EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Simpkins	**- V -**	World Fuel Services Europe Ltd

Heard at: London Central **On**: 4-6 June 2019

Before: Employment Judge Baty

Representation:

For the Claimant: Mr D Leach (counsel)
For the Respondents: Ms S Clarke (counsel)

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal and of wrongful dismissal fail.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 17 September 2018, the claimant brought complaints of unfair dismissal, wrongful dismissal and for both automatically unfair dismissal and being subjected to a detriment because of making a protected disclosure. The respondent defended the complaints.

2. The complaints of automatically unfair dismissal and being subjected to a detriment because of making a protected disclosure were subsequently withdrawn by the claimant and these are dismissed by the tribunal.

3. The remaining complaints, to be determined at this hearing, were of unfair dismissal and wrongful dismissal.

4. It was agreed between the representatives and me at the start of the hearing that the correct name of the respondent is "World Fuel Services Europe Ltd".

The Issues

5. The issues to be determined were agreed between the parties and the tribunal at a case management hearing on 16 January 2019 before REJ Potter and were annexed to her note of that hearing.

6. At the start of this hearing, I explored with the representatives whether or not those issues remained the same. They confirmed that they did, save for one exception, which was to add the issue regarding Polkey which is set out as issue 16 below. (Ms Clarke confirmed that the respondent would no longer be pursuing the contention, set out at paragraph 21 of the attachment to the response, that, had the dismissal been unfair, the claimant would have been dismissed in any case for failing to report theft/making a false allegation of theft having taken place).

7. The agreed issues to be determined at this hearing were therefore as follows:

Automatic Unfair Dismissal / Detriment due to protected disclosure

1. The Claimant's claims for automatic unfair dismissal and being subjected to a detriment due to protected disclosures (detailed at paragraphs 81-87 of the Claimant's Particulars of Claim) are withdrawn.

Unfair Dismissal

2. Did the Respondent have a potentially fair reason for dismissing the Claimant within the meaning of s.98(1) and s.98(2) Employment Rights Act 1996 ("ERA")? The Respondent relies upon two acts of misconduct as the reason for dismissal in accordance with s.98(2)(b) ERA.

3. If so, was the dismissal fair and did the Respondent act reasonably in treating misconduct as a sufficient reason for dismissing the Claimant in accordance with s.98(4) ERA?

4. Did the Respondent genuinely believe that the Claimant committed acts of gross misconduct? If so, did the Respondent have reasonable grounds to form its belief that the Claimant committed an act of gross misconduct?

a. The Claimant avers that the Respondent did not have reasonable grounds to form its belief that the Claimant had committed acts of gross misconduct for the reasons described at paragraphs 77- 80 of his Particulars of Claim;

b. The Respondent avers that it did have reasonable grounds to form its belief that the Claimant had committed acts of gross misconduct for the reasons described at paragraph 6-13 and 18-20 of its Grounds of Resistance.

5. Was either act of misconduct in its own right sufficient to dismiss? Was the cumulative impact of both acts sufficient to warrant dismissal?

6. Did the Respondent conduct a reasonable investigation prior to dismissal?

7. Did the Respondent undertake a fair procedure prior to dismissal in accordance with the Respondent's Staff Handbook and the ACAS Code of Practice? The Claimant avers that a fair procedure was not adopted by the Respondent for the reasons described at paragraph 80 of his Particulars of Claim.

8. In all the circumstances, was the decision to dismiss the Claimant within the band of reasonable responses which a reasonable employer could adopt?

9. Did the Respondent consider any alternatives to dismissal?

Wrongful Dismissal / Breach of Contract

10. Was the Respondent entitled to summarily dismiss the Claimant on 30 May 2018 in accordance with the Claimant's contract of employment?

Remedy

11. If the Claimant is found to have been unfairly dismissed, what (if any) compensation would it be just and equitable to award to the Claimant, taking into account the loss sustained by the Claimant in consequence of his dismissal in so far as it is attributable to action taken by the Respondent?

12. If the dismissal is found to be procedurally unfair should the compensation (if any) be increased to reflect the Respondent's failure to comply with the ACAS Code of Practice?

13. What deductions, if any, should be made to take account of sums received in mitigation, including income from alternative employment?

14. What deductions, if any, should be made to take account of any failure on the part of the Claimant to take adequate steps to mitigate his losses?

15. If the Claimant is found to have been unfairly dismissed, did the Claimant contribute to his own dismissal by his own conduct / actions leading to the termination of his employment? If so, should any compensation awarded to the Claimant be reduced to reflect the Claimant's contributory fault?

16. If there were any procedural failings in relation to the dismissal, should any adjustments to compensation be made under the principles in Polkey v AE Dayton?

8. It was also agreed that, as anticipated at the preliminary hearing, the present hearing would determine the issues on liability and also the remedy issues at paragraphs 12, 15 and 16 of the list of issues (ACAS Code, contribution and Polkey), but other issues related to remedy would be left for a separate remedies hearing (if required).

The Evidence

9. Witness evidence was heard from the following:

For the respondent:

Mr Mark Robinson, the Operations Manager for Fleet and Compliance at the respondent, who has been employed by the respondent since 8 January 2018, and who carried out investigations in relation to the claimant;

Mr David Coonan, the Operations Manager for Physical Operation at the respondent, who has been employed by the respondent since May 2017 and who held the disciplinary hearings in relation to the claimant which resulted in his dismissal; and

Mr Matthew Brown, the General Manager HSE & Facilities, Land UK at the respondent, who has been employed by the respondent since 1 November 2017 and who held the claimant's appeals against dismissal.

For the claimant:

the claimant himself.

10. An agreed bundle of documents numbered pages 1-311 and an agreed chronology were provided to the hearing. In addition, both representatives produced skeleton arguments.

11. I read in advance the witness statements and the documents in the bundle to which they referred, together with the skeleton arguments.

12. A timetable for cross-examination and submissions was agreed between the representatives and me at the start of the hearing. This was duly adhered to. It was acknowledged at the start of the hearing that, given the amount of time which would be required to hear the evidence, the decision would almost inevitably be a reserved one.

13. In addition to his opening note, Mr Leach also produced written submissions, which I read in advance of the oral submissions. Both representatives then made oral submissions.

14. The decision was duly reserved.

Findings of Fact

15. I make the following findings of fact. In doing so, I do not repeat all of the evidence, even where it is disputed, but confine my findings to those necessary to determine the agreed issues.

16. The respondent company supplies fuel including kerosene, gas, oil and diesel to residential and commercial customers in the UK. Given the flammable nature of these products, health and safety issues in relation to the transportation of these products are of very great importance.

17. The claimant was employed by the respondent as an Artic Driver/HGV Class I Fuel Tank Driver from 6 May 2006 until his dismissal with effect from 30 May 2018.

18. Up until his dismissal, the claimant had a clean disciplinary record.

19. On 2 March 2018, the claimant posted various comments on the "Petroleum Tanker Drivers Forum" on Facebook. This is a public forum, accessible by anyone, although it is likely that those with the greatest interest in the forum would be tanker drivers and others in or associated with the industry in general; that could include customers or potential customers of the respondent, rivals and competition of the respondent and employees or prospective employees of the respondent. The forum has 5000 members. The comments were posted in the context of a conversation with other individuals, who also posted comments. Some of those other individuals were also employees of the respondent.

20. The respondent is identifiable from the comments posted in the conversation. The conversation starts with a picture of a tanker, together with "WTF" (i.e. the respondent), which was posted by SH, at that time an employee of the respondent. Various comments follow, by various individuals, including the claimant. There was some dispute at this tribunal about just how derogatory the comments on the forum were; however, I have seen the totality of the comments and consider that several comments, in themselves and in the context of that conversation as a whole, are indeed derogatory in relation to the respondent. These include various comments posted by the claimant, specifically:

1. “I just got told when defect things it is driver abuse???”;

2. “Well they just took my tractor unit off me and said they are not replacing it”;

3. “I agree need you in the workshops”, in response to a suggestion that the respondent did not have decent fitters in the workshop; and

4. “Why do you think they are leaving? It is not rocket science”.

21. It is important to bear in mind that, whilst these comments are derogatory in their own right, the impact of them in terms of the picture of the company being painted is amplified in the context of the whole conversation, which is highly derogatory to the respondent. They are critical of the management and have potential to cause reputational damage.

22. Mr Robinson was asked by HR to investigate the comments made and he began his investigation on 5 March 2018. Mr Robinson knew who the claimant was but had had very little prior contact with him. Mr Robinson was able to gain access directly to the forum as it was a public forum.

23. Five employees of the respondent, including the claimant, had posted comments on the forum. In terms of investigation:

1. Mr Robinson did not investigate SQ further, as he had not posted derogatory comments;

2. SH, who posted the initial picture and made derogatory comments, was in his notice period and about to leave the respondent, so Mr Robinson did not investigate him further;

3. GB, who had posted derogatory comments, had been long-term sick for many months and remained long-term sick, so Mr Robinson did not investigate him further;

4. JK remained an employee and was not investigated further. He had posted derogatory comments, such as suggesting that the respondent needed new trucks and did not have decent fitters; and

5. Mr Robinson investigated the claimant.

24. The respondent has a social media policy within its “Portable Telephone Policy”. The policy is available at all of the respondent’s locations and it is displayed on all noticeboards in all depots. The policy is a short one (only two pages) and the social media section states:

“Employees are reminded that social media activity that has a detrimental impact to the company either in reputation or in contravention of the expectations of how company employees act could result in disciplinary action.”

The claimant's position is that he was unaware of the contents of the policy.

25. Part of the claimant's responsibilities was to ensure that his vehicle was in a safe and roadworthy condition prior to taking that vehicle out on the roads and, to that end, to carry out a visual check of the vehicle each day before taking a vehicle out.

26. At the respondent, the individual trucks which the drivers drive and the trailers which attach to them and contain the fuel are given separate identification numbers.

27. On 22 March 2018, the claimant had an accident at Bristol City Council yard whilst driving truck number WX15YYB and trailer number T80. The accident caused damage to trailer T80. For the avoidance of doubt, none of the disciplinary action which followed was taken because of the damage to the trailer.

28. It was alleged that, when he returned to site later that day, he was instructed by Richard Saxby to take out a different trailer (T61) the following day but that the claimant did not follow this instruction and took out T80 (the damaged trailer) and, further, that the claimant failed to carry out an inspection of T80 or make any enquiries as to whether it had been repaired prior to taking it out on 23 March 2018; and that this therefore resulted in the claimant driving a damaged vehicle. On 23 March 2018, Mr Saxby reported this issue to Mr Robinson, who commenced an investigation.

29. On 23 March 2018, Mr Robinson spoke to Mr Saxby to get more detail. Mr Saxby explained that he had told the claimant that it wasn't clear from the pictures of the damaged trailer T80 whether or not it was split and it would need a full check and pressure test; that the claimant had then asked him what trailer he should take the following day and that Mr Saxby had said to take trailer T61; that nothing further was discussed; that he was sure that his instruction had been clear and that there was no reason why the claimant should not follow it; and that this conversation was at his desk and he would have expected his colleagues RL, AH and MB to have heard it. Mr Robinson took a statement from Mr Saxby accordingly, which contains the above.

30. Given the severity of the allegation, Mr Robinson the same day asked the claimant to come and see him when he arrived back in the office. Mr Robinson asked the claimant why he had taken an unsafe vehicle out against instructions which could have caused danger to him and the public. The claimant said that he had not been told not to use T80 and that that morning he had assumed it had been inspected and was safe for use as he had not been told to switch trailers. Given this response, Mr Robinson thought it wise briefly to adjourn and look into things in more detail.

31. The same day Mr Robinson spoke to our RL, a fleet administrator (and one of the three potential witnesses to the conversation whom Mr Saxby had identified), and asked if he could recall a conversation between Mr Saxby and the claimant the previous day relating to the damaged trailer. RL confirmed that he

was aware and that he had heard discussion of pictures of the trailer and an instruction by Mr Saxby to use a different trailer which he said he was pretty sure was T61. RL confirmed that the conversation was brief and he didn't recall any further questions or comments. Mr Robinson's conversation with RL was also set down in a witness statement (which incorporated Mr Robinson's conversation with RL on 23 March 2018 and his subsequent conversation with RL on 26 March 2018).

32. Mr Robinson, having by that stage had corroboration from two individuals (Mr Saxby and RL), then went back to see the claimant and confirmed to him that he would be suspending him on full pay whilst he investigated the allegations in full. He followed this up by sending a suspension letter of 26 March 2018 to the claimant. This referred to the suspension being due to:

"allegations of gross misconduct that you failed to follow a reasonable request and company procedures on Friday, 23 March 2018 leading to a breach of health and safety procedures".

33. On the same day, 26 March 2018, Mr Robinson reconvened his meeting with RL. Mr Robinson asked RL if he wanted to add anything. RL said that he wanted to clarify that, although he was on the phone at the time of the conversation between Mr Saxby and the claimant, he was on hold so was not distracted by the call. RL also reiterated that the conversation between the claimant and Mr Saxby had, as he indicated to Mr Robinson on 23 March 2018, been a brief one and that there were no drawn out questions or debates over it.

34. On 27 March 2018, Mr Robinson spoke to AH and MB (the two other potential witnesses identified by Mr Saxby).

35. AH confirmed that he had been on the phone but that he had heard the conversation between the claimant and Mr Saxby and had heard Mr Saxby's instruction not to use the damaged trailer the following day but to take trailer T61. AH also said that he had taken the original call earlier on 22 March 2018 from the claimant reporting the damage, so he was already aware of the situation. Mr Robinson asked AH how he could be sure of what he heard if he was on the phone and AH said that the claimant had almost thrown some delivery tickets on his desk, so this distracted him from the call and that is when he heard Mr Saxby give the instruction. AH also said that later on that day, the claimant had asked him if he could load trailer T80 for his second load of the day and AH had said no due to the need to inspect the trailer.

36. MB confirmed that he could definitely recall the conversation between Mr Saxby and the claimant as the claimant had been loudly complaining about the delivery point being too tight to gain access (in relation to the accident). MB said that he remembered Mr Saxby telling the claimant quite clearly not to use the damaged trailer the next day as it would need to be checked over.

37. Mr Robinson took written statements from AH and MB as well, which included the matters referred to in the paragraphs above.

38. The statements taken from Mr Saxby, RL, AH and MB were signed at the time respectively by those four individuals. Because Mr Robinson kept the originals and forwarded electronic copies to HR which formed the pack for the subsequent disciplinary process, it appeared from those electronic copies as if the documents had not been signed by the individuals. Signed copies were later provided during the appeal. However, the statements had in fact been signed around the time that they had been made by the individuals who gave them.

39. Mr Leach suggested, in relation to those statements, that they demonstrated that Mr Robinson was pushing for particular answers from some of the individuals whom he questioned. However, I do not consider that that is clear from the written statements themselves and Mr Robinson denied in evidence that he was doing this. I do not, therefore, find that Mr Robinson was pushing any of these individuals for particular answers to questions; he was simply trying to ascertain what those individuals had witnessed.

40. On 28 March 2018, Mr Robinson held an investigation meeting with the claimant. It lasted approximately one hour and 30 minutes. At this meeting, the claimant did not merely deny that he had been given an instruction from Mr Saxby; he said that Mr Saxby had told him that he would check the trailer and that, if it was not okay, they would give him trailer T61 to use. He said the keys for trailer T80 were in the tray as normal and that there was no VOR notice on T80 (a VOR notice is a notice which is sometimes placed on a defective vehicle or trailer confirming that it is not to be used; however, such notices are not used all the time and the absence of such a notice does not mean that a vehicle is fit for use). The claimant said he had definitely not been told to switch trailers, that he had received an email from routing that evening with his work and that there were no specific instructions regarding which trailer to take; that he came in the following day, did his checks and went out with trailer T80. Mr Robinson asked the claimant what evidence of repair he looked for and the claimant said that he could not answer that question and reiterated that he had not been asked to switch trailers. Mr Robinson asked the claimant if it had occurred to him to wait until the workshop had opened to be absolutely sure given the risk and the claimant had said that it was too early. Mr Robinson suggested to the claimant that the lost time would have been worth it given the risk, but the claimant did not agree. The claimant confirmed that RL and AH had been in the vicinity when he had spoken with Mr Saxby on 22 March 2018, but that he was not sure about MB.

41. For the avoidance of doubt, the absence of a VOR notice, the fact that the keys for a vehicle or trailer are available and the fact that there is no reference to which trailer should be used in the instructions which a driver has for a day do not mean that a particular vehicle or trailer is fit for use and do not exempt a driver from his responsibility to check that that vehicle or trailer is fit for use.

42. Mr Robinson then went on to discuss another incident involving the claimant on 6/7 March 2018. I heard a lot of evidence about this incident during the hearing. However, it is clear from the contemporaneous documents and the evidence of the respondent's witnesses at this tribunal that this incident was not

nearly as serious as the incident of 23 March 2018; that the claimant would not have been dismissed for the incident of 6/7 March 2018; and that, even if the incident of 6/7 March 2018 had not taken place, the claimant would have been dismissed for the incident of 23 March 2018 anyway. Mr Coonan, the dismissing officer, was clear about this and I accept his evidence. It is not, therefore, necessary for the for me to go into any further detail about the incident of 6/7 March 2018 in order properly to determine the issues before me.

43. On the same day, 28 March 2018, and shortly after the investigation meeting in relation to the 23 March 2018 incident, Mr Robinson held an investigation meeting with the claimant in relation to the Facebook comments. Mr Robinson took the claimant through the comments and asked if he could see that it was part of a chain which named the respondent and then made derogatory comments about it. The claimant's responses were defensive and he maintained that he had not said anything negative about the company or that the comments didn't clearly reference the company, so that it was not betraying the company in a bad light. He repeatedly said "no comment" in responses to Mr Robinson's questions. At the end of the meeting, Mr Robinson was very concerned that the claimant had failed to understand or acknowledge any wrongdoing on his behalf.

44. At some point after the respondent was notified about the comments, the claimant removed the comments which he made from Facebook.

45. The two procedures (the Facebook comments and the 23 March 2018 incident) were from this point on conducted in parallel, with: Mr Robinson producing investigation reports in respect of each; separate disciplinary hearings being held by Mr Coonan in respect of each; and separate appeals being held by Mr Brown in respect of each.

46. In respect of both sets of proceedings, Mr Robinson produced an investigation report and recommended disciplinary action.

47. In relation to minutes taken of the investigation meetings (and indeed of subsequent meetings in the process) the claimant often made comments of his own on those minutes and returned them to the respondent. Much was made of this at the tribunal hearing, particularly in terms of suggesting that the original minutes were not accurate. However, many of the claimant's "amendments" to the notes are really his own comments as to what happened at the time, as opposed to actual issues as to the accuracy of the notes. Many of the points he raised were that certain irrelevant discussions were not minuted. I accept Ms Clarke's submission that it is difficult to see that any of his "amendments" actually changed the substance of the discussion which took place in any material way.

48. The claimant was invited to separate disciplinary hearings to be chaired by Mr Coonan on 14 May 2018. Prior to this process, Mr Coonan had had no dealings with the claimant and was not aware of who he was. Invitation letters were sent to the claimant on 10 May 2018. Both letters indicated that dismissal could be a possible outcome of the proceedings and advised the claimant of his right to be accompanied.

49. The charge in one of the letters was:

"to discuss the following allegations of gross misconduct specifically that you failed to follow a reasonable request and company procedures on both the 23rd March 2018 and 6th March 2018 leading to a breach of health and safety procedures and damage to company property."

50. The charge in the other letter was:

"to discuss the following allegations of gross misconduct specifically that you posted inappropriate comments on a public social media page demonstrating behaviour that is unprofessional and falls below company standards."

51. The claimant was accompanied by a trade union representative at both hearings.

52. At the hearing concerning the 23 March 2018 incident, the claimant continued to maintain that he had not been instructed to take out trailer T80. He accepted, however, that when he took out trailer T80, he had no evidence that it had been repaired. At no point during the meeting did the claimant acknowledge that he should not have taken the trailer or that he should have taken extra precautions to check that it was suitable to use. Mr Coonan found this surprising given that the claimant had been involved from start to finish so was well aware of the damage the day before (as he had the accident with trailer T80) and the instruction the day before not to load that trailer again.

53. Mr Coonan preferred the evidence of the four individuals who stated that the claimant had been given a clear instruction not to take T80 out on 23 March 2018 over the claimant's denial that he was given this instruction. He therefore considered that there had been a refusal by the claimant to obey a reasonable request which led to a breach of health and safety procedures (specifically taking out a damaged trailer before it had been properly checked). In addition, regardless of the instruction, he considered that the claimant had not carried out the vehicle safety checks which he needed to carry out on the morning of 23 March 2018 in relation to trailer T80 because, had he carried them out properly, he would have seen that the damage was still there (damage which he was well aware of because it was caused in the accident involving him the previous day) and that he should have queried the defect in line with the company procedure before taking it out. He therefore considered that the claimant had failed to follow company procedures leading to a breach of health and safety procedures.

54. The charges having been made out, Mr Coonan considered issues of mitigation which the claimant was putting forward, in particular his experience and previous achievements as a driver. Mr Coonan considered these to be aggravating factors as more was expected of someone with this level of experience and expertise. Furthermore, the claimant had shown no remorse and had not comprehended the concerns over his actions and the danger that they could have caused (carrying fuel in a tanker which was potentially defective). He therefore considered that the conduct was so serious as to warrant dismissal.

55. He communicated his decision to dismiss the claimant for this reason in a letter of 30 May 2018. The claimant was dismissed without notice on the basis that this conduct amounted to gross misconduct.

56. In the second disciplinary hearing on 14 May 2018, regarding the Facebook comments, the claimant was asked whether he was aware of the respondent's Portable Telephone Policy and said that he thought that it was about phones and not social media and said that he had not had guidelines. His representative stated that the respondent should really sit down with employees and go through the policy. The claimant said he had not seen the policy. Mr Coonan found this exchange worrying as there was no acknowledgement of the harm that the action could have caused or the fact that it was inappropriate.

57. The claimant and his representative focused quite a lot during the meeting on the fact that others had left comments on the Facebook page in question. Mr Coonan (who had no involvement with any other elements of the investigation in relation to other individuals which Mr Robinson had considered) reminded them that this was about establishing the details relating to the claimant. Mr Coonan tried to explain about the negative connotations of the comments. The claimant, however, continued to maintain that the comments were not negative and there was quite a lot of back-and-forth on this with the claimant maintaining that his comments were not negative. The claimant would deviate from the issue at hand and Mr Coonan would bring him back to the relevant points. Mr Coonan asked the claimant what he thought customers would think if they saw the posts and he and his representative referred to the claimant being naive and the claimant said he didn't think that customers would look at the page.

58. During the meeting, the claimant's representative requested several breaks and only after those breaks did the claimant modify his position to acknowledge that the remarks could have been seen to be detrimental, but he maintained that he hadn't been trained so didn't understand this at the time. He stated that:

"In hindsight it was detrimental, I should not have made the comments, I have not had any guidance maybe if I had some training it could have been a different story, I was not intending to cause the company any harm, I can see after today it could, it would never have happened if I was aware what you can and what you can't do. I can see I made an error of judgment, no way was I bringing company into [disrepute]. I was highlighting what happened, defending, when I spoke to someone about it I decided to come away"

59. The meeting ended with the claimant's representative emphasising repeatedly that the claimant had shown some contrition and understood that it was wrong and that there was no malice.

60. Mr Coonan took the view that this change of heart only came after the break and the opportunity that the claimant had to consult with his representative and that, given the claimant had during the meeting sought to blame others and deflect from responsibility himself up until then, he was not really contrite. Even after the break, he was still referring to not having been trained. As Mr Coonan said in evidence, he never got from the claimant an admission that he had been

absolutely wrong to do this and that it would not happen again. Mr Coonan therefore considered that the claimant had not, despite the passage quoted above, showed real remorse for his actions. I found Mr Coonan a credible witness in his evidence generally; I was not present at the disciplinary hearing to gauge the tone of what was said by the claimant in relation to this whereas Mr Coonan was; and Mr Coonan's conclusions are consistent with the notes of the meeting, notwithstanding the existence of the passage from those notes quoted above. For these reasons, I accept his evidence and find that it was reasonable for him to conclude that the claimant did not show real remorse for his actions.

61. Mr Coonan took the view that the conduct established was gross misconduct. In particular, he did not consider it plausible that the claimant had no idea as to the negative consequences of social media or that the comments could be seen by the wider public and he found that he was not genuinely remorseful in his actions, thus causing an irrevocable breakdown of trust and confidence. He therefore decided to dismiss him summarily on this charge. The decision was communicated to the claimant in a letter of 30 May 2018.

62. The claimant appealed both decisions.

63. The appeals were heard on 1 August 2018 by Mr Brown. Prior to this process, Mr Brown had never met or heard of the claimant. The claimant was accompanied at both appeal meetings by his trade union representative. The claimant was given the opportunity to make whatever points he wished to.

64. Mr Brown turned down the appeals.

The Law

Unfair dismissal

65. The tribunal has to decide first whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within s 98(1) and (2) of the Employment Rights Act 1996 ("ERA") and whether it had a genuine belief in that reason. The burden of proof here rests on the employer who must persuade the tribunal that it had a genuine belief that the employee committed the relevant misconduct and that belief was the reason for dismissal.

66. In conduct cases, the principles in British Home Stores v Burchell [1978] IRLR 379 apply, namely that, in dismissing the employee, the employer must have a genuine and reasonably held belief that the relevant misconduct took place, following such investigation as was reasonable.

67. The tribunal then has to decide whether it is satisfied, in all the circumstances (including the size and administrative resources of the employer), that the employer acted reasonably in treating it as a sufficient reason to dismiss the employee. I refer myself here to a 98(4) of the ERA and direct myself that the burden of proof in respect of this matter is neutral and that I must determine it in accordance with equity and the substantial merits of the case. It is useful to regard this matter as consisting of two separate issues, namely:

1. Whether the employer adopted a fair procedure? This will include a reasonable investigation with, almost invariably, a hearing at which the employee, knowing in advance (so as to be able to come suitably prepared) the charges or problems which are to be dealt with, has the opportunity to put their case and to answer the evidence obtained by the employer; and

2. Whether dismissal was a reasonable sanction in the circumstances of the case. That is, whether the employer acted within the band of reasonable responses in imposing it. I am aware of the need to avoid substituting my own opinion as to how a business should be run for that of the employer. However, I sit to provide, partly from my own knowledge, an objective consideration of what is or is not reasonable in the circumstances, that is, what a reasonable employer could reasonably have done. This is likely to include having regard to matters from the employee's point of view: on the facts of the case, has the employee objectively suffered an injustice? It is trite law that a reasonable employer will bear in mind, when making a decision, factors such as the employee's length of service, previous disciplinary record, declared intentions in respect of reform and so on.

68. In respect of these issues, I must also bear in mind the provisions of the relevant ACAS Code of Practice 2015 on disciplinary and grievance procedures to take into account any relevant provision thereof. Failure to follow any provision of the ACAS Code does not, in itself, render a dismissal unfair, but it is something the tribunal will take into account in respect of both liability and any compensation. If the claimant succeeds, the compensatory award may be increased by 0-25% for any unreasonable failures by the employer or decreased by 0-25% for any unreasonable failures on the employee's part.

69. Where there is a suggestion that the employee has by his conduct caused or contributed to his dismissal, further and different matters arise for consideration. In particular, the tribunal must be satisfied on the balance of probabilities that the employee did commit the act of misconduct relied upon by the employer. Thereafter issues as to the percentage of such contribution must be determined.

70. Under the case of Polkey v AE Dayton [1987] IRLR 503 HL, where the dismissal is unfair due to a procedural reason but the tribunal considers that an employee would still have been dismissed, even if a fair procedure had been followed, it may reduce the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

71. I was also referred to the well-known authorities of J Sainsbury plc v Hitt [2003] ICR 114 (CA) and Iceland Frozen Foods v Jones [1982] IRLR 439.

72. I was referred by Ms Clarke to the case of Hadjioannou v Coral Casinos Ltd [1981] IRLR 352, specifically what the EAT had to say about how a tribunal

should approach allegations of unfairness because of alleged disparity of treatment between the claimant and other employees. In short, where such an argument is made, there must be "truly parallel circumstances" to support the argument and the tribunal should scrutinise arguments based upon disparity with particular care, the EAT noting that there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for this argument and that it is of the highest importance that flexibility should be retained and that employers and tribunals should not be encouraged to think that a tariff approach to industrial misconduct is appropriate.

73. Mr Leach referred me to Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, where the EAT held that:

"In assessing the reasonableness of the decision to dismiss, length of service was not forbidden territory for the employment tribunal. The fact that Mr Newbound had been an employee of 34 years' service with a clean disciplinary record had been a factor the judge had been fully entitled to take into account: it would have been extraordinary if he had not done so."

74. Newbound was a case where the employment tribunal had taken into account length of service. The employer had taken the view that the claimant's long length of service counted against him because there was even less excuse for someone of that experience to commit the misconduct in question. The tribunal had, nonetheless, held that the dismissal was unfair. On exploring this, Mr Leach agreed that the case was not authority for the proposition that an employer cannot take length of service into account as counting against the employee; he simply submitted that, on the facts of the case before me, I should find it unfair that the respondent in this case did so.

75. Newbound was also a "disparity of treatment" case and contains a summary of the law in that respect at paragraphs 62-65. That summary is not, however, inconsistent with the principle set out in Hadjioannou and indeed refers to it. The representatives did not dispute that Hadjioannou applies.

76. Mr Leach also referred me to Salford Royal NHS Foundation Trust v Roldan [2010] EWCA Civ 522, specifically paragraphs 56 and 73. The case was one where there was a conflict of evidence. At paragraph 56, Elias LJ found that the employment tribunal was entitled to conclude that, given in particular the fact that the case turned on the conflict of evidence, the employer ought at least to have tested the evidence of one particular individual where it was possible to do so. At paragraph 73, Elias LJ reminds employers that they are not obliged, in cases of conflict of evidence, to believe one employee and disbelieve the other and, in such cases, it would be perfectly proper where the employee has given years of good service for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of one side or the other. Having said that, as Ms Clarke rightly points out, the facts of Roldan are very different from those of this case. In Roldan, the employer had failed to identify and look for other witnesses to the incident where it was appropriate to do so, such that it was the claimant's word against one other witness and the tribunal considered that further evidence should have been sought; in the case before me, there is no suggestion that other witnesses should

have been sought out; rather, it is not in dispute that the four witnesses whose evidence conflicted with that of the claimant were the relevant witnesses. Furthermore, in this case it was not one person's word against another as it was in Roldan; rather, it was the claimant's word against four other witnesses whose evidence corroborated each others'.

77. Mr Leach also referred me to Sandwell & West Birmingham Hospitals NHS Trust v Westwood [2009] UKEAT/0032/09/LA. This provides that gross misconduct raises a mixed question of law and fact; as a matter of law it connotes either deliberate wrongdoing or gross negligence.

78. Mr Leach also referred me to Game Retail Ltd v Laws [2014] UK EAT/0188/14/DA. This merely provides that, when it comes to social media cases, they are likely to be fact sensitive and there are no special rules which apply.

79. Ms Clarke also referred me to the well-known case of Taylor v OCS Group Ltd [2006] EWCA Civ 702, which is authority that defects in the initial hearing are capable of being remedied on appeal and that the tribunal should look at the process as a whole.

Wrongful dismissal (breach of contract)

80. As to the wrongful dismissal complaint, where the respondent claims that it was entitled to terminate the contract without notice, it is for the respondent to prove on the balance of probabilities that the circumstances existed, for example gross misconduct on the part of the claimant, which entitled it to do so.

Conclusions on the issues

81. I make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Unfair dismissal

Social media

82. There is no dispute that the claimant posted the comments on Facebook for which he was dismissed. The comments are, as I have found, unquestionably detrimental towards the respondent, not just the claimant's comments in isolation but those comments in the context of the Facebook conversation as a whole. The matter is in breach of the respondent's policy and, regardless of the existence of the policy or whether the claimant saw that policy, posting comments detrimental to one's employer on a public forum (and I don't believe that this was disputed at the tribunal hearing) is always likely to be misconduct in relation to that employer. The respondent therefore had a genuine and reasonably held belief that this misconduct took place. As the conduct was admitted, there was no need for any further investigation in this respect. The test in Burchell is therefore satisfied.

83. I have not identified any procedural defects which would render this part of the dismissal unfair (subject to my conclusions regarding JK below).

84. In terms of the reasonableness of the dismissal, the claimant has submitted that the fact that he maintains that he was unaware of the respondent's policy should have been taken into account in deciding whether or not to dismiss him. However, the policy was posted on the respondent's noticeboards and it is incumbent upon the claimant to read and take note of those policies; the policy in question is very short and does not involve wading through large amounts of details for an individual to familiarise himself with it. If the claimant did not read it, that was his own lookout. Furthermore, even if there had been no such policy, I consider that it ought to be obvious to an individual that posting detrimental comments in relation to one's employer on a public forum would amount to misconduct; indeed, the claimant admitted in evidence that one doesn't need a policy to know that posting such comments on a public forum is misconduct.

85. Furthermore, contrary to Mr Leach's submissions, comments of this nature are no light matter. As noted, anyone with an interest in the respondent (including its customers, who might be tempted to move their business elsewhere, future customers, who might be tempted not to give the respondent their business after all, employees, who might be tempted to leave, prospective employees, who might be put off joining, and the respondent's competition, which may as a result learn of potential weaknesses about the respondent) may be impacted upon by such public postings. It is a serious matter.

86. Furthermore, the claimant's attitude did not give the respondent confidence that this would not be done again. Notwithstanding that the claimant had subsequently removed the comments from Facebook, he was obstructive in the investigatory meeting in relation to this issue, repeatedly replying "no comment" to reasonable questions put by Mr Robinson; furthermore, as set out in my findings of fact above, whilst he eventually admitted that in hindsight he shouldn't have done it, this was a grudging admittance, made in conjunction with suggestions that he should have been trained, and following his having been able to take advice from his trade union representative in a break, all of which reasonably caused Mr Coonan to conclude that the claimant was not genuinely remorseful. He also suggested that he was naive about social media, which Mr Coonan, again reasonably, did not accept in the modern world.

87. All these reasons would lead me to conclude that the decision to consider the claimant's actions in this respect to be gross misconduct and to dismiss the claimant summarily for them was within the reasonable range of responses and therefore not unfair, but for one thing; that is the issue of disparate treatment.

88. I accept that the circumstances of SQ, SH and GB were not "truly parallel" or indeed parallel at all to those of the claimant: SQ had not made detrimental remarks; SH was in his notice period and was about to leave the respondent; and GB was long-term sick. However, JK remained an employee of the respondent, he had made derogatory comments on that forum and the

remarks which he made are, on their face, at least as critical of the respondent as the claimant's posts. However, Mr Robinson chose not to investigate him (whilst I am not suggesting that Mr Robinson was not genuine in this belief, I do not accept that it was reasonable for him to conclude, as he maintained in evidence, that JK's comments were light-hearted, without at least investigating further; on the face of them, they seem to be at least as detrimental as the claimant's comments). I am very mindful of the limited scope for cases of disparate treatment as set out in Hadjioannou; however, I consider that, on these facts, the case of JK was "truly parallel" to that of the claimant. Therefore, I consider that the decision not to investigate JK and not to apply the same investigation and, potentially, disciplinary process to him renders the dismissal of the claimant for the Facebook charges unfair.

23 March 2018

89. I turn now to the incident of 23 March 2018.

90. As to the allegation of failing to follow a reasonable instruction, there is essentially a conflict of evidence as to what happened and whether the instruction was given by Mr Saxby to the claimant on 22 March 2018. There is more than enough evidence for Mr Coonan to have reasonably taken the view that such an instruction was given. He was entirely entitled to prefer the evidence of the four witnesses who confirmed that Mr Saxby did give an instruction not to use the damaged trailer over the evidence of the claimant. His belief was genuine and reasonable.

91. Mr Leach has suggested at this hearing that it would have been in the interests of these four individuals, who are in the same department, to suggest that an instruction not to use the damaged tanker was given on the basis that, if it had not been given and the claimant had used it, blame might have fallen on them for not having prevented it. Whilst this is a possible motivation, it must be remembered that the claimant, regardless of any instruction, was obliged under the respondent's policies to do checks of his vehicle and not to use the trailer unless he was sure that any damage to it was not unsafe; furthermore, it is a pretty large leap to suggest that four separate employees would deliberately lie in the circumstances. By contrast, it is just as possible that the claimant would not tell the truth in order to avoid the charge of gross misconduct in relation to his behaviour (and that would not require a conspiracy involving four people, which would be inherently more complex and therefore more unlikely). I do not, therefore, think that it was unreasonable for Mr Coonan to prefer their evidence to that of the claimant.

92. In terms of the investigation, it has not been suggested that there was anyone else who should have been interviewed other than those who were. Mr Leach suggested that Mr Coonan should have gone back again to the four individuals to ask them whether they stood by their original statements; however, I do not consider that it was unreasonable for him not to do so; the statements were clear. Furthermore, during the investigation and the disciplinary hearing, the claimant himself was clear that what he says Mr Saxby told him was clear (in other words he did not think that there could have been any confusion or

misunderstanding in the instruction). Rather, there was a straight conflict of evidence and Mr Coonan was entitled to prefer the evidence of the other four witnesses rather than that of the claimant.

93. The Burchell test is therefore satisfied in relation to this part of the charge.

94. As to the second part of this allegation, the claimant was clearly in breach of company procedures by taking trailer T80 out without having done his checks or at least having done them properly. It is particularly significant that, of all people, the claimant knew that trailer T80 had been damaged, as he was the one involved in the accident the previous day which caused the damage, and he had been specifically told not to reload that trailer. Therefore, even without an instruction from Mr Saxby, this part of the misconduct was made out and Mr Coonan had a genuine and reasonably held belief that it had occurred. No further investigation was reasonably required. The Burchell test is therefore satisfied in relation to this part of the charge to.

95. I have not identified any procedural defects in relation to this charge.

96. In terms of sanction, the claimant accepted that, if he had not obeyed the instruction which Mr Saxby said he gave him, what he did amounted to gross misconduct. It is quite clear that, whether it is disobeying the instruction or simply taking the trailer out without having checked that it is definitely safe to do so, that amounts to gross misconduct; the potential consequences of driving a trailer full of fuel where damage to the trailer has not been checked speak for themselves.

97. Furthermore, the claimant did not show any remorse for having taken the action he did. (Even if he had not been given the instruction, there was still no remorse for taking the trailer without having checked whether it was safe enough to do so; the claimant's attitude was to try and justify his actions by suggesting that, variously, the keys to T80 were still there, there was no VOR sticker and there was nothing in in his instructions for the day about which trailer he should use.)

98. Furthermore, in these circumstances, I find it was entirely reasonable for Mr Coonan to look at the claimant's long service and level of experience and to conclude that that exacerbates the misconduct which he committed because the claimant should have known better; that analysis is entirely reasonable.

99. The decision to dismiss, therefore, both for a failure to follow a reasonable instruction and for taking the trailer out without having properly followed the procedures to check that it was safe to do so, was therefore well within the reasonable range of responses. The dismissal of the claimant was not, therefore, unfair, and the complaint of unfair dismissal therefore fails.

ACAS Code/Polkey/contributory conduct

100. In the light of the decision above, it is not strictly necessary to consider these issues. However, for completeness' sake, I do so.

101. I have not identified any unreasonable failure to follow the ACAS Code. Furthermore, I have not identified any procedural flaws in the dismissal and therefore the issues regarding Polkey do not arise.

102. As to contributory conduct, I find that the conduct in failing to follow a reasonable instruction and not following company procedures in relation to the 23 March 2018 incident did, on the balance of probabilities, take place, for the same reasons as Mr Coonan had a reasonable belief that it took place. Having found that it took place, I turned to the level of contribution. I find that the claimant's dismissal was because of this conduct; I further find that, even if the social media charges had not been brought and those events had not happened, the respondent would still have dismissed for the 23 March 2018 incident; and that the claimant contributed entirely towards that. Therefore, had the dismissal been unfair, I would have made a reduction of 100% in both the basic and compensatory awards for unfair dismissal.

Wrongful dismissal

103. As per the paragraph above, I have found that the conduct on 23 March 2018 for which the claimant was dismissed did take place and was of such a serious nature as to amount to gross misconduct. The respondent was therefore entitled to dismiss the claimant without notice. There was, therefore, no breach of contract by the respondent. The claimant's breach of contract complaint therefore fails.

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Employment Judge Baty

Dated: 9 July 2019

Judgment and Reasons sent to the parties on:

11 July 2019

For the Tribunal Office