EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102684/2020

Held remotely via Cloud Video Platform on 18, 19, 20 and 21 January 2021

Employment Judge: Claire McManus

Mr J Fennell	**Claimant** **Represented by: -** **Ms S Maclean** **(Solicitor)**
Arnold Clark Automobiles Limited	**Respondent** **Represented by: -** **Mr S Jones** **(Solicitor)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Judgment of the Tribunal is that: -

- The claimant's dismissal by the respondent was an unfair dismissal and the claimant is entitled to an unfair dismissal basic award of **£288.17 (TWO HUNDRED AND EIGHTY EIGHT POUNDS AND SEVENTEEN PENCE)** and a compensatory award of **£1,633.56 (ONE THOUSAND, SIX HUNDRED AND THIRTY THREE POUNDS AND FIFTY SIX PENCE)** and the respondent is ordered to pay to the First Claimant the total sum of **£1,921.73 (ONE THOUSAND NINE HUNDRED AND TWENTY ONE POUNDS AND SEVENTY THREE PENCE)** in respect of that unfair dismissal claim, subject to the effect of the Recoupment Regulations, as set out below.

REASONS

Background

1. The claim is for unfair dismissal only. Before me, the parties accepted that the claimant was dismissed from his position as a Technician following a criminal conviction for Dangerous Driving and a ban on him holding a valid driving licence of 18 months. It is the respondent's primary position that the dismissal was a fair dismissal for a conduct reason, with reference to section 98(2)(b) of the Employment Rights Act 1996 ('the ERA'). It is the claimant's position that the dismissal was unfair, both procedurally and substantively.

2. Parties' representatives had helpfully agreed a number of facts. That agreement was following directions from EJ R Macpherson when this case was originally scheduled for a Final Hearing in December 2020. Those directions, and others, were set out in a Case Management Order issued after that Hearing. The claimant was allowed to amend his ET1 to bring in an argument of inconsistency of treatment. That Final Hearing was postponed to enable formal amendment of the ET1 to be made and to give the respondent the opportunity to respond.

3. The overriding objective of the Employment Tribunal, as set out in Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Rules'), is to deal with a case fairly and justly. This hearing took place remotely using the Cloud Video Platform ('CVP') in order to progress the case in accordance with the overriding objective and in accordance with guidance issued in response to the restrictions in place due to the Covid-19 pandemic. The President of the Employment Tribunal (Scotland) has issued:-

    - Presidential Guidance in Connection with the Conduct of Employment Tribunal Proceedings during the Covid-19 Pandemic (being Joint Presidential Guidance issued with the President of the Employment Tribunals (England and Wales).

- FAQs about the Covid-19 pandemic (being a document issued jointly with the President of the Employment Tribunals (England and Wales).

- Practice Direction on the Fixing and Conduct of Remote Hearings.

4. At the conclusion of proceedings both representatives agreed that there had been a fair hearing in this case.

Proceedings

5. Both parties were professionally represented at the Hearing. Parties relied on documents contained in two Joint Bundles, with items 1 to 41 numbered consecutively with pages (1) to (169). The numbers in this Judgment refer to document numbers in the Joint Bundles.

6. Evidence was heard on oath or affirmation from all witnesses. For the respondent, evidence was heard from Ms Julie Ferguson (formerly employed by the respondent as a People Advisor), who took the decision to dismiss), Mr Alasdair Main (Service Manager at the branch where the claimant worked) and Ms Charlotte Cunningham (Senior People Advisor), who made the decision on the claimant's appeal of his dismissal. For the claimant's case, evidence was heard from the claimant himself and from Mathew Clark (formerly employed by the respondent as a technician).

Issues

7. Parties' representatives had agreed the issues for determination in this case. They agreed that the first issues for determination by the Tribunal were: -

- Was the Claimant dismissed for a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")

And

- In particular, as the Respondent contends, was the principal reason for the Claimant's dismissal a reason relating to his conduct in terms of section 98(2)(b) of the ERA?

8. The subsequent issues for determination as agreed between the parties were on the basis of the reason for dismissal being the claimant's conduct, including consideration of the reasonableness of the decision and application of relevant case law. It was the Respondent's position that this is not a case where the principles set out in *BHS v Burchell* applies. It was agreed that the Tribunal required to consider the reasonableness of the investigation carried out by the respondent prior to the dismissal (with regard to the matters relied upon by the claimant's representative in respect of her argument as to the reasons why the dismissal was an unfair dismissal). It was agreed that the Tribunal required to determine whether the dismissal was a fair dismissal in terms of section 98(4) and with regard to the arguments made by the claimant's representative. It was agreed that in the event of a finding of unfair dismissal the Tribunal required to consider the appropriate remedy, including issues of any contribution and mitigation. These are the issues which have been determined.

Findings in Fact

9. The following material facts were agreed, admitted or found by the Tribunal to be proven. The words in *italics* are quotes from the evidence:

The respondent is a large car dealership with approximately 12,000 employees at various locations. The Claimant was employed by the Respondent between 1 September 2015 and 23 March 2020. The Claimant worked in the workshop within the Service Department at the Respondent's Perth Motorstore. The Claimant was initially employed as an apprentice light vehicle technician. The Claimant completed his three year apprenticeship in September 2018, whereupon he remained employed by the Respondent as a fully qualified light vehicle technician and continued to work at the Perth Motorstore. The Claimant signed a contract of employment with the Respondent on 11 September 2018 in respect of his employment as

a light vehicle technician. The Claimant's contract of employment is document 5 in the paginated joint bundle of productions which has been prepared for the purposes of the final hearing. That contract does not contain a term that a driving licence is considered to be an essential requirement for the role as technician.

10. The Claimant was one of a number of vehicle technicians who were employed to work at the Perth Motorstore. At the time of his dismissal, the Claimant's line manager was Alasdair Main, who was the Service Manager with overall responsibility for the Service Department at the Perth Motorstore. The workshop, where the claimant worked, was supervised by the Workshop Controller who allocated repair jobs for each of the technicians to do on a daily basis by issuing job cards. At the time of the Claimant's dismissal there were five apprentice technicians who were employed to work at the Perth Motorstore. There were three first year apprentices, one second year apprentice and one third year apprentice at that time. The apprentice technicians were mentored and supervised by the qualified technicians. The apprentice technicians would rotate mentors and work alongside different technicians throughout their apprenticeship. The apprentice technicians would attend college in one week blocks at least eight times per year.

11. Like all of the other technicians at the Perth motorstore, the Claimant was employed service vehicles and to diagnose and repair faults with customer vehicles. Prior to his disqualification from driving, the Claimant's job as a technician included him locating and driving on and off the ramp in the workshop the vehicles that he was assigned to work on. The Claimant carried out road tests of vehicles that he had been working on. Road tests should be conducted on public roads away from the Perth Motorstore. Road testing has two main purposes: (i) to identify and diagnose any faults with a customer vehicle before any repairs were carried out; and (ii) to ensure that a vehicle which had been repaired was in a safe and roadworthy condition before it was returned to the customer. Many of the vehicles that the Claimant was required to work on needed to be road tested before being returned to the customer. It is the responsibility of the repairing technician to

ensure the post-repair safety of any vehicles that they had worked on before the vehicle was returned to the customer. The Claimant was therefore responsible for road testing any vehicles that he had been assigned to work on. Certain vehicle faults, such as issues with the steering and any issues with the brakes, can only be effectively diagnosed by the repairing technician actually driving the vehicle in question.

12. All of the technicians who worked at the Respondent's Perth motorstore were subject to efficiency targets. A technician's efficiency scores are assessed by comparing how long the technician takes to repair or service a vehicle against the benchmark time set by the vehicle manufacturer for the particular repair which has been carried out. A technician's efficiency score is based on meeting the target time for repairs. The quicker that a technician completes a job, the greater the technician's efficiency score for that particular job. The use of efficiency scores helps the Respondent manage waiting times for customers. Efficiency scores also have an impact on a branch's profitability. A branch will be more profitable if the technicians at the branch have a higher collective efficiency score as that means that more vehicle repairs are being completed throughout the day. The performance of each of the technicians at the Perth motorstore should be appraised twice a year. Each technician's performance was measured based on their efficiency score and four other criteria. If a technician scored highly enough across the five appraisal criteria then they would be awarded a pay increase which is additional to the annual cost of living increase. If a technician did not score highly enough in at least three of the five appraisal criteria in two consecutive review periods then their pay may be decreased.

13. The Claimant was involved in a car accident outside of working time on 7 July 2018. The car accident was the subject of a police investigation and the Claimant was charged with Dangerous Driving immediately following the accident. The Claimant informed the Respondent about the car accident and kept the Respondent updated about the progress of the police investigation. Alastair Main was not the Service Manager at the Perth Motorstore at the time of the accident. After Mr Main became Service Manager in Perth, the claimant told Mr Main that he had an upcoming court hearing in respect his

charge following the accident. Mr Main had several informal discussions with the claimant about the upcoming court case.

14. The Claimant attended a court hearing about his charge on 27 January 2020. The outcome of that court hearing was that the Claimant was convicted of Dangerous Driving and the Claimant received an interim disqualification from driving pending a sentencing hearing. On 28 January 2020 the Claimant told Mr Main that he had been convicted of Dangerous Driving and that his driving licence had been revoked as an interim measure. Mr Main told the Claimant that he was no longer permitted to drive at work with immediate effect. After that notification to Mr Main, the claimant continued to be employed by the respondent as a technician. There was no correspondence or other communication from the respondent to the claimant on the likely consequences for his employment with the respondent if he received a driving ban. Arrangements were put in place that others would carry out any driving required in respect of the claimant's role as technician. Mr Main understood from the claimant that it was being argued by his solicitor at the sentencing hearing that the claimant required his driving licence for his job. On that basis, the claimant hoped that the ban on his driving licence would be lifted. There was no intimation to the claimant from the respondent of the consequences for his employment if he lost his driving licence. There was no intimation to the claimant from the respondent that these arrangements were only put in place for an interim period and could not be in place for a longer period of time.

15. From 28 January 2020 until the Claimant's dismissal, the arrangement was that a first year apprentice, Connor Key, was paired with the Claimant and assigned to drive in and out of the workshop the vehicles that the Claimant was working on. When road tests were required on cars which the claimant was working on, Connor Keys drove the car and the claimant went in the passenger seat to diagnose the fault or do the safety check. It is not normal practice for the respondent to allow apprentices to drive vehicles in road tests. The claimant suggested that arrangement because he understood that Connor Keys was not happy working with the technician he was then assigned to. Connor Keys had more driving experience that the claimant.

During that time the claimant experienced no issues with obtaining assistance from Connor Keys or from other technicians, as required. During that time the claimant's efficiency scores increased. There was an occasion when the claimant and Connor Keys were unable to diagnose a fault on a road test when Connor Keys was driving the car.

16. The Claimant attended a sentencing hearing on 9 March 2020. A social work report had been conducted on the claimant for the purposes of the sentencing hearing. There was no evidence from the respondent that a ban would be likely to result in the claimant losing his job. At the sentencing hearing the Claimant was disqualified from driving for a period of 18 months. The Claimant immediately informed Mr Main about his disqualification from driving. Mr Main told the Claimant that he would need to refer the matter to the Respondent's People Team.

17. The Respondent's Employee Conduct Policy was available for the Claimant to view on his internal employee portal, known as the ACE Portal. The Employee Conduct Policy indicates that disciplinary action may be taken where an employee is convicted of a criminal offence outside of work which has an impact on their work (document 9 in the joint bundle of productions at page 52). The claimant complied with this policy. The relevant section is headed 'Crime or offence' and states:-

> "*If an employee finds themselves charged by the police with a crime or offence, they must inform their line manager or contact the People Team. A crime or offence is any breach of common or enacted law, including road traffic offences. Employees will not automatically be subject to a disciplinary action as a result of a crime committed outside work, but if the crime or offence impacts on your work, disciplinary action may need to be taken."*

18. The respondent has in place a Driving Policy (document 7) and Driving Guidelines (document 8). The Driving Guidelines contain a section headed 'Banned Drivers - Employees' This states:-

> *"Employees who receive a driving ban will be assessed by the People Team, who will be responsible for determining the outcome. Under no circumstances should an employee with a driving ban drive onsite or on a public road. Once an employee has served a driving ban, they must sit a driving assessment before being assessed by the People Team, who will be responsible for determining the outcome of the employee driving Company vehicles.''*

19. The claimant had no written notification or indication from the respondent prior to his sentencing court hearing that a full valid driving licence was a requirement for his job as a technician. There is no written policy in place within the respondent's organisation stating that a full valid driving licence is normally a required condition or essential requirement of employment as a technician and / or that if a technician were to be banned from driving for any period then the likely outcome would be dismissal. At no time prior to the sentencing hearing was the claimant issued with a letter from the respondent indicating that if he were to receive a driving ban following conviction for Dangerous Driving or otherwise, then he would be likely to be dismissed as a result. When the claimant asked Mr Main about the likely outcome should he lose his licence, Mr Main's position to the claimant was that he would not be making the decision and that it would be a matter for the People Team.

20. The respondent's practice is that decisions on disciplinary matters are taken by those in the People Team, rather than by managers. This practice has been in place within the respondent's organisation for at least 11 years. The reasons this practice is in place are to ensure continuity across the respondent's organisation; to ensure independence in the decision making; to ensure that decisions are taken in compliance with relevant employment legislation. Managers are present at Disciplinary Hearings to '*advise on practicalities*'. The People Team deals with HR matters including in respect of employee disciplinary, welfare and engagement for the respondent's employees, redundancy and TUPE transfer situations.

21. On 20 March 2020 the Claimant received a letter inviting him to attend a disciplinary hearing at the Perth Motorstore on 23 March 2020 (document 12 in the joint bundle). That letter was sent on behalf of the Respondent by Julie Ferguson, People Adviser. It was hand delivered to the claimant by Alastair Main near the close of business on Friday 20 March. The disciplinary invite letter informed the Claimant that: Ms Ferguson would be the decision maker for the purposes of the Claimant's disciplinary hearing; Ms Ferguson would not be physically present at the Perth motorstore for the disciplinary hearing but would dial into the disciplinary hearing by telephone; the purpose of the disciplinary hearing was *"to consider your suitability for your role due to the loss of your driver's licence (as a result of you being convicted of a criminal offence resulting in an 18 month driving ban)."; that* one possible outcome of the disciplinary hearing *"could be your dismissal with notice"*; the Claimant had the right to be accompanied to the disciplinary hearing by either a work colleague or an accredited trade union official.

22. The disciplinary hearing was conducted by telephone because of the restrictions caused by the COVID 19 pandemic and the lockdown which came into effect in the UK on 23 March 2020. Prior to the disciplinary hearing the claimant had received the email from Mr Main which is referred to in the disciplinary hearing as a 'statement' provided by Alasdair Main regarding the Claimant's disqualification from driving (document 11 in the joint bundle of productions).

23. The disciplinary hearing was conducted by Julie Ferguson (CIPD qualified People Advisor). The Claimant was accompanied to the disciplinary hearing by a work colleague, Lee Philip. The management representative for the disciplinary hearing was Allan Chambers, the Sales Manager for the Perth motorstore. Mr Main was not present because he required to self isolate. The Claimant, Mr Philip and Mr Chambers were all physically present at the Perth motorstore for the disciplinary hearing. Ms Ferguson dialed into the disciplinary hearing by telephone. With the Claimant's consent, the disciplinary hearing was recorded. A verbatim transcript of the hearing was

made based on the recording and is included as document 13 in the joint bundle. The transcript is an accurate record of the disciplinary hearing, after the recording was switched on. Prior to the recording being switched on, it was the claimant's position to Ms Ferguson that the disciplinary hearing should not proceed as there had not been a separate investigatory hearing. The claimant had taken advice from his step father who has some experience of conducting disciplinary matters as a manager. Ms Ferguson's position to the claimant was that there was no need for a separate investigation hearing and that the disciplinary hearing would proceed. This was not what the claimant had been expecting to happen. That conversation took place before the recording was switched on and is reflected in the first paragraph of the Minutes at Document 13. The claimant felt unprepared for the disciplinary hearing because he did not expect it to proceed on that day.

24. The Claimant raised two main points at the disciplinary hearing, namely that: Connor Key could be assigned to carry out the Claimant's driving duties until the Claimant was permitted to drive customer vehicles again and that the other technicians at the branch could pick up the Claimant's driving duties. At the end of the disciplinary hearing Ms Ferguson adjourned the hearing to consider her decision. During the adjournment, Ms Ferguson phoned Mr Main. Mr Main confirmed Ms Ferguson's view that it was not suitable for an apprentice to carry out road tests for the claimant. After the short adjournment Ms Ferguson informed the Claimant that she was of the view that neither of the suggestions that he had made would be feasible. Ms Ferguson informed the Claimant that she had decided to terminate the Claimant's employment and that he would be paid in lieu of his contractual notice period.

25. Ms Ferguson took the decision to dismiss the claimant. The following factors were taken into account by Ms Ferguson in her decision to dismiss the claimant: the claimant's position as a technician; the extent to which driving was required in his role as a technician; the length of his driving ban; the conviction for Dangerous Driving; the fact that the respondent's insurance cover would require the claimant to not drive in the course of his employment

for 6 months after the period for which the ban had effect; that apprentices do not normally drive vehicles on road tests; that Connor Keys would not always be at work when the claimant was, due to annual leave, attendance at college, and possibly other absences; that if another technician were to assist the claimant with driving that would distract that technician from the job they were working on and may affect their efficiency scores; the claimant's length or service and clean disciplinary record. Ms Ferguson sent a letter to the Claimant on 24 March 2020 (document 14 in the joint bundle) to confirm the outcome of the disciplinary hearing and to advise the Claimant of his right to appeal against the decision to terminate his employment. The claimant was paid 4 weeks' pay in respect of his notice period. The disciplinary outcome letter stated:-

> *"The reason for your dismissal is your suitability for your role due to your loss of your driver's licence, as a result of you being convicted of a criminal offence resulting in an 18 month ban. I can confirm that your length of service and previous disciplinary record has been taken into account, however due to you being unable to effectively fulfill your obligations in line with your role the decision has been taken that dismissal is the only suitable outcome. "*

26. The Claimant appealed against Ms Ferguson's decision to terminate his employment. The appeal was heard by Charlotte Cunningham (CPIPD qualified Senior People Advisor). On 30 March 2020, the Claimant sent an e-mail to Ms Cunningham outlining his grounds of appeal (document 15 in the joint bundle at pages 71 and 72). On 31 March 2020, Ms Cunningham responded to the Claimant by e-mail (document 15 in the joint bundle at page 70) to explain that the Respondent's business was currently closed and that the appeal process would be need to be put on hold until the business re-opened. The Respondent sent the Claimant a copy of the minutes of the disciplinary hearing on 28 May 2020, prior to the appeal hearing. On 3 June 2020, Ms Cunningham e-mailed the Claimant to confirm that the Respondent was now in a position to conduct the Claimant's appeal hearing (document 15 in the joint bundle at page 70). Ms Cunningham attached a letter to her

e-mail which invited the Claimant to attend a disciplinary hearing on 10 June 2020 (document 16 in the joint bundle). The letter of invitation to the appeal hearing: confirmed to the Claimant that the appeal hearing would be conducted by telephone (due to COVID-19); invited the Claimant to submit any additional points that he intended to rely upon in support of his appeal in advance of the appeal hearing; confirmed to the Claimant that he had the right to be accompanied to the appeal hearing by either a work colleague or an accredited trade union official.

27. The appeal hearing took place by telephone on 10 June 2020. The only persons present on the appeal hearing call were Charlotte Cunningham and the Claimant. At the start of the appeal hearing the Claimant confirmed that he did not wish to have a companion present on the appeal hearing call. Ms Cunningham adjourned the appeal hearing to investigate the points that the Claimant had raised in support of his appeal. Ms Cunningham informed the Claimant that she would aim to provide the Claimant with a written response to his grounds of appeal within 28 days of the appeal hearing (i.e. by 7 July 2020). With the Claimant's consent, the appeal hearing was recorded and a verbatim transcript of the hearing was produced from the recording. The transcript of the appeal hearing is document 17 in the joint bundle of productions. Both the Claimant and the Respondent agree that the transcript of the appeal hearing is an accurate record of what was discussed at the appeal hearing. The appeal hearing minutes were sent to the Claimant on 15 June 2020.

28. Ms Cunningham carried out investigations after the appeal hearing in respect the appeal points made by the claimant. She did this because she wished to "*ensure that [she] looked at it with fresh eyes and was satisfied in all aspects of the decision*". As part of these investigations, Ms Cunningham contacted Ms Ferguson, Mr Main and Andy Young (Group Service Manager). That email correspondence is at Documents 19. 20 and 21. The email from Mr Young to Ms Cunningham of 17 June 2020 states

> *"Just to confirm, a pre-requisite of a technician role within Arnold Clark is to have a full and valid driving licence. This has been the case for*

a few years with rules in place that recruitment will decline any applicants who don't meet this criteria, we also don't offer apprentices full time positions at the end of their training contract if they don't meet the same criteria."

29. In reply, Ms Cunningham asked '*roughly when this came into force in the and could you also expand on the reason for this?"* Mr Young replied:-

"This is something I have been firm on since my appointment to Group Service Manager (01/01/18).

The main reasons for this are:-

- *Diagnosis of engine faults mostly rely on road test/s*
- *The repairing technician is responsible for the post repair safety of a car, road tests being a key area to verify work carried out.*
- *Where a technician is unable to road test this puts an efficiency burden on others resulting in a loss of revenue to the company.*
- *Taking cars in and out of the workshop relying on others to do so has a negative effect on efficiency and cost.*

30. The position set out by Mr Young in those emails was not communicated to employees after his appointment on 01/01/18. These emails set out the position in respect of recruitment of technicians after 01/01/18. There is no written policy in place within the respondent stating or indicating that a technician employed by the company who loses his driving licence (whether as a result of a conviction for Dangerous Driving or otherwise) will be likely to be dismissed. There is no written policy in place within the respondent's organisation that all technicians must have a full valid driving licence. Although the claimant was unaware of the fact at the time of his appeal hearing, Mathew Clark had been employed by the respondent as a technician

after 1 January 2018, after having his driving licence revoked in December 2017.

31. Ms. Cunningham sent the Claimant a written response to his appeal by way of a letter dated 7 July 2020 (document 24 in the joint bundle of productions). Ms Cunningham's letter esponded to all of the Claimant's grounds of appeal and set out in detail her reasons from upholding the decision to dismiss. n respect of the reason for dismissal, Ms Cunningham stated:-

> *"You were employed as a technician and contractually required to undertake all of the duties associated with that position. Driving was a core component of your role and your disqualification from driving meant that you were therefore unable to fully fulfil your contractual duties for a significant period of time. It was made clear to you in advance of the disciplinary hearing that the purpose of the disciplinary hearing was to consider your suitability for continued employment as a technician due to the loss of your driving licence. This was clearly set out in the letter of invitation to the disciplinary hearing.*
>
> *I have spoken to Julie in relation to this point, who confirmed that your dismissal was based on your suitability for the role following the loss of your driving licence. Your licence was removed as a result of your behaviour and criminal conviction for Dangerous Driving. Your own criminal conduct was therefore the reason that you are no longer able to undertake the role for which you were employed."*
>
> And later
>
> *"The letter which was sent to you confirming the outcome of the disciplinary hearing clearly states that the reason for your dismissal is your lack of suitability for your role due to the loss of your driver's licence, as a result of you being convicted of a criminal offence resulting in an 18 month driving ban. In addition the letter explains that as a result of this you are unable to effectively fulfill your obligations in line with your role. Therefore is clearly explained in the*

letter that your behaviour (conduct) was the root cause of the situation which resulted in the termination of your employment."

32. As part of his appeal, the claimant's position was that he was treated inconsistently compared with Ross Buchanan. Ms Cunningham's response to that was that Mr Buchanan had left the respondent in 2017 and therefore before Mr Young had put in place the current rules.

33. Mathew Clark was employed by the respondent as a technician. In November 2017, while he was so employed, Mr Clark's driving licence was revoked. He was allowed to continue in his employment as a technician. Mr Clark was dismissed on 27 February 2018. He was dismissed for driving a vehicle on site while under a driving ban. Mr Clark had driven a vehicle onto a ramp to work on it because he was unable to get another employee to do that for him.

34. Since his dismissal, the claimant has obtained employment in the production line of a company manufacturing COVID tests. The claimant had difficulty obtaining another job as a vehicle technician. Factors affecting that were the COVID 19 pandemic and the fact of the claimant's driving ban. The claimant has taken reasonable attempts to mitigate his losses following his dismissal. The claimant started his new employment on 1 September 2020.

Relevant Law

35. The law relating to unfair dismissal is set out in the Employment Rights Act 1996 ('the ERA'), in particular Section 98 with regard to the fairness of the dismissal and Sections 118 – 122 with regard to compensation.
Section 98(1) states: -

'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.

Section 98(2) sets out that a reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee, [(ba) is retirement of the employee]

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

Section 98(4) states: -

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

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

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

This determination includes a consideration of the procedure carried out prior to the dismissal and an assessment as to whether or not that procedure was fair.

36. In circumstances where the reason for dismissal is conduct in terms of section 98(2)(b), what has to be assessed is whether the employer acted reasonably in treating the misconduct that he believed to have taken place as a reason for dismissal. Tribunals must not substitute their own view for the view of the employer (*Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23* and *London Ambulance Service NHS Trust -v- Small [2009] IRLR 563*) and must not consider an employer to have acted unreasonably merely because the Tribunal would not have acted in the same way. Following *Iceland Frozen Foods Ltd –v- Jones 1983 ICR 17* the Tribunal should consider the 'band of reasonable responses' to a situation and consider whether the respondent's decision to dismiss, including any procedure prior to the dismissal, falls within the band of reasonable responses for an employer to make. The importance of the band of reasonable responses was emphasised in *Post Office -v- Foley [2000] IRLR 827.*

37. Where the Tribunal makes a finding of unfair dismissal it can order reinstatement or in the alternative award compensation. In this case the claimant seeks compensation. This is made up of a basic award and a compensatory award.

38. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, the gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation.

39. The basic award may be reduced in circumstances where the Tribunal considers that such a reduction would be just and equitable, in light of the claimant's conduct (ERA Section 122 (2)).

40. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the

dismissal in so far as that loss is attributable to action taken by the employer. In terms of Section 123(6) where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

Submissions

41. Both parties' representatives spoke to their own substantive written submissions. Both parties made submissions on the material facts and their interpretation of these. There was substantial agreement on the law. Where either party's submissions were not accepted, this is addressed in the Decision section below.

42. The respondent's representative relied upon: -

D v Royal Bank of Scotland [2013] CSIH 86

T*aylor v OCS Group [2006] ICR 1602 (C of A*)

Royal Society for the Prevention of Birds v Croucher [1984] ICR 604

Boys and Girls Welfare Society v MacDonald [1997] ICR 693

Hadjioannou -v- Coral Casinos Ltd [1981] IRLR 352 EAT

Radia v Jeffries International Limited UKEAT/0123/18/JOJ (at paras 90 – 92)Sunshine Hotel Ltd v Goddard UKEAT/0154/19

43. In his submission that the dismissal was for a conduct reason in terms of section 98(2)(b), the respondent's representative relied on *D v Royal Bank of Scotland* [2013] CSIH 86, and in particular the Inner House's endorsement of the previous observations of the EAT in *Thomson v Alloa Motor Co Ltd [1983] IRLR 403*. He submitted that the Claimant's conviction for Dangerous Driving was a result of misconduct committed by the Claimant outside the workplace.

His submission was that the impact which the Claimant's criminal conviction had on the Claimant's capacity to carry out the core driving duties of his role as a technician with the Respondent brought the circumstances of the Claimant's misconduct within the definition of "conduct" for the purposes of section 98(2)(b) of the ERA, as per the decision of the Court of Session in *D v Royal Bank of Scotland* (supra).

44. It was submitted that the Respondent's view that the Claimant was unsuitable for continued employment as a Technician was a direct consequence of the Claimant's own criminal conduct and resultant criminal conviction. The respondent's position was that the Claimant's criminal conduct was the root cause of the circumstances which resulted in his dismissal and therefore the principal reason for the Claimant's dismissal. It was submitted that if the Tribunal concludes that the principal reason for the Claimant's dismissal was not conduct, then the set of facts which resulted in the Claimant's dismissal would quite clearly fit within at least one of the other potentially fair statutory reasons for dismissal. The respondent's esto (alternative) categorisations were capability or 'some other substantial reason' ('SOSR'). It was accepted that there was no statutory requirement for a technician to hold a valid driving licence.

45. The respondent addressed the various factors relied upon by the claimant's representative in her submissions. He submitted that in the event of a finding of unfair dismissal, a 100% deduction to any compensatory award should be made on application of *Polkey*. He also submitted that a 100% deduction should be made to both the basic award and the compensatory award to reflect the claimant being fully responsible for his dismissal.

46. The claimant's representative relied upon: -

Securicor Guarding Ltd v Mr C Rouse [1994] IRLR 633

P v Nottingham CC [1992] ICR 706

Post Office -v- Fennell [1981] IRLR 221

47. It was the claimant's representative's submission that the claimant was unfairly dismissed because of the lack of investigation; failure to provide a clear reason for the dismissal; insufficient time to prepare for the disciplinary hearing; the respondent's decision to dismiss was rushed and pre-determined; the respondent failed to consider all reasonable alternatives to dismissal all the respondent did not take a consistent approach when deciding to dismiss the claimant and that the respondent's decision to dismiss the claimant was not within the band of reasonable responses. It was the claimant's representative's position that it was not appropriate to apply a 100% contribution deduction. An agreed schedule of Loss was provided, including pension loss.

48. Neither representative made submissions on the application of any uplift in respect of the ACAS Code of Practice.

Comments on evidence

49. Evidence was heard on oath or affirmation from all witnesses. Much of the evidence was agreed in a statement of agreed facts. On hearing the claimant's evidence, it emerged that there were some areas of dispute. Mr Main was recalled to hear his evidence on three specific matters which arose in the claimant's evidence and which were not previously put to Mr Main. These were: whether prior to the sentencing hearing the claimant had asked what the likely outcome of a ban would be re his employment; whether he had offered to look for alternative employment for the claimant and how long he had been in a management role.

50. In the main, all witnesses gave their evidence in a straightforward and credible way. With regard to the areas of dispute, I concluded that the difference in evidence arose from the person's perception of events. It was the claimant's evidence that Mr Main was not experienced as a manager and that he had to leave the decision to the People Team. I accepted Mr Main's evidence that he had around 25 years' experience as a manager and that the respondent's practice was that the People Team made decisions on

disciplinary matters. I considered it to be credible in those circumstances that the claimant's perception of that would be that he understood that Mr Main did not have the experience to deal with disciplinary matters. In respect of when the invite to the disciplinary hearing was given to the claimant, I accepted the claimant's evidence on the basis of his clear recollection that he was given the letter on the Friday and his conversations with colleagues and family along the lines of '*what am I supposed to do with getting this last thing on a Friday with the hearing on Monday'*. I found that to be a more credible and reliable recollection, compared with Mr Main's position that he '*would have printed it off and given him it as soon as I received it*" having '*no reason not to'*. Mr Main had no clear recollection of when he had handed the letter to the claimant. I accepted the claimant's credible evidence that he didn't mention at the disciplinary hearing that he had only received the letter last thing on the Friday because I*t was the way I was feeling – anxiety and stress. There was a lot hanging over me. A lot of information to take in'".* For those reasons I accepted the claimant's version of events re when the letter was given to him but I did not consider that timing to be material. I did consider it to be material that that letter was the first indication to the claimant from the respondent that he may be dismissed as a result of a Dangerous Driving conviction. On the basis of the claimant's own evidence that there was a '*lot going on'*, I accepted Mr Main's evidence that he had not undertaken to look at alternative jobs for the claimant. I did not consider that to be material because I accepted the evidence that there were no alternative jobs available for the claimant at the time of his dismissal.

51. I attached significant weight to the undisputed fact that no written indication had been given by the respondent to the claimant prior to the issue of the letter inviting him to a disciplinary hearing letter that a full valid driving licence was a conditional requirement for his job as a technician and that losing his driving licence would be likely to or may lead to his dismissal. UI considered this to be particularly significant in circumstances where the respondent has a Driving Policy and Driving Guidelines in place, but there is no mention in either of the likely consequences on employment should a technician (or any other employee who is required to drive as part of their role) loses their driving

licence. I also considered this to be particularly significant in circumstances where interim arrangements were put in place to allow the claimant to continue his job without driving and without it being made clear that such measures were only temporary and could not be in place longer term, should the claimant lose his driving licence. The claimant was credible in his evidence as to his discussions with Mr Main about the likely outcome of the sentencing hearing. He said *'I was hopeful about it. We didn't sit down to discuss. I suggested I might not get a ban. I didn't know if it would be a ban or not. I tried to explain as best I could.*' There was no clear evidence that there had been a specific request for the respondent to put in writing that the claimant would be likely to be dismissed if he received a driving ban. I therefore did not find that that request had been made but did not take that point to be material. It was not in dispute that it hadn't been made clear to the claimant that the steps put in place re an apprentice doing his job were only interim measures and could not continue of he was banned from driving.

52. I accepted that the claimant was aware that a driving ban could have an effect on his job, but I considered there to be an important distinction between him being aware that his solicitor was going to say at the sentencing hearing that he needed a driving licence for his job against there being no written policy, contractual term or letter informing him that if he were to receive a substantial ban then he would be likely to be dismissed.

53. I found the claimant to be credible in his description of how much driving he was required to do in his role but accepted that it would be within the reasonable band of responses for the respondent to consider that in the circumstances his employment couldn't continue because he had lost his driving licence.

54. It was clear from his evidence that the claimant's perception of the People Team is that they deal with disciplinary matters and not that they offer a source of support or assistance to employees. His evidence was that they were '*certainly not there for me'*. That perception is perhaps a consequence of the respondent's practice of individuals from the People Team making decisions

in disciplinary matters. The intended consequences of ensuring independence and consistency in decision making and ensuring that decisions are made taking into account developments in employment law are more usually maintained in employers of a similar size to the respondent by ensuring that an appropriate HR employee advises the manager who makes the decision at initial hearing and appeal. The fact that members of the People Team made the decision does not however make the dismissal unfair.

55. There were some matters raised before the Tribunal which were not put for consideration during the respondent's internal proceedings and therefore were not material to the reasonableness of the decision to dismiss. I made it clear to all parties during the proceedings that it was not for me to substitute my own view for the decision of the employer, and that if matters were not raised at the time, or on appeal then there was a difficulty in matters which had not been raised during the internal proceedings, being raised at the stage of these Tribunal proceedings. That was the case in respect of a number of the claimant's representative's criticisms of the extent of investigation carried out by the respondent. It may be that the issues she raised would have been relevant points for the respondent to take into consideration, but I had to consider whether the investigation was within the reasonable range and it was relevant that that some of these criticisms were not raised either at the disciplinary or appeal stage.

56. The representatives had very helpfully agreed a number of facts which are reproduced in my Findings in Fact. Where the evidence did not support what was agreed, my findings vary from that statement. This is notably in respect of reference to the Respondent's Employee Conduct Policy. The agreed statement of facts stated at paragraph 6.2:-

> "*The Employee Conduct Policy stated that disciplinary action may need to be taken where an employee is convicted of a criminal offence outside of work which had an impact on their work (document 9 in the joint bundle of productions at page 52).*"

I considered that that paraphrasing did not accurately summarise the position in the Policy and so instead quoted the relevant section.

57. I took into account that the claimant's position in his evidence as to the extent of the impact of his driving ban on his role was not entirely reflective of what had been agreed in the statement of facts, particularly in respect of the extent of cars which required a road test. I took into account the claimant's evidence that '*the whole disciplinary process, appeal and ACAS was a whole new language to me. English was a difficult subject for me at school. I became a mechanic to get away from that. I've not been at school for a long time. It may seem simple to you but not for me."* In those circumstances I did not take that to affect the claimant's general credibility.

58. There was a direct dispute in evidence between the claimant and Ms Ferguson as to whether the claimant's initial point at the Disciplinary Hearing was that the Hearing should not proceed and there should first be an Investigatory Hearing. I found the claimant's recollection of events and detail given in respect of him having taken advice from his stepfather and how he felt at the time to be credible. I placed considerable weight on the consistency of the claimant's position with the position reflected in the first paragraph of the Disciplinary Hearing Notes. It is clear from those Minutes that before the recording started there was some sort of conversation along the lines as reported by the claimant in his evidence. In examination in chief, Ms Ferguson was asked if the claimant had raised that he had not had time to prepare and replied '*No. Absolutely no*t'. Her position then as to why there wasn't a separate investigatory hearing was '*I didn't think further investigation was needed. I don't know what was required. The facts were clear. That's why I proceeded to a disciplinary hearing without further investigation." W*hen pressed in cross examination, Ms Ferguson said '*It's correct that Jamie said that he didn't feel an investigation had taken place*". And '*Jamie felt that it was not in line with the Disciplinary Procedure as there was no investigation. I said there isn't always an Investigation Hearing and Alastair Mair had given a statement and there was no separate Investigation Hearing*.". I noted that Ms Ferguson's initial position was consistently to immediately support the

respondent's case e.g., in cross examination when it was put to her that the Driving Guidelines do not contain a term that a technician has to hold a driving licence her reply was *'I understand it's not stated in that but it's in a separate policy'* When pressed if there was another policy where that was written Ms Ferguson then said '*Sorry – No."* In cross examination, her position in respect of lack of preparation was '*He had ample opportunity to put forward his case. I asked him for his input re what happened in him losing his licence.'*

59. When first asked why the claimant was dismissed, Ms Ferguson's rely was '*Due to his suitability for the role. He could no longer be a technician for Arnold Clark, There was no reasonable adjustment which could be put in place for that length of time – an 18 month ban plus another 6 months because of the insurance position'* I took into account and accepted Ms Ferguson's evidence that the 'root cause' of the claimant's dismissal was *"due to [his] own actions of Dangerous Driving*' and that the length of the driving ban and period of time of impact of that on the branch were significant. I took into account Ms Ferguson's evidence as to the categorisation of the reason for dismissal. She said "*He was no longer suitable to carry out the role. I saw it as Some Other Substantial Reason*" In cross examination Ms Ferguson's position was *It was his suitability for the role because he lost his licence'*.

60. Ms Cunningham's evidence as to the reason for the claimant's dismissal was '*I was in agreement with the reasons for the dismissal. His behaviour caused him to be convicted of a criminal offence – Dangerous Driving – which meant he was unable to do a large proportion of his role. That was in relation to his conduct / behaviour*." Ms Cunningham's evidence was that she was '*satisfied with the level of investigation. It had established the full facts."* Ms Cunningham's evidence was that a separate investigation had not been necessary because *'She had the full facts available: Jamie had lost his driving licence; he was disqualified for driving for 18 months – that was not disputed. There were clear facts. A separate investigatory hearing was not beneficial before the disciplinary hearing'*. I did not accept that the respondent had the '*full facts*.' It was clear that there was a dispute as to the extent to which driving was required in the claimant's particular role as a technician and the

effect on other technician's efficiencies. I had to consider whether the extent of the investigation was reasonable in the circumstances.

61. There were some factors arising from Ms Cunningham's email communication to Mr Young which I attached weight to. These were: -

- There was no communication of Mr Young's practice to employees
- Mr Young refers to a practice re recruitment, which is distinct from dismissal.
- I noted that Ms Cunningham's position in respect of there being inconsistent treatment between Mr Clark and the claimant was that Mr Clark's ban had taken effect before January 2018 (in December 2017) and therefore it wouldn't be fair to change a decision which had already been made re allowing him to continue to be employed as a technician. That had some parallels to the claimant's situation in respect of lack of notification of consequences.

62. In considering the reasonableness of the decision to dismiss the claimant I took into account Mr Clark' straightforward evidence in respect of the reasons for his dismissal.

Decision

63. I applied the relevant law to the findings in fact. I took into account the relevant size, administrative resources and nature of the respondent's business.

64. I required to determine what was the reason or principal reason for the respondent's decision to dismiss the claimant. It was not in dispute that what caused the claimant's dismissal was that the claimant had a driving ban of 18 months, which was as a direct consequence of the Claimant's own criminal conduct and resultant criminal conviction of Dangerous Driving, and in those circumstances the respondent had taken the view that the Claimant was unsuitable for continued employment as a Technician. That was the reason

for dismissal. Although the ET1 had indicated that there may be another reason for the dismissal that argument was not made at the Hearing.

65. In terms of section 98(1) ERA, I was then satisfied that the respondent had shown the reason for the dismissal. I did not accept the respondent's categorisation of that as a conduct reason in terms of section 98(2)(b). I did not accept that the reason should be categorised as conduct because the conduct relied upon by the respondent (Dangerous Driving leading to a criminal conviction) was not conduct within the course of the employment and there is no indication in a written policy or other communication to employees that such conduct would be likely to be considered misconduct and lead to disciplinary action up to and including dismissal. Additionally, it was not the conduct itself which led to the dismissal but the consequences of that on his ability to drive in his role as technician. The claimant informed the respondent of his charge and sentencing and at neither stage was he told by the respondent that a consequence of that conduct could be his dismissal. There had been arrangements put in place which had allowed the claimant to continue in his role as a technician without a driving licence. I accepted that that conduct outside the workplace (Dangerous Driving leading to a criminal conviction) had an effect on the claimant's role.

66. I did not accept the respondent's *esto* (alternative) case that the categorisation was dismissal by reason of capability in terms of section 98(2)(a) because there was no written policy in place requiring technicians such as the claimant to hold a full valid driving licence and the claimant had been allowed to continue in that role for an interim period, with others carrying out his driving duties. For that reason, holding a full valid driving licence could not be said to be an essential requirement of the job, consequent to dismissal without that licence. In coming to that conclusion I had regard to His Honour Judge Pugsley comments in *Burns v Turboflex Ltd EAT 377/96*: I attached significant weight to the fact that nowhere is it stated in the contract of employment or Driving Guidelines that a full valid driving licence is a requirement for the job of technician and / or that a ban from driving may lead to termination of that employment. I placed significant weight to the fact that

at no time prior to the letter inviting him to a disciplinary hearing was the claimant made aware that a consequence of him losing his driving licence could be dismissal, despite him having kept the respondent informed of the accident and the consequential court proceedings.

67. I accepted the respondent's *esto* (alternative) case that the dismissal was for 'some other substantial reason' in terms of section 98(1)(b). I accepted that the claimant's driving ban had an impact on his ability to carry out the duties of his job as a technician. In accepting that *esto* case I proceeded on the basis that there was no difference in the substance or circumstances which led to the dismissal and that the difference is one of re-categorisation or re-labelling in terms of section 98. There was no dispute as to what was in the mind of Ms Ferguson when making the decision to dismiss. In her evidence Ms Ferguson herself queried the categorisation of 'conduct' and said that the reason could perhaps be better categorised as capability or some other substantial reason. I took into account *Smith v Charles Pugh (Windscreens) Ltd t/a National Windscreens ET Case No.3200917/18*, which coincidently also involved a technician, and where the tribunal found that the principal reason in the dismissing officer's mind was the employer's inability to cope with the employee's unreliability. In the Tribunal's view, this constituted SOSR, in that the needs of the business were such that it needed its technicians to be reliable. While the letter of dismissal stated that the employee was being dismissed for conduct, the Tribunal recategorised that to capability.

68. I was satisfied that the reason was a substantial reason, with regard to the claimant's job as a technician. I was satisfied that the respondent's witnesses genuinely believed that the driving requirements in the job as technician were such that the claimant could not continue in his role without a driving licence for the period of his driving ban. I was satisfied that the substantial reason was genuinely the reason for the claimant's dismissal.

69. Having decided that the respondent had shown the reason for the dismissal as required in terms of section 98(1)(b) and that that is a substantial reason

with regard to the claimant's job, which could justify dismissal of a technician such as the claimant, I then considered the fairness of the dismissal in terms of section 98(4).

70. In terms of section 98(4)(a), in all the circumstances (including the size and administrative resources of the respondent) I accepted that it was within the reasonable band of responses for the respondent to decide to terminate the claimant's employment as a technician in circumstances where the claimant had been banned from driving for 18 months (and where in terms of the respondent's insurance cover a further 6 months would require to pass before driving) and that that ban had been because of his own criminal conduct and resultant criminal conviction of Dangerous Driving. I accepted that in those circumstances the respondent could treat that reason as a sufficient reason for dismissing the claimant. I accepted that dismissal was within the reasonable band of responses given the length of the claimant's driving ban and the respondent's position on the consequences on his ability to carry out his tasks as a technician. However, in considering whether the respondent acted reasonably or unreasonably in so treating (section 98(4(a)) and in determining the case in accordance with equity and the substantial merits of the case (section 98(4)(b)) I decided that the dismissal was an unfair dismissal.

71. I accepted the respondent's representative's submission that when applying section 98(4) I required to consider the overall process, including appeal (*Taylor v OCS Group [2006] ICR 1602 (C of A*)). I was satisfied that the claimant had had an opportunity to make his points on appeal and that these had been considered by Ms Cunningham.

72. The claimant's dismissal was an unfair dismissal because at no time prior to the letter inviting him to a disciplinary hearing was the claimant made aware that a consequence of him losing his driving licence could be dismissal, despite him having kept the respondent informed of the accident and the consequential court proceedings. A fundamental principle of fairness of dismissal is that employees should be made aware of the consequences of

their actions before they carry out those actions. The appeal stage did not remedy that failure. It was accepted that the respondent has no written policy setting out a requirement for technicians to have a full valid driving licence. It was accepted that the email from Mr Young informing of his practice in place to that effect from 1 January 2018 was not communicated to employees. That email only referred to recruitment, which is distinct from dismissal. Despite the claimant informing the respondent of the accident, criminal charge, court hearing, conviction of Dangerous Driving, interim ban and sentencing hearing, at no time did he receive an indication from the respondent that if he were to lose his driving licence, either on the basis of a ban of 18 months or for some other period, that that would be likely to lead to his dismissal because holding a full valid driving licence is considered to be an essential requirement of the position of technician. If the claimant had received such notification from the respondent and /or if those consequences were stated in the respondent's Driving Guidelines or otherwise in a written policy, then the claimant would have been aware of that possible / likely consequence prior to his sentencing hearing. In circumstances where the claimant had not received any such notification of the likelihood of dismissal, where an interim arrangement had been put in place allowing his employment to continue while his ban was on an interim basis and where as far as the claimant was concerned there was no issue with the arrangements being in place for a longer period of time (although I accept that it was reasonable for the respondent to ultimately conclude otherwise) it was unfair to the claimant that he first received notification from the respondent of the consequence to his employment of a driving ban, after the sentencing hearing. For these reasons I decided that the respondent had acted unreasonably in terms of section 98(4)(a) and that the in accordance with equity and the substantial merits of the case (section 98(4)(b)) the dismissal was an unfair dismissal.

73. It is unknown what effect it may have had on the claimant's behaviour outside the workplace if it was stated in the Respondent's Driving Policy or Driving Guidelines that a criminal conviction such as Dangerous Driving and a resultant ban on driving for 18 months would be likely to lead to termination of the employment of a technician. If the claimant had been aware of that

likely consequence prior to the sentencing hearing, then that could have been presented to the court as evidence and may have had an effect on the sentencing outcome. I accepted the claimant's evidence that the sentence was made on the basis that the claimant would not lose his job if he was banned from driving: there was no evidence to the contrary. There was a dispute between the claimant and Mr Main as to whether the claimant had asked Mr Main what the effect on his job would be if he were banned from driving. Mr Main's evidence on recall was that he hadn't been asked that question but if he had then he wouldn't have given an answer. I did not then place weight on whether or not the claimant had specifically asked that question. I considered it to be material and placed significant weight on the fact that there is no term in the Respondent's Driving Policy or Driving Guidelines or otherwise that normally a full valid driving licence will be an essential requirement of a technician's job and that at no time prior to his sentencing hearing was the claimant notified that a ban would be likely to lead to his dismissal. A driving licence is not set out in the contact of employment as being an essential requirement for the role as technician.

74. It seemed to me that the claimant was disadvantaged twice by the respondent's failure to notify him in writing that a likely consequence of him being banned from driving would be his dismissal: if evidence had been presented at the sentencing hearing of the likely consequences of a driving ban on the claimant's employment then that it likely to have been taken into account in sentencing; if that evidence had been available at the sentencing hearing then the ban may not have been for 18 months. We cannot know what effect such evidence would have had at the sentencing hearing, but I consider it to be likely to have had some effect. It may have been that a ban would have been for a shorter period. I considered that to be important because the respondent's position was that the length of the claimant's ban was a factor in their consideration of the reasonableness of the decision to dismiss.

75. There was considerable reliance by the claimant on it being reasonable for the respondent to have continued with the interim measure of allowing the

claimant's driving duties to be carried out by Connor Key and /or other technicians. I accepted the respondent's witnesses' evidence as to why that arrangement was not considered to be suitable to be in place for the duration of the claimant's driving ban and the 6 months thereafter required in terms of the respondent's insurance terms. I accepted the evidence of the respondent's witnesses in that regard as credible, reliable and consistent. I accepted those reasons as reasonable. I also accepted that from the claimant's point of view there was no issue with others carrying out the driving requirements of his job. It was not for me to substitute any decision I would have made for that made by the respondent. I required to consider whether the respondent's decision was within the band of reasonable responses for an employer to take, after reasonable investigation. I accepted the respondent's representative's submission that dismissal was within the band of reasonable responses.

76. With regard to the claimant's representative's inconsistency argument, I had regard to the three limited circumstances in which a disparity argument may be available being identified by the Court of Appeal in *Hadjioannou -v- Coral Casinos Ltd [1981] IRLR 352 as*:

(a) where there is evidence that the employee has been led by an employer to believe that certain categories of conduct will either be overlooked or at least will not be dealt with by the sanction of dismissal

(b) where there is evidence that the purported reason stated by the employer is not the real or genuine reason for the dismissal, and

(c) where there is evidence of 'truly parallel circumstances.

77. What was relied on by the claimant in his argument of inconsistency treatment was comparison with Ross Buchanan and Mathew Clark. I accepted the respondent's representative's submissions that these were not 'truly parallel circumstances'. Neither were banned from driving for 18 months as a result of a conviction of Dangerous Driving. I took (a) to be of some limited

relevance to the respondent's failure to specify in their Driving Guidelines that if a technician were to lose their driving licence that may lead to termination of their employment. That was not reasonable in terms of section 98(4) and in the circumstances of this case.

78. I did not accept the claimant's representatives' submission that the respondent ought to have considered furlough as an alternative to dismissal. The fact of the furlough scheme does not serve as an alternative to the decision to dismiss. I accepted that in the consideration of the reasonableness of the dismissal a factor may have been the length of the driving ban and whether the claimant was likely to be on furlough for that period, but it did not take the decision to dismiss out with the range of reasonable responses because that furlough was not considered as a factor. In circumstances where the claimant had been convicted of Dangerous Driving and received a driving ban of 18 months and where I accepted the respondent's position that that had an effect on his ability to do the duties of his job as a technician, it was within the band of reasonable responses for the respondent to dismiss the claimant. The fact of the existence of the furlough scheme is not material to the decision to dismiss.

79. Having found that the dismissal was an unfair dismissal, I considered the respondent's representatives' submissions in respect of application of a Polkey reduction. That argument was based on there being no difference in the timeline if a fair procedure had been followed. I considered whether, in the circumstances of this case, what made the dismissal an unfair dismissal was a substantive rather than a procedural unfairness. In doing so, I had regard to *O'Dea v ISC Chemicals Ltd 1996 ICR 222, CA*, particularly at para 234 – 235. I also had regard to the guidance of the Inner House of the Court of Session in *King and ors v Eaton Ltd (No.2) 1998 IRLR 686, Ct Sess (Inner House)*, where the Court of Session held that, in considering the question of what would have happened had the unfairness not occurred ('the hypothetical question', to use the phrase used by the EAT in *Fisher v California Cake and Cookie Ltd 1997 IRLR 212, EAT*), making a distinction between the 'merely' procedural and the more genuinely substantive will often be of some practical

use. I considered whether in this case the dismissal could have been a fair dismissal but for a merely procedural lapse. The claimant's dismissal was unfair because of the failure to intimate prior to the issue of the letter inviting the claimant to a disciplinary hearing that a technician's ban on driving may lead to dismissal. This was particularly the case where there were written contract terms and the respondent had in place a Driving Policy and Driving Guidelines, but there was no mention of that likely consequence in them. This was not then a case where but for a procedural lapse the claimant might have been fairly dismissed at a later date. There was a failure to previously advise of the consequences of what was later relied upon as the reason for dismissal.

80. I took into account that even if it had been stated in a written contractual term or policy that a conviction for Dangerous Driving and resultant driving ban would be likely to lead to termination of a technician's employment the claimant may still have driven in such a way as to lead to that conviction. We cannot know that. I took into account that had a letter been issued to the claimant following the claimant's conviction for Dangerous Driving but prior to the sentencing hearing, although that evidence may have had an effect on the sentence imposed, the claimant may still have received a driving ban. If a ban were imposed for a lesser period because of the evidence on the implications on his employment, the respondent may still have considered the period of such a ban to be such that that was a substantive reason for dismissal. I took into account that in those circumstances that would all have occurred within the same time frame as actually occurred. I considered that these matters should be dealt with under a deduction for contributory conduct rather than a Polkey deduction, all in assessing a just and equitable compensatory award. This was not a case where but for a procedural lapse the claimant might have been fairly dismissed at a later date.

81. I awarded a compensatory award which I considered to be just and equitable in all the circumstances. In assessing the compensatory award, I had regard to the guidance provided by the Court of Appeal in *Rao v Civil Aviation Authority 1994 ICR 495, CA*.

82. In reaching my conclusion not to apply a *Polkey* reduction in the circumstances of this case, I had regard to Lord Prosser's observations in *King and ors v Eaton Ltd (No.2) 1998 IRLR 686, Ct Sess (Inner House)*:

> *'[T]he matter will be one of impression and judgement, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure makes no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been.'*

83. In these circumstances, where the driving ban followed the claimant's criminal conviction of Dangerous Driving, I accepted the respondent's representative's submission that it is appropriate to consider the question of the claimant's contribution to his dismissal. I accepted the respondent's position that a significant level of contribution was appropriate. In terms of section 123(6) ERA, I found that the claimant's actions (Dangerous Driving) to a significant extent caused or contributed to his dismissal and was 'blameworthy or culpable' conduct. I had regard to the factors set out by the Court of Appeal in *Nelson v BBC (No.2) 1980 ICR 110, CA*, i.e. that the conduct must be culpable or blameworthy; the conduct must have actually caused or contributed to the dismissal, and it must be just and equitable to reduce the award by the proportion specified. These factors were satisfied in the circumstances of this case.

84. I noted that section 122(2) ERA allows 'any conduct of the complainant before the dismissal' to be taken into account when assessing the basic award and that for the purposes of section 123(6) and the compensatory award, only conduct that 'caused or contributed' to the dismissal could be counted. In the circumstances of this case I applied the same level of deduction to both the basic award and the compensatory award. I did not accept the respondent's representative's submission that contribution should be assessed at 100%. I took into account that had there been evidence before the court at the sentencing hearing on the likely consequences of the claimant receiving a

driving ban then his sentence may have been lessened. I accepted that even if a lesser sentence had been imposed then the respondent may have taken the decision to dismiss and that decision may have been within the reasonable band of responses. I took into account that prior to the accident the claimant was not made aware by his employer that a criminal conviction for Dangerous Driving could lead to dismissal. I took into account that the claimant had a criminal conviction for Dangerous Driving and had been banned from driving for 18 months. I required to consider a hypothetical situation. In all the circumstances, I considered it to be just and equitable to reduce both the claimant's compensatory and basic award by 75% to reflect the claimant's contribution to his dismissal by the actions which led to his Dangerous Driving conviction. In doing so, I applied s123(1) ERA in assessing compensation of '*such amount as the tribunal considered to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.'* I could not take any other approach than to apply a percentage deduction because we could not know the consequences of evidence being presented at the sentencing hearing that a driving ban (either of 18 months or of any other period) would be likely to lead to the claimant's dismissal. It was not known whether the claimant's trial was on summary or on indictment. There was evidence before me that the period of the ban was taken into account, but not to what extent. Termination of the claimant's employment with the respondent was not to the claimant's knowledge envisaged at the time of the sentencing hearing and could not be regarded at that time as being part of the consequences of his actions which led to the Dangerous Driving conviction. We could not know the effect, if any, on the claimant's driving had it been clear to him from the outset that his role with the respondent as technician required him to have a driving licence and / or that a conviction of Dangerous Driving and a resultant driving ban of 18 months (or any lesser period) would be likely to least termination of his employment. I took into account the claimant's knowledge that his solicitor was going to argue for a lesser ban on the basis that he required to drive for his job. In all the circumstances, and taking into account the guidance and categories provided by the EAT in *Hollier v Plysu Ltd 1983 IRLR 260, EAT*, I

considered that the claimant was largely to blame for his dismissal and therefore assessed the contribution at 75%.

85. I accepted that the claimant had taken reasonable steps to mitigate his loss. I accepted that in circumstances of the restrictions caused by the Covid 19 pandemic and the because of the claimant's loss of his driving licence he was restricted in his search for alternative employment. The claimant has taken reasonable steps and has secured alternative employment through an agency. As a result of the claimant gaining that employment, a fixed period of 4 months is agreed in respect of wage loss until 1 September 2020.

86. The parties' representatives had agreed the calculations of the claimant's basic and compensatory awards. Sections 123 and 124 of the ERA set out the relevant statutory provisions in respect of calculation of the compensatory award. I assessed the financial award on the application of *Digital Equipment Co Ltd -v Clements (No 2) [1998] IRLR 134 CA.* I took the parties' representatives agreed figures on the attributable loss sustained (£6,534.24). I considered whether any reduction for failure to mitigate was appropriate and determined that it was not. I considered whether it was appropriate to apply a reduction on application of *Polkey –v- Dayton Services Ltd* 1988 ICR decided that it was not. I identified what is '*just and equitable'* in terms of s123(1), including with regard to the principles in *Polkey –v- Dayton Services Ltd* 1988 ICR and the guidance of the Court of Appeal in *Gover and others v Propertycare Ltd* 2006 ICR 1073, CA. I applied a deduction of 75% to the compensatory award, to reflect the claimant's contribution to his dismissal (£6534.24 - £4900.68 = £1,633.56).

87. It was not argued before me that the ACAS Code of Practice on disciplinary and grievance procedures applied and that an uplift should be awarded for failure to comply with that Code, in circumstances where the reason for dismissal was a substantial reason in terms of ERA section 98(1)(b).

88. The claimant's unfair dismissal basic award is £1152.70, calculated with regard to his age at EDT (23) his number of complete years of service with

the respondent (4) and his weekly gross pay ((£1998 / 12) x 52 = £461.08). It is noted that the schedule of loss refers to a calculation on a different rate of pay to that agreed. For the reasons set out above, because of the claimant's contributory conduct, a reduction of 75% is applied to that figure (£1152.70 - £864.53) £288.17.

89. For the reasons set out above, the claimant's dismissal was an unfair dismissal, and the claimant is entitled to an unfair dismissal basic award of £288.17 and a compensatory award of £1,633.56, totalling £1,921.73.

Recoupment

90. The Employment Protection (Recoupment of Job Seekers Allowance and Income Support) Regulations 1996 applies to the unfair dismissal compensatory award. The claimant has been in receipt of Universal Credit for part of the period in respect of which the compensatory award relates. To avoid double payment, the relevant government department will seek to recover the amount of Universal Credit which the claimant received during this period. This will be recovered from the respondent before the relevant part of the award is paid to the first claimant. The prescribed element of this award, to which the Recoupment Regulations apply relates to the period from 23 March 2020 until 1 September 2020. The claimant received £1,223.90 in Universal Credit. That amount of £1,223.90 is the prescribed element of the compensatory award. The compensatory award exceeds the prescribed element by (£1,921.73 - £1,223.90) £697.83.

91. For these reasons, the sum of (£288.17 + £697.83) £986 from the total award of £1,921.73 is now due to the claimant from the respondent. The prescribed element of £1,223.90 should not be paid to the claimant by the respondent until the relevant government department serves a recoupment notice on the respondent advising of the amount of benefit paid to the employee, or notification is given that there will be no recoupment. On service of a recoupment notice, the amount specified in that notice will then fall to be paid by the respondent to the relevant government department. Any balance between that specified amount and the prescribed element of £1,223,90 falls

to be paid by the respondent to the claimant once the respondent has received this recoupment notice or notice that there will be no recoupment, a copy of which will be sent to the claimant.

Employment Judge:	**Claire McManus**
Date of Judgment:	**04 February 2021**
Date Sent to Parties:	**11 February 2021**