EMPLOYMENT TRIBUNALS

Claimant: **Stephen Little**

Respondent: **Chandlers Garage Worthing Limited**

Heard at: **Southampton Employment Tribunal** **On: Wednesday, 7th March 2018**

Before: **Employment Judge Mr. M. Salter**

Representation:
Claimant: In person
Respondent: Mr. L.Godfrey, counsel.

JUDGMENT

The Claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are the reasons for my reserved judgment above.

BACKGROUND

The Claimant's case as formulated in his ET1

2. The Claimant's complaint, as formulated in his Form ET1, presented to the tribunal on 7th June 2017 [2] is, in short, he was unfairly dismissed from his employment with the Respondent.

The Respondent's Response

3. In its Form ET3, dated 10th July 2017 , the Respondent accepted that the Claimant was an employee and that he was dismissed but stated his dismissal was not unfair and was for a reason related to his conduct.

THE FINAL HEARING

Representation

4. The matter came before me today final hearing. The hearing had a one-day time estimate. The Claimant represented himself whilst the Respondent was represented by Mr. L. Godfrey of counsel.

List of Issues

5. The Respondent produced a list of issues which Mr. Little confirmed was an agreed list of issues. I set the list of issues out below:

The Claim

1. C claims unfair dismissal.

The issues – limitation

2. R no longer puts in issue the time in which C brought his claim.

The issues – unfair dismissal

3. The reason for dismissal:
   a. R avers that C was dismissed for the potentially fair reason of conduct. The relevant conduct was considered gross misconduct by R being the driving of a customer vehicle (namely a marked Sussex Police BMW X5) at excess speeds and bringing the company into disrepute.
   b. C contends that R dismissed him because it was not financially viable to retain him and/or as a scapegoat for failures in maintaining their relationship with Sussex Police.

4. Genuine belief:
   a. R's position is that the fact of driving at excess speed was admitted by C and C's explanation of his actions lacked understanding such that he was not genuinely remorseful. In that premise, R could not have faith that C would not repeat the same misconduct in the future.

b. C's case is that as he has not been found guilty of any criminal offence, R cannot be sure that he was driving at any specific speed. Further, C contends that his driving was controlled and safe despite breaching the law.

5. Reasonable grounds:
   a. R's position is that there was sufficient investigation where the misconduct was admitted applying the band of reasonable responses. R's position is that the misconduct was obvious, in breaching the law, and in any event was contrary to R's policies.
   b. C puts in issue the reasonableness of the investigation, and specifically that there was an inappropriate adjournment for R to re-interview key witnesses.
   c. R avers that this adjournment was proper, and further evidence was gathered in response to C's request and challenge to the veracity of initial evidence, and the investigation as a whole.
   d. C also contends that as he has not been charged or found guilty of any criminal offence, R cannot conclude that he had committed misconduct.

6. Decision within the band of reasonable responses:
   a. R's position is a failure to drive within the speed limit, or in a careless or reckless manner is gross misconduct and this is both obvious and contrary to R's policies.
   b. R avers that in addition to this act of gross misconduct, C's action had brought the company into disrepute with one of its largest customers, and it was therefore within the band of reasonable responses to dismiss.
   c. C's challenges the proportionality of this outcome. C also alleges that he has been made a scapegoat for the failure of others; this is denied by R.

7. Reductions (subject to liability):
   a. R contends that there should be a full reduction on a just and equitable basis and/or due to C's contribution to his dismissal.
   b. R contends that there should be a Polkey reduction in relation to any procedural defects.

Particular Matters Discussed

Timetabling

6. Surprisingly for a one-day hearing involving a claim of misconduct dismissal there were nine witnesses: eight for the Respondent and the Claimant himself. I had concerns over the possibility of this matter being resolved in time allocation and so discussed what I saw as the three open options: firstly, timetable the matter strictly and hear evidence and submissions in one day with a reserved judgment; secondly, go part-heard, or finally adjourn the matter without starting the evidence which would mean a relisted date in the late summer. The parties both

wanted the matter resolved as soon as possible and so agreed to strict timetabling of the hearing.

7. The Claimant indicated he would be 15 minutes with each of the Respondent's witnesses. I expressed some surprise at this, but the Claimant was adamant he would be quick with the witnesses.

Litigant in person

8. Being a litigant in person I was conscious that he may not appreciate some of the points of advocacy that Mr. Godfrey would; accordingly I explained to the Claimant that I was not able to run his case for him and that he would need to challenge all witnesses with whom he disagreed with their accounts. At various points throughout the day it appeared the Claimant had not challenged the relevant witness on an issue he later raised (e.g. for instance, in cross-examination he raised an issue over the accuracy of the appeal n=minutes; a point he had not raised with the appeal manager); further, whilst I did not feel it was appropriate for me to cross examine the Respondent's witnesses, where it was clear to me that a point had not been put by the Claimant, out of fairness to the Claimant and the relevant witness for the Respondent, I put the point to the witness.

DOCUMENTS AND EVIDENCE

Witness Evidence

9. I heard evidence on behalf of the Respondent from the following witnesses: Moya Gentle, an HR Business Partner; Carl Chart, an HR Advisor; Ellen Gates, HR Manager; Simon Westby, Aftersales Manager; Andrew Harding, Head of Business who conducted the disciplinary hearing; Martin Walsh, Franchise Director, who heard the Claimant's appeal; Aaron Silcock, workshop controller and Alan Winchester, a vehicle technician who conducted the repair and initial road-test of the vehicle in question. I also heard evidence from the Claimant himself.

10. All witnesses who gave evidence did it by way of written witness statements that were read by me in advance of them giving oral evidence. All witnesses who gave evidence were cross-examined. The Claimant indicated he had no questions for Mr. Chart and Miss Gates, who's statements I therefore took as read and agreed.

Bundle

11. To assist me in determining the matter I have before me today an agreed bundle consisting of some 110 pages prepared by the Respondent. My attention was taken to a number of these documents as part of the evidence and me hearing submissions and, as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

SUBMISSIONS

Respondent

12. I had a written skeleton argument provided by the Respondent. Both parties made oral arguments. Since the Respondent's skeleton is in writing it is unnecessary to repeat it here.

Claimant

13. The claimant made brief oral submissions which I have considered with care but do not rehearse here in full. In essence:

    a. he was at the tribunal am here as he firmly believe he carried out instructions to accelerate at various speeds to see in light came on and experience lack of power. He felt he carried out these instruction in a safe and controlled manner;
    b. He felt the police complaint was not just about himself but also about why BMW let the car go out on the road;
    c. He was dismissed to rebuild reputation and protect their contract,
    d. BMW have to take responsibility for these action;
    e. He would not have done this, he does not believe the dismissal was fair he should have been suspended pending the investigation, he does not feel they had sufficient evidence in relation to the charges as the speeds never confirmed, there were meetings with police and BMW I think if allowed to sit in the meeting with them there would have been a different result;
    f. He was here to clear his name as he is not guilty of the charges against him
    g. The speeding fine he was given a written warning, this to me is not BMW following their policies.

THE MATERIAL FACTS

General Points

14. From the evidence and submissions I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by all the witnesses in

evidence, both in their respective statements and in oral testimony. Where it is has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed. Rather, I have set out my principal findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Respondent

15. The Respondent is a garage and has a contract with the Sussex police to service and repair their vehicles. One of these is a marked BMW X5 registration number LD14 JYN ("the vehicle"). It is, I understand, a high-speed pursuit vehicle and is equipped with a tracker, which records its telemetry data, and video recording equipment which, I also understand, activates upon the engine being started.

16. The Respondent would, if necessary, road test any vehicles brought in to it, not just police vehicles, to see for themselves what the particular problem was or, after affecting a repair, to see if the repair had been successful.

The Claimant

17. The Claimant was at all material times a Service driver [5 §5.2] for the Respondent. He had occupied this role since 2014 [31 and 80], his continuity of employment starting on 5th March 2012 [5 §5.1 and 25]. The claimant had conducted many road tests on cars before including police cars [102].

The Day of the Incident

18. On 6th January 2017 the Claimant was at work.

19. The Police delivered the vehicle at 1040 as it has developed a power loss fault. It is the Respondent's practice to generate a Job Card for each vehicle's visit, so one vehicle could have multiple job cards generated if it was repeatedly taken to the Respondent. The job card for the vehicle's delivery at 1040 is [51], this records that the vehicle had been driven at 100mph. The vehicle was looked at by the

Respondent and, so they thought, repaired by them with the installation of a new air filter. A little while after the repair the vehicle was collected by the police.

20. It transpired that the fault was not repaired and so the vehicle was returned to the Respondent later that same day. As is normal practice a second job-card was created for the vehicle [52]; it should be noted there is no mention of any speed on this second job card, and, as is normal, the second job card was not connected to the earlier job card. Mr Winchester, who was asked to look into the fault this time is clear that when the vehicle was brought to the garage for the second time he was informed that the fault had occurred at 30mph [84] he reported this to Mr Silcock, the workshop controller.

21. Mr. Winchester conducted the repair and took the vehicle out for a road-test himself. After a short while he returned it to the garage. He said it should be road tested for another 10 or so miles, by another person as it needed the test. It was more cost-efficient for the Respondent if a driver road tested the vehicle as he, Mr. Winchester, is a Technician and is charged to the customer at a highly hourly rate than a Driver was, so by being back in the garage he can undertake more lucrative work for the Respondent.

22. Mr. Winchester retuned the vehicle's keys to the office. The Claimant was asked to take the vehicle for a test drive. The Claimant collected the keys. When he did so the Claimant contends he was told by Mr Silcock to "put your foot down and a light comes on so just keep driving it until you can make the light come on and that's when it loses power apparently" [63]. Mr Silcock is clear that he did not instruct the Claimant to speed and indeed tells me that if the fault is one that occurs at high speed then an officer would attend to drive the car at the speed required to replicate the fault [82][85]. The Claimant was then referred by Mr Silcock to Mr Winchester for further information about the fault. Mr. Winchester said to the Claimant "don't drive it like they do" [60 and 81] or, as Mr. Winchester recalls he said, "don't drive it like a twat" [84]. The Claimant denies he knew it was a police car when he was told this. Mr Winchester says he told the Claimant it was the police who told him about the fault occurring at 30mph [86]. Wherever the

accuracy in this lies, the Claimant could not have failed to notice it was marked police car when he approached it.

23. I find as a fact that the Claimant saw this second Job Card [52] and did not see the first one [51]. I heard evidence, which I accept that the Claimant would have had no reason to see the first Job Card which was a different job albeit on the same vehicle, indeed it was normal practice for the two cards not to be connected to one-another. Further, there is no mention by the Claimant at all about seeing this card or the reference to 100mph on the first card, until after the disclosure of the card as part of the litigation process: it was not raised by him in the disciplinary or investigatory meetings or his statement in preparation for the disciplinary hearing [63].

24. I note that, even on the Claimant's case, there is no instruction for him to speed in the vehicle.

25. The Claimant undertook the test drive. Upon returning the vehicle, Mr Winchester spoke to the Claimant and asked him if the vehicle ran well. The Claimant responded: "yeah…gave it be (sic) of blatting, got up to 100 on the bypass…got to test these things". The Claimant denies saying this. There is a dispute of fact therefore. I find as a fact that he did say it: it corresponds with what the Notice of Intended Prosecution records: namely that excessive speeds were recorded on the A284 Arundel bypass, and I have no reason to doubt the recollection of Mr. Winchester in this regard. When I balance this against the inconsistency and admissions of speeding in the Claimant's evidence I prefer the recollection of Mr. Winchester.

26. The Respondent then received a Notice of Intended Prosecution dated 7th January 2017 [53] for the offence of driving with excess speed at various points during the Claimant's test drive of the vehicle. The telemetry date showed that at times the car reaches speeds between 82 and 96 mph and the video recording in the car shows the vehicle, at one point, overtaking four cars on a B road by driving on the opposite carriageway of the road. The Claimant accepted he did carry out the manoeuvre.

27. I am told, and have no reason to doubt, that as a result of these speed and actions coming to the attention of the police various meetings were held between the Respondent and Police in an attempt to stabilise relations between the two [77][94]

The Investigation Meeting

28. The Claimant was interviewed on 10th January 2017, although the notes record it as being on that date in 2016 [54]. In this meeting the Claimant admits to being the driver of the vehicle and driving it at speed [56][57] Whilst there is a large degree of dispute on the Claimant's behalf over the record of this interview. Be that as it may it is an agreed statement in the notes that [55] the Claimant apologises that "if I have blighted the company I am sorry, I was told to take for a power test".

29. The Claimant is recorded as saying he "need to take responsibility for his actions" [58] although the Claimant disputes he said this later statement.

30. It is an agreed fact that he Claimant had been spoken to in the past by the Respondent in relation to his speeding [57] and so was aware that the Respondent did not expect its drivers to speed in vehicles. The Respondent tell me, and I accept, that this did not play any part in their decision to dismiss.

31. After the investigation the Claimant was called to a disciplinary hearing by way of letter dated 11th January 2016 [61]. This letter is in the usual terms and informs the Claimant of the allegations, the location of the meeting, the possible consequences of a finding of gross misconduct and of his right to be accompanied at that meeting. The meeting did not take place on the date set out in that letter, so it was rearranged for the 16th January 2017 [65] the letter rearranging the meeting was in similar terms to that of the 11th January.

32. The Claimant prepared a statement in advance of the meeting [62] in which he accepted he was the driver but gives an account as to what he says were the instructions he received from Mr Silcock.

The Disciplinary Hearings

33. This took place on the 16th January 2017 [67]. At the outset of this meeting the Claimant indicates that he thought there should be a further investigation. Mr Andrew Harding, the Chair of the meeting, granted that request and the meeting was re-arranged for the 20th January 2017 [68].

34. As a result of the adjournment, and because of the Claimant's request that this be done, on the 16th January Mr Harding spoke to Mr Silcock [80] and Mr Winchester again [84]. In the record of these meetings both Mr Silcock and Mr. Winchester add further details to their dealings with the Claimant on the 6th January 2017.

35. At the re-arranged meeting the Claimant objects to that investigation taking place between the two meetings which, he says, is against ACAS process [71].

36. The Claimant states that if he knew there was a tracker on the car he would not have taken it above 70 mph. It was pointed out to him that at no point was he told to go above 70mph. the Claimant does not deny this, or, as I set out above, say he had seen the Job Card with reference to the 100mph on it. [72]. Indeed the extent of the Claimant's account was that he was told to accelerate and that, in his view, he would be "at danger in going over the speed limit" [74] he says that "I never said anyone asked [him to exceed the speed limit]" [75].

37. The Claimant was summarily dismissed for gross misconduct at the end of the meeting [77]. His dismissal was confirmed by a letter dated 24th January 2017 [93]. The Claimant appealed the dismissal [97].

38. The appeal consisted of going through the Claimant's grounds of appeal. In the appeal meeting the Claimant states that "I may have hit those speeds [82mph/92mph and 100mph] in short bursts to test I was not looking at the speedometer. I came straight back down and only touched them. For me, I have been sacked but what have I done wrong? What am I guilty of?" [101].

39. On the 17th February 2017 the Appeal outcome was sent to the Claimant. He was unsuccessful and his dismissal was upheld [105]

THE LAW

40. The law relating to unfair dismissal is well established. By section 94(1) of the Employment Rights Act 1996 ("the 1996 Act"):

41. By section 95(1)(a):

> "For the purposes of the unfair dismissal provisions, an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice)."

40. By section 98(1) and (2): It is for the employer to show the reason (or principal reason) for the dismissal and, in the context of this case, that it related to the conduct of the employee. Conduct is the reason relied upon by the Respondent.

41. In Abernethy Mott, Hay v Anderson [1974] IRLR 213, CA, it was held that the reason for a dismissal is a set of facts known to the employer or beliefs held by him that cause him to dismiss the employee.

42. By section 98(4) of the 1996 Act:

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

43. The law to be applied to the reasonable band of responses test is well known. It applies equally to the procedural aspects of the dismissal, such as the investigation, as it does to the substantive decision to dismiss – see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA. As far as the investigation is concerned, and the formation of the reasonable belief of the employer about the behaviour, conduct or actions of the employee concerned, then I have in mind, of course, the well-known case of British Homes Stores Ltd v Burchell [1978] ICR 303, EAT. Did the Respondent have a reasonable belief in the Claimant's conduct formed on reasonable grounds after such investigation as was reasonable and appropriate in the circumstances?

44. My task is to assess whether the dismissal falls within the band of reasonable responses of an employer. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. I refer generally to the well-known case law in this area, namely Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, EAT; and Foley v Post Office; HSBC Bank PLC v Madden [2000] IRLR 827, CA.

45. At neither stage am I to substitute my own decision for that of the employer . I should not substitute its own view for that of the employer but should consider whether the employer's handling of the disciplinary process, and the application of dismissal as a sanction for the conduct found, were within the band of reasonable responses open to it. See, e.g., among numerous other authorities: Tayeh v Barchester Healthcare [2013] EWCA Civ 39.

46. Further guidance is to be found in the ACAS Code on Disciplinary and Grievance procedures of 2009; and the I am required to take account of any provision of that Code which appears to it to be relevant to any issue before me. Although the Code of Practice is not legally binding, in itself, Employment Tribunals will adhere closely to the relevant Code when determining whether any disciplinary or dismissal procedure was fair. The ACAS Code of Practice represents a common-sense approach to dealing with disciplinary matters and incorporates principles of natural justice. In operating any disciplinary procedure or process, the employer will be required to: Deal with the issues promptly and consistently; Established the facts before taking action; Make sure the employee was informed clearly of the allegation; Allow the employee to be accompanied and to state their case; Make sure that the disciplinary action is appropriate to the misconduct alleged; Provide the employee with an opportunity to appeal.

47. When assessing this I am to adopt a view of the entire end-to-end process, from the very start to the very end of the process: from investigation to appeal. In Taylor v OCS Group Ltd [2006] ICR 1602, CA, it was held that if an early stage of a disciplinary process is defective and unfair in some way, then it does not matter whether or not an internal appeal is technically a re-hearing or a review, only whether the disciplinary process as a whole is fair.

48. However, this does not mean that any defect of fair treatment that may occur leading up to the initial decision to dismiss is bound to be irrelevant, so long as a fair appeal process has been granted. There will be some cases where the unfairness arising at the first stage is so serious and fundamental, that the end-to-end process remains unfair.

49. After identifying a defect, the Tribunal will want to examine any subsequent proceeding with particular care. Their purpose in so doing would be to determine whether, due to the fairness or unfairness of the procedure adopted, the thoroughness or lack of it in the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at an earlier stage. I ultimately, always have to decide the fairness of a given dismissal, applying the words of section 98(4) and the statute makes no particular provision in relation to appeals.

50. In Brito Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854, EAT, it was held that a finding of gross misconduct does not necessarily make a dismissal fair. Even in cases of gross misconduct, regard must be had to possible mitigating circumstances such as, in this case, the Claimant's length of unblemished service and that dismissal would lead to her deportation and destroy her opportunity of building a career in the UK.

CONCLUSION ON THE ISSUES

General

51. Having made the above findings of fact, I returned to the issues the parties asked me to determine.

The Claimant in Evidence

52. Before I address these issues however, I feel I should comment on the Claimant's performance as a witness. Throughout his evidence the Claimant failed repeatedly to answer very straightforward questions, however, I gave him leeway owing to the stress of giving evidence and representing himself in proceeding which are undoubtedly important. Even so, even with this latitude found him an evasive witness not prepared to accept obvious points, I have considered this evasive nature when assessing his evidence when it conflicted with that of other witnesses or documents.

Findings on the Issues

The reason for dismissal:

a. *R avers that C was dismissed for the potentially fair reason of conduct. The relevant conduct was considered gross misconduct by R being the driving of a customer vehicle (namely a marked Sussex Police BMW X5) at excess speeds and bringing the company into disrepute.*

b. *C contends that R dismissed him because it was not financially viable to retain him and/or as a scapegoat for failures in maintaining their relationship with Sussex Police.*

54. On the basis of the legislative provision, the first step for me in any complaint of unfair dismissal, where the fact of dismissal is admitted is to consider whether the terms of s98(1) have been satisfied by the employer that the reason for the dismissal was one of the potentially fair reasons set out within that statutory provision.

55. I remind myself that for the purposes of this part of s98(1) the employer is not required to prove that the factual basis upon which the decision is based is correct, or even that they had reasonable grounds for believing that to be so. That comes later under section 98(4).

56. In relation to unfair dismissal, I had to make a finding as to what was the reason or, if more than one, the principal reason, for dismissal. The Respondent's case was that the decision to dismiss was taken by Mr. Harding and that he took the decision because of the view that he took of the Claimant's conduct in relation to the driving on the 6th January 2017. Its case was that this therefore was a reason relating to the conduct of the Claimant. For the purposes of the unfair dismissal claim the onus was on the Respondent to satisfy me of this; they are required to establish that the reason which existed in their mind at the time they decided to dismiss was some set of facts which falls within one of the categories set out in s98(1). Usually this is not particularly difficulty. Again, it is normally found, and the present case is no exception, that evidence of what the employer said at the time of dismissal, as being his reason for deciding upon that sanction, is the best evidence of the actual reason. In this case the material before the Respondent was enough to satisfy me that their reason for dismissal was the Claimant's driving of the vehicle on the 6th January 2017.

57. The Claimant did not accept that this was the true reason for dismissal. Because the onus is on the Respondent to show its reason, he was not obliged to put forward his own alternative case. However, it was his case that he was dismissed as it was not financially viable to retain him or that he had been scapegoated for other's failures. I have concluded that he was not dismissed for either of these reasons. The evidence I have heard satisfies me that there were no failings of others in this matter, the Claimant did not receive an instruction to speed, indeed there was no need to give such an instruction as the fault revealed itself at 30 mph; the Clamant did not see the earlier job-card which made reference to 100mph, and even if he had he would not have been required to travel at that speed in light of the instruction regarding the fault being at a lower speed. I do not accept that, if it occurred, the Respondent not telling the Claimant there was a tracker on the car was relevant: he is not legally permitted to speed, whether or not there is a tracker on the car.

58. As far as the assertion that it was not financially viable to retain the Claimant, I reject this argument as well. I have heard little evidence about it from either party, however, I do accept that the contract between the Respondent and the police force was an important one, indeed as I say there were meetings in the fall-out of the Claimant's driving in order to stabilize the relationship. Taking a permissive approach to the Claimant's assertions of "financial viability" of his continued employment covers the Respondent's desire to dismiss him in order to placate the concerns of the Police, I reject this assertion, the Respondent's witnesses were clear and credible, and were bolstered by the contemporaneous documents in this matter: the Claimant was dismissed because of his conduct.

59. This body of material was, as such, sufficient to satisfy me that the reason or principal reason for the Claimant's dismissal was related to his driving of the vehicle, unless other facts, or inferences that I might draw from them, were so compelling as to undermine that conclusion. I do not consider that there were. I have considered whether the Respondent conducted some perfunctory investigation, or ignored obvious points of enquiry which may shine a light on to some other motive for dismissal, they did not and so I have come to the

conclusion that the Respondent's reason for dismissal of the Claimant was the driving,

Genuine belief:

a. R's position is that the fact of driving at excess speed was admitted by C and C's explanation of his actions lacked understanding such that he was not genuinely remorseful. In that premise, R could not have faith that C would not repeat the same misconduct in the future.

b. C's case is that as he has not been found guilty of any criminal offence, R cannot be sure that he was driving at any specific speed. Further, C contends that his driving was controlled and safe despite breaching the law.

60. My findings here somewhat dovetail with the findings above. The material before the Respondent was enough to satisfy me that they genuinely believed he was guilty of misconduct, indeed, the Claimant accepted the conduct, albeit tried to row-back from the exact speeds the telemetry data stated he was driving at, and I cannot see any material to raise inferences strong enough to effect those conclusions.

Reasonable grounds:

a. R's position is that there was sufficient investigation where the misconduct was admitted applying the band of reasonable responses. R's position is that the misconduct was obvious, in breaching the law, and in any event was contrary to R's policies.

b. C puts in issue the reasonableness of the investigation, and specifically that there was an inappropriate adjournment for R to re-interview key witnesses.

c. R avers that this adjournment was proper, and further evidence was gathered in response to C's request and challenge to the veracity of initial evidence, and the investigation as a whole.

d. C also contends that as he has not been charged or found guilty of any criminal offence, R cannot conclude that he had committed misconduct.

61. I remind myself that the test for me to apply is whether a reasonable employer could have done what this employer did when conducting the procedure: I am not to determine what I would have done. This provides any employer with a wide margin of appreciation within which the tribunals will not interfere. I consider that the Respondent's actions in this case fall well within that margin of appreciation and so the dismissal is not unfair in this regard.

62. The Respondent had the notice of intended prosecution, it showed the vehicle was speeding. Speeding is a criminal offence, the Claimant admitted speeding, albeit he argued it was permissible. The Respondent investigated his allegations that he was instructed (either explicitly or implicitly) to speed and spoke to the

people who, he said, gave him that instruction. These people denied the instruction, a reasonable employer was entitled, I find, to believe Mr. Winchester and Mr. Silcock's accounts. The Respondent had reasonable grounds for its belief.

63. Turning to whether there was a reasonable investigation: the Claimant clearly was provided with compliant notices of hearings and was fully able to engage in the process itself, indeed the minutes show he was able to advance his case with vigour and clarity at the investigation meeting, disciplinary hearings and appeal meeting, and I have not been told he was or felt disadvantaged at any stage owing to any issue in the process.

64. At his request the first disciplinary meeting was suspended so that further investigations could be conducted. I do not think it is reasonable, therefore, for the Respondent to then be criticized by the Claimant for suspending the meeting to conduct those investigations; indeed the Claimant states such an act is contrary to ACAS guidance, I disagree: when interpreting the ACAS Code reference should be made to the Guide which states in terms: "If new facts emerge, it may be necessary to adjourn the meting to investigate them and reconvene the meeting when this has been done" [Section 4, page 2410 Butterworth's Employment Law Handbook, 25th Edition, Lexis Nexis, London].

65. The Respondent had the Claimant's account in response to the allegations, looked into the Claimant's explanation and weighed it up. I do not find their actions put them outside the band in that they did not wait for any criminal prosecution of the Claimant. Whilst it is correct to say that the Claimant has not been convicted of any offence, it does not appear to assist him. In this matter the Respondent did have sufficient evidence before it to sustain a reasonable belief in the Claimant's guilt which is the test they must consider. Hypothetically, if there was some doubt, for instance, say, that it could have been any number of drivers in the vehicle at the time, then the hypothetical-employer may have been best advised to adjourn the disciplinary hearing until after the criminal trial established who the driver in fact was, however this was not the situation here.

Decision within the band of reasonable responses:

a. *R's position is a failure to drive within the speed limit, or in a careless or reckless manner is gross misconduct and this is both obvious and contrary to R's policies.*
b. *R avers that in addition to this act of gross misconduct, C's action had brought the company into disrepute with one of its largest customers, and it was therefore within the band of reasonable responses to dismiss.*
c. *C's challenges the proportionality of this outcome. C also alleges that he has been made a scapegoat for the failure of others; this is denied by R.*

66. Again, the Respondent is granted a margin of appreciation here: if a reasonable employer could have dismissed in these circumstances then the dismissal is fair in this regard. I am not asking what I would have done in these circumstances.

67. Looking at the facts as I have found the Respondent has a genuine belief on reasonable grounds that the Claimant was driving at grossly excessive speeds in a marked police vehicle and on one occasion overtook four cars by traveling on the oncoming side of the road. The speeds the Respondent believed the Claimant was traveling at were in excess of the speed limit and so were potentially criminal acts, resulted in a notice of prosecution by one of the Respondent's major customers.

68. The speeds achieved were not slightly over the speed limit (e.g. a couple of miles an hour) but were at points more than 20mph over the speed limit for a motorway.

69. From his previous warning the Claimant was aware that the Respondent considered speeding a disciplinary offence. I am satisfied that the Respondent did not, however, take this as an aggravating factor in determining its decision to dismiss, rather it showed the Claimant was aware of the prohibition on speeding.

70. In these circumstances I consider a reasonable employer could have dismissed a driver in a matter such as this.

71. Accordingly it was a dismissal that fell within the band of reasonable responses open to a reasonable employer.

Reductions (subject to liability):

a. R contends that there should be a full reduction on a just and equitable basis and/or due to C's contribution to his dismissal.

b. R contends that there should be a Polkey reduction in relation to any procedural defects.

57. I address this, even though these questions are not necessary, to give an indication of my thoughts (if I think it appropriate to do so).

58. My findings on any "Polkey-reduction" would necessarily have been dependant on what were the errors the Respondent had fallen foul of. Above I found there were none.

59. In case I have erred in this regard, I would have been required to predict the effect on the dismissal of any failings by the Respondent in its procedure. Absent whatever errors there had been it would appear to me that the Respondent could have fairly dismissed the Claimant and, in light of the magnitude of the misconduct, and the investigation, including admissions from the Claimant, would have fairly dismissed the Claimant. Accordingly a high Polkey reduction is likely to have been made.

60. As I am only dealing with this matter as a hypothetical I will not set out my findings of fact in relation to whether the Claimant did, in fact, commit criminal acts as I am unclear of the status of any criminal prosecution he faces: I know there has been no prosecution to date.

FINANCIAL PENALTY

61. There having been no breach of any of the Claimant's rights to which the claim relates I am not empowered to consider a financial penalty under s12A of the Employment Tribunals Act 1996.

CONCLUSIONS

62. The Claimant's claim of unfair dismissal is dismissed as not well founded. Accordingly the Remedies hearing provisionally booked for Friday, 13th July 2018 is vacated.

_____

Employment Judge

_____

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE