Case No. 3307084/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr Sean D'Auvergne

Respondent: Metroline Travel Ltd

Heard at: Bury St Edmunds ET (In the virtual region via CVP) **On:** 6 & 7 March 2023

Before: Employment Judge Poynton (sitting alone)

Representation:

Claimant: In person

Respondent: Ms C Nicolaou (Solicitor, non-practising)
Ms K Patel (Operations Manager, Willesden Garage)
Mrs F Olawo-Jerome (Garage Manager, Holloway Garage & King's Cross Garage)
Mr G Siddhu (observing)

RESERVED JUDGMENT

1. The respondent's application to strike out the claimant's claim is dismissed.

2. The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Bus Driver / Operative 15 August 2011 until 11 March 2020, when he was dismissed without notice. The claimant was originally employed as a Bus Driver on the 168 route by a company, Arriva London North Ltd ("Arriva"). On 26 September 2015, the 168

bus route was transferred from Arriva to the Respondent, Metroline Travel Ltd. The claimant's contract of employment also transferred from Arriva to the respondent so that, pursuant to the provisions of the **Transfer of Undertakings (Protection of Employees) Regulations 2006** ("TUPE"), his contract was treated as having been made with the Respondent.

2. ACAS was notified under the early conciliation procedure on 27 May 2020 and the certificate was issued on 11 July 2020. The claimant presented his claim on 20 July 2020.

3. The claimant's position is that he was unfairly dismissed by the respondent within section 98 of the Employment Rights Act 1996.

4. The respondent contests the claim. It says that the claimant was fairly dismissed for misconduct in the form of threatening behaviour against a third party via posting on social media and bringing the respondent company into disrepute by posting inappropriate comments on social media. The respondent says that it was entitled to terminate the claimant's employment without notice because of his gross misconduct.

5. The claimant represented himself at the hearing. The respondent was represented by Ms C Nicolaou, a non-practising solicitor. The witnesses for the respondent were Ms K Patel and Mrs F Olawo-Jerome. I considered the documents from the respondent's 167 page bundle. I also considered late evidence submitted by the claimant which included fit notes from his doctor, evidence of prescribed medication, a document setting out the funerals he had attended prior to his dismissal and letters from the respondent in relation to his time off work.

Preliminary issues

6. At the beginning of the hearing, before I heard any evidence, I had to deal with some preliminary issues.

Type of hearing

7. This was a remote hearing using CVP.

8. There was a delay in the claimant joining the hearing at the start of the day on 6 March 2023. The hearing was delayed so that the clerk could make contact with the claimant by telephone. The hearing was delayed to allow time for the claimant to connect to the hearing

9. Mrs Olawo-Jerome had to step away from the hearing to collect a family member from a medical appointment during the break for lunch on 6 March 2023. She was able to re-join the hearing shortly after the hearing re-started. Ms Nicolaou, on behalf of the respondent, confirmed that the respondent was content to proceed with Ms Patel's evidence in Mrs Olawo-Jerome's absence.

10. There were several connectivity issues on the part of the claimant. The claimant was connected to the hearing via his mobile phone. We delayed the start to the afternoon session on 6 March 2023 to allow the claimant time to attempt to resolve these issues. The claimant reconnected via laptop which improved stability but the audio was very faint. The claimant reconnected via phone as the audio connection via laptop was so poor. I asked the claimant to have the documents he needed open on his laptop rather than switching between applications on the phone.

Application to strike out

11. The respondent applied to strike out the claim under Rule 37(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds of the claimant's failure to comply with case management orders and that the claim has not been actively pursued and/or the manner in which the proceedings have been conducted by the claimant is refused.

12. On 3 March 2023, the respondent provided the claimant with their witness statements in advance of today's hearing and in compliance with the Tribunal's directions. The claimant did not provide his witness statement in compliance with the Tribunal's directions.

13. The claimant provided his witness statement and an index to a bundle of documents early on the first morning of the hearing. The bundle of documents itself has not been received by the respondent or the Tribunal. The respondent asks me to strike out the claimant's claim as they have not had sufficient opportunity to consider the claimant's evidence given the late stage at which it was provided.

14. The claimant accepted that he had not complied with the order and that his witness statement and bundle were provided late. His explanation was that he thought he had representation dealing with this matter on his behalf and therefore did not respond to any of the respondent's emails as he thought his representative was dealing. He asks me to take into account that he was very tired. He further advised that his witness statement was the key part of his evidence.

15. In deciding whether to strike out the claimant's claim, I have had regard to the overriding objective set out in Rule 2, seeking to deal with cases fairly and justly. This requires me to consider all relevant factors, including:

    a. what disruption, unfairness or prejudice has been caused;
    b. whether a fair hearing would still be possible; and
    c. whether striking out or some lesser remedy would be a proportionate response.

16. A proportionate response requires me to consider whether there is a less drastic means of addressing the claimant's failures and achieving a fair trial for the parties. The striking out of the claimant's claim would be a draconian step

that would mean that the claimant was unable to continue to advance his case as pleaded.

17. This is a claim for unfair dismissal. It is not disputed that the claimant was dismissed by the respondent. The issues for the tribunal to determine in an unfair dismissal claim include the principal reason for dismissal. This is set out in the respondent's ET3 that this was due to the claimant's actions in posting on social media amounting to threatening behaviour against a third party and bringing the company into disrepute.

18. The tribunal would also need to consider whether:

    a. there were reasonable grounds for that belief;
    b. at the time the belief was formed the respondent had carried out a reasonable investigation;
    c. the respondent otherwise acted in a procedurally fair manner;
    d. dismissal was within the range of reasonable responses.

19. Ms Patel and Mrs Olawo-Jerome were in attendance on behalf of the respondent and I also had the claimant present. I concluded that I could hear from the parties present on these issues to be able to make a fully informed determination on the issues before the Tribunal.

20. I considered the proportionality of adjourning and noted that this claim dates back to 2020. I concluded that it is neither proportionate nor in the interests of justice to adjourn the hearing.

21. I also considered the respondent's request that the hearing proceed on the basis of the respondent's evidence only. I concluded that this would put the claimant at a disadvantage and that this would not comply with the overriding objective to deal with cases fairly and justly.

22. I was mindful that the respondent has not had sufficient time to consider the claimant's witness statement. I concluded that this could be ameliorated by allowing additional reading time before the hearing gets underway for the respondent's representative and witnesses to consider the claimant's witness statement and also by allowing reasonable supplemental questions that may arise.

23. In terms of remedy, which would only arise in the event of the claimant's complaint of unfair dismissal succeeding, the Tribunal would need to hear evidence on financial losses, the steps the claimant has taken to replace his lost earnings, for what period of loss the claimant should be compensated, whether there was a chance that the claimant would have been dismissed if a fair procedure had been followed, whether the claimant contributed to his dismissal by blameworthy conduct.

24. I concluded that in the event that the claimant's claim succeeds, I would be able to issue case management directions in relation to remedy. I could hear

representations from both parties as to contributory fault and Polkey as well as whether there were any breaches of the ACAS code of conduct at this hearing.

25. Having concluded that a fair hearing could take place and considered the overriding objective to deal with cases fairly and justly, which includes avoiding delay and saving expenses, I decided that the application should be refused. Ms Nicolaou and her witnesses were allowed time to consider the claimant's witness statement and I permitted reasonable supplemental questions.

Late evidence

26. The claimant had emailed a bundle of documents to the respondent and to the Tribunal on the morning of the hearing. However, the bundle did not arrive. The claimant advised that there appeared to be an issue with the email being sent. I took into account that this evidence was being provided very late as it had not arrived by the time the hearing got underway. I advised the claimant that I would not consider the whole bundle being admitted as late evidence as the respondent and their witnesses would not have sufficient time to be able to consider all of the documents. I asked the claimant to confirm which documents he considered were necessary for me to consider and he advised that he would like me to consider the following documents:

    a. Notes from a preliminary hearing relating to Geoffrey Seers;
    b. Documents provided in relation to his disciplinary hearing – clarified by the claimant to be fit notes, details of prescribed medication, a document setting out bereavements and letters from the respondent relating to sickness.

27. I duly considered the claimant's comments and heard representations from Ms Nicolaou in relation to the admission of late evidence. I refused the claimant's application for the admission of the notes relating to Mr Seers' preliminary hearing on the basis that this was not relevant to the issues that were before the Tribunal. Mr Seers was not present at the hearing to give evidence and be questioned on his evidence. The claimant confirmed that he considered this evidence to be relevant as it stated that the respondent did not have any policies. I advised the claimant that he would be able to address this in his own evidence and that Ms Nicolaou would be able to ask questions in relation to this aspect.

28. I considered whether the fit notes, details of prescribed medication, bereavements that the claimant had suffered prior to the disciplinary hearing and letters from the respondent relating to the claimant's absence through illness would be relevant to the issues on which I have to adjudicate and I concluded that they may be relevant and that it would therefore be in the interests of justice for these documents to be admitted as late evidence. I allowed a longer break for reading time to enable the respondent's representative and witnesses sufficient opportunity to consider the claimant's witness statement and additional evidence.

29. When the hearing reconvened, the claimant advised that he had not been able to open the respondent's witness statements as the password kept bringing up an error. I asked Ms Nicolaou to send un-passworded versions of the witness statements. She sent over word versions to the claimant. The claimant confirmed that he had received these. We took a further short break to allow the claimant sufficient time to consider the respondent's witness statements.

Claims and issues

30. Having dealt with the preliminary issues, I moved on to clarify the issues that were before the Tribunal. The claimant confirmed that he was not bringing a claim for unpaid wages within this claim and that this was a claim in relation to unfair dismissal only. Therefore, the issues for me to decide were agreed as follows:

Unfair dismissal

(1) Was the claimant dismissed?

(2) What was the reason or principal reason for dismissal? The respondent says the reason was the claimant's conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

(3) Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

   a. there were reasonable grounds for that belief;
   b. at the time the belief was formed the respondent had carried out a reasonable investigation;
   c. the respondent otherwise acted in a procedurally fair manner;
   d. dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

If the claimant was unfairly dismissed generally:

(4) Should he be entitled to a compensatory award? And, if so, how much?

(5) Should a reduction be made on the basis of failure by the claimant to mitigate his losses?

(6) Should a "Polkey" reduction be made? And, if so, how much?

(7) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

(8) Did the respondent or the claimant unreasonably fail to comply with it by failing to carry out an investigation into the claimant's conduct?

(9) If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

(10) If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

(11) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

31. I indicated that, although the Polkey and contributory conduct issues concerned remedy and would only arise if the claimant's complaint of unfair dismissal succeeded, I would consider them at this stage as they were so interwoven with the evidence to determine the claims.

Procedure, documents and evidence heard

32. The claimant was a litigant in person.

33. In advance of the hearing, the respondent had provided the Tribunal with a bundle of documents comprising 167 pages plus index.

34. The claimant also provided some additional evidence during the hearing (see paragraphs 26 to 28).

35. The Tribunal had written witness statements from the claimant on his own behalf and from Ms K Patel and Mrs F Olawo-Jerome on behalf of the Respondent.

36. The Tribunal heard oral evidence from the claimant and from both witnesses on behalf of the respondent.

Findings of fact

37. It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. My function is to make such findings of fact as are necessary to answer the issues in the claim and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

38. The respondent is one of the major London bus companies with a number of garages and routes around London and the Home Counties.

39. The claimant was employed by Arriva from 15 August 2011. The claimant transferred to employment with the respondent by virtue of the TUPE Regulations on 26 September 2015 where he was employed until 11 March 2020 when he was dismissed without notice.

40. Prior to the events leading up to the dismissal and during the time the claimant was employed by Arriva, the claimant had threatened another employee. The claimant accepted this in his evidence and advised that this resulted from him being under significant stress at the time.

41. Prior to the events leading up to the claimant's dismissal, the claimant and four other drivers had instigated a claim against the respondent for unauthorised deduction from wages. That claim proceeded to a final hearing on 11, 12 and 13 February 2019. That claim was successful to the extent that it related to meal relief payments. The remaining elements of the claimants' claims were unsuccessful. The respondent appealed that decision and the Employment Appeal Tribunal remitted the case back to the Employment Tribunal to reconsider the decision. The case proceeded to a final hearing on 23 and 24 February 2021 and the claimants' claims were dismissed.

Facebook posts in February 2020

42. In February 2020, the claimant posted a comment in a Facebook group in response to a comment made by Mr O'Neil Lewis. In the evidence before the Tribunal, Mr O'Neil Lewis is referred to as both Mr O'Neil Lewis and Mr Lewis O'Neil. Neither party was able to confirm which name was correct. This decision refers to the complainant as Mr O'Neil Lewis.

43. The Facebook group was for London bus drivers and had over 3,000 followers. The claimant posted the following:

    "Lewis why did you help Arriva and Metroline break the law' when we Tupe'd over? You stabbed us in the back and you act as if your a friend or colleague to drivers. Your a joke. I hope I see you on the street!"

44. A screenshot of the comment was included within the bundle. The claimant accepted in his evidence that he was the author of this post. The claimant could not remember the exact date on which he posted the comment. It is not necessary for me to make a finding on this as the date on which the comment made is not material.

45. On 20 February 2020, Mr O'Neil Lewis contacted the respondent by email attaching a copy of the claimant's Facebook post. He requested that the respondent investigate matters as he was concerned by the comment. Mr O'Neil Lewis advised in that email that other bus drivers had contacted him about the post and that the group administrator had removed the claimant from the group due to the nature of the comment. Mr O'Neil Lewis advised that he intended to report the matter to police as he did not know what the claimant would do if he saw him in the streets. He also advised that his colleagues and family were worried. I find that it is reasonable to infer from this that Mr O'Neil Lewis and others considered the comment posted by the claimant to be threatening. The claimant in his own evidence accepted that the comment could be seen as aggressive. The claimant was forthright in his submissions that as there was no reference to violence within the comment, this could not be considered to be threatening. I find that a reasonable interpretation of the

claimant's comment is that the claimant was intending there to be some form of confrontation with Mr O'Neil Lewis should he encounter him in public. I find that the effect of the claimant's comment on Facebook was that Mr O'Neil Lewis and other parties perceived the comment to be threatening Mr O'Neil Lewis in some way, whether or not the claimant made reference to any violence.

46. The claimant was consistent in his evidence that he believed that the respondent and Arriva had broken the law in relation to the TUPE transfer in September 2015. He stated that his comment was him voicing his opinion. His evidence was that the EAT decision supported this view. The respondent's position is that a comment in a Facebook group which suggests that the respondent and another company has broken the law and where that comment can be seen by over 3,000 London bus drivers, not all of whom would be employed by either the respondent or Arriva, constitutes bringing the respondent into disrepute. The claimant accepted that he was the author of the post. I find that the claimant intended that drivers working for other companies would see his comment and that he intended to portray the respondent and Arriva in an unflattering light, bringing them into disrepute.

The respondent's investigation

47. On 24 February 2020, the respondent acknowledged Mr O'Neil Lewis' complaint and asked him to attend an investigation meeting on 27 February 2020. The respondent also invited the claimant to a separate investigation meeting. The letter sent to the claimant on that date sets out that the respondent has decided to commence an investigation into an allegation relating to the claimant's conduct. The letter enclosed a copy of Mr O'Neil Lewis' emailed complaint and a copy of the Facebook post. It also sets out that the alleged misconduct is:

    a. Threatening behaviour against a third party via posting on social media;
    b. Bringing the company into disrepute by posting inappropriate comments on social media.

48. The letter advised the claimant that he should bring any evidence or information that he would like taken into consideration to the investigation meeting. The letter also advised the claimant that he was entitled to be accompanied to the meeting by a work colleague or trade union representative.

49. The claimant attended an investigation meeting with Mr Jaiden Lewis (Acting Operations Manager) on 27 February 2020. He was accompanied by a colleague, Mr Kingsley Chime.

50. At the meeting, the claimant stated that the reason he posted the comment on Facebook was that he wanted to make sure that all the Arriva employees knew that Mr O'Neil Lewis could not be trusted and he wanted to let Mr O'Neil Lewis know that he knew what he did and if the claimant ever saw him on the street he would tell him so. The claimant admitted at the investigation meeting that he was going to have a go at Mr O'Neil Lewis if he met him on the street. He accepted that was a threat but maintained that he did not consider it to be a

violent threat. The claimant advised that stress and fatigue were contributing factors to him posting the comment.

51. The claimant accepted at the meeting that his behaviour was not acceptable conduct.

52. The claimant was consistent in his evidence and submissions that the comments he made on Facebook relating to the respondent breaking the law were based on what he believed to be the outcome of a previous Employment Tribunal claim brought by the claimant and four other drivers relating to unlawful deduction from wages.

53. The investigation meeting was adjourned and Mr Jaiden Lewis considered the matter. The meeting was reconvened and Mr Jaiden Lewis advised the claimant that he believed that there was sufficient evidence to commence the respondent's disciplinary procedure. Mr Jaiden Lewis informed the claimant at the hearing that if the allegations were proven, it could constitute gross misconduct and that a possible outcome would be summary dismissal.

The respondent's disciplinary policy

54. The respondent's disciplinary policy lists threatening behaviour as an example of the type of conduct that may be considered to be gross misconduct. The claimant's evidence was that he was not aware of the respondent's disciplinary policy. The respondent's policy was within the evidence provided to the Tribunal before the hearing. I accept the respondent's evidence that copies of all the respondent's policies are available in every garage, in every union office of which there is one per garage and also via the respondent's internal communication network, Blink. This was also consistent with the respondent's contemporaneous notes of the disciplinary meeting.

The disciplinary hearing

55. On 28 February 2020, the respondent invited the claimant to a disciplinary hearing which was scheduled to take place on 11 March 2020. The letter restated the details of the allegations against the claimant and provided further copies of the email received from Mr Lewis, the claimant's Facebook post and the notes from the investigation meeting which took place on 27 February 2020. The letter notified the claimant that a possible outcome of that hearing was dismissal in the event that his conduct was decided to amount to gross misconduct, and advised that a decision on that would not be made until the claimant had full opportunity to put forward his version of events and any mitigation.

56. The claimant provided some additional documents for the disciplinary hearing. The claimant's case was that these were provided by hand and included the notes from a preliminary hearing relating to Geoffrey Seers and fit notes, details of prescribed medication and a document setting out bereavements.

57. The respondent's position was that the only documents provided by the claimant were the notes of the preliminary hearing and the WhatsApp messages. These were attached to an email dated 11 March 2020 and the email was contained within the bundle of documents. I prefer the respondent's evidence on this issue. The email shows that the attachments were a number of WhatsApp screenshots. The claimant was inconsistent about the method he provided this information and there was contemporaneous evidence in the form of the notes of the disciplinary hearing which supports the respondent's position that the claimant did not provide any fit notes, details of medication and a document relating to recent bereavements.

The dismissal

58. The respondent was dismissed at the disciplinary hearing on 11 March 2020. The contemporaneous notes of the hearing record that the claimant was provided with detailed reasons for the respondent's decision to dismiss and that this was based on the claimant's conduct in posting on social media in a manner that was threatening to a third party and in bringing the respondent into disrepute. The notes of the hearing were consistent with Ms Patel's oral and written evidence.

59. The decision to dismiss was confirmed in writing to the claimant in a letter dated 13 March 2020. The letter also set out in details the reasons for the respondent's decision to dismiss and the claimant's right of appeal.

Reason for dismissal

60. The respondent's case is that the claimant was dismissed due to his conduct, in posting a comment on social media that was threatening to a third party and brought the respondent company into disrepute. The respondent's position is that the claimant's conduct amounted to gross misconduct and that the respondent was therefore entitled to dismiss the claimant without notice. The claimant's case advanced at the hearing is that he was dismissed because he had brought a previous claim in the Employment Tribunal. Ms Patel and Mrs Olawo-Jerome were consistent in their evidence that the reason for the claimant's dismissal was his conduct. All of the respondent's evidence, both written and oral, is consistent that the reason for the claimant's dismissal was conduct.

The appeal

61. On 18 March 2020, the claimant advised the respondent that he was appealing the decision to dismiss. He stated that there were mitigating circumstances that he believed should be taken into account and that the decision to terminate should be reversed.

62. The appeal hearing took place on 6 April 2020 and 8 April 2020. The respondent's contemporaneous record of the hearing records that the claimant stated that his reason for appealing was that he felt there were mitigating

circumstances surrounding the incident with Mr O'Neil Lewis. The claimant was given the opportunity to put his mitigating circumstances and the basis of his appeal to Mrs Olawo-Jerome. Mrs Olawo-Jerome's evidence was consistent throughout. I find that Mrs Olawo-Jerome took into account the mitigating factors put forward by the claimant at the hearing. Again, the claimant was inconsistent in his evidence as to what he put forward by way of mitigation. I accept the respondent's evidence that the claimant did not refer to any fit notes or details of medication at the hearing.

63. Mrs Olawo-Jerome advised the claimant at the appeal hearing that the decision to dismiss had been upheld. I find that she was not able to give full reasons during the appeal hearing due to the claimant interrupting her and disconnecting from the call abruptly. The outcome of the appeal was confirmed in writing to the claimant in a letter dated 14 April 2020. The letter set out in detail that the claimant's representations at the appeal hearing had been taken into account. I find that Mrs Olawo-Jerome's evidence was credible and that in considering the claimant's appeal, she took into account all of the information that the claimant provided, the claimant's previous attendance and performance record, his length of service and his state of mind at the time of the post.

The Law

64. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95. In this case it is common ground between the parties that the claimant was dismissed without notice on 11 March 2020.

65. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

66. In determining the principal reason for the claimant's dismissal, I had regard to the oral and written evidence provided by both parties. The claimant's position is that his dismissal was due to him having brought a claim against the respondent relating to unlawful deduction of wages and that he was the spokesperson for other drivers in that claim. The respondent's position is that the claimant was dismissed because they believed he was guilty of misconduct by posting comments on social media that were threatening to a third party and brought the respondent into disrepute. The respondent's position relates to the claimant's conduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

67. Section 98(4) provides that the determination of the question of whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

68. In assessing fairness in cases of misconduct dismissal, the Tribunal must apply the '**Burchell test'**, originating in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal, subsequently approved in a number of decisions of the Court of Appeal. The test involves consideration of three aspects of the employer's conduct:

    a. Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?
    b. Did the employer genuinely believe that the employee was guilty of the misconduct complained of?
    c. Did the employer have reasonable grounds for that belief?

69. In determining whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances or whether that band falls short of encompassing termination of employment. The assessment should consider the fairness of all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed and not on whether the employee has suffered an injustice. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23**, and **London Ambulance Service NHS Trust v Small [2009] IRLR 563).**

70. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors **(Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854).**

71. There was no dispute that the reason for dismissal, misconduct, was a potentially fair reason relating to the Claimant's conduct. The issue for me to determine was whether it was fair or unfair applying the general test in section 98(4) of the Employment Rights Act 1996. That required me to take into account the size and resources of this employer as well as equity and the substantial merits of the case. I reminded myself of the case law summarised above.

Polkey

72. I agreed with the parties that if I concluded that the claimant had been unfairly dismissed, I should consider whether any adjustment should be made to the compensation on the grounds that if a fair procedure had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in Polkey v A E Dayton Services Limited [1988] ICR 142 and the subsequent guidance from the Employment Appeal Tribunal in Software 2000 v Andrews & others [2007] ICR 825.

73. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand (**Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 at para 24)**.

Contributory fault

74. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards. Where re-employment is not sought, compensation is awarded through the basic award and compensatory award.

75. The basic award is a mathematical formula determined by section 119. Under section 122(2) the basic award can be reduced because of the employee's conduct:

    "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

76. The compensatory award is primarily governed by section 123 as follows:

    (1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer….

    (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding……"

77. The Tribunal must be satisfied that the action by the claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award. The leading authority is the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111**. Culpable behaviour need not amount to a breach of contract

or a tort but is 'unreasonable in all the circumstances', though not all unreasonable conduct is necessarily culpable or blameworthy.

ACAS uplift

78. Where there has been an unreasonable failure to follow ACAS codes of practice on the part of the employer, the Tribunal is able to uplift an award by up to 25% if it considers it just and equitable to do so (section 207A(2) Trade Union and Labour Relations (Consolidation) Act 1992). The Tribunal is also able to reduce an award by up to 25% if it is considered just and equitable to do so in circumstances where an employee has unreasonably failed to comply with ACAS codes of practice (section 207A(3) Trade Union and Labour Relations (Consolidation) Act 1992).

Conclusions – Unfair dismissal

Reason for dismissal

79. The claimant's case is that he was dismissed due to the previous employment tribunal claim brought by him and four other drivers. The respondent's case is that the claimant was dismissed due to his conduct. The letter of 13 March 2020 and the notes of the disciplinary hearing record in some detail the reason for the claimant's dismissal. Ms Patel was consistent in her evidence both oral and written, that the reason for the claimant's dismissal was his conduct.

80. I have concluded based on the written and oral evidence that the primary reason for the claimant's dismissal was his conduct in posting comments on social media that were seen as threatening to a third party and bringing the respondent into disrepute.

Genuine belief

81. I am satisfied that Ms Patel, as the dismissing officer for the respondent, held a genuine belief that the claimant was guilty of misconduct. Ms Patel's evidence was clear that she had discussed the post with Mr O'Neil Lewis and taken into account that he felt threatened by the post. The evidence on behalf of the respondent was clear and consistent that the primary reason for the claimant's dismissal was his conduct. I am satisfied that Ms Patel genuinely held the view that the claimant's comment on Facebook was threatening. I am also satisfied that Ms Patel genuinely held the view that the claimant's comment was bringing the respondent into disrepute. The dismissal letter and appeal letter were unequivocal and the claimant did not dispute that he was the author of the comment on Facebook.

Reasonable grounds

82. The next question was whether the conclusion that the claimant was guilty of misconduct was based on reasonable grounds. The claimant accepted in his own evidence to the Tribunal that he was the author of the comment on Facebook. I was satisfied from the oral evidence of Ms Patel and the

documentary evidence that the belief was based on the evidence of the post itself, the evidence that the respondent had received from the third party, Mr O'Neil Lewis and the evidence from the claimant himself in the investigation meeting on 27 February 2020. I was satisfied that the respondent's belief that the claimant was guilty of misconduct was based on reasonable grounds and that at the time that belief was formed, a reasonable investigation had been carried out.

Reasonably fair procedure

83. I then considered whether a reasonably fair procedure had been followed. I have concluded that the respondent followed a fair procedure.

84. The ACAS Code of Practice for Disciplinary and Grievance Procedures recommends that employees should be notified of the case against them in writing and that this notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting.

85. The Code of Practice further recommends that at the disciplinary meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. It goes on to say that the employee should be allowed to set out their case and answer any allegations that have been made.

86. Although the Code of Practice is not legally binding in itself, Employment Tribunals will adhere closely to the relevant Code when determining whether any disciplinary or dismissal procedure was fair. The ACAS Code of Practice represents a common-sense approach to dealing with disciplinary matters and incorporates principles of natural justice. In operating any disciplinary procedure or process, the employer will be required to:

    a. Deal with the issues promptly and consistently;
    b. Carry out any necessary investigations to establish the facts;
    c. Inform the employee of the basis of the problem and give them an opportunity to put their case in response before any decisions are made;
    d. Allow the employee to be accompanied to any formal disciplinary meeting;
    e. Allow the employee to appeal against any decision made.

87. Having considered the evidence, I have concluded that there is nothing to indicate that the respondent failed to follow a fair procedure. I have concluded that the respondent dealt with issues promptly and consistently, they established the facts before taking action, they ensured that the claimant was informed clearly of the allegations against him, they allowed him to be accompanied to meetings and to state his case, he was offered the opportunity to bring evidence to the meetings to support his cases and there was a right to appeal.

Sanction – band of reasonable responses

88. The respondent's disciplinary policy and procedure gives examples of matters that would be viewed as gross misconduct. The list of examples includes "*violent, indecent or sexual behaviour – (including racial abuse or sexual harassment or harassment of any nature) assault or fighting e.g. assault upon an employee, customer or member of the public, threatening behaviour including verbal harassment".*

89. I have concluded from the evidence before me that the claimant had access to the respondent's disciplinary policy and procedure and that the claimant was aware of the respondent's disciplinary policy and procedure.

90. The claimant's case is that the respondent failed to take into account a number of mitigating factors including that he was off sick with stress at the time, the ongoing employment tribunal case, the alleged breach of the TUPE Regulations, that he had no contract of employment, the recent bereavements he had experienced, the deductions from wages, the equal opportunities policy, his child visitation problems and his health problems. At the disciplinary hearing, the claimant spoke about his frustration with the ongoing employment tribunal case, his lack of sleep and stress, his child visitation difficulties and the recent death of his uncle. The contemporaneous notes of the disciplinary meeting record that Ms Patel took into account the mitigating factors that the claimant had raised but that she did not consider that this justified the claimant's actions. Her oral evidence to the Tribunal was consistent with her written evidence. The contemporaneous notes of the appeal hearing and the oral evidence of Mrs Olawo-Jerome were consistent that the mitigating factors put forward by the claimant were taken into account when considering the claimant's appeal. I have concluded that the factors the claimant raised were taken into account before the respondent took the decision to dismiss the claimant. I have also concluded that the respondent took into account the mitigating factors put forward by the claimant at the appeal hearing before deciding to uphold the decision to summarily dismiss the claimant.

91. In considering whether the respondent's decision to dismiss fell within the band of reasonable responses, I remind myself that I should not substitute my own view for that of the respondent and must rely on the facts or beliefs which were known to the respondent at the time. I considered that the claimant's conduct was a serious issue. Mr Lewis had complained to the respondent and was concerned about the comment that the claimant had posted on social media. Mr Lewis was concerned to such an extent that he reported the matter to the police. The claimant accepted that he had posted the comment on Facebook and indicated that it sounded aggressive, although his view was that there was no obvious suggestion of violence within the post, therefore it was not a threat. The evidence of Ms Patel and Mrs Olawo-Jerome was consistent. They considered that the claimant had not shown any remorse within either the disciplinary hearing or the appeal hearing and that this was so serious, they could not allow the risk of the claimant repeating the behaviour. I accept their evidence and consider that for these reasons the decision to dismiss was within a band of reasonable responses.

92. As I have concluded that the respondent had reasonable grounds for their belief that the claimant had committed an act of misconduct, that at the time the belief was formed the respondent had carried out a reasonable investigation; that the respondent otherwise acted in a procedurally fair manner and that the claimant's dismissal was within the range of reasonable responses, the claimant's claim for unfair dismissal therefore fails.

93. As the claimant's claim for unfair dismissal has failed, I did not need to decide on Polkey, contributory fault or ACAS uplift as it was academic.

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Employment Judge Poynton

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Date 1 April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18/4/2023

NG

FOR EMPLOYMENT TRIBUNALS