EMPLOYMENT TRIBUNALS

Claimant: Mr T Lopatynski

Respondent: Warrington Borough Transport Limited (trading as Warrington's Own Buses)

HELD AT: Manchester (by CVP) **ON:** 30 September 2021 & 21 October 2021 (in chambers)

BEFORE: Employment Judge Peck (sitting alone)

REPRESENTATION:
Claimant: Ms D Janusz (of England & Wales Employment Advice)
Respondent: Mr J Lomax (of Backhouse Jones Solicitors)

JUDGMENT

1. The claimant's claim of unfair dismissal fails and is dismissed.

2. The claimant's claim in respect of notice pay fails and is dismissed.

3. The claimant's holiday pay claim is dismissed upon withdrawal by the claimant.

REASONS

Claim and Issues

1. This was a final hearing conducted as a remote hearing by CVP on 30 September 2021. The parties did not object to the case being heard remotely.

2. By a claim form presented on 15 February 2021, the claimant brings claims for unfair dismissal, notice pay and holiday pay. He alleges that, on informing the respondent that he had been disqualified from driving for 18 months, the respondent dismissed him. The claimant's case is that he became aware of this dismissal on receipt of his P45 on or around 17 November 2020. He alleges that he was dismissed without any disciplinary process being followed, that the respondent failed to consider alternative roles for him, that it failed to send him a letter confirming his dismissal and that he was not afforded the right of appeal.

3. By a response submitted on 18 March 2021, the respondent denies the claimant's claims. Its position is that the claimant was not dismissed, but that he resigned with immediate effect on 6 November 2020. The respondent's position is that there cannot, therefore, have been a failure to follow a disciplinary process and denies that there is any notice pay owing to the claimant. The respondent further denies that there was any holiday pay owing to the claimant on termination.

4. If the claimant's unfair dismissal claim against the respondent succeeds, he is seeking compensation only.

5. The respondent accepts that, if the claimant is found to have been dismissed, that dismissal will be procedurally unfair. However, it says that any compensation awarded should be reduced to reflect the prospect of the claimant being dismissed in any event (a Polkey deduction). The respondent also says that any awards of compensation should be reduced to reflect the claimant's contributory conduct.

6. At the outset of the hearing, I noted that the claimant had not particularised his holiday pay claim, nor had he specified the amount of holiday pay being claimed and brought to his attention the respondent's calculations, set out in its response. During a break early in the hearing, I therefore provided Ms Janusz with an opportunity to take instructions from the claimant. She did so and it was confirmed that the claimant was not owed any holiday pay and that this part of his claim was therefore withdrawn.

7. The remaining issues to be determined were identified as follows:

Unfair Dismissal

8. Was the claimant dismissed by the respondent or did his employment terminate by reason of his resignation?

9. If the claimant was dismissed by the respondent, what was the reason or principal reason for dismissal and was this a potentially fair reason under section 98 Employment Rights Act 1996 (**ERA**)?

10. Applying the test of fairness in section 98(4) ERA, did the respondent act reasonably in treating that as a sufficient reason to dismiss the claimant?

11. If the claimant's claim succeeds, what remedy should he be awarded?

    a. Would it be just and equitable to reduce any basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
    b. Should any compensatory award be reduced in terms of Polkey v AE Dayton Services Limited [1987] ICR 142 and if so, what reduction is appropriate?
    c. Did the respondent or the claimant unreasonably fail to comply with the ACAS Code of Practice and if so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
    d. Would it be just and equitable to reduce the compensatory award because of any conduct of the claimant before the dismissal? If so, to what extent?

Wrongful Dismissal

12. What was the claimant's notice period?

13. Was the claimant paid for that notice period?

14. If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

Procedure, documents and evidence heard

15. Miss Lepek participated in the hearing in her capacity as an independent interpreter for the claimant.

16. The claimant was represented by Ms Janusz of England and Wales Employment Advice and the respondent was represented by Mr Lomax of Backhouse Jones Solicitors.

17. In terms of oral evidence, I heard evidence from the claimant for himself and from Mr Wakerley (Managing Director) for the respondent. Both had prepared

and exchanged witness statements in advance of the final hearing, with the claimant's having been prepared in Polish and translated into English.

18. I was also provided with a witness statement for Mr Chisnall, signed and dated 2 March 2021, who held the role of Duty Supervisor with the respondent at that time. Mr Chisnall, who is no longer employed by the respondent, was expected to join the hearing to give evidence on behalf of the respondent but did not do so. The respondent did not provide an explanation for this. I was prepared to accept the witness statement into evidence, but in the absence of Mr Chisnall and given that Ms Janusz was not afforded the opportunity to cross-examine him, I have accorded the contents of his statement only limited weight. That said, I have not drawn any adverse inference from his absence from the hearing. I do not, as was suggested by Ms Janusz in her submissions, take the view that Mr Chisnall's absence indicates that he knew the contents of his statement to be untrue.

19. I was provided with an agreed bundle of documents, which ran to 66 pages.

20. At the outset of the hearing, I reminded the parties that it was a formal hearing and that it should be always treated as such, despite being conducted by CVP. I informed the parties that they should behave as though they were attending a tribunal in person. I also informed the parties that there would be regular breaks during the hearing, but that all participants (including representatives and the interpreter) could request a break at any time. Unfortunately, however, the claimant took several unrequested and unexpected breaks during the hearing, including whilst himself giving evidence. I informed him several times, both directly and via his representative, that such behaviour was not acceptable. I also noted that his behaviour caused delays, including it prompting me to take additional breaks and requiring proceedings to be paused whilst I explained to the claimant the behaviour expected of him during the hearing.

21. Having heard all the evidence on 30 September 2021, I invited both parties to submit written submissions, which I have considered in reaching my decision.

Findings of Fact

22. In making my findings of fact, I have taken account of the witness statements, the oral evidence and the documents that I have been provided with (and taken to during the course of the hearing). Where there was a conflict of evidence, I have determined it on the balance of probabilities.

23. The respondent provides bus services in Warrington and across the north-west. It operates approximately 125 vehicles, with 240 employees, of whom approximately 190 are drivers.

24. The respondent has in place a 6-page disciplinary procedure, last updated in 2016 and agreed with management and the trade union. Included as an example of gross misconduct is a "*driving disqualification*".

25. The claimant commenced employment with the respondent on 8 March 2006, working as a PCV driver. The claimant was paid an hourly rate, which was paid to him on a weekly basis.

26. In his role, the claimant drove buses and was required to have a full valid driving licence.

27. In October 2020, the claimant was involved in a driving incident whilst under the influence of alcohol, which resulted in him being arrested by the police. This took place outside of work and the claimant was driving his personal vehicle.

28. The claimant informed the respondent, and he was initially suspended by the respondent. Before commencing its disciplinary procedure, however, the respondent allowed the claimant to return to work whilst the outcome of the criminal process was awaited. It was agreed that the claimant could continue to work, provided he conducted an alcohol test on the days when he was scheduled to drive.

29. On 4 November 2020, at a court hearing, the claimant was disqualified from driving for 18 months.

30. After the court hearing, a conversation took place between the claimant and his supervisor, Mr Chisnall. The respondent says this conversation took place on 6 November 2020. In his witness statement, the claimant stated "*I cannot exactly remember when I went to see my employer about my disqualification. It was either the day of the [court] hearing or the following day the 5th November 2020*". During cross-examination, the claimant's evidence was that he was now certain that it was 5 November 2020. I do not consider it necessary to make a finding as to when, specifically, this conversation took place, since it is not in dispute that the claimant's employment terminated on 6 November 2020 (whether by reason of dismissal or resignation).

31. It is not in dispute that, during this conversation, the claimant informed Mr Chisnall of his conviction and of the fact that he had been disqualified from driving. It is also not in dispute that Mr Chisnall did not inform the claimant during this conversation that he was being dismissed or that the respondent was terminating his employment.

32. However, the contents of this conversation are otherwise in dispute and the claimant's version of events differs significantly to the respondent's version. I have therefore had to determine, on the balance of probabilities and in the

absence of a written record of this conversation, what is more likely than not to have been discussed.

33. In doing so, I am mindful of the fact that Mr Chisnall was not in attendance at this hearing and as noted, have accorded the contents of his witness statement limited weight as a result. Ms Janusz submits that the respondent's whole defence is based on Mr Chisnall's account of the conversation with the claimant and that, in his absence, his evidence should be rejected. I disagree. Mr Chisnall's account forms a key part of the respondent's defence but is not the only basis upon which I can make relevant findings of fact. Account is to be taken of all the relevant circumstances and the respondent's defence relies not only on Mr Chisnall's account, but also on the context in which his conversation with the claimant took place and the conduct of the claimant thereafter.

34. In assessing the evidence, I have also considered the reliability of the claimant's evidence. Ms Janusz submits that the claimant's evidence should be accepted by this tribunal. Mr Lomax submits that the claimant failed to directly answer questions and corrected statements made in his witness statement during cross-examination, making him a generally unreliable witness. In this regard, I found the claimant to be selective in terms of which questions he was prepared to answer directly. During cross-examination, his evidence also did not always correlate with his witness statement. I have therefore considered his evidence with some caution.

35. In terms of the conversation between the claimant and Mr Chisnall, the respondent's position is that, having informed Mr Chisnall about his conviction, the claimant asked what would happen next. It says Mr Chisnall then informed the claimant that the respondent would invoke a disciplinary procedure, given that the driving disqualification was a potential act of gross misconduct and that a possible outcome was the claimant's dismissal.

36. The claimant (in his witness statement) says that Mr Chisnall made no reference to a disciplinary procedure being invoked, contradicted in Ms Janusz's submissions in which she states that Mr Chisnall informed the claimant that losing his driving licence constituted gross misconduct.

37. On balance, I think that it is more likely than not that an employee, who knew that a conviction for conduct outside of work would have an impact on their ability to do their job (as was the claimant's evidence), would ask about what was going to happen next. I also find that a more likely than not response would be to refer to a disciplinary process. I therefore find that Mr Chisnall informed the claimant that a disciplinary process would be the next step, which is a finding further supported by the uncontested fact that the respondent had already put on hold the commencement of a disciplinary process with the claimant, pending conclusion of the criminal case. Having

made this finding, I also find it more probable than not that Mr Chisnall informed the claimant that a possible outcome was his dismissal.

38. The respondent's position is that the claimant then informed it that he did not want to go through a disciplinary process and have a dismissal on his record. The claimant disputes this. Considering all the surrounding circumstances, including the context of the conversation and the claimant's actions following the conversation (which I address below), I find it more probable than not that this was the claimant's response.

39. On the balance of probabilities, it follows that, in circumstances where he knew that he could not longer work as a bus driver and did not want to go through a disciplinary process, the claimant informed Mr Chisnall of his wish to resign.

40. There was then a discussion about alternative roles, which is not in dispute. The respondent's position is that Mr Chisnall informed the claimant that there were no other vacant roles and that a cleaner role had recently been filled. The claimant says in his witness statement that he was informed that there was "a possibility" of him being employed in an alternative position, which would not involve driving. In cross-examination, the claimant stated that he was told that there was "a big chance" of being employed in an alternative position. In her written submissions, Ms Janusz seeks to suggest that the claimant was assured that the respondent would "definitely" consider another job. In this regard, I believe that it was more probable than not that Mr Chisnall referred to alternative work and from what he said, the claimant believed that all was not lost. As per his evidence under cross-examination, Mr Chisnall had given him "hope".

41. However, whilst the claimant may have had some hope that he could work for the respondent in another role, it is my finding that he did not leave that conversation with the understanding that he would remain in employment whilst the respondent looked for alternative roles for him and that there would be no disciplinary process as a result. No disciplinary process was followed because the claimant had resigned.

42. During this hearing, the claimant provided additional detail about this conversation, not included in his witness statement. In particular, his evidence was that he asked Mr Chisnall about his uniform and that Mr Chisnall informed him that he should keep this "*as a souvenir*". This further supports the finding that the claimant resigned and on balance, I do not believe that the claimant would have asked what to do with his uniform if he considered himself to still be employed by the respondent.

43. The actions that followed further contribute to my finding that he resigned.

44. It is not in dispute that, following this conversation, the claimant handed in his company property to the respondent and there is an email from the

respondent's receptionist sent at 11:52 on 6 November 2020 stating that the claimant "*has handed in his uniform, cards, staff pass, red bag and emergency tickets*".

45. The respondent says that this was immediately after the conversation between the claimant and Mr Chisnall. The claimant says that this was at some point between 4 and 16 November 2020 and that the receptionist requested him to return his driver's uniform. He says that he did so because he knew that he could not work as a driver anymore, so did not see any reason to keep it.

46. This would explain him returning his uniform. However, if the claimant was of the belief that he was still employed and that the respondent was going to look for alternative roles for him, I do not believe that he would have handed in his cards, staff pass and other company items. He would only have handed in his driver's uniform. On balance, therefore, I find that he handed in his company property following his conversation with Mr Chisnall knowing that his employment had ended.

47. It is not in dispute that the claimant's resignation was not confirmed in writing, either by the claimant or the respondent. This is surprising and unfortunate, particularly on the part of the respondent, but is not a fact that leads me to an alternative conclusion regarding the conversation between the claimant and Mr Chisnall. I note (as highlighted in Ms Janusz's submissions) that there were limited documentary records in respect of the claimant's employment and so the absence of a written confirmation of resignation was not inconsistent with the respondent's usual practices.

48. It is also not in dispute that the claimant did not undertake any further work for the respondent. Nor did he receive any further pay, other than for work already undertaken.

49. The claimant's evidence is that he had a further conversation with Mr Chisnall and was assured that the respondent would consider other jobs for him. In the absence of evidence to the contrary from Mr Chisnall, I find that the claimant did speak to him on at least one further occasion about alternative roles. However, the fact that the claimant made such enquiries is not inconsistent with my finding that he resigned from his employment, being hopeful that he might still be able to work for the respondent in another role.

50. The claimant's P45, dated 16 November 2020, recorded his leaving date of 6 November 2020. This was received by the claimant on or around 17 November 2020.

51. On receipt of his P45, the claimant's evidence is that he went to the respondent's premises and was told by Mr Chisnall that the P45 had been issued to end the claimant's employment. I find that he did so, and this would

be consistent with Mr Chisnall having accepted the claimant's resignation during the conversation on or around 6 November 2020.

52. The claimant did not challenge Mr Chisnall in response or raise anything in writing with the respondent thereafter.

53. As per his evidence, he took steps to find other work and on 26 January 2021, the claimant initiated the ACAS early conciliation process.

The Law

Unfair Dismissal

54. Section 94 Employment Rights Act 1996 (**ERA**) affords an employee the right not to be unfairly dismissed by his employer.

55. A dismissal is defined by section 95 ERA:

> **(1) For the purposes of this Part an employee is dismissed by his employer (and, subject to subsection (2)…only if)-**
>
> **(a) the contract under which he is employed is terminated by the employer (whether with or without notice),**
>
> **(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or**
>
> **(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.**
>
> **(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if-**
>
> **(a) the employer gives notice to the employee to terminate his contract of employment, and**
>
> **(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;**
>
> **and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.**

56. The burden is on the claimant to show that there was a dismissal. In other words, it is the claimant who has ultimate responsibility of proving that he was dismissed by the respondent in issuing him with his P45, as opposed to him having resigned from his employment. If no evidence is adduced on either side regarding a disputed point, the party with the burden of proof will fail. If the evidence is so finely balanced that the tribunal cannot decide which side to favour, the party with the burden of proof will fail.

57. Actual dismissals occur where the employer terminates the contract. If the words used are clear it will be an express dismissal. Where the employer's words or actions are ambiguous, the tribunal must take into account the

surrounding circumstances and must ask itself how a reasonable employer or employee would have understood those words in the circumstances.

58. Ambiguous conduct by an employer might also be construed as a dismissal if known to an employee.

59. An employee's receipt of their P45 can amount to termination of the employment relationship (Kelly v Riveroak Associates Ltd EAT 029/05).

60. There will be no dismissal if the employee has resigned from their employment. A resignation need not be expressed in a formal way and may be inferred from the employee's conduct and the surrounding circumstances (Johnson v Monty Smith Garages Ltd EAT 657/79).

61. If an employee is found to have been dismissed, the reason for dismissal and its fairness have to be addressed.

62. Section 98 ERA reads as follows:

> **(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 sub-section (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 sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (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.**

63. Conduct dismissals can be determined by reference to the test which originated in British Home Stores v Burchell [1980] ICR 303, a decision of the Employment Appeal Tribunal which was subsequently approved in several decisions of the Court of Appeal.

64. The "Burchell test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

65. Since Burchell was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

66. If the three parts of the Burchell test are met, the tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

67. It is important that in carrying out this exercise the tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23). The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

Wrongful dismissal

68. Employment tribunals are given power to deal with breach of contract claims by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1984.

69. An employee who has not been given the notice of termination to which they are entitled, or who has been given no notice, may therefore pursue a breach of contract claim for this failure (often referred to as wrongful dismissal).

70. An employee will not be entitled to notice if they have fundamentally breached the contract of employment.

Decision

Unfair dismissal

71. This first (and key) issue for me to determine is whether or not the claimant was dismissed by the respondent. Who really ended the contract of employment?

72. And as per my findings of fact, it is my conclusion that the claimant brought the contract to an end, through his resignation. His employment terminated for this reason on 6 November 2020.

73. On the basis that the claimant was not, therefore, dismissed by the respondent it is my decision that his unfair dismissal claim fails.

Wrongful dismissal

74. Taking into account my findings of fact, I conclude that no amount was properly payable to the claimant on termination of employment in respect of notice pay.

75. His claim is respect of notice pay fails.

Employment Judge Peck
22 October 2021

JUDGMENT SENT TO THE PARTIES ON
15 November 2021

FOR THE TRIBUNAL OFFICE

Notes

1. Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

2. Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.