EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104152/2020

Hearing Held via Cloud Video Platform (CVP) on 10 and 11 August 2021

Employment Judge Brewer

Mr B Jenkins	**Claimant** **Represented by** **Mr G Booth,** **Consultant**
Royal Mail Group Limited	**Respondent** **Represented by** **Ms N Moscardini** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is:

1. The claimant's claim for unauthorised deductions from wages is dismissed on withdrawal.

2. The claimant's claim for unfair dismissal fails and is dismissed.

REASONS

Introduction

1. The claimant in this case is Mr Bruce Jenkins. The respondent is the Royal Mail Group Limited. The claimant was represented by Mr Booth, Consultant and the respondent was represented by their Solicitor Ms Moscardini.

2. There was an agreed bundle of productions and an agreed short supplementary bundle. The productions ran to some 300 pages. There was also an agreed set of facts. The claimant confirmed that he had withdrawn his claim for unauthorized deductions from wages and for the avoidance of doubt I have issued a judgment in respect of that claim.

3. Mr Jenkins gave evidence on his own behalf; he did not call any witness evidence in support of his claim. The respondent's witnesses were Ms Mary O'Neill, Delivery Line Manager, the claimant's direct line manager who carried out the initial fact-finding interview, Mr Ian McGregor, Operations Manager and dismissing manager in this case, and Mr Alan Rankin, Independent Casework Manager who heard the claimant's appeal against his dismissal. Each witness had produced a witness statement which stood as their evidence in chief. Each witness either affirmed or took an oath before giving evidence.

4. Before starting the hearing, I explained to the parties they no private recording should be made of the hearing, all of the participants were introduced, and I advised the parties that we would be taking regular breaks.

5. The respondent gave their evidence first. In the event Mr Booth finished cross-examination at around 2.15 pm on day one of the hearing. He then requested that the claimant not be required to give his evidence until the beginning of day two. We discussed this. The reason given by Mr Booth was that the claimant has dyslexia. I considered this but determined that the position would be no different at whatever point in the hearing the claimant was required to give evidence. I agreed to a 15-minute break. I said we would allow the claimant sufficient time to read or have read to him any document he was taken to, I

expected Ms Moscardini to ask short questions and explained to the claimant that of there was anything he did not understand or that he wish to have explained he should ask. I reminded the claimant that we could take breaks as and when necessary. In the circumstances the claimant confirmed that he was happy to proceed and in the event his cross-examination was concluded at the end of day one of the hearing.

Issues

6. The issues to be determined in the case are as follows.

1. What was the reason or principal reason for dismissal? The respondent says the reason was conduct, specifically gross misconduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

2. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

    i. there were reasonable grounds for that belief.

    ii. at the time the belief was formed the respondent had carried out a reasonable investigation.

    iii. the respondent otherwise acted in a procedurally fair manner,

    iv. dismissal was within the range of reasonable responses.

7. Should the claim succeed, the Tribunal will consider the following.

1. Does the claimant wish to be reinstated to their previous employment?

2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

5. What should the terms of the re-engagement order be?

6. If there is a compensatory award, how much should it be? The Tribunal will decide:

    i. What financial losses has the dismissal caused the claimant?

    ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

    iii. If not, for what period of loss should the claimant be compensated?

    iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

    v. If so, should the claimant's compensation be reduced? By how much?

    vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

    vii. Did the respondent or the claimant unreasonably fail to comply with it?

viii. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

ix. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

xi. Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

7. What basic award is payable to the claimant, if any?

8. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Law

8. The relevant statute law is set out in sections 94, and 98, Employment Rights Act 1996 (ERA). I need not set out the text of those sections here.

9. In terms of case law, the relevant test I have applied is as follows:

a. Did the respondent act reasonably in all the circumstances in treating the claimant's actions as a sufficient reason to dismiss the claimant and in particular:

i. Did the respondent genuinely believe in the claimant's guilt;

ii. Were there reasonable grounds for the respondent's belief in the claimant's guilt;

iii. At the time the belief was formed the respondent had carried out a reasonable investigation;

iv. Did the respondent otherwise act in a procedurally fair manner;

v. Was dismissal within the range of reasonable responses?

(see **British Home Stores Limited v Burchell** [1978] IRLR 379; **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439; **Sainsburys Supermarkets Limited v Hitt** [2002] EWCA Civ 1588)

10. I remind myself that I should not step into the shoes of the employer and the test of unfairness is an objective one.

11. In relation to the allegation of gross misconduct, exactly what type of behaviour amounts to gross misconduct is difficult to pinpoint and will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract) — **Wilson v Racher** 1974 ICR 428, CA. Moreover, the conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence — **Laws v London Chronicle (Indicator Newspapers) Ltd** 1959 1 WLR 698, CA, and **Sandwell and West Birmingham Hospitals NHS Trust v Westwood** EAT 0032/09.

12. Even if an employee has admitted to committing the acts of which he or she is accused, it may not always be the case that he or she acted willfully or in a way that was grossly negligent (see for example **Burdett v Aviva Employment Services Ltd** EAT 0439/13).

13. In determining the reasonableness of a summary dismissal, the tribunal must have regard to whether the employer had reasonable grounds for its belief that the employee was guilty of gross misconduct. In **Eastland Homes Partnership Ltd v Cunningham** EAT 0272/13 the EAT held that the employment tribunal had fallen into error when it failed to consider whether it was reasonable for the employer to characterise the employee's conduct as gross misconduct.

Findings of fact

14. The claimant was employed by the respondent as a Postman / Operational Postal Grade ("OPG"). He was based at Glasgow G43/46 Delivery Office.

15. The claimant commenced employment with the respondent on 19 March 2001.

16. At approximately 9:10am on 24 April 2020, the claimant left the Glasgow Delivery Office to begin delivering mail in a Royal Mail van. At approximately 9.30am on 24 April 2020, the Royal Mail van which was being driven by the claimant was involved in a Road Traffic Collision (RTC) with a third-party white transit van. At approximately 10:00am on 24 April 2020, the owner of the white transit van visited the Glasgow Delivery Office and reported to Nicola McRanor, Assistant Delivery Office Manager, that a van belonging to the respondent had hit his vehicle. Ms McRanor then phoned the claimant to seek further clarification. The claimant did not answer her call although he did call her back later.

17. At 2:30pm on 24 April 2020, the claimant returned from his delivery round and confirmed to Ian McGregor that he had noticed damage to the Royal Mail van that he had been driving.

18. On 25 April 2020, the claimant attended an initial discussion with Ms McRanor to discuss the RTC that he had been involved in on the previous day. During this initial discussion on 25 April 2020, Ms McRanor showed the claimant a copy of CCTV footage that had been provided to the respondent by the local store.

19. On 25 April 2020, the claimant was advised by Ms McRanor that as a precautionary measure, he would be removed from driving for the respondent while the investigation was ongoing.

20. On 28 April 2020, Mary O'Neill, Assistant Delivery Office Manager, wrote to the claimant to invite him to a Formal Fact-Finding Interview. The invite letter confirmed that the claimant was entitled to be accompanied at the meeting by a trade union representative or work colleague from within his work location. The claimant chose not to be accompanied to this meeting.

21. On 30 April 2020, the claimant attended the Fact-Finding Interview with Ms O'Neill. At the beginning of the interview, the claimant was asked if he was sure that he felt comfortable continuing without representation and he stated that he was happy to continue.

22. Following the interview, Ms O'Neill confirmed to the claimant that the case had been referred to the respondent's Ian McGregor, Delivery Office Manager, for consideration of any further action, as Ms O'Neill considered the potential penalty to be outside her level of authority.

23. On 7 May 2020, the claimant was placed on precautionary suspension from work with pay pending further investigations into the alleged misconduct of failing to report an RTC whilst on delivery.

24. On 19 May 2020, Mr McGregor wrote to the claimant to invite him to what is referred to under the respondent's disciplinary procedure as a formal conduct meeting but what is, in reality, a disciplinary hearing. The claimant was again advised of his right to be accompanied at this conduct interview. In his invite letter to the claimant, Mr McGregor confirmed that the following four conduct notifications (or allegations) would be considered:

> *"Gross misconduct in that on the 24.04.20 you breached the Health & Safety Standards by failing to report a blameworthy Road Traffic Collision (RTC) in a timely manner in line with our Safe Driving Code of Practice;*
>
> *Gross misconduct in that on the 24.04.20 you breached the Code of Business Standards regarding your honesty and integrity by intentionally withholding information that could have brought the business into disrepute;*
>
> *Gross misconduct in that on the 24.04.20 you breached Health & Safety Standards, the Code of Business Standards and Safe Driving Code of Practice by wearing headphone/s whilst on duty and when driving a Royal Mail vehicle;*

Misconduct in that on the 24.04.20 you breached the Health & Safety Standards by incurring a blameworthy RTC due to a careless act whilst driving, a task which you have been trained for."

25. In the letter dated 19 May 2020, Mr McGregor also advised the claimant that if substantiated, any of the first three notifications above would be regarded as gross misconduct and that should any of these conduct notifications be upheld, this could lead to formal conduct action, up to and including dismissal. Mr McGregor also confirmed in his letter that if any of the notifications were substantiated, when determining any penalty, he may also need to take into account the claimant's conduct code record, which had a serious warning for two years, expiring on 25 February 2022. Included with the letter were various documents that may have to be referred to during the conduct interview.

26. On 22 May 2020, the claimant attended the formal conduct interview. Despite being informed that he could be accompanied at the interview, the claimant chose to attend the conduct interview unaccompanied.

27. A copy of the minutes from the formal conduct interview were sent to the claimant and having made three manuscript alterations, he signed the minutes to confirm that they were an accurate record of the interview.

28. Following the formal conduct interview, Mr McGregor carried out further investigations, including interviewing the owner of the vehicle damaged in the RTC. The owner of the vehicle told Mr McGregor that he had been inside the shop on 24 April 2020 when he heard the van collide with something. The owner stated that he initially thought the van had hit a kerb but then saw the claimant looking at the back of his van. The owner left the shop and saw damage to his vehicle, by which point the claimant had driven off.

29. Mr McGregor wrote to the claimant on 24 June 2020 to confirm that he was summarily dismissed, with his last date of service being 24 June 2020.

30. The claimant was given the right to appeal against this decision.

31. The claimant appealed the dismissal, and the appeal was heard by the respondent's Alan Rankin on 8 July 2020. The appeal was by way of a complete rehearing.

32. Following the appeal hearing, Mr Rankin carried out his own further investigation. Mr Rankin wrote to the claimant on 21 August 2020 to confirm that he had completed the re-hearing of the case and considered everything that was put forward at the appeal. Mr Rankin confirmed in his letter that, considering all the evidence, his decision was that the claimant had been treated fairly and reasonably and therefore he believed that the original decision of dismissal was appropriate.

33. Mr Rankin set out in his "Conduct Appeal Decision Document" how he reached his decision that the appeal should be rejected. Mr Rankin considered that the behaviour of the claimant in driving with headphones in despite previous action for this, failing to report the accident in a timely manner and his lack of honesty around the timing of his knowledge of the collision to be of a sufficiently serious nature to merit consideration as gross misconduct and dismissal to be an appropriate outcome in the case.

34. In his Conduct Decision Appeal Document, Mr Rankin referred to the Royal Mail Code of Business Standards which demands that employees adhere to the standards and that any serious breach of those standards may result in action under the Conduct Code, which may result in dismissal.

35. Mr Rankin found that the actions of the claimant in leaving the scene of a collision and not reporting it immediately to his manager to be a breach of the trust placed upon him and to be a clear breach of the Code of Business Standards.

36. Having concluded his own deliberations, Mr Rankin's view was that the four conduct notifications were upheld and that the claimant had also breached Royal Mail health and safety standards by driving whilst wearing headphones, which contributed to him being involved in a collision that resulted in damage to a vehicle belonging to the respondent and to a third-party vehicle.

37. In his Conduct Decision Appeal Document, Mr Rankin also referred to the Royal Mail Conduct Agreement which states that for cases of gross misconduct, if proven, summary dismissal is warranted and whilst a non-exhaustive list of potential examples of gross misconduct is provided, deliberate disregard of health and safety is specifically mentioned in this list of examples. Having been spoken to previously and counselled on the issue of wearing headphones whilst working, Mr Rankin concluded that the claimant's actions were a deliberate disregard of health and safety.

38. Mr Rankin considered a penalty less than dismissal, however, he remained concerned that despite training, briefings and previous conduct action which resulted in counselling, the claimant still chose to operate in the way that he did, which saw him driving with a headphone in his ear and Mr Rankin had little confidence that he would not continue to operate in this way again, leaving both the respondent and third parties at risk.

39. The claimant commenced early conciliation on 15 July 2020. He was issued with an early conciliation certificate on 30 July 2020. The claim form was presented on 28 August 2020.

Discussion and conclusions

40. The respondent's case, consistent across the evidence of Mr McGregor and Mr Rankin, was that there was sufficient evidence to uphold each of the three gross misconduct allegations against the claimant. I shall deal with the substance of the evidence in relation to each of those before turning to consider procedural matters.

41. The first allegation was that on the 24 April 2020 the claimant breached the respondent's Health & Safety Standards by failing to report a "blameworthy RTC" in a timely manner in line with the respondent's Safe Driving Code of Practice.

42. The Safe Driving Code of Practice starts at page 209 of the bundle. The Code includes the following:

"Inform your manager, as soon as possible, about any vehicle damage incurred whilst you were using a vehicle"

43. It is not a matter of dispute that at around 9.20am on 24 April 2020 the vehicle which the claimant was using collided with a parked white van. The respondent considered that the vehicle sustained heavy damage (page 71). The claimant's initial and continued evidence was that he was unaware that he had collided with the white van. He maintains that he neither heard nor felt a collision. The witness, the driver of the van who was at the time of the collision in a local shop said that the collision was loud enough for him to hear. He initially assumed that the claimant's van had hit the kerb and it was only on return to his van that he saw that there had been a collision. He then visited the delivery office to report the incident. The claimant, in cross-examination said that the driver of the white van was lying about hearing the collision. However, he could not explain or even speculate as to why this individual would lie about this.

44. There is as part of the evidence in this case CCTV footage showing the claimant's actions immediately following him parking his van and therefore immediately following the collision. The claimant parked facing the shop he intended to, and did, go into, and thus in the normal course it would perhaps be expected that he would exit the driver's door and walk forward towards the shop. But the CCTV footage clearly shows the claimant exiting the driver's side and then turn and walk behind his van and thus away from the shop and pause precisely where the damage to his vehicle was. The claimant said in cross-examination that he was not inspecting the damage; he was looking down at the road. He could not explain why he did not go directly towards the shop.

45. Following the respondent being told of the RTC, Nicola McRanor called the claimant at 10.00am on 24 April 2020. The claimant missed that call. At 10.40am the claimant called Ms McRanor and when she asked him if he had been involved in an RTC he replied that he did not think so.

46. The claimant says that he noticed the damage to his vehicle between 1.00pm and 1.30pm. The claimant was asked why he did not then contact the respondent to report the RTC. His response both at the time and in his evidence at the Tribunal hearing was that he felt that it would be better to have a fact to face conversation. In answer to a question about that from me the claimant said that he "wanted to get my point across".

47. As to the claimant's evidence that he neither heard nor felt the RTC, his evidence shifted on the point. At the initial informal discussion the claimant said he would not have heard the RTC because he was wearing one headphone in his ear while driving and listening to music (page 79). At the Fact-Finding Interview the claimant agreed that he "was driving with my headphones in listening to music" (page 91). When asked how it was possible to have had the RTC and not realise it, the claimant said, "his mind was on other things as he was listening to music in his headphones" (page 91). He later corrected an entry in the notes to confirm he had his headphones only in one ear (page 92). The claimant did not alter his account at the disciplinary hearing or at the appeal.

48. I pause to point out that in his witness statement the claimant takes issue with a number of the points set out in the notes of the Fact-Finding Interview. For example he says that he did not admit to listening to music although he does still confirm he had a headphone in one ear. His witness statement says that this "did not prevent me from hearing what was going on around me" (paragraph 13(a)).

49. Given the above factual matrix both Mr McGregor and Mr Rankin found that the claimant was aware of the RTC when it occurred, that is at around 9.20am on 24 April 2020. In my judgment they were reasonable in so concluding. It is not credible that the claimant had unimpaired hearing, as his witness statement says, and yet he did not hear a collision which caused the damage seen in the photographs in the bundle, even is that is defined as minor damage, as the claimant contends. Even if the claimant was listening to loud music that to some degree impaired his hearing, his consistent evidence was that one ear was uncovered.

50. Further, given the CCTV evidence it is quite clear that the claimant saw the damage after exiting the vehicle immediately following the RTC.

51. This means that there was a delay on almost 5 hours between the RTC and the claimant's report of it. In the circumstances the respondent acted reasonably in concluding that the first allegation was made out in that the claimant did not inform his manager, as soon as possible, about the vehicle damage incurred whilst he was using a Royal Mail vehicle as required by the Safe Driving Code of Practice.

52. I should just deal with the point that the claimant wanted to tell his manager in person to as he put it, "get his point across". This is not credible. On his own evidence the claimant neither heard nor felt the RTC. On his account, he did not notice any damage to his vehicle until between 1.00pm and 1.30pm. At that point, if he is being honest, he could not have known how, when or where the damage was incurred. On his evidence, the vehicle check he carried out before taking out the van did not include checking the bodywork and he says he only used the back of the vehicle when taking out items for delivery, so for all the claimant knew the damage might have been there before he even took the vehicle to work. Thus, he had no "point" to get across and he had no need for a face-to-face discussion. His delay in reporting was wilful.

53. The second allegation was that on the 24 April 2020 the claimant breached the respondent's Code of Business Standards regarding his honesty and integrity by intentionally withholding information that could have brought the business into disrepute. That information was the fact of the RTC. The respondent's business standards document starts at page 232 of the bundle.

54. The claimant submitted that allegations one and two are the same. Mr McGregor's evidence was that they are not the same although the core facts are the same. The first allegation is about not following a specific procedural

obligation. The second allegation is behavioural, it goes to what might loosely be termed trust and confidence.

55. The business standards set out the behaviours required as the respondent expects staff to do "the right thing" to follow the law, to act honourably and to treat others with respect (page 234). Part of complying with the business standards is the requirement to follow other policies (page 238). The respondent's case is that failing to report the RTC in accordance with the Safe Driving Code of Practice is a failure to comply with the business standards because it is a failure to comply with that Code.

56. Throughout the disciplinary procedure, and to his credit, the claimant accepted that he did not comply with the Code or the business standards and therefore the respondent acted reasonably in reaching the conclusion that it did.

57. The third allegation was that on the 24 April 2020 the claimant breached Health & Safety Standards, the Code of Business Standards and Safe Driving Code of Practice by wearing headphones whilst on duty and when driving a Royal Mail vehicle.

58. The claimant never disputed that he was wearing a headphone while driving. He accepted that doing so was a breach of the Safe Driving Code of which he was aware at the time (see paragraph 3 page 90). During the hearing the claimant endeavoured to muddy the waters somewhat by trying to allege that the position on wearing headphones was unclear and different managers had different views, although he gave no specific examples of this. More significantly the claimant had been told twice in 2019 about not wearing headphones while on delivery.

59. On 28 August 2019 the claimant was spoken to about the use of headphones and the note of that states "[The claimant] was **again** reminded it is against company policy to have headphones in during working hours as this poses a health and safety risk" (my emphasis – see page 46). Following a subsequent Fact-Finding Interview (page 49 *et seq*) the claimant attended a counselling session where he was reminded that he had failed to follow the instruction not to wear headphones.

60. Given the above facts, the respondent acted reasonably in concluding that the third allegation was made out.

61. Under cross-examination the claimant confirmed the following:

    b. He was wearing a headphone while driving;

    c. He had already been told twice not to wear headphones at work;

    d. He would have heard if he had hit another vehicle;

    e. He did hit another vehicle, but he did not hear the collision;

    f. He did not see the damage immediately after the collision;

    g. His dismissal was not a foregone conclusion;

    h. He was aware of the Safe Driving Code and knew that driving with headphones in was a breach, that it was unsafe;

    i. The music in his ear was too loud, he was confused but he could hear;

    j. He did hit the white van;

    k. He was aware of the accident reporting procedure;

    l. He accepted that wearing the headphones contributed to the RTC;

    m. He accepted he had acted in an unsafe was by wearing the headphone.

62. Turning to the procedure, the respondent complied with the ACAS Code of Practice on Disciplinary and Grievances. There was an investigation. The claimant was made aware of the detailed allegations. There was a hearing and an appeal. The claimant had the right to be accompanied throughout, although he chose not to be.

63. I did have one concern about the respondent's procedure. There is a real risk in rolling together the disciplinary hearing with the bulk of the investigation. To explain; the respondent holds a short so-called Fact-Finding Interview. This is

very limited in scope and seems to result in little more than a chronology and some notes. It does not appear, for example, to seek to resolve matters of disputed evidence. If the case proceeds, this is followed by a disciplinary hearing which also carries out an investigatory role. There is in my view no inherent difficulty with this – hearings inevitably are investigatory. The difficulty for the respondent is that after the hearing between the claimant and Mr McGregor, Mr McGregor carried out further investigations, particularly contacting the driver of the white van who in effect provided a witness statement which was then not put to the claimant. Insofar as that evidence was then taken into account by Mr McGregor in reaching his decision, he was then using evidence which the claimant had not seen, was not aware of and did not comment upon. Had the matter ended there I would find the dismissal unfair for that reason alone.

64. The saving grace for the respondent is the fact that the appeal was a complete rehearing and the evidence from the driver of the white van was sent to the claimant as part of the pack for the appeal and thus he did have an opportunity to consider and if he wished to, to comment upon all of the evidence. Although Mr Rankin's appeal process suffers from the same potential difficulty encountered by Mr McGregor, in that after the appeal hearing Mr Rankin also carried out further investigations, he unlike Mr McGregor, fed back the outcome of those further investigations to the claimant and invited him to comment on the new evidence should he wish.

65. I accept Ms Moscardini's submission that the fault at the disciplinary stage was cured by the appeal (see **Taylor v OCS Group Limited** [2006] EWCA Civ 702).

66. Having made those findings, I turn to the test I have to apply in this case.

67. First there was no challenge by the claimant that the respondent did not genuinely believe in his guilt. Given his admissions the respondent clearly was genuine in their belief.

68. Was that belief reasonably held.? It is difficult to divorce consideration of this from the question of whether the respondent carried out as much investigation as was reasonable in the circumstances. In my judgment the respondent's

investigation was thorough. All relevant witnesses were spoken to, all relevant documents, policies and procedures were considered. In the event the only significant matter of dispute was the time at which the claimant knew of the RTC, and I have already found that it was reasonable of the respondent to conclude that the claimant knew of the RTC when it happened and not at some later stage.

69. Thus, in my judgment the respondent held a reasonable belief that the claimant was guilty of the three gross misconduct allegations having carried out a reasonable investigation.

70. I turn then to whether the procedure overall was within the band of reasonable responses. I find that it was. The respondent carried out a thorough process with one issue of concern which, as I have set out above, was saved by the way the appeal was conducted.

71. The final question is whether dismissal was within the band of reasonable responses. The claimant had 19 years' service and although his record was somewhat blemished by a number of concerns, he was considered to be a good worker.

72. For an act to be gross misconduct is must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence. In this case the respondent's Conduct Policy identifies as gross misconduct "deliberate disregard of health, safety and security procedures or instructions" (page 280). Of course, this is only an example, and the policy makes clear that gross misconduct is behaviour which is so serious and so unacceptable that summary dismissal is warranted.

73. In this case the claimant admitted deliberately breaching a safety rule against wearing headphones on duty, he deliberately disobeyed express instructions not to wear headphones on duty and he deliberately failed to tell his line manager about the RTC at all and only told Mr McGregor after a considerable delay which the respondent was reasonable in concluding did not meet the requirement to tell the respondent as soon as possible. Given those findings, in my judgment it is not possible to say that no employer could have dismissed

in materially similar circumstances and thus the dismissal, in this case was within the band of reasonable responses.

74. In the circumstances the claim of unfair dismissal fails and is dismissed.

Employment Judge: Martin Brewer
Date of Judgment: 11 August 2021
Entered in register: 16 August 2021
and copied to parties

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