EMPLOYMENT TRIBUNALS

Claimant: Mr C Randa

Respondent: Abellio London Ltd

Heard at: **Croydon and via CVP (hybrid) On: 17/5/2021 to 20/5/2021**

Before: **Employment Judge Wright**
Ms H Bharadia
Mr J Turley

Representation
Claimant: In person
Respondent: Ms R Jones - counsel

JUDGMENT having been sent to the parties on 24/5/2021 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:

REASONS

1. It was the unanimous Judgment of the Tribunal that the claimant's claim of race discrimination contrary to the Equality Act 2010 fails and is dismissed. The claimant's claim of unfair dismissal contrary to the Employment Rights Act 1996 succeeds and his dismissal was unfair.

2. The claimant presented a claim form on 16/8/2018 following a period of Acas early conciliation between 23/5/2018 and 23/6/2018. His employment on his case commenced on 8/5/2005 and on the respondent's case on 14/2/2005, however nothing turns on this. The claimant was dismissed for gross misconduct on 3/5/2018, as such he had 13 years' service.

3. The Tribunal heard from the claimant on his own behalf and for the respondent from: Ms Marta Leszczynska (investigatory officer); Mr Martin Moran (disciplinary manager); and Ms Lorna Murphy (appeal manager). The Tribunal had before it a bundle of 268-pages. All references to pages in the bundle are to the electronic page number.

4. The case had previously been listed for final hearings in December 2019 and June 2020. The hearing was postponed on the second occasion due to the Covid-19 pandemic. The Order from that hearing noted that witness statements had been prepared and exchanged. At the commencement of this hearing the respondent raised an issue that the claimant had subsequently served a second witness statement on 11/5/2021.

5. The witness statement was 59-paragraphs long, ran to 7-pages and the claimant confirmed he wished to solely rely upon it. The Tribunal considered that it was in the interests of justice to allow the claimant to rely upon this second witness statement.

6. The claimant pursued a claim of unlawful race discrimination contrary to the Equality Act 2010 (EQA) and the allegations were identified in the list of issues (page 38). His race is black and the prohibited conduct was direct discrimination (s.13 EQA) and harassment (s.26 EQA). The allegation was that the dismissal itself was direct discrimination ((xii a) in the list of issues). The claimant advanced no evidence-in-chief (either in his witness statement or supplementary) as to how he said the dismissal was less favourable treatment because of his race. The claimant did no more then to refer to a difference in race and the fact he was dismissed. He did not advance any allegation for the respondent to respond to.

7. The claimant also said that pressure or an invitation to move jobs in February/March 2018 was direct discrimination and/or harassment ((xii b) and (xv a) in the list of issues). The respondent took issue with jurisdiction as any act prior to 16/4/2018 was out of time. Even if the request that the claimant move jobs took place in early April 2018 (the claimant was suspended on 13/4/2018) which was a date the claimant also referred to, it was still out of time.

8. Allegations of acts in February/March and up to 13/4/2018 are out of time. The Tribunal was not invited to exercise its discretion to extend the time limit under s. 123 EQA and it declined to do so. Furthermore, again, the claimant did no more than to make passing reference to this in two paragraphs of his witness statement to unlawful discrimination. Indeed, the claimant accepted that he had failed to put this aspect of his claim across. There was nothing more than a mere assertion from the claimant of a difference in his race to that of his colleagues.

9. The claimant also claims his dismissal was unfair contrary to s. 94 Employment Rights Act 1996 (ERA). The claimant had over time been promoted and for the last five years he had been a Staff Manager. On 25/3/2018 he was driving a rail replacement service. There were incidents on this day and when they came to the respondent's attention, it launched an enquiry. Ms Leszczynska was appointed to investigate and she held a fact find meeting with the claimant on 11/4/2018. This continued on 13/4/2018 and on the same date, the claimant was suspended. On 16/4/2018 he was invited to a disciplinary meeting due to take place on 19/4/2018 (page 130). There was a further fact find meeting on

18/4/2018, however that concerned an incident on the 8/4/2018 and was not relevant to the 25/3/2018. The disciplinary meeting was rescheduled and on 24/4/2018 the claimant was invited to a meeting on 27/4/2018 (page 135). The claimant was dismissed on 3/5/2018 (page 151). He appealed on 4/5/2018 (page 155). The appeal hearing was held on 22/5/2018, at which the decision to uphold the decision to dismiss was taken (page 174).

10. The respondent's reason for dismissal was that the respondent found the claimant culpable of gross misconduct.

11. During the fact find meeting on 11/4/2018 the claimant was asked generally about what he would do if a driver was driving one-handed. He was not however directly questioned about his own one-handed driving. The claimant was also asked generally what he thought the rules were about driving and talking to passengers. It was not however put it directly to the claimant that he was accused of talking to a passenger on 25/3/2018 (the claimant admits he did speak to a female passenger, but says that he did not let her distract him and merely asked her to return to her seat).

12. After the second fact find meeting on 13/4/2018 the claimant was suspended. The suspension letter stated that 'purpose of the suspension is to enable a full and fair investigation of the facts to be carried out' (page 128). Yet, the fact find/investigation had already been carried out and it had been decided to proceed to a disciplinary meeting.

13. The letter informing the claimant of his suspension gave a list of five allegations of wrongdoing (page 128). It was not clear what the purpose of the suspension was, as clearly the investigation had already taken place and no alternative reason was given to the claimant. If it was the respondent's logic that the claimant could not continue to manage his staff (for example to deal with an issue of poor driving by one of his drivers) then, the Tribunal was told that the respondent employed Driving Standard Managers, who could presumably deal with such matters. In addition, if that element of the claimant's role was going to cause any difficulties, then it could be removed from his responsibilities. The disciplinary invitation letter was sent three days later and the original disciplinary meeting was scheduled to take place six-days after the suspension. It was clearly intended that this would not be a lengthy suspension and there is no reason why the claimant's duties could not be temporarily adjusted for a short period of time.

14. The first invitation to the disciplinary hearing listed six 'headline' allegations which the respondent said amounted to 'gross misconduct' (but gave no particulars) (page 130). The letter is headed 'Disciplinary Hearing – Gross Misconduct'.

15. A letter dated 18/4/2018 (headed Disciplinary Meeting – Gross Misconduct) gave an alternative disciplinary hearing date of 24/4/2018 and listed seven headline allegations the investigation had concluded formed a disciplinary case the claimant needed to answer (page 133). Breach of

trust was added. The allegations were framed as gross misconduct. Some of them were listed directly from the respondent's list of gross misconduct in the Disciplinary Policy (for example a serious breach of company health and safety procedures). Some did not, but the example from the Disciplinary Policy was clear (for example 'falsifying a legal document' could fall within 'fraud, deliberate falsification of company records or aiding and abetting other to commit such acts'). Others did not feature at all (breaches of company policy which leads to unacceptable standards of behaviour and conduct and breach of trust).

16. The Tribunal also noted that the original five allegations in the suspension letter increased to six by the time of the letter of the 16/4/2018 and to seven on the 18/4/2018. Not only were the additional allegations not particularised (what Company Policy was it the claimant was accused of breaching and how/what was the breach of trust?); the additions were not drawn to the claimant's attention.

17. The Tribunal accepts the list of gross misconduct in the Disciplinary Policy is not exhaustive (although it is lengthy), however, the issue is that the claimant did not know in advance of the disciplinary hearing the case he had to answer. Or, to put it another way, what was it exactly he was accused of?

18. The only allegation which is vaguely particularised is that of poor driving standards, which although is referred to as misconduct, is listed under a heading of 'gross misconduct charges' in the disciplinary outcome letter (page 151) and is cited as gross misconduct in the invitation to a disciplinary hearing letter (page 130). Poor driving standards is not listed on the respondent's examples of misconduct in the Disciplinary Policy (page 67). The claimant was however referred to: reversing on the narrow road when driving to Hayes from Battersea, one handed driving, talking to a passenger which driving, excessive speed, overtaking the cyclist and not planning ahead causing an avoidable incident. It is not clear why this matter was not addressed by a Driving Standards Manager as the Tribunal was told that the role was to address those issues.

19. The dismissing manager found all of the allegations proven.

20. The disciplinary invitation letter referred to 'a copy of the investigation report and a copy of all the evidence which may be referred to during the hearing' being enclosed, however, it is not clear what was enclosed. There is for example, no list of enclosures set out at the end of the letter. In view of that, if a document was missing, it would not be apparent to the claimant. As it is, the Tribunal is unsure what was sent to the claimant.

21. Apart from the seven headline allegations, categorised as 'gross misconduct', no further particulars were provided. It is accepted that various matters were discussed during the two fact find meetings; however, it was not clear to the claimant the detail of the allegations he was facing at the disciplinary meeting. Although the CCTV was viewed at the fact find meeting, it was not necessarily the case that all of the matters discussed at that hearing would be pursued at the disciplinary hearing,

although the actual allegations were never expressly set out. Furthermore, rather than the number of allegations being reduced, they were increased as the process went on.

22. The dismissing manager did not recatogorise the allegations and accepted the characterisation of gross misconduct. The Tribunal finds that as the dismissing manager found the conduct proven (some elements the claimant acknowledged and admitted) he therefore dismissed the claimant. The Tribunal accepts both the dismissing and appeal managers say they considered one alternative to dismissal, namely demotion to a driver, but that was not enough. Irrespective of the allegations be incorrectly categorised, there was no or not sufficient consideration of the claimant's circumstances. In particular his length of service and clean disciplinary record.

23. The claimant was represented by Unite the Union and his representative did raise at the start of the hearing the number of allegations and suggested the claimant continue in his role, with a caveat of no driving.

24. There were some references to the claimant's personal circumstances and he did attempt to raise them. He was in particular cut off by the investigating manager; he said he was having personal issues and in response he was asked if he drove the bus whilst unfit? As a result, he was not able to put forward by way of mitigation any personal issues which may have impacted on his performance.

25. Besides the lack of particulars of the allegations, the claimant was not provided with all of the relevant evidence. The Tribunal finds he was shown the CCTV footage during the fact find meeting on 11/4/2018 (page 112). It was then shown/reviewed at the disciplinary hearing on 27/5/2018 (page 141). He was not given a copy or allowed to view the footage on his own or accompanied by his Trade Union representative.

26. The claimant at the disciplinary hearing was answering allegations that were put to him for the first time, that was unfair and prejudicial.

27. There was no deception or fraud on the claimant's part, so as to lead to findings of falsification. It is accepted the claimant's paperwork was incomplete, however that is a performance matter not a conduct one. One example the Tribunal was given was of an engineer not completing a VCR (page 105). This failure was lodged at the claimant's door and it was found that the claimant should have insisted upon the engineer completing it. The Tribunal was not told of any action taken against the engineer who had failed to complete the form.

28. On 25/3/2021 when the warning light first appeared, the claimant made some telephone calls and he spoke to an engineer at Hayes. He was told it was a sensor, to reset it and it was fine for him to carry on. He got to Clapham Junction and as the bus could not be collected, he drove it to the depot at Battersea so the fault could be rectified. He had also tried to call iBus. It is not clear to the Tribunal what the conduct issue is with the

claimant's actions. Other incidents which were a genuine cause for concern for the respondent followed, which amounted to poor driving, incomplete paperwork and a failure to report certain matters or to follow procedure (such as contacting iBus). The respondent was entitled to take action in respect of these issues; however the Tribunal finds that they were not gross misconduct or even misconduct.

29. No reasonable employer in this industry however, would have categorised these allegations as gross misconduct. A reasonable employer certainly would not have, at the invitation to a disciplinary hearing stage, labelled them as gross misconduct. In doing so, this predetermined the severity of the sanction and the outcome.

Law

30. Section 94(1) of the Employment Rights Act 1996 (ERA) provides that 'an employee has the right not to be unfairly dismissed by his employer'. Dismissal is defined by Section 95(1) ERA. Once a dismissal has been established it is for the employer to show the reason or principal reason for the dismissal and 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 the employee holding the position which the employee held.

31. Section 98(2) sets out five potentially fair reasons, one of which is conduct (section 98(2)(b)). Once the reason for the dismissal has been shown by the employer the Tribunal applies Section 98(4) to the facts it has found in order to determine the fairness or unfairness of the dismissal. The burden of proof is neutral. Section 98(4) provides:

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

32. In considering Section 98(4), the Tribunal asks itself whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer. It is not for the Tribunal to substitute its own view for that of the decision makers in the case. The case of Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT, established that the correct approach for a Tribunal to adopt in answering the questions posed by Section 98(4) is as follows:

> The starting point should always be the words of section 98(4);

in applying the section, a tribunal must consider the reasonableness of the employer's conduct, not whether the tribunal considers the dismissal to be fair;

in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what the right course to adopt should have been;

in many (although not all) cases, there is a band of reasonable responses in which one employer might reasonably take one view, whilst another might reasonably take another; and

the function of the tribunal is to determine whether in the particular circumstances of the case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band of reasonable responses, the dismissal is fair. If it falls outside the band, it is unfair.

33. In the case of Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23 CA, the court of appeal held that the objective standards of a reasonable employer must be applied to all aspects of the question whether an employer was fairly and reasonably dismissed, including the investigation.

34. In Polkey v AE Dayton Services Ltd [1988] ICR 142 the House of Lords made it clear that procedural fairness is an integral part of the reasonableness test. The House of Lords decided that the failure to follow the correct procedures was likely to make a dismissal unfair, unless in exceptional circumstances, the employer could reasonably have concluded that doing so would have been futile. The question: 'would it have made any difference to the outcome if the appropriate procedural steps had been taken?' is relevant only to the assessment of the compensatory award and not to the question of reasonableness under section 98(4).

35. It is the employer who must show that conduct was the reason for dismissal. According to the EAT in British Home Stores Ltd v Burchell 1980 ICR 303, EAT, a three-fold test applies. The employer must show that:

it believed the employee guilty of misconduct;

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

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

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

37. If the Tribunal is satisfied that the respondent conducted matters in accordance with the Burchell, guidance it has to decide whether the dismissal was a reasonable response to the misconduct and must not adopt a 'substitution mindset'.

38. In respect of the investigation where an employee admits an act of gross misconduct and the facts are not in dispute, it may not be necessary to carry out a full-blown investigation. In Boys and Girls Welfare Society v MacDonald 1997 ICR 693 EAT the claimant admitted the misconduct and was dismissed. The EAT said that it was not always necessary to apply the test in Burchell where there was no real conflict on the facts.

39. The Tribunal also considered the EAT's judgment in Burdett v Aviva Employment Services Ltd UKEAT/0439/13. That is authority to say that dismissal does not necessarily fall within the range of reasonable responses in a gross misconduct case. It notes the legal principles and that the 'conduct' referred to in s. 98(2)(b) ERA is in general terms (it does not stipulate 'gross' misconduct) and that it need not amount to gross misconduct. The EAT goes onto say at paragraph 29:

> 'What is meant by "gross misconduct" – a concept in some ways more important in the context of a wrongful dismissal claim – has been considered in a number of cases. Most recently, the Supreme Court in Chhabra v West London Mental Health NHS Trust [2014] ICR 194 reiterated that it should be conduct which would involve a repudiatory breach of contract (that is, conduct undermining the trust and confidence which is inherent in the particular contract of employment such that the employer should no longer be required to retain the employee in his employment, see Wilson v Racher [1974] ICR 428, CA and Neary v Dean of Westminster [1999] IRLR 288, approved by the Court of Appeal in Dunn v AAH Ltd [2010] IRLR 709. In Chhabra, it was found that the conduct would need to be so serious as to potentially make any further relationship and trust between the employer and employee impossible. It is common ground before me that the conduct in issue would need to amount to either deliberate wrongdoing or gross negligence (see Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09/LA).
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> 30. The characterisation of an act as "gross misconduct" is thus not simply a matter of choice for the employer. Without falling into the substitution mindset warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct (see Eastland Homes Partnership Ltd v Cunningham UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as sufficient reason for dismissing the employee summarily.
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> 31. The reason for a dismissal will be determined subjectively: what was in the mind of the employer at the time the decision was taken.

Whether the dismissal for that reason was fair, however, imports a degree of objectivity, albeit to be tested against the standard of the reasonable employer and allowing that there is a margin of appreciation – a range of reasonable responses – rather than any absolute standard. So if an employer dismisses for a reason characterised as gross misconduct, the Employment Tribunal will need to determine whether there were reasonable grounds for the belief that the employee was indeed guilty of the conduct in question and that such conduct was capable of amounting to gross misconduct (implying an element of culpability on the part of the employee). Assuming reasonable grounds for the belief that the employee committed the act in issue, the Tribunal will thus still need to consider whether there were reasonable grounds for concluding that she had done so wilfully or in a grossly negligent way.

32. Even if the Employment Tribunal has concluded that the employer was entitled to regard an employee as having committed an act of gross misconduct (i.e. a reasonable investigation having been carried out, there were reasonable grounds for that belief), that will not be determinative of the question of fairness. The Tribunal will still need to consider whether it was within the range of reasonable responses to dismiss that employee for that conduct. The answer in most cases might be that it was, but that cannot simply be assumed. The Tribunal's task in this regard was considered by a different division of this Court (Langstaff P presiding) in Brito-Babapulle v Ealing NHS Trust UKEAT0358/12/1406, as follows:

"38. The logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. […]

39. […] What is set out at paragraph 13 ["Once gross misconduct is found, dismissal must always fall within the range of reasonable responses …"] is set out as a stark proposition of law. It is an argument of cause and consequence which admits of no exception. It rather suggests that gross misconduct, often a contractual test, is determinative of the question whether a dismissal is unfair, which is not a contractual test but is dependent upon the separate consideration which is called for under s.98 of the Employment Rights Act 1996.

40. It is not sufficient to point to the fact that the employer considered the mitigation and rejected it […], because a tribunal cannot abdicate its function to that of the employer. It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. […]"'

40. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the ERA. The Tribunal's power is discretionary and it needs to consider whether or not it is just and equitable to reduce an award and then by how much.

Conclusions

41. The Tribunal will need to consider what was in the respondent's (Mr Moran's mind) as the reason for the dismissal?

42. This is a case where the claimant made some driving errors and made mistakes on the paperwork. He got some timings wrong, however he said that his shift had started at 5am and the change to British Summer Time had taken place a couple of hours earlier. He was contrite, apologetic and acknowledged his mistakes. Driving was not his substantive role and he had (it seems) volunteered to work on a rail replacement driving shift. The Tribunal was not told of any performance or conduct issues with his substantive role of Staff Manager. The claimant had 13 years' service and no disciplinary issues (was how the claimant put it, the respondent said there was 'nothing of concern on the file') and the Tribunal finds therefore he had a clean disciplinary record.

43. The claimant was then summarily dismissed for his conduct.

44. This is a highly regulated and safety critical industry and the Tribunal acknowledged those factors. The claimant was culpable of wrongdoing. That came to the respondent's attention and it rightly investigated. Up to that point, the Tribunal has no issue with the respondent's process.

45. The respondent then, after it had concluded the investigation into matters on the 25/3/2018 suspended the claimant, to 'investigate'. That was unnecessary.

46. The investigation manager then categorised the allegations as 'gross misconduct'. Even if the dismissing manager had an open mind about how severe he should consider the allegations to be, the Tribunal was not told he had revisited this categorisation or considered afresh what level of sanction was warranted.

47. He found the allegations proven and as they had been classed as gross misconduct, he applied the sanction of summary dismissal. Although there were some discrepancies, the claimant admitted the wrong doing. He did not however do anything deliberately wrong or commit gross negligence. It does not even appear that the respondent considered dismissal with notice.

48. His treatment can be contrasted with that of PZ who in late 2016 ignored a red warning light with the result there was a fire on his bus. He was unable to extinguish the fire and the police and fire brigade were called to the scene. The fire obviously caused damage (the respondent recorded this a 'severe') and cost to the respondent. PZ was a driver, had

five years' service and was dismissed as a result. Unlike the claimant, the dismissing manager found PZ did not take responsibility for his actions and 'consistently' laid the blame with managers and the engineering department. PZ was reinstated on appeal and given a final written warning to last for one year. It is not clear, but it seems PZ returned to driving duties and certainly the letter of reinstatement does not refer to any retraining to be undertaken as a condition of him returning to work.

49. The Tribunal has been concerned to avoid substituting its own decision for that of the respondent. It was clear that it was not rehearing the allegations against the claimant and finding them proven or not. Instead, it was considering the respondent's actions. The Tribunal took particular note of the EAT's Judgment in Burdett v Avivia. It noted that characterisation of gross misconduct is not simply a matter of choice for the respondent and finds that in this case, the respondent (mostly) took headlines of examples of gross misconduct from the list in its Disciplinary Policy and then deemed the claimant's errors to be gross misconduct. The errors were not gross misconduct. They were however, matters which needed to be addressed.

50. The dismissing manager may have had in his mind reasonable belief that the claimant was culpable of some wrong-doing and that was a reasonable conclusion for him to reach in light of the claimant's admissions. Yes, there were some discrepancies in his account of the events on that day, however the Tribunal accepts he was giving his version of events some days later and from memory. When his account was contrasted against CCTV footage, there were bound to be differences.

51. One example of wrong doing was not reporting the 'near miss' within 24-hours as per the respondent's policy. It may also be fair to say the claimant had conflated his role as a Staff Manager with that of a driver and not followed the policy to contact iBus in the first instance. He was not however deliberately doing anything wrong, in fact he thought he was acting in the respondent's best interests, albeit he was incorrect. There was no negligence. Considering whether or not it was correct to categorise the wrong doing as gross misconduct forms part of the Tribunal's objective consideration of whether the respondent's decision was within the range of reasonable responses and it is acknowledged that imports a margin of appreciation for the Tribunal. It is the Tribunal's task to question whether or not the conduct in question amounted to gross misconduct. On this occasion the Tribunal finds that the conduct was not gross misconduct.

52. As a result, the Tribunal cannot conclude the respondent had a reasonable belief in the claimant's wrong doing which it categorised as gross misconduct and which resulted in summary dismissal.

53. The classification of the wrongdoing as gross misconduct was incorrect. Even if it had been correct, it did not automatically follow that it was in the range of reasonable responses to dismiss the claimant.

54. The Tribunal was told the only alternative to dismissal considered was demotion to a driving role. There were other sanctions which a reasonable employer would consider and indeed they were suggested by the claimant's Trade Union Representative at the start of the disciplinary hearing. He could have been given a final written warning and removed from driving duties (as suggested). He could have been given a final written warning with a condition that he re-take a driving test. The only consideration was of demotion to driver, yet the claimant had an Automotive Precision Machinery qualification and the Tribunal heard evidence about the role of the engineering department. It was unreasonable to not consider alternatives to dismissal and not to consider any other option other than demotion to Driver; demotion into a different role was also a possibility. The obligation to consider whether or not dismissal was the correct sanction or other alternatives to dismissal was particularly important in this case due to the claimant's length of service, his clean disciplinary record and the lack of consistency in the treatment of others.

55. This is a large employer of 2500 (ET3) employees and in considering the equity and substantial merits of the case and in particular the way PZ was treated, the Tribunal finds the respondent's decision to dismiss the claimant in these circumstances was unreasonable and was unfair.

56. On the issue of contribution, the Tribunal finds there was contributory conduct to the extent that had the claimant not made the errors he did on the 25/3/2018, then he would not be in this position. The Tribunal however, finds the contribution by the claimant was minimal and so declines to reduce any compensation. It was acknowledged at the start of the disciplinary hearing that he had merged his role of Staff Manager and Driver and in his appeal letter he apologised, was contrite and said he would accept demotion if he was given a second chance. Apart from the original transgression, the claimant's conduct did not contribute to his dismissal.

57. In respect of remedy, the claimant's attention has now been drawn to s.112 ERA and the orders which the Tribunal may make (set out below). There was no remedy documentation available at the hearing (as far as the Tribunal can see) although the hearing was listed to determine remedy in addition to liability. In light of the requirements of s.112 ERA and to give the claimant time to consider his options, remedy was adjourned. The parties are encouraged to agree remedy. If the claimant does not seek reinstatement or re-engagement, the basic award and award of notice pay should be capable of being agreed. The conciliation services of Acas may also assist. A remedy hearing has been listed for 14/1/2022.

> 112 The remedies: orders and compensation.
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> (1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.
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> (2) The tribunal shall—

(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and

(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.

(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126) to be paid by the employer to the employee.

113 The orders.

An order under this section may be—

(a) an order for reinstatement (in accordance with section 114), or

(b) an order for re-engagement (in accordance with section 115), as the tribunal may decide.

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Employment Judge Wright

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Date 17/6/2021

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE