EMPLOYMENT TRIBUNALS

Claimant: Mr A J Parsons

Respondent: XPO Supply Chain UK Ltd

Heard at: **Bristol** **On:** **16 and 17 January 2020**

Before: **Employment Judge Midgley**

Representation
Claimant: Mrs Hudson, USDAW
Respondent: Mr J Bromige, Counsel

JUDGMENT

1. The claim of unfair dismissal is well founded and succeeds.

2. The Respondent is Ordered to pay the Claimant the agreed sum of £**14,367.81**, consisting of a basic award of £8,662.50 and a compensatory award of £5,714.32. No deduction was made to the award for Polkey or contributory conduct.

REASONS

The claim

1. By a claim form presented on 27 July 2019, the Claimant, who was born on 8 August 1953, brought a claim of unfair dismissal against the Respondent, his former employer, following his dismissal for gross misconduct on 23 April 2019. The respondent defended the claim on the grounds that the dismissal was fair within the definition in s.98(4) ERA 1996, being within the band of reasonable responses open to a reasonable employer.

The hearing, procedure and evidence

2. The claimant was represented by Mrs Hudson, a Trade Union Official from

USDAW who also represented him during his appeal. The respondent was represented by Mr James Bromige of Counsel.

3. I had the benefit of the following evidence:

   3.1. For the claimant: a witness statement from the claimant

   3.2. For the Respondent witness statements from the following:

      3.2.1. Mr Andrew Powell, who was formerly employed as the Transport Manager at the respondent's Swindon site,

      3.2.2. Mr Ian Stewart, who is the respondent's Regional Transport Manager at the respondent's Swindon site.

   3.3. I also had the benefit of an agreed bundle of documents running to 147 pages. Each of the witnesses gave evidence and answer questions in cross-examination and to questions from the Judge.

The background facts

4. Having heard and considered the written and oral evidence I made the following findings of fact on the balance of probabilities.

The parties

5. The respondent is a logistics company. The claimant is an LGV driver.

6. The claimant had worked in that role since at least October 2007 when his employment transferred from the DHL Excel Supply Chain to the respondent. He had a clean disciplinary record and no concerns had been raised about his performance or conduct prior to the incident in question. The claimant's role with the respondent required him to manoeuvre LGV's trailers around sites. In order to do so he was required to connect and disconnect cabs and trailers. The claimant regularly used tugs and/or tractors to shunt the trailers.

Driver training and practice

7. In light of the potential for accidents (such as a trailer rolling away from a cab or tug), the respondent drafted a Safe System of Work procedure ('SSOW') which set out the procedure to be followed for coupling and uncoupling trailers. The SOSW stated that park-break should be applied before coupling and uncoupling.

8. The respondent also issued regular 'Colleague Briefings', which reminded employees of the correct coupling and uncoupling procedures. In January 2016, the respondent issued a Colleague Briefing headed "Avoiding vehicle rollaway" that advised colleagues to adopt an 'Exit Routine' and to 'set the park brake and visual [sic] check that the park brake is applied.'

9. In August 2018 the respondent issued another Colleague Briefing, headed "Awareness While Moving Trailers Around The Yard Using A Tractor Unit for Shunting Duties" which included the following guidance: "when uncoupling a trailer… Ensure the tractor park brake is applied and then the trailer park

brake is applied."

10. In October 2018 the respondent issued a series of safety focus briefings, including a briefing headed "Rollaways - the silent killer" that reminded colleagues "when exiting or entering the vehicle first task and last task apply the vehicle park brake" [sic] and gave further advice on a routine, advising colleagues to "set part breaks/check they been set."

11. The process of coupling a trailer was as follows: the driver would reverse the tug to the point that the magnetic clips (the fifth wheel pin) would connect the tug to the trailer. The driver should then undertake a tug test, engaging the forward gear and on two occasions seeking to pull tug and trailer forward to ensure that the tug and trailer were connected. Once satisfied that the trailer was safely and securely attached to the tug, the driver should apply the tug's handbrake, which would place the vehicle into neutral gear automatically, exit the tug cab and connect the relevant airlines from the trailer to the cab. The driver should then release the trailer's parking brake, return to the tug cab, disengage the handbrake and drive the tug and trailer forward.

The disciplinary policy

12. The respondent has a disciplinary policy which is known to its employees. The policy identifies the following matters as offences which, if proven, are likely to result in dismissal without notice on the grounds that they amount to gross misconduct: a "serious breach of the respondent's health and safety rules including the failure to… comply with any health and safety rules in force"; and "any act which may endanger persons or property."

13. The claimant accepted that the failure to apply the handbrake in the tug or cab would amount to a breach of the company's health and safety rules and could reasonably be regarded as gross misconduct.

14. The respondent regarded any breach of the SSOW as a very serious breach of health and safety rules. The respondent produced a schedule of disciplinary sanctions in respect of those who had been involved in rollaways, trailer drops or missed pins (all of which incidents the respondent regarded as being of similar severity). That schedule showed that the respondent consistently issued final written warnings or dismissed the employees who were found to be responsible.

15. However, the document did not demonstrate that in the absence of mitigation, such as a heavy workload, distractions or a technical failure contributing to the accident, the respondent had a practice of dismissing. Of the 23 individuals identified, nine were given final written warnings and of those four had no obvious mitigation. It was clear however that the respondent regarded any such incident as a very serious matter meriting a sanction at the higher end of the disciplinary sanctions available.

16. The disciplinary policy also provides (in the usual way) for a staged series of warnings, stating that an employee will not be dismissed for a first breach of discipline except in the case of gross misconduct, when the penalty will be dismissal without notice or payment in lieu of notice. Offences of a serious nature could be addressed at any stage of the disciplinary process. A final

written warning is stated to be appropriate 'in the case of a very serious offence or offences.'

The incident on 11 April 2019.

17. On 11 April 2019 at approximately 17:40 the claimant attempted to collect a trailer from the bay at the respondent's Swindon site. Having coupled the tug and the trailer and successfully conducted the tug test, the claimant exited the tug cab, walked to the trailer, connected the airlines and as he returned to the tug, having spotted three straps hanging down from the trailer curtain, put the straps up so they did not catch on the wing of the trailer and rip the trailer curtain.

18. Having put the straps up, the claimant noticed that the trailer was rolling slowly backwards at or about that time as someone from the recycling service unit shouted a warning of "woah" and "stop." The claimant therefore jumped onto the back of the tug and ripped the red airlines out, which automatically applied the trailer brake. The vehicle came to stop almost simultaneously with the point that it rolled into a handrail and cage in the RSU.

19. Fortunately, no one was injured; there was no damage to the vehicle. The claimant was very shaken by the accident as there were approximately five or six colleagues in the vicinity at the time of the accident. They included Gordon Bonnacoat, Sean Awazi, Menwin DiSilva, Alberto DiCosta and Anthony Lee. It is clear from their descriptions that the claimant took every reasonable action to stop the trailer rolling once he was aware of its movement.

20. The claimant spoke briefly to Anthony Lee, who was to give a statement four days after the incident. He described the claimant, who he reported was in a very shocked and distressed state, saying to him 'I think I forgot to put the handbrake on; I don't know how that happened.' The claimant has no recollection of that conversation, although he does not dispute that it may have occurred.

The Investigation

21. Mr Donald Thompson, the Interim Shift Manager, was called to attend the site. He attended with Grant Woodhams. When he arrived the tug and trailer were in the position at the point of the accident. Mr Thompson conducted a drug and alcohol test on the claimant, which was witnessed by Mr Woodhams (see 105), which the claimant passed at 18:10 and then suspended him pending an investigation.

22. Subsequently, Andrew King attended the scene; it is unclear whether he was present on the site prior to the incident.

23. It appears that Mr Thompson contacted Mr Powell, the Transport Manager. Mr Powell instructed Mr Thompson to take photos of the lorry, the area and the damage. Unfortunately, by the time Mr Thompson returned to the scene of the incident the tug and trailer had been moved. However, he took photos of the tug, the trailer and the damage to the handrail and cage.

24. The claimant was suspended by Mr Thompson and escorted from site. As the claimant was leaving with his possessions, which he had collected, Mr

Thompson asked if he would be prepared to make a statement. The claimant stated that he was in shock he wished to go home. Mr Thompson did not challenge the claimant's decision in that regard and did not insist that he gave a contemporaneous account. Indeed, he did not think that that conduct was of such significance as to record it in the suspension or incident escalation forms which he then completed to which he attached the photographs that he had taken. He noted on the incident escalation form that there was no damage to the tug.

25. Statements were taken on 11 April from Alberto DiCosta, Merwin DeSilva and Sean Awazi.

26. The tug was inspected by an engineer from the manufacturer, Terberg, and was examined the following day in the RSU yard. That examination occurred after the vehicle had been moved by Mr King. It noted "brakes checked/tested 31% pass Chambers checked all good (tested on same bay readjusted/tested. Still 30% with tractor) no movement on slope with handbrake on. Suggest 'handbrake not applied' sensor fitted."

27. On 12 April the claimant was invited to an investigation meeting in relation to the incident which was to take place on 16 April 2019.

28. On 15 April further statements were taken from Mr Dicosta, Mr Disilva and Mr Awazi, and statement was taken from Mr Lee, in the form described above. Mr Thompson and Mr Woodhams produced a statement. Save for Mr Lee's statement none of the statements contained evidence which identified whether the cause of the accident was a failure to comply with the SSOW by the claimant, or a mechanical defect.

The investigation interview

29. The claimant attended an investigation interview on 16 April 2019; he was unrepresented at that point. Mr Greenwood, the Shift Manager, conducted the interview using a pro forma list of questions (a copy of which was contained within the bundle).

30. During the interview the claimant stated that there was nothing out of the ordinary about the shift apart from the fact that it was busy as they were down two shifters. He stated that he had been conducting the duties in question for nearly 9 years. When asked about the circumstances of the accident he described undertaking the tug test and then said, "I applied the handbrake, got out of the tug and attached the lines and electrics". Mr Greenwood asked whether it would be necessary to adjourn to collect the CCTV evidence of the incident, given the claimant described speaking to someone he did not know in an orange jacket.

31. The CCTV was obtained, it showed a view of the incident from a camera which was positioned on the RSU, rather than in the tug cab itself. The CCTV was not available to the tribunal, but the parties accept that it showed a view of the trailer and the rear of the cab. Mr Stewart stated that it did not reveal who had entered the tug cab.

32. The claimant was asked whether he recalled putting the handbrake on before getting out of the tug, he replied "as far as I'm aware yes, this all

happened in a few seconds and added to that the fact that after completing the tug test you apply the handbrake which puts the tug in neutral so I assume I attempted to apply the handbrake otherwise the tug would have gone forward." Mr Greenwood replied, "you may not have applied it then, are you 100% sure you did?" The claimant replied, "no I can't be hundred percent sure, I assumed I did." The claimant stated in evidence that because he could not recall with absolute certainty that he had done it he was not prepared to lie and say that he was 100% certain that he had.

33. Subsequently he was asked what he considered to be the cause of the incident and stated "my mistake or an accident'", later in the interview he was asked how he thought the incident could have been avoided, he replied "hard to say, I double checked the handbrake, but was convinced I put it on. In older days there was a warning system for the handbrake none of which are fitted to ours." He was asked "were you following SSOW or distracted?" He replied, "as far as I was aware, I followed SSOW."

34. He was then asked, "looking back, would you say this was an error on your part?" He replied "yes, a mistake or accident." He was asked whether he wished to add anything and said, "I thought I was following SSOW… I didn't set out not to apply the handbrake, just followed my normal routine, so sorry for it looking back." He went on to say, "I can only say that if I had not attempted to apply the handbrake, it would have still been in drive and gone forward. I do feel I attempted to apply the handbrake."

35. Mr Greenwood accepted that the claimant was remorseful for what had occurred, but he felt the matter was so serious that it merited a disciplinary hearing.

The disciplinary hearing

36. On 16 April 2019 the respondent wrote to the claimant inviting him to a disciplinary hearing on 18 April 2019. In the letter of invitation the respondent enclosed copies of (amongst other matters) the disciplinary policy, the investigation questions, the minutes of the investigation meeting, the investigation summary that was produced, and the vehicle defect report from Terberg and statements from those who had attended the scene of the incident (detailed above).

37. The claimant therefore had precious little time to consider what amounted to extensive documentation prior to attending the disciplinary hearing, and far less to discuss its impact with his trade union representative, Mr Finch, from the USDAW. However, the claimant did not raise any concern about that at the disciplinary hearing itself.

38. The disciplinary hearing was conducted by Mr Powell in the presence of Mr Finch, the claimant and Ms Blower, an HR representative who took a minute. Mr Powell stated that he was interested to identify during the course of the disciplinary whether there was any matter which had led the claimant to be distracted, and except from repeating that it had been a busy day, the claimant did not suggest that there was.

39. When asked about the incident he stated, "I can only assume I attempted to apply the handbrake (thinking about it now)." He went on to say, "I thought

I'd followed procedure, I did the tug test, in my defence I must have attempted to apply the park brake otherwise it would have been in drive and not in neutral." Mr Powell asked which gear it was in, and the claimant said he did not know, as Dom (Thompson) had secured the tug and trailer.

40. Mr Powell read sections from the investigation interview to the claimant. The claimant stated that his account in the investigation that he had applied the handbreak was correct saying, "yes, I couldn't swear on my kids' lives, I always do the tug test, my biggest fear is dropping a trailer. I'm assuming I attempted to apply the handbrake." He was asked again what he thought the cause of the accident was and he replied "simple mistake, we are all human, on my part."

41. He accepted that he saw Anthony Lee after the incident but repeated that he did not remember speaking to him. There was some discussion as to the mechanic's report from Terberg, Mr Powell noting that it suggested there was no mechanical fault. Mr Finch queried whether the test been performed with the trailer attached in the same scenario, and Mr Powell stated he didn't believe so but was not certain, noting that there was a 31% and 30% result on the brakes which was passed and there was no movement on the slope of the brakes on. Mr Parsons stated he couldn't understand how the brakes had produced results of 31% and then 30%. Mr Powell stated during the interview, as he admitted during evidence, that he was not a mechanic and did not understand the effect of the report in that regard.

42. Critically, Mr Finch raised the issue of who had removed the tug and the trailer from the accident site. Mr Powell accepted that he didn't know. Mr Finch stated that if a statement were taken from the person who had moved the tug, it would clarify whether the handbrake was on. Mr Powell stated he assumed it was Mr Woodhams. At that point the claimant stated that Mr Woodhams was not trained, and therefore he believed it must have been Andy King.

43. Mr Powell accepted in cross examination that it was clear to him that Mr King would have been able to give evidence which was highly relevant to the issue of whether the handbrake was engaged at the point that the vehicle began to roll. He also accepted that it was clear that Mr King was the individual who could provide that evidence, but he stated that he simply did not apply his mind at that point to obtaining a statement from Mr King, although the course was open to him.

44. Prior to the meeting concluding, Mr Finch read from a statement that had been pre-prepared. The claimant stated in evidence that he had not been consulted as to the content of that statement, but he did not raise any concern either about its content or about it being read during the hearing. The statement identifies itself as being a statement from Mr Finch in respect of Mr Parson's disciplinary hearing.

45. Of relevance is the following: it states

> "*at some point in our lives we have all thought that we have done something but haven't… We all realise that this incident could have had devastating results should a member of staff had been walking behind the*

trailer at the time…..Shunting is a highly pressurised environment due to peak and site 2 opening, however this does not excuse him from his responsibilities and he is fully understanding that your decision is not a punishment but a wake-up call to slow down, check that the handbrake on the tug/tractor unit is applied and then check again before releasing the handbrake on the trailer."

46. Having explored whether the claimant had received the SSOW briefings, Mr Powell adjourned for approximately 10 minutes before communicating his decision to dismiss the claimant for gross misconduct. The key factors in his decision were the severity of the breach of the SSOW, the fact that the tug's park brake had been assessed as sound, and that breaches of health and safety were categorised as gross misconduct within the disciplinary policy. In determining sanction, he concluded that because the incident could have resulted in a fatality summary dismissal was the only appropriate sanction.

47. On 23 April 2019 Mr Powell wrote to the claimant notifying him of the reasons for his decision. That letter makes no reference to the issue of whether the handbrake had been engaged in the vehicle but states that given the potentially serious consequences of the incident the only available sanction was summary dismissal.

The appeal

48. On 26 April 2019 the claimant wrote a letter of appeal. He raised various points in the appeal the most germane to this hearing are the following: 'who moved the tug after the incident' and 'why a statement not been taken from them'; 'was it possible to see the maintenance records of the tug' and finally, 'inconsistent treatment' in terms of the sanction applied in his case and that of another in which serious injury had been caused, but the driver was not dismissed.

49. The appeal hearing occurred on 7 May 2019 and was conducted by Mr Stewart. The claimant was represented by Mrs Hudson. Prior to meeting Mr Stewart had read the statements of the individuals involved, the mechanic's report from Terberg, and the dismissal letter. He skimmed through the minutes of the investigation and disciplinary hearings. He stated that he understood that his task was to review the decision that had been made by Mr Powell and to identify whether it was a fair one that was open to him in the circumstances, however his focus was on considering the points that the claimant had raised in his letter of appeal.

50. On 4 May 2019 Mr King gave the claimant a statement in which he indicated that he had been asked to move the tug and trailer away from the RSU and that he had "selected forward gear released the trailer parking break and moved the trailer." In that context, it is worthy of note that only Mr King was qualified to move and operate a tug; Mr Woodhams was qualified as an LGV driver but was not tug certified. The other individuals who were present on site were similarly not qualified to move the tug. The claimant provided Mr Stewart with a copy of Mr King's statement at the outset of the appeal hearing.

51. The claimant informed Mr Stewart that the criticism he made of the

investigation included the fact that the respondent had not identified who had moved the trailer after the incident and that Mr Powell had not adjourned the hearing to enable that point to be investigated. In expanding upon the point, the claimant stated that in his view that the importance of Ms King's statement was that it brought into focus whether there were any mechanical faults as the statement clearly identified that the handbrake was applied when he had entered the tug (by inference as Mr King had had to disengaged it before moving). Mr Stuart's response was to suggest that the mechanics might say that the statement was irrelevant. Mrs Hudson insisted that it should be further investigated.

52. During the appeal hearing Mr Parsons stated that he had no idea why the tug had rolled away, but it was clear that the handbrake had been on when he left it. Mr Parsons also identified that there had been another similar incident since 11 April, raising concerns that without an alarm the risk of incidents was increased. He was adamant that there should be consistent treatment with the individual who had been disciplined in respect of an incident which had caused damage and injury and therefore that he should not have been dismissed.

53. Mr Stewart adjourned the hearing for further investigation. On 20 May Mr King was interviewed by Mr Stewart in the presence of an HR apprentice. He was provided with a copy of the statement that he given to Mr Parsons; he confirmed it was his statement and he was then asked whether he could recall whether the tug handbrake was on but said he couldn't remember whether it was on or not, although he added that "as soon as I released the handbrake the trailer would have moved if it wasn't on." He confirmed that the airlines had been reconnected to the tug, and later said he couldn't remember whether the red airline was off when he found the tug. He indicated that he did not recall any problem with the handbrake.

54. On 21 May Mr Stewart reconvened the appeal meeting. Again, the claimant attended with Mrs Hudson. Mr Stewart explained that he had obtained a further statement from Mr King and that he had spoken to Terbueg in relation to technical questions on testing, in particular whether it would have made any difference whether the tug were tested with the trailer connected. He stated that he also asked what could have caused the brakes to fail including air leaks or break fluid leaks, but was told that they were all the sorts of failures that would not resolve themselves and all would have been identified on testing. In his evidence, he accepted that he did not know what the significance or implications of the percentage of efficiencies for the brakes in those reports was, or what the levels indicated, but said that what was important to him was that the vehicle had passed the tests.

55. Mr Stewart stated that he was happy to operate on the basis that the handbrake had been on when Mr King moved the vehicle. Mr Parsons was clear that only three people could have put the handbrake on, himself, Mr King or Mr Woodhams and insisted that Mr Stewart should have obtained a statement from Mr Woodhams. Again, Mr Parsons insisted that he had conducted the tug test and therefore if he had not applied the handbrake the tug would have been in drive. Both he and Ms Hudson insisted that without the identity and actions of the person who connected the airlines being clarified, there would be a significant flaw in the investigation. Mr Parsons

maintained that a mechanical fault must have caused the incident and Mrs Hudson pointed to the fact of the significant changes in the break efficiency shown by the maintenance records recorded that they had increased and decreased over a period of time and, which she and Mr Parsons suggested raised reasonable doubt as to whether a mechanical fault was the cause as Mr Parsons argued.

56. On 29 May, Mr Stewart wrote to the claimant advising him of the outcome of the appeal. In that letter he set out his conclusions on the appeal points, although the letter is silent as to the basis of his decision, save for saying that following further investigation, Mr Stewart upheld the outcome of the disciplinary in hearing. In the course of the letter Mr Stewart indicated that Mr King had not identified any issues with the handbrake, and therefore he concluded that a third party had intervened prior to Mr King entering the tug.

57. In his evidence, Mr Stewart stated that he had concluded that a third party had applied the handbrake after the incident before Mr King released it and in consequence he had concluded that the claimant had failed to apply the handbrake at the time of the incident. That was not reflected in his reasoning in the appeal letter and was not something he gave the claimant an opportunity to comment upon.

58. Mr Stewart spoke to HR in relation to the previous outcomes for similar incidents. He stated that he did not receive the list of outcomes that was contained within the bundle but understood that the available sanctions were dismissal or final written warning.

The Law

59. Having established the above facts, I now apply the law.

60. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996 ("the Act").

61. I have considered section 98(4) of the Act which provides "…. 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".

62. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

63. The compensatory award is dealt with in section 123. Under section 123(1) "the amount of the compensatory award shall be 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".

64. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: "where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

65. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Sheffield Health and Social Care NHS Foundation Trust v Crabtree UKEAT/0331/09; Bowater v North West London Hospitals NHS Trust [2011] IRLR 331 CA; London Borough of Brent v Fuller [2011] ICR 806 CA; Taylor v OCS Group Ltd [2006] ICR 1602 CA; Adeshina v St George's University Hospitals NHS Foundation Trust and Ors EAT [2015] (0293/14) IDS Brief 1027 [Shrestha v Genesis Housing Association Ltd EWCA 2015 – reasonableness of investigation]; Turner v East Midland Trains Ltd [2013] IRLR 107 CA; A v B [2013] IRLR 405 CA; Nelson v BBC (No 2) 1980 ICR 110 CA and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The tribunal directs itself in the light of these cases as follows.

66. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, 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 take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether 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.

67. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral):

    (i) that the employer did believe the employee to have been guilty of misconduct;

    (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and

(iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case.

68. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

69. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd. A sufficiently thorough re-hearing on appeal can cure earlier shortcomings, see Adeshina v St George's University Hospitals NHS Foundation Trust and Ors.

70. Applying the Turner decision, the band of reasonable responses test provides a sufficiently robust, flexible and objective analysis of all aspects of an employer's decision to dismiss to ensure compliance with Article 8 of the European Convention on Human Rights. In addition, this test allows for a heightened standard to be adopted where the consequences are particularly grave, for instance where the decision to dismiss can be said to be career ending. Further, as stated in A v B: "serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serio's us of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."

Conclusion

(i) Did the employer genuinely believe the employee to have been guilty of misconduct?

71. The respondent genuinely believed at the point that it dismissed the claimant that he was guilty of misconduct. That belief arose from the fact of the rollaway incident on 11 April 2019 and was itself a conclusion which fell within a band of reasonable responses.

(ii) Did the employer have reasonable grounds on which to sustain that belief?

72. The respondent had reasonable grounds on which to sustain that belief because (a) the rollaway incident had occurred, (b) such incidents do not normally occur in the absence of error on the part of drivers and (c) the tug in question had been properly serviced in accordance with a maintenance regime and had passed its MOT, (d) during the course of which inspection its brakes had been tested and found to be operating at an appropriate level, albeit with varying efficiency. In addition, (e) the statement from Mr Lee suggested that the cause of the accident may well have been Mr Parson's error, in that he had indicated at the time that it was possible that he had not applied the handbrake; (f) that was a view that Mr Parson repeated at times

during the investigation and disciplinary hearings; and finally, (g) after the incident, the tug in question had been tested and no obvious cause of defect in the handbrake had been identified.

73. The respondent was entitled to regard the matter as one of gross misconduct given the potential risk of death or serious injury as a result of a rollaway, and given that it had established the SSOWs to protect against that risk and had categorized a failure to adhere to the SSOW as a matter of gross misconduct in the disciplinary policy, thereby notifying the workforce of the very serious consequences if they were breached.

(iii) Had the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, carried out as much investigation as was reasonable in the circumstances of the case?

74. This is a far more difficult issue. During the investigation, the claimant clearly stated that he believed that he had applied the handbrake and complied with the SSOW. Insofar as the respondent regarded the evidence from Mr Lee as tantamount to an admission of guilt by the claimant, that view could not be sustained beyond the claimant's interview. During the interview, the claimant was adamant and insisted on several occasions that he had applied the handbrake and complied with the SSOW. It was only after it he was asked whether he was 100% sure that he had, that he indicated that it was possible that he may not have done. However, as the claimant stated in evidence, that could not reasonably be taken as an admission that he had not applied the handbrake, rather the claimant was fairly and reasonably indicating that he could not say with hundred percent certainty that he had done so in circumstances where he was performing a function that he repeated on numerous occasions each day at work over a working career of nine years.

75. Insofar as the respondent considered the Claimant's account that he was not 100% certain that he had applied the handbrake and/or that the cause of the accident was human error to be tantamount to a complete admission of the offence, it was acting outside the band of reasonable responses open to a reasonable employer for the reasons given shortly below. Further, if the respondent formed the view that that admission meant that there was no ongoing duty to investigate to determine the cause of the accident and importantly, whether the handbrake had been applied, that approach was also outside band of reasonable responses. That is because Mr Powell understood that whether or not the handbrake had been applied was critical to the decision of whether or not misconduct occurred, and he understood the claimant's case was that he had applied the handbrake and that if the individual who moved the vehicle after the incident was interviewed, the question of whether the handbrake was applied not would be resolved. As Mr Powell described it, this would provide "clarity." That understand was also present during the investigation; one of the reasons the respondent had sought to obtain the CCTV was to see whether the handbreak had been applied and who had moved the tug. Critically, such clarity might have exonerated the Claimant or at the very least raised a very strong prima facie case that the cause of the rollaway was not human error but a mechanic defect effecting the parking break as the Claimant was arguing.

76. Mr Powell accepted that had he seen the statement from Mr King, he would have concluded that the handbrake had been applied and that would have created enough doubt in his mind for him to determine that gross misconduct had not occurred. During the disciplinary hearing Mr Powell understood that Mr King was the individual who had moved the vehicle and therefore his evidence was critical to that issue. However, for reasons he could not explain, except for to say that he did not turn his mind to it, he chose not to adjourn the hearing to interview Mr King.

77. A reasonable employer therefore would have adjourned the disciplinary hearing in order to obtain relevant evidence from Mr King; the Respondent's failure to take this reasonable investigative step fell outside the band of reasonable responses in failing.

78. Had Mr King been interviewed and produced the statement that he did on 4 May 2019 the claimant would not have been dismissed; that was the clear effect of Mr Powell's evidence - he stated that if he obtained Mr King's statement at the time, he would have a reasonable doubt that misconduct had occurred as alleged and he would not have upheld the allegations or dismissed the claimant.

79. The logical consequence of that evidence is that the statement that was produced by Mr Finch was not regarded by Mr Powell as containing an admission that the claimant had committed the misconduct or, it if it were, it was not viewed as admission of such force and cogency that when viewed in conjunction with the other evidence (such as the statement from Mr Lee) that Mr Powell believed that it resolved the issue of whether the handbrake was on or that he could reasonably conclude that misconduct had occurred. A reasonable employer would not therefore have dismissed on the basis of Mr Finch's statement, whether consider in conjunction with Mr Lee's statement or on its own.

80. Therefore, on the balance of probabilities I find that if Mr King's evidence had been available at the disciplinary, Mr Powell would not have dismissed the claimant.

81. Was the failure to obtain and consider a statement from Mr King remedied at appeal? By the time of the appeal, Mr Parsons had obtained a copy of a statement from Mr King. Regrettably, at the point that the statement was taken nearly 3 weeks had elapsed since the incident in question and Mr King's memory of events was less clear than would otherwise have been the case. However, the statement makes plain that at the point that Mr King entered the vehicle the handbrake was on and he needed to disengage it and put the vehicle into a forward gear to move forward. Mr Stewart accepted in evidence that he concluded from that statement that the handbrake was on and the tug's engine was in neutral at the point that Mr King entered the vehicle.

82. That evidence was clearly consistent with the claimant's account, which he maintained during the disciplinary and appeal hearings, that he had applied the handbrake and complied with the SSOW, although he could not be 100% certain that that was the case. However, he was clearly advancing an argument that if he had failed to engage the handbrake the vehicle would

have remained in a forward gear, because he was certain that he had completed the tug test, and therefore the accident could not have occurred as it did. Mr King's evidence was consistent and supportive of that account in so far as Mr King stated that if the vehicle were left in a forward gear and the handbrake was not on at the point that he disengaged the trailer's parking brake, the tug and the trailer would have rolled away as they did before.

83. Mr Stewart acted within the band of reasonable responses in seeking further information from Mr King and from the Turberg mechanics who had tested the tug. The information that Mr Stewart obtained from Terberg indicated that it was unlikely that there was a mechanical failure that had affected the handbrake. Mr Stewart's evidence was that he asked whether it was possible that there had been some form of intermittent failure that could explain why the handbrake was working at the point that Mr King moved the vehicle and a at the point when it was tested by Terberg the day after the incident, but may have failed on 11 April. Regrettably, he did not make a note of that evidence at the time, nor did he discuss it in detail with the claimant during the appeal hearing.

84. During the course of the appeal hearing Mrs Hudson had raised concerns as to how it was that the efficiency of the brakes could alter significantly, both increasing and decreasing, both over a period of time and in between the two tests conducted on 12 April and whether the fact of the varying consistency could have effected what happened. She clearly pointed to that as a possible cause of the incident in question. In the circumstances where, as Mr Stewart accepted, he was not a mechanical engineer and did not understand the effect or impact of the mechanic's evidence as to the brakes' efficiency, it was acting outside the band of reasonable responses not to seek some guidance or further clarification as to the impact of the breaking level's and what they indicated so as to be able to rule out the argument advanced by Mr Hudson on a reasonable basis.

85. Mr Stewart determined that a third party must have access the tug and applied the handbrake before Mr King entered the cab. The basis for that conclusion was that the red air pipeline had been reconnected prior to Mr King attending the site. In reaching that conclusion, Mr Stewart relied upon the evidence of Mr King which had been obtained nearly 6 weeks after the incident in question in circumstances where he had made no contemporaneous note. He necessarily concluded that Mr King's evidence that the pipe was connected was credible and accepted it. That decision (that the pipe had been reconnected) was not in itself outside the band of reasonable responses.

86. However, Mr Stewart concluded that the third party must also have entered the target and applied the handbrake. That was a scenario that was totally unsupported by the evidence that was then available to him and which he failed in any reasonable way to investigate. In particular during the course of the appeal hearing the claimant had suggested that it was critical that if that were the explanation which Mr Stewart was minded to adopt, the identity of the individual should be clarified and they should be spoken to. In addition, the claimant made the reasonable point that only someone who was qualified to enter the tug could have applied the handbrake. In the circumstances of the case given that Mr Woodham had been with Mr Thompson undertaking the

drug and alcohol testing of the claimant, the only individual who was qualified on site to move the vehicle was Mr King. The evidence did not identify any other individual, and Mr Stewart was therefore acting on a whim entirely of his own in reaching that conclusion in circumstances where it was wholly unsupported by the evidence and he had not conducted the necessary investigation to support it.

87. A reasonable employer would not jump to that conclusion without first conducting a reasonable investigation to support it. The respondent therefore acted outside the band of reasonable responses in that regard.

88. In addition, in reaching a conclusion that he did, Mr Stewart placed significant reliance upon the evidence of the Terberg mechanics. That in itself was not outside the band of reasonable responses, as I have concluded. However, in the circumstances where Mr Stewart accepted that he was not a mechanic or an engineer, and did not understand the significance or effect of the variations in the braking efficiencies, and where (as analysis of the letter of appeal and his witness statement suggest), he did not seek to resolve the issue of whether there could be an intermittent failure unconnected to a mechanical defect, such as the potential effect of movement and consequent heat upon the effectiveness of the braking system, it was all the more important that he engage with the claimant's arguments and did not rule them out on and reasonable basis of the reasonable investigation. Regrettably, that is precisely what he did because he did not seek to investigate whether his hypothesis that a third party had applied the handbrake as well as reconnecting the air pipes was supported by any evidence or was mere conjecture.

89. In the circumstances where he was proposing to dismiss an employee with an unblemished record who had served diligently for nine years, it was outside the band of reasonable responses not to conduct that is necessary investigation.

90. The claimant's dismissal was therefore unfair and the defects of the discipline were not remedied at the appeal. This was not a case where the claimant had accepted, without hesitation or ambiguity, that he had failed to apply the handbrake, which was the misconduct which was the subject of the disciplinary allegations. It was therefore incumbent upon the respondent to conduct a reasonable and thorough investigation into the elements that underlay its belief in misconduct. The respondent cannot therefore, as Mr Bromwich suggested, rely on an argument said to be contained in Turner v East Midlands Trains principle that the degree of investigation that was necessary was minimal given that the claimant had admitted the misconduct in question. I note that the decision of the Court of Appeal in that case does not contain the principle argued for by Mr Bromige, but in any event, accepting that the degree of investigation required of may alter depending on the extent to which the misconduct in question is admitted or disputed (Royal Society for the Protection of Birds v Croucher [1984] ICR 604, EA cited with approval in CRO Ports Ltd v Wilstshire EAT 0344/14) , the claimant had not admitted the misconduct but rather remained consistent in his argument that he had applied the handbrake (although he could not be entirely certain) and that he had therefore complied with the SSOW.

Polkey

91. In the circumstances of this case, had a fair process been followed Mr Powell would have obtained a statement from Mr King. Had he done so it is clear from his evidence that he would have regarded that evidence as being sufficient to a raise a reasonable level of doubt so that he would not have found that Mr Parson committed any misconduct. Mr Parson would not therefore have been dismissed. Accordingly, I find that there is no Polkey deduction to be made as a fair process would not have resulted in the Claimant's dismissal.

Contributory fault

92. In order for there to be contributory fault, there must be blameworthy conduct on the part of the Claimant which caused or contributory to his dmissal. Mr Bromige relies upon the Claimant's failure to adhere to what he argues the Respondent required or its employees, namely, a two-stage test for the handbrake requiring the handbreak to be manually applied and then a visual check that it was applied. Mr Bromige argues that the Claimant failed to conduct the visual check of the handbreak and relies upon that as the culpable conduct in question.

93. The difficulty for the Respondent is that the evidence before me did not demonstrate either that such a two-stage test applied at the time of the incident or, if it did, that it was a factor in the decisions of either Mr Powell or Mr Stewart. The existence and nature of the test was first raised in cross-examination of the Claimant; neither Mr Powell nor Mr Stewart gave any evidence as to its existence or nature; it was not referred to in their statement or in the documents they produced, particularly the dismissal letter or appeal outcome letter, and no evidence was led from them in supplementary questions or re-examination on the point. The Claimant was not asked at any stage during the investigation, disciplinary or appeal meetings whether he visually checked the handbreak.

Remedy

94. The parties had agreed the loss arising from the dismissal and Mr Bromige consented to my entering judgment in the sum so agreed.

Employment Judge Midgley

Date: 16 March 2020

Reasons sent to parties: 17 March 2020

FOR THE TRIBUNAL OFFICE