



EMPLOYMENT TRIBUNALS

Claimant: Mr B Sharratt

Respondent: Royal Mail Group Limited

Heard at: Liverpool

On: 7,8,9 July 2021

Before: Employment Judge Aspinall

Representation

Claimant: in person

Respondent: Mr Hartley

RESERVED JUDGMENT

Background

1. By a claim form dated 18 May 2020 and having achieved an early conciliation certificate dated 1 May 2020, the claimant brought a claim of constructive unfair dismissal. He had been employed as a postman by the respondent from 2 October 2000 until he resigned on 7 April 2020 giving 4 weeks' notice. The respondent needed only one week's notice and the parties agreed his employment would end on 11 April 2020.

2. On 4 March 2020 the claimant had an incident in the delivery van. He reported the incident and was removed from driving and all delivery duties and assigned indoor duties whilst the respondent investigated matter. The claimant says the way the respondent treated him after that accident was humiliating and demeaning to him and that the way in which it used the disciplinary process against him amounted to a fundamental breach of his contract entitling him to resign.

3. At the request of the respondent who sought clarification of the claimant's complaints the matter came to a case management hearing before employment Judge Buchanan on 22 April 2021 when a full list of issues was agreed for use at the final hearing and is reproduced below.

The List of Issues

4. The issues to be determined by the tribunal are as follows:

Dismissal

- 1.1 Can the claimant prove that there was a dismissal?
 - 1.1.1 Did the respondent do the following things:
 - 1.1.1.1 Did the respondent remove the claimant from all driving and all delivery duties after an accident with a post van on 4 March 2020?
 - 1.1.1.2 Did the respondent require the claimant to work in the post depot doing tidying duties and other mundane tasks from 4 March 2020 until the claimant resigned 7 April 2020? Did the respondent fail to offer the claimant any support in the period between 4 March 2020 and his resignation day causing the claimant to feel worried and stressed and to consider that dignity was adversely affected? Were those changes to the claimant's duties unreasonable and demeaning?
 - 1.1.1.3 Was the claimant subjected to banter and taunts from colleagues by reason of being required to work in the depot which the respondent did not protect him from?
 - 1.1.1.4 Was the work to which the claimant was put after 4 March 2020 demeaning for the claimant particularly as it was in the sight of all his former colleagues and in view of the fact that the claimant had worked for the respondent for upwards of 19 years and was a senior, well-known and popular member of the postal team?
 - 1.1.1.5 Did the officer (Mr Bull) who dealt with a fact-finding meeting with the claimant on 5 March 2020 take an instant dislike to the claimant and victimise and harass the claimant in that meeting? Did that same officer approach the claimant for a further interview some days later and treat the claimant in an intimidating and brusque manner? Did the respondent through Mr Bull fail to listen to the mitigation advanced by the claimant?
 - 1.1.1.6 Did the respondent unreasonably prefer allegations of gross misconduct against the claimant given that the accident which occurred on 4 March 2020 involved a collision with a boundary wall of a customer which was not

damaged and minor damage to the postal van which was repaired so that it was back on the road the next day?

- 1.1.1.7 Did the respondent unreasonably prefer allegations of gross misconduct against the respondent in light of the fact that he immediately reported and accepted responsibility for the accident?
- 1.1.1.8 Was the treatment of the claimant in being taken through the disciplinary procedure for an allegation of gross misconduct different to other employees of the respondent who had been involved in more serious accidents yet were not subjected to disciplinary action? In particular did the respondent not take disciplinary action against SW in respect of an accident some 3 or 4 years before the claimant's accident when a vehicle rolled back into a bus stop? Did the respondent fail to take action against a driver SQ/ CR who had an accident in a van some months before the claimant's accident but who did not report it and when the matter was investigated took no action against that driver in contrast to the treatment of the claimant?
- 1.1.1.9 Was the claimant treated differently to an employee PR who had a series of accidents in postal vans and had no action taken against him?
- 1.1.1.10 Did the officer (Mr Tysoe) taking the claimant's disciplinary hearing on 3 April 2020 say in response to a question from the claimant as to whether he was being treated differently say words to the effect that two/three wrongs do not make a right?
- 1.1.1.11 Did the respondent fail to allow the claimant to work the notice he had given at the time of his resignation and require him to leave on a date earlier than that he had wished to leave employment?
- 1.1.1.12 Did the respondent pursue allegations against the claimant in respect of the accident on 4 March 2020 which conflicted with the terms of the road traffic report prepared shortly after the accident? Was the vehicle being driven by the claimant defective in that the handbrake was soft

and required to be very firmly engaged before being effective?

1.1.1.13 Did the respondent fail to maintain the confidentiality of the claimant in that the claimant's colleagues knew he was facing disciplinary action? Did the respondent fail to suspend the claimant from duties even though he was facing allegations of gross misconduct?

1.1.1.14 Was the claimant told that he would not lose his pension and would get a good reference if he resigned?

1.1.2 Did that breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:

1.1.2.1 whether the respondent had reasonable and proper cause for those actions or omissions, and if not

1.1.2.2 whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

1.1.3 Did that breach the implied term of conducting disciplinary proceedings reasonably and in a timely way?

1.1.4 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

1.1.5 Was the fundamental breach of contract a reason for the claimant's resignation?

1.1.6 Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Reason

1.2 Has the respondent shown the reason or principal reason for the fundamental breach of contract?

- 1.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996? The respondent will say that any dismissal was related to the conduct of the claimant.

Fairness

- 1.4 If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

2. Remedy for unfair dismissal

- 2.1 Does the claimant wish to be reinstated to their previous employment?
- 2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
- 2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 2.5 What should the terms of the re-engagement order be?
- 2.6 What basic award is payable to the claimant, if any?
- 2.7 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
- 2.8 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 2.8.1 What financial losses has the dismissal caused the claimant?
 - 2.8.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 2.8.3 If not, for what period of loss should the claimant be compensated?
 - 2.8.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

- 2.8.5 If so, should the claimant's compensation be reduced? By how much?
- 2.8.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 2.8.7 Did the respondent or the claimant unreasonably fail to comply with it by?
- 2.8.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 2.8.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
- 2.8.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 2.8.11 Does the statutory cap of fifty-two weeks' pay or £88.519 apply?

The Hearing

Documents

5. There was a bundle of 166 pages. The respondent wished to add pages 160 A-E which were relevant to remedy. We agreed that they would be added should remedy become appropriate.

6. I had witness statements from the claimant and from the respondent's three witnesses: Mr Bull, Mr Tysoe and Mr Stone.

7. Mr Stone did not attend the hearing. The respondent said that some of Mr Stone's evidence at paragraphs 5 – 10 of his witness statement could be sworn to by Mr Bull who was also present at those events. The claimant could then cross examine Mr Bull as to those matters. It was agreed that it was a matter for me as to the weight to attach to Mr Stone's evidence on any factual dispute.

8. In the event I placed little if any weight on Mr Stone's statement. The only regard in which it was useful to me was to corroborate the claimant's assertion that he chased up an outcome of the investigation and protested about the duties he was being asked to perform and the taunts he was experiencing from colleagues on an almost daily basis between 5 and 16 March.

Oral Evidence

9. I heard from the claimant and found him to be a wholly reliable witness. He made frank admissions from the date of the incident (4 March 2020) about not having put the van in gear and being uncertain as to whether he had turned the engine off or not. He did not try to detract from what he had done or to deny that it was a potential gross misconduct offence.

10. I heard evidence from Mr Bull who gave his evidence in a straightforward and helpful way but limited his responses to the content of his report and stressed that he was not a decision maker in any disciplinary process.

11. I heard evidence from Mr Tysoe. He gave his evidence in a guarded way on key points and made limited admissions as to the content of the conversation on 3 April 2020 “two wrongs don’t make a right” and as to the conversation on 6 April 2020 when he conceded that there had been discussion about the Diary of Events document and the different impact on pension of resignation and dismissal. Mr Tysoe avoided making further admissions about the content of the 6 April conversation I did not find it plausible given the admissions he had made, and in the light of the claimant’s subsequent resignation, that he did not tell the claimant in that conversation that he was preparing the notice of dismissal. Elsewhere he was frank about admitting that, for example, he may not have sent Mr Bull’s report to the claimant before the disciplinary meeting and about the mistakes in the allegation letter.

The Facts

12. The claimant started working for the respondent on 2 October 2000. He was a postman. He drove a delivery van and was fully trained and very experienced delivery driver. He had previously had 12 years’ service in the Royal Air Force. He took pride in his work and did it well.

13. There were two minor work-related driving incidents in the claimant’s recent past; one when a third party ran in to the back of his vehicle and another when the claimant swerved to avoid collision. Neither of them were his fault. There was nothing in the claimant’s work history of a disciplinary nature.

4 March the rollaway incident

14. The claimant drove a small van at work. On 4 March 2020 at 13.45 the claimant was delivering to a customer address. He was almost at the end of his duties for that day having only about 10 -15 more deliveries to make. He would be done in under an hour. He drove on to a customer’s gravel front drive, like a forecourt, and parked at an angle not quite parallel to the property so that the driver’s door was closest to the property, on his right. The property had a low stone boundary wall with the property next door which was behind and at an angle to the right of the van.

15. The claimant put the handbrake on. He did not put the vehicle into first gear. He got out of his driver door, left the door open and walked away from the van to carry out the delivery when he noticed the van rolling slowly away from him and closing the gap between the open driver’s door and the low wall. The claimant ran to the passenger door and leaned in and pulled up hard on the handbrake. The van had come to a rolling stop after travelling about 1.5 metres when the driver’s door met the wall.

16. The claimant tried to use his mobile phone to report the incident immediately but had no power in his phone. He tried to use his PDA (work device) but could not get it to work. He completed the delivery at that address,

assessed the van as safe to drive and decided that as he had only about 10-15 more deliveries to complete and would be back at the depot within the hour the right thing to do was to finish his deliveries and report the incident on return to the depot.

Reporting the incident

17. The claimant returned to his depot and told his line manager about the incident. Mr Stone said he would sort it out in the morning. The van was sent to the in-house garage for a check.

5 March 2020

18. Mr Stone and the claimant sat down at Mr Stone's computer and completed the Road Traffic Accident Form (known as an ERICA) with content provided by the claimant. Mr Stone had feedback from the garage who said the handbrake had a long way to travel / very high pull up. Mr Stone put this on the ERICA and sent it electronically. Sending that email triggered an alert email to the Safety Health and Environment department and others. Mr Stone told the claimant he would not be driving that day and would need to go out delivering in a shared van. The claimant moved to a workstation to prepare to go out in a shared van.

19. Mr Bull, a Safety Health and Environment Business Partner for the respondent happened to be on site at the claimant's depot when he received notification of the incident. He saw the alert and as it was a rollaway incident decided to investigate straight away. He spoke to Mr Stone and told him that the claimant should not go out that day as he would be needed for an investigation.

20. Mr Stone came back to the claimant to tell him there had been a change of plan and he would now work indoors until further notice. After a further 5 minutes or so Mr Stone introduced Mr Bull to the claimant as the person who would be doing the factfinding report following the incident the previous day.

Site visit

21. Mr Bull and Mr Stone took the claimant in Mr Stone's car to visit the site of the incident. Mr Bull asked the claimant to show Mr Stone where to park the car in the position that the van had been in. The claimant said this couldn't be done at the time as there was a car on the driveway which had not been there the day before. Mr Stone parked parallel to the property straddling the road. At the site the claimant told Mr Bull what had happened, and photographs were taken of the site. They returned to the depot where the claimant continued with depot based duties.

22. Mr Bull completed a Serious Incident Report Form (SIR) on 5 March 2020. The claimant did not see this report until after termination of his employment. In that report Mr Bull said:

- (1) That the claimant had not turned off the engine (the claimant had said he could not be sure);

- (2) That the claimant had alternately applied the handbrake / failed to fully apply the handbrake.

Indoor duties

23. On Friday 6 March 2020 the claimant was again required to carry out depot based duties. His role included indoor duties but they were usually done early in the morning before going out to deliver. The claimant, not being able to go out on deliveries, was required to do the indoor duties all day. This meant preparing deliveries including putting leaflets and flyers in post trays for other postmen and women. Indoor duties also included generally clearing and tidying the office and sweeping up.

Friday 6 March – 16 March

24. The claimant's presence at depot and removal from driving duties made his colleagues aware that something was wrong. His colleagues enquired about why he wasn't driving, commented that worse had been done by others who had not been suspended from driving and teased him that he would be getting his P45.

25. Mr Bull came to see the claimant briefly for a second time and asked him questions about his use of the van after the incident in carrying on with his deliveries on 4 March 2020.

26. Mr Bull completed his report by around 9 March and sent it as was usual to Mr Kempster, who was Mr Stone's manager and Mr Tysoe and other senior managers. It was not sent to the claimant.

27. The claimant asked Mr Stone on Friday 6 March and each day of the week commencing 9 March what was happening and when could he return to his driving duties but was told to await an outcome of Mr Bull's investigation.

28. Mr Stone said he could not let the claimant return to driving duties until they had the outcome. The claimant spoke to Mr Kempster the manager and to representatives from a union (though he was not a member) to try and get back on driving duties. He felt he was being punished by being on depot duties and although these were duties that were ancillary to being a delivery driver the claimant found it demeaning to be doing them all day.

29. The claimant was absent from work from 16 – 23 March 2020. He returned to work on 23 March 2020 and was again told by Mr Stone that he had to work in the depot.

23 March 2020 meeting

30. The claimant was asked to attend a meeting with Mr Stone and given a written invitation to the meeting as it started. The meeting took place at lunchtime when most postal workers were out delivering and the depot was very quiet so that there was no one available for the claimant to ask to accompany him to the meeting. He was happy to go ahead without a workplace colleague with him. The claimant repeated what had happened on 4 March 2020 but this time said

that he could not be sure whether the engine had been left running or not.

31. At the end of the meeting Mr Stone handed the claimant a letter that said:

“I consider the potential penalty to be outside my level of authority.”

32. It referred the claimant to a telephone number for a 24 hour support service.

Comparator cases

33. The claimant was shocked at the escalation of the case. He had thought that he would be soon back on driving duty. This belief came from Mr Stone's initial reaction which was to put him out on shared delivery and from his own knowledge of other road traffic incidents. He was aware that prior to his incident another postman CR had had an accident which he didn't report. This accident caused a gash to the side of a van. An investigation, casting suspicion on other drivers, was needed to uncover that CR had been the driver. The claimant knew that CR had not been removed from driving duties or disciplined in any way.

34. The claimant was aware that prior to his incident another postman PR had been in a number of incidents; a rollaway, a blown out engine, and hitting a street sign all in a period of 12 months and that there had been no removal of driving duties and no disciplinary action.

35. The claimant was aware that WK had had a rollaway about 3 years before when he had not applied handbrake and that this had resulted in serious damage to the van and a bus stop. The claimant believed WK had not been taken off driving duties and was not disciplined in any way.

Claimant chases response

36. On each of the days of the week commencing 23 March the claimant asked about a return to delivery duties and told Mr Stone he was finding things difficult.

37. On 30 March 2020 which was a Monday the claimant was handed a letter inviting him to a Formal Conduct Meeting that Friday 3 April 2020. The letter set out the allegation.

“Gross misconduct in that on 4 March you did not properly apply the handbrake to your Royal Mail vehicle which resulted in it rolling into the road and as a result collided with a 3rd party property causing damage to the Royal Mail van and to the customer's property.”

38. The letter informed the claimant of his right to be accompanied by a trade union representative or work colleague at that meeting. The letter enclosed a guide setting out what to expect at a formal conduct meeting. The letter said:

“You should be aware that I will take into consideration your conduct record and that these formal notifications are being considered as gross misconduct. If the conduct notification is upheld, one outcome could be your dismissal with or without notice.”

39. This letter also provided the telephone number for the support service Feeling First Class. It was sent in the name of Mr Tysoe.

40. The claimant was becoming increasingly concerned at not being on driving duties, at the teasing from his colleagues and at the escalation of the issue to a gross misconduct hearing. He rang the support service. They were not able to help. He spoke to Mr Stone and told him he was struggling to cope. Mr Stone gave him a number to ring but when he rang he found that service was for managers only and they could not help the claimant.

41. The claimant spoke to Mr Kempster and Mr Stone about his concerns. Although he was not a member of the union, he also spoke to union representative Mr Clayton who advised the claimant to resign before he was dismissed. Mr Clayton said that if he resigned he would get a good reference and not lose any pension whereas if he stayed and was fired he might not get a reference and there could be adverse consequences for pension.

3 April 2020 the Formal Conduct Meeting

42. On 3 April 2020 the claimant was interviewed by Mr Tysoe at 7 am. Mr Tysoe had read Mr Bull's report but the claimant had not seen it. Mr Tysoe said that the investigation interview had been passed to him because it was now a 2nd line level which meant that dismissal without notice was a possible outcome.

43. The claimant repeated his account of the 4 March 2020 incident at this meeting. The claimant repeated that the incident took place in a private driveway, that he applied the handbrake and that he thinks he turned the engine off. The claimant said he took about 5 steps then realised the van was moving. He ran to the passenger door opened it and applied the handbrake even harder. He repeated that the van had moved about 1.5 m and that the driver door was resting on the customer's wall.

44. Mr Tysoe asked questions about the location and the claimant confirmed that the van was on a driveway off the public highway and was on an incline. The claimant repeated that if he had not applied the handbrake he would not have been able to get out of the van because of the incline, the van would have moved. The claimant accepted that he should have left the van in gear and turned the engine off.

45. The claimant told Mr Tysoe that there was no damage to the customers wall. The claimant confirmed the correct procedure for parking on an incline or decline in accordance with the respondent's procedures.

46. The claimant told Mr Tysoe when the vehicle had been tested the engineer had said that the handbrake was very high i.e. that it required a lot of travel to engage and the claimant said that he believed it had been tested on flat ground and not an incline. The claimant then showed Mr Tysoe a video on his phone to support his argument that the movement on that handbrake is exceptional. The claimant also said that he been told that the van which is 10 to 11 years old is due to be replaced and that he had had concerns about the handbrake before but not reported them.

47. The claimant said he had 19½ years' service with no previous conduct issues, that he does not go off sick and always puts customers first.

48. Mr Tysoe told the claimant that he would write up the notes of the meeting.

49. As the meeting was coming to an end the claimant referred to Mr Stone's initial reaction which was that he was not being taken off driving duties and he referred to inconsistencies in saying that others who had had incidents had not been taking off driving nor disciplined and he pointed out the difference in the way he was being treated. The claimant said CR had been dishonest and there had had to be an investigation to find out who had damaged the van in his case whereas he the claimant was honest. The claimant referred, not by name, but to the case of Mr WK who he told Mr Tysoe 3 or 4 years before had had rollaway when his van had rolled and done damage to a bus stop because he had left the handbrake off and he didn't get disciplined. The claimant said there were also others who had been treated differently to him. Mr Tysoe replied that two wrongs don't make a right.

The weekend and the Diary of Events mitigation

50. Following the meeting, over the weekend, the claimant prepared a written statement which he sent to Mr Tysoe on 6 April 2020. The claimant called it his Diary of Events. The statement gave a full account which was consistent with his previous accounts but which also included the following information:

- That there was video footage of the handbrake available;
- That the handbrake had not been looked at independently but was looked at in-house;
- That the vehicle was back on the road the next day;
- That the claimant's colleagues had been making remarks about the incident to him and that weeks of such comments was a source of stress;
- The claimant "felt like a rapist because I was left in the building for so many days to fester and worry";
- That Mr Bull is known as "BullyBull";
- The claimant had thought that the demotion to depot base duties was his punishment for the incident.

6 April 2020

51. The claimant rang Mr Tysoe on 6 April 2020 to check he had received the Diary of Events. Mr Tysoe said he had the email but that it wouldn't change anything.

52. The claimant asked what that meant and was Mr Tysoe preparing to dismiss him. Mr Tysoe said he was. The claimant asked would he stop it (the dismissal) if the claimant resigned as the claimant believed he would be worse off

in pension terms if he were dismissed. Mr Tysoe told the claimant he had a management meeting he needed to report to on Friday but that he would stop the notice of dismissal going out before then if the claimant resigned.

Resignation

53. On 7 April 2020 the claimant wrote to Mr Tysoe resigning his employment. He gave 4 weeks' notice "events over recent weeks have forced me prematurely into making this decision and rendering myself unemployed" after having been in post for almost 20 years.

Acceptance of resignation and notice agreed

54. Mr Tysoe responded to the resignation letter on Tuesday 7 April at 11.01 by email saying that he could not accept a months' notice but that if one day was taken as annual leave the claimant could have the rest of the week as notice. Mr Tysoe said:

"The reason for this is if the dismissal was progressed it would be with immediate effect. Therefore I will meet you halfway and give you the rest of the week and then your last day of service will be Saturday, 11 April 2020. This is purely a gesture of goodwill which I hope you will appreciate to support you going forward."

55. The claimant's employment ended on 11 April 2020.

Post termination of employment

56. Following termination of employment the claimant became aware of an incident in spring 2021 in which a Royal Mail colleague knocked a cyclist off a bicycle on Sealand Road Chester and was required only to watch a training video and allowed to return to driving duties the next day.

57. In the course of preparation for this hearing the claimant received disclosure from the respondent of Mr Bull's report and the notes of the 3 April meeting. In those notes the detail of the gross misconduct allegation had changed to include an allegation that the wheel of the van had touched the public highway. The notes also were headed, in error, to state that the interview related to Mr Ian Norris. This was the first time the claimant had seen the notes or report.

58. The claimant requested disclosure of paperwork relating to the comparator cases he had told Mr Tysoe about CR, WK and PR on 3 April. The claimant had referred to these in his Claim Form. No disclosure was forthcoming.

Relevant Law

59. The claimant's unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 95(1)(c) provides that an employee is dismissed by his employer if:

"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

60. The principles behind such a “constructive dismissal” were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

61. The term of the contract upon which the claimant relies in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and approved a formulation which imposed an obligation that the employer shall not:

“...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

62. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls said at page 611A:

“The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances.”

63. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

64. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

“12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of **BG plc v O’Brien [2001] IRLR 496** at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying “damage” is “seriously”. This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in **Malik v BCCI [1997] UKHL 23** as being:

“... apt to cover the great diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited.”

13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in **Morrow v Safeway Stores [2002] IRLR 9**.

14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In **Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347** it was “conduct with which an employee could not be expected to put up”. In the more modern formulation, adopted in **Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420**, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is

abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.

15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach.”

65. In some cases, the breach of trust and confidence may be established by a succession of events culminating in the “last straw” which triggers the resignation. The decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35 demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal affirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978.

66. In 2020 Auerbach HHJ in the Employment Appeal Tribunal in **Williams v The Governing Body of Alderman Davies Church in Wales Primary School** applied **Omilaju** and **Kaur**:

- “28. The starting point is that there will be a constructive dismissal, that is to say an dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 where a) there has been a fundamental breach of contract by the employer b) which the employee is entitled to treat as terminating the contract of employment and c) which has materially contributed to the employee’s decision to resign. As to the first element, the fundamental breach may be a breach of the Malik term. That may come about either by a single instance of conduct, or by conduct which, viewed as a whole, cumulatively crosses the Malik threshold. As to the third element, the conduct amounting to a repudiatory breach does not have to be the only reason for resignation, or even the main reason, so long as it materially contributed to, or influenced the decision to resign.

30. If there has been conduct which crosses the Malik threshold, followed by affirmation, but there is then further conduct which does not, by itself, cross that threshold, but would be capable of *contributing* to a breach of the Malik term, can the employee then treat that conduct, taken with the earlier conduct, as terminating the contract of employment?”

67. The answer comes at paragraph 34.

- “34. ...so long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it, has not been lost and the employee does resign at least partly in response to it, constructive dismissal is made out. That is so, even if other, more recent conduct has also contributed to the decision to resign. It would be true in such a case that *in point of time* it will be the later conduct that has “tipped” the employee into resigning: but as a matter of causation, it is the combination of both the earlier and the later conduct that has together caused the employee to resign..”

68. A resignation in response to the employer's conduct must be made in unambiguous words. The words can be informal or imperfect and can be taken at their face value without the need for analysis of the surrounding circumstances.

69. Section 95(1)(c) provides that the employee must terminate the contract *by reason of* the employer's conduct. The question is whether the repudiatory breach played a part in the dismissal. It need not be the sole factor but can be one of the factors relied on. If, however, there is an underlying or ulterior reason for the employee's resignation, such that he would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal.

70. Where there are mixed motives the tribunal must decide whether the employer's conduct was an effective cause of the resignation. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4**. If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause. That is particularly clear from the decision of the Court of Appeal in **Nottingham County Council v Meikle [2005] ICR 1**. At paragraph 20 of **Wright Langstaff P** summarised it by saying

"Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."

71. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract **W E Cox Turner (International)Limited v Crook [1981] IRLR 443**

72. If a potentially fair reason within section 98 is shown, such as a reason relating to conduct, the general test of fairness in section 98(4) will apply. Section 98 reads as follows:

- "(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 it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
- (2) A reason falls within this sub-section if it ... relates to the conduct of the employee ...**
- (3) ...**

- (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 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".

73. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

74. The "**Burchell test**" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

75. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23**. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

76. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

77. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

78. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

79. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13**. Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

Respondent's Submissions

80. The respondent submitted that the burden of proof on dismissal was the claimant's and that it had not been met. It submitted that there was no fundamental breach of contract. If there were a dismissal then it argued that it had a fair reason in conduct and that such failings as there were in procedure were not sufficient to render the dismissal unfair. Mr Hartley referred me in oral submission to the established relevant authorities which I have set out above.

81. Mr Hartley, helpfully, linked his submissions to the List of Issues and addressed the ways in which the claimant's case had evolved during the hearing, making alternate submissions as to how the claimant said the employment had come to an end and at my suggestion covering submissions on the following:

The claimant's arguments on failure to suspend contributing to a cumulative fundamental breach

81.1 The respondent said failure to suspend did not amount nor contribute to a fundamental breach (it said the respondent would have been criticized for suspending where there were alternate duties the claimant could do) and that the respondent acted proportionately in allocating the claimant indoor duties.

Waiver and if, as was alternately posited, the claimant's last straw was on Friday 3 April, did his Diary of Events sent to the respondent on 6 April amount to a waiver or affirmation

81.2 The respondent submitted the Diary of Events would amount to an affirmation of breach.

The range of reasonable responses in relation to the sanction. I invited a submission from Mr Hartley because the claimant's case had evolved to place increasing emphasis on the unfairness of the sanction compared to the comparators

81.3 Mr Hartley agreed that although not expressly recited in EJ Buchanan's List of Issues this point was raised in the claim form, is implicit in the List of Issues at item 2.4 within the test of fairness in Section 98 (4), and was put to the respondent's witnesses. The respondent submitted that it was within the range of reasonable responses to dismiss for a gross misconduct serious breach of health and safety in this case.

82. Mr Hartley submitted, in relation to any procedural failings that I might find, that the claimant would have been dismissed in any event had a fair procedure been followed and argued for a 75-80% reduction in any award.

83. He submitted that the C was guilty of blameworthy conduct and ought to have a further deduction of 80%.

84. Mr Hartley submitted that the claimant had failed to allow the disciplinary process to run its course and had denied the respondent the opportunity to allow an appeal and this was unreasonable of the claimant not to run internal process before coming to ET and ought to suffer 25 % reduction on ACAS Code.

Claimant's Submissions

85. In the claimant's primary submission his resignation was in response to the "last straw" act on 3 April when Mr Tysoe said two wrongs don't make a right. I note the claimant is a litigant in person who may use the phrase "last straw" colloquially to mean it was one of the things, close to the end, that added up to his decision to resign. I make that interpretation because of the claimant's own conduct in (i) writing to the respondent that weekend 4/5 April to submit mitigation in the form of his Diary of Events (ii) telephoning Mr Tysoe to check that the email had been received and (iii) in the call asking Mr Tysoe about the outcome of the process. He was not acting that weekend in a way that suggested he had yet reached a point where trust and confidence was lost.

86. The claimant's second position in submission, which I assisted him to frame on the basis that it had been the position he had put to Mr Tysoe in cross examination, was that he resigned in response to being told on 6 April that his dismissal notice was being prepared. Mr Hartley was invited to comment and made no objection to my assisting the claimant in closing submission to frame his second position to flow from his cross examination. Mr Hartley agreed that the point had been put to his witnesses.

87. The claimant's overarching submission was that he had been dismissed unfairly, that he had been honest throughout and would have accepted a two year final warning but ought not to have lost his employment after 19 years unblemished service for what he did, when others had done worse and not been disciplined and had remained employed. His argument was about proportionality: that the respondent's response to the incident was excessive.

Applying the Law to the Facts

Was the claimant dismissed?

88. Section 95(1)(c) Employment Rights Act 1996 says there can be a dismissal if the employee is entitled to terminate the contract by reason of the employer's conduct.

89. The conduct the claimant complained about which was in the List of Issues was:

- a) Being removed from driving duties

- b) Being given indoor duties
- c) A lack of support
- d) Being subjected to banter and taunts from colleagues
- e) Being given demeaning work
- f) Bringing disciplinary proceedings
- g) Treating him differently from others with same, similar or worse incidents
- h) Mr Tysoe saying “two wrongs don’t make a right”
- i) Breaching his confidentiality in that being in the depot made colleagues aware something was wrong
- j) Failing to suspend him
- k) Telling him to resign or be dismissed
- l) Conducting the disciplinary proceedings unreasonably

90. In addition, during the hearing it became apparent from the claimant’s cross examination of the respondent’s witnesses that he also complained about:

- m) the delay in an outcome to the investigation
- n) The failure to provide the claimant with a copy of the SIR before the disciplinary meeting on 3 April 2020
- o) The short notice, only three working days, of the disciplinary hearing
- p) The content of the letter of allegation which wrongly states damage to the customer’s property
- q) Mr Tysoe’s disregard for the claimant wishing to bring mitigating factors in relation to his comparators on 3 April, evidenced by Mr Tysoe’s admitted remark “Two wrongs don’t make a right”
- r) Mr Tysoe’s remark on 6 April 2020 to the effect that anything written in mitigation by the claimant in his email would not make any difference as he was preparing a notice of dismissal.

91. Applying the test from the Malik case, I consider did the employer

“...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

92. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative.

“The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances.”

93. I find that none of the actions complained of either individually or cumulatively amounted to a fundamental breach of contract. The claimant cannot establish a dismissal. I deal with each of the allegations of breach of contract below.

a), b) and e) removed from driving, indoor duties, demeaning work

94. The removal from driving duties was temporary and appropriate whilst the matter was under investigation. There was nothing in it calculated or likely to seriously damage or destroy the employment relationship. The allocation of indoor duties was a consequence of being removed from driving duties. The indoor duties were part of the claimant's role though he was carrying them out full time. The respondent had reasonable and proper cause whilst investigating a rollaway to remove the claimant from driving and give him indoor duties.

c), d) lack of support, banter and taunts

95. There was no lack of support that could amount to a fundamental breach of contract. The claimant asked Mr Stone and Mr Kempster what was happening in the investigation. He was able to talk to Mr Stone and Mr Kempster and he was given a helpline number and he was told the reason for the removal of his duties, that there was an investigation under way. The respondent's business standards conclude with a section called "Getting Help" and refer members to their managers, HR and the intranet. They also provide a telephone number for the Bullying and Harassment Helpline. The correspondence the claimant received also included a telephone number for Feeling First Class whose services were available 24 hours a day. He was able to talk to the union representative, though he wasn't a member. There was no lack of support calculated or likely to seriously damage or destroy the employment relationship.

96. The claimant experienced taunts and banter from his colleagues and this must have been hurtful for him but was not calculated by the respondent or likely to seriously damage or destroy the relationship of trust and confidence. If the investigation had said no case to answer, or even if the disciplinary had proceeded to a final warning and the claimant had returned to his duties, the taunts and banter would have subsided, stopped and been forgotten. They were not, in themselves or by any implicit suggestion that the respondent failed to stop them, something that amounted to a fundamental breach by the respondent.

f) and g) disciplinary action and being treated differently

97. The respondent's policy on rollaways is to take them very seriously because of the consequences that might flow from them. The respondent's conduct policy cites "deliberate disregard of health, safety and security procedures or instructions" as an example of gross misconduct. The claimant accepted that he had been trained about rollaways and he was able at investigatory interview to list the steps that needed to be taken to secure the

vehicle. The claimant admitted that he had not put the wheels to a kerb, put the van in gear, turned the engine off or locked the van. The instigation of disciplinary proceedings for gross misconduct does not amount to a breach of a contract. The respondent had reasonable and proper cause to commence disciplinary proceedings for gross misconduct.

98. The claimant said other people had done worse than him and not been disciplined. The claimant cited examples of other cases but there was insufficient evidence for me to know whether those people had faced disciplinary action or not. Even if they had not, this would not of itself mean that the respondent acted in a way that was calculated or likely to seriously damage or destroy the relationship of trust and confidence without proper cause. The claimant raised the point about inconsistent treatment and names cases to Mr Tysoe on 3 April 2020. If Mr Tysoe had got to the stage of finalizing a decision and writing a letter of dismissal he may well then have had proper cause to distinguish this case from those other cases, or not. Until a decision to dismiss was communicated it was too soon to say if there was a fundamental breach in not taking the other cases into account or not. On this point I note that the test for fundamental breach is a contract test and goes beyond showing that the respondent behaved unreasonably or, as in this case, was signalling that it might. It is a different test to that of the range of reasonable responses in terms of sanction. Mr Tysoe's remark "two wrongs don't make a right" is not enough to meet the contract test for fundamental breach.

j) and i) failure to suspend and breaching confidentiality

99. The claimant said he should have been suspended, that this would have avoided the need for him to perform duties he found demeaning and avoided the taunts and banter from colleagues. I accept the respondent's submission that it may have found itself criticized for suspending in this case. I had regard to the respondent's Guide on Precautionary Suspension which says it may be necessary to consider suspension where there is a serious breach of conduct and there is a reasonable belief that the breach may be repeated or there is a risk to people, property, mail or the good image of the Royal Mail or an investigation may be hampered. By allocating the claimant non driving duties it was possible to remove those risks without the need for suspension. The respondent was right to do the minimum necessary to protect against those harms and to consider suspension a last resort. Further, having the claimant in work meant that he was able to assist in the investigation. There is no breach of contract in the failure to suspend.

100. The claimant also said that by being in work and having correspondence left on his bench his confidentiality was breached. I reject the submission that failing to suspend the claimant breached his confidentiality. The claimant's colleagues may have put two and two together from the van going to the garage and the claimant being off driving duties, that there had been an incident. They could have reached that same conclusion if the claimant was suspended and they knew the van had gone into the garage. I had no evidence before me that Mr Stone, Mr Kempster, Mr Bull or Mr Tysoe breached the claimant's confidentiality. I had evidence that efforts had been made to have meetings during the middle of the day when the drivers would be out and the depot would be at its quietest. In relation to a letter being left on the bench, the claimant had

a letter handed to him on 23 March, and again the letter of invitation to a formal conduct meeting was hand delivered to him by Mr Stone. I can see nothing in the way in which the respondent got its letters to the claimant either by hand or on his bench that was calculated or likely to seriously damage or destroy the relationship of trust and confidence.

l), m), n) o), and p) Conducting the disciplinary proceedings unreasonably, the delay in an outcome to the investigation, the failure to provide the claimant with a copy of the SIR before the disciplinary meeting on 3 April 2020, the short notice, only three working days, of the disciplinary hearing and the content of the letter of allegation which wrongly states damage to the customer's property.

101. I find nothing in the conduct of the disciplinary proceedings to amount to a fundamental breach of contract. There were undoubtedly failings, but these were minor lack of attention to detail points which did not individually or taken together seriously damage or destroy the relationship of trust and confidence and were not calculated to do so.

102. The investigation was concluded relatively quickly. Mr Bull's report which contained errors and inaccuracies, could and should have been copied to the claimant if it was to be used as part of the disciplinary case against him. Mr Bull told us the report would have been done within a few days of the incident and yet the claimant did not see it at the time or later until these proceedings. In the event it made no difference that he had not seen it as he had discussed the points with Mr Bull and knew the case against him was that he had had a rollaway, that much was admitted. He was able to correct the error in the allegation letter about damage to the customer's wall so I find that there was nothing in the report that would have made any difference had it been served on the claimant prior to the hearing. It was largely a write up of what the claimant had said in the investigation.

103. The claimant agreed to short notice of the hearing, he had been pressing for a decision. He was expecting to get back to his driving job. There was nothing in the unreasonable conduct of proceedings allegations that amounted to acts that were calculated or likely to seriously damage or destroy the relationship of trust and confidence.

Mr Tysoe's "two wrongs" and Mr Tysoe's "preparing the dismissal"

104. As I have said above, on Friday 3 April at the conclusion of the disciplinary hearing the claimant was told, in response to his raising inconsistent treatment, that two wrongs don't make a right. This comment did not amount to enough to seriously damage or destroy the relationship of trust and confidence nor was it calculated to do so. It signalled that Mr Tysoe *might not* take the comparator cases into account, or might take them into account and decide not to follow them, but the decision had not yet been made or communicated to the claimant, and even after communication there was the possibility of an appeal against a decision. Mr Tysoe's words did not entitle the claimant to treat himself as dismissed at that point.

105. The preparing the dismissal exchange on 6 April 2020 was also not enough to found a fundamental breach of contract. Mr Tysoe said he did not

remember saying this. I find that he did say words to that effect. He said he was preparing the dismissal notice. I preferred the evidence of the claimant because:

- (1) The claimant was at risk of losing his job so these events were of high consequence to him compared to Mr Tysoe who was playing his part in a process which he took seriously but which at that time had no personal consequence for him;
- (2) The claimant acted promptly in response to the conversations in a way that was consistent with the version of the conversations he advanced. Before the call he was wanting his mitigation taking into account, after it he was resigning.
- (3) Mr Tysoe's email accepting the resignation which refers to *the* dismissal. It said:

"If the dismissal was progressed it would be with immediate effect. Therefore I will meet you half way and give you the rest of the week and then your last day of service of Saturday 11 April 2020."

106. The use of *the* dismissal tells me that Mr Tysoe was going to dismiss and that he had told the claimant that on Monday. The subjunctive *if / would be* relates to the progression i.e. his completion and communication of the dismissal report / letter rather than any contingent whether you are to be dismissed or not. It does not say *the outcome* nor *a dismissal*. My interpretation of that email in the context of the oral evidence (I heard oral evidence from Mr Tysoe and he was asked about this email) is that it corroborates the claimant's position that Mr Tysoe told him he would be dismissed during the call on Monday 6 April 2020.

107. What Mr Tysoe agreed to do was hold off communicating that decision to the claimant and allow the claimant to resign instead for reasons which they both believed were advantageous to the claimant in relation to his pension.

108. Did the content of the call on 6 April amount to a dismissal within section 95(1)(c) No. I find it did not. Telling the claimant that he was to be dismissed would of course seriously damage or destroy the relationship of trust and confidence but not without proper cause. Proper cause existed in that there had been a disciplinary hearing for gross misconduct.

109. Neither individually, nor taken together do the events above amount to a fundamental breach of contract. On the taken together point I find that the respondent was playing out its disciplinary process. There were mistakes in that process, as detailed above including errors and omissions in the SIR report, an error (which was corrected) in the allegation letter, a remark "two wrongs don't make a right" by Mr Tysoe which wasn't helpful as it could have signaled his intention not to take relevant content into account (or not), failure to show the SIR report to the claimant prior to the disciplinary hearing but, taken together the process itself does not amount to a breach of the Malik term, it does not cross the threshold and if it did then not without proper cause. The respondent is entitled to take the position that every rollaway is a potential gross misconduct and to invoke its disciplinary process.

110. The claimant fails to establish a dismissal and cannot succeed in his claim. It is not necessary for me to apply the law beyond this point but I am going to go on and look at what would have happened if the claimant had established a constructive dismissal.

111. If there had been a dismissal would it have been a fair dismissal? The respondent's procedure, in which the claimant had been trained and was fully knowledgeable provided that to safely park a vehicle on an incline you must:

- Turn the wheels in to the kerb;
- Engage the handbrake;
- Turn off the engine;
- Put the car in gear;
- Lock the vehicle.

112. There were five things that had to be done. The claimant accepted that he did not do three of them, he could not be sure if he turned the ignition off or not and says he did engage the handbrake. The respondent accepted that he may have partially engaged the handbrake but that he did not engage it sufficiently to prevent rollaway. It was accepted by both sides that the handbrake on the van had to be pulled up high to engage.

113. The respondent takes health and safety very seriously. It treats rollaways as serious breaches of health and safety and to classifies them as potential gross misconduct.

114. I would have found that the respondent had a potentially fair reason for dismissal under Section 98 (2) conduct.

115. Section 98 (4) requires me to consider whether the dismissal is fair or unfair and this depends on:

- (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

says that fairness

- (b) shall be determined in accordance with equity and the substantial merits of the case".

116. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Mr Stone completed the ERICA with the claimant, then Mr Bull and Mr Stone conducted a site visit and discussion with the claimant and then Mr Bull came back to the claimant for a further short discussion before preparing his report.

117. There were failings in the investigation. The site visit was not as thorough as it could have been. It failed to establish the definitive position of the vehicle. There was no site map. The photographs did not span the distance the vehicle travelled on rollaway. The photographs did not clearly show the line of the road and the property and the position of the van in relation to the two. The written report referred to the van in different locations.

118. The claimant made admissions about not being in gear / uncertain about engine on or off which added to his credibility. Mr Bull ought to have taken from those admissions that there could be something amiss with the vehicle handbrake on a gradient and tested the handbrake on a gradient equivalent to that on the site. Even if he had, and the vehicle had been slipping with the handbrake applied and rolling away, the claimant had still failed in 4 of the required steps. So this failing is not determinative. Whilst the report contained errors and inaccuracies and omissions they were not sufficient to render the outcome, which was the classification of the incident as a rollaway, unsafe. Nor the classification of a rollaway as gross misconduct unreliable.

119. When the claimant on 3 April told Mr Tysoe about other cases that had not led to dismissal a best practice approach would have been for Mr Tysoe to have stopped and taken full detail from the claimant and gone back to HR and Safety Health and Environment colleagues to find out about those cases. The consistency point ought to have been part of the investigation. If the claimant had established a constructive dismissal on 6 April 2020 then I would have found that failure to consider the comparator cases, to reject the point with the phrase "two wrongs don't make a right" fell outside the range of reasonable responses in relation to the investigation.

120. Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Yes, the claimant had reported the incident, admitted that the van had rolled backwards. He said the handbrake was on or he wouldn't have been able to get out of the van, but he did not dispute that the incident had taken place. Thirdly, did the employer have reasonable grounds for that belief? Yes, the respondent had reasonable grounds for believing that the claimant had been involved in a rollaway. He reported the incident and he admitted having failed to do 3.5 - 4 of the 5 required safety steps.

121. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses. The Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

122. There was a leap in this case from rollaway to dismissal without proper investigation of comparator cases and without consideration of sanction that would, if the claimant had been dismissed, have made this an unfair dismissal. It struck me that the banter from colleagues that the claimant would be getting his P45 spoke to a climate in which rollaway = gross misconduct = dismissal. That chain should be broken. A gross misconduct rollaway still needs consideration of

appropriate sanction. The individual's mitigation and consistency in decision making will be relevant and the respondent should be able to show that it thought about those things before deciding to dismiss.

123. Turning now to Polkey and contributory fault issues. The respondent's submissions on deductions and reductions, if the claimant had established a dismissal and won on unfair dismissal, would have been compelling, so that there would have been significant reductions and deductions to reflect the claimant's admitted rollaway.

124. For the reasons above the claimant's claim for unfair dismissal fails.

Employment Judge Aspinall
Date 3 August 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
10 August 2021

FOR THE TRIBUNAL OFFICE

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