EMPLOYMENT TRIBUNALS

Claimant: **Michael Leone**

Respondent: **Sharp Transport Ltd**

Heard at: **East London Hearing Centre On: 11 & 12 March 2021**

Before: **Employment Judge S Knight**

Representation

Claimant: Unrepresented, in person

Respondent: Katherine Reece, Markel Law

JUDGMENT having been sent to the parties on 16 March 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

The parties

1. The Claimant was employed by the Respondent between 6 January 2000 and 30 December 2019 as an HGV driver. The Respondent is a waste management service operating in and around the London, Essex, and Kent areas. It provides 3 main services: skip hire; roll-on-off container hire; and grab loader hire. The Respondent has been operating for 37 years.

The claims

2. The Claimant claims for unfair dismissal, arising out of his dismissal with notice on 30 December 2019. The Respondent says that the Claimant's dismissal was for reasons of conduct and some other substantial reason, namely a breakdown in trust and confidence.

3. On 9 March 2020 ACAS was notified of the Claimant's claim under the early conciliation procedure. On the same date ACAS issued the early conciliation certificate. On 15 March 2020 the ET1 Claim Form was presented in time. On or around 1 June 2020 the ET3 Response Form was sent to the Tribunal.

The issues

4. At a preliminary hearing on 19 October 2020 the parties agreed a list of issues. It appears at Annex 1 to these Reasons.

Procedure, documents, and evidence heard

Procedure

5. This has been a hybrid in-person and remote hearing which has been consented to by the parties. The form of remote hearing was "***V****: video whether partly (someone physically in a hearing centre) or fully (all remote)*". A face to face hearing was not held because it was not practicable due to the COVID-19 pandemic and no-one requested the same. The documents that I was referred to are in a bundle, the contents of which I have recorded.

6. The Claimant and his daughter attended the hearing in person, and everyone else attended the hearing through the Cloud Video Platform.

7. At the start of the hearing I checked whether any reasonable adjustments were required. The Claimant asked to be assisted by his daughter, which I agreed to. She assisted him with reading documents, and reading out the questions for witnesses that had been prepared. The Claimant also asked for concepts to be explained clearly and to be given time to think, which I agreed to.

Documents

8. At the start of the hearing I was provided with an agreed Hearing Bundle comprising 288 pages, plus 6 additional documents from the Respondent. During the course of the hearing I was also provided with 3 further documents relating to tachograph readings.

9. Witness statements from the Claimant, Terry Sharp, Lee Tyrell, George Sharp, Russell Gillmurray, and Charlotte Harber were provided separately.

10. Part way through the hearing the Respondent sought permission to rely on further evidence. The Claimant objected that it was too late and he could not deal with the new material. I refused to allow the Respondent to rely on the further documents because the Claimant could not properly deal with them at the hearing, and because the documents did not take matters any further in any

event.

Evidence

11. At the hearing I heard evidence under affirmation from Terry Sharp, Lee Tyrell, George Sharp, Russell Gillmurray, and Charlotte Harber, and under oath from the Claimant. Each of the witnesses adopted their witness statements and added to them.

Closing submissions

12. Both parties made helpful oral closing submissions.

Relevant law

13. Section 94 of the Employment Rights Act 1996 ("**ERA 1996**") provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer.

14. Section 98 of the ERA 1996 provides insofar as is relevant:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it— […]
>
> (b) relates to the conduct of the employee,
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case. […]"

15. In the case of *British Home Stores v Burchell* [1980] I.C.R. 303; 20 July 1978 the Employment Appeal Tribunal set down the test that the Tribunal applies in cases of unfair dismissal by reason of conduct. The burden of proof within the test was later altered by section 6 of the Employment Act 1980. As a result, the test applied by the Tribunal is as follows:

(1) The employer must show that it believed the employee to be guilty of misconduct.

(2) The Tribunal must determine whether the employer had in mind reasonable grounds upon which to sustain that belief.

(3) The Tribunal must determine whether, at the stage at which that belief was formed on those grounds, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.

16. This means that the Respondent does not need to have conclusive direct proof of the employee's misconduct: the Respondent only needs to have a genuine and reasonable belief, reasonably tested. Further, there is no requirement to show that the employee was subjectively aware that their conduct would meet with the Respondent's disapproval.

17. In *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401; [2017] IRLR 748; 23 May 2017 Lord Justice Underhill stated that the "reason" for a dismissal is the factor or factors operating on the mind of the decision-maker which causes them to take the decision to dismiss or, as it is sometimes put, what "motivates" them to dismiss.

18. In *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ 94; [2015] IRLR 399; 18 February 2015 Lord Justice Richards noted at ¶ 23:

> "To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole."

19. In considering the case generally, and in the Tribunal's assessment of whether dismissal was a fair sanction in particular, the Tribunal must not simply substitute its judgment for that of the employer in this case. Different reasonable employers acting reasonably may come to different conclusions about whether to dismiss. As Mr Justice Phillips noted when giving the judgment of the EAT in *Trust Houses Forte Leisure Ltd v Aquilar* [1976] IRLR 251; 1 January 1976:

> "It has to be recognised that when the management is confronted with a decision whether or not to dismiss an employee in particular circumstances, there may well be cases where more than one view is possible. There may well be cases where reasonable managements might take either of two decisions: to dismiss, or not to dismiss. It does not necessarily mean, if they decide to dismiss, that they have acted 'unfairly,' because there are plenty of situations in which more than one view is possible."

20. It is therefore not for the Tribunal to ask whether a lesser sanction would have been reasonable in this case. The Tribunal asks itself whether dismissal was

reasonable. The question is also not whether the Claimant committed misconduct, but whether the Respondent had a reasonable belief that the Claimant had committed misconduct.

Findings of fact

The Claimant's contract of employment

21. The Claimant's original contract of employment did not require him to work on Saturdays. However, this changed in 2011 due to changing business needs. On 21 April 2011 the Respondent wrote to the Claimant noting that he had not yet agreed to a new contract. The letter stated in particular:

> "Sharp Transport is proposing to make certain changes to your terms of employment. These changes relate to you being required to work on some Saturday's.
>
> Tachograph Regulations state that drivers have to rest a minimum of every other weekend. Accordingly, at the very most, you could only be required to work every other Saturday.
>
> I enclose a copy of your draft amended contract, which includes all of the proposed changes to your contract of employment dated 23rd November 2009. I would specifically draw your attention to clause 7.1 in new amended draft contract, which relates to you being potentially required to work on Saturday's. Your up to higher salary level is also included."

22. The Respondent requested that the new draft contract be signed by 5 May 2011. However, it was not signed by then.

23. On 3 June 2011 the Claimant signed a new contract of employment. It provided that his rate of pay was £12.00 per hour. In relation to working hours, it stated:

> "7.1. Your normal hours of work are 7AM – 4.30PM MONDAY – FRIDAY WITH AN UNPAID BREAK OF 45 MINUTES AND 7AM – 12PM SATURDAY WITHOUT A BREAK.
>
> 7.2. You may also be required to work overtime in addition to your normal hours of work per week if instructed to do so by Us on reasonable notice or if necessary for the proper performance of your duties which will be at the rate of £20.75 per hour."

24. These terms obviously are different to those set out in the letter of 21 April 2011. In particular they provide that every Saturday is a workday. They do not restrict the Claimant to working, or indeed to driving, only every other Saturday.

25. From 28 March 2014 the Claimant's contract was amended to increase his rate of pay. From 3 April 2015 the Claimant's contract was again amended to increase his rate of pay. Neither of these amendments changed his working hours.

26. On 16 July 2015 the Claimant and his trade union representative held a meeting with Terry Sharp of the Respondent to request a change to his working hours. He

asked no longer to work on Saturdays. The Respondent refused. The Respondent said in a letter dated 22 July 2015 "*if you wish to have Saturday off we require notice no later than the Monday before the occurring Saturday*".

27. After this, the Claimant continued to resent having to work on Saturdays. He also resented remaining at work for overtime, such as to attend toolbox talks, after 16:30 on weekdays. This was despite him receiving a higher rate of pay for overtime.

Toolbox talks

28. The Respondent holds regular continuing professional development sessions for its employees. It calls them toolbox talks. These are provided both by its staff and by external contractors. They are necessary to keep its employees up to date with regulatory requirements and changes in industry practice.

29. The Respondent holds the toolbox talks outside of regular contracted hours, as mandatory overtime, for which it pays an increased rate. The talks take about 20-30 minutes. It is impractical to hold them in normal working hours, because it would negatively affect the Respondent's business.

30. On 5 September 2017 the Claimant was issued with a letter of concern following his refusal to attend a toolbox talk. The letter of concern stated that it was necessary for him to attend toolbox talks for which he would be paid the overtime rate.

31. On 2 November 2017 a letter was sent to the Claimant to again record his refusal to attend toolbox talks despite being invited with good notice on two occasions. The letter emphasised the importance of attendance to be up to date with regulations.

32. The Respondent always runs at least two sessions for each toolbox talk. There are several reasons for this. Firstly, it is impossible to get all drivers physically in one space for the talk. Secondly, not all drivers can attend at the same time, for example due to family issues, holiday, and the like. Thirdly, talks could be missed and need to be caught up on. The Respondent tries to let staff have a choice of which session to attend.

The absence on 20 April 2019

33. The Claimant worked 6 April 2019 and 13 April 2019. He felt that this entitled him to take 20 April 2019 off. The Respondent disagreed.

34. On the Friday of each week the Respondent's drivers are told if they can drive the next day. This decision is based on whether they have hours remaining they are allowed to work under the relevant regulations.

35. The Respondent had in writing a policy that a holiday request could be made in writing or orally. In practice, the Respondent required holiday requests to be put in writing.

36. On 4 April 2019 at 07:00 for the first time the Claimant provided notice to the

Respondent (by way of a handwritten note) requesting leave on 20 April 2019 and 27 April 2019. Both were normal working days according to the Claimant's contract. On 10 April 2019 the request for leave was refused because too many other people were already taking leave, and this was a particularly busy time for the Respondent. The Respondent warned that being absent without leave could result in dismissal. The Claimant then threatened to be absent without leave. By a letter of 12 April 2019 the Respondent repeated that being absent without leave could result in dismissal.

37. The Claimant took 20 April 2019 off without having been granted leave.

38. If the Claimant had worked on 20 April 2019, then the work he did could either have involved driving or carrying out support work such as cleaning vehicles.

Removal of the tachograph card while driving

39. On 4 April 2013, 29 January 2015, and 24 August 2017 the Claimant had received training by way of toolbox talks. Those training sessions had reinforced the regulatory requirements regarding the use of tachographs. If tachograph data is falsified, or a driver does not produce tachograph data, then this can have severe regulatory effects for both the driver and the Respondent. The Respondent takes seriously compliance with its regulatory requirements relating to tachographs.

40. Tachographs monitor when an HGV is being driven. A card is registered to each driver. The driver inserts their card into the tachograph. This then records the driver's driving and working hours.

41. On 5 April 2019 the Claimant was driving an HGV for the Respondent. At 15:51 a tachograph recording was started using the Claimant's card, noting that the Claimant was working. It lasted for 6 hours and 6 minutes. At 21:57 it recorded "Insufficient Daily Rest". It continued recording that he was working for 2 hours 3 minutes, until midnight.

42. On 6 April 2019 the Claimant was driving an HGV for the Respondent. At 07:07 he began working, and this was registered on the tachograph. At 11:52, his tachograph registered that he was driving without an appropriate card.

43. The Claimant obtained a tachograph receipt and wrote on the back of it, "*Tacho saying take immediate break and also coming up no card. Tried several times taking card out and putting back in. Still the same. Maybe faulty tacho.*" He also completed a defect report the same day stating, "*Faulty tacho not taking card saying take immediate break*".

44. However, the tachograph was not faulty. On 5 April 2019 a defect report completed by another employee of the Respondent noted a defect with the vehicle, but that the tachograph unit was working. On 26 April 2019 the vehicle was subject to a service, and the tachograph was certified by DAF as working correctly.

45. The Respondent inferred that the Claimant had not understood that the tachograph was working correctly, and that he had left his tachograph card in

another vehicle overnight. This is a reasonable explanation for what occurred, and the most likely explanation.

Submitting daily defect sheets.

46. In order to comply with regulatory requirements, the Respondent requires that a defect sheet is completed before an HGV is driven and after it is driven. However, the Claimant failed on several occasions to complete defect sheets or return them to the Respondent.

The first disciplinary

47. The Respondent wrote to the Claimant on 25 April 2019 to invite him to an investigatory meeting on 29 April 2019. The concerns were (i) the Claimant's unauthorised absence on 20 April 2019; (ii) braking regulations relating to driving hours by removing a tachograph card whilst driving; and (iii) failing to comply with rules about submitting daily defect sheets.

48. The Claimant told the Respondent that he did not have enough notice of the meeting, and he decided not to open the letter inviting him to the meeting.

49. On 1 May 2019 the investigatory meeting was rescheduled, at the Claimant's request, to 2 May 2019. At the investigatory meeting, the Claimant gave very brief answers to questions. In relation to his absence on 20 April 2019 he said he told the Respondent he could not come in that day. In relation to the tachograph, he said that he had told Mr Gillmurray it was faulty and that Mr Gillmurray told him to drive. In relation to daily defects sheets he said he forgot to submit them. The meeting then ended as the Claimant had a migraine.

50. A disciplinary hearing was scheduled for 20 May 2019. This was rescheduled to 24 May 2019. This was then again rescheduled to 11 June 2019. This was then again rescheduled to 25 June 2019. The Respondent had told the Claimant in advance what all the relevant documents were, but the Claimant did not have them. As such, the Respondent agreed to reschedule the disciplinary hearing again. Some of these delays were down to the Respondent not being properly prepared.

51. On 27 June 2019 a letter was sent to the Claimant containing all the evidence and scheduling the disciplinary hearing for 4 July 2019. The Claimant's trade union representative was unavailable until 26 July 2019. The Respondent chose to proceed with the disciplinary hearing anyway, because there had been such a long delay waiting for the hearing.

52. On 4 July 2019 the Claimant was reminded that the disciplinary hearing was taking place that day. He said he would not attend. He was told it was not optional. He still refused to attend. He did not attend. His reason for non-attendance was that he did not have his trade union representative, and his trade union representative was required to help him read documents. However, he never told the Respondent this, and the Respondent was not aware of it. The Respondent was aware that the trade union representative was not available, and informed the Claimant that he could be represented by someone else, but the Claimant

refused to consider this.

53. The allegations against the Claimant were upheld. The Respondent had no reason not to uphold the allegations, because it had material capable of supporting the allegations, and the Claimant did not attend to defend himself, or provide any other form of defence beyond what was said in the investigatory meeting. The Claimant was issued with a final written warning. The Respondent had considered that the allegations were sufficient to allow them to dismiss, but decided not to dismiss because of the Claimant's 19 years of loyal service.

54. The Claimant said that he appealed the decision. However, the Respondent has never received the appeal. The Claimant was unable to evidence an appeal having been submitted. In fact, it appears his trade union failed to submit the appeal.

Subsequent events leading to the second disciplinary

55. In July 2019 the Respondent received notification from the Office of the Traffic Commissioner that the Respondent would be investigated in relation to alleged breaches of regulations.

56. Between 2 August 2019 and 2 September 2019 the Claimant was off sick as a result of stress and anxiety. He presented a fit note dated 22 August 2019 stating that "*Michael Leone would benefit from reduced hours, phased return to work and some adaptations with work environment due to stress and anxiety he feels at work*".

57. On 3 September 2019 the Claimant was invited to a return-to-work meeting scheduled for the end of his shift on 4 September 2019. The Claimant refused to attend and would not give a reason.

58. Also on 3 September 2019 the Claimant was issued with a requirement to attend a toolbox talk to be held on 5 September 2019 at 16:30. This requirement was placed into writing. The talk was repeating the content of two talks that had taken place in August 2019. 2 other drivers needed to attend the same talk. However, the Claimant refused to attend the toolbox talk, saying it should have been arranged within his contractual core hours. The Claimant was reminded that attendance was mandatory and that overtime was mandatory on reasonable notice. The Claimant refused to attend at the time specified, or to give a reason for his non-attendance. If he had given a reason for why he could not attend, then the Respondent would have taken it into account, and considered providing an alternative date. However, the Claimant did not do this. The Claimant felt that he was entitled to decline to attend a toolbox talk outside of his core ours if he was not given what he considered to be reasonable notice. However, he in fact did not think that the notice itself was unreasonable: rather, he had a counselling session he needed to go to instead. But he did not tell the Respondent that.

The second disciplinary

59. On 6 September 2019 the Respondent gave the Claimant a letter requiring him to attend an investigatory meeting on 9 September 2019. This was to double as

a return-to-work meeting to consider any reasonable adjustments.

60. On 7 September 2019 the Claimant called in sick with a migraine.

61. On 9 September 2019 the Claimant attended the investigatory and return-to-work meeting as required. The Claimant gave very short answers to questions and said "no comment" when asked about his migraines. He was offered access to a stress counselling helpline but declined. He stated it would help to have adjustments, and was told to go back to his doctor for another fit note relating to the migraines. In relation to the toolbox talk, the Claimant refused to give a reason for his non-attendance.

62. On 12 September 2019 the Respondent gave the Claimant a letter requiring him to attend a disciplinary hearing on 19 September 2019. The Claimant was provided with the relevant evidence and informed of his right to be accompanied. He was warned that he may be dismissed as a result of the combination of the previous final warning and the new allegations. Later, at the Claimant's request, the disciplinary hearing was rescheduled to 25 September 2019.

63. At the disciplinary hearing on 25 September 2019 the Claimant's trade union representative informed the hearing that the Claimant did not attend the toolbox talk because of personal issues. The Claimant did not explain what the personal issues were.

64. On 7 October 2019 the Respondent wrote to the Claimant confirming that he had been dismissed. The reasons given for dismissal related to the insubordination around the failure to attend the mandatory toolbox talk on 5 September 2019 as well as other matters surrounding disciplinary issues that year. This was against the background of the previous disciplinary findings. The letter concluded with the following passage:

> "Had you at any point given the company, your manager, or myself a good reason as to why you couldn't attend, for example a family emergency, we may have been able to reconsider, but you didn't."

65. On 9 October 2019 the Respondent placed the Claimant on what it called garden leave until the conclusion of his 12-week notice period. The Respondent required him to come into work every day but did not provide him with work to carry out.

Appeals

66. On 10 October 2019 the Claimant wrote to the Respondent to appeal against his dismissal. The appeal letter was very strongly worded. It was written by the Claimant's trade union representative, on his instructions, and with his approval. It said that he had no trust in management.

67. On 31 October 2019 the Respondent scheduled an appeal hearing for 5 November 2019, to be chaired by Terry Sharp. On 4 November 2019 the Claimant's trade union representative asked for it to be rescheduled. The Respondent agreed.

68. On 15 November 2019 the appeal hearing went ahead. It was chaired by Terry

Sharp, Managing Director. The Claimant gave brief answers to questions and did not expand on his reasons for non-attendance at the toolbox talk. He expressed his lack of trust in management. He had little to add.

69. On 5 December 2019 the Respondent wrote to the Claimant rejecting his appeal.

Conclusions

70. The reason for the dismissal was the Respondent's belief as to the Claimant's conduct, and the Respondent's belief that there was some other substantial reason to dismiss, in particular that there had been a breakdown in trust and confidence between the Claimant and the Respondent. Of those two reasons, the Respondent's belief as to the Claimant's conduct was the primary reason. The belief that there was a breakdown in trust and confidence was relevant to what sanction to impose for the conduct issues.

71. In considering the fairness of the procedure, I have had to look at the first disciplinary as well as the second disciplinary.

72. Regarding the first disciplinary hearing, I bear in mind that the Claimant did not attend because he did not have his trade union representative, and he needed the trade union representative to help him with reading and writing. But he did not tell the Respondent that was why he was not attending. He was given the option of having someone else attend to represent him. He declined that offer. The Respondent could not have understood that the Claimant was declining because he needed someone to help with reading and writing, because the Claimant never told the Respondent that. The Respondent cannot have held against it reasons for the Claimant's non-attendance that the Claimant did not tell the Respondent about.

73. Regarding the second disciplinary, the Respondent held an investigation into the Claimant's conduct. The material facts of that conduct were not disputed. The investigation was fair. The Respondent was limited in what it could do in the investigation because the Claimant was uncooperative. The disciplinary hearing was also fair. Again, the Respondent was limited in what it could find out because the Claimant simply would not put forward his defence. Looking at the process as a whole, and considering the first disciplinary hearing, with which the Claimant refused to cooperate, the procedure was fair.

74. Following the disciplinary procedure, the Respondent had a genuine belief that the Claimant had committed misconduct, both in respect of the first disciplinary and the second disciplinary. In relation to the second disciplinary, the Respondent was entitled to conclude that the Claimant had acted insubordinately, because he had been required to work on reasonable notice and had given no reason why he would not work. The Respondent was also entitled to conclude that this undermined the trust and confidence between it and the Claimant.

75. The belief that the Claimant had committed misconduct was based on reasonable grounds.

76. The belief was formed after a reasonable investigation. Indeed, the only defect in

the investigation is that the Claimant did not tell the Respondent the reason why he would not attend the toolbox talk. There was nothing the Respondent could reasonably have done to make the Claimant tell the Respondent.

77. As such, whether or not it was right or wrong to dismiss the Claimant, a reasonable employer could have made the decision to dismiss him. This was particularly the case given that there had been a breakdown in the trust and confidence between the Claimant and the Respondent.

78. Further, a reasonable employer could have concluded that its trust and confidence in the Claimant had broken down to such an extent that it was reasonable to dismiss the Claimant.

79. For these reasons the dismissal of the Claimant was fair.

Employment Judge S Knight
Date 23 March 2021

ANNEX 1: LIST OF ISSUES

1. What was the reason for dismissal?

2. Was it for a potentially fair reason? The Respondent contends that it was the potentially fair reason of conduct or some other substantial reason, being a breakdown in trust and confidence.

3. Was the decision to dismiss procedurally fair?

4. If procedurally fair did the Respondent act reasonably by treating that reason as sufficient reason for dismissal, i.e. was the decision to dismiss within the band of reasonable responses open to the employer? In conduct cases, in considering the fairness of a dismissal, the classic questions for a Tribunal to consider are:

   (1) Did the employer have a genuine belief that the employee was guilty of misconduct?

   (2) Was that belief based on reasonable grounds?

   (3) Was that belief formed on those grounds after such investigation as was reasonable in the circumstances? (See *BHS v Burchell* [1980] ICR 303)

5. If procedurally unfair, what was the percentage chance that the Claimant would have been dismissed in any event had a fair procedure been adopted?

6. Did the Respondent unreasonably fail to comply with the ACAS Code no. 1?

7. Did the Claimant contribute to the decision to dismiss? If so what percentage deduction to the basic and/or compensatory awards is just and equitable?

8. If unfairly dismissed:

   (1) What basic award is the Claimant entitled to?

   (2) What compensation would be just and equitable?