THE INDUSTRIAL TRIBUNALS

CASE REF: 18247/20

CLAIMANT: **Joseph Small**

RESPONDENT: **Northstone (NI) Limited**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claim is dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Ó Murray**

Members: **Mr E Grant**
Ms M McReynolds

APPEARANCES:

The claimant represented himself.

The respondent was represented by Ms R Best, Barrister-at-Law, instructed by Mr Balmer Solicitor of Lewis Silkin Solicitors.

THE CLAIM

1. The claim was for unfair dismissal. The respondent's case was that the claimant had insufficient service to enable him to claim unfair dismissal.

THE ISSUES

2. The issues were clarified during the Case Management process and narrowed to the following:

   (a) Did the claimant have sufficient service in order to bring an unfair dismissal claim. Was the claimant a fixed-term employee whose employment was terminated on the expiry of the fixed term.

   (b) As the claimant was sacked one day short of one year's service was he entitled to the benefit of his notice period for the purpose of establishing sufficient service, under Article 129 of The Employment Rights (NI) Order 1996 (as amended) (referred to below as ERO).

(c) If the claimant could establish that he had one year's service:

(i) Was he entitled to the SDP and if so were there any breaches which rendered any dismissal automatically unfair.

(ii) Is a ***Polkey*** deduction applicable.

(iii) Should any compensation award be reduced by a percentage to reflect any contributory conduct by the claimant.

SOURCES OF EVIDENCE

3. The tribunal had written statements and oral evidence from the claimant on his own behalf. The tribunal also had the written and oral evidence of the following witnesses for the respondent:

(a) Nigel Galbraith, Transport Manager, who offered the claimant his job initially and decided to extend the probationary period on two occasions.

(b) John McReynolds, Production Director, who dealt with the investigatory meeting into the incident which had occurred on 30 November 2019.

(c) Brian Watt, Director of Technical Operations, who was due to deal with the disciplinary hearing.

(d) Kelly Monaghan, HR Business Partner, who decided to terminate the claimant's employment.

(e) Jordan Morrow, Despatcher, to whom the claimant's spoke after the incident on 30 November 2019.

4. Whilst written statements were provided by Ryan McQuillan and Brendan McCusker, the respondent in advance of the hearing indicated that those witnesses would not be called to give evidence. For this reason their statements were entirely discounted by the tribunal.

5. The tribunal had regard to the documentation to which it was referred during the hearing.

6. Evidence was heard on 11 April 2022. There was time on that date for the submissions to be provided but the claimant was offered time (and then availed of that offer) to compose the submissions overnight. The hearing therefore resumed on 12 April 2022 for the submissions hearing. Ms McReynolds of the panel was taken ill on that morning and was therefore unable to attend the hearing. The parties were offered the opportunity to adjourn the hearing until Ms McReynolds was fit to attend. Alternatively the parties were informed that, if they agreed, there was power under the Rules for the Submissions Hearing to go ahead before two panel members. The Employment Judge however, made clear to the claimant in particular that he did not have to agree to this course of action and that the hearing could be adjourned until Ms McReynolds was fit to attend, if he so wished. Both sides however agreed to the Submissions Hearing proceeding in front of the two remaining panel members. The Employment Judge assured the parties that

panel discussions on the evidence and conclusions would not commence until the panel met as a whole when Ms McReynolds would be fit to do so. This is what occurred and this is a unanimous decision.

THE LAW

7. The following provisions of the Employment Rights (Northern Ireland) Order 1996 (as amended) (referred to in this decision as ERO) are as follows:

   (a) The right not to be unfairly dismissed is contained in Article 126.

   (b) The claimant needs one year's service for an unfair dismissal claim under Article 140.

   (c) Article 129 sets out the provisions in relation to the effective date of termination (EDT). Article 129(1)(c) states as follows in relation to a fixed term contract:

   > *"(c) In relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed, means the date on which the termination takes effect."*

   (d) At Article 118 are set out the minimum periods of notice provisions. At Article 118(6) allowance is made for summary dismissal whereby an employer is entitled to dismiss without notice in relation to conduct.

   (e) If an employer terminates without notice in circumstances where they should have given notice then the employee can have the benefit of the period of notice in order to determine whether he has sufficient service (ie one year) in order to bring an unfair dismissal claim. This is the combined import of Articles 129 and 118 of ERO.

8. The respondent relied on two provisions of ERO in relation to their argument that the claimant had insufficient service in order to bring an unfair dismissal claim namely:

   (a) That the EDT is 3 February 2020 being the date of expiry of the fixed term; or,

   (b) The EDT is 3 February 2020 because that is the date on which the termination took effect because the employer was justified in sacking the claimant without notice because of gross misconduct. The claimant was therefore not entitled to the benefit of the notice period in order for his period of service to exceed one year.

9. Ms Best also referred to the EAT decision of ***Lancaster and Duke Limited v Wileman UKEAT/0256/17/LA.***

10. A ***Polkey*** ([1988] ICR 142) deduction describes a situation where a tribunal can find a procedural defect but it is open to the tribunal to decide that following a perfect procedure would have made no difference to the outcome. As a result, in a claim of

unfair dismissal with a procedural defect, compensation may be reduced by a percentage of up to 100% to reflect the position that following a perfect procedure would have made no difference.

11. Any compensation awarded to a claimant for unfair dismissal may be reduced by a percentage of up to 100% for contributory conduct if the claimant by his conduct contributed to his dismissal.

FINDINGS OF FACT AND CONCLUSIONS

12. The tribunal considered all the evidence both oral and documentary to reach the following findings of fact. The tribunal then applied the law to the facts found in order to reach the following conclusions.

13. The claimant was employed from 4 February 2019 until his contract was terminated with effect from 3 February 2020.

14. Mr Galbraith initially offered the job to the claimant as a HGV driver for the respondent. Whilst in the tribunal proceedings the claimant originally argued that Mr Galbraith offered a permanent contract to him, in tribunal the claimant agreed that he was offered and accepted a six-month fixed-term contract which was subsequently extended twice. The initial six-month period was also the probationary period and, when the contract was extended the probationary period was extended by the same period due to issues of which details are set out below. The net position therefore was that, when the claimant's contract was terminated, he was still in his probationary period and had not reached one year's service.

15. Almost immediately into his employment the claimant had incidents involving damage to vehicles and several other infractions. The two incidents set out below were the most serious incidents relevant to this case.

16. As a HGV driver the claimant readily accepted in tribunal that he was responsible for health and safety in relation to his vehicle and had undergone a health and safety induction immediately after he was taken on by the respondent.

Incident - 15 October 2019

17. A member of the public reported to the respondent that they had witnessed a large spillage of stones from the claimant's lorry when he was driving along the main Larne road. The claimant had not reported this until he was asked about it by a manager when he returned to the depot. The claimant then admitted that the safety latch had not been secured on his tipper lorry and this had led to the spillage of stones which was a clear breach of health and safety.

18. This matter was investigated and the ensuing disciplinary process resulted in a first written warning dated 25 November 2019 which was due to expire one year later. That warning was therefore '*live'* at the date of termination of his contract. The reason for the disciplinary penalty related to breach of the disciplinary system as regards health and safety, the claimant's standard of work and his reckless behaviour.

19. The claimant accepted that this was a breach of health and safety and it amounted to reckless behaviour and did not challenge the first written warning which was given to him. From the respondent's point of view Mr Galbraith viewed this as something which could be improved upon and did not feel that it warranted a dismissal at that point. It was however a factor in the extension of the probationary period. We find that extension to be entirely justifiable in the circumstances.

20. Shortly afterwards the next serious incident of concern occurred.

Incident – 30 November 2019

21. After completing a delivery on a tipper lorry to a site, the claimant raised the body of the tipper lorry in order to ensure that it was emptied and thereafter drove off with the back of the lorry tipped up which led to the lorry colliding with force with a bridge.

22. A witness to the incident saw the claimant get out of his cab, adjust the tipper so that it could go under the bridge, and the claimant then drove off at speed. As part of the subsequent investigation relevant managers examined the records held by the tipper lorry.

23. The following were common case between the parties in relation to this incident:

    (a) The lorry struck the bridge with force and this led to damage on the lorry and the claimant was injured. The claimant had also not been wearing his seat belt.

    (b) The claimant drove at speed a distance of 13 miles to the depot in a damaged lorry when he believed himself to be concussed.

    (c) Responsibility for safety checks for the lorry lay with the claimant.

    (d) Responsibility for ensuring that the lorry was not tipped up lay with the claimant.

    (e) If the claimant had checked his mirrors he would have seen that the lorry was tipped up and should not have driven off. The claimant accepted that he should have looked at his mirrors and that he failed to do so on that occasion.

24. An investigation meeting took place on 6 December 2019 involving the claimant, Mr McReynolds and Mr Galbraith when several points of concern were put to the claimant arising out of this incident.

25. Mr McReynolds investigated the matter and regarded the issues as so serious that they warranted disciplinary action. This was an entirely reasonable conclusion on his part.

26. Following the investigation meeting the claimant was invited to a disciplinary hearing by letter dated 28 January 2020 which was sent by Ms Monaghan of HR. It was common case that the claimant received that letter on 29 January 2020 and that it related to a disciplinary hearing which was arranged for 31 January 2020.

27. There was conflicting evidence from the claimant and Ms Monaghan about the content of a telephone call which the claimant made to her on 29 January 2020. It was common case however that the claimant stated in that call that he would not be at the hearing on 31 January 2020 as he wanted to get some advice.

28. We find from the evidence and the surrounding documentation that the claimant agreed to ring Ms Monaghan the next day to talk about rescheduling the meeting. We accept that the claimant made efforts to do that. We do not accept that he left a voicemail message for Ms Monaghan as the telephone records produced in tribunal do not support the claimant's assertion that he left such a voicemail. Ms Monaghan's evidence was that she could not recall any missed calls from the claimant and therefore believed that he had not phoned her as arranged. We do not believe Ms Monaghan's evidence on that point. We find that she would have seen a number of calls missed from the claimant or from an unknown number. In circumstances where she expected a call from the claimant the onus was on her to contact the claimant. The issue for us however is the effect of our finding on this credibility point on the case before us. As set out in this decision our conclusions on the telephone call point do not alter our conclusions on the key points in this case.

29. The fact that no further contact was made with the claimant led to Ms Monaghan telling Mr Watt (who was due to conduct the meeting) that the claimant would not be at the disciplinary hearing. The disciplinary hearing therefore did not proceed on 31 January 2020 as Ms Monaghan had decided not to proceed with the disciplinary process. Instead Ms Monaghan decided, in view of the seriousness of the incident, the history of incidents including the live first written warning, and the fact that the end-date of his fixed-term was imminent, to terminate his contract as at the date of expiry of the fixed term on 3 February 2020.

30. The claimant was still in his probationary period at this stage and the contract and policies allowed for termination during a probationary period without a disciplinary process being gone through. The relevant extract from the disciplinary process states:

> *"3.4 Where behaviour amounts to serious or gross misconduct, the Company reserves the right to dismiss an employee without notice and without pay in lieu of notice and the Company shall not be obliged to give a warning. For the purpose of guidance, serious or gross misconduct is likely to involve a breach of any of Rules 1.17 or 1.35, although depending on the circumstances of each case, other misconduct may constitute serious or gross misconduct.*
>
> *3.5 In all cases where infringement occurs during an employee's probationary period, the Company reserves the right, where it deems it reasonable and appropriate, to terminate such employee's contract without any disciplinary warnings."*

31. Effectively Ms Monaghan relied on this part of the contract when deciding to terminate the claimant's contract as at the date of expiry of the contract.

32. A letter of termination was issued on 31 January 2020 and stated as follows:

> *"I am writing following our conversation about your disciplinary hearing that was due to take place today (31/01/2020). You had agreed with me on that call you would contact me back to discuss a rescheduled date by close of business yesterday. Unfortunately, you have not contacted me back to discuss this.*
>
> *I am aware that you are currently off work due to a rib sprain however I need to make you aware that your fixed term contract is due to end on Monday 3rd February.*
>
> *As you are aware, we have extended your probationary period on several occasions due to your poor performance.*
>
> *Having fully considered the matter it has been decided that we will not be renewing your contract and will now be terminating your employment which is due to expire on the 3rd February 2022.*
>
> *Your last day of service will therefore be 3rd February 2020. All terms and benefits associated with your employment will therefore cease on 3rd February 2020. The Company will provide you with your form P45 along with your final payslip within 14 days of the termination of your employment.*
>
> *Your payment in lieu of 1 weeks' notice and any outstanding holiday entitlement will be paid to you on the 7th February payroll and is subject to tax and NI."*

33. The claimant made two key points in his case as follows:

(a) That the disciplinary hearing should have been rescheduled when he made it clear he would not attend and that Ms Monaghan should have contacted him when she did not hear from him. The claimant's suspicion was that they wanted to rush the process because the termination date of his contract was imminent and they did not want him to go past one year's service.

(b) That in the termination letter he was not advised of his right to exercise an appeal and this rendered the process defective.

34. The claimant was employed for a fixed term which was then justifiably extended and had an expiry date of 3 February 2020.

35. The disciplinary investigation revealed numerous aspects to the incident of 30 November 2019 which were extremely serious and clearly amounted to gross misconduct. The fact that no other people were injured did not render that incident any less serious. We specifically reject the claimant's point on this ie that the fact no-one was injured somehow detracted from the seriousness of the incident as a whole.

36. The claimant had a history of at least one very serious breach of health and safety in relation to the spillage of two tonnes of stones on a public road in October 2019. Again we find that the fact no injury resulted from this does not render the incident any less serious.

37. The claimant had a live first written warning on his record which was in relation to health and safety breaches, standard of work and reckless behaviour and were therefore relevant to the assessment of the misconduct under consideration in relation to the decision to dismiss.

38. The SDP did not apply because he did not have one year's service. The employer was entitled under the contract and policies to terminate the claimant's contract without going through a disciplinary process at all as he was in his probationary period. It had been reasonable for the employer to extend the probationary period on two occasions given the concerns about the claimant's attitude to health and safety and the October 2019 incident which the claimant had admitted. Whilst in tribunal the claimant disputed some of the other numerous issues referred to, it was common case that the two very serious incidents (set out in detail above) had occurred and that they were his fault.

39. We can understand why the employer took a very serious view of the claimant's actions in these two incidents that were admitted by him, and in particular, took a very serious view of his attitude to health and safety following the incidents.

40. In all the circumstances and particularly due to the seriousness of the incidents involved, we find nothing untoward with the fact the employer availed of the expiry of the fixed term in order to terminate the claimant's contract with them as they were entitled to do that under the contract. This meant that they had no obligation to go any further through the disciplinary process.

41. As the claimant was validly sacked for gross misconduct he was not entitled to notice and cannot therefore avail of the extension to his period of service under Article 129 of ERO. A consequence of this is that he does not have one year's service and cannot claim unfair dismissal under ERO.

42. In these circumstances we do not need to consider a conclusion on the ***Polkey*** issue as we do not find there to have been a defect in procedures at all. If we are wrong on that and the failure to specifically advise the claimant of his right of appeal amounted to a defect we find that it would have made no difference to the outcome given the claimant's history and the seriousness of the misconduct under consideration in the disciplinary process.

43. As regards contributory conduct, insofar as we need to reach a conclusion on that, we find that the claimant contributed 100% to his demise given the seriousness of the issues arising from the admitted conduct on 30 November 2019.

SUMMARY

44. The claimant does not have the required one year's service in order to bring an unfair dismissal claim and his claim therefore fails for want of jurisdiction.

45. The employer was entitled to terminate the contract in the way they did, as the claimant was validly within his extended probationary period given the serious issues of concern that had arisen which had warranted extension of that period.

46. The incident involving the bridge was so serious that it amounted to gross misconduct in and of itself and was validly the subject of a disciplinary process. That process terminated when the employer availed of the expiry of the fixed term contract in order to terminate the contract. The expiry of the fixed term contract rendered the further progress of the disciplinary process unnecessary and the respondent was under no contractual or other obligation to progress that disciplinary process.

47. As the claimant did not have one year's service for an unfair dismissal claim the SDP provisions do not apply.

48. The claimant's claims are therefore dismissed in their entirety.

Employment Judge:

Date and place of hearing: **11 and 12 April 2022, Belfast.**

This judgment was entered in the register and issued to the parties on: