Case No: 1301295/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr Charles Christopher Barnes

Respondent: Robinsons of Worcester Aggregates Ltd

Heard at: Birmingham **On: 13, 16 and 17 November 2017**
20 November 2017

Before: Employment Judge Macmillan

Members: Mrs R A Forrest
Ms W A Stewart

Representation
Claimant: Miss Katherine Jones of Counsel
Respondent: Mr Gilmore, Solicitor

RESERVED JUDGMENT

The complaints of unfair dismissal and race discrimination succeed.

REASONS

Background and issues

1. This is a complaint by Mr Barnes that he was unfairly dismissed from his employment with the Respondents on the 3rd January 2017, following a minor road traffic collision at a junction on the A4071 near Rugby. He complains that his dismissal was also an act of race discrimination. He was the only black driver employed by the Respondents and he contends that the decision to dismiss him was less favourable than the decisions taken in respect of many white drivers involved in similar collisions, some of whom were not disciplined at all and none of whom were dismissed.

2. The Respondents admit the dismissal and give us the reason that Mr Barnes was guilty of gross misconduct in driving over a traffic light on red; careless and dangerous manoeuvring on the highway; failing to stop at the scene of an accident and bringing the Respondents' reputation into disrepute.

3. The Respondents have been represented by their Solicitor Mr Gilmore and we have heard evidence from Mr Edward Robinson, the Managing Director and co-owner of the business, Mrs Julie Bellerby who was formally employed by the Respondents in a

Human Resources capacity and who took the decision to dismiss Mr Barnes, and Mr Richard Parker, Senior Transport Manager who heard the appeal. Mr Barnes has given evidence to us and we have heard evidence in his support from Mr Adrian Ross, his Trade Union Representative. He has been represented by Miss Katherine Jones of Counsel.

4. We will deal with the complaint of unfair dismissal first.

The law

5. The right not to be unfairly dismissed is created by section 94 of the Employment Rights Act 1996. Section 98 deals with the general provisions with regard to fairness. Sub-section (1) provides:

> 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 principle 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.

Amongst the potentially fair reasons in sub-section (2) is one which relates to the conduct of the employee and that is the allegation here.

6. The all important test of reasonableness is set out at sub-section (4). This provides:

> Where the employer has fulfilled the requirements of sub-section (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 sources of the employers 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.

7. It is important that the Tribunal's role in dealing with cases of this nature is understood. It is not our task to say whether Mr Barnes is guilty or not of the matters alleged against him by the Respondents. Our task is to examine the Respondents and to say whether their decision to dismiss was one which fell within the range of responses of the reasonable employer in the circumstances which were known to or should reasonably have been known to them when the decision to dismiss was taken. In misconduct cases, the Tribunal is guided by the well known authority of ***British Homes Stores –v- Burchell*** [1978] IRLR 379 in which the Employment Appeal Tribunal said that all an employer needs to do in such a case is to satisfy the Tribunal that they genuinely believed the allegations which they make against the employee; that they had reasonable grounds for that belief; and that they had reached that belief on those grounds after making all such enquiries as were reasonable in the circumstances. When the judgment in ***Burchell*** was handed down, there was a burden of proof on the employer to establish fairness on the balance of probabilities, but that requirement has long since been amended out of the statute and the burden of proof is now neutral. ***British Home Stores –v- Burchell*** must now be read accordingly.

8. Even when the Tribunal is satisfied that the employer's conclusions were reasonably reached, the question then arises whether dismissal fell within the range of reasonable responses to the facts thus established. If it did not then the dismissal was unfair. In approaching all questions of reasonableness, the Tribunal must not substitute its judgment for that of the employer. In consequence, if the Tribunal feels that the dismissal was harsh but nonetheless was within the range of responses of the reasonable employer, the dismissal will be fair.

The Facts

9. The Respondents are one of three businesses controlled by the Robinson family, Mr Edward Robinson and his father. One is a farming business. The second is Robinsons of Worcester Limited which, like the Respondents, the third of those businesses, is a road haulier. Mr Robinson and his father are the only shareholders and the only directors and Mr Robinson is Managing Director of both haulage businesses. Both are relatively small. The Aggregates business in which Mr Barnes was employed, had, at the material time, some 15 vehicles, two transport managers, 15 full-time employees and some 5 or 6 agency staff. Robinsons of Worcester had some 28 employees in total. It is in our judgment necessary to consider the two businesses as effectively one, largely because of Mr Robinson's controlling influence over both, not merely in the legal sense, but in the day-to-day operational sense and, as we shall see later in our findings of fact, because he appears to have had at least indirect involvement in many if not most of the decisions of a disciplinary nature in both businesses.

10. Both Robinsons of Worcester and Aggregates were incorporated in 2013 when Aggregates won a contract with Semex UK at Rugby to deliver aggregates to the site. Mr Barnes had commenced employment with Semex on the 3rd of August 2004 and on the 1st of August 2013 his employment was transferred to the Respondents under the Transfer of Undertakings (Protection of Employment) Regulations 2006. On the date of the accident, the 6th of December 2016, Mr Barnes therefore had 12 years and 4 months continuous employment. He had a clean disciplinary record and a clean driving record, although we noted with some concern that during her evidence Mrs Bellerby seemed rather reluctant to credit him with a clean driving record, implying perhaps that he had been 'getting away with it' for a long period of time. She had to accept however that so far as the evidence went, Mr Barnes had a perfectly clean driving record.

11. On the 6th of December 2016 at about 8.45 in the morning, Mr Barnes was making the run which he made every day, several times a day, taking aggregates to Semex, Rugby. The accident happened a little over a mile from the Semex plant at a junction on the A4071 at Lawford. The junction is controlled by traffic lights. It is a large junction and the lights on both the entrance and exit side on the A4071 are set back some distance from the junction itself to accommodate pelican crossings. In the direction he was travelling as he approached the junction, the road is initially single carriageway, then becomes duel carriageway and on the final approach to the junction, a third lane appears which is a lane for turning to the right. The two left hand lanes are for carrying straight on. No measurements were taken of the junction either for the purposes of the Respondents' enquiry or for these proceedings and so it is not clear precisely where relevant markings on the road lie in relation to the traffic lights themselves. From an aerial photograph, supplied by the Respondents for this hearing and which Mrs Bellerby said she had in front of her as part of the disciplinary hearing documents, vehicles should come to a halt at a solid white line which is roughly in line with the traffic lights. Ahead of that solid white line, is a first and then a second dotted white line enclosing the pedestrian controlled pelican crossing. The pedestrian crossing sits in that part of the junction where the curbs still run straight and before they curve away to the left for traffic turning left.

12. Mr Barnes' vehicle was fitted with a dashboard camera and an important part of the evidence, both at the disciplinary hearing and at the Tribunal, was the video footage taken from the camera, which has been viewed many times during the hearing. At the conclusion of the hearing with the agreement of, but in the absence of, the parties, the Tribunal went through the footage again several times to make detailed findings of fact about the accident. We will set out those findings later in these Reasons but what we say in the following paragraphs can be taken to be a summary of them. The Respondents were unable to say with certainty where the camera was located in Mr Barnes vehicle, but it seems to be common ground that it was right at the front, inside the windscreen and either mounted on the dashboard or at the same height as the rear-view mirror would have been located in a car. The Respondents accept that the view shown by the camera is a little ahead of the physical front of the vehicle. Although the lens on the

camera is a fisheye lens, there is a blind spot between the physical front of the vehicle and the nearest object viewable in the footage. The Respondents have not measured the blind spot, but have estimated that it is some two to three feet. The view from the camera is also not the drivers view. The driver sits to the rear of the camera by a distance which again has not been measured, but which is probably 2ft or a little more. The video footage therefore shows a view some 4ft to 5ft ahead of the driver's eyes. Given the very slow speeds involved in the initial stage of this incident and the very tight timings, that distance may be of some importance in determining what Mr Barnes was actually aware of, but the point appears to have been overlooked or ignored by the Respondents.

13. The video footage shows that as Mr Barnes approached the junction, he was in the left-hand lane. The lights ahead of him were red. He slowed down and came to a near stop at least one car length from the white line. As he was approaching the junction, a silver car overtook him in the right-hand lane and remained ahead of him while the lights were on red and a black car followed the silver car. He slowly drew alongside the black car, but remained hovering at the rear of the silver car. Mrs Bellerby accepted that that is what the drivers are trained to do as a fuel economy measure so that they do not have to make a standing start after the traffic lights turn green. Somewhat surprisingly, Mr Robinson said that that wasn't the case. He said that fuel economy driving is not practiced by the Respondents, but he did accept that Mr Barnes may well have been taught it at Semex and may well have been driving in that way.

14. Mr Barnes is obviously very familiar with the junction having crossed it many hundreds of times. He is obviously very familiar with the traffic light sequence. He began to roll forward with the lights still on red but there is no doubt that by the time he entered the junction itself, by which we mean reached the point on the road where the nearside curb begins to move away to the left, the lights were on green. On the far side of the junction, the junction is very wide, very shortly after the exit traffic lights and pelican crossing, but at a distance which has not been measured, filter arrows appear in the right-hand lane. At a distance which again has not been measured but which Mr Robinson has estimated at being about 140 yards, the two lanes finally merge into a single lane. Mr Barnes crossed the junction and passed through the traffic lights on the far side still in the left hand lane. He then began to move across to the right. At that point (the moment of impact is not apparent from the video), the rear of his vehicle came into contact with the black car, the silver car having gone past him at some speed as he crossed the junction. The road is an urban clearway. Mr Barnes took the view that that meant he was not permitted to stop. It was in any event a very busy time of the morning and the black car was obviously driveable as it continued to follow him. As stopping would have effectively blocked the carriageway he decided to continue to the Semex works which are located a short distance off the A4071 at the next junction. He filtered left at the traffic lights at the next junction and then after perhaps 100yards or so, turned right into the Semex yard where he proceeded to the weighbridge with the third party behind him.

15. He has all along maintained that he was aware that a collision had taken place, but because he could not stop safely or legally on the clearway he had indicated to the third party to follow him by turning on his hazard lights and the flashing orange beacon on the cab top. There were angry exchanges between him and the third party on the Semex yard. Both he and the third party wanted the police called, but for some reason which the Respondents cannot explain and do not appear to have attempted to clarify, the Respondents manager on duty, Jim Coley, did not call the police. Mr Barnes and the third party exchanged insurance details, but Mr Coley did not apparently speak to the third party, at least in the sense of trying to ascertain what had happened. If he did, neither we nor the Respondents' decision makers have any evidence as to what was said and no note was taken. Mr Coley did look at the third parties' car and took some photographs. The nearside wing mirror was knocked back and broken and the bulb was hanging out. In the statement which he wrote that morning Mr Barnes refers to a

scratch on the nearside of the third parties car, but he does not say where. It is not shown in the photographs which Mr Coley took and the Respondents do not seem to know where the scratch was. After Mr Coley had dealt with the third party, he took Mr Barnes to the portacabin which serves as the office and, according to Mr Barnes, took a statement from him or asked him to write one down (it is not clear whether the document, on page 47 of our bundle is in Mr Coley's handwriting or Mr Barnes' though given the signature at the bottom, it appears to be in Mr Barnes' handwriting). Mr Coley downloaded the video footage from the cab of the lorry and Mr Barnes was shown an extract from it, the extract apparently being of the vehicles at the lights. Mr Barnes had to remain at the office until 4pm when Mrs Bellerby arrived to take a urine sample to check for alcohol and drugs. The sample was negative. Mr Barnes was not suspended from work and was allowed to continue working until the 12th of December.

16. The statement which he wrote on that day, so far as material, reads as follows:

I was driving along the New Road, when I approached the traffic light which had turned two (sic) red, so I slowed down two stop, so I looked in my drivers side mirror and saw a load of traffic alongside of me, so I looked at the lights which had turned green, so I pulled of then going straight on towards the rest of the New Road I saw one car come alongside of me which you expect, then another car tried to come down the side of me, when I looked in my mirror the car was trying to squeeze down the side of my lorry which of course was too late, I had moved over which the lady had tried her luck which was too late, she hit the side of the lorry….

Both Mr Robinson and Mrs Bellerby took the passage from the statement beginning "then another car tried to come down the side of me…" as an admission by Mr Barnes that the third party's vehicle was already trying to overtake him as he began his manoeuvre. In our judgment, no reasonable employer could have reached that conclusion; in an admittedly rather clumsy way, the statement says precisely the reverse. Mr Robinson was asked to re-read the statement during his evidence and having done so he accepted that Mr Barnes was indeed saying that the black car was not alongside him when he began his manoeuvre. He also said that he had to accept that there was no basis for disbelieving Mr Barnes when he had said that it was not, but having said that, Mr Robinson nonetheless continued to disbelieve him.

17. It is not clear at what point Mr Robinson first saw Mr Barnes' statement and formed the erroneous view that it contained what would have been a very damaging admission. He was not specifically asked in evidence, but he did say that his opinions about Mr Barnes' driving developed over a period of time as he saw fresh bits of evidence. There is no doubt that he saw the video footage before it was decided to bring disciplinary proceedings against Mr Barnes. It seems more probable than not that he had also seen Mr Barnes' statement and formed what he now accepts was an erroneous belief about what it said, prior to or at about the same time as viewing the video footage. There is no doubt that Mr Robinson took a very serious view of Mr Barnes' driving at an early stage, a view which was at least to some extent informed by the mistaken belief that he was aware of the presence of the black car alongside him before he started to move to the right. This view is supported by the use of a word which has permeated the Respondents case against Mr Barnes, namely that his action was 'deliberate'.

18. Mrs Bellerby on the other hand when asked to reconsider the statement would not accept that Mr Barnes was saying that the third party had tried to overtake him after he had started to move to the right. She continued to insist that it was an admission that he knew the black car was alongside him. She accepted that when conducting the disciplinary proceedings she had not asked Mr Barnes if it was such an admission and that she was conscious that what he was saying at the disciplinary hearing about how the accident had happened was completely incompatible with what she believed his original statement to be saying. She did not however seek to clarify that apparent contradiction but told us that instead she had dismissed his evidence that he had checked his mirror, signalled and move over when he saw it was safe to do so, because

it did not fit in with her assumptions about what had happened, an assumption that appears to be based on a miss-reading of his original statement.

19. In attempting to justify their view that the black car was alongside Mr Barnes's vehicle when the accident happened the Respondents have placed considerable reliance on the damaged caused to both vehicles. But the only damage to Mr Barnes's lorry was to the very rear of the chassis where his right-hand light cluster was damaged apparently in contact with the third party's wing-mirror. That damage is capable of supporting either the Respondents' belief that the vehicle was alongside the lorry or Mr Barnes' explanation that the third party tried to overtake him after he had started his manoeuvre when it was unsafe to do so.

20. Mr Barnes was suspended after completing his shift on the 12 December. The letter of suspension explains that he was being suspended because further investigation was required. The letter, which is signed by Jamie Knight the Transport Manager of Aggregates, says that he will be contacting Mr Barnes soon with further details and may wish to interview him again. However, on the very next day, Mrs Bellerby dictated or typed a letter summoning Mr Barnes to a disciplinary hearing. Miss Jones has criticized the suspension as being wholly unnecessary and irrational. There clearly was no further investigation and it is not clear why it was felt appropriate to suspend Mr Barnes. His suspension appears to have followed a collective viewing of and discussion about the video by a number of managers, which included Mr Robinson, and Mrs Bellerby. This was not unique to Mr Barnes' case. Similar gatherings took place to discuss most disciplinary issues.

21. Mr Robinson said in cross-examination that there were a number of things that informed his 'decision' about Mr Barnes, a word which he used more than once. Mr Robinson was not however formally involved in the decision making process at all. He accepted that he had discussed the incident with Mrs Bellerby and that she was aware of his views about it. Those views were forcefully explained to the Tribunal. Mr Robinson was of the opinion that Mr Barnes was deliberately attempting to block the black car from overtaking him, that he had jumped the red light in order to give him a head start on the black car to enable him to do so and he made no attempt to stop after the accident. Because of the size of his vehicle and his destination he should not have been in the left-hand lane at the lights but in the middle lane. Even if Mr Barnes was right not to stop at the scene of the accident, he should not have pulled on to the weighbridge at Semex and this gave the impression that he was trying to avoid the third party. He accepted that it may well be the case that his views were never explained to Mr Barnes even though it seems clear that they were fully understood by Mrs Bellerby. He didn't disbelieve what Mr Barnes was now saying but he had made his 'decision' based on what he saw on the video. In our judgment, it is clear that when Mrs Bellerby suspended Mr Barnes and the next day began the disciplinary process, she was well aware that Mr Robinson regarded this as a very serious matter. At that stage however, Mrs Bellerby was not intended to be the person taking the disciplinary hearing.

22. The third party – the driver of the black car - was never interviewed by anyone from the Respondents or if Mr Coley did interview her on the day of the accident no record of the interview survives. On the 6th December she wrote a very short letter to the Respondents which reads thus:

> This morning at 8.45am approximately, my vehicle was hit by a "big pink truck" registration BJ13 8PE causing damage to my car. In my opinion, this was a dangerous manoeuvre by the truck who nearly managed to run me off the road. At no point did he try and stop, I had to follow him into the Cement Works.

23. We have not heard any evidence from Mr Knight or Mr Coley. Mrs Bellerby told us that they carried out the investigation, but there does not seem to have been any real investigation at all. If there was there was no written report, nor, so far as we have been told, an oral one. A small number of photographs of the damage to both vehicles were

taken on the day of the accident, and Mr Barnes appears to have written, in the presence of Mr Coley, a slightly incoherent statement which, at worst, contained a number of ambiguities about which he was never questioned in order to clarify precisely what he meant. The Respondents do not appear to have checked what the parking or waiting restrictions on an urban clearway are. During the course of the hearing, we were given a number of extracts from the Highway Code by Mr Gilmore, but not the relevant one which is at rule 240 which is headed "YOU MUST NOT STOP OR PARK ON …" the list below the heading including "an urban clearway within its hours of operation except to pick up or set down passengers"**.** The wording about urban clearways does not include a phrase used in respect of rural clearways in the same section of the Code, "except in an emergency" although this minor collision could hardly be described as an emergency.

24. The disciplinary hearing was first fixed for 2pm on the 16th of December. The letter summoning Mr Barnes to the hearing was dated the 13th of December but was delivered to him by hand on the morning of the sixteenth itself. Unsurprisingly, he strongly objected to being required to attend a disciplinary hearing at such short notice and a series of telephone calls succeeded in having it postponed to the 3rd of January. He was notified of that hearing by a letter dated 20th December. The following disciplinary charges and a warning about the possible sanction were included in the letter:-

1. You drove through traffic lights when they were still showing red.
2. You veered over to the outside lane and caused an accident with a black Ford Grand C Max… and
3. You failed to stop at the scene of the accident.

These are serious allegations and if upheld, could lead to disciplinary sanctions, which could include your immediate dismissal

It is perhaps surprising given the minor nature of the collision, Mr Barnes' length of service, his clean record and the video footage, that the only potential disciplinary outcome mentioned in the letter is immediate dismissal. After listing the enclosures, the letter goes on to say "the possible consequences arising from this meeting might be gross misconduct."

25. The Respondents have a disciplinary policy and procedure, but it does not contain any examples of gross misconduct. Amongst the enclosures with the letter was a memory stick with the footage of the incident. Mr Barnes was unable to access the footage and professional IT advice which his wife obtained, confirmed that it was not accessible in the format provided by the Respondent. At least one request addressed to Mrs Bellerby on the 30th of December for replacement footage, produced no response. Mr Ross of Unite the union who represented Mr Barnes at the hearing was therefore not able to see the video footage until the start of the disciplinary hearing on the 3rd of January and Mr Barnes was only seeing it for the second time, having first seen it or part of it on the day of the accident.

26. The disciplinary hearing took a very unexpected turn from the outset. It was due to be heard by a Mr Lee Aldridge a Manager employed by one of the Robinson businesses. Mrs Bellerby was there only to offer HR advice and take the notes. However Mr Aldridge was apparently too nervous to conduct the disciplinary hearing and so Mrs Bellerby took the hearing while Mr Aldridge took the notes. At this stage, Mrs Bellerby had only been employed by the Respondents for nine months. The notes of the disciplinary hearing are extremely brief given that the meeting started at 12.50pm and ended at 3.00pm and of poor quality. There were two adjournments during the meeting so the video footage could be reviewed and another adjournment of about 35 minutes while Mrs Bellerby considered her decision and during which she telephoned Mr Robinson. Mrs Bellerby has made much of the fact that after the second viewing of the video, Mr Ross admitted that Mr Barnes had crossed the write line with the lights still on red. However the notes show that on three other occasions, two before the alleged admission and one after it, Mr Ross was saying that Mr Barnes did not cross the white line while the lights were on

red. Most importantly, the notes show him as saying this immediately after the second and longest viewing of the video. During that exchange between Mr Ross and Mrs Bellerby when they are, according to the notes discussing the video, Mr Ross makes it plain that Mr Barnes checked his mirror signalled and manoeuvred safely; the accident was not Mr Barnes's fault, it was because the third party driver was reckless. The notes record Mrs Bellerby as taking a different view.

27. In evidence, Mrs Bellerby told us that she disbelieved Mr Barnes's account of how the accident happened "because it did not match up with my assumptions about what had happened." She accepted that what she was being told about how the accident happened was completely incompatible with what she believed Mr Barnes' original statement to be saying, but she didn't raise this with him or seek clarification. She said that she based her disbelief on an assumption formed from seeing the video footage about what the silver car and the black car would be doing – not what the black car was actually doing as it does not appear in the video after Mr Barnes crossed the first white line. Her assumption must also have been based on the misreading of Mr Barnes' statement. What has only emerged belatedly during the Tribunal hearing is that by the time of the disciplinary hearing, the third party's insurers had admitted liability for the accident. They appear to have changed their view later, apparently in February 2017, possibly influenced by the Respondents' decision to dismiss Mr Barnes' for gross misconduct. There are no documents in the bundle about the insurance claim, which is to say the least surprising, and so it is not clear precisely when the third parties insurers accepted liability, but Mr Robinson in his evidence was clear that they had done so prior to the disciplinary hearing.

28. Mrs Bellerby telephoned Mr Robinson during the meeting before she announced her decision to dismiss Mr Barnes. She told us in evidence that she had discussed the case with him, but she did not remember any specifics. She was keeping him up-to-date, but she was not seeking his approval for her decision to dismiss. Mr Robinson confirmed that that was the nature of the conversation. Before going back into the hearing, Mrs Bellerby spoke to Mr Ross and offered Mr Barnes the opportunity to resign, which was refused on the basis that he felt he had done nothing wrong. Mr Barnes was told that he was dismissed at the conclusion of the hearing; he was told that he had done a careless and reckless manoeuvre and he had failed to stop at the scene of the accident. He was dismissed for gross misconduct. Notice of dismissal was sent to him (addressing him erroneously as "Colin") the same day. The reasons for dismissal were said to be "you drove over a red light: careless and dangerous manoeuvring on the highway: failed to stop at the scene of an accident: bringing the company's reputation into disrepute." The last reason did not feature in the letter inviting Mr Barnes to the disciplinary hearing and does not appear to have been discussed at the hearing. It seems to be based only on the fact that the Respondents' vehicles are painted pink and are therefore immediately recognizable and that the accident took place close to the Semex Depot, Semex being an extremely important customer of the Respondents. Mr Barnes was not however able to deal with any of these matters as he was unaware that they were relevant.

29. During the Tribunal hearing, the video footage was viewed several times. After the hearing and in the absence of the parties, the Tribunal viewed the footage again, at appropriate points doing so frame by frame, a facility that would have been available to the Respondents had they chosen to use it (we have not been told whether they did use frame by frame analysis but it seems unlikely). Doing the best we can given the lack of evidence about the length of the blind spot between the front of the lorry and the edge of what the camera sees, we make the following findings of fact from the video. Mr Barnes does appear to pass the first solid white line at the junction either as or immediately before the red light goes to red and amber. But in any event, the lights go to red/amber well before the front of the vehicle reaches the first dotted line of the pelican crossing. There are no pedestrians in the vicinity. The Highway Code does of course say that red and amber still means stop. The lights go to green probably as Mr Barnes crossed the second dotted white line of the pelican crossing, still well short of the junction itself and

before the nearside curb of the road starts to curve left. Given that Mr Barnes would be sitting four to five feet behind the edge of the blind spot, his belief that he saw something slightly different from what is revealed on the camera may well be true. Mr Barnes appears to move towards the middle of the road, straddling the two lanes as he reaches the pelican crossing on the far side of the junction. As he does so, not very far ahead of him, the arrows for filtering from the right hand lane appear, the first arrow being clearly visible as he starts to make his move. Because he almost immediately appears to move slightly back to the left, we assume that the collision took place at that time. The black car is never seen after Mr Barnes crosses the first white line before the junction and he is overtaken in mid-junction by the silver car.

30. Miss Jones submits that no reasonable employer could have concluded from the video footage that Mr Barnes crossed the solid white line on red. We do not agree. Although the Respondents do not seem to have specifically taken account of the length of the blind spot and the distance behind the windscreen that Mr Barnes was sitting, he does appear to cross the white line when the traffic lights were on red, but only by a split second. He was moving at not much more than walking pace at that point and accelerating slowly. On Mr Robinson's own account of what he saw on the video, the lights turned green three seconds after Mr Barnes crossed the white line. In our judgment however, no reasonable employer could have concluded from the video footage alone that Mr Barnes deliberately jumped the red lights which was Mrs Bellerby's conclusion. She said that the video showed that Mr Barnes barely stops and then starts up again before the lights change. She admitted that he may have simply got his timing wrong and that she didn't know what was going through his head, but she saw it as a deliberate act. She felt that it was deliberate because he wanted to get ahead of the other car. She did however accept that it was part of fuel efficiency training for drivers not to come to a dead stand at traffic lights.

31. During the course of the disciplinary hearing, Mr Barnes and Mr Ross described Mr Barnes' manoeuvre as 'taking command of the road', which Mrs Bellerby took to be an admission that he was making sure that no one else was going to be allowed to pass him i.e. that it was an aggressive action, but she did not ask him to confirm if that is what he meant. She accepts that during the course of the disciplinary hearing Mr Barnes explained to her (the minutes erroneously record him as showing her a press-cutting which was in fact about something else entirely) that at some time in the past he had been forced off the road at this junction by another heavy goods vehicle who had cut in from the right to prevent him moving into the centre of the road and that 'taking command of the road' was in fact a defensive manoeuvre designed to prevent a similar occurrence. He also explained that the Highway Code required vehicles to filter in turn at such a junction and that he was filtering behind the silver car and in front of the black car. Mrs Bellerby's recollection of whether this was said at the disciplinary hearing fails her, and at one stage of her evidence she said that she could remember nothing about the hearing other than what appeared in the notes although she later retracted that statement. Despite the fact that the notes are silent on many of these points we accept Mr Ross's and Mr Barnes' evidence that this explanation was given.

32. Mrs Bellerby's view that jumping the red lights was 'deliberate' by which she means aggressive, seems to be part of a narrative which the Respondents created at a very early stage which feeds upon itself and which derives from the misreading of Mr Barnes original statement, which the Respondents wrongly believed contains an admission that he knew the black car was alongside him when he moved across to the right.

33. Mr Barnes appealed against the decision to dismiss him. The letter of appeal which is dated 10th January 2017 says that the decision to dismiss was extremely harsh and unfair, given that he did not cause the accident and he followed the stopping procedure when it was safe to do so. As had been stated in the disciplinary hearing, the accident had occurred on a "no stopping urban clearway." Mr Barnes also stated in the letter that he had been led to believe that other drivers within the company have had similar

accidents and have been kept on which leads him to believe that he is being discriminated against because of his ethnic origin. "I am black and the other said workers are white". He then writes:

> Throughout this process I have felt that you have already reached your decision and you are just going through the motions and in today's society, I cannot even put down in words how this has made me feel to be discriminated against because of my colour and also potential stigma for Robinsons…..

34. In response, Mrs Bellerby wrote; "For the record, we employ many people from different ethnic origins and operate as an equal opportunities employer." She also said that Richard Parker, the senior transport manager at Robinsons of Worcester who would hear the appeal "will consider this allegation that race was part of the decision making process as one of your grounds of appeal." Prior to the appeal, Mr Barnes was sent a fresh copy of the footage from the in-cab camera, but once again it was in a format that he could not access. Despite Mrs Bellerby's letter, Mr Parker refused to consider the allegations of differential treatment and race discrimination. The minutes of the meeting record him as simply repeating what Mrs Bellerby had said - that the Respondents were an equal opportunities employer which employs various ethnic minorities. Mr Parker explained in evidence that he did not think the circumstances of the other accidents were of any relevance and he considered only the evidence concerning Mr Barnes accident. Mr Parker accepted that he personally had no knowledge of the junction where the accident happened. The minutes of the appeal hearing record him as saying that he believed that Mr Barnes manoeuvre was "deliberate, aggressive and dangerous which could have caused a serious collision with oncoming traffic for the third party." When this was explored in cross-examination he said that he thought that unless the third party had braked sharply to avoid the collision she would have been forced across the central reservation into the path of oncoming traffic. He had to accept that the claim that the third party had braked sharply was pure guesswork on his part. She had never been interviewed and her letter of complaint makes no reference to having to brake sharply.

35. Before turning to our conclusions about the unfair dismissal, we need to deal with two points raised by Mr Gilmore in his closing submissions about Mr Barnes. In attacking Mr Barnes's credibility as a witness Mr Gilmore referred to his "arrogant demeanour" as displayed on the first day of the hearing and by using words such as "take command of the road". His arrogance was also said to be demonstrated by his inability to accept that he had done anything wrong or to show remorse or concern about what had happened. In our judgment, Mr Barnes showed no such demeanour during the hearing. He was certainly indignant and felt strongly that he had been seriously wronged by the Respondents but that was all. The words "take command of the road" are not arrogant and aggressive if Mr Barnes's explanation for their use – having previously been on the receiving end of bad driving by another HGV at the same junction and being anxious to avoid a similar occurrence – is accepted. Quite the reverse in fact. Mr Barnes did not accept that he had done anything wrong because he sincerely believed that to be the case.

36. We also reject Mr Gilmore's suggestion that Mr Barnes' evidence lacked creditability because there were inconsistencies between his case and the video evidence. While it is true that the video footage appears to show Mr Barnes' vehicle going over a red light, the Respondents failure to measure the length of the blind spot and the distance from the windscreen to where he was sitting, does not eliminate the possibility that what he saw was slightly different from what the video camera records. Mr Barnes could genuinely have thought that he crossed on red/amber and from his position in the cab his body rather than the front of the lorry might have crossed on red/amber given the very slow speed at which the vehicle was travelling. It is not correct, as Mr Gilmore asserts, that Mr Ross's evidence on this point is inconsistent. The basis for that allegation is the completely inadequate notes of the disciplinary hearing which three times record Mr Ross as saying that Mr Barnes did not cross on red, but only once appear to record him accepting that he had crossed on red. Any other

inconsistencies between Mr Barnes first witness statement and what is shown on the video can be put down to lapse of memory.

37. Despite Mr Robinson's acceptance that the Respondents' initial reading of Mr Barnes' witness statement was incorrect and that it in fact says the opposite of what they believed it to say about how the accident happened, Mr Gilmore still appears to be asserting that the collision took place down the side of Mr Barnes' vehicle. From the photographs however the collision seems to have been between the wing-mirror of the black car and the rear most part of the chassis of the lorry. Mr Gilmore also accuses Mr Barnes of inconsistencies (wrong accounts) of what happened in the comparators cases all to suit his own case. Given that Mr Barnes will have only had second-hand knowledge of many of those incidences that allegation is unjustified. We see nothing in Mr Barnes's evidence or his demeanour as a witness to make us doubtful of his credibility.

Conclusions on unfair dismissal

38. In our judgment, Mr Barnes' dismissal was both procedurally and substantively unfair. There was a wholly inadequate investigation and there were no grounds at all for believing that he was guilty of deliberately aggressive and dangerous driving. To the extent that it is possible from the material provided by the Respondents both to themselves and to us, to say that he was in any way at fault for the accident, dismissal would have been manifestly outside the range of reasonable responses.

39. The procedural shortcomings are numerous. The third party was never interviewed. In particular no attempt was made to get her views on Mr Barnes' explanation for how the accident happened or whether, because he was unable to stop at the scene of the accident, he had put on his hazard warning lights and overhead beacon to indicate to her that she should follow him. Mrs Bellerby claimed that Mr Cole and Mr Knight had attempted to contact the third party without success but we were not told when or how and we heard no evidence from either Mr Cole or Mr Knight. The Respondents did not investigate the precise nature of the restrictions applying to stopping on an urban clearway. Instead they seem to have just assumed that because there was an accident Mr Barnes should have stopped to exchange documentation in the normal way. This is borne out by the fact that in closing submissions it was the part of the Highway Code relating to exchange of documents rather than the part of the Highway Code relating to stopping on urban clearways that Mr Gilmore produced to the Tribunal. The video footage was viewed at a very early stage by a group of people which included Mr Robinson who clearly formed strong views about Mr Barnes culpability which he seems to have made clear to those present and which must have strongly influenced Mrs Bellerby who was the ultimate decision maker. Mr Robinson's views were based, at least in part, on a belief that Mr Barnes statement contained an admission that when he started his manoeuvre the third party's car was alongside him, a belief which Mr Robinson accepted in cross-examination was wrong in the light of the statement read as a whole.

40. Mr Robinson's belief that Mr Barnes had deliberately jumped the lights to enable him to get ahead of the third party vehicle so as to block her path was never put to Mr Barnes who therefore had no chance to comment on it. That belief is not based on anything said by the third party and no reasonable employer could have reached that view on the evidence of the video footage alone. The only reasonable conclusion from the video footage was that Mr Barnes crossed the white line a fraction of a second before the lights turned red and amber as part of a practice of rolling starts at traffic lights which HGV drivers are trained to do as a fuel economy measure. The belief seems to be part of the narrative of deliberately aggressive driving which, other than the mistaken reading of Mr Barnes' initial statement, has no foundation in the evidence.

41. No reasonable employer could have rejected Mr Barnes' explanation that he checked his mirror and signalled and established it was safe to move before he began

his manoeuvre, simply because it did not fit in with their pre-conceived assumptions about how the accident happened, an assumption apparently based in part at least on the false reading of Mr Barnes' statement promulgated by Mr Robinson and accepted by Mrs Bellerby. No reasonable employer could have ignored the fact that at the time of the disciplinary and appeal hearings the third party's insurers were admitting liability for the accident - a fact, to say the least, that was not broadcast by the Respondents during the Tribunal hearing. During the hearing before the Tribunal, much has been made of the absence of evidence to corroborate Mr Barnes' story, but the fact that the third party's insurers were admitting liability was, as any reasonable employer would have recognised, extremely strong corroboration.

42. Given the nature of the collision and the rules regarding stopping in urban clearways, no reasonable employer could have concluded that Mr Barnes was deserving of any kind of disciplinary sanction for not stopping given what followed in the next few minutes. Although the Highway Code only refers to stopping in an emergency in rural clearways and this was an urban clearway, this was not an emergency. To the extent that this disciplinary offence may have changed during the disciplinary process into not stopping at the nearest and most convenient opportunity rather than not stopping at the scene, it was never explored with Mr Barnes and the overt reason for his dismissal remained not stopping at the scene. Although Mr Parker appears to have accepted Mr Barnes' explanation that he could not stop at the scene, in evidence before us, the Respondents refused to accept Mr Parker's view as being correct.

43. No reasonable employer, on the evidence available to the Respondent, could have rejected Mr Barnes' explanation that his manoeuvre was not aggressive, deliberate and dangerous, but an attempt to safely position his vehicle in the queue approaching the single carriageway section of the road. No reasonable employer could have concluded that Mr Barnes's statement contained an admission that the third party vehicle had been alongside him as he started to move across and the Respondents never explored with him what he meant by "taking command of the road" before concluding that it had bullying and aggressive connotations. Given Mr Barnes' explanation that the manoeuvre was defensive and he had made it at least in part because he had once been the victim of another HGV driver at this junction who had cut in from the right and forced him off the road, the Respondents' interpretation of that phrase was not one which was open to the reasonable employer on the evidence available to them. In his letter of appeal, Mr Barnes asserted that Mrs Bellerby went into the disciplinary hearing with a closed mind. In our judgment there is considerable substance in that belief given both her dismissal of Mr Barnes' explanation because it did not match her preconceptions about the accident and the influence that she must have been under from Mr Robinson's very strongly expressed views about the seriousness of Mr Barnes' driving.

44. The appeal added to, rather than remedied the unfairness by refusing to investigate Mr Barnes' claim that he was being treated less favourably on the grounds of race than other drivers involved in minor collisions and by introducing the wholly novel and unsupported theory that the third party had managed to avoid being forced off the road only by braking sharply, a complaint that was never made by the third party and did not feature at the disciplinary stage.

45. The complaint of unfair dismissal therefore succeeds. We will now turn to the complaint of race discrimination.

Additional findings of fact

46. Mr Barnes is black Afro-Caribbean. He was the only black person employed by either Robinsons of Worcester Ltd or Robinsons of Worcester Aggregates Ltd although both companies each employed one person of mixed race. All of the other drivers at the time of the accident were white, though not necessarily white British. Mr Barnes bases his complaint of race discrimination on a number of incidents, which he says are comparable to his, where either no disciplinary action was taken against the driver or the

disciplinary sanction was not dismissal. Although in each case the final decision maker was different, Mr Robinson accepted in evidence that the kind of group discussion which took place in Mr Barnes' case before the decision was made to move to a disciplinary hearing was commonplace at the Respondents and that he would have been involved in similar discussions about at least some of the comparator cases. In connection with his involvement with Mr Barnes, he used the word 'decision' on a number of occasions even though he was not the decision maker. It is therefore reasonable to assume on the balance of probabilities that he had at least some influence on the final decisions in at least some of the comparator cases.

47. Mr Barnes does not of course suggest that no white driver has ever been dismissed by the Respondents. However, we have heard almost nothing about white drivers who have been dismissed, one instance of which being a case where the reason for dismissal included a threat to kill. There seems to be a presumption against dismissal. Mr Robinson made it clear that one does not dismiss drivers lightly because there is a driver shortage and at any time his business has to rely on a number of agency drivers.

48. Although no complaint of race discrimination is made about the disciplinary process in Mr Barnes' case, it is a feature of all of the comparator cases that the driver involved was always given the benefit of the doubt and the most favourable construction was always put on their actions, whereas in Mr Barnes' case, right from the outset, the opposite appears to have been true and the worst possible construction was placed on his actions. Other drivers' accounts of the accidents were accepted almost without question and where there was what seems to us obviously culpable and blameworthy behaviour, exculpatory assumptions were made.

49. The first comparator is Mr Catalan Micu. On the 10th of November 2016 Mr Micu was driving northbound on the M6 motorway. He was driving in lane one of a three lane section at a point where the hard shoulder became lane one of a four lane section. He wished to move into lane one, the former hard shoulder. He checked his mirrors, saw nothing, checked them again, signalled and started to move into lane one when he heard a loud bang and noticed a small black car broadside on to his cab. He immediately braked, stopped his vehicle and went to approach the driver of the other car who turned out to be an off-duty police officer. The police were called. Mr Robinson said that Mr Micu had not been driving for the company very long and that blind spots are a big problem with trucks, even with experienced drivers. He was unable to say if Mr Micu could have avoided the accident or not. He had made a mistake but his behaviour was not intentional. There does not to appear to have been any investigation beyond taking a statement from Mr Micu and in Mr Robinson's view, no further investigation was warranted. The company accepted liability for the accident. Mr Micu was an agency driver and his services could very easily been dispensed with. Mr Robinson's response was that if he stopped using drivers who have low impact motorway collisions he wouldn't have many drivers left.

50. The next comparator is Szymon Cohnke who changed lanes whilst driving on a motorway but failed to notice as he did so that the van in front of him had stopped. Mr Robinson accepted that Mr Cohnke had not been paying attention, but apart from exchanging insurance particulars and getting Mr Cohnke to complete a form for the insurance company there was no other investigation. Mr Robinson again emphasized that in Mr Cohnke's case there was no intention involved. When he was asked to explain why in both the case of Mr Micu and Mr Cohnke he had referred to lack of intention, he said that he was not implying that Mr Barnes had deliberately struck the black car, but in his case the collision was the outcome of a manoeuvre which Mr Robinson regarded as deliberate, or intentional.

51. The next comparator is William Finch who was travelling down the A4071, the same road on which Mr Barnes had his accident. He was following a learner driver in a car which suddenly and unexpectedly braked and his lorry ran into the back of it. The

instructor got out and apologized to him as the learner driver had hit the wrong pedal but the Respondents' insurers had to accept liability because Mr Finch had been driving too close. There was a claim for damages for personal injury as a result of the accident. Mr Robinson had to admit that driving too close can be dangerous, but he seemed to excuse Mr Finch by saying that with so many vehicles congregating at junctions it is evitable that you get too close. He does not know what Mr Finch's speed was at the time of the accident and he had to agree that Mr Finch would not accept that the accident was his fault. However, Mr Robinson would not agree that driving too close behind a learner driver could be viewed as deliberate, aggressive, driving. There was no further investigation into Mr Finch's accident and there was never any consideration of disciplinary action. In Mr Finch's case, no video footage was available.

52. The next comparator is Mr Ben Warman. He caused very significant damage to the Semex plant by causing the raised body of his vehicle to strike an overhead gantry. He appears to have been unaware that the body was raised, despite there being both an audible and a visual warning in the cab. Mr Robinson agreed that Mr Warman had failed to follow proper systems. He was only given a first written warning for this offence, although he was dismissed soon after for unspecified reasons. No consideration seems to have been given to the rather obvious possibility of Mr Warman's actions bringing the company into disrepute and once again, Mr Robinson refers to lack of intention on his part in driving up the ramp with the vehicle body raised.

53. The next comparator is Mr Alan Misca who was involved in what Mr Robinson now accepts was a very serious incident, so serious in fact that Mr Misca was prosecuted. He was in collision with a barrier at the entrance to the wheel wash on the Royal Portbury Dock Bristol. The barrier is said to have been lifted out of the ground with its concrete foundations and carried through the wash and left on the exit. The email from the Royal Portbury Dock Chief of Police sent to the Respondents about the incident, notes that the collision was sufficiently serious to have indicated that the driver must have been aware of it and in consequence that he was required to stop and notify the port authorities which Mr Misca did not do. He did however stop once he got outside the port. He got out of his cab and CCTV footage revealed pooled diesel on the road surface which in turn indicated that the fuel tank was probably leaking heavily at that time. When Mr Misca arrived at the Avonmouth Dock on the other side of the river Avon, he spoke to a police support officer at the gate and apparently told him that his tank may have split. Mr Misca was also discovered to have driven in excess of the maximum fifteen hour working day permitted by driver regulations.

54. Mr Misca apparently told the Respondents that he wasn't aware that he was leaking fuel which the Respondents accepted. When it was drawn to his attention that the email from the port police appeared to say that Mr Misca was aware of the leak, Mr Robinson replied that that was just their view. He said that he had no clear recollection of this incident and he was just relying on the documents for his evidence. However he was able to give Mr Misca the benefit of the doubt by saying he thought that what had happened after the original collision came from panic. It is not at all clear that that was a claim made by Mr Misca; it just seems to be Mr Robinson's explanation. Mr Misca was invited to attend a disciplinary hearing. The charges were colliding with the wheel wash and barrier, failing to stop at the incident and driving above the legal driving time of fifteen hours per day. The letter merely says that the possible consequences might be a written warning or a final written warning. Ultimately, he was given a final written warning. Mr Robinson accepted that driving above the legal limit of fifteen hours a day is an offence which attracts a fine. Mr Misca was prosecuted and fined £750.00 but Mr Robinson is unclear for what offence. However Mr Robinson believes that Mr Misca did not knowingly exceed the fifteen hour limit. He had apparently been asked if he had sufficient time to drive back and had said that he had, but he had failed to get home within the limit. Mr Robinson was unable to say how many hours over the limit Mr Misca had been. Despite having earlier said in evidence that he had had little to do with the case at the time, he was able to give his view that this was just poor time keeping and

not deliberate. His recollection was that the manager dealing with the disciplinary hearing thought it was unintentional.

55. When his attention was drawn to an email from one of the managers which included this sentence "Alan stated that he wanted to do the best for ROW but knew he made the wrong decision when he had already been asked not to drive the vehicle" Mr Robinson had to agree that it did suggest that Mr Misca knew he should not have been driving because of his hours. However at the time Mr Robinson said he did not consider it was a deliberate act. He accepted that he was giving Mr Misca the benefit of the doubt, he did not think that Mr Misca intended to do what he did, although he had to acknowledge that Mr Misca had apologized for knowingly exceeding his hours. There was a claim by the Port Authority for the cost of the damage and although Mr Robinson accepted that he had not spoken to Mr Misca about it, he was able to say that he thought part of the reason why Mr Misca had not reported the accident was because he had panicked. He did accept that the incident would have brought the company's reputation into disrepute and that there was nothing in the paperwork to suggest that a gross misconduct charge had ever been considered. In hindsight he felt that Mr Misca should have been dismissed but at the time, he had "two very headstrong managers."

56. The next comparator is Russell Cutter. He was involved in either a collision or a near miss with another vehicle at a crossroads. He had been driving on the main road and in his accident report form he said that the car pulled out on him at the crossroads. Mr Robinson said simply that he had concluded from that extremely brief statement that this wasn't Mr Cutter's fault. He was aware that the Respondents' insurers had disputed liability but he did not know what the outcome was. There had been no further investigation by the Respondents. When the presence of a Warwickshire Police compliments slip in the bundle was drawn to his attention, he had to accept that the Police had been called to the scene. When it was put to him that Mr Barnes had been ahead of the accident on his way to Semex and returning had noticed an ambulance at the scene, Mr Robinson said that he did not know if that was the case even though Mr Barnes was saying that it was. "I have no evidence to prove either way if an ambulance attended". The impression he gave by this answer was that he was reluctant to accept at face value anything which Mr Barnes said. Mr Robinson had to accept that if an ambulance had attended, it was probably quite a serious accident. He would assume that the manager had attended the site but there was no record on file to show that he had.

57. The next comparator is Steven Whitcombe. He was involved in two incidents only ten days apart. In the first one he drove his vehicle into a ditch when taking avoiding action from a white van coming towards him on the other carriageway. The Respondents took no action as the police described it as an unfortunate incident. Ten days later, his vehicle struck an overhead gantry; Mr Whitcombe abandoned the vehicle on site and left the business never to return.

58. Finally, Mr Paul Adams who at various times has been employed by the Respondents as a manager. There is one very short note in Mr Adams' handwriting in the bundle. He was involved in a collision with another vehicle which he failed to see. Mr Robinson accepted that the accident was entirely Mr Adams's fault and was dangerous. Mr Adams gave no explanation for the accident , and from the Respondents records he does not appear to have been asked for one and there was no investigation. He had been employed by the Respondent as a manager, had left the business but had come back and at the time of the accident was a driver with some supervisory duties. He was promoted to manager again shortly afterward the accident. Mr Robinson told us that the company just saw this as an accident: "they happen".

59. Summing up the comparator incidents, Mr Robinson said that he looked at all of them as just accidents and he did not think he had been lenient other than in Mr Misca's case, as looking at it again, he felt that Mr Misca should have been dismissed. He

accepted that the benefit of the doubt had been exercised in all of the comparator cases, but not in the case of Mr Barnes.

The Law

60. The complaint is one of direct discrimination on the grounds of Mr Barnes' race. Section 13 of the Equality Act 2010 is in Chapter 2 of Part II of the Act, the Chapter which deals with prohibited conduct. Direct discrimination is defined in section 13(1) as follows:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

61. Protected characteristics are listed in Chapter 1 of Part II. Section 9 has the cross heading 'Race' which by virtue of sub-section (1) includes colour, nationality, ethnic or national origins. Race is therefore a protected characteristic for the purposes of sec. 13.

62. It has long been recognized that it is extremely difficult for a claimant to prove, even on the balance of probabilities, that the act complained of was done on the grounds of their race. Section 136 of the Act deals with the burden of proof. It provides so far as material:

(1) This section applies to any proceeding relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But sub-section (2) does not apply, if A shows that A did not contravene the provision

63. These proceedings relate to a contravention of the Equality Act: therefore section 136 applies. In his closing submission, Mr Gilmore appreciated that there was an argument that the burden had shifted to the Respondents under section 136 and it would be up to the Respondents to disprove that their actions were on the grounds of Mr Barnes' race. That there is a difference in race between Mr Barnes and his comparators is not disputed.

64. Section 23 of the Act defines the meaning of comparison by reference to circumstances. So far as material it provides:

(1) On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case

Although the Respondents do not accept that the circumstances of Mr Barnes case and those of the comparators are the same or broadly similar, that position derives from their unsustainable assertion that his driving was deliberately aggressive. In our judgment Mr Barnes' case and those of the comparators are at least very similar: there are no material differences between them. Indeed the case of Mr Misca seems considerably more serious than Mr Barnes' case. In addition to the difference of race therefore, Mr Barnes has been less favourably treated than others have been treated in a wide range of cases in which the circumstances are not materially different from his case. The burden of proof therefore clearly shifts to the Respondents. Applying sec 136(2) then, Mr Barnes' claim of race discrimination must succeed unless the Respondents can show that they did not treat Mr Barnes less favourably than they treated their other employees because of his race.

65. Mr Gilmore submitted that the Respondents were able to show that they did not treat Mr Barnes less favourably because of his race. There was very clear evidence from Mr Parker and Mrs Bellerby about the Respondents being an equal opportunities employer and of race having no part to play in their decisions. The most cogent evidence that race played no part in the process came from Mr Robinson who explained how he had assisted Mr Barnes when he first joined the Respondents from Semex. He had been recovering from throat cancer and Mr Robinson had treated him

sympathetically over his phased return to work. They were on first name terms; they had had coffee together in the portacabin and Mr Robinson had met Mr Barnes on a number of occasions. Mr Gilmore reminded us that here was a broad ethnic mix across both businesses and in addition to white British, there were East Europeans and one Egyptian as well as two people of mixed race. Mr Gilmore submitted that race played no part in the decision to dismiss; it was purely and simply misconduct. He submitted that there were no real similarities between the cases and the differences between Mr Barnes's case and the comparator cases were substantial. The primary difference was that Mr Barnes's manoeuvre had been deliberate, to command the road, and was unnecessary and dangerous. He said that there were other recent examples of white drivers being dismissed for gross misconduct and he referred us to a paragraph of Mr Robinson's witness statement which merely refers to one of their best drivers hitting a car in front of him at a cue for the ferry causing significant damage and who was dismissed immediately. The witness statement does not even say that the driver was white and no explanations of the circumstances or the driver's history are given. The only other example in that paragraph is the one which we mentioned earlier in this decision, the driver who threatened to kill one of the managers and set fire all of the lorries. Mr Gilmore also referred to the Respondents rather lax history of administration and suggested that with recently improved administration and compliance standards both Mr Warman and Mr Misca would, if they repeated their offences now, be dismissed.

Discussion and Conclusions

66. While Mr Gilmore's last point about improvements in administration and compliance may have some substance, suggesting that in the past lenient decisions were attributable in some measure to poor procedures, Mr Adams, who was involved in a road traffic accident for which he was fully responsible and which Mr Robinson admitted was entirely his fault and dangerous, was not disciplined at all despite it having happened after Mr Barnes dismissal and therefore after the presumed improvements in administration and compliance. We therefore do not accept that the decisions in the comparator cases and in respect of Mr Misca in particular can be explained away by poor administration and compliance.

67. It is often a contra indication of race discrimination that the decision makers in the comparator cases and in the case in question were different, but here we know that Mr Robinson took an active interest, albeit behind the scenes, in at least most disciplinary matters in both businesses: the group discussion about the video footage in Mr Barnes case was similar to discussions in other cases. His complaint about having two head-strong managers who were responsible for the lenient treatment of Mr Misca, does not sit comfortably with his forceful performance as a witness when he very clearly and very strongly articulated his views about the cases in question. As co-owner of the business and as Managing Director of both businesses, his opinion on any matter must carry a very great deal of weight with the ultimate decision maker. In connection with his consideration of Mr Barnes' culpability he more than one referred to 'his decision' even though he was not the decision maker. There is therefore a consistent thread running through the decisions in Mr Barnes' case and in the case of at least some of the comparators and that thread is Mr Robinson.

68. The contention that Mr Barnes' case can be distinguished from the comparator cases because of Mr Barnes deliberate and intentional manoeuvring cannot survive our finding that the dismissal was unfair and that that conclusion was not open to the reasonable employer. The same is true of claims about the arrogance of Mr Barnes' behaviour in taking command of the road and being aggressive in making the manoeuvre. Mr Gilmore in fact conceded in his closing submission that there was no evidence of any intention by Mr Barnes to force the driver of the black car off the road. That being so, it is difficult to understand why the Respondents persisted in the descriptions they used of Mr Barnes' driving. The facts that Mr Robinson has been civil to Mr Barnes on previous occasions and perhaps generous in allowing him longer to return to work after his illness is wholly insufficient by itself to discharge the burden that

now lies upon the Respondents under sec 136(3) and the repeated assertion that the Respondents are equal opportunities employer are empty and meaningless by themselves.

69. The only conclusion to which the Tribunal can come therefore having found that the burden of proof shifts to the Respondents is that the Respondents have failed to prove that they did not contravene sec13 of the Act. It must follow that the complaint of direct discrimination on the grounds of Mr Barnes' race also succeeds.

70. The matter must now come back before the same Tribunal on the question of remedy. Either party may apply for Case Management Orders in respect of the remedy hearing if they are not able to agree the appropriate process amongst themselves.

Employment Judge MacMillan
15 December 2017