



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100379/2024

Claimant: Mr J Lewis

Respondent: J S Strachan t/a Strachan Haulage

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

In accordance with the power set out in Rule 69 of the Employment Tribunal Rules of Procedure 2013, I hereby correct the clerical mistake(s), error(s) or omissions(s) in the Judgment sent to the parties on 19/06/2024, by deleting:

4100379/2004 and substituting therefore 4100379/2024

An amended version of the Judgment is attached.

Important note to parties:

Any dates for the filing of appeals or reconsideration are not changed by this certificate of correction or the amended Judgment or Case Management Order. These time limits still run from the date of the original Judgment or Case Management Order, or if reasons were provided later, from the date that those were sent to you.

Employment Judge: M Sutherland
Date of Judgment: 29 July 2024
Entered in register: 31 July 2024
and copied to parties



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100379/2004

Held in Edinburgh on 20 and 21 May 2024

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Employment Judge Sutherland

John Lewis

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**Claimant
Represented by
G Cunningham
Of Counsel
Instructed by
Gordon Cooke,
Solicitor**

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**John Stuart Strachan
t/a Strachan Haulage**

**Respondent
In person**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that the complaints succeed and the Respondent is ordered to pay the Claimant redundancy pay in sum of £7,875 and notice pay in sum of £5,250 (gross).

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E.T. Z4 (WR)

REASONS

Introduction

1. The claimant made a complaint of constructive dismissal and for redundancy pay. The complaints were denied by the respondent.
- 5 2. During the hearing the claimant made an application to amend to include a complaint for notice pay which was granted for reasons given orally.
3. The claimant and the respondent each gave evidence on their own behalf. Both parties lodged a bundle of documents.
4. Both parties made closing submissions.

10 List of Issues

5. Following discussion, the issues to be determined were agreed as follows:

Transfer of Undertakings (Protection of Employment) Regulations 2006

6. Parties were in agreement that the claimant was employed by the respondent
15 at the date of resignation and that there was not a relevant transfer to Forth & Clyde Logistics Ltd ('FCL') to which the claimant was assigned.

Constructive dismissal - Section 95 (c) Employment Rights Act 1996

- 20 7. Was there a repudiatory breach of the claimant's contract namely a breach of the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (*Malik v Bank of Credit and Commerce International Ltd [1998] AC 20*)?
- 25 8. The acts relied upon are that -
 - a. *From 16 September 2023 the Claimant's employment by the respondent as a HGV Class 1 driver was untenable because the respondent's operators licence was revoked and that the respondent was prevented from being a Transport Manager*
 - 30 b. *In September /October 2023 he was required to work under the direction and control of FCL as a third party on substantially different hours and routes*

- c. *By October 2023 he was subjected to a de facto transfer to FCL a third party without information and consultation*
- d. *The arrangements with FCL amounted to a deliberate attempt to circumvent the decision of the Traffic Commissioner (and therefore the licensing scheme) which he would be facilitating.*
- 5 e. *On 17 October 2023 he was invited to attend a disciplinary hearing but was not advised of the precise nature of the allegations, or the potential outcome, or his right to be accompanied.*
9. If so, was the breach a factor in the claimant's resignation?
- 10 10. If so, did the claimant affirm the breach?
11. If not, did the respondent have a potentially fair reason for dismissal (Section 98)?
- a. Was the reason for the repudiatory breach that the employee was redundant and/or relates to the employee's conduct?
- 15 12. Was the dismissal (i.e. the repudiatory breach) fair having regard to Section 98(4) of the Employment Rights Act 1996 including whether in the circumstances the respondent acted reasonably in treating it as a sufficient reason for dismissing the claimant? Did the decision to dismiss (and the procedure adopted) fall within the 'range of reasonable responses' open to a reasonable employer? *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17
- 20 13. If the reason for dismissal relates to the conduct of the claimant – Did the respondent have a genuine belief in the claimant's guilt? Did the respondent have reasonable grounds for that belief? Had the respondent conducted a reasonable investigation into that conduct? *British Home Stores Ltd v Burchell* [1978] IRLR 379, [1980] ICR 303
- 25 14. If the respondent did not adopt a reasonable procedure, was there a chance the claimant would have been dismissed in any event? *Polkey v AE Dayton Services Ltd* 1987 3 All ER 974.
15. To what basic award is the claimant entitled? Did the claimant engage in
- 30 conduct which would justify a reduction to the basic award?
16. What compensatory award would be just and equitable in all the circumstances? What loss has the claimant suffered in consequence of the dismissal? Did the claimant contribute to his dismissal? Has the claimant taken reasonable steps to mitigate his losses?
- 35 Redundancy pay Section 135 Employment Rights Act 1996

17. Was reason for dismissal that the respondent ceased to carry on business for the purposes of which the claimant was employed by him or a reduction in requirements for employees to carry out work of a particular kind (Section 139)?

5 18. Has the claimant unreasonably refused an offer of suitable alternative employment made before the end of his employment (Section 141)?

Period of notice Section 86 Employment Rights Act 1996

19. After amendment the following issues also required to be determined:-

20. Did the respondent terminate the claimant's contract?

10 21. Is the claimant's period of continuous employment 12 years or more?

Findings in fact

22. The Tribunal makes the following findings in fact:

23. The respondent operates a haulage business. The respondent employed the claimant as an HGV Class 1 driver from mid-2013 until 26 October 2023.

15 24. On 20 January 2019 the Claimant and respondent signed a written contract of employment which stated: you are responsible on a day to day basis to Stuart Strachan or any person nominated in his absence; the job which you are employed to do is HGV 1 driver; Strachan Haulage Bathgate ['SHB'] may amend your duties from time to time as necessary to meet the needs of the business; hours of work 50 hours a week; you are based at Coralinn Yard, Royston Road, Deans, Livingston. However you require to travel to other sites; all offences dealt with under the disciplinary procedure will be investigated to establish the facts. At each stage of the procedure in individual will be given the opportunity of stating their case at an investigation meeting before any decision is reached as to whether there is a case to be answered and a disciplinary hearing to be instigated; you are entitled to receive the following notice of termination...one week for each complete year of service up to a maximum of 12 weeks after 12 years service. SHB reserves the right to make payment in lieu of notice.

25 25. The Goods Vehicles (Licensing of Operations) Act 1995 states that no person shall use a goods vehicle on a road for the carriage of goods

except under an operator's licence. The respondent held an operator's licence from 21 February 1996 until 16 September 2023. Under the 1995 Act the operator is required to designate a competent and qualified natural person as a transport manager. The transport manager is required to manage the transport activities with a view to ensuring safe operations including management and monitoring of drivers (including licences and working time) and checks and maintenance of vehicles. The respondent was a transport manager until 16 September 2023.

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26. Traffic commissioners are the regulators of the road transport industry in Great Britain. Their stated function is to ensure that only safe and reliable operators of goods and passenger vehicles are permitted to be licenced.

27. On 18 February 2019 the Traffic Commissioner found that the respondent had been operation in excess of his authorised number of vehicles. He was issued with a serve warning and his licence was curtailed to a reduced number of vehicles. Following this decision the respondent arranged to hire some of his vehicles out to two other haulage businesses, Mr Bett t/a Streamlink and Forth and Clyde Logistics Ltd ('FCL'), and he sub-contracted haulage work to them.

28. On 26 January 2023 the respondent was called to a public inquiry held by the Deputy Traffic Commissioner ('DTC') regarding allegations that he had been operating more vehicles than authorized. The respondent's position was that Mr Bett t/a Streamlink was operating these vehicles (rather than him) because he had subcontracted the haulage work to Mr Bett, that Mr Bett would hire vehicles from the respondent, and that Mr Bett would employ and pay drivers, maintain and fuel the vehicles. However that subcontracting arrangement never came to fruition because no monies were transferred to or from Mr Bett.

29. In light of the public inquiry the Respondent began renting vehicles to FCL and sub-contracting haulage work to them. FCL had previously been incorporated on 29 October 2021. It was granted an operator's licence in December 2021. Its directors are Alan Reid and his wife Gillian Reid. Alan Reid had previously been the respondent's mechanic.

30. On 15 August 2023 the DTC issued his decision. The DTC found that the respondent and not Mr Bett was the user who was operating the vehicles. The decision stated:

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"I accept that there was nothing to prevent Mr Strachan from entering into subcontracting arrangement to carry out work that he could not do because he did not have enough authorised vehicles providing it was a genuine sub-contracting arrangement. The respondent could have leased vehicles to Mr Bett and then sub-contracted work to Mr Bett. I accept that the arrangement with FCL was a genuine sub-contacting arrangement...The point that I wish to make is that even if the intention was to enter into a genuine subcontracting arrangement, Mr Stachan was paying the drivers, fuel, maintenance etc. No money ever went to Mr Bett...I find, therefore that Mr Strachan deliberately attempted to circumvent the operator licensing system by entering into to an arrangement with Mr Bett in which Mr Bett would obtain an operator's licence and he would lend discs to Mr Strachan so that Mr Strachan could operate more vehicles than the maximum authorized...Because this is the second Public Inquiry at which Mr Strachan has been found to have operated more than the authorized number of vehicles on his operator's licence I have reached the view that it is unlikely that Mr Strachan will be compliant in the future".

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31. The decision of the Deputy Traffic Commissioner was that: the respondent's operator's licence be revoked with effect from 16 September 2023; he was prohibited from holding an operator's licence for 10 years; if he "operates any goods vehicle licence in partnership with a person who holds such a licence" that licence would be revoked; and he was disqualified from being a transport manager indefinitely. The DTC's decision is currently the subject of an appeal.

32. Before DTC proceedings the respondent had 4 drivers and 7 vehicles and had haulage contracts with Wincanton, Mitsubishi and Millview (Tesco). Immediately before August 2023 the claimant had driven central Scotland routes and worked less than 50 hours a week. In previous years he had driven longer routes and worked longer hours.

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33. As a result of the DTC proceedings the respondent lost the haulage contracts with Wincanton and Mitsubishi which represented about 75% of his work. He sold 3 of his vehicles (2 to FCL), rented out 3 vehicles (2 to FCL) and considered 1 vehicle no longer roadworthy. FCL paid £1,200 pcm for rent of the vehicles. FCL were responsible for their maintenance. The respondent sub-contracted his remaining haulage work to FCL and he received payment of 5% of the value of that work.

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34. As a result of the DTC proceedings, the respondent drivers (excluding the claimant) either left his employment, transferred under TUPE to the new service providers of the haulage contracts, or transferred to FCL.

35. After August 2023 the claimant was expected to undertake work from FCL driving their vehicles. He was expected to drive Scotland wide routes (including Fort William and Aberdeen) and to work at least 50 hours a week (sometimes considerably more). The FCL depot was 1 mile away from the respondent depot both of which were in Deans, Livingston. He received instructions from Alan and Gillian Reid who were Directors of FCL. Alan was also acting as FCL's transport manager (responsible for the management and monitoring of drivers and checks and maintenance of vehicles). There was no consultation with the claimant regarding these changes. The claimant had concerns about their financial standing and did not want to work for them. He was concerned that the new arrangements for undertaking the haulage work were unlawful.
36. In late August the claimant advised the respondent that he wanted to leave because he was unhappy doing the FCL work but he was going to take his accrued holidays first (due to expire on 16 September). Thereafter the claimant advised that he wanted redundancy pay but the respondent advised that he was not eligible because he was still employed by the respondent and there was work for him to do.
37. On 3 September the respondent advised the claimant that he can still continue to trade, that he should have a week off and then come back to work because he will have work for him. On 4 September he advised the claimant that he was expected back on 11 September if he was not leaving. On 10 September the claimant advised that he was taking his holidays as agreed until 16 September then he'll seek advice. On 11 September the respondent asked him to confirm whether he was leaving or staying. On 15 September he stated he expected him back to work on 18 September.
38. The claimant returned to work after his holidays.
39. On 31 September 2023 the claimant wrote to the respondent stating that he objected to being transferred to FCL and that, given that the respondent was unable to continue to trade, his position was redundant and he was entitled to redundancy pay.
40. In October the claimant was advised by the respondent's external payroll provider that his employment had transferred to FCL. When he spoke to Gillian and Alan they denied this.

41. By early October the relationship between the respondent and the claimant had broken down. In October the claimant had significant periods of absence without permission (he worked for a week, was absent for a week, worked for 3 days and was then absent until he resigned). The respondent and Alan Reid both sought to call the claimant on a number of occasions but he did not answer or return any of the calls.
42. On 11 October 2023 the claimant wrote to the respondent noting that he had been employed on a de facto basis by FCL because he had been driving one of their vehicles, been provided with their fuel card, provided with instructions from them, and was initially told he was employed by them. He considered this and the requirement to work substantially different hours and place amounted to a material change to his terms. He noted that he was redundant because the respondent was unable to employ him in his former position.
43. On 16 October 2023 the respondent texted the claimant to advise “you are still employed by Strachan haulage and there will be no redundancies and you are to return to work ASAP let me know what date you are coming back on as we will have to have a disciplinary meeting first for you going absent without leave from work for the second time and for not safely strapping down a load of timber you loaded at Fort William and then dropped trailer in at pollocks yard when checked by a Pollock driver the load had moved and could have resulted in a major accident. Also you have to meet Alan and download your driver card as a legal requirement” The claimant sought for the meeting to take place first but the respondent insisted that he do delivery run to Ellon, Aberdeenshire. The claimant did not turn up for work or the meeting.
44. On 25 October the respondent asked him to contact him to explain why he had not turned up for work and that whatever the problem he was sure it could be sorted out amicably.
45. On 26 October 2023 the claimant intimated his resignation on the basis that the respondent was unable to continue to employ him as an HGV driver, he has been transferred in all but name to FCL without due process, that he had not contacted him to discuss matters and he had instead been called to a disciplinary hearing.
46. The respondent advised that sometime in October he had received a letter from MSP Transport Ltd that Mr Lowis had failed to properly secure a load

of timber he was transporting from Fort William to Bathgate posing a risk to road safety with potential catastrophic consequences.

47. At the time of his resignation the claimant was age 60 and earned £525 gross a week (£509 net). Although the Claimant took some limited steps to mitigate his losses he remains unemployed. His savings are such that he is ineligible for state benefits. He accepted that had he taken reasonable steps he would have secured alternative employment within his notice period.

Observations on the evidence

48. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

49. Both the claimant and the respondent were mainly but not wholly credible and reliable in giving their evidence.

50. The claimant was not entirely candid when he stated in evidence that he had not previously intimated his intention of leaving after his holidays. It was apparent from the contemporaneous documentary evidence that the respondent understood from their conversation that he was leaving and that he had changed his mind when the respondent said he wasn't entitled to redundancy pay. It is considered more likely than not that the claimant had previously intimated his intention of leaving after his holidays.

51. The claimant was not entirely candid when he stated in evidence that he was not absent from work without leave in October but was in fact off sick. It was apparent from the contemporaneous documentary evidence that the claimant was reluctant to return to work following his holidays, that he had not called in sick, and the respondent was trying to find out why he was not in attendance at work. It is considered more likely than not that the claimant was absent from work without leave in October.

52. The respondent was disingenuous in giving evidence when he stated that the disciplinary meeting was not a disciplinary hearing. He initially accepted that the meeting was a disciplinary hearing and only when the need for prior investigation was raised did he seek to insist that it was an investigation meeting. Although it was apparent that the Respondent

would ordinarily have conducted a formal investigation into such allegations, it was clear from the paperwork that he had intended this meeting it to be a disciplinary hearing.

53. The respondent was not entirely candid when he stated that he would reasonably elect to believe the evidence of a third party intimated by telephone over the evidence of the claimant as to whether or not he had secured a load. The claimant had worked for him for over 12 years as a driver; he was trained in and regularly had to secure loads; there had never previously been an issue with the securing of a load; the failure to secure was said to be total and amounted to dangerous driving yet there was no formal investigation; the respondent had previously conducted formal investigations in respect of prior allegations but he had never previously dismissed a driver. It was considered more likely than not that the respondent's stated view as to who he would choose to believe was inappropriately influenced by the prospect that if he dismissed him for gross misconduct he would not require to pay him redundancy pay.

54. It is noted that much of the communication between the claimant and the Respondent was by text in light of longstanding medical advice that the claimant preferred to receive instructions by text rather than by telephone because of issues with his memory.

The law

Constructive dismissal - Section 95 (c) Employment Rights Act 1996

55. 'Dismissal' is defined in s 95(1) ERA 1996 to include 'constructive dismissal', which occurs where an employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (s 95(1)(c)).

56. The test of whether an employee is entitled to terminate their contract of employment without notice is a contractual one: has the employer acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract: (*Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*).

57. There must be a breach of contract by the employer which is "a significant breach going to the root of the contract" (*Western Excavating*). This may be a breach of an express or implied term. The essential terms of a

contract would ordinarily include express terms regarding pay, duties and hours and the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (*Malik v Bank of Credit and Commerce International Ltd [1998] AC 20*).

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58. The breach may consist of a one-off act amounting to a repudiatory breach. Alternatively, there may be a continuing course of conduct extending over a period and culminating in a "last straw" which considered together amount to a repudiatory breach. The "last straw" need not of itself amount to a breach of contract but it must contribute something to the repudiatory breach. Whilst the last straw must not be entirely innocuous or utterly trivial it does not require of itself to be unreasonable or blameworthy (*London Borough of Waltham Forest v Omilaju [2005] IRLR 35*).

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59. Whether there is a breach is determined objectively: would a reasonable person in the circumstances have considered that there had been a breach. As regards the implied term of trust and confidence: *"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of..."* (*Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT*).

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60. The breach must be a factor (i.e. have played a part) in the claimant's resignation. The claimant must not have affirmed the breach by any delay in resigning. It is open to the employer to establish that the reason for conduct amounting to breach was potentially fair and if so to consider whether the employer acted reasonably in all the circumstances.

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61. If the reason for the breach of contract is wholly or mainly attributable to a redundancy situation the employee shall be taken to have been dismissed by reason of redundancy.

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Redundancy pay Section 135 Employment Rights Act 1996

62. For the purposes of a claim for redundancy pay there is a presumption that an employee who has been dismissed has been dismissed for redundancy unless the contrary is proved.

5 63. Under Section 139, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —

a. *“the fact that his employer has ceased or intends to cease —*

10 i) *to carry on the business for the purposes of which the employee was employed by him, or*

ii) *to carry on that business in the place where the employee was so employed, or*

b. *the fact that the requirements of that business —*

15 i) *for employees to carry out work of a particular kind, or*

ii) *for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.”*

64. Under Section 139(a), in situations where there is a change in the type of business rather than a complete closure, the issue to be determined is whether the new business is completely different in nature (*Whitbread plc t/a Whitbread Berni Inns v Flattery and ors EAT 287/94*).

65. Under Section 139(b) there are two issues to be determined: first, whether there is a diminution in the requirement for employees (rather than for the claimant) to carry out work of a particular kind and second, whether the claimant’s dismissal is attributable to that diminution (*Murray and anor v Foyle Meats Ltd 1999 ICR 827, HL*).

Period of notice Section 86 Employment Rights Act 1996

66. Under Section 86 an employer must give at least one week’s notice of termination of employment for each completed year of continuous service up to a maximum of 12 weeks’ notice.

67. A failure to give notice gives rise to an action for damages unless the employee has a right to payment in lieu right which gives rise to an action for debt. An action for damages requires mitigation of losses whereas an action for debt does not (*Zepbrook Ltd v Magnus UKEAT/0382/06*).

Submissions

68. The claimant's submissions were in summary as follows –

- a. It is unlawful for an employer to transfer an employee to another employer without their consent (*Nokes v Doncaster Amalgamated Collieries Ltd [1949] AC 1014*)
- b. The reason for his resignation was he was redundant and effectively being employed by a third party
- c. Being transferred to a third party and implementing material changes to hours and routes without consent amounts to a breach of trust and confidence. The claimant had reasonable concerns about the legality of the arrangement with FCL.
- d. The claimant resigned in response without delay
- e. The claimant's dismissal would not have been fair because he was not given notice of the allegations, warned of the risk of dismissal or advised of the right to be accompanied
- f. The reason for his dismissal is that he was redundant. Following the revocation of the respondent's operator's licence there was a significant reduction in work and the need for drivers diminished.

69. The Respondent's submissions were in summary as follows –

- a. He was not transferred to FCL
- b. There were no material changes to his contract (the hours and routes were permissible under his contract)
- c. There was no redundancy situation because there was still work for him to do
- d. It's entirely competent for him to sub-contact work to FCL
- e. He would have been fairly dismissed had he not resigned
- f. He resigned because he wasn't given redundancy pay and was at risk of dismissal.

Discussion and decision

30 *Was there a repudiatory breach?*

70. Until September 2023 the Claimant's drove a heavy goods vehicle carrying goods for the respondent's haulage business in fulfilment of his contractual

duty. From September 2023, following the loss of the respondent's operator's licence, the claimant was seconded without consultation to Forth and Clyde Logistics Ltd ('FCL') and drove heavy goods vehicles operated by them carrying goods for their haulage business.

5 71. The Claimant's contract of employment expressly specified that "you hold your appointment from Stuart Strachan... You are responsible on a day to day basis to Stuart Strachan..". From September 2023 the Claimant was required to work under the direction and control of a third party, namely Alan and Gillian Reid who were Directors of FCL. Although his contract permitted reporting to
10 "any person nominated in his absence" and "an amendment of duties", that was not directed at reporting to an external third party and was too vague to dislodge the fundamental principle that an employee is free to choose the identity of their employer (*Nokes v Doncaster, HofL*).

15 72. Although the both Claimant's hours of work and length of routes increased substantially from September 2023 that increase was not out of line with historic working practices or the terms of his contract.

20 73. Following a public inquiry the Deputy Traffic Commissioner had found the respondent's working practices to be non-compliant with the operator's licensing regime and expressed the view that it was unlikely that the respondent would be compliant in the future. Notwithstanding the revocation of the operator's licence, the Claimant understood he was still driving vehicles owned by the respondent (albeit leased to FCL) in furtherance of haulage contacts still held by the respondent (albeit subcontracted to FCL). It was not unreasonable for the Claimant to have concerns that the new arrangements
25 for undertaking the haulage work were unlawful (notwithstanding that they may well have been lawful because of the contractual arrangements).

74. On 17 October 2023 the Claimant was invited to attend a disciplinary hearing but was not advised of the precise nature of the allegations, the potential outcome, or his right to be accompanied.

30 75. A continuing course of conduct extending over a period and culminating in a "last straw" may be considered together as amounting to a repudiatory breach. In light of the DTC decision published on 15 August 2023, the revocation of the respondent's operator's licence from 16 September 2023, the consequent requirement to work under the direction and control of a third
35 party, and the invite to a disciplinary hearing without due process, a reasonable person in the circumstances of the Claimant would have

considered that the respondent had acted in a way that was calculated or likely to destroy or seriously damage their relationship of mutual trust and confidence. Given the alternative approaches that were available (see below) it cannot be said that the respondent acted with reasonable and proper cause.

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Was the breach a factor in the claimant's resignation? Did he affirm the breach?

76. It was readily apparent from the timing and terms of his resignation that the course of conduct described above was the reason for the claimant's resignation.

10 77. There was also no reasonable basis upon which to conclude that the claimant had affirmed the breach given that only 2 months had passed since the DTL decision, given that the Claimant had periods of absence on holiday and otherwise, and given the seriousness of the decision to resign in light of the claimant's age and length of service.

15 *What was the reason for the dismissal? Was the dismissal fair?*

78. The reason for the repudiatory breach was wholly or mainly attributable to a redundancy situation.

79. Following the revocation of the operator's licence, the respondent had ceased to carry on the business for the purposes of which the claimant was employed.
20 The claimant was employed to drive a heavy goods vehicle for the carriage of goods for the respondent's haulage business. After the revocation of the operator's licence there was no such business and the claimant was instead required to drive vehicles for a third party's haulage business. Alternatively, the respondent's haulage business suffered a diminution in the requirement
25 for hgv drivers (only the Claimant remained) and the requirement to work under the direction and control of a third party was attributable to that diminution.

80. The respondent's approach to the allegations of misconduct (including the failure to properly investigate) was inappropriately influenced by the prospect
30 of paying redundancy pay and was attributable to the redundancy situation.

81. Whilst redundancy and conduct are both potentially fair reasons for dismissal, the respondent did not act reasonably in the approach he adopted either in response to the redundancy situation (by requiring the claimant to work for a third party without consultation) or in response to the allegations of

misconduct (by failing to properly investigate, etc). His approach fell out with the band of reasonable responses and the dismissal was accordingly unfair.

To what compensation is the Claimant entitled?

82. Had the respondent adopted a reasonable procedure the claimant would have
5 been dismissed with notice by reason of redundancy.
83. The claimant is accordingly entitled to statutory redundancy pay and statutory notice pay subject to the duty to mitigate.
84. The claimant had 10 years' continuous service and is accordingly entitled to redundancy pay in sum of £7,875 (10 x 1.5 x £525). He is also entitled to 10
10 weeks' notice pay in sum of £5,250 (10 x £525) subject to the duty to mitigate his losses.
85. The claimant had understandable concerns regarding the lawfulness of the arrangements with FCL and was entitled to object to the transfer to them. There was no unreasonable refusal of an offer of suitable alternative
15 employment. Had the claimant taken reasonable steps to mitigate his losses he would have secured alternative employment by the end of his notice period.
86. The claimant is not eligible for compensation for loss of statutory rights because he would have been fairly dismissed in any event.

Employment Judge: M Sutherland
Date of Judgment: 19 June 2024
Entered in register: 19 June 2024
and copied to parties