Case No: 2302736/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**

BETWEEN:

Mr A De'Lemos

Claimant

and

John Lewis plc

Respondent

ON: **6 & 7 July 2017**

Appearances:
For the Claimant: **Mr G Anderson, Counsel**
For the Respondent: **Mr P Lockley, Counsel**

JUDGMENT

1. The claimant was neither unfairly nor wrongfully dismissed.

2. The claim therefore fails and is dismissed.

3. The remedy hearing on 27 November 2017 is vacated.

REASONS

1. In this matter the claimant complains that he was unfairly and wrongfully dismissed.

Evidence

2. For the respondent I heard evidence from Mr C Eyre, customer delivery hub manager and Ms A Mihell, appeals manager.

3. For the claimant I heard evidence from the claimant, Mr L Stenning, a former porter, Mr J Brennan, delivery driver, and Mr J Stanton, agency delivery driver. I also read a signed witness statement from Mr D Knox, delivery driver. Mr Knox was not present to be questioned about his statement which therefore can only be afforded limited weight.

4. I also had an agreed bundle of documents. Very late additions to that bundle were made by the respondent. These were in the main not objected to by the claimant although he did object to a document purporting to be an article relating to enforcement action taken by the DVSA. I formed the view that in the interest of justice the respondent should have the opportunity to refer to it and allowed it in the bundle but there is no doubt that it should have been disclosed much earlier to the claimant. In any event although Mr Eyre confirmed that his "expectation" was that this document was posted at the claimant's depot he did not see it there and he did not discuss it with the claimant. The claimant's evidence was that he had not seen this document before. In all the circumstances I did not find this document helpful and accordingly I disregard it.

Relevant Law

5. Unfair dismissal: By section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

6. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

7. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.

8. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
    a. genuinely believed the claimant was guilty of misconduct;
    b. had reasonable grounds on which to sustain that belief; and
    c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

9. Any evidence that emerges during any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

10. The approach in Burchell is modified to the extent that even if the respondent fails to establish one or more of the three limbs above the Tribunal must still ask itself if the dismissal fell within the range of reasonable responses referred to below (Boys and Girls Welfare Society v Macdonald 1997 ICR 693).

11. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR 23). One factor to consider is whether the respondent has acted inconsistently in its treatment of employees but only where those employees are in "truly parallel circumstances". The EAT emphasised in Hadjioannou v Coral Casinos Ltd (1981 IRLR 352) that flexibility must be retained and employers are not to be encouraged to think that a tariff approach to misconduct is appropriate.

12. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

13. In coming to these decisions, the Tribunal must not substitute their own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

14. <u>Wrongful dismissal:</u> Any summary dismissal of an employee will be in breach of the right to notice of termination (either through the contract of employment or the statutory minimum) and therefore a wrongful dismissal unless there has been repudiatory conduct by the employee justifying that summary dismissal. Gross misconduct would amount to such repudiatory conduct. The misconduct need not be the conduct that caused the dismissal.

15. In contrast to unfair dismissal it is a question of fact for the Tribunal to decide if the contract has been so breached rather than considering whether the employer was reasonable in its conclusions. In reaching that decision the Tribunal is entitled to consider all relevant evidence whether it pre- or post-dates the dismissal.

Findings of Fact

16. Having assessed all the evidence, both oral and written, I find on the balance of probabilities the following to be the relevant facts.

17. The claimant

18. The claimant commenced employment with the respondent as a customer delivery technician in April 2008. He was based at the Brooklands depot and was one of approximately 40 drivers. His duties comprised driving a 7.5t HGV, delivering and installing products to customers then returning to the depot and unloading the lorry.

19. The claimant was also a driver assessor meaning that he assessed new drivers for the respondent. He attended the Certificate of Professional Competence (CPC) course in April 2014 and had also completed a 'Much More Than a Driver' assessment in April 2015 and on 25 February 2016 had completed the relevant working time declaration. The claimant accepts that he was fully familiar with and had been extensively trained on his and the respondent's responsibilities in relation to compliance with drivers' hours and the implications of failure to comply for the respondent's business which could extend to the depot's operating licence being at risk and the licence holder (James Glavin) being personally criminally responsible.

20. The respondent's rules & regulations

21. Drivers' hours and working time are highly regulated and subject to strict legal limits. In summary drivers may not work for more than 15 hours in a 24-hour period. Their working time - including driving, rest and any additional non-driving work - must be recorded on a driving card. Some of this is done automatically when the card is inserted into the tachograph machine but manual additions and notes can also be made.

22. The rules relating to the respondent's drivers, their working hours and the use of tachographs were fully and clearly set out in the Commercial Vehicle Partners Handbook issued in July 2014 and received by the claimant in September 2014. In particular that Handbook states:

    a. "… You must comply with the Drivers' Hours and Working Time Regulations. If you fail to comply… this could lead to disciplinary action resulting in potential closure of your contract."

    b. "Provided that road safety is not jeopardised, and in order to reach a suitable stopping place, you depart from any of the EC drivers' hours rules only to the extent that it is necessary… You must make a manual entry on the reverse of the printout fully explaining the circumstances… You should then carry the printout with you for 28 days."

    c. "In an unforeseen event… to allow you to reach a suitable stopping place, you are allowed to depart from the EU rules… You must make a note of all the reasons for doing so on the back of your tachograph record sheets… An example of an unforeseen event would be a hold-up on the motorway that meant you

would not be able to reach a safe stopping place to take a break… An infringement report will still be generated and you will need to sign it."

d. "If a driver card is removed from the tachograph unit before the end of the driving shift in order to falsify recorded hours and other data, this is not only a serious infringement but will also be dealt with using the Partnership's disciplinary procedures."

e. "You must not remove your digital tachograph card while the vehicle is moving or before the end of your shift. You'll be disciplined and could lose your job if you are found to have done so."

f. "If you remove your driver card before your driving activity is complete, you will be breaking the law and this will lead to disciplinary action resulting in potential closure of your contract. If your duties continue after you have left the vehicle… you should remove your driver card… and make a manual entry to record your activities when you next insert your card…Remember, your driver card must contain an accurate record of your working day. It is the cardholder's responsibility to accurately record their whole working day. You must not drive unless your card is inserted into the VU unless you have a valid reason and you have informed your manager."

23. In practice if a driver is still on the road when he/she is about to reach the maximum permitted driving time the practice is that he/she must find a suitable stopping place and call the depot and then await rescue. Two drivers would usually then be sent out by the section manager so that both vehicles could be safely driven back to the depot.

24. The respondent's shift patterns comprised an early shift from 6am to 2pm and a late shift from 2pm to 10pm. Therefore if a driver worked a double shift, in total 6am to 10pm, this would be in breach of those rules and accordingly anyone working a double shift had to finish by 9pm.

25. The respondent's disciplinary procedure sets out the procedures that it will follow in the event of suspected misconduct and a non-exhaustive list of examples of serious misconduct that are liable to result in summary dismissal. This list includes deliberate falsification of records and serious breach of Partnership rules and procedures.

26. During the claimant's employment a document was displayed on the wall at his depot which set out levels and descriptions of various disciplinary offences and resulting action. This showed "No tacho card in VDU" and "Failure to record whole shift" as level 2 offences, defined as "investigation with potential outcome to be formal disciplinary action". By contrast level 3 offences stated "dismissal likely". Mr Eyre accepted that this document "definitely could have been up at Brooklands".

27. At the time of the incident that led to the claimant's dismissal, the customer delivery hub manager at Brooklands was Peter Benton. He was appointed to this position in January 2013. Prior to that the depot had been managed by Mr Glavin. On Mr Benton's appointment Mr Glavin became the assistant manager. This was part of a general reorganisation of the respondent's logistics functions reflecting the greatly increased importance of retail deliveries in recent years with a corresponding increased focus on

training and compliance. The claimant accepted that training had tightened up and that Mr Benton was more of a "stickler for the rules" and that the introduction of the CPC was an example of more professionalism and compliance starting around 2014.

28. 24 March 2016

29. On 24 March 2016 the claimant performed a double shift - the late shift being voluntary overtime – and accordingly he had to complete all his working time by 9pm. Mr Stenning was with the claimant as his porter but was not an authorised driver. As often happens the claimant was delayed due to weight of traffic and by 20.25 realised that he was going to be in difficulty to return to the depot by 21.00.

30. The claimant and Mr Stenning started to telephone various people at the depot to advise them of the situation and request assistance with a rescue. They used both the official mobile phone in the vehicle cab and also the claimant's personal mobile. The records for the vehicle phone were not before me and were not before Mr Eyre or Ms Mihell during the disciplinary process. The claimant's personal mobile call records show that a series of calls on this phone started at 20.25 when the despatch office was called (the call lasted 1min 10 secs) followed by five calls to various partners ranging from 2 secs to 2min 23secs between 20.42 and 20.52.

31. The claimant then removed his driver's card from the tachograph unit in his vehicle (known as "pulling the card") so that the record would not show that he had driven past his permitted working time. He continued to drive his vehicle for a further 3 km until he was able to pull up in a petrol station. The claimant disputes that it was as far as 3 km but the evidence compiled by the respondent indicates that this was correct. The significance of this distance is that typically the respondent will not investigate breaches of use of tachograph for under 1 km as this is very likely to be when vehicles are being driven around a depot when a tachograph is not required. Even if the claimant only drove for less than 1 km, however, he was still driving on the public highway and therefore the card should have been inserted.

32. The section manager on duty that night was Greg Richards. At 20.58 the claimant made a 2min 30secs call to the section manager's telephone number. His evidence is that that was a conversation with Mr Richards. Mr Richards' evidence to the investigation and to Mr Eyre was that he did not have any conversation with the claimant that evening. The respondent has posited that this may have been a voicemail message. The claimant says that he tends not to leave messages. I conclude that this was more likely than not to have been an actual conversation. A message lasting 2m 30secs would be on the very long side given the claimant's situation at the time. I cannot conclude however who it was with. There is a straight conflict of evidence between the claimant and the respondent on this with plausible explanations for both accounts. In any event I conclude that at 20.58 Mr Richards, or someone on his behalf in his office, knew of the claimant's situation, that he was in difficulty and was right up against his working time limit.

33. In any event the claimant also made a call at 21.02 to his colleague Mr Burmingham who drove out alone in a 3.5t vehicle to rescue him. Mr Burmingham and the claimant then swapped vehicles so the claimant drove back to the depot in the smaller vehicle, which did not a require tachograph, and Mr Burmingham and Mr Stenning drove back in the 7.5t vehicle.

34. When the claimant drove back in the 3.5t lorry therefore someone in the respondent's actual or assumed management structure knew that he was driving that and that was a breach. Mr Richards would, or should, have known when the claimant got back to the depot that he should not have unloaded his lorry and should have left immediately.

35. On arrival back at the depot claimant unloaded and tidied the 7.5t vehicle. There is a dispute between the parties as to whether, when he arrived back at the depot, the claimant saw Mr Richards. The claimant says that he did and he remonstrated with him about the lack of assistance given to him. The claimant's case therefore is that Mr Richards was in no doubt that the claimant was working beyond his agreed hours when he unloaded the vehicle. The respondent's case, based on the investigatory and disciplinary interviews with Mr Richards, is that no such conversation took place. Mr Richards told the respondent that he had no contact at all with the claimant that evening.

36. In the course of the investigation the claimant asked to see CCTV footage as he said this would show that he had the conversation with Mr Richards. Limited footage was available to the investigation which showed the claimant talking to someone when he arrived at the depot but it was not possible to see who it was.

37. The evidence before me is inconclusive as to whether an exchange took place between the claimant and Mr Richards in the depot.

38. Having completed the loading and tidying up the claimant left the depot and was then on leave for five days over the Easter weekend. On his return to work the claimant failed to manually complete his driver's card to reflect the additional hours he had worked on 24 March. The claimant accepts that he should have done this and says that this was an oversight.

39. The respondent produces a Vehicle Driving Time and Exception report every 28 days for each depot based on data provided by the Freight Transport Association (FTA). These reports show if any drivers have driven vehicles without a card inserted. They are reviewed locally by the customer delivery hub managers who decide if any action is required. When the exception report for the vehicle driven by the claimant on 24 March was considered it showed that the vehicle had been driven for 4 minutes and 3km without a card inserted. This was referred to Ms A Drukteniene, a section manager in administration and compliance, to investigate.

40. Ms Drukteniene first interviewed the claimant on 4 May. The claimant was given no prior indication that he was to be interviewed or the reason why. When asked whether he drove without a driver's card on 24 March he replied "No why would I". He was then shown the printout and the claimant asked "Did I not do a manual entry the next day". After some recap of events on that day the claimant said "OK the vehicle was picked up at the petrol station as I was running late." He was later asked if he informed a manager and he said "I don't know…I'm not sure if Greg knew or not, he would have been aware that I asked for assistance…".

41. On 5 May Ms Drukteniene interviewed Mr Burmingham. Mr Burmingham, once reminded that he had rescued a partner on 24 March, recalled that he had rescued the claimant but he could not remember who had called him, the claimant or someone called Scott, but he thought it was the claimant who had said to him that he ran out of driving hours. He said that he gave the 3.5t vehicle to the claimant drive back and he drove the claimant's vehicle. When asked who the manager was on shift he said probably Greg (Mr Richards) and that he did not think Greg was aware of the situation.

42. The claimant was interviewed again on 10 May. On this occasion he said he could not remember if he called Mr Richards. He was then asked questions about events on 24 March to which he often failed to give direct answers. The answers he gave contrast markedly in several respects to his evidence at this hearing. The claimant and Ms Drukteniene also viewed the CCTV footage during that interview and after a brief adjournment the claimant asserted that it was a daily occurrence that drivers would work beyond their permitted hours and not record time and that he had been singled out.

43. At the conclusion of this interview the claimant was suspended from driving though not from working. He was also informed that the matter would be passed to another manager as there was a case to answer.

44. On 13 May Ms Drukteniene interviewed Mr Richards. He was asked what would happen if a driver was still on the road and reached his maximum working time. Mr Richards confirmed that the driver would stop with the vehicle before reaching maximum hours and then would have to wait for him to find a new driver to go out and recover the vehicle and bring back the driver and the porter and when the driver returns back on site he is to leave the building immediately. When asked if he received a phone call from the claimant on 24 March to ask to be recovered he said no and when asked if he was aware of any driver that would have recovered the claimant on that night he again said no.

45. In late May Mr Eyre was asked to chair a disciplinary hearing in respect of the claimant - it is clear that the decision to progress the matter had already been made at this point.

46. Mr Eyre wrote to the claimant inviting him to a disciplinary meeting on 8 June to discuss allegations of potential serious misconduct, deliberate

falsification of records and serious breach of Partnership rules and regulations. Enclosed in that letter were copies of all documents obtained during the investigation together with a copy of the disciplinary policy. The claimant was advised that disciplinary action may result including dismissal without notice or pay in lieu.

47. On 8 June the claimant attended with a companion. Shortly before the meeting the claimant gave Mr Eyre a copy of his personal mobile records

48. During the meeting the claimant admitted committing an offence which he said he had never done before, that he had been under pressure and panicked and he accepted that at 20.58 he should have pulled over and should not have put himself in that position in the first place.

49. When asked about what communication he had had with the duty manager the claimant said that it was hard to remember as it was a long time ago but he would have looked for support but he just could not remember the details. When told that Mr Richards had said he had not received a call from the claimant the claimant replied that his phone records "suggest" there was a 2 ½ minute conversation with him. He also said that his porter Mr Stenning was never interviewed and that he could confirm his story and he did not know why this did not happen. He confirmed that Mr Stenning was agency and he was not sure if he was still on site. He said "I just don't think all the facts were addressed in the investigation. Why was he not spoken to?".

50. Mr Eyre asked the claimant to talk him through the call with the duty manager and the advice he received. The claimant's response was "Potentially… I don't know. I don't remember. We tend to contact colleagues on site. Greg was aware but I don't remember the exact details of the conversation" and later "I was out of time. I don't know. I was up at 4 AM this morning. My bad. I don't want to get others involved. A lot of time has elapsed."

51. Mr Eyre said "I just don't understand as Greg does not remember conversation and you are vague" to which the claimant replied "I saw Greg when back on site. He could have kicked me off site. I don't want to get someone in trouble."

52. There was then a break at the claimant's request and on resuming when asked again about the phone call he said "I don't remember. I don't want to fabricate. My honest answer." Mr Eyre stated that during the break he had contact Mr Richards who "still states that he did not have conversation on that night".

53. The claimant confirmed that he did not generally leave voicemail messages but would call again. Mr Eyre said that he agreed it would be good to have the porter's views but that the meeting was about legal infringements. The porter "would be nice to have but not really relevant".

54. He then asked the claimant if he had a driver's phone to which he said yes but it was held by the porter.

55. When asked about returning to the depot the claimant said that Mr Richards saw him when he returned and that they spoke. He did not say

that he had been angry with him. He also specifically confirmed that Mr Richards did not instruct him to pull his card.

56. During the interview the claimant confirmed that he had never done this before and would not do it again.

57. The meeting adjourned again between 11.55 and 13.05. When reconvened Mr Eyre advised the claimant that his decision was that serious misconduct had been proved as he had "deliberately pulled the tacho" and therefore he had no option but to propose contract closure and handed the claimant a letter confirming the same. The claimant was advised of his right to appeal.

58. The claimant lodged an appeal on 10 June. His grounds were that all the facts were not established during the initial investigation and the disciplinary manager did not take into consideration all the evidence including new evidence.

59. The appeal meeting was held on 20 July. Notes summarising the appeal were made and show the claimant saying that he phoned six different drivers to get help, arranged with Mr Burmingham to come out and then called Mr Richards just prior to 9pm and that he definitely recalled speaking to him. He also said that Mr Stenning should have been interviewed and if he had been he would have said that both he and the claimant had spoken to Mr Richards. He said he thought the sanction was too severe, that Mr Eyre had already made up his mind before the interview and that other people had pulled cards and not been disciplined. Specifically he said that Mr Glavin had said that cards are removed about five times a week.

60. On 28 July Ms Mehill interviewed Mr Eyre, Mr Glavin, Mr Richards and Mr Burmingham.

61. In particular Mr Glavin confirmed that he had decided the situation was serious enough because the claimant had swapped vehicles and driven back to the site and that driving a very short distance without a card might not lead to dismissal. He confirmed there could be three or four cases every few months with "different circumstances".

62. Mr Richards confirmed his earlier evidence that he had no recollection of speaking to the claimant that night.

63. Ms Mehill wrote to the claimant on 1 August confirming that his appeal had been unsuccessful. It was a lengthy letter effectively recording the contents of the meeting, the background events, his points of appeal and her response to them. In particular under the issue of why Mr Stenning had not been interviewed, she concluded that whether or not the claimant spoke to Mr Richards, her belief was that he chose to remove the card and drive and then further breached regulations by driving another vehicle back to the depot. She also regretted the delays in the process but this was not uncommon and that she had reviewed other cases at Brooklands

and had found the circumstances to be significantly different to his. Finally that dismissal was a reasonable response to undoubted serious misconduct.

64. In conclusion, therefore she upheld Mr Eyre's decision to propose dismissal and that a further letter would be sent closing his contract. That letter was sent on 8 August 2016 and the claimant's employment ended on the following day without further notice or pay.

65. Ms Mihell confirmed in her evidence to the Tribunal that this letter is inaccurate in that she in fact only investigated the circumstances of RC's discipline.

66. Throughout the disciplinary process no attempts were made by the respondent to contact Mr Stenning. Mr Stenning's evidence to the Tribunal was that both he and the claimant spoke to Mr Richards and that it was he, Mr Stenning, who spoke to Mr Burmingham and asked him to pick them up. He confirmed that he was asked to give a witness statement in about February 2017 but he says he remembered the day well and he was 100% confident about his evidence.

Other disciplinary cases

67. The claimant says that he has been treated inconsistently with other employees and information has been provided regarding other disciplinary cases together with Mr Brennan's evidence about his own case. The position is as follows:

    a. Mr Brennan (also a driver assessor) was disciplined in November 2013 by Mr Glavin (then deputy operations manager) as he had pulled his card on nine occasions totalling 77 minutes. Mr Glavin awarded him a first and final warning. He advised Mr Brennan that he had broken the law and could have jeopardised the respondent's licence. Mr Brennan's unchallenged evidence is that since then his record has been exemplary and that he has learned from his mistakes.

    b. In 2014 and 2016, investigations commenced against partners at another depot within the same region as Brooklands for taking out cards but in both cases they resigned before the disciplinary hearings took place.

    c. In March 2016, a partner at Brooklands (RC) was investigated for driving without a card. Mr Richards dealt with the disciplinary hearing but did not dismiss. The partner was a new recruit only being in post for 6 weeks and was not fully familiar with the requirements and had a medical condition which led to a panic attack at the relevant time. He had also contacted his manager when he took the card out.

d. In April 2016 another partner was dismissed from a further depot within the same region as Brooklands for removing his card. The partner had similar length of service to the claimant and gave similar mitigation.

e. In 2016 3 agency drivers had their engagements terminated for removing cards.

f. A vehicle driving time – card exceptions report for 2016 shows that for the vehicle driven by the claimant shows 42 occasions on which cards were pulled. Of those the vehicle was driven for more than 1 km on 8 occasions. No partner was dismissed as a result but Mr Eyre gave credible explanations for this and the action that was taken in respect of each incident. The claimant says that this document shows that pulling cards was not treated seriously.

Credibility

68. The respondent has asked me to conclude that the claimant was not a credible witness as when he was first interviewed by Ms Drukteniene on 4 May 2016 he denied having pulled his card which is a different account to the one he gives now. I do not draw that conclusion from that interview – the claimant's initial denial can easily be explained by the fact that he had no prior notice of that interview which was some weeks after the events in question and therefore had not had a chance to recollect the events. It is true that the claimant's account of events at this hearing has been much fuller than he ever gave to the disciplinary process at both dismissal and appeal stages. His explanation of that is perhaps that he did not want to get anyone else into trouble. That is plausible, perhaps, up to the point where he knew his job was on the line but not thereafter. For that reason I treat some of the claimant's evidence with caution but that is not to say that I believe he has been deliberately untruthful.

69. As for Mr Stenning's evidence again I treat that with some caution. He was first asked to recollect events for a witness statement in February 2017 - almost a year after the events in question. Again I do not conclude that he has never intended to be untruthful, indeed he struck me as a sincere witness, but the circumstances are such that his evidence is not as valuable as it would have been if he had been interviewed much earlier in the process.

Conclusions

70. <u>Unfair dismissal</u>

71. The respondent, through Mr Eyre and Ms Mihell, had a genuine belief that the claimant was guilty of pulling his card and working beyond permitted hours both by driving 3.5t back to depot and working in the yard.

72. There were clearly reasonable grounds to sustain that belief as the conduct was admitted by the claimant.

73. I have some concerns regarding the adequacy of the investigation although ultimately I conclude that what was done was reasonable in all the circumstances.

74. In my view, at least some effort should have been made to interview Mr Stenning but the failure to do so was not fatal. Similarly, the respondent could have obtained and considered records for the vehicle mobile phone but ultimately, as described by Ms Mihell, this failure had no significant effect.

75. Both Mr Eyre and Ms Mihell could have asked Mr Richards specifically about the 2m 30 sec call made on the claimant's mobile. This perhaps could have triggered his memory or led to other questions but ultimately, both the claimant's and Mr Richards' views were sought on whether a conversation took place between them. The claimant's case varied quite significantly throughout the investigation whereas Mr Richards was consistent. When the claimant's position became that he did speak to Mr Richards, Ms Mihell reinterviewed both Mr Richards and Mr Burmingham who maintained their position. It was reasonable for Ms Mihell to form her conclusion based on that.

76. The respondent has said that in any event it does not matter whether the claimant and Mr Richards spoke as even on the claimant's case he does not say that Mr Richards told him to pull the card and go home. I do not accept this. An alternative scenario of course is that they did speak, Mr Richards knew the claimant should not be working beyond 9pm and, if he later knew he was, condoned the breach. When Mr Richards was then later asked and he denied speaking to or seeing the claimant, his motive for that denial could be to protect his own position. Without this being specifically investigated we just do not know but in any event having reached the conclusion that the investigation was reasonable, that speculation becomes irrelevant.

77. As for investigating the CCTV, the claimant viewed some footage during the investigatory meeting but thereafter he made very little, if any, reference to it. At the time of the investigatory meeting the claimant did not say that he had spoken to Mr Richards either on the phone or in the depot and therefore it was not unreasonable of the respondent to fail to get or save extended CCTV footage as it was not in issue. By the time it did become an issue, the CCTV had been wiped.

78. The procedure used by the respondent was reasonable. There were delays but overall they were insignificant and explicable.

79. As for reasonableness of sanction, I conclude that from Mr Benton's arrival in early 2013 there has been a change in culture with infringements of both the respondent's own rules and the statutory requirements being treated more seriously by the respondent. By the time of the claimant's dismissal that change in culture was well known and is supported by the dismissal of the partner in April 2016 referred to above. The treatment of Mr Brennan in November 2013 was more lenient but I find that that was during the

transition from the previously more lax culture. I do not find that there has been any inconsistency of treatment of the claimant such as to make his dismissal unfair.

80. Accordingly the dismissal of the claimant was fair.

81. For completeness, I confirm that even if I had found the decision to be unfair I would make a very significant finding of contributory conduct – potentially 100%. It is clear that the claimant was culpable of blameworthy conduct which directly led to his dismissal.

82. Wrongful dismissal

83. The claimant on his own admission committed a breach of conduct which he knew full well to be very serious. Even if he wrongly or rightly thought he would not be dismissed for a first offence, it very clearly was a serious offence capable of amounting to gross misconduct. I find that he did commit gross misconduct by pulling his card and by working over hours. Therefore the wrongful dismissal claim also fails.

84. The remedy hearing provisionally listed for 27 November 2017 therefore can be vacated.

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Employment Judge K Andrews
Date: 2 October 2017