5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4109213/2021 and 4109081/2021

Held on 23, 24, 25 November 2021
10 **and 19 and 20 January 2022**
(By CVP)

Employment Judge: B Campbell

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Mr G Brown	**First Claimant** **Represented by:** **Ms Flanigan –** **Solicitor**
Mr E Lipp	**Second Claimant** **Represented by:** **Ms Flanigan –** **Solicitor**
XPO Supply Chain UK Limited	**Respondent** **Represented by:** **Ms Ferber –** **Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

35 1. the claimants were not dismissed by reason of taking part, or proposing to take part, in the activities of an independent trade union at an appropriate time;

2. the claimants were fairly dismissed from their employment with the respondent by reason of their conduct; and

3. their claims are therefore dismissed.

REASONS

5 **INTRODUCTION**

1. This claim is by two individuals who were dismissed by the respondent as part of the same process. The respondent is a transport logistics business with bases throughout the UK and Ireland, including in North Lanarkshire. The claimants are both heavy goods vehicle delivery drivers. Each was dismissed 10 following a disciplinary process.

2. The respondent maintains that it dismissed each claimant fairly based on relevant conduct grounds. The claimants assert that they were automatically unfairly dismissed because of their status or involvement in relation to a trade union or its activities. Alternatively they argue that their dismissal was 15 unjustified on conduct grounds and based on inadequate or unfair procedures.

3. The hearing took place over five days and the Tribunal heard evidence from the following on behalf of the respondent: Mr John Cusick, Contract Manager; Mr Daniel Attwell, Auditor; and Mr Chris Seagriff, Transport Manger. It also 20 heard evidence from each of the claimants as well as Mr David Kirk on their behalf, who was a former driver and trainer with the respondent.

4. The parties had provided a main joint bundle of documents and a supplementary bundle. The claimant provided a separate bundle of documents in relation to remedy. Pages from those are referred to below 25 using their page numbers in square brackets where relevant. The parties' representatives also helpfully provided written submissions to close their cases.

5. In general each of the witnesses, including the claimants, was found to be generally reliable and credible in their evidence. Naturally there were some

disputes over certain events or views held, and where relevant to the issues those are dealt with below.

LEGAL ISSUES

6. The following legal issues had to be decided in relation to each of the claimants:-

    1. Was the claimant taking part or proposing to take part in 'activities of an independent trade union at an appropriate time' within the meaning of s.152(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C)A')?

    2. If so, was either that fact, or the fact of the claimant's membership of an independent trade union, the reason for the claimant's dismissal, such that they were automatically unfairly dismissed?

    3. If not, was the dismissal of the claimant for a potentially fair reason within the meaning of s.98(1) or (2) of the Employment Rights Act 1996 ('ERA')?

    4. If so, did the respondent meet the requirements of section 98(4) ERA in relation to the claimant's dismissal, so that the dismissal was fair overall?

    5. If not in relation to 3 or 4, and the dismissal was therefore unfair, or if the dismissal was unfair according to 2, 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 analysis.

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'.

9. Courtesy of section 152(1)(b) of TULR(C)A an employee will have been automatically unfairly dismissed if the reason, or principal reason, for the dismissal was that they had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time. There is no further statutory clarification of what will qualify as 'activities of an independent trade union' but there is a body of case law dealing with the concept and again relevant authorities are discussed below in the section headed 'Discussion and Conclusions'. 'Appropriate time' essentially means outside of the hours the employee was required to work, or within those hours if they had been given special authorisation by their employer to carry out the activities. Under section 152(1)(a) of the same Act, an employee’s dismissal will be automatically unfair if the reason, or principal reason, for it is that they were or proposed to become a member of an independent trade union.

FINDINGS IN FACT

10. The following findings were made as relevant to the issues in the claims.

11. The respondent is a transport logistics business. It has various bases in the UK. It has a number of sites in North Lanarkshire including two at Mossend, commonly referred to as Mossend 1 and 2. The claimants were employed by the respondent at the Mossend 2 depot. Both were qualified HGV class 1 drivers who typically drove heavy goods vehicles over long distances.

12. Drivers at Mossend 2 generally do not have fixed hours or days of working. They would have their shifts communicated via a weekly rota. The normal number of shifts was five in each week. The shifts would vary in length and how they were made up in terms of work type. They would not necessarily involve driving for the whole of a shift, or the same amount of driving time in every shift. There would regularly be the option to work additional shifts for extra pay. Drivers should only work a sixth shift once every two weeks at the most, and on condition that no rules or limits are breached regarding their working time. Drivers will normally volunteer for extra shifts rather than be assigned them.

13. Mr Brown commonly drove lorries to locations in England overnight, where he would meet a colleague and exchange his fully loaded vehicle for another loaded vehicle which he would drive back to the depot. This is known as 'trunking'. He also did a smaller amount of local deliveries. He would be given his working days on a weekly rota. Those would specify a start time, which would vary, but would not be able to state accurately a finishing time. He would finish each shift when he returned to the depot, which could be influenced by a number of factors such as where he was driving to and back from, traffic and other road conditions. His scheduled shifts often included overtime shifts.

14. Mr Lipp tended to follow a delivery run to Aberdeen and back, starting in the early hours of the morning and arriving back at the depot some time in the afternoon. Again, whilst he would have a designated start time, that could vary from day to day and his working time in a given shift would largely be dictated by how long it took him to complete his deliveries and return to the depot. His shift was finished when he handed in his paperwork for the day to a supervisor. He tended to have a series of stores to which he had to deliver stock in a designated order. In some cases he would need to wait for the store opening so a member of staff could receive the delivery. For other customers, there was an arrangement known as 'drop and lock' which involved the claimant having access to the premises via a key and alarm codes or similar,

depositing the delivery and locking up behind him without a member of the customer's staff needing to be present.

15. As well as their driving duties, each claimant might be asked to undertake other duties such as shunting within the depot or cleaning.

16. Mr Brown's continuous service period began on 1 March 2001 and ended on 7 December 2020. Mr Lipp's continuous service began on 23 March 2001 and ended on 25 November 2020.

Rules and policies

17. The respondent has a Driver Handbook (the '**Handbook**') [83a-z] which all of its drivers are required to be familiar with and follow. This includes rules on how drivers should record working time and use tachographs, which are contained in section 12.

18. The Handbook states that failure to comply with any of the rules around the use of tachographs could result in a fine of up to £2,500, or up to £5,000 for failure to comply with a requirement imposed by an enforcing officer or for deliberate falsification of records. In the latter case a sentence of two years' imprisonment is possible.

19. Various rules applied to the claimants as drivers, some industry-specific and some courtesy of the Working Time Regulations 1998. Those were summarised for drivers in a table on page 83r of the Handbook.

20. A later **'Core Drivers Handbook'** was introduced by the respondent [83ag-bh]. This updated the key rules applicable to drivers.

21. The respondent operated a **disciplinary policy** which covered employees including the claimants [84-90]. Within a non-exhaustive list of offences which the respondent will treat as gross misconduct is *'Falsifying records, expenses or [to] defraud the Company in any manner.'*

Use of tachographs

22. The respondent requires its drivers to use tachographs so that their working time spent driving and in other activities can be recorded and measured. Principally this is to ensure that drivers comply with relevant laws, and also do not work excessive hours. The main legal requirements which apply to drivers are:

    a. **The Road Transport (Working Time) Regulations 2005** – those imposed a requirement on the respondent that drivers should not drive for more than nine hours per day, save that twice in each week they were permitted to work up to 10 hours per day, and that for every 4.5 hours of driving, a driver must take 45 minutes of rest, whether as a single period or split between a 30 minute and a 15 minute spell; and

    b. **The Working Time Regulations 1998** – particularly in relation to workers' entitlements to breaks during working time, daily and weekly rest periods and any limits on weekly working time totals. Each driver is entitled to a break of at least 20 minutes in every shift of at least 6 hours' duration. Through a combination of the Regulations and locally agreed arrangements, they must not work more than 60 hours in a single week, or an average of more than 48 over a rolling 26-week period.

23. Rest breaks taken in compliance of the above Regulations are paid by the respondent.

24. The Core Drivers' Handbook states that:

    'Drivers must ensure that they understand the tachograph requirements and use the equipment correctly to provide accurate records. The driver must keep a record of their working duty and must keep possession of the records whilst at work and these records must be made available for inspection by the enforcement authorities when requested.'

25. There are potentially serious consequences for an operator if it breaches the above rules, or cannot demonstrate it has complied. In extreme cases of default it can lose its operator's licence, preventing it from employing drivers to transport goods commercially altogether. Fines can also be imposed. If a driver is at fault they can be served with an infringement letter. This is tantamount to a warning. They can also be fined.

26. To ensure that drivers are aware of their rights and responsibilities, training must be undertaken and refreshed on at least an annual basis. Each driver must hold a Certificate of Professional Competence as part of their licence to drive vehicles, and completion of the training is a requirement for that. This applied to both claimants.

27. Every vehicle operated by the respondent will have a tachograph device fitted in the driving compartment. Each driver has their own smart card which they can insert into the tachograph machine when they are operating that vehicle. In this way the tachograph will electronically monitor the work of the driver. At the end of each shift, or at the beginning of the next shift, the driver would go to the office and insert their card into a different 'Tachomaster' machine which would download the information from their card and so keep a record of the driver's working time by amount and type of activity. This was the primary method the respondent used to record the amount and type of time spent by each driver for each shift.

28. The types of activity which could be recorded on a tachograph machine were:

    a. Driving;

    b. Other work;

    c. Break; and

    d. Period of availability.

29. If a driver began driving, the tachograph would default to 'driving' as soon as the vehicle moved, and then switch to 'other work' when the vehicle stopped. A driver could manually choose 'break' or 'period of availability' when the

vehicle was stationary, but not when moving. The 'period of availability' setting tended not to be used.

30. Drivers are required to use their card to record their activity whenever it involves a vehicle. If they perform other duties such as clearing or tidying which does not involve a vehicle, they would have to account for that time manually.

31. By way of the above system the respondent records the amount and type of work carried out by its drivers, and can show that it has complied with the relevant rules and Regulations.

Wage negotiations

32. The respondent recognises the Unite trade union in respect of its drivers at Mossend 2. Both the claimants were members at the time of their dismissal.

33. In the latter part of 2020 negotiations were taking place between Unite and the respondent over pay and conditions. A meeting took place on 24 September 2020 as part of that process. A minute of the discussion was produced [107-110]. Mr Brown was present in his capacity as a Unite shop steward. The respondent was offering a pay increase which the union considered insufficient.

34. A further meeting took place on 22 October 2020 as part of the negotiations [111-114]. Mr Brown again attended. There was still a failure to agree on a pay increase.

35. There was a degree of strain in the relationship between the union locally as represented by its shop stewards, and management at Mossend 2, principally personified by Ms Margaret Farquharson, the Operations Manager with overall responsibility for the Mossend 2 site. This related to the difficulty generally in reaching agreement on terms in relation to working hours and pay, and to a lesser extent some exchanges between both sides on the nature of the process to be adopted for balloting and other procedures for opting out

of the weekly hours and night working limits under the Working Time Regulations 1998.

36. Mr Lipp was not a shop steward of Unite at this time, although he was a member. He had been a shop steward around five years before. Mr Brown had asked him to consider putting himself forward to be one again, and he had agreed to think about it but had not decided. The site would normally have two shop stewards to cover all shift times, and the other one had stepped down in the summer of 2020. He understood that the members were happy for him to be nominated and that Mr Brown had informed Mr Craig Chirrey, the Transport and Logistics Manager at Mossend 2 that he might be appointed.

Audit

37. The respondent has an internal Compliance and Auditing Manager named Daniel Attwell. He has responsibility for ensuring that the respondent complies with all necessary regulations and requiements for holding its operators licence. His remit covers the whole of the UK and Ireland.

38. Mr Attwell conducted an audit of Mossend 2 on 28 October 2020 at the request of Ms Farquharson. She asked him to conduct the audit at the beginning of that month as there had been a change in management at Mossend 2 and she had some concerns over its operation.

39. The audit covered a number of compliance areas including vehicle inspection and a review of drivers' working time. The audit report was in a standard format and is in the supplementary hearing bundle at pages [S2-10]. He emailed the report to Ms Farquharson on 30 October 2020, with a summary of his findings which was that 29 matters required immediate action, a further 13 items needed action at some point and an additional 8 observations had been made. An overall result, equivalent to a percentage of 32.5, was stated. The email [S1] stated that *'The result of this audit indicates a severe risk to the operator licence due to various compliance issues which we have*

discussed in length this week.' Ms Farquharson forwarded the email to Mr John Cusick, Contract Manager saying *'HELP!!!!!!!'*.

40. The majority of the audit report was redacted and so the full details of each action item or observation are not known. The single unredacted entry stated that there was a concern over two drivers who were recorded as exceeding 60 hours' working on a regular basis, and that *'more concerning is that their Tacho records doesn't [sic] actually reflect the excess duty because full duty is not declared. Gordon Brown, Edward Lipp. In the case of Gordon Brown there is evidence available that he is being paid for up to 79 hours per week. RTD 2005 restricts drivers to a maximum of 60 hours per week which must average out on 48 hours at the end of the reference period.'* 'RTD' was a reference to the EU parent Directive of the Road Transport (Working Time) Regulations.

41. Under 'Corrective Action Required' the audit report said *'Please supply full explanation on why this has been allowed and the reason why the full duty periods are not being recorded on the driver's tachograph records. With immediate effect, drivers MUST be limited to a maximum of 60 hours per week and full duty periods must be declared on tachograph records.'*

42. Mr Attwell had reviewed data relating to around 30 randomly chosen drivers over the period of the previous six months. Only the claimants' work records gave him cause for concern. He did not know them personally and was not aware whether either was connected to a trade union in any way.

43. In between the report date of 28 October and the date he emailed it to Ms Farquharson, Mr Attwell met with her for a 'close out' meeting. That was the discussion he referred to in his email. This was a typical action, to allow any particular concerns to be explained and means of support and rectification suggested. Mr Chirrey was also present. At that time as well as being a Transport Manager at Mossend 2 he was a 'Nominated CPC Holder'. As such he was personally responsible for compliance at the depot. Mr Attwell's concerns in relation to the claimants was part of the discussion.

44. The data which Mr Attwell collated in relation to Mr Brown was produced [91-99, 101-106]. This was in the form of a series of reports which together showed his daily working time, driving time and time taken as breaks. Of particular relevance to him was a large number of days where Mr Brown had recorded rest breaks totalling over 2 hours within an individual shift [95-96]. There were some 58 occasions, ranging from two hours exactly up to five hours and three minutes. He had also exceeded the 48-hour weekly working time average for the 26 week period under review, by recording 49 hours, 50 minutes on average [99]

45. The relevant data for Mr Lipp was also produced [100]. It showed that in the same review period he had worked for 65 hours, 36 minutes in one of those weeks – ending on 13 September 2020. That was not including breaks taken, totalling 3 hours, 23 minutes. In doing so he had exceeded the individual weekly working limit of 60 hours. It was also suspected that owing to the amount of time recorded as breaks over the whole review period, he may have been habitually recording working time as rest periods in order to artificially keep his weekly average under 48 hours.

Disciplinary process – Mr Brown

46. Mr Brown was suspended on 29 October 2020. This was done verbally by a manager at the depot and confirmed in a letter with the same date. The decision was Mr Cusick's but he did not implement it in person as he was on a different shift pattern from Mr Brown at the time. The suspension was said to be in connection with *'an investigation into anomalies which have been identified in your driving hours which could amount to a breach of the Working Time Directive. The anomalies were identified during a recent Transport audit.'*

47. Mr Brown attended an investigatory meeting on 6 November 2020, chaired by Mr Colin Millar who was a Shift Supervisor at the depot. The claimant was accompanied by Mr Kenny Jordan from Unite. The meeting was minuted by a further attendee [117-128]. Both Mr Brown and Mr Millar signed each page

of the notes and they are taken to be a suitably accurate account of the discussion.

48. On 30 November 2020 Mr Brown was invited by letter to attend a disciplinary hearing proposed for 2 December 2020. It was to be chaired by John Cusick. He had become the Contract Manager for both Mossend sites in October or November 2020 and before that had been a Transport Manager for 14 years.

49. The letter set out the disciplinary matters to be considered as:

    a. *'Breach of working time directive in relation to your legal obligation to record and manage your working time'*; and

    b. 'Abuse of tachograph mode, thus falsifying working records for financial gain.'

50. An investigation pack of materials was enclosed along with the letter.

51. The disciplinary meeting proceeded as arranged on 2 December 2020. The claimant was again accompanied by Mr Jordan. Notes were taken and both Mr Brown and Mr Cusick signed each page [141-167]. The notes are accepted as a suitably accurate record of the meeting.

52. Mr Cusick adjourned the hearing in order to carry out further investigation in light of the claimant's responses. There were essentially three areas, namely:

    a. Whether any other member of staff was on-site and may have moved vehicles whilst the claimant was taking a break on 31 August and 2 September 2020;

    b. To seek clarity in relation to the terms of the hearing invitation letter, including obtaining more specific details of the dates on which the claimant had recorded excessive breaks and was thought to have been working, so he could better respond; and

    c. To look into the process adopted of selecting cases from the recent audit for follow up.

53. Mr Cusick reviewed some CCTV footage of the depot on some of the dates under review. He could see vehicles moving on between 15 and 20 occasions at times when the claimant had manually recorded being on a rest break. The claimant had not been inserting his card into the tachograph of the vehicles. By visual observation and cross-checking the vehicle details and their movements Mr Cusick ascertained they were assigned to the claimant at the time.

54. The disciplinary hearing was reconvened on 7 December 2020. The same individuals attended, save that the note-taker was different. Mr Brown and Mr Cusick again signed each page of the notes and they are taken to be an accurate note of the discussion [170-181].

55. The claimant's response to the allegations across the two meetings is summarised as follows:

    a. He considered the responsibility to ensure weekly working time fell below 48 hours on average to be a joint one between himself and the respondent. In saying that he recognised that he had a degree of personal responsibility;

    b. He may have recorded time when he was waiting to be given work to do as rest;

    c. Although he declined to view the CCTV footage showing vehicles assigned to him in motion at the depot, he denied it was him driving them;

    d. There was also however a suggestion by Mr Jordan that the claimant may have inaccurately recorded his time on tasks such as shunting because he was doing it 'retrospectively' – i.e. manually on the following day. If so, it was a genuine error and not for financial gain;

    e. The claimant also said that it was not feasible to put his card into the tachograph machine of some of the vehicles in the depot as it could take up to 15 minutes before the system would register him as an

operator of that vehicle. That was too long when he might be working between a number of vehicles in a shift;

f. He also said to Mr Cusick that he may have accidentally left his card in another vehicle;

5 g. Towards the end of the reconvened hearing he said that drivers were being allocated additional shifts by management, others didn't want to do them and he was trying to help out by taking them on.

56. Mr Cusick adjourned the reconvened hearing for around 90 minutes. In that time he reached the decision to dismiss the claimant on grounds of gross 10 misconduct. He felt that the claimant had broken the law by recording his working time wrongly. He believed that Mr Brown had deliberately recorded working time which did not involve driving as rest rather than other work. He believed that Mr Brown did so in order to be able to take on more shifts and be paid more without exceeding the weekly limits on working time. Mr Cusick 15 was not influenced by Mr Brown being a member of, or otherwise connected to, a trade union. He was aware that Mr Brown was a member of Unite and it was likely that he knew that Mr Brown was also both a shop steward and involved in wage negotiations going on between Unite and the respondent. This is found because he spoke to Ms Farquharson before suspending Mr 20 Brown and given that the pay negotiations were current and ongoing it is unlikely the impact of suspension would not have been discussed.

57. Mr Cusick reconvened the meeting and confirmed his decision to the claimant and the option to appeal. He followed up the meeting with a letter dated 10 December 2020, confirming that the claimant had been dismissed at the 25 conclusion of the reconvened meeting three days before [182-184]. The letter summarised the matters which had been clarified and discussed at the reconvened meeting before covering other issued which had been discussed.

58. The letter concluded by confirming that Mr Cusick considered the claimant to have been guilty of gross misconduct, and that his last day of service was 7 30 December 2020. His right of appeal was explained, which had to be exercised

within five days of receipt of the letter by notifying the HR department. A copy of the notes of the reconvened hearing was enclosed.

59. Mr Brown appealed against his dismissal by letter of 18 December 2020, although a copy was not available to be included in the bundle. His letter was acknowledged on 20 December 2020 by the Regional HR Manager who confirmed that an appeal hearing would take place on 13 January 2021, chaired by Mr Chris Seagriff, Transport General Manager. He was based at another of the respondent's sites, in Bellshill. He had been asked to chair the appeal by the Regional HR Manager.

60. Mr Seagriff's recollection in evidence of the claimant's appeal points was that they were:

    a. Any alleged breach of regulations was not an instance of gross misconduct;

    b. If he was in breach, he was not personally responsible; and

    c. The audit exercise had targeted him, possibly by virtue of being a shop steward and relations with the union not being particularly healthy at the time.

61. The claimant attended the appeal hearing as scheduled and was again accompanied by Mr Jordan. Mr Seagriff chaired the meeting and notes were taken [186-195]. The claimant and Mr Seagriff each signed every page and the notes are accepted as an accurate summary.

62. Mr Seagriff adjourned the hearing without making a decision, saying that he would try to reach one and communicate it no later than was necessary.

63. By 25 January 2021 Mr Seagriff had decided to uphold the original decision to dismiss the claimant and therefore reject his appeal. He confirmed this by letter on that date [196-198]. He was not influenced by the claimant's status as a shop steward or union member. He considered the evidence which came out of the audit about the claimant's working time was the relevant material on which to reach his decision.

64. Mr Seagriff's decision was the conclusion of the respondent's disciplinary process.

Disciplinary process - Mr Lipp

65. Mr Lipp was suspended on 29 October 2020 by a manager. His suspension was confirmed in a letter from Mr Cusick with the same date [200].

66. The suspension letter contained the same text in relation to the subject matter of the process as is reproduced above from Mr Brown's suspension letter.

67. Mr Lipp attended an investigatory meeting with Mr Millar on 6 November 2020. Mr Jordan from Unite accompanied him and a note was taken of the discussion [202-211]. Mr Lipp and Mr Millar signed each page and the notes are accepted as an accurate summary of the discussion.

68. Mr Lipp was invited by letter to attend a disciplinary hearing on 19 November 2020, to be chaired by Mr Cusick [212-213]. As Mr Jordan was unavailable to attend on that date it was changed to 23 November 2020 via a second letter.

69. In both invitation letters the matter for review was described as *'Abuse of tachomaster thus falsifying records for financial gain'*. A set of investigatory materials was enclosed.

70. Mr Lipp attended the disciplinary hearing on 23 November 2020 along with Mr Jordan. Mr Cusick chaired the meeting and another colleague took notes which were reproduced and are taken to be accurate, having been signed by the claimant and Mr Cusick [216-233].

71. Mr Lipp's position was as follows:

    a. He had done nothing wrong. There was no proof of him recording excessive breaks; and

    b. He also said that he had been put under pressure to take on additional work.

72. Later in the meeting Mr Lipp did admit to treating delays and waiting time as rest, to keep himself within legal limits. He specifically said to Mr Cusick *'I use RP [rest period] to bring down hours.'* When told in reply *'But this is illegal'* by Mr Cusick, he said he did not know that. He then went on to say *'[I] admit that I use RP to manage time but was never done to defraud.'*. He suggested he was asked or expected to do it by managers. Mr Jordan said he was working under duress.

73. In the meeting Mr Lipp stated that he was hard of hearing and affected by dyslexia. Mr Cusick checked his personnel file to see if that had been reported to the respondent before. These conditions were mentioned by Mr Lipp to ensure that he could follow what was being said in the meeting and not as a defence to the accusations or in mitigation of them. Mr Lipp was able to understand the case against him and to respond with his position on them.

74. As with Mr Brown, the nature of the discussion led Mr Cusick to adjourn Mr Lipp's hearing to make further enquiries. Once he did so he did not see it as necessary to reconvene the hearing. He wrote to Mr Lipp on 27 November 2020 to confirm his decision, which was to terminate his employment on the basis of a finding of gross misconduct [234-235].

75. Mr Cusick's position was that the claimant's non-driving time should have been treated as other work unless that was when a scheduled break was being taken, and that the claimant's total amount of break time taken suggested he was going beyond doing that. As the tachograph would default to other work when the vehicle stopped moving, it was considered that the claimant was manually changing his activity to rest. By the end of the disciplinary hearing Mr Lipp had admitted to doing so.

76. The dismissal letter stated that the claimant's employment was being terminated with effect from 25 November 2020 and a copy of the disciplinary hearing notes was enclosed. Mr Lipp's right of appeal was explained.

77. Mr Cusick was not aware of the claimant having any connection with a trade union. That was not part of his reasoning in deciding to dismiss him.

78. Mr Lipp appealed against his dismissal. Again, his appeal letter and any written grounds he provided were not available in the bundle. Mr Seagriff's recollection of the claimant's appeal basis was that he disputed he had falsified records.

79. The appeal was acknowledged on 20 December 2020 and an appeal hearing was scheduled for 13 January 2021, to be chaired by Mr Seagriff.

80. Mr Lipp attended the scheduled appeal hearing and was joined by Mr Jordan. A note-taker recorded the discussion which was produced [237-251]. The notes are sufficiently accurate.

81. Following the appeal hearing Mr Seagriff considered the issues and reached the decision that the claimant's dismissal should stand. He wrote to Mr Lipp sometime after – the date on his outcome letter erroneously reads 1 January 2021 - to confirm that the appeal was rejected. He had no knowledge of the claimant being a member of a trade union and his decision was not informed by any consideration of the claimant being connected with a union or performing acts in relation to a trade union.

82. This concluded the disciplinary process available to Mr Lipp.

Concurrent disciplinary proceedings

83. Two other employees of the respondent based at Mossend 2 were subject to disciplinary procedures around the same time as the claimants. Copies of correspondence to and from them was produced, with the employees' names redacted. In the course of evidence it was confirmed that the two individuals were John Maxwell, a Transport Manager and Craig Chirrey, the Transport and Distribution Manager. Both were managers whom the claimants reported to.

84. Mr Maxwell was invited to a disciplinary hearing on 9 December 2021 with Mr Cusick. The disciplinary allegations were described as follows:

> *'Following a recent Transport audit, the Mossend 2 operation has been identified as breaching legal compliance as well as company process*

in regards to multiple areas including but not limited to; Driver hours, vehicle maintenance and record keeping.

'The above mentioned breaches could have seriously compromised the Scottish Operator License of which you are named person for the Mossend 2 operation.

'Failure to ensure Driver adherence to Working Time Regulations despite knowledge of Driver breaches of this legislation.'

85. The disciplinary hearing initially proceeded as planned, but part way through Mr Maxwell tendered his resignation with immediate effect, which was accepted and confirmed by a letter on 11 December 2020.

86. Mr Chirrey attended a disciplinary meeting with Mr David Fraser, a Site Manager on 1 December 2020. The disciplinary matters under consideration were set out in similar terms to those put to Mr Maxwell, save that the last of the three points was phrased as follows:

'By failing to ensure full compliance in all of your areas of responsibility, you have endangered both XPO colleagues as well as company property thus leading to serious breaches od health and safety.'

87. The discussion which took place in the meeting is summarised in a set of bullet points. Not all of the matters related to drivers and their working time, but the following point was made by Mr Fraser:

'In reference to Driver hours, I reminded you that there were Drivers who were recording as much as 72 hours per week and I asked if you were just signing these off with no checks in place. I do not believe that you explained sufficiently that whilst you received weekly reports containing Driver hours, you were not aware that some Drivers were recording such excessive hours at significant cost to the business.'

88. Mr Fraser concluded by saying that in light of the seriousness of the allegations, the exposure of the site and the wider Scottish operation to risk

in relation to its operator licence, a disciplinary outcome had to be reached rather than allow Mr Chirrey early retirement.

89. Mr Fraser went on to say that he had found the allegations to have been established against Mr Chirrey, amounting to gross misconduct, and that therefore his employment was being terminated with immediate effect.

DISCUSSION AND CONCLUSIONS

What was the reason for the claimant's dismissal and was it automatically unfair or potentially fair?

90. The respondent argues that each claimant was dismissed by reason of conduct, under section 98(2)(b) ERA. This was said to be the sole reason for his dismissal. The respondent maintains that neither was dismissed for being a member of an independent trade union or for performing activities which fell within the scope of section 152(1)(b) TULR(C)A by acting in the way which led to his dismissal.

91. The claimants contend that they were dismissed for a reason connected to the activities of a trade union, in breach of section 152(1)(b). Alternatively they were believed to have been dismissed for being union members in contravention of section 152(1)(a).

92. Mr Brown believed that the respondent wanted to find a way to remove him because of the way that the pay negotiations were going, and because he had pointed out to Ms Farquharson a number of ways in which the respondent was acting or proposing to act which were inconsistent with applicable Regulations or previously agreed protocol. In essence he was saying that the respondent had an interest in removing him from the discussion and allowing him to be replaced by someone more amenable to the respondent's position. He especially noted that he was suspended on 29 October 2020, which was the date of a scheduled wage negotiation meeting which he was therefore unable to attend. He believed that Mr Lipp was singled out for similar reasons. He was not a shop steward and therefore had not been directly involved in

the negotiations, but it was known to the respondent, he understood, that Mr Lipp might again become one.

93. Mr Lipp himself in evidence appeared less convinced that this was the respondent's motivation for either dismissal, but somehow linked the arrival of new management from another depot to replace the managers at Mossend 2 with the difficulties in agreeing a wage deal with the drivers.

94. It is recognised that there is no set statutory list of activities which, if undertaken, bring an employee within the scope of the protection offered by section 152. It has been determined in previous cases that an individual may be protected even if they are not a member of a trade union at all, provided their actions are closely enough related to the union/employer relationship. They may be protected even if they are not acting in an official capacity.

95. On the evidence presented, it is found that Mr Brown was undertaking the activities of a trade union by way of his involvement in pay negotiations with the respondent in the summer and autumn of 2020. There is no evidence of Mr Lipp doing anything which could reasonably qualify for the same protection.

96. Also on the evidence provided, it is found that neither was dismissed for the sole or principal reason of being either a member of an independent trade union or involved in trade union related activity. This is based on the oral evidence given by each of the respondent's witnesses on oath, the documents accepted in evidence and the claimants' own evidence, including in particular the concessions they made during the disciplinary process they each took part in. As such it is accepted that:

    a. Mr Attwell was not aware of any connection between either claimant and a trade union or its activities when undertaking the audit, or flagging up anomalies with the claimants' working time as requiring immediate attention. Rather, he was guided only by data gathered about the working time of a random sample of drivers;

b. Mr Cusick dismissed each claimant solely on the basis of his genuine belief in their acts of misconduct; and

c. Mr Seagriff was similarly satisfied that each dismissal was justified on the evidence as to their conduct alone, as it related to recording of working time.

97. The decision of the Tribunal is therefore that the claimants were not dismissed for any reason falling within section 152 of TULR(C)A and were dismissed by reason of their conduct in terms of section 98(1)(b) ERA.

Were the dismissals reasonable according to section 98(4) ERA?

98. Given that the respondent has satisfied the onus of proving that dismissal was for a potentially fair reason, it is next necessary to consider the requirements of section 98(4) ERA were met.

99. 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.

100. ***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.

101. In relation to the first part of the ***Burchell*** test, it is accepted that there was a genuinely held belief in the claimants' misconduct. This was held by both Mr Cusick and Mr Seagriff. Their belief was not challenged in any meaningful way and in any event their evidence is accepted. That evidence was as given under oath to the Tribunal and by way of the documents which were created in the course of the disciplinary processes, including in particular each individual's outcome letters. As referred to above, relevant to this issue also was the extent to which each claimant made concessions during the

disciplinary process. Mr Brown did not fully admit to the allegation against him, although he suggested towards the end of the discussion with Mr Cusick that he was taking on extra shifts as other drivers would not. Mr Lipp more clearly admitted that he had consciously recorded non-driving time as rest when it ought to be treated as other work in order to 'manage' his hours.

102. According to ***Burchell*** it is next necessary to consider whether the respondent had reasonable grounds for holding the belief that the claimant was guilty of misconduct.

103. The considerations above in relation to the first limb of ***Burchell*** are also relevant, including any admissions made by the claimants. There was accurate and unchallenged data in relation to the working time of each claimant, showing when they started and finished on each day, how much time was spent driving and how much was given to various other types of status such as other duties and rest. That suggested that each individual had breached one or other limit on their overall working time, or had recorded anomalous amounts of rest time. As such there was at least a question for each claimant to answer. Also relevant to this consideration was the presence of external rules which carried with them sanctions for both employer and employee, and the need for drivers to be aware of that regime. This was evident from the external requirement to hold a CPC on a continuing basis, and the respondent's own internal rules and systems. Accurate time recording could not realistically be considered anything other than highly important.

104. It is therefore found that the respondent's belief in the claimants having committed acts of misconduct was genuine.

105. 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 pursue every avenue irrespective of time, cost and prospects, but no obviously relevant line of enquiry should be omitted.

106. 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.

107. The respondent's investigation was sufficiently thorough in this context. The starting point was the data gathered by Mr Attwell. It was sufficiently complete and accurate, and was not challenged by the claimants. Mr Cusick undertook further investigation after his initial meeting with Mr Brown, focussed mainly on establishing whether he had been performing shunting work when he had recorded breaks. This was understandable as the initial discussion made clear that any discrepancies related to the way he spent his working time when not driving. He found at least 15 occasions of Mr Brown performing work at the depot at times recorded as rest. Mr Brown did not challenge that, but changed his explanation of why his record did not match the apparent reality, to say that he was simply inaccurate in the recording of his time. There was little reason for investigating further by that point. Mr Cusick was entitled to accept that as truthful and adequate, or not. There was no identifiable way to establish whether Mr Lipp had been recording his non-driving duties as rest, save for example by having him covertly observed. Given that by the end of his disciplinary hearing he had admitted to wrongly recording his time there was no reasonable need to investigate further.

The band of reasonable responses

108. 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.***

109. 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, or vice versa.

110. 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.

111. Mindful of the above approach which a Tribunal must take in dealing with the question of reasonableness, it is found that dismissal of each claimant was within the band of reasonable responses open to the respondent in these circumstances.

112. Firstly, it is necessary to consider whether the ultimate sanction of dismissal was warranted in each of the claimants' cases.

113. Under cross examination Mr Brown conceded that he *'got [his] times wrong'*, in the sense that he inaccurately recorded time as rest when he was shunting across six or seven different trucks. He said that he took rest later in the shift and recorded it manually. That concession highlights the problematic nature of the practice he was adopting, namely completing time entries manually and after the event. That is even before considering whether he was honestly, but on occasion erroneously, accounting for his non-driving time or whether he was doing it more deliberately and cynically to allow him to complete more paid working time overall than would otherwise have been legal, as Mr Cusick concluded. In the context of his particular role with the respondent, Mr Cusick was entitled to consider Mr Brown's account was inadequate. There was a responsibility primarily on him to ensure that his time was recorded accurately. There were consequences for both himself and the respondent if it was not, which he knew. The high number of occasions when rest breaks were in

excess of two hours per day was persuasive evidence of breach of that responsibility.

114. Mr Brown stated in evidence that he felt obliged to take on extra shifts to the point where it became more of a default than an option. He said that latterly he would have to give his duty supervisor three days' notice if he didn't want to do an overtime shift allocated to him. This may be so, but did not exonerate him from monitoring his own working time or recording it promptly and accurately. That was first and foremost his duty and he failed in it. He acknowledged that he would be able to speak to his duty supervisor if he was in danger of exceeding the weekly maximum of 60 hours of working time.

115. Mr Lipp also stated in evidence that he was being given work which had the likely result of taking his working time over the relevant limits. He had raised this with Mr Brown as a shop steward around September 2019 and a meeting with Mr Chirrey was planned to discuss the issue. Before it could take place the Covid-19 pandemic brought about a lockdown and the business was disrupted. Mr Lipp said that at least once when he had tried to decline a shift he had been threatened with disciplinary action by Mr Maxwell.

116. Mr Lipp confirmed in evidence that he would not generally record work such as waiting for customers to open up their stores or his drop and lock activity as rest. That should be recorded as 'other work'. He said that would be illegal. Only if he used a waiting period to take a rest break due to him would he record any of that time as rest. In his disciplinary hearing however he confirmed to Mr Cusick that he used the rest period setting to bring down his working hours total and that he did not mean to defraud the respondent in doing so.

117. Both claimants were experienced drivers. They were familiar with the external regulations which applied to their work. They knew of the consequences of breaching those regulations for themselves and their employer. There was a system in place to ensure this was so, which incorporated the need to hold a certificate of professional competence which was contingent on ongoing training, and the respondent's own driver handbook.

118. In these claims the question of whether the claimants were forced to work excessive hours, or to record their time incorrectly, should also be considered.

119. It is accepted that there was a degree of expectation, even at times pressure, on the claimants to work extra shifts. That did not in itself entail that they would breach any limits because the nature of their work was so fluid. The onus remained on each of them individually to monitor their working time and to record it accurately. By their own admission they did not do so and it is unsurprising therefore that the respondent reached the conclusion that it did.

120. To the extent that managers were in any way influential in the claimants not recording their working time correctly, or working excess hours, it is noted that the two key protagonists were disciplined also. One was dismissed and the other resigned before a decision could be reached. As such it cannot be said that the respondent let the claimants 'carry the can' for their managers' misdeeds. The claimants' own dismissals would not fall outside the band of reasonable responses in light of this.

Conclusions

121. 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.

122. Both of the claimants were fairly dismissed by reason of their conduct after a reasonable process. Their claims are therefore dismissed.

Employment Judge:	**B Campbell**
Date of Judgment:	**04 March 2022**
Entered in register: and copied to parties	**07 March 2022**