EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106895/2020

Held by Cloud Based Video Platform (CVP) on 28 and 29 September 2021

Employment Judge Neilson

Robert Beattie	**Claimant**
Co-Operative Group Limited	**Respondent** **Represented by:** **Ms G Nicholls,** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim of unfair dismissal does not succeed and is dismissed.

REASONS

1. At the hearing on 28 and 29 September 2021 the claimant was unrepresented and the respondent was represented by Ms Nicholls of Counsel. There was a bundle of documents lodged by the respondent.

2. The respondent led evidence from Mr Rowan, Transport Manager at the Newhouse Depot and from Mr Baird, the Distribution General Manager, Newhouse Depot. The claimant gave evidence on his own behalf.

3. There was a preliminary issue of time bar which the Tribunal agreed to hear submissions on and determine before hearing evidence in the case.

Issues

4. The claimant had brought a claim for unfair dismissal under section 94 of the Employment Rights Act 1996 ("the ERA"). The respondent admitted that the claimant had been dismissed but maintained that dismissal was for a fair reason, namely misconduct. The issues to be determined were as follows:-

4.1 Was the claim for unfair dismissal presented by the claimant to the Tribunal on 30 October 2020 presented in time in accordance with section 111 of the ERA.

4.2 If the claim was not presented in time was it presented within such further period as the tribunal considers reasonable where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of 3 months.

4.3 Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of section 98(1) or (2) of the ERA?

4.4 Was the claimant's dismissal for that reason fair in all the circumstances, in terms of section 98(4) ERA?

4.5 If the claimant's dismissal was unfair, what compensation should be awarded?

Preliminary Time Bar issue

5. The Tribunal heard submissions from the respondent regarding time bar. The respondent's position was as follows. The claimant was dismissed on 18 June 2020. The ordinary time limit (subject to any ACAS extension) expired on 17

September 2020. The claimant contacted ACAS on 28 October 2020 and the ACAS certificate was issued on 29 October 2020. The ET1 was then lodged on 30 October 2020. The claim was clearly out of time. The claimant had received notification of the outcome of his first appeal on 24 July 2020. He had plenty of time to submit his claim before he was notified of the outcome of the second stage outcome on 24 November 2020. The claimant had received support from his union throughout the appeal process and ought to have been aware of the time limits that applied. Ms Nicholls made reference to the cases of ***Palmer and Saunders -v- Southend on Sea Borough Council 1984 IRLR 119*** and ***Porter -v- Bandridge 1978 IRLR 271***. It was for the claimant to prove it had not been reasonably practicable to submit within the 3 months.

6. The claimant explained that he was dismissed on 18 June 2020. He then pursued the appeal process. He only engaged TU support on the morning of the second appeal – the 3 September 2020. He was told by his union representative at that time that he needed to lodge his claim form within 3 months. That was the first time he was aware of the time limit. He was told that he would need to do that by himself. He then contacted ACAS on the 11 September and received an ACAS certificate dated 11 October. However the name that the claimant gave for the employer was Co-Operative Food Primary Logistics. That was the name on the ACAS certificate. He then lodged his claim on the 20 October 2020. That was claim reference 412013700800 and case number 4106542/2020. He then found out that his claim could not proceed as he had used the wrong name. He was speaking to Willie McKay the union official towards the end of October who told him he had used the wrong name. The claimant on becoming aware of this immediately contacted ACAS and made a fresh application to them on 28 October 2020 in respect of The Cooperative Group. ACAS issued the Early Conciliation Certificate on 29 October and the Claimant submitted a fresh ET1 on 30 October 2020.

7. Having heard submissions from both the respondent and the claimant the Tribunal adjourned to consider the position and to check the factual position

regarding case number 4106542/2020 with the clerk. The Tribunal was satisfied that a claim form 4106542/2020 was lodged by the claimant on 20 October 2020 in respect of Cooperative Group but with an ACAS certificate in the name of Cooperative Food Primary Logistics.

8. Section 111(2) of the ERA provides that:- "…an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal – (a) before the end of the period of three months beginning with the effective date of termination, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it is not reasonably practicable for the complaint to be presented before the end of the period of three months."

9. These time periods may be modified by the ACAS conciliation process.

10. The test as to whether or not an unfair dismissal claim should be received although late is a two stage test under section 111(2)(b). Firstly the issue is whether or not it was not reasonably practicable to lodge within the original time period. If it was not then the Employment Tribunal must go on to consider whether the time that has elapsed since then is itself a reasonable period.

11. In accordance with ***Dedman v British Building and Engineering Appliances 1973 IRLR 379*** and ***Marks and Spencer v Williams-Ryan 2005 IRLR 562*** the relevant principles to be applied from these authorities are:-

11.1 section 111(2)(b) ERA should be given a liberal construction in favour of the employee;

11.2 it is not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit;

11.3 however, a claimant will not be able to successfully argue that it was not reasonably practicable to make a timely complaint to an employment tribunal, if he has consulted a skilled adviser, even if that adviser was negligent and failed to advise him correctly;

11.4 the question of reasonable practicability is one of fact for the tribunal, and should be decided by close attention to the particular circumstances of the particular case;

11.5 it is not reasonably practicable to bring a claim if a claimant is unaware of the facts giving rise to the claim. However, once they have discovered them, a tribunal will expect them to present the claim as soon as reasonably practicable, rather than allowing three months to run from the date of discovery;

11.6 if a claimant knows of the facts giving rise to the claim and ought reasonably to know that they had the right to bring a claim, a tribunal is likely not to extend time. If the claimant has some idea that they could bring a claim but does not take legal advice, a tribunal is even less likely to extend time.

12. In considering the position here the Tribunal had regard to the fact that the claimant was only made aware of the three month time limit on 3 September; that he then moved to present his claim in time by contacting ACAS on 11 September 2021; that he did in fact present a claim on 20 October 2020 – which would have been in time, had he provided the correct name of his employer to ACAS. His mistake was to get the name of the employer wrong. Was that a reasonable mistake to make in the circumstances? The claimant maintained that he used the name of the location where he worked – that was Co-operative Food Primary Logistics at Newhouse. In the view of the Tribunal that was a reasonable mistake for the claimant to make since that was the place at which he worked.

13. In all the circumstances the Tribunal concluded that it had not been reasonably practicable to lodge within the original time limit and that thereafter the claimant had lodged his claim with a reasonable period of time.

14. Having dealt with the preliminary issue of time bar the Tribunal went on to hear evidence on the facts of the case.

Findings in Fact

15. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

16. The claimant was employed by the respondent as an HGV driver based at their Newhouse Depot. The claimant's employment commenced on 13 August 2013.

17. The respondent operates the Newhouse Depot from which goods are loaded onto heavy goods vehicles for despatch to various shops operated by the respondent around central Scotland.

18. The vehicles would be parked in loading bays for the purposes of loading. Employees known as loaders would load the goods onto the vehicles. Once loaded the vehicles would be parked elsewhere in the yard by employees known as shunters.

19. At Newhouse the vehicles would be moved around the loading yard by the shunters. Employee Y was a shunter.

20. The claimant has no set vehicle that he drives. The claimant can drive a different vehicle every shift or drive more than one vehicle in the course of a shift. Once allocated a vehicle the claimant would take the paperwork for the delivery and the keys for the vehicle and carry out vehicle checks. The vehicle checks would involve a visual inspection of the tyres and an all-round visible check of the vehicle. It would also involve opening the back doors to check that he had the correct load for the store he was delivering to and that the load was secure. The vehicle checks could take from between 5 to 45 minutes. Once carried out the claimant would drive to the store, deliver the goods and return to the Newhouse Depot.

21. The claimant has been trained by the respondent in the method of unloading his vehicle using the tail lift at the rear of the vehicle. In particular the claimant was aware that the respondents Logistics Standard Operating Procedure

stipulated that the tail lift must never be loaded with more than two standard roll cages. The respondents Safe Working Procedures also stipulated that "only two cages at a time allowed on platform". The claimant had received training on these procedures in 2012, 2018 and 2019.

22. The cages that are placed on the tail lift may weigh up to 300kg each.

23. There are CCTV cameras covering the loading bays where the vehicles have the goods loaded and covering the yard where the vehicles are parked up.

24. From time to time the goods delivered by the respondent to the stores would include "securities". Securities are clear plastic bags containing cigarettes or other tobacco products.

25. The respondent operates a system known as Transport Execution System ("TES") or Microlise. This is an electronic tracking system fitted to the vehicles which allows the respondent to track where the vehicle is, where it has been and to record events such as rear door opening. The TES system records when door opening events occur inside a geofence.

26. The geofence is an electronic fence that the TES system recognises. There is a geofence at the Newhouse Depot and at the Blantyre Store.

27. On 3 March 2020 the claimant was working a shift from the Newhouse Depot. The claimant clocked in to the Newhouse Depot at 13.52 and clocked out at 22.43. The claimant carried out to two deliveries during that period. The second delivery was to a store in Blantyre. The vehicle used for that delivery was NK68 XNN.

28. A number of heavy goods vehicles operated by the respondent from the Newhouse Depot were involved in deliveries to stores on the 3 and 4 March 2020. Three of these vehicles were NK68 XNN ("XNN"); NK64 VGU ("VGU") and NK13 TXM ("TXM").

29. On 3 March 2020 Vehicle VGU was loaded at bay 312 at the Newhouse Depot with goods for delivery to the Harthill store. The loader was Mr Miskiewicz. On

3 March 2020 vehicle TXM was loaded at bay 314 at the Newhouse Depot with goods for delivery to the Mayfield, Dalkeith store. The loader was Mr Downie. The goods to be loaded on both vehicles included securities. There were two bags of securities to be delivered to the Harthill store and two bags of securities to be delivered to the Mayfield, Dalkeith store.

30. Mr Colin Dickson ("Mr Dickson") was the respondent's Warehouse Team Manager in March 2020. He had overall responsibility for the loading operation.

31. After loading on 3 March 2020 the vehicles TXM and VGM were moved by employee Y to adjacent locations in the yard. Vehicle XNN was parked adjacent to those vehicles.

32. The TES system disclosed that whilst parked in the yard at the Newhouse Depot Vehicle TXM's rear doors opened at 20:11:53 and closed at 20:12:36 Vehicle VGU's rear doors opened at 20:11:13 and closed at 20:11:40 and Vehicle XNN's read doors opened at 20:11:32 and closed at 20:13:21.

33. The TES system also disclosed the following in respect of vehicle XNN:- 21:50:44 Door open inside geofence, Blantyre; 21:58:05 door closed; 21:59:18 Door open inside geofence – 166 mins 51 secs. Newhouse CDC; 22:03:35 Ignition on Blantyre; 22:06:09 Ignition off Blantyre; 22:07:13 – stopped; 22:11:32 Ignition on Blantyre; 22:14:17 Stopped; 22:29 Ignition off – Newhouse CDC.

34. Vehicle TXM delivered goods to the Mayfield, Dalkeith store. The driver of vehicle TXM on 3/4 March 2020 was Mr Carberry. Vehicle VGU delivered goods to the Harthill store. The driver of vehicle VGU on that occasion was Mr Gunn.

35. Mr Carberry reported to the Newhouse Depot at 02:35 on 4 March 2020 that two bags of securities were missing from the delivery to the Mayfield, Dalkeith Store. Mr Gunn reported to the Newhouse Depot at 03:45 on 4 March 2020 that two bags of securities were missing from the delivery to the Harthill store.

36. On 4 March 2020 the Mayfield, Dalkeith Store and the Harthill Store contacted the respondent to report that there were two missing bags of security in each of their respective deliveries. A formal report was submitted by the respondents Customer Services Manager notifying the Transport Team that two bags of securities were missing from the delivery to the Mayfield Store, Dalkeith. A separate report at that time also confirmed that two bags of securities were missing from the delivery to the Harthill store.

37. The value of the 4 bags of securities missing was £7,480.

38. The respondent initiated an investigation to check if the securities had been delivered in error to another store and to check the warehouse. The securities were not found.

39. The claimant was suspended from his employment on 26 March 2020 on basic pay due to an allegation of theft of the respondent's stock. Employee Y was also suspended at that time for the same reason.

40. The respondent appointed Jim McLaughlin ("Mr McLaughlin") to investigate the alleged theft.

41. On 29 March 2020 Mr Dickson provided a statement as part of the respondent's investigation. In that written statement he said:-

41.1 "CCTV footage shows both loaders – Mikolai Miskiewicz Bay 321 and Colin Downie Bay 314 collecting cigarette bags from the secure chamber and loading both vehicles with cigarette bags in accordance with loading procedures. Once loading was completed both loaders have locked and sealed the vehicles.

41.2 Manhattan tracking shows the correct bags were scanned onto the respective vehicles prior to loading completion.

41.3 I therefore confirm that both vehicles were correctly loaded with cigarettes and that both vehicles were locked and secured following loading."

42. An investigatory meeting took place on 31 March 2020. Mr McLaughlin and Louise Calvert attended for the respondent. The claimant attended and was accompanied by Derek Wilson.

43. At the investigatory meeting Mr McLaughlin asked the claimant if he recalled the events of the evening of 3 March 2020. The claimant said no. Mr McLaughlin explained the door opening times of the vehicles in the yard and that the claimant was present at these times with employee Y. The claimant said he did not recall speaking to employee Y. The claimant denied removing the cigarettes from VGU and TMM.

44. During this investigation meeting the claimant and Mr McLaughlin reviewed the CCTV footage of the evening of 3 March 2020 that showed the claimant walking towards his vehicle XNN and then the claimant and employee Y coming together and going out of view to the back of the vehicles VGU, TMM and XNN. The claimant accepted in the meeting that that was what the CCTV showed.

45. Mr McLaughlin discussed with the claimant during the investigation meeting on 31 March the movements of the vehicle XNN at the Blantyre store.

46. The TES system established that the vehicle XNN arrived at Blantyre store at 20:34. The rear door was opened at 21:50 and closed at 21:58. The rear door is then recorded as open again at 21:59 for 166 minutes and 51 seconds. XNN left the Blantyre store at 22:03 and returned to the Newhouse Depot for 22:29. Mr McLaughlin discussed these timings with the claimant. The claimant remarked that CCTV footage should be available from the Blantyre store.

47. Mr McLaughlin interviewed Mr Gunn on 3 April 2020. Mr Gunn confirmed that he had reported the cigarettes missing at 03:45 on 4 March 2020 and that in response to a question as to whether or not he saw or found anything unusual when checking the load he replied that there were no issues when he had checked the vehicle.

48. Mr McLaughlin interviewed Mr Carberry on 6 April 2020. Mr Carberry confirmed that he had reported the cigarettes missing at 02:35 on 4 March 2020 and that in response to a question as to whether or not he saw anything different or unusual when checking the vehicle he replied no everything looked fine.

49. Mr McLaughlin checked with Janice Melrose, Transport Compliance & Fleet Manager that there were no defects with vehicles XNN; VGU and TXM. She confirmed by e mail of 6 April 2020 that there were no reported defects and specifically no reported defects with rear doors.

50. The claimant was invited to a further investigatory meeting on 7 April 2020 with Mr McLaughlin and Louise Calvert. The claimant attended accompanied by Derek Wilson.

51. At the investigatory meeting on 7 April 2020 the claimant was asked again about the doors of the three vehicles all opening at about the same time. He replied that “My backdoors would have been open to do my checks. I don’t know about the other vehicles involved.” When asked if he was aware of employee Y in the area at the time he said no he did not recall.

52. At the investigatory meeting on 7 April 2020 all present viewed the CCTV footage obtained from the Blantyre Store. The clock on the CCTV footage was inaccurate. It was 8 minutes fast. Mr McLaughlin discussed with the claimant the possibility that the CCTV footage shows his door not properly closed - which would explain the TES recording of a door open event for 166 minutes. The CCTV footage also showed the claimant placing three cages on the tail lift of the vehicle.

53. The claimant asked about seeing the CCTV footage of the loaders placing the cigarettes on the two vehicles at the Newhouse depot. Mr McLaughlin explained that the CCTV footage had not been retained.

54. At the end of the Investigatory interview on 7 April the claimant was informed that the footage of him placing three cages on the tail lift was a serious breach

of health and safety and that this would be the subject of a separate investigation by another manager. With regard to the theft allegation the claimant maintained his innocence and his representative maintained that the lack of CCTV footage mean there was no proof that the cigarettes went on the vehicles in the first place.

55. At a meeting on 14 April 2020 the claimant was notified by Mr McLaughlin that he was forwarding the investigation to the next level of the disciplinary process. The claimant was notified that the disciplinary hearing would be conducted by Mr John Rowan, Transport Manager ("Mr Rowan").

56. On 15 April 2020 Mr Rowan interviewed Mr Downie. He asked Mr Downie if he remembered loading goods for an out of hours delivery for the Mayfield Store on 3 March 2020. Mr Downie confirmed that he did recall it as "Colin" had asked him about it before. He recalled it as a heavy load and he had to go twice for securities. He stated "The ones at the back end were underneath toilet rolls. You wouldn't have seen the two of them. That's all I remember." He confirmed that when he was finished he locked the door and put a blue seal on the door.

57. On 15 April 2020 Mr Rowan interviewed Mr Miskiewicz. Mr Rowan stated to Mr Miskiewicz that he had loaded an out of hours delivery to the Harthill Store and asked if Colin had asked him before about this. Mr Miskiewicz said no. Mr Miskiewicz did not remember the load.

58. On 15 April 2020 Mr Rowan interviewed Mr Dickson. In that interview Mr Dickson confirmed that he did not retain the CCTV footage of the vehicles being loaded. Mr Dickson stated that he had made an assumption there had been a theft based on the information provided to him. Mr Dickson confirmed he had viewed the CCTV footage for bay 312 and that clearly showed the security being loaded on to the vehicle. Mr Dickson showed Mr Rowan the load sheet for Mayfield Dalkeith with two securities referenced and his comment beneath it "Observed on Camera @ DD 312 loading 2 bags" and signed by him. With regard to 314 Mr Dickson stated "314 was not recording

but I can see loader picking up bags from security and activity tracker confirms times but I could not see loader putting bags on the vehicle". Mr Dickson showed Mr Rowan the Load Sheet for the Harthill delivery with the two securities referenced. Mr Dickson confirmed that he wrote on the Load Sheet "No camera on DD314 however Mikolai observed on camera collecting bags-cage." Mr Dickson was asked if he spoke to the Loaders and he confirmed he spoke to Colin Downie but he did not remember anything.

59. In total 4 bags of securities were loaded on to vehicle VGU – two for the Dalkeith, Mayfield store and two for the Hunterfield Road Store.

60. The respondent carried out a separate investigation into an alleged breach of health and safety procedures by the claimant. An investigatory meeting took place on 16 April 2020 with the claimant. That investigation was conducted by Derek Brynes from the respondent. He was accompanied at that meeting by Alan Wood. The claimant was accompanied by Mr Jim Moran.

61. At this investigatory meeting the claimant was shown the CCTV footage from the Blantyre store. The claimant accepted he had placed three cages on the tail lift. The claimant maintained he did this as he feared for his security. Putting three on would be quicker and would reduce the risk of him being robbed. The claimant accepted he had never been trained to put three cages on. Mr Brynes took the claimant through his training records and the respondents Safe System of Work document ("SSOW"). The SSOW specifies only two cages at a time used on the platform. The claimant accepted he had not followed the SSOW but no damage was done. Mr Brynes confirmed at the close of the investigatory interview that he was putting the matter forward for potential disciplinary action.

62. By letter of 6 May 2020 the claimant was invited to attend a disciplinary hearing in respect of two allegations that were notified to him in that letter. The first allegation was "Alleged serious misconduct and/or theft of Coop property on 3 March 2020, specifically you collaborated with a colleague to steal £7480 worth of cigarettes from Coop vehicles that had been loaded

earlier in the day. We treat this as gross misconduct and a breach of trust and confidence." ("the theft allegation"). The second allegation was "Alleged serious health and safety breach on 3 March, specifically that whilst unloading cages from the delivery vehicle you have placed 3 cages on the tailgate lift which is in contravention to company policy and places yourself, colleagues and potentially customers at risk of serious injury. We treat this as gross misconduct." ("the health and safety allegation"").

63. The respondent notified the claimant in the 6 May letter that dismissal may be an outcome.

64. A disciplinary hearing to consider the theft allegation and the health and safety allegation was held with the claimant on 12 May 2020. The claimant was accompanied by Mr Jim Moran, fellow employee. The meeting was conducted by Mr Rowan. Mr Rowan was a manager who had considerable experience of conducting disciplinary hearings in his career with the respondent. N Coutts attended as a witness.

65. At the disciplinary hearing the two allegations were put to the claimant and he was given an opportunity to respond. The claimant maintained his innocence regarding the theft allegation and questioned the credibility of the evidence regarding the loading of the cigarettes and the reliability of the TES system. The disciplinary hearing was adjourned for Mr Rowan to consider matters.

66. Mr Rowan carried out tests on the vehicles TMM, XNN and VGU on 14 and 15 May 2020 to determine that the TES system was operating correctly on all three vehicles. The outcome of those tests was that the TES system was accurately recording door opening and closing events for TMM and VGU but was 4 minutes adrift on that occasion for XNN.

67. The disciplinary hearing was reconvened on 18 June 2020. The claimant was accompanied by Mr D Howie, Unite the Union. The meeting was conducted by Mr Rowan. N Coutts attended as a witness.

68. The claimant was dismissed on the grounds of gross misconduct at the reconvened disciplinary hearing on 18 June. Mr Rowan considered that the theft allegation was established due to the timing of the door openings; the fact they were only open for a very short time; the claimant being in the area and the lack of any other explanation from the claimant. With regard to the health and safety allegation Mr Rowan also found this to be established as there was a blatant disregard for the respondent's procedures. The decision to dismiss the claimant was confirmed in a letter dated 18 June 2020.

69. In the letter of 18 June 2020 Mr Rowan incorrectly references the opening and closing times for the doors from the tests carried out on 14 and 15 May 2020 rather than the times from the TES system for 3 March 2020.

70. Employee Y was also dismissed by letter of 18 June 2020 for "Alleged serious misconduct and/or theft of Coop property on 3 March 2020, specifically you collaborated with a colleague to steal £7,480 worth of cigarettes from Coop vehicles that had been loaded earlier in the day."

71. The claimant appealed against his dismissal by letter of 23 June 2020.

72. An appeal hearing was held on 7th July 2020. That hearing was held before Andy Baird, Depot General Manager. Dani Donnelly, People Advisor from the respondent attended to take notes. David Howie fellow employee and Unite representative accompanied the claimant.

73. At the appeal hearing the claimant raised the following points in relation to the alleged theft:- That there was an inconsistency in the TES system (the door being shown open for 166 minutes); the contradictory statements of Mr Dickson; the lack of CCTV in the warehouse and that Mr Rowan dismissed on a "feeling" the claimant was guilty. In relation to the alleged health and safety breach he raised the following points:- the security issue at the Blantyre store; the fact no -one was injured and inconsistency in how these matters are treated. The hearing was adjourned to allow Mr Baird to carry out some further investigation.

74. Mr Baird spoke to Colin Hodge in the Transport Department to understand whether there could be issues with the TES system. Colin Hodge is seen within the respondent as an expert on the TES system. Colin Hodge did confirm that there can be occasional issues where the vehicle is outside a geofence area but this is normally picked up on the driver reports when the driver returns to the depot.

75. By letter of 23 July 2020 Mr Baird rejected the claimant's appeal. His grounds for doing so were there were grounds to dismiss for the alleged theft – it was not due to a feeling. That on the balance of probabilities it was unlikely that the TES system was in error on 3 March 2020; that Mr Rowan had dealt with the issue of the statement of Mr Dickson and the loaders. That with regard to the alleged health and safety breach it was not acceptable for the claimant to risk assess the situation himself.

76. Mr Baird's position was that he could not see any other possibility other than that the claimant and employee Y had colluded to steal the cigarettes.

77. The claimant lodged a second stage appeal by letter of 27 July 2020.

78. A second stage appeal hearing was held on 3 September 2020. That appeal was heard by Lynn Brown, Regional Support Manager. Dani Donnelly, People Adviser, attended as note taker for the respondent. Pat McIlvogue, Regional Industrial Officer, Unite, accompanied the claimant.

79. At the second stage appeal hearing the claimant raised the following points:- that there was an error in the timings given by Mr Rowan in his letter of 18 June 2020; there was a problem with the TES system; Mr Dickson's contradictory statement and dismissal based on a "feeling". In respect of the alleged breach of health and safety that there was inconsistency with three or four drivers not being dismissed for that offence.

80. By letter of 24 November 2020 the claimant was notified by Lynn Brown that his second stage appeal was unsuccessful. Her reasons for rejecting the appeal were set out in that letter. She rejected the claimants concerns

regarding the timings in Mr Rowan's letter pointing out that these were clearly an error but that throughout the process the correct timings were provided. With regard to the TES system she stated that further investigation had been carried out by her and this supported the accuracy of the system. That the only anomalies on 3 March relate to events in the Newhouse Depot and the claimant stopping on his return from Blantyre to the depot which have not been answered by the claimant. With regard to the health and safety breach she stated in the letter *"Point 2. Health and Safety aspects of your dismissal in that you carried out the delivery in a clean manner and for your own safety at delivery point. Having read the notes from previous meetings and our discussions, I find that there were other routes for you to take regarding this delivery point if you felt as unsafe as suggested and yet you didn't take these routes. I also believe that retraining wouldn't support you in the improvement of the Health & Safety breaches. I conclude this on the basis that you knowingly/wilfully made the decision to carry out this delivery as you saw fit with total disregard to the policies in place to protect you from incident/accident. The health and safety policies/procedures/ssow (safe system of work) are in place for a reason and it concerns me that you felt you were in the right not to follow these and would potentially do so again as I can see you were adamant that you did the right thing in that you had a clean delivery. For me that was down more to luck than good judgment on your part. I stress that the health, safety and welfare of all is paramount and your disregard for this is truly disappointing."*

81. The claimants gross monthly wage was £2,580.96 (£1,861.32 net) and his gross weekly wage was £645.24 (£465.33 net).

82. The claimant received a 10% employer contribution to his pension.

Submissions

Submissions for the respondent

83. Ms Nichols submitted on behalf of the respondent whilst the burden of proof was on the respondent to show the reason for the dismissal was misconduct that was clearly discharged on the evidence as both the alleged theft and the alleged health and safety breach were misconduct grounds and capable of being gross misconduct.

84. Ms Nicholls referred to the test in ***British Home Stores Ltd v Burchell [1978] IRLR 379*** and submitted that the evidence showed that the respondent had a belief in the guilt of the claimant; that there were reasonable grounds to sustain that belief and that as much investigation as was reasonably possible had been carried out. She also referenced the case of ***Monie -v- Coral Racing Limited 1980 IRLR 464*** which established that where there is more than one employee under suspicion the employer may dismiss both if it has a reasonable suspicion that one of the two or both acted dishonestly. Here both the claimant and employee Y were dismissed.

85. With regard to the TES system relied up by the respondent and criticised by the claimant the respondent had investigated the concerns raised and checked the position.

86. In relation to Mr Dickson's evidence being unreliable Mr Rowan did deal with that and found him to be credible with no ulterior motive.

87. In response to the claimants position that there was no evidence the cigarettes were loaded the respondent maintains that the loaders and drivers were interviewed as was Colin Dickson – there was no further investigation that could be carried out. What is inescapable is that if the TES system is correct then both the claimant and employee Y are in close proximity to the open doors of the vehicles and the bags of security go missing. That is a reasonable ground upon which to conclude that one of the two or both acted dishonestly. In addition the claimant simply says he does not remember, his

answers are not plausible. The respondents says that you have the TES information; the CCTV, the claimants responses and the question of when else could the cigarettes have gone missing. That all adds up to reasonable grounds.

88. With regard to the health and safety ground for dismissal the respondent's position is that the admitted breach is grounds for gross misconduct. There was a fair reason for dismissal and a fair process. The policy was very clear and was there for a very good reason. The reason given by the claimant for breaching it – his security concerns, is put forward after the event – he did not raise it at the time.

89. The respondent maintains that if the dismissal was unfair then a reduction on Polkey grounds would be appropriate (***Polkey -v- A.E. Dayton Services Limited 1987 IRLR 503***) and a reduction on the grounds of contributory conduct.

Submissions for the Claimant

90. The claimant pointed to multiple discrepancies – the TES system not working and the fact that it shows the door to his vehicle open for 166 minutes establishes that the system is not reliable; the lack of CCTV footage; the loaders saying they did not remember; the lack of evidence that the cigarettes were loaded on to the vehicles as grounds for the dismissal being unfair. He categorically denied being involved in the theft. His claim is not about the money – it is about establishing his innocence.

91. With regard to the health and safety allegation the claimant accepted he had put three cages on the lift but in that year there had been a lot of thefts and he was concerned about that. He considered the process had taken too long and the respondent had been too quick to bring in the health and safety issues. He accepted that he knew what the allegations were and had had an opportunity to respond to them.

92. The claimant started a new job in September 2020 and is only seeking compensation up to September 2020.The Tribunal gave the claimant an opportunity to expand upon his position re ongoing losses but the claimant insisted he was only looking at the position to September 2020.

The Law

93. Section 94 of the ERA provides for the right of an employee not to be unfairly dismissed by his employer.

94. Section 98 of the ERA provides:-

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

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of an employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under an enactment.

(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."

95. In terms of Section 98(1) of the ERA it is for the employer to establish the reason for dismissal. In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section 98(4).

96. The Tribunal should first examine the facts known to the employer at the time of the dismissal and ignore facts discovered later. In a misconduct case if facts emerge after the dismissal which show that the employee was innocent of the suspected misconduct after all that does not make the dismissal unfair.

97. The Tribunal must then ask whether in all the circumstances the employer acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The onus of proof is no longer on the employer at this stage. The matter is at large for determination by the Tribunal under section 98(4).

98. Each case must turn on its own facts. The Tribunal must not substitute its view for that of the employer (***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*** and ***Foley v Post Office 2000 IRLR 827*** and ***HSBC Bank v Madden [2000] ICR 1283***). The question is whether the dismissal fell within the band of reasonable responses which a reasonable employer might have adopted in response to the employee's conduct, not whether the Tribunal itself would have dismissed in these circumstances.

99. In misconduct cases it is appropriate to consider the tests set out in ***British Home Stores Ltd v Burchell [1978] IRLR 379***:-

"First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further.

It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure" as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt". The test, and the test all the way through, is reasonableness, and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstances be a reasonable conclusion."

100. The test in Burchell has been modified in the case of ***Monie -v- Coral Racing Limited 1980 IRLR 464***. The Court of Appeal determined that where there is a reasonable suspicion that one of two or possibly both employees must have acted dishonestly, it is not necessary for the employer to believe that either of them acted dishonestly.

Discussion & Decision

101. It is appropriate to deal separately with the theft allegation and the health and safety allegation. However before considering the evidence and applying he relevant legal tests the Employment Tribunal notes that it was satisfied under S 98(1) of the ERA that the respondent had satisfied the burden of establishing that the reason for dismissal was misconduct. The claimant did not maintain that there was any other reason for the dismissal and it is clear from the findings in fact that the reason for the dismissal was one or both of the theft allegation and the health and safety allegation. Both of these allegations fall into the category of misconduct.

102. It is also noted that the claimant did not take issue with any matters relating to process, save as regards the length of time the process took – which we will return to. The claimant accepted that he was fully aware what the allegations were and had ample opportunity to respond to them. He was accompanied at all the relevant investigation and disciplinary and appeal meetings and had sight of the relevant statements and CCTV footage. He did raise a concern about the CCTV footage of the cigarettes being loaded on to the vehicles being missing – but it was not disputed that through the whole process he had an opportunity to view the CCTV footage of the yard and the Blantyre store. When attending the disciplinary meetings he was aware that dismissal was a potential outcome.

103. Turning firstly then to apply the test in S 98(4) of the ERA to the theft allegation. It was the respondents position that the appropriate tests to apply are those set down in ***British Home Stores Ltd v Burchell [1978] IRLR 379*** as modified by the decision in ***Monie -v- Coral Racing Limited 1980 IRLR 464.*** However the Employment Tribunal is not satisfied that in fact the test set out in ***Monie*** is the appropriate test in the current circumstances. The point behind the ***Monie*** test is that the employer is unable to identify which of two

or more employees may have committed the offence in circumstances where either of them could have committed the offence or indeed both of them. That is not the position here. Here the very specific allegation put to the claimant is that he "collaborated with a colleague to steal £7,480 worth of cigarettes". The allegation is not that he did it alone or in collaboration. The distinction is an important one as ***Monie*** is an exception to the general requirement as set out in ***Burchell*** that the employer must believe that he is guilty of the misconduct – whereas ***Monie*** applies a lesser standard of a reasonable suspicion that one or both of them must have acted dishonestly. It is critical to the decision in ***Monie*** and cases such as ***Parr v Whitbread plc (t/a Threshers Wine Merchants) 1990 IRLR 39*** that the claimant was one of a small number of employees who had the opportunity to commit the theft and the employer cannot determine between them who it was. Either they acted alone or together. In the present case there is no suggestion that the claimant could have acted alone. Indeed on the evidence it is not possible for him to have acted alone as he did not have access to the keys for the two vehicles on which the cigarettes had been loaded. The only suggestion is that he acted in collaboration. In these circumstances the test in ***Monie*** is not appropriate, The appropriate test is that set out in ***Burchill***.

104. Did the respondent believe that the claimant collaborated with employee Y to steal £7480 worth of cigarettes? On the evidence the Tribunal is satisfied that the employer did believe that. Evidence was heard from Mr Rowan and Mr Baird (first appeal stage). They were both of the opinion that the only plausible explanation was that the cigarettes were removed from the two vehicles in the yard at Newhouse around the time that all three vehicles were parked adjacent to each other and that the claimant was involved in that. They both thought there could be no other explanation. That was a position that Ms Brown supported in her final decision on the appeal on 24 November 2020.

105. Did the respondent have in his mind reasonable grounds upon which to sustain that belief? That is really the key area of this case. Was there evidence upon which the respondent could conclude that it was more likely than not

that the claimant had committed the misconduct? The evidence that the respondent relied upon was that the cigarettes had been placed on the vehicles TXM and VGU. Although Mr Dickson gave contradictory statements there is no suggestion that he had any motive for lying about what happened. The CCTV footage not being retained was unhelpful but Mr Dickson was clear that for vehicle VGU (Dalkeith) the CCTV showed the cigarettes being placed on the vehicle. For vehicle TMM the loader was seen collecting the bags from the cage. There was evidence upon which the respondent could conclude it was more likely than not that the cigarettes were placed on the vehicles. Thereafter if you accept the accuracy of the TES system the only time that the doors of TXM and VGU were opened was when the TES system indicated that the doors of all three vehicles opened at around the same time in the Newhouse Depot. The claimant challenged the reliability of the TES system based upon the error in his vehicle recording 166 minutes with the door open. However that may have been because his door was not properly closed as Mr McLaughlin suggested in the investigatory meeting on 7 April. The respondent did carry out checks on the TES system and found it to be reliable. Mr Baird in addition spoke to Colin Hodge. Ms Brown made further enquiries on the accuracy of the TES system. In any event the CCTV footage from the Newhouse Depot was consistent with what the TES system displayed and it would seem unlikely that the TES system for all three vehicles would malfunction at the same time. There is accordingly evidence upon which it was reasonable for the respondent to conclude that all three vehicles did have their doors opened at the same time in the Newhouse Depot. The CCTV footage of the Newhouse Depot places the claimant and employee Y in the same vicinity with the vehicles at the time the doors are opened. It showed both of them together going around to the back of the vehicles. For TXM and VGU there were no other door opening events before the vehicles arrived at their destinations for their deliveries.

106. It is not for the Employment Tribunal to substitute its own view on these matters. The issue is whether the evidence before the respondent was enough upon which it would have been reasonable for the respondent to

conclude that it was more likely than not that the claimant colluded with employee Y in the theft of the cigarettes? In the view of the Employment Tribunal there were grounds upon which the respondent could come to that view.

107. Had the respondent carried out as much investigation into the matter as was reasonable in all the circumstances of the case? The respondent had interviewed Mr Dickson twice; the two loaders were interviewed; the two drivers were interviewed; the TES system was analysed and a check on the system was carried out on 14/15 May 2020; Mr McLaughlin checked with the Transport Compliance & Fleet Manager on 6 April regarding the vehicles themselves. Mr Baird spoke with Mr Colin Hodge. Ms Brown made further enquiries regarding the accuracy of the TES system. It is difficult to think of any further investigation that the respondent could have carried out. The claimant did not suggest any further investigation that could be carried out. His primary concern was with the lack of clear evidence pointing to his guilt and the inconsistencies in the evidence that had been obtained.

108. Finally was dismissal within the band of reasonable responses? If the respondent had grounds to be satisfied, in accordance with the ***Burchell*** tests that the misconduct was established it is clear to the Employment Tribunal that dismissal does fall within the band of reasonable responses.

109. The Employment Tribunal did also consider whether the length of the time for the investigation and disciplinary process was a factor in assessing the fairness of the dismissal under Section 98(4) of the ERA. Whilst the process did take some time the Employment Tribunal accepted the respondent's submission that it was a complex matter and in all the circumstances the Employment Tribunal did not consider that the time taken had any impact on the overall fairness of the process.

110. In all the circumstances the Employment Tribunal finds the dismissal on the basis of the allegation of theft to be a fair dismissal.

111. Turning to the health and safety allegation. It was not disputed by the claimant that he did load the three cages onto the tail of the vehicle at the Blantyre store. It was not disputed by the claimant that this was in breach of the health and safety rules of the respondent. The claimant accepted that the cages could weigh up to 300kg each. The claimant accepted that he had been trained only to place two cages on the tail. His reasoning for placing three cages on the tail was that he was concerned about his own security at night in that location. There was only one way in and out of the car park behind the store. He was concerned about being blocked in by someone looking to steal the goods. He wanted to complete the work as quickly as possible. No one was hurt and no damage was caused by him placing three cages on the tail lift. He claimed that he had raised concerns about security but conceded that he had at no point refused to go to the Blantyre store. The claimant did raise as an issue at an earlier stage the suggestion that the health and safety allegation was only raised because of the theft allegation and that it was dealt with with undue haste. However the Employment Tribunal was satisfied on the evidence that the issue arose when the claimant suggested a review of the CCTV footage at the Blantyre store; that it was a serious issue and that the respondents were entitled in the circumstances to consider it as a separate serious allegation. In terms of process the claimant did not dispute that he had fair notice of the allegation and a fair opportunity to respond to it.

112. In these circumstances where the misconduct is admitted the only material issue for the Employment Tribunal to consider is whether or not dismissal was within the band of reasonable responses in all the circumstances.

113. It was the claimant's position that the appropriate sanction should have been a final written warning and re-training. The claimant made reference to other employees being given a similar sanction for that type of offence. However the claimant did not provide any specific examples. In the appeal hearing before Ms Brown the claimants representative, Mr McIlvogue, raised the same point about inconsistency of treatment. Ms Brown confirmed in her written decision that she was not aware of any inconsistent treatment on this point.

In turning down the appeal she had regard to the fact that the claimant had knowingly and willingly made the decision to load the three cages with total disregard for the policies in place. Mr Rowan in arriving at his decision to dismiss considered there was a blatant disregard for the respondent's health and safety advice. Mr Rowan also pointed out that the additional weight could have resulted in a fatality. In his evidence before the Tribunal Mr Rowan did say under cross examination that he was aware of others receiving a final written warning for this type of offence and he was not aware of anyone else being dismissed. He stated that he was swaying between a final written warning and a dismissal but what persuaded him to go for dismissal was that the claimant showed no remorse and indicated he would continue to do it in the circumstances.

114. The fact that for some offences some employees may receive a final written warning whilst for others dismissal may be the sanction does not by itself mean that that is an inconsistency that makes the dismissal unfair (***Hadijoannou -v- Coral Casinos Limited 1981 IRLR 352***). There was no evidence to show that any of the other cases where a final written warning was given were in exactly the same circumstances as applied in the case of the claimant. In the absence of evidence suggesting that there was inconsistency in very similar cases or suggesting that the claimant had been led to believe that he was free to ignore the standard operating procedure it is ultimately a matter for the Employer to determine the appropriate sanction and provided it falls with the band of reasonable responses it is not for the Employment Tribunal to interfere. In the present case there were reasons why the respondents considered that dismissal was an appropriate sanction. In light of the potentially very serious consequences of cages toppling over from the tail lift the Employment Tribunal can understand why a breach of this rule would be treated very seriously. In the opinion of the Employment Tribunal dismissal was within the band of reasonable responses and for that reason a dismissal on the grounds of the failure to comply with the requirement to have two cages only on the tail lift was a fair dismissal in all the circumstances.

115. The Employment Tribunal accordingly dismisses the claim of unfair dismissal.

Employment Judge: Stuart Neilson
Date of Judgment: 05 December 2021
Entered in register: 09 December 2021
and copied to parties