EMPLOYMENT TRIBUNALS

Claimant: Mr D Lister

Respondent: Apcoa Parking (UK) Ltd

Heard at: Leeds **On: 16 June 2017**

Before: Employment Judge Rogerson

Representation
Claimant: Mr Neil Sharples (Trade Union representative)
Respondent: Miss K Reece (Consultant)

RESERVED JUDGMENT

1. The complaints of unlawful deductions from wages and a failure to provide written reasons for dismissal were withdrawn at the hearing and are dismissed.
2. There was a 'relevant transfer' in accordance with regulation 3(1) (a) of the Transfer of Undertakings Regulations 2006 ('TUPE 2006'), from Leeds Car Parks to the Respondent on 1 April 2017. By virtue of regulation 4 of TUPE 2006, the Claimant's start date of employment was 1 March 2014 and he has sufficient qualifying service to bring a complaint of unfair dismissal.
3. That complaint of unfair dismissal succeeds and the Claimant is awarded compensation in the sum of £4,133.03 comprising a basic award of £1,130.79 and a compensatory award of £3,002.24 (losses from end of notice period of 17.11.2016 with 26 weeks future loss of £4,002.99 reduced by £1,000.75 which represents a 25% deduction for contributory conduct in accordance with section 123(6) of the Employment Rights Act 1996 'ERA 1996').
4. The complaint of wrongful dismissal succeeds and the Claimant is awarded 2 weeks notice pay in the sum of £664.12

REASONS

Issues

1. The Issues in this case were clarified and agreed between the parties at the beginning of the case and were as follows;

1.1 Was there a 'relevant transfer' from Leeds Car Parks to the Respondent APCOA on 1st April 2017 in accordance with regulation 3(1)(a) of the Transfer of Undertakings (protection of Employment) Regulations 2006 ('TUPE 2006').

1.2 If so the Claimant has sufficient service to be eligible to bring an unfair dismissal complaint with his employment commencing on 1st March 2014and ending summarily on 3 November 2017.

1.3 It was accepted that the Claimant was dismissed for a 'conduct' related reason, a potentially fair reason under section 98(2) Employment Rights Act 1996 ('ERA 1996'). The question was having regard to that conduct reason, whether the Respondent acted reasonably in dismissing the Claimant in light of the circumstances, equity and substantial merits of the case in accordance with section 98(4) ERA 1996.

1.4 Was the dismissal procedurally fair?

1.5 If the dismissal is unfair what reductions should be made (if any) to the compensatory award by virtue of section 123(6) if the dismissal was found to any extent caused or contributed to by any action of the claimant or for 'Polkey' to reflect the chance that a fair procedure would have made no difference to the outcome?

1.6 Was the Claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? If not the claimant is entitled 2 weeks notice pay as damages for wrongful dismissal.

Findings of Fact.

2. I heard evidence from the Claimant. For The Respondent I heard evidence from Sarah O'Toole (HR manager) from Lindsey Gould (dismissing officer/line manager) and Graham Sweedy (appeals officer/contracts manager). I also saw documents from an agreed bundle. From the evidence I saw and heard I made the following findings of fact.
3. The Claimant began working for Leeds Car Parks (LCP) on 1 March 2014. LCP provided a car parking and transportation service for customers travelling from/to Leeds Bradford Airport. LCP staff would park the customer's cars, on land rented by LCP for that purpose. LCP staff would then transport the customer and their luggage from/to the car park to the airport.
4. The Customers were mainly obtained through agreements made by LCP with travel agents who would book the LCP service at the time the customer booked the holiday but that was not the only source of customer bookings.
5. The Claimant's role as a 'driver' was to take the customers car to/from the parking area to the allocated parking area and to drive the minibus transporting the customers to/from the car park and airport. This shuttle service was provided throughout the day/night.
6. He was one of 6 drivers employed by LCP. The equipment used by LCP (the minibuses/trailers) to transport the customers and luggage was leased and the land used for parking the cars was leased by LCP. The drivers, equipment and land were the essential components of the service provided by the business.
7. In January 2016, the commercial manager at APCOA, Simon Hope visited the site. The Claimant was aware at that time that LCP were losing the lease to the land where the cars were parked and that APCOA would be 'taking over' the business. Mr. Hope told the Claimant that if he signed a

contract with APCOA he would carry on working for APCOA on the same hours and pay with a start date of 1.2.2016.

8. The Claimant accepted that offer and signed the contract dated 27 January 2016. The contract identifies his job as a 'driver' and his place of work as Leeds Bradford Airport and his salary at £10.00 hour. These were the same terms as before with LCP as promised.
9. On 17 February 2016, Mr. Hope advised the Claimant there was a delay regarding the commencement date for APCOA to be operational on site.
10. Mrs. O 'Toole was the only witness I heard from regarding the transfer issue. She could not comment on the discussions that took place between the Claimant and Mr. Hope.
11. In her witness statement she states that there was no transfer of the business from LCP to APCOA because:

    a) The Respondent did not take over from LCP they entered their own lease.

    b) The Respondent did not take over any business and had no commercial or contractual relationship with LCP.

    c) No customer contracts were taken over "the only allowance made was in respect of some customer cars which were still parked" as at 1st April 2016.

    d) The Respondent entered into contracts with travel companies like Holiday Extras independently there was no 'taking over' of contracts from LCP.

    e) The legal representatives of APCOA had confirmed to LCP that TUPE did not apply because "*there was no transfer to which the regulations can or do apply. The Respondent was granted a lease of the site at Unit 1A by a landlord that is not connected with either party in any way. No assets or business were purchased by the Respondent or transferred from LCP and so there was no transfer of the matters normally associated with an economic entity being taken over by a new owner or the provider of an outsourced service. There was no contractual relationship between APCOA and LCP at all*"
12. The lease between the Landlord and APCOA came into effect on 1st April 2016 and not earlier in January 2016 as planned, because LCP had applied for an injunction and legal proceedings delayed the process.
13. APCOA commenced the customer car parking and transportation business on 1st April 2016. The Claimant was paid by APCOA as a driver from 1st April 2016.
14. As far as the Claimant was concerned there was no change to the business or the job he performed for the business, before and after the 1st April 2016, other than a change in the identity of his employer from LCP to APCOA.
15. Mrs. O'Toole accepted that the Claimant and the other drivers were approached prior to the purported transfer to work for the Respondent because as 'experienced' drivers they were useful for the Respondent. Mr Sharples makes the point quite correctly the Respondent was not starting up the business from scratch it was benefitting from the business LCP had been operating with those drivers.
16. She confirmed that all the drivers that had been employed by LCP were taken on by APCOA to perform the same role at the same rate of pay/hours. She was able to confirm this by referring to data that had been provided by LCP described in the bundle as "spreadsheet of employees LCP and Respondent". That data included the employee's full name, address, contact number, gender, start-date, job title, current salary,

employment type (permanent/self employed). All 6 employees were taken on by APCOA. Only 3 'self employed' individuals on the list were not taken on. She could not explain why APCOA had sought obtained and used that data, given its case that there was no transfer/connection with LCP at all.

17. She accepted the whole purpose of the business for APCOA after 1st April 2016 was "ferrying people to/from the airport and parking their cars" and nothing changed.
18. Mrs. O'Toole relied upon a letter from APCOA's legal representatives (pages 29a-d) to LCP's representatives dated 26 January 2016 (the day before APCOA made an offer of employment to the Claimant). Unfortunately 2/3rds of the letter has been redacted, but the references relied upon by Mrs. O'Toole are set out above at 11(e).
19. Mrs. O'Toole did not dispute that the Claimant and the other 5 drivers (the whole employed driver workforce) were the organized grouping of drivers providing the service to customers. They were doing exactly the same job for APCOA as they had done for LCP prior to 1st April 2016. She could not provide any details of the numbers of customer cars parked as at 1st April that had contracted with LCP for a service that was in fact performed by APCOA.
20. These were customers who had left there cars to be parked prior to the 1st April 2016 and had returned on/after the 1st April 2016. For those customers nothing changed in term of the service provided of 'parking their cars and ferrying them to/from airport' whether LCP/ APCOA carried out that service. The same drivers were performing that role as far as the customers were concerned.
21. The first question I had to address was whether there was a relevant transfer on 1st April to the First Respondent from LCP? Both parties agreed regulation 3(1)(a) of TUPE 2006 applies which provides that the regulations apply to-"*a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity*".
22. Helpfully Mr. Sharples has set out in his skeleton argument the relevant authorities and principles in determining the answer to the question of whether there is an identifiable economic entity and if so whether there is a transfer of that entity.
23. He has set out the guidance given by the EAT in Cheesman and ors-v- R Brewer Contracts Ltd.
24. There needs to be a stable economic entity which is an organised grouping of persons and of assets enabling or facilitating the existence of an economic entity that pursue a specific objective. Here the ferrying of customers and car parking service was performed by the drivers using land and equipment leased by the business in order to pursue that objective. The assets were the drivers who were an organized group of drivers who collected and parked the customers cars onto land leased from the landlord. They transported the customers and their luggage using minibuses and trailers leased by the business in order to pursue that activity.
25. Mr Sharples identifies at paragraph 11 that the employees were specifically and permanently assigned to the common task without which the business would not be capable of performing its economic service of providing a car parking service for persons travelling from Leeds Bradford Airport. That was the economic entity.

26. Did that economic entity retain it's identity after 1st April 2016 in the hands of the Respondent? Mr Sharples refers to the 7 factors identified in Spijkers –v-Gebroeders Benedik Abattoir CV and ors 1986 2 CMLR 296 which include the degree of similarity of activities before and after the transfer, whether the majority of staff are taken over by the new employer and whether there is any interruption in those activities.
27. Here the activity was identical in the hands of LCP and APCOA all the employed drivers were taken on and there was no interruption in the activity. That was demonstrated by the fact that a customer before and after the 1st April 2016 would have the same service provided by the same drivers as before.
28. The Respondent points to the absence of any commercial or contractual relationship with LCP. The Respondent relies on no transfer of assets goodwill contracts or customers to support its case. There does not have to be a direct relationship between LCP and ACPOA for a relevant transfer to occur (Foreningen af Arbejdsledere i Danmark –v- Daddy's Dance Hall A/S 1988 IRLR 315 ECJ). That was a case where the lease of a restaurant/bar came to an end with IC and the landlord concluded a new lease with Daddy's Dance Hall (DDH) which took over the business previously run by IC. The ECJ held that those employed by IC at the restaurant/bar transferred to DDH rendering IC, the transferor and DDH the transferee, even though there was no direct relationship between them
29. The previous lease agreement leasing the land to park the customer cars made between the Landlord and LCP had ended on 31st March 2016. The Respondent asserts that the new lease between the Landlord and the Respondent '*enabled the respondent to run a car parking business from the site but the respondent was* ***not obliged*** *to run it as such which supports it's case of no transfer*'.
30. I was not shown the lease agreement and theoretically there may be no obligation but the fact is that is what the Respondent actually did. The key question was whether the economic unit retained its identity. It is difficult to see what other business the Respondent would operate given the location of the airport to the land. The reality of what happened was that that the economic entity retained its identity and was continued by the Respondent without interruption using the same workforce, organised and operating in the same way as before. The only change was the identity of the employer There was a relevant transfer within regulation 3(1)(a) of TUPE 2006, the Claimant's employment contract transferred and continuity of employment was preserved with a start date of 1st March 2014.
31. This means the Claimant had sufficient qualifying service to complain of unfair dismissal and that for each employee that transferred their previous service with LCP counts as part of their employment with the Respondent. Regulation 4 of TUPE 2006 applies so that the transferee. The Respondent steps into the shoes of the transferor (LCP) as far as all the rights and liabilities under the contract of employment are concerned. Any term of the contract issued by the Respondent that tries to avoid/limit the rights on a transfer (for example by failing to accept previous service prior to the transfer) is void.
32. The facts in relation to the dismissal (and the complaints of unfair dismissal and wrongful dismissal are as follows): The Claimant had been offered and had accepted employment with the Respondent as a driver in January 2016 but the start date was delayed until April 2016.

33. Although the Claimant was interviewed on 1st April that was an artificial exercise, because he had already been offered and had accepted the job in January 2016.
34. The contract the Claimant was provided incorrectly states that the start date was April 2016 when it should be 1st March 2014. It provides for the same rate of pay and hours as the Claimant had previously with LCP. It provided for 1 weeks notice for each year of service which would entitle the Claimant to 2 weeks notice of termination. The contract provides for summary dismissal without notice in circumstances of 'gross misconduct'. No disciplinary policy was provided at this hearing or during the disciplinary process to the Claimant. There is no contractual requirement requiring the Claimant to update his driving licence as required by the DVLA
35. On 10 April 2016, the Claimant's manager Mr. P Hammond did a check on the Claimant's driving licence inspecting and copying the original. He was satisfied with the licence after that inspection
36. The Claimant and manager assumed everything was in order. The same licence had been checked by LCP from March 2014 to April 2017. No problems had been raised as a result of those checks. Through out this period the licence had been endorsed with a '101 restriction'.
37. In October 2016, the Claimant's new line manager Mark Armitage queried the '101 restriction' next to D1 vehicles which included minibuses. At this point, neither Mr. Armitage, nor the Claimant knew what the restriction meant.
38. The Claimant contacted the DVLA (in Mr. Armitage's presence) to enquire about the restriction. They were told that although the Claimant was licenced to drive D1 vehicles he could not do so for 'financial reward'. He was advised that he would need to get a medical assessment of his fitness to drive D1 vehicles before the restriction could be removed. The Claimant subsequently became aware that persons driving D1 vehicles for financial reward need to be medically assessed every five years or so, dependant on their age.
39. Mr. Armitage told the Claimant that he would have to go home but would get paid. The Claimant was also told he would have to pay for the medical assessment. The Claimant did undertake a medical assessment at his own cost.
40. On 14 October 2016, Ms Lindsey Gould (contract manager) wrote to the Claimant inviting him to attend a disciplinary hearing. The letter refers to the disciplinary charge of:
    "failure to meet the requirements of your PSV and ***updating*** *your driving licence as required by the DVLA, which constitutes a breach of your employment with APCOA Parking as a bus driver. You are advised that in view of the seriousness of the allegations that the company regards this matter as potentially constituting Gross Misconduct which may result in your dismissal".*
41. With the letter the Claimant was provided with a copy of his licence and the statement of Mark Armitage dated 13 October 2016. The statement confirms a conference call with the DVLA on 13 October 2016 and states:

    "Mr David Lister has a 101 restriction which means he can drive a minibus with trailer for his own purposes but not for 'hire or reward. The reason is he was due a medical in 2009 which he has never taken. This restriction will remain on his licence ***until he takes and passes a medical****. I confirmed all this on a conference call with the DVLA on 13/10/16 with Mr. Lister present. Mr. Lister also moved house last*

December but he never sent is licence for change of address, this is a contravention of the DVLA requirements and would result in £1,000 fine if he was asked to present his license by the DVLA or Police.

42. The Claimant was not interviewed as part of the investigation process.
43. The Claimant emailed Ms Gould about the suspension which he believed should have been paid as agreed with Mr. Armitage. He was advised by Ms Gould that he was on unpaid leave and suspended from duty because the Claimant was "***currently unable"*** *to* meet the requirements of his job as a driver.
44. On 29 October 2016, the Claimant having had and passed the medical assessment with the DVLA had the 101 restriction removed from his licence.
45. On 3 November 2016, the Claimant attended a disciplinary hearing with his representative (Chris Weaver) Ms Gould and a company representative (Sarah O'Toole). The notes of the disciplinary are at pages 71-79 in the bundle.
46. The Claimant explained that he had been unaware of the restriction until the call with the DVLA and that he now knew that if you are 50 years of age you had to have a medical every 5 years. He confirmed that he had a medical and no longer had the restriction on his licence. He also raised alleged inconsistency of treatment, on the grounds that other employees had been driving vehicles in contravention of restrictions on their licences but no disciplinary action had been taken against them. Ms Gould accepted a check of the Claimant's licence had been carried out by managers in April and October 2016 and that they had only 'understood' the restriction position in October 2016. The notes record a 10 minute adjournment after which the Claimant was informed of the decision to dismiss him summarily from that date.
47. By letter dated 8 November 2016 the Claimant received written confirmation of the reasons for dismissal which were:
    1) *"You confirmed that you had not maintained the legal requirement of your PSV licence as required by the DVLA by not attending medicals and therefore had been driving when you were not entitled to do so. The requirement of DVLA is that drivers of 'hire and reward busses must take pass and maintain the required medical. By not doing so your PSV licence had expired.*
    2) *By not having a current PSV licence you were not in a position to drive buses on behalf of APCOA and as such are in breach of your employment contract and terms and conditions.*

    This breach of legal and employment requirements of your role as a Bus Driver cannot be condoned by the Company and therefore I have taken the decision to award the most severe sanction available to me and summarily dismiss you in accordance with the Company Disciplinary Policy listed as gross misconduct. This dismissal will be with immediate effect from 3 November 2016".
48. By email dated 12 November 2016, the Claimant appealed against the dismissal. In his grounds of Appeal he raised his lack of knowledge about the restriction, the fact he had taken and passed a medical on 26 October and informed Ms Gould his licence was updated on 2 November removing the restriction and that Ms Gould did not ask to see the updated licence. He also raises inconsistency of treatment with other staff that also did not have the appropriate licence to carry out their duties which was not investigated by Ms Gould and his concern that the outcome was predetermined.

49. Ms Gould was questioned about her reasons for dismissing the Claimant. In her witness statement she states the claimant did not declare that he had the medical and a new licence so this was not taken into consideration by her. She repeats this assertion at paragraph 12 when she states "at no time during the process did the Claimant make it apparent that he would take any steps to remove the restriction on his licence. Only in cross examination did she accept that the Claimant had told her at the disciplinary hearing that the restriction had been removed she accepted the Respondent
50. The notes clearly record that this information was provided to Ms Gould so she could have taken it into account but did not do so. Her statement that the Claimant could not continue to work in the position he held was also incorrect. As at the date of the disciplinary hearing that restriction had been removed and the Claimant could perform his role. I did not find Ms Gould to be a credible witness. The Claimant believed her decision was predetermined because of the way she had dealt with him and her failure to consider the evidence provided by the Claimant.
51. In her witness statement she refers to the Claimant failing in his duty to update the licence and that "he had worked for us for a period of time without a valid licence". She said she viewed it as gross misconduct because if there had been an accident whilst the Claimant was driving there was a risk to the public and the insurance would be invalid. She accepted that other drivers had driven the mini busses with trailers to transport the luggage without a 'trailer' licence. They could also have exposed the Respondent to the same risk of an accident invalidating the insurance. No action had been taken against those drivers for failing to update their licence or for working without a valid licence. She also failed to investigate the Claimant's concerns about inconsistency of treatment before dismissing him.
52. Ms Gould denied her decision was predetermined but I did not accept that. It was clear from her conduct of the disciplinary hearing that she had made up her mind and had not listened to anything the claimant had to say in his defence/ mitigation. She did genuinely believe the Claimant was guilty of the alleged misconduct but her belief was predetermined and was not based on any reasonable grounds or any reasonable investigation.
53. Section 98(4) of the Employment Rights Act 1996 provides that the determination of the question whether the dismissal is fair or unfair, (having regard to the reason shown by the employer) -
    a) depends on whether in the circumstances(including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
    b) shall be determined in accordance with equity and the substantial merits of the case.
54. Ms Gould ignored the fact that the restriction had been removed as at 3rd November which meant the restriction relied upon by the Respondent was no longer in place because the Claimant had paid for and passed a medical assessment. She ignored the undisputed fact that neither the Claimant or his manager had been aware of what the restriction meant until the conference call with the DVLA, after which the Claimant acted promptly to address the position. She ignored the Claimant's concerns about inconsistency of treatment and could not explain the inconsistency at this hearing. She did not deal with the disciplinary with an open mind she had predetermined the dismissal and had acted unreasonably in

treating this conduct as a sufficient reason for dismissing the Claimant in light of all the circumstances brought to her attention. The dismissal by Ms Gould was unfair.

55. The Claimant's appeal was heard by Mr. Graham Sweedy (Contract Manager) on 1st December 2016. He describes the Appeal as a 'rehearing'. In relation to updating his licence the Claimant had explained to Mr. Sweedy that in 2009 he had no fixed abode due to a divorce and he had not received any reminder letters from the DVLA about a medical assessment. In his witness statement, Mr Sweedy says he did not accept that explanation and he thought the reason why the Claimant failed to get an up to date medical examination was the cost of getting the medical examination. Mr Sweedy never questioned the Claimant about this possible reason during the Appeal process and the notes appear to accept the explanation offered.
56. He took the view that even if the Claimant had not known about the restriction he ought to have known and was negligent. He took no account of the new licence the Claimant had obtained by 3rd November 2016, because he decided that the disciplinary was to specifically look at the period the Claimant had driven whilst ineligible to drive in breach of his contract. He decided it was not unfair that Ms Gould did not view the updated licence at the disciplinary hearing. He concluded the Claimant's conduct had invalidated the insurance policy which meant that any accident would be the liability of the Respondent. He felt the trailer restriction was different because the driver could still drive a minibus without a trailer and the Company could remove the trailers. He accepted however that there had been a period of time when these drivers had driven with a trailer restriction which (like the Claimant) would have invalidated the insurance if there had been an accident. He did not find the dismissal decision was predetermined but does not explain why he reached that conclusion given the concerns raised by the Claimant.
57. Unfortunately, Mr Sweedy did not conduct the Appeal as a 'rehearing' or address any of the unfairness of the process at the disciplinary hearing. Furthermore he contradicts Ms Gould's witness statement in which she states that if the Claimant had taken steps to remove the restriction she would have taken that into consideration. The disciplinary allegation itself refers to the 'current' position being relevant because it refers *to the Claimant "not having a current PSV licence"* which meant he was *"not in a position to drive buses on behalf of APCOA"* and as such was *"in breach of your employment contract and terms and conditions".* It was an important consideration that was not addressed by Ms Gould or Mr. Sweedy at the Appeal.
58. In relation to the past period when the Claimant had been driving whilst unaware of the restriction Mr Sweedy knew at the Appeal hearing that in fact no accidents had occurred to invalidate the insurance and he knew that in this regard the Claimant was being treated inconsistently with others.
59. Having regard, to the size and resources of this employer, equity and the substantial merits of the case the appeal process did not rectify any of the failings of the disciplinary process. The dismissal was unfair.
60. Based on my findings of fact I did not find the claimant was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily dismiss him on the 3rd November 2016. The Claimant had been unaware and management had been aware of the restriction until 13 October 2016. By 26 October he has

the medical assessment which he paid for and passed so that by the disciplinary hearing the restriction had been removed. He had not been aware prior to the 13 October 2016 because he had not received any correspondence from the DVLA. The conduct of the Claimant did not entitle the Respondent to dismiss without the 2 weeks notice of termination he was contractually entitled to. As damages for breach of contract the Claimant is awarded 2 weeks notice pay.

61. The Claimant is successful in his complaint of unfair dismissal and I did consider section 123(6) which provides that where the dismissal was to any extent caused or contributed to by any action of the complainant the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. If the Claimant had informed the DVLA of his change of address he would probably have received the reminder about the medical assessment which would have prompted him to do something earlier than he did. To his credit the Claimant accepts he forgot to tell the DVLA and accepts some responsibility for his actions contribution to his dismissal. The Claimant suggests a 20% deduction for 'contributory conduct if I considered it was appropriate. The Respondent suggests 100%. I decided the appropriate reduction to make to reflect my findings of fact and the contribution of the claimant was 25%. In relation to the schedule of loss there was no challenge on the losses claimed except in relation to the loss of statutory rights which the Respondent submits should be limited to £400 but where the Claimant has claimed 2 weeks gross pay. The amount claimed was just and equitable in my view to reflect the loss of 2 years of statutory rights the Claimant will now have to build up with his new employer. The remedy calculations I have made are based on the schedule of loss prepared by the Claimant which was not otherwise disputed.

Employment Judge **Rogerson**

Date: 26 July 2017