EMPLOYMENT TRIBUNALS

Claimant: Mr J Wynn

Respondent: Canal and River Trust

Heard at: Manchester **On:** 21 July 2020

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mrs A Newborough, Solicitor

JUDGMENT

The judgment of the Employment Tribunal is that the claimant was not unfairly dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from 27 July 2015 until his dismissal on 14 November 2019. He was a Volunteer Leader. The claimant alleges that he was unfairly dismissed. The respondent contends that the claimant was dismissed by reason of conduct following a full and fair procedure.

The Issues

2. The issues were confirmed with the parties at the start of the hearing. The issues were as follows:

   a. What was the reason for the dismissal and was it a potentially fair reason in accordance with section 98 of the Employment Rights Act 1996? The respondent asserts that it was a reason relating to the claimant's conduct.

b. Was the dismissal fair or unfair in accordance with section 98(4) of the Employment Rights Act 1996 (that is in accordance with equity and the substantial merits of the case)?

    i. Did the respondent have a genuine belief in the misconduct which was the reason for dismissal?

    ii. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?

    iii. Did the respondent carry out a reasonable investigation in all the circumstances?

    iv. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

c. If the dismissal was unfair, did the claimant cause or contribute to the dismissal by any blameworthy or culpable conduct and, if so, to what extent?

d. If the dismissal was procedurally unfair, what adjustment (if any) should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed? (*Polkey*).

The Hearing

3. The claimant represented himself throughout the hearing. The respondent was represented by Mrs Newborough, solicitor.

4. The Tribunal considered a bundle of documents which ran to 167 pages, the content of which was agreed (albeit as the claimant emphasised throughout the hearing, he objected to all of the notes of the meeting on 3 October 2019, which he said were not accurate). Only pages referred to in the witness statements or expressly referred to by the parties were read by the Tribunal. At the start of the hearing the Tribunal read the witness statements together with the relevant pages from the bundle.

5. The Tribunal heard evidence on behalf of the respondent from: Mr Stephen Ballard, the Regional Operations Manager for the north west region (and the person who made the decision to dismiss); and Mr Daniel Greenhalgh, the Regional Director for the north west region (and the person who heard the appeal). They were each cross-examined by the claimant and asked questions by the Tribunal.

6. The Tribunal heard evidence from the claimant. His statement as exchanged was only one-page long. At the start of the hearing the claimant provided a new supplemental statement. After having had time to consider it, the respondent did not object to the claimant relying upon this supplemental statement. The claimant's evidence was accepted as being the two statements combined. The claimant was cross examined on his statements by the respondent's representative and asked questions by the Tribunal.

7. The claimant made brief oral submissions. The respondent's representative made oral submissions. Neither party produced any written submissions for the Tribunal, nor did they refer to any specific case law as part of their submissions.

8. Based on the evidence heard, and insofar as relevant to the issues that must be determined, the Tribunal makes the findings set out below.

Findings of Facts

Background

9. The respondent has a "Smoking at Work" policy. That is a lengthy document, and includes the statement that all Trust workplaces are smoke-free. It highlights the importance of employees following what is said in the policy. The definition of a Trust workplace includes *"work vehicles which are enclosed and used by more than one person regardless of whether they are in the vehicles at the same time"* (139). The claimant's evidence was that he had never seen the Smoking at Work policy.

10. The respondent's disciplinary procedure includes in the non-exhaustive list of examples of behaviour that may be considered as gross misconduct *"smoking in non-designated areas"* and *"serious breaches or non-observance of the Trust's policies, procedures, rules and regulations"* (134). The claimant's evidence was that he had never seen the disciplinary policy as he had never previously needed to look at it, however where it could be found was identified in the claimant's terms and conditions.

11. The claimant drove a van belonging to the respondent. The side of the vehicle clearly displayed the respondent's branding. There was no dispute that the claimant would on occasion need to transport the respondent's employees and volunteers in the van, and that others might occasionally need to use the van (after the claimant had been given sufficient notice that they needed to do so).

12. The respondent is a charity with an emphasis on volunteering. Its aims include promoting well-being. The claimant in his role, as a volunteer team leader who organised and oversaw volunteers, was expected to set an example to the volunteers.

The initial allegation

13. At 9.40am on 2 October 2019 the respondent received a complaint via its live chat facility that a driver had been seen openly smoking in a vehicle which belonged to the respondent. The information was provided through a typed conversation undertaken on-line (it was not a verbal conversation). The visitor to the site identified themselves as working for the Smoking Cessation Services and, later in the chat, identified the location where they said they had observed the vehicle. After a four-minute pause in the conversation, the visitor was asked for their details, but no response was received. The visitor did not provide their name or contact details (78 and 78A).

14. It was established that the claimant had been driving the vehicle identified and that the vehicle had been at the location recorded on, or around, the time at which it was said it had been seen.

Investigation

15. The following day, 3 October 2019, at the end of a meeting which had been arranged to discuss other matters, Mark Ferris, the area operations manager and the claimant's line manager, raised the complaint with the claimant and asked him about it.

16. The notes of this meeting which were provided to the Tribunal were strongly disputed by the claimant and his criticisms of them formed a central part of his evidence to the Tribunal. When answering questions in the Tribunal, the claimant frequently returned to voicing his objections to the contents of the notes. Three versions were contained in the bundle:

a. typed notes which addressed only the element which related to the allegation being considered by the Tribunal, which had been included in the internal investigation report and had been considered by those hearing the disciplinary and appeal (60-62);

b. typed notes of the full meeting, including the other issues discussed in it, in which the relevant section about the smoking allegation was the same as that included in the extract (65-66) – the other issues discussed were not relevant to or related to the smoking allegation, albeit they did show Mr Ferris being critical of the claimant; and

c. handwritten notes of the full meeting (165-167), which the claimant complained had only been provided shortly prior to the Tribunal hearing (the respondent's explanation for any delay being related to Covid-19 and access to their premises).

17. The claimant's contention was that the meeting had not taken place in the manner recorded. The various issues had not been discussed in the distinct ways recorded. He also denied that he had said much of what was recorded in Mr Ferris' notes, and contended that Mr Ferris had said things which were not recorded. The claimant did not provide any note made by himself of the meeting. The claimant confirmed to the Tribunal that he had explained his objections to the notes in both the disciplinary and appeal hearings. Part of the claimant's criticism of the respondent's process was that it had been difficult for him in hearings because he had been asked to respond to things recorded in Mr Ferris' notes, which he contended he had never said.

18. During the claimant's meeting with Mr Ferris, the two of them went outside to look at the van. Mr Ferris took a number of photographs (68-74). The photos show:

a. A no smoking sign clearly displayed on the dashboard of the vehicle;

b. Debris in the vehicle, which Mr Ferris, Mr Ballard and Mr Greenhalgh identified to be ash. The claimant denied that all of it was ash;

c. A Coke can which had been used as an ash tray placed between the driver and passenger seats. Mr Ferris identified ash on and around the can; and

d. Smoking paraphernalia, such as tobacco, placed on the passenger seat.

19. The claimant at the meeting with Mr Ferris confirmed that he smoked but denied that he had done so in the van. Whilst the notes do record the claimant as denying that he had smoked, they also record some alternative explanations. These include: the claimant saying that he sometimes had an unlit cigarette in his mouth which helped him smoke less; that he may have jumped in the van when the cigarette was still lit; and he may have set off with a lit cigarette. In the Tribunal the claimant denied that was what he had said. The claimant's explanation was that he had given hypothetical explanations for what might have been seen (when under pressure in an investigation meeting for which he had not prepared), but he was adamant that he had always denied that he had smoked in the vehicle.

20. The claimant accepted that the vehicle was untidy. His explanation for the smoking paraphernalia on the seat was that he had placed it there prior to going to the meeting (and he emphasised that there was no rule against such items being in the van). He agreed that the Coke can was used as an ash tray, but the claimant said this was when he smoked outside the van. In the Tribunal, the claimant emphasised that as part of his role was to supervise litter collections which often involved picking up cigarette butts, he was particularly careful to ensure that his butts were not discarded and he would place them in his pocket and return them to the can if he was smoking when away from the vehicle. He accepted that to Mr Ferris the van could have smelled of smoke, and some ash could have been in the vehicle (albeit he disputed that there was as much ash as was suggested by Mr Ferris).

21. As part of the investigation, email statements were obtained from Chris Bird, Lead Volunteer, and Gary Wilkinson, a Volunteering Team Leader. Their emails said that, while in a vehicle with Billy Cox on 31 October, they had overheard a conversation with the claimant (on a hands-free telephone) in which the claimant said to Mr Cox that: they "*had found out about the smoking – I should've said it was crack cocaine*" (in the words of Mr Bird); or "*they found me smoking, I should've said it was crack cocaine*" (in the words of Mr Wilkinson). The claimant denied that he admitted to smoking in the vehicle as part of this conversation, but did not dispute that something of this kind was said (his point being that the way in which Mr Ferris had spoken to him had been of a manner that it felt like he was being accused of smoking crack cocaine).

22. It was proposed that a further investigatory meeting would be undertaken with the claimant. However, the claimant had a period of ill health absence, and it was concluded that a further meeting was not required. This appeared to have been a conclusion reached by Mr Ferris. In any event, the claimant, after a conversation with his trade union representative, had also decided that a further investigatory meeting should not take place and declined to attend one.

23. On 4 November 2019 Mr Ferris prepared an investigation report (87-90). Notes and emails were appended to it. He summarised the investigation undertaken. He recommended disciplinary action.

Disciplinary Invite

24. On 4 November 2019 the claimant was sent an invite to a disciplinary hearing to take place on 14 November (91-92). The invite set out the following as being the disciplinary allegations:

a. On 2 October 2019 you were seen by a member of the public (smoking cessation service) smoking in a Trust vehicle; and

b. It appears, due to photographic evidence, you may have on occasions smoked in a Trust vehicle.

25. The letter made clear that the allegations could result in dismissal. The right to call witnesses and to be accompanied was confirmed in the letter. The letter enclosed the investigation report and accompanying documents.

26. The letter was sent by Royal Mail recorded delivery. The claimant did not dispute that the card which notified him that Royal Mail had tried to deliver something to him was put through his letter box (the claimant being at work when the attempt to deliver it was made). However, the package was not collected by the claimant until after the disciplinary hearing, because the claimant had not identified the card which he said he did not notice amongst other post which had come through his letterbox.

27. In the Tribunal hearing the claimant criticised the fact that the respondent did not chase the claimant or check that he had received the recorded delivery letter. The claimant and his trade union representative did attend on 14 November 2019 for the disciplinary hearing, the claimant's evidence being that he had spoken to a member of the respondent's Human Resources team about the arrangements for the hearing. It was therefore clear that the claimant knew about the hearing, albeit that he had not received the materials in advance of the day of hearing.

Disciplinary Hearing

28. The claimant's disciplinary hearing on 14 November 2019 was heard by Mr Ballard. The hearing was also attended by: Ms Needham, HR Business Partner and note taker; the claimant; Mr O'Brian, trade union representative, who accompanied the claimant; and Mr Ferris, as the investigator. The Tribunal was provided with typed notes of the hearing (93-100), which it accepts as an accurate record of what was said.

29. The hearing was due to start at 10.00am. When it was identified that the claimant had not seen the documents, he was offered the opportunity to delay or reschedule the hearing. The hearing commenced at 11.25am. The notes record the claimant as saying that he did not want to delay the process. The notes also record the claimant as saying it was fine to carry on, when offered an adjournment on two occasions. The notes record the claimant's trade union representative explaining in response to the offer that they had had a couple of hours before the hearing (albeit it appears that they did not in fact have this long), and he had gone through the statements with the claimant. Mr Ballard's evidence to the Tribunal was that there was a genuine offer made to re-schedule the meeting and that this offer was repeated by Ms Needham, with the offers of adjournment also being intended to provide the claimant with an opportunity to say if he wanted the hearing to continue

on another date. The claimant did not understand the adjournment offers to be offers to continue on another date, but he did not dispute that he was given the opportunity to have the hearing re-arranged and he chose not to do so.

30. The Tribunal finds that there was a clear offer made to the claimant to either postpone the hearing to a later date or delay the hearing. The claimant declined the offer to re-arrange. The start was delayed in order to provide the claimant and his representative time to consider the documents. In the Tribunal hearing the claimant explained that he was not very happy with the advice he had received from his trade union representative on the day. It is also clear that with the benefit of hindsight the claimant wished that he had accepted the offer to re-arrange the hearing. Nonetheless it is clear that the claimant and his representative on the day were offered the opportunity to re-arrange the hearing and informed the respondent that he/they wanted the hearing to go ahead that day.

31. Amongst other things, in the course of the disciplinary hearing the claimant:

a. said he was completely clear that he had not smoked in the van (and had been when he spoke to Mr Ferris);

b. stated that did not want to call Mr Cox, when asked. In the Tribunal the claimant confirmed that he said no when offered the opportunity to call Mr Cox, but his thinking for doing so (which he did not voice at the time) was that Mr Cox was not available on that day; and

c. confirmed he was aware of the company policy about not smoking in vans.

32. In the Employment Tribunal hearing the claimant was adamant that he had always maintained that he did not smoke in the van. However, the notes of the disciplinary hearing on 14 November record the claimant providing various explanations of why he might have been seen as smoking in the van. Mr Ballard's evidence was that the claimant kept offering theoretical explanations as to why the complaint could have been made against him (without explicitly stating that he did any of those things on the morning in question), including: it could have been a lolly in his mouth; he sometimes drove with an unlit cigarette; and that he may have jumped in the van with a lit cigarette by mistake. Mr Ballard felt that the way the claimant responded regarding these issues did affect the claimant's credibility, he did not think that the explanations given by the claimant fitted with the evidence and, in some cases, didn't seem plausible to him. The Tribunal accepts Mr Ballard's evidence and accepts that there were reasonable grounds for Mr Ballard to form this view. It was apparent to the Tribunal, from the claimant's evidence in the Tribunal hearing, that the claimant clearly had some difficulty answering hypothetical questions and in explaining what he was saying when providing a hypothetical answer. He struggled to explain when providing a possible explanation for something (rather than an account of what had actually occurred). Part of the claimant's criticism of the respondent's disciplinary process was that he was being asked to provide an explanation for what had been recorded as seen, when in fact it was simply an untrue allegation. In practice, the explanations provided were a factor taken into account by Mr Ballard in reaching his decision.

33. At the end of the disciplinary hearing Mr Ballard adjourned the meeting to consider the evidence and make his decision. Mr Ballard took around 45 minutes to do so.

34. Mr Ballard returned to the meeting and informed the claimant of his decision. That decision was confirmed in a letter dated 21 November 2019 (102-104). Mr Ballard's decision was that the claimant had smoked in the van, that this constituted gross misconduct, and that the claimant would be summarily dismissed.

35. In his decision letter and in his evidence to the Tribunal, Mr Ballard provided a detailed explanation for the decision reached. His evidence in his statement to the Tribunal was *"The initial investigation notes, the photos of the Trust vehicle, the report from the member of the public, the lack of any seemingly credible explanation from the claimant, and the email statements from Gary Wilkinson and Chris Bird all very strongly pointed to the claimant having smoked in the van. This was the conclusion I arrived at".*

36. The Tribunal did question Mr Ballard about his decision and, in particular, asked him to explain a statement made in his decision letter that *"you failed to provide any evidence to prove that the allegations were not truthful".* The Tribunal was concerned from this that Mr Ballard may have started from the point that the claimant had to disprove the allegations which had been made. In answer to this question Mr Ballard provided a full and thorough explanation of why he had reached the decision that he believed that the claimant had smoked in the vehicle, placing particular emphasis on the photographs of the interior of the vehicle. His evidence was that he reasonably believed that the claimant had been smoking in the vehicle. The Tribunal found Mr Ballard to be a credible and genuine witness who had clearly carefully considered the decision that he reached. Having heard his evidence, the Tribunal does not find that Mr Ballard had predetermined the outcome. It finds that Mr Ballard considered the evidence before him prior to reaching his decision, which he reached on the balance of probabilities.

37. In terms of the sanction and decision to dismiss, Mr Ballard took account of: the fact that the misconduct was illegal; it posed a risk to the wellbeing of others who may need to travel in the van; it was against the Trust's rules; it posed a risk to the Trust's reputation; and the fact that he considered that the claimant was not being honest (which he said compounded the seriousness of the issue). Mr Ballard's evidence was that the claimant's length of service and the fact that this was the first disciplinary in which he had been involved, were taken into account, but did not result in a different outcome.

The Appeal

38. On 26 November 2019 the claimant submitted an appeal (105-108). The appeal was, in summary, on the following grounds: that the allegations did not constitute gross misconduct; that the claimant did not have sufficient time to prepare for the hearing; that the original statement could have been made by anyone and there was no genuine evidence to support it; that Mr Cox had prepared a statement and a copy was provided with the appeal letter (109); and the claimant objected to Mr Ferris' note of their meeting and stated that at no time had he admitted to smoking in the vehicle.

39. The statement provided by Mr Cox was handwritten and stated that, *"I do not recall"* the claimant saying that he had smoked in his work's van and confirmed that Mr Cox had never seen the claimant smoking in his work's van. It did not explicitly address the accounts of Mr Wilkinson and Mr Bird of the claimant's conversation with Mr Cox.

40. The appeal hearing took place on 13 December 2019 and was heard by Mr Greenhalgh, Regional Director. The appeal hearing was also attended by: Mr Ellis, HR Business Partner, who took notes; the claimant; and Mr Maguire, a trade union representative. The Tribunal was provided with lengthy notes of the appeal meeting (110-119), which it finds to be an accurate record of the meeting. The notes record that the hearing lasted from 10.30am until 12.32pm (including breaks).

41. Prior to the appeal hearing, Mr Greenhalgh identified that there was a Smoking Cessation Service office very close to where the claimant had been seen driving the van (and allegedly smoking in it). This was confirmed to the claimant in the appeal hearing, who accepted it was the case. The claimant challenged whether there was time for such a person to see the claimant and then make the complaint at the time recorded. He also questioned whether he could have been seen as suggested, taking account of the speed of vehicles and the fact that someone behind the van could not have seen through its rear window. Mr Greenhalgh's evidence was that the location of the office was something he took into account in deciding that the complaint recorded was credible.

42. In the appeal hearing, the claimant, for the first time, alleged that someone may have had an axe to grind or a grudge against him, and that was why there had been the original complaint. This was also what the claimant said in evidence before the Employment Tribunal, he alleged the complaint was a false complaint. In neither the appeal hearing nor the Employment Tribunal hearing did the claimant identify any specific person who he believed might have such a grudge. In his evidence to the Tribunal the claimant said that he would not do this because that would involve him making an unsubstantiated allegation (in the same way as an unsubstantiated allegation had been made against him). The claimant had grown up in the area where he had been seen driving the van and therefore posited the theory that it could have been someone out to get him who he grew up with, or alternatively that it could be another (unidentified) employee of the respondent.

43. During the appeal hearing the claimant was given an opportunity to explain everything that he wished to. In the course of the Tribunal hearing the claimant was asked what he would have raised at the disciplinary hearing had he had more time to prepare for it after he had received the papers. The claimant explained that he would have: obtained a statement from Mr Cox; highlighted the errors in the meeting notes prepared by Mr Ellis; and identified issues with the copy of the no smoking policy which he had been given. The claimant also confirmed that he had in fact raised all these things in the appeal hearing, and this is consistent with the record of the appeal.

44. Mr Greenhalgh's evidence was that, during the course of the appeal, the photographs of the van were looked at on his computer as digital images. That enabled those attending the appeal to zoom in and to look at the pictures in far greater detail than it was possible for the Tribunal to do. It was Mr Greenhalgh's evidence that to him the photos were very strong evidence that the claimant had

smoked inside the vehicle and he made particular reference to: the can which had been used as an ashtray; the ash in the photographs; and the quantity of what he believed to be ash shown in the photographs. Mr Greenhalgh in evidence confirmed that he accepted the claimant's explanation for the presence of the smoking paraphernalia on the passenger seat and therefore did not consider that as part of his decision. The claimant accepted, in answers to questions in the Tribunal hearing, that he accepted that the photos may look incriminating, but that was only (in his view) before he had the chance to explain them.

45. After adjourning the appeal hearing, Mr Greenhalgh did undertake limited further investigations. He spoke to Mr Wigley about an allegation made by the claimant in the appeal that he felt marginalised. He also spoke to Mr Cox and exchanged emails with him about his conversation with the claimant. The emails (123-124) record Mr Cox as stating that he did remember what was said in the van when he spoke to the claimant and recorded it as the claimant saying *"I'm up for the chop, I'm gone, a goner, I might as well of told them I was smoking crack cocaine".* With regard to the statements made by Mr Wilkinson and Mr Bird, Mr Cox confirmed that the statements sounded right. The claimant was not given any opportunity to further respond to this statement, Mr Greenhalgh's evidence being that he had spoken to Mr Cox as he wanted to clarify the points which the claimant had raised in the appeal hearing.

46. Mr Greenhalgh provided the claimant with a lengthy letter outlining his decision dated 23 December 2019 (125-128). That letter explained Mr Greenhalgh's decision that the appeal was not upheld, and his reasons for reaching it. After referring to the investigation and the email statements, the letter included the statement, *"I have a reasonable belief that you have been smoking in the van;* [because of] *the evidence above and the fact that a member of the public reported seeing you smoking in the van".*

47. Mr Greenhalgh's evidence was that he did not have any reason to doubt the genuineness of the complaint received, when it was considered with all of the other evidence which, in his view, pointed the same way. His conclusion was, *"I felt as certain as it is possible to, without actually having seen him smoking myself, that James had been smoking in the work van".*

48. Mr Greenhalgh in evidence also explained why he felt the sanction was appropriate: in the light of the no smoking sticker in the van; that he had no doubt that the claimant understood the rules; that smoking in the van flouted the law; that the respondent charity has a well-being focus; and that in openly smoking in a branded vehicle, that created a real risk of damage to the respondent's reputation.

49. In answers to questions, Mr Greenhalgh was very clear that he himself reached the decision that the decision to dismiss the claimant was correct. He confirmed that had he felt that Mr Ballard's outcome had been wrong, he would have found it was wrong and would have overturned the decision.

The Law

50. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct. If the respondent fails to persuade the

Tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair.

51. If the respondent does persuade the Tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The Tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

52. In conduct cases, when considering the question of reasonableness, the Tribunal is required to have regard to the test outlined in **British Home Stores v Burchell [1980] ICR 303**. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

53. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.

54. It is important that the tribunal does not substitute its own view for that of the respondent, **London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220** at paragraph 43 says:

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

55. It is important that the Tribunal does not substitute its own decision for that of the respondent. It is not for the Tribunal to weigh up the evidence that was before the respondent at the time of its decision to dismiss (or indeed the evidence before the tribunal) and substitute its own conclusion as if it were conducting the process afresh. The Tribunal does not need to determine whether the claimant committed the misconduct alleged.

56. The appropriate standard of proof for those at the employer who reached the decision, is whether on the balance of probabilities they believed that the misconduct was committed by the claimant. They did not need to determine or establish that the misconduct was committed beyond all reasonable doubt (nor did they need to do so on any other more onerous basis than the balance of probabilities).

57. In her submissions, the respondent's representative highlighted that when the Tribunal considers the investigation undertaken, the relevant question is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted.

58. Neither party referred to any specific authority regarding third party allegations and/or anonymous complaints. The Tribunal has taken account of **Henderson v Granville Tours Ltd [1982] IRLR 494** in which the EAT considered the reasonableness of an employer's belief and the adequacy of an investigation, in a case where a coach driver was dismissed following passenger complaints. In that case the Tribunal had erred in finding the dismissal unfair due to the absence of any appropriate or further investigation into the allegations which had been made. The EAT emphasised the importance of considering the tests laid down in **Burchell**. The Tribunal has also noted the guidance of the EAT on anonymous informants in **Linfood Cash and Carry Ltd v Thomson [1989] IRLR 235**, whilst noting that the situation was different in that case where the employer knew who the anonymous complainants were, and therefore many of the EAT's recommendations cannot apply to the circumstances in the current case. That decision emphasises that every case must depend upon its own facts and circumstances may vary widely. Emphasis was placed by the EAT on the need for further investigation to confirm or undermine the complaint raised, with corroboration being "*clearly desirable*".

59. Where the Tribunal is considering fairness, it is important that it looks at the process followed, as a whole, including the appeal. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of the procedure are sufficient to cure any earlier unfairness. Where the appeal is a re-hearing, it can remedy any defects in the procedure at an earlier stage.

60. The Tribunal referred to the ACAS code of practice on disciplinary and grievance procedures to which it is required to have regard. The Tribunal considered all of the ACAS code, but particularly noted:

a. That employers should carry out any necessary investigations, to establish the facts of the case;

b. Employers should inform employees of the basis of the problem and give them an opportunity to put their case <u>before</u> any decisions are made [the Tribunal's emphasis added]; and

c. Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct.

Discussion and Analysis

Issues a and b(i) – the reason for the dismissal and genuine belief

61. The Tribunal is satisfied that the respondent has proved that the reason for dismissal was the claimant's misconduct, that is that Mr Ballard and Mr Greenhalgh concluded that on balance the claimant had smoked in the respondent's vehicle. Each of them had a genuine belief that the claimant was guilty of the misconduct alleged. That was the reason that they reached the decision that they did. Both Mr Ballard and Mr Greenhalgh gave evidence which made clear that they had carefully considered their decision, understood the importance of it, and reached it for the reasons that they evidenced.

Issue b(ii) – did the respondent hold that belief in the claimant's misconduct on reasonable grounds

62. In terms of whether the respondent held that belief in the claimant's misconduct on reasonable grounds, the Tribunal understands the claimant's criticism of the process followed by the respondent. The allegation which led to the finding was based upon a report made by an unidentified member of the public. This is the central tenet of the claimant's case and his arguments before the Tribunal. The claimant did not believe that he should be dismissed for an allegation which had been made by an unidentified person in a way which had no formal signed record or other statement.

63. Both Mr Ballard and Mr Greenhalgh explained in their evidence the basis for the decision that they reached and why they believed that the claimant had committed the misconduct alleged. This belief was not solely based on the anonymous allegation, albeit clearly that anonymous complaint formed a key part of the decision(s). The photographs of the vehicle, the way in which the claimant explained what had occurred (in addition to his denial), and the accounts of others about a conversation with the claimant, all formed a component part of the decisions reached, as confirmed in more detail above at paragraphs 32, 35 and 36 (for Mr Ballard's decision) and 41 and 44-47 (for Mr Greenhalgh's decision). The Tribunal finds that the respondent did hold that belief in the misconduct on reasonable grounds. The Tribunal accepts the claimant's complaint that it was difficult for him to contradict the anonymous allegation made, nonetheless the respondent did hold its belief on <u>reasonable</u> grounds.

Issue b(iii) - did the respondent carry out a reasonable investigation in all the circumstances

64. The Tribunal also finds that the investigation carried out by the respondent was reasonable in all the circumstances, that is that it was one which fell within the range of reasonable responses that a reasonable employer might have adopted.

65. The Tribunal does not need to determine the accuracy of the notes made in the investigatory meeting, of which the claimant was highly critical (the benefits of investigatory meeting notes being signed and agreed is illustrated by this case). However, such investigation as was appropriate was undertaken and recorded in the investigatory report. A second investigatory interview might have been undertaken, but as the claimant himself declined the opportunity to attend a second investigatory

meeting that cannot mean that the lack of such an interview was unreasonable. As is recorded in paragraph 63, the Tribunal understands the claimant's difficulty in being asked to defend himself against an anonymous allegation, nonetheless the Tribunal finds that the respondent did such investigation as falls within the range of responses of a reasonable employer even in the light of the fact that the allegation made was by an anonymous member of the public (taking into account the test in **Burchall** and the cases of **Henderson** and **Linfood** highlighted above).

66. The reasonableness of the investigation is also to be considered in terms of the position at the end of the relevant hearing. The claimant was given a full opportunity to raise everything that he wished to at the disciplinary hearing. With hindsight the claimant regrets going ahead with that hearing (as he stated in the appeal) without having further time to prepare, but nonetheless that was a decision that the claimant took having obtained advice from his own trade union representative. Mr Ballard fully explored with the claimant the issues being considered, and gave the claimant a full opportunity to raise anything which he wished to at that hearing. In particular, the fact that the claimant disagreed with Mr Ferris' notes of the investigation hearing and denied that he had said some of what was recorded, was heard and considered by Mr Ballard who heard from both Mr Ferris and the claimant in the course of the disciplinary hearing and reached his own decision based upon what he had heard. Mr Ballard was able to form his own view of the claimant's explanations given to him during the hearing.

67. The claimant challenged the fact that the appeal was heard by Mr Greenhalgh alone. He did not raise this himself during the internal appeal hearing. The Tribunal finds that it was entirely appropriate for Mr Greenhalgh to hear the appeal and to do so alone. There was no obligation on the respondent to have the appeal heard by a panel or a panel incorporating a trade union official, whether under the respondent's procedures, the ACAS Code, or the basic requirements of fairness or natural justice.

68. As confirmed at paragraph 43, the claimant confirmed to the Tribunal that all of the things he would have raised at the disciplinary hearing had he had more time to prepare, he raised in the appeal. Those issues were considered by Mr Greenhalgh. In particular, the additional statement which the claimant obtained from Mr Cox was considered, and Mr Greenhalgh clarified that statement with Mr Cox. The Tribunal accepts Mr Greenhalgh's reasons for not providing the claimant with an opportunity to respond to what he identified in his further investigations and there was nothing raised by the claimant at the Tribunal hearing about the further email from Mr Cox which would have made any difference to the outcome (that is he disagreed with it but didn't know why Mr Cox had said what was recorded). Whilst the Tribunal does not find that there was any failure to carry out a reasonable investigation in all the circumstances at the end of the disciplinary hearing, even if there had been any failure that would have been rectified by the full and thorough appeal hearing conducted by Mr Greenhalgh. The Tribunal accepts Mr Greenhalgh's evidence that he determined the correct outcome for himself, and finds that the appeal was therefore a re-hearing.

Issue b(iv) – was the decision to dismiss a fair sanction

69. The claimant says that he should not have been dismissed, as a result of what was found. When asked, he said that he should have received some form of warning only. This was the first point raised by the claimant in his internal appeal. He

says the sanction was too harsh – that is he argues it falls outside the range of reasonable responses of a reasonable employer.

70. There is no real dispute that the claimant knew that smoking in the company vehicle was in breach of the respondent's rules. He confirmed that he knew this in the disciplinary hearing, as recorded in the notes. There was a large sign on the vehicle's dashboard telling the claimant that it was a no-smoking vehicle. Whilst the Tribunal accepts the claimant's evidence that he had neither seen the smoking policy nor the disciplinary procedure, nonetheless those documents do make clear the seriousness with which the respondent would treat such misconduct. If the claimant had chosen to look at the disciplinary procedure, that made clear that smoking in a non-designated area (whether or not any designated areas actually existed) was considered by the respondent to potentially be gross misconduct for which the sanction could be dismissal – in that respect it acted in compliance with the ACAS code.

71. Paragraphs 37 and 48 above record Mr Ballard and Mr Greenhalgh's evidence about why each of them considered that the misconduct amounted to gross misconduct and why dismissal was an appropriate sanction (including that smoking in the vehicle was unlawful) and the Tribunal finds that the reasons provided were the reasons why they determined that dismissal was the appropriate sanction.

72. In the light of those factors and for the reasons given, the Tribunal finds that the decision to dismiss was a fair sanction and was one which a reasonable employer could reach. The claimant understood that he should not smoke in the vehicle. The question for the Tribunal was whether the decision to dismiss fell within the reasonable range of responses for a reasonable employer, and the conclusion is that it clearly did.

73. It is not the Tribunal's role, nor is the Tribunal required to decide, whether or not the claimant smoked in his vehicle, or whether the Tribunal itself would have reached the same decision as that reached by Mr Ballard and Mr Greenhalgh. The claimant understandably attended the Tribunal determined to clear his name and prove he was innocent of the charges made against him by the respondent. As identified above in the **London Ambulance Service** judgment, the Tribunal must not substitute its own view for that of the employer. The claimant strongly argued before the Tribunal that he had not done what was alleged. He also did not believe that there was sufficient evidence for the respondent to reach the decision that it did. For the reasons given above, the Tribunal does find that dismissal was fair and was a decision reached following a fair procedure, in accordance with equity and the substantial merits of the case.

Issues c and d

74. As a result of the Tribunal's conclusions, it is not necessary for the Tribunal to determine the issues of *Polkey* or contributory fault.

Conclusion

75. For the reasons given above, the conclusion of the Tribunal is that the claimant was not unfairly dismissed.

Employment Judge Phil Allen

Date: 23 July 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

24 July 2020

FOR THE TRIBUNAL OFFICE

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