EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102981/2020

Held in Glasgow on 5, 6 and 7 July 2022

Employment Judge L Wiseman

DR	**Claimant** **In Person**
Automobile Association Developments Ltd	**Respondent** **Represented by:** **Ms A Stobart - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal claiming he had been unfairly dismissed, was due to be paid notice pay and that he had been discriminated against because of disability.

2. The respondent entered a response admitting the claimant had been dismissed for reasons of conduct, but denying the dismissal was unfair. The respondent denied the allegations of discrimination and asserted the claimant was not a disabled person in terms of the Equality Act.

3. A preliminary hearing took place on the 11 February 2022 at which a tribunal decided the claimant was not a disabled person within the meaning of section 6 of the Equality Act.

4. The issues for the tribunal to determine at this hearing were:

- was the dismissal of the claimant unfair and
- was the claimant entitled to be paid any notice pay.

5. The tribunal heard evidence from Mr Alastair Nisbet, Customer Performance Manager, who took the decision to dismiss; Mr Michael Bedworth, Head of Roadside Operations (North), who heard the appeal, and the claimant. The tribunal was also referred to a jointly produced folder of productions. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

6. The claimant had indicated on the claim form that he wished reinstatement if successful with his claim. The claimant decided against this during his evidence when he confirmed he could not realistically return to work with the respondent.

Findings of fact

7. The respondent is part of the Automobile Association group, and it provides car insurance, driving lessons, breakdown cover/assistance, motoring advice and other services.

8. The claimant was employed by the respondent as an Outdoor Patrol Agent (known as Patrol) from the 27 September 2010, until the time of his dismissal on the 2 April 2020.

9. The claimant reported to a Performance Leader, Mr Paul McCrorie, who in turn reported to a Customer Performance Manager, Mr Sam Alcorn.

10. The claimant's key duties were to attend emergency breakdowns at the side of the road, diagnose and fix the problem where possible, and if this was not possible then to recover the vehicle or arrange for a truck to recover the vehicle. The claimant, in common with all Patrols, used a laptop for allocation of work and the van driven by the claimant had a tracker system in place and telematics to enable driver behaviour to be monitored.

11. The respondent had a Misappropriation of Time policy, which was briefed to employees again in July 2018, following the management restructure (page

165). The briefing acknowledged patrols had not, in some areas, received the management guidance required, and there had been an increase in behaviours which were not acceptable. The briefing went on to say that *"if you have picked up some bad practices in the past few months, we hope that this educational piece will allow you to correct any working practices that could be deemed as persistent Misappropriation of AA Time."* The briefing went on to give examples of how the respondent wanted patrols to behave, the way in which bad habits affected customers and the business, an explanation of gross misconduct and why the respondent viewed misappropriation of company time as a gross misconduct offence.

12. Misappropriation of company time was also included in the Independent Democratic Union (IDU) Bulletin of July 2018 (page 169) when employees were informed the respondent had lots of data to enable it to deploy jobs, but that it could also be used to highlight if a patrol was doing something out of the ordinary.

13. The IDU August bulletin (page 225) also made reference to Misappropriation of Time and *stated "Please be aware that the AA are looking very seriously at misappropriation of AA time. This means when you are doing something to allegedly avoid work, such as driving away from jobs, holding onto jobs and moving location, misuse of unproductive icons to name just a few. We know the pressures that patrols are under and are fully prepared to defend the allegations made against our members, but the best defence is to avoid the pitfalls in the first place…. Please remember your service vehicles are tracked and that everything you do can be monitored and looked back upon if something arouses suspicion."* The Bulletin warned that the respondent was likely to view a pattern of avoiding work over a longer period very harshly.

14. An AA Business Voice document prepared in September 2018 was produced at page 227. This document transcribed a recording made by Mr Michael Bedworth and Mr Dan Knowles regarding misappropriation of company time.

15. The respondent takes misappropriation of company time very seriously because it not only causes delay in service to members but is also a huge

cost for the company and impacts on efficiency. Patrols are lone workers and trust is a key feature of the employer/employee relationship.

16. The above information was available on The Hub (an online information resource for employees). The claimant had access to this information even though he preferred to use the online resource for patrols only (PSNOM).

17. Mr Sam Alcorn emailed the four Performance Leaders for whom he was responsible on the 20 January 2020 (page 191) regarding roadside service (that is, patrol) tow times. This measured the time between a patrol confirming he could not complete a repair and confirming he needed to make a recovery. Time spent on the job is an important factor for the respondent because it feeds into budgets and how many jobs could be expected of patrols in a particular area. The information attached to the email identified the claimant as one of five people who were outside the average for the task. Mr Alcorn asked the Performance Leader to review their teams and provide feedback.

18. Mr McCrorie responded by email of the 31 January 2020 (page 193) with initial findings of an investigation into the claimant's recovery times. Mr McCrorie provided a detailed breakdown of four jobs and identified a number of questions to be asked of the claimant to explain various actions, or inactions, during the course of the jobs investigated.

19. Mr Alcorn emailed Mr Michael Bedworth on the 3 February (page 200) to inform him the initial investigation had identified misappropriation of company time and that a pack was being put together for a formal disciplinary.

20. Mr Alcorn sought HR advice from Mr David Wynn regarding suspension of the claimant (page 208). The claimant was not suspended because he was considered to be low risk.

21. Mr Alcorn met with the claimant on the 27 February and notes of the investigation meeting were produced at page 214. Mr Alcorn and the claimant were present at the meeting, and also another manager who took notes. Mr Alcorn informed the claimant the purpose of the meeting was to investigate why the claimant had appeared on a national report for having an excessive

non-drive time (this was on occasions where the claimant had attended at a roadside, converted to recovery and his under-bonnet time, loading and unloading time were measured against the overall "A2C against your EPA"). The claimant acknowledged his understanding of non-drive time.

22. Mr Alcorn put to the claimant the four incidents which had been detailed by Mr McCrorie, and the claimant put forward his explanation. At the end of the meeting Mr Alcorn informed the claimant that a more in-depth investigation needed to be done with a view to a hearing under the respondent's disciplinary procedures. The claimant was also advised that serious misappropriation of company time may be viewed as gross misconduct.

23. Mr Alcorn concluded his in-depth investigation and prepared an Investigation Report (page 218 – 341). The report identified 63 incidents where it was alleged the claimant had misappropriated company time. The report contained detailed information and photographs in respect of each alleged incident.

24. Mr Nisbet, Customer Performance Manager, was asked to conduct the disciplinary hearing. He wrote to the claimant on the 3 March (page 343) to invite him to attend a disciplinary hearing on the 12 March (subsequently rearranged to the 19 March). The allegations against the claimant were (i) that he failed to follow AA policies and procedures; (ii) that he misappropriated company time and (iii) there had been unacceptable working practices and behaviours.

25. Mr Nisbet was provided with a copy of the Investigation Report, and this was also sent to the claimant in advance of the disciplinary hearing.

26. The claimant wrote to Mr Nisbet on the 17 March (page 350) setting out his "mental issues" which he thought he had been dealing with but which, unbeknown to him, had been affecting his work. The claimant made reference to buying a new house which had been over his maximum budget and there had been difficulties with the builder; his wife becoming pregnant and worrying about finances; a previous disciplinary issue which had resulted in a final written warning and an allegation against a volunteer football coach with his

son's team. All of these issues led to the claimant feeling unable to cope although he was now receiving help with his depression.

27. The disciplinary hearing took place on the 19 March 2020 and notes of the hearing were produced at page 355. The claimant was represented by Mr John Wood, a trade union representative from IDU. A note taker was present.

28. Mr Nisbet put each of the allegations to the claimant for a response. The claimant had prepared for the disciplinary hearing by writing a response to each of the allegations, using his diary for information and reference. The claimant, for example, had attended a Renault Traffic with a broken rear brake pipe. The claimant did a repair on the 3.5 tonne vehicle. There was a concern the claimant had allowed the member to drive through the city in the vehicle with faulty brakes. The claimant believed he had been helpful to the member, but acknowledged he would not do it again.

29. The claimant was asked about a Vauxhall Meriva where it had been coded as a temporary repair and then a recovery. The claimant had spent 2 hours in recovery status. The issue to be addressed was that the claimant ought to have closed the job down, but instead he had kept the job open until he got home for his break (which took 71 minutes).

30. There were also examples where it appeared the claimant had not closed off a job at the actual time, but had kept the job open until he was into the last hour of his shift, which meant he would not be given any further jobs to attend. There were also examples of the claimant entering one post code into the vehicle, but attending at another location; and examples of the claimant changing his break time to avoid getting jobs.

31. The claimant responded to the examples raised by Mr Nisbet and often explained the job had been difficult, or that he had had to go for a coffee or take time to calm down or to clear his head.

32. Mr Nisbet adjourned the meeting at 11.15 and upon reconvening the hearing he informed the claimant there was a lot of information still to check and that he intended to adjourn the hearing until a future date. One of the issues Mr

Nisbet wished to check was the claimant's performance when working on Pay Per Job work (PPJ), where the patrol can volunteer to do stand-by shifts and earn an enhanced rate of pay for each job attended.

33. Mr Nisbet was provided with information (page 382) which confirmed the behaviours being investigated were only displayed when the claimant was working on roadside recovery, which is basic rate work. None of the concerning behaviour was displayed when the claimant was working on PPJ. This led Mr Nisbet to question the claimant's position that his mental health had been affecting his work.

34. The claimant went off sick on the 25 March 2020 (page 400) because of depression.

35. The claimant was advised by email of the 27 March (page 401) that a continued disciplinary hearing had been arranged for the 2 April. The claimant was advised that following on from his responses to the incidents put to him, his behaviours on normal roadside recovery had been compared to his PPJ shifts, and that he would be required to provide information regarding some of his activity.

36. Mr Nisbet took HR advice prior to proceeding with the continued hearing on the 2 April because where an employee is on sickness absence it would be usual for the hearing to be postponed. The claimant had however indicated he wished the hearing to proceed and so on that basis HR agreed the hearing could proceed.

37. The claimant was represented by Mr Simon Wright, a more senior trade union representative, on the 2 April. The notes of the previous disciplinary hearing had been agreed by Mr John Wood, but the claimant wished to discuss and agree several changes to the notes at the start of the continued hearing.

38. Mr Nisbet put to the claimant other incidents and allegations from the Investigation report. Mr Nisbet had also, in the intervening period, had Mr Hutton contact two members to check whether they agreed with the claimant's

version of events: they did not. Mr Nisbet put this to the claimant and his only explanation was that the members had been lying.

39. Mr Nisbet concluded the hearing and took time to consider the information he had obtained before informing the claimant that he had upheld the three allegations against him. The failure to follow AA policy and procedure concerned the claimant not closing off jobs and manipulating times for his own benefit. Mr Nisbet considered this required a conscious effort by the claimant. The misappropriation of company time involved being logged on as being at a job whilst travelling to his home address, or going to a shop or other location, rather than closing down a job accurately or not closing down a job until into the last hour of the shift thus avoiding getting other work. The key issue for Mr Nisbet was the number of times the claimant had done this. The unacceptable working practice involved allowing the member to drive a vehicle on unbalanced brakes.

40. Mr Nisbet concluded the allegations amounted to gross misconduct. The issue of misappropriation of company time was high profile in the business, yet the claimant had simply continued to do it. Mr Nisbet further concluded there had been a breakdown in trust and confidence because patrols work by themselves and are trusted to do the job and follow policies and procedures.

41. Mr Nisbet took into account the claimant's references to having to calm down, take a break or go for a coffee, but felt this was undermined by the fact this only happened on a normal shift and not on PPJ. The data showed the claimant carried out twice as much work on a PPJ shift.

42. The claimant was advised by letter of the 13 April (page 606) of the decision to dismiss.

43. The claimant appealed against the decision to dismiss (page 548) and he also raised a grievance against Mr Alcorn and Mr Nisbet (which was subsequently withdrawn at the start of the appeal hearing).

44. Mr Michael Bedworth was appointed to hear the claimant's appeal. He wrote to the claimant on the 8 April (page 552) to invite him to an appeal hearing on the 21 April.

45. Mr Bedworth, prior to the appeal, was provided with and had regard to the Investigation Report, the notes of the investigation and disciplinary hearings, the letter of dismissal and the letter of appeal.

46. The notes of the appeal hearing were produced at page 608. The claimant was represented by Mr Tony Dunne, senior representative of the IDU. The claimant was given the opportunity to go through each of the appeal points and his representative read out a statement (page 620). The claimant acknowledged he had *"done wrong"* and hoped that he would get his job back. The main points of appeal were that the claimant had had mental health issues for some time and the respondent ought to show some empathy and overturn the decision to dismiss to give the claimant help and an opportunity to return to being the very good patrol he had previously been. It was also argued the continued disciplinary hearing should have been postponed to allow the occupational health appointment to proceed; that some of the respondent's policies had been breached in terms of an intrusive use of telematics; that he had not been given sufficient notice of the investigation meeting; that the letter confirming dismissal had not been received within a reasonable time after the meeting and that written statements should have been obtained from the members.

47. Mr Bedworth looked into the points raised by the claimant and his representative at the appeal but concluded there was no mitigation for the misappropriation of time which had been "rampant", and there was no explanation for why that same behaviour was not displayed when the claimant was doing PPJ work.

48. Mr Bedworth wrote to the claimant on the 23 April (page 624) to confirm his decision not to uphold the appeal. Mr Bedworth responded to each of the points raised by the claimant.

49. The claimant was signed off by his GP as unfit for work until August 2021. He was subsequently in receipt of Jobseekers Allowance until he obtained alternative employment on the 18 October 2021.

Credibility and notes on the evidence

50. There were no real issues of credibility in this case. Mr Nisbet and Mr Bedworth each gave their evidence in an honest and straightforward manner, and each explained the reasons for the decisions they made.

51. The claimant was, on the whole, a credible witness although he often sought to avoid answering difficult questions. Some aspects of the claimant's evidence were not reliable. For example, the claimant suggested he had understood misappropriation of company time to mean something like going to a football match during a shift. This struck the tribunal as wholly unreliable, particularly given the terms of the respondent's Policy and the briefings which had been circulated to explain what misappropriation of company time meant and what was expected of patrols.

52. The claimant pointed to various mattes which he described as having been "unfair". For example, whether the 2017 or 2019 disciplinary policy applied, an assertion that texts and emails had been missing from the Investigation Report, a belief the information gathered from the members should have been in writing and not getting 5 days' notice of the hearing on the 2 April. The claimant did not however go on to suggest why these matters had been unfair or to suggest he had been disadvantaged by them.

53. The claimant utilised his diary to provide a response to each of the allegations put to him by Mr Nisbet. The claimant could not however offer any explanation for the fact the alleged behaviours were only displayed when he was working a roadside service shift for which he earned basic pay. If the claimant volunteered to undertake PPJ shifts, which are paid at an enhanced rate for each job done, none of the alleged behaviours were displayed and the claimant carried out 50% more work. The claimant's only explanation was that he needed the money. This however did not explain the behaviour alleged to

have occurred on a roadside shift and undermined the claimant's position that he had been stressed and needed breaks.

Respondent's submissions

54. Ms Stobart submitted the reason for dismissal was conduct, and the decision to dismiss in the circumstances had been fair.

55. The claimant's case was principally:-

(i) the investigation was not fair;

(ii) the disciplinary hearing was not fair;

(iii) the information obtained from the members should have been in a written format;

(iv) he should have been given 5 days' notice of the continued disciplinary hearing on the 2 April and

(v) the 2 April hearing should have been postponed to allow the referral to occupational health to take place.

56. Ms Stobart referred the tribunal to the case of ***Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23*** where it was held the investigation must be within the band of reasonable responses. The investigation carried out by the respondent fell within this band.

57. Ms Stobart acknowledged the claimant challenged which disciplinary policy had applied in his case: the claimant referred to the 2017 policy, whereas the respondent used the 2019 policy. The difference in the policies, highlighted by the claimant, was that the 2017 policy referred to the investigation meeting being a one-to-one meeting. There was no specific reference in the 2017 policy to a notetaker being present. Ms Stobart submitted none of this detracted from the fact the issue being addressed in the 2017 policy was the fact the employee was not permitted to be represented at the investigation meeting, and this was why it was referred to as a one-to-one meeting.

58. The claimant complained that at the investigation meeting with Mr Alcorn, he had no notice of the meeting or the allegations and no opportunity to prepare for it. Ms Stobart submitted the claimant knew what the meeting was about and gave an explanation for the four issues raised. The claimant was told an in-depth investigation would be carried out and he was subsequently given the Investigation Report and given time to consider it and prepare a response.

59. Ms Stobart submitted the investigation meeting did not need to be separate from the disciplinary hearing because investigation was an ongoing process, even at appeal. The investigation was well conducted and not pre-judged.

60. The claimant had a fair opportunity at the disciplinary hearing to explain his actions. It was not a tick-box exercise: each issue was raised and put to the claimant for an explanation. The hearings had been lengthy and the first hearing was adjourned to enable Mr Nisbet to obtain further information.

61. The claimant referred in the first disciplinary hearing to stress and needing time out to calm down or go for a coffee. Mr Nisbet compared and contrasted the claimant's behaviour when working PPJ shifts and, it was submitted, it was legitimate for Mr Nisbet to take into account the fact the claimant displayed none of the behaviour complained about when on PPJ work.

62. Mr Nisbet also had regard to the fact the two members contacted regarding their recovery, did not support what the claimant had said. Ms Stobart acknowledged that in a perfect world the information from the members would have been in written format, but the claimant was told what the members had said, and he was given an opportunity to respond to it. Ms Stobart suggested the claimant's response (that the members were lying) would have been the same regardless of whether it had been in writing or not.

63. The claimant made reference to feeling harassed in the hearing, but he had been represented and no complaint had been forthcoming from the trade union.

64. The claimant argued he ought to have been given 5 days' notice of the hearing on the 2 April. Ms Stobart submitted the claimant had been asked if he wished

the hearing to go ahead, and he confirmed he wished to continue. In the circumstances there had been no prejudice to the claimant. Ms Stobart acknowledged the claimant subsequently learned of the referral to occupational health, but he did not ask for the hearing to be postponed or adjourned, and he was given several chances to do so. The claimant maintained he wished to proceed with the hearing.

65. Ms Stobart invited the tribunal to find the decision to dismiss fell within the band of reasonable responses. The claimant admitted at the appeal that he had done wrong, and it was reasonable for Mr Nisbet to form that view having considered and listened to all of the evidence and the comparison with PPJ. There had been a conscious decision by the claimant to misappropriate time, and that went not only to loss of trust but also to loss to the business and delay to members. The respondent had followed a fair procedure.

66. Ms Stobart submitted that should the tribunal find the dismissal unfair, then a reduction in compensation should be made to reflect the claimant's contributory conduct and the fact he would have been dismissed in any event even if a fair procedure had been followed.

Claimant's submissions

67. DR submitted the respondent had no reasonable grounds to believe him guilty of misconduct, because he had given a reasonable explanation for his actions. DR considered it unfair to compare roadside recovery with PPJ: it was like comparing apples and oranges.

68. DR complained about the information from the members not being in written format. He felt he had been prejudiced by this. He also objected to the fact Mr Hutton had contacted the members because Mr Hutton was someone with whom the claimant did not get on.

69. The claimant referred to the respondent's duty of care towards him and submitted he should have been allowed to attend occupational health before the disciplinary hearing continued.

70. There had been an invasion of his privacy; skulduggery and he had been badly let down by his trade union representation.

71. The claimant had a mental breakdown all because the respondent did not ask him what was wrong.

Discussion and Decision

72. I had regard firstly to the terms of section 98 Employment Rights Act which provides that:-

"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

A reason falls within subsection (2) if it (b) relates to the conduct of the employee..

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances … the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and

(b) shall be determined in accordance with equity and the substantial merits of the case."

73. I also had regard to the case of ***British Home Stores Ltd v Burchell 1980 ICR 303*** where the EAT held the employer must show:-

- it believed the employee guilty of the misconduct;

- it had in mind reasonable grounds upon which to sustain that belief and
- at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

74. I next turned to consider the investigation undertaken by the employer. There was no dispute in this case regarding the fact patrols are lone workers and there is a large degree of trust placed by the employer in the employee to conduct themselves in accordance with the applicable policies and procedures. There was also no dispute regarding the fact misappropriation of company time is a serious issue for the respondent and that there had been various briefings about this in terms of its importance to the respondent, what it means and the fact breaches will be treated seriously. This was evidenced by the fact of the Policy on Misuse of Time (page 226), the Misappropriation of AA Time (slides presented to the patrols) in July 2018 (page 165), the IDU Bulletin in August 2018 (page 225) and in June 2020 (page 169) and the Michael Bedworth/Daniel Knowles audio briefing (page 227).

75. Mr Nisbet and Mr Bedworth both told the tribunal that there was a recognition at or about the time of the management restructure in 2018 that patrols had got into poor habits, and so the Misappropriation of AA Time slides were prepared and presented to patrols to re-enforce the standards required. There was no suggestion the claimant had not seen the slides or misunderstood the presentation. The claimant was an experienced patrol and knew what was expected of him.

76. The claimant suggested during his evidence that misappropriation of company time referred to big transgressions, for example, going to a football match during a shift. The tribunal could not accept that evidence as credible or reliable because both the slides and the IDU briefing made clear what was expected of patrols. The slides, for example, specifically referred to not holding on to, or extending, the last job of a shift, or before breaks.

77. The claimant came to the attention of the respondent when a review of tow times identified him as being an individual who was 10 minutes above the average non-driving time. The claimant's Performance Leader was asked to review his team and provide feedback. The initial investigation into the claimant's recovery times identified four jobs where questions required to be put to him to explain what he had been doing and why it had taken him so long.

78. Mr Alcorn emailed the claimant on the 26 February inviting him to a meeting the following day. Mr Alcorn explained the claimant had appeared in a report on job times and he needed to get a better understanding of what the claimant did on certain tasks. The claimant argued that he should have been given notice of this meeting, together with notice regarding the allegations being investigated. He also argued that the 2017 disciplinary policy was the applicable policy and that he should have had a one-to-one with Mr Alcorn without another manager present.

79. The tribunal understood the respondent uses an online resource called The Hub, for all employees to access information, policies and procedures. There was also a Patrol Service National Operating Manual (PSNOM) specifically for patrols, where polices applicable to them could be found. It appeared the 2017 disciplinary policy was on PSNOM.

80. I accepted the respondent's evidence that the applicable policy was the 2019 policy, and that was the policy used by the respondent throughout this disciplinary procedure. The position regarding The Hub and PSNOM was unclear beyond the fact that it was the respondent's position that all employees should be using The Hub to access information.

81. The only difference identified by the claimant between the policies was that the 2017 policy referred to the investigation meeting being a one-to-one meeting, and on that basis the claimant objected to a notetaker being present. The 2019 policy makes clear specifically that a notetaker may be present.

82. I was not persuaded a notetaker could not be present at the claimant's meeting with Mr Alcorn, and I say that because it is usual for a notetaker to

be present. The claimant suggested it had been intimidating for two managers to be present, but I did not find this position to be credible in circumstances where the claimant was not put off or prevented from giving Mr Alcorn what he termed "a reasonable explanation" for his timings.

83. The investigation meeting with Mr Alcorn focussed on the four jobs where misappropriation of company time was suspected. Mr Alcorn made clear to the claimant that the meeting was a fact-finding investigation and that the outcome of the meeting could result in a further in-depth investigation.

84. The claimant referred to a script prepared for Mr Alcorn's meeting (page 211) where the comments to be made by Mr Alcorn had been completed and space left for the claimant's responses. The last paragraph of this script stated *"I have now completed my initial investigation and I can inform you that as a result of my findings and my concerns about your working practices I need to inform you that I will now carry out a more in-depth investigation, with a view to a hearing under the AA disciplinary procedures. My findings will be sent to an independent manager who will be in contact to arrange a disciplinary hearing if deemed necessary. If the findings of the in-depth investigation are found to highlight serious misappropriation of AA time or failure to follow AA procedures and policy, they may be viewed as gross misconduct. The in-depth investigation will be concluded within the next 7 – 10 days and we will write to you advising of the next steps…"* The claimant argued that based on this script Mr Alcorn's mind had already been made up.

85. The tribunal accepted the script tended to show how Mr Alcorn intended to proceed if the claimant's explanation for the four situations was not acceptable. This however only mirrored what Mr Alcorn explained to the claimant at the start of the hearing, and that was that he was conducting an initial fact-finding investigation and that the outcome of the meeting may result in a full in-depth investigation. The tribunal did not consider this disadvantaged the claimant in any way because the claimant had an opportunity to respond to the points raised by Mr Alcorn and an acceptable explanation would have rendered a further in-depth investigation unnecessary.

86. The in-depth investigation was carried out and an Investigation Report of some 124 pages was produced, which detailed each incident where suspected misappropriation of company time occurred. There was no dispute regarding the fact Mr Alcorn did not, when preparing the investigation report, speak to the claimant again regarding the incidents. Mr Alcorn did as detailed in the above paragraph, and sent his findings to an independent manager to decide if the matter should proceed to a disciplinary hearing.

87. Mr Nisbet decided the matter should proceed to a disciplinary hearing and he framed the disciplinary allegations. The claimant was provided with a copy of the investigation report and had time to prepare a response to each incident. There was no dispute regarding the fact the first time the claimant had an opportunity to respond to each of the incidents in the report was at the disciplinary hearing with Mr Nisbet.

88. The claimant challenged the fairness of the investigation because the full allegations had not been put to him at the investigation meeting with Mr Alcorn, and he had not had an opportunity to respond to all of the allegations until the disciplinary hearing. The tribunal had regard to the fact the onus on the employer is to carry out as much investigation as is reasonable in all of the circumstances and that there should be an investigation before deciding whether dismissal is a reasonable response. The tribunal also had regard to the ACAS Code of Practice which makes clear the extent of an investigation and the form that it takes will vary according to the particular circumstances. There are no hard and fast rules that there must be an investigatory meeting at which all allegations must be put to the employee. The material point is that the procedure followed by the employer must be reasonable.

89. The tribunal considered the procedure followed by the employer and whether there was any prejudice to the claimant. The tribunal accepted the review into excessive tow times highlighted the four situations which were put to the claimant in the fact-finding meeting with Mr Alcorn. The claimant could, at that stage, have provided an explanation which was acceptable to the respondent. He did not do so, and this triggered an in-depth investigation. The respondent collected all available data from the telematics on the claimant's vehicle. This

provided them with information about when the claimant accepted a job, when he left home, the route he took to get to the job, how long he spent doing a repair, whether there needed to be a recovery, where the vehicle was to be recovered to, how long the claimant took, the routes he took, the times of his breaks and the times he closed off a job. The data essentially provided a detailed synopsis of the claimant's day and identified points where it appeared the claimant had taken too long, or not closed off a job until he was into the last hour of his shift, thereby avoiding getting another job to attend or where he had not attended at the destination which he had input.

90. The claimant stated texts and emails were missing from the investigation report, but he did not explain why this was relevant, and he did not ask for the information to be included in the report.

91. The investigation in this case evolved from the four incidents raised by Mr Alcorn to the in-depth investigation which led to the production of the Investigation Report. The tribunal asked whether the investigation carried out by the respondent fell within the band of reasonable responses which a reasonable employer might have adopted and was satisfied that it did. The respondent thoroughly reviewed all of the information available and investigated points raised by the claimant. The claimant did not suggest the respondent had omitted to investigate any points.

92. The tribunal next considered whether the claimant had been prejudiced by the way in which the investigation evolved. The key consideration is whether the claimant had an opportunity to understand the allegations against him and to respond to them. The claimant accepted he had been provided with the Investigation Report and had time to go through it with his diary and respond to each incident. The claimant took all of that information with him to the disciplinary hearing. The tribunal was wholly satisfied the claimant not only understood the allegations against him, but had an opportunity to respond to each of the incidents put to him.

93. The claimant complained that Mr Nisbet had asked for two members to be contacted and questioned about the repair/recovery of their vehicle. The

claimant felt the information provided by the members should have been put in writing to give him notice of this. The tribunal accepted that ideally this ought to have been done; however the claimant did not argue that if the information had been in writing he would have responded any differently and therefore the tribunal could not accept the claimant had been disadvantaged by this. The key point was that the claimant understood the information obtained from the members and had an opportunity to comment on it.

94. Mr Nisbet also investigated the claimant's performance when working on the enhanced rate PPJ shifts. This investigation disclosed that when doing PPJ shifts the claimant took 50% less time to do jobs and did not continually go home, or go for coffee or take breaks. The claimant could not explain the difference between the two shifts other than to say he was having money worries.

95. The tribunal concluded, having had regard to all of the above points, that the claimant was not prejudiced by the way in which the investigation was carried out in the circumstances.

96. The tribunal next asked whether the respondent had reasonable grounds upon which to sustain their belief the claimant had acted as alleged. One of the incidents put to the claimant concerned a 3.5 tonne vehicle where the claimant had carried out a repair to the brakes, which resulted in the brakes being unbalanced (faulty). The claimant permitted the driver of the vehicle to drive through the city centre. The claimant considered he had provided good service to the member, but agreed on reflection, he would not do that repair again. Mr Nisbet considered this had been dangerous and not something he would expect of a qualified technician. Mr Nisbet concluded this was an unacceptable working practice.

97. There were numerous incidents where it was alleged the claimant had misappropriated time. The claimant was provided with all of the available data and asked to explain why he had either taken so long to arrive at a repair, or why he had returned home for his break or why he had not closed off jobs when they had finished. For example, the claimant was asked about a job

involving a Meriva (page 230). The data showed the claimant went into recovery mode at 14.30 although he had driven the vehicle and should have noted this as a temporary repair. The claimant had spent 2 hours in recovery. The ignition in the van went on at 15.28 showing the claimant was back at the van and the job should have been closed down. The ignition remained on until the claimant returned to base (that is, his home) for a break. The job was closed down at 16.30. The claimant arrived at his home for a break at 16.39. The issue was that the claimant should have closed the job down, but instead he kept it open until he got back home for a break and this took 71 minutes.

98. The claimant explained he had had to charge his phone and clean the van and repair the lighting board. The claimant was aware he was still “on the job” but thought this was acceptable. The claimant told Mr Nisbet he was trying to eat healthily and that explained why he had chosen to go home.

99. A further example was of a Touareg (page 241) where the claimant could not diagnose why a vehicle would not start. He spent an hour on it. The claimant closed the job at 16.45. It was noted the claimant had been back in his van at 16.39. The allegation was that the claimant had sat in the van and deliberately not closed the job until 16.45, knowing that was into the last hour of his shift and he would not be given another job.

100. The claimant told Mr Nisbet he had been trying to join up a member, but there was no evidence to support this.

101. Mr Nisbet concluded there was a pattern of behaviour by the claimant demonstrating the number of times he had gone home, or to the shops and had not closed jobs at the appropriate time. Mr Nisbet acknowledged the claimant argued he had various worries which had caused him stress and this explained why he had needed to stop for breaks or to go for coffee. Mr Nisbet did not accept this explained or mitigated the claimant’s actions because the claimant did not display the same behaviour when carrying out PPJ shifts.

102. Mr Nisbet acknowledged patrols were permitted to go home for breaks but this was discouraged because it led to bad habits. The claimant frequently went home for breaks and took time to do this.

103. Mr Nisbet also concluded the claimant had failed to follow AA policy and procedures when misappropriating company time and, on those occasions when he put on his beacons early rather than upon arrival at a job, and when he failed to carry out daily checks on the van.

104. The tribunal concluded Mr Nisbet had reasonable grounds, based on the information gathered during the investigation and the claimant's responses to it, upon which to sustain his belief the claimant had failed to follow the respondent's policies and procedures, that he had misappropriated company time and that he had engaged in unacceptable working practices. Mr Nisbet further concluded the claimant had, by his actions, breached trust between the employer and employee.

105. The tribunal next had regard to the procedure followed by the employer when dismissing the claimant. The claimant complained that Mr Alcorn had been involved throughout the process because much of the correspondence had come from him. The tribunal accepted Mr Nisbet's evidence that during a disciplinary process, the employee's line manager will undertake the administrative work. The tribunal was satisfied that Mr Alcorn did the administration for Mr Nisbet, but played no part in the decision to dismiss the claimant.

106. The claimant also complained that the notes did not accurately reflect his explanation. The tribunal noted the notes of the disciplinary hearing were agreed with the claimant and his trade union representative. The notes were not verbatim and therefore could only reflect the essence of what was said. The claimant did produce what was termed a transcript of a hearing, and although the transcript included points not recorded in the notes, there was no suggestion those points demonstrated any disadvantage to the claimant.

107. The claimant complained about the involvement of Mr Hutton who had contacted the members, but this was not an issue raised during the disciplinary hearing or appeal.

108. The claimant complained that he had not received 5 days' notice of the disciplinary hearing on the 2 April. The claimant was, by email of the 27 March,

advised of the continued disciplinary hearing scheduled for the 2 April. The tribunal noted there was a period of 6 days from the 27 March to the 2 April, but acknowledged there may have been an intervening weekend. The claimant did not suggest he had been disadvantaged by this: indeed, the claimant confirmed he was keen for the hearing to proceed.

109. The respondent did consider whether the continued disciplinary hearing on the 2 April should have been postponed, not because the claimant had not been given sufficient notice of it, but because the claimant had submitted a sick line from his GP. The claimant had however informed Mr Alcorn that he "wished the hearing to conclude on the 2 April as planned to allow [me] to get over this depression". The respondent, having taken the claimant's wishes into account, decided to proceed with the hearing.

110. The claimant was subsequently notified that a referral had been made to occupational health. The claimant argued the disciplinary hearing should have been postponed or adjourned to allow the referral to take place. There was no dispute regarding the fact Mr Nisbet gave the claimant a number of opportunities at the start of the disciplinary hearing to either make that request or to take advantage of his offer to adjourn the hearing. The claimant repeatedly confirmed that he wished to proceed. The respondent acted on the claimant's wishes.

111. The question the tribunal must ask is whether the decision of the respondent to proceed fell within the band of reasonable responses which a reasonable employer might have adopted. The tribunal balanced on the one hand the claimant's position that the respondent owed him a duty of care, and on the other hand took into account the fact the respondent offered the claimant several chances to adjourn the hearing which the claimant refused notwithstanding the fact he knew the disciplinary issues were serious and could result in dismissal. The tribunal concluded the decision of the respondent to proceed with the continued disciplinary hearing notwithstanding the referral to occupational health did fall within the band of reasonable responses which a reasonable employer might adopt, particularly given the

fact the claimant was offered and refused several chances to have the hearing adjourned.

112. The claimant exercised the right to appeal against the decision to dismiss. The claimant accepted he had an opportunity to raise the points of appeal with Mr Bedworth, and he confirmed the summary read out by the trade union representative had been "good". Mr Bedworth investigated and considered the points raised by the claimant but he decided not to uphold the appeal because nothing the claimant had said was mitigation for the misappropriation of time, which Mr Bedworth described as "rampant". Mr Bedworth also attached significance to the fact the claimant did not display the same behaviour when working on PPJ.

113. The tribunal, in summary, concluded the respondent carried out as much investigation as was reasonable into the alleged misconduct; that the respondent had reasonable grounds upon which to sustain their belief the claimant had acted as alleged and that the respondent followed a fair procedure when dismissing the claimant. The tribunal must now ask whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

114. The claimant argued Mr Nisbet did not give him a fair hearing because he had already made up his mind. The tribunal could not accept that suggestion in circumstances where Mr Nisbet spent a great deal of time going through the various incidents with the claimant and getting his explanation to consider.

115. The tribunal concluded the decision by the respondent to dismiss the claimant did fall within the band of reasonable responses which a reasonable employer might have adopted. There was a huge volume of evidence against the claimant which demonstrated a pattern of behaviour involving remaining in recovery mode, parking up or driving to another location (sometimes going home), going into recovery status but not doing the recovery and holding onto jobs (that is, not closing them) to prevent last job of shift. The claimant, at the appeal, admitted he had done wrong, albeit not on all jobs. The claimant worked in a position of trust. Misappropriation of company time was a serious

issue for the respondent who had issued various briefings about it to ensure patrols understood what was expected of them and what misappropriation of company time meant. The claimant was an experienced patrol and understood what was expected of him. The respondent had reasonable grounds to sustain their belief the claimant had acted as alleged and had thereby broken trust. The tribunal concluded that dismissal in those circumstances fell within the band of reasonable responses and was fair.

116. The tribunal also dismissed the claim in respect of the payment of notice. The tribunal was satisfied the respondent had grounds to dismiss the claimant for gross misconduct, and in those circumstances the contract may be terminated immediately without payment of notice.

Employment Judge: **L Wiseman**
Date of Judgment: **25 July 2022**
Entered in register: **26 July 2022**
and copied to parties