# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr P Rees**

**Respondent:** **Vale of Glamorgan Council**

**Heard at:** **Cardiff** **On: 21, 22, 23, and 24 October 2019**

**Before:** **Employment Judge Harfield (sitting alone)**

**Representation:**
Claimant: In Person
Respondent: Mr Pourghazi (Counsel)

# WRITTEN REASONS

These are the written reasons for the judgment delivered orally with reasons on 24 October 2019.

## Introduction and the issues in the case

1. As stated at the start of my oral judgment I wanted to deliver an oral judgment to the parties on the afternoon of the last day of the hearing. In my oral judgment I also explained that due to time limitations I truncated my summary of the background to this case, my findings of fact and summary of the law in order to concentrate on explaining my reasoning for my decision on the key issues identified by the claimant. I explained that if written reasons were requested then those would expand upon the areas I truncated for the purposes of delivering oral judgment.

2. These proceedings began with a claim form presented on 1 August 2018 for unfair dismissal. The claimant worked for the respondent as a refuse driver from 30 August 1995 until his dismissal for alleged gross misconduct on 1 May 2018. The proceedings were resisted by way of a response form filed on 23 August 2018. The issues in the case were clarified by Employment Judge Beard at a

case management preliminary hearing on 15 November 2018 in which the liability issues were identified as:

"(a) What was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 (ERA)? The respondent asserts that it was a reason relating to the claimant's conduct. The respondent must prove it had a genuine belief in misconduct and this was the reason for dismissal.

(b) Did the respondent hold that belief in misconduct on reasonable grounds, following a reasonable investigation? The burden of proof is neutral but it helps to know the challenges to fairness. The claimant identifies:

(i) The initial investigation was conducted in bad faith by Mr Penson who intimidated witnesses by threatening the security of their employment.

(ii) Failure to investigate: a general practice of cleaning cameras adopted by crews; the vehicle reversing protocol was not properly explored and the policy distinguishing between domestic and commercial waste was unclear and not properly investigated and CCTV footage was used unfairly because of the absence of a policy.

(c) Was the dismissal fair or unfair in accordance with Section 98(4)ERA? Was the decision to dismiss within the "band of reasonable responses" for a reasonable employer? The claimant contends that because the conduct alleged was general practice the dismissal was unfair in all the circumstances."

3. The claimant's claim form also identified the following complaints about his dismissal and the procedure followed by the respondent:

(a) One of the claimant's loaders, AT, was made to sign an inaccurate statement;
(b) Prior to the claimant's disciplinary hearing an inaccurate statement was produced which had large contents omitted;
(c) Witnesses were denied to the claimant;
(d) The claimant was refused permission for written statements;
(e) The council refused CCTV footage to the claimant's defence on occasions;
(f) The disciplinary officer, Emma Reed, had a closed mind and did not listen to the claimant or his witnesses;
(g) A witness, Bob Summers, confirmed that AT's statement was incorrect;
(h) AT was approached and told to forget about the claimant to save his own job;
(i) Ms Reed behaved inappropriately during the appeal hearing;

(j) AT had his dismissal overturned on appeal (but the claimant did not) when, according to the claimant, it was found a manager was threatened with disciplinary action if he attended and gave evidence;
(k) At the appeal the respondent continued to use a false statement from AT;
(l) Alan Penson's statement was inaccurate;
(m) The claimant was not allowed to rely upon a voice recording of Pam Toms and AT showing that AT had not said what his statement sets out.

4. The claimant's written closing statement also additionally identified:

(a) HR should have told him he could put written questions to the anonymous witness;
(b) The dynamic risk assessment he undertook driving the refuse vehicle on the day in question was not properly taken into account;
(c) He was denied a crucial witness prior to the disciplinary hearing;
(d) He was not given key witness statements until he entered the disciplinary hearing;
(e) A witness was denied the right to change his statement in relation to alleged unauthorised waste at the location in question.

5. For the respondent I received written witness statements from and heard evidence from Alan Penson (Works Manager), Colin Smith (Operational Manager for Neighbourhood Services), (Pamela Toms (Operational Manager for Public Housing Services and the investigating officer), Emma Reed (Head of Neighbourhood Services and Transport and disciplinary officer), Clare Ford (HR Business Partner), and Reuben Bergman (Head of Human Resources and member of the appeals panel). The respondent also relied on a written witness statement from Robert Thomas (Managing Director and member of the appeals panel). The claimant did not have any questions for Mr Thomas in cross examination and therefore the panel took his statement as read. The claimant initially provided written witness statements for himself, James Swan (a retired refuse driver and union representative) and Michael Cheek (refuse driver). The claimant was also granted witness orders to secure the attendance of Michael Harney (front line supervisor) and Robert (Bob) Summers (refuse driver). During the course of the hearing I directed that written witness statements were to be provided by Mr Harney and Mr Summers which was duly undertaken. I also heard oral evidence from all of the claimant's witnesses.

6. Prior to the hearing the claimant also applied for a witness order for GH, who had provided some information that led to the investigation into the conduct of the claimant and whose identity had previously been unknown to the claimant. The witness order was granted by Employment Judge Jenkins on 14 October 2019. On 15 October 2019 and again on 16 October 2019 GH contacted the tribunal expressing concerns about the witness order and her availability to attend. The

witness was asked to provided medical evidence which, when provided, detailed her medical conditions but did not expressly certify she was unfit to attend tribunal to give evidence. The parties were invited to comment upon a proposal by Employment Judge Davies that GH would not be required to give evidence as her written statements about the incident in question should be sufficient. The claimant indicated he still wished GH to attend so that he could ask questions about alleged inconsistencies between GH's written statements.

7. Prior to the start of the hearing I released GH from attending on the first day so that the relevance of her evidence could be discussed further with the parties on that day. I decided at the time that I was not convinced that the oral evidence GH could give would be directly relevant to the issues I had to decide in the case. The claimant also indicated that if GH was genuinely in distress he would not want to compel her to attend. I said that I would keep the decision under review as the case progressed. I did not, as the case progressed, decide I needed to hear from GH to fairly decide this case.

8. I received a bundle of documents extending to 558 pages. I received a small bundle of additional documents from the respondent. The respondent also provided a cast list. I received written and oral closing comments from both parties. At the start of the hearing I was also given a memory stick containing CCTV footage from the refuse vehicle on the day in question which recorded 4 different angles. I took some time on the morning of the first day to review that CCTV footage. It was also reviewed again in evidence, particularly with the claimant during cross examination. I also listen to the audio footage that I was provided with.

## The relevant legal principles

### The legislation

9. Section 94 ERA gives an employee the right not to be unfairly dismissed by their employer. Section 98 ERA provides, in so far as it is applicable:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--
…
(b) relates to the conduct of the employee…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

10. Under section 98(1)(a) of ERA it is for the employer to show the reason (or the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden of showing the reason is on the respondent.

**Conduct Dismissals**

11. The reason or principal reason for a dismissal is to be derived by considering the factors that operate on the employer's mind so as to cause the employer to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, it was said:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

12. In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303. In particular, the employer must show that the employer believed that the employee was guilty of the conduct. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances.

13. The tribunal must have regard to the guidance set out in the case of Iceland Frozen Foods v Jones [1982] IRLR 439. The starting point should be the wording of section 98(4) of ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct; not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was 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 and another quite reasonably take another view. The function of the tribunal 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 that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

14. The band of reasonable responses test also applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23). As part of the investigation an employer must consider any defences advanced by an employee but there is no fundamental obligation to investigate each line of defence. Whether it is necessary for an employer to carry out a specific line of enquiry will depend on the circumstances as a whole and the investigation must be looked at as a whole when assessing the question of reasonableness (Shrestha v Genesis Housing Association Ltd [2015] IRLR 399). I also reminded myself of the decision of South West Trains v McDonnell [2003] EAT/0052/03/RH and in particular:

> "Whilst not only unfair it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or where arguably unfair. Whilst, of course, an individual component on the facts of a particular case may vitiate the whole process the question which the Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances was the investigation as a whole unfair?"

15. The band of reasonable responses analysis also applies to the assessment of any other procedural or substantive aspects of the decision to dismiss an employee for misconduct reason.

16. Disparity in treatment by an employer between how it deals with employees in comparable situations can be a relevant consideration. However, whilst an employer should consider truly comparable cases of which it is known or ought reasonably to have known, the employer must also consider the case of each employee on its own merits which includes taking into account any mitigating factors. The tribunal should ask itself whether the distinction made by the employer was within the band of reasonable responses open to the employer or so irrational that no reasonable employer could have made it. The tribunal should again not substitute its own views for that of the employer (London Borough of Harrow v Cunningham [1998] IRLR 256 and Walpole v Vauxhall Motors Ltd [1998] EWCA Civ 706 CA).

17. Any defect in disciplinary procedure has to be analysed in the context of what occurred. Where there is a procedural defect, the question that always remains to be answered is did the employer's procedure constitute a fair process? A dismissal may be rendered unfair where there is a defect of such seriousness that the procedure itself was unfair or where the results of defects taken overall were unfair (Fuller v Lloyds Bank plc [1991] IRLR 336.) Procedural defects in the initial stages of a disciplinary process may be remedied on appeal provided that in all the circumstances the later stages of the process (including potentially at appeal stage) are sufficient to cure any deficiencies at the earlier stage; Taylor v OCS Group Ltd [2006] EWCA Civ 702. That case also importantly reminds me ultimately the task for the tribunal as an industrial jury is a broad one. I have to ultimately consider together any procedural issues together with the reason for dismissal. It was said:

> "The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. So for example, where the misconduct which founds the reason for the dismissal is serious, an ET might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the ET might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee."

**Findings of Gross Misconduct**

18. A finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Generally to be gross

misconduct the misconduct should so undermine trust and confidence that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) it is for the tribunal to consider:

(a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct; and

(b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, matters such as the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

**Allegations of bad faith against individuals other than the dismissing officer**

19. It is sometimes alleged in unfair dismissal cases that someone in a managerial position has manipulated a decision made by a disciplinary officer where that disciplinary officer is in ignorance of the manipulation (for example by deliberately setting the employee up in some way). The question arises whether the manipulating manager's reasoning can be attributed to the reasoning of the disciplinary officer who decides to dismiss. At the time I heard this case and provided my oral reasons I was aware of the decision of the Court of Appeal in Royal Mail Group Ltd v Jhuti [2017] EWCA Civ 1632 which held that a tribunal was only obliged to consider the mental processes of the person or persons who were authorised to and did take the decision to dismiss although that may include a manager with some responsibility for the investigation. Since I gave my oral judgment the Supreme Court has handed down its decision at [2019] UKSC 55 where it held that a Tribunal need generally look no further than at the reasons given by the appointed decision maker as:

> ".. most employees will contribute to the decision-maker's inquiry. The employer will advance a reason for the potential dismissal. The employee may well dispute it and may also suggest another reason for the employer's stance. The decision-maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee and, if reaching a decision to do so, will identify the reasons for it."

But that there could be instances where a person in the hierarchy of responsibility above the employee (such as a line manager) invents a reason for dismissal that the decision maker unwittingly adopts. There a Tribunal can attribute to the employer in an unfair dismissal claim that person's state of mind rather than that of the deceived decision-maker.

## Findings of fact

20. I do not need to reach findings of fact on every issue raised by a party. I need only reach findings of fact necessary to decide the issues in the case. In reaching findings of fact I applied the balance of probabilities. References to numbers in square brackets [ ] are references to the page numbers in the bundle.

21. The claimant drove a refuse vehicle collecting domestic waste from private households. He was responsible for the vehicle and his crew of loaders.

22. On 21 February 2018 GH, a resident in the Vale of Glamorgan, but who also worked for the respondent in customer services sent a message to the respondent via a colleague, SC. The information passed on included that vehicle number WU67 CFJ had "just been to Taf Close in Barry. They spent 20 minutes at the bottom of the street loading on all the things we don't take with the refuse – wooden pallets, rolls of carpet etc. They were a refuse truck & they took a kitchen the other day. They are clearly taking back handers or know the people" [545]. The email made its way to Mr Penson who at the time was acting as the claimant's second line manager. The original email exchanges cannot be located but Mr Penson had a copy of the email text that he had kept in a separate file [545].

23. Mr Penson and Mr Harney spoke with two of the loaders who were still in work, AT and CC. The third loader, BW had already left. CC and BW were agency workers and AT was an employee of the respondent. AT and CC denied loading inappropriate material. The claimant found out about the questioning and asked Mr Penson why he had not been questioned himself. Mr Penson stated that as it was a question about collections he asked the loaders in the first instance. Mr Penson stated in his subsequent meeting with Ms Toms [132] that the claimant told him that he "did favours from time to time and suggested that I look at the CCTV footage." He also told Ms Toms that the claimant requested clarification of what the team should and should not pick up. Mr Penson checked the CCTV but could not initially find the footage in question. On 23 February Mr Penson spoke with AT again but then told him he would speak to the whole crew at a later date. On 26 February the claimant and RW collected signatures for a collective grievance which, as I understand it, was resigned and resubmitted at a later date and became the collective grievance at [135-136]. It was handed to KA, a Unison Representative.

24. On 27 February 2018 Mr Penson spoke with AT about an image seen on the CCTV showing AT standing on a wall. He was also given a booklet about

reversing assistant methods. Also on 27 February 2018 Mr Penson emailed GH stating he had initial informal discussions with two of the crew members and would need to review the CCTV and may have to conduct a formal investigation. He asked for GH's detailed statement of the alleged incident and whether she knew the house number or any other instances. He also asked for more information about the earlier incident involving the kitchen. GH responded with further, more precise details of the alleged time of the incident and said: "They spent the majority of the time at the bottom of the street, emptying rubbish from outside house number 26 or 28. Both houses are in a small cul-de-sac and have a shared parking area, so it is hard to work out which of the houses it was. The items that were loaded into the truck was a wooden pallet, some other wood and several large bags of rubbish. A kitchen was also taken from the same place, but this was months ago and I wouldn't be able to provide any information as it was too long ago."

25. Mr Penson then checked the CCTV again and found and viewed the footage. He reached the view that the rear camera had been deliberately covered by someone climbing up the back of the vehicle. In his subsequent statement for the disciplinary investigation signed on 29 March 2018 he gave the view that drivers had been instructed that if the rear camera was not working they should use their mirrors and the reversing assistant[i] procedure operated by loaders to reverse. He asserted that the claimant could be seen reversing into Taf Close with no visibility from the rear camera but also that not one of the three loaders operated the reversing assistant procedure either.

26. Mr Penson showed the CCTV footage to Mr Smith and Ms Ford who called in Miles Punter, Director of Environment and Housing. Ms Reed also became involved. A management decision was made that the team should be suspended whilst a formal investigation took place. The investigation would be passed to Ms Toms as she was outside the department.

27. On 6 March 2018 the claimant was suspended by Ms Reed [114 – 116] in the presence of Mr Smith. The suspension was confirmed in writing. The reasons for suspension are said to be:

> "1. You have breached the Council's Health & Safety rules whilst driving a Council Vehicle.
> 2. You have used a Council Vehicle in order to collect unauthorised waste during Council time.
> 3. You have undertaken fraudulent action of which is likely to bring the authority into disrepute."

28. Ms Toms investigated the claimant and the three loaders. She first checked with the Head of Regulatory Services that overt surveillance fell outside of the

Regulatory of Investigatory Powers Act 2000. The Head of Regulatory Services also confirmed he could see no reason why the CCTV footage could be produced as part of Ms Toms' investigation. Ms Toms then viewed the CCTV footage and met with Mr Penson on 12 March 2018 [132-133]. Thereafter she interviewed CC, the claimant (who was accompanied by a Unison representative), AT and BW on 26 March 2018 taking them through the CCTV footage and asking some questions she had pre-prepared. I have been given the typed draft statements that were then produced together with a typed summary of what is said to be the exchanges that were had with the witnesses in interview prepared by Ms Toms' assistant, CB.

29. In the written statement prepared by Ms Toms, CC [120] stated that the claimant had told him the claimant was having trouble with the rear camera and therefore CC "took a white cloth from the cab, climbed up and tried to uncover it, but there was still something on it." CC denied covering the camera but stated that he did climb back up later to remove an obstruction from the camera when instructed to by the claimant when the claimant said it was then safe to do it. CC confirmed that the claimant had told him that the claimant was unable to turn in Taf Close and therefore the vehicle was reversed out and back in to complete the refuse pickup. CC denied picking up any carpets or pallets or commercial waste. BW also stated that the only things loaded were black bin bags and wheelie bins [138].

30. The question and answers prepared at the time record AT being shown the CCTV and being asked what they did with the commercial waste outside a property with him stating: "We cleared the waste, we cleared everything that was there. We have always been told to take carpets by Simon Chilcott, even if not bagged up and in wheelie bins". It records that when asked if he remembered clearing pallets AT said "yes." [129].

31. The claimant's unsigned draft statement and summary of the interview records the claimant allegedly stating he asked CC to clean the rear camera as the claimant did not think it was clean and that there was an obstruction on it. It records the claimant allegedly stating that on reversing he could see the camera was still obstructed but that he did not need it as he could use his side mirrors. He disputed there was anything placed on the camera. He, according to Ms Toms' record, later told CC that the camera was not very good and to clean it properly. He allegedly said that whether to use the reversing assistant procedure was at the driver's discretion but that he did use it when reversing that day. He denied seeing any inappropriate waste being collected, saying he himself only saw black bags and wheelie bins. He could not remember the loaders asking him any questions about what to take albeit he stated general practice was to order loaders to pick up what was there. He apparently said he would not have told them to throw on pallets [121 – 125a].

32. On 27 March 2018 Ms Toms met with GH and produced an anonymised statement for her [131] which referred to a wooden pallet, piles of wood which were all loose and massive black refuse bin bags which were full and much bigger than the normal black bin bags used for household refuse. GH had initially been reluctant to provide a statement telling Ms Toms she was concerned about repercussions. Ms Toms explained it was needed for the investigation and asked GH to think about it for a few days. GH then agreed to provide an anonymised statement.

33. On 3 April BW and AT signed their statements [138, 137]. AT read through his statement and signed and dated it. He then told Ms Toms that he could not remember attending a reversing assistant course. Ms Toms told him that she had checked his training records and asked him if he wanted to see them. AT said that he did so she went to get the document. On her return to the room AT, without Ms Toms' knowledge recorded their discussion. Ms Toms told him that he could not change his statement as he had already said he was content with it and the contents were also consistent with the contemporaneous notes taken by CB. That afternoon AT emailed Ms Toms expressing concerns that his statement was not an accurate account of what he had said in their earlier meeting. He complained that he had not been allowed to change his statement. He said he did not recall taking a wooden pallet only bits of wood/timber and that he had not admitted to taking commercial waste [138b-c]. Ms Toms did not change AT's statement but his concerns set out in his email were included in his investigation pack.

34. The claimant was also due to meet with Ms Toms and sign his statement that day but telephoned her to state that his union representative was on leave and he did not wish to attend without his representative. He asked to move it to another day and said he wanted his specific union representative to be with him. Ms Toms took advice from Ms Ford who advised that the claimant was not legally entitled to have a representative at that stage so Ms Toms could proceed if she wished to do so. Ms Toms decided she wished to proceed as the claimant was only there to check his statement, make any changes required and sign it and she wanted to keep the investigation moving promptly. She telephoned the claimant and told him this and he declined to attend. Ms Toms therefore proceeded on the basis of his unsigned statement. The claimant was reluctant to attend because of what he had been told about AT's experience; although he did not tell Ms Toms that was the reason.

35. Ms Toms compiled investigation reports for the claimant and the three loaders which she passed to Ms Reed on 5 April 2018. The claimant's is at [139-140] and AT's is at [149 – 151]. Having considered the contemporaneous documents

provided and having heard Ms Toms' evidence I am satisfied on the balance of probabilities that:

(a) She believed on her assessment of the information before her that CC had deliberately covered the rear view camera before the refuse vehicle was reversed out and back into Taf Close;

(b) she believed on her assessment of the information before her that the claimant would have been aware that the rear view camera had been deliberately obstructed;

(c) she believed on her assessment of the information before her that the claimant was aware of large items of waste being collected on the day in question and whilst the rear view camera was obscured;

(d) she believed on her assessment of the information before her that the claimant was in breach of health and safety procedures by not following the reversing assistant procedure when reversing on the day in question and in the circumstances in question, including that the rear view camera was obscured.

36. CC and BW as agency workers had their agency appointments with the respondent terminated. That was a decision taken by Ms Reed. Ms Reed also considered the investigation reports in relation to the claimant and AT and decided that they should be subject to disciplinary proceedings. The claimant was sent a letter inviting him to a hearing [156 – 157] and was given a copy of the investigation report. He was asked to give a list of workplace witnesses to JH in HR. He was notified of his right to be accompanied, the allegations of gross misconduct were set out, the potential sanctions were set out, and he was given a copy of the disciplinary procedure.

37. In advance of the disciplinary hearing the claimant asked for 47 witnesses to be called. JH in HR responded to state that staff would not be entitled to paid time off and suggested it may be possible to obtain written statements. The claimant asked whether this was a change in policy as he had attended disciplinary hearings as a witness previously with full pay and he set out the topics he considered the individuals could comment upon [166]. JH responded [165] to explain that it would be extremely difficult to release the number of witnesses the claimant had requested and stated that letters requesting written statements would be sent to the individuals the claimant had identified and that he could also identify up to 5 key individuals to attend in person on full pay in works time. The claimant asked for Mr Smith, Mr Harney, Mr Cheek, LD and LE. The respondent also wrote to the other individuals asking them to comment in writing on the questions the claimant had identified for the 32 individuals that they had addresses for [158, 170-

171]. Responses were received from a few individuals [172 -175]. The claimant asked if he could also meet individuals in the presence of HR to take statements [164] which was not permitted. He was also told he could not see the interview questions and answers for AT [163] although he had his statement. The claimant's Unison representative asked to see the CCTV footage and he was offered the opportunity to meet with Ms Toms and view the footage [200]. He did not do so.

38. Of the five witnesses requested by the claimant LD and LE did not attend. Mr Cheek and Mr Smith were confirmed as likely to be able to attend the disciplinary hearing, dependent upon Mr Smith's other commitments that day [161 and 162]. He did ultimately attend. Mr Harney did not attend. Mr Smith stated that Mr Harney told him did not want to attend. Mr Harney told the claimant after the event that he was waiting in the room next door but was not called in.

39. The claimant and AT were invited to separate disciplinary hearings albeit they took place on the same day and Ms Reed did not reach her decisions until both hearings had completed. The claimant attended his hearing on 24 April 2018 accompanied by a Unison representative, JR.

40. Notes of the disciplinary hearing are at [200 – 222]. During his evidence in this tribunal hearing the claimant asserted that the disciplinary minutes were not a record of what was said. He had not, however, at any point sought to correct or amend the meeting notes or put forward an alternative version from, for example, his trade union representative. I find, applying the balance of probabilities, that the notes do reflect the gist of what was said.

41. It transpired at the start of the disciplinary hearing that the claimant had not received copies of CC and BW's witness statements appended to the investigation report. He and his union representative were given time to read them together with the written witness responses that had been received. The claimant agreed in evidence he had sufficient time to read them. The CCTV footage was shown with both Ms Toms and the claimant commenting upon it. The claimant was allowed to ask questions of Ms Toms. He explained why he had not attended to sign his statement and was given the opportunity to say what he thought was not covered in the draft statement, such as the fact he had not done a three point turn in Taf Close because of parked cars, and that he had reversed using his mirrors because a silver car was waiting to exit the road. The claimant was permitted to call Mr Cheek and Mr Smith to give witness evidence. BW also gave witness evidence. Mr Smith confirmed that whether to use a reversing assistant was down to a dynamic risk assessment on the day by the driver. It was also confirmed that there was no written policy for use of the CCTV on the refuse vehicles but that drivers had been told that it would be viewed when there was a complaint or incident raised by a customer The claimant was permitted to hand up documents

he wished to rely upon and his union representative summed up the claimant's case.

42. AT's disciplinary hearing took place the same day. The claimant attended as a witness [223 – 230]. At his own hearing AT said that they had loaded black bags, bits of timber and carpet but again denied having lifted a pallet saying it would be too heavy for him to lift bearing in mind he had a history of back injury. He wanted to call Mr Summers to give evidence that he had never said there was a pallet and therefore the hearing was adjourned until 27 April. Mr Summers gave evidence that AT had told Ms Toms that he did not know what a pallet was and when she described one he said he just picked up pieces of wood and not a pallet.

43. On 1 May 2018 Ms Reed deciding to summarily dismiss the claimant and AT. She told the claimant in a meeting and confirmed it in writing [236 -237]. I find as a matter of fact Ms Reed decided to dismiss the claimant based on the information before her because she considered:

(a) that the claimant had breached the council's health and safety rules. This broke down in turn into considering that:

(i) the claimant had requested CC to clean the rear view camera which was positioned at height and put him at serious risk of falling or slipping into the back of the vehicle. She found that the camera did not require cleaning as the CCTV showed it was sufficiently clear so the request was unnecessary.

(ii) the claimant had reversed his vehicle up Taf Close for a long distance without using the reversing assistant procedure. Ms Reed decided that on viewing the CCTV footage CC had not followed the reversing assistant procedure as CC had his back positioned to the vehicle. Ms Reed had, I find, genuine concerns about the implications in terms of the safety of staff, members of the public and public property. She also considered that the claimant should have known to use a reversing assistant in the particular circumstances and monitored it such that if he could not see the reversing assistant he should have stopped driving.

(b) Based on the CCTV evidence, and statements from GH and AT that the claimant had used a council vehicle to collect unauthorised waste during council time comprising of at least wood and carpets. She also considered that in likelihood it also included wooden pallets. Ms Reed considered the request for CC to clean the rear view camera was not a genuine request and instead CC had deliberately covered the camera with a plastic bag or similar item and that the claimant was aware of this. She believed that this was knowingly done for the purpose of collecting the unauthorised waste and that the claimant had been further involved in assisting the loaders with removing the unauthorised waste.

Further, she found that after the unauthorised waste had been collected the claimant had further requested CC to further clean the camera which meant that he removed the plastic bag or similar item. Ms Reed did not accept the claimant's account that there was interference on the camera rather than it being deliberately covered as her opinion was that the camera view was sufficiently clear other than when obstructed by the plastic bag or other item.

(d) that the claimant had undertaken fraudulent activity which was likely to bring the authority into disrepute. She found that as the collection of authorised waste was not authorised by a supervisor or manager and was undertaken during council time it was fraudulent action as it was collected at a loss to the public purse and the public seeing these kind of actions would give a risk of reputational damage. She also referred to the fact the council's attention was drawn to the matter by a complaint received from a member of the public.

(e) she was of the opinion that the explanation given by the claimant was in all likelihood dishonest and he had not acknowledged any wrongdoing on his part. Ms Reed saw that as significant in deciding to apply the sanction of dismissal as she considered that if she gave a final written warning to the claimant she did not consider that she could trust him in the future.

44. AT was dismissed on the basis that, in part, Ms Reed found it likely he had watched CC cover the camera in order to collect unauthorised waste.

45. The claimant was given the right of appeal. He set out his grounds of appeal [242 -243]. The claimant's appeal was acknowledged on 11 May 2018 [245] in which he was told to provide the names and copies of their written witness statements together with documents relied upon by 22 May 2018. On 20 June the respondent wrote to the claimant [256] to remind him that it was his responsibility to make arrangements for witnesses to attend.

46. The claimant also lodged a complaint with the Information Commissioners Office (ICO). The ICO decided [249 – 250] it was likely that the Council had complied with the requirements of the Data Protection Act as whilst the CCTV was not installed to monitor the employees once the Council viewed it they could not reasonably ignore what they saw.

47. The claimant's appeal was heard on 28 June by a panel comprising Mr Bergman, JT and Robert Thomas. The minutes are at [257 – 277]. Ms Reed was also in attendance. A full day was available for the appeal. Mr Swann, a retired trade union representative accompanied the claimant and was permitted to represent him. The claimant asked to rely on additional documents including ACAS guidelines in relation to CCTV footage and he was permitted to do so; the papers being copied for him. The claimant was given the opportunity to say what he wished to do so in support of his appeal. The CCTV footage

was shown with the opportunity for Ms Reed and the claimant to comment upon it. At the appeal the claimant raised the possibility that CC had concealed the camera to hide him smoking (which was visible on the CCTV footage). The claimant also sought to rely upon the audio clip of AT and Ms Toms when he attended to sign his statement but it was refused by the panel on the basis the claimant did not have the consent of the parties involved to use the clip.

48. The appeal panel did not uphold the claimant's appeal [276 – 279]. The appeal panel hearing AT's appeal was comprised on 27 July was comprised of Mr Bergman, PH and GJ. Mr Bergman states, and I accept, that whilst it was felt the allegations were made out, that because AT was a loader following the direction of the claimant as driver it was decided that AT should receive a lesser sanction of a final written warning.

49. At his appeal AT called Mr Harney as a witness and alleged that Mr Penson had threatened Mr Harney with his job if he attended as a witness and that Mr Penson told Mr Harney he could face a disciplinary or lose his job if he attended as a witness. An investigation was carried out during which Mr Harney said that he had he had not felt bullied or intimidated by Mr Penson and that Mr Penson had told him he did not have to attend if he did not want to and that he should watch what he was saying as it could jeopardise Mr Harney's job but that he should at all times be truthful. Mr Penson stated he had just told Mr Harney to be careful about what he might say at the appeal at the behest of others and with the intention of protecting Mr Harney. The complaint about Mr Penson allegedly intimidating witnesses was therefore not upheld and it was not the reason why AT had his sanction reduced to a final written warning. At his appeal AT also alleged that ER pressurised him by telephone on 26 April and in person on 27 April to forget about the claimant and think about saving his own job [240-241]. ER explained that her plea to AT was to come and tell her what happened as she thought he was not telling the truth. I accept it is likely that is what happened.

## Discussion and Conclusions

### The reason for dismissal

50. Having considered all the documents and the evidence I am satisfied that the reason for the dismissal was that Ms Reed considered the claimant was guilty of gross misconduct for the reasons set out in my findings of fact above. I am satisfied that Ms Reed had genuinely believed these were the reasons for dismissal.

### Was Ms Reed's belief based on reasonable grounds having carried out a reasonable investigation?

51. It is important to bear in mind here that I have to primarily look at what information was before Ms Reed at the time she made her decision, together with what she reasonably could have known if a reasonable investigation had been undertaken (in the sense of it

being within the range of reasonable responses). I cannot therefore decide these issues just on the basis of the evidence presented before me afresh at the tribunal hearing.

Health and safety – cleaning the camera

52. I am satisfied that Ms Reed had reasonable grounds for believing there had been a health and safety breach in asking CC to climb the rear of the vehicle to clean the rear view camera. The CCTV shows him climbing it. There is an inevitable risk of falling. The claimant accepted asking CC to clean it. Ms Reed had the CCTV before her and it was reasonably open to her to conclude, based on that CCTV evidence, and therefore based on a reasonable investigation that the camera did not need cleaning. As such there were reasonable grounds for concluding that it was an unnecessary request that likewise unnecessarily placed CC at risk.

53. The claimant's evidence in the disciplinary hearing was that there was interference on the camera and that there was something wrong with the camera such that he needed to ask CC to clean it. However, it was within the range of reasonable responses open to Ms Reed based on the CCTV evidence to conclude that any interference on the rear view camera was mild and did not justify making that request. She had to take the claimant's version of events into account when reaching her decision but Ms Reed was not bound to follow it; she had to reach her own assessment on the evidence. As I have said it was *not* outside the range of a reasonable employer to take a view on the evidence the camera did not need cleaning. Further, I do not consider the respondent needed to investigate it further to investigate how others might clean cameras or the equipment available to do so as the central finding here was that the action did not need to be done.

Health and safety – reversing without using reversing assistant procedure

54. CC confirmed he was acting as reversing assistant and that he knew not to walk backwards. He said that if he was off in his reversing assistant process it was his fault. Mr Smith attended the disciplinary hearing as the claimant's witness where he said that most route risk assessments said to deploy reversing assistants and that the advice was to use reversing assistants but that in some instances it could be unsafe (such as no pavements, rural lanes or lots of parked cars) such that a driver had to undertake a dynamic risk assessment on the day.

55. The claimant said at the disciplinary hearing that he had done the round for two years, knew the obstacles and used his knowledge and mirrors to safely manoeuvre. His evidence at the disciplinary hearing on whether he thought he deployed a reversing assistant was unclear. He said according to the notes at [107] "accused of no banksman but was not required as I was coming back." But he also said "He watched me in. In my opinion mirrors were used safely to get up there." It reads on balance that the claimant was saying he had partially deployed CC as a reversing assistant but also ensured

safety through using his mirrors and his driver experience and he was using his own discretion to decide what was needed.

56. I heard much evidence in this case about people's understanding or beliefs about how many reversing assistants should be used or the degree of training that individuals have had. However, it is important to bear in mind that the finding made by Ms Reed was not about whether or not the claimant should have used more than one reserving assistant, it was that, on my finding of fact, she did not consider that any of the loaders (particularly CC) on a single basis were properly fulfilling the duty of reversing assistant and that the claimant, as driver and responsible for the safety of the vehicle and people and objects around it, had some ownership of that. It did not just rest with CC. The CCTV shows CC actions are, I think I quote the words of Mr Smith, lackadaisical. The footage does not show, for example, the claimant stopping the vehicle to ensure that CC came into view or indeed speaking with CC about how he was acting. I appreciate that the claimant would say that was because he was reverting to use his knowledge, experience and mirrors.

57. Ms Reed said in evidence that she had taken account of the claimant saying his knowledge and experience would ensure safety. She had before her Mr Smith's evidence that a driver could dynamically risk assess. However, she also had before her the CCTV footage and her understanding from the reversing assistant documents that it was a process whereby the loaders via hand signals assist the vehicle in reversing to minimise the risk of incidents and the driver missing anything he may not have seen. She stated looking at the method adopted and the claimant's comments that she had concern about safety for people and property. The claimant had never said he did not understand how a reversing assistant should be safely deployed even though he was non-committal about what documents he had or had not seen. Certainly, he raised concerns we see at [79a and b] but in doing so he emphasised his own knowledge and training in the area that he had.

58. I therefore cannot find it was outside the range of reasonable response for Ms Reed to have concluded that the claimant knew what should have been happening with the deployment of a reversing assistant and failed to ensure it was undertaken properly. It is also a matter in which I do not find that the extent of the respondent's investigation was outside the range of reasonable responses. The evidence was already there that the claimant had discretion. The dispute was whether that had been properly exercised for which Ms Reed had the evidence of the claimant, CC, the guidance notes, the CCTV, Mr Penson and Mr Smith (who was I should add the claimant's witness at the disciplinary hearing).

59. It is important to bear in mind this not a finding the claimant was rightfully dismissed on that one allegation alone. The sanction of dismissal has to be looked at in respect of the collective conclusions as to the claimant's conduct, which I return to later.

Using council vehicle to collect unauthorised waste during council time/ fraudulent activity

60. Ms Reed had before her the statement from GH that there was a wooden pallet, loose piles of wood, and massive black refuse bin bags which GH said she saw being loaded up. CC recollected white and black bags (as well as wheelie bins and black bin bags) but did not recall carpets or pallets. AT admitted in his own disciplinary hearing (which took place before Ms Reed reached her decision in the claimant's case) that he remember black bags, bits of timber and carpet. He was by that time denying (or indeed saying he had never admitted to Ms Toms) that they took a pallet. BW said that they loaded just black bin bags and wheelie bins and did not pick up any wood.

61. The claimant's evidence was that he had asked BW and AT to stack the bags whilst he reversed back down and that when he went to the back of the vehicle there were no large building items, pallets or kitchen units. In his statement taken by Ms Toms (which he later disowned) he had said there were black bins and wheelie bins but he could not speak for what the loaders might have dealt with prior to him being at the back of the vehicle. He did not recall the loaders asking him for advice but said if he had been asked he probably would have told the loaders to clear everything, but not pallets.

62. Ms Reed had before her the CCTV which does appear to show some sizeable objects by the black car, visible when the vehicle first drove down Taf Close and therefore before any stacking was undertaken whilst the vehicle was reversing. The CCTV also showed the obstruction of the rear view camera following CC climbing it. It shows the obstruction being removed about 13 minutes later, along with some attempt to wipe it, after the vehicle has reversed up and back down Taf close and after some sort of loading activity had completed at the back of the vehicle, during which the claimant exited his vehicle and was during some of that time at the back of the vehicle. One interpretation of the CCTV is also that it shows at the end some kind of remaining debris on the ground by the black car.

63. One reasonable interpretation of that CCTV footage is that CC was deliberately obscuring the camera view. One reasonable interpretation of the CCTV footage combined with the complaint from GH and the evidence from AT was that the camera had been deliberately obscured to prevent it recording the loading activity that was being undertaken and that it was of unauthorised waste - as why else obscure it?

64. The claimant had admitted telling CC to clean the camera, on both occasions. He admitted knowing that the camera was obscured – he could see that when the vehicle was reversing but said he did not stop again because of the silver car.

He denied that it was covered deliberately; he said that he could see that the camera was not right.

65. Ms Reed evaluated that evidence. As I have already said above, she concluded that the camera did not need cleaning and that was a conclusion that was in the range a reasonable employer could reach based on the evidence. Following that cleaning it then in fact became obscured. It was therefore within the range of reasonable responses open to an employer to conclude that it is likely that the claimant was involved in the deliberate obscuring of the camera and thereafter to conclude that he was involved in some form of activity that they were seeking to conceal, such as the picking up of unauthorised waste.

66. The claimant denied it as did his colleagues. However, Ms Reed was not bound to follow their account or the claimant's account, simply to weigh it in the balance of the evidence which she did.

67. Was this conclusion reached having followed a reasonable investigation that was itself in the range of reasonable responses? I find that it was. I heard a weight and wealth of evidence as to what is authorised or unauthorised waste or domestic waste or commercial waste and what the practices of individual drivers would be, whether they should call in with queries, whether they could call in with queries, or whether a custom and practice had built up (at least for some drivers) of just take everything/ clear the streets. However, in my view it was within the range of a reasonable investigation for this not to have been explored. If there was a sufficient basis on which to conclude (as I have done) that there was deliberate concealing of some form of loading activity, none of this was really directly relevant. It had never been the claimant's case that he had picked up dubious waste because he thought that was the policy or because he had been told to clear the streets or because he could not call a supervisor on the phone or he was confused as he had not been properly educated about it.

68. Likewise, the claimant's inability to ask or direct questions to GH would not have affected the CCTV evidence, particularly the interpretation that the CCTV could show deliberate concealment of the camera.

69. The claimant candidly conceded in evidence that if he had collected unauthorised waste, and had done so in a way that deliberately sought to conceal what he was doing, that this could be viewed as fraudulent activity. Clearly he denied that he did this.

70. It was within the range of reasonable responses for Ms Reed to conclude, having made her other findings, that this amounted to fraudulent activity which was likely to bring the respondent into disrepute. Ms Reed in her decision letter referred to the complaint having been made by a member of the public. GH did of course

also work for the council but she reported it as an incident she had seen in her domestic life. It therefore not outside the range of reasonable responses of an employer to have described and assessed the conduct in that way. She also explained, which I accept, that there was a risk of disrepute of the public in general being exposed to these sorts of activities.

**Sanction of Dismissal**

71. Taking that all into account did the decision to dismiss fall within the range of reasonable responses? Again, I cannot substitute my own views on what sanction I would have applied. As set out above, Ms Reed had reached the view that the claimant had been involved in the deliberate concealment of collecting unauthorised waste, amongst other things which he had not admitted doing. For Ms Reed it went to the central issue that she felt the respondent could not trust the claimant and therefore that summary dismissal was appropriate. She rejected the alternative of a final written warning. Notwithstanding the claimants long, until then unblemished service, dismissal in these circumstances was in the range of reasonable responses open to this employer.

72. In reaching that view I have taken account of the fact that AT's appeal was overturned and his dismissal was replaced with a final written warning. Here a distinction was drawn by the respondent on the basis that AT had lesser responsibility for the activities that day than the claimant as the driver who was in charge. (It was of course CC not AT who had obstructed the camera). I do not consider that the distinction made by the respondent was outside the band of reasonable responses or so irrational no reasonable employer could have made it. The respondent here considered each case on its merits with their own mitigating features.

73. The claimant also commented during the hearing that others were not dismissed, such as those who were found on CCTV having not been using the correct reversing assistant procedure. However, I do not consider there were other circumstances before me that were on fours with that of the claimant which fundamentally amounted to a finding, in the respondent's eyes, of dishonesty.

**Fairness of the process**

74. I also have to consider the fairness of the procedure followed. This is not a case in which there was no procedure followed. Ms Toms was appointed as investigator from outside the department, a disciplinary hearing was held, and the claimant given the right of appeal. He was told of the allegations he was facing. He was invited to an investigation meeting. He accepted in evidence that he was given the opportunity at the disciplinary hearing and the appeal hearing to put his

case across. He was given the opportunity to have union representation. He was aware that a potential outcome of the process was dismissal.

Mr Penson

75. As against that the claimant makes various allegations. One central allegation is that Mr Penson, who carried out the preliminary investigation stage, was acting in bad faith. It is clear the claimant holds a great deal of animosity towards Mr Penson and he questions, in short terms, Mr Penson's credentials. The claimant considers that Mr Penson deliberately reactivated the investigation once the claimant and RW handed in a collective grievance on the 27 February. He relies on the evidence of AT in that regard and comments that AT states that Mr Penson made to him about the claimant. I do not have the collective grievance of the 27 February in terms of the signature sheet for it. Mr Harney confirmed it had been handed it in that day. I have not heard from AT to confirm the comments were made by Mr Penson which affects the weight that I can give to AT's evidence. Mr Penson denies anything improper saying he was discussing other things with AT such as CCTV footage showing him standing on a wall.

76. The claimant's case, as I understand it, is that his collective grievance later became the document at [134 -137] with a new signature sheet. The grievance does not, however, directly name Mr Penson and Mr Smith's evidence was that it was not about Mr Penson. Furthermore, all that Mr Penson does on the 27 February is email GH asking for further details and says that he is yet to view the CCTV having spoken to the loaders and that he may have to conduct a full investigation. I do not consider that this demonstrates, on the evidence I actually have before me on the balance of probabilities, bad faith or that the disciplinary investigation and action would not have otherwise proceeded.

77. It was also suggested that Mr Penson may have somehow coerced GH into making a complaint and that she was a reluctant complainant. Ms Toms explained in evidence that GH's reluctance was at a later stage when asked to give a statement (which GH did having been given time to think about it by Ms Toms). GH was not known to Mr Penson other than professionally. The email exchanges that have been retrieved do not suggest anything inappropriate and show where Mr Penson, in my finding, got the initial information about rolls of carpet and wooden pallets. I do not find that GH was inappropriately coerced by anyone, including Mr Penson.

78. I do not also have evidence before me on the balance of probabilities of Mr Penson somehow otherwise tainting the disciplinary process or the findings. Once he had reported his initial findings, it was senior management who placed the matter in the hands of Ms Reed and Ms Toms. Mr Penson had limited contact with the process after that. He had some contact with Ms Toms as set

out and none with Ms Reed. He was not a decision maker in the claimant's case and he did not influence the decision making process. I do not consider this to be a Jhuti type exceptional case.

79. The allegation of Mr Penson threatening Mr Harney is not in my view of central relevance to the claimant's case as it related to AT's appeal and happened after the claimant had already been dismissed. Furthermore, Mr Harney himself when it was investigated denied he had been threatened and agreed Mr Penson was giving him advice. This allegation was not the reason why AT was given a reduced sanction on appeal.

80. I also do not find that the claimant's grievances whether individual or collective or that the points he raised in focus group meetings were the reason for or influenced the decision to dismiss the claimant. I find that Ms Reed acted fairly in reaching her decision in assessing the actual evidence that she had before her.

The CCTV evidence

81. I do not consider the claimant's dismissal was rendered unfair through the use of CCTV against him notwithstanding that the respondent had no formal CCTV policy. Mr Smith's evidence, which I accept, was that the CCTV was not installed with the express purpose of monitoring staff but that it could be used to clarify a situation if there was an incident or an accusation or a complaint. The claimant was aware the CCTV was there and indeed invited Mr Penson to look at it. The ICO, following the claimant's complaint, declined to take any action in relation to it. There is nothing inherently here that I can see that goes to the heart of the fairness of the claimant's dismissal in his case, as opposed to a wider concern as to whether the respondent does not or does not have the correct policies in place on matters of CCTV[1].

82. The claimant also complains that he was denied access to the CCTV hearing before his disciplinary hearing. In fact he accepted that he had been given access at the investigatory hearing and the disciplinary hearing and that there had been other offers via the union for it to be viewed but his union had not done so. The claimant's complaint in reality was that he considered he had a fundamental right to be given a copy rather than access to it. The respondent's concern was about the need to redact the footage which was only done in preparation for these proceedings. The only documentary evidence I have of the claimant requesting a copy is after the appeal had concluded [558]. Clearly this was important evidence and the claimant had to be able to prepare his defence. However, what is fair depends upon all the circumstances. In circumstances in which he was given various opportunities to view it, and in

[1] See City and Council of Swansea v Gayle [2013] IRLR 768

which I accept, if he had made other requests to view it they are likely to have been accommodated by the respondent, I do not consider the failure to provide a copy was outside the range of reasonable responses open to this employer.

Challenging GH's evidence

83. On the circumstances if this case I do not consider that the refusal to produce GH for questioning at the disciplinary hearing was outside the range of reasonable responses. The respondent had to undertake a balancing exercise of seeking to maintain her confidentiality if it could whilst safeguarding the claimant's right to a fair hearing. There is no absolute right to cross examine witnesses at disciplinary hearing; each case depends upon its own facts. Here I do not find it unfair in circumstances in which GH's account was not the only evidence as to the alleged unauthorised waste. There was the evidence from the CCTV footage and the other loaders combined with the allegation the claimant had to address of whether the camera had been deliberately concealed.

84. Ms Ford said, and I accept, that if the claimant had asked to send GH anonymous questions this would have been accommodated; as was done for the other witnesses that he wanted. The claimant did not request this but I do not consider that there was an onus on the respondent to offer it up to the claimant, who in particular had trade union representation, without his request.

ATs' request to change his statement

85. This was of course a request that related to AT's own disciplinary process. Ms Tom's evidence was, which I accept, that she did not allow the changes because AT had already said he was happy with the statement and signed it. Instead, she passed his further observations along about the changes that he wanted to make to his evidence as part of his disciplinary pack. I do not find that an unreasonable stance. The information was available and indeed Mr Summers gave evidence about it at AT's hearing.

86. It is also said that Ms Toms had written the pallet in to AT's statement when AT had in fact denied that he had ever loaded a pallet. Mr Summer's evidence is that he recalls this and that Ms Toms kept returning to the question. I do not find it established that Ms Toms was acting improperly or was somehow seeking to improve AT's evidence to his detriment or that of the claimant in turn. AT admitted timber and carpets and in reality it made little difference to the evidence on the unauthorised waste whether there was a pallet. I consider it is likely that there was a communication error which also was not picked up by AT on his first reading of the statement, possibly because he had a limited understanding of what a pallet was.

87. I do not find this tainted the fairness of the claimant's process in any way. Ms Reed was aware of the dispute on the point of the pallet and had, as I have found, sufficient information to proceed on in its absence in any event.

Refusal to postpone the investigatory meeting where the claimant was due to sign his statement

88. I do not consider that Ms Toms' actions were unfair or indicate bias on her part. Her understanding was that the claimant's trade union representative was on holiday (having forgotten originally that he was) and that others were available. The claimant was reticent to attend alone because of the situation with AT's statement but Ms Toms did not know this. The claimant was not entitled to a companion at law and was attending on the face of it a non-controversial appointment to sign a statement or make amendments. It was not unreasonable on Ms Toms' part on the information she had to decline to do this. The fact that she moved appointments for others in other circumstances (for example Mr RW for a family funeral) does not affect my analysis.

89. Furthermore, the claimant was always at liberty to write to the respondent with a different or amended statement or indeed to make oral comments at the disciplinary hearing, which indeed he did and which Ms Reed took into account.

Kitchen cabinets

90. The claimant expressed concern that the complaint GH raised about kitchen cabinets on a previous occasion had been used against him; particularly that Ms Reed may have treated it as a factor to substantiate her conclusions as to the events of the 21 February. I questioned Ms Reed about this. I accept her evidence that she did not take it into account.

The appeal

91. I do not find there was any unfairness in the conduct of the claimant's appeal. He was allowed to raise the matters that he wished and he was listened to. He complains about the conduct of Ms Reed. I find she is quite an animated person and Mr Bergman recalled her making an expression of incredulity in the appeal. But I do not consider that she engaged in conduct that affected the fairness of the appeal or that the appeal panel did not address the appeal in an open minded way. Indeed they were not challenged by the claimant on this. I find their refusal to listen to an audio recording which had been obtained without consent was not unreasonable. In any event the claimant was able to put forward the clarification that AT wished to give.

Other witnesses

92. I do not find that it was unreasonable on the part of the respondent to not release the 47 witnesses that the claimant asked for. The respondent's conduct in offering to write to them for written statements was appropriate and proportionate as was their offer for the claimant to call 5 actual witnesses which was facilitated. I do not find that the claimant was denied Mr Harney's attendance. There is no direct evidence of the claimant being told that. Mr Harney's evidence was that he said that he would, in effect, do it if he had to but he did not want to and so he stayed in the office in case someone did call him. It is easy to see how that frame of mind could, depending on your perspective, be viewed as a willing or an unwilling witness. It is likely that led to a communication breakdown as to Mr Harney's availability and willingness. I accept that could have been better communicated to the claimant as it was the respondent who was responsible for the witness attendance arrangements albeit it is likely in my view that the claimant would not have forced Mr Harney to attend as he clearly does care for the welfare of his colleagues. The claimant also had the opportunity to rectify the position by calling Mr Harney to the appeal but did not do so (Mr Harney attended AT's appeal).

93. I consider it is likely that the claimant was not initially sent the statements of BW and CC with his pack. The email exchange he had with Joanne Hale reinforces this. I do not consider this is likely to have been deliberate concealment rather a mistake which was rectified by Ms Reed at the hearing which the claimant was given time to review. I consider it is likely that if he had asked for more time again or indicated he felt prejudiced that Ms Reed would have dealt with that appropriately. In fact he did not do so as he considered he had enough time. The claimant was also given the three responses to the request for written statements that morning again with time to read them. The claimant was also in receipt of them long before the appeal hearing where he also had the opportunity to raise any points he wished to make.

Other matters

94. When I gave my oral reasons I did not directly address the allegation that Ms Reed had allegedly approached AT and told him to forget about the claimant and save his own job. I also did not directly address the suggestion the claimant made to the appeal panel that CC could have concealed the camera to conceal smoking (which was not an allegation the claimant himself had made when clarifying the issues in these proceedings). They were, however, matters before me in evidence and which formed part of my deliberations. Written reasons are the vehicle for me to provide my most considered justification for the decision reached and I will therefore address these points now for completeness. I do not find as a matter of fact that Ms Reed threatened AT or that she was seeking to

use him to target the claimant or that it shows she had a closed mind as opposed to seeking to persuade him to tell, from her point of view, the truth. The smoking suggestion was not before Ms Reed at the disciplinary hearing. It was raised late at the panel stage and it was not outside the range of reasonable responses for the panel to reject that narrative and uphold Ms Reed's conclusions. For one, it runs contrary to the claimant's own acceptance that he instructed CC to clean the camera.

**In Conclusion**

95. Taking a step back I have to review the process overall as it is not the case that any procedural defect will render the dismissal unfair. I have to look at the process in the round including the opportunities given to the claimant at appeal stage. I also have to consider the procedural issues together with the reason for dismissal. The defects I have found related to Mr Harney and the late provision of some witness material. I do not consider that collectively those defects when considering within the process as a whole, taking into account the reason for dismissal, equity and the substantial merits of the case that this renders the whole process and decision unfair. These are also defects that were remedied or could have been remedied at appeal stage where the claimant was open to make contact with Mr Harney directly and call him.

96. Overall I consider that in all the circumstances the respondent acted within the range of reasonable responses in dismissing the claimant and the dismissal was fair.

_____
Employment Judge Harfield
Dated: 29 January 2020

JUDGMENT SENT TO THE PARTIES ON 30 January 2020

…….
FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS

[i] This was often also referred to as the Banks man procedure, but I use reversing assistant in these written reasons.