



# EMPLOYMENT TRIBUNALS

**Claimants:** (1) Mr A Thomas  
(2) Mr C Thomas

**Respondent:** WJ Roadmarkings North Ltd

**Heard at:** Leeds (by video)                      **On:** 4 July 2023

**Before:** Employment Judge T Knowles

## Representation

Claimants: In person  
Respondent: Ms E Mayhew-Hills, Solicitor

# RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The First and Second Claimants' claims of unfair dismissal are not well-founded.
2. The Second Claimant's claim of automatically unfair dismissal for having made a protected disclosure is not well-founded.
3. The Second Claimant's claim for other payments is not well founded.

# RESERVED REASONS

## Issues

1. The First Claimant has brought a claim of unfair dismissal only.
2. The Second Claimant has brought claims for unfair dismissal, whistleblowing and for other payments.
3. In relation to the whistleblowing complaint, there are no detriments listed and the complaint appears to only relate to dismissal.
4. The Second Claimant originally brought a claim of age discrimination but this has

been dismissed upon its withdrawal 29 June 2023.

5. The Respondent denies the Claimants' claims.
6. Accordingly the issues for determination are as follows:
  - 6.1. What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimants had committed misconduct.
  - 6.2. Was the reason or principal reason for the Second Claimant's dismissal that the claimant made a protected disclosure? If so, the Second Claimant will be regarded as unfairly dismissed.
  - 6.3. If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimants? The Tribunal will usually decide, in particular, whether:
    - 6.3.1. there were reasonable grounds for that belief;
    - 6.3.2. at the time the belief was formed the Respondent had carried out a reasonable investigation;
    - 6.3.3. the Respondent otherwise acted in a procedurally fair manner;
    - 6.3.4. dismissal was within the range of reasonable responses.
  - 6.4. In relation to the Second Claimant, are other payments due to him and if so in what amount?

## **Evidence**

7. This hearing was undertaken by video using HMCTS's cloud video platform.
8. Both Claimants gave evidence and produced a written witness statement.
9. On behalf of the Respondents I heard evidence from the following, who each produced a written witness statement:
  - 9.1. Mr Loren Jackson, General Manager,
  - 9.2. Mr Colin Blanchard, Contracts Manager.
10. All witnesses affirmed that the evidence that they gave was the truth.
11. The parties produced a bundle of documents 129 pages.
12. References in this Judgment to numbers in brackets are to page numbers in the bundle of documents.

## **Findings of fact**

13. I made the following findings of fact on the balance of probabilities. These findings are not intended to cover all of the evidence heard. These are the material points in evidence which are relevant to the issues and to my determination of the issues.

14. The First Claimant commenced employment with the Respondent on or around 23 October 2017 and was a Road Marking Linesman.
15. He and his cousin, the Second Claimant, worked together as a crew.
16. The Second Claimant's employment commenced employment on or around 1 July 2014.
17. The Respondent is a specialist road marking business.
18. On 22 September 2022, the Claimant's were booked to undertake work in Halifax.
19. However on route, unbeknown to the Respondent, they travelled to Wyke. They stopped at a bathroom supplies shop. This was recorded on the Respondent's vehicle GPS. They were at those premises for 40 minutes.
20. The Respondent, specifically Mr Blanchard, later became aware from another employee's partner that the Respondent's vehicle had been seen at those premises in Wyke and that the crew were working (104).
21. He checked the GPS and found that that the crew had been there a considerable length of time when they should have been elsewhere (73-75).
22. Mr Blanchard visited the site and found that the car park had been newly lined recently. He took photographs. This was on or around 24 September 2022.
23. On or around 27 September 2022 the Claimants were suspended. Only the Second Claimant was spoken to at the time. The First Claimant was on annual leave
24. Mr Blanchard's evidence is that the Second Claimant admitted doing the work when first spoken to and offered to pay for the materials.
25. The Second Claimant disputes this.
26. I preferred Mr Blanchard's evidence because it is consistent with the transcript of a later telephone conversation between the two which Mr Blanchard was unaware the Second Claimant was recording (111). When Mr Blanchard asked why the Second Claimant admitted doing the work when it was first put to him, the Second Claimant referred to having felt intimidated. I consider this to be indicative of an acceptance by him that admissions were made during that first meeting.
27. The Claimants both say that they were advised to resign because they would otherwise be sacked. The Respondent has not disputed this. I find it probably did happen.
28. Both Claimant's were suspended on full pay for using the company vehicle for personal use without permission and for carrying out personal work during business hours (83.85).
29. On 11 October 2022, the First Claimant was interviewed.
30. On 14 October 2022, the Second Claimant attended a disciplinary hearing.
31. They complain of being given insufficient notice of these investigations but neither of them have told me what difference this actually made. They also complain about not receiving copy minutes prior to their disciplinary hearings. I doubt these procedural points make any difference because the accounts they gave at the time are the same as they have given to me today in this hearing therefore they were afforded a full opportunity to

put forwards their cases.

32. Both Claimant's presented a case at their investigation meetings that they were present at the premises in Wyke but did not do any work there. The First Claimant stated that he had telephoned Mr Jackson but he did not reply so they passed the work onto a 3<sup>rd</sup> party and left. They were asked who they passed the work onto but refused to say.

33. The Respondent tried to contact the third party premises but they refused to discuss the line marking.

34. The Second Claimant was dismissed at his meeting on 14 October 2022.

35. The First Claimant was invited to a meeting on 17 October 2022. He maintained the account he had given on 11 October 2022 and submitted photographs of private works completed on Mr Blanchard's family members premises, together with a text message he received from Mr Jackson notifying him that his cousin had resigned and suggesting that he did the same.

36. The First Claimant was dismissed 17 October 2022.

37. Both Claimants were dismissed for the same reason, the two asserted issues of conduct for which they were originally suspended.

38. Both Claimants received letters confirming their dismissal and advising of a right to appeal dated 19 October 2022 (100-103).

39. They procured for the appeal hearings a letter from the 3<sup>rd</sup> party premises which appears to corroborate their account that they attended the premises to look at marking out the car park but left because they were unable to contact the person in charge. The First Claimant accepts that this person is his friend, although he states he is not a close friend.

40. They both appealed but the decisions to dismiss were upheld (109).

41. At the hearing today the Claimants have essentially stuck to the account they gave during the disciplinary hearings.

42. Both admitted in answer to questions in cross examination that they did not dispute that they had taken the vehicle to 3<sup>rd</sup> party premises without permission and that this was gross misconduct, whether or not they actually undertook the work.

### **Submissions**

43. The First Claimant recited circumstances concerning the lack of minutes of meetings being produced at the time and that the witness statement from the person who allegedly saw them working at the 3<sup>rd</sup> party premises was not dated at the time, and was only produced later.

44. The Second Claimant made no submissions.

45. The Respondent reiterated their case, that they had GPS evidence of the time the Claimants were at the premises and both admit gross misconduct by taking the vehicle to those premises without permission.

### **The Law**

46. Section 98 of the Employment Rights Act 1996 sets out how this Tribunal should

approach the question of whether a dismissal is fair. There are two stages.

47. First, the employer must show the reason for the dismissal and that it is one of the five potentially fair reasons set out in sections 98(1) and 98(2).

48. Second, provided the respondent is successful at the first stage we must then consider whether the employer acted reasonably in dismissing the employee for that reason under section 98(4).

49. A reason for dismissal is a set of facts known to the employer or belief held by him which caused him to dismiss the employee (**Abernethy v Mott Hey & Anderson [1974] IRLR 213 CA**).

50. It is sufficient that the employer genuinely believed on reasonable grounds that the employee was guilty of misconduct. The employer does not have to prove the offence (**Alidair Limited v Taylor [1978] ICR 445 CA**).

51. Guidance applicable to cases of misconduct was given by the EAT in **British Home Stores Limited v Burchell [1980] ICR 303**. The issue of fairness involves three elements:

- 1 Whether the employer believed the employee was guilty of misconduct, and
- 2 Had in his mind reasonable grounds upon which to sustain that belief, and
- 3 At the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

52. This guidance must be read in the light of **Boys & Girls Welfare Society v McDonald [1996] IRLR 129 EAT** which reminds the Tribunal that in considering the question of fairness for the purposes of section 98(4) the burden of proof is neutral.

53. I also reminded myself of the decision in **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT** that the function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

54. In **Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854** the Employment Appeal Tribunal held that:

*“the logical jump from gross misconduct to the proposition that the dismissal must then inevitably fall within the range of reasonable responses gave no room for considering whether, though the misconduct was gross and dismissal almost inevitable, there were mitigating factors that might be such that dismissal was not reasonable. The tribunal's function was to look at the trust's conclusion. It was not sufficient to point to the fact that the trust considered the mitigation and rejected it, largely upon the basis that the failure to observe the verbal notice and the letter undermined it, because a tribunal could not abdicate its function to that of the employer. It was the tribunal's task to assess whether the employer's behaviour was reasonable having regard to the reason for dismissal. It had to consider the whole of the circumstances with regard to equity and the substantial merits of the case. But that general assessment necessarily included a consideration of those matters that might mitigate, such as long service, the consequences of dismissal and a previous unblemished record. For that reason, there had been an error of direction*

*to itself by the tribunal. The case would be remitted to the same tribunal, which had to take a proper approach in asking whether the gross misconduct justified dismissal in the light of all the mitigation available personally to B.”*

55. The Respondent has directed me to **Chief Constable of Lincolnshire v Stubbs. [1999] I.C.R. 547 (1998)** in which the Employment Appeal Tribunal held that “*although the two incidents took place away from the actual work place [in a public house], they occurred during work based social gatherings. In that context they could be seen as occurring in the course of employment in an extended version of the work place, Tower Boot Co Ltd v Jones [1997] 2 All E.R. 406, [1996] 12 WLUK 162 and W v Commissioner of Police of the Metropolis [1997] I.C.R. 1073, [1997] 7 WLUK 88 applied... each case will depend upon its own facts*”.

56. The Court of Appeal in **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23** held that the range of reasonable responses test applies to both, the decision to dismiss and to the procedure by which that decision is reached.

57. In determining the fairness of dismissal on grounds of misconduct we have regard to the provisions of the ACAS Code of Practice on disciplinary practice and procedure as well as the overall principals of natural justice and fair hearings.

58. Under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, an award may be increased or reduced where the employer or employer unreasonably fails to follow the ACAS code. The amount of the adjustment is up to 25% in the following circumstances:

- the claim concerns a matter to which a relevant code of practice applies
- the employer or employee has failed to comply with the code
- the failure was unreasonable, and
- the tribunal considers it just and equitable in all the circumstances to make an adjustment.

## Conclusions

***What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimants had committed misconduct.***

59. I do not consider that, on the evidence before me, either Claimant is in any doubt of the reasons for dismissal. They both referred me to the note on page 111 where Mr Blanchard was suggesting that they would lose their jobs and that he believed they had done the work in Wyke as evidence of prejudice. Neither suggests any other reason for their dismissal. I conclude that the Respondent's all genuinely believed that the Claimant's had taken the vehicle to premises in Wyke without permission and undertaken private work their when they were on paid time with the Respondent.

***Was the reason or principal reason for the Second Claimant's dismissal that the claimant made a protected disclosure? If so, the Second Claimant will be regarded as unfairly dismissed.***

60. The Second Claimant has produced no evidence of any protected disclosure. He has not mentioned any potential other reason for his dismissal in his evidence, nor can any be seen in his claim form.

61. The Second Claimant's claim of automatically unfair dismissal for having made a protected disclosure is not well founded.

***If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimants? Were there were reasonable grounds for that belief?***

62. I conclude that the Respondent had reasonable grounds to believe that the Claimants had taken a vehicle to Wyke without permission and undertaken private work when they were on paid time with the Respondent.

63. There is no dispute between the parties that they took the vehicle to Wyke without permission.

64. The only issue is whether or not the Respondent had reasonable grounds to believe that they also undertook private work at those premises.

65. The Respondent had the independent witness evidence, GPS records for the Claimants travel and had visited the premises soon afterwards and found new lines in the car park.

66. The Second Claimant had admitted doing the work and offered to pay for the materials.

67. It was for the Respondent to balance the Claimants' explanation that they did not end up doing the work because they did not manage to get through to obtain permission, and to take into account the statement that the Claimant's obtained from the 3<sup>rd</sup> party premises owner (the First Claimant's friend) prior to their appeal.

68. There was clearly conflicting evidence before them albeit it should be noted that none of the evidence is conclusive one way or another.

69. However, they had to take a decision and the evidence that they produce is in my conclusion sufficient to demonstrate reasonable grounds to believe that the Claimants had committed the misconduct and to dismiss the Claimants evidence to the contrary.

***At the time the belief was formed the Respondent had carried out a reasonable investigation?***

70. The only item of investigation that remained by the time the appeals process had been completed was whether or not the vehicle camera recording would have shown whether or not the Claimants did any work.

71. I can see no reference to this in the internal proceedings, it has been referred to only in submissions by the First Claimant.

72. I have insufficient evidence to consider this point in isolation as meaning the investigation was outside of a range of reasonable investigations.

73. I have no evidence about how the vehicle was parked and whether or not the camera would have the car park in view.

74. I do note, and have made a finding of fact, that the conduct had initially been admitted in full. That is quite an important factor to weigh in to the balancing exercise. In my conclusion this is a case in which the cause any need for any potential further investigation is the about turn the Second Claimant made in deciding no longer to admit to doing the work in Wyke.

75. In these circumstances the investigation which has been presented by the Respondent appears to me within the range of reasonable investigations which may have been undertaken by an employer acting reasonably.

***Did the Respondent otherwise act in a procedurally fair manner?***

76. There appear to me to be issues concerning notice of the investigation meeting for the First Respondent and concerning minutes which were missing from the information sent to the Claimants. The witness statement also appears only to have been disclosed after the dismissal but before the appeal.

77. A disciplinary process should be considered as a whole and includes the process of appeal.

78. I am satisfied that if we look at this inclusive of the appeal, then it is clear that the procedure followed was within the range of processes which might have been adopted by a reasonable employer.

***Was dismissal within the range of reasonable responses?***

79. The Respondent was responding to two instances of misconduct; the unauthorised taking of a vehicle to price up a private job and the undertaking of private work without permission during a period of time where the Claimants were being paid to undertake work for the Respondent. Dismissal is, in my conclusion, well within a range of reasonable responses which may have been adopted by an employer acting reasonably.

80. In my conclusion, the Respondent acted reasonably in all the circumstances in treating the conduct as a sufficient reason to dismiss the Claimants.

81. The Claimants' claims of unfair dismissal are not well founded.

***In relation to the Second Claimant, are other payments due to him and if so in what amount?***

82. The Second Claimant has not particularised any claim for wages or notice outside of his claim for compensation for unfair dismissal, nor has any evidence been produced in support of any such claim.

83. That claim is therefore not well founded.

Employment Judge T Knowles

4 July 2023