EMPLOYMENT TRIBUNALS

Claimant: **Mr D Duffy**

Respondent: **Stagecoach South East**

Heard: in private by CVP On: 9th – 10th May 2022

Before: **Employment Judge Codd**

Appearances

For the claimant: in person
For the respondent: Ms R Caneti

JUDGMENT

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

REASONS

1. This is an application brought by the claimant Mr Daniel Duffy for unfair dismissal. The claimant was employed in various roles from 11.08.2009 for the respondent, Stagecoach South East. The respondent operates bus services. The claimant has been promoted a number of times and at the point of his dismissal, he was employed as an engineering manager until his dismissal on 06.04.2020.

2. The claimant entered a period of early conciliation between 01.07.2020 and 15.07.2020. His ET1 claim is dated 11.08.2020, and was made within time.

3. The respondent relies upon the conduct of the claimant as being the reason for his dismissal in the contect of S98(4) Employment Rights Act 2006.

Preliminary Matters

4. At the outset of the hearing there were some issues with all parties and indeed the court having complete papers. I have afforded time where necessary to allow the claimant to read any material which he was missing. I am satisfied that he has had access to all relevant material and that he has, where necessary, been afforded time to consider the same.

Issues for the tribunal to decide

5. Having dealt with these preliminary matters, I agreed with the parties that the issues for me to decide related to whether there had been an unfair dismissal. Although the **Polkey** and contributory conduct issues concerned remedy, I agreed with the parties that I would consider them at this stage and invited the parties to deal with them in evidence and submissions.

6. Although the claimant has been unrepresented, he has diligently and comprehensively addressed the legal arguments, and presented his case.

Unfair dismissal

7. Section 98 of the Employment Rights Act 1996, deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). The

burden of proof rests with the employer to demonstrate the reasons. In this case the respondent relies upon 'conduct' being the potentially fair reason for dismissal.

8. Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider S98(4), without there being any burden of proof on either party, namely whether the respondent acted fairly or unfairly in dismissing for that reason. I must consider the overall merits and circumstances of the case when balancing this issue.

9. A principal limb of the claimant's case was that the procedural aspects of his dismissal were unfair, and that had a fair process been applied, he argues that he should not have been dismissed.

10. In misconduct dismissals, there is well-established guidance for Tribunals on the approach to fairness in section 98(4). The decisions in **BHS V Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827** should be applied. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, (including the investigation, the grounds for belief, the penalty imposed, and the procedure followed), in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

11. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.**

12. Finally, I must consider whether it would be just and equitable to reduce the amount of the claimant's award because of any blameworthy or culpable conduct before the dismissal, as set out in section 122(2) & 123(6) of the 1996 Act, and if so to what extent? The respondent said that if I decided that the claimant was unfairly dismissed, the award should be reduced by 100%.

Background

13. The claimant was suspended from duty on full pay on 16.03.2020 by the engineering director Mark Wallis. The respondent appointed an investigating officer - Grahame Patterson - to conduct an investigation.

14. The original suspension related to an incident on the 5th March 2020 whereby damage had occurred to both fuel pumps at the depot where the claimant worked, resulting in an inability to fuel the buses. After some delay the claimant was contacted and he attended (out of hours) and personally fixed one of the pumps. However, a number of buses had been missed from the fueling run. The following day a number of these vehicles ran out of fuel, resulting in them having to be swapped, and in one case breaking down, resulting in the police having to attend the scene.

15. It was said that the claimant was responsible for the failure to ensure the buses had appropriate fuel, for minimising the incident, concealing the lost mileage and failing to fill out a major incident report relating to the police callout. The claimant was suspended on the 16.03.20.

16. Whilst he was suspended two further matters came to light which were subject to investigation. These related to an incident whereby the claimant was alleged to have permitted a bus to enter service, when its breaks were measured to be below the manufacturer's limit and therefore should have been replaced prior to re-entering service. The claimant avers that he re-measured those breaks and that they were on the limit. It is not disputed that he failed to record this within the service record for the vehicle. The bus had therefore been in service for some 13 further days prior to this being discovered.

17. The second incident related to an alleged payroll irregularity. This related to the approval of payroll where the hours worked by an employee were substantially less than the contracted expectation and the time recorded by the clock card. The claimant had approved full pay for the individual concerned. There was a dispute for how long this had endured. The matter is further complicated by the fact that the employee in question was the son of the claimant.

18. Once these matters were discovered further letters of suspension were issued to the claimant and all three matters formed the basis of a disciplinary hearing.

19. The disciplinary hearing took place on the telephone on 06.04.20. That meeting was chaired by Joanne Howe and concluded with a decision to dismiss the claimant on all three grounds of alleged misconduct.

20. The claimant appealed. On the 22.04.2020 an appeal hearing took place chaired by Chris Remnant. That appeal hearing upheld the appeal in part. The decision in relation to the misconduct dismissal relating to the fueling issue on 6th March 2020 was overturned. However, the appeal upheld the dismissal decision upon the two other limbs.

21. The respondent has a two-stage appeal process. The claimant initiated this, and a further appeal hearing was heard by the managing director Mr Mitchel on 07.05.20. During the intervening period of time two further matters were alleged against the claimant. Firstly. that he had solicited workers to falsify overtime claims for a cut of the money, and secondly that he had not accounted properly for the sale of scrap metal. The latter of these two matters was not progressed as it was not felt necessary or proportionate to include this within the misconduct hearing.

22. The appeal was reconvened again via telephone on 19.06.20 where the dismissal decision was upheld. Subsequent to that appeal the claimant initiated these proceedings.

23. The claimant claims that the appeal process was fundamentally unfair, having been conducted entirely via telephone and taking 14 weeks to conclude. He offers mitigation and justification for the misconduct complained of (which I shall deal with below). He also argues that the dismissal sanction was unduly harsh and should have been substituted with a lesser sanction. For the avoidance of doubt the claimant does not seek re-instatement.

24. I have considered an extensive bundle of evidence and I have heard evidence from the key witnesses in this matter, namely the claimant, Grahame Patterson the

investigating officer, and the three decision makers, Joanne Howe, Chris Remnant and Joel Mitchell. The evidence and submissions lasted for two days.

Findings of fact and analysis

25. Where it has been necessary to resolve a conflict of evidence, I have indicated this. No witness (other than the claimant) has been called by either party to speak to any elements of disputed facts.

Incident on 6th March 2020

26. This incident was the catalyst for the claimant's dismissal. The incident was not of his making. He attended out of hours on 5th March 2020 and took personal responsibility for repairing the fuel pump. That much was commendable and underscored the commitment which the claimant had shown to his role and to the respondent.

27. However, having taken charge of the incident, he was then in the most senior management position to resolve any difficulties created by this. The claimant told me that along with a colleague they agreed that vehicles with half a tank of fuel, (which had been missing from the fuel run) should be ok for the following day as they had used less than half a tank on the preceding day. This was a huge assumption on their part and left no margin for error.

28. I was informed that the vehicle fuel sheets had been marked with a cross for the vehicles that had been missed. It then appears that no one was tasked with cross-referencing the vehicles that had been missed, with the amount of fuel they had. The claimant instigated no procedure to ensure they were checked or fueled. The claimant admitted in evidence to me that he should have made arrangements to

put the vehicles back through the fueling line. I agree. Subsequently, why the drivers did not raise early concerns was not explored by the respondent.

29. However, this was in my view undoubtedly a chaotic and stressful situation. No evidence has been presented to me to suggest that the respondent had any form of procedure or contingency to deal with these types of issues. Undoubtedly, fueling issues did occur from time to time. Grahame Patterson confirmed that there had been issues over the years where such incidents had occurred, for reasons beyond the control of engineering.

30. In terms of the criticisms for the coding of the lost mileage, much is made in the papers of the claimant's use of 'other internal' as the cause of the issues. From all the evidence I heard, I could not decipher what the claimant was supposed to record the errors as. It seemed to me that the rationale provided by the claimant was justifiable, even if he was incorrect in doing so. I do not consider there was any attempt to conceal the issue.

31. The issue about whether the claimant had minimised the incident by asking a colleague to "shush" when discussing the issue, was a factor in the original dismissal. That was later overturned upon appeal and Chris Remnant, who accepted that this was banter between colleagues discussing the issue and not a genuine minimisation. Text messages produced in this bundle confirm as much.

32. Finally, with regard to the major incident report, which it is said the claimant failed to complete following the police attendance. I have to say that this was a process which lacked a clear and transparent procedure. No one addressed me on how soon this should be completed. Joanne Howe, was asked by me to explain how the person responsible for completing the report was identified. Having heard her

evidence, I remain at a loss to understand what the procedure was. I am not sure that she knew either. It seems to me that any number of senior managers could or should have been responsible for the task. Who it was assigned to and how, was at best opaque. Whether the claimant ever knew it was his responsibility is again unclear.

33. The analysis I have articulated above, goes above and beyond the reasons that Chris Remnant gave for upholding the appeal in respect of this issue. I have gone into detail because it is important to understand how the disciplinary process started and the justification for the suspension.

34. Whilst there were undoubtedly errors in the way the incident was handled by the claimant. I do not understand why these could not have been resolved by discussion, performance management and supervision by his line manager, in the first instance, rather than moving to an investigatory phase. The fact that there were no formal management meetings within engineering about this issue goes some way to justifying the claimant's position that there was a fractured working relationship with his line manager. Given that the claimant had been consistently promoted over his 13-year career with the company, was not taken into account at this stage.

35. The decision to suspend the claimant (for the reasons articulated above) appeared to me to be unfair, and unnecessary in the circumstances. Had the suspension and dismissal been based on these matters alone, then I would have been concerned about the fairness of the dismissal decision. It seems to me that Chris Remnant was right to uphold the claimant's appeal in this regard. However, this is far from the end of the process.

36. The fact that during the claimant's suspension, that he was further suspended for two additional matters, cured the deficits in fairness regarding the original suspension. I say this because those two matters related principally to vehicle safety and payroll irregularities, both of which are matters which an employer might reasonably be expected to suspend an employee for, whilst an investigation took place. I accept that the claimant was in a position of special responsibility with regard to safety.

37. Graham Patterson was independent as an investigating officer and he had extensive knowledge of engineering work practices. Indeed, he would have been the claimant's line manager in November 2019 in respect of the payroll irregularities. The claimant raised no issues with the integrity and knowledge of Grahame Patterson, other than whether he had spoken to all necessary employees.

38. It seems to me that the investigation carried out by Grahame Patterson on these remaining issues was fair and balanced, and proportionate to the size of the company. I note that the claimant does not deny that he had not completed the paperwork in respect of his decision to authorise the use of the vehicle with the break disc issue, or that he had authorised payroll for hours not worked. I shall deal with the subsequent allegations later.

Break disc issue

39. I have heard extensive evidence on this matter. There is no dispute that the vehicle in question had one disc that was measured by the engineer to be below the manufacturing tolerance. The claimant re-measured the brakes (with the wheel on) and considered that they were 'on the limit'.

40. Mr Patterson agreed in evidence that this was not strictly speaking illegal if the vehicle was below the tolerance. He argued that at this level the manufacturers indicate that the performance of the breaking could be affected. He told me that if there was any doubt the wheel should have been removed to measure it more accurately and that this was not done. He indicated that in any event the failure to update the paperwork with the measurements and sign it fit for service was the issue, even if the break test was satisfactory (as the claimant argues).

41. Mr Patterson argued that if an accident had occurred, then there would have been a VOSA investigation, and the company and its senior staff may have been liable in those circumstances. There was nothing to evidence the claimant's assertion that he had measured the breaks and his reading was not recorded.

42. I accept that the claimant measured the break. I accept that he believed it was safe (that day). I do not for a second believe that the claimant would have allowed the vehicle to enter service if he perceived it to be unsafe. However, I suspect that the claimant was driven by an ambition to have a smooth-running operation. That unfortunately has clouded his judgment.

43. The vehicle had its breaks measured on a 28-day rolling basis. It follows that there must be a logic to this, regarding the amount of wear sustained during this period. The fact that the vehicle entered service for 13 days (almost half of this period), suggests that at the point it was removed, it would have been well below the tolerance, even if it was at the limit as the claimant suggests.

44. The claimant failed to record his measurements or his rationale for allowing the vehicle to enter service. He ordered the parts, but did not arrange for them to be fitted. Although he was on annual leave for some of the following period, I find that

he should have taken steps to ensure the vehicle was serviced and he should have recorded his actions.

45. His failure to do so allowed a vehicle to enter service that either was or became unroadworthy (according to manufacturing specifications). I agree with Mr Paterson that in those circumstances the company may have faced significant consequences including criminal liability, had an incident occurred. In short, I can easily see how those charged with investigating this matter perceived this neglect to amount to gross misconduct. It is not an unreasonable conclusion to arrive at.

Payroll irregularities

46. The claimant does not deny that he authorised payments to his son and he says another worker as well, when their time keeping fell below the expected standard. There was no dispute that there was a responsibility upon the claimant to check the timesheets against the clock cards. He argued that the clocking in was not always accurate. This stems from a dispute regarding the number of authorisations he had made.

47. The claimant argues that in the past that he had been permitted to authorise overpayment (compared to the clocking cards) for another worker, so that they would receive full pay at times of ill health. Albeit this permission had been specifically authorised for this individual by his line manager.

48. The claimant argued that the workers in question here were suffering with mental health issues and he was trying to support them through a difficult period and manage them out of the situation. The respondent treated these incidents as the claimant seeking to profit from a fraudulent entry on the time cards.

49. I have great difficulty with the suggestion that the claimant was profiting from the arrangement. I prefer the claimant's argument that he was trying to support underperforming workers. Unfortunately, I consider that the claimant minimised the period of time that this had gone on for and I am not convinced he has a clear picture of this himself.

50. I am also persuaded that the claimant did not have authority to authorise these payments, either from a management perspective, or without further evidence of the health difficulties of the workers involved, which should have been recorded. The difficulty here is that the claimant had a family relationship with the worker involved. That gave him access to information not available to the respondent. Anyone objectively reviewing the situation thereafter would not have such knowledge. In short the claimant cannot evidence his point.

51. Given the relationship the claimant had with the worker involved, he should have sought approval for his approach as it could easily have been seen as a conflict of interest. That approval (at the time) would have been from Grahame Patterson, with whom the claimant had a positive working relationship and whom he knew had a compassionate approach to other employees in similar circumstances. I consider the reason he did not do so was because he knew that another manager may well have been less tolerant of the situation.

52. It seems to me that in the circumstances it would not have been unreasonable to conclude that the actions of the claimant amounted to misconduct.

Burchell Test

53. I have heard extensive evidence and submission on the issue of the disciplinary process and investigation. The claimant has been candid where he accepts his conduct has been culpable. I have carefully considered the fairness of the decision making in the context of S98(4).

54. I have already expressed my findings and doubt about the origin of the investigatory process. It was initially flawed and unnecessary in my view. However, it seems to me that there was a genuine belief that the claimant had committed a misconduct. Once the investigation started further allegations and evidence came to light. From the point of the second suspension letters, the process was in my view corrected and had a secure foundation. I have no hesitation in finding that from this point that the respondent had a reasonable belief in the claimant's misconduct.

55. It seems to me that although there were some shortcomings in relation to the investigation of the fueling incident on 6th March, the investigation itself was thorough and balanced. The claimant had an opportunity to put his case and he has been candid in accepting his own errors and shortcomings. Witnesses were spoken to. Many of the matters were acknowledged by the claimant. The fact that the respondent did not re-interview certain people, did not in my view render the whole investigation unfair, given the context of the claimant's admissions.

56. In terms of the original disciplinary meeting chaired by Ms Howe, the claimant complained that this should have been heard by someone with an engineering background. Had it been so, he argues a greater latitude would have been afforded to him. I disagree.

57. Whilst I have made findings in respect of the flaws in the decision making regarding the fueling incidents, these were overturned subsequently by the appeal.

58. It strikes me that it does not take an engineer to observe that the break disc service paperwork provided by the claimant was incomplete, and that fact alone created a liability for the respondent. The fact that elements in respect of the fuel pump incidents were overturned upon appeal shows the objectivity with which the respondent viewed the issues.

59. By the time matters came before Joel Mitchell for the final appeal, two further matters had arisen. It was deemed that matters in relation to the scrap metal policy and funds would not be pursued. I make no finding in respect of that.

60. However, the second matter was more concerning. Mr Mitchell said that allegations made by fellow employees that the claimant had offered to artificially inflate their overtime for a cut of the money. Mr Mitchel argued in evidence that these matters refocused him. He was, by his own admission, inclined to see the good in people and re-instate them. The high regard which he held the claimant in, was clear to me.

61. Mr Mitchell said that it was these allegations which refocused and underlined his belief that the claimant was prepared to try and profit from these arrangements. He referred to his belief that the claimant was profiting from payroll irregularities with his son.

62. These new allegations added little, in my view, to the overall investigation. I am inclined to accept what the claimant says, that these comments had their origins

in light-hearted banter or a joke related to how much overtime he was authorising. Nor do I believe that they truly influenced the appeal decision. Mr Mitchell's reasoning on the other matters was clear, reasonable and justifiable.

63. Mr Mitchell's role was to look at the evidence and the process to do date to decide if it had been fair and review any new submission. It was not a rehearing. The appeal process has been settled with the union. The claimant was represented at each hearing by a union representative. Whilst the hearings took place by telephone, I am not persuaded that these made them unfair. These meetings took place at the height of the covid pandemic. Whilst video or in person would have been preferable, I am satisfied that the claimant was able to make his points appropriately.

64. The respondent company is a household name. They have well-defined resources and procedures for dealing with disciplinary matters, which have been agreed with the union. These were followed in full. I am satisfied that the steps taken in the claimant's case were an appropriate use of resources for the size of the company involved. The investigation itself appeared reasonable to me.

65. Turning then to consider the fairness of the S98(4) decision. The claimant has been candid regarding his own shortcomings. Whilst there were issues with the investigation and decision regarding the 5th and 6th May. The subsequent suspension for the break disc issue and the payroll irregularities cured any deficits in the process. These subsequent issues were in many respects more serious than the fuel pump incident.

66. Each of these matters independently contained admissions by the claimant of his own culpability. It is to his credit that he has not tried to hide away from them.

However, I accept that safety is a significant issue for the respondent. The decision to dismiss him for the break disc issue seems to be entirely within the band of reasonable responses for an employer. The claimant was responsible for safety and his shortcomings in those circumstances were significant.

67. Equally the payroll irregularities clearly severed the trust and confidence that had been afforded to the claimant. Even if he had some discretion to support his staff, the level and duration here as well as the family relationship was a matter, he should have sought authority for. Not least because he was the only one who knew of his son's difficulties which were entirely undocumented elsewhere, by the claimant. For all those reasons I conclude that it was within a band of reasonable responses to dismiss the claimant for the payroll issues.

68. Therefore, both separately and together the claimants' shortcomings with the break disc and the payroll were within the band of reasonable responses to merit dismissal.

69. I have considered the claimant's argument that a demotion may have been appropriate. However, I am not satisfied that this would have cured the trust and confidence breach. The safety breach, as I have said, was significant. For these reasons I think it was reasonable for the respondent to conclude that a dismissal without notice was reasonable in the circumstances.

70. Looking at matters in their totality, I am satisfied that the respondent acted fairly and reasonably and had reasonable belief in the claimant's misconduct. The claimant admitted his errors and the investigation, in the main, was comprehensive and fair. For all of those reasons I consider the **Burchell** test to be satisfied.

71. For all of those reasons above, I dismiss the claimants claim for unfair dismissal.

72. That is my judgment.

Employment Judge **Codd**

27 May 2022

Sent to the parties on

08 June 2022

For the Tribunal

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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