EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103832/2023

Held at Inverness on 15, 16 & 17 July and 16 August 2024

Employment Judge J M Hendry

Ms Jacqueline Noble	**Claimant** **In Person**
Scottish Ambulance Service Board	**Respondent** **Represented by,** **Mr G Fletcher,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal finds as follows:

1. **That the application for a finding of unfair dismissal being not well founded is dismissed.**
2. **That the application for a finding of wrongful dismissal/failure to pay notice pay not being well founded is dismissed.**
3. **That the claims for arrears of pay and breach of the Working Time Directive are dismissed.**

REASONS

1. The claimant in her ET1 sought a finding that she had been unfairly dismissed by the respondent from her post as National Despatch Manager. The respondent's position was that the claimant had been fairly dismissed on the grounds of conduct and that her conduct had amounted to gross misconduct entitling them to summarily dismiss.

2. The claimant had been represented by solicitors but they had withdrawn from acting. The case had initially been listed to be heard in November 2023 and then relisted for March 2024. This hearing in turn was postponed due to the claimant's representative withdrawing.

Issues

3. The case proceeded to a Case Management Preliminary Hearing on 11 July 2024 in front of Judge Sangster. The case was discussed with the claimant and Mr Fletcher. It was explained that the respondents relied on the claimant's conduct, in particular, it was noted that the Tribunal had to consider.

    a) whether the respondent believed the claimant had committed the misconduct relied upon;
    b) whether that belief was based on reasonable grounds; and
    c) when it formed that belief it had carried out as much investigation as was reasonable in the circumstances.

4. TQ this must be added the claim of wrongful dismissal namely the issue of whether the respondent could dismiss for gross misconduct under the terms

of the claimant's contract. This involves an objective consideration of the conduct.

5. The claimant had sought statements from other witnesses. She withdrew that request.

6. The claimant had attempted to introduce a document called "Grounds of Claim" which she indicated was a response to the respondent's Grounds of Resistance. The claimant agreed to the document as the basis of her submissions. It was notable that no request was made to amend the pleadings. In the event the claimant was allowed, of consent, to use the document as an *aide memoire* in giving her evidence. It had been agreed that she would copy the document to Mr Fletcher in advance of giving evidence and this was done.

7. Judge Sangster had also noted that the claimant was going to challenge the appropriateness of the investigation. The respondent's agents sought to have the hearing put back because the investigating officer was unwell but Judge Sangster rejected the application and indicated that the hearing should proceed noting, amongst other matters, that the application came very late in the day and should be rejected.

Evidence

8. The Tribunal heard evidence from two witnesses on behalf of the respondents:

- John Burnam, who was the Disciplinary Officer who dismissed the claimant and
- Mr Stephen Massetti, the Appeals Officer.

9. The claimant initially indicated that she wanted to call her Trade Union Representative, Mr Anderson as a witness but in the course of the hearing decided against this course of action. She gave evidence on her own behalf.

10. The Tribunal had regard both to a bundle of documents prepared by the respondents headed Final Hearing Documents ("RB") and a separate bundle of documents prepared by the claimant ("C1 to 270"). The Tribunal made the following findings in fact.

Facts

11. The claimant began work with the respondent organisation "SAS" on 26 October 1992. She joined as a Control Room Assistant and worked her way up through various supervisory and junior management positions. She remained in the control room part of the organisation. In the control room in Inverness approximately 80 staff work on roster provide assistance (ambulance services).

12. The aim of the "SAS" is to despatch medical assistance or clinical advice to those living in Scotland. It operates three multi-site ambulance service control centres ("ACC"). These make clinical and operational decisions to ensure that patients receive the most appropriate response from the service. This includes dealing with "999" calls from the public.

13. The claimant was employed under NHS Scotland Terms and Conditions of Employment. They are commonly referred to as ("Agenda for Change"). The terms are set out in the NHS Terms and Conditions of Service Handbook.

14. The respondents have no specific policy or guidance documents in relation to the use of "Pool Vehicles" or the definition of business use. NHS Scotland Agenda for Change Handbook was last updated in November 2021 (R214-473) contains reference at page 422 to "pooled vehicles" it states:

"10 sometimes Oakwell Partnerships find it convenient to have one or more vehicles readily available for business use, by a number of employees. These vehicles are owned by the employer. They are not allocated to an individual employee and are only available for business use. Provision of "pooled" vehicles is an important part of Oakwell Travel Policies. The arrangements are for a local determination, in partnership."

15. The respondent adopts NHS Scotland's Conduct Policy in relation to disciplinary matters (R474-484) and defines gross misconduct and misconduct in the following terms:-

"***Gross misconduct*** *is deliberate wrong doing or gross negligence by the employee which is so serious that it fundamentally undermines the employment relationship. Gross misconduct entitles the employer to dismiss the employee without notice. The guide to expected standards of behaviour.*

Misconduct *is unacceptable or improper behaviour which can include an employee acting in an intentional or premeditated manner meet the Guide to expected standards of behaviour."*

16. These policies are available on the internet for staff.

17. The respondents adopt NHS Scotland Workforce Policies on preliminary hearings (R485-489).

Background

18. The claimant has her own car but was disinclined to use it for work because of the mileage incurred and would generally take public transport to work.

19. A senior manager is required to go on duty on site during normal working hours.

20. The respondents have an "on-call duty" which is a national duty covering all three ACCs in Scotland.

21. The on-call working shift begins when the person undertaking the on-call shift finishes their rostered shift for the day. The claimant along with other managers were required to undertake on-call shifts approximately two in every twelve days. The management staff that are required to undertake on-call through the use of a rota. Payments are made for work carried out following the submission of a claim outlining the details of the on-call work, travel time etc. on a monthly basis. There is also a flat fee payment for carrying out on-call duties.

22. In order to assist managers who are on-call, a back shift was introduced. This allowed managers on that shift to take calls in the early evening which would otherwise be routed to the on-call manager who would be on overnight. This relieved the pressure on the on-call manager for a period after they finished their normal shift duties by providing some respite from taking the calls until the end of the back shift. This in practice would allow an on-call manager finishing their shift to go home, get something to eat and rest before the calls were routed to them.

23. There was a possibility that a manager on backshift providing this assistance could be working from home and might have to attend the ACC office to deal with a matter arising from the duties they were covering for the on-call manager. If this happened they would have been entitled to use a pool car. The claimant argued that when on backshift and when assuming possible on-call duties she was entitled to take a pool car to go home in case she was called back to work. On occasion she was rostered to work on on-call she would take the pool car home and sometimes in the course of the journey visit her father in Inverness as she was providing care and support to him.

24. Management staff throughout the relevant period were particularly busy and under pressure. There were other difficulties for them to manage such as IT issues at the control centre. The claimant worked long hours.

25. The claimant created a booking system for the pool vehicle on Teams. She would report the logged use of the vehicle at the end of the month. Each journey and it's purpose should be logged.

26. The claimant came to use the pool car regularly when she was on backshift. She would also use the vehicle for personal errands when she had it. The claimant lives approximately 7.8 miles from the ACC. Mileages recorded when the vehicle was used by the claimant did not always tally with the expected mileage for her journeys. It was estimated that 247.8 miles were unaccounted for (JBp53).

27. The respondents accept that on occasion there can be an incidental use of a vehicle for personal reasons such as stopping for lunch or to get something to eat but the primary purpose of the vehicle being used must be business related.

Investigation

28. The respondents have a staff member called Janie Logan who is a Clinical Duty Manager. She received a text message from the claimant on the morning of Wednesday the 20 July (JBp88). The message asked her if she would be able to "drop" the claimant and her daughter in town at 14.00 hrs. The claimant had written "The Kia will be available?" The reference to The Kia was to a pool vehicle. The claimant was taking her daughter to lunch in the centre of Inverness.

29. The claimant was not on shift that day but came into the ACC to carry out some work around lunchtime. Her daughter was due to finish her shift at 14.00hrs but was running late. Ms Logan felt obliged to give the claimant a lift as she was her manager. She felt uncomfortable about the use of the pool car as she understood it was to be used for business use. Ms Logan after becoming aware of a news story concerning the use of a pool vehicle by an

SAS manager who was then dismissed decided to report the matter which she did a few weeks later.

30. James McGuire was asked to investigate the matter. The four allegations were that she had organised the use of a vehicle for personal gain, she had asked a colleague to drive her whilst on shift, her actions were an abuse of her position and her actions were in breach of the SAS organisational values.

31. The claimant was suspended on the 21 September (JBp32). That suspension was reviewed and continued on the 21 November (JBP33) and 1 March 2023(JBp116).

32. The Investigating Officer interviewed witnesses including Ms Logan. He was told that the claimant used the Kia regularly. The claimant was interviewed on three occasions. He prepared an Investigation Report (JB 34-115). He concluded that the matter should be referred for a formal hearing under the Conduct policy.

33. When interviewed the claimant did not deny organising the lift for herself and her daughter. She denied using the pool car in the past except for business use. She explained that she had been very busy that morning and that she and her daughter were running late. She said that she had told Ms Logan that if it was inconvenient they could make other arrangements. It was recorded that she said “I took it that she would take her own car”. Mr McGuire recorded that the claimant did not apologise for the use of the pool car that day.

34. The claimant was also asked more generally about her use of the pool car. It was noted that she accepted that she would sometimes take the pool car when on backshift on the assumption that she might have to take duties from the person on-call (p40). Mr McGuire investigated the use of the pool car by the claimant. He noted that at the second interview the claimant said “Yeah I don’t know if I have explained it well enough with assuming on-call, I just took it that we all did that, Michael and Claire definitely do it because we have

discussed it". The claimant was referring to two managers who she worked with.

35. Mr McGuire interviewed Claire (Conaghan). She denied the arrangement suggested by the claimant. She indicated that she would not use the pool car when on backshift as it was still a shift "within my shift pattern". He also checked the claimant's rotas and any claims she had made for on-call duties. He examined the use of the pool vehicle and prepared a table showing what appeared to be excess mileage logged (JB 49/50). He concluded that the claimant had the use of a pool car amounted to a minimum of 248.4 miles but he believed the true number to be in excess of 318 miles.

Disciplinary Proceedings

36. The respondent has a conduct policy (JBp474-484). It provides for the calling of witnesses by "any party".

37. The person who conducted the disciplinary hearing was Mr Burnam, the General Manager. The meeting which took place on the 17 April 2023 was minuted (JB117-135) under the incorrect heading "Notes of Investigation Meeting". The claimant had her TU representative present.

38. He decided to divide the disciplinary matters into two sections, Part A and B. Part A related to the incident in July and Part B the other allegations of misuse of the pool vehicle over an extended period.

Part A - Incident 20 July 2022

39. The disciplinary investigation included four allegations as follows:

"1) You organised and authorised the use of a Scottish Ambulance (SAS) vehicle for your own personal gain;

2) You asked a colleague to use an SAS vehicle, whilst they were on shift, knowingly depleting cover for your own personal gain, with a potential impact on patient's safety;
3) Your actions were an abuse of power, position and misuse of public funds which may be considered fraudulent;
4) Your actions and behaviours are in breach of SAS organisational values."

Disciplinary Hearing

40. The claimant was asked if she had received the Investigators Report and supporting documentation and she confirmed that she had. She did not require it to be read.

41. The management case was outlined by Mr McGuire referring to the Report. He went through the allegations in order. The claimant and her representative were able to ask questions and comment.

42. During the disciplinary hearing the claimant was asked for an explanation as to why she had made reference to the Kia in the text message requesting a lift into town. She indicated that it was a poorly phrased question. She gave evidence in relation to the circumstances surrounding the request for a lift that day. She accepted that in hindsight it was not appropriate to use the pool car (p120). Her Trade Union representative highlighted that there was no policy on the use of the pool car. Mr Burnham put it to the claimant whether there were any circumstances where the pool car could be used to go to a private lunch. The claimant responded that she was unaware of the HMRC rules and had never had a leased vehicle. She had only looked into the matter when on suspension. She was referred to the initial interview in which she accepted that such a vehicle would not be used for a normal shift. Later the claimant confirmed that she did not use the pool car for personal journeys.

43. The system for booking the pool car was discussed. The claimant was asked why the journey wasn't logged and why there was no audit trail. They then moved on to the further allegations of the more general use of the pool

vehicle. It was pointed out that backshifts were 'normal' shifts and part of the claimant's weekly rostered hours. The claimant was asked about the spreadsheet that had been prepared showing excess mileage. It was put to her that where there was a cross over with staff on-call they could not recall the arrangment the claimant said was in place to cover various areas. The claimant said that she had apologised (JBp125) and was remorseful. There was then a discussion about working practices and workload. She later said that she had not prepared well for the first interview and did not know she had done anything wrong (p126). She had been working very long days. She had used the pool car to respond to work issues.

44. The claimant's Trade Union member said that the claimant was a workaholic and spent long periods at work. He said that he had spoken to the manager who had told him that there were periods when the claimant picked up local on call issues. Mr Burnham pointed out that there was no statement from the manager.

45. The meeting lasted almost three hours.

46. Mr Burnam issued his outcome on 21 April 2023 dismissing the claimant for gross misconduct. The letter said (JBp134-143):

"Throughout the hearing and in summary you provided little be (sic) *way of mitigation. In relation to Part A, you admitted the journey but concluded at the time you felt it was appropriate and it was the lack of policy which drove your decision making. Similarly in Part B you once again denied any wrongdoing and tried to justify the inappropriate use of a pool vehicle by reference to non-existent On-call periods. Whilst you confirmed that you now understood that you should not have used the car on the 20th of July 2022, you did not offer an apology for this. You did apologise for the need for the investigation, but once again you failed to recognise or apologise for any wrongdoing on your behalf.*

In coming to my decision, I have taken the following factors into account,

- *The findings of both the allegations in Part A and Part B demonstrate a pattern of behaviour over a prolonged period.*

- *You hold a senior position within the ACC and have worked within that environment for a significant number of years, including several, in management positions.*
- *You have not demonstrated that you have taken responsibility or accountability for your actions. Nor have you apologised or shown any degree of remorse in relation to them.*

Having taken into account the evidence and mitigation outlined above I would advise that I am dismissing you from your post of Regional Control Manager as I deemed your actions and behaviour cumulatively constitute gross misconduct. Therefore, in line with the NHSScotland Conduct Policy, I concluded that dismissal was the appropriate sanction with effect from the date of this letter, i.e. 21st April 2023. Under these circumstances you have no entitlement to notice or pay in lieu of notice. In addition, you are entitled to payment for any outstanding annual leave up until the date of dismissal.

In determining the appropriate sanction, I considered whether, although the evidence in relation to these allegations suggested dismissal was the appropriate route, an alternative to dismissal should be considered. I therefore considered whether there was scope to continue your employment elsewhere in the Board or in a different role or banding. I concluded, however, given the repeated nature of your misconduct I had no confidence that this pattern of behaviour would cease and that there was a breakdown in trust and confidence between the Board and you, and therefore given the nature of your misconduct this could not be sanctioned.

You have the right to appeal against my decision. Should you wish to do so, you must submit your appeal in writing, stating the grounds for your appeal, no later than 14 calendar days from receipt of this letter to Stephen Massetti, Direction of National Operations, West Region Headquarters, Range Road, Motherwell, ML2 1JP.

Yours sincere//.

Appeal

47. The claimant appealed by letter dated 2 May 2023. Broadly her position was that the penalty was too severe. In relation to the incident in July she said that this was a one-time error of judgment. She apologised unreservedly. She had apologised to Mr Carr when the issue had first arisen. In relation to Part B she focussed on the 9 occasions highlighted by Mr McGuire. She wrote "*I had only utilised the pool car to be available to respond immediately to the ACC".* The claimant took exception to Mr McGuire carrying out the

investigation stating that she did not feel listened to or understood and that her answers were misconstrued. She challenged that some of the information was incorrect. For at least 5/9 of the occasions listed she was on-call or returning or leaving from Glasgow or Edinburgh. The claimant was therefore entitled to have the pool car. The claimant set out her position and the issues that she felt should mitigate any penalty including the long period on suspension. She indicated that she was in the process of requesting witness statements.

48. During her suspension the claimant was not allowed access to her emails or to the intranet. She had to surrender her telephone. The claimant emailed the respondent's clinical quality lead Steph Jones on the 10 May seeking access to emails, WhatsApp messages and other information (JBp161). Ms Jones responded (JBp160) that she had taken advice from HR and that the appeals process did not allow new information. She suggested that the claimant or her Trade Union representative might want to escalate the matter to "appropriate people". The claimant did not seek to do so or to challenge the advice given.

49. The Conduct Policy provides in relation to appeals (JBp481): ***"The employee and the Chair of the conduct hearing are required to provide a written statement of their case and confirmation of any witnesses attending".***

50. The claimant was invited to attend an Appeal Hearing on 20 July 2023. At the outset the process was outlined including the calling of witnesses for the claimant.

51. The Notes record:

"1. The Employee or their Representatives present their case.

a. *Jackie, you will begin the process by presenting your case. Willie can present your case on your behalf if you prefer. This should include the reasons for your Appeal, any explanations and/or mitigating circumstances you would like the panel to take into account.*

b. *Jackie, you (or Willie on your behalf) will then be able to call witnesses in support of your case, as appropriate."*

52. The Notes record the claimant saying as follows:

"Following the dismissal outcome, I was upset as I thought I'd be believed, I've made errors and maybe not logged things correctly. I didn't think I'd need to call witnesses as the evidence is there; if I'd known I would have called more witnesses, I had nothing to hide and wish I had taken more time. I'm disappointed I didn't ask for every piece of evidence. I requested access for my phone records showing calls from SOM's, supervisors, East ACC etc that would show call outs during the night on the dates in question but was refused and told not allowed to bring any new evidence."

53. She also raised the lack of a policy (p179):

"Lack of policy. It's just been common practice. It's unfair to say I should have known about HMRC; I maybe should have known but I didn't.

I thought the pool car was bought by SAS for emergencies or whatever; I thought we owned it outright. Since being suspended I have read a lot about it and HMRC say the company must have a policy and keep staff updated and trained on it. This is important I've lost my job over this and it should be available as guidance or policy, not under 300+ page document under leased cars, Annex 13 and 1 line is not good enough."

54. During the hearing the claimant called her daughter to give evidence by TEAMS. Graeme Parker and Derek McLean also gave evidence.

55. The Appeal outcome letter was issued on 25 July 2023 refusing the appeal.

56. The Appeal Officer had noted that the claimant had admitted and apologised for using the pool car on 20 July. He concluded that the claimant did not genuinely believe herself to be in reality on-call during the periods of

"assumed on-call". He noted that she did not claim for any on-call sessions but assumed on-call whereas she did the on-call shifts on the normal rota. He upheld the original disciplinary decision. He wrote in relation to the severity of the sanction (p212):

"The severity of the Sanction.

31. It is very difficult to continue employing a member of staff, especially a manager, when they lose the confidence and trust of the Board. In mitigation you are well respected and thought of by your teams and have proven yourself to be a committed manager over many unblemished years of service. Furthermore, when the vehicle was used I saw no evidence that you had deliberately tried to cover up that use. However, I must also consider aggravation, and I believe that, considering the evidence above and on the balance of probability, your construct of assumed on-call was your attempt, once caught, to justify systematic use of a Service vehicle when it was not appropriate. You have stood by that construct through this process despite the explanations to the contrary and even after you yourself have clearly shown you know the difference between a shift and on-call. I therefore believe that dismissal from the service is justified.

Conclusion

32. As has become clear from my explanations above, I do not uphold your Appeal against the decision made by John Burnham at the original Hearing. I believe that John Burnham's decision was justified on the evidence presented, and that his sanction was justified and proportionate. I hope you feel that you have had the opportunity to fully explore your concerns. I'm afraid that this now concludes the scope for appeal under the NHSScotland Conduct Policy."

Witnesses

57. I found the claimant to be generally credible and reliable as a witness. She had a good recollection of events in general. I found some of her evidence difficult to accept and there was a contradiction running through it in the sense that although she said that she apologised for using the pool car she still maintained that she had been entitled to use it when on backshift covering for the on-call person and that it's use was justified in these circumstances.

58. I found the two management witnesses credible and reliable. They evinced no antipathy towards the claimant. They gave their evidence and conclusions in a straightforward and professional manner.

Submissions

59. Both parties lodged written submissions prior to the final day of the hearing.

60. Mr Fletcher invited the Tribunal to dismiss the claims. He made reference to the following cases:

- ***Iceland Frozen Foods Ltd v Jones*** [1982] IRLR 439).
- ***London Ambulance Service NHS Trust v Small*** [2009] IRLR 563).
- ***Taylor v OCS Group Ltd*** [2006] LC.R. 1602).
- ***Sharkey v Lloyds Bank*** UKEAT/0005/15).

61. The Tribunal ought to make a finding that the reason for dismissal was the claimant's conduct, a potentially fair reason. The elements of the ***Burchell*** test are an issue. It is submitted the respondent carried out a reasonable investigation, formed a reasonable belief in the claimant's guilt/misconduct, and had reasonable grounds for that belief. It should be noted that the process was overall fair. The claimant's original investigation meeting was stopped and rescheduled to allow her to present mitigation[p86].

62. The question for the Tribunal is simply whether the respondent's decision to dismiss was within the range of reasonable responses. The respondent asserts it was, based on the following evidence and arguments:

a. It was not disputed that the journey into town for lunch took place.

b. The claimant has admitted using the car on back shift for going to lunch, visiting her father, and collecting items from home.

63. The first witness Mr Burnham's evidence was measured and fair. He approached matters in a considered and thoughtful way. The Tribunal ought to afford his evidence significant weight. Mr Massetti dealt with the appeal. He was measured and fair. The Tribunal ought to afford his evidence significant weight. He invited the Tribunal to accept Mr Massetti's outcome letter [206 - 213] as reflective of his decision making process at the time.

64. The claimant was a senior manager who made clear she knew a car was not to be used for commuting. The evidence from Mr Massetti was that the claimant did not take ownership or responsibility for using the pool car on backshift. This swayed his decision making.

65. The claimant says that she was aware of not being allowed to use the car for a commute. She says that it was the responsibility of the respondent to notify staff based on HMRC rules but Annex 3, Paragraph 10 of Agenda for Change [p422] makes clear pool cars are only for business use. In any event the claimant was fully aware of this as a senior manager. The claimant caused or contributed to a material extent to her dismissal. It would not be just to order reinstatement in terms of s116 ERA. Should compensation be awarded, significant if not total reductions should be made for contributory conduct in respect of both the basic and compensatory award.

66. The claimant made reference to a number of cases. In relation to procedural defects ***Tykocki v Royal Bournemouth & Christchurch Hospitals NHS Foundation Trust*** *UKEAT/0081/16/JOJ.* In relation to a failure to provide evidence ***A v B*** [2003] IRLR 405] and limiting witnesses in an investigation and relying on presumptions ***Mr S Smith v Teleperformance limited.***

4111842/2019. She challenged the reasonableness of the investigation. She argues that it was not right for the investigator to be Mr McGuire as he was not impartial. This impacted on the fairness of the Investigation which was then relied on by the Disciplining Officer and at the Appeal. There were inaccuracies in the report.

67. The appeal process was not reasonable and did not take the opportunity to investigate or correct the imbalance in the investigation and disciplinary hearing when highlighted. The claimant submitted that her suspension was not reasonable or proportionate and did not follow NHS Scotland Workforce Policy (R bundle document 43. P476-478). The respondent's decision to dismiss and the reason for not considering an alternative to dismissal was not reasonable or proportionate.

68. The claimant suggested that Mr Burnham gave rehearsed evidence. It was put to him that he had been in the same room as the appeal panel. Mr Massetti found it difficult to answer questions that he had not prepared rehearsed answers for. She submitted that during the Tribunal Mr Massetti, when questioned on one instance on the use of the pool car on backshift, confirmed that this occurrence was a legitimate use of a pool car. This confirmation contradicted the findings at the investigation stage, the disciplinary stage, and the appeal panel stage. The Tribunal is asked to question whether Mr Massetti's decision making renders the process unreasonable and flawed.

69. The claimant's evidence should be preferred as being open and honest.

70. The claimant had an exemplary and unblemished record of 30 years' service to the SAS. The claimant was a senior manager who was aware that a pool car would not be used for commuting. She repeatedly made it clear that she did not use a pool car for commuting. She confirmed she had used the pool car whilst undertaking on-call duties when on back shift.

71. There was a lack of any policy on the use of pooled vehicles. The respondent has stated that the claimant was aware of not using the car for a commute. It should be noted that the claimant has repeated throughout this process that a pool car had not been used to commute. This is a presumption that has been prevalent throughout the dismissal process.

72. The respondent states that Annex 3, Paragraph 10 of Agenda for Change [p422] makes clear pool cars are only for business use. This paragraph also states that "Provision of "pooled" vehicles is an important part of local travel policies. The arrangements are for local determination, "in partnership." The SAS has been aware of local determination and arrangements that utilise pool cars and service vehicles for personal use when it was of benefit for the Service to do so - and at other times for personal use. It should be noted that it is HMRC who have said it is the respondent's responsibility to notify staff of HMRC rules. (p36, paragraph 8).

Discussion and Decision

The Reason for Dismissal

73. The first matter for the tribunal to consider was whether it had been satisfied by the respondent that the reason for the dismissal was one of the potentially fair reasons for dismissal contained in section 98(1) or (2) of the Employment Rights Act 1996 ('ERA'). They had said that it was the claimant's conduct, namely the unauthorised use of the pool vehicle, that had led to dismissal, so that it was for them to show that misconduct on her part was the real reason for dismissal, i.e. under s.98 (2)(b) of the ERA.

74. In the circumstances it is clear that the reason for dismissal was misconduct, characterised as gross misconduct under their disciplinary policy, and what the employers had in mind at the time of dismissal was the information in relation to the whole circumstances around the use of a pool vehicle on the

20 July and at other times. Accordingly, the dismissal "related to the conduct of the employee" under s.98(2)(b).

Section 98(4) ERA

75. The task for the Tribunal in terms of section 98(4) of the Act was to ascertain whether, in all the circumstances (including the size and administrative resources of the respondent) the dismissal was fair or unfair. The Tribunal had regard to the well-known cases of ***British Home Stores Ltd v Burchell*** [1978] IRLR 379, ***Iceland Frozen Foods v Jones*** [1982] IRLR439, and ***Sainsbury's Supermarkets v Hitt*** [2003] IRLR 23 and to the guidance contained in those cases as to the approach the Tribunal should follow in assessing such a dismissal.

76. Under paragraph (a) of this sub-section the question of whether the employer acted reasonably, particularly where the reason for dismissal related to conduct of an employee, often involves consideration of the adequacy of the employer's investigation and thus whether a reasonable employer could have concluded that he was guilty, i.e. the ***Burchell*** test.

77. In relation to the adequacy of the investigation no real issue was raised in the ET1. The claimant did argue however that there was no clear policy on pool car use. I don't think this position is tenable given the responses she made during the investigatory and disciplinary process. As a senior manager she knew that the vehicle could only be logged in and out for business purposes. The real focus of the case was, therefore, firstly the substantive one of whether the claimant's conduct in itself could reasonably have been considered by a reasonable employer to be "sufficient" reason for dismissal (taking account of any mitigatory factors such as the absence of a specific policy) and secondly had she been forewarned that this conduct might lead to instant dismissal. A clear focus required to be maintained on exactly what

that conduct was, what was the character of that conduct and the effect of the conduct.

78. The Tribunal also has regard to the ACAS Code on Disciplinary matters which provides statutory guidance on what will amount to a fair process.

79. The respondent expressly labelled that conduct as "gross misconduct". They described the breaches of the health and safety rules as amounting to a 'gross breach of duty' The question of whether a dismissal is fair or unfair under s.98(4) of the ERA is not answered by deciding whether or not the employee has been guilty of gross misconduct. As Phillips J said in the case of ***Redbridge London Borough v. Fishman*** [1978] ICR 569:

> *"The jurisdiction based on [what is now section 98(4) of the Employment Rights Act 1996] has not got much to do with contractual rights and duties. Many dismissals are unfair although the employer is contractually entitled to dismiss the employee. Contrary-wise, some dismissals are not unfair although the employer was not contractually entitled to dismiss the employee. Although the contractual rights and duties are not irrelevant to the question posed by [s.98(4)], they are not of the first importance. The question which the Industrial Tribunal had to answer in this case was whether the [employer] could satisfy them that in the circumstances having regard to equity and the substantial merits of the case they acted reasonably in treating the employee's [conduct] as a sufficient reason for dismissing her."*

80. This was confirmed by the EAT in ***Weston Recovery Services v. Fisher*** (EAT0062/10) i.e. that the only relevant question is whether the conduct was "sufficient for dismissal", according to the standards of a reasonable employer and whether dismissal accorded with equity and the substantial merits of the case" (s.98(4)(a) and (b)).

Gross Misconduct/ Wrongful Dismissal

81. Whether conduct by the employee amounts to gross misconduct must be determined on the balance of probabilities. It must be conduct that is deliberate and sufficiently serious and injurious to the relationship between employer and employee to justify summary dismissal. The conduct must undermine the trust and confidence between employer and employee to the extent that an employer should no longer be required to keep the employee.

82. This depends on all the circumstances conduct has been held to amount to gross misconduct where it has the quality of wilful disobedience or is of such a grave and weighty character as to amount to a breach of mutual trust and confidence. The following passage is from ***Neary v Dean of Westminster*** [1999] IRLR 288:

> *"What degree of misconduct justifies summary dismissal? I have already referred to the statement by Lord James of Hereford in Clouston & Co Ltd v Corry [1906] AC 122. That case was applied in Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698], where Lord Evershed MR, at p.700 said: 'It follows that the question must be - if summary dismissal is claimed to be justified - whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service'. In Sinclair v Neighbour [1967] 2 QB 279, Sellers LJ, at p.287F, said: 'The whole question is whether that conduct was of such a type that it was inconsistent, in a grave way - incompatible - with the employment in which he had been engaged as a manager'. Sachs LJ referred to the 'well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them'. In Lewis v Motorworld Garages Ltd [1985] IRLR 465, Glidewell LJ, at 469, 38, stated the question as whether the conduct of the employer 'constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify the employee in leaving his employment ... and claiming that he had been dismissed'. This test could equally be applied to a breach by an employee. There are no doubt many other cases which could be cited on the matter, but the above four cases demonstrate that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."*

83. The claimant argued that the disciplinary process was flawed and she had been misrepresented in some way. I did not accept that there was a basis for that assertion. The minutes of the various meetings all appear clear and detailed. I could not find any evidence in support of her position except, perhaps, the interview of other management staff at the claimant's level when it was put to them her position was that there was an arrangement for her to take over on-call for the north. At points it wasn't particularly clear that Mr McGuire was putting her central assertion that she would effectively take over on-call duties when on backshift. To be fair to Mr McGuire the claimant's initial position also seemed a little confused. It was not so much an issue of any geographical area it was simply that the claimant might work her backshift at least partially from home and if picking up on-call duties might have to come into the office hence justifying the use of the pool vehicle.

84. There was much argument over the status of the claimant's backshift. She accepted that it was a rostered shift and that she would not be entitled to use the car to commute. There was understandable confusion because she said that she would pick up on-call when on backshift. This is not how the respondent viewed the matter. Their perspective was that backshift was just a shift and that a manager would deal with issues which would have devolved to the on-call manger if there was no backshift. I am not sure if there was any real difference in parties' positions when looked at carefully but it does seem that the respondents focussed very much on the mantra that backshift is just a normal shift and there is no special assumption of on-call duties. What the claimant was trying to say was that she could properly have picked up duties that would have devolved to the on-call person thus necessitating her coming into the office. She never had any specific examples of this (or to otherwise evidence this happening) either in the course of the disciplinary process or before the Tribunal.

85. The logical difficulty with her position was that if the claimant goes home in the pool car she would not know if she would have to travel back into work or

not. If she wasn't called out then effectively she is using the car to commute. As a senior manager and one aware that the pool car was there for business use she must have realised that this was the sort of usage that should have been discussed with her line manager. She also argued that as she was travelling to say Glasgow the following day this would justify her taking the car home. This was accepted by the respondent. It is therefore surprising that she does not give the investigating officer real examples of this usage or how common it might be. The claimant mentioned being regularly asked to return to work to deal with "outages" but I cannot see this being said to Mr McGuire. Even if it did not wholly justify the use of the vehicle it would be mitigatory.

86. I also bear in mind that the claimant is an experienced manager and had the benefit of Trade Union assistance. She also had a number of meetings with Mr McGuire before the disciplinary and appeal hearings to get the information, evidence and witnesses that she argues she was prevented from getting because of the email from Ms Jones.

87. In passing the email from Ms Jones was not helpful to the respondent as it misrepresented their written policy on appeals which clearly envisaged evidence being appropriately led and indeed this is what happened. It is mystifying to why the claimant or her Trade Union representative did not raise this matter, if they truly thought they were being prejudiced, or to escalate the matter as Ms Jones suggested. It was certainly poor practice not to alert the appeal manager to the issue and perhaps ask for his input or refer the matter to someone higher up in HR. However, looking at the whole process, the investigatory disciplinary and appeal processes all appear to have been conducted thoroughly and fairly with the appeal effectively being a rehearing of the whole case and a further opportunity for the claimant to say what she wanted to say and lead evidence. Because the claimant did not produce the evidence she says would justify the usage of the vehicle either to the respondent or to the Tribunal she was unable to demonstrate either what the

evidence was or that if it had been produced it would have undermined the respondent's position. To this extent she was caught in a Catch 22 situation.

88. The claimant suggested to Mr Massetti that the use of SAS vehicles for personal use was not clear cut. She said that manager's vehicles had been used in the past for example to take staff to the Christmas lunch. He accepted that he had challenged someone he had seen potentially using a vehicle for a personal purpose but broadly his position was that if for example an ambulance driver stops to get food for himself then as long as that is incidental to the vehicle's proper usage then the matter was objectionable. I took it from his evidence that if the claimant had a genuine reason to have the pool car then an incidental use might cover a short detour on her way home to check her father was okay. This would not explain the mileage logged as 'missing' by Mr McGuire.

89. To be fair a dismissal has to be within the range of reasonable responses open to an employer. I concluded that in the present case they had a genuine belief in the claimant's guilt, that this belief was reasonably formed after having carried out a reasonable investigation. The dismissal was therefore fair and the application for unfair dismissal will be dismissed.

Gross Misconduct/Wrongful dismissal

90. The disciplinary policy defines gross misconduct as "deliberate wrongdoing" (JB476). The absence of a written policy on the use of pooled vehicles and in particular what is and is not business mileage does not assist the respondent. How can they show that the conduct was 'deliberate' in the absence of such a policy. They first of all, point to what is regraded as business use by HMRC for tax purposes. To expect employees to be familiar with HMRC guidance, as HR professionals might, is a little ambitious. Nowhere are staff told where to find the definition used by HMRC or as crucially that a failure to strictly

adhere to the use of a vehicle in conformity with the definition would lead to summary dismissal.

91. It was accepted as early on as the investigation meeting that the matter was not particularly clear with Mr McGuire describing the rules on the use of pooled vehicles thus: "We *stumbled across the Scottish agenda for NHS handbook that there is a section..* It is trite to say that before some conduct can be deliberate it has to be known to be wrong. An employee is required to know what conduct amounts to gross misconduct.

92. However, two background factors assist the respondent. The first is that the claimant was a senior manager, who had set up the system for logging out the pool car and who conceded that the use by her of the pool vehicle to go to lunch on the 20 July was impermissible. In short, the respondents are justified in saying that she knew the policy and the seriousness of breaching it. If these were the only circumstances the respondent relied upon then it could strongly be argued that her first breach of discipline might be insufficient to justify both dismissal and summary dismissal. However, the second factor is that the claimant was found to have used the car multiple times before and been unable to justify or explain all but one occasion (it was accepted that the 31 October usage referred to at page 50 was justified) or explain the excess mileage discovered and not logged. She was aware that the vehicle was for business use only and that it's use had to be logged. The claimant accepted that on occasions she had taken the vehicle home when on backshift. That admission shows, unless each occasion can be justified, clear breaches of the business use of the vehicle taking her own understanding of the policy. The respondents have therefore shown on the balance of probability conduct which amounts to gross misconduct in terms of the policy and the claim for

notice/wrongful dismissal is also dismissed.

93. For completeness there are claims for arrears of pay and breach of the Working Time Directive which are also dismissed as they were not insisted upon.

Employment Judge: J M Hendry
Date of Judgment: 28 August 2024
Entered in register: 28 August 2024
and copied to parties