EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107341/2019

Held in Aberdeen on 12, 13 and 14 February 2020

Employment Judge J Hendry

Mr H Wilkinson	**Claimant** **Represented by** **Ms Churchhouse,** **Counsel**
Driver & Vehicle Standards Agency (DVSA)	**Respondent** **Represented by** **Dr A Gibson,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is as follows:

1. That the claimant was unfairly dismissed from his employment.
2. That no monetary award will be made because of his conduct.

REASONS

1. The claimant in his ET1 sought a finding that he had been unfairly dismissed from his employment as a Driving Examiner with the respondent. The respondent denied that the claimant had been unfairly dismissed and contended that he had been fairly dismissed on the grounds of gross misconduct.

Issues

2. The first issue was whether the respondent had dismissed for a potentially fair reason. Thereafter the issues for the Tribunal were whether or not the respondent had carried out a reasonable investigation into the circumstances, had properly considered any mitigatory matters and if dismissal was within the range of reasonable responses open to them.

Evidence

3. The Tribunal considered the joint bundle prepared by parties. It also had regard to the agreed statement of facts (JBp2).

4. The Tribunal heard evidence from the following witnesses on behalf of the respondent:

   - Mr Gobinder Walia, Test Centre Manager and Investigating Officer
   - Ms Mary Archer, Operational Delivery Manager and Decision Officer.
   - Martin Owens, Operational Manager DVSA and Appeal Manager

   The claimant gave evidence on his own behalf.

Facts

5. The claimant is a former police officer with many years' experience. He was latterly a "traffic" officer. He retired from duty after unblemished service. He applied for and was successful in obtaining employment with the respondent as a Driving Examiner on 25 April 2016.

6. The respondent is the Driving and Vehicle Standards Agency. It is a statutory body responsible for testing candidates to ensure that they have

reached an appropriate standard of driving before issuing a driving licence to them.

7. The respondents have strict rules in relation to checking that candidates have provided proof of their identity to avoid impersonation.

8. The claimant attended an induction or training course prior to starting work. The course was held at Cardington. He was then based at the Test Centre in Elgin.

9. One of the issues covered in the training was the issue of "test terminations" which is where a Driving Examiner terminates a candidate's test early. A slide from the presentation given to the cohort of new employees including the claimant was produced. It stated:

> *"Once a test has been terminated the candidate* ***must not be allowed to drive back to the test centre.***
> ***The examiner must not drive the candidate's car****"* (JBp103)

10. The respondent's policies also included examiner guidance (JBp104-139) which contained the principal policies for Driving Examiners conducting tests. It was available on the internet. It was the 'Bible' for Examiners and referred to regularly.

11. Clause 7.04 of the document dealt with terminated tests. It prescribed the form an Examiner would complete in relation to the test (form DL25). When a test was terminated the DL25 had to be annotated with the appropriate code and a description of the circumstances of the termination written in the 'Remarks' column. The clause also stated:

> ***"Tests stopped away from the test centre***
> *If a test has to be stopped away from the test centre, offers to return the examiner to the test centre by an accompanying driver/ADI should be accepted.*
> *If the accompanied driver is not present the examiner should suggest to the candidate that they might prefer to return to the centre with them. However, if the candidate is adamant they don't want to return with the examiner their wishes should be respected.*

The most safe and convenient method of returning to the test centre must be sought. Every effort should be made to help a disabled candidate to return to the centre, possibly by calling a taxi or telephoning the centre for assistance. On return to the test centre the examiner should contact the accompanying driver as quickly as possible."

12. Clause 7.29 is in the following terms:

*"**Interference with candidate's vehicle***
Examiners must not drive candidates' vehicles. Strict observance of this instruction is essential as there are many situations in which insurance cover for the examiner might not be effective. Candidates are rarely familiar with details of motor vehicle insurance conditions or in a position to give the necessary permission. In any case, only third party risks might be covered. Similarly, an examiner's own motor insurance policy may not provide full cover when they are driving someone else's vehicle even with the owner's permission."

13. Driving Examiners including the claimant were aware that they should not drive a candidate's car.

Incident 2 November 2018

14. On 2 November 2018 the claimant was taking a candidate on a driving test. The test was terminated approximately four and a half miles from the test centre in the countryside outside Elgin. The claimant contacted the candidate's driving instructor, whose car the candidate was using, and was told by the driving instructor (ADI) that the claimant was insured to drive the car. He was asked if he would drive the candidate back to Elgin.

15. The claimant advised the Instructor on a couple of occasions that he was not meant to drive the car and that he might not have insurance. The driving instructor reassured the claimant that he would be insured and accordingly the claimant drove the car with the candidate back to the test centre. He did not attempt to contact his manager to discuss what he intended to do or inform him later what had happened.

16. On returning to the test centre the claimant filled out an entry in the terminated test log wherein he recorded the activity code as 4 which meant "fail in the interests of public safety candidate's conduct unsafe for the public". He gave reasons for the termination. He did not record in the terminated test log or in the DL25 that he had driven the instructor's car back to the test centre. The claimant recorded in the DL25 form under Remarks "test terminated on safety grounds. ADI informed."

Investigation, Disciplinary and Dismissal.

17. The incident did not come to the attention of Mark Neill, the claimant's manager until 19 December 2018 when a driving instructor passed a comment alluding to the incident to another Driving Examiner who in turn reported it to Mr Neill.

18. On 21 December 2018 Mr Neill spoke to the Driving Instructor whose car had been used by the claimant in the incident on 2 November. He confirmed that the claimant had driven his car back with his permission.

19. On 28 December Mr Neill had e-mailed Mr Dalby with a report following his meeting with the claimant. He noted:

> *"Incident*
> *Harry Wilkinson took a driving test on 02/11/18 at 10:24 with candidate , the test was terminated by the examiner several miles from the test centre due to the candidate's poor driving. The driving instructor had been contacted by phone and instructed and informed Harry that he was insured to drive the car, to which he did and drove back a few miles to the test centre car park with the candidate.*
> *On doing this he didn't inform his manager what he intends to do or had done. This only came to my attention on 19 December when the driving instructor whose car it was spoke to another examiner about it who then reported it to myself. I spoke to the instructor on Friday 21 December and he confirmed that Harry had driven the car back to the test centre with permission."*

The e-mail made reference to clause 7.29 of the policy.

20. On 4 January 2019 Mr Neill met the claimant to speak to him and ascertain the circumstances surrounding the matter. The claimant accepted that he had driven the vehicle back. He accepted that he was aware of the correct process to follow in such situations and knew that he had done wrong. He said that he had been "*a bad boy*". He explained that he had done so in order to prevent the next test he was scheduled to carry out being cancelled. He apologised for the situation that had arisen.

21. Following this meeting Mr Neill reported the incident to Ms Archer his Line Manager. They discussed whether the claimant should be suspended. It was agreed that he would not be suspended. The claimant was not advised that he was not being suspended to allow him to rebuild trust with his manager or how he could achieve that. Thereafter the claimant worked as normal with no additional supervision. This included being tasked by Mr Neill to work at outstations on his own.

22. It was arranged that Mr Gobinder Walia, who did not know the claimant and who worked in Newcastle, would carry out an investigation.

23. Ms Mary Archer who was based in Perth was tasked to act as a Decision Officer. On 7 January 2019 she wrote to the claimant informing him that Mr Walia had been appointed to investigate an allegation that on 2 November 2018 the claimant terminated this test and then drove the driving instructor's car back to the test centre (JBp35-36).The letter noted that this act went against the respondent's protocols, procedures and practices and was in breach of the Civil Service Code and as such was potentially gross misconduct.

> *"Dear Harold,*
>
> *Investigation*
>
> *I am writing to advise you that Gobinder Walia LDTM has been appointed to investigate allegations made that on 2 November 2018 you terminated your 10/24am test and then drove the driving instructor's car back to the driving centre.*
>
> *When this was discussed with you, you informally during a fact finding meeting on 4 January 2019 with your manager Mark Neill you said you were aware of the correct process but you did drive the car.*

This act was against DVSA protocols, procedures and practices and is in breach of the Civil Service Code and as such is potentially gross misconduct.

The purpose of the investigation is to gather and present evidence. The investigation report will show whether, on the realms of probability, there is a case to answer."

24. On 9 January Mr Neill e-mailed Mr Dalby in the respondent's HR department copying Mr Walia

"Hi Jagdeesh, I held an informal meeting with Harry on Friday 4 January, he admitted that he drove the car back to the test centre with the candidate.

With this updated information I have appointed Gobinder Walia as Investigation Officer and Mary Archer (ODM) as Decision Officer. Both are copied into this e-mail.

I will keep you updated as the investigation is carried out."

25. On 11 January 2019 Mr Neill e-mailed Mr Walia and provided him with more detail of what was said to have occurred on 2 November 2018. It noted that the claimant had attended a test termination presentation on 2 June 2016 during his training. It noted that all the claimant's previous termination reports had stated how he had returned to the test centre such as walking or the driving instructor driving the car back. It said that his report on the incident did not mention anything of how the claimant had got back to the test centre.

26. Mr Neill sent Mr Walia on 17 January details of the terminated test log and previous tests that the claimant had recorded the following:

"11/5/18 candidate and I walked to DTC, de-brief with ADI
13/6/18 accompanied back to DTC
27/7/18 ADI attended scene and drove back to DTC
11/5/18 candidate and I walked back to DTC, de-brief with ADI
16/8/18 ADI contacted, attended and returned to DTC
04/10/18 walked to DTC + briefed with ADI
12/10/18 stopped car on Northfield Terr car park. Escorted her to Tony's (driving school office) terminating test on safety grounds

25/10/18 I walked back to DTC
16/11/18 I walked back to DTC, candidate happy to wait in car"

27. On 4 February the claimant received a letter from Mr Walia inviting him to an investigation meeting on 13 February (JBp49-51). In the letter Mr Walia wrote:

> *"I am writing to advise you that I have been appointed to investigate the allegation of procedures and practices which are in breach of the Civil Service Code of Conduct.*
> *It has been alleged that you drove a driving instructor's car back to the driving test centre on 2 November 2018. The investigation will consider the Civil Service and its core values: integrity, honesty, objectivity and impartiality. I should like to interview you so that I can find out what happened. Your co-operation in this matter will greatly assist my enquiries and will inform my investigation report. The meeting will take place on Wednesday 13 February 2019, 10am at Elgin DTC."*

28. On 8 February 2019 Mr Walia e-mailed Mr Neill to ask if the claimant had a high number of terminations compared to the rest of the office. Mr Neill responded he was the highest for terminations.

29. On 13 February 2019 the claimant attended the fact-finding interview. The meeting was chaired by Mr Walia and Mr Hugh Campbell was in attendance as note taker. The claimant had chosen not to be accompanied at the meeting. The meeting took place on 13 February. It was minuted (JBp80-84). The Minutes disclose that the claimant said the following:

> *"Working from memory as I don't have the DL25. I stopped the test on an unclassified rural road off the A96 (towards) at the village of Mosstowie, on the west side of Elgin, about four and a half miles from the test centre. I decided to terminate the test when we had to avoid a head-on collision at a bridge. There was a number of other serious faults and the candidate was becoming very distressed. In the interests of public safety I decided to terminate the test. If my memory services me right I was the only one in the office and was unable to call anyone for support. I then had to assess how to get the upset*

candidate and myself back as there were other candidates to follow. I considered calling a taxi but the time constraints of the next test would have meant it took too long. I then considered phoning the instructor and phoned him, and asked if he could assist. Again this would have involved him getting a taxi and a lengthy delay to the next test.

The instructor asked if I could drive his car back. I said I couldn't, I explained the DVSA policy to him and why. He categorically assured me that I was in fact insured to drive his car. I went over it again with him and he reiterated I was insured to drive his car. Now with that reassurance combined with my own business use insurance, of driving other vehicles with the owner's permission I was satisfied that I was legally covered to drive the car.

I explained to the ADI what my intention was with which he agreed. Before setting off I had to consider the risks involved. As part of my assessment I had to consider the insurance and the legality of my actions. I also considered my driving experience and familiarity of that type of vehicle a large four wheel drive. I have significant experience of these vehicles in driving in general and I am satisfied that it was within my abilities. I further considered the route back to the test centre took the most direct route.

I believe these actions at the time were necessary and in the best interests of the candidate due to the circumstances we found ourselves in. It was also in the best interests of the agency as this would allow me to continue testing throughout the day without loss to the agency or later candidates. On my return to the test centre I debriefed the instructor and candidate and there had been no incidents on our return journey."

30. When asked by Mr Walia why he didn't report the incident to his manager at the earliest opportunity the claimant responded,

"No I didn't feel it was necessary as nothing had happened and didn't want to incriminate myself."

31. The claimant was asked why the previous test termination reports stated how he had returned to the office but on this one he had stated ADI informed. The claimant responded,

"I knew I'd breached the policy but was not going to lie about it so I left it vague."

32. It was put to the claimant that there was a risk to himself, his passenger, members of the public and the reputation of the agency and he responded,

"I accept what the policy is. I am not sure I put the agency at risk but there has been no incident."

33. The claimant raised the Civil Service Code and stated he was unclear what area applied. The claimant towards the end of the interview made a comment that he had seen a senior manager breaching DTI policy and justifying it by stating it was in the best interests of the candidate and agency so why was it different for him. He declined to give Mr Walia details of the person involved or the incident.

34. Mr Neill e-mailed Mr Walia on 14 February (JBp85).

"Hi Gob, my response for your investigation of Harry.
I have trained Harry from when he came out of his training at Cardington and throughout our working relationship we have always got on well. I always held Harry to be a trustworthy member of my team. He works away for many days on his own, and I always trust him to do a good job and had no reason not to.
Now that I have had the issue of Harry not informing me of what he did when driving the instructor's car with the candidate back from a terminated test I now find it very hard to trust he is doing what he should be. I cannot monitor this when he is working at the mainly outstations. The incident was brought to my attention by a third party this was seven weeks after it had happened, Harry had sufficient time to inform me of what he had done, unfortunately he didn't. When I spoke to him about it he didn't think he should tell me as he had dealt with the situation
With this I am now realise that the trust I had with Harry has been broken. I'm sure Harry has learned a valuable lesson and may not do this again however the trust between employer and employee is a serious issue one of which it is hard to repair."

35. Mr Walia finalised his Investigatory Report on the 14 February (JBp77-79). It was sent to Ms Archer.

36. Ms Archer was tasked to be the decision maker. She used the template or "model letter" to write to the claimant. The letter that was sent to him was not fully completed (JBp88-89). It made reference to gross misconduct being a possibility and had no detail of the allegations. It did not contain details of when this preliminary meeting would take place. The claimant was aware that Ms Archer was visiting Elgin on 7 March and obtained the date and time of the meeting.

37. On 14 February 2019 the claimant was provided with a copy of the notes of the meeting.

38. On 19 February 2019 he returned them with a few amendments and on the 20 February Mr Walia made a further amendment. By the 25 February 2019 the notes were agreed.

39. Mr Walia wanted to know what Mr Wilkinson's manager, Mr Neill thought about working in the future with him. On 14 February 2019 Mr Neill e-mailed Mr Walia stating that he had lost trust in the claimant given his actions and the fact that the claimant had not informed him of the incident at the time.

40. On 25 February 2019 Mr Walia sent to Ms Archer the agreed notes of the meeting, his investigation report, the driving test report and Mr Neill's e-mails of 11 January 2019 and 14 February 2019 for consideration of the next stage in the process.

41. On 27 February 2019 Ms Archer wrote to the claimant inviting him to a decision meeting on 7 March 2019. She used a 'template letter' which was not completed. Mr Wilkinson e-mailed Ms Archer on 27 February (JBp90c).

> *"I can confirm receipt of this e-mail; however the letter inviting me to a meeting is simply a blank template. I understand that it is next Thursday, remark could you please clarify the place and time."*

42. On 7 March 2019 the claimant attended the meeting. It was chaired by Ms Archer. Mr Neill was in attendance as a note taker. After 24 minutes the hearing was adjourned and Ms Archer returned eight minutes later with

her decision that the claimant should be dismissed on the grounds of gross misconduct. Although Ms Archer mentioned that gross misconduct could be constituted by a breakdown of trust she did not put the terms of Mr Neill's e-mail to him nor explore the matter with him. She did not tell him that she placed considerable store on his line manager's views on this matter as he would have to work with the claimant in the future. The claimant was unaware of the evidence of Mr Neill on this matter.

43. Ms Archer indicated that the claimant's behaviour had left a question mark on his honesty and integrity as a Civil Servant. He had denied that he had lied by omission and she challenged him that he had not been remorseful. In response he indicated that he had apologised to his manager.

44. Ms Archer set out the basis on which she was dismissing the claimant which was

> *"1. You returned to the office and said nothing about what you had done.*
> *2. You lied by omission by not adding the necessary information to the DL25.*
> *3. You put trust in an ADI candidate that they wouldn't say anything.*
> *4. Mark found out and you still chose to hide information and he had to dig for the information.*
> *The minute recorded your actions of broken trust between the employer and the employee and when this incident came to light Mark and I discussed suspending you. We agreed suspending you would not provide an opportunity for the trust to be repaired. It was important that your manager made you aware of your actions and had an assurance that this would not happen again. As a driving examiner you need to be trusted to work on your own and unfortunately you have planted the seed of doubt and that trust cannot be restored. As such it is unfortunate that your actions have resulted in your dismissal with immediate effect."*

45. Ms Archer wrote to the claimant setting out the reasons for his dismissal where she wrote:

"It needs to be said that if you had returned to the test centre and told your manager what you had done the outcome would most certainly be a different one. The fact that you lied and chose to cover this up leaves your integrity and honesty in doubt."

Appeal

46. The claimant lodged an appeal. His appeal was on the basis that the penalty was harsh in his assessment given the level of accepted misconduct and that as the respondent had not suspended him this contradicted the manager's rationale for his dismissal. As the respondent had not suspended him that had led him to believe the outcome would be considerably different. He suggested that an impartial view would conclude that the conduct met the criteria for serious misconduct and that the appropriate sanction would be a written warning. In relation to Mr Neill's involvement he wrote:

"It is stated that I was not suspended to provide an opportunity to rebuild trust, a fact I was not informed of until I had been dismissed. When I asked what I had done during this period to show I could be trusted, I was informed that once the seed of doubt is sown it is there the actual inclusion from this is that nothing I could have done would have changed the manager's view, therefore, the correct, fair and honest course of action would have been to suspend me immediately, or place me under supervised conditions to prevent a recurrence. Either would have allowed me to reconsider my future with the agency."

The claimant also argued that he believed that insufficient weight had been applied to the unusual mitigating circumstances.

47. There was a delay in the Appeal Manager Mr Owens being able to deal with the matter. He did not write to the claimant until 6 June (JBp101). A hearing was arranged for the 20 June. Mr Owens made it clear that the purpose of the appeal was to re-examine the decision-making process and decide whether the decisions made were reasonable but it was not a full re-hearing of his case.

48. The claimant attended a meeting on 20 June 2019. Minutes were taken. He explained that he didn't think there was any benefit in telling the manager after the event. When it was put to him how could the organisation trust him he stated,

> *"I won't do it again. During the investigation I worked normally including a termination. That's an example of I know what to do. That's all I can say."*

49. Mr Owens wrote to the claimant when rejecting the appeal:

> *"Driving examiners regularly work unsupervised and hold a position of significant trust. This is particularly true in the north of Scotland where examiners often work alone in remote, rural locations and are trusted to apply all areas of the agency's established policies and procedures correctly and consistently. My view is that the significance of this particular incident has damaged a relationship of trust and on that basis, I am unable to uphold your appeal."*

Aftermath

50. The claimant raised Employment Tribunal proceedings on 14 June 2019.

51. Following his dismissal the claimant was unemployed. His net basic weekly pay had been £331.70. His net monthly basic pay was £1437.40. His service with the DVSA would have been pensionable.

52. The claimant set up in business in January in accident investigations and has obtained work through an organisation Examworks Investigation Services.

Witnesses

53. I found Mr Walia to be an experienced Examiner and one used to dealing with Investigations. It was surprising that he did not seek the claimant's views on the crucial email from Mr Neill that he had lost trust in the claimant but perhaps he expected Ms Archer to raise this matter. He explained that he had asked whether the claimant's test terminations were high compared to others and this was heavily criticised by the claimant's Counsel as opening up separate disciplinary issue. I was satisfied that this was not his

intention merely to get a picture of how many terminations had occurred (and been dealt with correctly). Accordingly this did not impact on my assessment of him as a credible and reliable witness.

54. Ms Archer was a confident determined and clear witness. There were signs of some antipathy towards the claimant particularly when she asserted that he had not apologised, that he was 'arrogant' and had 'chosen to hide information' even after the manager discovered the incident. This did not assist her credibility or instil confidence in her being even handed. On top of this I gained the impression that she thought that the matter was rather 'open and shut' and she did not convince me that she had given sufficient thought to many of the issues before her. She did not put the terms or substance of the important email from Mr Neill to the claimant. This breakdown was ultimately the rational for her decision to dismiss and not impose a final written warning. He was present and could have given evidence and been available to be questioned particularly about the fact that he seems to have agreed that the claimant should not be suspended, face no additional monitoring or restrictions and was trusted sufficiently to work on occasions on his own at outstation. I regret to say that I found some of her evidence was not particularly credible.

55. Mr Owens was a clear and confident witness who was generally credible and reliable. However, I do not think that he fully got to grips with the issues before him particularly around the alleged breakdown in trust. He did not go back to Mr Neill and explore the matter or examine or comment on the apparent disconnection between Ms Archer's position on this matter and the failure to suspend etc. I believe that both he and the claimant were disadvantaged by the fact that the issue was not highlighted at either the investigatory or disciplinary stage.

56. The claimant was a reliable historian in my view. I did not regard him as particularly credible in relation to many of the sometimes rather stretched, abstruse or implausible grounds he advanced for the unfairness of the dismissal including attempts to argue that the policy was in some way unclear in the face of his admissions that he knew that it was prohibited to drive a candidate's car and didn't report it as he would be incriminating himself. I did accept his evidence in relation to the respondent's failure to

write to him properly setting out his disciplinary offence, the interaction with the Civil Service Code and the terms of Mr Neill's email.

Submissions

57. Ms Churchhouse began by making reference to the respondent's internal policies and procedures beginning with the presentation the claimant received at Cardington and the termination of test procedures set out at paragraph 7:04, paragraph 7:29 and also to the relevant parts of the Security restricted documents, the disciplinary policy in so far as it related to the roles of the Investigation Officer, Decision Manager and Appeal Manager.

58. In respect of remedy Ms Churchhouse referred to the ***Polkey*** principle arguing that the claimant would not have been dismissed in any event. She also submitted the claimant did not contribute to his dismissal through his conduct in respect of breaches of ACAS Code and she sought an uplift of 25% in relation to breaches of the Code that she submitted had occurred.

59. She submitted that one of the issues in the evidence was an allegation that the claimant had carried out too many test terminations. It had emerged in cross examination of Mr Walia that this could reflect on the Centre Manager, Mr Neill, and that this was evidence weighing in the favour of this being the real reason for dismissal. She made reference to Mr Walia looking at this matter despite it not being part of the terms of his reference and Mr Neill's repeated behind the scenes involvement and pointing to his involvement note taker at the disciplinary hearing. She asked that inferences should be drawn from the repeated procedural failings at all stages. She referred to the argument that there had been inconsistent treatment for breaches of policies contained in the DT1 handbook. If the respondent was correct that the decision related to misconduct it should be restricted to those matters set out in the decision meeting (JBp93).

60. Turning to the decision to dismiss, Ms Churchhouse, argued that the respondent did not have reasonable grounds to believe the claimant was guilty of misconduct and pointed to the format of the DL25 documents which do not require individuals to state how they returned and the lack of any such requirement on the test termination leg. The e-mail from Mark Neill

showed that on at least two occasions the claimant had not stated how he returned to the office and had faced no sanction. The claimant disputed that the respondent had any reasonable grounds for believing that he hid information from Mr Neill or that "he had to dig for it". The claimant candidly admitted to Mr Neill on 4 January that he returned to the test centre in the instructor's car and there was no reasonable grounds for believing the claimant's conduct fell short of honesty and integrity under the Civil Service Code of Conduct.

61. The claimant also disputed that the respondent had reasonable grounds for believing there was a breakdown in mutual trust and confidence exemplified by the failure to suspend the claimant or subject him to additional monitoring. Further, she pointed to Ms Archer's remark that the claimant had not been suspended because *"a suspension would not provide an opportunity for trust between the claimant and the respondent to be repaired"* strongly suggested that there had not been irreversible breakdown in mutual trust and confidence.

62. She then turned to the investigation and pointed to a number of alleged flaws in the process including a failure to interview all relevant witnesses namely Mr Neill and the driving instructor whose car the claimant drove back to the test centre. Mr Neill was never challenged about his assertion that he could no longer trust the claimant. This could not be properly tested or examined. It was later included in the investigation report on which Mary Archer based her decision and referred to by her in the reasons for dismissal. Unfairness was, she said, repeated at the appeal stage and the report was relied upon by Mr Owens in upholding the decision of Ms Archer.

63. In Counsel's view there was also a failure to examine all relevant evidence. Mr Walia failed to request the DL25 documents for the terminated tests he relied on and did not properly investigate Mr Neill's allegations that the DL25s where terminated in tests showed how the Examiner had returned to the driving test centre. A statement that all previous test terminations stated how the claimant returned to the test centre was included but wrong. This later formed part of the reasons for dismissal. There was also a failure to investigate the apparently inconsistent treatment in the application of a disciplinary policy vis-a-vis the incident the claimant had told Mr Walia

about. The respondent's managers did not comply with the respondent's own policies as there was a failure to properly record all the information obtained from the employee and witnesses. Mr Walia failed to set out all relevant e-mails to Mr Neill, had he done so this would have alerted Ms Archer to the fact that not all DL25 test termination reports showed how the claimant returned to the driving centre and thus whether there was misconduct and a breach of the Civil Service Code of Conduct in failing to set this information out. Mr Walia failed to set out whether he believed the DL25s in terms of the reports that existed. He failed to explain why he had not interviewed Mr Neill and why he also failed to interview the driving instructor. Had he done this he would have alerted Ms Archer to the fact that the driving instructor's account of whether the claimant was insured, which was the risk the business was concerned about, was unfounded in this instance. This was not weighed in the mitigating factors when determining the level of sanction. This unfairness was repeated at the appeal stage when the report was relied on by Mr Owens. There was also a failure to assess whether in these circumstances the conduct could be properly regarded as gross misconduct.

64. In Ms Churchhouse's submission the claimant specifically asked how the Civil Service Code impacted on matters and was never told.

65. The claimant's position was that not being properly informed of the charge against him was a breach of both the disciplinary policy and the ACAS Code. He was not informed of the precise case he had to answer (***Spink v Express Foods Group Ltd [1990] IRLR 320***).

66. Prior to going to the decision meeting the claimant did not know the precise charge against and the charges put to him at the decision meeting were substantially different to those presented in the investigation letter and in the invitation to a disciplinary meeting letter. There was a significant delay in the conduct of the appeal proceedings which was a separate breach of both the disciplinary policy and ACAS Code. There was also a failure to consider the claimant's appeal against the factors in the disciplinary policy.

67. Ms Churchhouse then went on to discuss the apparent inconsistent treatment. She alleged that the claimant had given a false sense of security because he had not been suspended. The dismissal for gross misconduct

was predetermined prior to the decision meeting. This was exemplified by the failure to suspend the claimant or subject him to additional monitoring. There was no basis to suggest that trust had broken down other than the comment being made that the "seed of doubt" had been planted. There was an overall failure to apply the guidance and the disciplinary sanctions and consider the weight of mitigating factors.

68. Finally, in relation to ***Polkey*** she submitted that on the basis that the lack of procedural fairness has made a significant difference to the outcome namely the various failings and difficulties in the process that she had identified it could not be said with confidence that the claimant would have been dismissed. In relation to contributory conduct she submitted there were no grounds for reducing remedy for contributory conduct. The reason for dismissal is clearly set out in the decision meeting letter and should not be elided. Other reasons which did not form part of the reasons for the dismissal were given at the time. Those reasons were

    a. The claimant did not say anything about what he had done when he returned to the office
    b. He lied by omission when not adding the necessary information to the DL25
    c. That he had put his trust in an ADI and a candidate that they wouldn't say anything
    d. That even if Mark Neill found out the claimant chose to hide information and Mark had to "dig" for the information that he fell short of honesty and integrity of the Civil Service Code and that his actions had broken the relationship of trust and confidence between the employer and employee.

69. In response Dr A. Gibson asked the Tribunal to bear in mind that conduct was admitted by the claimant and that any investigation had to be seen in that light. The respondent's position was that there was a potentially fair reason for dismissal namely conduct and that was evidently the reason for dismissal. He indicated that he wasn't sure whether the matter was seriously in dispute as it was not foreshadowed in the pleadings. This appeared he said to be a line of argument that has been developed during the hearing and such a case was flimsy. It related simply to suggestions

that terminations might reflect badly on his manager Mr Neill. It was not a serious suggestion, it was not raised by the claimant during internal proceedings at all. It is not set out in the ET1 either the original or amended form. In addition, he submitted there was simply no evidence to back up any suggestion that Mr Neill manufactured the dismissal or that Ms Archer had dismissed the claimant in some way to cover up her own alleged wrongdoing in 2016.

70. The respondent's solicitor then addressed the issue of whether the respondent had a genuine belief in the alleged misconduct of the claimant. He pointed to paragraph 7.29 of the DT1. The alleged conduct of the claimant was essentially that he knowingly and deliberately breached the policy and thereafter failed to disclose his actions. This is a clear breach of the DT1 and a breach of the Civil Service Code in respect of honesty which includes being open. He was spoken to about this on 4 January and admitted driving the car back to the test centre. Both Ms Archer and Mr Owens gave evidence in the genuine belief the claimant was guilty of the allegations which led to his dismissal. They had a genuine belief that the claimant had failed to be open about his wrongdoing. They looked at the basis for their belief.

71. Dr Gibson reminded the Tribunal that the conduct was admitted. At no point did the claimant deny he drove the car back to the test centre. He was taught from the very outset that driving instructors could not drive candidates' vehicles. He was aware of the policy and said so to Mr Walia. He told the instructor who had asked him that he could not drive the car back if the claimant thought in his mind that what he was doing was not gross or serious misconduct that was "hardly a great excuse". He seems to adopt the position that it was a minor breach and in actual fact he knew fine well there was a serious breach of policy and that was why he compounded his failings by covering it up. At no point did he deny knowledge of the policy or his actions were in breach of any policy. At no time did he deny not informing his manager of his actions indeed he stayed silent.

72. In relation to the test termination log on the DT25 forms the claimant was clutching at straws because one of the entries only says "accompanied

back" which might be vague but it misses the point. It does give an explanation and when asked why he had not informed his manager of any such explanation he had indicated that he did not want to incriminate himself. As a former police officer he knew perfectly well what he was doing.

73. Returning to whether there was a reasonable investigation Dr Gibson rejected the criticisms made of the respondent's investigation. Reminding the Tribunal of the case of ***Sainsbury's Supermarket Ltd v Hitt*** there was a band of reasonable responses which applies to the conduct of investigations. It would be wrong for the Employment Tribunal to suggest that further investigations should have been carried out as to do so would amount to substituting their own standards of what an adequate investigation should be. In his view any suggestion that in a situation where serious misconduct is alleged a dismissal is rendered unfair by reason of a failure on the part of the employer to carry out more investigations than it had in fact done was ''classic substitution territory'' and when conduct was admitted the extent of the investigation which required to take place to make the investigation reasonable was minimal. In this instance the policy had to be strictly observed. There were good reasons for this. The claimant did not see the driving instructor's insurance documentation. The respondent doesn't doubt that the claimant convinced himself that he was insured and that the instructor had told him he was insured but that was not the point. He could not be 100% certain that he was insured.

74. There was no reason for Mr Walia to interview Mr Neill. He had a written account of the fact-finding interview and Mr Neill's view of why for him the trust and confidence he had in the claimant had broken down. The question of suspension is entirely a separate matter. Suspension is a precautionary measure based on assessment of risk and that assessment was made at the time. The claimant repeatedly clutched at straws criticising Mr Walia for not providing a Civil Servant with a copy of the Civil Service Code, for not providing a driving instructor with a copy of the guidance document for driving examiners, for not providing an employee subject to a disciplinary procedure with the disciplinary procedure. These were he submitted "nonsense" criticisms.

75. Turning to the incident the claimant says he witnessed on 20 July 2016, on 24 November the claimant's representative wrote four detailed paragraphs setting out what the claimant said he had witnessed. This was the first time any of this had been brought before the respondent. It was not raised during the investigation meeting, the disciplinary meeting, or the appeal meeting or in any of the claimant's written statements. It was incredible to think that a throwaway comment at the end of the investigation meeting should have been investigated.

76. The respondent's agent then turned to consider whether the decision to dismiss was within the range of reasonable responses. In his submission this was the only serious challenge to the dismissal. The arguments were two-fold, firstly the claimant says the conduct does not amount to gross misconduct and secondly notwithstanding the classification of his conduct there were sufficient mitigating circumstances to take it outwith the band of reasonable responses. The claimant alleges that he was not told during his training that a breach would be treated as gross misconduct. It would not be appropriate for any employer to go through each part of a policy and label it serious or gross misconduct or whatever as it all depends on the circumstances. The claimant knew that his behaviour was wrong. He covered it up. Ms Archer stated in her evidence that it was unlikely that the claimant would commit another act of misconduct during the period he was under investigation. Gross misconduct clearly fell within the range of reasonable responses open to the employer here.

77. In relation to the issue of inconsistent treatment there were no truly parallel circumstances here as the Tribunal should ask whether the employer's differential treatment of the employee was so irrational that no reasonable employee could have taken that decision (***Securicor Ltd v Smith [1989] IRLR 356*** and ***Epstein v Royal Borough of Windsor and Maidenhead UKEAT/0250/07***).

78. In relation to mitigation the claimant's actions were fully considered. Mr Owens pointed out that it suited the claimant as well as the driving instructor and the candidate and wasn't wholly altruistic behaviour. The claimant did not have particularly long service. The claimant appeared to show some remorse for the inconvenience caused but he did not display

inside the full acceptance of his own wrongdoing. Remorse only came after he had been found out some seven weeks after the event.

79. In terms of procedural fairness Dr Gibson submitted it was necessary to consider the terms of the ACAS Code of Practice on Disciplinary Grievance Procedures, failure to follow the Code does not necessarily render dismissal unfair. He submitted that a fair procedure was followed throughout. He then turned to issues of compensation. In his submission the ***Polkey*** principle is applicable here. If the Tribunal finds that the claimant's dismissal was substantially unfair then in his submission, compensation should be reduced by 100% due to the claimant's contributory conduct. He knowingly breached the policy, he accepted he did not inform anyone of his actions. At the appeal he simply argued that the sanction was too harsh. It was a classic case of significant contributory conduct.

Discussion and Decision

The Reason for Dismissal

80. The first matter for the tribunal to consider was whether it had been satisfied by the respondent that the reason for the dismissal was one of the potentially fair reasons for dismissal contained in section 98(1) or (2) of the Employment Rights Act 1996 ('ERA'). They had said that it was the claimant's conduct that had led to dismissal, so that it was for them to show that misconduct on his part was the real reason for dismissal, i.e. under s.98 (2)(b) of the ERA.

81. It was argued that in some way the dismissal had been engineered by the claimant's manager, Mr Neill, as the relatively high number of terminated tests the claimant had reflected adversely on him. There was scant evidential basis for this and the witness evidence was clear that the focus of the investigation, disciplinary hearing and appeal was the use of the candidate's vehicle and that matter not being recorded or disclosed. In my view it is clear that the reason for dismissal was misconduct and what the employers had in mind at the time of dismissal was the incident that had occurred when the test was terminated and that this "*related to the conduct of the employee*" – s.98(2)(b).

Section 98(4) ERA

82. The task for the Tribunal in terms of section 98(4) of the Act was to ascertain whether, in all the circumstances (including the size and administrative resources of the respondent) the dismissal was fair or unfair. The Tribunal had regard to the well-known cases of **British Home Stores Ltd v Burchell** [1978] IRLR 379, **Iceland Frozen Foods v Jones** [1982] IRLR439, and **Sainsbury's Supermarkets v Hitt** [2003] IRLR 23 and to the guidance contained in those cases as to the approach the Tribunal should follow in assessing such a dismissal.

83. Under paragraph (a) of this sub-section the question of whether the employer acted reasonably, particularly where the reason for dismissal related to conduct of an employee, often involves consideration of the adequacy of the employer's investigation and thus whether a reasonable employer could have concluded that he was guilty, i.e. the ***Burchell*** test.

84. The respondent expressly labelled that conduct as "gross misconduct". They described the conduct as breaching the Civil Service Code and leading to an irretrievable breakdown in mutual trust and confidence.

85. The question of whether a dismissal is fair or unfair under s.98(4) of the ERA is not answered by deciding whether or not the employee has been guilty of gross misconduct. As Phillips J said in ***Redbridge London Borough v. Fishman*** [1978] ICR 569:

> "*The jurisdiction based on* [what is now section 98(4) of the Employment Rights Act 1996] *has not got much to do with contractual rights and duties. Many dismissals are unfair although the employer is contractually entitled to dismiss the employee. Contrary-wise, some dismissals are not unfair although the employer was not contractually entitled to dismiss the employee. Although the contractual rights and duties are not irrelevant to the question posed by* [s.98(4)]*, they are not of the first importance. The question which the Industrial Tribunal had to answer in this case was whether the* [employer] *could satisfy them that in the circumstances having regard to equity and the substantial merits of the case they acted reasonably in treating the employee's* [conduct] *as a sufficient reason for dismissing her.*"

86. This has been more recently confirmed by the EAT in **Weston Recovery Services v. Fisher** (EAT0062/10) i.e. that the only relevant question is whether the conduct was "sufficient for dismissal", according to the standards of a reasonable employer and whether dismissal accorded with equity and the substantial merits of the case" (s.98(4)(a) and (b)).

87. It is of course perfectly reasonable for an employer in their policies to provide information or a forewarning on what kinds of misbehaviour may be regarded as serious enough for summary, or indeed any other form of dismissal. Indeed paragraph 23 of the ACAS code suggests this is done.

88. It is not up to the Tribunal to rerun the investigation process and the warnings of the dangers of possible substitution are noted especially where the facts leading to the findings of misconduct are not denied. With this in mind I will turn to consider the issues raised in relation to investigation.

Investigation

89. The starting point is a consideration of the internal policies and procedures. It must be borne in mind that the claimant was fully aware of the terms of the policy that he should not drive a candidate's car. This was clear at his training and in the DT1. An argument was made that there was some dubiety in the policy in that there was no reference to this prohibition in paragraph 7.04 which dealt with test terminations and spoke of finding a safe and convenient way back to the test centre. It was also argued that 'candidate's car' should mean only a vehicle the candidate owned and not one provided by the Driving Instructor for the test. I found no merit in these arguments. These were not interpretations the claimant applied at the time.

90. The policy must, in any event, be read as a whole and clause 7.29 is pre-emptory in its terms. The interpretation given to 'candidate's car' by the respondent's witnesses was that it was the car that the candidate was using for the test and no deeper meaning could be ascribed to it. That interpretation appears perfectly reasonable in these circumstances and one that was commonly held by Examiners including in my view at the time of the incident by the clamant himself.

91. There is always a danger that an investigation could be regarded as having been unduly cut short or incomplete and this is broadly the claimant's

position. Dr Gibson is correct that this is difficult territory for a Tribunal not to fall into a substitution mindset. The claimant's Counsel suggested that the candidate for the test should have been interviewed about the circumstances of the incident and this would have been done by a reasonable employer. It was not suggested what such an exercise would expect to garner and given that the respondents appear to have accepted the claimant's version of what happened then no unfairness can occur. The same can be said for the alleged failure to interview the Driving Instructor as again the claimant's version of what was said was accepted.

92. There was one aspect of the investigation that did give rise to some concern and that was the fact that no steps were taken to check if it was likely that the claimant had in fact been insured. An employer has a duty to consider mitigatory aspects of any conduct. The argument here was that if it had been conclusively ascertained that he was insured then that would have meant that although there was a breach of the policy, as the claimant was in fact insured, there was no harm done and the breach was in a sense, as is often described as being a 'technical' breach. There seemed at least some weight in the argument that if the claimant had been found to have actually been insured that might have been treated, in the eyes of a reasonable employer, as being of some mitigation although not exculpation.

93. There are inherent dangers in such an enquiry and approach, as the respondent's agent pointed out, as respondent's managers are not lawyers trained to ascertain if the claimant was insured or not under a particular policy. The position taken by the respondent's witnesses was that they did not accept that being insured was mitigation and the issue for them was that the claimant had knowingly breached the policy. The policy was there for a good reason. Their position is also, perhaps, understandable on the basis that if the focus became whether someone was actually insured or not that might lead to complex enquiries and possibly devalue the deterrent effect of policy which in effect was a 'zero tolerance' one. It was argued that the problem for the respondent was that Ms Archer went further relying on the possibility of the claimant not being insured as being a risk to the respondent's reputation and accordingly the actual status of the claimant, insured or not insured, was an important factor. In the round, although with a little unease, I accept that the approach taken by the respondent's fell

within the band of responses open to a reasonable employer namely to disregard whether the claimant was actually insured or not and in such circumstances no unfairness arises.

94. The one area of the investigation which gave rise to concerns that impacted on the later process was the evidence from Mr Neill encompassed in his email dated ( ) which stated that his confidence in the claimant had irretrievably broken down. As that matter also related to the reasonableness of the dismissal and also to the disciplinary and appeal process I intend considering it in those contexts.

Disciplinary process and Appeal

95. The claimant's Counsel raised a series of alleged defects in the process adopted and I will return to some of those matters. Looking at matters broadly I do not accept that the evidence disclosed any untoward or malign influence from Mr Neill the claimant's manager or any underhand reason for dismissal. Mr Neill responded to requests by giving appropriate information that appears wholly accurate. The situation was clear to the disciplining and appeal managers namely that the claimant had knowingly broken the strict rule on driving a candidate's vehicle and had not written down how he had returned to the test centre.

96. It was suggested that Mr Walia should not have asked about prior test terminations. He did so principally to find out how the claimant had dealt with such situations in the past and this was not some attempt to open up further disciplinary issues as advanced.

97. In the course of the hearing the Tribunal was asked to accept that the claimant had gone further than the notes of his meeting with Mr Walia suggested in naming the manager, allegedly Ms Archer, who had breached policy. I prefer the evidence of Mr Walia on this matter buttressed as it was by the notes which were not themselves challenged by the claimant either immediately after their production or at the appeal. If Ms Archer had been named then it would be very difficult to accept that nothing would have been done about the information and I am sure that if Ms Archer had become aware of the allegation she would have sought advice and almost certainly declined to hear the disciplinary.

98. The explanations given by the claimant around the information recorded when tests were terminated have to be understood in the context of the operation of the service in Elgin. The claimant's Counsel suggested that two entries disproved the claim that explanations were regularly given as to how the Examiner returned from the test and by acting in the way he had done he could be said to have lied by omission. I would observe that the format of the documents is not helpful in that they do not call for particular information about the manner of returning to the centre but the practice of how to complete them was clear and known to the claimant.

99. The first entry relied upon was simply a note stating 'Accompanied back to DTC '. Most tests were in fact terminated within the town, unlike the test at issue, and the instructor walked back with the candidate. That is in fact what most entries say unless the Driving instructor drives the candidate and Examiner back when they have sat in the rear during the test. The notes reflect simply the ordinary run of events. The second entry says that the car was stopped in Northfield Terrace car park and the candidate escorted to 'Tony's Driving School. In evidence the claimant confirmed that the car park was immediately behind the Driving School which itself was on the High Street and walking was the only practical method that could be used to get from the car park to the Driving School. In other words anyone looking at the log who knew the local area would find what they expected to find namely no reference to driving a candidate's car and be able either to see, or assume with some certainty, how the Examiner got back to the centre i.e. by walking (the centre is not far from the Hight Street) . The matter was really put into context rather damningly by the claimant's own comments at the Investigation Meeting (JBp81/82) when he claimed, not that it wasn't the practice to put the method of return down, but that he had omitted saying what happened as he *'didn't want to incriminate himself*' and that he had deliberately left it vague for that reason. This gave the respondents ample evidence for their belief that the claimant had not acted honestly or transparently and was in breach of the Civil Service Code.

100. The use of the word 'dig' in the findings by Ms Archer (JBp93) when she seems to suggest that the claimant had continued to hide the circumstances after Mr Neill found out and he had to 'dig' for the information. It was accepted that the claimant fully admitted the matter once confronted. The

explanation given by Ms Archer for the use of these words was that the claimant had not told Mr Neill about what had occurred and when he looked at the paperwork it omitted the explanation. It is perhaps stretching the matters a little and the way the finding is phrased hints at the claimant denying the truth even after Mr Neill found out. It is a clumsy phrase but does not itself does not render the dismissal unfair and is used in the context of no explanation being found in the relevant paperwork.

101. There was one procedural issue of note and that was about the invitation sent to the claimant (JBp18) inviting him to the disciplinary meeting. The letter, which was accepted as originating from a template, does not contain details of the disciplinary charges or the date of the hearing or the investigatory report. The claimant says the letter was attached to Ms Archer's email dated 27 February and he found out about the date of the disciplinary hearing and time of the meeting through his manager Mr Neill.

102. In evidence Ms Archer was sure that the matter had been rectified but the claimant denied this, and the respondents were unable to provide evidence that an amended letter had been emailed to the claimant. There was on the one hand more than a week to resolve the difficulty and on the other the claimant does not raise it at the outset of the disciplinary hearing. He seems to know what the factual allegations are (except for one which I will return to) and this is not surprising given his admission of the basic facts and his involvement in the investigatory process. Ms Archer struck me as generally a careful and methodical person who would have resolved any problem. However, I concluded that on the balance of probabilities that no new amended letter was sent (JBp90a). Disappointingly in any event the Investigatory report only refers to one allegation being before Ms Archer namely the allegation that the claimant drove the car back to the centre and not what came to be the main issue for the respondents the failure to disclose/record the irregularity and the breakdown of trust. This is unfortunate as the letter should have reflected exactly what the allegtions being pursued were otherwise the claimant would find it difficult to know exactly what factors were being considered that might lead to the loss of his job.

103. The claimant also suggested that the failure to suspend him lulled him into a false sense of security and that it was inconsistent with a situation where gross misconduct was being suggested. Dr Gibson quite correctly, in my view, pointed out that the rationale for suspension can differ between cases for example suspending someone to ensure evidence was not tampered with and so forth. However, although I accept that argument in principle it is always open to a claimant, in Mr Wilkinson's position, to explore the reasoning behind such a decision and argue, as he does here, that it is inconsistent with upholding a later allegation that trust had completely broken down. In the face of it allowing the claimant to continue with a responsible job without any additional restrictions does not sit well with an allegation discovery of the original offence destroyed any trust.

104. One of the agreed facts was that the claimant was subject to no additional monitoring or restrictions during his period of suspension. It was strongly argued that he would have been very foolish to breach any of the rules during his period of suspension but it poses the question that if the claimant could be trusted to continue his work without any additional supervision, involving as it did working on his own and unsupervised at times, with the compulsitor being the threat of further disciplinary action then why a final written warning, with a similar threat if the rules were disobeyed, was not sufficient punishment.

105. The evidence on these matters from the respondent's witnesses was not particularly well thought out or indeed particularly convincing but at the end of the day not suspending, in itself, was the sort of risk that an employer is best placed to make guided by the disciplinary policy.

106. Much was said about the interviewing of witnesses. It would have been prudent for Mr Walia to have interviewed Mr Neill especially given the reliance the respondent's witnesses subsequently put on his email claiming that his trust in the claimant had completely broken down. He could also have confirmed the understanding Examiners had around the process and the undertsnading of the entries. It would have highlighted the importance of this issue to the claimant for the forthcoming disciplinary. It was also submitted that Mr Walia should have obtained all the relevant DL25 forms for the terminated tests. This would have been best practice but in the event

the claimant's own evidence and knowledge and the understanding that Ms Archer had of the practices in Elgin was robust and clear and can give rise to no unfairness. In addition the interviewing of the Driving Instructor concerned would not have added anything to the information the respondents had given their acceptance of the claimant's evidence around the circumstances of the incident.

107. One area that could have been handled better and which was, at least on the face of it, of some possible concern was the failure in the disciplinary process to make it clear how the breach of the policy could in turn breach the Civil Service Code. This had been raised but not answered by the claimant in his meeting with Mr Walia. The Investigatory meeting didn't directly explore either issues of trust or lying by omission or any interaction with the Code. This deficiency was not rectified later. In essence it would have been wise for the respondents to have highlighted the terms of the Code at issue and to have shown him all the emails from Mr Neill.

108. The so- called failure to investigate the somewhat historic breach of policy alleged to have been committed by an unnamed senior manager later identified as Ms Archer, which I have touched on earlier, does not assist the claimant's case even if the respondent's manager had been given her name earlier. To be inconsistent the two incidents of misconduct have to be on all fours with each other. The claimant did not convince me that he could demonstrate this given that the full circumstances around Ms Archer's alleged breach was never investigated and not known to him at the time. Crucially, I have found that the matter was not properly before the respondent's investigator and no duty arose to investigate in the absence of a named culprit.

109. The claimant argued that he did not see breach of the policy as being such a serious matter that it might amount to gross misconduct. Every term of a policy cannot come with a health warning as it were but the one at issue was very clear in its terms and the claimant as an experienced individual and ex Police Officer must have known that not admitting the breach of policy could be treated very seriously in a public post that carries considerable responsibility and which requires high standards of probity.

110. No disciplinary process is perfect and there were areas which could have been handled better at both the investigation and particularly the disciplinary stage but the Tribunal has to look at the matter in the round. There was only one matter that stood out above the other more minor deficiencies and that was the issue of alleged irretrievable breakdown in trust.

111. As noted earlier the claimant was disadvantaged in my view as this matter not being explored at the Investigatory hearing which took place on the 13 February. The email from Mr Neill which was so heavily relied upon by Ms Archer and Mr Owens was only received on the 14 February. The Report itself refers to Mr Neill's position in rather ambiguous terms (p78) recording that the claimant often works away for days on his own and was found to be trustworthy but then he says the trust is broken and finally the trust 'is hard to repair'. This is dealt with rather summarily by Ms Archer (p91) who does not tell the claimant what her manager is saying or more accurately her interpretation of what he is saying and simply adds that a breakdown of trust can constitute gross misconduct without any exploration of the evidence. The disciplinary meeting, leaving aside the announcement of the decision, took only 24 minutes and the notes show that the issues were not fully or fairly explored particularly the significant issue of the alleged breakdown in trust and confidence. It would be unfortunate if the simple assertion of a belief that trust and confidence has irretrievably broken down was accepted as being sufficient. A reasonable employer would not take such a matter as read except perhaps in the clearest of cases. There was material before Ms Archer as we have seen that undermines the assertion and yet it was not engaged with. This finding was crucial to the decisions made both by Ms Archer and later Mr Owens.

112. It is important to consider the effects of the appeal here and whether it could be said to rectify any earlier shortcomings. Mr Owens pointed out that the appeal was not a rehearing but a consideration of the decisions made earlier in the process. He did not specifically revisit the evidence of Mr Neill or look into any apparent inconsistencies. He posed the question of how the clamant could be trusted as he had gone deliberately against policy but did not engage with the various issues although the matter is raised by the claimant in the appeal nor did he consider how the question should be

answered against the background of the claimant having worked for Mr Neill without further incident or need for restriction from 21 December when Mr Neill was told about the incident until the 7 March when he was dismissed a period of some weeks. It was interesting that he didn't appear able to go as far as saying in his letter rejecting the appeal (JBp102) that trust has been irretrievably broken down just that it has been damaged. In evidence it is clear that Mr Neill is examining Ms Archer's decision and effectively accepting the basis on which she made her decision.

113. For completeness the delays in the appeal process were unfortunate but no particular unfairness arose other than the delays themselves.

Remedy

114. The first question is the so called '***Polkey***' question namely what would have happened if the claimant had been alerted earlier to the stance being taken by his line manager over trust issues. I am of the opinion that it is not certain what Mr Neill would say about the issue of trust or how he would explain that he seems to have trusted the claimant to work unrestricted including working on his own at outstations for some weeks after the incident came to light. The evidence is not satisfactory as Mr Neill did not give evidence nor were the difficulties with his position even put to him. Nevertheless looking at the matter broadly I would expect that there was probably a fifty-fifty chance that Mr Neill would stick to his position that he could not trust the claimant in the future and that the implied term had been irretrievably broken.

115. The issue of contributory fault cannot be dismissed as Ms Churchhouse suggested. It is the employee's conduct which is the proper focus of the Tribunal's attention when considering a reduction under Section 123(6) of the ERA. The Section requires the Tribunal to consider a reduction where the dismissal was caused or contributed to by a claimant. The claimant was a former Police Officer. He knew the importance of following rules and his own description of events makes it clear that he initially refused to drive the car back. He is wholly the author of his own misfortune here. He knew it was a strict rule both from his training, his experience in the role and from the Examiner's 'Bible'. In addition, he deliberately kept quiet about the matter. His conduct was both blameworthy and culpable and led to his

dismissal. In my view it would be inequitable to make any compensatory award.

116. The Tribunal has a discretion under Section 122(2) to reduce or not reduce a basic award because of a claimant's actions before the dismissal if it is just and equitable to do so. It is only in unusual cases that the deductions vary between the basis and compensatory award and I see no reason why the basic award should not be reduced to nil for the same reasons as I have outlined above.

117. I did observe that this case was to an extent treated as being an 'open and shut' one by the employers. There is always a danger, especially when misconduct is admitted, for employers to forget that there is a duty to consider mitigatory factors and these may not be immediately obvious to them. There is also a risk that short cuts will be taken and less time spent, than should be spent, by a reasonable employer, in examining whether dismissal is actually the appropriate option (and no lesser sanction appropriate) and if so which elements of the misconduct are being relied upon and why.

Employment Judge: **James Hendry**
Date of Judgment: **19 March 2020**
Date sent to parties: **23 March 2020**