EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110440/2021

Hearing held by Cloud Video Platform (CVP) on 10 and 11 November 2021

Employment Judge Campbell

Mr G Summers	**Claimant** **Represented by:** **Ms A Bowman,** **Solicitor**
First Glasgow (No 2) Limited	**Respondent** **Represented by:** **Ms R Smith,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed contrary to section 94 of the Employment Rights Act 1996 and the claim is therefore dismissed.

REASONS

GENERAL

1. This claim arises out of the claimant's employment by the respondent which began on 12 February 2012 and ended with his dismissal on 4 March 2021. It was agreed that the respondent dismissed the claimant on the latter date.

2. The Tribunal heard evidence from Mr Ewan Scrymgeour, Engineering Manager and Mr Robert Larkins, Fleet Manager on behalf of the respondent, and the claimant himself.

3. All of the witnesses were found generally to be credible and reliable. The parties were not in direct conflict over much of the evidence and the case turned more on matters such as the parties' positions on the adequacy of the process followed and the severity of the sanction imposed in the particular circumstances.

4. An indexed joint bundle of documents was provided and pages within it are referred to below in square brackets. The parties' representatives helpfully provided an agreed schedule of the claimant's losses before the conclusion of the hearing.

5. Closing submissions were delivered orally and noted. Those were considered in reaching the various conclusions below.

LEGAL ISSUES

6. The legal questions before the tribunal were as follows:

   6.1. Was the claimant's dismissal on 4 March 2021 by reason of his conduct, and thus a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996 ('ERA')?;

   6.2. Alternatively was the claimant's dismissal for 'some other substantial reason' falling within the scope of section 98(1) ERA?;

6.3. if so in either case, did the respondent meet the requirements of section 98(4) ERA so that the dismissal was fair overall?;

6.4. If not, and the claimant's dismissal was unfair, what remedy should be awarded?

APPLICABLE LAW

7. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a Tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that consideration.

8. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment Tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.

FINDINGS OF FACT

9. The following findings of fact were made as they are relevant to the issues in the claim.

Background

10. The claimant was an employee of the respondent from 12 February 2012 until 4 March 2021. The respondent operates a passenger bus service in predominantly the west of Scotland.

11. The claimant's expertise was as an electrician and he was employed as a Night Shift Electrician and stand-in chargehand. He was based at the respondent's depot at Dumbarton.

12. The claimant received an appointment letter dated 8 February 2012 confirming the initial terms of his role [41-42]. In May 2013 he signed a written statement of terms and conditions of employment [43-48].

13. The respondent agreed a set of disciplinary procedures with the Transport and General Workers trade union in 2007 [32-40] and those procedures applied to the claimant in his role.

14. As his job title suggested the claimant worked night shifts. His normal working hours were from 10pm to 6am, Monday to Friday. He would regularly work overtime for which he was paid separately at his standard hourly rate. This could involve him starting each shift early or working on Sundays. He worked overtime by choice and was not compelled to do so. Towards the end of his employment he was working between 45 and 65 hours per week.

15. At an earlier point in the claimant's service at Dumbarton, he had worked alongside a mechanic and a 'bus worker', plus his supervisor Mr Szymon Magon. The bus worker was transferred to another depot and the mechanic left and was not replaced, so that by around September 2020 it was only the claimant and Mr Magon who worked night shifts. Other staff worked day shifts at the depot.

16. The claimant's main role was to service the buses which made up the part of the respondent's fleet based at Dumbarton. Although his background was as an electrician he could also perform a number of other maintenance tasks. More demanding tasks, such as those which might require more than one

person or were lengthy and complex, would not be done by him and would be left for the day shift staff.

17. On a night shift the claimant and Mr Magon would share the list of required jobs between them. Mr Magon would not supervise every job the claimant would carry out in the sense of inspecting or overseeing it, but he would be responsible for jobs being done by the claimant and signed off as such.

Wheel torquing

18. It was frequently necessary for wheels to be fitted to the respondent's buses. This might be a new wheel, or in connection with a puncture repair, or part of general servicing of the vehicle.

19. There were particular procedures in place for wheel fitting. A large part of that was the torquing process, involving the correct placement of the wheel on its hub, initial fitting of wheel nuts in a given order and then tightening them to the correct degree in sequence. A wheel should be properly cleaned and oiled before the process is carried out. Wheel tightening was done with a torque wrench which is a piece of equipment up to five feet long. The tightness of the wheel nuts would then be checked with a torque gauge.

20. After a wheel was fitted and properly torqued it would be checked again 30 minutes later. The vehicle would be driven for up to 50 kilometres and then checked a third time. Then 'RIC' clips would be fitted to pairs of wheel nuts. All of the checks will be logged in a **'Wheel Change Daily Record'** sheet.

21. If the wheel nuts were not properly tight after the above checks there might be a fourth check after a further short period of driving, or the vehicle might be taken off the road for further inspection and work.

22. The job of fitting a wheel would normally be done by two people for safety reasons although it was possible in some cases for later torque checks to be done by one person.

23. The claimant would carry out between three and ten torque checks in each shift he worked. If a particular job was too physically demanding he would be expected to leave it for the following day shift. Of relevance to this was that Mr Magon was unable to carry out more physically demanding tasks.

24. The respondent provided guidance on the process by way of a 'Toolbox talk' in 2019. Being a night shift worker the claimant did not attend a talk but was given a copy of the guidance notes [49-55] and signed to confirm he had received them on 7 August 2019 [56].

Incident on 11 February 2021

25. On 11 February 2021 there was an incident with one of the respondent's buses. In Glasgow city centre and whilst in service, one of a pair of rear wheels on the near side of the vehicle became detached and the other wheel of the pair also came loose, but remained attached to the vehicle. The bus was travelling slowly at the time and no significant injury or damage was caused, other than to the wheels themselves.

26. The incident was immediately reported by the driver and the vehicle had to be taken out of service. The respondent required to report the incident to the Driver and Vehicle Standards Agency ('DVSA') which is the relevant regulatory authority. It is the DVSA which provides and controls the respondent's licence to operate as a passenger bus company. Mr Scrymgeour, Engineering Manager and Mr Larkins, Fleet Manager were also made aware of the incident very quickly after it had occurred.

27. The respondent recovered the bus to one of its depots where it was quarantined in order to examine it. Mr Frank Gordon, the respondent's senior vehicle examiner, inspected it and reviewed the records relating to the servicing of the relevant wheels leading up to the incident date. This included checking when the wheels had last been fitted to the vehicle and any work done on them since then.

28. The bus was also examined by a DVSA enforcement examiner and a prohibition notice was issued to the respondent for the incident. Such notices effectively act as a warning on an operator's record, and if enough are issued and/or a notice is given for a serious enough matter the operator may have its licence suspended or revoked. The notice was initially issued as a 'PG9' type at the roadside, then upgraded to 'S-PG9' later, indicating that it was deemed more serious. A total of three notices were issued in relation to different defaults arising from the incident.

Investigation by James McLennan

29. Following Mr Gordon's inspection it appeared that staff may have caused or contributed to the incident and so Mr James McLennan, an Engineering Manager at the respondent's Scotstoun Depot was asked to conduct an investigation. He used Mr Gordon's notes as a starting point and reviewed the events leading up to the incident in more detail.

30. At the conclusion of his investigation Mr McLennan prepared a two-page summary of his findings which incorporated suggested actions and lessons learned [68-69].

31. Mr McLennan interviewed the following individuals as pet of his investigation, and a note was prepared of each conversation:

    31.1. Mr Gordon, who had initially inspected the vehicle and records relating to the wheels affected;

    31.2. Eric Millar, a dayshift Engineer who had fitted the wheels on 27 January 2021;

    31.3. Michael O'Hara, Mr Millar's supervisor;

    31.4. The claimant, who confirmed having carried out a job relating to the wheels on the night of 10/11 February 2021;

    31.5. Mr Magon, who signed off the claimant's job on 10/11 February 2021;

31.6. Paul Lowe, an Engineering Manager who examined CCTV footage of the claimant's depot on 10/11 February 2021 along with Mr McLennan; and

31.7. An employee of Cordant, a company contracted to provide bus cleaning services to the respondent, who noted an issue with the wheels on 10/11 February 2021.

32. Mr McLennan also reviewed records relating to the wheels and photographs taken by Mr Gordon.

33. Part of the documentation consisted of Wheel Change Daily Record Sheets for 7 and 10 February 2021 [57-58].

34. Mr McLennan also reviewed **'Vehicle Defect Cards'** dated 3, 6, 7 and 10 February 2021. Those are initially completed by the driver of each vehicle on a daily basis to note any problems experienced when driving the vehicle. Those notes are then used to identify jobs to be done by the claimant and others. Each card has a section where the driver would report any defects (or write 'none' if there were not any), then next to that the person reviewing and remedying the defect would write what they had done and sign the card. At the bottom of the same page a supervisor of the person who had remedied the defect would sign it. That was to confirm that the work carried out as noted was appropriate to fix the defect. It did not mean that the supervisor had inspected the work.

35. The Vehicle Defect Card dated 10 February 2021 for the vehicle which suffered the detached wheel [60-61] showed that one driver had reported RIC clips loose on the nearside rear wheel. RIC clips were only fitted to rear wheels. The claimant had added the words *'checked torque + refitted'* next to that and added his initials. Mr Magon had signed the card at the bottom as his supervisor.

36. The claimant was suspended on or around 11 February 2021 at or near the beginning of his shift. He was interviewed by Mr McLennan on 19 February 2021. He was accompanied by Mr Joe Molloy who was a full-time trade union

representative. A note was prepared of the discussion which Mr McLennan signed and the claimant countersigned [77-78].

37. The claimant confirmed that he was familiar with the wheel torquing policy, but did not fit wheels, only torqued them, i.e. he carried out the subsequent checks to ensure the wheels were properly torqued. When asked to describe the process he had gone through on 10 February 2021 he was unable to, saying he *'was on autopilot'.* When asked if he checked the torque settings of the wheel he said he assumed so, but was *'on semi auto pilot'.* He could not remember any further details.

38. There was discussion about the claimant's private life. This was because the claimant had some difficult circumstances relating to family members. He said his supervisor knew, who in turn had reported to a more senior manager named Jim Hill. He said another manager named Mr Toye was also aware. He stated that he would consider himself fit to be working despite those circumstances.

39. Mr McLennan viewed some CCTV footage of the claimant's depot for the night of 10/11 February 2021. He watched it along with Mr Lowe, the depot Operation Manager. The men were able to view the bus in question. They prepared a note stating that what they saw was a figure in *'Hi-viz'* clothing dragging a torque wrench to the vehicle, leaning the wrench against the body of the bus and bending down to visually check the wheel. The torque wrench was not used by the individual on the vehicle.

40. The provisional conclusions reached by Mr McLennan were that responsibility for the wheel detachment was shared between Mr Millar and the claimant. He believed that Mr Millar had not properly cleaned the wheels before fitting them on 27 January 2021 and he considered that the claimant had not properly checked the wheel and carried out any work required to deal with the driver's reported defect on 10 February 2021.

Disciplinary procedure with Ewan Scrymgeour

41. Mr McLennan recommended that disciplinary action be initiated for both the claimant and Mr Millar. Mr Larkins checked among his other Engineering Managers to see who was available. Mr Scrymgeour was available and agreed to take both cases on. He covered the Blantyre and Overtown depots and had not been involved in the process.

42. Mr Scrymgeour received a pack of documents from Mr McLennan including the report, Wheel Change Daily Record Sheets, Vehicle Defect Cards and the interview notes. He did not receive a copy of the CCTV footage considered by Mr McLennan and was not given access to it. He verbally clarified with Mr McLennan what the latter had seen. He asked if Mr McLennan could be sure it was the claimant he saw next to the bus. Mr McLennan could not be completely sure, but said the appearance of the person in the footage matched the claimant in terms of height and build, and the clothing the person was wearing. He said he had viewed footage of the whole shift and no-one came near the vehicle at any other time. Mr Scrymgeour made a handwritten note on his copy of Mr McLennan's statement to record the further information provided [85].

43. The only persons working in the Dumbarton Depot on the night of 10/11 February 2021 were the claimant, Mr Magon and an employee of Cordant.

44. Mr Scrymgeour sent the claimant a letter dated 1 March 2021 inviting him to a hearing on 4 March 2021 [84]. The letter said that there would be three *'principal points of discussion'*, namely:

'That you failed to perform the repair that you have described and signed off

The likely damage to the company's reputation and operators' licence standing; and

The likelihood of public enquiry as a result of the repair as presented'

45. The letter enclosed the same materials Mr Scrymgeour had received and a copy of the respondent's disciplinary policy.

46. The claimant attended the disciplinary hearing on 4 March 2021 along with Mr Molloy, his trade union representative. Mr Scrymgeour was assisted by a Ms Samantha Murphy who took notes and prepared a typed minute [86-91]. The minute is taken to be a sufficiently accurate summary of the conversation. The meeting lasted for around 90 minutes including an adjournment towards the end of around 25 minutes.

47. Mr Molly said that he felt the respondent was in breach of its duty of care towards the claimant as it had not taken adequate steps to support him in dealing with personal matters. He felt the claimant should not be attending a disciplinary hearing because of that. Mr Molloy said that the claimant was *'on autopilot with his personal life'.*

48. The claimant had not viewed the CCTV footage of 10/11 February 2021 before the disciplinary hearing. He did not ask to view it. The minute records him as saying that he had watched the CCTV but he was firm in his evidence that he had not.

49. When the footage was discussed, Mr Molloy asked whether it should even be watched if it was established that the person responsible was not the claimant. Mr Scrymgeour agreed. Neither the claimant nor Mr Molloy challenged Mr Scrymgeour on what he said the CCTV showed, particularly that a torque wrench was not applied to the wheel reported as defective. The claimant agreed that he usually torqued wheels on the night shift.

50. Mr Scrymgeour adjourned the meeting and moved to a different room to reach a decision. Ms Murphy joined him as he wished to check back over her notes of the discussion. He reached a decision, which was that the claimant had committed an act of gross misconduct and should be dismissed. He did not speak to anyone other than Ms Murphy during the adjournment and took the decision alone.

51. Mr Scrymgeour reconvened the meeting and told the claimant his decision. He said that he considered the claimant's actions to be gross misconduct and that he had signed off work that he hadn't done. The claimant was not expecting to be dismissed and the decision came as a shock to him. Mr Scrymgeour explained that the claimant had seven days in which to appeal the decision and brought the meeting to an end.

52. Mr Scrymgeour confirmed his decision in writing by letter dated 5 March 2021 [92-93]. His conclusion was explained as follows:

'That you failed to complete work to our vehicle 67711 on the 10th of February 2021 that you had signed off as having done so.'

53. The letter confirmed that any appeal should be submitted to Mr Larkins. He was Mr Scrymgeour's line manager.

54. Mr Scrymgeour considered the claimant's submissions about difficulties in his private life, but did not agree that the respondent had failed in any duty of care towards the claimant. He considered that the claimant was working by choice and had the option to declare himself unfit to work if he felt unwell. He could also have asked his manager Mr Magon to take a period of compassionate leave. He concluded that Mr Magon had asked the claimant essentially on a daily basis how he was and had said that family came first. The option to take time off remained open. The claimant had adequate opportunity to flag up if he felt unable to carry out his duties. It was not for the respondent to order the claimant not to be at work.

55. Ultimately he did not find that the claimant's personal issues mitigated against the conclusion he reached that the claimant had stated he had performed work when he had not done that work. As such he formed a view that it was the claimant who was shown in the CCTV footage, that he visually inspected the wheel but did not use a torque wrench on it, and that he had then deliberately falsified his entry in the Vehicle Defect Card of 10 February 2021 rather than mistakenly believing that he had carried out the work.

Appeal process

56. The claimant confirmed his intention to appeal against his dismissal by emailing Mr Larkins on 5 March 2021 [94]. He stated:

'I wish to appeal the severity of my disciplinary as the responsibility was not just my own.

The mitigating circumstances were due to personal circumstances of which I notified the company and they failed in their duty of care.

As such placed myself and others in potential danger.'

57. An appeal hearing was arranged for 14 April 2021. Rather than being in person as the disciplinary hearing had been, it took place virtually. The claimant attended and this time was accompanied by Mr Pat McIlvogue, also a full time trade union representative. Mr Larkins chaired the appeal and notes were taken by Ms Lynne MacLeod. They were prepared in a typed minute [97-98].

58. Mr Larkins received a pack of materials from Mr Scrymgeour. That consisted of the documents from the investigation as well as the minutes of the disciplinary hearing and disciplinary outcome letter. Mr Larkins took the decision not to read those documents until he had heard from the claimant what the grounds of appeal were. He said he did so to keep an open mind. He intended to read all of the documents after the meeting. He was generally familiar with the incident itself as it had been reported to him as soon as it happened, and he had had to deal with the DVSA over it.

59. The claimant put forward the mitigating circumstances of the issues he was dealing with at home. Although Mr Magon had discussed those with him, the more senior Mr Hill had not approached him. Mr McIlvogue stated that the claimant had not been adequately supported.

60. Mr McIlvogue also raised that the claimant's inability to perform the torquing job with a colleague was a contributing factor. Had there been a second individual present, it would have been less likely that the torquing process would have been omitted.

61. It was also said that the disciplinary outcome letter was lacking in detail, such as in specifying exactly what work had supposedly not been done by the claimant.

62. Mr Larkins closed the meeting, saying that he would review the investigation and disciplinary materials, speak to Mr Magon about what was said about support for the claimant, and then issue a decision.

63. On 15 April 2021 Mr Larkins emailed Mr Magon to seek answers to a set of questions about what had been discussed between him and the claimant in relation to the claimant's personal circumstances [99]. He asked whether Mr Magon had suggested that the claimant should not be at work, whether the claimant had been offered time off work, what if so was the claimant's response, how frequently the issue had been discussed, whether the situation had been reported to Mr Hill and how Mr Magon observed the claimant's behaviour at work around this time, i.e. from 4 to 10 February 2021.

64. Mr Magon replied later that day to say that to the best of his recollection he had asked the claimant if he should be at work, and did offer time off. He recalled the claimant saying he did not need time off at that point, but would let Mr Magon know if he did. A few days later he asked Mr Magon to let Mr Hill know that he might need time off in the future. Mr Magon passed that message on to Mr Hill. Mr Magon found the claimant to be more quiet than normal.

65. Around this time Mr Larkins also spoke to Mr Magon verbally about the same issues. It was then that Mr Magon confirmed that Mr Hill had consented to the claimant taking time off if he needed it.

66. Mr Larkins reached a decision in relation to the claimant's appeal, which was to uphold Mr Scrymgeour's decision. He confirmed that in a letter to the claimant dated 23 April 2021 [100-101].

67. Mr Larkins discussed his reasons why he concluded that the respondent had satisfied any duty of care towards the claimant in terms of his mental wellbeing and fitness to work. He also explained why he agreed with Mr Scrymgeour's decision that the claimant had been guilty of gross misconduct – as he put it by *'failing to carry out your duties and by falsifying records'.*

68. The letter concluded by confirming that this was the final stage in the respondent's process and there was no further right of appeal.

Mr Millar

69. As a result of Mr Gordon's initial investigation into the wheel detachment, a disciplinary investigation was undertaken into the involvement of Mr Millar. That progressed to a disciplinary hearing which Mr Scrymgeour chaired. He took the decision to dismiss Mr Millar for gross misconduct, finding that he was culpable in not following the correct process for preparing and fitting the wheels. Mr Millar had acquired over 35 years of service with the respondent. He did not appeal against his dismissal.

DISCUSSION AND CONCLUSIONS

Reason for dismissal

70. The claimant was dismissed. The parties agreed that the claimant had been dismissed because of his conduct, but disagree over whether the requirements of section 98(4) ERA had been satisfied.

71. It is found that conduct was the reason for the claimant's dismissal. That is evident from all the documents in the process, particularly the disciplinary hearing and appeal outcome letters.

General reasonableness of the respondent's process

72. In assessing the overall reasonableness of an employer's actions in such cases ***British Home Stores Ltd v Burchell [1978] IRLR 379*** will apply. Both parties' representatives agreed and dealt with the various principles and requirements established by that authority in their closing submissions.

73. ***Burchell*** requires three things to be established before a conduct dismissal can be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

74. There appears to be little doubt that Mr Scrymgeour, as disciplinary hearer and the person who decided to dismiss the claimant, genuinely considered he was guilty of misconduct. His outcome letter of 5 March 2021 makes this clear. He concluded that the claimant had failed to complete the work he had stated on the Vehicle Defect Card of 10 February 2021. He expressly said he considered the claimant had committed an act of gross misconduct.

75. It was not suggested on behalf of the claimant that Mr Scrymgeour did not hold that belief. Rightly or wrongly, his letter did faithfully set out his belief.

76. It is next necessary to consider whether the respondent had reasonable grounds for holding the belief that the claimant was guilty of misconduct. Looking first at whether there was evidence of the misconduct which Mr Scrymgeour had found to have occurred:

    76.1. The claimant signed the Vehicle Defect Card of 10 February 2021 for the vehicle in question, to say that he had checked the torque of the wheel and re-fitted the RIC clips;

    76.2. There was CCTV evidence of the night shift of 10/11 February 2021 which two managers viewed and described in writing. They said that a person fitting the claimant's description went over to the vehicle,

crouched down to look at the wheel but clearly did not use a torque wrench on it;

76.3. No other person came near the vehicle apart from that occasion;

76.4. The only individuals present in the depot that night were the claimant, Mr Magon and an employee of a contractor engaged to clean vehicles;

76.5. The wheels in question came loose whilst the bus was in service the next day and one wheel of the pair became detached altogether;

76.6. The claimant could not confirm that he had done the work he signed off, saying that he was *'on autopilot'*.

77. Considering the question of whether Mr Scrymgeour had reasonable grounds on which to make a finding of gross misconduct specifically, there was sufficient evidence, some of it corroborated, to do so. That evidence pointed to conduct serious enough in nature given the real and potentially severe events which occurred, both in terms of safety of passengers and the public, and also the related risk to the respondent's licence to operate. Those potential consequences were reasonably capable of being traced back to the conduct of Mr Millar and the claimant. The evidence was sufficient for Mr Scrymgeour to conclude that the claimant had deliberately stated he had carried out work which he had not done, and that had he done that work the risk of the incident which occurred the next day would have been removed or reduced.

78. The third limb of ***Burchell*** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to uncover every metaphorical stone, but no obviously relevant line of enquiry should be omitted.

79. Considering again the disciplinary allegations raised, the evidence gathered and the claimant's response to them, it is found that the respondent's

investigation met the required legal standard. This is not to say that it was perfect, as it was not. But the legal test, as emphasised in ***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect differently.

80. There was no material witness or area of enquiry which the respondent overlooked. At the time of the process the claimant did not raise issues with the sufficiency of the investigation. Whilst he had not been given the opportunity to review the CCTV evidence, he did not raise that as a challenge to the process either before Mr Scrymgeour or Mr Larkins. The former had not viewed the footage either but relied on a clear statement from Mr McLennan who had done, backed up by another manager who viewed the footage along with him.

The band of reasonable responses

81. In addition to the ***Burchell*** test, a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.***

82. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would only issue a final warning.

83. It is also important that it is the assessment of the employer which must be evaluated. Whether an employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision

falls within the reasonableness range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer against the above standard. How the employee faced with disciplinary allegations responds to them may also be relevant.

84. Mindful of the above approach which a tribunal must take in dealing with the question of reasonableness, it is found that dismissal of the claimant was within the band of reasonable responses open to the respondent in these circumstances. The claimant was found not only to have not carried out a job assigned to him, but to have created a written record of having carried out that work which was false. The consequences of that were clear as they were experienced the following day. It was reasonable to hold the claimant at least partially responsible for them.

85. In particular, whilst both Mr Scrymgeour and Mr Larkin had sympathy with the claimant regarding his personal circumstances, they were entitled to conclude as they did that the claimant had been given adequate support and consideration by managers, that the claimant himself was primarily responsible for deciding whether he was fit to attend work, and if he did come to work, that he carried out the work he was asked to do and took responsibility for that. The claimant was not only working his normal hours, but performing additional overtime by choice.

86. Considering that the respondent also initiated a disciplinary process against Mr Millar, and dismissed him for his part in the matter, there can be no suggestion of inconsistent treatment of the claimant, and in fairness no such argument was put forward on his behalf.

87. Therefore, it is found that dismissal did fall within that lawful range on the evidence in this case.

88. Ms Bowman for the claimant raised that the claimant had not been offered the opportunity to view the CCTV footage relied on in dismissing him and in rejecting his appeal. However, it is difficult to see what difference would have been made to the process had the claimant viewed the footage, given that he

accepted the job of checking the reported wheel defect was his but could not say with any force that he had done the work, or recall any details of doing so, and that he accepted what he was told was in the footage. Had the focus of his case been different, such as that he strongly maintained that he had done every part of the required torquing process, then viewing the footage may have been of value. His case was not that he had done so. It was that he was 'on autopilot' and should have been given more support regarding his personal circumstances by management. It is noted that his grounds of appeal were not that he had done the work, but that the sanction of dismissal was too severe and that his personal circumstances should have counted more in mitigation.

89. It was also submitted on the claimant's behalf that the disciplinary case against him changed in nature as the procedure progressed. This is not found to be the case. The potential issue to be tried was described in Mr McLennan's report as *'[the claimant] did not torque the wheel as per his repair action on the defect card.'* The disciplinary hearing invitation said *'you failed to perform the repair you have described and signed off'* as one of three 'points of discussion'. Admittedly the other two points in relation to company reputation and licence standing, and likelihood of a public enquiry, fell away somewhat although the potential consequences for the respondent's licence were relevant and remained in the background. Mr Scrymgeour's outcome letter stated *'you failed to complete work to our vehicle…on the 10th February 2021 that you had signed off as having done so.'* Mr Larkins' appeal outcome letter referred in its penultimate paragraph to the claimant not properly checking the wheels and falsifying records. As such there was a consistent thread and the claimant understood, or ought to have understood, the principal allegation against him. There were two components to that – not doing the work required and signing a document to say that the work had been done. The claimant was accused, and found guilty, of both throughout the process.

Conclusions

90. As a result of the above findings it is not necessary to address further matters such as contributory conduct, ***Polkey,*** mitigation or other aspects or remedy. It is noted that the parties agreed that the claimant had taken reasonable steps to mitigate his losses in any event.

91. The claimant will understandably be disappointed that he has not succeeded in his claims when in his view the conduct for which he was dismissed arose through error during a difficult time. However, applying the necessary legal tests it is determined that the respondent did not unfairly dismiss him and therefore his claim must be refused.

Employment Judge: B Campbell
Date of Judgment: 16 November 2021
Entered in register: 17 November 2021
and copied to parties