



EMPLOYMENT TRIBUNALS

Claimant: Mr S Bhana
Respondent: Sturgess of Leicester & Sons Limited
Heard at: Nottingham by Cloud Video Platform
On: 9 and 10 December 2020
Before: Employment Judge Victoria Butler (sitting alone)

Representatives

Claimant: Mr H Wiltshire of Counsel
Respondent: Mr J Tunley of Counsel

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - CVP. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

JUDGMENT having been sent to the parties on 15 December 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The Employment Judge gave judgment as follows:-

1. The Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Background to this hearing

1. The Claimant submitted his claim form to the Tribunal on 25 June 2020 following a period of early conciliation between 11 May 2020 and 11 June 2020. He presented claims of unfair dismissal, race discrimination and holiday pay following his dismissal for gross misconduct relating to his driving and behaviour towards a police officer. The Respondent submitted its

defence on 24 July 2020.

2. On 8 December 2020 (the day before this hearing), the Claimant withdrew the race discrimination and holiday pay claims, so the only claim before me was that of unfair dismissal.
3. The case was the subject of a closed preliminary hearing for case management purposes on 21 September 2020, before Employment Judge Hutchinson ("EJ Hutchinson"). Case management orders were made to progress the case to the final hearing.

The issues

4. The Claimant contends that his dismissal was unfair for the purposes of sections 94 and 98 of the Employment Rights Act 1996 (ERA). I had to consider the following:
 - (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 ERA? The Respondent asserts that it was a reason relating to the Claimant's conduct.
 - (b) If so, was the dismissal fair or unfair in accordance with section 98(4) ERA and, in particular, did the Respondent in all respects act within the so-called "band of reasonable responses"?
 - (c) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.

The hearing

5. This case was heard on 9 and 10 December 2020 by Cloud Video Platform ("CVP"). Prior to the commencement of the hearing, I had sight of an agreed bundle of documents and the parties' witness statements.
6. On 10 December, the Claimant submitted an updated schedule of loss along with a supplemental witness statement to support the same.
7. References to page numbers in these Reasons are references to the page numbers in the agreed bundle.

The evidence

8. I heard evidence from:

On behalf of the Respondent:

- Andrew Land, Site Manager
- Neal Delo, Head of Business for Jaguar Landrover
- Barnaby Sturgess, Managing Director

On behalf of the Claimant:

- The Claimant

9. Where there was a conflict in the evidence, I preferred the evidence of the Respondent's witnesses. I was satisfied that they were consistent, credible and reliable. That is not to say that I did not believe the Claimant but, rather, where there was a conflict, the Respondent's evidence was corroborated by the supporting documents.

Findings of fact

10. I have made my findings of fact based on the material before me, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I resolved any conflicts of evidence that arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.
11. The Respondent is a family owned and operated franchised car dealer based in Leicester. Its staff handbook provides:
- "we operate in a very competitive market place and the only thing that separates us from our competitors is the quality of our work and the personal professional service we provide. It is therefore essential that in whatever action you take on the company's behalf you maintain the highest standards at all times"* (p.43).
12. The Respondent has a comprehensive non-contractual disciplinary procedure. It defines gross misconduct as:
- 'a serious breach of contract and includes misconduct which in our opinion is likely to prejudice our business or reputation or irreparably damage the working relationship and trust between employer and employee'* (p.47).
13. The procedure sets out the various stages in the disciplinary process. In respect of investigatory interviews, it confirms that employees do not normally have the right to be accompanied. However, *"we may allow you to bring a companion if it helps you to overcome any disability or any difficulty in understanding English"* (p.51).
14. The Claimant commenced employment with the Respondent as a Parts

Delivery Driver on 5 September 2006. He was issued with a contract of employment (pages 36-38) and a copy of the staff handbook. His role entailed delivering motor vehicle parts to garages and to the Respondent's group dealerships throughout the Midlands region.

15. On the afternoon of 4 February 2020, the Respondent received a phone call from Police Officer Aran Gibbs ("PC Gibbs"). Mr Phil Bale (Parts Manager for Land Rover Sturgess, Leicester) took the call and subsequently (on a date after 16 April 2020) made a statement as follows:

"I received a phone call from Leicestershire Police Officer Aran Gibbs on the afternoon of 4 February. It was in relation to Siraj Bhana stating the following:

Committed moving traffic offences along Leicester Road; one undertaking into a bus lane at speed, bullying, speeding and driving aggressive (sic) less than a foot away from my bumper at speed (unmarked car). When I managed to get him to pull over, he was disrespectful, aggressive and argumentative. At the time I had no tickets with me or I would have issued him with a fixed penalty notice in old terms (TOR). I was in uniform and he showed utter disrespect for the law and authority. I was also dealing with another prisoner and needed to return to the station for other reasons.

During the whole phone call I could hear Siraj talking in an aggressive and argumentative manner, disputing he had done anything wrong over the phone whilst talking to PC Gibbs, at some stage PC Gibbs had to tell Siraj to be quiet so I could actually hear PC Gibbs, at that stage PC Gibbs was willing to arrest Siraj had he not had other commitments. I informed the PC we would deal with this in-house.

A week before this incident a lady that wished to remain anonymous had called Matt Robbins to complain about Siraj's driving style again stating that he was driving in an unsafe manner, as we had no evidence apart from the phone call I had a chat with Siraj and reminded them of our driving standards" (p.106).

16. On 6 February 2020, Mr Bale e-mailed PC Gibbs to obtain a full account of events (p.103). When PC Gibbs failed to respond, Mr Bale e-mailed him again on 10 February 2020 and received a substantive reply on 13 February 2020. PC Gibbs apologised for the delay and confirmed the detail of his account of events as follows:

"What I can say is that your driver Mr Bhana committed moving traffic offences along Leicester Road: one undertaking into a bus lane at speed, bullying and speeding and driving aggressive (sic) less than a foot away from my bumper at speed (unmarked car). When I managed to get him to pull over he was disrespectful, aggressive and argumentative. At the time I had no tickets on me or I would have issued him with a fixed penalty notice in old terms (TOR). I was in

uniform and he showed utter disrespect for the law and authority. I was also dealing with another prisoner and needed to return to the station for other reasons.

In relation to charging him this is not going to happen, as I feel it is only correct if I deal with it at the time of the offence. From a police point of view his driving was very below par and from a delivery driver and representing a company I feel his manner of driving should be addressed by the employer in any way they deem fit....." (p.102).

17. In essence, PC Gibbs confirmed that no charges would be made against the Claimant and it was a matter for the Respondent to deal with.

18. On 17 February 2020, the Respondent's HR officer, Ms I Pietrukaniec, e-mailed PC Gibbs requesting further information and also requesting any footage of the Claimant's driving. She said:

"Dear Aran

1. How would you describe Mr Bhana's aggressive behaviour? Was it verbal or physical? Could you please provide me with some examples of what he said and did?

2. Do you have and can share a footage of his driving?" (p.100)

19. PC Gibbs replied later that day confirming the following:

"1. He was not physical or he would have been arrested.

2. He was verbally aggressive, dismissive of any request, very aggressive in his manner of driving, shouting at me and overtalking me when I am asking why he thinks it's okay to drive as he was, telling me that he does not care what I think, it means nothing to him, shouting charge me or get lost or let me go or words very similar and then he exited the police vehicle without permission.

3. Saying 'yeah I was speeding and close to you, so what you going to do charge me or let me go" (or words very similar)

4. Telling me; were all the same it's your uniform you think your untouchable, talking about police in a negative manner, would not listen to anything at all,

5. Telling me he didn't care what I said.

6. Upon releasing him, he walked off shouting loudly at me, and waving his arms around in an angry manner, so loud that the builders stopped building and stood watching.

7. His behaviour was something I have come to expect from a young out of control criminal, I was very shocked to see an employee from a large company act in this manner, with such disrespect for police." (p.100).

20. Thereafter, the Claimant was suspended. His suspension was lifted whilst he

was on a period of annual leave between 12 and 24 February 2020 and re-imposed on his return whilst the investigation continued.

21. An investigation meeting with the Claimant was initially scheduled to take place on 2 March 2020. This was postponed at the Claimant's request because his union representative was not available. It was postponed for a second time because the Respondent's HR officer was self-isolating with Covid-19 symptoms.
22. The investigatory meeting ultimately took place on 16 April 2020 and was chaired by Andrew Land, Site Manager. The Claimant was not accompanied at this meeting because he had no right to be, nor did he have a disability or any problem understanding English.
23. Mr Land allowed the Claimant full opportunity to explain his version of events. The Claimant confirmed that he was not undertaking illegally in the bus lane, nor was he speeding. He denied driving aggressively, albeit acknowledged that PC Gibbs may have assumed that he was close to him due to the differing size of their respective vehicles. The Claimant said that when PC Gibbs pulled him over, he accused him of going through a red light but failed to mention this in his subsequent e-mail, thereby casting doubt on his version of events. The Claimant advised that there was another police officer in the car with PC Gibbs at the time.
24. The Claimant could not offer any explanation as to why PC Gibbs would report the incident to the Respondent if it were not true. The Claimant also requested the recording of the phone call between Mr Bale and PC Gibbs on 4 February 2020 (pages 73 – 82).
25. Following the investigatory interview, Mr Land undertook further investigation. On 20 April 2020, he contacted PC Gibbs by phone, and thereafter by e-mail, to enquire who the second police officer was. He also asked if the second officer could provide a statement (p.85).
26. On 20 April 2020, PC Gibbs confirmed that PC Sanders was with him and forwarded Mr Land's e-mail to her for her comments (p.84). PC Sanders provided her account on 24 April 2020, as follows:

"I echo what you have said and must say I was shocked at the level of disrespect to police the driver displayed especially as he was at this point only getting words of advice. He did not want to listen and shouted in an aggressive manner which caused me to have to tell him to calm down more than once. I would say that he did not behave in a way that was appropriate to police whilst representing his place of work and whilst at the side of the road a group of builders were looking over clearly shocked at his behaviour" (p.84).

27. On 1 May 2020, Mr Land also made further enquiry of PC Gibbs to ascertain if there was any bodycam footage, but there was not (p.159 & 160).

28. Mr Land also investigated whether there was a recording of the call between Mr Bale and PC Gibbs, but one did not exist. Accordingly, he asked Mr Bale to provide a statement in respect of the call on 4 February 2020 (referred to in paragraph 15 above).
29. Having concluded his further investigations, Mr Land reviewed the information before him and drafted his investigation report based on the following three allegations; that the Claimant had been undertaking on a bus lane at speed, driving in a bullying and aggressive manner and had been aggressive, disrespectful and argumentative towards a police officer. He set out in detail why he felt all three allegations should proceed to the disciplinary stage:

“Reason of investigation

An investigation was conducted as a result of a complaint raised by Police Officer Aran Gibbs made on 4 February 2020.

Methodology used

The investigation officer, Andrew Land and HR officer, Iwona Pietrukaniec, investigated by interviewing both sides Aran Gibbs, the Police Officer and Siraj Bhana, the Parts Van Driver.

After the investigation hearing with Siraj Bhana, the further investigation took place and covered the following steps;

- 1. taking statement from the second Police Officer (Joanne Sanders) present on the day of the event.*
- 2. including a highway code provided by Siraj Bhana into the evidence.*
- 3. requesting a record of the telephone conversation between Aran Gibbs and Phil Bale, Parts Manager. The record was not found, therefore the statement from Phil was taken instead.*

This process gathered evidence and responses received have been reviewed and used to form the basis of this investigation.

Terms of reference

The investigation was conducted in the following areas;

- undertaking on a bus lane at speed;*
- driving in a bullying and aggressive manner;*
- being aggressive, disrespectful and argumentative towards a Police officer.*

Views of the investigation officer

- 1. In terms of undertaking on the bus lane at speed, I agree with Siraj Bhana that he was allowed to drive on the bus lane at that*

time of day. However, the merit of this allegation is based on the aggressive way of overtaking the other vehicle (unmarked Police car). There is no physical evidence to prove the speed limit Siraj was driving, but there is a Police Officer's statement confirming the case. I have spoken to Aran (police officer) and he described in detail the events that took place and that it started when he was driving right on the rear bumper of his vehicle, at one stage he said I tried to break to see if he pulled back but instead he moved sharply into the bus lane at speed to undertake him. I followed him and his driving was in an aggressive manner and at one stage broke very heavy before a speed camera

2. *Siraj Bhana declined (sic) the aggressive way of driving. During the investigation hearing, he highlighted that he was driving within the speed limit. Taking into consideration both sides, I still believe this allegation should be upheld. Driving in a bullying and aggressive manner does not necessarily relate to speed driving. The statement provided by the police officer proves that Siraj's driving manner was dangerous for other road users. Even not having a video record, the weight of the Policeman's statement is still strong enough to process this allegation.*
3. *The last allegation is the strongest one in my opinion. We have statements provided by two police officer confirming the case. Again, Siraj disagreed with the statement, and suggested to check it with the second police officer who was present during that event. His version was not confirmed. In the same time, the statement provided additional evidence to prove the allegation.*

Siraj asked to check the telephone conversation made by Aran Gibbs to Phil Bale (Manager). He suggested that the record could prove that the Police Officer was aggressive and Siraj was only trying to explain the situation. The record was not found, however Phil provided his statement and explained that he heard Siraj being aggressive towards the Police Officer.

Recommendations of the investigation officer

1. *It is recommended to process (sic) disciplinary hearing based on all three allegations.*
2. *It is recommended to include further investigation findings: statement from the second Police Officer (Joanne Sanders) and statement from Phil Bale.*
3. *Please take into consideration, that this case is not the only one that relates to Siraj's aggressive behaviour. There is a pattern of similar aggressive behaviour" (pages 66-67).*

30. Following Mr Land's recommendation that the allegations proceed under the disciplinary procedure, the Claimant was invited to a disciplinary hearing on 4 May 2020, at which he was offered the right to be accompanied. The three

allegations were set out clearly as follows:

“An investigation of facts surrounding the driving ban has been completed; the separate allegations are as follows:

- *Undertaking on a bus lane at speed;*
- *Driving in a bullying, and aggressive manner;*
- *Being aggressive, disrespectful and argumentative towards a Policeman.*

The above are considered separate allegations of acts of gross misconduct, but the company will also consider whether cumulatively they also amount to gross misconduct having undermined trust and confidence” (p.87).

31. The disciplinary hearing was chaired by Mr Neal Delo (Head of Business for Jaguar Landrover), and the Claimant was accompanied by his union representative. The Claimant confirmed that he agreed with the notes from the investigatory meeting and was ‘comfortable’ with the investigation (p.109).
32. In respect of allegation one, the Claimant reiterated that he was not speeding and it was safe and legal for him to undertake in the bus lane. In respect of allegation two, he denied driving aggressively, but again acknowledged that PC Gibbs might have perceived this to be the case because of the sizes of their respective vehicles. In respect of allegation three, he maintained his denial that he was aggressive, disrespectful and argumentative.
33. The Claimant’s representative raised a question mark over PC Gibbs’ account of events, submitting that his statement was contradictory. The Claimant also submitted that another of the Respondent’s drivers had received speeding tickets and ‘nothing’s happened’ (p.114).
34. At the conclusion of the disciplinary hearing, Mr Delo summarised the parties’ respective positions and confirmed that he would consider all the relevant information and advise the Claimant of his outcome in writing. He also advised the Claimant of his right to appeal at this stage (pages 107-116).
35. Following the disciplinary hearing, Mr Delo considered the evidence from PC Gibbs, PC Sanders and Mr Bale, alongside the Claimant’s representations. He did not feel that the Claimant had been particularly convincing during the disciplinary hearing and there was no apparent reason why two police officers would lie so, on balance, he preferred their version of events and believed them to be accurate.
36. Mr Delo concluded that the danger and risk caused by the Claimant’s actions to be serious and, therefore, dismissible. Further, the way the Claimant had spoken to PC Gibbs was completely unacceptable for an employee of the Respondent. Accordingly, he took the decision to summarily dismiss him. Mr Delo confirmed his outcome in writing on 7 May 2020 as follows:

“Following the disciplinary hearing on 4th May 2020, I am writing to inform you that the Company’s decision is to terminate your employment with immediate effect for reasons of cumulative gross misconduct allegations (listed below), which also undermine trust and confidence between the company and the employee.

The allegations against you were as follows:

- Undertaking on a bus lane at speed;*
- Driving in a bullying and aggressive manner;*
- Being aggressive, disrespectful and argumentative towards a Policeman.*

My decision to terminate your employment is based on the arguments below:

- On the balance of probability I find it unlikely that these police officers would fabricate or tell lies, there was no motive or interest in them inventing or exaggerating your behaviour and so despite your denials, on the balance of the evidence I find all three allegations are upheld and each one of them would be gross misconduct but certainly combined, any 2 or 3 of them would have undermined trust and confidence in you as an employee.*
- I have considered the other representations you made at the disciplinary hearing, some of which are irrelevant. In relation to the representation made regarding speeding tickets, I have investigated that matter and the other speeding tickets were factually different to the 3 allegations of your behaviour in this disciplinary and therefore those speeding tickets do not change my decision.*

I confirm that your employment is terminated without notice period, therefore your last day of service will be 7th may 2020.

....

You have the right to appeal against the decision to dismiss you on the ground of trust and confidence.....” (pages 117-118).

37. On 13 May 2020, the Claimant e-mailed Mr Barnaby Sturgess, Managing Director, advising him that he wished to appeal. The e-mail was not received by Mr Sturgess. In the absence of a response from Mr Sturgess, the Claimant did not pursue the matter any further and no appeal was heard.

38. The Respondent only became aware that the Claimant wished to appeal the decision to dismiss him on or around 6 October 2020, after the preliminary hearing before EJ Hutchinson on 21 September 2020. It conducted a full search of its e-mail account but there was no evidence of the Claimant’s e-mail being received (pages 131 – 135).

The law

39. Section 98 of the Employment Rights Act 1996 (“ERA”) provides:

- “(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—*
- (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,*
 - (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.*
- (3) *In subsection (2)(a)—*
- (a) *“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
 - (b) *“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*
- (4) *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.*

40. When determining the fairness of conduct dismissals, the Tribunal must consider a threefold test - British Home Stores v Burchell 1980 ICR 303 (“*the Burchell test*”):
- a. Did the employer have a genuine belief that the employee was guilty of misconduct;
 - b. Did the employer have reasonable grounds upon which to sustain that belief; and
 - c. At the stage at which the employer formed that belief on those grounds, did it carry out as much investigation into the matter as was reasonable in the circumstances.
41. Procedural fairness is an essential part of the fairness test under section 98(4) ERA. In determining the question of reasonableness in this regard, the Tribunal will have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures.
42. If an employer could reasonably have concluded that a proper procedure would be “utterly useless” or “futile”, it might be acting reasonably in ignoring it - Polkey v Dayton Services Ltd [1988] ICR 142.
43. The Tribunal must not substitute its own decision as to the reasonableness of the investigation. The relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted - Sainsburys Supermarkets v Hitt [2003] IRLR 23.
44. Nor must the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal’s function is to determine whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted in the particular circumstances of the case - Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.

Conclusions

45. The starting point in an unfair dismissal case is establishing the reason for the dismissal. The burden of proof is on the Respondent who, in this case, asserts that the reason for dismissal is conduct. Considering the allegations made against the Claimant by PC Gibbs, the subsequent investigations into the same and deliberation of them at the disciplinary hearing, I am satisfied that the reason for the Claimant’s dismissal was conduct.
46. In considering the fairness, or otherwise, of the Claimant’s dismissal, it is not my role to substitute my decision as to the reasonableness of the action taken by the Respondent. Rather, it is for me to determine whether in the particular circumstances of this case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. In reaching my conclusions, I considered the *Burchell* test, as I am required to

do.

Did the Respondent have a genuine belief that the employee was guilty of misconduct?

47. I am satisfied that the Respondent had a genuine belief that the Claimant was guilty of misconduct. There were three allegations against him; i. that he had undertaken on a bus lane at speed, ii. that he had been driving in a bullying and aggressive manner; and, iii. he had been aggressive, disrespectful and argumentative towards a police officer.
48. Turning to the facts, the Respondent's Mr Bale received a call from PC Gibbs on 4 February 2020, complaining about the Claimant's behaviour. PC Gibbs explained that the Claimant had undertaken him at speed in the bus lane, was driving in a bullying and aggressive manner less than a foot away from his bumper and, thereafter, he was disrespectful, aggressive and argumentative towards him.
49. Mr Bale made further contact with PC Gibbs to obtain additional detail, which he duly provided by way of e-mail dated 13 February 2020, confirming his account of events as described to Mr Bale on 4 February 2020.
50. Mr Bale's recollection of the phone call with PC Gibbs was that he could hear the Claimant talking in an aggressive and argumentative manner in the background, thereby supporting PC Gibbs' version of events. PC Sander's e-mail also corroborated PC Gibbs' account and she expressly confirmed that the Claimant had shouted in an aggressive manner.
51. The dismissing officer, Mr Delo, carefully considered the investigation material and the Claimant's representations at both the investigatory and disciplinary meetings. He did not find the Claimant particularly convincing and there was no apparent reason why two police officers would lie. The Claimant was unable to offer an explanation as to why they would fabricate events. Based on the corroborative evidence before him, Mr Delo concluded that the Claimant's actions amounted to gross misconduct. Given the available evidence, I am satisfied that he held a genuine belief that the Claimant was guilty of gross misconduct.

Did the Respondent have reasonable grounds upon which to sustain that belief?

52. The Claimant accepted that PC Gibbs had pulled him over on 4 February 2020, but denied that he had been aggressive or committed an offence. He was concerned that PC Gibbs was not being entirely truthful, and alleged that he had initially accused him of running a red light, but then subsequently failed to mention this.
53. At the disciplinary hearing, Mr Delo had Mr Land's investigation report, along with statements from PC Gibbs, PC Sanders and Mr Bale. In arriving at his conclusions, he gave the Claimant's account of events due consideration. On

balance, he preferred the information provided by the two police officers and Mr Bale, which was consistent. In the absence of any credible explanation by the Claimant as to why PC Gibbs' version of events was untruthful or, indeed, that of PC Sanders and Mr Bale, I am satisfied that Mr Delo had reasonable grounds on which to sustain his belief of the Claimant's guilt.

54. Under cross examination, Mr Delo accepted that allegation one by itself (undertaking in a bus lane at speed) was not a dismissible offence. However, in his view, allegations two and three were sufficient, either singularly or collectively, to amount to gross misconduct. I am satisfied that this is a reasonable conclusion and does not undermine his decision to summarily dismiss.
55. The Claimant submitted that no account was taken of the delay between the incident on 4 February 2020 and the subsequent gathering of information. However, the initial statement obtained from PC Gibbs was contemporaneous and his additional information provided shortly thereafter. There was some delay in obtaining statements from PC Sanders and Mr Bale, but the delay was not significant or unjustified as they were provided in consequence of matters raised by the Claimant in the investigatory meeting. When the statements were obtained, they were consistent with PC Gibbs' initial complaint and I am, therefore, satisfied that that the delay had no impact on the cogency of the overall evidence taken into account by Mr Delo.

Did the Respondent carry out as much investigation into the matter as was reasonable in the circumstances?

56. Both Mr Land and Mr Delo were criticised under cross examination about their respective handling of the disciplinary process. My function is to consider what happened at the time, and whether the investigation carried out was reasonable in the circumstances of the case.
57. Mr Land carried out the investigation into the matter and received a written account of events from PC Gibbs. Thereafter, he undertook further investigation by asking PC Gibbs for more information, enquired if there was any video footage and obtained statements from PC Sanders and Mr Bale. Mr Land also investigated whether there was a recording of the call between PC Gibbs and Mr Bale, but found one did not exist. I had no reason to doubt that it did not exist and no substantive evidence has been provided to support the Claimant's assertion that it was suppressed.
58. Mr Land confirmed his findings in an investigation report. He gave due care to the Claimant's representations, demonstrated by his acknowledgement that the Claimant was permitted to drive in the bus lane at the time in question.
59. The Claimant submitted that the Respondent should have obtained more evidence, but I am satisfied that the Respondent acted reasonably in relying on the evidence it had in its possession. The Claimant did not advance any new information that required further investigation after his interview with Mr Land (who had already undertaken further investigation), or at the disciplinary

hearing before Mr Delo. Notably, the Claimant himself says that the investigation '*was conducted in a reasonable manner*' (paragraph 30 of his witness statement). Accordingly, I am satisfied that the Respondent carried out as much investigation into the matter as was reasonable in the circumstances.

Was the Claimant treated inconsistently compared to others?

60. The Claimant also alleges inconsistent treatment. He relies on another driver, Mr Webb, who was given a verbal warning following a complaint that he was driving too close to the car in front of him. The Respondent produced evidence about this incident in the bundle, along with a further complaint against Mr Webb which led to his dismissal.
61. The first complaint made against Mr Webb on 11 January 2020 was that he was driving aggressively and too close to the car in front of him. The complainant provided a picture of his van behind her. The photographic evidence did not show that Mr Webb was too close to her vehicle and the complainant declined to provide further information on request. In light of conflicting evidence, Mr Webb was given a verbal warning and reminded of the Respondent's driving policy.
62. The second complaint against Mr Webb was in respect of careless driving and resulted in his dismissal.
63. I am satisfied that it is not appropriate to compare the allegations against Mr Webb to those of the Claimant. The surrounding circumstances are entirely different, save the allegation that the Claimant was driving too closely to PC Gibbs. Notably though, Mr Webb was dismissed as a result of the second complaint of careless driving so there is no basis on which the Claimant can sustain an argument of inconsistent treatment.

The procedure adopted by the Respondent

64. I am satisfied that procedure followed by the Respondent was fair. Mr Land was appointed as an independent investigator and carried out a reasonable investigation which, as above, the Claimant himself says '*was conducted in a reasonable manner*'. Following his interview with the Claimant, Mr Land undertook further investigation consequent of matters raised by the Claimant and produced an investigation report summarising his findings.
65. The Claimant was called to a disciplinary hearing on 4 May 2020. He was provided with all the available evidence in advance, was accompanied at that hearing, and given full opportunity to explain his case. Thereafter, Mr Delo took the time to consider the evidence and concluded that the appropriate sanction was summary dismissal. He confirmed his decision in writing and advised the Claimant of his right to appeal.
66. The Claimant e-mailed Mr Sturgess with his appeal, copying in his union representative. I am satisfied that, for a reason and we will never know, Mr

Sturgess did not receive it. The Claimant did not contact the Respondent further when he received no response, nor did his union representative.

67. The Respondent was first aware that the Claimant wished to appeal during these proceedings on or around 6 October 2020, following the preliminary hearing before EJ Hutchinson. On learning this, the Respondent undertook a thorough search of its e-mail accounts but no record of the Claimant's e-mail was found.
68. The Claimant submitted that if the Respondent had allowed an out of time appeal, further evidence may have come to light. I do not accept that this would have been a likely outcome. The grounds of appeal do not offer any new information requiring further investigation, so no additional evidence would have been before Mr Sturgess.
69. I find no fault in the procedure adopted by the Respondent leading to the Claimant's dismissal but did the lack of an appeal render the Claimant's dismissal unfair? Given that the Respondent was completely unaware that the Claimant wished to exercise his right to appeal, it was reasonable for it to assume that he did not want to. There is no obligation to hold an appeal which is substantially out of time and I do not criticise the Respondent for not convening one some five months after the Claimant's dismissal, particularly in the absence of evidence from its search that the e-mail was ever received.
70. Accordingly, I am satisfied that the procedure followed by the Respondent fell within the range of reasonable responses open to a reasonable employer.

Summary

71. I am satisfied that the decision to dismiss the Claimant was both substantively and procedurally fair and within the range of reasonable responses open to a reasonable employer. In light of my conclusions above, the Claimant's claim of unfair dismissal is not well founded and is, therefore, dismissed.

Employment Judge Victoria Butler

Date: 19 February 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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