EMPLOYMENT TRIBUNALS

Claimant: Mr I Brown

Respondent: Arriva London (North) Ltd

Heard at: Watford ET **On: 22 and 23 February 2023**

Before: Employment Judge Tuck KC

Appearances:

For the Claimant: In Person
For the respondent: Mr B Jones, Counsel.

RESERVED JUDGMENT

1. **The Claimant's claim of unfair dismissal, breach of contract and of unlawful deductions from wages fail and are dismissed.**

REASONS

1. The Claimant was employed by Arriva London (North) Limited as a bus driver from March 2015 until his dismissal on 11 August 2020. By an ET1 presented on 9 November 2020 following the provision of an Early Conciliation Certificate on 17 September 2020 (the process having been started the same day), the claimant brought claims of unfair dismissal, race discrimination, and unauthorised deductions from wages or alternatively breach of contract in relation to failure to pay him sums due between 13 March 2020 and 11 June 2020.

Hearing.

2. At the outset of the hearing in informed Mr Brown that Mr Jones, the barrister representing the Respondent, was a member of the same set of chambers as me, and assured him I knew

nothing about the case, and that we were both self employed practitioners. He did not object to my hearing the case.

3. At a Preliminary Hearing on 20 January 2022 EJ George made a deposit order in relation to the claims of race discrimination on the ground that she considered they had little reasonable prospect of success. The claimant withdrew his race discrimination claims and on 16 May 2022 a judgment dismissing those claims was made by the Legal Officer, and sent to the parties on 14 June 2022.

4. The issues to be considered for the claims of unfair dismissal and unauthorised deductions/ breach of contract were set out by EJ George in January 2022, and were at pages 79 and 85 of the bundle of documents.

5. I was provided with a joint bundle consisting of 573 pages to which two more pages were added from the claimant in the course of the hearing, two CCTV clips from 13 March 2020 (I also watched a third clip which was of another driver in the same vehicle on the same day, which the parties agreed was not of the claimant and was sent to him in error), and one audio clip of an exchange between the claimant and controller from the same day. The claimant was given a hard copy of the agreed bundle on the morning of the hearing; I understand he had been sent a PDF version in accordance with the directions, and had requested pages be added so sent an amended version. When the claimant used his original documents Mr Jones assisted in locating them in the bundle. The only two pages the claimant relied upon which were not in the bundle were copied by the tribunal and added.

6. I had written statements and heard evidence on oath from Yasmin Bishop, currently Interim Head of Operations, South London (the dismissing manager), Nick Bland currently on secondment in an interim role of Area Operations Director for Arriva the Shires and Southern Counties (appeal manager) and Alex Jones Company Operations Director (who conducted what under the respondent's policy is called a "sympathetic appeal" on paper). The claimant did not produce a witness statement, but gave evidence by confirming the content of his ET1 and was cross examined.

7. I read such documents as I was referred to in the bundle, and set out below my findings of fact relevant to the issues in the case before me. I considered all the evidence and submissions made. Mr Brown and Mr Jones agreed a timetable at the outset of the hearing; the claimant said he wanted 10 minutes to question each witness and was afforded at least an hour with each; in fact he spent almost 1.5 hours with Ms Bishop, and confirmed he had asked all the questions he wanted to. Mr Brown was clearly disappointed that Mr Wyatt – who had considered one of his grievances, and Mr Cobham – the chair of the Unite branch at the respondent's Tottenham garage were not giving evidence. He did not ask either to attend, nor seek an order compelling their attendance. Mr Brown did produce a written letter from O'Neil Lewis who attended his appeal hearing as a workplace companion, which I read. In the course of cross examining Mr Bland the claimant sought to ask questions from the list of issues concerning race discrimination. I made it clear that race discrimination is no longer in issue; in closing submission he suggested he had been prevented from asking questions about his human rights and equality; I could not discern any matters relevant to the issues before me which remained unexplored.

Facts

8. The claimant commenced work for the Respondent as a bus driver in 2015. I was directed to a number of policies and procedures operated by the Respondent including a policy and driver handbook on attendance, driver handbook on driving standards, a safe driving policy, disciplinary policy and grievance policy. I cite provisions within these policies where relevant, below.

9. The claimant was, at all material times, a member of Unite the Union – which is recognized by the Respondent at the Tottenham Garage – where, at all material times, the claimant worked.

10. The claimant directed my attention to his disciplinary record; this showed the following:

    25/2/16 – caution for attendance

    7/12/16 – caution for attendance

    25/5/17 – Caution & [illegible?] for attendance

    1/11/17 – final caution for attendance

    17/5/18 – final caution for attendance

    29/8/18 – final caution for self-suspension

    30/5/19 – final caution for attendance

    3/12/19 – final caution for abusive language towards an official

11. Final cautions remain 'live' on an employee's record for a period of 12 months. Ms Bishop confirmed that she imposed the May 2018 final caution and December 2019 final caution to the claimant, neither of which he appealed against. The claimant's cross examination of each of the Respondent's witnesses demonstrated that he was familiar with, and understood the importance of the policies and procedures.

12. By a letter dated 12 March 2020, handed to the claimant on 13 March2020, he was invited to a disciplinary hearing to take place on 24 March 2020 to consider an allegation of unsatisfactory attendance over a rolling 12 month period.

13. On 13 March 2020 the claimant was driving a double decker bus on route 243. Ms Bishop's statement says he arrived late to take over the bus – at around 14.17 hrs, then left it unsecured at a bus stand, with the engine running and passengers on board, while he went to the café to use the toilet and collect a hot drink, not leaving the stand until 14.21hrs. I understand this was agreed by the Claimant who also confirmed his work was due to commence at 14.14hrs. CCTV from a camera in the bus cab from 14.22 to 14.23 shows the claimant opening a sealed envelope while the bus appears to be stationary, then with the bus in motion, shows the claimant taking pages which had been in the envelope, opening them from folded to A4 size, and flicking through the pages. The CCTV shows that the claimant left his indicator flashing when it should have been turned off as he was opening out the folded papers, and a second CCTV view of the same minute (some 10 seconds later)

shows that the claimant was breaking as he approached a traffic light, shows the light turning from amber to red at least 3 seconds before the claimant reached the stop line, and the claimant proceeding across the junction. It is not in dispute that the letter which was in the claimant's hand and shown during this CCTV footage was the letter dated 12 March inviting him to a disciplinary hearing.

14. At 14.24 hours a controller from the respondent's garage contacted the claimant to ask him about why the vehicle had departed late. The audio file from this call clearly records the controller, but the claimant's voice is more difficult to discern. The controller wrote a report which I had at page 331, recording the claimant saying "it is against my contract. I'm not driving this bus for the rest of the day". The controller said that a refusal to continue to drive would be a 'self suspension', and the claimant said "I'm not suspending myself, you are bullying me and I'm not fit to drive. You can collect the bus from Seven Sisters". The claimant did leave the vehicle at Seven Sisters and it was retrieved later by another individual. The controller recorded that the claimant "came across as very irate and stressed insinuating that I was pressuring him". This audio file was reviewed by Ms Bishop in the disciplinary hearing at the Claimant's request, and she concluded that the exchange had taken place after the incident of driving whilst opening / perusing the letter and running the red light, and was not therefore relevant to the driving standards issue.

15. The claimant accepts that he "self suspended" on 13 March 2020. The respondent's policy provides that self suspension will be without pay. It must be reviewed "at the earliest possible opportunity" which the policy provides is "normally at 9am the next working day". In March 2020, the next working day was 16th and the claimant was invited to a meeting at 09.00. At 06.54 Ms R Geral emailed him saying she had tried to call him but was unable to reach him; "there is no union present today, so please attend the garage tomorrow at 9am when union will be present for a suspension review". The claimant did not say at which time he received this email nor whether he saw missed calls on his phone; he said he lived 115 miles from work (this may refer to a round trip) but did not say whether he was on his way to the meeting when it was postponed. Certainly the claimant did not reply to the email, telephone or attend in person to object to the postponement. His case before this tribunal was that because the self suspension review was not done on 16th March, the respondents were "in breach of policy", and though he declined to give an express answer, it seems to be his case that the suspension could not be reviewed on any later date.

16. The claimant did not attend on 17 March 2020 as invited. Ms Geral emailed him noting that and asking him to come the following day – 18th. She said "I note you have opened a FirstCare absence and now extended it to 23/3/20. However you are currently under suspension and have been since 13/3/20. Please make contact with the garage as soon as possible". FirstCare is the name give to the respondent's system whereby employees can self certify as unfit to work. The claimant had told FirstCare on 16th March that he was suffering from stress; I understand that because of this he did not attend the meeting scheduled for either 17 or 18 March. On 20 March 2020 he had a medical certificate saying he was suffering from "stress at work". Ms Geral attempted to contact the claimant again on 20 March by telephone, and sent an email inviting him to a meeting on 24th March. The letter and email of 20 March made it clear that the claimant's absence at that time was considered to be 'self suspension'.

17. On 3 April 2020 the claimant emailed Ms Geral saying that he would not work due to stress, and the "self suspension don't exist [sic] due to controllers constant bullying and harassment while on duty goes unnoticed. Are you saying I have no rights to a toilet break or to be paid while off sick…. This is not a self suspension but stress under duress".

18. The claimant's wife contracted Covid on or around 6 April, which also required the claimant to self isolate. He did not however tell his employer about her covid diagnosis until 26 May – in fact in a lengthy email of 8 April 2020 which set out a large number of grievances, he made it clear he was absent due to his own sickness.

19. On 22 April 2020 the suspension review and a fact find about the matters of 13 March 2020 took place in the claimant's absence, but in the presence of the Unite branch secretary, Mr Freddie Cobham. At the end of that note it is recorded by the manager that the claimants suspension would continue with pay. A review note made the following day records "due to IB not attend this meeting a decision has been made not to pay suspension pay but SSP instead as IB is currently non-compliant. This will be reviewed in the upcoming grievance meeting which has been arranged on 30 April 2020".

20. The claimant was certified as unfit to work between 22 April and 10 June 2020. I understand he says he was entitled to contractual sick pay. His contract of employment (pg 561) says that "details of current terms and conditions and other arrangements regarding…. Incapacity for work due to sickness or injury and sick pay… are in documents available for inspection in the Personnel Office". It is not clear whether those contractual documents have been provided; there is a "general information details for Arriva London North Drivers" handbook which is headed "details as at 1 January 2020". This states (pg 568) that for employees who have between 5 and 6 years service, they will receive 16 weeks full rate and 16 weeks half rate. Sick pay rates for a "DRP 5" – which I understand to refer to a driver with five years' service, is £399.51 per week.

21. The claimant had complained about receipt of SSP rather than company sick pay in his grievance; Mr Wyatt found that a decision had been made on 24 April to pay him only SSP due to not being fully compliant with procedures. He found that as of 26 May 2020 he was fully compliant and at that stage his SSP should have been converted to company pay which should have continued until 10 June 2020 – from which date the claimant was suspended with pay. Mr Wyatt stated that correct payments had been paid since 26 May and that he had requested the conversion from SSP to full pay for the period between 24 April and 26 May. In his letter dismissing the claimant's grievance appeal, Mr Parry wrote of being paid SSP only "a full discussion of the reasons for paying SSP only for your time away from the business was set out by Mr Wyatt. I have reviewed this explanation and agree with the response. The issue is closed." (pg 430).

22. In her evidence Ms Bishop stated "Fabio made the decision to only pay Ian statutory sick pay rather than company sick pay. Company sick pay is discretionary and Fabio exercised his discretion here to pay SSP only. Arriva's absence policy provides an obligation for an employee to maintain regular contact with managers, including attending meetings when required which was also considered when deciding appropriate sickness payments". She was not challenged on this evidence by the Claimant – and in any event I would accept her

evidence which is consistent with the reasoning set out by Mr Wyatt and reviewed and upheld by Mr Parry that co sick pay is discretionary.

23. The claimant required his grievance to be considered before any disciplinary hearing was embarked upon. Therefore, save for a "fact find" on 11 June 2020 by Mr Wyatt, the disciplinary issues involving both attendance (which had been foreshadowed in the letter dated 12 March 2020) and the events of 13 March 2020 were put on hold.

24. As referred to above, the claimant's grievance was determined by Mr Wyatt whose decision letter was dated 26 June 2020, and his appeal against that was dismissed by Mr Parry on 29 July 2020. I note that at the conclusion of his letter Mr Parry – seemingly in answer to the claimant raising the issue of a transfer request – wrote "I will inform the Operations Manager of your expression of interest to transfer to a garage closer to your home address so that she may look into this for you once the current outstanding disciplinary investigation is closed". The claimant says Mr Parry told him verbally he would be transferred. In the list of issues there is an allegation that Mr Bland told the claimant he would be transferred – a matter denied by Mr Bland. I understand that the claimant meant to refer to Mr Parry (rather than Bland) in the list of issues. I do not find it likely that such an agreement was given verbally by Mr Parry because (i) it is contrary to the express and carefully worded statement in his decision letter, (ii) as the Head of Driver Recruitment and Training, it would not be within his gift, and (iii) he was obviously conscious of the claimant being suspended pending a disciplinary hearing.

25. The disciplinary hearing was scheduled to take place on 3 August 2020 before Ms Bishop. In advance of that the claimant was asked about representatives; he emailed on 2 August saying "if Freddie or O'Neil is [sic] available for tomorrow that would be great". This refers to either Mr F Cobham, the Unite Branch Secretary, or Mr O'Neil Lewis who worked from a different garage.

26. The meeting scheduled for 3 August 2020 did not go ahead on that date – I accept the evidence of Ms Bishop that this was because the claimant had not had the opportunity to consider in detail the outcome of Mr Parry's letter dated 29 July. The meeting was rescheduled for 11 August.

27. The disciplinary hearing convened on 11 August 2020 was chaired by Ms Yasmin Bishop and the claimant was accompanied by Mr Cobham. The two issues for consideration were (i) an allegation of unsatisfactory attendance over a rolling 12 month period, and (ii) the issue of his driving standards on 13 March 2020. Ms Bishop says the 9 single spaced typed pages were her notes, taken on the computer during the hearing. The claimant said that Ms Brown took no notes and simply stared at him for 5 hours, and denied their accuracy. At the appeal hearing which followed the HR officer who attended with Mr Bland recorded that the claimant was asked if he had the minutes of the disciplinary hearing and if they were accurate, and he replied yes, and that they were accurate. I have no hesitation in preferring the evidence of Ms Bishop that she took minutes at the time and that they are accurate. At the outset of the hearing the claimant took no issue either with her chairing the meeting, nor with Mr Cobham being his representative. By contrast I note that the claimant did take issue with Mr Wyatt chairing his grievance hearing – a matter recorded and determined.

28. There is no record in the hearing notes of the claimant saying the disciplinary could not go ahead because he had a second stage appeal against his grievance. The respondent's grievance policy does not provide for a second stage appeal; it seems however from an email disclosed by the claimant on the first day of this hearing that the claimant emailed a Simon Roland of HR on 14 August 2020 who told him by reply on 19 August 2020 that he would have Mr Alex Jones conduct a second stage appeal on 26 August 2020. I accept entirely that Ms Bishop knew nothing of any suggestion of a second stage appeal and considered the grievance to be concluded. Nor did the claimant raise an issue about an outstanding stage of the grievance process when confirming his ability to attend on either 3 or 11 August 2020. Mr Bland told me that Mr Roland also does HR work for other Arriva companies which do have a second stage of appeal and it appeared to him most likely that Mr Roland was mistaken in making the offer. In any event, no such meeting took place, and nor did the claimant or his union chase for such a meeting.

29. During the course of the disciplinary hearing the CCTV footage from 13 March was played and considered carefully. The claimant had his opportunity to put forward his case – which was that he was not reading the letter he was handling whilst driving on 13 March – as you could not see his face this could not be proven against him, and that he had been paying attention as he approached the red light but felt he had passed the 'point of no return' when it went from amber to red.

30. Ms Bishop made the decision that summary dismissal was appropriate for both the attendance issues and the driving standards issues from 13 March 2020.

31. The claimant appealed – his appeal was heard on 8 September 2020 by Mr Bland and Mr Gardener, with Ms Butcher of HR taking notes. The claimant was accompanied by Mr O'Neil Lewis – described as a workplace companion. The CCTV was again reviewed – Mr Lewis int eh course of that hearing said that drivers must approach lights with caution and coming up to an amber light must be able to stop in time. The claimant said this record was incorrect. I do not accept that. The appeal was upheld in relation to the decision to dismiss for attendance, but dismissed in relation to driving standards. The claimant's dismissal therefore stood – set out in a letter before me at page 497.

32. The claimant requested a "sympathetic appeal". There was evidence about the procedure for this changing in September / October 2020, but nothing turned on that; Mr Alex Jones agreed to conduct such an appeal -which is a paper based exercise. He did that, and his conclusions are set out in a letter dated 2 October 2020. Through oversight/ human error, this letter was never sent to the claimant. In evidence before me Mr Jones apologised to the claimant for that. He also noted that he had not received any "chasers" as he would clearly have sent the response immediately had he done so. Mr Jones, having viewed the CCTV and relevant documents was also of the view that the dismissal was fair.

Law.

33. **Section 13** of the Employment Rights Act 1996 ("ERA") provides:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(*a*) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(*b*) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Breach of Contract

34. The Employment Tribunal (Extension of Jurisdiction) England and Wales Order 1994 provides that proceedings may be brought before an Employment Tribunal in respect of a claim of an employee for the recovery of damages if the claim arises or is outstanding on the termination of the employee's employment.

35. Mr Jones in his written note on the law cited *Braganza v BP Shipping Ltd* [2015] ICR 449, SC which set out the correct approach to a contractual discretion is that to be applied to public law decisions. I.e. a decision must not be arbitrary, capricious or irrational. A decision can be impugned on rationality grounds if irrelevant considerations were taken into account, relevant considerations were not taken into account or if no reasonable decision maker could have reached such a decision.

Unfair Dismissal

36. Section 98 of the Employment Rights Act 1996, so far as material, provides as follows:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

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

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

(2) A reason falls within this subsection if it—

(*a*) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(*b*) relates to the conduct of the employee,

(*c*) is that the employee was redundant, or

(*d*) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

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

(*a*) depends on whether in the circumstances (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

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

37. In *London Borough of Hammersmith and Fulham v Keable* [2022] IRLR 4 the EAT reviewed the law in relation to 'conduct' dismissals and gave the following summary:

> ***"68***
> *The right not to be unfairly dismissed is set out in s 94 of the Employment Rights Act 1996 (ERA 1996). It is currently afforded to employees with two or more years of continuous service with an employer.*
> ***69***
> *The fairness of a dismissal is determined in accordance with the principles set out in s 98 of the ERA 1996. An employer bears the burden of establishing that the dismissal is for a potentially fair reason within the meaning of s 98(2) ERA 1996, and then, if that is established, the Tribunal will determine whether that dismissal was fair or unfair, (having regard to the reason shown by the employer). That determination will depend upon 'whether in 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, shall be determined in accordance with equity and the substantial merits of the case'. The critical question, therefore, is whether, having regard to those matters, the employer acted reasonably or not in treating the particular, potentially fair reason, as a sufficient reason for dismissing a particular employee.*
> ***70***
> *It is implicit within those words that the question the Tribunal must address, is not whether the Tribunal members themselves would have made the decision to dismiss the employee; they must not simply substitute their view for that of the employer*

(Morgan v Electrolux Ltd [1991] IRLR 89, [1991] ICR 369 CA; London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, [2009] IRLR 563 CA). Over the years, Tribunals have been reminded that they must judge the standard of a fair dismissal, not by that which they would, or might have done, but by reference to the options open to a reasonable employer, in other words by an objective standard. A dismissal is only to be held to be unfair if it was outside the range of reasonable responses open to a reasonable employer. This assessment, of whether the decision to dismiss this particular employee in respect of a particular matter or issue, came within the range of reasonable responses open to a reasonable employer lies at the heart of the law relating to unfair dismissal; it is the litmus test by which each stage of the dismissal process and the decision to dismiss is to judged. Sainsbury's Supermarkets v Hitt [2002] EWCA Civ 1588, [2003] IRLR 23, [2003] ICR 111, particularly para [30].

71

In the context of a conduct dismissal it is clearly established that that test requires a Tribunal to address the following three matters:

> *a. Whether the employer genuinely believed that the employee was guilty of the relevant misconduct; and, if so,*
>
> *b. Whether that belief was based on reasonable grounds; and*
>
> *c. Whether that genuine belief on those reasonable grounds had been formed after having carried out a reasonable investigation.*

72

This, oft cited statement, or one similar to it has its origins in the following passage from Arnold J in British Homes Stores v Burchell [1978] IRLR 379, [1980] ICR 303n:

'The case is one of an increasingly familiar sort in this Tribunal, in which there has been a suspicion or belief of the employee's misconduct entertained by the management, it is on that ground that dismissal has taken place, and the Tribunal then goes over that to review the situation as it was at the date of dismissal. … What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question … entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure" …[or].. "beyond reasonable doubt." The test, and the test all the way through, is reasonableness;'

> ***73***
> *A fair process requires that an individual should know the case against them and have an opportunity to respond to it. See Spink v Express Foods Ltd [1990] IRLR 320: 'Fairness … requires … that someone accused should know the case to be met; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence, and to adduce his own evidence and argue his case.'*
>
> *To similar effect see Boyd v Renfrewshire Council [2008] SCLR 578 at 586G–587A; K v L (2020) UKEATS/0014/18, [2021] ICR 192 at paras 30–33.*

38. Mr Jones produced a written note on the law. This included the proposition that it is legitimate for an employer to rely on a final written warning when deciding whether to dismiss an employee, even if the warning related to different kinds of conduct. In particular *Davies v Sandwell Metropolitan Borough Council* [2013] IRLR 374, CA, in which Beaston LJ held "*there is a need for finality. Where there has been no appeal against a final warning, or where an appeal has been launched but not pursued, I consider there would need to be exceptional circumstances for going behind the earlier disciplinary process and in effect reopening it*".

Conclusions on the issues.

39. Considering the issues listed at the PH in turn:
    a. *Was the claimant dismissed*? Yes.
    b. *What was the reason or principal reason for dismissal*? I find it was conduct – relating to driving standards on 13 March 2020.
    c. *Was it a potentially fair reason?* Yes, within section 98(2).
    d. *Did the respondent act reasonably in all of the circumstances in treating it as a sufficient reason to dismiss the claimant*? I have concluded that they did.

40. The well known test from *BHS v Burchell* requires consideration of whether the belief was genuinely held – it clearly was here by Ms Bishop, Mr Bland and Mr Jones. Were there reasonable grounds for the belief; that is answered in the affirmative. The conduct in issue was recorded on CCTV. Had such investigation as was reasonable been carried out? Again the answer to this is yes. There was a fact find meeting for the CCTV to be reviewed, and time was spent considering it at the disciplinary and appeal hearings.

41. The claimant's essential challenge to his dismissal was that it was not procedurally fair. Taking each of his complaints in turn:

    a. "*YB the dismissing officer continued with the disciplinary hearing when a grievance which impacted her was pending*".
    I note that the claimant says his grievance "impacted" Ms Bishop; I accept it mentioned her, but it mentioned many others and did not appear to me to be specifically critical of her.
    b. The respondent refused the claimant his representative of choice Mr O'Neil Lewis

I am satisfied that the Respondents were not aware that the claimant had any objection to being accompanied by Freddie Cobham, not least after his email of 2 August saying he was happy with either Freddie or O'Neil. He was not refused his representative of choice.

c. *Delay in completing the disciplinary process*
The delay in considering the events of 13 March 2020 arose firstly from the claimant's period of time off sick, and then to enable his grievance to be heard and considered on appeal. When the appeal decision was sent on 29 July, a disciplinary hearing was convened for 3 August, delayed to 11th to enable the claimant to digest the contents of the grievance appeal decision. There was no unreasonable delay. The claimants contentions that there is a policy requirement to conclude a disciplinary matter in either 30 or 90 days is misconceived.

d. *Nick Bland told the Claimant that he would be transferred to a location closer to his home address*
It was agreed that Nick Bland did not say this. I do not find that Mr Parry said it either for the reasons set out above.

e. *The decision to dismiss was disproportionate and did not take sufficient account of his good driving record and previous commendations.*
I am satisfied that Ms Bishop, Mr Bland and Mr Jones each took into account the claimant's service history. As Mr Jones said in evidence, he took into account not only the "good driving record", but also when stepping back and taking a wholistic view of the claimant's service, his history of cautions and final cautions for his attendance and conduct – which had not been appealed. I dismiss this criticism.

f. *The claimant did not have a sympathetic appeal which is part of the respondent's dismissal process.*
The claimant did have the advantage of having his case considered by the COO. It is understandable that he included this as a criticism given the failure by the respondent to send the outcome letter to the claimant. That omission – for which an apology was properly given by Mr A Jones in his evidence before me – does not mean that the appeal did not take place and does not render the dismissal unfair.

42. I am satisfied that dismissal was within the range of reasonable responses. In any event, I would have been satisfied that any procedural defects would have made no difference to the final outcome. Furthermore, I would have found that the claimant contributed to his dismissal by 100%.

43. As to the claim of either unauthorised deductions from 20 March to 11 June, the claimant has not shown to me what was properly payable on set dates. I have nevertheless considered the substance of his compliant under the heading of breach of contract.

44. The claimant claims there was a breach of contract in keeping him on self suspension between 13 and 20 March in breach of their policy when the claimant was unable to work because of ill health. I suspect he probably intended this issue to cover the period between 13 March and 22 April. During that time the claimant was unpaid on "self suspension". It is clear the respondent has a contractual right not to pay employees who have self suspended. The Claimant's rigid interpretation that because the review scheduled for 16 March was postponed for 24 hours by the respondent (due to lack of a union representative on site), it could not take place under the policy at all thereafter, was misconceived. The policy says

reviews will take place as soon as possible which will NORMALLY be the next working day. Whilst the Respondent ought to have asked the claimant if he was content to proceed without a union official, rather than assuming it could not go ahead without union presence, I do not find their 24 hour postponement to amount to a breach of contract. Thereafter whilst the claimant had effectively self certified, then got a doctors certificate that he could not work (not that he could not attend a meeting), I find that his refusal to go to a meeting was because of his unreasonable interpretation of the contract that because the respondent had postponed the meeting of 16th, they were in breach of policy and could not conduct the meeting at a later date. The correspondence sent to the claimant by Ms Geral informed him that he was considered to be self suspending and urged him to make contact. There is no breach of contract during this period.

45. I have thought carefully about the claim that the failure to pay they claimant "contractual sick pay" after 22 April amounting to a breach of contract. It was unsatisfactory that I was not taken to the full sick pay policies operated by the Respondent. However, having seen the decision of Mr Wyatt who looked at this under the grievance, and did reinstate company sick pay from 29 May, and of Mr Parry who reviewed the position, and in light of the evidence of Ms Bishop that contractual sick pay is discretionary and effectively dependent on an employee co-operating with meeting requests, I do not find the respondent to be in breach of contract. Furthermore, the claim in relation to any period of self isolation when the claimant's wife had covid is not upheld in circumstances where the claimant did not tell the respondent of this until after the relevant period, and relied instead on his own certified sickness.

46. The claims are accordingly dismissed.

EMPLOYMENT JUDGE TUCK KC.

Dated this 24th day of February 2023.

JUDGMENT SENT TO THE PARTIES ON

1st March 2023

GDJ

FOR THE TRIBUNAL OFFICE

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.