Case Number: 2501010/2016

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr A K Markwell	**AND**	**Loomis UK Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 23 & 24 January 2017**

Before: **Employment Judge Hargrove**

Appearances

For the Claimant: **Mr McHugh of Counsel**
For the Respondent: **Mr J Jupp of Counsel**

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's claims of unfair dismissal and wrongful dismissal are not well-founded.

REASONS

1 On **17 August 2016** the claimant brought claims to the Employment Tribunal of unfair dismissal and wrongful dismissal against his employer, Loomis, arising out of events which took place in the course of his employment as a Driver/Custodian on **31 March 2016**. The claimant was suspended on that date; there was an investigation by Darren Little the claimant's Shift Manager, and following a disciplinary hearing on **14 April** he was summarily dismissed for alleged gross misconduct by Mr R Davidson the Branch Manager for Edinburgh. His appeal was unsuccessful.

The respondent's response dated 14 **September 2016** asserted that he was fairly dismissed for a reason related to conduct; and that he was in fact guilty of gross misconduct such that the respondent was entitled to dismiss without notice namely the failure by him to wear a protective helmet with a visor on a coin collection at the private car park of ISS Mediclean in Bishop Auckland on 31 March. The claimant asserts that the respondent had an ulterior motive for dismissing him other than any gross misconduct on his part; that in any event the processes which led to the decision to dismiss were unfair even if the reason or principal reason for his dismissal was a reason related to conduct; and that he was not in fact guilty of gross misconduct.

2 The issues identified at a preliminary hearing on **13 October 2016** were:-

2.1 What were the facts known to or beliefs held by the employer which caused it to dismiss the claimant?

2.2 Were those facts or beliefs related to the employee's conduct or were they related to past events in the claimant's employment history which were not related to his conduct?

2.3 Having regard to the reason for dismissal did the employer act reasonably in all the circumstances of the case –

(a) in having reasonable grounds after a reasonable investigation for its genuine beliefs;

(b) following a fair procedure;

(c) in treating that reason as sufficient reason to warrant dismissal?

2.4 If the employer acted fairly substantively, but not procedurally, what are the chances it would nevertheless have been entitled to dismiss the employee if a fair procedure had been followed?

2.5 If the dismissal was unfair did the employee cause or contribute to the dismissal by any culpable and blameworthy conduct whereby it would be just and equitable to reduce basic and/or compensatory awards, or not to make any such awards?

2.6 As to wrongful dismissal had the respondent proved on the balance of probabilities that the claimant was in fact guilty of gross misconduct for which summary dismissal was justified?

3 There follows a summary of the relevant statutory provisions and the Employment Tribunal's more detailed self direction on the law:-

3.1 **<u>Unfair dismissal</u>**

Section 98(1) of the Employment Rights Act provides that:-

> "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
>
> (a) the reason or if more than one the principal reason for the dismissal; and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".

One of the reasons specified in subsection (2) is a reason which relates to the conduct of the employee.

In **Abernethy v Mott, Hay & Anderson [1974] IRLR page 214** Lord Justice Cairns said:

> "The reason for dismissal in any case is the set of facts known to the employer, or maybe the beliefs held by him, which caused him to dismiss the employee. The reason for the dismissal must be established as existing at the time of the initial decision to dismiss and at the conclusion of any appeal hearing".

The initial burden of proving the reason for dismissal lies upon the respondent in a case where dismissal is admitted. That reason for dismissal is disputed in this case. The claimant asserts that there are altogether different reasons for his dismissal which the Tribunal will identify in due course. In this connection I have been referred to the case of **ASLEF v Brady [2006] IRLR page 576 EAT**. It is appropriate to read the relevant part of the head note:-

> "Dismissal may be for an unfair reason even where misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that. A tribunal is not obliged to reach a view about whether the conduct was in principal capable of amounting to a dismissible offence. It is open to a tribunal to find that whether or not the conduct, in principle, could amount to gross misconduct, nevertheless, in the circumstances of the case the employer had not satisfied it that it was the real reason for dismissal. It is not incumbent on the tribunal to make any findings as to the actual reason.
>
> It does not follow therefore that whenever there is misconduct which could justify dismissal, a tribunal is bound to find that that was indeed the operative reason. Even a potentially fair reason may be the pretext for a dismissal for other reasons. For example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – will not be the misconduct at all, since that is not what

> brought about the dismissal, even if the misconduct in fact merited dismissal.
>
> Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so. Evidence at others would not have been dismissed in similar circumstances would be powerful evidence against the employer, but it is open to the tribunal to find the dismissal unfair even in the absence of such strong evidence. In a case of mixed motives such as malice and misconduct, the principal reason may be malice even thought he misconduct would have justified the dismissal had it been the principal reason.
>
> On the other hand, the fact that the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding that the dismissal was for a fair reason. There is a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords".

If the respondent establishes the reason for dismissal falling within section 98(2) namely misconduct or genuine belief in misconduct, the tribunal then has to consider the issue of fairness. Section 98(4) of the Act states:-

> "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".

It is to be noted that an employer does not have to prove at the hearing even on the balance of probabilities in a case of unfair dismissal that the conduct it believes took place actually did take place. The employer simply has to show the genuine belief in it. That is to be contrasted with the position with regard to the burden of proof in the claim of wrongful dismissal, where the burden lies throughout on the employer to prove that the claimant was guilty of gross misconduct or some other matter causing a complete breakdown of trust and confidence, and for this purpose an employer may rely at a trial upon facts which came to the employer's

attention merely before the dismissal but also afterwards up to and including the hearing before the Tribunal.

In an unfair dismissal case relating to conduct the Tribunal must determine with a neutral burden of proof whether the employer had reasonable grounds for that belief and conducted as much investigation to the circumstances as was reasonable. This was the test first set out in **British Home Stores Limited v Burchell [1978] IRLR page 279** as qualified by the removal of the burden of proof from the employer enacted most recently in section 98(4) of the 1996 Act as set out above and as reflected in later decisions including **Boys and Girls Welfare Society v MacDonald [1996] IRLR page 129**, **Post Office v Foley [2000] IRLR page 827**, and in particular **Sainsbury's Supermarkets Limited v Hitt [2002] IRLR page 23**, in which it was emphasised that the band of reasonable responses test was to be applied not only to the reasonableness of the grounds for the belief and to the adequacy of the investigation but also as to the third requirement namely that the dismissal must fall within a band of reasonable responses by a reasonable employer under the circumstances relevant to the particular case. It does not necessarily follow that because one employer acting reasonably might have decided not to dismiss that another who did decide to dismiss would have acted unfairly. There is a band of responses within which an employer may reasonably decide to dismiss, sometimes called the actions of the hypothetically reasonable employer.

It is to be emphasised that the Tribunal must not substitute its own view for what would have been reasonable for that of the hypothetically reasonable employer. This is particularly exemplified in a passage in the judgment of Lord Justice Mummery in **London Ambulance Service NHS Trust Limited v Small [2009] IRLR page 566 at paragraph 43**:-

> "It is all too easy, even for an experienced employment tribunal to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the employment tribunal that he was innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the employment tribunal so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal".

As to the reasonableness of the investigation the Tribunal directed itself in accordance with a passage in the judgment of the EAT in **A v B [2003] IRLR page 405**:-

> "In determining whether an employer carried out such an investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their

> potential effect upon the employee. Serious allegations of criminal behaviour, where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the enquiry should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges".

In the present case there has arisen an argument as to inequality of treatment in that the claimant asserts that another employee also guilty of failing to wear a protective helmet and other misconduct was not dismissed, that event taking place in **December 2016**, some seven months after the claimant's dismissal. He also relies upon other cases where he asserts that more serious or much more serious conduct by employees of the respondent including failure to wear a protective helmet had resulted in dismissal. The parties had been referred by the Employment Judge at the preliminary hearing, and relied upon at this hearing, a well-known statement of principle in **Hadjioannou v Coral Casinos Limited [1981] IRLR page 352**:-

> "An argument by a dismissed employee that the treatment he received was not on a par with that meted out in other cases is relevant in determining the fairness of the dismissal in only three sets of circumstances. Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least will not be dealt with by the sanction of dismissal. Secondly, there may be cases where evidence made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for dismissal. Thirdly, evidence as to decisions made by the employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances. Industrial tribunals should scrutinise arguments based upon disparity with particular care and there will not be many cases in which the evidence supports the proposition that there are cases which are truly similar, or sufficiently similar, to afford an adequate basis for argument".

In the present case, as will be seen, there was a specific and longstanding provision in the disciplinary procedure which was incorporated in the contracts of employment of employees of Loomis and which specified that summary dismissal could result where it is confirmed that an employee has committed one of a list of offences, which included "breach of cash and valuables in transit rules and regulations "(CVIT)". In **Paul v East Surrey District Health Authority [1995] IRLR page 305** the Court of Appeal cited with approval the principle in **Hadjioannou**, set out above, at paragraph 35 in the judgment of Lord Justice Beldam continued:-

> "I would endorse the guidance that ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct, it would not be fair to change the policy without warning. The employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified".

Were the Tribunal to find that the dismissal was for the reason relied upon by the respondent, but was procedurally unfair, the Tribunal has to apply the **Polkey** test which derives from section 123(1) of the 1996 Act. This is the issue identified in 2.4 of the list of issues above. The Tribunal has to decide what are the chances that a dismissal would have resulted in any event if a fair procedure had been followed, and when. Next, if the Tribunal finds that the dismissal was unfair the Tribunal had to decide whether or not the basic and/or compensatory award should be reduced, or no award should be made for contributory and blameworthy conduct under sections 122(2) and 123(6) of the Act. Those provisions provide for a three part test as follows:-

> Was the claimant guilty of any culpable and/or blameworthy conduct (in this case in the admitted non wearing of the protective helmet)?
>
> Did that conduct contribute to his dismissal?
>
> Would it be just and equitable to reduce either or both of the awards or not to make any such awards?

4 The evidence before the tribunal

The burden falling upon the respondent to prove the reason for dismissal the claimant's witnesses gave evidence first, relying upon witness statements taken as read. They were:-

4.1 Mr Daniel Roche, Branch Manager at the respondent's Newcastle site where the claimant worked from **April 2013**.

4.2 Mr Darren Little, the claimant's Shift Manager at the Newcastle branch.

4.3 Mr Rab Davidson, Branch Manager for Edinburgh, who conducted the first disciplinary hearing.

4.4 Mr Robert Whitelock, Branch Manager for Glasgow, who undertook the appeal meeting on **19 May 2016** and dismissed the appeal.

The claimant gave evidence and relied upon two witness statements, and a witness statement of Mr Robert Earl Bennett signed by him on **12 December 2016**. Mr Bennett did not attend the Tribunal hearing and the Tribunal was informed at the outset of the hearing that he had suffered a recent back injury which prevented his attendance. Mr Bennett's witness statement contains one important assertion which is disputed by the respondent. Mr Bennett was the Car Park Security Officer at the ISS Mediclean site at Bishop Auckland who was present at the time that the claimant went to collect a coin box from the car park meter on **31 March 2016**. He asserts in paragraph 3 that none of the regular Driver Guardians collecting cash from the car park wore a helmet. As is well known, a party is entitled to rely upon the statement of a witness who does not attend a hearing, but that statement is likely to carry less weight than if the witness does attend to give evidence before the Tribunal, and subjects himself to cross-examination so that the Tribunal can make an assessment of his credibility. It is a matter for the Tribunal to decide what weight is to be attached to Mr Bennett's statement in that respect. It is to be noted that the claimant did assert during the disciplinary process that other fellow employees did not wear a helmet during coin collections, but he cannot have been present when such visits occurred because the collections were made by Driver Guardians operating on their own.

There was a joint bundle of documents consisting of nearly 400 pages to which some additions were made during the hearing.

6 Chronology

The Employment Tribunal will summarise the facts not in dispute and make some findings of fact where there are disputes, but leave the more serious disputes to the Tribunal's conclusions:-

6.1 The claimant commenced his employment as a Driver Custodian in July 1999 originally for Securitas which was taken over by Loomis.

6.2 It is common ground that there were the following types of vehicle and processes operated by the respondent:

(a) Coin Star vehicles - these are vehicles which were used principally for the collection of large quantities of coin from premises such as supermarkets which operate Coin Star machines, which automatically weigh and value large quantities of coins brought in by members of the public for that purpose who then exchange a token for notes typically from the reception area of the supermarket. This process generates large quantities of coins which are of considerable weight. They were habitually collected in large metal containers which were themselves heavy and were transported by means of trolleys at the rear of the vehicle where there was a lift to enable them to be loaded into the rear of the vehicle. Exceptionally, drivers were not required to wear PPE such as helmets and stab vests when undertaking this duty. The reason for that was that the large and heavy boxes of coins were not seen as

a significant risk from bandits because of the low value of the coins and their excessive weight and difficulty of getaway. In addition, because of the heavy nature of the work in dragging the trolleys to the vehicle, it was acknowledged that the wearing of a helmet would make that operation considerably more difficult;

(b) Trunker vehicles were vehicles which conveyed high value quantities of notes from one site to another such as a bank but where loading and unloading was always performed in a secure area;

(c) CVIT vehicles (cash and valuables in transit) – in the case of the claimant he used a vehicle known by the numerals as an 816. This vehicle was used for the delivery and collection of coins and notes. It was a secure armoured van and to access the vehicle the operator had to use fingerprint ID and then enter a code. This enabled the operator to enter via the nearside of the vehicle using a swivelling door and once entry was gained the valuable collection could be deposited to a dropdown safe.

6.3 **Training**

The drivers were given induction training which included security as a major feature; and updated training on an annual basis. There are a bundle of the claimant's training records at page 120 which indicate that he had refresher CVIT training at least up to and including 2014 (see pages 120 onwards). The CVIT training instruction document is at pages 45 and 52. My attention has been drawn in particular to paragraph 2 on page 46 which states:-

> "The company's ability to obtain the necessary insurance is based on it being able to demonstrate that it operates systems and procedures commensurate with the industry in which it operates, and that all of its employees, as well as being aware of their responsibilities, operate at all times in accordance with these rules and regulations.
>
> Any breaches of the rules and regulations causes the company to be seriously criticised and jeopardises its ability to obtain the necessary insurances in the future".

Most importantly, at paragraph 9 on page 49, which deals with the wearing of helmets, it states:-

> "You must always wear a helmet with chin straps correctly secured when operational outside the vehicle. Helmets must be put on before leaving the cab. Helmets and visors have protected crews against serious injury in the past.

> In certain customers' premises, where for identification purposes the customer requests the helmet to be removed, the custodian has the authority to remove the helmet.
>
> The wearing of helmets is not compulsory on coin only vehicles or in secure areas. Where large amounts of coin are being delivered and the vehicle is not a dedicated coin vehicle, the wearing of helmets whilst the coin is being delivered is subject to local instruction.
>
> During authorised toilet and lunch stops only it has been agreed that crew persons do not have to wear their helmets. Following risk assessment and with the current information available to Loomis it is felt that the wearing of protective helmets during toilet and lunch stops may draw unnecessary attention to the crews. However all crews must remain vigilant and aware of their surroundings, and any suspicious circumstances reported to the branch".

On **5 January 2016** the claimant attended a seven hour course at work addressed by the trainer Trevor Jones. The course was entitled CPC3 – CVIT Refresher. Slides were added to the bundle at pages 160D to 160J. In particular at page 160H there are two slides, the first headed Uniforms which states "Helmets worn all the time whilst operational". The second is headed Golden Rules for Collections/Deliveries:-

> "The following rules and procedures MUST be applied at ALL deliveries and collections. They are designed to deter the criminal and to protect YOU".

It continues:-

> "When exiting the vehicle before you open the door always check what is going on outside the vehicle and who and what is in the vicinity …
>
> Always put on your helmet before opening the vehicle door – *do not remove it until you are safely back within the vehicle".*

At 160J there is a slide headed PPE – Company Policy:-

- CVIT helmets must be worn at all times once operational of the vehicle, it must be on before you open the outer door of your vehicle, with chin straps secure, and visor down.

- Your helmet will remain in this position until you have completed the service and are safely back onboard your vehicle, outer door closed.

The claimant admits that he attended that refresher training session in relation to CVIT work but asserts that he did raise the issue with the

trainer whether it was necessary to wear a helmet when collecting coin on CVIT work (when it was not required when doing Coin Star work) as opposed to when delivering or collecting cash in the form of notes. It does not appear that the claimant raised this at the investigatory meeting, but there is a note of him stating at the first disciplinary hearing on **14 April 2016** at page 304:-

> "That highlighted one there have been bit discussions in the lessons with regards to coin. The trainer said he would look into it and feedback from it but I have heard nothing until that came out".

The reference to "that came out" is a reference to the document which Mr Davidson produced at that disciplinary hearing which is a document in the bundle headed Operational Basics at page 149. This document was issued to the drivers in **March 2016**, some two months after the CVIT training and it materially states at paragraph 9:-

> "Always wear PPE including safety footwear, helmets and stab vests (including protective plates), unless authorised not to do so, they are provided for your protection".

At the bottom of that document there is a passage in capitals:-

> "REMEMBER; IF YOU'RE NOT SURE OF ANYTHING PLEASE ASK YOUR SHIFT/BRANCH MANAGER. THERE IS NO BLAME IN QUESTIONING BUT THERE MAYBE BLAME IN OPERATING INCORRECTLY AND MAKING YOURSELF AND YOUR COLLEAGUES A POTENTIAL TARGET".

The claimant signed for the receipt of that document on **22 March 2016**. That was only nine days before the events of **31 March 2016**. Mr Trevor Jones has not been called to give evidence before the Tribunal nor is there a witness statement from him. There are disputes as to whether or not Mr Jones actually acknowledged to the claimant that he would feed back to him the issue which the claimant says he raised at the training session on **5 January**. The Tribunal will deal with this dispute in the conclusions.

6.4 **The claimant's sickness and disciplinary record**

This is of importance because the claimant asserts that matters arising from his past record formed the basis of the respondent's motive for dismissing him and using the excuse of his non-wearing of the helmet on **31 March** for doing so. In summary there are three matters of note:-

(a) The first is that he states, and there is no reason to doubt, that he suffered a work injury in **March 2010** – the record at page 180 indicates that he was off from **25 March to 23 July 2010** "due to accident" – which was the subject of a successful personal injury claim which was settled in his favour for £13,000 in 2013.

(b) The second relates to his sickness absence record – in 2009 he was off sick with irregular heartbeat between **July and October 2009**. The claimant also was off work with a rupture of some kind for three months in **2010** and was paid sick pay, after which he was off in **2011** having surgery for it. In **2015** he was off from **June to November** when he underwent heart surgery. There were absence review meetings which he attended with Mr Roche, Branch Manager, also attended by Lindsey Carr, HR Business Partner (who is claimed later to have influenced the decision to dismiss him) on **25 September 2015** and **18 November 2015**, the notes of which have been drawn to my attention by the respondent at pages 282 to 287 – see especially at pages 285-286 where it is indicated that it was agreed that the claimant could return to work initially on a phased return two to three days a week but on "normal duties", at the end of his current sickness note and outstanding holidays. It is of some significance because the claimant asserts that on his return he was set up to fail because there were certain duties which he found difficult to which he claims he was assigned. These issues were raised by the claimant in particular at the appeal stage of the disciplinary process before Mr Whitelock (see page 321).

(c) As to the claimant's disciplinary record, the claimant received a verbal warning in **January 2014**, and on **18 July 2014**, on appeal, a final written warning for a separate matter recorded in a letter at pages 263 to 264. That final written warning is said by the claimant to have been excessive for the misconduct alleged – behaving aggressively towards an Asda employee dealing with a cash collection; and is claimed to be evidence that in particular Mr Roche, who imposed it, was out to get him. The claimant appealed the final written warning to Mr Tarrant who affirmed it. The respondent points out that he took into account the claimant was already on the earlier written warning from **January 2014**.

6.5 On **31 March 2016** the claimant was undertaking CVIT duties. There was a record of the route he undertook produced during the disciplinary process at page 328 which reveals that the claimant had made a considerable number of cash as opposed to coin collections prior to the visit to the ISS car park at 12:43pm on that day. Collections had commenced at 7:02am in Newcastle. On that day Mr Roche was undertaking covert surveillance to ensure that crews were undertaking their duties following the correct procedures. He says at paragraph 51 of his witness statement that he selected the claimant at random, that he did not suspect the claimant of any wrongdoing in breaches of procedure at the time. In the light of the claimant's claim as to the real reason for his dismissal, it is of at least some significance that Mr Roche claims that the claimant was the thirteenth person from the Newcastle branch that had been subject to covert surveillance by either himself or the management team in 2016 up to that point. It is not clear from the evidence what if any

earlier breaches of policies and procedures had been detected. It is not in dispute that on this occasion Mr Roche observed the claimant at the previous collection point at Halfords wearing his helmet not with the helmet visor all the way down. He followed the claimant to the ISS car park site where he first observed the claimant getting back into his vehicle but not wearing his helmet. The claimant then drove to the next car park machine and alighted from the vehicle, completed the collection of the machine box, which is portable, with no helmet on. Mr Roche then made himself known and asked the claimant why he did not have his helmet on to which the claimant is reported to have replied, "It's too heavy, well not too heavy but …". Mr Roche explained that it did not matter how heavy the box was he needed to have his helmet on. Evidence at the Tribunal indicates that the box was about one foot square. The claimant was permitted to continue with his rounds for a short time but Mr Roche called the Shift Manager at the branch to inform him what had happened and the claimant was requested to return to base. Apparently his round was completed by another driver. Mr Roche informed Lindsey Carr by e-mail on the same day at 4:15pm (see page 327). The claimant was suspended by Mr Roche and it was confirmed in a letter of the same date (at page 291). The allegation against him was identified as "On site ISS Mediclean Bishop Auckland at approximately 12:50pm you were observed carrying out the service without wearing your helmet which is a fundamental part of your PPE".

6.6 Mr Little, the Shift Manager, was appointed to investigate the matter by Mr Roche. On **1 April** he wrote to the claimant asking him to attend an investigation meeting to be held on **6 April** at the Newcastle office. He was notified that he could bring a colleague. The investigatory interview took place on that date. The claimant attended with Mr Sparks of the GMB union. There was an HR note taker (not Lindsey Carr). The claimant confirmed that he had been present at the refresher training on 5 January and that on **22 March** he had signed receipt of the operational basics document. His initial response to the question about what had happened was:-

> "I drove onsite as normal and I got the attendant, Bobby, and he came round with me as normal. I have done it for years; it is the only place where I don't wear my helmet. There is someone else there and where I park the van I can reach and put it straight on the van. It is my mistake, that is what I did".

He was then asked whether on previous occasions at that site he had carried out the job without his helmet to which he replied:-

> "Not when I'm with Bobby, I don't wear my helmet. When Bobby is there I am comfortable and I don't wear my helmet".

A little later he said, "There was confusion with Coin Star as there is cash on board but you don't have to wear a helmet". Later he was asked what Mr Roche had said to him and he replied:-

> "Basically he asked why I wasn't wearing my helmet and I said I don't normally wear my helmet on this job with the parking attendant. He said I should have it on as I was carrying coin. I then got back on the van".

Mr Sparks from the union is reported to have said on the claimant's behalf:-

> "This guy was the regular one who did it with you. If you did not know the guy you would wear a helmet?".

To which the claimant responded:-

> "I'm not confident with the others".

Mr Sparks said:-

> "It is a breach of health and safety especially as this is in the mix now and the refresher training in the last few months I understand why we are in this situation but it appears that things have been done in the past so why has it not been picked up in the past? Do you not think the suspension is over the top?".

Mr Little is reported to have responded:-

> "I spoke to three other lads who have done this job with the same attendant and they all wore their helmet".

Mr Sparks' response to that was to the effect that as they would have known that the claimant had been suspended they were not going to admit to it themselves. Later in the interview the claimant said when asked if he had anything to add:-

> "No I know myself and the time that I have been here the lads do exactly the same thing, it is common practice among people who have been here for years, more so than the new guys. I put my hands up; I should have had my helmet on but it won't happen again".

In his evidence to the Tribunal Mr Little identified the three driver guards said to have done the same job previously with the attendant Bobby (Robert Bennett) as being Norman Carson, Andrew Garrett and Lee Henderson.

On **7 April** Lindsey Carr e-mailed Mr Little in the following terms:-

> "Darren – have you obtained statements from anyone working at the car park regarding our guys and if they wear helmets or not? We need as much evidence as possible to ensure that this is

> watertight and any CCTV footage of previous services would be ideal if available. What about the others you refer to in the minutes – any statement from them?".

Mr Little responded on **12 April**:-

> "This location does not have attendants onsite 24/7 and even on their service days of a Thursday on many occasions it has been cancelled because he is not there. I will try and get a number but think our chances of getting a response for tomorrow are rather slim".

The reference to "tomorrow" is a reference to the fact that the original disciplinary hearing was listed for that date, **13 April**, but was put back to **14 April**. Mr Little did not contact Mr Bennett. Mr McHugh makes two points about this piece of evidence. First he asserts that Mr Bennett ought to have been contacted and if he had done so he would have provided information that others too did not wear their helmets when making collections from this car park. Secondly that the use of the word in Lindsey Carr's e-mail "watertight" is significant.

6.7 The claimant's e-mail of 7 April had originally been copied also to Jodie Fennell who was a Branch Manager in Manchester and was originally scheduled to take the disciplinary hearing. In fact, she was not available and Mr Robert Davidson, Branch Manager in Edinburgh, was invited instead. Mr Little provided a copy of the letter inviting the claimant to the investigation meeting and a copy of the investigation meeting minutes too. On **8 April 2016** he wrote to the claimant inviting him to a disciplinary hearing (see pages 298-299). The letter identified the allegations against him and enclosed at that stage a copy of the investigation meeting notes which indicated that some additional evidence was still being pursued by the company and if this became available he would be able to view it before the commencement of the hearing. It was notified that the claimant could have the right of representation at the hearing. On **11 April** he wrote to the claimant postponing the hearing to **14 April**. The notes of the appeal hearing where there was a note taker (not Lindsey Carr) the claimant was again attended by Mr Sparks of the GMB union. The notes are at pages 301 to 310. At its conclusion, following an adjournment of some 40 minutes, the hearing was resumed and after a further half an hour or so Mr Davidson notified the claimant that he was summarily dismissed. He was notified of his right of appeal. The Tribunal will discuss further the contents of the notes, which are not significantly in dispute, when stating its conclusions.

6.8 Mr Davidson wrote confirming the reasons for the dismissal on **19 April 2016** – page 312:-

> "As stated in the CVIT rules and regulations helmets must always been (*sic*) worn whilst operational outside of the vehicle. They are a fundamental part of your uniform and are provided for your

protection and through your own admission you did not wear yours during this collection. Your training is up to date. You confirmed that you were in receipt of the operational basics and you could provide no mitigating circumstances as to why you were not wearing your helmet.

Having reviewed all the factual evidence available to me and taking into account your version of events, I have reasonable belief that there has been a serious breach of procedures by you and that your act of not wearing helmets whilst operational is to be construed as gross misconduct".

It is to be noted that during the adjournment of the disciplinary hearing the dismisser considered documents outlined above and also the claimant's personnel file which included the details of past disciplinary matters and correspondence relating to the respondent supporting the claimant's return to work following sickness absence.

6.9 It is also to be noted that on **15 April 2016**, the day after the claimant's dismissal, the respondent circulated to all staff at the Newcastle depot a memo on the subject of "PPE and Procedures". It read:-

"I feel that I need to remind everyone of the rules of wearing PPE.

Helmets, stab vests, protection shoes etc must be worn at all times while operational on a CVIT or ATM vehicle.

The only time a helmet is not required is for a coin only route or for trunkers etc. As we don't currently have any coin only routes, the only time helmets don't have to be worn is on Coin Star or trunkers.

It has also been decided by the Head of Health and Safety that you now do not need to wear your stab vests if you are on a Coin Star route".

6.10 On **24 April 2016** the claimant appealed in writing:-

"I Alan Markwell wish to appeal against the decision to terminate my contract. The reasons for this are:-

- The severity of the punishment.
- Victimisation".

That appeal notice was acknowledged by Lindsey Carr, HR Business Manager at Leeds, on **3 May**. She stated that she was organising a date for the appeal hearing. On **5 May** Robert Whitelock, Branch Manager at Glasgow, wrote to the claimant notifying him that the appeal hearing would take place on **10 May** and would be conducted by him. Mr Whitelock is unclear whether or not he had a communication by e-mail or otherwise from Lindsey Carr. The hearing was rescheduled for **16 May** apparently

because the claimant was not able to attend on **10 May**. The notes of the appeal hearing taken by Mr Whitelock are at pages 319 to 323. Again the claimant was attended by Mr Sparks. The Tribunal will describe the contents of that appeal meeting in giving its reasons in due course. Mr Whitelock did not give his decision on the appeal during the hearing. He stated that he would take the information away and read through the notes and give a decision in writing in 5 working days. In fact he responded on **1 June** (see pages 324 to 325). Mr Whitelock dismissed the appeal. The claimant was notified of a further right of appeal to the Area Director but did not take that opportunity up.

That concludes a chronology of the facts.

7 Conclusions

7.1 The reason for dismissal

The Tribunal is satisfied that the reason why Mr Davidson and Mr Whitelock dismissed the claimant was because of a belief that he was guilty of misconduct for not wearing his helmet at the time of the collection of coin from the car parking machines at ISS Mediclean in Bishop Auckland. I have accepted their evidence as being truthful on this point. I reject the alternative suggestion put forward by the claimant that he was dismissed because of his attendance record – particularly around the past treatment of his heart complaint and his treatment after his return from that complaint; and/or because he had brought a personal injury claim against the respondent. It is correct that Mr Davidson did have the opportunity to see the claimant's personal file and could thereby have been aware of his attendance record, but I reject the contention that he took that into account in anyway in deciding to dismiss. Furthermore this allegation was only raised for the first time at the appeal hearing (see page 321) and only in relation to his treatment on his return to work after his heart complaint. The claimant did not mention even at the appeal stage, and in any event there is no evidence that either dismisser was aware, of the claimant's personal injury claim, which in any event was resolved three years earlier in 2013, the accident having taken place five or six years earlier. I do not accept the claimant's view that Mr Roche and/or Mr Little must have been aware of the outcome of the personal injury claim. The matter would have been resolved by the insurers who would not automatically notify the Newcastle branch of the outcome. In any event, it is mere conjecture on the claimant's part that the dismissers were notified of the desired outcome of dismissal by either Mr Roche or Mr Little, or more particularly, by Lindsey Carr. Accepting that Lindsey Carr may have contacted them to notify that they were to undertake the disciplinary proceedings and the appeal, they adamantly deny that they were in effect nobbled to deliver the desired result by Lindsey Carr or anyone else and I accept their denials. In addition I reject the sinister interpretation put upon Lindsey Carr's e-mail of **7 April 2016** at page 329. Lindsey Carr was clearly picking up on the point which the claimant had raised in the investigatory interview on **6 April** where he asserted that it was common practice (by inference not to

wear a helmet) among "people who have been here for years"– see page 296. The word "watertight" is a reference to the adequacy of the investigation, it is not a euphemism for "ensuring the claimant's dismissal". I will deal with the adequacy of the investigation later in these reasons. A further argument put forward by Mr McHugh as to the reason for dismissal centred upon the different treatment of one of the comparators, Mr Aynsley, who was not dismissed six months later in **December 2016**, having also got out of his vehicle on a CVIT round without wearing a helmet. That decision was taken by Mr Roche. There was a dispute at the Tribunal hearing as to whether Mr Aynsley's offence was less serious, but I note that at page 341 Mr Roche stated in his disciplinary issue, "Your actions aren't as serious but people have been dismissed for these kinds of things". In any event, I do not accept that the relative leniency shown to Mr Aynsley by someone else six months later demonstrates in any way that the dismissers of the claimant cannot have dismissed for doing what the claimant did. There were other cases where other employees had been sacked for not wearing a helmet, although that misconduct was accompanied by other misconduct. The common feature was the failure to wear a helmet. I will return to the comparator issue in applying the **Burchell** test below.

I am well satisfied that Mr Davidson dismissed, and Mr Whitelock rejected the appeal, because they believed that he was guilty of misconduct in not wearing a helmet.

7.2 In applying the **Burchell** test, I have to decide whether their belief in that misconduct was a reasonable belief. I find as a starting point that it was for the simple reason that the claimant never disputed that he had not worn his helmet and that he should have done; that he had attended the last training session in **January 2016**; and had received the operational basics document on **22 March 2016** only nine days before. Furthermore at his investigatory meeting, the claimant admitted that he only did not wear his helmet when collecting from this car park and only when Bobby was on duty "because I am not confident with the others". He repeated that account at the disciplinary hearing on 14 April 2016 – see page 301. He also claimed that he had got mixed up with Coin Star deliveries. This was a matter which occupied the attention of the Tribunal during the hearing. I accept that the decision makers concluded that Coin Star deliveries were however treated differently for good reason. First cash in notes were not collected on Coin Star deliveries; secondly the vehicles were totally different and were not security vehicles in the sense that CVIT vehicles were. Thirdly, Coin Star collections were not a desirable target for criminals because of the excessive weight and comparatively low value of the load. Fourthly the weight of the Coin Star collections made it very difficult to manage them whilst wearing a helmet. These factors had led to a decision that neither helmet nor stab vests were required for Coin Star deliveries. This is confirmed by photographs of a Coin Star collection within the bundle. In contrast the mixed CVIT collections were attractive to potential criminals; in particular the coin box boxes to be collected were much smaller and easily portable by the driver single handed.

Furthermore it was taken into account that surveillance by a criminal of someone who was not wearing a helmet making a potentially tempting collection would or could lead to the guard being perceived as an easy target. There were good reasons why the dismissers should reasonably perceive the claimant's misconduct in failing to wear a helmet on this type of delivery as being serious and helmets were not required at all on Coin Star deliveries. The two tasks were not comparable.

7.3 Turning to the second issue, the adequacy of the investigation, it is a valid criticism that Mr Little failed to follow up the suggestion from Lindsey Carr that he should check whether others too did not wear a helmet when undertaking coin collection on a CVIT round. Mr Little claimed in a later e-mail on **12 April**, the day before the disciplinary hearing was first scheduled, that attendants were not on site 24/7; and were not always there on a Thursday delivery day and in those circumstances collections were cancelled. I accept that greater attempts could have been made to locate "Bobby" and the hearing did not in fact take place the day after, and the appeal hearing not until **mid May**. It is a fact that if Bobby's statement to the Tribunal is true, others also failed to wear helmets on collection, but Bobby did not attend the hearing and his reasons for non attendance are hearsay. I do not accept that the regular non-wearing of helmets at this car park was commonplace, even if it may have happened on the odd occasion. The respondent did make enquiries of other drivers with a negative result, but I accept, and it was recognised during the disciplinary hearings, that a negative result was highly likely because anyone who admitted to failing to wear a helmet would have knowingly been at risk of ending up in the same disciplinary boat as the claimant. The investigation might have uncovered that breaches of the helmet rule were more widespread, but it would not have materially affected the claimant's case. There is, importantly, no evidence that the respondent knew of the practice and overlooked it. I accept Mr Davidson's evidence that if they had identified another driver who had not worn his helmet, he too would have been disciplined. Furthermore, the fact that the claimant said he only took his helmet off at this car park and if Bobby was there demonstrates that he was aware of the normal practice of wearing a helmet. I reject the claimant's evidence that there was a "local instruction" of a kind recognised in the third paragraph of paragraph 9 of the CVIT rules whereby the respondent acknowledged that helmets need not be worn. This leaves the allegation that in some way the claimant was misled by Mr Jones at the training session in **January 2016** about the necessity for wearing a helmet. This is disputed by the respondent, who did not however call Mr Jones. The claimant did not mention this in the investigatory interview on **6 April**, but did mention it at the first disciplinary hearing in passing but not in detail, asserting that he had had no feedback "until that came out" – a reference to the operational basics document which at paragraph 9 states, "Always wear PPE including safety footwear, helmets and stab vests … unless authorised not to do so". I do not accept that the trainer did introduce a level of uncertainty at the training session. The position was made clear in the CVIT slides and I also accept that subsequently, although the date is unclear, Mr Roche spoke to the trainer

who denied having said what is alleged to have been said. At the appeal hearing on **19 May** the claimant did not raise this issue again according to the notes. It was rejected by Mr Davidson and Mr Whitelock. In summary, I accept, that although there was a deficiency in the investigation it was not such as to render the investigation inadequate or unreasonable applying the band of reasonable responses test.

7.4 **Was dismissal within a band of reasonable responses?**

The memorandum of agreement between the trade unions representing CVIT drivers, including the GMB, and Loomis included at paragraph 12 a disciplinary procedure. It is not alleged that the procedure was not followed in this case. The provisions concerning gross misconduct at paragraph 12D stated:-

> "Summary dismissal could result from the most serious disciplinary cases. Where it is confirmed that an employee has committed an offence of the following nature, then they may be summarily dismissed without notice or pay in lieu of notice. This list is not exhaustive".

One of the items on the list is "breach of cash and valuables in transit rules and regulations". The issue here is whether a dismissal in the circumstances of the present case fell within a band of reasonable responses. It is not whether the Tribunal would itself have dismissed. I accept the decision was harsh particularly having regard to the claimant's length of service but that is not the point. I accept the dismissers' evidence at the Tribunal – particularly from Mr Whitelock – that this particular employer in the industry in which it worked regarded the wearing of helmets to be an important safeguard; and the non-wearing of them during cash collections was exposing the guard to the risk of the theft of a cash box from him; and that he would be seen as vulnerable if not wearing his helmet (see for example page 306 by the hole punch). The claimant admitted that he had not worn it on this occasion and that he should have been wearing it. The essential matter for consideration is whether there was inequality of treatment between the claimant and others in similar circumstances (particularly Mr Aynsley) falling within any of the three circumstances in **Hadjioannou**, as further explained in **Paul**. These are:-

(a) There is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked or at least will not be dealt with by the sanction of dismissal.

(b) Cases where evidence made in relation to other cases supports an inference that the purported reasons stated by the employers is not the real or genuine reason for dismissal.

(c) Evidence as to decisions made by an employer in truly parallel circumstances would be sufficient to support an argument in the particular case that it was not reasonable on the part of the

employer to visit the particular employee's conduct with a penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances.

I do not accept that the respondent has overlooked other occasions where helmets have not been worn such that the claimant might have been led to believe that it was acceptable. On the contrary there were previous cases where the non-wearing of a helmet, admittedly with other misconduct, had been visited with dismissal. Mr Aynsley's case had not taken place at the time of the decision in the claimant's case but in any event, I accept that there were material differences in that Mr Aynsley had completed the delivery at the particular site still wearing his helmet, took off his helmet in the cab, had then realised that he had forgotten to give the customer some empty cash bags and left his cab to deliver them for a short space of time, forgetting to put his helmet on. That is at least what the disciplining officer found. He did not at that time have possession of any cash. There was no basis upon which the claimant could argue that he had been misled by something that happened after his own case. What happened to Mr Aynsley, who received only a final written warning, could not form a basis for supporting an inference that the reason for the claimant's dismissal given by the respondent was not the real or genuine reason. In any event, I have rejected the claimant's alternative reason for dismissal. None of these cases could be said to be truly parallel to the claimant's case or support the proposition that some lesser penalty would have been appropriate.

8 **Wrongful dismissal**

Here the test is totally different from that for unfair dismissal. The respondent has the burden of proving the claimant was in fact guilty of a fundamental breach of contract justifying summary dismissal, or which disclosed a deliberate intention to disregard the essential requirements of the contract (see **Laws v London Chronicle (Indicator Newspapers) Limited [1959] IRLR page 698**). The only case which the representatives have referred to the Employment Tribunal is that of **Robert Bates Wrekin Landscapes v Knight EAT0164/13**. In summary, the Employment Appeals Tribunal upheld the Employment Tribunal's finding of a wrongful dismissal where the claimant, a contract gardener, had recovered a box of bolts belonging to a customer from the MOD site where he was assigned intending to hand them in, but absentmindedly, as the tribunal found, left the box on the dashboard when he drove off site, in breach of the customer's security rules. The contract contained a specific clause (14.10) permitting termination "if the employee commits any breach of the employer's or customer's security rules". The relevant parts of the judgment are at pages 24 to 28:-

"24 As a general rule, an employee is entitled to notice unless the employer can point to a repudiatory breach of contract. It is well established in the employment context that a repudiatory breach of contract is one which entails either wilful and deliberate contravention of an essential term of the contract or gross negligence:- see **Sandwell** above.

> 25 It is important to keep general principles of contractual interpretation in mind. Clause 14 is a printed clause put forward by the employer. It is to be interpreted in its commercial context: the general understanding of employer and employee is that, absent gross misconduct or gross negligence, an employee will be entitled to notice. It is not likely to be interpreted in a way which extends the rights of an employer contrary to that general understanding. Individual provisions should be interpreted against the background of the clause as a whole.
>
> 26 … The general effect of the provisions is to spell out types of conduct which would usually be regarded as in repudiatory breach of contract.
>
> 27 Some provisions, however, could be interpreted as extending to conduct which would not otherwise be repudiatory. For example clause 14.17 appears to allow summary dismissal for any breach of health and safety regulations, however minor. But it was plainly not intended to have this meaning – for clause 14.9 refers to a "serious" breach of safety regulations. To my mind clause 14.17 could not be relied on to dismiss summarily an employee who committed any minor inadvertent breach of a regulation.
>
> 28 In the same way, I do not read clause 14.10 as giving an employer the right to dismiss for any breach of a security rule however minor or inadvertent. It would fly in the face of the general understanding of employer and employee if it applied in all such cases. To take the example given by Mr Reece (counsel for the employer) it will be absurd if an employee could be dismissed summarily because he forgetfully took a broken cup with him from the site".

In the judgment there is also reference to the following statement of principle in **Sandwell v West Birmingham Hospitals NHS Trust [2009] UKEAT0032/09**:-

> "Gross misconduct raises a mixed question of law and fact; as a matter of law it connotes either deliberate wrongdoing or gross negligence".

This passage followed the Court of Appeal judgment in **Wilson v Racher [1974] ICR page 428**. In the judgment of Lord Justice Cairns there is a citation from the earlier Court of Appeal in **Laws v London Chronicle** above, a case where the claimant had been dismissed for disobedience:-

> "One act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show in effect that the servant is repudiating the contract, or one of its essential conditions; and for that reason therefore I think that you find in the passages I have read that the disobedience must at least have the quality that it is wilful: it does in other words connote a deliberate flouting of the essential contractual conditions".

The question the Tribunal has to decide is whether the respondent has established that the claimant's failure to comply with the CVIT rules amounted to a wilful and deliberate disregard for the rule concerning the wearing of a helmet, as opposed to mere inadvertence or forgetfulness. With some hesitation I find that the respondent has proved that the claimant's conduct was wilful and deliberate: he knew of the rule, would usually comply with it, but chose on this occasion not to. It was a sufficiently serious breach to undermine trust and confidence. The claim of wrongful dismissal also fails.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON: 10 February 2017

JUDGMENT SENT TO THE PARTIES ON:

13 February 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL