



EMPLOYMENT TRIBUNALS

Claimant: Mr P Willie
Respondent: Abbey Logistics Limited
Heard at: By CVP
On: 22 March 2021
Before: Employment Judge Anderson

Representation

Claimant: Miss Gray (friend of Claimant)
Respondent: Mr Crowe (solicitor)

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Technology

2. This hearing was conducted by CVP (V - video). The parties did not object. A face-to-face hearing was not held because it was not practicable and all the issues could be dealt with by CVP.

Introduction

3. This was a claim of unfair dismissal brought by the Claimant, Mr Willie, against his former employer, Abbey Logistics Ltd. The Claimant was represented by his friend, Miss Gray. The Respondent was represented by solicitor, Mr Crowe.

Preliminary Matters

4. Shortly before the hearing began, the Respondent produced a new document. This was a short email sent on the material date. The Claimant requested 30 minutes to consider this document, which I allowed. On resuming the hearing, it was confirmed that the Claimant had considered the document and had no objection to it being admitted.

Evidence

5. There was an agreed bundle of documents running to 127 pages. I also considered the witness statements sent to the Tribunal, and a submissions document from the Claimant.
6. I heard evidence from the Claimant directly. For the Respondent, the Tribunal heard from Mr Freek (Operations Manager).

The Claims and Issues

7. The Claimant brings a complaint of unfair dismissal. There was no dispute that the Claimant was an employee of the Respondent within the meaning of the Employment Rights Act 1996, that he had the necessary qualifying service to bring the claim, or that the claim had been brought within the stipulated time limits.
8. There was no dispute that the Claimant had been dismissed. The Respondent's case is that the Claimant was dismissed for driving without a digicard, and that this was a 'conduct' dismissal.
9. Therefore, the issues I had to decide were:
 - a. Did the Respondent genuinely believe the Claimant had committed misconduct?
 - b. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?
 - c. In particular:
 - i. Were there reasonable grounds for the Respondent's belief that the Claimant had committed misconduct?
 - ii. At the time the belief was formed, had the Respondent carried out a reasonable investigation?
 - iii. Did the Respondent otherwise act in a procedurally fair manner?
 - iv. Was dismissal within the range of reasonable responses?

The Facts

10. The Tribunal made the following findings of fact:
11. The Claimant started working for the Respondent on 16 July 2007 as a HGV driver.
12. The Respondent is a bulk tanker logistics service provider.
13. The Respondent is required to issue all drivers with a card, referred to as a 'digicard',

or 'driver card', in order to comply with various laws and regulations. The digicard records a driver's driving time, break time, other work time, speed of travel and distance travelled.

14. The Claimant's contract of employment annexes a disciplinary procedure. That disciplinary procedure sets out that *Any Employee who is found guilty of gross or serious misconduct may be summarily dismissed at any time without notice and without payment in lieu of notice. What is considered gross or serious misconduct may depend upon the circumstances.* A non-exhaustive list of examples follows, which include:
 - *Persistent breaches of EU regulations or UK Statutes and Regulations in relation to maximum driving/minimum break and rest periods.*
 - *Serious breaches of the Road Traffic Act or the Regulations relating to the safety of the vehicle and its load.*
15. The disciplinary procedure states that *The disciplinary action taken will depend upon the gravity of the offence, the circumstances surrounding it, and the employees past record with the Company.*
16. In respect of sanction, the procedure sets out that depending upon the circumstances, the following action may be taken:
 - i. A verbal warning will be given which will be recorded on the employee's record.
 - ii. If, despite the verbal warning, the Employee commits a further offence of misconduct, or otherwise fails to produce adequate performance, he/she will be given a written warning. A copy will be placed on file, and a copy given to the Employee.
 - iii. If, despite the written warning, the employee commits a further act of misconduct, or fails to improve performance, he/ she will be given a final written warning. A copy of which will be provided to the employee.
 - iv. Further misconduct of any nature will result in dismissal without due notice, or payment in lieu of notice, in accordance with the relevant Statutory Provisions.
 - v. Written warning may also result in suspension for a short period, this suspension may be with or without pay at the discretion of the Company.
 - vi. A final written warning may be given in the first instance in respect of serious misconduct or dereliction/negligent duty matters.
17. The Respondent produced a memo dated 5 March 2019 which states, amongst other things, "*Drivers MUST NOT move a vehicle without a digicard in the tachograph. Whether at home or away from base drivers MUST NOT drive a vehicle without a card*" (original emphasis). The memo also refers to action that can be taken against drivers by the police and DVSA for various breaches of the relevant rules. The Claimant signed this memo on 7 March 2019.
18. In October 2019, the Claimant was issued with a 'brief' on the Drivers Hours Regulations EC 561/2006, Working Time Directive Regulations 2002/15/EC and Digital Tachograph Operation. The Claimant signed this 'brief' on 11 October 2019. This is a one-page document that reminds employees that *Drivers hours and working time directive regulations are not guidance, they are your legal responsibility as a HGV driver and must be adhered to at all times.* This document includes the following point:

You must keep your Digital Driver Card with you at all times and insure it is downloaded regularly, if your card is lost or stolen you must report it to your manager immediately and apply for a new one immediately.(sic)

19. Mr Freek provided details of some of the relevant rules and guidance relating to digicards/driver cards. This included the following from the DVLA: *a driver who is not in possession of their issued driver card is not permitted to drive a vehicle equipped with a digital or smart tachograph unless the card has been lost or stolen, in which case the procedures for reporting this must be followed.* Mr Freek explained that if the Driver Card is lost or stolen, the driver has 7 days to report this to the DVLA, and the driver may then drive without the Driver Card for no more than 15 days.
20. On 26 November 2019, it was reported that the Claimant had lost his digicard and had been driving in excess of the permitted 15 days. The Respondent took disciplinary action over this issue. The emails sent at the time record that the Claimant had waited ten days before applying for a new driving licence and had not applied for a new digicard, until instructed to do so. The Claimant said there had been a misunderstanding in the application for the cards, as a fee was required. He also said that he thought the limit was 15 days driving, as opposed to 15 consecutive calendar days.
21. The allegation of driving without a digicard was substantiated. Mr Freek was the decision maker at that time and the letter records that based on the findings and the Claimant's honesty in the matter, the sanction was a written warning for gross misconduct.
22. On 8 June 2020, the Claimant arrived at work at approximately 3am. He realised he did not have his digicard, which was in his own personal vehicle, which was at a (closed) car repair shop. He says that he rang the 'nightman', Mr Henson, firstly because he did not have a 'unit' (an allocated tanker to drive), and then again when he realised he did not have his digicard. The Claimant says he was not sure of the specific rules in the circumstances where the card was not lost, but was unobtainable. He said Mr Henson told him he could perform a manual printout and hand this to the manager. The Claimant said Mr Henson told him he would put this in an email to the manager. The Claimant said he trusted what Mr Henson told him was correct.
23. The Claimant performed his first delivery on 8 June 2020 and on his return to the depot, then made his way to the car repair shop, to retrieve his digicard. The Claimant said his manager rang him at this time and said the matter would need to be discussed.
24. On 19 June 2020, the Claimant attended an investigation meeting into the allegation of driving without a digicard, and a separate allegation of falsifying timesheets. The notes of the meeting identify the allegation of driving without a digicard as 'misconduct' and 'gross misconduct'. The notes of that meeting record the Claimant explained the position in relation to the whereabouts of the digicard. The notes go on to record the Claimant as saying "*I can't quite remember if I called (Mr Henson) on nights, but I am sure I did.*"
25. On 22 June 2020, the Claimant was invited to a disciplinary meeting, to take place on 25 June 2020. The invitation stated that the possible outcome of the meeting might be no further action or up to and including dismissal.
26. The Claimant attended the meeting. He told Mr Freek, who was chairing the meeting, that he had told Mr Henson he did not have his digicard. He told Mr Freek he had

“spoken to (Mr Henson), not saying (Mr Henson) said anything”. Later in the meeting, the Claimant said that he *“made (Mr Henson) aware I didn’t have my card, didn’t ask him to advise of anything else”*. The Claimant said that he thought he would be ‘ok’ doing a manual entry for the period involved.

27. Mr Freek adjourned the meeting to speak to Mr Henson. The notes of the conversation between Mr Freek and Mr Henson record that Mr Henson checked the phone records and confirmed he had received a phone call from Mr Freek, but could not remember what it was about. When Mr Freek said that the Claimant had stated he spoke to him (Mr Henson) about forgetting his digicard, Mr Henson replied “No way, I would definitely remember that.” Mr Henson went on to say that he would have recorded this in the night report, and he was “fairly certain he has not told me. If he would have, I would have told him not to go out, even if it made the job late.”
28. The disciplinary hearing was reconvened on 26 June 2020. The outcome of the meeting was that the allegations of falsifying timesheets were not upheld and the allegation of driving without a digicard was upheld. Mr Freek informed the Claimant during the meeting that he was being dismissed with immediate effect for gross misconduct. Mr Freek referred to the previous disciplinary and noted that the Claimant had said he was going to go away and familiarise himself with the card legislation. The Claimant agreed with this.
29. Mr Freek said he considered the Claimant’s explanation for the events on 8 June 2021 to be unsatisfactory and considered he ought to have been fully aware of the legal requirements and implications of driving without a digicard. Mr Freek found the Claimant had breached the Tachograph legislation by driving without the card.
30. Mr Freek referred to legislation providing that: *“if you have misplaced or left your card at home, it must be retrieved before you are able to drive. Only those who have no possible method of driving, unless their card is replaced, will be allowed to drive without their card”*. Mr Freek considered his own findings in the context of the Claimant’s written warning and confirmed the Claimant was being summarily dismissed, in accordance with the Company’s disciplinary procedure for Gross Misconduct.
31. I find that Mr Freek dismissed the Claimant for gross misconduct, by driving without a digicard, which was contrary to the legislation and company rules, and that Mr Freek applied the Respondent’s disciplinary procedure. I accept that two instances of driving without a digicard was uncommon and Mr Freek was entitled to take this into account.
32. The Respondent wrote to the Claimant on 29 June 2020, confirming the dismissal and reiterating the right to appeal.
33. The Claimant did not appeal.

Legal Principles

34. Section 94(1) of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer.
35. Section 98 sets out that:
 - (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.

36. The case of ***British Home Stores -v- Burchell [1978] IRLR 379*** sets out the test when considering the assessment of reasonableness of an employer's actions when dismissing an employee for alleged misconduct to three questions:

1. Whether the employer reasonably believed that the employee was guilty of misconduct.
2. Whether the employer had reasonable grounds on which to base that belief.
3. Whether it had arrived at that decision after conducting a reasonable investigation.

The test does not require the employee to have actually been guilty of misconduct.

37. It is a well-established principle that when considering a misconduct dismissal, an employment tribunal must not substitute its own view of a claimant's alleged conduct, and must not substitute its own view of what should have happened; it is judging whether the actions of the employer were fair, not deciding what it would have done.

Application of the Law to the Facts

Did the Respondent genuinely believe the Claimant had committed misconduct?

38. I have found that the Respondent believed the Claimant had committed misconduct. I consider the Respondent did hold a genuine belief that the Claimant had committed misconduct, which was based upon the Claimant's own acceptance of driving without a digicard. The Respondent was also aware of the manual printout, which indicated there had been no digicard inserted. The fact of his driving without the card was not in dispute. Driving without a digicard could constitute misconduct, based upon this being a breach of the memos circulated and signed by the Claimant (eg on 5 March and 11 October 2019).

Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

Were there reasonable grounds for the Respondent's belief that the Claimant had committed misconduct?

39. The Claimant admitted the act of driving without a digicard. I have found that Mr Freek dismissed the Claimant for driving without a digicard, in circumstances where he had a written warning on file for a similar 'offence', following which he had said he would refresh his memory of the rules. The Claimant had also had reminders of importance of using a digicard via company memos, which he had signed.
40. Based upon the above and the responses from Mr Henson, there were reasonable grounds for the Respondent's belief that the Claimant had committed misconduct.
41. The disciplinary procedure sets out that *Persistent breaches of EU regulations or UK Statutes and Regulations in relation to maximum driving/minimum break and rest periods and Serious breaches of the Road Traffic Act or the Regulations relating to the safety of the vehicle and its load* can amount to gross misconduct. The Claimant argued that two incidents were not sufficient to constitute a 'persistent' breach. The Respondent told me that it was uncommon for a driver to have two instances of driving without a card and I accepted that, as set out above.

At the time the belief was formed, had the Respondent carried out a reasonable investigation?

42. The Claimant was invited to an investigation meeting and then a disciplinary hearing and was informed twice of his right to appeal the decision.
43. The Claimant submitted that the investigation was not carried out 'promptly' as set out in the ACAS Code. The Claimant says that the three-week period between the incident and Mr Henson being spoken to caused the uncertainty in Mr Henson's recollection. I do not accept that there was a delay of any material significance in this case. I do not consider three weeks is evidence of a substantial delay to constitute a breach of the expectation to investigate promptly.
44. The Claimant submitted that there was a failure by the Respondent to separate the investigation and the disciplinary stages. In particular, he submits that once the 'fresh point' on the conversation with Mr Henson was raised, a different manager should have undertaken the interview with Mr Henson. It is submitted that Mr Freek had already substantially made up his mind. I do not consider it was necessary for another manager to deal with the interview of Mr Henson. A point was raised, which required to be explored. Mr Freek had conduct of the process at that time and I do not consider it unreasonable or inappropriate for him to have sought to clarify this point, mid-way through the meeting. I do not find that Mr Freek had made up his mind; that he adjourned the meeting to go and speak to Mr Henson and put the Claimant's case suggests he was carrying out a full investigation.
45. The Claimant raises the point that he was not allowed/given the opportunity to put questions to Mr Henson. Mr Freek told the Tribunal that the Claimant could have requested this, but did not. The Claimant said that the onus was on the Respondent to offer this opportunity. I do not consider it fatal to the reasonableness of the investigation.
46. I note the Claimant could have exercised his right to appeal his dismissal and raised these points at that time, but chose not to do so.

Did the Respondent otherwise act in a procedurally fair manner?

47. The Claimant submits that his actions do not amount to gross misconduct. It is submitted that there is no repudiatory intent by the claimant: he did not try and cover his actions, he told his line manager what had happened when he rang, and he completed a manual print out. It is essentially a matter for the Respondent to determine what behaviour it considers may amount to gross misconduct and in my view, the Respondent's approach was reasonable.
48. The Claimant then submits that the examples provided within the disciplinary procedure do not encapsulate his own actions. He points to the specific wording and argues that two occasions do not equate to a persistent breach, and that the example around persistent breaches refers to maximum driving/minimum break and rest periods, which do not apply here. He also says that the breaches of the Road Traffic Act in the example relate to the safety of the vehicle and its load. The Claimant says that the common feature in these examples is action that is inherently dangerous; the Claimant says that driving without a digicard is not inherently dangerous in itself.
49. I do not consider the dissection of the words used and the overlay of a specific intention or meaning by the Claimant leads to a conclusion that the Respondent was not entitled to characterise the behaviour as gross misconduct. Mr Freek explained that it is worth remembering that the list of examples is, in any event, specifically stated to be 'non-exhaustive'.
50. The Claimant says that the Respondent failed to follow its own disciplinary procedure. Specifically, it was submitted that the respondent was required to 'go through' the sanctions listed in the disciplinary procedure, in turn. The Claimant submitted he was "entitled to two written warnings, not one, before dismissal". I reject this submission entirely. There is no requirement for the respondent to approach the disciplinary procedure in that way, as a matter of principle. As the procedure makes explicitly clear, *disciplinary action taken will depend upon the gravity of the offence, the circumstances surrounding it, and the employees past record with the Company and Any Employee who is found guilty of gross or serious misconduct may be summarily dismissed at any time without notice.*

Was dismissal within the range of reasonable responses?

51. When considering this question, I remind myself that it is not for me to consider what action I might have taken in the circumstances being considered, and it is not for me to substitute my own judgment for that of the Respondent. The question for me is whether dismissal was within the range of responses that a reasonable employer might take.
52. The Respondent regarded driving without a digicard as a serious matter, and in my view that was reasonable. There are rules, regulations and directives that cover the issue. The Respondent had set out repeatedly the need for all drivers to use digicards at all times and had posted memos and reminders in unequivocal terms in March and October 2019. In addition, the Claimant had been subject to disciplinary action for driving without a digicard previously and received a written warning for this. He had said he would remind himself of the rules.
53. It is not in dispute that the Claimant drove for only a short time without the card and that he retrieved his card following his first 'job' on 8 June 2020. However, in all the

circumstances, including the context of the information available to the Claimant and the information provided to the Respondent in investigating the incident, it concluded that dismissal was necessary because of the seriousness of driving without a digicard, and the potential repercussions to both Claimant and Respondent. In my view, that was within the range of reasonable responses.

Conclusion

54. For the reasons set out above, the claim is dismissed.

Employment Judge Anderson

Date 7 April 2021