Case Number: 2307384/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr S Sajdera

Respondent: Port Traction Limited

Heard at: London South **On:** 7,8 September 2022

Before: Employment Judge Sekhon
Mrs S Dengate
Mrs M Foster-Norman

Representation
Claimant: In person with a Polish interpreter
Respondent: Mr A Myers

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. **The complaint of unfair dismissal is well-founded, the respondent unfairly dismissed the claimant. The unfairness related to flaws in the disciplinary and appeal procedures.**
2. **A 100% reduction in the compensatory award for unfair dismissal will be made under the principles in Polkey v A E Dayton Services Limited 1988 ICR 142.**
3. **The claimant contributed to his dismissal to the extent of 100%, to be applied to the basic and compensatory award for unfair dismissal. Any award is therefore extinguished.**
4. **For the reasons set out below, the Tribunal does not extend the time limit to enable the claimant to amend his claim to add a claim of direct race discrimination.**

REASONS

Summary

1. This is the reserved judgment with reasons following the hearing on 7 and 8 September 2022.

2. The claimant was employed as a full-time driver of a Heavy Goods Vehicle by the respondent, Port Traction Limited, until he was dismissed with immediate effect on 3 July 2020. His last day of employment was 3 July 2020. The respondent is a ground service transportation company with premises in Aylesford, Kent, and employs approximately 60-70 HGV drivers. Mr Anthony Myers is the Managing Director and Head of HR at the respondent company.

3. The claimant notified ACAS under the early conciliation procedure on 2 October 2020. The ACAS certificate was issued on 21 October 2020.

4. By a claim form received on 2 November 2020 the claimant seeks compensation for unfair dismissal including arrears in holiday pay and notice pay and a claim for race discrimination which was not particularised in his claim form.

5. The respondent resists the claim by ET3 dated 9 December 2020, denying that the claimant was dismissed for raising health and safety issues and instead asserts that he was summarily dismissed for issues relating to his capability, which amounted to gross misconduct, namely his disregard for the Drivers Hours Regulations and that he had received prior warnings for exceeding the permitted driving hours and for which the company had been involved in a Public Enquiry in October 2019.

Claims and Issues

6. The issues were clarified to some extent at the preliminary case management hearing on 13 April 2022 before EJ Truscott QC who prepared a list of issues at paragraph 5 dealing with the unfair dismissal claim being sought. The agreed list of issues did not contain issues relating to arrears in holiday pay and notice pay which are set out in the ET1. The claimant confirmed at the hearing that he was not seeking a separate wage claim for holiday pay and notice pay. His case is he should not have been summarily dismissed and that therefore he is entitled to his notice period and the holiday pay he had accrued until the end of his notice period. Both parties confirmed at the hearing that there were no additional issues that should be added to this list relating to unfair dismissal.

7. Paragraph 6 of EJ Truscott QC's order set out the further information that the claimant should provide the Tribunal on the claim for the direct race discrimination being made and that this should be provided by 18 May 2022. The claimant confirmed that he had not sent a response to the Tribunal or the respondent by 18 May 2022 seeking to clarify his race discrimination claim. When questioned by the Tribunal he confirmed that he received less favourable treatment because he was Polish compared to English employees as his payslips were not kept in the central office as theirs were and he had set this out in his statement dated 31 July 2022.

8. This Tribunal noted however that this information not referred to in his ET1. EJ Truscott's order clarified that only issues referred to in the ET1 could be brought before the Tribunal. The Claimant confirmed that he wished for this race claim to be considered but could not decide whether he wished to make an application

to amend his ET1 to include this and to seek an extension of time for this claim to be bought as it was just and equitable to do so. As the claimant was not legally represented and there were language barriers during the hearing, the Tribunal decided to hear all the evidence and rule on whether the ET1 could be amended to include the race discrimination claim, consider the time limits and then to decide on the merits of this claim, if appropriate. The Tribunal noted that the factual issues raised for race discrimination were the same as for his unfair dismissal claim and so the evidence would be heard at the hearing in any event.

9. The Tribunal confirmed that these were the only issues that they would determine.

Procedure and Hearing

10. The case was listed for a 2-day public final hearing and took place by CVP. The Tribunal was not provided with an agreed bundle. The claimant had submitted a witness statement and various documents totalling 25 pages dated 31 July 2022 and the Tribunal were provided with the ETI, ET3 and previous CMO order of EJ Truscott QC dated 13 April 2022. Due to the time taken to case manage the hearing at the outset, agree a list of issues at the beginning of the hearing, read into evidence provided by the respondent, IT difficulties on the second day of the hearing and the additional time taken for the interpreter to interpret everything said at the Tribunal, it was apparent that it was unlikely that there would be sufficient time for evidence, submissions, judgment and remedy. Further the Tribunal noted that there was limited documentary / witness evidence dealing with the issues of remedy.

11. The Tribunal decided it would hear evidence and submissions in respect of liability only and hear evidence on the issues of Polkey and contributory fault, if relevant in the first instance and give their judgment. If the claimant was successful in his claim and there was sufficient time, then the Tribunal would then consider the issues of remedy.

12. It became apparent that the respondent had sent the Tribunal a witness statement on 6 July 2022 with enclosures that the Panel had not received. This 28-page statement was provided to the Panel and reading in time was required for the Panel to consider this. The claimant confirmed that he had received a copy of this document.

13. At the Hearing, neither the claimant nor respondent were represented. Both the claimant and Mr Myers gave sworn oral evidence and were cross examined by each other and questioned by the Tribunal panel. The claimant had the assistance of a Polish language interpreter in the hearing and everything that was said at the hearing was interpreted for the claimant. The claimant gave his answers under cross examination through the interpreter.

14. Both parties directed the Tribunal to the documents they considered relevant during the hearing. To this end, the Tribunal agreed for Mr Myers to send the Tribunal a report from TruTac, setting out an analysis of the tachograph taken on

19 June 2019 of the claimant's vehicle as this was relevant to the issues in dispute. Mr Myers sent this together with a GPS document showing the claimant's driving time on 19 June 2020.The claimant did not object to this and he also sent a picture of the tachograph dated 19 June 2020.

15. We set out our findings and conclusions on the list of issues below. Dealing first with direct race discrimination claim.

Race Discrimination

16. At the hearing, the claimant asked the Tribunal to consider whether an application to amend his claim to add a claim of direct race discrimination could be pursued. The ET1 was received by the Tribunal on 2 November 2020.

17. EJ Truscott QC advised parties at the Case Management Hearing on 22 April 2022 that only issues raised in the ET1 form could form part of any race discrimination claim put forward. He ordered the claimant provide further information on the race discrimination claim by 18 May 2022 to include: -

"every act (or omission) of less favourable treatment because of race you rely on, referring to the matters you have set out in the ET1. For each act, please state.

- *Who treated you unfavourably?*

- *When did they treat you in that way? Please give dates if possible, or state approximately when the alleged treatment occurred.*

- *What exactly was the unfavourable treatment?*

- *In respect of each allegation of direct discrimination, please set out any actual comparators you rely on or say whether you rely on a hypothetical comparator."*

18. The claimant failed to provide any information by 18 May 2022. The claimant set out in paragraph 10 of his witness statement dated 31 July 2022,

"I also clearly raised a concern to the Respondent about less favourable treatment toward me in regards with delivering my payslips that has continually been left at the yard in an open envelope while my English colleagues had them delivered personally to their hands. English colleagues and I were not living at the yard apart from the seasonal employees from Poland. In my believe, it was because of my Polish nationality because I do not see any other reason for delivering my payslip to me in person like my English colleagues"

The relevant law - Application to amend Claim

19. The principles to be considered when dealing with an application to amend were set out in the case of Selkent Bus Co Ltd v Moore [1996] ICR 836. Whilst this is not a prescriptive list, and there are other factors that might be relevant, there are certain circumstances which should be considered to ensure a balance between the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(a) Nature of the amendment

20. The nature of the amendment is an important issue to consider. Here, the proposed amendment raises a new cause of action, namely direct race discrimination rather than simply amounting to a correction of a clerical error or adding more detail to allegations already made. Mr Myers stated that a majority of his workforce is Polish, and he takes issue of having a claim of race discrimination made by the claimant for being Polish very seriously.

(b) Time limits

21. The applicability of time limits must be considered. The Tribunal must consider whether a new complaint or cause of action is out of time, and if so, whether the time limit should be extended under the applicable statutory provisions. EJ Truscott QC at the case management hearing on 13 April 2022 has set out that that, "The claimant should be aware that the claim should be contained in his ET1 and there is a 3-month time limit to make such claims." When discussing his direct race discrimination claim with the claimant, an interpreter was present at the hearing and would have been advised of the time limits. Here, this complaint is out of time. The issue to be decided is whether the time limit should be extended. The claim may be considered out of time if it has been presented within, 'such other period as the employment Tribunal thinks just and equitable' (section 123(1)(b) Equality Act).

22. The conduct complained of, namely the delivery of payslips, took place during the claimant's employment which continued until 3 July 2020. The onus is on the Claimant to convince the Tribunal that it is just and equitable to extend the time limit. The delay in this case has been some 21 months. The claimant has not made any applications prior to the hearing to amend his claim.

23. The Court of Appeal in Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA, made it clear that when employment Tribunals consider exercising the discretion under s123(1)(b), "there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule".

24. Whilst the ET1 form ticked the box discrimination, no particulars of this were given and the ETI form does not mention any issues with payslips. Mr Myers

stated that he had no knowledge of the particulars of the Race Discrimination claim being made until he received the claimant's statement which is dated 31 July 2022. Neither of the letters from the claimant to Mr Myers following his dismissal dated 3 August or 6 September 2020 refer to less favourable treatment due to his payslips being left in the yard.

25. We have to consider the balance of hardship and injustice. The time limit provisions are in place for good reason. They protect respondents from being faced with stale claims. We bear in mind that the Claimant is a litigant in person and that there are language barriers in this case.

(c) Time and manner of the application

26. The timing and manner of the application is important. The Tribunal should consider why the application was not made earlier and why it is now being made.

27. The claimant wished to make an application to amend his claim on the first day of the hearing, some 21 months out of time. He states he did not know he needed to do so earlier as he has no legal representation, and his command of English is poor. He explained a person was initially helping him with written communications but that they have returned to Poland.

28. However, this does not explain why when the claimant was asked directly about this aspect at the Case Management hearing with EJ Truscott QC on 13 April 2022, he was unable to provide more detail on the direct race discrimination claim at that time and explain his concerns about the payslips. He also was unable to explain why he failed to provide further information on the race discrimination claim by 18 May 2022 as ordered by EJ Truscott QC or ask the Tribunal for more time to do so. If this was because he was without assistance from an English-speaking person then this does not explain why once he had prepared his witness statement on 31 July 2022 (which he received assistance with), he did not make an application to the Tribunal at that stage.

29. We find that the claimant could have fully particularised his direct race discrimination claim at any time and was afforded an opportunity to explain his case (with the assistance of an interpreter) to EJ Truscott QC at the case management hearing on 22 April 2022, but he did not raise any issues with payslips at this hearing. The first time he has mentioned the issues with payslips was in his statement dated 31 July 2022. This is not referred to in any previous correspondence with the respondent or with the Tribunal. Further he has attended the Tribunal with no further evidence to support his claim that the less favourable treatment he allegedly received was because he was Polish.

30. We find that the respondent would be prejudiced by the granting of the application to amend the claimant's claim to include a direct race discrimination claim. The respondent was not aware that an application to amend would be made until the day of the hearing and has been deprived the opportunity of calling

potential witnesses that could be asked to recall events more than 2 years ago to defend this claim.

31. Having regard to all the circumstances above, we do not allow the claimant to amend his claim. The claim should and could have been made in time, and it is not just or equitable to extend the time limit.

Relevant Law

Unfair dismissal

32. 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)(b) ERA.

33. 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 all 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.

34. 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.

35. 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.

36. In determining 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 or whether that band falls short of encompassing termination of employment. The assessment should consider the fairness of all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed and not on whether the employee has suffered an injustice. If a dismissal falls outside that band, then it is unfair. 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).

37. The Tribunal should consider the whole dismissal process, including any appeal stage, when determining fairness (Taylor v OCS Group Ltd [2006] ICR 1602).

38. 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.

39. 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).

40. 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".

41. Where misconduct is admitted or the facts are not in dispute, it may not be necessary to carry out a full investigation: Boys and Girls Welfare Society v McDonald [1996] IRLR 129.

42. 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).

43. The House of Lords in West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL: the employer's actions at the appeal stage are relevant to the reasonableness of the whole dismissal process.

44. Nothing in principle prevents an employer's appeal panel upholding a decision to dismiss on a different basis from that on which the original decision was made. For the dismissal to be fair, though, the employer must ensure that whatever grounds remain still justify dismissal. In Perry v Imperial College Healthcare NHS Trust EAT 0473/10

45. Not every procedural defect will render a dismissal unfair. For example, in D'Silva v Manchester Metropolitan University and ors EAT 0328/16 the EAT upheld an employment Tribunal's conclusion that a flaw in the disciplinary process that rendered it 'not ideal' did not render the dismissal unfair

Reductions to any award for unfair dismissal

46. 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).

Contributory fault

47. Section 123(6) of the Employment Rights Act 1996 (ERA) states that: 'Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.'

48. There is an equivalent provision for reduction of the basic award contained in S.122(2) ERA which provides merely that; "where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly"

49. EAT in Optikinetics Ltd v Whooley 1999 ICR 984, EAT, held that S.122(2) gives Tribunals a wide discretion whether or not to reduce the basic award on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal and that this discretion allowed a Tribunal to choose, in an appropriate case, to make no reduction at all. However, under S.123(6) where, to justify any reduction, the conduct in question must be shown to have caused or contributed to the employee's dismissal. This required the Tribunal to consider what was the reason operating on the mind of the dismissing officer.

50. 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.

51. It is a prerequisite of a reduction of either a basic award under Section 122(2) or a compensatory award under Section 123(6), that the Tribunal find the conduct in question to have been blameworthy: Sanha v Facilicom Cleaning Services Ltd UKEAT/0250/18/VP

52. 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

53. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for conduct. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal. 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).

54. 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).

Findings of fact

Background

55. The claimant commenced employment at the respondent company as an HGV class one driver. He signed a contract of employment on 11 July 2016. The contract of employment does not provide any details of a notice period, provides for 28 days per year (including 8 Bank Holidays) for holiday entitlement and includes the following paragraphs: -

"1) By signing this Statement, the Employee acknowledges

understanding of the Drivers Hours and Tachograph Regulations

for Goods vehicles and agrees to comply with and respect same

at all times - all deviations are to be reported immediately

to the Company, intentional or unintentional.

16) DISIPLINARY PROCEDURE:

STAGE ONE: verbal warning and notation on work record.

STAGE TWO: Written warning and notation on work record.

STAGE THREE: Final written warning

STAGE FOUR: EXIT INTERVIEW AND DISMISSAL FROM THE COMPANY

Your Line Manager and point of contact for all matters is Mr Anthony Myers."

56. There is a factual dispute as to date the claimant commenced employment with the respondent. The claimant states that he worked from 6 December 2015, but Mr Myers believed that the claimant did not start work until he signed the contract of employment on 11 July 2016 despite the fact that he ticked the box in his ET3 form stating that he agreed with the dates of employment that the claimant had presented. There was no clear evidence before the Tribunal to determine this issue.

57. We note that the difference of dates for the purposes of this action is that the claimant would either be employed for 4 years and 1 month or 4 years and 7 months. This makes no material difference to the issues raised in this case and also would not affect the claimant's compensation payment should he be successful in his claim.

58. Mr Anthony Myers is the Managing Director and Head of HR and his sons Mr Paul Myers and Mr Charles Myers, joint Transport Managers and Mr Allen Kelly, Assistant Transport Manager. The respondent hired 60 -70 HGV drivers and the majority of the drivers were Polish. At the time, the claimant was employed there were 2 to 3 English employees. The respondent had 3 full time Polish interpreters available to assist with communicating with employees, but they also had other driving duties in the company and therefore their time was limited.

Payslips

59. Mr Myers explained that the payslips are left in the depot for when the drivers return from their journeys as the office is closed outside of office hours. On 23 April 2019, the claimant sent two text messages and a picture via WhatsApp to the Mr Paul Myers, respondent, asking that his payslip not be left in the yard and that these be sent to him by email, or he would collect these from the office. The claimant's payslip had been opened and he provided Mr Myers with a photograph showing this.

60. All payslips were left in the yard area bar one employees who was English and had confirmed to My Myers that he preferred his payslip is sent to him by email.

Two weeks after the claimant's request, Mr Paul Myers arranged for the claimant's payslips to be picked up from the office for a period of 6 weeks, after which time this system lapsed and they were placed in the yard as before.

61. On 2 April 2020, the claimant was furloughed on 80% of his salary. He did not receive his salary whilst on furlough until 22 May 2020. During the claimant's employment, he lived at an address in Bournemouth and in Hemel Hempstead. However, he could access his post from the Bournemouth address at all times.

Previous warnings

Documentation not signed by the claimant

62. There is a factual dispute as to whether the following warnings were given to the claimant by hand by Mr Anthony Myers and whether these were then posted by Mr Myers by first class post to the claimant's address in Bournemouth. The claimant states that he has never seen these documents. My Myers states he explained the contents of the documents to the claimant when he handed the document to him. Mr Myers states that he did not ask the claimant to sign these documents to confirm receipt as he handed these to him himself. These are as follows

    a) Written warning dated 10 November 2018 from My Myers for excessive use of diesel for the week ending 3 November 2018.

    b) Final warning letter dated 30 March 2020 regarding the unusual usage of fuel by the vehicle allocated to the claimant. This states,

    "I will therefore personally check your paperwork, receipts, fuel usage etc in the coming weeks to ensure there are no anomalies, but please be aware that immediate dismissal will follow any such further occasions such as this. Please treat this warning with the utmost seriousness."

    c) Letter dated 17 Jan 2019 from Mr Anthony Myers stating that a traffic examiner from the DVSA was investigating whether the claimant had driven without a tachograph card, classified as a most serious offence, and asking him to be cautious and comply with tachograph regulations at all times

    d) Letter dated 17 October 2019 from Mr Anthony Myers stating that the company appeared before a Public Enquiry to defend various drivers' tachograph infringements, of which the claimants was the most serious, having driven his vehicle without a tachograph card inserted in the head, i.e., Friday 14th September 2018 with vehicle EU15 ZPF. He was advised to ensure 100% compliance.

e) Verbal warning letter dated 8 March 2019 given to the claimant by Mr Anthony Myers and Mr Charles Myers for tachograph offences for driving for over 4.3 hours without taking a rest

f) First written warning letter dated 13 July 2019 given to the claimant by Mr Anthony Myers and Mr Charles Myers for tachograph offences for "Reducing the minimum daily rest period, driving for over the maximum limit allowed (10 hours) and Reducing the minimum daily rest period allowed"

g) Second written warning letter dated 18 September 2019 given to the claimant by Mr Anthony Myers and Mr Charles Myers for tachograph offences for "Reducing the minimum daily rest period allowed (28 August 2019)"

h) Verbal warning letter dated 4 October 2019 given to the claimant by Mr Anthony Myers and Mr Charles Myers for tachograph offences for driving for over 4.3 hours without taking a rest

63. Documents (e)-(h) above all state that, *"Should you not rectify these offences with immediate effect, furthermore serious disciplinary action will be taken against you which may ultimately result in your dismissal from this company."* The Tribunal refer to these documents throughout this judgment as the "warning documentation" given to the claimant in respect of tachograph offences.

64. The Tribunal find that the documentation listed in (a) to (i) above was given to the claimant by hand by Mr Myers.

Documentation signed by the claimant

65. The claimant accepts that he has seen and signed three "Infringement debrief documents" prepared and signed by Mr Fitzroy Theodore, employee of the respondent. These are as follows: -

i) A document dated 4 October 2019 relating to a 4.3 hour rule infringement on 5 September 2019. This document states,

"Although driving time is only over by 2 minutes and is over an extended period (6:17) we still warned Slawek about this during his ToolBox Talk. We have stressed the importance of staying within his driving times.

Conclusions:
The driver has recently received a 2nd written warning letter for his tachograph violations and attended a ToolBox Talk on 20/09/19 (copy of his signed attendance attached). We have agreed with Slawek that all his movements will be monitored moving forward and if we do not see improvements in his tachograph reports then we will be forced to proceed to further/ final disciplinary action."

j) A document dated 18 October 2019 relating to excess speed on 21 October 2019. This was signed by the claimant on 15 November 2019.

k) A document dated 31 October 2019 relating to less than minimum daily rest taken on 8 October 2019 and 10 October 2019. This document states, "Driver will be reminded of daily rest rules". Signed by the claimant on 15 November 2019.

66. In addition, the claimant has seen a Notice dated 22 July 2019 confirming that after an inspection on 20 July 2019 the claimant's truck had blown bulbs and seeking him to rectify this. This notice is signed by the claimant on 9 August 2019

19 June 2020

67. On 19 June 2020 there was a tachograph card in the claimant's vehicle that day showing his movements. This shows that the claimant drove for 10 hours 43 minutes and exceeded the 10 hours maximum driving limit that day. This also showed that his duty time was 16.38 hours exceeding the 15-hour maximum limit. The claimant accepts these times. The dismissal letter dated 3 July 2020 to the claimant states,

"*Having then had your tachograph analysed, we have seen the*

following result: Drive time 10.43 (card taken out before

duty ended), Working time 11.45 and a total duty time of 16.38."

68. The claimant accepts that he took the tachograph card out of his vehicle when he returned to the depot at around 8.11 p.m. There is a dispute between the parties as to whether removal of the tachograph card from the vehicle on return to the depot was standard practice and whether removing this prior to the end of the claimant's duty (albeit once the claimant had stopped driving for the day) was a further violation of tachograph offences. The Tribunal do not make a finding on this as this does not affect the Tribunal's conclusions set out below. There is no dispute between the parties that the claimant exceeded his driving and duty time on 19 June 2020.

69. On 22 June 2020, the respondent downloaded the vehicle tracking information for the claimant's vehicle that he drove on 19 June 2020, and this was investigated by an independent tachograph bureau, named TruTac. This investigation was carried out as the respondent was aware that the claimant would not have been able to return to the depot on Friday 19 June 2020 without exceeding his driving time allowance of 10 hours.

70. A report of the tachograph was received from TruTac by Mr Anthony Myers on 1 July 2020. On 2 July 2020, Mr Myers then downloaded a GPS report from a system that the respondent subscribed to. The letter of 3 July 2020 confirmed

the information from both documents. Until the second day of Tribunal hearing, the respondent did not send the claimant a copy of the report from TruTac dated 1 July 2020 or the GPS real time report from 19 June 2020.

71. The respondent did not contact the claimant to discuss his conduct on 19 June 2020 at any time between 19 June 2020 until 3 July 2020.

72. The claimant did not contact the respondent between 19 June 2020 until 3 July 2020 to advise them that he was aware that he had exceeded the driving and duty time on 19 June 2020.

2 July 2020

73. On 2 July 2020 the claimant delivered the goods to a client address and was asked by his co-worker to unload the goods from his truck. His co-worker refused to do this as the load was 2.8 m high and it was unsafe for him to unload the goods. The claimant refused as he felt it was unsafe for him to unload the goods.

74. The claimant called Mr Paul Myers at the office to explain what had happened. Mr Paul Myers requested that the claimant unload the goods manually. The claimant refused to do this because it was unsafe to do so and not part of his duties as an HGV driver. The claimant was asked by Mr Paul Myers to drive to a local car park and a colleague met him and unloaded his truck.

Dismissal

75. When the claimant arrived at the respondent's depot on 3 July 2020, Mr Paul Myers met him in the yard and handed him a letter signed by Mr Anthony Myers which stated that he was dismissed from work with immediate effect due to his conduct of driving on 19 June 2020. The letter states,

"Having then had your tachograph analysed, we have seen the following result: Drive time 10.43 (card taken out before duty ended), Working time 11.45 and a total duty time of 16.38.

You having been warned previously and having had the consequences fully explained to you. we cannot excuse you breaking the law so blatantly and endangering yourself, our vehicle and the general public. and must therefore terminate your employment forthwith."

76. Neither Mr Anthony Myers, nor any member of the respondent's company spoke to the claimant about the events on 19 June 2020 to seek his explanation of events before they gave him his dismissal notice on 3 July 2020 advising him that he was dismissed with immediate effect. No translator attended with Mr Paul Myers to explain the contents of the letter dated 3 July 2020 or enable the

claimant to ask questions about this. The claimant was not advised of an appeal process when he was dismissed.

Appeal

77. The claimant wrote to Mr Myers on 3 August 2020 appealing against the grounds of the Dismissal notice dated 3 July 20 20 stating that he had been wrongly accused of breaking the law. This letter states,

"Please note that you failed serving me with an official writing warnings and relevant evidence prior the dismissal.

Just to confirm my position, on 02/07/2020 I delivered the goods to the depot and asked my co—worker that is responsible for it to unload the goods. Unfortunately, he refused to do it by explain to me that the load is having a hight of 2 meters 80 centimetres and it is unsafe for him to do it. Although, the reloading ramps were free for its usage and I was happy to help him by giving access to both sides of my vehicle's semi-trailer, the co-worker still claimed that I should do it manually by myself. Please bear in mind that if the employee responsible for unloading claimed that it is unsafe these overloaded goods to unload so what about me being a driver who is only responsible for delivery? I refused to do it based on the fact that this was not my responsibility as well as it was unsafe for me too. So, in my opinion this particular incident finally contributed to this unfair dismissal."

Appeal response

78. Mr Myers wrote to the claimant on 19 August 2020 to his address in Hemel Hempstead. The claimant received this letter. The respondent set out that the dismissal would stand and stated,

"We enclose copies of previous warnings, previously posted to your Bournemouth address after speaking to you personally in each instance."

79. This letter did not invite the claimant to a meeting to discuss the dismissal notice and the reasons for this or offer an independent review of the claimant's case.

80. The claimant received a cheque on 5 September 2020 for £827.06 from Port Traction Limited (dated 17 August 2020) for monies owed to him for his employment up to 3 July 2020. The cheque stated on the back "cheque to be accepted in full and final settlement "

81. The claimant wrote to Mr Myers on 6 September 2020 acknowledging receipt of the cheque for £827.06 but stating that this was not sufficient payment for the money that he was owed for working up to 3 July 2020 and he sought a further £1,700 in payment. This letter stated,

"Please bear in mind that your handwritten notes left on the back of the cheque does not constitute a right to end my claim against you for an unfair dismissal from work without serving me with a relevant notice to quit."

List of issues

82. Turning to the list of issues in the Case Management Order of EJ Truscott QC dated 13 April 2022 on Unfair dismissal: -

"5.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct."

83. There is a factual dispute between the parties as to the principal reason for the dismissal on 3 July 2020. The claimant believes that he was dismissed due to several factors which he described "had piled up against him".

84. He explained that due to language barriers, he was unable to communicate with the office. He raised concerns with the respondent that he was given too much work to do on Fridays, made complaints to Mr. Paul Myers regarding the delivery of his payslips and the employees living in the yard area, refused to unload his truck on 2 July 2020 for safety reasons and he had several clashes with Mr Charles Myers.

85. He does not believe he was summarily dismissed for tachograph offences as many other drivers have committed the same offences and no action has been taken against them. He also believes that the documentation providing verbal warnings, first written warning and second written warnings (listed in paragraph 62 above) and which the Tribunal refer to as "warning documentation" have been prepared for the purposes of the Tribunal because he has never been given these documents personally by Mr. Myers as alleged or received these in the post at his Bournemouth address. He could not understand why Mr. Myers did not ask him to sign the documents to confirm receipt as he had done with other documents. He therefore does not believe the primary reason he was dismissed was because of his conduct on 19 June 2020.

86. In contrast, the respondent states that the claimant was summarily dismissed for gross misconduct due to tachograph offences that took place on 19 June 2020 when he exceeded the legal driving time of 10 hours by 43 minutes and exceeded the legal duty time of 15 hours by 1 hour 38 minutes. Mr Myers states that he had previously given the claimant two verbal warnings, a first and second written warning about these issues (listed in paragraph 62 above). The respondent has also been involved in a Public Enquiry in 2019. Such tachograph infringements were illegal and puts the respondent's operator's licence and livelihood at risk and is unsafe for the driver and the public.

87. The burden falls on the Respondent to show a potentially fair reason for dismissal. The Tribunal find, on the balance of probabilities, that the primary reason for dismissal was for his misconduct on 19 June 2020.

88. The claimant does not dispute that he exceeded the driving time by 43 minutes and the legal duty time by 1 hour 38 minutes on 19 Jun 2020. Having considered the warning documentation (listed at paragraph 62 above), the Tribunal do not accept that these were prepared for the purposes of the Tribunal proceedings. It is not a legal requirement for written warning notices to be signed although we accept the claimant's point that had these been signed, they would be no issues about whether he had received these and we note that other documents were signed by the claimant including mechanical logs of his HGV vehicle.

89. The Infringement notice dated 4 October 2019, which the claimant signed and accepts is not a fake document, states in the conclusion section, "The driver has recently received a 2nd written warning letter for his tachograph violations and attended a ToolBox Talk on 20/09/19" and the letter from Mr. Myers to the claimant on 19 August 2020 enclosed a copy of the previous verbal and written warning documents that have been provided to the Tribunal. The Tribunal find that this provides contemporaneous evidence in October 2019 and August 2020, prior to the claimant issuing his ET1 and therefore before a claim was contemplated by the respondent, that the warning documentation existed.

90. The claimant's evidence is that he did not receive this warning documentation. The Tribunal are of the view that it would serve no purpose for the respondent to produce such documentation and then not to give this to the claimant. The Tribunal accept Mr. Myers evidence that he handed these documents to the claimant at the relevant times.

91. The claimant accepted that he signed three infringement debrief documents dated 4 October 2019, 18 October 2019, and 31 October 2019 and that he committed the tachograph offences listed in these documents, namely for infringing the 4.3-hour rule of driving time, using excessive speed, and not taking the minimum daily rest periods on 2 occasions. The infringement debrief document signed by the claimant on 4 October 2019 states,
"We have agreed with Slawek that all his movements will be monitored moving forward and if we do not see improvements in his tachograph reports then we will be forced to proceed to further/ final disciplinary action."

92. The claimant has raised issues as to whether he would have been able to read English and understand these documents which were written in English, and we consider this below when discussing the procedural aspects of the disciplinary process.

93. The claimant's submission that there was a culmination of factors that led to his dismissal relating to his complaints is not persuasive to the Tribunal. The

claimant has not referred to any behaviour from the respondent that would suggest that they wanted to "get rid of him" such that they would falsify documents.

94. The claimant in his witness statement places much reliance on the timing of his dismissal on 3 July 2020 after an incident on 2 July 2020 when he says he refused to unload the contents of his truck because it would have been unsafe to do so, and Mr. Paul Myers was not happy with him. However, the respondent had at this stage already sent the tachograph of 19 June 2020 for analysis by a company called TruTac and their report was not received until 1 July 2020. The Tribunal find that it would be reasonable in the circumstances for the respondent to review these findings.

95. Accordingly, the Tribunal do not find that the events of 2 July 2020 were the primary reason for the claimant's dismissal or that anything can be read into the timing of dismissal on 3 July 2020 following this event as suggested by the claimant.

96. The Tribunal finds that the Respondent dismissed the claimant for a potentially fair reason falling within section 98(2) ERA, namely the claimant's conduct.

"5.1 The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct."

97. The Tribunal accept the evidence of Mr Myers that he genuinely concluded, based on the evidence before him from the tachograph analysis documents from TruTac dated 1 July 2020 and the document he downloaded from the GPS navigation system to which the respondent subscribes which corroborated the report, that the claimant had committed tachograph offences on 19 June 2020. The claimant provided no evidence that Mr Myers was not genuine in his belief.

98. The Tribunal have found as a matter of fact (discussed above) that the claimant was given previous verbal and written warnings for tachograph offences and the respondent was therefore aware that the claimant had committed similar offences previously. Accordingly, The Tribunal finds that the respondent did have a genuine belief that the Claimant had committed gross misconduct.

"**Issue 5.2: Did the respondent act reasonably in all the circumstances in treating the potentially fair reason as a sufficient reason for dismissing the claimant, considering section 98(4) ERA."**

99. The burden in relation to this issue is neutral. Before setting out the Tribunal's overall conclusion on this issue, we first address the sub-issues identified in the List of Issues which feed into that overall conclusion.

“Sub-issue 5.2.1: Whether there were reasonable grounds for the respondent to hold that belief?”

100. The respondent obtained an independent report from TruTac and downloaded GPS data from 19 June 2020, and this provided consistent data to show that the claimant had significantly exceeded his driving and duty time that day. The respondent could extrapolate from the data that the claimant had removed the tachograph card at 8.11 p.m. from his vehicle and therefore his duty time could conceivably have been longer than recorded.

101. There were therefore reasonable grounds for the respondent to hold the belief that the claimant had committed gross misconduct, particularly in light of the previous warnings given to the claimant for tachograph offences.

“Sub-issue 5.2.2: Whether the respondent reached that belief after it had carried out a reasonable investigation.”

102. The claimant was critical of the lack of investigation carried out by the respondent. The Tribunal agrees. Whilst the respondent obtained an independent report downloaded GPS data from 19 June 2020, the Tribunal find that the respondent did not invite the claimant at any stage to provide an explanation for his behaviour on 19 June 2020 prior to making the decision to dismiss him nor did the respondent provide the claimant a copy of the TruTac report or GPS data to comment upon.

103. The Tribunal reject the evidence of Mr Myers that Mr Paul Myers would have asked the claimant for an explanation of his conduct on 19 June 2020 and only hand the dismissal notice to him if it was reasonable to do so. The Tribunal prefer the evidence of the claimant that he was handed the dismissal notice and Mr Paul Myers told him that the decision had been made by Mr Anthony Myers.

104. There will be situations where an employer acts reasonably in foregoing such a meeting, but they will be rare. The Tribunal find that was not a case in which Mr Myers could sensibly say that there was nothing the claimant could possibly put forward that might conceivably change the situation. Mr Myers was entitled to believe that those were remote possibilities, but the Tribunal’s view is that he owed the claimant the opportunity to put his case before the decision to dismiss was taken.

105. The Tribunal find that Mr Myer’s actions deprived the claimant an opportunity of explaining why he had exceeded the driving and duty time. In the Tribunal’s judgement, that was not a reasonable position for Mr Myers to take as this prevented Mr Myers from considering whether the explanation provided by the claimant was objectively reasonable.

106. Accordingly, the Tribunal finds that the respondent's belief in the claimant's conduct was not reached after a reasonable investigation was carried out in the circumstances.

"Sub-issue 5.2.3: Whether the respondent otherwise acted in a procedurally fair manner?"

107. Stepping back and looking at the procedure in its totality, the Tribunal concludes that the procedure was not fair overall, for the following reasons:

(a) When the issues came to light on 19 June 2020, the claimant was provided with no opportunity to provide an explanation before he was given his dismissal notice and summarily dismissed on 3 July 2020. He was not warned that his conduct was being investigated or invited to a meeting to explain the seriousness of the allegations that were being investigated.

(b) On 3 July 2020, at the time of dismissing the claimant, there was no Polish interpreter present to ensure that the claimant understood the charges against him set out in the dismissal notice, the reasons for his dismissal or the procedure for this to be reconsidered. Mr Myers stated that a majority of the respondent's employees are Polish, and they employ 60-70 employees. He stated that the respondent has 3 Polish interpreters available for staff issues. Considering the size, administrative resources of the respondent, one of the interpreters should have been available during the discussion on 3 July 2020.

(a) The claimant was not provided with copies of the materials relevant to the allegations against him (i.e., the tachograph analysis from TruTac, the download of GPS data of his truck from 19 June 2020) at any time before his dismissal on 3 July 2020.

(b) The claimant was not advised of any right to appeal the respondent's decision to dismiss him. When the claimant wrote to the respondent on 3 August 2020 appealing against the grounds of the dismissal notice dated 3 July 2020, the respondent did not offer the claimant a meeting to discuss the issues he had raised with an interpreter present.

(c) The Tribunal have found that the notices of previous verbal and written offences for tachograph offences were given by Mr Myers to the claimant. However, the Tribunal find that there was no interpreter present when these documents were given to the claimant to ensure that he understood the serious nature of the offences he had committed, and the consequences of his potential dismissal should he continue to commit tachograph offences. In advance of these warnings being given, the claimant was not invited to provide an explanation of why these tachograph offences occurred to establish whether the claimant was culpable.

(d) The respondent's disciplinary process was managed solely by Mr Anthony Myers. When questioned by the Tribunal, he accepted there was no independent person from the respondent company to consider decisions at the latter stages of the disciplinary process and he is the only one involved in all stages of the disciplinary process, he did not have a written policy for how long warnings would remain on employees' files and he did not take notes of any key discussions with employees. These are all flaws in the disciplinary process. Mr Myers conformed that he did not know what the ACAS Code of Practice was or the guidance that this set out of how grievances should be managed.

108. The combination of these procedural flaws rendered this an unfair dismissal and therefore the unfair dismissal complaint succeeds.

"Sub-issue 5.2.4 Was dismissal within the range of reasonable responses?"

109. As already noted, it is not for the Tribunal to substitute its own view on whether it would have taken the decision to dismiss considering all of the circumstances. The Tribunal must instead determine whether the decision to dismiss falls within the range of reasonable responses of a reasonable employer.

110. The Tribunal have already determined that the did not carry out a reasonable investigation before dismissing the claimant and the procedure adopted was not fair in the circumstances. In coming to that conclusion, we have had regard to all the circumstances detailed above, as well as to the size and administrative resources of the Respondent.

111. However, the Tribunal does find that the decision to dismiss was within the band of reasonable responses. The behaviour that the respondent held a belief had occurred, namely tachograph offences, was a serious issue which could affect the respondent's licence and safeguards for maximum driving and duty time were in place to ensure the safety of the driver of the HGV vehicle and the public.

112. The claimant had been warned on previous occasions for tachograph offences and had previously received a second written warning for these offences and dismissal was the next step for any further tachograph offences (as set out at paragraph 16 of his contract of employment). The two verbal warning letters, first and second warning letters all set out that dismissal may follow if further tachograph offences occurred. The infringement notice dated 4 October 2019 signed by the claimant also stated that further / final disciplinary action may be taken if the claimant repeats tachograph offences.

113. The Tribunal acknowledge there may have been language barriers for the claimant with written documentation, but he accepted that there were three translators at the respondent company. He could however not recall whether he asked for their assistance to translate the documents that he signed.

114. Further the claimant did not tell the claimant he had exceeded his driving and duty time on 19 June 2020 with an explanation of why this was the case. This was contrary to paragraph 1 of the claimant's contract of employment which states that the claimant should tell the respondent of any such offences whether intentional or unintentional. The respondent carried out their own independent inquiry because of his previous offences and after noting he had returned to the depot and was unlikely to be able to do so without exceeding his driving limit of 10 hours. This is relevant to whether the respondent felt they could trust the claimant in the future not to commit further tachograph offences.

115. **In conclusion, the dismissal was both procedurally unfair. The claimant's claim that he was unfairly dismissed therefore succeeds.**

Polkey Principle: section 123 (1) ERA

116. The Tribunal have concluded that the claimant was unfairly dismissal because of an unfair procedure, and so must consider the likelihood that the claimant would have been dismissed in any case had a fair procedure been followed and whether any adjustment should be made to the compensation on the grounds that a fair procedure might have led to the same result and/ or a fair dismissal at a later date.

117. In this exercise the Tribunal must assess what decision the respondent would or might have made in the event that the flaws in the procedure had not taken place and the procedure had been fair. The Tribunal finds that it was inevitable that the respondent would still have dismissed the claimant. The Tribunal took into account the claimant's conduct for driving more than the legal driving time and duty time on 19 June 2020 was blameworthy and he accepted that what he had done was wrong. The claimant also accepted that he had committed previous tachograph offences.

118. The claimant's contract of employment signed by the claimant at paragraph 1 states, "that the employee acknowledges understanding of the Drivers Hours and Tachograph Regulations or Goods vehicles and agrees to comply with these at all times and all deviations should be reported immediately to the respondent whether intentional or unintentional." The claimant did not tell the respondent that he exceeded the driving and duty time on 19 June 2020 and his evidence was that he was aware of this on 19 June 2020.

119. Had the respondent given the claimant an opportunity to explain his behaviour of 19 June 2020, on the balance of probabilities, he would have given the respondent the same reasons he gave the Tribunal. He stated that he had 3 long jobs and had to collect a semi-trailer, 45 km from the yard depot. He could not find anywhere safe to park his vehicle because the closest car park was not available. He did not want to work on Saturday as he would have received less pay and so he wanted to finish on Friday and return home. He therefore decided to drive back to the depot.

120. The Tribunal find that the respondent is unlikely to have been persuaded by this explanation as they stated that it is every driver's responsibility to plan their route for their jobs in advance and plan a safe place to park before they exceed the maximum driving time.

121. The Tribunal do not consider that a fair process would have taken much longer, possibly a few weeks, as a discussion with the claimant and a translator could have taken place on 3 July 2020. The claimant would have admitted the tachograph offences and the respondent is likely to have made a decision shortly thereafter. Had the claimant appealed, the appeal procedure is unlikely to have taken more than a few weeks.

Contributory fault

122. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards. Where re-employment is not sought, compensation is awarded through the basic award and compensatory award which can be reduced in line with the principles set out above. The Tribunal must be satisfied that the action by the claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

123. In all the circumstances the Tribunal find that the claimant's behaviour on 19 June 2020 was blameworthy and not only contributed to, but caused, the dismissal. The Tribunal consider it just and equitable for any award to be reduced by 100% to reflect that his conduct was the sole cause of the dismissal and that the claim for unfair dismissal succeeded only on procedural unfairness.

Unfair Dismissal Award

124. For the reasons set out above relating to contributory fault and reduction because a fair procedure would have produced the same result, the Tribunal find that any award that may have been payable is extinguished.

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Employment Judge Sekhon

Date: 15 September 2022

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