EMPLOYMENT TRIBUNALS

Claimant: Mr J Pancholi

v

Respondent: Sofidel UK Limited

Heard at: Leicester

On: 7 March 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: Ms A Rumble (Counsel)
For the respondent: Mr P Bownes (Solicitor)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The claimant's effective date of termination is 22 February 2021.

3. There is to be no deduction to take account of *Polkey*.

4. The claimant engaged in culpable conduct which contributed to his dismissal and consequently his basic award and compensatory awards are to be reduced by 25%.

5. There is to be no adjustment in relation to any unreasonable failure to follow ACAS Codes of Practice.

6. The remedy in this case is to be considered at a remedy hearing.

REASONS

Introduction

1. The claimant was employed by the respondent from 20 October 2006 to his summary dismissal on 2 June 2021. He had carried out different roles at the respondent. At the time of his dismissal, he was employed as a Finished Goods Operator at the respondent's Rotheley site.

2. The respondent asserts that the claimant's dismissal was fair and that the claimant was dismissed for gross misconduct following his submission of two fit notes which the employer found to be falsely procured and submitted. The respondent asserts that the claimant procured his first fit note to avoid a contractual duty to drive a forklift truck ('FLT') with a clamp attachment ('clamp truck'). The specific allegations the respondent found proved against the claimant were:

    a. Breach of trust, confidence and loyalty; and
    b. Supplying false medical documents to the company in an attempt to avoid a contractual duty.

3. The claimant disagrees, and claims that he did as instructed to when advised to get a doctor's note detailing his medical concerns about driving a clamp truck. He says that there was then a misunderstanding about the nature of that medical evidence, perhaps related to a language barrier, and that when he tried to resolve the misunderstanding through clarification, there was further misunderstanding which resulted in the respondent wrongly viewing his actions as gross misconduct and dismissing him. He says that he never refused to drive the clamp truck and was not trying to avoid a contractual duty.

4. The claimant had the assistance of a Gujrati language interpreter in the hearing, and gave his answers under cross examination through the interpreter.

5. The claimant was represented by Ms Amy Rumble, Counsel, and gave sworn evidence in support of his own case. The respondent was represented by Mr Paul Bownes, Solicitor, and provided sworn evidence from Miss Nikki Payne (HR Assistant) and Mr Claudiu Florin Galan (Integrated Plant Warehouse Manager).

6. I also had access to an agreed bundle of documents which ran to 176 pages. References to page numbers in this judgment are references to the page numbers of that bundle. I also had the benefit of viewing footage of what is known to the parties of the 'clamp truck'.

Issues to be decided

7. The live issues were discussed at the outset of the hearing, and were set as follows:

    a. Was the respondent's belief in the claimant's misconduct formed on reasonable grounds?
    b. Did the respondent conduct a reasonable investigation in all the circumstances?
    c. Was the decision to dismiss within the band of reasonable responses?
    d. Did the respondent fail to follow a fair procedure?
    e. If the respondent did not follow a fair procedure, would the claimant have been dismissed in any event?

f. Was there any contributory conduct from the claimant which would serve to reduce any award due to him?

Findings of fact

8. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.

Background

9. The claimant was employed by the respondent for almost fifteen years. He had held previous roles as a Team Leader and Dispatch Clerk. At the time of dismissal, the claimant's role involved using FLTs and clamp trucks to move loads around the respondent's Rotheley site. The majority of the role involved using an FLT, which has a standard set of forks. The second type of load required use of a clamp truck, which is identical to an FLT save that the forks are replaced with a C shaped clamp which was used to take large reels of material from the warehouse to production.

10. The respondent says, and I accept, that the warehouse operatives are less keen on driving the clamp trucks because they are required to work alone without being able to share workload as they would if driving an LFT. The respondent also says that there were problems with drivers refusing to drive clamp trucks, or submitting questionable medical evidence to avoid driving the clamp trucks. This evidence was not tested at the hearing, although it is clear from the evidence heard and what happened to the claimant that the respondent considered the claimant to be following this pattern of behaviour.

The claimant's English and language barriers

11. The claimant relies on English being his second language to explain the miscommunication he says occurred with the respondent about the issue, and potentially also any miscommunication with his doctor about the fit notes supplied to the respondent. The respondent denies that any language barriers existed which impacted on the claimant's ability to engage with the process which led to his dismissal. This is important because the claimant did not benefit from the assistance of an interpreter during the investigation phase of the respondent's disciplinary process. The respondent's response form claims that the claimant was able to communicate clearly with Miss Payne about his medical evidence (page 27).

12. In her witness statement, Miss Payne says the same thing. She also says that the claimant could converse freely during his investigation meeting and the appeal meeting. Miss Payne notes that the claimant had a translator at the appeal meeting but relied on him less and less throughout the meeting. She also considered the claimant's employment record, noting that he had worked as a Team Leader and Dispatch Clerk, and said that these roles required a good level of English to be done properly. Finally, she notes that the claimant never required translation for internal meetings. In his witness statement, Mr Galan recalls that he interviewed the claimant in the past about a team leader role and that he did not recall any difficulty in communicating then.

13. In his claim form, the claimant says he had issues with communication throughout his employment with the respondent. In the hearing, the claimant used an interpreter only for when under cross examination. He did not appear to have any difficulty communicating with Counsel, for example. However, the notes of the meeting, transcribed from recordings, do indicate that the claimant's English was not as strong as the respondent appears to assert. When asked on page 93 if the claimant considers he did anything wrong, he said: *"I think maybe I can't explain it properly"*. The notes from the investigation meeting on page 64 have sections where Mr Pancholi is speaking but the transcriber has recorded what he was saying as *"unclear"*. Mr Pancholi's responses in that meeting are also generally very short, often one or two words, and when he does speak he does so with slightly broken English. I consider that the respondent really ought to have recognised that the claimant would have benefitted from an interpreter at this point and find as a fact that the claimant has weak English when it comes to the matters he was asked about and subjected to during the respondent's investigation and disciplinary process.

14. The claimant was able to expand on his views and meaning under cross examination with the benefit of a professional interpreter. I do not consider that the claimant could have engaged with the employment tribunal hearing adequately without the assistance of translation, and I would have been concerned that I could not have held a fair hearing without that assistance. Consequently, I find that the claimant did require an interpreter to engage with the respondent's process. Whilst the claimant may well have sufficient English to interact on a day to day basis at work, it is clear to me that the nuances of the language are easily lost and that the claimant was unfamiliar with the terminology used throughout the process. This, in my view, exacerbated any existing tendency for there to be miscommunication.

The claimant's previous back injury

15. In June 2019, the claimant received training on driving the clamp truck. He says that, during this training, the clamp truck 'bounced' as he set down a load and that this sent a shock through his back. He says this caused an injury and a back problem. He did not immediately raise it at the time and had four scheduled days off work thereafter. In that time, the claimant says he struggled considerably with his back. He says he took painkillers, did some yoga and stretching, and had massage to alleviate the symptoms. During the respondent's investigation process, he told occupational health that his back pain resolved after one month (page 55).

16. The claimant raised his back injury with his manager Mr Yeomanson shortly after he suffered the injury in 2019. He explained that the injury was caused when driving the clamp truck. In response, Mr Yeomanson informed the claimant that he did not need to drive the clamp truck in order to protect from reoccurrence of injury. He was able to drive the FLT instead, and that is what he did. I find these points as facts because the claimant maintained throughout his investigation and disciplinary process that he had suffered the back injury and that this was his manager's response. It is not contested by the respondent, though I acknowledge that the respondent's senior management and human resources were not aware of the adjustment because it was not officially recorded. I do consider, though, the respondent, through the claimant's line manager, made adjustments aimed to protect the claimant's health and safety at work.

17. In the hearing, the claimant explained that he does still get stiffness in his back from time to time, but that he practices yoga and exercises to manage this and his wife will massage his back to provide further assistance. It is clear to me that, whilst the claimant might not have suffered a back injury or pain similar to that he experienced in 2019, he does consider that he has a tendency for back pain and injury which he manages through preventative measures outlined above. What he describes is a chronic condition which requires maintenance, and which comes with apprehension about causing another acute episode of injury.

Circumstances giving rise to medical evidence

18. In April 2021 (the claimant says on or around 18 April), he was instructed by a team leader to drive the clamp truck. Mr Yeomanson was no longer involved with the claimant's work and the respondent was unaware that the claimant had not driven the clamp truck for two years following his back injury. The claimant explained that he did not drive the clamp truck due to a previous back injury. At page 52, the supervisor, Mr Anielak, writes to explain that he consulted with Mr Neumann, a more senior manager, about the claimant's issue with the clamp truck. Following that consultation, Mr Anielak advises the claimant that he would require medical evidence *"of any current health issue"* to avoid driving the clamp truck. Mr Anielak describes this course of events at page 62.

19. The claimant explained his understanding about the need for medical evidence in his investigation meeting on 13 May 2021. When asked if he told anyone at the respondent about his back issue recently, the claimant said (page 67): *"yeah I report to Mariusz. I say Mariusz I'm fearing with back pain".* He went on to say: *"So if you he's a manager and he he on that time he advise me if you bring doctor letter then it's good for you"*. When asked what Mr Anielak actually said to him, the claimant says: *"Mariusz say you have to go there but if you fear you can't go there then he advised I think he advised I think talk with you maybe and then after that he tell me if you bring doctor letter it is helpful for me"*. The claimant is then told that Mr Anielak says that he told the claimant to bring evidence from a doctor of any medical issues confirmed by a doctor.

20. Clearly, the claimant was told by Mr Anielak in April 2021 that he needed to obtain medical evidence of any issues which might excuse driving the clamp truck.

The first fit note

21. Consequently, the claimant rang his doctor on 26 April 2021 to talk about the circumstances and obtain that evidence that he was instructed to provide should he wish to continue to not drive the clamp truck. He said in cross examination that he explained his injury history to the doctor, and explained that he was afraid that he would get further back ache or pain if he were to drive the clamp truck. The claimant says that the doctor considered the difference between an FLT and clamp truck, and then agreed to provide a fit note intended to excuse the claimant from driving the clamp truck in order to guard against aggravating a previous back injury. This corresponds with the account he has given ever since first being challenged about the fit note, and so I accept that this is an accurate account of the conversation he had with his doctor.

22. The resulting Statement of Fitness to Work was included at page 52. It is referred to generally as a 'fit note' or 'sick note' or 'MED 3' in the documents. In this judgment, it is referred to as the first fit note. The note covered the period from 26 April 2021 to 25 July 2021. The note explains that, having been assessed for the condition of *"backache"* the claimant was fit to work taking account of the advice that he should *"avoid clamp fork lift operation*". The note is signed by a doctor. There is no requirement or certification on the fit note that the condition of backache was at that time an acute condition that the claimant was suffering from on that particular day. A common sense reading of the document allows the possibility that the 'condition' may be an issue someone has but is not currently suffering the symptoms from – much like someone may need adjustments at work to manage having panic attacks without them suffering from panic attacks at every moment of the day.

23. Mr Waldemar sent the first fit note to Miss Payne on 29 April 2021 and asked for guidance. Miss Payne responded fifteen minutes later to advise that the claimant should not be allowed to work as the clamp truck and FLT operation was so similar that if the claimant was unfit to drive one, he was unfit to drive both. As there was no other work available, he was to be treated as if signed off sick and placed on to statutory sick pay. I was told in cross examination by Miss Payne that she had received no training in how to read or deal with fit notes and had never driven a clamp truck or an FLT. Miss Payne also writes that *"this is the same situation as [another employee] therefore we shall treat them both the same"*.

24. Miss Payne telephoned the claimant on 29 April 2021 to advise him that he would not be able to work due to his backache and explain that she would arrange an occupational health meeting for him. The claimant was upset by this, as he considered that he was able to drive FLT. Further, he could not afford to spend three months on statutory sick pay and this was not the intention behind obtaining the medical evidence to guard against the injury he perceived he would suffer should he drive the clamp truck. The claimant told Miss Payne that he would go back to the doctor to clarify the intention of the first fit note, because he considered that there had been a misunderstanding about the document and what it was meant to achieve.

25. Miss Payne says that she found the willingness of the claimant to clarify or alter his fit note to be puzzling. Her witness statement says: *"if he genuinely had backache, I did not understand how he could ask his doctor to change his sick note. I therefore questioned the claimant in relation to my concerns, and said to him that, if he were to do this, it would make us question the validity of his initial sick note"*. She did not deviate from this point of view in cross examination, and indeed this interpretation of the fit note and the claimant's actions is what drove the respondent to his dismissal. It is clear to me that Miss Payne interpreted the fit note as a 'sick note' certifying that the claimant was suffering from an acute episode of backache or back pain on the day he consulted with the doctor. She did not consider that the claimant may have been trying to raise a health and safety issue, but that guarding against re-injury due to his back issue was not worth three months of being placed on statutory sick pay.

The second fit note and occupational health meeting

26. The claimant felt that he could not afford to spend time on statutory sick pay, and so went back to his doctor on 30 April 2021 to make clear that he considered himself fit to work and that he was willing to work in pain if the alternative caused serious financial difficulties for his family. In cross examination, he explained that he was panicked at this point and that he was willing to drive the clamp truck and risk aggravating or actually aggravating his historic back injury if that meant that he could continue to work and earn a wage for his family. The resulting 'second fit note' was shown at page 54 and is dated 30 April 2021. It again said that the claimant was assessed for the condition of backache and that he was fit to work taking account of the advice that he was *"fit from 30.4.21"*. The note is then certified as applying for only one day, which is confusing. The claimant explained in the hearing that he had told the doctor that his work was not letting him attend hid job, and the doctor agreed that this was not the intention of the first fit note. The second fit note was intended to allow the claimant to work and reflected the claimant's resolution to work despite any fear of injury or actual injury in order to support his family. If this explanation is accepted then it is difficult to conclude the first fit note is false or invalid, as the respondent went on to do.

27. On 6 May 2021, the claimant attended a telephone appointment with an occupational health clinician. The report produced by the OH clinician is at pages 55 to 57. The claimant explained the circumstances of his previous back injury and explained that he had not experienced a similar episode of back pain or injury since. He explained that he had not driven the clamp truck for two years and was fearful of driving it, and so he had gone to his doctor for support about that. The claimant confirmed to occupational health that he was medically well and was not suffering with any back pain at the time of the appointment. There was no translation offered for Mr Pancholi during this meeting and no transcript is provided. When asked about it in cross examination, Mr Pancholi said that the conversation was difficult and stilted but that he had been able to answer the questions after several instances of repetition.

28. It appears that Miss Payne had asked the OH clinician to provide answers to the following questions, which were answered broadly as outlined:

    a. Does Mr Pancholi actually have backache? (answer was that the claimant did not and had not suffered from it for approximately two years);
    b. What has caused his backache? (answer was in relation to the historic pain caused by the clamp truck);
    c. Is Mr Pancholi able to drive an FLT? (answer was yes);
    d. How long has Mr Pancholi suffered with backache? (answer was one episode two years previously);
    e. Why does Mr Pancholi believe that he would be fit to work if he avoids the FLT? (answer was that the claimant felt the clamp truck was heavier with greater shocks through the driver's seat, but that he now felt he had overcome those fears and could drive the clamp truck);
    f. Is the condition due to work related matters? If so, what are they, how are they impacting and how can the organisation support the resolution (answer was that issue was related to clamp truck training and that it is recommended management explores refresher training to provide support); and

g. Is Mr Pancholi capable on health grounds of carrying out the duties of the post for which he is employed? (answer was that OH clinician's opinion is that the FLT and clamp truck postures are sufficiently similar for someone to be able to drive both if they are fit to drive one, and so the claimant should be able to drive the clamp truck without detrimental impact to his back).

The respondent's investigation into alleged gross misconduct

29. Miss Payne wrote to the claimant (page 58) on 11 May 2021 to invite him to an investigation meeting to take place on 13 May 2021. Miss Payne advised that the respondent was investigating *"the validity of the MED3's sent through"* and the claimant was told he could be accompanied. Mr Neumann would chair the meeting. Mr Neumann did not provide witness evidence at the hearing. The evidence offered by the respondent about this stage comes from Miss Payne, the note taker from the investigation meeting, a transcript of the meeting, and Mr Neumann's investigation report.

30. On 12 May 2021, the claimant returned to work and completed a return to work form with Mr Anielak. The form (pages 59 to 61) records that the claimant was absent to prevent from having back pain and that he is fully recovered following yoga and exercise. Mr Anielak explains that the claimant contacted his doctor to prevent from suffering from back pain after a historic problem and that the claimant was not suffering from back pain at that point (page 61).

31. On 13 June 2021, Mr Anielak gives a witness statement on page 62 and explains, as outlined above, that he told the claimant to get evidence of any current health issue if he needed to avoid driving the clamp truck.

32. Also on 13 June 2021, the claimant attended his investigation meeting. The meeting was online and recorded, with the transcript shown from page 63 to 71. I have outlined the language issues above. The claimant explained that he contacted the doctor due to the fear of the clamp truck causing back pain, as had happened previously. The doctor had listened and produced the first fit note. He explained that Mr Anielak advised him to go to the doctor for medical evidence, so that is what he did. When asked why he felt there was a difference between the FLT and the clamp truck, the claimant responded that the clamp truck was heavier and that when he drove it before he felt that it bounced more and provided a greater shock to his back.

33. Part way through the investigation meeting, Miss Payne took over the meeting and began to direct the questions. The claimant explained that he had not driven the clamp truck for two years with the agreement of his manager at the time. Miss Payne asked a series of questions to find out if the claimant was currently suffering from back pain or had been suffering from back pain at the time he visited the doctor. The misunderstanding about what the fit note meant, as outlined above, continued in the following exchanges:-

    a. *"NP: So when you. Did you have a physical consultation with your doctor?*
    JP: We talk with me on the phone.
    NP: So it was a phone consultation?
    JP: Yes yeah.

NP: So where did backache come into that?
JP: At the time nothing.
NP: Right so you've submitted a MED3 Certificate to the company that states that you have backache but you've just confirmed to me that you do not have backache. Is that correct?
JP: Yeah."

(page 66)

b. *"NP: Okay sorry Jignesh when you spoke to your doctor then where did backache come into the conversation? Because you've you've just said sat here and said to us that that fear driving the clamp truck and if you avoid it then you're fine. So how did your doctor come to the conclusion that you have backache?*
JP: Well I explained to my doctor before when I got training I explain everything to him and he suggest me if you avoid that one so it's good for you.
NP: Yes but you've confirmed to us also that you don't have backache so.
JP: Yeah I tell him I don't have now."

(page 67)

34. At the end of the meeting, the claimant says that he is willing and able to drive the clamp truck because he understands the respondent's position that it is part of his job. He says he will not refuse to drive the clamp truck. He confirmed when asked that he will try to drive the clamp truck in the hope that he does not suffer pain and that he is doing exercises and yoga to try to guard against that pain.

35. Mr Neumann's investigation report was at pages 72 to 75. It summarises the meeting and outlines that the claimant's actions *"place him in breaches of"* the sections of the company handbook about conduct whilst on company business, specifically relating to the points of conduct that the claimant was ultimately dismissed for. The report's conclusions include the following statements:

a. *"From the evidence compiled I have found the following:*
    i. *JP has deliberately submitted a MED3 with false information on it to the company in an effort to avoid working on the clamp truck'*
    ii. *When the severity of the notes on the MED3 were explained to JP (that we would not be able to offer him work safely on any truck), JP ignored advice given by the HR department and proceeded to send through a further contradicting note so that he was able to work and avoid being on SSP;*
    iii. *JP has admitted he does not currently have backache and did not have back ache at the time the MED3 was submitted. This is supported by his comments in the investigation hearing and also the OF report that has been completed."*

(page 74)

b. *"Based on the above I conclude that JP has deliberately supplied the company with false documents surrounding his health status in an attempt*

to manipulate his contractual duties and in doing so has breached the trust, confidence and loyalty between employee and employer."

(page 75)

36. The report goes on to recommend disciplinary action for gross misconduct. It is clear to me that Mr Neumann had drawn conclusions from his investigation which are more properly left to the disciplining officer to determine, and that moreover he had done so following a mistaken reading of the first and second fit notes which were exacerbated by a failure to account for the language barrier hindering communication in the investigation stage.

The claimant's disciplinary process and dismissal

37. On 17 May 2021, the claimant was invited to a disciplinary meeting on 19 May 2021 to be chaired by Mr Galan. Nikki MacDonald, HR Assistant, was to attend to take notes. The claimant was advised of the specific allegations against him and was sent a copy of the relevant documents and policies. The claimant was told about the process and that he might be dismissed following the meeting if Mr Galan decided to impose that sanction. That meeting was rearranged on 19 May 2021 to take place on 24 May 2021.

38. The transcribed notes of the disciplinary meeting were at pages 80 to 95. The claimant was accompanied by a colleague, Mr Patel, who assisted with translation. When asking for the translator, the claimant said: *"My English is not 100% so if you allow he express"*. The parties watched the footage I was shown of the clamp trucks in operation. Mr Patel noted that the driver in the footage was very experienced with the clamp truck and the claimant was not. The inference I take from this, given that the claimant's problem with training was in relation to the jerky operation of the clamp truck, is that Mr Patel was trying to point out that the footage appears very smooth because the drivers are experienced. Mr Galan did not take that point and explained that he did not expect the claimant to be experienced before moving on.

39. The claimant supplied a letter to be taken into account at the disciplinary hearing to account for difficulties and misunderstanding with language. It was read out for the benefit of the recording, and a copy of the letter is at page 96. The letter outlines the points that the claimant continues to make to this day. In essence:

    a. He suffered back pain when training on the clamp truck;
    b. His manager said that he did not need to drive it as a result;
    c. He was then told he needed to drive the truck unless he had a doctor's note;
    d. He told his doctor about the problem and was given the first fit note;
    e. He never refused to drive the clamp truck;
    f. The respondent said he could not work after seeing the first fit note;
    g. The claimant could not afford to be away from work;
    h. He went back to the doctor and explained that he was not being allowed to work, but needed to, and so he would now drive the clamp truck if asked even if it does cause pain;
    i. He does regular exercise to prevent back pain and hopes to be able to avoid back pain;

j. He has a clean employment record with no disciplinary issues; and
k. He hopes that the misunderstanding can be straightened out.

40. A discussion followed about how the clamp truck motion might be different to the FLT such that the clamp truck could cause a difficulty. The claimant explained again that the bigger load meant there was a bigger jolt when unloading, and this is what had happened in training. He also said that the floor was more uneven in the area where the clamp truck is operated. Mr Galan considered these points and countered that the clamp truck chair is sprung in the same way and the floor looks even. At no point, it seems, did the respondent consider that the claimant had suffered as a result of a fault with a specific clamp truck or as a result of something specific that the claimant did which might be resolved with further training (as the OH report recommended).

41. Mr Galan asked about the fit notes. The claimant was asked what he said to the doctor to get the first fit note. He explained that he said he might get back pain if he drives the clamp truck, and that he had said that he does not currently have back pain. He explained very clearly that he told the doctor he was concerned about having back pain as a result of driving the clamp truck rather than that he had had back pain at the time as was being alleged. Mr Galan was clear in that exchange that the claimant had got the first fit note to prevent the claimant from having back pain.

42. At this point, Miss MacDonald directs the questions towards the use of the phrase 'backache' on the fit notes (page 85). She asked the claimant why he did not query the phrase 'backache' on the fit note. The claimant responded that he had mentioned a fear of back pain in case it returns. Miss MacDonald asks the claimant if the doctor misunderstood and the claimant responds that this may be the case. The claimant explains again that he told the doctor that he did not have back pain at that time, but that if he drove the clamp truck, his back pain from the previous occasion might return. It was put to the claimant several more times that the use of the word 'backache' on the fit notes was wrong and that he could or should have noticed that before submitting the notes to the respondent (page 87; page 90; page 91; page 94). Both parties agreed that it would have been better to get a letter from the doctor about the issue instead of a fit note (page 87).

43. The claimant then says that the respondent's misunderstanding about what the first fit note meant caused him to go back to the doctor to get the second fit note such was his desperation to work and earn a wage. He said again that he did not refuse to drive the clamp truck, but had got medical evidence as advised to try to avoid a repeat of a back injury (page 88). It was agreed that the claimant might benefit from training. Miss MacDonald told the claimant that everyone has parts of the job they do not like, but they need to be done.

44. Mr Galan asked the claimant if he thinks he did anything wrong (page 89). The claimant responded that the respondent was mistaken on the first fit note. He said: *"they think I got back pain but I want to say I don't have back pain"*. Mr Galan then responds, halfway through the meeting:

"I'm conscious that the company and myself as well they understand you brought the sick note in for back pain but did not have it to avoid to drive the clump. I don't

know if it's to avoid to drive the clump because it is harder yes or you didn't want to change your location where you are working".

45. It is clear to me from this statement that Mr Galan had already decided that the claimant had committed the gross misconduct alleged. The claimant's explanations, that he has had back pain and that the fit note was intended to guard against exacerbation of the condition of backache, were simply ignored. The respondent completely failed to appreciate at the disciplinary stage, as well as when the fit notes were submitted and at the investigation stage, that the 'condition' in a fit note might relate to a chronic condition that a patient manages whether or not they are suffering from acute symptoms at the time. The meeting ended with the claimant confirming that he may have had a misunderstanding with the doctor about what he meant and what was required.

46. In cross examination, Mr Galan was asked about some of the themes from the meeting. It is clear that Mr Galan was mistrustful about the amount of apparent misunderstandings the claimant was relying upon to explain himself. He said several times that *"something didn't add up"*. He was sceptical that the claimant could have had a misunderstanding: (1) with the respondent about the medical evidence required; (2) with the doctor about the first fit note; (3) with Miss Payne about the meaning of the note; and (4) with the doctor about the second fit note. He said he was disappointed that the claimant sought to explain the position he was in by the respondent's misunderstanding rather than reflecting on his own behaviour.

47. Mr Galan said that he spent days thinking about the sanction to be applied, given the claimant's record, but that the number of things that 'didn't add up' were too many to reconcile. It is clear that at no point did Mr Galan listen to what the claimant was saying to try and accept quite what was said to him and what he said to the doctor. Mr Galan did not consider that Miss Payne may have been wrong about the meaning or purpose of the 'condition' part of the fit notes. He did not consider that the claimant might have been managing a back problem, despite the claimant explaining that he had had a back injury previously and was engaged in yoga and exercises to keep it away.

48. It became apparent from cross examination that Mr Galan did not conduct or consider conducting any further investigations when conducting his part in the process. When asked what the claimant could have done to change his preconceptions following reading the investigation report, Mr Galan said that the claimant could have brought more medical clarification. When asked whether he considered asking for that, Mr Galan said it was not his role to do that sort of investigation. When asked whether he considered that the claimant might have been willing to work in pain to ensure he earned a living, which might explain his actions, Mr Galan responded *"not my problem"*.

49. Mr Galan wrote to the claimant on 2 June 2021 to confirm that he was dismissed for gross misconduct with immediate effect. That letter is at pages 98 to 100. The letter summarised the timeline discussed in the disciplinary meeting. Along with finding the allegations to be well founded, Mr Galan wrote: *"not only did you supply a document containing false medical information, the intent of this was clearly to avoid a contractual duty"*. The claimant was advised that he could appeal the decision.

The claimant's appeal against dismissal

50. On 7 June 2021, the claimant appealed to Mr Gillifan, who was appointed as the appeal manager at the respondent. In his appeal letter, the claimant outlines his position again and explained that he felt there was a language barrier at play because his only intention all along was to inform the respondent that he had a health and safety problem in relation to driving the clamp truck.

51. The appeal meeting took place on 25 June 2021 and was chaired by Mr Moseley instead of Mr Gillifan. Mr Moseley was not present to give evidence at the hearing, but Miss Payne was there as a note taker and was able to answer limited questions about Mr Moseley's process. Part of the transcribed notes from the appeal meeting were at pages 104 to 112 but it appears the recording then failed or the transcription stopped abruptly.

52. Mr Patel was present again to translate for the claimant. Mr Patel explained the claimant's case to Mr Moseley, including that the claimant had been instructed to get medical evidence if he needed to avoid driving the clamp truck and so that is what he did. The claimant offered to allow the respondent to speak to his doctor directly to clarify what he had said and what the outcome of the consultation was (page 106).

53. Mr Moseley was interested in why the fit notes used the term 'backache' to describe the claimant's condition. Mr Patel explains that the claimant told the doctor about his historic problem and apprehension that the back pain might reoccur. The claimant then explained that this was the first time he had ever got a fit note and he thought it was all correct and as it should be so he submitted it to the respondent (page 109). Mr Patel translated that the point of the fit note was to try to flag that driving the clamp truck could cause the claimant pain and to guard against that.

54. Miss Payne commented that a fit note was a disproportionate way to achieve that and Mr Mosley agreed that the claimant should not have got a fit note to fix a pre-emptive problem. It is apparent that both Miss Payne and Mr Moseley overlooked the fact that the claimant was advised to obtain a doctor's letter by his direct managers at the respondent. The decision to dismiss the claimant was upheld and the claimant was informed in writing by a letter dated 6 July 2021 (pages 113 to 115).

Relevant law

Unfair dismissal

55. Under s98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal and that it is either for a reason falling with section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee. The respondent asserts that the claimant was dismissed by reason of the claimant's conduct. Dismissal for conduct is a potentially fair reason falling within section 98(2).

56. Where the employer has shown a reason for the dismissal and that it is for a potentially fair reason, section 98(4) of the Employment Rights Act 1996 states that the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with the equity and substantial merits of the case.

57. In *Iceland Frozen Foods v Jones [1982] IRLR 439*, it was held that, when considering s98(4), the tribunal should consider the reasonableness of the employer's conduct and not simply whether the dismissal is fair. In doing so, the tribunal should not substitute its view about what the employer should have done. The case also outlined that there is a range of responses open to a reasonable employer; although different employers could come to different decisions in the same circumstances, all might be reasonable.

58. Consequently, the tribunal must consider whether, in the particular circumstances of the case, the decision to dismiss the employee fell within the reasonable range of responses which a reasonable employer might have adopted. If a dismissal falls outside that band, then it is unfair. In other words, it does not matter if I think I would have dismissed or not dismissed in the same circumstances, and my judgment does not reflect any position on that. The tribunal should consider the whole dismissal process, including any appeal stage, when determining fairness (*Taylor v OCS Group Ltd [2006] ICR 1602*).

59. When considering cases of alleged issues of conduct, it is important to consider the case of *British Home Stores v Burchell [1980] ICR 303*. This case establishes a three stage test for dismissals:

    a. the employer must establish that it believed that the misconduct had occurred;

    b. the employer had in its mind reasonable grounds upon which to sustain that belief; and

    c. when the belief in the misconduct was formed, the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

60. When considering whether a dismissal on the grounds of conduct is fair, it is important to consider only matters which the employer was aware of at the time of the dismissal; the question is whether the employer reasonably concluded that the misconduct occurred at the time of dismissal, not whether the misconduct actually happened (*Devis (W) & Sons Ltd v Atkins [1977] HL*).

61. The band of reasonable responses test applies as much as much to the respondent's investigation as it does to the decision to dismiss (*Sainsbury's Supermarkets v Hitt [2003] IRLR 23*). There is helpful case law to assist with determining what sort of investigation might be reasonable in all the circumstances

of the case as envisaged in *Burchell*. In *W Weddel & Co Ltd v Tepper [1980] IRLR 96*, Stephenson LJ said that employers

"must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably".

62. When the allegations are particularly serious with potentially serious consequences for the employee if the allegations are proven, such as with accusations of a criminal offence, then more will be expected from an employer if it is to be said to be acting reasonably (*Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721*).

Reductions to any award for unfair dismissal

63. If a finding of unfair dismissal is made as a result of an unfair procedure, then the tribunal should consider the likelihood that the employee would have been dismissed in any case had a fair procedure been followed. The compensation to be awarded should be reduced to reflect that likelihood (*Polkey v AE Dayton Services Ltd [1987] UKHL 8)*.

64. *Section 122(2) of the Employment Rights Act 1996* provides that the tribunal should reduce the basic award to reflect any circumstances where the tribunal considers the conduct of the claimant before the dismissal makes it just and equitable to do so. By *s123(6) ERA 1996*, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding. The tribunal must make a reduction where there is a finding of contributory fault (*Optikinetics Limited v Whooley [1999] ICR 984*). The reduction may be as much as 100% (*W Devis & Sons Ltd v Atkins [1977] ICR 662*).

65. When considering whether or not to make a reduction for contributory conduct, it is helpful to keep in mind guidance from *Nelson v BBC (No 2) [1980] ICR 110* which said:

    a. the relevant action must be culpable and blameworthy;
    b. it must have caused or contributed to the dismissal;
    c. it must be just and equitable to reduce the award by the proportion specified.

66. Broadly, it is understood that the reduction should be: (1) 100% where the employee's conduct is wholly to blame for the dismissal; (2) 75% where the employee is mostly to blame; (3) 50% where there is equal blame; and (4) 25% where the employee is partly to blame.

ACAS uplift

67. Where there has been an unreasonable failure to follow ACAS codes of practice on the part of the employer, the tribunal is able to uplift an award by up to 25% if it

considers it just and equitable to do so (*s207A(2) Trade Union and Labour Relations (Consolidation) Act 1992)*. The tribunal is also able to reduce an award by up to 25% if it is considered just and equitable to do so in circumstances where an employee has unreasonably failed to comply with ACAS codes of practice (*207A(3) Trade Union and Labour Relations (Consolidation) Act 1992*).

Discussion and conclusions

Unfair dismissal

68. The evidence clearly shows that the respondent considers that the claimant had committed the misconduct alleged and dismissed him for that reason. There is a genuinely held belief in the misconduct alleged. The question is whether the respondent formed that belief on reasonable grounds following an investigation which was reasonable in all the circumstances of the case, keeping in mind that at all times it must be considered whether the investigation fell within the reasonable band of responses of a reasonable employer.

69. In my judgment, the respondent's attitude towards the claimant was set and did not deviate from the moment the claimant indicated he would go to get a second fit note to allow him to start working again. Miss Payne considered that this would inevitably mean that the first fit note was fraudulent or invalid and told the claimant as much on that initial telephone call in late April 2021. The claimant was accused of a serious offence – supplying false documents or supplying documents for a false purpose. It follows that more is expected for the respondent's investigation to be considered reasonable in the circumstances.

70. Miss Payne, with no training about how to read fit notes and without pausing to consider what the fit note meant, concluded that the claimant must have lied to obtain a fit note which said 'backache' on it. This attitude bled into the investigation meeting when Miss Payne turned the direction of the conversation to focus on what the fit note said on it. It bled into the disciplinary stage when Miss MacDonald, present when Miss Payne warned the claimant about the consequences of getting the second fit note, changed the course of the subject to talk about what it said on the fit notes. It bled into the appeal meeting stage when the claimant was asked to explain how he had a fit note with 'backache' written on it when he was not at that time suffering with back pain.

71. This misunderstanding on the part of the respondent is underpinned in the allegations brought against the respondent. If account is taken of the possibility that the claimant could legitimately have a fit note which says 'backache' on it because the doctor understands it to be a managed chronic condition or vulnerability (which I find that it was), then factually speaking the claimant has not submitted false documents to the respondent and could not have breached the trust, confidence and loyalty that the respondent might be expected to have in him.

72. The investigation did not include the possibility that what the claimant was saying could be true, and for this reason it cannot be said to have been reasonable in the circumstances. I find, similarly to *Tepper* outlined above, the respondent formed a hasty belief that the claimant must have committed a significant act of misconduct without pausing to make reasonable enquiries about the reasoning behind it. The

respondent, in my view, then acted upon that hastily formed view without adequate investigation.

73. It is also clear to me that the respondent did not account at all for any language barrier issues, at the investigation stage, that the claimant experienced either in relation to the facts that gave round to the procurement of the fit notes, the procurement of the fit notes themselves, or with the investigation stage. The claimant has an admirable command of English for someone without a formal English education, but the transcripts show that the claimant's English is occasionally broken and he mentions that he is unsure he is communicating what he means properly.

74. In light of the above, I do not consider that the respondent's belief in the claimant's conduct could have been formed on reasonable grounds following a reasonable investigation in the circumstances.

75. I also find that the claimant's dismissal process suffered from further flaws which made it unfair. Mr Neumann's investigation report drew conclusions on the basis of the material he had reviewed and those conclusions were passed to Mr Galan. This does not mean that unfairness automatically follows, but I do consider that Mr Galan was influenced by those conclusions, based on errors, and followed the conclusions without opening his mind to all of the circumstances of the case. It is particularly telling, in my judgment, that Mr Galan did not seek to conduct any investigation or review any additional material of his own even though he did admit in the hearing that more information would have been useful and he was aware of evidence which if produced might have led him to change his mind about the sanction imposed.

76. It is also apparent from early on in the disciplinary meeting that Mr Galan had decided that the claimant was guilty of the misconduct. He said as much and then the rest of the meeting was directed towards any potentially mitigating responses. Mr Galan did not listen to the claimant's explanations about the fit notes or, if he did, he did not consider them openly as a reasonable disciplinary officer would. Perhaps most surprisingly, Mr Galan described the situation that the claimant found himself in when not able to work or earn properly as 'not my problem'. I do not consider that this attitude is appropriate or indicative of a reasonable disciplinary officer. No reasonable approach from a manager would adopt this sort of dismissive attitude. Overall, then, I consider that the process conducted by Mr Galan fell outside the range of reasonable responses open to the respondent.

77. It is possible that the procedural defects outlined could be cured at the appeal stage. This is most frequently the case when an investigation has failed to look at a point properly and the appeal stage considers the point and decides what effect it has on the outcome. In this instance, Mr Moseley's process did consider the language issue in some detail in the appeal hearing, and the claimant had another opportunity to put his position across very plainly. However, Mr Moseley did not take on board the claimant's case about what he said to his doctor and what the purpose was in terms of getting evidence to protect a medical issue that the claimant had been protecting since an acute injury. This meant that the respondent still failed, at the final possible hurdle, to properly engage with the fit note and what it actually means. By upholding the decision to dismiss for falsification of

documentation without pausing to truly reflect on if the documents were false, Mr Moseley effectively rubber stamped the earlier unfairness which had been introduced by Miss Payne's very early assessment that the first fit note must be questioned as invalid if a second fit note is procured by the claimant. The respondent did not ever delve deeper than this first reading of the documents in question, and that in my judgment is an unreasonable mistake to have made.

78. I consider that these points of unfairness present in the claimant's case necessitate that I find the respondent's process as a whole fell outside of the band of reasonable responses. Similarly, in my judgment, the decision to dismiss fell outside of the reasonable band of responses open to the respondent. No reasonable employer would dismiss an employee for these allegations where:

    a. the employee had been protected from doing something by management following an injury;
    b. the employee was told to obtain medical evidence of the injury to continue with that protection;
    c. the employee procured evidence he understood was required;
    d. that evidence was accurate following a medical professional's judgement that the employee had an on-going back condition;
    e. the employee was then told not to work because he had procured a fit note rather than a letter, perhaps in error;
    f. the employee took steps to rectify that situation; and
    g. in so doing, sought to override the fit note that the employer led him to think must have been produced in error.

79. Consequently, I find that the claimant was unfairly dismissed and he is entitled to be compensated accordingly. Should this compensation be reduced under either *Polkey* or the legislation relating to contributory conduct?

80. Considering first *Polkey*. Mr Galan's evidence was that he agonised for some time, days, over the sanction to impose on the claimant, and that he decided to dismiss the claimant reluctantly after careful consideration of the evidence. I consider that, if the procedural deficiencies outlined above had been rectified such that Mr Galan was presented with a more open minded and balanced picture of the circumstances prior to the disciplinary meeting, the claimant would not have been dismissed. Further, if Mr Galan himself had asked the claimant for further clarification, or a specific letter from the doctor explaining what the fit notes meant, and the claimant had produced that, then I consider that the claimant would also have not been dismissed. It follows that I should make no deduction in respect of what is known as the Polkey reduction. Indeed, in my judgment, the likely outcomes should the procedure have been fair mean that a decision to dismiss would remain outside of the reasonable range of responses available to a reasonable employer in the circumstances.

81. However, I do consider that I should make a reduction to reflect culpable conduct on the part of the claimant which contributed to his dismissal. The claimant submitted fit notes which lacked detail and which were open to mistaken interpretation by the respondent. Whilst I do not consider this to be culpable or blameworthy conduct in itself, I do consider that the claimant could have done more to try to resolve the misunderstanding which ensued. Submission of the

second fit note also added to the confusion and did not help to shed light on matters.

82. In my judgment, the claimant could have enlisted more help to procure the sort of information from his doctor which could have saved himself from dismissal. The failure to do so did contribute to his dismissal, and so I consider that I should make a contributory conduct deduction to the claimant's basic and compensatory awards to account for his part in the misunderstanding relating to the dismissal. The deduction I make to both awards is 25%, which is a percentage I consider to be just and equitable in the circumstances.

ACAS Codes of Practice

83. The claimant submits that the respondent unreasonably failed to follow the ACAS code relating to disciplinary action and that it is just and equitable to uplift his compensatory award by 25% as a consequence. In my view, it does not automatically follow that there has been an unreasonable failure to follow an ACAS code of practice even where a dismissal is found to be unfair. I can identify no unreasonable failure to follow the code. The process followed was comprehensive, but misguided in two or three material aspects. Consequently, I make no uplift in respect of ACAS.

Remedy

84. Remedy falls to be considered at a remedy hearing taking account of the principles outlined above in relation to reductions and ACAS. The claimant should also submit updated documentation showing how he mitigated his losses – the documents in the hearing bundle did not show the mitigation he said he had completed and I am conscious that some time will have passed between the final hearing and a remedy hearing.

Employment Judge Fredericks
24 May 2022