



EMPLOYMENT TRIBUNALS

Claimant: Mr P Willie

Respondent: Abbey Logistics Limited

Before: Employment Judge Anderson

UPON APPLICATION made by email dated 4 May 2021 and received on 5 May 2021 to reconsider the judgment dated 7 April 2021 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing.

JUDGMENT

1. The application for reconsideration of the wrongful dismissal claim is allowed.
2. The complaint of wrongful dismissal is dismissed.

REASONS

Context

3. On 22 March 2021, I heard the Claimant's claim of unfair dismissal. A complaint of wrongful dismissal/notice pay was raised in the ET1 claim form and some of the documents before the Tribunal. It was not raised during the preliminary discussions at the hearing by the judge or any party, and was not dealt with explicitly within the judgment.
4. The Claimant has requested reconsideration of the judgment, by email dated 4 May 2021 and received by the Tribunal on 5 May 2021. The Claimant noted that the separate and distinct complaint of breach of contract, or wrongful dismissal (failure to pay notice pay) was not referred to or recognised in that judgment. The Claimant sought, by way of reconsideration, a decision on that complaint.

5. The Tribunal notified the parties that it was minded to reconsider the judgment for the reasons set out by the Claimant and was minded to do so without a further hearing, on the basis that the issues had been addressed within the evidence and submissions before the Tribunal. Neither party objected to this proposed course of action.
6. In the previous judgment dated 7 April 2021, detailed findings of fact were made, which will not be repeated here. However, they are adopted so far as they are relevant to the complaint of wrongful dismissal.
7. There is no dispute that the Claimant was not paid for his notice period. The Respondent says this was due to the Claimant being summarily dismissed for gross misconduct.
8. When considering the complaint of wrongful dismissal, I must consider whether the Claimant was guilty of gross misconduct.

Background Information

9. The Claimant worked for the Respondent as a HGV driver.
10. The Respondent is a bulk tanker logistics service provider.
11. 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 data about a driver's driving time, break time, other work time, speed of travel and distance travelled. The purpose of these cards is to ensure the safety of the driver and other road users.
12. At the hearing on 22 March 2021, I heard evidence from the Claimant and from Mr R Freek, Operations Manager, on behalf of the Respondent.
13. The Claimant was summarily dismissed on 26 June 2020. The Claimant was dismissed for driving without a digicard on 8 June 2020. The Claimant's digicard had been left in his own vehicle, which was in a garage and was not due to open until later that day.
14. I found that the Claimant had not been unfairly dismissed.

The Evidence

Relevant Documents

15. The Claimant's contract of employment annexes a schedule, which deals with disciplinary, grievance and appeal procedures. Under 'Discipline', it states 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.*

16. A non-exhaustive list of examples follows, which include:

- *Unauthorised use of Company/Customers vehicles, property, tools, equipment and facilities.*

- *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.*

17. At the end of the list, it is stated, in bold, capitals and italics, that '***THIS IS NOT AN EXHAUSTIVE LIST***'

18. The schedule then lists a number of 'Company Rules', which include:

- Any reasonable instruction given to an employee in the course of his/her employment by any person within the Company, entitled to give such an order **MUST** be followed.
- ALL company notices must be complied with.

19. Under 'disciplinary procedure', it 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.*

20. In respect of sanction, the procedure sets out that depending upon the circumstances, the following action may be taken (my emphasis):

- 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.

21. 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.

22. Part of that memo states:

PLEASE BE AWARE that any attempt to falsify records either by way of an absence of records, e.g. moving a vehicle without a card in a position to record, or interference of the recording mechanism will be fully investigated and if proven will be found to be GROSS MISCONDUCT which will lead to DISCIPLINARY ACTION AND LIKELY SUMMARY DISMISSAL (original emphasis)

23. The Claimant signed this memo on 7 March 2019.

24. 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).

25. The Claimant was subject to disciplinary action in December 2019 for driving without a digicard, at a time when it had been lost. In the letter inviting him to the disciplinary meeting on that occasion, it was explicitly set out that the allegation was driving without a tacho card (digicard), that this was potential gross misconduct, and that the possible outcome might be no further action up to and including dismissal. These same provisions were set out in the letter of June 2020 following the 8 June 2020 incident.
26. There is no specific procedure, either from the Respondent, or apparently from the DVSA, that covers the specific circumstances in which a person does not have their digicard, but it is not lost or stolen; it is simply 'unavailable'.

Disciplinary Documents

27. It is recorded that at the time of his disciplinary meeting on 19 June 2020, the Claimant told the interviewing officer, *"I can't quite remember if I called (Mr Henson) on nights, but I am sure I did."*
28. It is recorded that at the time of the meeting on 25 June 2020, the Claimant told the interviewing officer 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"*.

Evidence of Mr Henson via form:

29. Mr Freek adjourned the disciplinary meeting on 19 June 2020 to speak to Mr Henson after the Claimant informed him of the conversation he said took place. 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 the Claimant, 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."*

The Claim Form

30. In his claim form, the Claimant said he had contacted the nightman (Mr Henson) to inform him that he did not have a unit, or digicard on 8 June 2020, and that he would have to do a manual printout until he was able to obtain the digicard from his vehicle, when the garage opened later that morning. The Claimant said this was the correct procedure as he understood it. The Claimant said that Mr Henson arranged a unit and said that a manual printout was fine, as long as the delivery was being made as required and he could obtain the digicard following the first delivery.

The Witness Statements

31. In his witness statement, the Claimant said:
 - a. On arriving at work on 8 June 2020, he did not have a unit and so contacted Mr Henson about this. He said that he then remembered he had left his digicard in his car, which was at the garage; he called Mr Henson back to inform him of this.
 - b. He understood the importance of following the rules and regulations in regards to his digicard at all times, however, was not sure of the specific rules that would apply in this case, so sought advice from Mr Henson. The Claimant said Mr Henson informed him he could perform a manual printout showing the work that the vehicle had done, as long as the delivery was being made as required, and to hand this over to the Claimant's manager. The Claimant said Mr Henson said he would put all of this in an email to the manager, so the Claimant did not need to make him aware. The Claimant stated he would do this and retrieve his digicard on his return to Hull following the delivery. The Claimant said this is what he did, trusting what he was being told by Mr Henson, as being the point of contact outside of normal office hours, was correct.
32. In respect of this last point, I was provided with an email that Mr Henson sent on the day in question, within an hour and a half of the Claimant arriving on site. The email makes reference to the Claimant having to take a particular unit, as there were no keys for the allocated truck. There is no reference to anything else relating to the Claimant.
33. In Mr Freek's witness statement, he set out that: *The DVLA states "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". 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. In addition, the DVLA expressly state that in the absence of a Driver Card "it is not permitted to keep manual records if the driver card has been forgotten".*
34. Mr Freek also set out that *on 20 February 2019 (Mr Willie) undertook a 7-hour CPC course which specifically included a module on "Digital Tachographs – Manual Entries – The Law" (page 68 – 70). Additionally, on 11 October 2019, Mr Willie was issued with a "Brief" on the Drivers Hours Regulations, Working Time Regulations and Digital Tachograph Operation (page 71) which reiterated his obligations to comply with the Rules and confirmed that "any failure to adhere to the above regulations may lead to disciplinary actions".*

Oral Evidence

35. In his oral evidence, the Claimant accepted that if a driver was to drive without a digicard, this would be illegal and they would be committing an offence. He also accepted that following that offence, the driver could be open to potential prosecution, which could result in a fine or a ban, and that there could also be repercussions for the employer.
36. The Claimant stated that he did not remember signing the memo dated 5 March 2019, but accepted it was his signature on the document.
37. The Claimant accepted that he was previously disciplined for driving without a digicard and that he was told any further examples of this could lead to further disciplinary

action. He accepted that it was 'very very clear' in December 2019 that driving without a digicard was gross misconduct and could result in dismissal.

38. When asked if, hypothetically, someone was told by the Respondent not to drive unless they had a digicard, to do so would be an unauthorised use of the vehicles, the Claimant replied '*I suppose so*'.
39. 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.
40. Mr Freek told the Tribunal that it was really irregular to drive without a card. When challenged that to do so twice could not constitute a 'persistent' breach of the regulations, Mr Freek responded that it was not a common occurrence and that 'twice is more than I've experienced with my workforce'.

Legal Principles

41. Dismissal without notice (or with inadequate notice) is wrongful (i.e. is a breach by the employer) unless the employer can show that summary dismissal was justified because of the employee's repudiatory breach of contract. The Tribunal has to consider whether the employment contract has been breached.

Application of the Law to the Facts

Was the claimant guilty of gross misconduct?

42. It is not in dispute that the Claimant drove without a digicard.
43. I accept there was no specific procedure relating to a temporarily unavailable digicard (rather than one that is lost or stolen). It might be thought to be comparable to an individual forgetting their card and that as a matter of common sense, the card ought to be retrieved. I note the record of Mr Henson's comments that if the Claimant had told him the situation, he would have told him (the Claimant) not to go out, even if it made the job late. In my view, this comment supports and reinforces the importance of digicards and the requirement to use them.
44. The Claimant 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 the importance of using a digicard via company memos, which he had signed. It was clear that the Respondent had repeatedly emphasised the importance of and the requirement to use a digicard and comply with the relevant statutory provisions.
45. I did not hear directly from Mr Henson. I had a written record of a conversation he had with Mr Freek. I reject the Claimant's evidence that Mr Henson told him he could drive for the following reasons:
 - a. The Claimant's evidence about his conversation with Mr Henson was

- inconsistent and changed between his disciplinary meeting, claim being brought, and the hearing itself. In particular, the Claimant initially said Mr Henson had not said anything about
- b. The record of what Mr Henson said to Mr Freek was clear that he did not recall the Claimant saying he did not have his digicard.
 - c. The email sent by Mr Henson within 90 minutes of the Claimant's arrival on site makes no reference to any conversation relating to a digicard.
 - d. Mr Henson's reported reaction to Mr Freek's questions is consistent with the evidence of Mr Freek and the wider evidence as to the importance of using a digicard, and not driving without one.
46. The Claimant submitted that the circumstances were such that his actions did not amount to gross misconduct. He said that his actions did not 'fit' within the examples given within the Respondent's disciplinary procedure.
47. The schedule explicitly states that the list of examples of behaviour amounting to gross misconduct provided is 'non-exhaustive'. However, I consider the following:
48. The memo dated 5 March 2019 and signed by the Claimant on 7 March 2019 could not be more clear: *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.*
49. Similarly, the memo signed by the Claimant on 11 October 2019 states *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).
50. The act of driving without a digicard therefore, must be seen in the context of, and as a breach of, the following company rules:
- Any reasonable instruction given to an employee in the course of his/her employment by any person within the Company, entitled to give such an order MUST be followed.
 - ALL company notices must be complied with.
51. In light of this, driving without a digicard could also fall within the definition of an unauthorised use of company vehicles.
52. The Claimant argued that two incidents were not sufficient to constitute a 'persistent' breach, as reason for the act not falling within the example of *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.*
53. The Respondent told me that it was uncommon for a driver to have two instances of driving without a card, and I accepted that. Two instances of driving without a digicard within 6-7 months is significant. That the Claimant could not remember signing the memo of 5 March 2019 suggests he perhaps did not take the matter as seriously as he might have.

Summary

54. In summary, I find as follows:

- A digicard is required, by law, for drivers such as the Claimant was at the time of his dismissal.
- There had been repeated messages, set out in documents, of the importance of using digicards and the requirement not to move a vehicle without one.
- The Claimant had signed such documents indicating his acceptance of and agreement to the rules and requirements.
- The fundamental nature of the requirement for a digicard is clearly apparent.
- The Claimant had a previous 'offence' of driving without a digicard; the written warning was still on his file at the time of this incident.
- The examples within the schedule are non-exhaustive and may depend on the circumstances.
- In any event:
 - i. The act is so serious of itself, in the context of the purpose of the digicard to safety, to amount to gross misconduct.
 - ii. The act was a breach of company rules, as it was a breach of a reasonable instruction and company notices.
 - iii. A second 'offence' in such a short period and in all the circumstances, could be considered a persistent breach, as set out in the examples.
 - iv. Whilst the act of driving without a digicard does not impact on the safety of the vehicle itself, the purpose of the card is to ensure the law is followed and vehicles are used in a safe manner, for the driver and the wider public. Therefore, driving without a digicard could be viewed as a breach of safety regulations.

55. For all those reasons, I conclude that the Claimant's actions amounted to gross misconduct within the meaning of the Respondent's policy, that the Respondent was therefore entitled to summarily dismiss the Claimant and by doing so, the Respondent did not breach the contract of employment.

56. I do not accept that the Claimant was 'entitled' to expect a lesser sanction than summary dismissal as a result of the previous outcome of disciplinary proceedings. I note that the letter sent to the Claimant on 12 December 2019 set out that he was being issued with a written warning, and explicitly states '*should there be any further examples of any misconduct of any nature during the life of this warning you may have further disciplinary action taken against you*'. I reject that the absence of the phrase 'including summary dismissal' means that was an avenue unavailable to the Respondent.

57. I reject the submissions that the Claimant was 'entitled' to 'go through' each stage of sanctions as set out in the disciplinary procedure, and that he was entitled to two written warnings. I also reject the submission that the disciplinary procedure does not 'allow' the employer to 'jump' from a written warning, to dismissal. Any employee can behave in such a way as to warrant summary dismissal, regardless of previous disciplinary, or a lack of previous disciplinary action. It is clear from the schedule itself that any employee who is found guilty of gross misconduct may be summarily dismissed at any time without notice and without payment in lieu of notice.

58. During both the 2019 and 2020 disciplinary proceedings, the Claimant was aware that he was being investigated for potential gross misconduct and all outcomes were open, from no further action, up to dismissal.

Conclusion

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

Employment Judge Anderson

Date 12 July 2021