Case No: 2415201/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr J G **Sunderland**

Respondent: Jansen Travel Limited

HELD AT: Carlisle **ON:** 16 February 2021

BEFORE: Employment Judge B Hodgson (sitting alone)

REPRESENTATION

Claimant: In person

Respondent: Mr C Jansen, Managing Director

CORRECTED RESERVED JUDGMENT ON LIABILITY

The Judgment of the Tribunal is that

1. the claim of unfair dismissal is well-founded
2. the matter is to be listed for a Remedy Hearing

REASONS

Background

1. This is a claim of unfair dismissal which is denied

2. Standard directions for the preparation of the case were given by the Tribunal without a Preliminary Hearing but, with neither party being legally represented, the preparation was less than comprehensively completed

3. The respondent had put together a bundle of documents which was numbered and comprised 51 pages. The claimant had not been sent a copy of this bundle prior to the hearing but, having been provided with a copy to go through at the outset of the hearing, confirmed that this had not put him to any disadvantage and he was content that the hearing proceed

4. There were various witness statements within the bundle. The claimant's witness statement was at pages 36 – 37. The respondent provided a statement from Mr Carl Jansen, Managing Director, who was also representing the respondent at the hearing. This statement with attachments was at pages 24 - 34

5. Each party had also provided a further witness statement. The claimant had provided a statement from Mr Grant Hoggarth (page 35) and the respondent a statement from Mr Ken Heddle (pages 38 – 40). Both parties indicated that it had not been their intention to call these individuals to give oral evidence. The Tribunal explained the position as to the limited weight, if any, that would be given to the content of a statement put forward as evidence without the maker of the statement giving sworn oral evidence and being available for cross-examination, which each party considered

6. The claimant confirmed that, in the circumstances, he would not be calling Mr Hoggarth or producing his statement as evidence. Mr Jansen however did indicate a wish to call Mr Heddle and was given the opportunity by the Tribunal to contact him. It transpired that Mr Heddle was able to attend the Tribunal to give evidence, despite the short notice, and did so

7. Given the timescale allocated to the hearing and the time taken up by the preliminary matters, it was agreed that the Tribunal would initially limit itself to hearing evidence, and reaching a finding, on liability only and then move to a remedy hearing if that proved necessary

Issues

8. The issues as to liability raised for the Tribunal to determine, in summary, were agreed at the outset of the hearing as follows:

8.1. Was there a potentially fair reason for the claimant's dismissal? The respondent relies upon misconduct under section 98(2)(b) of the Employment Rights Act 1996 ("ERA").

8.2. Was the decision to dismiss the claimant fair and reasonable in all the circumstances (taking into account the size and administrative resources of the respondent) under the provisions of section 98(4) of the ERA?

8.3. Was summary dismissal within the range of reasonable responses open to the respondent?

8.4. Was a fair procedure followed and did that procedure comply with the requirements of the ACAS Code?

8.5. If the claimant was unfairly dismissed, did he cause or contribute to his dismissal by blameworthy conduct?

Facts

9. As indicated, the respondent had prepared a bundle of documents and references in this judgment to numbered pages are to pages as numbered in such bundle

10. The claimant gave evidence on his own behalf. The respondent called to give evidence Mr Carl Jansen, Managing Director, and Mr Ken Heddle, Consultant

11. The Tribunal came to its conclusions on the following facts – limited to matters relevant or material to the issues - on the balance of probabilities having considered all of the evidence before it both oral and documentary

12. The business of the respondent is the provision of coaches, with drivers, for hire. A large part of the business, although not exclusively so, is school transport. The business employs a total of approximately fifteen staff

13. The claimant commenced his direct employment with the respondent on 28 February 2018. It was on this date that the respondent purchased the assets and business of J B Pickthall Limited ("the transferor") and the claimant was transferred pursuant to the provisions of TUPE. The claimant had been employed by the transferor for approximately two years up to the date of transfer, and this prior employment period will in the circumstances count towards his continuous service with the respondent, but neither party was able to produce the claimant's precise start date with the transferor at the hearing

14. The claimant was employed by the respondent as a driver. No written terms and conditions of employment were produced to the Tribunal but it was agreed that the claimant was employed on a regular 25 hour week comprising mainly school runs in the morning and afternoon, Monday to Friday, with further less regular but scheduled school-related journeys and also occasional additional work outside the school contracts

15. Mr Heddle gave the Tribunal very helpful evidence as to the technical position on the statutory framework relevant to this claim. As understood by the Tribunal, in summary, there are statutory obligations arising with regard to rest periods dependent upon the days and hours of work of a driver. Scheduled school runs as a rule fall outside of these obligations by way of exemption. Carrying out driving duties additional to scheduled school runs, however, takes the driver outside of the exemption and, in such circumstances, the relevant rest periods must be observed. The responsibility for complying with the relevant regulations falls jointly upon both each individual driver and their employer. Breaches of the regulations would put both the individual's and the operator's licence at risk

16. From when he was previously working with the transferor, the claimant had a second job, working as a driver on Saturdays, namely one of his regular days off from his principal employment ("the second job"). The claimant's evidence, which the respondent was in no positon to challenge and was accepted by the Tribunal, was that the transferor was aware of this arrangement and raised no objection to it. The claimant carried on with the second job after the acquisition of the business by the respondent. Notwithstanding, the claimant's invariable practice, both with the transferor and then the respondent, was to note on his timesheets that Saturday was a "rest day" – he understood this to be correct procedure, it being a rest day from his principal employment

17. The respondent's evidence, which the claimant did not challenge and is accepted by the Tribunal, is that the transferor had not passed on to the respondent at the time of transfer any indication that the claimant had the second job

18. It is however the claimant's evidence that he met with Mr Paul Adamson, the respondent's Operations Manager, in or about August 2018 and the claimant notified Mr Adamson of the second job, which entailed him working regularly on a Saturday. Mr Adamson's position was that this arrangement would not put the claimant in breach the relevant regulations and he took no issue with it. The respondent was aware of this evidence from having had sight of the claimant's witness statement but did not challenge it and did not call Mr Adamson as a witness. In those circumstances, the Tribunal accepted the claimant's evidence in this regard. No notes of the meeting were produced to the Tribunal

19. It is common ground between the parties that there was a further discussion in or about November 2018 concerning the claimant's second job, the clamant attending together with Mr Jansen and Mr Adamson. Again, no notes of the meeting were produced to the Tribunal

20. The recollection of the claimant and Mr Jansen as to what was said at this meeting differ. Mr Jansen's stated recollection is that the claimant confirmed he had the second job but was vague and evasive as to the detail. The claimant's evidence was that, as before in the earlier meeting with Mr Adamson, he was open as to the detail of the second job. The claimant's evidence is consistent with the Tribunal's findings as to the earlier meeting. It is also improbable in the

Tribunal's view that, if the meeting was arranged to discuss details of the claimant's second job – which it appears to have been - the respondent would accept vague responses. The respondent's evidence was that it had intended to follow up this meeting to ensure compliance with the regulations but had been distracted from doing so for operational reasons. Again, given the nature of the information being sought and its significance, the Tribunal finds it improbable that, in the face of incomplete or inadequate information, the respondent would not progress matters further or more urgently or require the claimant to give the information sought

21. The claimant continued after that meeting to take up the additional, non-school, duties as occasionally offered by the respondent and continued to note on his time-sheets with the respondent that Saturdays were rest days – on the Tribunal's finding, the respondent being fully aware at that stage of the second job carried out regularly on that day. The claimant's evidence which is accepted by the Tribunal was that he was unaware that, in doing so, he may have been breaching any regulation and the respondent made no reference to any potential breach when allocating the work

22. In March 2020, the claimant along with the respondent's other drivers, was asked to complete a "Declaration concerning secondary employment" (see page 32). This comprises two alternative declarations. Declaration A states that: "In order to comply with the provisions of the Road Transport Regulations, I confirm that I am not currently engaged in any work commitments other than my employment with Jansen Travel Ltd. I will formally advise Jansen Travel Ltd if this changes and if I work for anyone else in the future, whatever the nature of that work may be." It was this Declaration A that the claimant signed (on 11 March 2020). The alternative, Declaration B, is notification of details of other work commitments. The claimant's evidence was that he understood that, having notified the respondent of his alternative work, there was no need to advise further and this declaration was intended to cover any employment that the respondent was unaware of. The Tribunal accepts this evidence in the context of what preceded and followed it. On the evidence, the claimant had not been seeking in any way to hide the second job from the respondent

23. Following the closure of schools as a consequence of the lockdown imposed due to the Covid pandemic, the respondent furloughed its staff, including the claimant, on 20 March 2020. The business of the claimant's secondary employer continued to operate and the claimant took up additional duties with that employer as he was legally entitled to do. The claimant in fact remained on furlough throughout the rest of his employment with the respondent up to his dismissal and accordingly carried out no further driving duties for the respondent

24. The respondent subsequently engaged Mr Ken Heddle, a Consultant, to deliver a presentation to the respondent's drivers, covering Induction and the Drivers' Handbook which he did on 2 June. In that presentation, he advised all drivers in attendance, which included the claimant, that secondary employment was

not permitted under the terms of their employment contract without the permission of their employer, explaining that the reason for this was to avoid a potential breach of the regulations

25. The drivers were asked to sign another copy of the Declaration Form, as previously, and again, on that day, 2 June, the claimant signed off a second copy at Declaration A (see page 33). His evidence was that he did so for the same reason as previously and knowing that he had the permission of the respondent

26. The claimant was subsequently approached by Mrs Alison Burgess, the respondent's Transport Manager, understood to be on 19 June. She indicated to the claimant that, with the respondent being aware of the claimant's second job, it was in fact necessary for him to complete Declaration B. The claimant did so, giving all relevant details. This third Declaration Form was not produced to the Tribunal. Mr Jansen had no explanation as to why he had considered it relevant to include the first two Declaration Forms but not the third in the documents produced to the Tribunal

27. Using the information provided by the claimant, the respondent requested and obtained details of his second job which were passed on to Mr Heddle with the request that he investigate whether there had been any breaches of the regulations by the claimant. The statement that Mr Heddle produced to the Tribunal by way of witness statement comprised in fact his report to the respondent, dated 23 June 2020, as to what his investigation uncovered

28. In essence, Mr Heddle had discovered that there had been a breach of the regulations by the claimant in November 2019 together with further potential breaches of the obligation to keep records. Based upon his belief that these events had occurred without any knowledge on the part of the respondent of the claimant's second job, Mr Heddle's view was that "disciplinary action must be taken against [the claimant] with serious consideration to an offence of gross misconduct"

29. The reason given for this conclusion is that, in the event of any enforcement agency discovering those facts, "immediate prohibitions" of the claimant would have resulted and both [the claimant] and [the respondent] (and the Transport Manager) would have been reported to the Office of the Traffic Commissioner. In Mr Heddle's view, disciplinary action needed to be taken against the claimant "to ensure full transparency of the situation as a whole and in the best interests of [the respondent]"

30. Following receipt of this report, Mr Jansen's evidence was that he had entered into correspondence with the relevant regulatory body and had understood from them, in light of the breaches identified, that an internal disciplinary process should be followed and either the driver or the company or both may face action. He also stated however that the regulatory body had advised him that they could not offer any advice. The correspondence between Mr Jansen and the

regulatory body was not produced to the Tribunal because, said Mr Jansen, the regulatory body had asked for it not to be "put on record"

31. Mr Jansen decided that disciplinary action should be taken against the claimant. Mr Jansen's own evidence was that he personally decided, in light of the content of Mr Heddle's report and subsequent discussions with the regulatory body, that the claimant was to be dismissed. He however felt it necessary that he remain available to hear any subsequent appeal and therefore instructed Mr Adamson to action the dismissal

32. Mr Jansen made reference in his evidence to the respondent's Disciplinary Policy but no such document was produced to the Tribunal

33. Mr Adamson is said to have written a letter to the claimant dated 29 June inviting him to a meeting on 2 July. The claimant's evidence, which was accepted by the respondent, was that the claimant did not in fact receive that letter. For reasons again which Mr Jansen could not explain to the Tribunal, a copy of that letter was not produced to the Tribunal

34. The letter having not been received, the claimant received a telephone call from Mr Adamson on 2 July asking him why he was not at the meeting. Learning that the claimant had been unaware that a meeting had been arranged, Mr Adamson agreed to reschedule it for 7 July. He told the claimant simply that the meeting was to discuss his second job and that he was entitled to be accompanied

35. Mr Adamson subsequently telephoned the claimant again on 6 July to advise him that he was in fact facing an allegation of gross misconduct, without giving the claimant any explanation as to what the alleged gross misconduct comprised

36. The claimant attended the meeting the following day, 7 July. He was accompanied by a colleague. He was not given sight of any documentation either before or during the meeting but was told by Mr Adamson what Mr Heddle had discovered. The claimant responded with his understanding of the position including that the respondent was aware of the second job. The meeting ended with Mr Adamson indicating to the claimant that he believed the claimant was to be dismissed but he would have to check the position with Mr Jansen. No notes of the meeting were produced to the Tribunal

37. Mr Adamson telephoned the claimant later that day to confirm he was being summarily dismissed

38. Mr Adamson subsequently wrote to the claimant by letter dated 9 July (page 34). It erroneously refers to the disciplinary meeting as having occurred on 6 July and confirms that the claimant is being dismissed "due to gross misconduct". It refers to the alleged breaches of the regulations and the declarations completed by the claimant as the reasons for the decision. The

letter ends with an indication that the claimant had the right of appeal to Mr Jansen

39. Mr Jansen's evidence was that Mr Adamson had drafted the dismissal letter but that he (Mr Jansen) had amended it without being able to recollect what his amendments had comprised

40. The claimant spoke by telephone to Mr Jansen on 14 July. There is an issue between the parties as to the content of that call and also a follow up call between the claimant and Mr Jansen on 16 July

41. The claimant's version of those calls is that Mr Jansen made it clear to the claimant that, having made the decision himself, it would not be overturned on appeal. Mr Jansen went on to refer to other allegations of what he described as poor attitude on the part of the claimant, which had not previously been raised with the claimant, indicating that these had also been part of the overall consideration and decision that the claimant be summarily dismissed

42. Mr Jansen's evidence was that he had simply made clear to the claimant that he would listen to anything new the claimant had to add but that, if there was nothing new, the dismissal would stand. He accepted that he had made reference to his view of the claimant's attitude to both him and the company but had done so to highlight that the claimant generally had shown himself to be untrustworthy

43. Again, the Tribunal had to determine what was said in those calls by reference to the competing oral evidence alone, there being no documentation to assist

44. The Tribunal found the evidence of the claimant more compelling. He gave his evidence consistently and the Tribunal found the manner in which he gave his evidence to be more credible than that of Mr Jansen. Additionally, the fact that it was accepted by Mr Jansen that he had already made the earlier decision and that he did make reference to other allegations of poor attitude against the claimant is consistent with, and supportive of, the claimant's evidence

Law

45. Section 98(1) of the Employment Rights Act 1996 states:

> 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.

46. Relating to the "conduct of the employee" is one of the reasons set out in subsection (2)

47. Section 98(4) of the Employment Rights Act 1996 states:

> 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.

48. It is for the employer to prove the reason for dismissal. The application of section 98(4) has a neutral burden of proof.

49. There is well-established case law setting out the guiding principles for determining an unfair dismissal claim based upon a dismissal by reason of conduct, as alleged in this case

50. The case of *British Home Stores Limited v Burchell (1980) ICR 303* proposes a three-fold test. The Tribunal must decide whether:

    50.1. the employer had a genuine belief that the employee was guilty of the misconduct alleged;

    50.2. it had in mind reasonable grounds upon which to sustain that belief; and

    50.3. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances (which include the gravity of the charges and the potential impact upon the employee – *A v B 2003 IRLR 405*).

51. The Tribunal must then consider whether the sanction of summary dismissal was reasonable in all the circumstances

52. The Tribunal must not substitute its own view for that of the employer unless the latter falls outside the band of reasonable responses (*Iceland Frozen Foods v Jones 1983 ICR 17)*. This applies to procedural as well as substantive matters (*Sainsburys v Hitt 2003 ICR 111*).

Submissions

53. Both parties made oral submissions

54. The claimant briefly submitted that the respondent had been aware of his supplementary employment throughout but otherwise he was satisfied that everything had been said in evidence

55. Mr Jansen made submissions on behalf of the respondent summarised as follows

56. Mr Heddle had been engaged to ensure everything at the respondent's business was in order. Despite being equally responsible for compliance with the regulations, the claimant had not kept records and, although they had tried to work with him, he had wanted to blame other people. The claimant had said nothing in the appeal process to give any confidence that the same actions would not be repeated. Mr Jansen accepted that he may have made mistakes but would never have refused the right to appeal. In the appeal calls, he had indicated to the claimant that he would have to say something new otherwise the decision would remain, but nothing new had been offered

Conclusions

57. It is for the respondent to prove the reason for dismissal. The reason relied upon by the respondent is conduct, alleged to be breach of the regulations by the claimant and false declarations made by him

58. The Tribunal does not accept on the evidence that this was the true reason for the claimant's dismissal. The respondent was aware of the claimant's second job, which involved working Saturdays, and they continued to allocate additional work either, culpably, not being aware of or turning a blind eye to potential breaches of the regulations. There is no dispute as to how the claimant completed the two Declarations in March and early June but that was in the context of the respondent having knowledge, at the time, of the claimant's second job

59. It appears clear to the Tribunal on the evidence that the respondent's concerns centred on the prospect of their own actions, in allocating additional duties to the claimant, putting the company as well as the claimant at risk of punitive action. The dismissal letter sets out the self-serving statement that "had the company been made aware that you were working every weekend then you would not have been scheduled to work". On the Tribunal's findings, the respondent was fully aware of that very fact but sought to attach entire blame upon the claimant by way of attempted self-protection

60. The Tribunal's conclusion therefore is that, the respondent having failed to satisfy the Tribunal that the reason for the dismissal was the claimant's conduct, the claim is well-founded

61. Noting however that the decision is centred on allegations of misconduct, the Tribunal went on to consider whether the dismissal would otherwise have been fair or unfair under the provisions of section 98(4) ERA

62. The Tribunal considered the procedure followed by the respondent as found on the facts. The claimant was not given advance notification of the allegations against him. He was not shown any supporting documentation either prior to or at the disciplinary hearing. The respondent's own evidence is that in fact the decision to dismiss was taken by the respondent's Managing Director prior to the disciplinary hearing being held. The purported dismissing officer did not take that decision. There was no meaningful appeal afforded to the claimant. In all the circumstances, the Tribunal's clear conclusion is that the dismissal was procedurally unfair

63. In terms of substance, this being a conduct dismissal, the Tribunal considered the application of section 98(4) of the ERA through the prism of the *Burchell* test. It is not for the Tribunal to form or substitute its own view but rather to examine the reasonableness of the respondent's actions and conclusions. In doing so, the Tribunal must take into account the size and administrative resources of the respondent.

64. On the facts found, the Tribunal does not accept that the respondent had a genuine belief in the claimant's guilt of the alleged conduct. The respondent was fully aware of the claimant's second job and yet continued to allocate additional duties to him, which it is correct to say the claimant accepted, thereby at times putting him and it in breach of the regulations. Equally, being aware of the claimant's second job, the signed Declaration Forms cannot properly be said to have misinformed or misled the respondent

65. The Tribunal has set out above its findings as to the true rationale for the respondent's decision

66. In the Tribunal's view, the investigation carried out by Mr Heddle was a proper and reasonable investigation. The Tribunal would wish to emphasise that nothing in this judgment is, or is intended to be, a criticism of Mr Heddle. He is clearly knowledgeable in the field and his conclusions are based on the premise, as confirmed to him, of the respondent's lack of knowledge of the claimant's second job

67. The Tribunal's conclusion, however, on the facts is that no reasonable employer acting reasonably could have come to the conclusion that the claimant's conduct amounted to gross misconduct, given the knowledge the respondent had. The respondent cannot properly participate in and condone the conduct of the claimant and then categorise it as gross misconduct

68. Accordingly, the Tribunal's conclusion would be that, both procedurally and substantively, the dismissal of the claimant was unfair

69. Turning to issues of principle on the question of remedy, the Tribunal is clear, on the above analysis as to the procedure followed by the respondent, that it is in clear breach of the ACAS Code and the Tribunal will hear argument at the Remedy Hearing as to an appropriate uplift

70. In terms of contributory conduct, the Tribunal is satisfied on the facts found that the claimant cannot be said to be free of blame in all the circumstances. As a coach driver whose duties involved school runs, he must or should have been aware of the regulations relating to health and safety that he is bound to comply with and has equal responsibility with the respondent to follow. He did not do so, albeit facilitated by the respondent. The Tribunal does accordingly find that the conduct of the claimant is such that there is contributory conduct on his part. Again, the Tribunal will hear argument as to an appropriate level of contribution at the Remedy Hearing

71. In terms of preparation for the Remedy Hearing, the attention of the parties is drawn to the previous Case Management Orders made by the Tribunal and in particular:

    71.1. That the claimant shall send to the respondent copies of all documents he has relevant to the claim which includes documents relevant to financial losses and what the claimant has done to find another job

    71.2. That the claimant's witness statement shall include any evidence about financial losses and any other remedy the claimant is asking for

Employment Judge B Hodgson

Date 19 March 2021

REASONS SENT TO THE PARTIES ON

24 March 2021

FOR THE TRIBUNAL OFFICE

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