EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101956/2020 (V)

Held via Cloud Video Platform (CVP) on 29 and 30 September 2020

Employment Judge S MacLean

Mr G Gibson	**Claimant** **In Person**
XPO Logistics Limited	**Respondent** **Represented by:** **Mr C MacNaughton – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claim of unfair dismissal is dismissed.

Background

1. On 26 March 2020 the claimant sent a claim form to the Tribunal's office complaining that the respondent unfairly dismissed him on 26 January 2020. The claimant sought reinstatement failing which compensation.

2. In the response form the respondent said that the claimant was dismissed for a potentially fair reason; his conduct. The respondent denies that the claimant was unfairly dismissed. The respondent says that there was an appropriate investigation; a disciplinary hearing in which it was decided that the allegations were proven on balance; and that dismissal was a reasonable response. The claimant was offered a right of appeal. If there were any shortcomings in the dismissal process the claimant's actions were contributory conduct.

3. The final hearing was conducted by cloud video platform Jonathan Davis, formerly Site Manager, and David Mangan, Account Director gave evidence for the respondent. The claimant gave evidence on his own account. Witness statements were provided and treated as their evidence in chief. They were cross-examined and re-examined in the usual way.

4. The parties provided a joint set of documents along with a chronology of events and list of issues. Mr MacNaughton helpfully provided outline legal argument in writing and both he and the claimant made oral submissions.

Relevant Law

5. Section 94(1) of the Employment Rights Act 1996 (the ERA) provides that an employee has the right not to be unfairly dismissed by his employer.

6. Section 98 of the ERA sets out how a Tribunal should approach the question of whether a dismissal is fair. Section 98(1) and (2) provides that the employer must show the reason for the dismissal and it is one of the potentially fair reasons. If the employer is successful, the Tribunal must then determine whether the dismissal was fair or unfair under Section 98(4).

7. Where the reason for dismissal is based on the employee's conduct, the employer must show that this conduct was the reason for dismissal. For dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct the procedural steps necessary in the great majority of cases misconduct is the full investigation of the conduct and a fair hearing to hear what the employee must say in explanation and mitigation (see *Polkey v AS E Dayton Services [1981] ICR (142) HL.* It is the employer who must show that the conduct was the reason for dismissal and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct (*see British Home Stores Ltd v Burchell [1980] CA;* and confirmed in *Post Office v Foley [2000] ICR 1283 and J Sainsburys v Hitt [2003] C111.*

8. The Tribunal was also referred *to British Leyland (UK) Ltd v Swift [1981] IRLR 91* which sets out the correct approach for the Tribunal to take when

considering a band of reasonableness. *HSBC Bank Plc v* Madden *[*2000*] ICT 1283* where L J Mummery stated that the question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case having regard to the equity and substantial merits of the case. The Tribunal must not substitute its own view of that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to an employer. It is necessary to apply the objective standards of a reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been treated fairly, including whether the dismissal of the employee was reasonable in all the circumstances.

The Issues

9. The issues to be determined by the Tribunal are:

   a. What was the reason for the claimant's dismissal? The respondent asserts that the claimant was dismissed for conduct; a breach of company policy and failure to ensure adequate training for drivers and himself before operating the company vehicles; and falsification of company records.

   b. Did the respondent have a genuine belief in the misconduct of the claimant?

   c. At the time the respondent formed that belief had the respondent carried out as much investigation into the matter as was reasonable in the circumstances? The claimant maintains that the investigation was not reasonable because: there no statements were taken from Ian Lee, Gary Prescott and David Fraser; there was no proper investigation; and the time it took was unreasonable.

   d. Was the sanction imposed on the claimant within the band of reasonable responses of a reasonable employer. The claimant says that it is not because the decision was predetermined and that the

claimant was not responsible for his own refresher training without clarity from his superiors.

e. What if any remedy should be awarded to the claimant?

Findings in Fact

10. The Tribunal makes the following findings in fact.

11. The respondent is a limited company carrying on business in the transport and supply chain industry. The respondent has transport depots at various locations including Grangemouth and Motherwell. The respondent operates a range of vehicles from light to heavy goods.

12. The respondent requires to conduct relevant driver training and assessment checks for health and safety and insurance reasons. The respondent must ensure that all drivers have the appropriate licence; that the licence is valid and does not have too many points; and that drivers have up to date training in driver assessment. These checks regulate whether the driver is suitably trained and qualified to carry out the job that the respondent is asking them to undertake.

13. The respondent has a disciplinary policy. Under the policy no employee will be dismissed for a first breach of discipline except in cases of gross misconduct where the penalty may be dismissal without notice. The investigation is to be conducted without unreasonable delay and the amount of investigation depends on the nature of the allegations and the circumstances of the particular case. The investigating manager has the right to investigate a colleague directly without prior notification. Employees will normally not have the right to bring a companion along to an investigatory interview. Employees may be suspended in full pay while investigation takes place, but this is not in itself disciplinary action. Gross misconduct offences include a serious breach of the company's health and safety and falsifying records in any manner.

14. The respondent employed the claimant from 9 February 2004. At the time of his dismissal the claimant was employed as a Regional Transport Manager

based at Grangemouth. He was in a senior position with a responsibility within the business. Part of his role and responsibility was to ensure that drivers were trained and up to date with their driving assessments, as well as to conduct site health and safety checks before drivers were sent out on the road. The claimant also holds a Class 1 driving licence and on an ad hoc basis would drive the respondent's vehicles. He was familiar with the disciplinary policy and had conducted disciplinary proceedings in his capacity as Regional Transport Manager.

15. The claimant reported to Helen Burke, Regional General Manager and when she was unavailable to Gary Prescott, Regional Transport Manager. They were based in England. Ian Lee, Quality Health and Safety Executive Manager is also based in England.

16. On 22 October 2019 a driver incident occurred (the Munro Incident) following which Ms Burke met with the claimant in Grangemouth and short falls in driver training were identified. The claimant then asked Mr Lee for the training matrix which he had been prepared which the claimant had not received. This was provided.

17. On 11 November 2019 Mr Lee attended Grangemouth to undertake pre-audit checks in preparation for a QHSE audit the following week. During the check the claimant discovered that paperwork was missing from the file of an agency driver, Michal Czajka. The claimant knew that Mr Czajka has previously work at the Motherwell depot, so the claimant contacted Russell Hamilton, Regional Transport Manager Motherwell to request that any documents they held for Mr Czajka were sent over. The claimant was informed that they had not carried out an assessment on Mr Czajka. The claimant and Mr Lee arranged for a complete assessment be carried out on Mr Czajka on 14 November 2019 involving a safe system of work (SSOW) and site induction.

18. The claimant received a letter dated 6 December 2019 inviting him to an investigatory meeting on 10 December 2019 to be conducted by David Fraser, Site Manager, Motherwell. It was a fact-finding exercise. Joanne O'Neil, Site Administrator was to attend to take notes. The purpose of the meeting was to

investigate and discuss the allegation that there was a failure to ensure adequate training for drivers before allowing them to operate vehicles for the respondent. The letter stated that the claimant,

> *"…was able to be accompanied by a colleague or certified Trade Union representative at the meeting if you wish. Please find enclosed a document for you to hand to your chosen representative should you wish to be accompanied which details their role in the meeting."*

19. At the investigation meeting on 10 December 2019 the claimant explained to Mr Fraser that when he had started working in Grangemouth there had been no training matrix in place. He had prepared one and sent it to Ms Burke in May 2019. He received no response and therefore assumed what he was doing was correct. In relation to agency drivers the claimant said that he was under the impression that Motherwell had assessed agency drivers who had worked there. The claimant explained that he had been unaware of the training policy/matrix until a meeting on 11 November 2019. The claimant confirmed that Mr Czajka was assessed on 14 November 2019 and that he was the only agency driver the claimant used. The claimant said that Mr Czajka had worked a couple of shifts after the Munro Incident shifts. The notes record that the claimant said that he had,

> *"…done the basic site induction on the first shift with him, I done his licence check, his training was done after the Munro [Incident]. Told agency I wanted drivers who had worked at Motherwell as I thought with you having two trainers here that he would have been assessed here (Motherwell).*
>
> *There is an employed driver at Grangemouth who has in records on his file stating he has [passed] the Pasquil training but when I asked him about it he said that he hadn't actually done it , he only just completed the forms, so he doesn't go there anymore either. I don't use any drivers who haven't been trained or assessed."*

20. The claimant was told that Mr Fraser would be in touch. The claimant was asked to provide him with the paperwork for Mr Czajka. The claimant sent: a

site induction dated 12 September 2019 bearing Mr Czajka's signature (the September Induction) and a licence check dated 22 October 2019.

21. On checking with the agency when Mr Czajka started worked at Grangemouth Ms O'Neil was advised he worked five shifts in the week commencing 29 September 2019. He next worked two shifts in the week commencing 3 November 2019. Ms O' Neil asked the claimant to confirm the start and finish time for Mr Czajka on 12 September 2019 and if there was a licence check for 1 October 2019 as one provided was dated 22 October 2019. The claimant replied as follows:

> *"Jo. To be truthful, I cannot find an earlier licence check for Michal this is why I have got this one on 22nd. Michal was not back out with us until 07.11.19.*
>
> *Obviously I have messed up with regards to this and will take whatever arises from it in due course. [Michal] had a full induction on 14.11.19.*
>
> *And he is the only agency driver we currently use on site due to this issue."*

22. Mr Fraser prepared an undated investigation report (the Fraser Investigation) in which he recorded:

> *"Gary Gibson has advised during meeting that he carried out a basic site induction, a licence check, and spoke with the driver personally on his first shift with him. When asked to provide a copy of the paperwork, the site induction was dated 12 September 2019 and the licence check was dated 22 October 2019. He was asked then to confirm the shift start and finish time on 12 September to clarify he was working on that day. Gary then spoke by telephone to Joanne with "can you just ignore that one, I made a mistake he didn't work that day" Gary then stated that his first shift was in fact 1 October 2019, no induction or licence check was carried out as he was on holiday this day and returned on 2 October 2019. The agency confirmed that Michal had worked five shifts that week. A full induction and training was completed on 14 November 2019."*

23. On 17 December 2019 one of the claimant's drivers advised that he would be unable to attend work as he had injured himself at home and was at hospital. The claimant endeavoured to move loads about and ascertained if the work could be covered by agency drivers or subcontractors. None was available. The claimant was unable to contact Ms Burke but told Mr Prescott what was happening.

24. During a conference call later that morning Ms Burke became aware that the claimant was on the road covering a driver's absence. She asked whether the SSOWs and driver assessments were up to date. The claimant replied that they were. Ms Burke subsequently emailed the claimant asking him to confirm his latest assessment and SSOW for her piece of mind.

25. On 18 December 2019 Mr Prescott met with the claimant to discuss what had happened the previous day and why the claimant took the action that he did. During the meeting Mr Prescott completed a handwritten interviewee statement which the claimant signed (the Prescott Investigation).

26. The claimant explained why he decided to take the load. Mr Prescott asked if the claimant's driver qualifications were up to date (CPC SSOW and driver assessment etc). The claimant confirmed that the CPC was up to date but not SSOW or driver assessment because he could not find any of the documentation from his previous site. Mr Prescott asked when the claimant was last assessed. The claimant could not remember but thought it would be over 12 months. The claimant was asked if he was aware that all drivers employed by the company must have a driver assessment every 12 months. The claimant explained that he thought it was between a year to 18 months. The claimant said that his assessment was possibly more than 18 months, but he could not remember. The claimant also confirmed that he had not had any training for delivering international timber product. He had spoken to Mr Lee about yesterday. The claimant had been concentrating on drivers. He did not sign it for himself. The claimant said that it did not enter his head to consider whether he had a valid driving assessment and had signed the relevant SSOW before taking out the load. He did not want a failed load so he drove the load so as not to look stupid in front of the customer. The claimant

accepted that in hindsight it was the wrong decision to make but reiterated that he did not want to fail the load and feel stupid in front of the customer. The claimant was advised that the health and safety of staff, customers and other road users was paramount. No load or the potential to be embarrassed in front of a customer was worth the potential to cause injury or harm because of unsafe practice. On this basis the claimant was being suspended on full pay pending an investigation. The claimant was advised that he would be contacted in writing in due course outlining the next steps.

27. By letter dated 18 December 2019 in which the claimant received on 21 December 2019 the claimant was advised that he was being suspended on basic pay while an investigation was conducted into the allegations concerning the claimant knowingly driving a company vehicle without the required assessment and without completing the training in the required the system of work. The claimant was advised that the length of suspension would be as short as possible and was informed that the allegations may constitute gross misconduct and could result in his dismissal.

28. By letter dated 24 December 2019 the claimant was invited to attend a disciplinary hearing on 8 January 2020 to be chaired by Jonathan Davis, Site Manager (the First Disciplinary Invite). Mairi McNeil-Caulfield, Regional HR Manager who authored the Disciplinary Invite was to be present. The claimant was informed that he was entitled to be accompanied by a colleague or a union representative at the meeting. The letter stated that the purpose of the meeting was to discuss the allegation that he had breached company policy and failure to ensure adequate training for drivers and himself before operating of company vehicles. Enclosed with the letter were a copy of the disciplinary policy; investigation notes and supporting documentation of the interview on 10 December 2019 and interview and suspension notes dated 18 December 2019. The claimant was advised that the allegation if proven amounted to gross misconduct and that his continued employment was under threat.

29. The claimant contacted Mr Prescott on 6 January 2020 to ascertain what was happening. Following this telephone call the claimant received an email with

the Disciplinary Invite attached. The claimant did not receive a hard copy of the Disciplinary Invite until after meeting Mr Davis on 8 January 2020.

30. The claimant attended the disciplinary hearing on 8 January 2020 (8 January Meeting). He was accompanied by Russell Hamilton, Regional Transport Manager, Motherwell. Mr Davis indicated that if the claimant needed any adjournments he was to ask and gave a summary of the investigation and asked the claimant to provide an explanation.

31. The claimant explained that following the Munro Incident everyone on the international timber contract required specialist training. Mr Lee had come to Grangemouth and training had all been up to date. There was also discussion regarding the claimant carrying a load on 17 December 2019. The claimant said that Ms Burke had been aware that he had on previous occasions driven loads and he had done so when based at Cumbernauld. The claimant said that his last driving assessment was in 2015 and he had never been contacted by central training despite requesting training. Mr Davis asked about Mr Czajka signing the September Induction when he was not working that day or the day of the licence check which was dated 22 October 2019. The claimant said that he brought him in. The claimant questioned why he was being asked about when this was not the reason for his suspension. The claimant also thought that there had not been sufficient investigation; there was no statement from Ms Burke. He questioned why he had not been advised that there was an ongoing investigation when he was suspended. The claimant said that Mr Prescott did not want to suspend him, but he was directed by Ms Burke. The claimant said that he was concentrating on drivers, but it had not entered his head that he should undertake any of the training. When the claimant raised it with Mr Lee, Mr Lee said that he should have done it.

32. Following a short adjournment Mr Davis asked about the discrepancy in the dates between the site safety induction and the licence check for Mr Czajka. The claimant confirmed that it was his writing and could not understand why there was a discrepancy; it was possibly that he was juggling too many things. Mr Davis indicated that he was concerned that there was a possible breach of policy and falsification of company records. The claimant mentioned that

one of the drivers at Mr Davis' site (Mossend) had driven without an assessment/SSOW. Mr Davis confirmed that he would investigate: the falsification of records; Ms Burke's knowledge; training responsibilities and the Mossend driver driving without an assessment.

33. Mr Davis was concerned that a signature for Mr Czajka appeared on the September Induction for a date that he had not been working. Mr Davis considered that the allegation in the Disciplinary Invite did not take into consideration that the claimant had potentially forged a signature on the September Induction. Mr Davis therefore considered this should be clarified and discussed when the meeting was reconvened.

34. A letter was sent to the claimant dated 16 January 2020 inviting him to the reconvened disciplinary hearing (the Second Disciplinary Invite) on 21 January 2020 (21 January Meeting). The claimant was advised that with the First Disciplinary Invite he was issued with copies of documents pertaining to Mr Czajka's safety induction about which there were some questions raised around the authenticity of dates/signatures. Mr Davis had said that he felt that the matter was very concerning and warranted further investigation. The Second Disciplinary Invite confirmed that that allegation would be discussed during the 21 January Meeting. The Second Disciplinary Invite stated that the allegation mentioned in the First Disciplinary Invite covered breach of company policy and confirmed in the interest of clarity the specific allegation was falsification of records thus constituting breach of company policy. The claimant was again advised that if proven it would amount to gross misconduct and that his continued employment may be under threat.

35. Ms Burke provided a statement dated 17 January 2020 which confirmed that she was aware that the claimant had driven HGV vehicles in Grangemouth. She knew that he had a Class 1 licence and that he was fully up to date with his CPC training. Ms Burke understood from the conference call discussion on 17 December 2019 that all drivers including the claimant had now in date assessment and the relevant SSOW in place. Considering recent developments, she sent an email to the claimant requesting copies of the

claimant's documents for her own piece of mind. She did not receive a response.

36. Mr Davis also met Mr Czajka on 17 January 2020. Mr Czajka said that the signature on September Induction was not his. He was definite about it. Mr Czajka commented on the signature and provided some samples to illustrate the differences. Mr Czajka was also not working at Grangemouth on 12 September 2019. A signed statement showing the questions asked and the responses was obtained.

37. At the 21 January Meeting the claimant was accompanied by Mr Hamilton. Ms McNeill-Caulfield was present. The claimant was provided with copies of the statements of Ms Burke and Mr Czajka. Mr Davis explained that Mr Czajka said that the signature on the September Induction was not his. Ms Burke knew that the claimant drove company vehicles that she was unaware that his driving assessment and SSOW were out of date and had sought clarification on the conference call. The claimant said the Ms Burke has asked about the drivers at Grangemouth. Mr Davis said that the advice from Mr Burns at central training was that the responsibility for training lies with the site and driver. Mr Davis also confirmed that the Mossend driver had been driving without an assessment.

38. There was a ten-minute adjournment to allow the claimant to consider the paperwork. When the 21 January Meeting reconvened, the claimant confirmed he was content to continue. The claimant insisted that the signature on the September Induction belonged to Mr Czajka. There was no reason for the claimant to falsify the signature. He had admitted putting the wrong date on the September Induction. The claimant could give no explanation why he had written 12 September 2020 especially as Mr Czajka did not start working at Grangemouth until 30 September 2019. In relation to Mr Burke's statement the claimant said that he had been out driving which was why he had not responded to her email and that she should have been aware of the site training as he was not on her training matrix. The claimant confirmed that he checks the drivers but did not check himself. Mr Lee had

been in the depot and had not questioned the claimant was not on the list. The claimant felt that it was a witch hunt.

39. Following the 21 January Meeting Mr Davis considered the allegations and the evidence.

40. Mr Davis noted that the claimant indicated during the Fraser Investigation the claimant said that he had carried out a basic site induction with Mr Czajka on the day he started. The claimant then supplied the September Induction to Ms O'Neil. She queried this as Mr Czajka was not working at Grangemouth that day. The claimant then provided the November Induction. Mr Czajka was adamant that he had only signed the November Induction. The signature on the September Induction was not his. Mr Czajka was able to note several differences to his signature and was sure that the signature on September Induction was a forgery. Mr Czajka started on the site in the week commencing 29 September 2019. Neither document was completed on his start date contrary to the claimant's statement during the Fraser Investigation. The November Induction was produced on being challenged about the validity of the September Induction. Given Mr Czajka's position that he had not signed the September Induction Mr Davis believed that the claimant falsified the September Induction to support his testimony to Mr Fraser that an induction had been carried out on the required timescale.

41. Mr Davis accepted that there are occasions when drivers who have not been assessed are used but when it is identified it is rectified. Mr Davis considered that in the December Investigation the claimant had indicated that he did not use any drivers who had not been trained and assessed but within one week the claimant drove a company vehicle though he had no up to date assessment or training record. When challenged by Ms Burke she said that the claimant had advised that he had been assessed and had up to date training. The claimant countered that he was only asked if the site was up to date for which he was responsible. The claimant replied yes. As the claimant drove company vehicles from that site Mr Davis had challenged why the claimant had confirmed that it was complete. The claimant said that he had not regarded himself as a driver. Mr Davis considered that the responsibility

for ensuring a driver's record is up to date and valid rests with the site and the driver. The claimant was the site lead and was therefore responsible for ensuring the site was up to speed and that included himself. The claimant thought that others should have advised him about his training certificate assessment being out of date but did not take any responsibility for his own compliance.

42. Mr Davis believed Mr Czajka. Mr Davis believed that the claimant had forged the signature on the September Induction. He produced November Induction after he had been challenged on the validity of the September Induction by his colleagues. Mr Davis believed that this was a falsification and forgery of a health and safety record and was gross misconduct. Mr Davis considered that the claimant was being dishonest and that this destroyed the trust and confidence that the respondent should have of its employees.

43. Mr Davis considered that the claimant admitted that he knew drivers should be regularly assessed and that his last assessment was probably out of date as best as he could remember but then he later accepted during the 8 January Meeting that his last driver training assessment was in 2015. Mr Davis considered that if drivers were used who had not been assessed or the assessment was out of date, it was against company policy. However, when it did occur, it was rectified. Mr Davis did not consider that the fact that someone had done it made it correct. It was still a serious matter. The claimant understood he should not use drivers that were not assessed and despite this, the claimant, only one week later, drove the company vehicle even though he did not have an up to date assessment or training record.

44. Mr Davis therefore believed the claimant had falsified company health and safety records by forging Mr Czajka's signature and had failed to ensure that adequate training and assessments were in place before driving himself or before utilising Mr Czajka. Mr Davis concluded the forging of the company's documents was gross misconduct and a breach of trust and confidence. His failure to ensure up to date training was dereliction of his duties. Mr Davis found that during the disciplinary process, the claimant did not seem willing to accept responsibility as site lead, to ensure that his own site was up to date

and that the responsibility naturally rested with him. Mr Davis also felt that there was an unwillingness to take personal responsibility for his own training records as a senior member of the business.

45. Mr Davis considered that dismissal was appropriate. He was aware of the claimant's length of service and clean disciplinary record but also took into account the severity of his actions, his seniority, level of responsibility and the damage his behaviour had on the relationship of trust.

46. The claimant was advised of the decision in writing by letter dated 23 January 2020 and advised that he had the right to appeal the decision. The claimant exercised that right and set out his grounds of appeal in a letter dated 26 January 2020.

47. The claimant was invited to attend an appeal hearing on 12 February 2020 to be conducted by David Mangan, Account Director accompanied by Rebecca McGregor, HR Business Partner, who would take notes. The claimant was informed that he had the right to be accompanied. Before the appeal hearing, Mr Mangan considered the claimant's grounds of appeal and the documentation which accompanied it along with the investigation pack.

48. At the appeal hearing, Mr Hamilton accompanied the claimant who was invited to talk through his points of appeal, which he did. The claimant suggested that Mr Mangan speak to Mr Lee and Mr Mancz.

49. After the appeal hearing Mr Mangan noted that before the Fraser Investigation an email "had been taken" from Mr Lee regarding the issues at the Grangemouth site and training records.

50. Mr Mangan spoke to Mr Prescott about the claimant's assertion that Mr Prescott said that he was suspending the claimant on full pay by Helen Burke". Mr Prescott said at not time did he say that.

51. Mr Mangan considered each point of appeal which he either rejected or found it had no validity. The claimant was provided with all relevant material that he needed to respond to the relevant allegations and was able to put forward his versions of events. Mr Mangan considered that the allegations were clear and

largely admitted. The timescales in Mr Mangan's views were not excessive; they were reasonable. He felt that the claimant's attempt at the appeal hearing to blur his knowledge of the SSOW procedures and the responsibilities in relation to this which he previously accepted made matters worse. The evidence in Mr Mangan's view of falsification or forgery of Mr Czajka's signature on a health and safety record was very clear and compelling. On that basis, he did not consider much relevance in suggestions of bias from those who were clearly not the decision makers in the case.

52. Mr Mangan wrote to the claimant by letter dated 26 February 2020 setting out his reasoning and confirming that he did not uphold the claimant's appeal. Mr Mangan considered that dismissal was the appropriate sanction and was well supported and reasoned.

53. At the date of termination, the claimant was 54 years old. The respondent had continuously employed the claimant for 16 years. His gross weekly wage was £260.41 per week. He earned £200.20 net per week.

54. The claimant has found alternative employment on 10 February 2020. He earns £783 per [text].

Observations on witnesses and conflict of evidence

55. From the above findings in fact, it may be taken that the Tribunal considered Mr Davis and Mr Mangan gave their evidence honestly and based on their recollection of events which were consistent with the documents that had been produced during the disciplinary process.

56. Turning to the claimant's evidence, the Tribunal did not doubt that the claimant was hardworking and committed to providing a service to the respondent's customers. He gave his evidence in a calm and measured manner and accepted points which were unhelpful to his case.

57. The Tribunal considered that there was little dispute on material facts between the evidence of the respondent's witnesses and the claimant. It was not for the Tribunal to decide if the alleged falsification took place.

58. There was a lack of clarity about whether the claimant received the enclosures in the First Disciplinary Invite were attached to the email that was sent to him on 6 January 2020. The claimant's position was that there were not. Mr Davis though that they had been attached. There was no disputed that they were enclosed with the printed First disciplinary Invite. Little turned on this point as the claimant was aware that there were enclosures and he did not mention that he had not received them or request and adjournment to consider them at the 8 January Meeting.

Respondent's submissions

59. The respondent asserts that the claimant was dismissed on the grounds of conduct: (i) a breach of company policy and failure to ensure adequate training for drivers and self before operating company vehicles, and (ii) falsification of Company Records.

60. The reason for dismissal was misconduct. Falsifying records is a gross misconduct offence in the respondent's disciplinary policy.

61. The respondent was able to maintain a genuine belief in the misconduct of the claimant. Driving without an up-to-date training assessment and SSOW was admitted. The claimant accepted he had no up-to-date assessment since 2015 and that, he knew he had to and enquired in 2018 but the training providers were too busy. He also accepted it was wrong.

62. The claimant offered mitigation in the form of the reminder should have been better and the process was not smooth as they would like it to be from time to time, or the trainers were busy, as they indicated in 2018. This was not in fact challenged by either witness who focused also on the most important feature of the situation, namely it was the claimant's responsibility, as he knew, and that he was also a leader and Manager and should set the standard in ensuring that both he and his site were up-to-date. They felt his answers were not good enough, and there is no surprise there when the Claimant tried to hide behind the suggestion that he should not be responsible for his own training (56, as in ET1 page 7) or that as he was not technically classed as a

driver on paper he should not be subject to the checks that all others using XPO vehicles are (including vans as he was quick to point out).

63. The investigation was fair and reasonable. All relevant evidence was gathered and shared and the claimant was happy he said all he needed to say in response. When relevant issues were raised Mr Davis diligently and promptly looked into them. Nothing in dispute or relevant was in fact overlooked.

64. Having proven on balance that the claimant had forged Mr Czajka's signature and falsified company health and safety records, it is submitted that dismissal was carefully considered and with regret found to be entirely the appropriate sanction. The sanction for such dishonesty which goes to the root of the contract and was extremely serious sat fairly and squarely within the range open to a reasonable employer. An employer in the logistics industry sending out drivers in 44 tonne vehicles could hardly maintain a position whereby employees had the ability falsify the odd health and safety record here or there before they are dismissed.

65. Further and in addition, the claimant did not seek to attack the sanction as unreasonable. In the circumstances the dismissal was fair.

66. If procedurally any issues in want, made no difference at all. The most serious allegation and clearly the claimant's downfall had the material required, obtained in a fair and reasonable manner and provided to the claimant to respond.

67. In the alternative, the claimant contributed to his dismissal. See the inconsistency in account throughout.

Claimant's submissions

68. The claimant submitted that the respondent did not follow the process correctly. The decision to dismiss him was pre-determined. The letter dated 16 January 2020 said that the allegation was confirmed yet the interview with Mr Czajka did not take place until 17 January 2020 and there were no witnesses present. The claimant referred to his P45 which stated that his employment was terminated on 21 January 2020 rather than 23 January

2020. That suggested that the decision taken on 21 January 2020 rather than the date of Mr Davis' letter advising him of the decision.

69. The claimant said that there was no reason for him to forge the September Induction. He had stated from day one that he had made a mistake with the date. The date was erroneous because he was juggling too many balls. Mr Czajka's statement said that he could not remember whether he had one or possibly two inductions, but he had only one driving assessment.

70. The claimant felt that he decision all boiled down to Mr Davis' opinion which he felt was very personal to him. Mr Davis should have been more objective rather than expressing his opinion on the matter.

Deliberations

71. The Tribunal had to decide firstly, whether the claimant had been unfairly dismissed and secondly, if he was dismissed, what remedy to award.

72. In reaching a judgment in this case, the critical question for the Tribunal was whether the claimant's dismissal was fair in terms of section 98 of the ERA. The parties agreed that the reason for the dismissal was misconduct. Mr Davis confirmed in evidence that he believed that Mr Czajka did not sign the September Induction and that the signature on the September Induction had been forged by the claimant. Mr Davis said that he believed that the claimant was aware that he could not use drivers that were not assessed and despite being so aware, he drove a company vehicle without an up to date assessment or training record. Mr Davis formed this belief based on information obtained during the Fraser Investigation, the Prescott Investigation and his own investigation at the 8 January Meeting and 21 January Meeting. Mr Davis said that the claimant's misconduct was the reason why he was dismissed. While the claimant challenged the process and the decision to dismiss, the Tribunal did not understand him to advance that the dismissal was for any other reason than conduct. The Tribunal was therefore satisfied that the respondent had shown the reason for dismissal was misconduct. The Tribunal therefore concluded the respondent was successful in establishing that the dismissal was for a potentially fair reason.

73. At this point, the Tribunal referred to section 98 of the ERA which sets out how a tribunal should approach the question of whether the dismissal is fair. The Tribunal then referred to the case of *Burchell* (above) which was approved by the Court of Appeal and the case of *Foley* (above).

74. The claimant did not dispute that Mr Davis believed that the claimant was guilty of the misconduct. The issue was in relation to whether the respondent had reasonable grounds for that belief and at the time it formed that belief that it carried out as much investigation into the matter as was reasonable in the circumstances.

75. The Tribunal considered the reasonableness of the respondent's conduct. The Tribunal noted that it must not substitute its own decision as to what the right to adopt for that of the respondent. The Tribunal applied the range of reasonable responses approach to whether the respondent had carried out a reasonable investigation and had reasonable grounds for its belief that the claimant was guilty of misconduct.

76. The Tribunal turned to consider the investigation in this case. The Fraser Investigation came about because of information arising from Mr Lee's preparation for an audit. It was discovered that the paperwork relating to the Mr Czajka was incomplete. At that point, it was agreed that a full assessment be carried out on 14 November 2019 which is what happened. The claimant had advance notice of the Fraser Investigation and was offered the right to be accompanied. It was during that the Fraser Investigation that the claimant said that the site induction was undertaken on the "first shift" and there was also a licence check. He said the training was done after the Munro Incident. It was as part of the Fraser Investigation that the claimant provided the September Induction and the licence check dated 22 October 2019. At that point, it was ascertained that Mr Czajka did not work on 12 September 2019.

77. Form the paperwork it appears (as the report is undated) that the Fraser Investigation had not reached a conclusion when another incident occurred. The Prescott Investigation investigated the allegation that the claimant drove a vehicle knowing that drivers should be regularly assessed and that his last

assessment probably was out of date, as best as he could remember. The Tribunal noted that unlike the Fraser Investigation the claimant had no notice of the meeting and was not allowed to be accompanied. In the Tribunal's view this was not contrary to the disciplinary policy of which the claimant was familiar. Mr Prescott took notes during the meeting which the claimant signed. There was no suggestion that the claimant raised any concern at the time.

78. The claimant said that his suspension was predetermined. While the decision to suspend the claimant was taken at the end of the Prescott Investigation it the disciplinary policy states that suspension is not disciplinary action. There was no evidence that Mr Fraser, Mr Prescott or Ms Burke had any influence of the decision to proceed to the disciplinary meeting. To the contrary when the claimant spoke to Mr Prescott on 6 January 2020, he was unaware of what was happening. It was Mr Davis sent an email to claimant attaching the Disciplinary Invite from Ms McNeil-Caulfield.

79. The investigation did not however stop there. It continued throughout the disciplinary meetings. The Tribunal turned to consider the investigation undertaken by Mr Davis.

80. At the 8 January Meeting, Mr Davis expressed concerns about the September Induction which he said that he would investigate. The claimant raised issues about Ms Burke's knowledge; training responsibilities and the Mossend driver driving without an assessment. Mr Davis agreed to investigate these issues.

81. While the Tribunal considered it would have been open to Mr Davis to ask either Mr Fraser or Mr Prescott who had been previously involved in investigating matters to undertake these investigations, the Tribunal considered that it was a reasonable approach for Mr Davis to make these enquiries particularly as he was making enquiries as to what had happened on his own site.

82. The claimant referred to the wording of the invite letter to the 21 January Meeting and said that the allegation of falsification was confirmed before the investigation. The Tribunal did not agree with that interpretation. The letter did not confirm that the allegation had been found but rather that the

allegation of falsification was to be considered at the 21 January Meeting. The Tribunal considered that this was also substantiated by the fact that Mr Davis' concerns about this allegation arose as a result of the comments at the 8 January Meeting and the letter was seeking to clarify and give notice that this issue was to be addressed at the 21 January Meeting.

83. Ms Burke provided Mr Davis with her statement dated 17 January 2019. The claimant criticised the tense of the sentences in her statement. There was no evidence that Mr Davis was involved in writing the statement obtained or that he had reached a decision on the claimant's employment.

84. Mr Davis interviewed Mr Czajka. The claimant criticised the fact that no witness was present. The Tribunal noted that under the disciplinary procedure there was no requirement for someone being interviewed during an investigation to be accompanied. The Tribunal also considered that while Mr Davis had prepared several pre-set questions, those questions were framed in a way that suggested that he was approaching the matter with an open mind and had not pre-judged what the answer to those questions might be. The Tribunal noted that Mr Davis considered that Mr Czajka was reliable and credible and had no reason to disbelieve him. Mr Davis felt that Mr Czajka was adamant about the signature on the September Induction not being his.

85. Mr Davis made enquiries about the driver at Mossend site. Mr Davis discovered that it had happened but once identified it was rectified. He also clarified with central training about where responsibility for training lies.

86. The Tribunal considered that it was significant that neither Ms Burke nor Mr Czajka had any previous issues with the claimant. If anything, it was to the contrary. The claimant was very well regarded and a trusted member of the team. There was no suggestion that they colluded against the claimant. The Tribunal's impression was that Mr Davis was carrying out further investigation and endeavouring to look for information which may be supportive of the claimant's position. Indeed, he found supporting information in discovering that the written procedures were not being followed at Mossend site. It was also possible that in speaking directly to Mr Czajka, the reasonable

explanation would be found as to when site inductions were carried out and why his signature was on an erroneously dated induction certificate.

87. The Tribunal was satisfied that before the disciplinary hearings, the claimant was aware of the case against him. He had been provided with documentation that was being considered by Mr Davis and was given an opportunity to respond to the allegations.

88. While the claimant suggested at the appeal hearing that statements should have been obtained from Mr Lee and Mr Mancz his former general manager, this was not requested by him during the disciplinary meetings. Given that the claimant conceded that he knew the requirement that all drivers were to be properly assessed before driving the respondent's vehicles; that he was aware that before driving, he too required to have the appropriate documentation in place and that this required to be renewed on a regular basis, the Tribunal did not consider that it was unreasonable for these gentlemen not to be interviewed.

89. At the 21 January Meeting Mr Davis explored with the claimant Mr Czajka's position that the signature on the September induction was not his. The claimant disputed that he forged the signature and said that the signature was that of Mr Czajka.

90. The Tribunal did not consider that there was any further reasonable investigation to be undertaken by Mr Davis. The Tribunal acknowledged that while other employers may have acted differently, it could not conclude that the investigation carried out by the respondent up to and including the disciplinary meetings did not fall within a band of reasonable responses to the situation.

91. The Tribunal then applied a range of reasonable responses test to the decision to dismiss and the procedure of which that decision had been reached.

92. With regards to the investigation, and the conduct at the disciplinary meetings, for the reasons previously indicated, the Tribunal was satisfied that there had been a reasonable investigation.

93. The Tribunal noted that the First Disciplinary Invite indicated that a potential sanction was summary dismissal. The Tribunal considered that this was so that the claimant was aware of the seriousness of the allegation and the potential consequences. The Tribunal did not feel that the decision was in anyway predetermined or automatic. The Tribunal considered that it was unfortunate the claimant did not receive the printed copy of the First Disciplinary Invite until 8 January 2020. Given the holiday period and the unpredictability of the post at that time of year, the Tribunal felt that it would have been helpful for the respondent's HR advisors to have ensured that all relevant documentation had been received. As indicated above, there was some conflict as to what actual documents had been received by the claimant before the 8 January Meeting. However, from the claimant's own evidence, he wanted the 8 January Meeting to proceed and not be delayed even though the claimant was offered to adjourn the meeting at any time. While the claimant was not provided with the Ms Burke's statement and Mr Czajka's statement until the 21 January Meeting, the Tribunal was again satisfied the claimant was given a reasonable opportunity to review this documentation before responding to it.

94. While the respondent's policy allowed for summary dismissal on the grounds of gross misconduct, the Tribunal considered what the reaction of a reasonable employer would have been in the circumstances.

95. The claimant felt that Mr Davis' decision to dismiss him was predetermined. The Tribunal did not agree. There was no evidence that either Mr Prescott or Ms Burke had any influence in the decision to proceed to a disciplinary hearing, or that they had any part in the decision to dismiss the claimant. The Tribunal's impression was that Mr Davis approached the 8 January Meeting with an open mind; he made further enquiries and considered the information supplied by the claimant and his attitude at the disciplinary meetings.

96. Mr Davis candidly accepted that in relation to the allegation which had prompted the 8 January Meeting, whilst serious, he would not have dismissed the claimant if that had been the only issue. Mr Davis' concerns were in relation to the claimant's difficulty in explaining the circumstances surrounding the September Induction. The claimant did not dispute that this document was prepared by him and that the date was in error. However, he was unable, even at the final hearing, to confirm when Mr Czajka undertook a site induction other than on 14 November 2019. The claimant was also unable to explain why the licence check was dated 22 October 2019 when he previously stated that this was made, along with the site induction, when the Mr Czajka first visited the Grangemouth site. The Tribunal considered that there were reasonable grounds for Mr Davis to believe that the signature on the September Induction did not belong to Mr Czajka. Mr Czajka said it was not his and there was no reason for him to dispute that. The claimant, by contrast, gave contradictory explanations and was unable to explain satisfactorily as to why documents were being produced with dates which did not correspond with the dates that Mr Czajka was on site.

97. The Tribunal concluded that there were reasonable grounds for a finding of gross misconduct. The Tribunal went on to consider whether it was within the band of reasonable responses to dismiss the claimant for that gross misconduct.

98. The Tribunal asked if dismissal was a fair sanction applying the "band of reasonable responses test" and if the respondent acted reasonably in treating the claimant's conduct as gross misconduct.

99. The Tribunal was satisfied from Mr Davis' evidence that he did not automatically impose the sanction of dismissal; he knew that he was able to impose a lesser sanction; and he did not take the decision to dismiss lightly. The Tribunal observed that Mr Davis knew that the claimant had no history of misconduct. He was a longstanding employee and by all accounts was well regarded. The claimant denied there was any fault on his part other than an administrative error in respect of the date. He deflected responsibility to others for his driver assessment and Mr Czajka's driving assessment. The

claimant was reluctant to concede responsibility in respect of training or that in future he would do things differently. The Tribunal considered that the claimant was asking Mr Davis to believe that the Mr Czajka was lying and did not know his own signature. The Tribunal felt that in the absence of the claimant having any regret or remorse or reflecting that he would do thing differently in the future, while other employers may have reached different decisions, it could not conclude that the decision to dismiss the claimant fell out with the band of reasonable responses which a reasonable employer might have adopted.

100. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage, is relevant to the reasonableness of the whole dismissal process. The Tribunal then considered the appeal process.

101. The Tribunal found that Mr Manning considered on the grounds of appeal and the relevant paperwork. He approached the appeal with an open mind. At the appeal hearing, Mr Manning asked the claimant to talk through his grounds of appeal. Afterwards, Mr Manning made more enquiries; considered each of the points raised and gave a reasoned and detailed explanation of concluding that the appeal was not being upheld.

102. The Tribunal was satisfied that the respondent had carried out a reasonable and proper procedure at each stage of the dismissal including the appeal stage.

103. The Tribunal concluded that the dismissal was fair, and having reached its conclusion, the Tribunal did not consider it necessary to go on to consider the question of remedy.

104. The claimant's claim is dismissed.

Employment Judge: S MacLean
Date of Judgement: 14 October 2020
Entered in register: 27 October 2020
And copied to parties