EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
v	
Mr M Mitev	**Driveline Ltd**

Heard at: **Ashford Employment Tribunal**

On: **16 November 2021**

Before: **EJ Webster**

Appearances
For the Claimant: **In person**
For the Respondent: **Mr Tunley (Counsel)**

JUDGMENT

1. The Claimant's claim for unfair dismissal is not upheld.

2. The Claimant's claim for wrongful dismissal is not upheld.

REASONS

The hearing

3. The hearing was in person. I was provided with witness statements for the claimant, Mr Speed and Mr Fraser and a digital bundle numbering 110 pages although there were in fact 134 pages included with various pages inserted with 'a' b' etc.

4. At the outset of the hearing we agreed the issues that needed to be decided by the tribunal and they are set out below.

5. All witnesses were available to give evidence. As he was a litigant in person I assisted the claimant with asking questions where they were not clear and I

also suggested that he needed to put more of his case to the witnesses by way of questions which he then did.

6. I delivered my oral judgment at the conclusion of the hearing. Mr Mitev wrote to the Tribunal requesting written reasons on 29 November 2021 which were forwarded to me on 1 December 2021. I apologise for the short delay in getting these finalised but this was caused by unforeseen constraints on my time due to the Covid pandemic.

The Issues

7. **Unfair dismissal**

6.1 Was the claimant dismissed?

6.2 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

6.3 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

i. there were reasonable grounds for that belief;
ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
iii. the respondent otherwise acted in a procedurally fair manner;
iv. dismissal was within the range of reasonable responses.

8. **Wrongful Dismissal**

7.1 Did the claimant commit the act of gross misconduct relied upon?

7.2 If no, what losses has the claimant suffered as a result?

Facts

9. By an ET1 dated 25 May 2020 the claimant brought claims of unfair dismissal and wrongful dismissal. The ACAS EC period was 27 April to 22 May 2020. In an ET3 dated 26 August 2021 the respondent refuted both claims stating that the claimant had been fairly dismissed by reason of gross misconduct.

10. The claimant was employed as a Technician working on and repairing cars for the respondent which is a car dealership. He was employed between 18 April 2017 and 31 January 2020.

Request for a payrise

11. On 20 January the claimant emailed his line manager, Mr Fraser, at the respondent requesting a pay rise as he considered he was underpaid by reference to others employed by different car dealerships in similar roles in the

area. Although the pay rise was not enacted because of subsequent events, the respondent agreed to the pay rise because they viewed the claimant as a valuable member of the team and, as I heard in evidence from Mr Speed, because it was difficult for them to recruit people with similar skills in the area. That was agreed as evidenced in the bundle by an email dated 23 January 2020 from Mr Fraser to other managers confirming a pay rise.

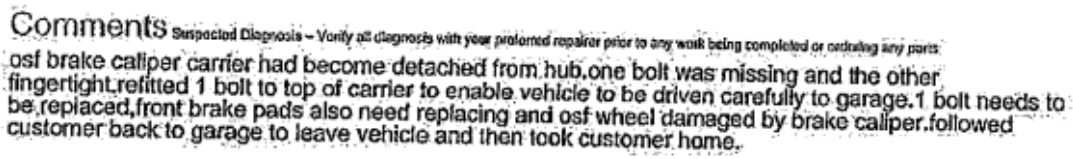
The car repair

12. Shortly after this (24 January 2020), the claimant was tasked with repairing a car that required an entirely new engine. Several individuals worked on the car and he was the last to do so. His work included dismantling the engine and fitting a new one. It was accepted that this included work on the brake calipers.

13. The claimant accepted in evidence that there was no pressure on him to finish the job in any particular time frame, and that this was a routine job for him that he had had adequate training and experience to perform.

14. The claimant took the car on a test drive once he had completed the work. The test drive was not long and did not travel far (less than one mile) and the claimant accepted that it was shorter than normal in all respects due to the traffic conditions that afternoon. The car was then returned to the owners.

15. Later that evening the family whose car it was experienced difficulties because the car stopped working. The RAC were called and found that the brake calipers were loose as was another bolt. They concluded that these issues had caused significant damage to the car. This was recorded in the RAC's report.


Comments Suspected Diagnosis – Verify all diagnosis with your preferred repairer prior to any work being completed or ordering any parts
osf brake caliper carrier had become detached from hub,one bolt was missing and the other fingertight,refitted 1 bolt to top of carrier to enable vehicle to be driven carefully to garage.1 bolt needs to be replaced,front brake pads also need replacing and osf wheel damaged by brake caliper.followed customer back to garage to leave vehicle and then took customer home.

16. In evidence to the Tribunal, the claimant stated that he accepted that such faults, if they existed, could be dangerous. The complaint letter from the customer stated that he was told by the RAC that had the car been driving faster, the car could have flipped over. I have no reason to doubt that information and it was not challenged by the claimant. The claimant however refuted that the car had any faults at all.

17. The claimant asserted for the first time in these proceedings, that the RAC report was a forgery. This had not been mentioned in his disciplinary process, his appeal against dismissal, his claim form or his witness statement. He based this assertion on the fact that the customer's signature on the report did not match the signature on the letter he had written or another example of the customer's signature that was in the bundle. The claimant also stated that it must have been a forgery because there was no other possible explanation for

the allegations against him as he had done the work correctly on the car. The claimant's claim was that if the work had been done as badly as suggested by the RAC report, it would have been obvious to him when he test drove the car before he gave it back to the customer. It was the claimant's case that the fact that it had not become obvious to the claimant during the test drive meant that the faults relied upon by the RAC and then the respondent, were deliberately falsified.

18. The claimant's theory, if true, would have required the RAC, the respondent and the customer to all work together in order to frame the claimant. I was provided with no evidence to suggest that this was the case and I find it implausible that such a conspiracy existed. I find it implausible for a number of reasons.

19. Firstly such a theory requires three separate entities or people to work together to frame someone when there is no evidence to suggest that they knew each other previously or would engage in such an elaborate plan.

20. Secondly, there would be no reason for them to do so; the respondent was about to give a pay rise to the claimant because he was such a valuable member of staff.

21. Thirdly, the basis for the claimant believing the RAC report was a forgery was ostensibly the difference between the customer's signatures. I accept Mr Speed's evidence that the reason for the difference in signatures was that the customer had signed the RAC's digital hand held device which they use on the roadside. This explains why the signatures look different.

22. Finally, I do not consider that the claimant can rely on him not noticing the faults in the work during the test drive as being evidence that the faults did not exist. I set out the reasons for that in full below as it is simpler to address it during the analysis of the disciplinary process.

<u>The Disciplinary Process</u>

23. The customer's car was brought back to the respondent by the RAC and the customer was driven home. He then contacted the respondent to report the problems and complain. As a result of the complaint, the claimant was invited, by a letter dated 27 January 2020 to a disciplinary investigation meeting on 29 January 2020. He was not given the right to be accompanied at that meeting.

24. At that meeting (29 January 2020**)** the claimant was given the opportunity to explain what he thought had happened to the car. He was shown the RAC report and the Job card that the respondent was basing its concerns on. In addition, prior to this the respondent asked a different mechanic to confirm whether what the RAC report described was accurate and they said that it was.

25. The claimant stated in that meeting that he had done the work to the required standard and had taken it for a test drive. He accepted during the investigation, and before me in evidence, that the test drive was shorter than normal for this

type of job because there was dreadful traffic that prevented him going up and down the dual carriageway. Before the tribunal today he said that this shorter test drive was nonetheless sufficient because he was in the car for about 20 minutes which brought it up to the correct temperature and ensured he could change gears; though he only travelled approximately one mile. I accept the respondent's assertion that this test drive was well below what was normally expected given that the claimant also recognized it was not what he would normally do.

26. On the day after the investigation meeting the claimant carried out an experiment with a car of the same model. He did this without the respondent's permission or knowledge. He says that he loosened the calipers or bolts in the same way that it was alleged that the bolts had been left in the other car and took it for a drive in the car park. He says that the knocking started immediately thus proving that the fault in the other car either didn't exist as he now says, or that it would have been apparent in his test drive had it been left in this way and therefore that something else was the reason for the report.

27. As a result of the investigation by the respondent (interviewing claimant, considering job card, RAC report and other mechanic's confirmation of the report), Mr Fraser recommended that the matter progress to a disciplinary process.

28. The claimant was sent a letter dated 29 January inviting him to a meeting on 31 January. That letter informed him that he was being accused of gross misconduct and set out what the incident was and confirmed that if the allegation was upheld, he was at risk of dismissal. It was accepted by the respondent that this letter failed to inform him of his right to be accompanied at the meeting.

29. It was accepted by the claimant that he was told by Mr Speed at the outset of the meeting on 31 January 2020 that he had the right to be accompanied and offered to postpone the meeting if required. The claimant said that he did not need the meeting to be postponed.

30. On questioning by the tribunal the claimant confirmed that had he known beforehand that he could be accompanied, he would have brought a colleague with him once he understood the possible benefits of bringing someone with him. He did not elaborate on what those benefits would be. The respondent submitted that the claimant would not have asked anyone to accompany him because he did not expect to be dismissed and had not taken the process seriously.

31. It is impossible to tell whether the claimant would have chosen to be accompanied had he been aware of the right to be accompanied. However I do accept that he did not think he was going to be dismissed as he said as much in cross examination. I find that he had not expected this process to proceed in the way that it did and did not take it very seriously at the time.

32. At the disciplinary meeting, the claimant was given the opportunity to present his case. Mr Speed accepts that he did not consider the claimant's argument that the fault could not have occurred in the way described because he had proven it would not with his experiment on a different customer's car. Mr Speed said that he did not consider that evidence because he felt that the claimant's behaviour in experimenting on another customer's car and putting his own safety and potentially the safety of his colleagues at risk was not something he ought to take into account because it would condone what he thought were further acts of misconduct. He said, had he taken the claimant's actions in this regard into account it would have meant he was more certain about the severity of the claimant's misconduct not less.

33. At no point during the disciplinary meeting did the claimant suggest that the situation had been manufactured or that the customer, the RAC or the respondent was lying about the fault itself. He did not raise any concerns about the signatures on the documents. His theory that the whole situation was a conspiracy against him because he had asked for a pay rise was not raised during the disciplinary process.

34. At the meeting, Mr Speed took the decision to dismiss the claimant for gross misconduct as he felt that the claimant had performed substandard work that had put a customer at risk. Mr Speed stated in evidence that he did consider a lesser sanction as he really did not want to dismiss the claimant because of the difficulty of finding replacement staff. However he felt that the situation warranted dismissal because the claimant did not seem to be taking the situation as seriously as he ought to have given the possibility of harm to the customer. The claimant did not apologise for the situation and refused to accept any responsibility. This was not disputed by the claimant who has maintained the same arguments before this tribunal; namely that he had not done anything wrong.

35. I do not accept that the claimant was in such shock that he was not able to properly engage with the disciplinary meeting as it unfolded. He had clearly thought through his defence namely that it could not have been him because a similar car in similar circumstances had showed different 'symptoms' and he had carefully constructed this as his defence. He answered all questions put to him and understood all the reasons as to why he was there and what had happened.

36. The claimant was told that he was being dismissed at the end of the meeting and this was confirmed in writing by letter dated 31 January 2020 (pg 65). That letter informed him of his right to appeal the dismissal and gave him 7 days from receipt of the letter to appeal. In the event, the claimant appealed after 3 months by letter dated 24 April 2020. That appeal set out that he disagreed with the decision and that there was a problem with the evidence. The respondent refused to consider the appeal as it was out of time.

37. The claimant explained the delay as being caused by the shock of being dismissed, the need to look for alternative work and then subsequently working in the new job.

38. I do not accept that the claimant was in such shock that he could not appeal given that he was able to find alternative work relatively quickly. Certainly, it was reasonable to expect the claimant to appeal within a shorter time frame than 3 months. He provided the respondent with no explanation for the delay in his appeal. He did not raise anything new in his appeal letter. He clearly received advice that he ought to appeal – which was good advice – but nevertheless the appeal letter was very late and gave no explanation for being sent so late.

The Law

Unfair Dismissal

39. Section 98 of the Employment Rights Act 1996 (ERA) provides 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 subsection (20 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
    (2) A reason falls within this subsection if it –
        (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
        (b) Relates to the conduct of the employee,
        (c) Is that the employee was redundant, or
        (d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
    (3) In subsection (2)(a)
        (a) 'capability' in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental qualify and
        (b) 'qualifications in relation to an employee means any degree, diploma or other academic technical or professional qualification relevant to the position which he held.
    (4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss 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 reasonable 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.

40. The respondent's case was that this was dismissal for conduct. That is a potentially fair reason under s 98(2)(b) Employment Rights Act 1996 ('ERA'). In the event that the respondent is correct in that context a determination of the fairness of the dismissal under s98(4) ERA is required. This involves an analysis of whether the respondent's decision makers had a reasonable and honest belief in the misconduct alleged. Further a tribunal must determine whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band of reasonable responses also applies to the belief grounds and investigation referred to.

41. The test as to whether the employer acted reasonably in section 98(4)ERA 1996 is an objective one. I have to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*). I have reminded myself of the fact that I must not substitute our view for that of the employer (Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82);

42. I have also reminded myself that this test and the requirement that I not substitute my own view applies to the investigation into any misconduct as well as the decision. (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*. This means that I must decide not whether I would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. I know that I must assess the reasonableness of the employer not the potential injustice to the claimant Chubb Fire Security Ltd v Harper [1983] IRLR 311). and only consider facts known to the employer at the time of the investigation and then the decision to dismiss (W Devis and Sons Ltd v Atkins [1977] IRLR 31.)

43. I was referred to two cases by respondent's counsel – Adesokan v Sainsburys and Taylor v Alidair. Adesokan had a helpful discussion of when gross misconduct could amount to gross misconduct and Mr Tunley rightly drew my attention to paragraph 26 which at the end stresses that where there was no intentional decision to act contrary to or undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal. It was not in dispute in the current case that the claimant had not acted wilfully but had acted negligently. The case of Taylor v Alidair discusses when a matter should be considered a matter of conduct as opposed to capability. Mr Tunley drew parallels between the case of a pilot badly landing a plane and the claimant's failure to put the car back together safely in this case.

Conclusions

44. The genuine reason for dismissal was the claimant's conduct. I find that the respondent had a genuine belief that the claimant was responsible for poor quality work, including the lack of a test drive, on the vehicle. They believed the customer and the RAC that this could have led to serious injury or worse. The claimant had been the last person to work on the vehicle and test drive it. I do not consider that this incident amounted to a capability issue. The claimant was well trained and it was not in dispute that he was generally good at his job and this particular type of work. Therefore whilst it can sometimes be difficult to assess whether something is a capability or disciplinary matter, it was reasonable in all the circumstances for the respondent to treat this as a disciplinary matter.

45. I do not accept the claimant's argument that the whole situation was put together by the respondent, colluding with the RAC and a customer, to frame the claimant so as to avoid giving him a pay rise or amend his notice period. This is simply not plausible and is defeated by the emails which show that Mr Fraser asked for and obtained a pay rise for the claimant before the incident occurred. I accept Mr Speed's evidence that people with the claimant's skills were difficult to recruit so I find it implausible that they were trying to get rid of him. Secondly, the idea that the RAC and a customer would work with the respondent to establish a situation such as this in order to justify the claimant's dismissal is implausible. The claimant has never raised this before either in the disciplinary process or his ET1 or his witness statement. He says that he thought it sensible to keep it back until the tribunal hearing but it is not clear to what end. Even if he had made the allegation earlier however he has produced no evidence whatsoever to support such an elaborate conspiracy.

46. I must then consider whether the decision to dismiss the claimant fell within the range of reasonable responses for an employer in all the circumstances. Those circumstances ought not be a prescriptive list however they include:
    i. there were reasonable grounds for that belief;
    ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
    iii. the respondent otherwise acted in a procedurally fair manner;
    iv. dismissal was within the range of reasonable responses.

47. I conclude that they did have reasonable grounds for the belief that the claimant had caused the failures in the car because:
    (i) he was the last person who had worked on the car,
    (ii) he had not taken it for a normal length test drive,
    (iii) the car had only travelled 14 miles before it was brought back in by the RAC/customer
    (iv) the RAC report set out the repair problems
    (v) the respondent's own mechanic stated that the RAC report was correct.

48. I find that they did undertake a reasonable investigation. The claimant suggests that they ought to have more carefully considered the experiment he did with a similar car as it would have exonerated him. I do not accept that. There is no evidence that shows that bolts put on (or not put on) or calipers etc. would have loosened or shown exactly the same symptoms or errors in every situation. It is

not known how loosely the calipers or bolts were fixed back in the customer's car and whether the claimant had exactly replicated that – replicating that situation was not a reasonable option for the respondent because of the risk of damage to another customer's car and putting a member of their staff at risk. Instead they used the evidence they had of the situation that had actually occurred and asked for the claimant's explanation for that situation. I consider that this was reasonable in all the circumstances. The claimant did not raise concerns regarding any other part of the investigation. On considering it in the round though I consider that their investigation was reasonable in all the circumstances.

49. I have also considered whether the process followed by the respondent was reasonable and in accordance with the ACAS Code. I do not find that the failure to allow the claimant to be accompanied at the investigation meeting was in breach of the code or the respondent's own policies and procedures.

50. However the respondent did fail to inform the claimant of his statutory right to be accompanied at the investigation meeting prior to the meeting. The respondent accepts that this was a failure and is contrary to the ACAS code. The respondent submitted that any such failure was wholly mitigated by the fact that Mr Speed told him that he did have the right to be accompanied at the outset of the meeting and offered to adjourn the meeting as a result.

51. I have very carefully considered this situation particularly in light of the claimant's assertion that he would have brought a colleague with him had he known that he could. The ACAS Code is silent on when the employee ought to be informed of their right to be accompanied. Clearly it is reasonable and best practice to inform someone in good time to arrange such representation in advance of the meeting. However, I find that the unfairness to the claimant was rectified when Mr Speed offered to adjourn the meeting to allow the claimant to bring someone with him. I accept Mr Speed's evidence that he realised the mistake on reviewing the documents and his aim was to ensure that the claimant had the opportunity to exercise his right to be accompanied and that he was genuine in his offer to adjourn the meeting. I do not accept the claimant's evidence that he was in such shock that he did not know what to do. The minutes of the meeting (which he did not dispute) demonstrate that he engaged perfectly well with Mr Speed. I consider that he decided to proceed unaccompanied because he considered that he had proven himself not guilty by way of the experiment the day before and he wanted to get the meeting over with. Had he wanted to take someone with him he could have done so and I accept Mr Speed's evidence that this would have been allowed. Therefore any unfairness caused by the failure to advise the claimant in advance was remedied by Mr Speed's offer to the claimant to adjourn the meeting to arrange representation. The claimant willingly chose not to accept that offer.

52. I find that the claimant was given the right to appeal and failed to do so within a reasonable time frame. He has given no adequate explanation for the length of the delay to his appeal. Had it been a shorter period or there was a more concrete explanation as to why he failed to engage with the respondent at all

during that 3 month period then I may have considered the respondent's refusal to hear the appeal unreasonable. But in these circumstances it was not.

53. Finally I must consider whether the dismissal was within the range of reasonable responses. I must not substitute my opinion for that of the respondent. In the round, I find that Mr Speed's decision does fall within the range of reasonable responses for an employer in all the circumstances. He did consider a lesser sanction but he took into account the claimant's refusal to accept any responsibility for the situation or to attach any apparent seriousness to the potential repercussions that his actions had caused. Therefore although the claimant had a clean record and was a good employee, the decision to dismiss where the potential safety repercussions of his actions had been so serious, was within the range of reasonable responses.

54. That decision was based on a reasonable investigation following a largely, procedurally fair process. There was one matter of procedural unfairness with the failure to inform the claimant beforehand that he had the right to be accompanied at the meeting in the invitation letter. However, when considering the fact that such failure was mitigated by the fact that the respondent offered to adjourn the meeting to allow the claimant to be accompanied, and when considering the entire dismissal procedure and decision making process in the round, I conclude that the decision overall was procedurally and substantively fair and fell within the range of reasonable responses.

55. I do not uphold the claimant's claim for unfair dismissal.

Wrongful Dismissal

56. With regard to the wrongful dismissal claim, I must decide, on balance of probabilities, whether the claimant actually did commit the act of gross misconduct as alleged by the respondent. I find that he did.

57. He failed to properly tighten the brake calliper and the bolts and he failed to complete a reasonable test drive that properly checked his work. I reach this conclusion because the car suffered difficulties so soon after he had worked on it and the RAC report, an independent document confirms that the faults existed. The claimant has provided no plausible explanation for how the faults could have occurred on the car if it was not because of his work. I do not accept the claimant's explanation that this was all a conspiracy. The RAC report is independent and clearly identifies this as the problem that caused damage and I accept that it was lucky that the car and its passengers were not more seriously hurt. The fact that on a different car and a different test drive a knocking sound occurred, does not persuade me that the whole situation is fabricated and that it was not the claimant's work that resulted in the situation. The test drive that the claimant performed on the faulty car was short and slow and by the claimant's own admissions shorter than normal thus indicating that he did not properly check his work on that occasion.

58. For all those reasons therefore I conclude that the claimant's work was faulty and that the potentially serious repercussions of such faulty work meant that it

could amount to gross misconduct as set out in the respondent's handbook. The respondent did not breach the claimant's contract in dismissing him without notice and the claimant's claim for wrongful dismissal is not upheld.

Employment Judge Webster

Date: 11 January 2022