EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103014/2018

Held in Glasgow on 9, 10 and 11 October 2018

Employment Judge: Robert King

Mr J Brannan	**Claimant** **Represented by:** **Ms Deidre Flanigan - Solicitor**
CPI Mortars Ltd T/A CPI Euromix	**Respondent** **Represented by:** **Ms Sara Thompson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was not unfairly dismissed by the respondent and accordingly his complaint of unfair dismissal is dismissed.

The claimant's claims for notice pay and a redundancy payment are also dismissed on withdrawal.

REASONS

Introduction

1. In addition to his claim for unfair dismissal the claimant had initially presented claims for unpaid notice pay and a redundancy payment. At the outset of the hearing, the claimant's representative confirmed that he was only advancing a claim of unfair dismissal and that the remaining claims were withdrawn.

2. The claimant gave evidence on his own behalf and the respondent led evidence from Chris Jack (Plant Manager), Alan Muir (Operations Manager), Marc Allen (Operations Manager) and Craig Buttenshaw (Head of Operations). A joint bundle of productions was lodged. This included CCTV footage of the incident that took place on 26 September 2017, which resulted in the claimant's dismissal. All of the witnesses gave credible and reliable accounts of their evidence.

Issues

3. As the claim was only for unfair dismissal the issues to be determined by the Tribunal were as follows:-

1. What was the reason for the claimant's dismissal?

2. Was the reason for dismissal a potentially fair reason within the meaning of section 98 (1) and (2) of the Employment Rights Act 1996?

3. If, as asserted by the respondent, the reason for dismissal was related to the claimant's conduct and thus potentially fair, was the dismissal actually fair having regard to section 98 (4) of the Employment Rights Act 1996 and in particular the following:

    (1) Did the respondent have a reasonable belief that the claimant had been guilty of misconduct?
    (2) Did the respondent have reasonable grounds for that belief?
    (3) By the time it held that belief, had the respondent carried out as much investigation as was reasonable in the circumstances?
    (4) Was the decision to dismiss fair having regard to section 98 (4) of the Employment Rights Act 1996, including whether in the circumstances the respondent acted reasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee?

(5) Did the decision to dismiss and the procedure adopted fall within the "range of reasonable responses" open to a reasonable employer? *Iceland Frozen Foods Limited v Jones 1983 ICR 17*

(6) If the respondent did not adopt a fair and reasonable procedure, was there a chance the claimant would have been dismissed in any event? *Polkey v A E Dayton Services Ltd 1987 All ER 974*

(7) Did either party unreasonably fail to comply with the ACAS Code of Practice and, if so, should the Tribunal reduce or increase any compensatory award due to the claimant (and if so, by what factor not exceeding 25%)?

(8) By his conduct, did the claimant contribute to his dismissal and should any compensatory award be reduced accordingly (and, if so, by what factor)?

(9) Did the claimant engage in conduct that was culpable or blameworthy and, if so, should the Tribunal make a reduction to any basic award to which the claimant would be entitled (and if so, by what factor) to reflect this?

(10) What financial loss has the claimant suffered in consequence of his dismissal and has he taken reasonable steps to mitigate his loss?

Findings in fact

The Tribunal considered the following facts to be admitted or proved.

4. The respondent is a manufacturer and supplier of dry mix mortar products and related services to the construction industry. It has nine factory sites across the UK, including sites at Bellshill and Coatbridge. The respondent employed the claimant as a Driver from 27 April 2015 until 31 October 2017 when he was dismissed for gross misconduct.

5. During his employment the claimant was based at the respondent's site at Gartsherrie Industrial Estate, Hornock Road, Coatbridge and he reported directly to the Plant Manager, Chris Jack. As a Driver the claimant's principal

duty was to make deliveries of the respondent's dry mix mortar to its construction industry customers' sites. The claimant was required daily to drive a heavy goods articulated vehicle ('HGV') in order to make those deliveries. The vehicle that the claimant normally drove in the course of his employment was HGV registration SE15 VFZ, which weighs 40 tonnes fully laden.

6. All the respondent's HGVs, including SE15 VFZ, are fitted with 4 CCTV cameras (one on the dashboard facing forwards, one on the rear facing backwards and one on each front wing facing backwards) each of which makes a video record of each step of the vehicle's journey. The vehicles are also fitted with trackers that record driver behaviour, such as harsh acceleration, harsh braking, harsh cornering and speeding. Information from the CCTV and the trackers is routinely analysed by the respondent for the purpose of improving driver efficiency.

7. In order to lawfully drive such HGVs as operated by the respondent for its deliveries the claimant had to obtain an HGV Class 1 Licence, which he obtained shortly after his employment commenced. In common with all the respondent's drivers the claimant was also subject to regular ongoing certified driver training in order to maintain his driving skills.

8. Prior to the incident resulting in his dismissal, the claimant had a clean disciplinary record with the respondent.

The 23 December incident and the claimant's grievance

9. On 23 December 2016, the claimant had a conversation with Chris Jack and the operations manager Alan Muir, during which they both made comments to him to which he took offence. The claimant was so upset that he left work early for the day and did not attend the work's Christmas night out, which was arranged for that evening.

10. Even though Mr Jack apologised to the claimant for any offence he had caused, the claimant was unwilling to accept his apology and Mr Jack therefore suggested to the claimant that he ought to raise a grievance if he was unable to appease him.

11. On his return to work in the new year the claimant raised a grievance against Mr Jack and Mr Muir arising from the 23 December 2016 incident. Following an investigation by Marc Allen, Operations Manager, the claimant's grievance was upheld; Mr Allen concluding that *"the behaviour exhibited by Alan and Christopher during the conversation was inappropriate and ill informed. What originally started as banter between colleagues has escalated and unacceptable comments were made by both during the conversation".* Both men also received informal warnings about their conduct as a result of this incident.

12. After the grievance procedure had been concluded Mr Jack was cautious about his dealings with the claimant but nevertheless sought to rebuild their relationship.

13. In August 2017 Mr Jack successfully nominated the claimant for the respondent's 'Employee of the Month' award in view of his having gone above and beyond the call of duty on a day when his vehicle had been off the road for its MOT and he had come in to help around the factory instead. Mr Jack had been pleased because the claimant was the first Coatbridge based driver to win this award.

The incident with the cyclist on 26 September 2017

14. On 26 September 2017, the claimant left the respondent's Coatbridge site at approximately 6.20 am to make his first customer delivery of the day. He was driving his usual HGV, SN15 VFZ, which was fully laden and weighed 39.1

tonnes. Prior to his departure from the site the claimant competed his normal safety checks and reported no defects with his vehicle. His route that day would initially take him out of the site along Hornock Road to its junction with Gartsherrie Road where he would turn left. This is a route the claimant would routinely drive between 20 and 30 times each week. There are give way lines at the end of Hornock Road at this junction.

15. Shortly before 9 a.m. on 26 September, a member of the public telephoned the respondent's Coatbridge site and spoke to one of the supervisors there. He reported to the supervisor that as he had cycled on Gartsherrie Road past its junction with Hornock Road earlier that morning, one of the respondent's vehicles had nearly struck him as it emerged from Hornock Road.

16. The cyclist's message was relayed to Chris Jack who called him straight back to discuss the incident. The cyclist explained to Mr Jack that he had been cycling to his work earlier that morning along Gartsherrie Road past its junction with Hornock Road when one of the respondent's HGVs had nearly hit him as it emerged from Hornock Road to turn left on to Gartsherrie Road. The cyclist told Mr Jack that he believed that the driver of the HGV should have seen him because he had been wearing full high visibility outer wear. The cyclist sounded shaken while reporting the incident to Mr Jack who noted that the cyclist had also required to compose himself before he initially reported the incident.

17. When the claimant returned to the Coatbridge site later that day from his first delivery, Mr Jack approached him and asked if he could look at the CCTV footage from his vehicle for that morning, which they then viewed together. The CCTV footage showed that as the claimant was driving along Hornock Road on approach to its junction with Gartsherrie Road, a van and a cycle were moving along Gartsherrie Road from right to left towards its junction with Hornock Road. As it was dark, the van and the cycle both had their lights on and the cyclist was wearing high visibility outer wear.

18. The CCTV footage showed that even though the road ahead was not clear to turn left the claimant did not stop his vehicle at the give way lines at the end of Hornock Road and that he turned left onto Gartsherrie Road at the same time as the cyclist was passing the junction. The claimant narrowly missed hitting the cyclist who had to take evasive action by moving to the middle of the road to avoid a collision, having previously been cycling close to the near side kerb.

19. Information from the CCTV footage confirmed that, on approach to its junction with Gartsherrie Road, the claimant was driving along Hornock Road at 17 mph when approximately 10m from the junction and that he was driving at 12 mph as he turned left onto Gartsherrie Road.

20. When shown the CCTV footage the claimant admitted that he had been driving the vehicle at the time of the incident but explained that he had not seen the cyclist as he turned onto Gartsherrie Road because he had been in his blind spot. Mr Jack understood the claimant to mean that his view of the cyclist had been obscured by the pillar at the front off side of the vehicle, to which the vehicle's wing mirror is attached. Mr Jack accepted the claimant's account that he had not seen the cyclist.

21. After the claimant and Mr Jack had viewed the footage together, the claimant was permitted to carry out a further delivery while Mr Jack considered what further action, if any, was necessary.

22. Later that same day, Mr Jack obtained information from the claimant's vehicle tracker. He found no evidence of harsh braking or harsh acceleration at the time of the incident. Mr Jack also reported the incident to the respondent's Head of Operations Craig Buttenshaw and sought his opinion on how to deal with matters.

23. Having considered all the evidence available to him at this time and having spoken to Mr Buttenshaw, Mr Jack formed the view that the incident had likely

occurred because the claimant had been driving his vehicle that morning without due care and attention. Considering the CCTV evidence that the claimant's fully laden vehicle was being driven at 17 mph when it was approximately 10 metres from the give way lines and at 12 mph as it turned left, Mr Jack, also believed that the claimant would not have been able to stop his vehicle safely at the junction even if he had seen the cyclist.

24. In the circumstances, when the claimant came back from his second delivery that day, Mr Jack informed him that he would be suspended on full pay pending the respondent considering its position in relation to possible disciplinary action. The claimant was upset to be suspended because he believed that he had not done anything wrong.

The disciplinary hearing

25. On 27 September 2017, Mr Jack wrote to the claimant inviting him to attend a disciplinary hearing to answer an allegation that

"on 26 September 2017, on Hornock Road, you drove a company vehicle without due care and attention".

The meeting was scheduled to take place on Tuesday 3 October 2017 and the letter informed the claimant of his statutory right to be accompanied by a work colleague or recognised union representative. The letter did not mention the possibility of dismissal because at that time dismissal was not in Mr Jack's contemplation.

26. In advance of the hearing Mr Jack reviewed the CCTV from the vehicle and the claimant's tracker information as well as the respondent's company handbook where it dealt with the definitions of 'Misconduct' and 'Gross Misconduct'.

27. Clause 12.7 of the respondent's staff handbook provides as follows:-

'**GROSS MISCONDUCT**

12.7. Gross misconduct is a serious breach of contract and includes misconduct which, in our opinion, is likely to prejudice our business or reputation or irreparably damage the working relationship and trust between employer and employee. Gross misconduct will be dealt with under the Disciplinary Procedure, and will normally lead to dismissal without notice or pay in lieu of notice (summary dismissal)'

28. Mr Jack also checked the government's DVSA website to view its guidance about safe stopping distances. He noted from the DVSA website that the safe stopping distance for a car travelling at 20 mph was 40 feet/12 metres.

29. The hearing scheduled for 3 October 2017 did not go ahead because the claimant was unable to arrange a trade union representative to accompany him. It was therefore rearranged for 26 October 2017 and took place that day. Present at the hearing were Mr Jack, the claimant, his union representative Linda Wilson and Paul McGowan, an employee of the respondent who was there to take notes.

30. During the hearing, the CCTV footage was shown, and the claimant was invited to make comments about the incident when the cyclist had nearly been knocked off his bicycle. Having viewed the incident, the claimant observed that *"the cyclist was too close to the van"* and said that *"the cyclist has seen me at the junction, why has he kept cycling?*". He claimed he had not seen everything the camera had recorded, and in particular he had not seen the cyclist moving from right to left along Gartsherrie Road as he approached the junction along Hornock Road.

31. The claimant also explained that he had always been trained that when driving a 40 tonne vehicle a driver should try to maintain the vehicle's momentum at junctions by not coming to a halt. Before the incident he had believed the

road was clear so in order to maintain the vehicle's momentum on the slight incline on Gartsherrie Road he had not stopped at the junction.

32. The claimant explained to Mr Jack that he had no infringements on his driver's record. He believed that he was being targeted for driving the same way as all the respondent's drivers and that if Mr Jack checked their vehicles' downloads, he would find that was the case. As far as he was aware all the respondent's drivers routinely negotiated this junction at the same speed and in the same way he had done that day. The claimant gave no indication he was prepared to alter the way he approached this junction. While the claimant did not challenge Mr Jack's assertion that he was driving at 17mph while approximately 10m from the junction he claimed he would have been able to stop safely at the junction if he had seen the cyclist on Gartsherrie Road; but he had not, and he had made a genuine mistake.

33. The claimant also asserted that if the respondent were to contact HGV driving instructors and ask their opinion of the incident, they would confirm that he had approached the junction in an appropriate manner.

34. During the disciplinary hearing, neither the claimant nor his union representative made any mention of his previous grievance against Mr Jack and Mr Muir or raised any objection whatsoever to Mr Jack chairing the hearing.

35. Following the hearing Mr Jack did not carry out the further investigation that the claimant had asked him to conduct with his fellow drivers in relation to the manner in which they would approach the junction in question. Mr Jack did not believe that the other drivers would provide unbiased objective responses because of an earlier altercation between the claimant and another driver in which the claimant had been accused of being lazy. Other drivers had also made similar comments to Mr Jack concerning the claimant's attitude to work.

36. As a result, Mr Jack considered that if there was ill feeling towards the claimant from any of the other drivers, who were aware of the claimant's suspension, it would have been unfair to ask their opinion if that was potentially going to be determinative of his future employment.

37. In any event he felt that such further investigation as had been suggested by the claimant (either with fellow drivers or with driving instructors) would have been of little or no value where there was already clear objective evidence of the claimant's driving at the time of the incident and he was able to form his own view based on his knowledge and experience of running a business operating HGVs.

38. Having heard the claimant's explanation at the disciplinary hearing Mr Jack was concerned that the claimant had not accepted there was anything wrong with his driving at the time of the incident because he believed that he had been driving the way he had been taught to drive and it was clear he had no intention of altering his driving style.

39. In those circumstances, Mr Jack was concerned that the claimant had not recognised the risks inherent in driving as he had done on the approach to the junction at the time of the incident. He therefore concluded that there was a serious risk that there could be a repeat of the incident; particularly so in circumstances where the claimant would routinely negotiate this junction in his HGV between 20 and 30 times each week.

40. While Mr Jack had initially approached the hearing on the basis that the likely outcome would be short of dismissal his view was altered by virtue of the claimant's admission that his driving on the day of the incident had been his normal practice and that he was not willing to change. Mr Jack accepted that it was normal practice to maintain the momentum of an HGV at a junction if possible. However, he believed it would only be acceptable and safe to do

so where the junction ahead was clear, which had not been the case prior to the incident in question. Mr Jack also concluded that the claimant could not possibly have stopped his vehicle safely at the junction in circumstances where he been driving a fully laden HGV at 17 mph when still only approximately 10 metres from the junction.

41. Mr Jack found that not only had the claimant driven his HGV dangerously on 26 September 2017, he had also failed to accept that he had done so and gave no indication of a willingness to alter his driving style. As a result, Mr Jack came to the view that he could not trust the claimant to drive the respondent's vehicles safely in future. He concluded that the claimant's conduct had amounted to a serious neglect of his duties, which had irreparably damaged the working relationship and was sufficiently serious to justify his dismissal.

42. Mr Jack made his decision purely on the evidence obtained in his investigation, which included reviewing the vehicle's CCTV footage, the tracker information from the claimant's vehicle, information from the DVSA website and the claimant's own account of the incident on 26 September 2017. Mr Jack's decision was not influenced to any extent by the fact that the claimant had previously raised a grievance against him and against Mr Muir.

43. In the circumstances Mr Jack wrote to the claimant on 31 October 2017 explaining that: -

"Having considered all matters at issue I have been able to form a genuine belief that you drove a company vehicle in a dangerous manner on the 26th September 2017 on Hornock Road, Coatbridge. I have come to the decision that your actions constitute gross misconduct as defined in clause 12.7 of the staff handbook.

In view of the above I have decided to dismiss you from employment without notice or pay in lieu of notice effective from the above date."

44. In his letter Mr Jack explained that the claimant had a right of appeal to Alan Muir, Operations Manager based at the respondent's Bellshill site.

The appeal against dismissal

The hearing before Alan Muir

45. In due course, the claimant notified the respondent that he wished to exercise his right of appeal and an appeal hearing before Mr Muir was convened for 17 November 2017 at which the claimant was once again represented by his union representative Mr Wilson.

46. Shortly after the meeting began the claimant raised an objection to Mr Muir hearing his appeal because he believed that: -

"I think this has all stemmed from Christmas, wanting to get rid of me".

47. In raising this objection, the claimant was referring to the fact that he had previously raised a grievance against Mr Jack and Mr Muir, which had been upheld, and that he believed Mr Muir and Mr Jack were biased towards him because of that.

48. Immediately the claimant raised his objection Mr Muir agreed to close the meeting in light of those concerns because he accepted that it was unfair to carry on if the claimant was now alleging bias. As a result, Mr Muir had no further involvement in the claimant's disciplinary process.

Marc Allen's hearing

49. In the circumstances Craig Buttenshaw appointed Marc Allen (the Operations Manager who had dealt with the claimant's earlier grievance) to hear the appeal.

50. Mr Allen is an experienced HGV driver, having obtained his Class 2 licence in 1994 and his Class 1 licence in the early 2000s. In advance of the appeal hearing Mr Allen reviewed the relevant documents in the case and looked at the CCTV footage from the claimant's vehicle. The version of the CCTV footage that Mr Allen was provided with did not contain a reading of the vehicle's speed during the incident. He was however aware that Mr Jack had found that the claimant's speed on Hornock Road on the approach to the junction was 17 mph, reducing to 12 mph as he turned left into Gartsherrie Road.

51. The fresh appeal hearing before Mr Allen took place on 1 December 2017 at the respondent's Coatbridge factory site. The claimant was again represented by Linda Wilson and Mr Allen was accompanied by the respondent's employee Sarah Ann Fagan who was there to take notes.

52. At the outset, Mr Allen offered the claimant the opportunity to view the CCTV footage and make comment on it but he declined.

53. At the start of the hearing Miss Wilson asserted that dismissal was *'a step too far'.* The claimant then submitted that he believed he had been dismissed because Mr Jack and Mr Muir *"had it in for him"*. Mr Allen found the hearing difficult to keep on track because the claimant repeatedly accused Mr Jack and Mr Muir of being biased towards him.

54. During the hearing Miss Wilson claimed that such incidents as that which had occurred on 26 September 2017 would not normally result in dismissal. She submitted that the claimant had not brought the company into disrepute, that dismissal was inconsistent with other decisions taken by the respondent in relation to similar incidents (albeit she did not specify any such similar incidents) and that the reason for the claimant's dismissal had been personal rather than based on the incident that had taken place.

55. Miss Wilson submitted that the claimant had not seen the cyclist because he had been in his blind spot and that his speed had been acceptable in circumstances where he had deemed the junction to be clear. He had not seen everything the CCTV had captured. He had made an error of judgement and there was nothing in the respondent's employee handbook to the effect that such an error of judgement should result in dismissal.

56. Furthermore, on the claimant's behalf, Miss Wilson pointed out that while the cyclist had been frightened, he had not been hurt and there had been no damage. In all the circumstances she did not believe that the incident merited being described as gross misconduct.

57. Following the appeal hearing Mr Allen viewed the CCTV footage again in order to try to understand the claimant's position that the cyclist had been in his blind spot. Based on his own lengthy experience of driving similar vehicles Mr Allen did not accept that the claimant's view of the cyclist would have been obscured by a blind spot on the front off side of the vehicle. He believed that the cyclist would have been in the claimant's line of sight as he approached the junction. He also concluded that any blind spot caused by the pillar supporting the off side wing mirror would likely only have come into play just at the point when the claimant was turning left into Gartsherrie Road, but only very briefly as he started to make the turn.

58. Mr Allen was also aware that the sight lines at the junction were poor on approach from Hornock Road because of a wall on the left hand side of the junction and a line of trees on the right hand side. He therefore believed that care had to be taken on approach. In the circumstances, Mr Allen concluded that the claimant's speed on approach to the junction had been excessive, that he had not taken care on approach, and that he would have been unable to stop safely even if he had seen the cyclist.

59. While the claimant had insisted he had not driven dangerously, Mr Allen's view was that the claimant's driving had been unacceptable, and he had received no indication from the claimant that he would contemplate changing his driving style. His attitude had simply been that '*'mistakes happen".* In those circumstances Mr Allen was fearful that there would be a repeat of the incident in circumstances where the respondent's drivers negotiate this particular junction regularly each week.

60. Ultimately Mr Allen concluded that the claimant had been guilty of dangerous driving because of his speed on approach to the junction, his lack of concentration while in charge of the vehicle, his failing to stop at the junction and his failure to see the cyclist whom he should have been able to see in the circumstances. Having regard to clause 12.7 of the respondent's staff handbook, Mr Allan found that the claimant had been guilty of conduct that had irreparably damaged the working relationship and that summary dismissal had been an appropriate sanction in line with the respondent's policy as set out in the handbook.

61. Mr Allan also found that there was no evidence to support the claimant's allegation that the disciplinary action taken, or the level of sanction applied by Mr Jack was related to the earlier grievance.

62. In the circumstances Mr Allan wrote to the claimant on 6 December 2017 rejecting his appeal against dismissal.

63. None of the respondent's drivers have been treated more leniently for a similar offence. On the only two other occasions where there have been serious accidents involving the respondent's HGV vehicles, there has been no evidence of misconduct on the part of either driver.

64. The claimant has been unable to find alternative employment as an HGV driver since his dismissal. He has been reluctant to apply for driving jobs with agency employers who provide HGV drivers while he has a finding of gross misconduct on his record. He believes that his career as an HGV driver will

be adversely affected by that information being provided to agencies and being shared around agencies.

65. Since his dismissal the claimant has only worked occasionally; such work having been undertaken on an *ad hoc* basis for a family member on four occasions for which he earned £50 per shift. The claimant has not received any other earnings or benefits save for a payment of £443.71 by way of ESA to cover the period of 6.7 weeks between 13 August and 25 September 2018 when he was hospitalised because of pneumonia. The claimant remains unemployed as at the date of the hearing.

Relevant law

66. Section 94 of the Employment Rights Act 1996 ('ERA 1996') provides the claimant with the right not to be unfairly dismissed by the respondent.

67. It is for the respondent to prove the reason for his dismissal and that it is a potentially fair reason in terms of section 98 (ERA 1996). At this first stage of inquiry the respondent does not have to prove that the reason did justify the dismissal, merely that it was capable of doing so.

68. If the reason for the dismissal is potentially fair the Tribunal must determine, in accordance with equity and the substantial merits of the case, whether the dismissal was fair or unfair under section 98 (4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. At the second stage of enquiry the onus of proof is neutral.

69. If the reason for the claimant's dismissal relates to the conduct of the employee, the Tribunal must determine that at the time of dismissal the respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation. *British Home Stores v Burchell 1978 IRLR 379 1980 ICR 303.*

70. In determining whether the respondent acted reasonably or unreasonably, the Tribunal must not substitute its own view as to what it would have done in the circumstances. Instead the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in the circumstances and determine whether the respondent's response fell within that range. The respondent's response can only be considered unreasonable if no employer acting reasonably would have responded in that way. The range of reasonable responses test applies both to the procedure adopted by the respondent and the fairness of its decision to dismiss. *Iceland Frozen Foods Limited v Jones 1983 ICR 17 EAT.*

71. Any provision of a relevant ACAS Code of Practice, which appears to the Tribunal, may be relevant to any question arising in the proceedings shall be considered in determining that question (Section 207A, Trade Union and Labour Relations (Consolidation) Act 1992).

72. The ACAS Code of Practice on Disciplinary and Grievance Procedures provides that:

a) Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

b) Employers and employees should act consistently.

c) Employers should carry out any necessary investigations to establish the facts of the case.

d) Employers should inform employees of the basis of the problem and give them an opportunity to put their case and response before any decisions are made.

e) Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

f) Employers should allow an employee to appeal against any formal decision made.

The Code also provides that, in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

Respondent's submissions

73. The respondent's oral submissions were, in summary, as follows:

- The sole and principal reason for the claimant's dismissal was his dangerous driving on 26 September 2017. There was no evidence that the claimant's earlier grievance against Mr Jack and Mr Muir had influenced the respondent's decision whatsoever. The fact that Mr Jack had nominated the claimant for the "driver of the month" award after the grievance had taken place was clear evidence that there was no animosity from him towards the claimant. Mr Allen had looked at all the evidence afresh on appeal and had found no bias on Mr Jack's part.

- Mr Jack's position in evidence was that he had not initially contemplated dismissal. That did not fit with the claimant's belief that Mr Jack was trying to get rid of him. He had also nominated the claimant for the 'driver of the month' award and had been pleased when he won because he had been the first Coatbridge driver to do so.

- The claimant's conduct had amounted to gross misconduct in accordance with paragraph 12.7 of the respondent's employee handbook because in the circumstances it had been *"likely to*

irreparably damage the working relationship between employer and employee".

- The claimant's conduct was a serious breach of his duties as a driver in circumstances where the manner of a driver's driving was essential to the purpose of the contract.

- Even if the claimant's conduct in relation to his driving on 27 September 2017 had not on its own amounted to gross misconduct the claimant's driving had nevertheless fallen below an acceptable level of safe driving and he had not admitted his fault or that he had to alter the way he drove an HGV. An employer who dismissed in those circumstances would be acting reasonably in treating that as a fair reason for dismissal even if the driving on its own did not amount to gross misconduct.

- Primarily the claimant's driving had amounted to dangerous driving which was gross misconduct. On the day in question he had been driving too fast on his approach to the junction. At the point when he was approximately 10m away from the junction in a vehicle weighing 39.1 tonnes he was driving at 17mph in circumstances where the DVSA safe stopping distance for a car doing 20 mph is 12m. There was no margin for error. Even if the claimant had seen the cyclist (which Mr Allen believed he should have) he would not have been able to stop in time. While the respondent accepted that the driver of an HGV should try to maintain his vehicle's momentum, it was only safe to keep driving and maintain momentum when the road ahead was clear, and the junction had not been clear before the incident.

- The claimant's attitude to the incident was unacceptable. During the disciplinary hearing, he had sought to blame the cyclist for the near miss. He had repeatedly said that he had only driven as he had been taught. He admitted in cross examination that in the same

circumstances he would drive exactly the same way again. He had shown no contrition and no intention to change his driving style.

- The combination of his driving and his attitude meant that the respondents had acted reasonably in treating his conduct as a sufficient reason to dismiss him.

- There had been no inconsistency in the respondent's decision to dismiss. Evidence had been led from Mr Buttenshaw that on the only other two occasions where there had been a serious accident involving one of the respondent's HGV vehicles, there had been no evidence of misconduct on the part of either driver. Otherwise no evidence of inconsistent treatment had been provided by the claimant.

- The investigation conducted by the respondent had been fair and reasonable in all the circumstances. There was CCTV footage available and from the outset the claimant had admitted that he was driving the vehicle at the time the footage was taken and that he had not seen the cyclist. The alleged misconduct was the claimant's driving and as there had effectively been an admission by the claimant of his conduct there was no requirement for it to do any more investigation than it had done.

- In those circumstances, it would have been futile to do as the claimant had suggested and to speak to other drivers employed by the respondent or to external driving instructors. The test was whether the investigation was in the circumstances a reasonable one and in these circumstances the respondent had done all that was reasonable.

- It would not have been reasonable to expect the respondent to obtain CCTV of other drivers driving similar vehicles approaching this junction in circumstances where the claimant's driving was being judged in light of the prevailing conditions and it would have been virtually impossible

to find footage of similar comparable conditions in terms of vehicle weight, weather, light and road conditions.

- Similarly, it would have been futile to ask other drivers or driving instructors what they would have done in similar circumstances because they would likely all have answered that their driving would have depended on the prevailing driving conditions.

- In relation to the claimant's complaint that there should have been different investigation and disciplinary officers in circumstances where Mr Jack had carried out both roles, it was submitted that the procedure adopted by the respondent had nevertheless been fair and had not been in breach of the ACAS Code. The claimant had effectively admitted his conduct to Mr Jack at the outset and there had been no need for any further investigation. In those circumstances it had not been practicable for the respondent to appoint separate investigation and disciplinary officers.

- There was no evidence of bias by the respondent. Furthermore, neither the claimant nor his union representative had taken issue with Mr Jack hearing the discipline case and there had been no need for him to recuse himself. The fact that Mr Jack had initially decided there was a case to answer did not mean he had formed a final view of the outcome and there was no evidence that he had.

- The respondent's failure to warn the claimant in its original disciplinary hearing invitation letter of the risk of dismissal was not unreasonable. Based on his evidence the claimant knew the disciplinary case against him was that his driving had been substandard, and he had admitted that he was fully aware prior to the disciplinary hearing that his job was on the line, so he could prepare for it on that basis.

- In any event even if there had been previous procedural failures (which was denied) the appeal, which was a rehearing of the evidence, had cured any earlier defects in procedure.

- The claimant had failed to apply for driving jobs that were available to him and had thereby unreasonably failed to mitigate his loss.

Claimant's submissions

74. The claimant's oral and written submissions were, in summary, as follows:

- The respondent had not established a fair reason for dismissal.

- The investigation process was not reasonable and the respondent could not have formed a genuine and reasonable belief that the claimant was guilty of misconduct.

- The investigation process was carried out by a manager against whom the claimant had raised a grievance that same year and there had been bias as a result.

- The investigation and disciplinary stages of the disciplinary process were carried out by the same person who had already determined there was a case to answer and therefore it was impossible for him to be objective.

- The dismissal was procedurally unfair and the claimant was not warned about his potential dismissal before attending the disciplinary hearing with Mr Jack.

- Dismissal was not within the band of reasonable responses as the claimant's conduct did not fall within the description of "gross misconduct" in the respondent's policy.

- The employer failed to determine what standard the claimant's conduct was being measured against.

- The claimant had not failed to mitigate his loss. The respondent had failed to prove that he had acted unreasonably by holding off applying for driving jobs where he had a genuine, if possibly mistaken, belief that he may have jeopardised his career by applying for driving jobs while he had a finding of gross misconduct on his record.

Discussion and decision

75. The question for the Tribunal is not whether the claimant had in fact driven dangerously, as alleged, but whether the respondent genuinely believed that he had done so and whether there were reasonable grounds for that belief having carried out a reasonable investigation.

76. The Tribunal had no hesitation in concluding that the respondent had a genuine belief that the claimant had driven his HGV in a dangerous manner on 26 September 2017 and that this had amounted to gross misconduct in terms of paragraph 12.7 of the respondent's employee handbook.

77. The Tribunal was also satisfied that the respondent's belief was formed on reasonable grounds having carried out a reasonable investigation in the circumstances. The respondent had obtained the cyclist's account of the incident, CCTV footage and tracker information from the claimant's vehicle and it had consulted the DVSA website for details of safe stopping distances. The respondent's investigation also included taking the claimant's own account both shortly after the incident and at the disciplinary hearing.

78. The respondent's decision not to do as suggested by the claimant and question its other drivers or speak to external driving instructors about how they would have driven in similar circumstances did not render its investigation inadequate. The Tribunal accepted the respondent's assertion

that such further inquiries would not have added anything useful to its investigation because it was likely that they would simply have said they would drive in a manner that was appropriate to the road conditions. The Tribunal also accepted the respondent's explanation that there would have been a risk of biased responses from some of the claimant's former colleagues.

79. The respondent's investigation established on reasonable grounds that (1) the claimant had driven his vehicle on Hornock Road at 17mph while approximately 10m away from its junction with Gartsherrie Road (2) he was driving at 12 mph as he turned left onto Gartsherrie Road (3) he had failed to see a cyclist who was cycling past the junction as he turned left, as a result of which he had nearly struck him and knocked him from his cycle, (4) because of the speed and the weight of the vehicle, even if the claimant had seen the cyclist he would not have been able to stop his vehicle safely at the junction in time (5) the claimant had not accepted any fault and had given no indication that he would change his style of driving.

80. The Tribunal found that in all the circumstances the respondent was entitled to find that on 26 September 2017 the claimant had driven his company HGV in a dangerous manner on Hornock Road. It had therefore established a potentially fair reason for dismissal relating to the claimant's conduct.

81. The Tribunal then considered whether the dismissal was actually fair having regard to section 98 (4) of the ERA including the procedure which was adopted. The respondent operates a fleet of heavy goods vehicles, which it uses to deliver its products to its customers. It is an essential feature of its business that its drivers must drive safely and with regard for other road users. In circumstances where the claimant's driving had not only been dangerous, but he had also refused to admit fault and gave no indication that he would change his driving habits, the respondent was entitled to its view that his conduct had damaged the employment relationship irreparably. The Tribunal

had no doubt that the respondent's decision to dismiss him therefore fell within the band of reasonable responses.

82. The Tribunal was also satisfied that there was no evidence of bias on the part of the respondent. It concluded that Mr Jack's decision was based purely on the evidence he considered and not influenced at all by the fact the claimant had previously raised a grievance against him.

83. The claimant had focused on alleged errors in the procedure followed; the fact that Mr Jack had carried out both the investigation and the dismissal stage of the disciplinary procedure and the failure to advise him in writing in advance of the disciplinary hearing that dismissal was a possible outcome.

84. In the case of *Taylor v OCS Group Limited 2006 ICR 1602*, the Court of Appeal, held that -

"*The task of the tribunal is to apply the statutory test and, in doing so, they should consider the fairness of the whole of the disciplinary process".*

Therefore, even if there are some procedural imperfections a Tribunal might well still decide that in all the circumstances an employer acted reasonably in treating the reason as sufficient to dismiss an employee.

85. In the first place the Tribunal finds that there was no unfairness by virtue of Mr Jack having carried out both the investigation and dismissal stage of the disciplinary procedure. In this case the key evidence was from the vehicle's CCTV and tracker, which was obtained at the outset and was not in dispute. There had been no need to obtain further evidence and it was not necessary for Mr Jack to recuse himself from the disciplinary process simply because he had initially obtained that undisputed evidence. In that respect there had also been no breach of the relevant part of the ACAS code.

86. Furthermore, while the claimant had not been advised in writing prior to the disciplinary hearing that his dismissal was in contemplation, his own evidence

was that prior to the hearing he believed that dismissal was a potential outcome - even if Mr Jack had not yet formed that view. Therefore, he had been able to prepare for the disciplinary hearing with that possibility in mind.

87. The Tribunal also concluded that it was reasonable for Mr Jack's view of the seriousness of the claimant's conduct to have altered in circumstances where, during the hearing, the claimant sought to attribute blame to the cyclist, maintained that he had not been at fault, admitted he had always driven his vehicle on Hornock Road in the manner he had done on 26 September 2017 and gave no indication he would change his style of driving in future.

88. In any event, even if all or any of these issues did amount to procedural flaws, each of them was cured by the appeal that was heard by Mr Allen who was a senior and independent manager and who carefully reconsidered all the evidence in the case rather than simply reviewing Mr Jack's decision to dismiss the claimant.

89. The Tribunal accepted that the respondent's failure to warn the claimant of his potential dismissal in advance of the disciplinary hearing was a technical breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures but that in all the circumstances it was not an unreasonable failure and it did not render the dismissal unfair.

90. The Tribunal is satisfied that the respondent acted reasonably in finding that the claimant had committed an act of gross misconduct and in treating that as a sufficient reason for dismissing him. It cannot be said that no employer acting reasonably would have dismissed the claimant in those circumstances. The Tribunal concludes that the decision to dismiss the claimant fell within the range of reasonable responses and that he was not unfairly dismissed.

91. For completeness, the claimant's claims for unpaid notice pay and for redundancy payment are dismissed on withdrawal.

Employment Judge: Robert King
Date of Judgment: 06 November 2018
Entered in register : 09 November 2018
and copied to parties