EMPLOYMENT TRIBUNALS

Claimant: Mr S Thom

Respondent: Greater Manchester Buses South LTD t/a Stagecoach Manchester

HELD AT: Liverpool **ON:** 26 May 2022

BEFORE: Employment Judge Ficklin

REPRESENTATION:

Claimant: In person
Respondent: Ms R Jones - Counsel

JUDGMENT

1. The claim of unfair dismissal is well-founded. The claimant was unfairly dismissed.
2. It is just and equitable to reduce both awards for unfair dismissal by 75% on the ground of the claimant's conduct prior to dismissal.
3. As compensation for unfair dismissal, the respondent is ordered to pay the claimant:
   3.1. A basic award of £1,097.25;
   3.2. A compensatory award limited to £50 representing loss of statutory rights.
4. The claimant's claim for wrongful dismissal is well-founded. As damages for breach of contract, the respondent is ordered to pay the claimant the sum of £3,159.37 (6 weeks and 4 days of gross pay at £462.00 per week, plus £123.38 for loss of pension in that period).
5. The tribunal is satisfied that the Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply because there was no award for loss of earnings.
6. The claimant is awarded a total of £4,306.62.

REASONS

Preamble

1. In a claim form received on 8 December 2021 following ACAS Early Conciliation that took place on 25 November 2021 the claimant, who was employed has brought complaints of unfair dismissal, and wrongful dismissal.

Evidence

2. I heard evidence from the claimant on his own behalf. For the respondent I heard from Lesley Hester, Operations Manager, Sharston; Matthew Kitchin, Operations Director; Zachary McAskill, Operations Manager, Ashton; and Vivien Stephenson, Operations Manager, Stockport.

3. In the 134-page bundle there were *inter alia* copies of notes and documentation from the claimant's disciplinary process and termination including an occupational health report, and copies of the respondent's disciplinary policy and drug and alcohol policy. There is an accident form that was produced about three weeks after the incident. There are also witness statements from the claimant and the respondent's witnesses.

Agreed issues

4. The issues were agreed between the parties, as follows:

5. Unfair Dismissal

   5.1 Was the reason for the claimant's dismissal conduct pursuant to section 98(2)(b) the Employment Rights Act 1996 (the ERA)?

   5.2 If yes, did the respondent act reasonably in dismissing the claimant for that conduct pursuant to section 98(4) of the ERA? In particular,

   i. Was the dismissal procedurally fair?
   ii. Did the respondent believe the claimant to be guilty of misconduct?
   iii. Did the respondent have reasonable grounds for believing that the claimant was guilty of that misconduct?
   iv. At the time it held that belief, had the respondent carried out as much investigation as was reasonable?
   v. Did the decision to dismiss fall within the range of reasonable responses available to the Respondent?

6. Wrongful dismissal / Notice pay

   6.1 Was the Respondent entitled to summarily dismiss the Claimant on account of his repudiatory breach of contract ie. was the Claimant guilty of gross misconduct?

Facts

7. The respondent is a bus company and employs approximately 2350 employees in the UK. The claimant's employment as a Passenger Carrying Vehicle (PCV) driver commenced on 30 September 2013. He was dismissed on 15 September 2021 for

gross misconduct for failing to carry out a legitimate instruction, namely refusing to take a drug and alcohol test through a breathalyser.

Policies & Procedures

8. The respondent's Alcohol & Drugs Policy and Disciplinary Policy are in the bundle.

9. The Alcohol & Drugs Policy materially states:

> "Any tests carried out as a result of the random selection will be carried out ... when the employee reports for duty.
>
> ...
>
> 11. An employee who does not consent to undertake a breath test will be advised that he/she will be referred to the relevant line manager who will decide the appropriate course of action according to the circumstances and the information available, including the fact that the employee has refused to take the test which in itself may potentially be regarded as an offence of gross misconduct. This will result in the employee being dealt with in accordance with the relevant disciplinary procedure which may result in dismissal. The employee will be suspended on pay pending the disciplinary interview taking place."

10. The Disciplinary Policy materially states:

> "b) Examples of offences regarded as gross misconduct warranting summary dismissal:
>
> ...
>
> Wilful refusal to carry out a legitimate instruction"

Findings

11. On 26 July 2021 the claimant arrived at the respondent's Stockport site a few minutes before 5am. I accept his claim that he had been feeling back pain throughout the previous week. I also accept the claimant's evidence that on the days of his shifts in the week before the incident he had asked for "mutual swaps" (mutuals), which means that he had asked to trade a shift to avoid working on that day, because of his back pain.

12. On the way into the building, the claimant spoke to an Allocation Manager, Mr Mike Woodcock, who did not provide a witness statement or give evidence. The claimant's version of this conversation, recorded in his witness statement, is different in some respects than Mr Woodcock's which was set down in a report the following day. Despite differing versions, they both say that Mr Woodcock initiated the conversation about what was wrong with the claimant, and both say that the claimant said that he had back pain. I accept that the claimant raised the issue of his back pain, albeit casually, with Mr Woodcock prior to the incident.

13. The claimant says that upon reaching the bottom of about three steps on his way into the depot he jarred his back, exacerbating the injury and causing serious pain. The recording of the incident on the respondent's security cameras was not in evidence, though it was played in the subsequent disciplinary hearings. The claimant obtained a sick note as of 28 July 2021 and was signed off from work until 16 August 2021. In the disciplinary hearing of 15 September, the respondent accepts that to some extent the claimant hurt himself, though his pain level is disputed. I also accept that the claimant exacerbated his existing back pain on his way into the building.

14. The main dispute of fact in this case revolves around what was said when the claimant walked up to the Allocator's window that morning. The allocator is the first point of contact for drivers reporting for work. The claimant claims that he first asked for a mutual, intending not to work that day but wanting to avoid formally calling in sick. He has maintained this from the initial investigation meeting with Vivien Stephenson on 16 August 2021, the first time he was asked. The respondent accepted the claim that the claimant's first words to the Allocator were about a mutual in the final appeal outcome letter dated 18 October 2021.

15. The Allocator at the window on that day was Alisa Duncan. Her report, dated the same day, states that she first told the claimant that he had a drug and alcohol test on that day. She says she told him this after he had reported to work but before he said that he was unable to work due to back pain. Her report says that he "seemed ok" before she told him that he had to take a drug and alcohol test. Her report did not mention the claimant asking for a mutual.

16. The respondent's position on this point has evolved. It was put to the claimant in the Stage 1 appeal hearing on 21 Sept 2021 that he had not said that he asked about "spare men" a phrase I accept to refer to a mutual swap, at the interview with Ms Stephenson. But he used those exact words, according to Ms Stephenson's notes of that meeting. He had done so, according to the notes, before Ms Duncan's version was put to him.

17. Matthew Kitchin says as recorded in his notes of the final stage appeal, that the issue of asking for a mutual was "fundamental", despite also saying that he thought the truth of what was actually said between the claimant and Ms Duncan was somewhere in the middle. Mr Kitchin accepts in the final appeal outcome letter, dated 18 October 2021, that the claimant's first words were about a mutual.

18. During the claimant's evidence it was put to him again that he had not said this, but he maintained that he had. It seems to me that the issue of the order in which the words were said is not determinative. This is because I find that the claimant had not reported for work and so was not subject to the instruction to take a drug and alcohol test.

19. The most senior member of the R's organization to give evidence, Matthew Kitchin confirmed that there is no defined policy of what 'reporting for duty' means. He said that he resorted to observing the practices of workers at the claimant's former place of work to determine the practice and found the results inconclusive.

Notwithstanding this, the respondent's case is that the claimant had reported for work and become subject to the test by being on the premises.

20. The claimant raised during the appeal against dismissal that he reported for duty through a keypad that was near the allocator's window. The respondent's position is that the claimant's reliance on the keypad system for sign-in was not raised until late in the procedure and was an attempt to deflect. I accept this and I agree that the use of the keypad is not determinative of reporting for duty. I accept Mr Kitchen's evidence that the keypad system is a remnant of an old IT project. But it is clear that there is no settled position on what 'reporting for duty' means at the premises. Mr Kitchin said that he observed about 50% of employees using the keypad and presumably the rest went to the window.

21. In the absence of any policy or clear understanding even by the respondent of when an employee has started work, it is an issue of fact that depends on the circumstances.

22. At the conclusion of the claimant's conversation with Ms Duncan, he said something to the effect of "give me a minute". The claimant then walked out of the depot to the car park by what was accepted by both parties to be a longer and more circuitous but flatter route. The claimant loitered in the car park for approximately fifteen minutes before driving home. He did not inform Ms Duncan, or anyone in the management structure that he was leaving.

23. There is no evidence before me about the claimant's levels of pain at that time other than his own claims. It seems to me that I do not need to make a finding about whether the claimant's pain was, as it were, legitimately severe enough not to drive a bus but not so severe as to prevent driving a car. While his pain level was in dispute between the parties, it was not the respondent's case that the claimant had faked the injury.

24. The respondent recorded the claimant as having an unauthorised absence, but the same day the claimant rang Mr Woodcock and advised that he would not return to work until 29 July 2021, three days later. This was apparently accepted, since a letter from the respondent to the claimant dated 30 July 2021 refers to the claimant being absent from work since 29 July. The claimant obtained a sick note as of 28 July 2021. As I understand it, the respondent accepts that the claimant was legitimately away from work until 16 August 2021.

25. On the day the claimant returned to work, 16 August 2021, he was called into an investigatory meeting. He was asked about the incident by Ms Stephenson. The claimant was subsequently suspended with pay and the respondent arranged an Occupational Health appointment for him. The claimant eventually attended an appointment with an Occupational Health doctor, and claimed that he thought at the

time that breathing into a breathalyser would exacerbate his pain. The doctor opined that this was highly unlikely. As noted above, I need not make a finding on the claimant's pain levels at the time of the incident.

26. The claimant attended a disciplinary hearing on 15 September 2021, which resulted in his dismissal for gross misconduct. He had appeal hearings on 21 September and 7 October 2021 but his appeals were denied.

Law

27. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

28. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

29. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

30. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: "If no reasonable employer would have dismissed him then the dismissal was fair. But is a reasonable employer might reasonably have dismissed him, then the dismissal was fair…in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view.

31. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

32. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

33. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

34. The basic award may be reduced where the tribunal 'considers that any conduct of the complainant before the dismissal was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent...'. In respect of other awards 'where the tribunal finds that the [act] was to any extent caused or contributed to by any action of the complainant, [the tribunal] shall reduce the amount of the compensatory award by such proportion as it considers just and equitable...'. The claimant's conduct must be 'culpable or blameworthy', and must cause or contribute to the claimant's dismissal, though not its fairness or unfairness. Such conduct need not amount to gross misconduct - Jagex Ltd v McCambridge UKEAT/0041/19.

35. if there is a finding that the claimant's conduct was contributory, the steps are to:

1) Identify the relevant conduct;
2) Assess whether it is objectively culpable or blameworthy;
3) Consider whether it caused or contributed to the claimant's dismissal; and
4) If so, determine to what extent it is just and equitable to reduce any award - Steen v ASP Packaging Ltd UKEAT/0023/13/1707

Conclusion

36. The claimant was not dismissed for faking an injury or absenteeism. He was dismissed for refusal to carry out a legitimate instruction. The respondent's case has been put on the basis that the claimant may have been in pain and may have had a legitimate back injury after jarring his back coming down the steps, but in the circumstances his pain didn't seem so serious as to prevent him from taking a drug and alcohol test, so he was required to take it because he had entered the building.

37. The respondent's case is predicated on the starting point that the claimant reported for work and then refused to take a drug and alcohol test. But this is misconceived. I find that the claimant never 'reported' for work.

38. There is no dispute that in the 'mutuals swap' system, an employee may report to the allocator's window and then not work that day because someone else does the shift. There is no suggestion that that person starts work and then two minutes later goes off from work. That person never started that day.

39. The respondent cannot clearly identify the actual threshold for starting work, and there are accepted circumstances where walking into the building and speaking to the allocator does not constitute starting work. I find that in these circumstances it is not shown that the claimant was subject to the policy instruction to take the breathalyser test.

40. In this hearing, the respondent's position has evolved to become that whether the claimant asked for a 'mutual swap' first or at all is irrelevant because he had entered the building. I have found that entering the building was not determinative. I find that the dismissal was based on unclear, unwritten and inconsistent policy about his responsibilities to follow an instruction and scant and unclear evidence of the instruction itself. The respondent did not have reasonable grounds for the belief that the claimant had committed gross misconduct. The claimant's claim for unfair dismissal is well-founded.

41. Notwithstanding this, the claimant's actions after he spoke to Ms Duncan contributed to his dismissal. The claimant did not return to Ms Duncan to explain his position clearly. He did not speak to the Allocation Manager, Mike Woodcock, on his way out. I find that he could have simply made clear that he was leaving due to pain but did not. While I understand that the respondent has subsequently accepted that the claimant was off sick, the claimant's failure to speak to anyone about his intentions contributed to the respondent's confusion about whether he had reported for work. I find that his conduct is objectively blameworthy and contributed to the claimant's dismissal. I find it is just and equitable to reduce the claimant's basic award and compensatory award by 75%. The claimant's compensatory award is limited to his loss of statutory rights.

<u>Wrongful dismissal / Notice pay</u>

42. It is not enough for the respondent to prove that it had a reasonable belief that the employee was guilty of gross misconduct in a wrongful dismissal claim. The test for a wrongful dismissal claim is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief is necessary as part of the legal test. I find that, for the reasons set out above that the claimant had not reported for work, the respondent has not proved on the balance of probabilities that the claimant was guilty of gross misconduct.

43. The respondent was in breach of contract when it dismissed the claimant, and his claim for wrongful dismissal is well-founded.

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Employment Judge Ficklin

10 November 2022

SENT TO THE PARTIES ON

17 November 2022

FOR THE TRIBUNAL OFFICE

Notes:

(1) This judgment follows a remote hearing that took place on a remote video platform. Neither party objected to the format of the hearing.
(2) Damages for breach of contract have been awarded gross. This is because it counts as Post-Employment Notice Pay and the claimant is liable to pay tax and national insurance on it. The respondent may deduct the tax and national insurance at source.