



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Bailey

**Respondent:** Amey Services Ltd

**Heard at:** Leicester

**On:** 22 June 2023

**Before:** Employment Judge McTigue

## Representation

Claimant: Mr T Lester, Counsel

Respondent: Ms S McTosh, Consultant

**JUDGMENT** having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Introduction

1. The claimant was employed as a Highways Maintenance Operative by the Respondent from 24 July 2011. His role included traffic management and the maintenance and repair of highway barriers and structures. He claims that his dismissal for gross misconduct on 11 October 2022 was unfair and that he did not receive his notice pay. ACAS was notified of the early conciliation procedure on 5 December 2022 and the certificate was issued on 12 January 2023. The ET1 was presented on 9 February 2023. The ET3 was received by the tribunal on 15 March 2023.
2. The tribunal would like to apologise for the length of time it has taken to provide the written judgment in respect of this matter. Although an extempore judgment was provided on the day, it was an oversight of the tribunal not to have provided the judgment in writing earlier.

## Claims and Issues

3. The claimant was dismissed and brought claims for unfair dismissal and breach of contract, i.e. wrongful dismissal. The tribunal was required to determine the following issues arising out of the unfair dismissal claim:

**1. Unfair dismissal**

- 1.1 Was the claimant dismissed?
- 1.2 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 claimant had committed misconduct.
- 1.3 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:
  - 1.3.1 there were reasonable grounds for that belief;
  - 1.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
  - 1.3.3 the respondent otherwise acted in a procedurally fair manner;
  - 1.3.4 dismissal was within the range of reasonable responses.

**2. Remedy for unfair dismissal**

- 2.1 If there is a compensatory award, how much should it be? The Tribunal will decide:
  - 2.1.1 What financial losses has the dismissal caused the claimant?
  - 2.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
  - 2.1.3 If not, for what period of loss should the claimant be compensated?
  - 2.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - 2.1.5 If so, should the claimant's compensation be reduced? By how much?
  - 2.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
  - 2.1.7 Did the respondent or the claimant unreasonably fail to comply with it?
  - 2.1.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
  - 2.1.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
  - 2.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
  - 2.1.11 Does the statutory cap of fifty-two weeks' pay apply?

- 2.2 What basic award is payable to the claimant, if any?
- 2.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

### **Procedure, documents and evidence heard**

4. The tribunal heard evidence from the claimant. Evidence was also heard from Mr Stephen Primmet and Mr Dale Mawby on behalf of the claimant. There was a tribunal bundle of 101 pages. Oral submissions were made by the representatives of both parties.
5. The tribunal found the claimant to be a credible witness and preferred his evidence over that of the respondent with regard to the procedure that was followed by the respondent prior to his dismissal.

### **Fact-findings**

6. The respondent provides infrastructure support services across the United Kingdom. The claimant commenced employment with the respondent on 24 July 2017 as a highways maintenance operative. The claimant's role included traffic management, and the maintenance and repair of highway barriers and structures.
7. On 16 September 2022 the claimant and Mr Pegg commenced a shift working on the incident response team. In the course of this shift at approximately 3 am on 17 September 2022, the claimant and Mr Pegg were called to an incident regarding a number of containers which had been disposed of by an unknown person in a layby on the A46 southbound near Widmerpool heliport. Upon discovering that the contents of the containers were diesel, the claimant and Mr Pegg decided to move the containers to a nearby ditch. The intention was that the diesel would be sold to a third party.
8. The claimant called the respondents control centre to notify them of the containers and informed them that he was going to take them to Syston refuse tip in order to be disposed of. He later confirmed to Mr. James Kennedy of the respondent that the containers had been left outside the gates at Syston refuse tip. This was, of course, untrue.
9. Due to shift patterns, the claimant was next in work on 21 September 2022. When the claimant arrived at work he was asked to write a short statement regarding the incident of 17 September 2022. He also met with Mr Michael Cox who was highways team leader for the respondent. At that meeting, the claimant repeated the untruth that the containers had been dropped off at Syston refuse tip. By this point, statements had also been obtained from Mr Pegg and Mr. Kennedy. These confirmed that the contents of the containers had not been disposed of at the tip but rather placed in a ditch at the side of the A46. Mr Cox informed the claimant that he was suspended and the Claimant was instructed to leave the respondent's premises.
10. Later that day on 21 September 2022, the claimant telephoned Mr Michael Cox and admitted to lying about taking the containers to Syston refuse tip. Mr Cox instructed the claimant to put his confession in writing. On 23 September 2022

the claimant set out his written confession in the form of an e-mail to Mr Cox. That e-mail read as follows:

“Mick, may I firstly apologise again for my actions during my interview, you are the last person I want to be dishonest to.

On Saturday the 16th September, I Steven Bailey was on duty IRT with Thomas Pegg. At approximately 01.20am whilst responding to a call out regarding some containers left in a lay by on the A46 S/B between the helipad and the go-cart track, we arrived on scene to find 11 25 ltr containers all full of liquid. On inspection and with a slight smell of diesel, my colleague Thomas Pegg asked me if I would mind if we put the containers into the ditch just behind the layby as he knew someone who would buy the discarded diesel. He said that he would return over the weekend to collect the containers and take them away.... I agreed to his suggestion and we put the containers into the ditch. I then informed Karen at the NCC that we had taken the containers to Syston refuse tip and placed them outside the gates. I also told my level 2 James Kennedy the same thing on our return to the depot. At the time I did not see the harm in helping Tom as he is constantly telling me how much he is struggling and the amount of overtime is doing to try and cope. I know I was wrong to allow this, but was just trying to help out colleague in need. I am truly sorry for my mistake, and can assure you and the company that this will never happen again.

Steven Bailey”

11. The respondent alleges that the claimant was invited to an investigation meeting which took place on 29 September 2022. The tribunal finds that such a meeting did not in fact take place. There is no supporting documentary evidence in respect of this meeting and the tribunal preferred the evidence of the claimant over that of the respondent on this point.
12. On 2 October 2022 the claimant was hand delivered a letter by Mr Cox which confirmed his suspension. This letter was dated 21 September 2022 and appears in the bundle at page 50. Prior to this letter being hand-delivered, Mr Cox sent a text message to the claimant on 28 September 2022 which confirms that this suspension letter had not been sent earlier. That text message appears at page 100 of the bundle.
13. The respondent alleges that on 3 October 2022 Mr Mawby hand-delivered a letter inviting the claimant to a disciplinary hearing was scheduled to take place on 5 October 2022. The letter in question appears at page 64 of the bundle. On balance, the tribunal finds that Mr Mawby did not hand deliver this letter to the claimant. The Tribunal finds that at no point did the claimant receive an invitation in writing to a disciplinary meeting.
14. On approximately the 3rd or 4th of October 2022, the claimant received a telephone call inviting him to go to the Sandyacre Depot on 5 October 2022 at 11am for what he thought was an informal chat. This however turned out to be the claimant’s formal disciplinary meeting. The claimant was not informed of his right to be accompanied at this meeting. This meeting was chaired by Mr Stephen Primmitt, the operations manager of the respondent. Amy Longden of the respondent also attended the meeting, via Microsoft Teams, in order to take notes. The notes of this meeting appear at pages 66 to 68 bundle.

15. On 11 October 2022 the claimant received a letter from the respondent dated that same date. In this letter he was informed of the fact that he had been summarily dismissed. This letter stated that disciplinary hearing had been arranged to discuss the following allegations:

“Zero code – dishonesty  
Breach of safety regulations  
Breach company site rules (Health and Safety Regulations)  
Not following Amey incident reporting procedure  
Putting Amey’s name and reputation in disrepute”

16. The letter also stated:

“After the hearing and subsequent adjournment, I give my decision which is as follows:

- you have admitted to each of the above allegations, confirming that you did make a full statement during the investigation, that you failed to follow the Amey incident reporting procedure, that you didn’t follow the appropriate guidelines around waste disposal and in fact your actions created an environmental issue. Furthermore, you confirmed that each of these failings were completed using a company vehicle and whilst you’re working as an Amey employee, therefore bringing Amey’s reputation into disrepute.
- You have failed to provide an acceptable explanation for why you threw barrels with engine oil into a ditch, rather than calling Veolia to dispose of them safely as you knew you should have done.
- I consider your actions to amount to gross misconduct.
- In mitigation, I have taken into consideration the fact that you held your hands up to the allegations above and said you wished you had just phoned in Veolia to remove the barrels as per the procedure.
- However, because of the seriousness of the allegations set out above I feel I have no alternative but to dismiss.

Therefore, I have decided to take the severe sanction an employer can take against an employee and to summarily dismiss you with effect from 10 October 2022. You are not entitled to notice pay.”

17. The claimant was informed of his right to appeal this decision in his dismissal letter. However, he chose not to appeal.

## **Law**

18. In respect of the unfair dismissal claim, where the dismissal is admitted, the respondent has the burden of establishing that it dismissed the claimant for an admissible reason in accordance with section 98 (1) of the Employment Rights Act 1996. Misconduct is an admissible reason.

19. In a misconduct dismissal the Tribunal in determining the fairness of the dismissal considers the following factors in accordance with **BHS v Burchell (1978) IRLR 379** namely whether (a) the employer believed that the employee was guilty of misconduct; (b) the employer had reasonable grounds for believing that the employee was guilty of misconduct; and (c) at the time it held that belief it had carried out a reasonable investigation.

20. In terms of investigations into possible misconduct, there is no set rule as to the level of inquiry the employer should conduct into the employee's (suspected) misconduct in order to satisfy the test in **BHS v Burchell (1978) IRLR 379**. Thus, in **Miller v William Hill Organisation Ltd EAT 0336/12** the EAT acknowledged that there is a limit to the steps an employer should be expected to take to investigate an employee's alleged misconduct. How far an employer should go will depend on the circumstances of the case, including the amount of time involved, the expense and the consequences for the employee being dismissed. Similarly, **Salford Royal NHS Foundation Trust v Roldan 2010 ICR 1457** demonstrates that it is particularly important to conduct a most careful investigation where the employee's reputation or ability to work in their chosen field is at risk.
21. In terms of the decision to dismiss, the Tribunal must consider whether the employer's decision to dismiss fell within the band of reasonable responses that a reasonable employer in those circumstances might have adopted. In **Iceland Frozen Foods Limited v Jones (1982) IRLR 439** Mr Justice Browne-Wilkinson summarised as follows:

**“We consider that the authorities establish that in law the correct approach for the... tribunal to adopt in answering the question posed by s.98(4) is as follows:**

**(1) the starting point should always be the words of s.98(4) themselves;**

**(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the... tribunal) consider the dismissal to be fair;**

**(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;**

**(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;**

**(5) the function of the... 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. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.”**

22. The range of reasonable responses test applies not only to the decision to dismiss but also to the investigation, meaning that the Tribunal must decide whether the investigation was reasonable and not whether it would have investigated things differently (**Sainsbury's Supermarket Limited v Hitt (2003) IRLR 23**). Thus, when assessing whether the employer adopted a reasonable procedure, tribunals will use the range of reasonable responses test that applies to substantive unfair dismissal claims. In **Sainsbury's Supermarket Limited v Hitt (2003) IRLR 23** Lord Justice Mummery stated:

**“The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer)**

applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.”

23. In **Taylor v OCS Group Ltd 2006 ICR 1602** the Court of Appeal stressed that a tribunal’s task under s.98(4) of the Employment Rights Act 1996 (ERA) is not simply to assess the fairness of the disciplinary process as a whole but also to consider the employer’s reason for the dismissal, as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, where the misconduct is of a less serious nature, so that the decision to dismiss is nearer the borderline, the tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. Further, the Tribunal must not substitute its own decision for that of the relevant decision-maker and decide how it would have responded had it been the employer (see **Foley v Post Office; HSBC Bank plc v Madden (2000) IRLR 82**).
24. In the case of **Hadjionannous v Coral Casinos (1981) IRLR 352** it was held that evidence of inconsistent treatment between employees is relevant in limited circumstances because two cases had to be truly parallel to compare (namely similar or sufficiently similar).
25. In respect of the notice pay issue, the claim is effectively a breach of contract claim under the jurisdiction of the Tribunal by virtue of section 3 of the Employment Tribunal’s Extension of Jurisdiction (England & Wales) Order 1994. This provides:

**Extension of jurisdiction**

**Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages or for a sum due, in respect of personal injuries) if – (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England Wales would under law for the time being in force have jurisdiction to hear and determine; (b) the claim is not one to which article 5 applies; and (c) the claim arises or is outstanding on termination of the employee’s employment.**

26. An employee cannot be summarily dismissed unless they have committed a repudiatory breach of contract, or if the employer had a contractual right to make a payment in lieu of notice.

**Conclusions**

27. In order to reach its conclusions regarding the claimant’s unfair dismissal claim, the Tribunal returns to the issues it set out at the start of the hearing. These were the pertinent issues that the Tribunal had to determine.
28. The first question is the reason for dismissal. The Tribunal finds that the reason is misconduct and that the motivating factor for the respondent deciding that

the claimant had committed misconduct was the fact that the claimant was dishonest about his involvement in the incident on 17<sup>th</sup> September 2022.

29. The next questions originate from the three stages from the **BHS v Burchell** case. First, did the respondent reasonably believe that the claimant committed the misconduct, i.e. that he was dishonest about his involvement in the incident on. The Tribunal finds that they did.
30. Second, was the belief held on reasonable grounds? The Tribunal finds that it was. The dismissing officer, Mr Primmett, had statements from Mr Pegg, Mr Kennedy and the claimant. Most importantly, the claimant informed his employer that he had not been truthful. By way of example, this can be seen in the email that the claimant sent to Mr Michael Cox on 23 September 2022. The Tribunal decides that the respondent's belief was held on reasonable grounds.
31. The next question is was there a fair and reasonable investigation? In terms of investigations into possible misconduct, there is no set rule as to the level of inquiry the employer should conduct into the employee's (suspected) misconduct in order to satisfy the test in **BHS v Burchell (1978) IRLR 379**. Upon reflection, the Tribunal finds that no investigation meeting took place on 29 September 2022. Mr Mawby's evidence was unconvincing on this point. There was no fair and reasonable investigation.
32. As regards procedure generally, the Tribunal finds that the procedure followed was not reasonable. The respondent alleges that on 3 October 2022 Mr Mawby hand-delivered a letter inviting the claimant to a disciplinary hearing that was scheduled to take place on 5 October 2022. The letter in question appears at page 64 of the bundle. The tribunal finds that Mr Mawby did not hand deliver this letter to the claimant. Indeed, at no point, did the claimant receive an invitation in writing to a disciplinary meeting and he was not informed he could bring a fellow employee or trade union representative to the meeting.
33. In respect of the disciplinary meeting of 5 October 2022, Mr Primmett did not go through each allegation in turn with the claimant and consequently, in the Tribunal's opinion, did not conduct the meeting in a fair manner.
34. The Tribunal is also unable to accurately assess whether the respondent complied with own procedures as somewhat surprisingly, the respondent did not disclose key documents in its possession including the claimant's contract of employment or the disciplinary procedure and other relevant policies. In addition, the ACAS code was not followed. By way of example the claimant was not informed of this right to be accompanied at his disciplinary meeting. In short, the Tribunal is not satisfied that a fair procedure was followed.
35. It was submitted that the claimant was treated differently from other workers, specifically Mr Pegg. Evidence of inconsistent treatment between workers is relevant in limited circumstances because the cases have to be truly parallel to compare i.e., similar or sufficiently similar. The claimant's case is, the Tribunal believes, different to that of Mr Pegg. When he provided his statement to the respondent on 21 September 2022. Mr Pegg was clear that the containers had not been disposed of correctly. By way of contrast, the claimant was dishonest



in the statement that he provided to the respondent on 21 September 2022 specifically with regard to his reference that the containers had been disposed of at Syston refuse tip.

36. Finally, the question is whether dismissal was a fair sanction. Could a reasonable employer have decided to dismiss in a similar instance? It should be noted that it is not for the Tribunal to substitute their view of what the respondent ought to have done. The Tribunal can only interfere and declare a dismissal to be unfair if the respondent's decision to dismiss is one that fell outside the range of reasonable responses in the circumstances. Although the claimant had worked as an employee for the respondent since 2017 and had a clean disciplinary record, this was a very serious offence. Not only was the claimant initially dishonest but his actions could have had significant environmental implications and implications for the reputation of the Respondent. Dismissal was within the range of reasonable responses.
37. In respect of the notice pay claim, the Tribunal has to determine whether the claimant did something so serious that the respondent was entitled to dismiss without notice? The Tribunal finds that the claimant's dishonesty about the incident and his involvement in it, undermined the trust and confidence inherent in the contract of employment that he had with the respondent. Consequently, the respondent was justified in summarily dismissing the respondent. That claim fails.
38. However, for the reasons I have given, the claim of unfair dismissal succeeds. A further hearing will now be listed in order to determine remedy.

\_\_\_\_\_  
Employment Judge McTigue

\_\_\_\_\_  
Date 3 July 2023

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE