



EMPLOYMENT TRIBUNALS

Claimant: Mr Simon Reilly
Respondent: DPD Group UK Ltd
Heard at: Watford (in person) **On:** 23-27 October 2023
Before: Employment Judge Bedeau

Appearances

For the claimant: In person
For the respondent: Mr P Bownes, Solicitor

JUDGMENT having been sent to the parties on 20 December 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. On 13 August 2021, the claimant presented his claim form in which he claims unfair dismissal and notice pay or wrongful dismissal. In the response presented on 6 October 2021, the claims are denied. The respondent averred that the claimant was summarily dismissed without pay for gross misconduct and that there was a breakdown of trust and confidence in him.
2. The case came before Employment Judge Din on 23 September 2022, at a case management preliminary hearing, who set out the issues in respect of each of the claims I have to determine.
3. In relation to the unfair dismissal claim, the principles are set out in the well-known case of British Homes Stores v Burchell, a judgment of the Employment Appeal Tribunal. The guidance is of relevance in relation to this case as it is a conduct dismissal.
4. In relation to the wrongful dismissal claim, I have to determine on the facts as I have found them whether or not the claimant had repudiated, by his conduct, his contract of employment with the respondent entitling the respondent to terminate that employment summarily.

Evidence

5. In relation to the evidence, I heard oral evidence from the claimant, and he called:

- Mr Jerome Wilson, Operations manager, and
 - Mr Geoff Bird, Shift Manager.
6. On behalf of the respondent evidence was given by:
- Mr Stewart Woodruff, Distribution Centre Manager;
 - Mr Paul Daily, Distribution Centre Manager in Bicester;
 - Mr Volkan Bellikli, Regional Manager;
 - Ms Sharon Hughes, Director of People and Talent, and
 - Mr Ross Tompkins, Distribution Centre Manager, Dunstable.
7. In addition to the oral evidence, the parties produced a joint bundle of documents comprising of 936 pages with a smaller additional bundle produced by the respondent of 24 pages.

Findings of Fact

8. After considering the oral evidence from the witnesses, and the documentary evidence the parties have referred me to, I made the following material findings of fact.
9. The respondent is a parcel delivery business providing services to customers in 30 countries including the United Kingdom. It is an essential part of its business to know where parcels entrusted to it are, to keep accurate records of their movements, and to know whether there have been any attempted deliveries. It uses a software system called Universe to track its parcels. Drivers would go out on deliveries with all the information about where the parcels would be delivered which is stored on a handheld device called Saturn. When the driver delivers the parcel, an electronic signature would be obtained from the customer acknowledging delivery. If the instruction is to leave a parcel in a particular place, a photograph of that parcel's location would be taken as proof of delivery. It is very important that the respondent's customers and the respondent are aware of where the parcels are at any point in time. Should the respondent fail to account for a parcel's non-delivery or failure to deliver on time, it may face a claim from its customers. Some customers have contracts with the respondent for parcels to be delivered by a certain time.
10. There is a facility to record manually when a parcel cannot be delivered for whatever reason. This is called a manual carded event. A driver unable to deliver a parcel would return it to the depot where its non-delivery is recorded by someone at the depot or by a manager. The procedure also requires that the person doing the recording speaks to the driver to ascertain why that parcel could not be delivered. Notes would then be entered in the system in relation to that parcel. Manually carded events may occur when there is an IT failure, such as, with Saturn or when there is a system failure. In such cases there is no record or proof of the correct delivery procedure being followed leading to potential claims.
11. In the claimant's case, he worked, at all material times, at the Dunstable Distribution Centre. In terms of his continuity of service that began in 1997 and his employment, on 3 July 2017, was transferred to the respondent. As Operations Manager, he was responsible for achieving the depot's

objectives in terms of operational, compliance, financial, customer service, effective management of employees, the maintenance of company standards, and of ISO operating procedures.

12. The circumstances which led ultimately to the claimant's dismissal began with an audit by the respondent's National Operations Team. They carried out an audit from 23 to 29 November 2020, and found that there had been an excessive number of manual carded events recorded at the Dunstable depot. The Distribution Centre Manager, Mr Stewart Woodruff, was informed of this by the National Operations Team and on 1 December 2020, he sent an email to staff, including the claimant, in which he banned all manual carded entries with immediate effect except where the driver had legitimately attempted the delivery and notes were added to that particular parcel. The driver had to verify to the person recording the notes why that parcel could not be delivered. (page 89 of the bundle)
13. The email from Mr Woodruff was followed up by a management meeting at which he reinforced his message in his earlier email. That management meeting took either one or two days after his email was sent to staff.
14. The claimant said in evidence that after reading the email he spoke to Mr Woodruff about the difficulties in entering notes on manual carded entries due to the pressure of time and workload. The claimant said that Mr Woodruff's response was to say, "Do the best you can." What Mr Woodruff did not say was to ignore his instruction given on 1 December 2020 and during the subsequent meeting. I find that his instruction on 1 December 2020, still applied to all staff at Dunstable. There was no evidence produced during the course of this hearing that contradicted his instructions.
15. On 10 March 2021, the National Operations Team flagged up a high number of manual carded events at Dunstable. A list of consignment issues was in a spreadsheet to which the claimant was asked to give an account of each consignment referable to him.
16. From 12 and 15 March 2021, the claimant spent time responding to the request. The National Operations Team reviewed the accounts he gave and found that they were incorrect. (150)
17. During the hearing I was taken to page 150 in the bundle of documents in relation to three delivery routes, 316, 616 and 617 but, in particular, routes 316 and 616. With regard to those routes, the claimant's response to the entries, the National Operations Team determined were incorrect.

The investigation

18. As a result of the concerns raised by the Team the matter was escalated to Mr Woodruff who was appointed to carry out an investigation. I find, based on the claimant's evidence, that on 10 March 2021, there was a new quantum operating system that had been implemented and that gave rise to a higher number of manually carded entries. Having said that, Mr Woodruff did not change the instruction he gave on 1 December 2020.
19. He met with the claimant on 17 March 2021, as part of his investigation and also present at the time was Mr Ross Tompkins, General Manager, who

was later promoted to Distribution Centre Manager, Dunstable but, at that time, he was General Manager. The claimant was at work at the time and was not forewarned about the meeting. I accepted claimant's and Mr Tompkins' evidence that the length of that meeting was one and a half hours and not forty-five minutes as Mr Woodruff had stated. During that time a lot was discussed. Mr Woodruff took notes, but those notes are not verbatim. They only cover one and a half sides of A4 paper.

20. At the meeting the claimant acknowledged that he was aware of Mr Woodruff's prohibition against manually carded events. He was asked to explain the high level of manual carded events at Dunstable to which he featured prominently. He stated that there were daily issues with Saturn resulting in high numbers of manually carded events which needed to be keyed in. He was not shown the screenshots in the possession of Mr Woodruff at the time but acknowledged that they were referred to. That point was also confirmed by Mr Tompkins. It was pointed out by Mr Woodruff that none of the manual carded events had notes confirming that they were justified. The claimant's answer was that there was simply not enough time to enter the details. He asked Mr Woodruff why he did not protect him and why he was not told, prior to the investigation, about these issues to enable him to give his account. Mr Woodruff's reply was that he had been instructed to conduct the investigation.
21. The claimant said that at the start of the meeting he was suspended, and this was again confirmed later at the end. In Mr Woodruff's account the claimant was suspended after he had been questioned. I find that whether it was before or after the interview, on 17 March 2021, he was suspended on full pay pending the outcome of the investigation. I was satisfied that the claimant was taken to several manual carded entries and gave his explanation. (219-221)
22. Mr Woodruff, after conducting his investigation, concluded that there was a case the claimant had to answer and that the matter should proceed to a disciplinary hearing.

The disciplinary hearing

23. In a letter sent by Mr Paul Daily on 28 March 2021, who was at the time and still is, the Distribution Centre Manager, Bicester, the claimant was invited to a disciplinary hearing on 1 April 2021. He was advised of his right to be represented and was warned that one possible outcome may be his dismissal. A copy of Mr Woodruff's investigation report was attached to the letter. The allegation that he faced was that,

“You have been persistently falsifying.”

24. The disciplinary hearing was chaired by Mr Daily, who was assisted by Mr Barry Kingsley, Human Resources Business Partner. The claimant attended but was not represented, notwithstanding that he was advised of his right to representation in the invitation letter.
25. The meeting was audio recorded by both the claimant and Mr Kingsley on their mobile phones.

26. In Mr Woodruff's summary, which was part of the pack, he dealt with the National Operations Team's audit in November 2020; his email of 1 December 2021 to the managers and staff; the claimant's replies to the spreadsheet; and he then wrote, in paragraphs 7 to 9, the following:
- “7. March 10 National Operations again flagged a high amount of manual carded events for the depot. They provided a list of consignments which was responded to by Simon. National Ops have checked to verify the responses and found them to be incorrect.
 - 8. Route 617 full audit. Total stops 114. Delivered on Saturn all remaining 63 stops are manual carded events entered from 22.14. Saturn transmitted all day until returning to the depot at 22.00 hours. Keyed by Mark Reilly.
 - 9. Further retrospective audit checks were made by the depot have further manual entries including carding with no or FD scan, appeared falsifying of service was discovered.”
27. The claimant said in evidence that he asked for a copy of the National Operations audit for November 2020 as it had alleged that the manual recorded events referable to him had been falsified but he told me that he was not provided with a copy of the audit.
28. Also in the pack, document 3, were the claimant's manual carded events from November 2020 to March 2021. The claimant's case has been that there was no evidence of falsification based on the absence of notes.
29. Document 5, is a photograph of a Post-it note by Mr Woodruff about the December 2020 meeting.
30. Document 6, is Mr Woodruff's notes of the meeting on 3 December 2020 with managers. One item recorded in the notes was that there should be no manual carded events.
31. Document 7, is confirmation by Ms Caroline Capone, Depot Manager, that those present at the meeting on 3 December 2020, were aware of the discussion in relation to manual carded events.
32. Documents 8 to 13, again were manual carded events to which the claimant's case is that some of those were not done by him and that Mr Woodruff had made wrong assumptions.
33. These were the claimant's views in relation to some of the documents which were in the pack. (69-87)
34. At the disciplinary hearing he alleged that Mr Daily made no introduction; that there was no date or timings in the minutes of the meeting; there was no mention that it was a formal disciplinary hearing, and no reference to his right to request an adjournment. These, I find, although legitimate matters to raise, were of limited significance in the claimant's case because he confirmed in evidence that he had experience in conducting disciplinary hearings and knew of his rights. He could have requested an adjournment at any time and he knew that it was a disciplinary hearing as he received the invitation to it.

35. The notes transcribed by Mr Kingsley from his recording were in the bundle. Having listened to the claimant's audio recording, I was prepared to accept, in part, that Mr Kingsley's notes are not verbatim and, in some cases, do contradict the audio recording.
36. At the hearing the claimant did not deny he had inputted manual carded events. He referred to staff shortages and the lack of time. It was during Covid-19 pandemic, and many staff members were off work. He asserted that Mr Woodruff had targeted him for dismissal and that he, the claimant, had a bundle of documents to substantiate that assertion. He also said that there were problems with Saturn and with Quantum not operating properly. He asked why National Operations had audited him to which Mr Daily replied that his comments on the spreadsheet were found to be incorrect. His response was that he had copied and pasted the explanations given in respect of the parcels. He denied that he had falsified the entries and that he had proof in support of that statement. He explained that as Operations Manager, one of his KPI's was to reduce manual carded events and with that in mind he would not deliberately falsify them. He had no motive for doing so. There was a high daily volume of work, and he had in his pack manually, carded events done in the firm belief that they were accurate. The only issue was he had not added notes but there was no evidence of falsification. He explained that if a driver had Saturn issues and his whole route was wiped out from the system, the only way of knowing what happened to the parcels would be to interview him and obtain an account. In that circumstance, the only evidence of proof of delivery would be the driver's account. (467-470)
37. The hearing was adjourned for Mr Daily to carry out an investigation into the additional evidence and matters raised by the claimant. Statements were obtained from Mr Woodruff, Ms Capone, Andrew Eaton and from Kevin Button. They were responses to questions drafted by Mr Daily. Although IT and Saturn were issues that the witnesses were aware of, the upshot of what they were saying in their statements was that manual carded events should be avoided. (482-545)
38. The disciplinary hearing was reconvened on 23 April 2021. Again, the claimant repeated his concerns about the lack of introductions, timing and the like, the same concerns that he had raised in relation to the start of the first part of the disciplinary hearing. He stated that not all of the potential witnesses were questioned, and he questioned Mr Woodruff's recollection of the December 2020 managers' meeting.
39. The claimant told me in his written evidence that from November 2020 to March 2021, there were 4,907 manually carded events of which his amounted to 73, the equivalent of 1.49% of that total. At the time, although he was unaware of it, there was another document prepared by Mr Woodruff dated 7 April 2021. That document was later given to him during the second appeal. His concern being that had he had that document he would have been in a much better position to argue that he had been targeted by Mr Woodruff as, Mr Woodruff, in that document, had made a number of allegedly inaccurate and false statements.
40. The claimant had a bundle of manually carded events done by Shift and

Acting Operations Managers, but they were not disciplined. He was shown CCTV footage of a parcel at the depot to which he had recorded a manual entry on the system, but that parcel had never left the depot. He challenged whether the information was correct. He maintained it was not falsification. Mr Daily informed him that another manager was carrying out disciplinary investigations into others engaged in alleged similar conduct. The claimant then raised a grievance about Mr Woodruff's conduct towards him and other managers and a decision was taken that that would be dealt with separately. Here, I do find that Mr Woodruff's alleged conduct towards others did not impact on the manual carded entries the claimant made.

41. As regards being targeted by Mr Woodruff for dismissal, it is clear, in this case, that the decision to dismiss the claimant was not Mr Woodruff's decision. In relation to the appeal outcomes, referred to below, again, Mr Woodruff did not play any part in those outcomes. During the disciplinary hearing, the claimant confirmed that Mr Woodruff did not instruct anyone to falsify entries.
42. After hearing the claimant and after taking into account the evidence before him, Mr Daily took time to consider the issues.
43. On 5 May 2021 he wrote to the claimant his outcome which is summarised in his witness statement at paragraph 10, and I shall read paragraph 10:

“I sent my decision by letter dated 5 May 2021. At the outset I recorded the points that the claimant had raised with me during our hearings, and also noted the volume of documentation that had by that point been exchanged which I had to consider. Having reviewed everything my decision was that the claimant should be summarily dismissed for gross misconduct. I set out my reason for this within the letter, which were in summary that:

- (a) The claimant had been trained on our processes but had not worked in accordance with what was required.
- (b) Given his position, it was his responsibility to manage other managers which would include addressing anyone else falsifying information as he had identified to me was happening. If he knew other people were doing things incorrectly then he should have addressed it as Operations Manager. People he had named were his direct reports. I also confirmed that the business had taken appropriate actions to deal with this. I further noted that an alleged culture of falsifying data was not an indication that it was acceptable. That the claimant focused on saying other people doing things only highlighted his failure to address their behaviour.
- (c) The reason that the claimant's actions were questioned were his incorrect responses to the National Operations audit.
- (d) Having considered the incorrect data entries with him at the disciplinary hearing he said that he had taken drivers at their word, but this was not mitigation. I noted that doing this simply leads to a culture where drivers can and will falsify information. This would lead to an increase in losses for us. Again, as a senior manager the claimant should have known better.
- (e) I did not accept that IT issues were acceptable mitigation as the claimant had said. They did not put the claimant in a position where he needed to input false data.

- (f) Ultimately, the claimant's role was to have accountability for compliance and performance at the depot and in behaving the way he did he had failed to uphold compliance. This placed the depot and the business at unnecessary risk.
- (g) Though the claimant had raised an issue of alleged bullying I could see no evidence of it and did not consider that his allegations of being targeted were correct in terms of the disciplinary allegations. As already noted, the claimant had brought attention upon himself by providing incorrect answers to the National Operations audit and it was at that point that an investigation was deemed necessary. I did however say that I would be happy to investigate a grievance if the claimant wished to raise one.
- (h) In behaving the way that he had, the claimant had destroyed the trust and confidence placed in him to act in the best interest of the business. This is particularly important in a senior managerial role such as the claimant's." (602-604)

- 44. Mr Daily then, in his evidence, stated that he considered alternatives to dismissing the claimant but, due to the severity of the misconduct and the position the claimant was in, and who had breached trust and confidence, alternative sanctions were not appropriate.
- 45. On 6 May 2021, the claimant unfortunately suffered a heart attack which led to a cardiac arrest, and he spent time in hospital recovering. Following his discharge, he was only able, at that point, to read Mr Daily's outcome letter.

The first appeal

- 46. It is the claimant's case that Mr Jerome Wilson, Operations Manager, had a conversation with Mr Daily who, it is alleged, said to him that he was not going to dismiss the claimant but was instructed to do so by Mr Volkan Bellikli, Regional Manager. When both men were questioned in relation to this alleged conversation, they both denied making such statements.
- 47. On 18 May 2021, the claimant appealed putting forward nine grounds. (605-606)
- 48. The respondent's disciplinary policy in relation to appeal, states that it is not a rehearing; the employee has to provide new evidence to challenge the disciplinary outcome decision.
- 49. In his grounds of appeal the claimant wrote:
 - 45.1 Firstly, that DPD and DG procedure was not followed throughout the seven-week period he was on suspension.
 - 45.2 Secondly, the catalyst for the investigation into him was the National Operations audit where the examples of his apparent falsification were not even entered by him.
 - 45.3 Thirdly, Mr Woodruff made changes and suggested it was because of the claimant's comments on the audit. The claimant went on to write that Mr Woodruff had targeted him, and was using the audit as an opportunity to get rid of him and to then accuse him of

falsification, insults everyone intelligence but could possibly constitute libel.

- 45.4 The fourth point was that it became apparent that Mr Daily was unaware of the challenges faced by the Distribution Centre of the size of Dunstable, and was, therefore, ill-equipped to adequately understand what was involved in terms of the IT and Saturn issues. These diminished his ability to rule correctly in the case.
- 45.5 Fifthly, Mr Daily appeared to be mistaking every manual event for falsification.
- 45.6 Sixthly, Mr Daily's mention in the dismissal letter that the claimant had identified falsification by others was untrue as the claimant had been quite clear at the hearing that he was not making such an allegation.
- 45.7 The seventh point was that Mr Daily referred to the December 2020 meeting despite the conflicting evidence on dates, content and those present.
- 45.8 Eighth, that the claimant's 24 years' service in the Group and his previous excellent record, did not seem to have been taken into account. He stated that he was extremely disappointed to find that his grievance against Mr Woodruff had not been taken seriously by the respondent.
- 45.9 In relation to the claim made by Mr Daily that he, the claimant, had failed to provide specifics and failed to offer any specific information other than he felt targeted, the claimant's response was that he had counted 15 different specific occasions of being targeted and/or bullied in the written evidence. Also, he referred to the recordings of the hearings. He then wrote of his knowledge of managers being suspended and to events on 6 May 2021.
50. There are two levels of appeal. The first appeal hearing took place on 1 June 2021, chaired by Mr Bellikli, Regional Manager. Also in attendance was Ms Carrie Blake, People Business Partner. Again, the claimant was not represented but that meeting was recorded by him and by the respondent. It lasted around three hours and, as already stated, it was not a re-hearing. The claimant was required to present new evidence to challenge the decision to dismiss him. He invited Mr Bellikli, on more than one occasion, to listen to the audio recordings of the disciplinary hearing, in particular, the failure to follow procedure and to clarify certain statements. Towards the end of that meeting Mr Bellikli undertook to listen to the recordings.
51. On 21 June 2021, he wrote to the claimant dismissing his appeal. It is a very lengthy document to which the claimant has challenged the accuracy of some of the statements made. Mr Bellikli summarised the decision in his witness statement in paragraph 6.
52. In relation to procedural challenges, Mr Bellikli did not consider that those challenges were valid as they did not impact on the question of whether the

claimant had made manual carded entries falsely.

53. In relation to bullying by Mr Woodruff and the claimant's request that the disciplinary hearing be paused until the grievance had been decided, Mr Bellikli took the view that the matters which the claimant referred to in his grievance did not impact upon the allegation of falsification. There was no suggestion that the claimant had been coerced into falsifying the manual carded entries according to Mr Bellikli,
54. In relation to the catalyst for the investigation, Mr Bellikli confirmed that it was the answers he gave to the National Operations audit team.
55. Having regard to those matters Mr Bellikli came to the conclusion that there was a lack of evidence that the claimant had been targeted by Mr Woodruff. Others were investigated but they were junior to the claimant and the claimant had a specific level of responsibility over others. Mr Bellikli did not accept the claimant's explanation about IT issues or about Mr Daily's lack of knowledge of the system at Dunstable. He stated that Mr Daily was an experienced senior manager. Mr Bellikli accepted that just because something was manually entered did not mean that it was falsification, but he took into account that where there were valid reasons, these should be verified, and appropriate notes recorded on the manual entry to ensure a compliant process had been followed. The investigation demonstrated numerous instances where this did not happen.
56. In relation to the December 2020 meeting, Mr Bellikli stated in evidence that there were differences in recollection particularly as to date and the claimant said that he could not recall such a meeting. The evidence supports that there was such a meeting and that expectations surrounding manual carded events were discussed. There were also other communications to managers reminding them of the processes which needed to be followed. The investigation, therefore, demonstrated that managers were aware that falsification and failure to follow the correct processes, were not acceptable.
57. In relation to the claimant's 24 years' service not being taken into account, Mr Bellikli wrote that it had to be balanced against the seriousness of the situation and the impact upon the business.
58. In relation to why the client's grievance against Mr Woodruff had not been taken seriously, he asked, that is Mr Bellikli, why the claimant had not escalated any concerns to either him or the people in Talent Team sooner in order that they be addressed. The claimant accepted that he should have done so. The issues he raised in relation to the grievance had no bearing on the disciplinary issues. He concluded that there was no evidence of bullying by Mr Woodruff. The outcome was that the decision to dismiss the claimant should stand.
59. In relation to the grievance, witnesses' statements were obtained from Caroline Capone, Andrew Eaton, Manny Lemon and Robert Birch, regarding Mr Woodruff's alleged behaviour, referring to people as "losers", "big fat Kevin", and making disparaging comments. Only Mr Birch, from reading his witness statement, had a concern about Mr Woodruff and that was in relation to Mr Woodruff's questioning of his work. Mr Birch was

concerned and upset and had a discussion with Ms Capone following which the situation improved. (742-749)

The second appeal

60. Unusually in this case the respondent has a second level of appeal which is not a rehearing but for the employee to produce new evidence to challenge the disciplinary decision and the first appeal outcome.
61. The claimant appealed on 23 June 2021 and the hearing was held on 8 July of that year. It was audio recorded by him and by the respondent, and there are notes of that appeal hearing in the bundle. Again, the claimant was not represented.
62. The hearing was conducted by Ms Sharan Hughes, Director of People and Talent. At this point in the judgment, I make this finding: I observed Ms Hughes giving evidence and I found her to be a very experienced person in the role of Human Resources. She had carefully taken time to understand the claimant's points on appeal and she was anxious that he should have the evidence that should have been given to him much earlier in the process. I did not find that she and the other decision makers Mr Daily and Mr Bellikli, had an axe to grind against the claimant, or that there was an ulterior motive for their outcomes. Ms Hughes impressed me as a very credible and truthful witness, and I accepted her evidence. She gave a witness statement and in relation to the content of that document, I do accept her reasoning for the decision she came to. The claimant was given a copy of the document prepared by Mr Woodruff in relation to matters extraneous to the issue of manual carded events to which the claimant took exception and stated in evidence that much of that document was incorrect and false. She did not uphold the appeal. (750, 753-779)

Inconsistent treatment

63. The claimant asserted that he had been treated inconsistently when compared with others in similar circumstances. I have read the statement by Mr Ross Tompkins who replaced Mr Woodruff, who disciplined other members of staff. Mr Woodruff left shortly after suspending the claimant.
64. During the disciplinary hearings Mr Tompkins met with a number of individuals: Mr Eaton, Acting Operations Manager/Shift Manager; Mr Gareth Rogers; Mr Andrew Dube, Shift Manager; Mr Liam Doo, Acting Operations Manager, and with Mr Mark Riley, the claimant's son.
65. Mr Mark Reilly was given a final written warning. Mr Tompkins came to the conclusion that his conduct in relation to falsification of manual carded entries was not for personal gain. The period of the final written warning was to last 12 months.
66. In relation to the other individuals, the tribunal was handed a pack of documents by Mr Tompkins evidencing how he dealt with these individuals. He said that they were interviewed separately, and his decision was communicated to them separately. The email they received had the same wording and it was:

“As per our discussion within the last 48 hours, it has come to my attention that you have knowingly falsified or guessed manual carded events to save service.

There was a clear lack of process within Dunstable and this must be addressed.

I have taken on board your valid points of “culture” and “direction from line managers” and although I can appreciate the predicament you may have been in, this issue cannot be ignored as you’re fully aware its wrong.

Furthermore, falsification is not acceptable and will not be tolerated, should any further incidents of this nature happen, you may be liable for more serious disciplinary action.”

67. There was another individual, but his case did not impact on manual carded entries.
68. The differences in their cases when compared with the claimant’s case, are the following:
 - 62.1 They were not identified by the National Operations Team;
 - 62.2 They were not in a substantive operations manager role, and
 - 62.3 the duration of the conduct was not as long as the claimant’s, from November or December 2020 to March 2021
69. Mr Geoff Bird, Shift Manager, and the claimant’s witness, believed that Mr Woodruff had influenced the outcomes of the disciplinary and appeals. There was no evidence in support of that assertion.

Submissions

69. I take into account the very detailed and careful submissions made by Mr Bownes, the solicitor, on behalf of the respondent and by the claimant. I also take into account the law they have referred me to.

The law

70. Section 98(1) Employment Rights Act 1996 (“ERA”), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

“Where the employer has fulfilled the requirements of subsection (1), and 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 employees 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."

71. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following must be established:
 - a. First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,
 - b. Second whether that genuine belief was based on reasonable grounds,
 - c. Third, whether a reasonable investigation had been carried out,
72. Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case. Was the decision to dismiss within the band of reasonable responses?
73. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.
74. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.
75. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.
76. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark, held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer. Reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.
77. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's supermarket Ltd v Hitt [2003] ICR 111 CA.
78. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.
79. The seriousness of the conduct is a matter for the employer, Tayeh v

Barchester Healthcare Ltd [2013] IRLR 387 CA.

80. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer or of adopting a substitution mindset. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was suffering from an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, “It’s been a few months since I have been in this position with a man underneath me” was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, for the comment made. The employment tribunal found, by a majority, that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, in which the Court of Appeal held that the tribunal is required to consider section 98(4) ERA 1996, when considering the fairness of the dismissal.
81. The level of inquiry the employer is required to conduct into the employee’s alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. “At the one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.”, Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.
82. In Hadjiannou-v-Coral Casinos Ltd [1981] IRLR 352, the EAT held, Waterhouse J,
- “We should add, however, as counsel has urged upon us, that industrial tribunal would be wise to scrutinise arguments based on disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from the proper consideration of the issues raised by section 53(3) of the Act of 1978. The emphasis in that section is upon the particular circumstances of individual employee’s case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or tribunal is to think that a tariff approach to industrial misconduct is appropriate. ...”
83. In that case the EAT adopted counsel’s argument that the disparity argument becomes more relevant “in truly parallel circumstances” where the claimant is dismissed and the other is given a lesser penalty.

84. A wrongful dismissal claim is a common law action based on a breach of contract. It has to be established that the employer was in breach of the contract of employment by dismissing the claimant summarily. However, if it can be shown that the employee committed the misconduct in question thereby repudiated the contract of employment, the claim will fail, British Heart Foundation v Roy (debarred) [2015] UKEAT/0049/15, Langstaff J. It is for the tribunal to decide what happened and not the employer, Enable Home Support v Pearson UKEAT/0366/09.

Conclusion

Unfair dismissal

85. In the well-known case of British Homes Stores v Burchell and the guidance in that case, I bear in mind that it is for the employer to determine the seriousness of the alleged conduct. It is not my function to put myself in the position of being the reasonable employer.
86. Had the respondent a potentially fair reason for terminating the claimant's employment? Based on the wording of the dismissal letter, that reason was conduct. It had to do with manual recorded entries without querying the drivers in question. Had the respondent engaged in a reasonable investigation? The claimant was approached, I appreciate and do accept, that he was unaware of the purpose of the meeting on 17 March 2021 until Mr Woodruff spoke to him. He was able to give an account in relation to those matters at that time. He was given the opportunity again to put his account forward at the disciplinary hearing. By then the respondent had had the manual carded entries without notes and was anxious for the claimant to give his account in relation to those particular entries. The claimant gave his account; he denied that he had engaged in any falsification of the entries. The matter was again explored by the respondent at the first and second appeals. Again, the claimant gave his account, and further information was obtained by the respondent. I have come to the conclusion that the respondent had conducted a reasonable investigation into the claimant's conduct in relation to the manual carded entries.
87. Was there a genuine belief by Mr Daily, based on reasonable grounds, in the claimant's guilt? In Mr Daily's outcome letter he sets out the reasons why he took the view that the claimant had engaged in falsification of the manual carded entries. Putting in an entry without questioning the driver concerned can lead to a false account being given and that was the view taken by Ms Hughes. I am satisfied that Mr Bellikli and Ms Hughes also had a genuine belief in the claimant's guilt. They were not motivated by any ill-feeling or an ulterior desire to get rid of the claimant notwithstanding Mr Bird's evidence that he believed Mr Woodruff had influenced the disciplinary and appeal outcomes. There was no evidence in support of that claim. In relation to assertion that Mr Daily was instructed by Mr Bellikli to dismiss the claimant, that was denied by these two individuals in evidence. Even if that is right, there is no suggestion that Ms Hughes was similarly instructed to give the same outcome.
70. Was the decision in the range of reasonable responses? I have to accept

that there are features in this case in which an employer may take the view that the claimant, where the IT systems were down, was doing his level best. He may have not followed the procedure but taking into account his very long length of service and his hitherto clean disciplinary record, that in his case a final written warning was merited. At the other end, an employer faced with the same evidence may take the view, as the respondent did, that such conduct was prohibited. He was told on 1 December 2020, not to engage in manual carded entries unless it can be justified having spoken to the driver, but he persisted for several months in that activity and, in the process, such an employer may conclude that the entries were false. Having regard to the disciplinary policy, it merited summary dismissal because it had an impact on trust and confidence.

- 71. I cannot put myself in the position of being the reasonable employer as that is not my function. My function is to review the evidence, make findings of fact, and apply the law to those findings. I accept that the wording in the disciplinary policy does have the added to it, falsification for personal gain and there is no evidence that the claimant had gained personally by his conduct. What is apparent was the seniority of his position, the length of the conduct, the fact that others took guidance from him, and they were disciplined. According to the respondent his conduct was serious. Notwithstanding the absence of personal gain in the allegation, the seriousness of the conduct is to be determined by the employer.
- 72. My conclusion, regrettably in the claimant's case because I have to acknowledge his very lengthy 24 years' service and his unblemished hitherto disciplinary record, is that the unfair dismissal claim is not well founded and is dismissed.

Wrongful dismissal

- 73. In relation to the wrongful dismissal claim, I take in to account all of the factors that I have referred to in relation to the unfair dismissal; the duration of the conduct, the seniority of his position, others junior to him were disciplined, though not dismissed, and the fact that Mr Woodruff had given an express instruction not to engage in manual carded events unless it can be justified having spoken to the drivers.
- 74. It is my judgment that the claimant, by his conduct, had repudiated his contract of employment with the respondent entitling the respondent to terminate his employment without pay and without notice.

Employment Judge Bedeau
12 February 2024
Date:

Judgment sent to the parties on
16 February 2024

For the Tribunal office