THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr R Portwin		**Deans Blinds & Awnings UK Ltd**

Held at London South **On 25 September 2018**

BEFORE: Employment Judge Siddall

Representation

For the Claimant: **Mr D Patel, Counsel**

For the Respondent: **Mr J England, Counsel**

JUDGMENT

The decision of the tribunal is:-

1. The claim for wrongful dismissal succeeds and the Claimant is awarded £4,399.92.

2. The claim for unfair dismissal succeeds and the Claimant is awarded a basic award of £13,199.00 and a compensatory award of £14,034.60.

3. The total monetary award is £31,663.52.

4. The prescribed element is £6,984.00.

5. The prescribed period is 10 January 2018 to 25 September 2018.

6. The amount by which the total monetary award exceeds the prescribed element is £24,679.52.

REASONS

1. This is a claim for unfair dismissal brought by the Claimant. He was summarily dismissed by the Respondent on 10 January 2018 for use of his company vehicle outside business hours in breach of company policy.

2. I have heard evidence today from the Claimant himself and from Ms Olamide Bankole, an HR officer, on behalf of the Respondent. Although the Respondent has made it clear that Paul Morrison was the decision maker in relation to both the disciplinary hearing and the appeal, he has failed to attend the Tribunal today and give evidence. He has submitted a written statement and asked for that to be taken into account. There were a number of questions that would have been put to Mr Morrison about the basis on which he made his decision. Ms Bankole has admitted that in a number of areas she is not able to assist us on matters that formed part of his decision making. As a result I am only able to give limited weight to the written witness statement and I have to say that Mr Morrison has done no favours for the Respondent by not turning up to the hearing today.

3. The facts I have found and the conclusions I have drawn from them are as follows. The Claimant commenced his employment on 9 January 1979 and was a blind installation engineer. He agrees that he was given a contract of employment and a blank version of the terms that he would have been issued was contained in the Hearing Bundle.

4. The Claimant agrees that at one stage he was issued with a company handbook and he produced an extract from that handbook, which is contained at page 42 of the Bundle and under the Section on Company Vehicles reads as follows: “In some circumstances the use of the vehicle for reasonable private mileage is permitted under an employee’s terms of employment. However, the definition of what constitutes reasonable private mileage remains the domain of the Company and may be limited for any individual considered to be abusing the privilege”. I find that this is the provision that applied to the Claimant during most of the period of his employment up to 2017.

5. The Respondent's case is that in August 2013 a new handbook was introduced and distributed to all members of staff. The Claimant says that he was never given a copy. The Respondent is not able to produce any direct evidence either of the distribution of the handbook to its employees or of any communication about any changes that this handbook contained.

6. Ms Bankole said that following the Claimant's dismissal she spoke to a Mike Emingworth, a Manager within the business, and he confirmed that the handbook had been circulated in August 2013. There is no documentary evidence of distribution to everybody and there is no evidence, for example, of a receipt to show that the Claimant received it. In the absence of any witness from the Respondent who is able to give direct evidence about the circumstances in which the handbook was communicated in 2013 I prefer the evidence of the Claimant and find on the balance of probabilities that a copy of the handbook was not supplied to him.

7. I make a further point, which is that if the introduction of the new handbook was intended to implement a significant change to the vehicle use policy in relation to private use, there is no evidence at all that this was directly brought to the attention of any member of staff. In fact, when I look at the terms of the new handbook in 2013 (page 33 of the Bundle), the Section on private use is not unequivocal. It reads as follows: "the use of any vehicle *unless explicitly stated otherwise by the management* is restricted to business use only"(my emphasis). That suggests that if a member of staff has been given authority to use a vehicle for private purposes there will not be a breach of the vehicle user's policy.

8. I accept that the Claimant had been permitted use of his company vehicle outside business hours for a number of years prior to the introduction of the new handbook in 2013. He believed quite reasonably that he had authorisation to do so. Even if he had seen the new handbook in 2013, he may well have assumed it did not apply to him because he had authority to use the vehicle outside business hours. In any event, the Claimant received a letter in July 2016 which made that clear. He said that he obtained that letter for

insurance purposes. The letter which is signed by the Operations Director at the time, Mr Mike Holden, states that Mr Portwin had been driving a company vehicle throughout the last 10 years and it goes on to say "during that time he was driving on the company fleet motor insurance policy for the purposes in connection with the business and also for social, domestic and pleasure use". I find that this letter of July 2016 amounts to implicit authorisation granted to the Claimant to use the vehicle outside business hours. This authorisation covers a period of time from around 2006 onwards and postdates the introduction of the new handbook in 2013.

9. The Respondent refers to a meeting that took place on 13 February 2017 which followed a change in the ownership of the business and the arrival of new directors. The notes of that meeting are contained on page 40 of the Bundle.

10. It is recorded that during that meeting Martin Portwin (the Claimant's son and a manager of the business) stated that "vehicles not permitted to be used out of working hours for personal use unless authorised by the office". Again, this makes it clear that there is no unequivocal ban on use of vehicles outside business hours because private use is permitted where authorisation has been given.

11. The Claimant said today in evidence that after that meeting on 13 February, his son had said to him that this policy did not apply to the Claimant as his use of the vehicle was authorised. This conversation was not referred to in his witness statement nor had it been mentioned during the disciplinary process. I find that although they may have had a conversation following the meeting about his father's use of the vehicle and may have agreed between them that the policy did not apply to him because he had prior authorisation, I do not accept that anything said by Mr Martin Portwin on 13 February amounted to further specific authorisation to his father that he was permitted to carry on using the vehicle outside business hours. If specific authorisation had been given, I find that the Claimant would have mentioned this during the disciplinary process. In saying that, there is still of course the question of whether there had been earlier authorisation which I find that there had. I note also that the

Claimant did not go and try to clarify the rules around the use of the van following that meeting.

12. Ms Bankole joined the company in a HR role in December 2017. During her training, Ms Bankole was with the Operations Manager, Ms Natalie Charaf and they discovered from the vehicle tracker that the Claimant had been using his vehicle outside business hours. A discussion took place between Ms Bankole, Ms Charaf and Mr Paul Morrison, a Director of the Respondent. During this meeting Ms Charaf and Mr Morrison alleged that the Claimant had been in receipt of earlier warnings about his performance at work. Ms Charaf handed Ms Bankole a folder but she searched through it and could find no evidence of any earlier warnings. Ms Bankole said in evidence that Mr Morrison wanted to use these warnings as part of a disciplinary case against the Claimant, but she advised him that he could not.

13. The Claimant was sent a letter of invitation on 4 January asking him to attend a disciplinary meeting to answer an allegation about use of his vehicle outside business hours. This letter stated that the possible outcomes of the meeting could be a formal warning, suspension or dismissal. I accept that the letter enclosed evidence of the tracking of the vehicle outside business hours and a copy of the vehicle user policy from the handbook of August 2013.

14. On 10 January 2018, the Claimant attended a disciplinary meeting. This meeting was conducted in an unusual way. Although Ms Bankole conducted the meeting, she agreed that she was not the decision maker and that the decision maker was Mr Morrison. Ms Bankole said she requested that Mr Morrison conduct the disciplinary hearing himself but he refused to do so. At this meeting the Claimant admitted using the vehicle outside business hours but he said he had never seen the handbook that was produced in August 2013. This meeting lasted for 12 minutes. Ms Bankole then went back and reported to Mr Morrison, who instructed her to issue a letter of summary dismissal to the Claimant and this took effect on the same day.

15. The Claimant appealed against his dismissal. In his letter of appeal he referred to the letter of authorisation dated July 2016, which indicated that he was

permitted to use the vehicle for both business and 'social, domestic and pleasure' use. Before the appeal Mr Morrison and Ms Charaf told Ms Bankole that the Claimant's nephew had also been dismissed for personal use of his vehicle. Ms Bankole went on to state this to the Claimant in the appeal meeting, but it turns out that this was incorrect. Ms Bankole confirmed in evidence today that the nephew was given a warning for unauthorised use of the vehicle and he was dismissed for another reason. I was told that someone else had been dismissed for using the vehicle outside business hours, but in that case the vehicle had been stolen.

16. Ms Bankole explained that the Respondent is part of a group of companies. Mr Paul Morrison and Mr Dan Morrison are directors of the Respondent and there were three directors of the group holding company (the two Mr Morrisons and Ms Charaf). Ms Bankole reports that there are now just four members of staff employed by the Respondent although there are approximately fifty one people working across the group, many of whom are sub-contractors.

17. Ms Bankole said that she was aware of the ACAS Code of Practice relating to grievance and disciplinary procedures. When it came to the appeal hearing she suggested that the Respondent asked a different director, such as Mr Dan Morrison (who deals with sales) but she said that Mr Paul Morrison refused. So Ms Bankole conducted the appeal hearing herself but again she did not make the decision herself. Following the hearing she reported to Mr Morrison. There seems to have been little consideration of the letter of July 2016 during their discussion. Mr Morrison said that the writer of that letter, Mr Holden, could not be contacted as he had left the company. There was no attempt to speak to anyone about whether the Claimant had received authorisation in the past for private use of the vehicle and Ms Bankole was instructed to dismiss the appeal which she did.

Decision

18. I find that the reason for the dismissal was the Claimant's alleged misconduct, which is a potentially fair reason under section 98 of the Employment Rights Act 1996.

19. Both sides agree that the test to be applied here is that set out in the *Burchell v British Home Stores* case, namely: did the Respondent have a genuine belief that the Claimant was responsible for misconduct, and did they hold that belief on reasonable grounds and after reasonable investigation? If so, was dismissal within the range of reasonable responses available to the Respondent?

20. I accept that initially the Respondent had a genuine belief that the Claimant had breached the vehicle user policy. It had grounds to do so based on the contents of the employee handbook which they believed to have been issued to staff in August 2013. However I find that belief was unsustainable after the letter dated July 2016 was produced by the Claimant as part of his appeal. This put the situation in a completely different light. To some extent this made the issue of whether the handbook was distributed to the Claimant in August 2013 irrelevant as the Claimant had a letter postdating the issue of the new handbook, which clearly gives authority to use the vehicle outside business hours for his personal use. There is no evidence that the Respondent gave fresh consideration to that situation on the appeal.

21. The Respondent has placed particular weight on what happened at the meeting in February 2017. It is clear that at this meeting the Respondent stated to all the staff who were present that the vehicle should not be used outside business hours unless specific authorisation had been obtained. Even if his son had not given specific authority to continue, I find that it was reasonable for the Claimant to assume that the stipulation did not apply to him as he had prior authorisation and he had been using the vehicle outside business hours for over 10 years. I do note that the Claimant made no effort to check the position or clarify it with his management at that stage and I will return to that later on.

22. When I look at the investigation and the process carried out by the Respondent I find that this had serious flaws. There was a failure to investigate the question of whether the Claimant had prior authorisation. Paul Morrison who is the decision maker did not attend the disciplinary hearing or the appeal. Taking into account the totality of the evidence, I accept the Claimant's assertion that Mr Morrison had prejudged the situation. He seems to have made up his mind at

the outset that the Claimant should be dismissed and even wanted to take other matters into account that had not been the subject of formal warnings and were not put to the Claimant as part of the disciplinary hearing. There was very little pause for reflection either following the disciplinary hearing or following the appeal hearing before Mr Morrison issued instructions that the dismissal should be implemented.

23. Secondly, I find that it was unreasonable for the Respondent not to find a different manager to conduct the appeal. The Respondent is part of a medium sized group of companies with common directors and there was a second director available who could have heard the appeal. It is entirely possible in this case that a fresh person looking at the evidence produced on the appeal (including the terms of the earlier handbook and the letter from July 2016) would have taken an entirely different view of the situation and could have decided that the decision to dismiss should be withdrawn. The appeal process was not fair and was in breach of the ACAS code of practice. I find that overall the investigation and the disciplinary processes carried out were not reasonable.

24. In any event, even if those aspects of the Burchell test had been satisfied I would find that dismissal was outside the range of reasonable responses available to the Respondent. The Claimant had had permission to use the vehicle outside business hours for over 10 years and he had a letter of authorisation confirming this. He had been with the company for 39 years and had a clean disciplinary record. In all the circumstances I find that it was not reasonable for the Respondent to conclude that summary dismissal was the appropriate sanction. There is no evidence that the Respondent gave any consideration to another sanction. It may have been open to the Respondent to conclude that the Claimant should have sought further authorisation following the meeting in February 2017 and this may have justified at most a formal written warning and perhaps an instruction to the Claimant that in the future private use would not be permitted, but that is not what happened. The Respondent moved straight to summary dismissal. In any event I do not accept that it was reasonable for the Respondent to treat this offence as one of gross

misconduct warranting immediate dismissal. The handbook does not state that breach of the policy would be a gross misconduct offence. Such a decision was not consistent with other cases. The Claimant's nephew had only received a warning for private use of the vehicle. Another member of staff had been dismissed but the circumstances appear to have been rather different. I find that in all the circumstances the decision to summarily dismiss fell outside the band of reasonable responses that was available to the Respondent and that the dismissal was unfair.

25. I also find for the same reasons that there was no repudiatory breach of contract by the Claimant. He was using the vehicle outside business hours, but he was doing so on the basis that he had been given prior permission to do so. Notwithstanding the instruction issued in February 2017, which he believed did not apply to him, I find that this did not amount to a fundamental breach of his contract of employment.

Remedy

26. I have considered carefully whether in light of the case of *Polkey*, I should make a reduction to any compensation on the basis that if a fair process had been carried out there is a percentage chance that the Claimant could have been fairly dismissed. I do not accept that in this case. I find that the whole process was fundamentally flawed. There seemed to have been a decision made at the outset that the Claimant was to be dismissed and no proper consideration of the evidence. Had a fair appeal been carried out, there is every chance that the Claimant would not have been dismissed and in all the circumstances I find that a *Polkey* reduction would not be appropriate.

27. I have also considered whether I should make a reduction for contributory conduct on the part of the Claimant. I find that in this case a small reduction for contributory conduct is appropriate. Following the meeting in February 2017, which came soon after new owners had taken over the business, the Claimant did not make any effort to clarify the situation relating to use of the vehicle. He could have produced the letter of July 2016 to the new directors and sought ongoing authorisation. It may be that some agreement about use of the vehicle

have been reached at that point, as the vehicle use policy allowed for a degree of flexibility. I find that there was some fault there on the part of the Claimant and I have made a reduction on the basis of contribution of 10% from the basic award and the compensatory award.

28. Turning to the monetary elements, I award the following sums.

29. In relation to notice pay I award the sum of £4,399.92 which represents the period of 12 weeks' notice.

30. In relation to unfair dismissal, the basic award is calculated at £14,644.90. I have applied a 10% reduction which brings the figure down to £13,199.00.

31. I turn to the compensatory award. In calculating the losses from date of dismissal to the date of the tribunal hearing today, I leave out of account the 12 weeks in relation to which the Claimant is awarded notice pay. I also note that as from 31 July this year, the Claimant has been signed off as unfit for work for reasons unrelated to his dismissal. I do not consider the Respondent should have to pay for any period during which the Claimant cannot work due to ill health. I have therefore calculated a period of 16 weeks from the end of the notice period to 31 July 2018. 16 weeks at £367 comes to a figure of £5,872. To that I add 16 weeks loss of employer pension contribution at £38.25 per week and I award an additional sum of £612.00.

32. In relation to loss of statutory rights I considered what both parties have submitted. Mr Patel asked for 2 weeks at full pay, Mr England suggested £250. In all the circumstances given the Claimant's long service and the fact that once he finds new employment it will take him two years to acquire statutory protection against unfair dismissal, I think that £250 would be a minimal amount and I award a sum of £500.

33. That brings me to a figure for past losses of £6,984. I consider that the Claimant made reasonable efforts to mitigate his loss. He has not applied for a huge number of jobs, but he has applied for approximately six jobs over the

period up to when he became unwell and I find that he has made reasonable efforts to find other employment.

34. The Claimant's evidence was that at his age (he is in his early sixties) and after almost 40 years employment with the Respondent he did not to want to consider working on a self-employed basis. He said he wanted to work and be paid a salary and I consider that was reasonable in all the circumstances.

35. In relation to future loss, I note that the Claimant seeks an award of 15 weeks future loss. I take into account the fact that he has been ill since the end of July. He is going to have surgery and he thinks it will take him around 10 weeks to recover. After that the Claimant will be looking for another job. He is now aged 63 and he worked for 39 years for the same company. I accept that he has had trouble finding work since his dismissal. In all those circumstances I find that the claim for 15 weeks future loss is reasonable. In fact I might have been inclined to award rather more than that, but as that is the period of time and the sum claimed in his Schedule of Loss, that is what I am going to award. So, the award for future loss is £6,576.

36. If I add up the past and future loss, that brings me to a figure for the compensatory award of £13,560, but to that I have applied a 10% reduction for contributory fault.

37. Now we come to the question of the ACAS Code of Practice. I accept the submission that there have been serious breaches of the ACAS Code of Practice here. First of all, in relation to the fact that the person who made the decision did not conduct a hearing with the Claimant and secondly in relation to the failure to find an independent manager to hold the appeal.

38. One of the principles set out at paragraph 4 of the Code of Practice states that employees should be given the opportunity to put their case in response to any disciplinary allegation before a decision is made but the Claimant was given no opportunity to put his case to Mr Morrison.

39. Paragraph 27 of the Code of Practice states that 'the appeal should be dealt with impartially and wherever possible by a manager who had not previously been involved in the case'. Given the size of the group company and the fact that it has three directors, and there was clearly another director available who could have heard the appeal, I find that the conduct of the appeal was unreasonable in breach of the Code. In effect the appeal was conducted by Mr Paul Morrison who had already conducted an (unfair) disciplinary hearing and was not impartial. I also note Ms Bankole's evidence that she was aware of the Code of Practice and that she advised the directors on what it meant. Despite that they did not take her advice and I find that an uplift to reflect a failure to follow the ACAS Code is more than appropriate. This is a serious case of breach of the ACAS Code perhaps not the most serious, but there are certainly significant defects and I take into account the fact that the director had the benefit of receiving advice from an HR Manager. I have allowed a 15% uplift amounting to £1,830.60. That brings the total compensatory award to £14,034.60.

40. To summarise the award, the basic award less 10% is £13,199. The total compensatory award is £14,034.60. Notice pay comes to £4,399.92 and the total award made is £31,633.52.

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Employment Judge Siddall
Date: 12 October 2018.