EMPLOYMENT TRIBUNALS

Claimant: Mr Gerard Hogg

Respondent: DHL Services Limited

Heard at: Newcastle (remote CVP) **On: 7 December 2020**

Before: Employment Judge A.M.S. Green

Representation
Claimant: Mr P Morgan - Counsel
Respondent: Mr R Dunn - Counsel

JUDGMENT

The claimant's claims of ordinary unfair dismissal and wrongful dismissal are dismissed.

REASONS

Introduction

1. For ease of reading, I have referred to the claimant as "Mr Hogg" and the respondent as "DHL".

2. Mr Hogg's claim was initially against DHL Supply Chain Limited. The parties agree that the correct name of the respondent should be DHL Services Ltd. The name has, therefore, been amended for the purposes of these proceedings.

3. I conducted a remote video hearing using the CVP platform. The parties worked from a digital bundle. An additional digital document entitled "Hebburn Depot Traffic Plan" (the "Traffic Plan") was admitted into evidence on the day of hearing. The hearing related to liability and remedy. The following people adopted their witness statements and gave oral evidence:

    a. Mr Mark Price – DHL's Warehouse Manager at its Hebburn site. Mr Price was the dismissing officer.

b. Mr Chris Bingley -DHL's Site Manager at its Hebburn site. Mr Bingley was the appeal officer.

c. Mr Hogg.

The representatives provided written submissions after the hearing for which I am grateful. I reserved judgment.

4. In reaching my decision, I have carefully considered the oral and documentary evidence, the submissions, applicable legislation, the case authorities, my record of proceedings and the ACAS Code on Disciplinary and Grievance Procedures (the "Code") and the ACAS Guide: "Discipline and Grievances at Work" (the "Guide"). The Code is relevant to liability and will be considered when determining the reasonableness of the dismissal.

5. The fact that I have not referred to every document produced in my decision should not be taken to mean that I have not considered it.

6. Mr Hogg must establish his claim on a balance of probabilities. However DHL, in defending the wrongful dismissal claim, must prove, on a balance of probabilities, that Mr Hogg committed a repudiatory breach of contract to justify summarily dismissing him.

The claim and the response

7. Mr Hogg presented claims for ordinary unfair dismissal and wrongful dismissal to the Tribunal on 13 August 2020. The effective date of termination of his employment was 6 March 2020. His claims should have been presented on or before 5 June 2020, but this period was extended by virtue of ACAS Early Conciliation which commenced on 1 June 2020 and ended on 14 July 2020. Consequently, his claims were presented in time.

8. Mr Hogg claims that he worked as a Class I HGV driver from 6 July 1997 until his summary dismissal on 6 March 2024. The dismissal allegedly flowed from an incident on 27 February 2020 when he was involved in a collision with a forklift truck ("FLT") driven by Mr Ian Walker under instruction by Mr Michael McDonald (the "Incident"). Mr Hogg and Mr Walker were subjected to disciplinary action. Mr Hogg was dismissed with immediate effect but Mr Walker was allowed to return to work. He received a warning Mr McDonald was not disciplined. Mr Hogg believes that the inconsistency of treatment between himself, Mr Walker and Mr McDonald suggests that his dismissal was not a reasonable sanction and/or the alleged misconduct was not the genuine reason for his dismissal. He says that he had an issue regarding overtime with DHL's transport manager, Mr Gav Hall, about three weeks before the Incident which resulted in Mr Hall behaving in a threatening manner. He questions whether this was linked to his dismissal. Consequently, he claims that his dismissal was both unfair and wrongful (he was dismissed without notice).

9. DHL denies that it wrongfully and unfairly dismissed Mr Hogg. In relation to the unfair dismissal claim, DHL says that after the Incident, it started an immediate investigation and suspended Mr Hogg on full pay. It says that it considered the roles and potential culpability of the other members of staff

who were present at the Incident. It considered the responsibilities of each employee and determined that no further action was to be taken against Mr McDonald. Mr Hogg and Mr Walker were sanctioned differently. This was because Mr Hogg was ultimately responsible for the vehicle and had not conducted appropriate checks before starting the engine and making the manoeuvre.

10. DHL says that it carried out a fair process and gave Mr Hogg adequate opportunity to respond to the relevant facts and statements during the investigation as a result of which DHL concluded that there was a disciplinary case to answer. A disciplinary hearing was held and chaired by Mr Price during which Mr Hogg was given a full opportunity to state his case, ask questions and present evidence. Mr Price concluded that Mr Hogg failed:

    a. to check load security;

    b. to follow the Highway Codes general rules 159 to 161 before making a manoeuvre; and

    c. Failed to follow the 5 Keys Smith System.

    He was dismissed without notice. DHL claims that it considered mitigating circumstances including Mr Hogg's length of service and disciplinary record. However, because of the serious nature of the misconduct and the serious risk to health and safety, summary dismissal was appropriate in the circumstances. Mr Hogg had failed to follow the correct procedure in several ways, each of which could have resulted in serious health and safety risks. He was an experienced driver who confirmed that he knew what the correct procedures were.

11. Mr Hogg appealed the decision and his appeal was heard by Mr Bingley on 14 May 2020. DHL says that after considering all the evidence and Mr Hogg's representations, the decision to dismiss was upheld.

12. DHL say that they followed a fair procedure and its own disciplinary policy. The dismissal was a fair sanction having regard to Mr Hogg's conduct. DHL denies that there was any other reason for Mr Hogg's dismissal.

13. In relation to the wrongful dismissal claim, DHL says that it dismissed Mr Hogg because he committed an act of gross misconduct. Consequently, it was entitled to dismiss him without notice because of Mr Hogg's repudiatory breach of his employment contract. DHL says that it did not commit any breach of contract.

The issues

14. The issues relating to liability for unfair dismissal that the Tribunal must determine are:

    a. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

b. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did DHL, in all respects act within the so-called 'band of reasonable responses'?

15. The issues relating to liability for wrongful dismissal that the Tribunal must determine are:

    a. What was Mr Hogg's notice period?

    b. Was Mr Hogg paid for that notice period?

    c. If not, was Mr Hogg guilty of gross misconduct? / did Mr Hogg do something so serious that DHL was entitled to dismiss without notice?

Findings of fact

16. DHL is part of a global logistics company. Mr Hogg started his employment with DHL on 7 July 1997. When he was dismissed, he was employed as a Class 1 HGV driver. He worked at DHL's premises in Hebburn.

17. A copy of Mr Hogg's contract of employment was produced [38]. Mr Hogg signed the offer letter containing his terms and conditions of employment on 7 July 1997. In so doing, he acknowledged receipt of the letter and agreed to the terms and conditions stated therein and confirmed that he had retained a copy. Paragraph 13 of his contract drew his attention to DHL's disciplinary procedure and the section relating to offences leading to dismissal.

18. DHL operates a disciplinary and grievance policy which was applicable to Mr Hogg's employment [60]. The policy provides, amongst other things, that employees are required to understand the rules and standards of performance and conduct expected of them by DHL. It provides that employees will only be subjected to disciplinary action once there has been an investigation of the facts and they have had an opportunity to present their side of the case. If an employee is disciplined, they will receive an explanation of the decision that has been reached and details of any sanction imposed and their right of appeal against that decision and/or sanction. The policy goes on to say that it is not possible to set out every example of conduct or performance which may lead to disciplinary action. It states, as a general rule, that DHL's disciplinary procedure may be invoked as a result of a failure to observe DHL's rules or procedures including those set out in the policy or in any other part of their contract of employment. Unsatisfactory conduct is categorised as follows:

    a. unsatisfactory conduct/misconduct; and

    b. gross misconduct.

19. The policy then lists examples of gross misconduct for which an employee may be summarily dismissed (i.e., dismissed without notice). The list is stated to be non-exhaustive and includes:

    a. deliberate or serious breaches of conduct, standards/rules and procedures;

b. deliberate, repeated or serious breaches of Health and Safety procedures, rules and Safe Systems of Work;

c. Conduct which causes, or has the potential to cause, unacceptable loss, damage, or injury.

20. DHL operates the Smiths Keys system which is a safe system of driving procedure on which Mr Hogg received training. DHL expects all drivers to adhere to it. A copy of the Smiths Keys system was produced [86]. The Smiths system sets out 5 Keys to safety. Mr Price speaks about the Smiths Keys system in his witness statement. He explains that it is a training course in driver safety, which provides five key "pillars" of driver safety.

21. The usual procedure that HGV drivers are required to follow is to hand the keys to their vehicle to the transport office at the end of their shift. Despite this, many drivers do not do that and instead leave the keys in the ignition despite there having been three briefings on the correct procedure within the 12 months prior to the Incident. Mr Hogg was present at two of those briefings. The reason for handing the keys in is to ensure that an FLT driver can retrieve the keys from the transport office before loading a vehicle, meaning that the vehicle cannot be moved off as the FLT driver has possession of the keys.

22. On 5 February 2020, Mr Paul Dellow was doing load planning duties. He approached Mr Hogg asking him to do overtime the following day. Mr Hogg replied that he did not want to work overtime but offered to look at the load and if it seemed okay, he would do it. He looked at the load and declined the offer of overtime. There was a disagreement about this between the two men and Mr Dellow told Mr Hogg to take the matter up with Mr Gavin Hall, DHL's Transport Manager. Mr Hogg and Mr David Turner, Drivers Mate, talked about the overtime issue and both said that they did not work overtime. They both went into the office and explain the situation to Mr Hall. Mr Hall told them to take the work out and see how they got on and if, by the time they got to Wooler, it was too late he would take it from there. Mr Hogg and Mr Turner agreed to this and left the office. Mr Turner then spoke to Mr Hogg to say that he could not stop out as he had to get home because his wife was unwell. Mr Hogg then told him that he would need to tell Mr Hall because the job had been agreed. Both gentlemen went back into the office to explain matters to Mr Hall and told him that Mr Turner was no longer willing to do the additional drop. Mr Hall told them to take the workload out and to bring the overtime work back. The following day, Mr Hogg and Mr Turner spoke to Mr Hall. It is suggested during that conversation that Mr Hall behaved in a threatening manner.

23. The following facts are agreed relating to the Incident:

a. On 27 February 2020, Mr Hogg, an HGV driver, turned up to site to collect his lorry.

b. When he got into the cab, the keys were in the ignition. Mr Hogg had not been driving the same vehicle the day before the Incident which meant that another employee had left the keys in the ignition to the vehicle instead of handing them in to the transport office.

c. He had not checked the near side of the lorry before he got in.

d. The lorry was being loaded by the FLT.

e. Mr Hogg did not realise this and started to move the lorry out of the bay.

f. Almost immediately, the FLT driver beeped his horn and Mr Hogg stopped the vehicle.

g. The lorry was being loaded by Mr Macdonald, driver's mate and Mr Ian Walker, the FLT driver.

h. Mr Walker received some form of warning as a result.

i. Mr Macdonald received no disciplinary sanction.

24. In relation to the Incident, I find the following additional facts. As a result of the collision with the FLT, product belonging to one of DHL's clients was damaged. This consisted of eight cases of client stock.

25. The Incident was investigated between 27 February 2020 and 3 March 2020. During his investigation interview on 3 March 2020, when he was asked why the keys had been left in the HGV, Mr Hogg stated that they were always left there and that he had been doing the same thing for 20 years.

26. Because of the results of that investigation, it was decided that Mr Hogg had a disciplinary case to answer and, on 3 March 2020, Mr Price wrote to Mr Hogg inviting him to attend a disciplinary hearing on 6 March 2020 [101]. He identified the following allegations:

    a. he failed to carry out appropriate vehicle checks OPS 13;

    b. he failed to check load security;

    c. he failed to follow the Highway Code general rules 159 to 161 before making a manoeuvre resulting in a collision with a MHE (i.e. the FLT which was loading his vehicle; and

    d. he failed to follow the 5 keys Smith System.

    He was warned that the allegations were very serious and could constitute gross misconduct which could result in his summary dismissal. He was notified of his statutory right to be accompanied by a work colleague or trade union representative at the disciplinary hearing.

27. Mr Hogg attended the disciplinary hearing on 6 March 2020 which was chaired by Mr Price. Having concluded the hearing, Mr Price dismissed Mr Hogg with immediate effect. During the disciplinary hearing, Mr Hogg stated, amongst other things, that he hoped to be "lucky enough" to keep his job [106]. This suggests that he understood the severity of his actions.

28. Mr Price wrote to Mr Hogg on 9 March 2020 to inform him of the outcome of the disciplinary hearing [109]. He found the following:

    a. Mr Hogg failed to check the load security prior to moving the vehicle.

    b. By failing to check mirrors and blind spots or looking around the vehicle before moving off, Mr Hogg failed to follow basic rules set out in the Highway Code 159-161.

    c. Mr Hogg failed to follow his Smiths Training, most notably Key 2.

    In the light of those findings, Mr Price summarily dismissed Mr Hogg without notice on the grounds of misconduct. His effective date of employment was 6 March 2020, and he would be paid up to and including that date as normal. He would not receive payment in lieu of notice. Mr Price notified Mr Hogg of his rights to appeal the decision. If you wish to appeal, he was required to submit his grounds of appeal within five working days of the date on which he received the disciplinary outcome letter.

29. In relation to the proven allegations set out in Mr Price's disciplinary outcome letter, I accept that Mr Price held an honest belief that those allegations had been established. In this regard, in his evidence, Mr Hogg accepted that it was important to check the security of his load before moving the vehicle. Furthermore, he agreed that had he not done that and the load could have moved within the vehicle or could have exited it as the vehicle moved away. Mr Hogg accepted that this could damage the stock, and/or injure other people. Mr Hogg accepted that this applied on site. I also note that Mr Hogg accepted that this meant confirming that the curtains around his trailer were properly shut. This is also supported by the section in the Traffic Plan entitled "Driving Safety Principles" which lists 12 principles to be followed. Number 11 stipulates that a person should not "drive around the site loaded with your curtains open". I also note that in his evidence, Mr Hogg accepted that stock could be loaded overnight, or in the morning and this could be done by hand even if an HGV were in a parking bay.

30. There was disputed evidence about whether it was common for HGVs to be loaded in parking bays at the site with an FLT given the restraints of the site layout. Mr Hogg questioned this in his evidence but I note that he never raised this either at the time of his investigation [89] or during his disciplinary hearing [103]. DHL's position on this is that it demonstrates that Mr Hogg was aware that this practice was followed. I think there is force in that because if he had he contested this, I would have expected him to have raised it during the investigation and/or his disciplinary hearing. Consequently, I find that it was more probable than not for HGVs to be loaded in parking bays with an FLT notwithstanding the restraints on the site layout. Even if I am wrong in this regard, whilst Mr Hogg disputed the existence of this practice, in his evidence, he said accepted that it was important to check his load security because the curtains on his trailer could be open or the vehicle could be loaded by hand.

31. I find that during the investigation and disciplinary meetings, Mr Hogg admitted entering the vehicle, starting it, and pulling forwards without checking around it. He simply assumed that nobody was around [16 & 81]. He admitted that he had not checked the load and he suggested that he would only do so if he saw "anyone around" [94 & 105].

32. There was disputed evidence as to whether DHL retracted the allegation concerning the failure to follow the Highway Code rules 159 to 161 before making his manoeuvre. This is something that is set out in Mr Hogg's claim form. However, I have not seen any evidence of such action on DHL's part. Consequently, I accept that Mr Price honestly believed that the allegation had been made out. Furthermore, this proposition is supported by the following:

    a. Rule 159 requires all drivers to use their mirrors and blind spots before pulling off, to ensure it is safe [82]. In his evidence, Mr Hogg accepted that.

    b. In conducting the disciplinary hearing, Mr Price was confronted with inconsistent evidence. Mr Hogg suggested he made checks or only checked one mirror [105] or made no checks [106]. During the disciplinary hearing, Mr Hogg seemingly admitted that he had not made any checks and said that he had never done anything like that before [106]. When Mr Price put it to Mr Hogg that such behaviour was inexcusable, and that Mr Hogg failed to make checks, he replied "I know" [106]. In other words, Mr Hogg was admitting to failing to check his mirrors.

    c. Mr Hogg had also suggested that he was not bound by the Highway Code as the Incident took place on private land. This does not sit comfortably with his admission that he should have checked his mirrors. He also attempted to justify his failure to follow the rules because, as he was driving on private land, there would have been nothing behind him [185]. As a matter of fact, that was plainly not the case because the Incident occurred. Two people, Mr McDonald and Mr Walker, were behind the HGV loading it. Mr Hogg was oblivious to that fact because he had not checked.

    d. In his defence, Mr Hogg had alleged that he was blinded by a spotlight when he was allegedly checking his nearside mirror. However, in his evidence he agreed that if his vision had been obscured, he should have got out of the cab and made physical checks, buthe did not do that [95 & 106].

    e. In his evidence to the Tribunal, Mr Hogg accepted that this was a serious breach of rules and procedures regarding health and safety.

33. In respect of the Smiths Keys system, during the disciplinary hearing Mr Hogg acknowledged that he had failed to follow Keys 2, 3 & 5 and did not provide an explanation to Mr Price. The Smiths Keys system deals with key checks drivers must make when pulling off and moving their HGV. Key 2 requires drivers regularly to check the sides and rear of their vehicle [86]. In his evidence, Mr Price explained that he had focused on key 2 and Mr Hogg's failure to be aware of the sides and rear of his vehicle. He also said that he had considered keys 3 & 5. In his evidence, Mr Hogg accepted that he failed to follow the 5 keys of the Smiths system and he accepted that that constituted a serious breach of health and safety rules and procedures.

34. In his evidence regarding his decision to dismiss Mr Hogg, Mr Price explained that this was not a case of Mr Hogg "not doing more". Mr Price was very clear

that Mr Hogg failed "even to do the basics". He explained that the Incident had been very similar to an incident at Prestonbrook in 2019 in which an FLT had tipped over causing injury. Mr Hogg accepted the similarity of that to the Incident. Mr Price stated that there could have been injuries because of the Incident but for Mr Walker's quick reversing. Mr Hogg agreed that injuries could have occurred because of the Incident.

35. In paragraph 34 of his witness statement, Mr Price explained that there had been fatalities in the past and similar incidents. Furthermore, the Incident involved an HGV. Both in his evidence and in his witness statement, Mr Price stipulated that health and safety was of paramount importance and that DHL is a large logistics business that must treat incidents, such as this, very seriously. I have no reason to doubt what Mr Price said. Regarding the severity of the Incident, I note Mr Bingley's evidence where he said the accident report prepared because of the Incident was sent to every DHL depot nationally. This underlines how seriously DHL took the Incident.

36. In his witness statement, Mr Price also explained that he was concerned that Mr Hogg did not fully appreciate the gravity of the situation notwithstanding his admissions, both during the investigation and disciplinary stages. Consequently, this caused Mr Price to lose trust in Mr Hogg particularly when Mr Hogg alleged that Mr Walker and Mr McDonald had committed an act of gross negligence and he had not [164]. I find this explanation both plausible and credible.

37. During the disciplinary hearing, Mr Price states in his witness statement at paragraph 36 that he considered Mr Hogg's mitigating circumstances including his length of service and his disciplinary record. However, given the seriousness of Mr Hogg's breaches, he felt that he had no option but to dismiss him.

38. In Mr Bingley's evidence, he was clear that the Incident had an impact on DHL's client relations and could undermine its reputation. Client property had been damaged. I have no reason to doubt what Mr Bingley said.

39. The question of inconsistency of treatment between Mr Hogg, Mr Walker Mr McDonald has also been raised. Mr McDonald was not responsible for the HGV at the time of the Incident whereas Mr Hogg was. Mr McDonald did not cause injury or harm because he was never in a position to move the HGV whereas Mr Hogg was and he accepted that he could have caused harm. Mr Price made it clear that Mr McDonald was never in breach of any written rules or procedures whereas Mr Hogg accepted that there had been serious breaches of health and safety rules and procedures. Mr McDonald was simply the driver's mate. Regarding Mr Walker, he was the FLT driver. DHL in separate disciplinary proceedings, found that he had acted in breaches of rules and procedures because he failed to take the keys out of the ignition of the HGV. That was not the same as Mr Hogg. In his evidence, Mr Price said that Mr Hogg was a professional driver behind the wheel of an HGV and was entirely responsible for that vehicle. Mr Bingley agreed with that and he saw Mr Hogg's conduct is more serious.

40. Mr Hogg appealed the decision to dismiss him setting out his reasons in an undated letter to Mr Bingley [114]. His grounds of appeal were as follows:

The disciplinary action was too harsh.

I believe it's harsh because there were four parties who all had equal failings in this incident and I am the only one who has paid the price, making my treatment unfair.

Although I accept that I have to shoulder some of the blame and responsibility I believe a final written warning would of [sic] be more merited.

Using the Highway Code and also the 5 Smiths Keys and not an actual company policy to justify dismissal.

The fact I reported the incident hasn't been took [sic] into consideration, it would of [sic] been easy to hide the three broken cases and no one would of [sic] been none the wiser.

The fact my quick response prevented a more serious accident happening. This also hasn't been taken into consideration.

I've done the same thing for the last 23 years and nothing like this has ever happened before.

A similar incident of not checking or securing a load, which resulted in a sack barrow coming off the back of a wagon. A sanction of a written warning was issued.

Gross misconduct is a willful or deliberate act this wasn't.

41. On 12 March 2020, Mr Bingley emailed Mr Hogg to acknowledge receipt of his appeal letter [115]. On 7 April 2020, Mr Bingley emailed Mr Hogg to tell him that it would not be possible to conduct the appeal hearing on site. In further evidence on this point, the reason for this was the Covid pandemic. He had been offered the opportunity to conduct the hearing via Skype but Mr Hogg had declined this. Consequently, the next opportunity to hear his appeal on site would be when the social distancing restrictions had been lifted and the site reopened. He indicated that he would contact him when both of those conditions had been satisfied.

42. There was further communication between Mr Hogg and Mr Bingley about the arrangements for hearing his appeal and he subsequently stated that whilst Skype was not ideal, he had agreed to it and he asked for an appeal to be heard using that platform [117].

43. A Skype meeting was arranged for 10 April 2020 but did not go ahead. Mr Hogg believed that it had been arranged to take place at the conference room at the site. Mr Bingley disagreed and stated the meeting was not cancelled by himself or Mr Hogg's representative, Mr Vardy. He copied the email where he had offered Mr Hogg the two options one of which was the Skype call, or the other was to wait until the restrictions had been lifted regarding social distancing. He stated that Mr Hogg had asked for a Skype hearing. Both Mr Bingley and Ms Hall (the HR representative) were ready for the meeting. Mr

Bingley denied that he had told Mr Hogg to come to site for the meeting. He offered to review the situation in three weeks' time [119].

44. On 5 May 2020, Mr Bingley wrote to Mr Hogg inviting him to an appeal hearing [122]. He confirmed that he would be the chair of the hearing. The hearing would take place on 14 May 2020 at 1 PM via telephone.

45. The telephone appeal hearing took place on 14 May 2020. It was chaired by Mr Bingley. Ms Hall, Lead HR Business Partner was the notetaker and management representative. Mr Hogg attended and was accompanied by Mr Vardy, his trade union representative. During the appeal hearing, Mr Bingley had noted, amongst other things, that Mr Hogg not been driving the same vehicle the day before which meant that another employee had left the keys in the ignition to the vehicle instead of handing them into the Transport Office. He asked Mr Hogg if he had handed in the keys for the other vehicle which he was driving the day before the Incident to which he replied that he had not and he had also left them in the ignition. This was in breach of the procedure. Mr Bingley questioned Mr Hogg further on this because if the keys had not been in the ignition, Mr Hogg would have retrieved them from the office and he still would have got into the vehicle having not done his safety checks and move the vehicle causing the collision. He did not understand why the keys being with Mr Hogg instead of the ignition would have changed the events. Regardless of where the keys were, Mr Hogg could still move the vehicle without making the necessary checks thereby causing the collision.

46. On 11 June 2020, Mr Bingley wrote to Mr Hall to confirm that he had dismissed his appeal [195].

Applicable law

47. The circumstances under which an employee is dismissed are set out in section 95 of ERA as follows:

> *(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)…., only if) –*
>
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> *…*

48. The fairness of a dismissal is set out in section 98 of ERA as follows:

> *(1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

…

(b) relates to the conduct of the employee,

…

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

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

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

49. DHL must show that Mr Hogg's misconduct was the reason for the dismissal. According to the Employment Appeal Tribunal in **British Home Stores Limited v Burchell 1980 ICR 303**, a threefold test applies. DHL must show that:

    a. it believed that Mr Hogg was guilty of misconduct;

    b. it had in mind reasonable grounds upon which to sustain that belief; and

    c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

    This means that DHL need not have conclusive direct proof of the Mr Hogg's misconduct; only a genuine and reasonable belief, reasonably tested.

50. The **Burchell** guidelines are clearly most appropriate where misconduct is suspected. Little purpose would be served by an investigation where the misconduct is admitted (**SSE v Innes [2011] 00043/10/BI**). However, the reasonableness test contained in section 98 (4) ERA must still be applied and the employer must consider whether that particular conduct warranted dismissal. There may also be special circumstances in which the reasonable employer would still be expected to carry out its own investigation. In **CRO Ports London Ltd v Wiltshire EAT 0344/14** the claimant had admitted that he bore full responsibility for an accident involving a heavy lift, which had come about because of his breach of health and safety rules. However, at a disciplinary hearing he pointed out that the employer had effectively condoned the practice as a means of dealing with time pressures. Despite this, he was summarily dismissed. An employment tribunal found the dismissal unfair

because the employer had not carried out a reasonable investigation into the employee's explanation for his misconduct. Upholding an appeal against that decision, the EAT stressed that where the grounds relied upon by the employer to justify dismissal include the employee's admission of his or her misconduct, the question becomes whether the employer acted within the range of reasonable responses of the reasonable employer in limiting the scope of its investigation in the light of those admissions.

51. An employer who establishes a reasonable belief that the employee is guilty of misconduct in question should still hold a meeting and hear the employee's case, including any mitigating circumstances that might lead to a lesser sanction.

52. Exactly what type of behaviour amounts to gross misconduct depends upon the facts of each case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e., it must be repudiatory conduct by the employee going to the route of the contract) (**Wilson v Racher ICR 428, CA**). The conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence.

53. An employer is expected to have regard to the principles for handling disciplinary and grievance procedures in the workplace set out in the Code. The Code recognises that an employee might be dismissed even for a first offence where it constitutes gross misconduct. A non-exhaustive list of examples is given in paragraph 88 of the Guide. This includes causing loss, damage or injury through serious negligence and a serious breach of health and safety rules.

54. Single acts of misconduct must be particularly serious to justify summary dismissal. For 'gross misconduct' to be found the conduct is likely to be considered 'such as to show the servant to have disregarded the essential conditions of the contract service' although a single act of negligence might justify summary dismissal at common law, as Lord Maugham commented in **Jupiter General Insurance Co Ltd v Shroff [1937] 3 All ER 67**, this will be in exceptional circumstances only

55. Although dismissal for gross misconduct will often fall within the range of reasonable responses, this is not invariably so. This was made clear by the EAT in **Brito-Babapulle v Ealing Hospital NHS trust 2013 IRLR 854, EAT** which overturned an employment tribunal's decision because it was based upon that false premise. The EAT noted that the Tribunal's approach gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, notwithstanding the gross misconduct. Such factors might include the employee's long service, the consequences of dismissal and any previous unblemished record. The tribunal was suggesting that the existence of gross misconduct, which is often a contractual issue, is determinative of whether a dismissal is unfair, whereas the test for unfair dismissal depends upon the separate consideration called for under section 98 ERA. This decision is reflected in the Guide which states that when deciding whether a disciplinary penalty as appropriate and what form it should take, consideration should be given to, among other things, the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service; any special circumstances that might make it appropriate to adjust

the severity of the penalty; and whether the proposed penalties reasonable in view of all the circumstances.

56. I remind myself that in this case Mr Hogg has put in issue his length of service as a factor to be weighed in the decision whether to dismiss, especially if it is long service with little or nothing by way of disciplinary record. I am reminded that the starting point here is that in a case of gross misconduct there may be little role for long service. In **AEI Cables Ltd v McLay [1980] IRLR 84, Ct Sess** it was said that in such a case it would be wholly unreasonable to expect an employer to have any further confidence in the employee and to continue the employment; the gravity of the offence outweighed the factor of the length of service. The basic proposition in **McLay** was described as 'trite law' in **London Borough of Harrow v Cunningham [1996] IRLR 256, EAT**.

57. Inconsistency of punishment for misconduct may give rise to a finding of unfair dismissal, as the Court of Appeal recognised in **Post Office v Fennell 1981 IRLR 221, CA**. In that case F have been dismissed for striking a colleague during a quarrel in the canteen. A tribunal found the dismissal unfair, pointing out that the Post-Office had acted differently in comparable cases, and ordered a re- engagement. In the Courts of Appeal Lord Justice Brandon cited the words “having regard to equity and the substantial merits of the case” (contained in the precursor to section 98 (4) ERA) and said:

> *It seems to me that the expression “equity” as there used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that (a) the Tribunal is entitled to say that, where that is not done, and one man is penalised more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal.*

Brandon LJ made two further observations. First, it is for the tribunal to decide whether, on the facts, there was sufficient evidence of inconsistent treatment. As he pointed out, the Tribunal would have less detailed information regarding other cases allegedly dealt with more leniently by the employer than the information in the case before it. His second point stressed that while a degree of consistency was necessary, there must also be considerable latitude in the way in which an individual employer deals with particular cases.

58. I remind myself that in **Hadijioanno v Coral Casinos Ltd 1981 IRLR 352, EAT**, the EAT held that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances:

    a. where employees have been led by an employer to believe that certain conduct will not lead to dismissal;

    b. where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason;

    c. where decisions made by an employer and truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.

59. Although the decision in **Fennell** was not referred to, **Hadijioanno** simply placed different emphasis on the same rule. Employers, while retaining flexibility of response to employee behaviour, must act reasonably in the sanctions they choose to apply. Any change of punishment policy without warning, any dismissal for faults previously condoned or any unjustified difference in treatment of employees in similar positions will contribute towards making the dismissal unfair.

60. When determining whether or not dismissal is a fair sanction, it is not for the Tribunal to substitute its own view of the appropriate penalty for that of the employer. The position was stated most succinctly by Phillips J giving judgment for the EAT in **Trust Houses Forte Leisure Ltd v Aquilar [1976] IRLR 251**:

> *It has to be recognised that when the management is confronted with a decision to dismiss an employee in particular circumstances there may well be cases where reasonable managements might take either of two decisions: to dismiss or not to dismiss. It does not necessarily mean if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible.*

61. Consequently, there is an area of discretion with which management may decide on a range of penalties, all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable, but whether or not dismissal was reasonable: see the Court of Appeal decision in **British Leyland v Swift [1981] IRLR 91**, more recently applied by the Court of Appeal in **Securicor Ltd v Smith [1989] IRLR 356** (which concerned an alleged inconsistency in treatment between two employees). But this discretion is not untrammelled, and dismissal may still be too harsh a sanction for an act of misconduct.

62. In para 3 of the ACAS Code, it is stated that:

> *Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case.*

63. There are a whole range of potential factors which might make a dismissal unfair. Many of these are likely to be relevant in all unfair dismissal cases. In misconduct cases they include especially the employee's length of service and the need for consistency by the employer. The importance of length of service and past conduct were emphasised by the EAT in the early case of **Trusthouse Forte (Catering) Ltd v Adonis [1984] IRLR 382** as being proper factors for a tribunal to take into account when considering whether the sanction imposed falls within the band of reasonable sanctions. Moreover, it was later accepted by the Court of Appeal that the severity of the consequences to the employee of a finding of guilt may be a factor in determining whether the thoroughness of the investigation justified dismissal: **Roldan v Royal Salford NHS Foundation Trust [2010] EWCA Civ 522**, (dismissal likely to lead to revocation of work permit and deportation). While this latter point has obvious sense behind it (particularly where, for example, some form of professional status is in grave jeopardy), it was suggested subsequently in **Monji v Boots Management Services Ltd UKEAT/0292/13**

(20 March 2014, unreported) that some care may be needed in its application; the basic principle was not doubted, but three caveats were mentioned:

d. this is an area where the EAT must be particularly careful not to substitute its own view on the facts for that of the Tribunal;

e. it may be that the **Roldan** principle may be most applicable to facts such as those in that case itself, namely where there is an acute conflict of fact with little corroborating material either way, and/or where the case against the employee starts to 'unravel' as it proceeds, in which case it makes sense to expect a higher level of investigation and adjudication on the part of the employer in the light of the severe effects of dismissal on that employee;

f. the question is whether the Tribunal has in fact applied the **Roldan** approach, not just whether they have done so expressly, though the EAT did add that in such a case a tribunal is advised to make it clear in their judgment that this has been part of their reasoning.

64. One other area where it is particularly important for the Tribunal to apply the correct 'range' test is where the claimant argues that he or she should have been given a lesser penalty than dismissal on the facts. In principle that is not the question posed by the legislation, which is whether the dismissal actually imposed was or was not fair. However, the (split) decision of the NICA in **Connolly v Western Health and Social Care Trust [2017] NICA 61**, may at first sight appear to question this because the majority held that dismissal on the (rather harsh) facts was disproportionate and thought that the possibility of a lesser penalty (ignored by the Tribunal) was relevant to the question of proportionality when applying the ultimate ERA 1996 s 98(4) test of 'in the light of equity and the substantial merits of the case'. Did this imply criticism of the range test itself? The clue may be in the passage in the majority judgment which poses the question 'whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct' (emphasis added). In applying the ultimate lodestone, all factors are relevant and the italicised phrase suggests that the possibility of a lesser penalty can be one such factor provided it is used in applying the correct range test – not whether the Tribunal thinks the employer should have imposed that lesser penalty but whether a reasonable employer could still have dismissed in spite of that lesser possibility.

65. One final point to note is that, although misconduct can take so many forms, there is no hierarchy or gradation of the 'range' test, which simply must be applied in all the circumstances. Clearly, there can be instances where an employer wishes (or indeed needs) to take a 'zero tolerance' approach to a certain form of misconduct, an obvious and pressing example being abuse of children or vulnerable adults. This can of course be a factor (and indeed in that particular example it can occasionally justify dismissal on suspicion rather than belief), especially if made sufficiently clear to employees in advance. However, conceptually this does not alter the range test itself. This was made clear by the Court of Appeal in **Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, [2015] IRLR 734** in another particularly sensitive area. Breaches of health and safety rules by an employee are usually treated particularly seriously by employers but in this case the court affirmed that they

do not constitute a separate subset in unfair dismissal, in which the range of reasonable responses open to the employer is wider than normal.

66. In **Newbound**, the claimant was dismissed for a serious breach of procedures in going into an enclosed space without breathing apparatus. His senior who had permitted it was given a lesser penalty. The claimant had over 30 years' service with the employer, but the latter considered that in these circumstances this acted as an aggravation of the misconduct, not mitigation. The tribunal found that the dismissal was unfair generally, partly in the light of the long service, and also specifically because of the disparity in treatment in comparison with his senior; this was subject to 40% contributory fault. The EAT allowed the employer's appeal, considering that the Tribunal had substituted its own view for that of the employer. Allowing the employee's further appeal, the judgment of Bean LJ is largely concerned with the role of the EAT in such cases, finding that it had overstepped the mark and that the tribunal had applied the law properly and reached conclusions open to it; the EAT had been wrong to intervene. On the specific health and safety point above, however, the employers had argued that in such cases the margin of appreciation given to employers ordinarily by the range test should as a matter of principle be widened, but the Court of Appeal disagreed and held that the normal rules on fairness still must be applied.

67. Any dismissal by the employer in breach of contract, whether constructive or express, will give rise to an action for wrongful dismissal at common law. There are several different examples of wrongful dismissal. In this case, the relevant type of wrongful dismissal is whether dismissal occurs with no notice or inadequate notice and summary dismissal is not justifiable. Underpinning this is repudiatory conduct by an employee justifying summary dismissal.

68. Cases concerning repudiatory breaches by employees typically concern dishonesty, disobedience, or negligence. However, the common theme underlying the concept of all repudiatory breaches is that the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract (**Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698, CA**). The employer faced with such a breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation, which results in immediate (i.e., summary dismissal). There is a link here between summary dismissal and wrongful dismissal as dismissal without notice is wrongful (i.e., is a breach by the employer) unless the employer can show that summary dismissal was justified because of the employee's breach of contract.

69. DHL must be able to prove that there was a repudiatory breach of contract to justify summarily dismissing Mr Hogg without incurring liability for wrongful dismissal. It is not enough for DHL to prove that it had a reasonable belief that Mr Hogg was guilty of gross misconduct. The Tribunal must be satisfied both that Mr Hogg committed the misconduct, and that it was sufficiently serious to amount to a repudiation (**Shaw v B and W Group Ltd Eat 0583/11**).

70. The degree of misconduct necessary for Mr Hogg's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal to decide. I remind myself that in **Briscoe v Lubrizol Ltd 2002 IRLR 607, CA** the Court of Appeal approve the test set out in **Neary and anor v Dean of Westminster**

1999 IRLR 288, ECJ (Special Commissioner), where the Special Commissioner asserted that the conduct:

> *must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment.*

71. There are no hard-and-fast rules. Many factors may be relevant: for example, the nature of the employment and the employee's past conduct. The issue of whether misconduct by the employee amounts to a repudiation of the contract may also turn on the terms of an individual's contract where the employer has stated that certain acts are to be treated as warranting summary dismissal.

Discussion and conclusions

72. In the light of my findings of fact and having considered the submissions and applicable law I now turn to the issues.

73. In relation to the unfair dismissal claim I find that the principal reason for dismissal was Mr Hogg's conduct which is a potentially fair one in accordance with sections 98(1) and (2) of ERA for the following reasons:

    a. DHL's witnesses maintained a consistent position on this in their statements and this is supported by the evidence relating to the investigation, the disciplinary hearing, and the appeal.

    b. Whilst Mr Hogg advances a conspiracy theory as the operative reason for his dismissal emanating from his disagreement with Mr Hall concerning his overtime, I cannot accept his alternative proposition. In his evidence, Mr Hogg accepted that he had committed serious breaches of the rules and procedures. An example of this can be seen in his appeal letter. Despite this, he continued to deny that conduct was the reason for his dismissal. That is neither logical nor plausible given the weight of evidence to the contrary. In this regard, he would have to establish that Mr Price was aware of the issues concerning overtime and that this informed and motivated his decision to dismiss Mr Hogg. However, in his evidence, Mr Hogg could not say whether Mr Price was aware of the overtime issue when he decided to dismiss him. This is also accepted by Mr Hogg in his appeal [193]. In his paragraph 44 of his witness statement, Mr Price states that he was unaware of the overtime issue until Mr Hogg presented his claims. Finally, Mr Hogg agreed that he made the overtime complaint jointly with Mr Turner and he would have expected any alleged retaliatory action to be against both men. However, no action was taken against Mr Turner [190].

74. Given that Mr Hogg's conduct was the reason for his dismissal I find that it was fair in accordance with ERA section 98(4), and that DHL, in all respects acted within the so-called 'band of reasonable responses'? For the following reasons:

    a. Mr Hogg has not challenged the fairness of the procedure. Instead, he focused his challenge on the outcome of the procedure. He did not object to the fact that he was suspended, and he did not complain

about the disciplinary procedure, the choice of Mr Price to conduct the disciplinary hearing and the choice of Mr Bingley to conduct the appeal. I also find that DHL followed the principles enshrined in the Code and the Guide.

b. Whilst I note that Mr Hogg objected to the appeal notes, he was entitled to make amendments to them and to submit evidence of his own recollection [165].

c. When Mr Price wrote to Mr Hogg inviting him to the disciplinary hearing he set out the allegations of misconduct that he had to answer to [101]. None of this is contested.

d. After hearing the disciplinary case, Mr Price upheld some but not all the allegations. The allegation that was not upheld was the failure to conduct OPS13 checks. This shows that Mr Price had considered and accepted Mr Hogg's representations on that allegation. Mr Price had meaningfully engaged with Mr Hogg which is an essential facet of natural justice.

e. Regarding the allegations that were upheld, in view of my findings of fact, Mr Price held an honest belief based on reasonable grounds following a reasonable investigation.

f. Mr Hogg admitted his breaches both during the investigation and the subsequent disciplinary hearing. Consequently, this limited the scope of DHL's investigation. Furthermore, Mr Hogg, in his evidence, accepted the seriousness of the breaches of the rules and procedure he committed.

g. In his appeal letter, Mr Hogg admitted that he had to "shoulder some of the blame and responsibility" [114]. He also accepted that a final written warning would have been appropriate. That was the admission of his conduct.

h. Dismissal was within the range of reasonable responses for the following reasons:

    i. DHL's disciplinary and grievance policy identifies serious breaches of conduct, standards, rules or procedures and serious breaches of Health and Safety procedures and rules as constituting gross misconduct. Mr Hogg knew about this and accepted it in his evidence. Furthermore, in signing his offer of employment letter he acknowledged and accepted his terms and conditions of employment which specifically referred to the disciplinary procedure. He was also warned that dismissal was a possible outcome when he was invited to the disciplinary hearing.

    ii. Mr Hogg admitted in his evidence that he was guilty of three serious breaches of Health and Safety rules and procedures. DHL was entitled to treat Mr Hogg's conduct as gross misconduct.

iii. Not only did Mr Hogg admit his conduct but also, he accepted that a final written warning would have been warranted [180]. Mr Hogg accepted this in his evidence and under such circumstances, dismissal is unlikely to be outside the range of reasonable responses.

iv. Mr Hogg stated during his disciplinary hearing that he hoped to be "lucky enough" to keep his job. This indicates that he must have known that his conduct was serious and that he would be fortunate to avoid dismissal.

v. In Mr Price's opinion Mr Hogg had failed "even to do the basics".

vi. The Incident was serious and was comparable to a previous one in 2019 where injuries had been sustained. The fact that there were no injuries caused by the Incident was attributable to Mr Walker's quick reaction in reversing the FLT. Furthermore, there had been other instances of fatalities in similar incidents which underlined DHL's emphasis on maintaining health and safety which was of paramount importance. Such incidents needed to be treated very seriously.

vii. The potential adverse impact on DHLs reputation with its clients.

viii. Mr Hogg admitted leaving the keys in vehicles for 20 years and had left keys in another vehicle on the day before the Incident. Even if the keys had been in the Transport Office, Mr Hogg would have collected them and gone to the HGV and done exactly the same thing. Mr Hogg claimed that he would have given the keys to the FLT driver but that could not have been the case because he made no checks and, therefore, could not have known that Mr Walker was in the vicinity of the vehicle.

ix. Mr Hogg's failure to follow the keys procedure not only fails to exonerate him but it indicates his tendency to blame others for not stopping him and acting in breach of procedures. In his evidence, Mr Hogg admitted that what he was saying was that Mr Walker should have stopped committing the serious health and safety breaches that he did. This supported a lack of trust that Mr Price had in Mr Hogg by the end of the disciplinary process.

x. Mr Price considered Mr Hogg's mitigating circumstances but given the severity of the breach, he felt that he had no alternative but to dismiss him.

xi. Regarding the alleged inconsistency of treatment meted out to Mr Hogg, Mr McDonald and Mr Walker, neither Mr McDonald nor Mr Walker were in a very similar position to Mr Hogg. Mr McDonald was not responsible for the HGV at the time of the accident whereas Mr Hogg was. Mr McDonald could not have caused injury or harm because he was never in a position to move the HGV whereas Mr Hogg was. Furthermore, Mr Hogg accepted that he could have caused harm. Mr McDonald never

breached any written rules or procedures whereas Mr Hogg accepted serious breaches of health and safety rules and procedures. Mr Walker was disciplined for breaching rules and procedures because he failed to take the keys out of the ignition of the HGV but that did not put him in the same position as Mr Hogg. Their actions were of different severity. Furthermore, Mr Hogg was a professional driver responsible for an HGV. His conduct was more serious. The risk of injury and harm only arose when Mr Hogg chose to move the HGV in breach of health and safety rules and procedures. Had he not done that; no risk of harm would have arisen. Mr Walker was simply loading a stationary vehicle and his actions could not have directly caused injury or harm. Mr Walker was not responsible for alerting Mr Hogg of his presence when he was loading an unattended vehicle. He was required to load it in any event regardless of whether Mr Hogg appeared at the scene.

75. Turning to the issue relating to liability for wrongful dismissal that the Tribunal I find the following. Mr Hogg had 22 years complete service at the effective date of termination of his employment. He was entitled to 12 weeks' notice. Mr Hogg was not paid his notice because he was guilty of gross misconduct and DHL was entitled to dismiss without notice because Mr Hogg admitted responsibility for the Incident. Several of the allegations were upheld on a balance of probability because of the disciplinary action which amounted to serious breaches of conduct, standards, rules or procedures and serious breaches of Health and Safety procedures and rules which amounted to gross misconduct as per DHL's disciplinary policy. DHL had lost confidence in Mr Hogg.

Employment Judge Green
Date 23 December 2020