EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102930/2019

Held in Glasgow on 8, 9, 10 and 11 March 2021

Employment Judge M Kearns
Members: Ms N Elliott
Mr J Haria

Mr C Stewart	**Claimant** **Represented by:** **Mr P Ward** **Lay representative**
Asda Stores Limited	**Respondent** **Represented by:** **Mr A Johnston** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal was to dismiss the claim.

REASONS

1. The claimant who is aged 49 years was employed by the respondent as an HGV delivery driver from 17 March 2008 until 22 October 2018 when he was dismissed. On 25 February 2019, having complied with the early conciliation requirements, the claimant presented an application to the employment tribunal in which he made a number of claims. Two were subsequently

withdrawn and one was held to be time barred. The purpose of this hearing was to consider the claimant's remaining claims of unfair dismissal and automatically unfair dismissal by reason of having made protected disclosures.

Issues

2. The respondent admitted dismissal. The issues for the employment tribunal were:

   (i) Whether the dismissal was automatically unfair because the reason or principal reason for it was that the claimant made protected disclosures;

   (ii) If not, whether the respondent's dismissal of the claimant was unfair contrary to section 98 Employment Rights Act 1996 ("ERA");

   (iii) If it was unfair, whether reinstatement would be practicable;

   (iv) If not, what remedy would be appropriate;

   (v) If the dismissal was unfair, the percentage or other chance a fair procedure would have reached the same result;

   (vi) Whether the claimant contributed to his own dismissal to any extent.

3. The parties had prepared a detailed list of issues. These are addressed in the discussion and decision section below.

Applicable Law

Automatically Unfair Dismissal

4. Section 103A of the Employment Rights Act 1996 ("ERA") states:

"***103A Protected disclosure***

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

Unfair Dismissal

5. Section 98 of ERA indicates how a tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of an employee is a potentially fair reason under section 98(2).

6. To establish that a dismissal was on the grounds of conduct, the employer must show that the person who made the decision to dismiss the claimant (in this case, Mr Martin) believed that he was guilty of misconduct. Thereafter, the employment tribunal must be satisfied that there were reasonable grounds for that belief and that at the time the dismissing officer reached that belief on those grounds the respondent had conducted an investigation that was within the band of reasonable investigations a reasonable employer might have conducted in the circumstances.

7. If the employer is successful in establishing the reason, the tribunal must then move on to the second stage and apply section 98(4) which 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) –

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

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

8. In applying that section, the tribunal must consider whether the procedure used by the respondent in coming to its decision was within the range of reasonable procedures a reasonable employer might have used.

9. Finally, the tribunal must consider whether dismissal as a sanction was within the band of reasonable responses a reasonable employer might have made to the conduct in question.

10. The employment tribunal is not permitted to substitute its own view on any of these issues for that of the employer. Specifically, the tribunal is not permitted to re-run the disciplinary hearing, decide whether the claimant was guilty or not guilty of the misconduct alleged and substitute its own decision for that of the employer. Instead, the tribunal must consider whether the process and decisions of the respondent fell within the band of reasonable responses to the conduct, noting that within that band, one employer might reasonably take one view, another might quite reasonably take another.

Evidence

11. The parties had prepared a joint bundle of documents (J) and referred to them by page number. The claimant lodged some additional documents at the hearing and these were received without objection and numbered with the prefix (A). The claimant gave evidence on his own behalf. The respondent called Mr Jonathan Taylor, Transport Department Manager, who conducted the investigation; Mr Kenny Martin, Distribution Manager, who chaired the disciplinary hearing; Mr Colin Reid, General Manager, who heard the first level appeal and Mr David Wilson, the former General Manager of a neighbouring depot who heard the final appeal. Mr Wilson is no longer employed by the respondent.

Findings in fact

12. The following relevant facts were admitted or found to be proved:-

13. The respondent is a well-known supermarket chain. It has over 600 stores in the UK and employs around 180,000 members of staff. The claimant was employed by the respondent as an HGV1 delivery driver at the respondent's Grangemouth Distribution Centre (depot) from 17 March 2008 until his dismissal on 22 October 2018. The claimant's role included distributing products from the depot to the stores in his region. Prior to the events described below, the claimant had a clean disciplinary record and good performance reports.

14. The respondent's yard is rectangular and has a one-way system. Looking at the yard plan (A5) in landscape format, the gate is in the bottom right hand corner. The road inside the yard goes clockwise in a rectangle from the gate around the four sides of the distribution centre. The incident described below concerned that part of the road from the top left-hand corner (diagonally across from the gate), to a point approximately 200 feet along the top long side of the rectangle. On either side of the road there are perpendicular parking bays large enough for HGVs. Just after the corner, to the right-hand side of the road is a smoke shelter and the entrance to the transport office. Between the HGV bays and the road there are painted lines denoting walkways (similar to those in some car parks). The rule is that a driver may drive over a walkway when necessary but must first check for pedestrians.

15. On several occasions during his employment, the claimant reported to Mr Kenny Martin, one of the respondent's distribution managers, that overweight container boxes had been brought into the depot from the rail yard. Mr Martin arranged for steps to be taken to address this. By the time of the claimant's disciplinary hearing described below, Mr Martin recalled that someone had reported overweight containers to him but did not recall that it had been the claimant.

16. On an unknown date the claimant reported to Mr Martin that other driver colleagues were using non-container loading bays to park which did not have safety bump stops fitted. Mr Martin took steps to address this concern.

17. On several occasions in the two years prior to the 2018 events described below, the claimant reported a fellow driver (J) to Callum MacDonald, transport manager. The claimant told Mr MacDonald that J had mental health issues and that he had failed on a couple of occasions to lock the twist locks on his containers, thereby presenting a risk to health and safety. He also notified Mr MacDonald that J had driven out of the yard one day with his back doors swinging open. Mr MacDonald dealt with these matters at the time. Mr Martin was not involved and was not aware of them.

18. On a separate occasion, in or about 2017 the claimant told Mr MacDonald, transport manager that another driver, J had assaulted him in the depot canteen. The incident was investigated by Mr Taylor and statements were taken from the claimant and J. No other witnesses came forward. CCTV footage was sought, but the spot in the canteen where the alleged incident had taken place was not covered by cameras. Mr Taylor passed on the material from his investigation to Mr MacDonald. Ultimately, it was the claimant's word against J's, but Mr Taylor indicated to Mr MacDonald that the claimant would not have just made it up. The end result was that J was counselled. Mr Martin was aware of this alleged incident, but not involved.

19. A few weeks prior to September 2018, the claimant reported to Mark Hainey, transport manager that two colleagues, Chris Donnelly and Jason Boyne, (both of whom were drivers at the Grangemouth depot on the same shift as the claimant) were speeding in the yard, not following safety standards on loading bays and not using safety straps on the rear doors of trailers. The matter was handled directly by Mr Hainey and Mr Martin was not aware of it.

20. On or about 26 September 2018 the claimant telephoned the depot transport department manager, Mr Jonathan Taylor and complained that Mr Donnelly and Mr Boyne were not completing their safety checks properly throughout

the day and that they must have been speeding or else how was it that they were at 'Schenker' already? Mr Taylor investigated these complaints in the following way: he immediately went and found the drivers, pulled them aside and asked them whether they had done their safety checks. They said they had done so. Mr Taylor then looked at their railhead check sheets. He also requested another person whose identity he cannot now remember to look at their Microlise vehicle check sheets to verify what they had told him. It was found that the vehicle checks had been done (J401). Mr Martin became aware of the claimant's complaint about Messrs Boyne and Donnelly and the subsequent checks that had been done, when he received the documentation for the disciplinary hearing, because the claimant had brought it up at the investigatory hearing of which Mr Martin had minutes (J282 – 3).

21. The incident that led to the claimant's dismissal occurred on or about Friday 28 September 2018. On that date, three written incident reports (J256 -8) were submitted by depot drivers to the Grangemouth depot management. Mr Taylor was not in the office that day and he did not see the reports until he was next in work on Monday 1 October 2018.

22. The first report was put in by Lewis Gordon, one of the depot drivers. In his report, Mr Gordon stated that at around 0700 hours on 28 September 2018 he had been standing at door 2 talking to Jason Boyne when the claimant had [driven his HGV] around the corner at "*a considerable speed past the smoke shelter and seemed to speed up.*" Mr Gordon went on to say that Jason Boyne had parked his unit and trailer on the left-hand side of the walkway around door 10/11 and that the claimant "*at speed went around Jason's parked unit and trailer on the right. Chris was uncoupling and Craig at speed pulled up in front of Chris's unit and slammed on the brakes*". (J256).

23. The second report was from Jason Boyne. He stated that he had been standing with Lewis Gordon and had seen the claimant come round the corner with a trailer. He said that the claimant had looked at Mr Gordon and himself and also Chris Donnelly who had been on Bay 13. Mr Boyne alleged

that the claimant had "*then started to speed up dangerously and weaved in between my trailer and the bays, continuing to speed up towards Chris*". He went on: "*It is my opinion that he then continues to speed up and aims to hit Chris. This then resulted in Chris nearly being pinned to his unit, Craig then jumps out of his unit still angry (what I could tell) and walked to the transport office, shouting abuse aimed at Chris and I. This was witnessed by Lewis Gordon, Oz Petale and perhaps other drivers who were starting their shift.*" (J257).

24. The third report was by Chris Donnelly (J258) who said that he had been walking round to the other side of his unit and that: "*Has I was at the O/S corner of my unit Craig came past in his unit and trailer to close to me* [sic]*. I jumped back against the front of the unit. I carried on with my duties… Once I done that I came in and reported it to the D.M.*" Mr Donnelly stated that the incident had been witnessed by Mr Boyne and Mr Gordon. He had drawn a diagram to show where he and the witnesses had been standing and where the claimant's HGV had ended up in relation to himself, Mr Boyne's trailer and the walkway (J259).

25. The matter was passed to Mr Taylor for investigation when he came into work on Monday 1 October 2018. Mr Taylor obtained a statement from another driver, Oz Petale (J260). Mr Petale said that after heading towards the stairs for transport he had seen a unit passing the smoke shelter and transport [office] at excessive speed. (He said he was unsure how fast). He went on: "*It kept going and stopped quickly at bays, due to speed he was doing. As I was walking up stairs to transport office, spoke to Jason Boyne and said don't tell me, Craig Stewart. He confirmed it was. That's all I seen of incident*."

26. Mr Taylor held an investigatory meeting with the claimant on 1 October 2018. A minute was taken (J 261- 268). The claimant was offered representation, which he refused. Mr Taylor notified the claimant of the allegation that he had driven his vehicle, whilst pulling a container, in an unsafe manner, potentially putting others at risk. The claimant stated that he had been driving up to the bays alongside the footpath when Chris Donnelly had stepped

forward and then back again. The claimant said that this was all he felt had happened. At this point in the meeting, Mr Taylor adjourned to collect the CCTV footage from the day in question. He then played this for the claimant and asked him whether, having seen it he had anything to say. The claimant responded that he had nothing to say. Having explained to Mr Taylor why he parked where he did, he said: "*This is "tit for tat" with 2 drivers with something I reported to you earlier in the week."* The claimant was critical of Mr Boyne for being parked in the yard with his doors open.

27. Mr Taylor considered that the footage clearly showed the claimant driving unsafely at a dangerously excessive speed which was putting the safety of those within the area at risk. He asked the claimant what speed he had been doing and whether he had been travelling at the speed limit of under 10mph. The claimant said that he didn't know, but that no one stuck to that speed limit. He said that if he had thought he was driving too fast he would have slowed down. He asked whether the footage was in real time. Mr Taylor confirmed that it was. The claimant asked to see footage of other drivers going round the same bend and this was shown to him. Mr Taylor asked him again whether he thought he had been driving too fast and the claimant said "no". He asked him whether he had driven with due care and attention and the claimant said "yes". He asked him whether at any point he had braked harshly. The claimant said "no". He asked him whether he had deliberately driven at any other driver in an unsafe manner and the claimant said "no". Mr Taylor decided further investigation would be required. He told the claimant that he was suspended on full pay in accordance with the disciplinary policy and that he would be notified of the date and time of a further hearing.

28. The OBD black box information from a vehicle can be obtained from Scania provided it is requested within 24 hours. Mr Taylor was not in the workplace on 28 September 2018 when the incident occurred. By the time he began his investigation on Monday 1 October 2018 it was too late to obtain this evidence from Scania. Had the respondent been able to obtain it, the black box data would have shown the claimant's exact speed during the incident.

29. On 2 October 2018 Mr Taylor interviewed Mr Boyne. A minute was taken (J269 – 71). Mr Boyne said the claimant had come round the corner with his window down, had looked at Mr Gordon and himself and was driving very slowly; that he had then looked up at the bays, had seen Mr Donnelly standing in front of his unit and trailer and "*then proceeded to accelerate and swerve past my container driving up or along walkway*.." Mr Boyne said the claimant had shouted abuse at Mr Donnelly and himself.

30. Mr Taylor then interviewed Mr Donnelly. A minute was taken (J272). Mr Donnelly said he had had to jump against his unit because the claimant had driven too close to him with his unit and trailer. He said that the claimant had come to around three feet of him. Mr Taylor asked Mr Donnelly whether the claimant had shouted at him after the incident and Mr Donnelly said: "*No, I was working on unit*".

31. By letter dated 5 October 2018 (J275) Mr Taylor invited the claimant to an investigatory hearing the following week at which he would be asked to respond to the allegation: "*That on Friday 28th September you drove your vehicle in an unsafe manner which potentially put others at risk*". The claimant was told he had a right of representation at the meeting by a GMB representative or colleague. The investigatory hearing took place on 12 October 2018 before Mr Taylor. A minute (J277 - 300) was taken by Sharlene Thomson, note taker. The claimant stated that he did not want a representative.

32. Mr Taylor told the claimant that he had carried out further investigations and had gathered information, statements and further CCTV footage that he would present to the claimant. He explained to the claimant the nature and content of the statements and read out the relevant bits. Mr Taylor told the claimant that Mr Donnelly had said that he had had to jump against his unit because the claimant had come too close to him with his unit and trailer. The claimant said that this had not quite happened as Mr Donnelly had stated. Mr Taylor put it to the claimant that Mr Donnelly had alleged the claimant would shout at him and on one occasion referred to him as an 'arsehole' yelling "*you's are not doing your vehicle checks*". Mr Taylor asked the

claimant if there was any truth in this to which he responded that this specific incident had occurred on 26 September 2018 and that, in his opinion, there was no chance Mr Donnelly could have done his checks and paperwork in that time without speeding.

33. Mr Taylor also read the claimant Mr Boyne's statement, and specifically put to him that Mr Boyne had said he was accelerating potentially to hit or scare Mr Donnelly. The claimant's vehicle had ended up parked next to Mr Boyne's vehicle. The claimant's account of the incident was that he would have been slowing down coming up towards the bays. He denied that he had been accelerating. He said that as he had come up towards the unit he had had a clear view and that Mr Donnelly had stepped from the side of his vehicle, had stopped, level to his cab and "*he went all exaggerated, then went back in*". The claimant said he felt that Mr Donnelly's statement was more favourable and honest than Mr Boyne's.

34. The claimant denied any wrongdoing and asked to see the dashcam footage from his vehicle. The claimant's dashcam footage was not available because of a technical fault on the claimant's vehicle hard drive which meant the camera was not recording, but Mr Taylor showed him the 'fisheye' dashcam footage from Jason Boyne's adjacent unit (J292), which he had managed to obtain and which showed the claimant's vehicle approaching and his manoeuvre relative to Mr Donnelly. The footage showed Mr Donnelly step out, then jump back as the claimant's unit came to around three feet of him. Mr Taylor then asked the claimant what his view was of his standard of driving in the manoeuvre. Mr Taylor thought this footage showed the claimant travelling at speed, but the claimant continued to deny this. The claimant said that he did not think he was speeding because he felt in control of the vehicle. He said he had not been wearing his seatbelt because he was in the yard, but that the seatbelt alarm (which usually sounds at 12 mph) had not come on. He said he felt he carried out the manoeuvre safely.

35. Mr Taylor pointed out to the claimant that at their previous meeting he had denied parking on the walkway, which the claimant strongly reiterated. Mr Taylor showed the claimant the footage which showed him parked on the

walkway. After viewing it, the claimant said: "*Okay. I am guilty of parking on the walkway. Everyone parks on the walkway*."

36. The claimant was adamant that he had not done anything wrong. Towards the end of the meeting, Mr Taylor asked the claimant whether, after viewing the CCTV he understood all the risk factors in which he could easily have hit someone or potentially caused damage to property. The claimant responded that: "…*It is a working yard. It was a near miss. You are asking me to answer hindsight and hearsay. I am a professional driver and assess everyday out on the road, a cyclist, a child etc. I assessed that manoeuvre in the yard*."

37. Mr Taylor adjourned the meeting for an hour to consider the notes and information gathered before reconvening. He then informed the claimant that his decision was to progress the matter to a disciplinary hearing on the basis that he was driving without due care and attention on 28 September 2018, which had the potential to cause damage to company property as well as endanger other colleagues and his own health and safety.

38. The evidence Mr Taylor had gathered was forwarded to Mr Kenny Martin, Distribution Manager at the Grangemouth depot who was asked to chair the disciplinary hearing. Mr Martin wrote the claimant a letter dated 15 October 2018 (J301) inviting him to a disciplinary hearing on Friday 19 October 2018. The letter advised the claimant that he would be asked to respond to the following allegation: "*Driving without care and attention on 28th September 2018; The manoeuvre you made could have caused damage to company property and endangered other colleagues and your own health and safety*". The claimant was advised that the allegation was deemed gross misconduct which, if proven, may result in his dismissal. Enclosed with the letter were the investigation notes and witness statements. The claimant was informed of his right to representation by a trade union official or work colleague.

39. The claimant attended the disciplinary hearing on 19 October 2018. It began at 11 am and lasted (with a number of adjournments) until 3:45 pm. The hearing was chaired by Mr Martin. Ms Laura Haston attended and took notes (J304 – 324). The claimant elected not to be represented or accompanied.

40. Prior to the meeting Mr Martin had attempted to download from the Freight Transport Association ("FTA") website information from the claimant's tachograph for the day in question. However, the information from that date and the two following days had not downloaded to the website and was not available. The FTA is an independent third party which is not connected to the respondent. Mr Martin had also attempted to obtain the dashcam footage from the claimant's own vehicle. This was unable to be downloaded by the respondent's analysts because of a technical fault with the hard drive on the claimant's vehicle resulting in a failure to record any footage. This was confirmed to Mr Martin in an email dated 22 October 2018 (J331) from Mr Steve Brown of the respondent's Analyst Fleet Field Operations.

41. At the meeting, Mr. Martin read out what he considered to be key passages from the witness statements with which the claimant had been provided. The claimant took exception to this. Mr. Martin asked the claimant to respond to the key points he had read out. The claimant stated that he was of the view that the CCTV footage did not show any deviation or acceleration in speed. He raised a concern that he had reported Mr Donnelly and Mr Boyne for health and safety breaches and he felt that they were retaliating. He also pointed out to Mr Martin that one of the witnesses had said he had come round the corner at considerable speed, whereas another had said he had come round "slowly". Mr Martin acknowledged there were some inconsistencies, but he considered that the CCTV evidence was important.

42. Mr. Martin reviewed the CCTV footage from two cameras with the claimant. The claimant conceded that he had maintained his speed. Having reviewed all the evidence available, Mr. Martin considered that the claimant was not slowing down. He also felt that the claimant was beginning to contradict himself. At first, he had denied all wrongdoing, but then he stated that Mr Donnelly stepped out and stepped back and that there had been a "near miss" which he felt was "unfortunate". Mr. Martin confirmed to the claimant that a near miss, according to the respondent's health and safety guidelines was "*an event which occurs but does not cause personal injury, ill health or damage but had the potential*" to do so. Mr. Martin agreed with the claimant

that the incident fitted that definition. The claimant also said (J314) "*I know my view perfectly clear. If someone to come out at side only have split second to make decision."*

43. Mr. Martin felt that the fact that the claimant had referred to the incident as a near miss indicated that there had been an element of risk or harm, particularly given that Mr Boyne's dashcam footage showed the claimant steer away from Mr Donnelly at the last minute. Mr Martin noted that the claimant had continued to deny that he could potentially have hit Mr Donnelly. However, he had said that there had been no malice intended. Mr. Martin took this as an acceptance by the claimant that he had nearly hit Mr Donnelly, albeit, in his opinion, by accident.

44. During the disciplinary hearing, Mr. Martin had probed to find out how the claimant had known that no one was in the area where he had carried out the manoeuvre (J313 – 6). He felt the claimant did not give him a straight answer. He concluded that it was safe to say that the claimant did not know whether Mr Donnelly was in the local vicinity or not. Mr. Martin concluded that whilst the claimant did not aim for Mr Donnelly, he had had to take avoiding action to ensure he did not hit him, which was as a result of what, in Mr Martin's view was a reckless, unsafe and dangerous manoeuvre.

45. Mr Martin noted that the claimant had been consistent in saying that he did not know what speed he was travelling at. Unfortunately, the claimant's tachograph data was not available to Mr. Martin or to the claimant. The OBD black box data would have had to have been requested within 24 hours from Scania and no one had thought to do this until Mr Taylor had begun his investigation on Monday 1 October. Thus, in order to try and establish the claimant's speed, Mr. Martin timed how long it had taken the claimant on the CCTV to travel over the distance from the corner to where he parked. He then instructed a driver training manager, Mr Wilcox to re-enact the claimant's manoeuvre over the same part of the yard at 10 mph (the speed limit). The time taken for the claimant to carry out the manoeuvre had been six seconds, as established from the CCTV footage of his driving on 28 September 2018. Driving at 10 mph, the CCTV showed that the driver

training manager took 12 seconds to effect the same manoeuvre. Mr. Martin concluded from this that the claimant had been travelling at twice the speed limit, given that he had taken exactly half the time. He put this evidence to the claimant. The claimant was adamant that it was not accurate. Mr. Martin therefore instructed the driver training manager to conduct a second trip, this time, with the claimant sitting beside him in his HGV unit whilst it was being driven again at the maximum speed limit allowed (10 mph).

46. After reviewing the CCTV footage from this second trip, Mr. Martin concluded that the claimant had covered far more ground than the manager had in the reconstruction in the same period of time and that he was unquestionably travelling significantly faster than the comparator vehicle had been on both occasions. The claimant requested that Mr. Martin should instruct the driver training manager to drive at 20 mph which he wanted to compare to his own footage. Mr. Martin refused on the basis that he considered this a reckless and irresponsible request which would be a breach of health and safety and would put colleagues at risk.

47. Mr Martin adjourned the hearing until the following Monday, 22 October 2018. In the interim, Mr. Martin considered what decision he should make. He considered mitigating factors. He took into account the claimant's length of service and clean employment record. Having considered the evidence before him, he decided that the appropriate sanction in this case would be summary dismissal. The reasons why he came to this view were as follows:

    (i) He concluded that the claimant had been guilty of a serious breach of health and safety and that he had carried out a dangerous manoeuvre, endangering himself and other colleagues which Mr. Martin felt was unacceptable and reckless. He judged that there had been a danger to life and that he could not have a colleague who carried out such a manoeuvre within the business.

    (ii) Mr. Martin considered that the claimant had shown no remorse and that there was a failure by him to recognise that he had done anything wrong, thus, there would be little reason for him not to drive in this way

again. Mr. Martin concluded that he could not reasonably consider allowing a colleague to continue to work for the respondent who considered this dangerous driving acceptable.

48. Mr. Martin decided he had little trust that the claimant could continue to carry out and perform his role safely. For that reason, a lesser sanction (such as a warning) was inappropriate given the severity of the claimant's actions.

49. The fact that the claimant had made health and safety reports previously against colleagues was not the reason or principal reason for his dismissal. Indeed, it was no part of the reason for dismissal.

50. At the reconvened hearing on the Monday Mr Martin gave his decision and the reasons for it to the claimant in detail (J325 – 330). He stated his belief that the claimant had committed a serious breach of health and safety by deliberately driving at excessive speed between a parked vehicle and trailer loading bays on 28 September 2018, thus endangering himself and other colleagues. The grounds for his belief were the content of the statements from the four witnesses, from which he quoted; the claimant's admission that the incident had been a 'near miss' and his reference to having had a "split second" to make his decision; the dashcam footage from Mr Boyne's vehicle; the CCTV footage; and the combination of the CCTV footage with the reconstruction evidence suggesting that the manoeuvre had been made at excessive speed. The decision was confirmed to the claimant in a disciplinary outcome letter to him from Mr Martin dated 24 October 2018 (J340 – 1). The letter informed the claimant of his right of appeal.

51. On 24 October 2018, the same day as he was sent the disciplinary outcome confirmation letter, the claimant raised a complaint through the respondent's ethics helpline, and this was investigated by the respondent's warehouse operations manager Mr Alan Brown. The complaint concerned Mr Taylor's handling of the investigation which the claimant said was biased. He alleged that Mr Taylor had coached Mr Donnelly and Mr Boyne in what to say. After investigation, Mr Brown found that Mr Taylor, Mr Donnelly and Mr Boyne had not engaged in inappropriate conduct.

52. By letter dated 26 October 2018 (J342) the claimant appealed against his dismissal. The respondent's appeal procedure has two stages. By letter dated 30 October 2018 (J344) the claimant was invited to attend a stage 1 appeal hearing with Colin Reid, General Manager at the Grangemouth depot on 28 November 2018.

53. The claimant's grounds of appeal were that:

(a) the near miss incident did not constitute grounds for dismissal;

(b) the respondent's reconstructions of the claimant's driving were not evidence but an estimate and accordingly there was no evidence to accurately determine what speed the claimant was travelling at;

(c) there was no evidence that the claimant deliberately drove at excessive speed towards Mr Donnelly;

(d) the witnesses involved in the investigation and disciplinary could not be relied upon as the claimant had made reports against them two days earlier;

(e) the claimant had no reason to show remorse given that he felt he had done nothing wrong.

54. In his letter of appeal, the claimant also set out four questions he wanted addressed during the course of the appeal hearing (J342a).

55. The claimant failed to attend the appeal hearing on 28 November 2018, so Lorna Robison, HRBP wrote him a letter dated 28 November inviting him to a rearranged appeal hearing on 12 December 2018 (J351). The rearranged hearing took place on that date. It was chaired by Mr Reid. A note was taken by Ms Robison (J352 – 359). The claimant attended but declined a representative. At the start of the hearing Mr Reid explained that his role was to listen to the claimant's appeal points and consider any information the claimant wanted to bring to his attention. He said that his role was not to re-hear the original case or re-visit all the evidence. The claimant was given an opportunity to bring to Mr Reid's attention anything he wished in relation to

the decision to dismiss him. The claimant told Mr Reid that he felt he had been victimised by all levels of the respondent. Mr Reid asked him to expand on this. The claimant referred to being suspended for three weeks which, he said, implied that he had been found guilty. Mr Reid found that the claimant's suspension was in accordance with the respondent's policy and was not an assumption of guilt. The claimant also referred to being found guilty of misconduct (which was as a result of the disciplinary). Finally, the claimant said he had not been checked on during his suspension. Mr Reid found that there was no policy for doing so, and said that Mark Hainey, shift manager had contacted the claimant during his suspension. The claimant disputed this.

56. The claimant had also alleged that he had been sacked because he had made an ethics complaint. Mr Reid investigated this and found that the ethics complaint had been made by the claimant on 24 October 2018 (J349), at which point the claimant had already been dismissed (on 22 October 2018), so that the ethics complaint could not have been the reason for the dismissal. The claimant requested that an independent driving instructor assess the video footage and give an opinion as to whether the incident was anything more than a near miss. Mr Reid found that there was no need for such an assessment, as the near miss had had the potential to cause injury or damage and the video footage [from Mr Boyne's dashcam] had shown the claimant driving at speed, Mr Donnelly having to jump back out of his way and the claimant having to steer away from him at the last minute.

57. Mr Reid investigated the questions raised by the claimant in his appeal letter and found as follows:

    (i) In relation to the dashcam footage from the claimant's vehicle, the fleet manager had confirmed this was not available, the most likely explanation being a fault with the hard drive which would not have been apparent from the claimant's [morning] checks.

    (ii) Scania had been unable to supply the tachograph. (Mr Reid appears to have been referring to the OBD black box data.)

(iii) The claimant's vehicle was not fitted with a seatbelt alarm which would have gone off at 12 mph.

(iv) The claimant had been present in the driver training manager's unit during the second reconstruction, with the claimant personally witnessing his speed.

58. Mr Reid reconvened the appeal hearing on 19 December 2018 to deliver the appeal outcome to the claimant. A note was taken (J364- 367). The claimant became hostile while the appeal outcome was being delivered and Mr Reid therefore notified him that he would deliver the outcome in writing. Mr Reid dismissed the claimant's appeal and upheld the original decision to dismiss him. He wrote to the claimant with his detailed reasons by letter dated 19 December 2018 (J368- 371). In the letter Mr Reid informed the claimant that he had one further right of appeal.

59. On 28 December 2018 the claimant made a telephone call to Lorna Robison and confirmed that he wished to lodge a second stage appeal against his dismissal. By an undated handwritten letter (J373) he set out the main points of the appeal. Mr David Wilson, who was, at the time general manager of the respondent's Falkirk Depot was asked to hear the further appeal. Mr Wilson did not know the claimant and had no working relationship with him. The claimant's main points of appeal were that:

(i) The respondent failed to provide equipment to assist the claimant in monitoring his speed in that there was no seat belt alarm (the claimant was not wearing his seatbelt) neither was there a working dashcam;

(ii) There was no evidence that the claimant was driving at speed and if he was speeding, it was reasonable for him to expect the seat belt alarm to sound so as to warn him to slow down;

(iii) There was no evidence that the claimant acted with intent to cause harm or that he deliberately drove at speed;

(iv) The respondent denied a reasonable request to have an independent driving instructor review the evidence; and

(v) The respondent had no regard to the claimant's years of unblemished driving record.

60. At no point in his letter of appeal did the claimant state that he thought he had been dismissed for making a protected disclosure. Mr Wilson invited the claimant to a second stage appeal hearing on 31 January 2019 at the respondent's Falkirk depot. The hearing was chaired by Mr Wilson. Catriona Morrow took a note (J380 – 395). The claimant said he did not require representation. The claimant was given an opportunity to discuss his points of appeal and to raise any issues he wished to raise. He pointed out discrepancies between the statements of Mr Boyne and Mr Donnelly, which he felt undermined their evidence. He was critical of management for failing to obtain the digital print out from his unit which would have provided his exact speed. He was of the view that he had been dismissed on the basis of a 'guestimation' based on the comments of others and CCTV from 100 yards away on a roof top. The claimant said he felt that a near miss was not enough to dismiss him. There had been no damage or injury and probable cause was not enough to dismiss him. The claimant said he was aware of an accident that had taken place in the yard between a shunter and a trailer causing many thousands of pounds of damage, and the person responsible had been given a written warning. Once the claimant had made the points he wanted to make, Mr Wilson said he would investigate the points he had made and then reconvene the hearing.

61. On 6 February 2019 Mr Wilson wrote to the claimant (J396) inviting him to a reconvened hearing to take place at the Falkirk depot on 21 February 2019. On 19 February Mr Wilson met with Mr Taylor and Mr Martin in order to investigate the claimant's points. Catriona Morrow was also in attendance and took a minute (J399 – 402). Mr. Wilson highlighted a potential discrepancy in the statements, in that Jason Boyne's statement referred to the claimant driving around the corner very slowly, whilst all the other statements said he was driving fast. Mr. Martin said that Mr Boyne had said that the claimant sped up. Mr Wilson then asked Mr Taylor: "*So after this CS came to you with an allegation about JB and CD and their driving style?*"

Mr Taylor replied: "*Yes I had a word with them.*" Mr Wilson then said: "*But why was there a full process of investigation for CS but not for JB and CD?*" Mr Taylor replied: "*I felt it was all tit for tat. We tried to manage our way through it. CS made complaints about things all the time."* Mr Martin went on: "*There was nothing to substantiate this. He said they weren't doing vehicle checks and we checked and the vehicle checks had all been done.// There have been claims and counterclaims on that team. So when JT thought he could nip an incident in the bud it seemed the way to deal with it. However, when CS incident was raised there were four drivers who corroborated the allegation.*"

62. The reconvened hearing took place on 21 February 2019. It was again chaired by Mr Wilson. Ms Catriona Morrow took a note (J407). The claimant attended and once again declined representation. Mr Wilson told the claimant that he had conducted an extensive review of all the documentation, studied the CCTV footage and undertaken a further reconstruction of the incident in the depot along with two regional driver trainers. He stated that following this, he had decided to uphold the original decision to dismiss him. By letter to the claimant dated 21 February 2019 (J410) Mr Wilson confirmed the decision and the reasons for it.

Observations on the evidence

63. Put shortly, the tasks of the tribunal in this case were to consider whether the reason or principal reason for dismissal was that the claimant made protected disclosures; if not, to consider whether the respondent had shown that the reason was the claimant's conduct; and if so, to assess whether the process and decisions of the respondent were within the band of reasonable responses to that conduct. Most of the evidence relevant to those issues was not in dispute. It was reasonably clear what material was before Mr Martin when he made his decision. The claimant was critical of Mr Taylor's investigation and of Mr Martin's decision. He considered that more investigation ought to have been done and we consider his

submissions in relation to that below. However, there were very few conflicts in the evidence material to our task.

64. One area of evidence challenged (or at least, regarded with scepticism) by the claimant concerned the diligence with which Mr Taylor had investigated the claimant's complaint that his fellow drivers had not been doing their safety checks and must have been speeding on 26 September 2018. We accepted Mr Taylor's evidence that he had taken the steps he described to look into the claimant's complaint. We found Mr Taylor to be an honest witness for the following reasons. Mr Taylor listened carefully to the questions he was being asked and answered in a measured and fair way without embellishment. He made a number of concessions in answering Mr Ward's cross examination questions.

65. The tribunal was not shown the dashcam footage from Jason Boyne's vehicle. However, it was clear from the minutes of the investigatory meeting at J292 – 294 and it was not in dispute that Mr Taylor had shown this footage to the claimant. Mr Ward asked Mr Taylor in cross examination: "*Do you honestly think what Chris Donnelly said about jumping back was correct?*" Mr Taylor replied: "*I showed Craig the dashcam footage from Jason Boyne's unit. I did witness it and Craig did witness it. I believed Chris's statement to be true – that he did step out and jump back"*. Mr Ward's cross examination of Mr Taylor was very long and detailed, but the assertion that Mr Taylor and the claimant had together watched the dashcam footage from Mr Boyne's vehicle and that it showed Mr Donnelly stepping out and jumping back was not challenged or disagreed with either by Mr Ward, or by the claimant who was quite vocal in relation to witness evidence with which he disagreed. (The tribunal gave the claimant more latitude on this than would normally have been the case because he was having to sit 2.5 metres from Mr Ward owing to 'social distancing'.) It was also clear from the minutes of both the investigatory and disciplinary meetings that the claimant had described the incident more than once as a 'near miss', though he sought to distance himself from that idea at the tribunal hearing. Thus, the content of this footage did not appear to be in dispute.

66. In contrast, there did appear to be a dispute about what the CCTV footage showed, and whether the respondent had been entitled to regard it as reasonable grounds for their belief when taken together with the other evidence before them. The footage was not initially going to be made available to the tribunal because the respondent's solicitor's office had mislaid it. However, it was subsequently located and Mr Johnston applied to the tribunal to admit it as evidence. Mr Ward opposed this application on the basis that it was unfair because the claimant had not had the opportunity to have it viewed by an independent expert. He also argued that it was unfair that the claimant had not been given a copy of the CCTV footage prior to the disciplinary hearing as he could then have taken it to an independent expert in transport matters at that point. The tribunal adjourned to consider the matter. We decided to grant the application to allow the footage to be shown for the following reasons: We concluded that there appeared to be a dispute about what the CCTV evidence showed. It was therefore appropriate for us to view it as part of our overall assessment of whether Mr Martin had reasonable grounds for his belief in the claimant's misconduct. The claimant had seen it on many occasions as documented in the records in the bundle. There was accordingly no prejudice in allowing it to be received.

67. With regard to the CCTV footage itself, owing to the strictures of social distancing, the tribunal allowed both the claimant and Mr Ward the opportunity to question witnesses about it and to point out to the tribunal what, on their case, it showed. The footage could only be shown on the respondent's laptop and before releasing the laptop, the tribunal requested both parties to confirm that they did not require it to be shown again or to question witnesses or lead further evidence in relation to it. Both parties confirmed this to be the case.

Discussion and Decision

68. The parties had produced a list of issues in this case. We set these out and address them simultaneously below. Quotations from the list of issues are in italics.

Whistleblowing

69. The 'preamble to the list of issues states:

"Automatic Unfair Dismissal

The claimant brings claims for automatic unfair dismissal following making alleged protected disclosures under section 47B Employment Rights Act 1996. The alleged protected disclosures relied upon by the claimant are:

(a) On several occasions, the claimant told Mr Martin that overweight container boxes [were] being brought in from the rail yard. The claimant asserts that this tended to show a breach in health and safety as overweight containers may impact on a HGV's turning and braking abilities;

(b) On an unknown date, the claimant told Mr. Martin that other Asda drivers were using non-container loading bays to park which did not have safety bump stops fitted. The claimant alleges this was a health and safety issue as the HGVs had nothing to stop them from damaging Asda property and presented a risk;

(c) On several occasions, the claimant reported issues with another Asda driver [J] to Callum MacDonald, transport manager. The claimant alleged [J] presented a health and safety risk due to issues with his mental health and his erratic driving, which caused damage to trailers;

(d) On several occasions, the claimant reported issues with trailers being damaged and correct safety equipment not being used, this was allegedly disclosed to his team leader, Robert Fultier and Carol Anne, department manager.

(e) On one occasion the claimant told Mr MacDonald, transport manager that [J] had assaulted him. Mr Taylor, department manager who dealt with the matter allegedly took no formal action against [J];

(f) On one occasion the claimant informed Mark Hainey, transport manager that Mr Donnelly, warehouse driver, had failed to comply with

yard rules by speeding in the yard and not doing safety checks on trailers prior to his shift; and

(g) On several occasions, the claimant told Mr Taylor that Mr Donnelly and Mr Boyne, warehouse drivers were speeding in the yard and not carrying out the appropriate safety checks on their HGVs."

70. The following questions are numbered as per the list of issues. Superfluous alternative questions are omitted.

1. *Did the claimant make a qualifying disclosure/s within section 43(B)(1) ERA?*

2. *Did the claimant make a protected disclosure within the meaning of section 43A ERA?*

3. *If the claimant made a protected disclosure, did the claimant:*

(a) raise the protected disclosure in good faith; and/or

(b) have a reasonable belief in the protected disclosure?

71. With regard to questions 1 – 3, Mr Johnston accepted that the claimant had made various health and safety concerns known to the respondent over the course of his employment. He said that the question of whether any of them amounted to a protected disclosure was moot. This was because the real question here was whether the disclosures were uppermost in Mr Martin's mind at the point of dismissal or whether his primary focus and principal reason for dismissal was the incident on 28 September 2018 and what it said about the claimant's driving. We accordingly turned to question 4 first.

Section 103A ERA

4. *If the claimant made a protected disclosure, was the claimant dismissed by reason or principle reason, of making a protected disclosure contrary to section 103A of the Employment Rights Act 1996?*

72. Setting to one side questions 1, 2 and 3 of the list of issues for present purposes, the tribunal concluded without hesitation that the disclosures were no part of the reason for the claimant's dismissal. Indeed, such was the evidence that although Mr Ward conducted an extremely competent and testing cross examination of Mr Martin, he had to be reminded to put to him the claimant's case that the disclosure(s) were the reason or principal reason for dismissal.

73. Mr Martin was unaware of many of the disclosures, most of which were not made to him. In relation to (a) we accepted Mr Martin's evidence that he had not recalled that it had been the claimant who had raised this. Mr Martin was dimly aware of (b), which appeared to have been made some time ago. (No one could remember exactly when.)

74. By the time of the disciplinary hearing, Mr Martin was aware of the telephone call the claimant had made to Mr Taylor on 26 September 2018 about his fellow drivers Boyne and Donnelly because the claimant had raised this during the investigatory hearing with Mr Taylor on 12 October 2018 (J282) and Mr Martin had the notes of that hearing in his documentation. However, as Mr Johnston submitted, Mr Martin's belief was that any issues the claimant had raised had been appropriately addressed by Mr Taylor and dealt with. Although the details of the checks done into Messrs Boyne and Donnelly were discussed with him in cross examination, it was not suggested to Mr Martin that the claimant's disclosure was itself any part of the reason for dismissal. There was simply no evidence to suggest the dismissal was for any other reason that the claimant's conduct on 28 September 2018.

75. We considered the fact that on 19 February 2019, Mr Wilson had asked Mr Taylor and Mr Martin about a possible disparity between the treatment of the claimant and that of the drivers he had complained about: "*But why was there a full process of investigation for CS but not for JB and CD?*" Mr Taylor replied: "*I felt it was all tit for tat. We tried to manage our way through it. CS made complaints about things all the time."* Mr Martin then said: "*There was nothing to substantiate this. He said they weren't doing vehicle checks and*

we checked and the vehicle checks had all been done.// There have been claims and counterclaims on that team. So when JT thought he could nip an incident in the bud it seemed the way to deal with it. However, when CS incident was raised there were four drivers who corroborated the allegation."

It is true that Mr Taylor said that the claimant made complaints about things all the time. However, read in context, that was simply an observation of fact. In any event, it was said by Mr Taylor. Mr Martin's contribution indicates that the claimant's complaints were taken seriously and investigated, but that, in answer to the disparate treatment question, there had been corroborated evidence in relation to the complaint against the claimant. The focus of the disciplinary hearing and the various investigations and inquiries made by Mr Taylor and Mr Martin to establish the facts were all centred on the incident on 28 September. The tribunal concluded without hesitation that Mr Martin genuinely believed the claimant guilty of misconduct and that that was the reason for the claimant's dismissal. The claim of automatically unfair dismissal contrary to section 103A ERA is dismissed.

Ordinary Unfair Dismissal

5. *Was the claimant dismissed for a potentially fair reason pursuant to section 98(2)(b) ERA, namely misconduct?*

6. *….*

7. *Did the respondent act reasonably in treating the claimant's conduct as a sufficient reason for dismissing the claimant, in that:*

    (a) Did the respondent form a genuine belief that the claimant was guilty of misconduct?

    (b) Did the respondent have reasonable grounds for that belief?

    (c) Did the respondent form that belief based on a reasonable investigation in all the circumstances?

76. The Tribunal answered questions 5 and 7 in the list of issues as follows: Firstly, we concluded without hesitation that Mr Martin formed the genuine belief that the claimant had committed a serious breach of health and safety by deliberately driving at excessive speed between a parked vehicle and trailer loading bays on 28 September 2018, thus endangering himself and other colleagues.

77. The grounds for Mr Martin's belief were the content of the statements and interview records of the four witnesses; the claimant's admission that the incident had been a 'near miss' and his reference to having had a "split second" to make his decision; the dashcam footage from Mr Boyne's vehicle showing Mr Donnelly stepping out and jumping back with the claimant's unit at one point coming to around three feet from him; the yard CCTV footage; and the combination of this with the reconstruction evidence suggesting that the manoeuvre had been made at excessive speed. On this issue, Mr Ward submitted that it had been established in evidence that Mr Donnelly had seen the claimant's vehicle coming round the corner a minimum of 200 feet from Bay 13 where Mr Donnelly was parked. He said that the claimant had established that Mr Donnelly had a legal duty to protect his own health and safety and that he had failed to do so when he had stepped out in front of his vehicle into the path of the claimant's 44 tonne unit which he had seen 200 feet away. Mr Ward submitted that if a near miss had taken place, Mr Donnelly must have been partly responsible for it. He said that Mr Taylor had confirmed that if there was no pedestrian on the walkway, the walkway was part of the yard and the claimant was entitled to drive on it. Mr Martin had failed to establish a near miss had happened and who was responsible for it. If Mr Donnelly was in danger, it was because he had deliberately placed himself in harm's way.

78. We were unsure of the point being made by Mr Ward with this submission. The claimant had admitted the near miss. He had also stated that he had had a "split second" to make his decision. It appeared to us to be an unexceptional proposition that one should not drive a 44 tonne truck in such a way as to get into a 'near miss'. If that does occur, it is important to be

open to the possibility that one's driving may have been at fault so that it does not happen again. The tribunal concluded that it was open to Mr Martin to base his belief in the claimant's misconduct on the matters set out above; that these were reasonable grounds, and that Mr Ward's argument did not suggest otherwise.

79. We turned to consider whether, at the time Mr Martin formed that belief on those grounds the respondent had carried out as much investigation as was reasonable in the circumstances. The claimant had a number of issues with the investigation. He pointed out that there were discrepancies between the statements of the witnesses. We accepted that that was true. One witness had said the claimant came round the corner "very slowly", others had said he had done so at speed. Mr Boyne said the claimant had shouted abuse at Mr Donnelly and himself. Mr Donnelly had not heard this. Firstly, it is not unusual for witnesses to be inconsistent in some of the peripheral details. It was not the rounding of the corner that was in issue, but what had happened next in relation to the manoeuvre. Secondly, the primary evidence relied upon by the respondent was the CCTV and dashcam footage and the statements made by the claimant. The witness evidence was only part of the factual matrix in the case. We did not, therefore conclude that the discrepancies in the witness statements undermined the investigation so as to take it outside the band of reasonable investigations a reasonable employer might have conducted in the circumstances.

80. The claimant was very critical of the evidence gathered by the respondent in relation to his speed. He said that not only had the respondent failed to obtain the OBD black box evidence from his vehicle within 24 hours, they had also failed to obtain digital evidence in relation to four other vehicles seen on the CCTV footage: the claimant's vehicle, two others shown rounding the corner in the same footage and a double decker also seen. He said that digital evidence of all these vehicles ought to have been obtained and their speed compared to his. Furthermore, digital evidence ought to have been obtained of the exact speed of Mr Wilcox's vehicle in the reconstruction.

81. The respondent's investigation requires to be within the band of reasonable investigations a reasonable employer of the same size and administrative resources etc might have carried out in the circumstances. The respondent is not required to leave no stone unturned. It was unfortunate that the OBD black box data was not available and that the claimant's tachograph had not uploaded to the FTA website. However, the CCTV footage combined with the reconstruction evidence appeared to us a reasonable substitute in the circumstances. Another employer might have relied on the time taken (as shown on the CCTV) divided by distance travelled alone. However, the respondent attempted to double-check this by carrying out not one, but two reconstructions. The claimant was given the opportunity to sit with Mr Wilcox on the second reconstruction so as to satisfy himself as to Mr Wilcox's speed.

82. Thus, turning to the question of whether the respondent had carried out sufficient investigation, we concluded that the investigation conducted by Mr Taylor, whist not perfect, was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances.

9. Did the respondent follow a fair procedure when dismissing the claimant? Did the respondent follow the ACAS Code of Practice?

83. Mr Ward did not draw attention to any specific issues with the procedure as such. Taking the whole procedure in the round we concluded that the overall process was fair. The claimant was given a chance to state his case. He was advised of his right to be accompanied, which he elected to forego as is his entitlement. The procedure involved two appeal stages. Separate personnel were involved at each stage. The ACAS Code was followed.

8. Was the dismissal of the claimant fair in all the circumstances? In particular, was the dismissal within the band of reasonable responses available to the respondent?

84. Finally, the tribunal considered whether dismissal as a sanction was within the band of reasonable responses a reasonable employer might have adopted to the conduct in question in the circumstances. In relation to this last issue, Mr Ward submitted that dismissal was an unduly harsh sanction. He said that the claimant's vehicle was one of three vehicles alleged to have breached yard rules and that all three colleagues ought to have been treated the same. (We were unsure which three vehicles he was referring to and he did not elaborate.)

85. Mr Ward submitted that the claimant had driven into a part of the yard he was entitled to enter as there were no pedestrians on the walkway. He had had a clear view from his cab. The only rule he had breached was not to park in front of the bays, though Mr Taylor had said it was okay to park behind Mr Boyne's vehicle. Mr Ward said that the claimant had not done anything wrong given these facts. He went on to say that Mr. Martin had failed to establish that a near miss had happened and who was responsible for it. Mr Donnelly must have been partly responsible for it as he had admitted seeing a vehicle approaching him. There had been no actual damage to person or property and therefore dismissal was not an appropriate response.

86. The tribunal must be careful not to substitute its own view for that of the respondent. The question we must ask is whether, in all the circumstances dismissal was within the band of reasonable responses a reasonable employer might have had to the conduct in question. The fact of the matter was that the claimant had, on his own admission been involved in a 'near miss' in relation to a pedestrian colleague. He accepted he had come three feet from Mr Donnelly with his 44 tonne HGV. One of Mr Martin's reasons for deciding upon dismissal as a sanction in this case was that the claimant had shown no remorse and had failed to recognise that he had done anything wrong. Thus, there would be little reason for him not to drive in this way again. Mr. Martin had concluded that he could not reasonably consider allowing a colleague to continue to work for the respondent who considered this dangerous driving acceptable. Given the claimant's attitude to the

matter, which was defensive and unapologetic to the last, we concluded that dismissal was within the band. It seems possible that if the claimant had taken responsibility and apologised for the incident, he would not have been dismissed.

87. Mr. Ward also submitted that Mr Martin had failed to notice other breaches of health and safety which had been pointed out to the tribunal from the CCTV footage. When asked about this in cross examination, his answer had been that he was focused on the claimant. Mr Ward said that for a transport manager this was unbelievable. In particular, said Mr Ward, Mr. Martin had failed to see: nine colleagues not using the walkway; a white vehicle travelling in the wrong direction in the yard; another two vehicles travelling at the same speed as the claimant; Mr Donnelly reversing onto bay 13 when his vision was impaired by Mr Boyne's trailer. None of these observations had been raised by the claimant in relation to the CCTV at the disciplinary hearing. With regard to the question of equity and the substantial merits of the case, none of the matters raised (including the claimant's complaints against Messrs Boyne and Donnelly) were, in any event, sufficiently similar to the misconduct alleged against the claimant or of the same gravity to give rise to a stateable argument about disparity of treatment.

88. Taking all the foregoing facts into account and bearing in mind the size and administrative resources of the respondent, we have concluded that dismissal was within the band of reasonable responses of a reasonable employer in the circumstances. It follows that the claim does not succeed and is dismissed.

Employment Judge: Mary Kearns
Date of Judgment: 31 March 2021
Entered in register: 22 April 2021
and copied to parties