



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Mr P Howes

v

O'Loughlin Commercials Limited

**Heard at:** Watford

**On:** 29 May 2026

**Before:** Employment Judge Hyams, sitting alone

### Appearances:

**For the claimant:**

In person

**For the respondent:**

Mr C Firmin, representative

## RESERVED JUDGMENT

The claimant was not dismissed unfairly. His claim of unfair dismissal therefore does not succeed.

## REASONS

### Introduction

- 1 The claimant worked as a heavy goods vehicle ("HGV") driver for the respondent, which is a small logistics company. In the ET1 claim form, the claimant claimed only that he had been dismissed unfairly. In box 8.2 of the form, he said this, and this only:

"On the 27/02/2025 an argument took place in the yard between myself and Tony Murphy the transport manager.

This was over a misunderstanding of working hours.

He shouted and swore at me and was very unprofessional.

He told me to clean my lorry out, finish the week as I am sacked.

I then went to Brian the main boss to clarify that this was allowed to happen over such a small matter.

His reply was it's down to Tony Murphy to make those decisions.  
Tony Murphy is my cousin and this is why I think he could treat me this way so unprofessionally.  
To sack me on the spot like that is not right."

**The hearing of 29 May 2026**

- 2 The hearing of 29 May 2026, which I conducted, was listed for a day, which was intended to be sufficient to deal with both liability and remedy. The region's then-standard case management orders for a case of this type were included in the letter in which notice of the hearing was given. There was no preliminary hearing to discuss the issues and prepare the case for trial. The fourth of the four case management orders which were in the notice of the hearing was in the following terms:

"The claimant(s) and the respondent(s) shall prepare full written statements of the evidence they and their witnesses intend to give at the hearing. No additional witness evidence may be allowed at the hearing without permission of the Tribunal. The written statements shall have numbered paragraphs. The claimant(s) and the respondent(s) shall by 9 February 2026 send the written statements of their witnesses to each other. Two copies of each written statement shall be provided for use by the Tribunal at the hearing (and not before)."

- 3 That meant that before the start of the hearing, all I had available to me was what was in the tribunal's file.
- 4 At the start of the hearing, I had before me a copy of the claimant's witness statement, but no bundle of documents and no witness statement for the respondent. When the parties came into the hearing room, I was given a copy of the respondent's witness statement evidence and the hearing bundle. Any reference below to a page is to a page of that bundle. The bundle was short (47 pages long) and there were in it very few evidential documents (that is to say, documents other than the claim form, the response form and the notice of the hearing). Even then the document which was evidentially helpful at page 28 appeared to have been created for the purposes of the hearing. That document raised an evidential issue about the continuity of the claimant's employment and whether he had the necessary two years' continuous employment in order to be able to make a claim of unfair dismissal within the meaning of section 98(4) of the Employment Rights Act 1996 ("ERA 1996"). There was also, on the content of the witness statements before me, a dispute about the manner in which the claimant's employment had ended.
- 5 The respondent had only one witness giving evidence for it, and that was Mr Brian O'Loughlin, who was the "Brian" referred to in the details of the claim form which I have set out in paragraph 1 above. I therefore looked briefly at the witness statement for Mr O'Loughlin and asked Mr Firmin whether Mr O'Loughlin had

heard what had been said by Mr Murphy to the claimant on 27 February 2025. Mr O'Loughlin then himself said that he had not done so. That meant that the only direct evidence before the tribunal about what Mr Murphy had said on that day was going to be given by the claimant.

- 6 After reading the witness statement of Mr O'Loughlin (which was only four pages long; that of the claimant was only three pages long), I explained the issues as I saw them at that time, given what was in the evidence before me, including in the hearing bundle.
- 7 The issues in the case as I explained then (but amplified by me for present purposes so far as necessary), were as follows.
  - 7.1 Did the claimant have sufficient continuous employment to be able to claim unfair dismissal? In that regard, as I observed, it was not open to the respondent to confer such continuity by agreement, that being the effect of the decision of the House of Lords in *Secretary of State for Employment v Globe Elastic Tread Co Ltd* [1980] AC 506.
  - 7.2 Was the claimant dismissed, or did he resign? If he was dismissed, what was the day when he was so dismissed? Was it 27 February 2025 or was it 28 February 2025?
  - 7.3 If the claimant was dismissed, what was the reason for his dismissal? It appeared clear that it was conduct.
  - 7.4 Assuming that the claimant was dismissed (and the rest of the issues stated below assume that the claimant was dismissed) and that the reason for his dismissal was his conduct, was the procedure followed within the range of reasonable responses of a reasonable employer? It was clear that there had been no pause after the disagreement between the claimant and Mr Murphy which led to the claimant's departure from his employment with the respondent. However, in some cases it will not be outside the range of reasonable responses of a reasonable employer to follow no kind of procedure in deciding that the employee should be dismissed. That is shown by the following passage from *Harvey on Industrial Relations and Employment Law*, which is part of paragraphs DI[2710]-[2710.1]:

“Prior to the decision in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503, [1988] ICR 142, HL, the courts took the view that if on the balance of probabilities, the dismissal would have occurred even where there was a procedural irregularity, then the dismissal should be held to be fair. This view was embodied in the ‘principle of *British Labour Pump v Byrne*’ [1979] IRLR 94, [1979] ICR 347 which the House of Lords in *Polkey* held was not good law save in rare cases where the following of a fair procedure would be ‘utterly useless’ or ‘futile’.

**[2710.01]**

An example of a finding of futility may be found in *Gallacher v Abellio Scotrail* UKEATS/0027/19 (4 February 2020, unreported). This was held by the EAT (Choudhury P presiding) to be one of those rare cases where it was open to the tribunal to conclude that dismissal without any procedure was within the band of reasonable responses. The employee was a senior manager whose continued good working relationship with her manager was critical during a difficult period for the respondent's business. Moreover, the evidence was that the employee recognised the breakdown in relations herself and was not inclined to retrieve the situation. The tribunal found that any procedures at this time would not only have served no purpose but would in fact have worsened the situation.

For another case where the EAT held that the employment tribunal was entitled to conclude that the following of a fair procedure would have been futile (in light of an employee's intransigence), see *Matthews v CGI IT UK Ltd* [2024] EAT 38 (25 March 2024, unreported)."

- 7.5 Was the claimant's dismissal within the range of reasonable responses of a reasonable employer?
- 7.6 If the claimant's dismissal was outside that range, or unfair because a fair procedure had not been followed, what compensation should the tribunal award the claimant in respect of that dismissal? In determining that question, it would be necessary to decide whether the claimant was guilty of contributory conduct of such a sort that the compensation which he would otherwise have been awarded should be reduced. This is a question which, I now record, would need to be asked in three ways:
  - 7.6.1 by reference to the basic award within the meaning of section 119 of the ERA 1996,
  - 7.6.2 by reference to the compensatory award within the meaning of section 123 of that Act, and
  - 7.6.3 in the application of the principles arising from the decision of the House of Lords in *Polkey v AE Dayton Services Ltd* [1988] ICR 142.
- 8 It was by then about 10.20am. I adjourned the hearing to 11am primarily to permit Mr Firmin to consider whether to call Mr Murphy to give evidence and, if Mr Murphy was not able to attend the hearing that day, to apply for an adjournment. I also was going to use the time to read the witness statements again, read the bundle contents in so far as I had not already done so, and consider the issue of continuity.

- 9 When I resumed the hearing shortly after 11am, Mr Firmin said that the respondent had decided that it was not going to call Mr Murphy to give evidence and therefore that it was not seeking an adjournment. Mr Firmin gave an indication of the reason for not calling Mr Murphy to give evidence, and it related to the strength of feeling of Mr Murphy about the circumstances. I then was told by the claimant that he had fallen out with Mr Murphy since 28 February 2025 (which the claimant agreed was the last day on which he worked for the respondent; in the circumstances that meant that no limitation issue arose).
- 10 I had by then seen that Mr O'Loughlin was giving some direct evidence about what had happened on the day that Mr Murphy said whatever he said to the claimant which led to the claimant's departure from the respondent's employment. In any event, I discussed with the parties who would be giving evidence first and said that in a claim of unfair dismissal where the dismissal was admitted, it would usually be the respondent because of the need for the respondent to prove to the tribunal the reason for the dismissal. The parties had no preference, so I suggested that I heard from Mr O'Loughlin first. I then explained to the claimant what cross-examination was and asked if he had prepared any questions to ask in cross-examination. He had not. I therefore suggested that I asked questions first, which I would do on the basis that I would need to find out as much as I reasonably could about the factual background, applying rule 41 of the Employment Tribunal Procedure Rules 2024. The claimant agreed to that.
- 11 I therefore heard oral evidence from Mr O'Loughlin, which largely consisted of me asking Mr O'Loughlin questions about his evidence and where necessary asking the claimant what his response was to the evidence of Mr O'Loughlin in so far as it was not already clear from the claimant's witness statement.
- 12 Both parties' witness statements had been written for them. The best evidence of that was that in paragraph 14 of Mr O'Loughlin's witness statement, this was said:
- "In addition, our customers often contacted Mr O'Loughlin to complain about Mr Howes's rude conduct on site."
- 13 As I pointed out during the hearing, that would, if it had been in the form of a witness statement of the usual sort, have had the word "me" instead of "Mr O'Loughlin". Mr Firmin then said that the statement was the result of the work of a colleague of his and that it had resulted from that colleague taking instructions.
- 14 The claimant then gave oral evidence. I asked him initially about what was said in paragraphs 3-5 of Mr O'Loughlin's witness statement, which were as follows:
- "3. After taking 6 weeks off for an eye operation from December 2022 (during which he was paid SSP), Mr Howes then told us he did not want to return to work as he wished to look after his terminally ill wife.

Out of compassion for Mr Howes, we kept his job open and continued to pay him SSP for two months until March 2023.

4. Following the passing of his wife, Mr Howes told us again that he did not feel ready to return to work. As a family business, we decided that whilst we would not pay Mr Howes, we would keep his job open should he feel that he wanted to return at some point. We did not terminate his employment as we felt a P45 was inappropriate in the circumstances. In retrospect, Mr Howes's employment should have ended then rather than us showing compassion to him and leaving his job open.
  5. Two and a half months later in June 2023, Mr Howes asked could he come back to work again – which we agreed to – up until he walked out of the job again on 28<sup>th</sup> February 2025. Therefore, within this 3-year period, Mr Howes did not work for six and a half months – of which, two months SSP were paid at the company's expense.”
- 15 The claimant's response was, as noted by me and tidied up for present purposes (as is the case with all of the quotations from my notes below):
- “I do not believe that I packed up there; he did not give me a P45; and I was off with my daughter. SSP? I cannot remember whether or not I got SSP. I was seeing a counsellor and I am sure it was not more than a couple of months.”
- 16 The claimant was then cross-examined by Mr Firmin. The claimant's evidence ended just after 12.45pm and I adjourned the hearing after a discussion about the way that the case would continue after lunch. I said that I might well need to give judgment in writing, which would mean that I would have to give full reasons for it.
- 17 I resumed the hearing at 2pm. During the lunch break I had re-read the bundle and the witness statements and formed some preliminary views on the evidence. However, as a result of re-reading the bundle and the witness statements, it became clear to me that there were several evidential factors on which more input from the parties was required. I therefore asked the parties in sequence about those things. I first asked Mr O'Loughlin what was said in paragraph 14 of his witness statement (which I have set out in paragraph 12 above) about complaints from customers. I asked about that because it was capable of affecting my view of the credibility of both parties' witnesses. I had not asked anything about the alleged complaints initially because they were not in my view directly relevant.
- 18 Mr O'Loughlin said firmly that there had been such complaints. I asked him for some specific examples, and he gave two examples, each of which was from a different customer of the respondent. Mr O'Loughlin's evidence was that when

the complaints were made, he, Mr O'Loughlin, had said in response that the respondent did not have enough drivers to allocate another driver to the customer in question, so that the customer would have to accept the claimant as their delivery driver if they wanted the respondent to continue to "service them".

- 19 The claimant in responding (as I invited him to) to those examples vehemently denied that there had been any complaints about his conduct towards the respondent's customers, but as I pointed out to him he could not know what the customers had said about him unless it was relayed to him, which he accepted.
- 20 The second thing that I raised with Mr O'Loughlin was that there was some handwriting on the copy in the bundle of the ET3 which was not on the ET3 in the tribunal's file. Mr O'Loughlin said that it was his wife's handwriting, that she is the company secretary and very much part of the respondent's small family business (which, I saw from paragraph 28 of his witness statement, "has 9 employees dependent on it"). Mr O'Loughlin said that the words which she had added by hand were originally intended to be included in the box on the page below which the words had been added, but that the online response form did not permit more than what was in the box as it stood to be included. The words included on the printed form were in the box for giving "further information about the claimant's employment dates". That box was on page 19, and had the following words in it.

"Mr Howes rejoined the company (for the third time after walking out twice) on 17/01/2022. He worked until 15/12/2022 when he took SSP for 19 days until 27/01/2023 due to an eye operation.

Mr Howes did not return to work but took further absence from 30/01/2023 until 24/03/2023 to look after his ill wife. Mr Howes was paid SSP for this 8 week period as a goodwill gesture."

- 21 The additional words added by hand below that box were on the second half of that page and were these (the words were in capitals, but I have converted the case so the words are in the usual narrative form):

"He then told us he would not be returning to work. We did not issue a P45 as we thought it insensitive as his wife had died.

10 weeks later on 12/06/2023 Mr Howes asked if he could start back again.

Therefore his period of work has not been continuous."

- 22 I also remembered during the lunch adjournment that the claimant had said (apparently for the first time) when giving oral evidence that he had put it in his diary that he was dismissed on 27 February 2025, but that he had not been asked about that diary in cross-examination. I therefore asked him whether he had the diary with him. He did. He showed it to me and Mr Firmin. It was a pocket diary,

so it was relatively small. With the claimant's permission I took a photograph of the pages for the final two weeks of February 2025 (so two photographs, one for the pages for the penultimate week and one for the final week) and Mr Firmin took a photograph of at least the two pages for the second of those two weeks. I return to those pages in paragraph 29 below.

- 23 I then heard submissions. The claimant, understandably, did not have much more to say. Mr Firmin addressed me at more length. After hearing submissions, which was at about 14:45, I said that it was clear to me that there was not enough time to conclude the hearing that day and that it would be necessary for me to give my decision in writing in the form of a reserved judgment, and to agree a provisional remedy hearing. In order to see how much time would be required for that hearing, I made some initial inquiries about the claimant's financial claims. I return to what he said in that regard in paragraph 44 below. Here, I record only that it appeared to me that the remedy hearing would not need more than half a day, and that two hours should be sufficient. I then, with the agreement of the parties, listed the hearing to resume if necessary at 2pm on 4 September 2026, in person at Watford.

### **Some observations about the evidence before me**

- 24 Before stating my findings of fact, I observe that human memory is only rarely completely accurate, so that any contemporaneous documentation which was not completed with a view to being used to promote a particular line in pursuing a possible future claim, is often, if not usually, the best evidence of what occurred.
- 25 I record here too that the fact that Mr Murphy was not present to give evidence became completely understandable to me during the hearing as a result of what the claimant said about his relationship with Mr Murphy. That was that they had, until 28 February 2025, been very close. By way of example, their families had habitually gone on holiday together. Now, however, said the claimant, there was no ongoing relationship between him and Mr Murphy or their families. By way of example (and I expand on this in paragraph 38 below), (1) the claimant and Mr Murphy had not spoken since 28 February 2025, and (2) Mr Murphy's children now did not even acknowledge the claimant if they met him when shopping.
- 26 My third observation before stating my findings of fact arises from the fact that Mr O'Loughlin said, and the claimant accepted, that Mr Murphy was not just the respondent's Transport Manager, he was also himself an HGV driver. One consequence of that was that it was highly likely that Mr Murphy knew very well what legal requirements applied to driving an HGV. That meant that the claim in the ET1 which I have set out in paragraph 1 above that there was "a misunderstanding of working hours" on the part of Mr Murphy was a surprising one.

**My findings of fact**

**Introduction; the agreed or almost precisely agreed facts**

- 27 The factual findings that I needed to make were very narrow. There were some things that were agreed, or at least in substance agreed although the precise words describing the situation might be material in determining the things that were disputed. The things that were agreed, or in substance agreed, were as follows.
- 27.1 The claimant's last day at work for the respondent was 28 February 2025.
- 27.2 The claimant was absent from work to care for his wife while she was terminally ill, and he was then absent for a further two and a half months or so, "due to bereavement".
- 27.3 On Thursday 27 February 2025, the claimant and Mr Murphy had a dispute at work about a work-related matter. The claimant said in paragraph 9 of his witness statement that it was "regarding working hours".
- 27.4 On Friday 28 February 2025, there was a further disagreement between the claimant and Mr Murphy arising from the claimant refusing to take out and deliver a third load for the day.
- 27.5 The claimant did not have a written contract of employment or a statement within the meaning of section 1 of the ERA 1996.
- 27.6 The claimant was "told [by Mr Murphy] that if he wasn't prepared to do the work asked of him, then he could work his week's notice to Friday 7<sup>th</sup> March 2025 and finish up." That was said in paragraph 16 of Mr O'Loughlin's witness statement. The claimant said in paragraph 13 of his witness statement that he 'was told that if [he] would not do the work, [he] could "work [his] week in hand" and that [he] was sacked.' In substance, those sets of words were the same.
- 27.7 After being told that, the claimant immediately or shortly afterwards went to see Mr O'Loughlin about the situation, who said that Mr Murphy was the respondent's transport manager, "and the matter should be resolved with him".
- 27.8 The following week, the claimant did not return to work.
- 27.9 The first two days of that week were pre-booked days of holiday. The final three days were unauthorised absences. The claimant's explanation for not attending on those final three days of the working week was that he "believed it was unfair and unreasonable to expect [him] to continue working after dismissal."

27.10 The respondent paid the claimant for all of those days. It also paid him 2.5 days' accrued holiday pay even though it could have paid him only half a day's holiday pay as the first two days of the final week of the claimant's employment had reduced his remaining outstanding holiday entitlement to half a day.

**The thing about which the parties disagreed**

28 As far as I could see, after hearing all of the evidence, the parties disagreed only about one thing of substance. That was the date when the claimant was told (using his words in paragraph 13 of his witness statement) that 'if [he] would not do the work, [he] could "work [his] week in hand" and that [he] was sacked', or (using Mr O'Loughlin's words) "that if he wasn't prepared to do the work asked of him, then he could work his week's notice to Friday 7<sup>th</sup> March 2025 and finish up". The claimant said that it was on 27 February 2025. The respondent said that it was on 28 February 2025.

**Was there any documentary evidence regarding that conflict of evidence?**

29 There was only one document before me which purported to have been completed contemporaneously and to have recorded when the claimant was told the words which I have set out in paragraph 27.6 above. That was the claimant's diary page for the period from Monday 24 February to Sunday 2 March 2025. When I asked the claimant why he kept a diary he said that it was "so that there would not be any arguments about the loads done the week before". He then said this about the manner in which he filled in the diary:

"Once I have finished and pulled into the yard I put the entry in. I write the jobs done that day."

**Was that diary entry evidentially persuasive?**

30 As I pointed out during the hearing on 29 May 2026, the entry looked as if it had been added after 27 February 2025. That was for the following reasons.

30.1 The entries for that week and the week before were mainly a single tick in the middle of the section for the day in question or a diagonal line through that section. If words had been added to a page with a tick then they were added at the top or the bottom of the section, and were well away from the tick. The words for the days other than 27 February 2025 were indeed about loads. For example, for 24 February 2025, there were the words "Croydon 2 in 2 out St John's Wood 1 out". For 18 February 2025 there were the words "B/Green 2 in 1 out 1 J Club".

30.2 There were some words of the latter sort also at the bottom of the section for 27 February 2025: "Croydon 2 in 2 out".

- 30.3 The words on which the claimant was relying as being a contemporaneous record made on 27 February 2025 were bigger than the words at the bottom of the section which I have just quoted, and were just above the tick, so that the tick was almost obscured by the words.
- 30.4 The words now relied on were “THE DAY TONY SACKED ME”. I have quoted them precisely, i.e. in capitals, because that is what those words were in. Nothing turned on that, as the rest of the entries were also in capitals. However, as Mr Firmin pointed out, if the words had been written contemporaneously then they would have been more like this: “TONY SACKED ME TODAY.”

**What was the rest of the relevant oral and documentary evidence before me about the precise sequence of events?**

- 31 The claimant said that he understood that in order to comply with the requirements of the legislation governing the number of hours an HGV driver could work per day, he had to work on the basis that he could drive for no more than 4.5 hours continuously after which he would have to have a 45-minute break before being able lawfully to drive for a further 4.5 hours.
- 32 Mr O’Loughlin’s evidence about the legislative régime regarding driving an HGV vehicle was that the maximum number of hours of actual driving (i.e. while the vehicle being driven was moving) which could be done was 9 hours per day and on two days per week, 10 hours per day. If the vehicle was stationary then that would not be counted by the tachograph. The claimant accepted that the driving limit of 9 hours was applicable to “the hours in motion”. He did not know that there was a maximum driving limit (i.e. of actual movement) of 10 hours per day on two days per week.
- 33 Mr O’Loughlin said that the maximum number of hours of duty permitted per day was 15. I was not sure whether that was relevant here, but I have recorded it for the avoidance of doubt.
- 34 Mr O’Loughlin also said (and the claimant agreed with this) that the tachograph would in effect warn the driver if the driver was at risk of breaking the law relating to driving, by, as Mr O’Loughlin put it (according to my notes), “count[ing] down for you your break”. The claimant agreed that “you do get a warning”.
- 35 There were at pages 29 and 30 print-outs of the tachograph records for the claimant for 27 and 28 February 2025. On the first of those two days, the claimant was shown to have driven for 6 hours 44 minutes and to have started the working day at about 3.45am and finished it at about 1.45pm. On the second day, the claimant was shown to have driven for 6 hours 4 minutes, and to have started his day at about 3.45am and finished it at about 1pm.

36 The claimant's witness statement evidence about what was said on Thursday 27 February 2025 was in these terms:

'9. On 27 February 2025, a disagreement took place between myself and the Transport Manager regarding working hours.

10. During this discussion, the Transport Manager stated that I would be required to carry out more loads going forward.

11. I was concerned that carrying out additional loads would cause me to exceed my legal tachograph driving hours.

12. I explained that my concern related to my legal obligations as an HGV driver and the serious consequences of breaching drivers' hours regulations, including safety risks and potential penalties.

13. As a result of this discussion, I was told that if I would not do the work, I could "work my week in hand" and that I was sacked.

14. I understood this statement to mean that my employment had been terminated.

15. I was dismissed on the spot on 27 February 2025."

37 During the hearing, I asked the claimant about what he had said in paragraph 10 of that sequence; I asked him what he was in dispute about. His answer was this:

"Nothing; he said there were more jobs coming up. He started swearing and abusing me. I said there was no need to keep swearing and abusing me."

38 Mr O'Loughlin said that the claimant and Mr Murphy "were cousins and were always rowing. Sometimes you did not know whether it was banter or real. They lived close to each other. They went drinking together. They would go on holiday together. And [the claimant] had walked out twice before." The claimant denied walking out previously: he said that he did not recall doing so. He also said that he had "come back from doing jobs and done it to help out Tony", i.e. Mr Murphy. The claimant also said this:

"We used to be very close since we were able to walk. He has poisoned his grown up children [against me]. I see his daughter in Tesco's and she has looked at me and walked past; that is them all over."

39 The claimant's oral evidence about seeing Mr O'Loughlin after he had had the disagreement with Mr Murphy that led to Mr Murphy telling him whatever it was that led the parties to say that the claimant was told the things which I have recorded in paragraph 27.6 above, was this:

“Once I had the row with Tony I walked into the yard [and went to see Mr O’Loughlin] and explained to him. And he said that Tony was in charge and runs the lorries. Got no sense out of that.”

40 As for what happened on the next day, 28 February 2025, the claimant’s evidence was as follows.

“18. Despite having been told I was sacked, I attended work the following day.

19. On that day, I was instructed to carry out another load.

20. Prior to this instruction, I had already been informed that there had been a major accident on the motorway and that traffic was heavily backed up.

21. Based on this information, I reasonably believed that undertaking an additional load would cause me to exceed my legal tachograph driving hours.

22. For that reason, I did not carry out the extra load.”

41 Mr O’Loughlin’s witness statement contained this passage about what happened on and after 28 February 2023.

“18. Mr Howes walked out of the job on Friday 28<sup>th</sup> February 2025 without completing the final load of the day.

19. Monday and Tuesday (3<sup>rd</sup> to 4<sup>th</sup> March 2025) – this was previously booked and approved as holiday for Mr Howes. He did not turn up for work on these two days. No communication received from Mr Howes. Assumption made that he had taken the holiday and would return on Wednesday.

20. Wednesday 5<sup>th</sup> March 2025 – Mr Howes did not return to work and no communication was received from him either.

21. Thursday to Friday 6<sup>th</sup> to 7<sup>th</sup> March 2025 – Mr Howes did not turn up for work again; no communication received from Mr Howes.

22. At this point, we made the logical conclusion Mr Howes was not returning to work as had happened on the previous occasions noted earlier.

23. We therefore terminated his employment as of 28<sup>th</sup> February 2025.

24. We paid him in full for a weeks’ notice even though he did not attend work (3<sup>rd</sup> March 2025 to 7<sup>th</sup> March 2025).

25. We also paid him for his 2.5 days holiday accrued (even though two of these days holiday were booked from the 3<sup>rd</sup> to the 4<sup>th</sup> March 2025). This demonstrates again our fair treatment of Mr Howes.
26. A P45 was issued and Mr Howes's employment with O'Loughlin Commercials was ended."
- 42 The claimant's oral evidence about the load that he refused to take out on Friday 28 February 2025 was that the load was to be taken to a location in the area of junction 29 on the M25, and that it would involve driving at least an hour each way. Mr O'Loughlin's oral evidence (given in answer to a specific question from me) was that if the claimant had run out of lawful driving time then (1) the claimant could have stopped his lorry (2) he, Mr O'Loughlin, would have driven to the location of the lorry and driven it back himself, and (3) the claimant could have driven home in the car which Mr O'Loughlin had used to get to the location.
- 43 The parties agreed that the claimant and fellow HGV drivers employed by the respondent were paid per shift, and that that was a 10-hour driving period not including breaks. The claimant also agreed that it was normally possible to do 3 loads per day, although he said that that was so only if the delivery locations were local.
- 44 In the hearing before me, the claimant said that he had not worked since leaving the respondent's employment. He said this, as noted by me:
- "I have had trouble with my back. I went to the doctor. She put me through to a skeletal professor who told me I had arthritis in my back and not to go back to lorry driving. He [i.e. the professor] said 'a lot of my patients are HGV drivers' and I said 'When would I be able to look even for a part-time job?'. He said that I would be in a wheelchair within three months if I did so; that was in March or April of last year."
- 45 The claimant just before the end of the hearing said that he had had "a big hernia operation a few years ago" after which the professor in whose care he had been had told him to do no more than a 10-minute daily walk, so that he "would have probably have had to stop work soon anyway". However, when I pointed out to him that that meant that his compensation if he won his case would have to be limited, he said that he would have carried on working, and just used painkillers to enable him to do so, which, he said, he was doing before 27 February 2025.

**My conclusions about the evidence on the sequence of events on 27 and 28 February 2025**

- 46 I could not accept that the claimant had a conversation about future loads in the way he described in paragraphs 9-12 of his witness statement, which I have set out in paragraph 36 above. Those paragraphs were inherently unlikely to be true, since it was highly unlikely that there would be a heated conversation about

future loads as such. In addition, the paragraphs did not reflect the reality of the heated conversation that the claimant plainly had with his cousin, Mr Murphy which led Mr Murphy to say the words which I have recorded in paragraph 27.6 above. In oral evidence, as I record in paragraph 39 above, the claimant said that he had had “a row” with Mr Murphy at that time.

- 47 It was in my view on the evidence before me most likely (and I therefore concluded on the balance of probabilities) that on both Thursday 27 February and Friday 28 February 2025, the claimant refused to take out a load in the final part of the day, as instructed by Mr Murphy he should do.
- 48 It was in my view plainly lawful to require the claimant to take out a further load on Friday 28 February 2025. That was because he had by then driven for only 6 hours 4 minutes, and he could lawfully have driven (i.e. been in the driving seat of a vehicle which was moving on the road) for at least 9 hours that day, and in all probability 10 hours on that day. The journey which he was being instructed to do was going to take at most about two and a half hours, even assuming that some of it, or even much of it, was in slow-moving traffic.
- 49 I concluded also that that was the day when the claimant was told the things described by the parties as set out in paragraph 27.6 above. It was not the day before. The reason why the claimant said that it was the day before was, in my view, that he did not want to acknowledge (possibly to himself) the reality that he had on both 27 February and 28 February 2025 refused to take out a load when he was being instructed lawfully to take out that load.

### **My conclusions on the claim of unfair dismissal**

- 50 I first came to the clear conclusion that the respondent had not terminated the claimant’s contract of employment during 2023. Rather, it had permitted the claimant to remain an employee but had not required him to attend work. The respondent had been kind to the claimant, by (1) paying him sick pay for part of the first half of 2023 when it had not needed to do so, and (2) deliberately deciding not to dismiss him.
- 51 As a result, the claimant had the right to claim unfair dismissal.
- 52 As for the question whether the claimant was dismissed or whether he resigned, I came to the following conclusions.
- 52.1 I concluded that the claimant was given what could be described as a conditional notice of dismissal of the following sort: if you are not willing to do what the respondent is able lawfully to require you to do by way of delivering a third load on a normal working day, then you are dismissed on a week’s notice. That, however, was not notice of the normal sort. It was in my view equivocal and therefore was not notice of dismissal within the meaning of section 95(1)(a) of the ERA 1996.

- 52.2 The claimant then decided not to return to work the following week. It may have been because he knew that he was no longer able to guarantee that he would be able and willing to do what was required by way of taking out a third load when he was required to do so. That in turn may have resulted from difficulties caused by the hernia to which I refer in paragraph 45 above, or from pain arising from the arthritis in his back which I have mentioned in paragraph 44 above, or from both of those things. However, the claimant did not say that he was not going to return to work.
- 52.3 As a result, by not returning to work and not informing the respondent (1) that he was not going to return to work and (2) why he was not going to do so, the claimant was in my judgment in breach of the implied term of trust and confidence. Alternatively, he was in repudiation of the contract of employment in that he was showing an intention not to return to work without an objectively good justification for that intention.
- 52.4 As a result, the respondent “issued” a “P45”. By doing so, it accepted the claimant’s repudiation or fundamental breach of contract. In doing so, it terminated the claimant’s contract of employment within the meaning of section 95(1)(a) of the ERA 1996. In other words, it dismissed the claimant at that time. For the avoidance of doubt, he did not resign.
- 53 As for the procedure followed and the question whether the claimant’s dismissal was within the range of reasonable responses of a reasonable employer, in my judgment, this was a rare case where consultation would have been futile. That was because (1) the claimant had been warned that if he was not willing to take out and deliver a third load whenever he was instructed to do so, then he would be dismissed, and (2) he had decided that he was not so willing and then not returned to work after 28 February 2025 and not communicated any reason for not returning to work. He had his own reasons for not being willing to take out a third load when required by Mr Murphy to do so, I concluded, and they were to do with his health. I concluded that it had become difficult, if not impossible in practice, for the claimant to be able to guarantee that he would take out and deliver a third load when required to do so, and that that was because of his physical condition. No blame whatsoever attached to the claimant in that regard, but it meant that he was no longer able to do his job.
- 54 In all of those circumstances, including that by the end of the week commencing on 3 March 2025 the claimant had not communicated with the respondent since 28 February 2025, I concluded that it was within the range of reasonable responses of a reasonable employer to dismiss the claimant in the manner and circumstances in which he was in fact dismissed. For the avoidance of doubt, the claimant was not dismissed on 28 February 2025. Rather, he was dismissed on the day when the respondent subsequently sent the claimant his P45, which was on or after Friday 7 March 2025.
- 55 In all of the circumstances, in my judgment the claimant’s dismissal was not unfair, and his claim had to be dismissed.

**Case Number: 3304564/2025**

**Approved by Employment Judge Hyams**

**On: 3 June 2026**

JUDGMENT SENT TO THE PARTIES ON  
3 June 2026

FOR THE TRIBUNAL OFFICE