EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Martin Burton	v	**Spencer Signs Ltd**

PRELIMINARY HEARING

Heard at: **Hull** **On:** **18 & 19 February 2020**

Before: **Employment Judge T R Smith, sitting alone.**

Appearance:

For the Claimant: **In person**

For the Respondent: **Mr Muirhead, Consultant**

JUDGMENT

1. The Claimant was under fairly dismissed.
2. The Claimant was wrongfully dismissed in breach of contract and is entitled to 9 weeks' notice.
3. It is just and equitable to make an upward adjustment of 10% under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA") in favour of the Claimant. The uplift applies to both the unfair dismissal and wrongful dismissal complaints.
4. The Claimant caused or contributed to his dismissal as to 50% and his basic award is reduced by the said proportion.
5. There was 100% chance that had an appeal been held the Claimant would have been fairly dismissed and thus the Claimant is not entitled to a compensatory award.

REASONS

1. **The Issues.**

At the commencement of the hearing the Tribunal clarified with the parties the issues it had to determine and the areas of dispute, which are set out below.

1.1. What was the reason for the dismissal? The Respondent asserted that it was a reason relating to conduct which was a potentially fair reason under section 98 (2) of the Employment Rights Act 1996 ("ERA96"). It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

1.2. Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds?

1.3. Did it act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal having regard to the factors set out in section 98 (4)ERA96?

1.4. Was the decision to dismiss a fair sanction, that is, was it within a reasonable range of responses of a reasonable employer?

1.5. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This required the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged? ("the Contribution issue")

1.6. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event, and/or to what extent and when? ("the **Polkey** issue")

1.7. Did the ACAS code of practice: disciplinary and grievance procedures 2015 apply?

1.8. If so were either party in breach?

1.9. If so, was it reasonable to make an adjustment under section 207A of TULCRA?

1.10. If the Claimant was dismissed did the Respondent breach the Claimant's contract of employment in failing to give him notice or pay him money in lieu of notice? It was common ground that if the Claimant was entitled to notice that entitlement amounted to 9 weeks.

1.11. It was agreed at the start of the hearing that the Tribunal would determine liability, contribution and **Polkey** only and then, if necessary, proceed to remedy.

2. **Evidence**

2.1. The Tribunal had before it an agreed bundle initially totalling 269 pages. During the course of the hearing one further page was added but it was not referred to in evidence and nothing turns upon it.

2.2. A reference in this judgement to a number in brackets is a reference to a document in the bundle.

2.3. The Claimant gave oral evidence and was cross examined.

2.4. The Tribunal heard oral evidence from Mr Mark Stephenson, Mr Simon Johnson, Mr Mark Spencer and Mr Ashley Leighton on behalf of the Respondent.

3. **The Law.**

3.1. Unfair dismissal.

The Tribunal applied section 98 (1), 98 (2) and 98 (4) of the ERA 96 which provides as follows: –

"98 (1) – in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that either it is a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee helped.

98 (2) – a reason falls within this subsection if it…….

(b) relates to the conduct of the employee.

98 (4) –….. Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

(a) depends on the weather in the circumstances (including the size and the 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."

3.2. In **Abernethy – v – Mott, Hay and Anderson 1974 IRLR213** the Court of Appeal held that a reason for dismissal was a set of facts known to the employer or beliefs held by him which would cause him to dismiss the employee.

3.3. The Tribunal had regard to the guidance given in **British Home Stores Ltd -v- Burchall 1978 IRLR 379.**

However, the Tribunal reminded itself that **Burchell** was decided before the alteration of the burden of proof effected by section 6 of the Employment Act 1980.

In that case the first question raised by Mr Justice Arnold: *"did the employer had a genuine belief in the misconduct alleged?"* goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer. However, the second and third questions, the reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under section 98 (4) of the ERA 96 and then the burden is neutral.

3.4. The Tribunal had regard to the guidance given at paragraphs 13 to 15 in the case of **Sheffield Health and Social Care NHS Foundation Trust -v- Crabtree UKEAT 0331/09/ZT**.

3.5. The approach to fairness and procedure is the standard of a reasonable employer at all three stages:- **Sainsbury's Supermarket-v- Hitt 2002 EWCA CIV 1588**.

3.6. The Tribunal reminded itself that when considering the objective standard of a reasonable employer the test was the material which was available the employer at the time. However, the test goes further as it involves information which would have been available had a proper investigation being conducted and this point was emphasised by His Honour Judge Serota QC in the case of **London Waste Ltd -v-Scrivens UK EAT/0317/09.**

3.7. Whilst the Tribunal must have respect for the opinion of the dismissing officer it is ultimately for the Tribunal and not for the Respondent to decide whether the dismissal fell within or outside the range of reasonable responses open to an employer in the circumstances.

3.8. The Tribunal also applied the guidance given in the case of **Iceland Frozen Foods Ltd -v- James 1992 IRLR 439**: –

"The authorities establish that in law the correct approach for an employment Tribunal to adopt in answering the question posed by section 98 (4) is as follows……

(1) the starting point should always be the words of section 98 (4) themselves.

(2) in applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair.

(3) in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take on you, another quite reasonably take another.

(5) the approach of the Employment Tribunal, as an industrial jury, is to determine whether the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses in which a reasonable employer might have adopted stop if a dismissal falls within the band the dismissal is fair….. If the dismissal falls outside the band it is unfair."

4. In summary the Tribunal must ask itself all questions namely: –

- Was there a genuine belief in the alleged misconduct?
- Were there reasonable grounds to sustain that belief?
- Was there a fair investigation and procedure?
- Was dismissal a reasonable sanction open to a reasonable employer?

In a case, as here, where it is alleged that there has been inequality of treatment in the disciplinary process with other employees the Tribunal must

examine the facts of those cases that are said to be comparable and they must be truly comparable to be taken into consideration. Tribunals are also reminded that an employer has considerable discretion in relation to the imposition of a disciplinary penalty and it is wrong for the Tribunal to look at matters solely on a tariff-based approach, **Hadjioannou -v- Coral Casinos Ltd [1981] IRLR 352.**

5. **Contributory conduct.**

5.1. Section 123 (6) ERA 96 states that *"[W] here the Tribunal finds that the dismissal was to any extent caused all contributed to by any action of the complainant, it shall reduce the….. compensatory award by such proportion as it considers just and equitable having regard to that finding."*

5.2. The wording in relation to any deduction from the basic award is set out in section 122(2) and differs from that in section 123 (6) ERA 96.

5.3. A reduction for contributory conduct is appropriate according to the Court of Appeal in **Nelson-v- BBC (2) 1980 ICR 110** when three factors are satisfied namely: –

- The relevant action must be culpable or blameworthy
- It must have caused or contributed to the dismissal, and
- It must be just and equitable to reduce the award by proportion specified

5.4. For a deduction to be made a causal link must exist between the employee's conduct and the dismissal. In other words, the conduct must have taken place before the dismissal; the employer must have been aware of the conduct; and the employer must then have dismissed the employee at least partly in consequence of conduct.

6. **Polkey Reductions.**

6.1. Under Section 123 (1) ERA 96 the Tribunal must consider whether it would be *"just and equitable"* to make a reduction from any compensatory award.

6.2. The case of **Polkey -v- AE Dayton Services Ltd 1988 ICR 142** held that a Tribunal must consider whether the unfairly dismissed employee could have been dismissed fairly at a later date.

6.3. The **Polkey** principal applies not only to cases where there is a procedural unfairness but also to substantive unfairness, although in the latter case it may be more difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred, see **King -v- Eaton Ltd (2) 1998 IRLR 686.**

6.4. The mere fact a **Polkey** reduction may involve a degree of speculation or is difficult does not mean it should not be undertaken, see **Gover -v- Property Care Ltd 2006 ICR1073.**

6.5. The burden of proving that an employee would have been dismissed in any event is on the employer. Provided the employee can put forward an arguable case that he or she would have been retained were it not for the unfair procedure, the evidential burden shifts to the employer to show

that the dismissal might have occurred even if a correct procedure had been followed, see **Britool Ltd -v- Roberts 1993 IRLR 481.**

6.6. The Tribunal looked carefully at the guidance given in **Software 2000 Ltd -v- Andrews 2007 ICR 825** on the application of **Polkey**.

7. In summary the guidance directs that the Tribunal must assess how long the employee would be employed but for the dismissal. If the employer contends that the employee would or might have ceased to have been employed in any event had a fair procedure been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee (for example an intention to retire). There will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. The Tribunal must have regard to all material reliable evidence even if there are limits to the extent to which it can confidently predict what might have happened. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary namely that the employment would be terminated earlier is so scant that it can effectively be ignored.

8. The proper approach when applying the **Polkey** principle is not to look at what the Respondent would have done if it had not made an error, rather to look at what would have happened if the correct procedure had been applied

9. **Gross misconduct.**

9.1. Gross misconduct occurs when there is a fundamental breach of contract by the employment. The focus must be on the damage to the relationship between the parties and it must strike at the root of the contract of employment. If the contract of employment sets out examples of gross misconduct which the employer would consider sufficient to merit summary dismissal, even if that conduct may not necessarily amount to gross misconduct, it probably should be classed by the Tribunal as gross misconduct. Not every act of gross misconduct however, necessary merits dismissal, and the employer should first of all consider penalties other than dismissal and should not automatically assume that dismissal is the appropriate penalty **Brito-Babapulle -v- Ealing Hospitals NHS Trust [2013] IRLR 854.**

9.2. **Trade Union and Labour relations (Consolidation) act 1992**

Section 207A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides: –

"(2) if, in the case of proceedings to which this section applies, it appears to the employment Tribunal that-

(a) the Claimant to which the proceedings relate concerned the matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with Apco in relation to that matter, and
(c) that failure was unreasonable, the employment Tribunal may, if it considers it just and equitable in all the circumstances to do so,

increase any award it makes to the employee by no more than 25%".

10. **The Facts**

Rather than adopt a pure chronological order to the Tribunal's findings of facts, the Tribunal considered it more helpful, so the parties could better understand its judgement, to deal with the various topics raised in evidence.

11. Background

11.1. The Claimant commenced employment with the Respondent on 01 February 2010.

11.2. The Claimant's employment ended on 05 April 2019 when he was dismissed for what the Respondent described as gross misconduct.

11.3. The Claimant was employed by the Respondent as a sign installation supervisor.

11.4. He worked as a two-man team. The vast majority of the Claimant's time was spent on site or travelling throughout the United Kingdom.

11.5. As a supervisor the Claimant was responsible for the workmanship of his colleague.

11.6. The Respondent manufactures and installs specialist signs throughout the United Kingdom.

11.7. The Respondent employs approximately 42 staff.

11.8. Mr Stephenson is the Respondent's managing director, and most senior employee.

11.9. Mr Spencer is the Respondent's operations director.

11.10. Mr Johnson is the Respondent's senior contracts manager.

11.11. Mr Leighton is the Respondent's production/installation manager.

12. Documentation.

12.1. The Claimant was issued with written particulars of employment dated 28 February 2011 (26 to 31).

12.2. Under the written particulars the Claimant was required to abide by the Respondent's rules, policies and procedures in force from time to time (27).

12.3. On termination, otherwise than for gross misconduct, the Claimant was entitled to one week's notice for each complete year of service (29).

12.4. The Claimant was also issued, with an employee handbook, which included the Respondent's disciplinary rules and procedures (32 to 75).

12.5. Under the disciplinary procedure a final written warning remained extant on an employee's record for a period of 12 months(48).

12.6. The Respondent set out in the written particulars and handbook examples of what it regarded as a serious breach of contract entitling it to

dismiss for gross misconduct (29 and 45). Speeding does not appear as an example of gross misconduct. The deliberate falsification of any records is regarded as potential gross misconduct.

12.7. A driver's handbook was also issued, signed for by the Claimant on about 24 April 2018. It contained the stricture that drivers should not exceed the national speed limit. The policy also made it clear that the Respondent installed GPS tracking devices in vehicles and this recorded information including vehicle routes and speeds and such information could be used to support discipline procedures if inappropriate use of a vehicle was suspected. (94). It did not specifically state that speeding was an offence that could merit summary dismissal. At its highest it said that failure to comply with book *"may result in disciplinary action to include summary dismissal"* (97).

12.8. The Respondent operated a number of what were classed as toolbox talks. A number were placed before the Tribunal. The toolbox talk dated 19 March 2018 (127) simply contained the bullet point speeding as did that for 29 May 2018 (129). It did not set out any particular penalties.

13. Was the Claimant subject to an extant final written warning?

13.1. A key issue in this case was whether, at the time of dismissal, the Claimant was subject to an extant final written warning.

13.2. Put simply the Respondent's case was that one was issued and the Claimant's case was that he was unaware of the same at his disciplinary hearing. It is therefore necessary for the Tribunal to examine this issue and made a specific finding of fact.

13.3. On 24 September 2018 the Claimant was invited to a disciplinary hearing. The allegations were set out in a letter of the same date (131).

13.4. In essence the allegations were that the Claimant had incorrectly installed post mounted signage for Clipper Sheffield, fixed the sign incorrectly to posts, that the installation itself was of poor quality and the completion paperwork was incomplete.

13.5. When the matter reached a disciplinary hearing there were further allegations as regards the Claimant's workmanship at the St Mowden's sites at Bury and Lincoln. In relation to the former it was alleged the Claimant should not have left site while there was still potentially work to do, and in respect of the latter whether there should have been better communication before the Claimant left site.

13.6. At the disciplinary hearing held on 15 October 2018, chaired by Mr Spencer, the Claimant explained that in relation to much of the work at Clipper Sheffield it was the fault of his co-worker, although he had ultimate responsibility. He accepted that there was a measurement error for which he was responsible, and in respect of the work at St Mowden's he considered there was no further work to be done and he preferred to get home at the end of the week, although he did not liaise directly with the Respondent's head office. No oral decision was given by Mr Spencer at that meeting. He decided to reflect upon matters.

13.7. The Respondent claimed that the Claimant was issued with a final written warning in the form of a letter of 24 October 2018 (146 to 147) to

last until 24 October 2019. The Tribunal added here that therefore, if the warning had been issued, it would have been extant as at the time the Claimant was dismissed. The Claimant was warned in the letter that any further misconduct could result in dismissal. The Claimant was advised of his right of appeal. The Claimant contended he never received this document.

13.8. Those factors that favoured the Respondent can be summarised as follows:-

- There were notes of the disciplinary hearing on 15 October 2018 that were not disputed by the Claimant. A disciplinary hearing had clearly taken place
- There was an acceptance of some fault by the Claimant at the disciplinary hearing, although he offered mitigation.
- The matters were of some seriousness. A large sign falling down, as it was incorrectly fixed, could have caused injury. It was the sort of case where an employer might well have imposed a disciplinary penalty.
- The final written warning purported to have been sent to the correct address of the Claimant. The Claimant had been subject to previous, albeit spent, disciplinary proceedings where the outcome had also been sent to the Claimant in writing by ordinary post. He had received them.
- The invitation letter dated 29 March 2019 (151), inviting the Claimant to a disciplinary hearing that lead to his termination, contained the words *"Please be aware that if the explanations for the above allegations are unsatisfactory it may be necessary to issue you with a disciplinary sanction and, as you already have a current final written warning on file, the outcome of this hearing might be your dismissal".* It is appropriate that the Tribunal further noted that the Claimant accepted he received the letter of 29 March 2019 , but contended he did not read the final paragraph. He did, however, read the allegations and also viewed the supporting documentation
- The Claimant did not raise the issue of not receiving the final written warning at the disciplinary hearing which led to his dismissal.
- The Claimant had not followed up what the outcome had been of the disciplinary hearing on 15 October 2018. Even if the Claimant considered his explanations have been accepted, an employee could reasonably expect to have received a letter to confirm that no further action was being taken.

13.9. The factors that favoured the Claimant were:-

- Firstly, that the Tribunal found the Claimant, generally, to be a more credible witness than the Respondents
- Secondly, in the Claimant's letter of appeal, in which he referred to the letter of dismissal, he stated *"Please provide evidence of any written warning as I am not aware of the above".*

13.10. Having weighed up those factors that told both in favour of the Claimant and in favour of the Respondent the Tribunal concluded on the balance of probabilities the Claimant had been issued with a final written warning and was aware of the same prior to the commencement of the disciplinary proceedings that led to his dismissal. The Tribunal placed particular weight on the letter of 29 March 2019 and simply did not accept the Claimant would not have seen the reference to a final written warning, and if he queried it, would not have raised the matter at the subsequent disciplinary hearing. Further the Tribunal noted that the Claimant was represented by a work colleague. The Tribunal is entitled to infer the work colleague would have read the letter of 29 March 2019 as it contained details of the allegations against the Claimant and even if the Claimant had not noticed a final written warning the colleague would, have raised the issue as to why it was mentioned.

14. Injury at work.

14.1. It was the Claimant's case that his dismissal was effectively engineered because he had instructed solicitors to pursue the Respondents for an injury he received at work.

14.2. The Tribunal made the following findings on this topic.

14.2.1. The Claimant sustained an injury at work on 15 February 2019. He was off work for approximately two weeks. His solicitors wrote to the Respondent's on 15 March 2019 intimating they were acting on his behalf and were bringing a personal injury claim (269).

14.2.2. The Tribunal does not find that as a result of intimating a personal injury claim the Claimant's employment was terminated.

14.3. The reason the Tribunal reached this conclusion was that the letter from the Claimant's solicitors, dated 15 March 2019, was date stamped as received by the Respondents on 19 March 2019. However, Mr Stephenson had already instituted an investigation into the Claimant's alleged misconduct before receipt of the letter, as is evidenced by an internal email of 17 March 2019 (224 to 226).

15. Driving convictions.

15.1. The Claimant has never been convicted of speeding but was offered the opportunity, as a result of his driving in work time in October 2018, as an alternative to criminal proceedings, of attending a speed awareness course. He was travelling at 70mph on the M1 in an area limited to 60 mph.

15.2. Mr Leighton, an employee of the Respondent, had been disqualified from driving. He was travelling to work when he was speeding and involved in an accident. As a result of enquiries at the scene he was found to be driving with excess alcohol. Had he not been stopped he would have been operating machinery at work. He was not subject to any form disciplinary penalty by the Respondent.

15.3. Mr Spencer lost his licence under the totting up procedure. He was not subject to disciplinary proceedings but left the Respondents employment and was subsequently re-engaged when he recovered his licence.

15.4. Mr Johnson was convicted of speeding, 70mph in a 60mph limit in August or September 2018. He was not subject to any form of disciplinary proceedings.

15.5. Mr McNaughton, a site surveyor employed by the Respondent, was convicted of speeding in approximately May/June 2018. He was not subject to any form of disciplinary proceedings.

16. The Disciplinary proceedings.

16.1. The Claimant was summoned to a disciplinary hearing, ultimately arranged for 01 April 2019, in a letter dated 29 March 2019 (151). Notice may seem short, but in fairness to the Respondent a previous hearing had been adjourned due to the Claimant's ill health so it is appropriate the Tribunal records that it did find the Claimant had adequate time to prepare for the hearing.

16.2. The allegations the Claimant was required to answer were specified as follows: –

- *"– Alleged breach of company procedures in relation to poor workmanship, specifically it is alleged this occurred Clipper Sheffield w/c 25 to 2019 (installation of RIDDOR sign), TK Maxx-Mansfield-Mansfield/Guiseley (incorrect installation of vinyl lettering).*
- *Alleged breach of company procedures in relation to speeding in the works vehicle* [the Tribunal adds that it became clear this related to 01 February and 01 March 2019]
- *Alleged breach of company procedures in relation to falsifying a timesheet."*

Some supporting information accompanied the letter.

16.3. The Tribunal observed that in relation to the first allegation it effectively broke down into two elements, the first being Clipper Sheffield and the second TK Maxx. That is how it was dealt with by the Respondent in the internal proceedings and that is how the Tribunal will address matters.

16.4. At the disciplinary hearing on 01 April 2019 those proceedings were documented and there is no substantial challenge to the accuracy of the notes produced (170 to173).

16.5. The hearing was chaired by Mr Stephenson and the Claimant was accompanied by Mr Goucher, a workmate who had recently worked with the Claimant.

16.6. The Claimant was dismissed by letter dated 05 April 2019 (174 to 175). The Tribunal will return to that letter in due course.

16.7. The Claimant was given a right of appeal in the letter of dismissal.

17. Health.

17.1. Before examining, in detail, the disciplinary hearing and the reasoning for the outcome, the Tribunal should deal the Claimant's contention that

he failed to give a proper account of his actions or omissions at the disciplinary hearing because he was seriously ill.

17.2. The Tribunal was prepared to accept that on the morning of the disciplinary hearing, before it commenced, he told Mr Leighton, who acted as a notetaker, that he thought he had very bad indigestion.

17.3. The Tribunal accepted Mr Leighton did not tell the determining officer, Mr Stephenson of this conversation.

17.4. Mr Stephenson did ask a number of general questions as to the Claimant's health at the start of the disciplinary hearing, particularly as to when the Claimant would be fit for full duties (as he was on restricted duties due to a back injury). The Claimant made no reference to the fact that he was anyway hampered in the presentation of his case due to serious ill-health.

17.5. It is also significant that the Claimant's representative, Mr Goucher, did not suggest any stage that he considered the Claimant was unable to effectively participate due to ill health.

17.6. Whilst the Tribunal accepted that following the disciplinary hearing the Claimant was admitted to hospital with a suspected heart attack, the Tribunal is satisfied that Mr Stephenson could not know or be reasonably expected to know from the Claimant's presentation at the disciplinary hearing that he was allegedly adversely affected in the presentation of his case. Careful study of the notes of the hearing (170 to 173) showed the Claimant engaged fully in the proceedings. Further the Claimant could not identify what he would have said, but did not say due to his ill health.

17.7. It follows the Tribunal did not accept that because of the Claimant's ill health he was deprived of a fair hearing.

18. <u>The disciplinary allegations.</u>

18.1. <u>Clipper.</u>

18.1.1. The Claimant's evidence was clear that he did not notice any damage to the sign and that was supported by the fact the customer signed off the job as satisfactory.

18.1.2. It is equally plausible, as the Claimant contended, that if there was any damage to the bottom of the sign it was not caused by dragging as alleged, given the small size of the sign. The Claimant pointed out that given the sign was small and of little weight, and he had a colleague with him, there was no reason why there be any need to drag the sign., Any apparent damage could equally have been due to poor storage by the factory on the van. The Claimant specifically raise this matter at the disciplinary but it was not investigated.

18.1.3. Further whilst the Respondent contended there may have been some minor bubbling to the sign, the Claimant's case was it was more consistent with a manufacturing defect than the erection of the sign. Again, that was plausible and not a matter that was investigated or challenged by the Respondent

18.2. TK Maxx

18.2.1. The Claimant contended that the sign he was required to fit for TK Maxx measuring approximately 6" x 4" was positioned in accordance with the instructions of the manageress of TK Maxx.

18.2.2. He believed he had to abide by her instructions, although they were not in accordance with his job sheet, particularly as this was a company that the Respondent was seeking to enhance its relationship with. Mr Stephenson accepted the Claimant had been acting in accordance with the instructions given by the store manager as is evident from his own statement (paragraph 8)

18.2.3. Allied to the above issue the Claimant accepted he left a piece of metal channelling known as a "Unistrut" at a previous job because he did not appreciate it was required for the installation at TK Maxx. He explained that the materials were not properly labelled. It was not a matter that was even discussed with the Claimant at the disciplinary hearing and therefore cannot have been used, fairly, as a reason to justify the dismissal of the Claimant.

19. Speeding.

19.1. The Claimant contended that the finding that he had been speeding was unfair because on the two occasions the Respondents had produced evidence which showed his vehicle was being driven in excess of the speed limit, it was being driven by his work colleague, Mr Goucher.

19.2. It is true that Mr Goucher, after he left the Respondents employment, and after the Claimant's dismissal, submitted a letter stating that he was indeed the driver at one of the times. The Tribunal noted he did not attend to give oral evidence.

19.3. Given that at the disciplinary hearing the Claimant never disputed he was the driver at the time of the alleged speeding, and accepted the records showed the company vehicle issued to him was driven in excess of the speed limit, the Tribunal concluded that Mr Stephenson was entitled to find that the Claimant was the responsible person.

19.4. It stretches credibility that Mr Goucher, a person the Claimant described as having a very good memory, and as the representative of the Claimant at his disciplinary hearing, never raised the fact that he was the alleged driver. At the time of the disciplinary hearing Mr Goucher had not resigned his employment with the Respondent and had no alternative job offer. The letter from Mr Goucher now says he was the driver was written after he left the Respondents employment and thus could not be subject to any form of disciplinary proceedings. In any event Mr Goucher only stated he was driving on 30 January 2019 and not on the two occasions when the Claimant was accused of speeding, on 01 February and 01 March 2019

19.5. The Tribunal concluded that given the way the Claimant's case was presented Mr Stephenson was entitled to assume, as it was not

challenged, that the Claimant was the driver when the company vehicle issued to him was driven above the statutory speed limit.

20. Falsified time sheet.

20.1. The Claimant was dismissed, in part for *"falsifying"* a time sheet.

20.2. The timesheet, the subject of the allegation (155) was found in the bundle and the key issue relates to an entry on Wednesday, 30 January 2019. The procedure with timesheets was the Claimant inserted his start and finish times and then a member of payroll calculated the hours payable.

20.3. The Claimant indicated a start time of 7.30 am and finish time of 19.45. What is undisputed is during part of that time the Claimant was undertaking a speed awareness course.

20.4. The Claimant had discussed with Mr Johnson that he needed to undertake a speed awareness course prior to working on the 30 January 2019.

20.5. Mr Johnson drew up a fixing and survey schedule (154, in effect the Claimant's job sheet for the week) and clearly noted that on 29 and 30 January 2018 the Claimant was working at Clipper in Stockton-On-Tees also noted for 30 January *"Martin – speed awareness course".*

20.6. The Claimant was working with Mr Goucher and it was agreed with Mr Johnson that the Claimant would finish at Clipper, drop Mr Goucher at home and then go and do his speed awareness course.

20.7. As it transpired, and this was accepted by Mr Johnson, the Clipper job reasonably took longer than expected. He therefore agreed with the Claimant that Mr Goucher would remain with him whilst he went on his speed awareness course and would be paid.

21. The Appeal.

21.1. The Claimant was hospitalised on 02 April 2019 with a suspected heart attack.

21.2. However, his sister-in-law, Mrs Sharon Brannen lodged an email, from her own email account, as detailed grounds of appeal dated 16 April 2019 (176 to 178)

21.3. The email was signed by Mr Burton in the sense it had his name printed on the bottom and contained a sentence which read *"Please note Mrs Sharon Brannen has my full permission to communicate with Spencer Signs on my behalf due to my ongoing illness".*

22. **Findings as to likely continuity of employment**

Given the Respondent has raised the **Polkey** issue, it is necessary for the Tribunal to make some findings of fact on this point, which are set out below.

22.1. The Claimant had suffered a back injury but was on light duties and had returned to work. Medical evidence was being sought by the Respondent as to prognosis for the future. No such evidence was before the Tribunal to suggest the Claimant would not have been able to return to work in a reasonable time to comply with the provisions of his job description.

22.2. The Claimant has suffered the afore mentioned suspected heart attack on 02 April 2019 and was discharged from hospital on 05 April 2019. The Claimant's evidence was that he was advised he could return to light duties and then, subject to monitoring, return to his full-time duties.

22.3. There was no evidence before the Tribunal that had the Claimant not been unfairly dismissed, he would not have retained his employment and continued working for the Respondent in the foreseeable future. The Respondent appears to have a viable and long-standing business. Whilst the Claimant did not find working for the new management very satisfactory, they had been in post for two years and the Claimant was not actively looking for alternative employment.

23. **Submissions**

23.1. Both parties made oral submissions as to the evidence. The Tribunal means no disrespect to either Mr Burton or Mr Muirhead by not repeating those submissions but have taken that into account when reaching its judgement.

23.2. The Tribunal was referred to one particular authority by Mr Muirhead on the issue of consistency namely **United Distillers Ltd versus Conlin 1992 IRLR 252.** In that case it was not surprising that the Employment Appeal Tribunal found that a second deliberate act of fraud, even of a relatively small value, following a final written warning for the same issue, justified a finding of a fair dismissal. There was no inconsistency because other coopers who engaged in similar acts were given final written warnings for the first offence, exactly what happened to Mr Conlin. It was the second deliberate act of fraud following a final written warning that justified a fair dismissal. At its highest the EAT held that consistency was important in disciplinary actions but also it was important that some degree of flexibility was also permitted. The Tribunal does not disagree with that principle.

24. **Discussion and Conclusions.**

24.1. The Tribunal has concluded that the Claimant was unfairly dismissed.

24.2. The Tribunal has reached this conclusion for the multiple reasons set out below.

24.3. The Tribunal found Mr Stephenson to be a witness who was not prepared to consider the evidence that pointed in favour of the Claimant. He was not impartial. He ignored evidence that potentially favoured the Claimant and had a predetermined view.

24.4. This is a serious finding and it is only right that appropriate the Tribunal justifies that conclusion. It does so for the following reasons.

24.5. Mr Stephenson stated it was not part of the Claimant's case that he ever contended in respect of the Claimant's answer to the allegations regarding the Clipper sign that if there was damage it was caused by the fact that the sign was not securely strapped to the delivery van. However, a careful examination of the disciplinary notes shows this was raised, albeit on the Claimant's behalf by his colleague Mr Goucher (172). Even when faced with this evidence from the Respondent's own notes, Mr Stephenson found it difficult to resile from his previous evidence.

24.6. Mr Stephenson stated in his evidence that the Claimant had previously been subjected to disciplinary proceedings for the theft of scrap metal from the Respondent. That was a gross exaggeration. The documentation disclosed, at its highest, that the Claimant had been questioned as regards the disposal of scrap metal but the Respondent could not find evidence to support any allegation that he stolen metal from the Respondents (113 and 116).He was never subjected to a disciplinary penalty.

24.7. It was put to Mr Stephenson that he spoke both to the Claimant's wife and his sister-in-law Mrs Sharon Brannan when he was informed the Claimant was in hospital and Mrs Brannan was supporting the Claimant in his appeal. Mr Stephenson denied any such contact. . The phone records however (262) made to Mr Stephenson's own mobile phone showed that there were conversations on both 04 and 08 of April. The Tribunal does not accept that Mr Stephenson would have forgotten such calls.

24.8. The Tribunal noted that Mr Stephenson had an influence on the investigation even though he was to be the determining officer. Before the disciplinary hearing had even took place, he wrote an email dated 17 March 2019 to the investigating officer and the proposed appeal officer which showed an element of pre-judgement. He said, *"the aim of the investigation is to establish why the expected standards continue to not be met despite previous meetings"* (225). In his mind he'd already concluded that standards had not been adhered to and the Claimant was at fault. Further in the same email he stated with reference to the Claimant *"incorrect completion of timesheets on multiple occasions"*. Only one allegation was ever put to the Claimant. It may well have been that Mr Stephenson believed there were issues with the Claimant's timesheet completion but as these were never put, the Claimant was deprived of the chance to answer such concerns. What it did display, to the Tribunal, is that in Mr Stephenson's mind he regarded the timesheet issue brought to the disciplinary hearing as merely being the tip of the iceberg. The Tribunal concluded that this influenced him in his decision-making and was unfair on the Claimant.

24.9. Whether deliberate or not Mr Stephenson was seeking to influence the investigation and any subsequent appeal in the aforementioned e-mail.

24.10. The Tribunal found Mr Stephenson's evidence as regards the recruitment of a Mr Hitchin as a fitting supervisor (the job the Claimant did) with the Respondent to be wholly unconvincing. It was common ground that Mr Hitchin took over the duties of the Claimant from 08 April 2019, that is the following Monday following the Claimant's dismissal on the previous Friday. Mr Stephenson stated he was taken on because they were seeking to expand. However, in evidence it became clear that one fitter had left in early 2019 and with the dismissal of the Claimant they were two fitters short. Only Mr Hitchin had been recruited and that cannot have been due to expansion. The Tribunal concluded that Mr Hitchin had been recruited because the Respondents had decided, before the dismissal hearing, that the hearing was a foregone conclusion

and the Claimant would be dismissed. The recruitment process must have started prior to the Claimant's disciplinary hearing.

24.11. Whilst the Tribunal does not say that the dismissal process and evidence was invented, such that the Claimant would be replaced by Mr Hitchin, it does find there was credible evidence to support the conclusion that whatever the Claimant said he was going to be dismissed.

24.12. The Tribunal is not satisfied that the investigation was as thorough as required given the fact the Claimant's employment was at risk.

24.13. The Tribunal reach this conclusion for two reasons.

24.13.1. The Tribunal is not satisfied that the Respondent carried out a reasonable investigation into the apparent damage of the bottom of the Clipper sign for the reasons set out in its findings of fact.

24.13.2. The Claimant contended throughout the proceedings that he fixed the signage at TK Maxx in accordance with the client's instructions on site. That was never challenged by the Respondent. The Respondent accepted it took no steps to investigate further. A reasonable employer would have done.

24.14. Mr Stephenson did not carry out a reasonable investigation to discover whether there was any form of complaint from TK Maxx as alleged. A reasonable employer would have done so. At best he believed, from what he was told by a witness, who was not called to give evidence, that there had been a telephone call from TK Maxx complaining, although it was undocumented. The Tribunal was not satisfied that a medium-size company such as the Respondent would not have a procedure for documenting customer complaints. The Tribunal simply did not accept that there was any complaint from TK Maxx, evidenced by the fact the Respondents accepted that it still had done nothing to remedy the alleged complaint. This was a national client and the Tribunal simply does not accept, if there really was a serious issue, that it would not have been addressed promptly.

24.15. In the circumstances undue due weight was placed on this allegation at the disciplinary hearing.

24.16. The Tribunal regarded it as unfair that the Claimant was deprived of a right of appeal against his dismissal.

24.17. The appeal was rejected by Mr Stephenson for two reasons and his reasons were not consistent.

24.17.1. Firstly, he alleged the appeal was lodged by a person other than the Claimant, and although bearing his name and with his express request that it be treated as an appeal, could not be regarded as an appeal from the Claimant.

24.17.2. Secondly, he said that the appeal would fail in any event.

24.18. Mr Stephenson was wrong on the former as it was clear the appeal was written on his behalf, particularly given the detail contained therein. If Mr Stephenson truly had concerns, he could have sought to contact the Claimant either by letter or telephone. He did not do so. He did not

because there was to be no appeal as he had decided as the managing director that the Claimant was to be dismissed.

24.19. On the latter it was not for Mr Stephenson to prejudge the outcome of an appeal.

24.20. The ACAS code requires that an appeal is conducted by a more senior member of staff where possible. Mr Stephenson was the most senior member of staff as the Respondents managing director who conducted the disciplinary hearing leading to the Claimant's dismissal. The officer to whom the Claimant was required to appeal to, Mr Spencer, was not more senior than Mr Stephenson. Whilst this was not a large employer the situation could have been remedied by the disciplinary hearing being dealt with by Mr Spencer and the appeal by Mr Stephenson. The contention that Mr Spencer could not deal with the disciplinary hearing because he imposed a final written warning is unsound. Whilst Mr Spencer, in dealing with the disciplinary hearing would know of the final written warning, Mr Stephenson also knew of the final written warning as he took it into account in reaching his decision to dismiss.

24.21. No reasonable employer would have regarded the issue of the timesheet as deliberate falsification and thus an act of gross misconduct as classified by Mr Stephenson. On the evidence the Claimant assumed he would also be paid as the speeding arose in work time. Whether that was a reasonable assumption or not is open to some conjecture but what is clear is the Claimant was transparent as to his intentions. At no stage did he seek to hide the speed awareness course and cleared the same with management. There was no falsification. At best there was carelessness. The Claimant could and it is a justifiable criticism, have sought advice before completing his timesheet to check that he was entitled to payment but it cannot be said the Claimant was falsifying his timesheet when he knew Mr Goucher was being paid, even though he was not working, and simply waiting for the Claimant to complete the course. Dismissal based on this being an act of gross misconduct was out with the band of responses of a reasonable employer.

24.22. The Tribunal is satisfied that Mr Stephenson carried out a reasonable investigation into the allegation of speeding and had evidence to support his concern that the Claimant had indeed been speeding. He made it clear both in his oral evidence and his statement it was this matter that principally persuaded him to dismiss for gross misconduct (paragraph 14 of his statement). However, the penalty was out, with the band of responses of a reasonable employer by classifying it as gross misconduct. Mr Stephenson in reaching his decision regarding the Claimant as having a "history" of speeding. That was not the case expressly put to the Claimant. At best the Claimant had attended a speed awareness course and there was evidence on two occasions subsequent to that course that the van in his custody had exceeded the speed limit. The speed awareness course arose from the fact the Claimant was recorded as travelling at 70 on the M1 when that section of the motorway was restricted to 60mph. The two incidents on 01 February and 01 March principally involved speeding on motorways with a highest speed been

87mph but the majority in the 70s. There appears to be one occasion when the Claimant did 76mph on the A617.

24.23. However, the Tribunal is not persuaded this was an act that a reasonable employer would reasonably have regarded as gross misconduct although it would be conduct such that in conjunction with a final written warning would justify dismissal with notice.

24.24. The Tribunal has observed that there was nothing specific in the documentation that indicated that speeding would be treated as gross misconduct.

24.25. When the Claimant explained to the Respondents he had been speeding, as he had to attend a speed awareness course notice reaction whatsoever was taken even though he was already subject to a final written warning. This again points to speeding not being regarded by the Respondents as an act of likely gross misconduct.

24.26. There is then the situation of driving offences and other employees.

24.27. The Tribunal has reminded itself of the dangers of looking at the situation with other employees if the circumstances are not truly comparable. While it could be said that the Claimant had been speeding following a speed awareness course he had never been convicted of speeding, unlike other members of staff. The disparity between the way other members of staff were treated, no action whatsoever, and the way the Claimant was treated, the offence being regarded as a stand-alone offence of gross misconduct was such that it was out with the band of responses of a reasonable employer. It might, in the Tribunal's judgment, been different if other members of staff received, for example final written warnings and the Claimant had been dismissed but this is not such a case. The disparity between the way the Claimant and other employees was treated was so wide, particularly given in the case of Mr Leighton, (which could be regarded as far more serious by many employers) as to render this element of the dismissal unfair.

24.28. The Tribunal has then stood back and looked at its above findings it has concluded that there are errors by the Respondent both of procedure and substance such that the Claimant's dismissal was unfair.

25. **Wrongful dismissal.**

25.1. The Respondent has established that as a fact that the Claimant drove a company vehicle in excess of the statutory speed limit.

25.2. The Respondent has not established that this,, in isolation was an act of gross misconduct.

25.3. Nowhere in the documentation is speeding specifically regarded as an act of gross misconduct. It is not an offence which notoriously employers and employees would regard as an act of gross misconduct. The Tribunal noted that speeding, and even more serious drink-driving offences were not treated by the Respondent as gross misconduct.

25.4. The Claimant had not committed a fundamental breach of contract by way of speeding.

25.5. The Respondent has not established, as it must for gross misconduct, that the Claimant falsified his timesheet as alleged. The Tribunal does accept that deliberate falsification could amount to gross misconduct but that was not established on the evidence before the Tribunal.

25.6. Thus, the Tribunal concluded the Respondent was not entitled in law to dismiss the Claimant for gross misconduct and he is therefore entitled to 9 weeks' pay in lieu of notice as damages for breach of contract.

26. **Section 207A**

26.1. The ACAS statutory code makes it clear that an employee is entitled to a right of appeal when dismissed for misconduct (paragraph 4, and 26 to 29 of the code).

26.2. There is no suggestion that the Claimant did not appeal within the time specified under the Respondent's disciplinary policy.

26.3. The Tribunal is not satisfied, for the reasons already outlined, that Mr Stephenson was justified in refusing to allow the Claimant's appeal to proceed to a hearing.

26.4. The Tribunal therefore found that the Respondent has failed to comply with the code and that failure was unreasonable.

26.5. In the circumstances the Tribunal determined it would be just and equitable to make an uplift in favour of the Claimant.

26.6. The maximum uplift is 25% but that must be reserved for the most serious cases where, for example, there has been no compliance whatsoever with the ACAS code. Here there was part compliance, certainly in relation to the disciplinary proceedings, absent the appeal. In the circumstances the Tribunal has determined that a proportionate uplift would be 10%.

27. **Polkey**

27.1. Whilst addressing adjustments the Tribunal has gone on to consider the **Polkey** question.

27.2. It is for the Respondent to place evidence before the Tribunal once the Claimant has indicated he would have continued in employment that there should be a **Polkey** deduction.

27.3. The Tribunal has considered whether the Claimant's health might have resulted in subsequent termination on the grounds of incapability.

27.4. Whilst the Tribunal reminded itself it may sometimes have to make judgments on incomplete evidence there is no evidence here as to how the Claimant's health would have impacted upon his future employability and the Tribunal cannot embark on a sea of speculation.

27.5. The Tribunal has concluded there should be no **Polkey** deduction in respect of the possibility the Claimant's employment would have terminated on the basis of ill-health.

27.6. Turning to whether the Claimant may have lost his employment even if an appeal had taken place the Tribunal reminded itself that it must look

at what would have happened had a proper procedure been applied and not what this Respondent would have done.

27.7. Had a proper procedure been applied, given the admissions as to speeding, and the fact the Claimant was on a final written warning there is in the Tribunal's judgement a certainty the Claimant would have been dismissed for misconduct with notice. The Claimant had been on a speeding awareness course and had speeded thereafter. Given he was on a final written warning it only requires one further disciplinary matter then to trigger the prospect of dismissal with notice. .The Tribunal has concluded that in this particular case there should be a 100% reduction in relation to the Claimant's compensatory award.

27.8. The Tribunal considered whether the Claimant should be given an award to cover the period between dismissal and the holding of the appeal . The Tribunal rejected that notion . It would be unfair on the Respondent given the Tribunal has already found that the Claimant was wrongfully dismissed and therefore entitled to money in receipt of notice.

28. **Contribution**

28.1. Given the Tribunal has already determined that there should be a 100% reduction in relation the compensatory award under the principles of **Polkey** then it is not necessary for the Tribunal to address the issue of contribution in that regard.

28.2. However, contribution covers culpable or blameworthy conduct in relation to the basic and compensatory award.

28.3. The question for the Tribunal therefore is whether there should be any deduction for contribution in relation to the basic award?

28.4. The Tribunal carefully noted that the test differs in relation contribution between the basic and compensatory award.

28.5. The Tribunal must determine whether it just and equitable to reduce the basic award given it has found there was culpable conduct in relation to the speeding, which taken with the Claimant's final written warning would have resulted in his dismissal with notice.

28.6. The Tribunal has concluded that a proportionate and just and equitable response would be a 50% reduction.

29. **Conclusion.**

29.1. The Claimant was unfairly dismissed.

29.2. He is entitled to a basic award.

29.3. He is entitled to an increase in the basic award of 10% under section 207A of TULCRA.

29.4. However, there should also be a deduction from the basic award of 50% for contributory conduct.

29.5. The Claimant is not entitled to a compensatory award, applying the principles set out in **Polkey**.

29.6. The Claimant is entitled nine weeks money in lieu of notice.

29.7. The Claimant is entitled to an increase of 10% to his money in lieu of notice under section 207A of TULCRA.

29.8. If remedy cannot be agreed within 21 days the parties are to write to the Tribunal with agreed directions and non-available dates for ½ day hearing in the months of May, June and July 2020

Employment Judge T R Smith

25 February 2020