EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121888/2018

Held in Edinburgh on 29, 30 and 31 October 2019

Employment Judge A Kemp

Mr Daryl Robertson	**Claimant** **Represented by** **Ms L Neil** **Solicitor**
Sainsburys Supermarkets Limited	**Respondent** **Represented by:** **Ms A Stobart** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was not unfairly dismissed by the respondent and the Claim is dismissed

REASONS

E.T. Z4 (WR)

Introduction

1. The claimant pursued a claim of unfair dismissal. It was defended by the respondent. Dismissal was admitted by the respondent, which argued that it was for the reason of his conduct. The case called for a Final Hearing.

2. There had been previous Preliminary Hearings held in the case, when the claimant was unrepresented and the respondent represented by another advocate, on 21 December 2018, 25 March 2019 and 27 June 2019.

3. Ms Neil who had recently been instructed for the claimant confirmed at the commencement of the hearing that the only claim pursued was for unfair dismissal, and that there was no dispute that the reason for the dismissal was conduct. Ms Stobart who had also recently been instructed appeared for the respondent. I would like to thank both of them for the manner in which they conducted the case and their excellent submissions.

4. In the course of the evidence there was reference to an issue that the claimant had with another member of staff, who was believed to have suffered from autism, although there was no specific evidence as to that. After discussion with the representatives it was agreed that it be appropriate to refer to that person without disclosing his name. The respondent also raised the issue that in some of the documents the names of customers and other details were disclosed, and it was agreed that it was not necessary to refer to those details in this decision. In light of the agreement I do not consider that any formal order is required under Rule 50.

The Issues

5. The issues before the Tribunal were–

    1. Was the claimant's dismissal unfair under section 98(4) of the Employment Rights Act 1996, and in particular:

(a) Had the respondent held the belief that there had been misconduct?
(b) Was that a reasonable belief?
(c) Had there been a reasonable investigation?
(d) Was the penalty in the range of responses open to a reasonable employer?
(e) Was the procedure one that a reasonable employer could have followed?

2. In the event of a finding that the dismissal was unfair, what remedy, should be given to the claimant, and in that regard
(a) what loss was caused by the dismissal,
(b) would there have been a fair dismissal by a different procedure
(c) had the claimant contribute to his dismissal, and
(d) if either or both of (b) and (c) applies should any award be reduced, if so to what extent.

The Evidence

6. The parties had prepared a bundle of documents. Not all of the documents in the bundle were spoken to in evidence. There was added to it of consent a photograph from a further and better particulars document the claimant had earlier provided, and two letters in relation to the complaint he had made regarding another staff member.

7. The Tribunal heard oral evidence from (i) Mr Stuart Hogg, Operations Manager and (ii) Mr Martin Lowe, Store Manager for the respondent (iii) the claimant himself and three witnesses for him (iv) Mr Colin Cramond, an Online Delivery Driver of the respondent (v) Mr Russell Ireland and (vi) Mr Raymond Humphries, both trade union representatives and employees of the respondent

8. During cross examination of the claimant he was asked about the address to which he had gone om 26 January 2018, which was that of his former partner

and the mother of his son, and whether that was his home such that there was a breach of provisions in relation to receipt of benefits. That had the potential to be an allegation of having committed a criminal offence. I informed him that he did not require to answer a question that might incriminate him. He stated that he was happy to answer it and denied the allegation made.

The facts

9. I make the following findings in fact:

10. The claimant is Mr Daryl Robertson.

11. He was employed by the respondent from 15 February 2007 as an Online Delivery Driver.

12. The respondent is Sainsbury's Supermarkets Limited. It is a very large and well known organisation operating supermarkets throughout the United Kingdom. It has nearly 150,000 employees in Great Britain.

13. The claimant's principal role was to drive a delivery van, taking orders which had been placed by customers online to their properties. A delivery plan was organised for each shift setting out details of the customers and deliveries. The plan could be deviated from if the driver was able to make arrangements with customers, whose contact details were provided.

14. The claimant was employed under a contract of employment dated 15 February 2007. It provided for 20 hours of work per week. He was initially employed as a Marshall. The contract was amended on 12 March 2007 by agreement to increase that to 39 hours per week at which point he became an Online Delivery Driver.

15. The respondent had a disciplinary policy in writing, which was available to staff online (it was not produced to the Tribunal).

16. Online delivery drivers such as the claimant worked generally in eight hour shifts. If they finished deliveries earlier than the end of the shift, they could

either return to the supermarket from which they worked and be found other duties, or cease working and would then not be paid for the balance of the shift.

17. The claimant worked at the respondent's store at Cameron Toll, Edinburgh. There were about 40 other online delivery drivers employed at that store. It is the largest store operated by the respondent in Scotland.

18. The claimant had a relationship with a partner, who is also an employee of the respondent. They had a son in 2014. Since then they separated. Both live in the Mayfield area of Edinburgh. The claimant lives with his mother on Crawlees Crescent, His partner and son live on Kippielaw Park.

19. On 19 July 2016 the claimant raised a complaint that he was being bullied, stalked and harassed by another member of staff. He did so shortly after that member of staff complained that he had held him by the lapels in a dispute over his behaviour. His complaint was investigated and upheld by letter dated 31 July 2016, after which the member of staff was moved from the same department as the claimant to another department. Approximately one month later, that member of staff left the respondent's employment. He then moved to Manchester for a period before returning to Edinburgh towards the end of 2017.

20. The respondent issued a document titled "Online Driver's Responsibilities". It was re-issued every six months. Each time it was issued, it would be initialled by the driver concerned. In October 2017 a new such document was issued. It had under the heading "Introduction" the words "No delivery schedule is so important that drivers need to risk injury or death to themselves of members of the public." Under the hearing "What are your (the driver's responsibilities)……..

    - Complete Driver Risk Assessment form & discuss it with your line manager every 6 months. Your Online Manager must print off the completed document and you must sign it (April and October)it must then be retained on your file until the next assessment."

21. Under the heading "Vehicle Use" was stated the following

- "You must not take an Online vehicle to your home at any time
- You should not complete any un-planned stops on the route (i.e diverting off the route for your own purposes), unless it is for the purpose of having your break. This still means breaks cannot be taken at your home address."

22. Under the heading "Compliance" was stated the following

"Failure to abide by the responsibilities, best practices or requirements set out in this document may result in:

- Injury or putting yourself and other members of the public at risk

…….

- Disciplinary actions/process
- Dismissal from your job"

23. The document was signed by the claimant and his manager Margaret McMeechan on 23 October 2017, with the claimant initialling each page.

24. On 5 December 2017 the claimant received a final written warning which was to remain in force for a period of twelve months. It related to an abusive remark he had made to another motorist when on shift. He did not appeal that warning.

25. On 18 January 2018 the claimant drove the van he was working in during his shift to the home of his former partner as he felt unwell, in order to go to the bathroom and obtain medication for a stomach ulcer. He took 47 minutes in doing so.

26. On 26 January 2018 the claimant was working a shift from 4pm to midnight. At about 8pm he received a call from his mother, who was looking after his four year old son at his former partner's house. She told him that the person who had been the subject of his complaint was outside the property, and he heard that his son was upset. He drove to the property in the respondent's van. His

own car was parked at the store. Had he taken his car he would not have been paid for the time he was not on his shift working. He attended at the property and was away from his shift and working for a period of one hour and forty six minutes. He did not speak to any manager before or after leaving to seek permission or retrospective approval for his actions.

27. As a result of information passed to the respondent that the claimant had taken his van to his home address an investigation was commenced by Mr Temmy Mack, the respondent's department manager. He wrote to the claimant on 31 January 2018 to call him to a meeting on 3 February 2018. The allegation was that he had done so on 18 and 26 January 2018, and that his actions had caused a potential food safety risk. A delivery van requires to have its engine running to generate refrigeration, and if that does not occur for over 30 minutes there is a risk that the food quality deteriorates such that its safety is impaired.

28. The claimant attended that meeting alone, and said that he wished a representative to be present for it. The meeting was a brief one. A note of it is a reasonable record of it.

29. The meeting was adjourned to 6 February 2018, as confirmed by letter of the previous day. The claimant appeared without a representative. A note of it is a reasonable record of it. At it the claimant stated that he had been on a shift on 26 January 2018 from 3 – 11pm, and had received a call at about 8pm from his mother who was looking after his son, and was hysterically crying. Another member of staff who had, he claimed, been stalking him in and outside work was outside the house. He said he contacted the department two or three times "but couldn't get through". He had not been aware how long he was at home but knew it was over an hour. The other staff member had reported asked a colleague "what would you do if someone took your kids", and thought that he may have done that to his son.

30. He stated that on 26 January 2018 he had been on a shift from 4pm to 12 midnight. He got a phone call at about 8pm from his mother, his son was hysterically crying. His (the claimant's) mother did not look after his son much, and she was upset as the staff member who had been staling him was outside

the house. He panicked about it, and took the van. He needed to get home and contact his partner to come home as he was working. He contacted the department two or three times but could not get through. He did not call the shop (the store itself). He was not aware how long he had been there and did not try and call the shop again. He added that the staff member had said to another colleague "what would you do if someone took your kids", and he "panicked that he may have done that".

31. He said that on18 January 2018 he was ill with sickness and diarrhoea, he had a stomach ulcer and went to get tablets for that. He had not called the store to report that. He raised a concern over completion of risk assessments. He said that he had been told that he could go home on a run. When he was referred to the drivers responsibility document he said that "the rules need to be changed because we don't have the canteen or the toilet for breaks".

32. The meeting was adjourned again until 9 February 2018 on which date the claimant appeared with his union representative Mr Russell Ireland. A note of the meeting is a reasonably accurate record of it. During the meeting the claimant accepted that he had signed the online drivers responsibilities document and had done so every six months but said that he had not been "fully aware" when doing so. There was he said pressure from team leaders to sign it.

33. On 12 February 2018 the claimant commenced a period of sickness, and was absent from work thereafter.

34. Mr Mack obtained records of the location of the van driven by the claimant, from a tracking system called Isotrak. That established that the van had been at the claimant's home address for 47 minutes during his shift on 18 January 2018, and for an hour and 46 minutes during his shift on 26 January 2018. Mr Mack sought advice from occupational health advisers for the respondent, Axa PPP Healthcare, and received a report dated 22 May 2018 which stated that the claimant was unfit for work, but fit to attend any meeting at work. He passed the information he had gathered to Mr Stuart Hogg, Operations

Manager, who was at the level of those who had authority to dismiss an employee.

35. On 18 July 2018 Mr Greig MacBride wrote a memorandum, having undertaken a search of Isotrak records for six drivers on 17 or 18 July 2018 at the request of Mr Hogg, that none of those drivers returned to their homes during their working shifts on the day of the search for them. The Isotrak data showed each street on which the van was present, with timings, such that that search required substantial work to check each of the six records for any note of attendance at the driver's home address.

36. Mr Hogg wrote to the claimant on 31 July 2018 to call him to a disciplinary meeting on 3 August 2018. It contained the same allegation as made at the investigation meeting. He attached investigation notes from the meetings held with Mr Mack, the document on online driver responsibilities, and the Isotrak data. The claimant was told that he should be aware that as he had a current final written warning if the allegation was upheld it could result in dismissal. The claimant was also provided with Mr MacBride's memorandum before the disciplinary meeting.

37. The claimant wished his trade union representative to attend the meeting, and it was adjourned to 13 August 2018, confirmed by letter dated 8 August 2018.

38. The claimant attended that meeting with his representative Mr Russell Ireland. Mr Hogg was present, with Jacqueline Phillips as note taker. Her handwritten notes are a reasonable record of the meeting.

39. At the meeting the claimant accepted that his van had been present at his home address on the dates and for the periods set out above. He gave as explanations that for 18 January 2018 he had felt ill, with sickness and diarrhoea, and had gone to his home to obtain medication, and that for 26 January 2018 he had received a call from his mother than another then employee, against whom he had earlier raised a grievance, was outside the property and that the claimant's son was hysterical. He said that he would have taken his car, which was at the supermarket he worked from and which he went

past to go to his home, but “could not afford to lose money”. He said that he had tried to phone the online department. He had finished the deliveries that were required in his shift, and that “had he not needed the money he would have dropped van off and picked up car.”

40. He added that he had logged out of Isotrak, and was told that the tracking function continued to operate. He added that he had verbal agreement with a previous HR Manager Fiona Carlotti, and a manager Paul Lovie. The claimant alleged that he had verbal agreement to go home “as long as it does not interfere with deliveries”.

41. Mr Ireland asked him about stalking by the other employee, and the claimant stated that it had caused him a lot of stress. The claimant alleged that all drivers had taken the van they used to their home on more than one occasion. When asked if he had anything to add, he said in relation to the incident on 26 January 2018 that he did not trust his mother with his son.

42. By the time of the meeting Ms Carlotti had left the employment of the respondent about three years previously, and Mr Lovie had done so about a year previously.

43. If a call is made to the online department or store, there is a member of staff available to receive it, and to pass it on to a manager who is on duty when the store is open to the public, which is from 7am to 10pm.

44. Mr Hogg accepted the explanation for the incident on 18 January 2018, although considered that the respondent ought to have been informed of what had happened, and accepted that on the incident on 26 January 2018 no food remained to be delivered such that no issue of food safety arose. Mr Hogg decided that the claimant would be dismissed on notice, of eleven weeks in light of his service. He confirmed that at the meeting and then completed a form titled “Decision Making Summary”. He stated that the claimant was in the wrong, had defrauded the company by going home with the van “instead of collecting his car, as the claimant admitted that he could have”, the absence of any written evidence of approval from managers, the terms of the

responsibilities document which prohibited taking the van home, and the lack of remorse shown, together with what was described as being aggressive throughout.

45. The dismissal was confirmed by letter dated 13 August 2018. Notice was given, but the claimant did not return to work as he remained off work through illness.

46. The claimant appealed by letter dated 17 August 2018, which did not set out the grounds for doing so. The claimant was invited to an appeal meeting before David Bainbridge the Store Manager by letter dated 20 August 2018. The date of the meeting was re-arranged so that the claimant could be represented, and Mr Bainbridge was then on holiday such that the appeal was heard by his colleague, Mr Martin Lowe. That was confirmed by letter dated 23 August 2018, with the hearing then arranged for 3 September 2018.

47. On and around 29 August 2018 the claimant sent text messages to other online delivery drivers employed by the respondent asking them if they had ever gone home in the van. There were replies from five such drivers that indicated that they had done, such as “when I’ve been near by or had time I’ve [gone] home”. All confirmed that they had not been investigated for that.

48. The appeal meeting took place before Mr Lowe on that date, and the claimant was accompanied by Mr Raymond Humphries. A written note of the meeting taken by Ms Phillips is a reasonable record of it.

49. Mr Lowe had received the documentation before Mr Hogg, together with the minute of the meeting, summary of decision document, and letter of dismissal. He gave the claimant an opportunity to set out what his appeal was based upon, and to argue why the decision to dismiss him was wrong. The claimant made comments about having had verbal agreement, the harassment he had suffered, and the incident on 26 January 2018. He said that by the time he arrived the person referred to as having stalked him was not there. Mr Lowe proposed an adjournment so that the claimant could confer with his union representative and set out further what his grounds for appeal were, as he was concerned that that was not being done. After that adjournment further

representations were made including that the claimant did not believe that he had been fairly treated.

50. The claimant did not provide Mr Lowe with the text messages from other drivers, or details of who might give evidence to support his assertion of other drivers acting as he did.

51. Mr Lowe concluded that the original decision to dismiss was fair, and wrote to the claimant on 9 November 2018 to inform him that the decision to dismiss him was upheld.

52. The claimant was 33 years of age at the date of the dismissal. He had a gross weekly pay from the respondent of £366.68 per week, together with 2% employer contribution to pension. His net pay was £307.81 per week.

53. The claimant has not worked since the dismissal. He has been certified as unfit by his general practitioner, and assessed independently by the Benefits Agency. He has been in receipt of Universal Credit, and continues to do so, at the rate of £73.34 per week.

Respondent's submissions

54. The following is a basic summary of Ms Stobart's submission. She referred to section 98(4) of the 1996 Act. She noted that there had been a final written warning on 5 December 2017 which was for twelve months and live both at the time of the incidents and disciplinary hearing. The claimant had signed the document as to driver's responsibilities, and she did not accept his later evidence to the contrary. The claimant had tried to argue that he was not returning home but the address had been where medication was kept, it was used in correspondence including his appeal and the evidence pointed to that being his home.

55. The respondent did not routinely check the whereabouts of staff, but acted on any information given if the responsibilities were breached. The text messages

the claimant later produced referred to toilet breaks, with one driver keeping the engine running.

56. The claimant's evidence before Mr Hogg was of a conscious decision to take his van so as not to lose money. The suggestion that all drivers took the van home was subject to a spot check, which was reasonable in light of it being labour intensive work to carry out. It was not proportionate or reasonable to do more. There was nothing in the argument about delay in carrying out the spot check. The claimant had been off sick at the time. The investigation had been thorough.

57. On 26 January 2018 when the claimant's mother had called his son had not been hysterical. Mr Hogg had understood that the claimant drove past the store to go there. That was not consistent with the Isotrak records, but even if the claimant was correct, he was at the store where his car was. She did not accept the new evidence that he had told another member of staff called Jacqueline.

58. Mr Hogg had weighed up the facts. He accepted the explanation for 18 January 2018 but not that for 26 January 2018 in light of the admission regarding taking the van so as to be paid, and lack of contact with a manager. In cross examination the claimant had been vociferous as to how he had been treated, and what he thought he was owed for being short-changed. No claim is made before the tribunal for unlawful deduction from wages and that did not happen but in any event could not justify a dishonest act in retaliation.

59. Mr Hogg had been entitled to dismiss and the appeal officer had agreed. If that view as held to be wrong, any further investigation or procedure would have led to the same outcome, and a deduction to nil was appropriate. Separately the claimant had caused the dismissal and a deduction of 100% or near to that was appropriate. She accepted that there was an error in the outcome letter referring to food safety, but the position had been understood by the claimant at the time. She confirmed that no issue as to mitigation of loss was pursued.

Claimant's submissions

60. The following is a basic summary of the submission Ms Neil made. She also started by referring to section 98(4). The investigation was not a fair one. There was a delay before the spot check was carried out which was not explained. Two methods of tracking drivers existed and both had not been checked. It could not be assumed that all possible checks had been carried out. There could have been monitoring if it was so important to have two methods of tracking on a vehicle. The claimant had not been asked to provide evidence of the stalking or his medical condition.

61. The respondent did not have a sufficient reason for the dismissal. There was evidence of managers accepting or turning a blind eye to drivers taking their van home. The responsibilities document had not been signed by the claimant. In any event it had a provision that no schedule was so important as to override safety. It had suited the respondent not to allow Mr Lovie to attend the investigatory meeting as a companion for the claimant.

62. She referred to the case of ***Burchell. (***referred to below). The claimant had gone home as there was an issue with his child being at risk. The claimant had been subject to stalking, but the matter was regarded as minor by Mr Hogg. The claimant had not known he was alleged to have been fraudulent. Matters were not fully investigated, or investigated in a timely manner. The claimant had raised that other drivers had taken their vans home. The claimant had done so previously himself. His van was tracked. He had been entitled to act as he had, and there was a difference where an employee acted consistently with his reasonable belief that what he did was not misconduct, such as not to require remorse.

63. She referred also to ***CRO Ports London Ltd v Wiltshire UKEAT/0344/14, Post Office v Foley, Small*** (referred to below, ***Secretary of State v Lown UKEAT/0082/15, Byrne v BOC Ltd EAT231/90***, a Tribunal decision ***MacKie v AWE plc 25 March 2015,*** and to ***Coyne*** (referred to below).

64. She noted that the claimant had not been given the disciplinary procedure, and argued that there were flaw in the investigation. She argued that dismissal had

not been inevitable. No reasonable employer would have dismissed the claimant. No reasonable employer would have regarded the claimant's conduct on 26 January 2018 as misconduct in all the circumstances. Mr Hogg had lacked experience in matters relating to online delivery drivers.

65. She sought the remedy of compensation and referred to the Schedule of Loss which had been produced.

The law

(i) The reason

66. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act").

67. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Conduct is a potentially fair reason for dismissal.

(ii) Fairness

68. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> "depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

69. That section was examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was

consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

70. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

(i) Did the respondent have in fact a belief as to conduct?
(ii) Was that belief reasonable?
(iii) Was it based on a reasonable investigation?

71. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
> in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
> the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

72. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct:

> "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

73. The focus is on the evidence before the employer at the time of the decision to dismiss, rather than on the evidence before the Tribunal. In ***London Ambulance Service v Small [2009] IRLR 563*** Lord Justice Mummery in the Court of Appeal said this;

> "It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

74. The band of reasonable responses has also been held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure. Where there is an admission by the claimant that may affect the investigation that may be required - ***Boys and Girls Welfare Society v McDonald [1996] IRLR 129.*** In ***John Lewis plc v Coyne [2001] IRLR 139*** the EAT added that:

> "the necessary investigation into the seriousness of any such conduct must be fairly carried out so that any decision to dismiss for misconduct can be seen to be fair and reasonable."

75. The position of those who have a current final written warning was set out in ***Wincanton Group plc v Stone [2013] IRLR 178***, where at paragraph 37(6) the then President of the EAT stated:

> "A Tribunal must always remember that it is the employer's act that is to be considered in light of s. 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with

dismissal, and it is likely to be by way of exception that that will not occur."

76. Where there is an argument as to disparity of treatment, which is at least similar to the argument maintained by the claimant, the allegedly similar situations must truly be similar (***Hadjioannou v Coral Casinos Ltd [1981] IRLR 352,*** heard in the EAT) . In the later case of ***Paul v East Surrey District Health Authority [1995] IRLR 305*** the guidance given in ***Hadjioannou*** was specifically endorsed. There the employee, a charge nurse at a hospital for mentally disturbed patients, was dismissed after drinking a quantity of whisky while on duty and becoming abusive to other members of staff. Mr Paul pursued an internal appeal against his dismissal, alleging inter alia that two other staff members had been more leniently treated, one being was his supervisor who had also been drinking on the night in question but had only been reprimanded and given a formal warning. The EAT and Court of Appeal held that the dismissal was fair, as there were disparities between the claimant's situation and that of the other staff members.

77. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

78. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. The following provisions may be relevant:

> "4.3(4) "Employers should carry out any necessary investigations to establish the facts of the case.
>
> 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification…

79. An appeal is a part of the process for considering the fairness of dismissal – ***West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192*** in which it was held that a failure to permit an employee to exercise a contractual right of appeal was of itself capable of rendering a fair dismissal unfair and that employers must act fairly in relation to the whole of the dismissal procedures***.*** The importance of an appeal in the context of fairness was referred to in ***Taylor v OCS Group [2006] ICR 1602*** in which it was held that a fairly conducted appeal can cure defects in the dismissal such as to render the dismissal fair overall.

(ii) Remedy

80. In the event of a finding of unfair dismissal, the tribunal requires to consider whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116.

81. The tribunal requires also to consider a basic and compensatory award which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. In respect of the latter it may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair.

82. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant. The amount of the compensatory award is determined under section 123 and is “such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer”.

Observations on the evidence

83. I considered that both Mr Hogg and Mr Lowe were credible and reliable witnesses. I accepted their evidence. I considered that both were straightforward in giving their evidence, accepting points put to them where that was appropriate. I considered that each looked at matters objectively and independently.

84. For Mr Hogg an important factor was the admission by the claimant that on 26 January 2018 he could have gone to the supermarket where his car was parked and picked that up. Doing that however would have meant that from that point he was not being paid, and by not doing that he was paid for the not inconsiderable time that he was at his house. That of itself is I consider a fact that an employer can regard as misconduct, and that is then sufficient to trigger a fair dismissal.

85. Mr Lowe wished to give the claimant every opportunity to set out his grounds for appeal, and adjourned the hearing specifically for that purpose. His view was that nothing was put forward that caused him to consider the original decision to be unfair. The fact however that he did offer that adjournment I consider does fortify my assessment that he was a credible and reliable witness.

86. The claimant's position in evidence was not always consistent. There were a number of aspects of it that caused me concern as to its credibility and reliability. He gave his evidence in a manner that was not always direct and candid, failing to answer the question asked of him on a number of occasions. I took into account that he had mental health difficulties, including depression and anxiety, but there were a number of matters where there was an inconsistency between his earlier position during the investigation and disciplinary process and his evidence before me.

87. He had been asked at the investigatory interviews about the online drivers responsibilities document, including on 9 February 2018 when his trade union representative was present. He accepted that he had signed it at that meeting. That meeting was less than four months after the form's date. He accepted in

evidence that that was his position but said that after the first preliminary hearing he had realised that he had challenged that version of the form and had not signed it. The first preliminary hearing was on 21 December 2018, and therefore over a year after the date of that document, and over ten months after the investigation meeting. It did not appear to me likely that his recollection was more accurate at that later stage, after his Claim Form had been lodged and after consideration of the Response Form, and the first Preliminary Hearing, than at the investigatory meeting before any decision had been reached.

88. There was also no reference to his changed position in the second or third preliminary hearings. At that stage he was acting for himself. It was at the very least entirely surprising that such a potentially material matter had not been raised by him formally at either of those hearings. As noted above, Ms Neil was only instructed latterly.

89. A second matter that he raised for the first time in his own evidence, which was not put to the respondent's witnesses or referred to in any of the investigation, disciplinary or appeal meetings was the claim that he had been at the store after completing his deliveries on 26 January 2018, had received the call from his mother, and then told a General Assistant who was there called Jacqueline that he had to go home, and that she had then told a manager who was on shift but not from the online delivery driver department, called Eric. That was also a material matter, as one issue raised in the earlier formal meetings with him had been whether he had called a manager to advise of the situation that day. When asked about how he came to understand that Jacqueline had told Eric about matters, he was initially somewhat evasive and then said that he did not know. Not to have mentioned such a matter before, and only to do so in evidence, was I considered very unlikely to be reliable evidence. I considered that it was more likely to have been made up to seek to support his position for the purposes of the present claim.

90. The claimant's position on making, or attempting to make, calls to the respondent that evening has also changed. He accepted that there was one number for the department, and a different one for the store, or the shop as it

was called, itself. At the investigation stage his position was that he had "contacted the depot two or three times but couldn't get through". He was asked if he had called the shop, and said no, just the depot. At the disciplinary hearing his position was that he had called both the store and the depot. By the depot was meant the online delivery department. In the Claim Form the claimant's position was that he had "phoned the department and main phone line" without success as the lines were down. In evidence he said that he had phoned the department two or three times, but was unsure about the store. He added that the lines had been down after an incident involving a thief, which had not been raised by him before or put to the respondent's witnesses.

91. He had said in the investigation when asked whether he had called the police "I have in the past but they can't do much about it." In evidence the only occasion he spoke to was when police officers were in the store and he asked their advice about what was happening with the stalking he experienced.

92. He had told Mr Hogg that when his mother had called on 26 January 2018 his son was hysterical, but in evidence said that he was upset, and only became hysterical after he, the claimant, had returned home.

93. He accepted that by the time he arrived at the property the person had left. He did not give any , or at least an adequate, explanation for not seeking to contact a manager if only after the event and to state what had happened and why he had required to leave suddenly in the van.

94. He had told Mr Hogg, but not Mr Mack, that the other employee had made a comment to another member of staff as to how they would feel if someone took their child, but in evidence the claimant alleged that that comment had also been made to him personally.

95. In evidence the claimant alleged that a training manager named Rae had said that a blind eye was turned to taking the van home, but that had not been raised before Mr Hogg or Mr Lowe in the meetings with them, nor was it put to them in cross examination.

96. The pattern that I considered emerged was of the claimant exaggerating his evidence both during the investigation and disciplinary processes, and before me.

97. He had also told Mr Hogg that he would have taken his car to return to the property where his son was, but he could not afford to lose money. Mr Hogg asked about him expecting to be paid, and the notes record that he said "Yes, could not afford to lose wages". In evidence he did not deny saying that but tried to change his position, by saying that his sole motivation was to go back to his son, aged four, to ensure that he was safe. That was not consistent with other evidence he gave during the disciplinary process that he had not been given shifts he should have, and lost money for that, as an apparent explanation for not wishing to lose money on 26 January 2018, and a justification for acting as he had done.

98. The position was perhaps most clear when Mr Hogg asked him where he was until he was at home at 20.22, and he said "doing deliveries – had he not needed the money he would have dropped van off and picked up car."

99. The admissions made were consistently to the effect that he used the van to go to his son because he would remain on shift and be paid for that. His later position in evidence was essentially to the contrary. It appeared to me that the version given to Mr Hogg was more likely to be accurate.

100. In both the investigation and disciplinary interviews when referring to "home" he had been referring to an address at Kippielaw Park. It emerged in his evidence that this was the home of his partner, and the mother of his son, but that they had separated and he had as another home his mother's address at Crawlees Crescent, with both properties being in Mayfield, Edinburgh. He gave evidence that both he and his former partner were in receipt of universal credit, and that he did not stay there permanently as otherwise that would affect the payments. He suggested however that the Kippielaw Park address was not his home.

101. His evidence on that issue was also equivocal. Although he said that the address of his partner was not his home, it was where his son was, it was where he kept some of his medication, it was where he went on both 18 and 26 January 2018, and it was the address he described as home in those meetings. Further, the correspondence about the holding of the disciplinary meeting, and the outcome, was sent to that address at Kipplielaw Park, and it was the address from which he wrote his letter of appeal, albeit that it had the wrong postcode. When asked about that appeal letter and the address it was sent from he said that it was a "typographical error". That was contrary to all the evidence, and not credible.

102. The Isotrak records for 26 January 2018 do not show his vehicle as being at the Cameron Toll store immediately before it records it being at Kippielaw Park (albeit at the next postcode address as he did not park directly outside, but along the same street which is in that different postcode). It records the vehicle as being "en route" for 12 kilometres after a delivery. That is consistent with what he told Mr Hogg as noted above that before going to the address where his son was he was "doing deliveries". It is not however consistent with his evidence that he was by then finished deliveries, was back at the store, and it was there that he received the call from his mother. But even if his evidence on that is accurate, it does not explain either the taking of the van to be paid, rather than his car, or the failure to contact a manager before or after leaving.

103. Overall, I concluded that the claimant's evidence was not reliable, and in material respects not credible.

104. Mr Cramond gave evidence in an entirely straightforward and candid manner, and I accepted it. He said that he himself did not follow the term of the driver's responsibility document as he did go home on occasion when on shift in the van to go to the bathroom, have a drink of water, and then leave. It took him less than five minutes, and was done when in the vicinity. He knew that technically it was wrong to do that, and a breach of the provisions of that document which he signed every six months. He gave evidence that other

drivers he understood to do the same on occasion. He referred to a training course held by someone called Rae, who told those present that a blind eye was turned to doing so.

105. Mr Ireland gave brief evidence on the two meetings he attended. I accepted his evidence.

106. Mr Humphries gave brief evidence in relation to the appeal meeting. I accepted his evidence as far as it went, although he could not recall some of the details.

Discussion

(a) Reason

107. It was not disputed, and I find, that the respondent has established that the reason for the dismissal was conduct.

(b) Reasonableness

108. I will consider this issue firstly in respect of substantive matters, and secondly the procedure.

(i) Fact of Belief

109. I am satisfied that the respondent did in fact hold the belief that the claimant was guilty of misconduct. That was based essentially on the claimant's admission firstly that he had been aware of the responsibilities of the driver, and accepted at that stage that he had signed the document in October 2017, and secondly that he had used the van on 26 January 2018, for a period of one hour 46 minutes, in order to be paid, but had gone home to respond to the issue of a potential stalker. Those are sufficient as a basis for a belief in guilt of misconduct in my opinion.

(iii) Reasonableness of belief

110. I consider that the belief was reasonable. There was no dispute at the time of the disciplinary hearing that the provision in the responsibilities document had been breached on 26 January 2018. The period of time involved is significant, amounting to one hour and forty six minutes– this was not a short stop to go to the bathroom as other drivers spoke to in text messages and as Mr Cramond gave evidence about. The claimant alleges that he spoke to another member of staff about his leaving as he had to go home, and his belief that she then told a manager, but that evidence I cannot accept, for the reasons set out above. Although he claims to have tried to call the respondent, the version of events has changed, and even if he did make two or three attempts, having not had any success he made no attempt later to do so. By the time he had arrived at the property the other person had left. If there was any concern over danger to his son that had ended. There may have been time taken to sort matters out, and ask his former partner to return, but the failure to explain to any manager what he had done and why was a material matter. Whilst he was off work ill from 12 February 2018 the failure to make any contact with the respondent is a factor that Mr Hogg was entitled to consider.

111. There are two further matters that I consider are significant, and were so for Mr Hogg. The first is the admission that he could have used his own car to go to the address, but did not, instead taking the van so that he would not lose money. He gave that explanation three times to Mr Hogg, but sought to depart from it when he came to give evidence. Ms Neil sought valiantly to explain that, suggesting that he panicked, and that there had also been background of a dispute over hours and shift. I consider that the version given to Mr Hogg is most likely to be the right one, but in any event Mr Hogg was fully entitled to take that at face value, and consider that it inferred dishonesty. Whilst the use of the word “fraudulent” may not have been the most apt, that being the word he used when recording his decision in writing, he did believe that there had been dishonesty and that belief was reasonable in the circumstances he faced. It arose from the claimant’s own admissions given to him at the disciplinary

meeting itself. The respondent was not aware of that beforehand, and did not therefore set that out in the allegations that were made.

112. Whilst the letter recording the outcome simply repeated the initial allegation, and did so wrongly firstly in failing to record the opinion as to dishonesty and secondly in retaining an issue of food safety which had not been maintained, Mr Hogg had stated his decision orally, and the error was in the nature of an administrative one in my assessment. It does not of itself render the dismissal unfair.

113. Matters must be judged on the basis of what was before the employer at the time, as Lord Justice Mummery made clear in the quotation referred to above. I consider that Mr Hogg was acting reasonably in coming to the belief that the claimant was guilty of misconduct.

(iv) Reasonableness of investigation

114. I consider that the investigation was one a reasonable employer could have conducted. That is so primarily as the belief arose from the claimant's own admissions. In addition, however, Mr Hogg did cause a spot check to be undertaken of other drivers. What was done was reasonable given the fact that it required manual checking of large amounts of data. It did not support the claimant's position. A point is taken about delay, but the claimant was absent on account of illness, there was occupational health advice taken, and only later was the matter passed to Mr Hogg.

115. The claimant did not provide Mr Hogg with details of who might support him on what had happened with other drivers. It is surprising that he said that he was advised not to give details, but in any event he did not provide such information, and only later obtained some evidence by text messages. When he had them, he did not then provide them to Mr Lowe. Those messages are however very different in character and detail from the situation on 26 January 2018. They refer to having a toilet break, or a break at home, with the former likely to last

about 5 minutes as Mr Cramond spoke to and the latter lasting up to 30 minutes. The time spent by the claimant was over an hour and a quarter longer than that. Mr Cramond also accepted that taking even such a five minute toilet break was wrong.

116. The claimant did not say to Mr Hogg, or to Mr Lowe, that there had been a comment by a training manager earlier that a blind eye was turned to going home for matters such as toilet breaks. In any event, turning a blind eye to short breaks at home is very different in kind to what the claimant did on 26 January 2018.

117. What the claimant did refer to was that other drivers went home with their van, and that he himself had done so on many other occasions with the knowledge of Fiona Carlotti and Paul Lovie. Ms Carlotti had left the business about three years earlier, and Mr Lovie was off work ill before also leaving it in about June 2018. The situation on 26 January 2018 was I consider very different from anything to which a blind eye might have been turned, and at the least Mr Hogg was entitled to consider it in that light. The length of time away from the shift was far greater than any normal break which the claimant himself may have understood he could take properly at home.

118. This is not directly a case where inconsistency is the argument, on which there are two authorities noted above, but the principles I consider are equivalent. Even if the claimant is right and a blind eye was turned by at least some managers to short stops at home being taken, or scheduled breaks being taken at home, that is not of the scale of an absence of over an hour and three quarters in the circumstances set out.

119. That he may have taken quite long periods of time on other such breaks does not amount to evidence of approval when that was not known to the respondent. Those other breaks were not the subject of allegations made in any event.

120. Whilst it would have been possible to interview some of the drivers, and ask about whether they had attended their home addresses with the van when on shift, that was not a step I consider was required of all reasonable employers, given the circumstances. I take into account the size and resources of the respondent as a very large organisation. There is however a limit to what is reasonable. Whilst it was argued that not all that could have been done was, that is not the test.

121. A separate and fundamental difficulty for the claimant is the admissions he made to Mr Hogg. He volunteered that he could have taken his car, but did not as he wished to remain on shift and be paid, was I consider an admission of wrong-doing that Mr Hogg was entitled to take at face value.

122. At first hearing the submission made by Ms Neil as to the inadequacy of the investigation in certain respects was strong. One point that she made was that there was a delay between the investigation meetings in February and the spot check by Mr MacBride in July, and that by then drivers could have known of the issue with the claimant and modified their behaviour. There were however problems with that submission such that I did not accept it. Firstly it was not put to the respondent's witnesses. Secondly it was not a matter raised in evidence with Mr Cramond, one of the online delivery drivers. Thirdly it was not spoken to in evidence by the claimant, and finally it had not been raised by him as an issue either at the disciplinary hearing or appeal, but he accepted that he had had that memorandum from Mr MacBride.

123. She also argued that there should have been further investigation of the allegations of stalking. But Mr Hogg read the file, which had the correspondence relating to that, and the decision to uphold the complaint. The person had then left after a move of departments, and was not an employee. The person who could have put forward more detail about the alleged stalking or comments made by the person or otherwise was the claimant himself. If he thought that more detail would assist, he was able to give it. He chose not to. I do not consider that a reasonable investigation required more than was in fact done.

124. The investigation was not perfect, and other steps may have been taken by other managers, but that is not the test. The test is whether the investigation was one that a reasonable employer could have undertaken in all the circumstances and I have concluded that it was.

(iv) Reasonableness of Penalty

92. I consider that this is the strongest of the arguments for the claimant. He had earlier complained about being stalked by a fellow employee, and his grievance had been upheld. The person had been moved, and had then left the respondent. He had been away from the Edinburgh area thereafter for a considerable time.

93. The claimant some time later and it appears somewhat out of the blue received the call from his mother indicating that that person was outside the house where his son was, being the address of his former partner. I can fully understand that that would cause concern, and a desire to go and check on his wellbeing. That does not however explain the admission of the taking of the van in order to be paid, rather than his own car which was at the store when he would not be paid. I also consider that the claimant did not make reasonable, if any, efforts to seek either prospective or retrospective approval for going to the location he described as “home” in the circumstances described. It was obvious, at the very latest when returning to the store after that absence of one hour forty six minutes, that that was the very least that was required. That the claimant did not do so was a factor that Mr Hogg was fully entitled to take into account as amounting to misconduct.

93. The claimant was on a final written warning. His argument was essentially that he should have been given an extension to that final written warning. I consider however that Mr Hogg was entitled to come to the view that he did. The issue of extending final written warnings was raised by the claimant at the meeting before Mr Hogg, and he considered that he could have a discretion to do so but would exercise that in exceptional circumstances.

There was no written provision on that, either to permit or prohibit it, in the disciplinary procedure which was spoken to in evidence but not produced as a production.

94. I do not however consider that this was a case where extending the final written warning would be the only step a reasonable employer could take. There was a breach of the provisions on taking a van home, exacerbated by the issue of admitting that that was done to secure that he was paid for doing so. Whilst there could have been a good reason to go to the address given a concern over what might happen, there could not be for use of the van rather than his car when there were the admissions as to the financial motivation. That was further exacerbated by the failure to contact a manager to seek any kind of approval for what was on any view a lengthy absence, where the cause of his going, the other person being present, had stopped by the time of his arrival.

95. A separate matter is that at the disciplinary hearing, when Mr Hogg made a comment to the effect that the outcome would be either no action or dismissal, the claimant said that the company did also re-issue final written warnings, and that had happened to him earlier. The potential for re-issue of a final written warning was also discussed at the appeal hearing. For that to be appropriate, as the claimant was in effect arguing, he would require to have committed an act of misconduct, as otherwise the outcome would be no action. It is I consider inherent in his arguments at the time that he accepted that there was a degree of misconduct on his part. In evidence and submission however his position was that he was not. He argued that having been told by managers that a blind eye was turned to taking the van home, and given the circumstances of the stalking, he was justified in acting as he did. His positions are I consider inconsistent, and the position taken originally of acceptance of a degree of fault is more likely to be accurate.

97. Whilst I did consider the cases founded on by Ms Neil, their circumstances were very different to those of the present case. This was not an issue of gross misconduct, but further misconduct during a live, and fairly recent, final

written warning. There may be circumstances where lack of remorse is irrelevant, as on a proper analysis the allegation had not basis in fact. But that is not this case. There may be cases where fairness requires a fuller investigation than was undertaken into the circumstances and extent of mitigation. For the reasons given above, I do not consider that this is such a case, in light of the claimant's admissions.

98. In light of the findings made, I consider that it was at the least open to a reasonable employer to dismiss the claimant. It may have been, on one view, somewhat harsh given the concern over potential stalking, and a need to ensure his son was safe, but that alone is not sufficient to render the decision to consider what was believed to have happened as misconduct, such as to lead to dismissal in light of the recent final written warning, one that no reasonable employer could take.

(v) Appeal

99. I consider that the appeal was conducted both reasonably and fairly. Mr Lowe considered in detail all that the claimant and his union representative said, and adjourned the hearing to allow them to discuss matters as he was concerned that there was too little being put forward to allow him to reconsider the decision.

100. The claimant argued that it was all there in the documentation, and in effect that he did not need to put anything new forward. It was however his appeal, and the failure to be specific as to the grounds for it does mean that there was little for Mr Lowe to act upon. He was not provided with detail of drivers who had gone home, or in what circumstances, or how that might affect the decision. He in effect argued that he had been able to act as he did in the circumstances. Mr Lowe did not agree.

101. Mr Lowe was aware that the outcomes could involve extending the final written warning, if that were thought appropriate. He considered that it was not in the circumstances. I consider that he was entitled to come to that

decision, and that had there been some form of deficiency with Mr Hogg's decision, which I consider there was not, that would in any event have been cured by the appeal such as to render the dismissal fair overall. There was reference to Mr Lowe saying something to the effect that after six months the claimant could be considered for employment at his own store, but that does not mean that the appeal decision was not a reasonable one.

(vi) Procedure

102. In general terms I consider that the procedure followed was one that a reasonable employer could have decided upon, and followed the ACAS Code of Procedure. It was suggested that the Code was breached as the investigation was not adequate. There was however an investigation, conducted by three meetings with the claimant, latterly with his union representative in attendance. The claimant was sent the outcome of that investigation when being called to attend the disciplinary meeting. He accepted that he was given the result of Mr McBride's later investigations as well. There was then a disciplinary meeting at which he was represented by his union official, and an appeal at which he was also represented by a union official.

103. I did not consider that there had been any breach of the Code.

Polkey and contribution

104. In any event, even if I had found that there had been an inadequate investigation I would have concluded that there would have been a fair dismissal had there been a more full investigation. Even taking account of the later evidence from the drivers' texts, and all of the information before the Tribunal, I consider that the actions of the claimant in admitting to taking the van so as not to lose money, and not speaking to any manager before or after the event, having regard also to the length of the time he was away from work and the circumstance that by the time he arrived the person present earlier

had left, he did commit an act of misconduct, and that in light of the final written warning there would have then been a dismissal. The event had occurred less than two months after the final written warning and I consider that dismissal was the obvious penalty that a reasonable employer would impose, having regard to the remarks in ***Wincanton***.

105. Separately, the claimant contributed to the dismissal. His position sought in effect to ignore the final written warning. In light of that final written warning, his actions on 26 January 2018 did amount to misconduct, such that he wholly caused the dismissal by his actions. I would therefore have reduced both the basic and compensatory awards to nil.

Conclusion

106. The claimant was dismissed for the reason of his conduct. That is potentially a fair reason. The claimant was not unfairly dismissed under the terms of section 98(4) of the 1996 ACT.

107. I require therefore to dismiss the Claim.

Date of Judgment: 08 November 2019
Employment Judge: A Kemp
Entered Into the Register: 13 November 2019
And Copied to Parties