



EMPLOYMENT TRIBUNALS

Claimant: Mr Darren Reid

Respondent: 3663 Transport Limited

Heard at: Reading **On: 2, 3, and 4 November 2022**

Before: Employment Judge Gumbiti-Zimuto
Ms A Crosby and Ms B Osborne

Appearances

For the Claimant: Ms C Step-Marsden, counsel

For the Respondent: Mr s Britton, solicitor

JUDGMENT

1. The claimant was unfairly dismissed.
2. The respondent discriminated against the claimant by treating him unfavourably because of something arising in consequence of disability namely by dismissing him, failing to consider him for alternative employment and in informing the claimant that he had to be fit and well for 12 months from the date of the letter from DVLA contrary to sections 15 and 39 of Equality Act 2010
3. The respondent breached the duty to make reasonable adjustment by failing to consider the claimant for alternative roles contrary to sections 21 and 39 of the Equality Act 2010.

REASONS

1. In a claim form presented on 3 December 2020 the claimant made complaints of unfair dismissal and disability discrimination. The respondent denied the claims.
2. The claimant gave evidence in support of his own case, the respondent relied on the evidence of Mr Peter Tanner and Mr Steven Hunt. All the witness produced written statements which were presented as their evidence in chief. The parties also produced a trial bundle containing 438 pages of documents. From these sources we made the findings of fact which we set out below.

3. The claimant was employed by the respondent as a Transport Team Leader from 13 April 2004 until his dismissal on 13 August 2020.
4. In the role of Transport Team Leader, the claimant's duties included working in the office allocating routes to drivers and re-loading any lorries that had not been loaded; the claimant also carried out driving duties. There is a dispute between the parties as to whether the claimant's role was essentially that of an LGV driver, or as the claimant states a role where he would "do one or two drops a day rarely driving a full driving route" varying from week to week including weeks where the claimant did no driving at all.
5. The claimant's employment was terminated because his licence was suspended for medical reasons.
6. The issues that the Tribunal has to consider are as follows:
 - 4.1 Whether the claimant was a disabled person.
 - 4.2 Whether the respondent knew that the claimant was disabled.
 - 4.3 Whether the claimant was treated unfavourably because of something arising from disability by
 - 4.3.1 Mr Watkins email to the claimant on 19 February 2020.
 - 4.3.2 Inviting the claimant to a disciplinary meeting.
 - 4.3.3 Suspending the claimant.
 - 4.3.4 Failing to consider whether the claimant would be suitable for driving any other vehicles / any other roles.
 - 4.3.5 Mr Tanner informing the claimant that he had to be fit and well for 12 months from the date of the letter from DVLA.
 - 4.3.6 Mr Tanner stating that the claimant was in breach of contract.
 - 4.3.7 Dismissing the claimant.
 - 4.4 Was the claimant indirectly discriminated against by the respondent.
 - 4.5 Was the respondent in breach of the duty to make reasonable adjustments.
 - 4.6 Whether any of the claimant's complaints have been presented outside the time limit for the presentation of complaints contained in section 123 Equality Act 2020 (EqA), and if so whether the employment tribunal can consider such complaints.
 - 4.7 What was the reason for the claimant's dismissal, was it for a potentially fair reason.
 - 4.8 If the claimant was dismissed for a potentially fair reason, was the claimant's dismissal fair, was it reasonable in all the circumstances, was the dismissal procedurally fair.
 - 4.9 Did the claimant contribute towards his dismissal.

Facts

7. On 16 February 2020, the claimant suffered what he describes as a mental breakdown caused by previous traumatic event.

8. The claimant was signed off as unfit to work due to depression from 18 to 25 February 2020. On 19 February 2020, the claimant informed Mr Paul Watkins, the Transport Operations Manager, of his condition and explained some of the background reasons. In his response to the claimant Mr Watkins 'signposted' the claimant to the respondent's counselling service and asked to be updated at the end of the week.
9. On 25 February 2020 the claimant was diagnosed with a severe depressive episode; the claimant contacted the respondent to inform that he was too unwell to work.
10. On 20 March 2020 the claimant attended a welfare meeting with Mr Watkins at which he explained his condition and detailed the medication that he was taking. The claimant was informed that due to the medication he was taking he had to notify the DVLA of his health condition, the claimant subsequently did so by telephone.
11. The claimant was referred to Occupational Health and attended a consultation on 29 April 2020. The claimant requested a copy of the Occupational Health Report but did not receive a copy of the report despite the report being sent to the respondent on 4 May 2020. The report stated that the claimant was fit to work, and that the medication he was taking did not impact on his ability to drive, the report recommended that the claimant be given altered duties pending confirmation from DVLA that he was fit to drive.
12. The claimant was advised to shield due to COVID, he informed the respondent of this on 28 April and was placed on furlough.
13. On 28 May 2020 the claimant attended a Welfare Meeting with Mr Watkins and informed him that he was undergoing counselling. The claimant explained that once able to do so (as a result of COVID guidelines) he would like to return to work.
14. On 14 July 2020, the respondent sent letters to all employees including the claimant asking them to consider whether they would take an alternative to redundancy. In his reply, the claimant had indicated that he would consider a reduction in hours and associated pay up to 20%.
15. The claimant returned to work on 27 July 2020. On 5 August 2020 the DVLA notified the claimant that his LGV licence had been revoked with effect from 6 August 2020. The claimant could re-apply once he could provide medical evidence that he had been in stable mental health for 12 months and the amount of medication he required "do not cause side effects likely to impair your ability to safely control a vehicle". The claimant informed Mr Watkins of this position.
16. On 10 August 2020 the claimant attended an investigatory meeting with Mr Watkins where he was told that as he did not have a licence he was in breach of contract and will be referred to a disciplinary where they will look

at alternative roles “if applicable”. The claimant was also told that he was not being suspended but he was not expected to be in work. The claimant was sent a letter inviting him to attend a disciplinary hearing on 13 August 2020 the email confirmed that the claimant was not suspended. The letter included the statement that: *“These are extremely serious allegations and, if proven, may result in disciplinary sanctions being taken against you, up to and including, summary dismissal for gross misconduct.”*

17. The claimant replied to Mr Watkins stating that he was waiting to hear from his union and further stated that he expected the suspension of his licence to end in April 2021. In response to this the claimant was told by Mr Watkins that he was now suspended on full pay until the disciplinary hearing.
18. The claimant attended the disciplinary hearing which was conducted by Mr Peter Tanner, Mr Watkins presented the management case. The claimant was accompanied by his trade union representative.
19. During the disciplinary hearing it was stated that the respondent was treating the issue as a breach of contract matter and not an issue of capability. The question was asked by the claimant’s representative if any consideration had been given to the claimant driving smaller vehicles as it was only his LGV licence that had been suspended, the claimant was told *“that consideration will be part of this meeting”*. There was no further discussion about alternative roles. The claimant’s union representative also spoke of the need to consider reasonable adjustments for the claimant it was said that the respondent *“can’t look into this at this time.”* After a short adjournment the claimant was dismissed with immediate effect: *“The grounds for this dismissal are a breach of the terms of your contract or employment, based on the fact that you no longer hold a valid driving licence which is a requirement of your role as ‘Senior Driver’. This is a statutory restriction that prevents the employment continuing, whereby if we were to continue to allow you to carry out your role this would be unlawful.”*
20. The claimant appealed against the dismissal. In his appeal the claimant pointed out that another driver had also lost his licence as a result of an injury but had been given an alternative role within the office. The appeal was conducted by Mr Steve Hunt, Head of Operations, on 9 September 2020. The claimant was informed in a letter dated 14 September 2020 that his dismissal had been upheld.

Disability

21. Section 6 EqA provides that a person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. Schedule 1 EqA defines ‘long-term effects’ as, if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect

is likely to recur. The word 'likely' should be interpreted as meaning 'that it could well happen'.

22. Paragraph 5(1) of Sch 1, EqA provides that in determining whether a person's impairment has a substantial effect on his or her ability to carry out normal day-to-day activities, the effects of measures such as medical treatment or corrective aids on the impairment should be ignored. If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect: the 'measures' envisaged by para 5(1) of Schedule 1 include medical treatment.
23. The respondent does not concede that the claimant is a disabled person.
24. The respondent states that from the unchallenged evidence given by the claimant in his Supplementary Disability Statement, in which the claimant sets out the impact of his dismissal upon his mental well-being, it is not clear whether the claimant's impairment was having or would have had but for medication a substantial adverse effect on the claimant's ability to carry out normal day to day activities as at the material time. The material time is the period immediately leading up to the claimant's dismissal.
25. The respondent says it is not clear when the claimant first had a disability and whether the disability is anxiety, rather than depression. The respondent states that the claimant's evidence gives the impression that his mental health issues have been a reaction to two "life events" in 2020, an historic issue and the loss of his licence. The claimant's description of the adverse effect set out within the Statement is not consistent with the claimant's ability to perform paid employment from August 2020 onwards. The respondent states that the claimant may have been a disabled person at the material time, but without evidence of the same, the respondent is not in a position to concede.
26. The respondent puts the claimant to proof on disability. The respondent says that there is no evidence before the Tribunal about the adverse effect of the impairment on the claimant's ability to carry out normal day to day activities at the material time. The respondent says that the first statement addressed the period February / March 2020 but does not say much about the adverse effect of the impairment later on in 2020. The Supplementary Disability Statement focuses on claimant's mental health post termination. The respondent says that there is a gap in the evidence, the medical records do not deal with the period of the gap. The respondent says that we should be cautious that claimant is asking us to make assumptions and draw conclusions as to the impact of the claimant's mental health without evidence.
27. The claimant states that he has a mental impairment, namely depression. The claimant relies on his two disability statements, they are not contested by the respondent. The claimant says that at the time of the dismissal without medication it was likely that his symptoms would continue for 12

months. The claimant would suffer a serious effect on his ability to carry out normal day-to-day activities if treatment were stopped.

28. The Tribunal must consider whether, without medical treatment, the claimant's condition 'could well' last more than 12 months, as at the time of the dismissal. The claimant's medical records show that he had a severe depressive disorder. At the time of the dismissal without medication it was likely that the claimant's symptoms would continue for 12 months.
29. The claimant was to have specialist counselling to address the underlying issues, but this was delayed because of COVID; in May 2020 the claimant was having counselling the programme was to be continuing for a period of months.
30. The claimant's depression had a substantial adverse effect on his ability to carry out normal day-to-day activities.
31. We agree that it is common sense that the claimant would suffer a serious effect on his ability to carry out normal day-to-day activities if treatment were stopped. The claimant had a period of severe mental health symptoms for which he had medical management the claimant was to remain on this medical management for a prolonged period of time. On the evidence before us we are satisfied that the claimant has shown that he has a mental impairment that had a substantial and long-term adverse effect on his ability to carry out normal day to day activities. The claimant's medical records show that he had a severe depressive disorder. At the time of the dismissal without medication it was likely that that the claimant's symptoms would continue for 12 months.

Did the respondent know that the claimant was disabled?

32. From February 2020 the claimant informed the respondent of his condition. The information that the claimant provided to the respondent was sufficient for the respondent to know that the claimant was likely to be disabled. The respondent referred the claimant to occupational health in respect of his condition in April 2020 and received a report on the claimant's condition from Occupational Health on 4 May 2020 advising that it was likely that the claimant was disabled within the meaning of the EqA section 6. We are satisfied that from February 2020 the respondent has been aware of the information from which the respondent ought to have been aware that the claimant was disabled. From May 2020 the respondent has known or ought to have known that the claimant was a disabled person.

Was the claimant treated unfavourably because of something arising from disability?

33. Section 15 EqA provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This does not apply if A

shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

- (i) Did the respondent treat the claimant unfavourably by Mr Watkins' email to the claimant on 19 February 2020.

34. The claimant says that on 18 February 2020 he emailed Mr Watkins to notify him of his breakdown. In his email the claimant told Mr Watkins what the root cause of his condition and the impact it was having on him including suicidal thoughts. When Mr Watkins replied on 19 February 2020, he did so laconically. The content of what he said cannot be criticised, he expressed sympathy, and informed the claimant of a service available to him as employee of the respondent and asked the claimant to update him at the end of the week. While Mr Watkins could have reacted differently and perhaps even been more long-winded in his reply manner, what he did write in our view cannot reasonably be described as unfavourable treatment.

- (ii) Did the respondent treat the claimant unfavourably by inviting the claimant to a disciplinary meeting.

35. There is no doubt that the respondent intended to treat the claimant as though he was guilty of misconduct. This was expressly stated by Mr Watkins in his dealings with the claimant before the disciplinary hearing. Mr Tanner carried out the claimant's disciplinary hearing. He said of this issue, *"I did not immediately take issue with the fact that the allegation had been described as gross misconduct, because to begin with I equated it with "breach of contract". However, it was clear when I became more familiar with the circumstances that the Claimant was not guilty of any culpable behaviour."* The matter was never corrected by the respondent and Mr Tanner in the dismissal letter repeated reference to the disciplinary hearing being for gross misconduct and the claimant's dismissal being for breach of contract.

36. The claimant says it *"was entirely inappropriate to invite C to a disciplinary, in accordance with the disciplinary policy for gross misconduct, in circumstances where no misconduct had, or could be alleged to have been, committed."* The explanation for this provided by the respondent in the amended Grounds of Resistance has not been established.

37. The Tribunal has concluded that by failing to properly reflect the claimant's situation it has treated the claimant unfavourably. The way that each of the managers that dealt with the claimant has approached matters has implied that he is guilty of misconduct, and it may have infected the way that the claimant was dealt with by the respondent.

- (iii) Did the respondent treat the claimant unfavourably by suspending the claimant.

38. Mr Watkins did not suspend the claimant immediately. Initially he expressly stated that the claimant had not been suspended. After the claimant had

been notified of the date of the disciplinary hearing the claimant replied referring to a possible need for a postponement if his union representative was not available. It was this email that provokes Mr Watkins to suspend the claimant. It would have read ominously for the claimant as the email from Mr Watkins read as: *“Given the above, I am suspending you on full pay until your disciplinary hearing, as upon your advice your CV licence has revoked by the DVLA from 6th August and you’re unable to fulfil you’re duties at this time.”* There was no need for the claimant to have been suspended. The circumstances had not changed so as to justify suspension. We are satisfied that the claimant was treated less favourably in being suspended.

- (iv) Failing to consider whether the claimant would be suitable for driving any other vehicles / any other roles.

39. The notes of the disciplinary hearing record the following exchange

DM: *Any consideration for Darren driving vans?*

PT: *That consideration will be part of this meeting. Unknown if we can offer due to current situation. Will find out.*

40. However, there is no record in the notes of any discussion about alternative roles even though the record of the meeting speaks of an adjournment *“to gather more info / evidence”*. There is an adjournment for 45 minutes, when the meeting resumes there is no discussion about alternative roles for the claimant or of the outcome of any enquiries. However, the respondent stated in the letter of dismissal that: *“we discussed the possibility of reasonable alternative roles that we could consider offering you as a business, however as you are aware the business is going through a period of consultation and reductions across all areas due to the devastating impact of Covid-19 on our industry, and after due investigation during the adjournment of the meeting. I confirmed we have no alternative roles we could deploy you to at this current time.”* This is not established by the face of the record. The claimant’s evidence was that there was no discussion about alternative roles. The evidence presented to us does not support a conclusion that there was a discussion or consideration with the claimant of alternative roles for the claimant. The claimant was in our view treated unfavourably in the circumstances.

- (v) Mr Tanner informing the claimant that he had to be fit and well for 12 months from the date of the letter from DVLA.

41. Mr Tanner interpreted the letter received from the DVLA as meaning that the claimant had to demonstrate stable mental health for 12 months from the date of the letter, this was incorrect. Mr Tanner made the decision to dismiss the claimant applying the erroneous conclusion that the claimant would be unable to drive an LGV until August 2021. This in our view was unfavourable

- (vi) Mr Tanner stating that the claimant was in breach of contract.

42. Mr Tanner concluded that the claimant was in breach of contract. While on one construction the claimant's contract does not state that he was required to hold an LGV licence. The contract states:

*'If it is an essential condition of your employment that you hold and continue to hold a current, valid UK driving licence/LGV licence, you may be asked to produce this at any time on reasonable notice.....
If you lose your driving licence through a conviction, this must be reported immediately to your line manager. Depending on the circumstances, this may result in the termination of your employment.'*

43. The claimant contends that this does not state that losing a licence because of a medical condition amount to a breach of contract nor does it address the issue of losing a licence because of a medical condition at all.

44. There is in our view no unfavourable treatment arising from describing the claimant as being in breach of contract. The underlying fact is that the claimant had his licence suspended and could not drive an LGV vehicle. In the circumstances we do not consider that there is established unfavourable treatment in describing the claimant in the circumstances as having breached his contract of employment.

(vii) Dismissing the claimant.

45. Dismissing the claimant was unfavourable treatment.

Arising in consequence of the claimant's disability

46. The claimant lost his LGV licence in consequence of his disability. The treatment and medication that the claimant was receiving was the reason the claimant's licence was taken away, and it was not to be returned until the claimant had been stable for 12 months and any treatment must not affect his ability to drive.

Was the unfavourable treatment because of something arising in consequence of disability

47. The events that took place leading up to and including the claimant's dismissal arose because of the claimant's disability. These were the claimant's dismissal, informing the claimant that he had to be fit and well for 12 months from the date of the letter from DVLA, suspending the claimant, failing to consider whether the claimant would be suitable for driving any other vehicles / any other roles, and inviting the claimant to a disciplinary meeting. These matters all arose because the claimant's disability meant that his licence was removed and this in turn led to the various incidents which were unfavourable.

Was the treatment a proportionate means of achieving a legitimate aim?

48. The legitimate aim in this case is the need to comply with the statutory requirement for the claimant to drive an LGV vehicle lawfully. So long as his licence was suspended, he could not do so. In those circumstances, where the claimant's employment requires that he drives an LGV lorry it necessary to consider how the claimant's employment with the respondent could lawfully continue.
49. In the circumstances we consider that it is legitimate and proportionate for the claimant to carry out a process for deciding what to do with the claimant in view of the fact that his licence has been suspended. The suspension the claimant and inviting the claimant to a disciplinary meeting are in our view legitimate and proportionate.
50. The claimant's dismissal, informing the claimant that he had to be fit and well for 12 months from the date of the letter from DVLA, and failing to consider whether the claimant would be suitable for driving any other vehicles / any other roles were not legitimate acts and not proportionate. In respect of dismissal, the respondent had failed to consider the claimant for other roles and did not discuss with the claimant the role he had been performing in the period prior to his extended period of sick leave and on his return to work. Whether it is legitimate and proportionate depends on whether the respondent has properly considered with the claimant what the claimant's role requires him to do and also what the alternative roles available are. In this case there is a dispute between the respondent and the claimant as to the correct description of the scope of his role. There is no indication at all that the respondent has considered whether the claimant is correct in what he says about the nature of his role or whether in fact he was wrong, and his role was 95% driving LGV. In considering these issues it is necessary to have possession of the correct information and to apply it in a reasonable way. It is clear from the record of the disciplinary hearing that this approach was not applied by Mr Tanner. The respondent's failure to consider the work that the claimant actually carried out is in our view fatal for the respondent in this case because it not only touches on whether he could properly continue in his role but also whether there might be alternative work that could be done, or an adjustment made to his role so that he could continue.
51. The conclusion of the Tribunal is that the claimant was subjected to discrimination arising from his disability in dismissing him, failing to consider him for alternative employment and in informing the claimant that he had to be fit and well for 12 months from the date of the letter from DVLA.

Time limits

52. We have gone on to consider whether any of the claimant's complaints pursuant to section 15 and section 21 EqA above have been presented outside the time limit for the presentation of complaints contained in section 123 EqA, and if so whether the employment tribunal can consider such complaints. The claimant's dismissal and the matters arising from the way that the respondent dealt with the claimant's disciplinary hearing all occurred

on the 13 August 2020. The claimant started early conciliation on the 20 October 2020 and ended on 20 November 2020. The claimant presented her complaint to the employment on the 3 December 2020. The relevant complaints are therefore in time.

Failure to make reasonable adjustments

53. Section 20(3) EqA dealing with the need to make reasonable adjustments states that: "The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."
54. The respondent applied a PCP of requiring employees to hold an LGV licence. This put the claimant at a substantial disadvantage compared to those without the claimant's disability, in that he was not able to hold the licence. The respondent knew or could reasonably be expected to know that the claimant was likely to be placed at that disadvantage. The respondent was informed in the Occupational Health Report that 4 May 2020 the claimant was *"fit to work however fitness to return to his role as an HGV driver will be dependent on formal response from the DVLA as they are the legal body responsible for fitness to drive. As such I would suggest that he returns to altered duties until he has had a formal response from the DVLA regarding his fitness to return to HGV driving"*.
55. The claimant contends that to avoid the disadvantage, it would have been reasonable to allow the claimant to continue his transport team leader role as it was previously before his period of shielding. This would have been reasonable because it was largely the role that the claimant had already been doing. It is the view of the Tribunal that the respondent needed to have considered what the nature of the role that the claimant had been doing was. There was a dispute in this hearing between the claimant and the respondent as to the nature of that role. The determination of what was reasonable and what was not depends on determining what that role was, however, it is clear that there was no such consideration. In any event even if the claimant's role was as the respondent states it was, the respondent should have considered whether they could have continued with the role as the claimant describes it.
56. It would have been possible to avoid the disadvantage by altering the claimant's duties in such a way as it avoided driving LGV vehicles.
57. To avoid the disadvantage, it would also have been reasonable to consider alternative roles for the claimant. The evidence before the Tribunal did not show that the respondent had considered alternative roles for the claimant.
58. The Tribunal is satisfied that the respondent has breached its duty to the claimant to make reasonable adjustments by failing to consider the claimant

for alternative roles. The point at which the adjustments should have been made is 13 August 2020. The complaint is therefore in time.

Indirect discrimination

59. The claimant avers that the respondent applied the PCP that employees hold a particular type of driving licence. This was clearly applied to the claimant, and to other staff.
60. This PCP put the claimant, and people who shares the protected characteristic with the claimant at a particular disadvantage compared with persons whom the claimant does not share the characteristic, as it is more likely that the claimant and those who share his protected characteristic would be more likely to have their driving abilities restricted. The PCP did put the claimant at that particular disadvantage as the claimant's licence was revoked by the DVLA.
61. The claimant says that the PCP was not a proportionate means of achieving a legitimate aim. Whilst the aim of ensuring that the claimant did not illegally drive an LGV vehicle is legitimate, it is not proportionate to require him to have a licence, as he did not need to drive an LGV. He could have undertaken other driving roles or other roles which did not require an LGV licence, and these should have been applied. This is supported by the fact that he was not contractually required to hold an LGV licence.
62. The Tribunal reject this complaint the PCP was both proportionate and legitimate. To the extent that the claimant was subjected to a detriment it was because the respondent failed to consider matters outside the scope of the PCP. The respondent dismissed the claimant without properly considering whether the PCP should be applied to the claimant at all, i.e., whether to perform his role he needed a LGV licence. The indirect discrimination claim is not well founded.

Unfair dismissal

63. The respondent made an application to amend the response. The respondent sought to add to section 30 of the grounds of resistance an averment that the dismissal was proportionate "and the efficient management of resources" and a further averment that the claimant's dismissal was a proportionate means of ensuring that the respondent complied with its legal obligations "and the efficient management of resources in the absence of alterative roles or duties."
64. We did not consider that the amendment made any difference to the way that the parties might have prepared for this case or the way that they had in fact prepared. The amendment in our view was setting out a matter that was in scope for both parties in the way that they must have actually prepared for the hearing before any amendment is allowed. There was no prejudice to the claimant in allowing the amendment. To the extent that there was prejudice to the claimant it merely arose from losing the ability to

have a technical gap in the respondent's case which the respondent might not have been able to rely on if the amendment is not granted. In the view of the Tribunal the balance of convenience required us to allow the amendment.

What was the reason for the claimant's dismissal?

65. The reason the claimant was dismissed was because the claimant lost his LGV licence and therefore unable to drive LGV vehicles as part of his role. For the claimant to continue to drive LGV vehicles was in contravention of the law. The reason for the claimant's dismissal is a potentially fair reason (section 98(2)(d) Employment Rights Act 1996).

If the claimant was dismissed for a potentially fair reason, was the claimant's dismissal fair, was it reasonable in all the circumstances, was the dismissal procedurally fair.

66. There was an issue in this case as to what was the claimant's role. There was a dispute even as to what the title of the claimant's role was, Senior Driver or Transport Team Leader. There were produced contractual documents which showed that the claimant was described as both at different times. The parties had very different emphasis on the extent of the claimant's driving duties, the claimant suggested that his role was much wider than an LGV driver and had latterly evolved into a significantly office-based role. The respondent suggested that the claimant's role was essentially a driving role, driving LGV vehicles, with some (a minor amount) office based administrative duties.

67. This issue though engaged in the employment tribunal hearing was entirely absent in the considerations made by the parties during the claimant's disciplinary process. The Tribunal have had to consider what was the claimant's role before going on to consider whether the way that the respondent dealt with the claimant was within the range of responses of a reasonable employer.

68. In paragraph 22 of his witness statement Mr Hunt says: "The Claimant was designated as a Senior Driver, which would mean that his routes would not always be assigned, and on those occasions, he would welcome drivers in during the morning and cover unexpected absence by driving a vehicle on another driver's route. If there was an issue with breakdowns or late deliveries it was essential that he had an LGV licence so that he was in a position to go out in a vehicle to assist. The Claimant's role also required him to have an LGV licence so that he could have routes assigned to him for cover of planned absences, such as holiday. He was unable to continue in this role due to the loss of his LGV licence."

69. The claimant accepted that description of his role but adds: "Transport Team Leaders would cover any sickness when required. For around two to three years prior to my dismissal I had mainly worked in the office, organising all

paperwork, allocating routes to drivers and re-loading any lorries that had not been loaded. I would occasionally do one or two drops a day rarely driving a full driving route, but this would vary from week to week and sometimes I would not do a driving route at all.”

70. The Tribunal concluded that the claimant was doing some driving, the respondent has provided a snap shot to show how much driving and seeks to persuade us that it was as much as 95%. The respondent then goes on to say that in such circumstances the claimant could not continue in his core role as before. The respondent says that there were no altered duties in terms of the nature of the role, the respondent says the claimant was doing lighter duties at the point his licence was suspended. The claimant denied the way that the respondent put its case to him.
71. The parties produced run sheets which showed the claimant’s work after his return to work, this was not representative of the work/role that the claimant did before Covid. We are not satisfied that the runs sheets demonstrate that the claimant was working light duties.
72. The Tribunal’s conclusion is that we prefer the account given by the claimant of the nature of his duties. We consider that his role was one which involved considerable amount of driving of LGV vehicles but also other vehicles (such as vans). The amount of driving that the claimant did was variable and his role included a significant amount of office-based work.
73. If the respondent considered alternative roles or adjustments to the claimant’s role, the respondent was not considering the claimant’s role accurately, it was not a 95% LGV driving job although there was a significant amount of LGV driving involved.
74. The Tribunal is not satisfied that the respondent has shown that there was any real consideration given to the possibility of the claimant being employed for an alternative role. The Tribunal notes that at the hearing before Mr Tanner it was stated that alternative roles were to be considered. There was a break for 45 minutes but there was no discussion recorded about alternative roles after the break. Towards the end of the disciplinary hearing there was a break for 15 minutes during which Mr Tanner must have prepared the decision that he gave to the claimant dismissing him from employment. There is no evidence of the claimant being considered for alternative roles if he was so considered there is no indication of what those roles were or that any such invisible consideration was done in a way that involved consultation with the claimant. We do not accept the simple assertion made by Mr Tanner that he considered alternative roles, in his evidence Mr Tanner says at paragraph 20 that he asked about redeployment, but this is not recorded as having been reported to the claimant or discussed with the claimant. Mr Tanner’s evidence contained vague assertions about what he did, referring to his discussion with HR about possible redeployment of the claimant: he said, “I did not get the exact details from Ms Friend during the adjournment”. In his dismissal outcome letter Mr Tanner says that he discussed the possibility of redeployment in

the disciplinary meeting but this is not correct. The respondent has not produced evidence to show that proper consideration of alternative roles was carried out.

75. In a situation such as that faced by the claimant and the respondent, we consider that a reasonable employer would have looked for alternatives to dismissal. This is something that the respondent states it has done in comparable situations, prior to the claimant's case, where employees have lost their licence. The respondent indicated that it had done so even in circumstances where employees have lost their licences due to their own culpable conduct. We note that the claimant was blameless in losing his licence it arose as a result of his disability.
76. We also note that the respondent at around this time was considering redundancies, the letter of 14 July 2020 (p134) set out a number of options in respect of redundancies that might be available. In the claimant's case we know these were not considered we do not know if they were considered in the case of other employees who were made redundant. The claimant had completed a redundancy options form in which he had selected reduced hours and associated pay.
77. We also note that the respondent was not considering redundancies in the Transport Team at Slough but was considering redundancies in the warehouse. The respondent also had a fleet of vans for which an LGV licence was not required, the respondent did not consider the claimant for any such role, we do not have an indication of what if any roles were available in this regard. We bear in mind that while the respondent speaks of a paucity of alternative roles and the prospect of redundancies at the point that the claimant was dismissed there had not been any redundancies at the time at the date of the claimant's dismissal and it was not anticipated that redundancies would be made in the transport department at Slough.
78. The claimant was purportedly disciplined for gross misconduct, it was never expressly stated that the claimant was not being dealt with under the disciplinary policy. The respondent always considered the claimant to be in breach of contract and referred to it as misconduct and gross misconduct. There was a duty to use the correct procedure when dealing with the claimant and having regard to the claimant's mental health issues, of which Mr Tanner was aware, the claimant was vulnerable.
79. The claimant was afforded the right of appeal however to the extent that there were shortcomings in the process leading up to the decision to dismiss the claimant we are of the view that the appeal did not solve the issues. In the appeals the procedural issues were reinforced by it being expressly stated that the claimant was dismissed for gross misconduct. Further in the appeal the claimant asked specifically for an alternative role and mentioned others (p249-250). The notes suggest that no discussion about alternative roles took place.

80. In the circumstances described we are of the view that the claimant was unfairly dismissed by the respondent.
81. The claimant did not contribute towards his dismissal. The respondent has not established any evidential basis on which we could conclude that there should be a reduction of the claimant's basic or compensatory award.

Employment Judge Gumbiti-Zimuto
Date: 23 January 2023
Sent to the parties on: 2/2/2023
NG
For the Tribunals Office

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