Case Number: 3303331/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Camozzi	**v**	North Northamptonshire Council

Heard at: Cambridge **On**: 8 and 9 July 2021

Before: Employment Judge Tynan (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Ms Jennings, Counsel

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. The Tribunal considers that it would be just and equitable to reduce the basic and compensatory awards by 75% to reflect both the chance that the Claimant would have been dismissed but for any procedural unfairness and that the Claimant's dismissal was contributed to by his own actions.

RESERVED REASONS

1. By a claim form presented on 19 March 2020, the Claimant has brought a complaint that he was unfairly dismissed by the Respondent. He was employed by the Respondent as a Refuse and Recycling Driver Loader. He commenced employment with the Respondent on 4 January 2011 and was summarily dismissed with effect from 18 December 2019 for alleged gross misconduct. There were two stated grounds for the Claimant's dismissal:

    1.1 That he had behaved aggressively towards a colleague, Dela Moreland on 13 July 2018; and

    1.2 That he had performed unsafe reversing practices on 12 July 2018 whilst driving a refuse vehicle.

2. In her closing submissions, Ms Jennings stated that the Claimant's alleged conduct on 13 July 2018 would not in itself have warranted his dismissal. The more serious aspect was the Claimant's alleged reversing practices on 12 July 2018. As I shall return to, the Respondent's concerns in relation to these two matters arose separately, though were considered together at a disciplinary hearing on 17 December 2019.

3. As the Claimant alleges that the Respondent was motivated to dismiss him because he raised concerns that he had been bullied and victimised, it falls to the Respondent to establish a potentially fair reason for his dismissal.

4. The Respondent's witnesses gave their evidence first. The Tribunal heard evidence from Mark Lancaster, Operations Manager; Samantha Maher, employed by East Midlands Councils as Director of HR and Counsellor Development; and Brendan Coleman, the Respondent's Head of Environmental Care Services who chaired the Disciplinary Hearing and accordingly decided that the Claimant should be dismissed from the Respondent's employment. Mr Coleman had retired from the Respondent's employment two days prior to the Tribunal Hearing.

5. The Claimant gave evidence in support of his claim and called two witnesses: Jamie Hayes, a former colleague who worked as a Loader for the Respondent until in or around August 2019 when he left the Respondent's employment following a period of ill health; and Ross Goodchild, also a Loader who works for the Respondent. At the Claimant's request Mr Goodchild was interviewed by Ms Maher on 18 November 2019 as part of her combined Disciplinary and Grievance Investigation. Mr Hayes was not interviewed by Ms Maher for reasons I return to.

6. There was a single agreed bundle of documents running to some 445 pages. As is often the case, the parties referred to a relatively limited number of key documents in the course of the Hearing.

7. At the outset of the Hearing, in addition to providing an outline of how the Hearing would proceed, I explained the provisions of Section 98 of the Employment Rights Act 1996 to the parties and also reminded myself and the parties of the well-known principles in British Home Stores Limited v Burchell [1978] ICR 303, emphasising to the Claimant in particular that Employment Tribunals do not act as appeal bodies and must not substitute their views for those of the employer. Once an employer satisfies an Tribunal that it dismissed its employee for a potentially fair reason the question then is whether it acted as a reasonable employer might have acted in the matter, and it is irrelevant whether the Tribunal would or might have reached a different conclusion. Before inviting the parties' closing submissions, the Tribunal reminded them that in the event of a finding of procedural unfairness the Tribunal would go on to consider what would, or might, have happened but for that unfairness, in accordance with the well

established principles in Polkey v AE Dayton Services Limited [1987] UKHL 8, as well as whether there was any contributory or culpable conduct on the part of the Claimant.

Findings

8. In 2017, the Claimant began to be concerned about the actions of two colleagues, Dela Moreland and Cliff James, including that Ms Moreland may have breached his confidence by sharing with Mr James that the Claimant had spoken with her about overtime that he felt Mr James had worked at his expense. It was a potentially sensitive situation as Mr James is a Trade Union Representative whose remit was to represent the Claimant's interests amongst others. Tensions between the Claimant and Ms Moreland seem to have escalated over Christmas 2018 when the Claimant was absent from work for three weeks with an ear infection. It was reported to him that Mr James had allegedly encouraged Ms Moreland to discipline the Claimant for his absence.

9. The Claimant shared his concerns informally with the Respondent's HR department. His evidence is that during his interactions with HR in early 2018 he made them aware of approximately 17 separate matters of concern. An email to Jenny Kerfoot in the HR department dated 4 March 2018 documents the Claimant's understanding that Beth Gordon, Operations Manager – Streetscene, had offered for him to be moved to another department, albeit this did not happen. However, it is unclear to me where else in the Council the Claimant might have been moved to as there was only one Refuse Department.

10. On 9 July 2018, the Claimant reported to HR that colleagues at work had stopped talking to him and that he felt isolated. He was advised that he would need to raise a formal grievance.

11. The Claimant was suspended from his employment on 13 July 2018 following an alleged verbal altercation with Ms Moreland during which she claimed to have felt threatened by the Claimant and fearful for her safety. The Claimant claims that he remained calm during their interaction, speaking in a normal tone of voice and with relaxed body language. He alleges that it was in fact Ms Moreland whose voice was raised and aggressive, and whose body language was challenging and confrontational. A few hours later he was recalled from his round to the Depot where he was informed that he was being suspended due to the alleged incident between himself and Ms Moreland that morning.

12. The Claimant remained suspended from work over the next 17 months. He was interviewed on 15 August 2018 in connection with the alleged incident on 13 July 2018, Ms Moreland having been interviewed on 1 August 2018 in relation to the matter.

13. The Claimant's suspension was confirmed in a letter dated 16 July 2018 from Lynne Spencer in the Respondent's HR Team. Contrary to Ms

Jennings' closing submission, the Claimant's alleged conduct on 13 July 2018 was said to amount to gross misconduct. The Claimant was provided with a copy of the Council's Disciplinary Procedure and also alerted to a confidential counselling service available to employees. That evening the Claimant sent a short email to Ms Kerfoot stating,

> *"Further to our discussions regarding the incidences I have previously raised with you, I would like to take out a formal grievance against Della Moreland for bullying and victimisation and Cliff James for encouraging and enabling her discrimination towards me."*

14. I find this reflected a genuine ongoing sense of grievance on the part of the Claimant rather than a defensive or retaliatory move on his part and that he believed that his suspension was the culmination of several months of bullying behaviour towards him.

15. On 18 July 2018, Mr James emailed Sarah MacIntosh, Human Resources Manager, reporting alleged concerns that were said to have been reported to him by a colleague that the Claimant had been reverse loading refuse bins in breach of the Respondent's documented policy.

16. The concerns were first allegedly reported to Mr James on 9 July 2018 and then again on 12 July 2018, but for reasons that remain unclear Mr James did not escalate the matter within the Respondent until the morning of 18 July 2018. I do not know whether he would have been aware by then that the Claimant had formally notified his wish to pursue a grievance against him.

17. The practice of reverse loading was primarily addressed in Mr Lancaster's witness statement and evidence.

18. The Claimant's written particulars of employment documents that a safe code of practice booklet would be issued for the relevant tasks to be performed on behalf of the Respondent and any standing instructions for drivers of Council vehicles. This is reinforced in the Job Description for Refuse Driver Loaders which makes clear that the Driver has lead responsibility for the operation of the service during the round, and must comply with safe working practices as well as adhere to the Respondent's Safety Policy.

19. In annual training delivered to Drivers and Loaders, the Respondent has identified reversing and manoeuvering as potentially the most hazardous task for refuse and recycling vehicles. The training slides at page 324 to 343 of the Hearing Bundle are clear and concise, and they include photographic and pictorial illustrations evidencing good and poor practice. They are explicit, amongst other things in stating, "Never load whilst the vehicle is reversing".

20. The Respondent has a specific Safe Working Practices and Policy in relation to Refuse & Recycling, a copy of which is at pages 344 to 355 of

the Hearing Bundle. It includes a section on reversing. Amongst other things, "The driver must ensure that waste is only collected when the vehicle is collecting in a forward direction". There are also specific provisions in relation to the role of reversing assistants, including where they should position themselves. The primary responsibility of the reversing assistants (who will usually be Loaders) is to ensure that members of the public do not enter what is referred to as the crush zone. The Policy does not prescribe the hand signals that are to be used, except that a clear stop hand signal should be delivered to the Driver where appropriate. Signaling is dealt with more extensively in the training.

21. It was not suggested by the Claimant, either at Tribunal or during the disciplinary investigation and proceedings that he was unfamiliar with his terms of employment, Job Description, the Respondent's Safe Working Practices and Policy or that he had not received regular training, though it is his case that Mr James stated during a training event in January 2018 that there could be circumstances in which it would be permissible to reverse load.

22. For completeness, I note that the Respondent's Disciplinary Policy and Procedure cites bullying and/or harassment, serious insubordination, bringing Kettering Borough Council into serious disrepute, serious breach of health and safety rules, and serious breach of confidence as examples of potential gross misconduct.

23. Late afternoon on 18 July 2018 Ms Kerfoot emailed the Claimant to let him know that Ms Maher had been appointed as the Investigating Officer in relation to the 13 July 2018 incident and his Grievances. There was no mention of Mr James' expressed concerns though I do not know whether Ms Kerfoot was aware of them at that point. Her email concluded with a reminder that the Claimant was to provide her with details of additional concerns expressed by him as to the confidentiality of the investigation process. The Claimant responded to her within a couple of hours to complain that Mr James was reported to be recounting details of the Claimant's alleged altercation with Ms Moreland, albeit Mr James had not in fact been present when the Claimant and Ms Moreland had spoken on 13 July 2018.

24. The Claimant contrasted Mr James' alleged actions with the very clear instruction in his suspension letter that confidentiality must be maintained. Word had also reached the Claimant that Mr James was allegedly speaking to colleagues and encouraging them to report him for reverse loading. He emailed Ms Maher at 21:22 to express his concern, including whether colleagues were coming under improper pressure in the matter. His email concluded,

> *"I feel isolated, under pressure and extremely anxious. I seldom think about anything else other than this awful situation."*

He asked Ms Maher to consider, amongst other things, the effect on his mental wellbeing.

25. None of the Respondent's witness statements are clear as to the circumstances in which the decision was taken to formally investigate the Claimant's reversing practices or who took that decision, nor was this information contained in Ms Maher's Investigation Report. I can only reasonably infer that the decision was made in response to Mr James' email of 18 July 2018, albeit there is a paucity of evidence around the matter. Mr James was interviewed by Ms Maher on 10 October 2018 regarding the events on 13 July 2018 (albeit he had not been present when the Claimant and Ms Moreland had spoken) and the Claimant's Grievances. However, they did not discuss the Claimant's reversing practices. Ms Maher states that she attended the Depot to view CCTV footage taken during the Claimant's round on 12 July 2018. She does not identify in her statement when this was, except that it seems to me this must have been after her meeting with Mr James on 10 October 2018, assuming her statement provides a chronological narrative of events.

26. Having viewed the CCTV footage, Ms Maher felt that she needed someone suitably qualified and experienced in reversing manoeuvres to review and comment on the footage. She enlisted Rodney Linnell, Refuse and Recycling Supervisor in the task. Mr Linnell was working part time as he transitioned into retirement. He reviewed a 20 minute recording and provided his comments and observations in an email to Ms Kerfoot dated 27 November 2018. It is a very short email with the comments and observations spread over 10 short lines of text. This was over four months after Mr James had first raised concerns.

27. A further five months later, on 29 April 2019, Ms Maher wrote to the Claimant to notify him of the Respondent's concerns in relation to alleged unsafe reversing practices. The letter identified the concerns as being related to reverse loading, reversing without any signal being given and reversing without the correct signal being given, but it did not identify any specific date(s) on which such practices were alleged to have occurred. The letter warned the Claimant that the alleged practices were potentially a breach of the Respondent's Policy and Training in relation to reversing refuse vehicles and that he was at risk of summary dismissal for gross misconduct. Copies of the Policy and Training referred to were seemingly provided to the Claimant.

28. I explored with Ms Maher at Tribunal the reason for what appeared to be "gaps" or delays in the investigation process. I found her explanations in this regard to be somewhat generalised, and indeed repetitive, including that people were on leave. Having taken Ms Maher carefully though the chronology of events, I ultimately found her explanations for the various delays to be unsatisfactory. One of the key principles of the Respondent's documented Policy states,

> *"All issues under this procedure must be dealt with speedily, with no unreasonable delays to meetings, decisions or appeals".*

29. I did not hear evidence from any members of the Respondent's HR team, leaving Ms Maher to struggle to explain why concerns first raised by Mr James on 18 July 2018 in relation to the Claimant's driving practices were not progressed until in or around November 2018 and thereafter not taken forward with the Claimant until the end of April 2019. Even then, Ms Maher did not arrange any further interview with Mr James to discuss the concerns raised in his email of 18 July 2018, including as appropriate what had prompted him to raise his concerns. In circumstances where the Claimant had raised a formal grievance that Mr James was effectively colluding with Ms Moreland to bully and victimise him, I find that a surprising omission on her part.

30. Ms Maher invited the Claimant on 29 April 2019 to attend an Investigation Meeting to be held on 10 May 2019 to discuss the Respondent's further concerns, but this proposed meeting coincided with the Claimant being out of the country on pre-booked annual leave. In any event, the Claimant's fitness to participate in the process was in question and he was therefore referred for an Occupational Health Assessment. Ms Maher also explained to the Claimant that she intended to show him the relevant CCTV footage when they met in order that he might comment on it. There is no evidence in the Hearing Bundle that the Claimant had by then been made aware of the date(s) in question.

31. Ms Maher acknowledged in her letter of 29 April 2019 that the arrangements for communicating with the Claimant during his suspension would be looked at so that they might be improved. I accept the Claimant's evidence that until this letter, he had not been informed that his suspension would be kept under review, nor informed as and when such reviews took place or their outcome.

32. A report from occupational health specialists, Medigold, dated 12 June 2019 confirms that the Claimant had found the situation stressful and that he was receiving counselling, but that he wished to go ahead as he felt the situation was being exacerbated by his lengthy suspension. Medigold advised that the process should be undertaken in relation to the Respondent's policies and time scales. As I shall return to, their advice was not heeded.

33. The Claimant met with Ms Maher and Mr Linnell a few days later on 17 June 2019. Following introductions, the Claimant was shown the CCTV footage from 12 July 2018. There was seemingly no footage from 9 July 2018, notwithstanding this was the initial focus of Mr James' stated concerns. When invited to offer his initial response the Claimant said,

> *"I can see it – bang to rights"*

He immediately went on to say,

> *"In training we were told that reverse loading could be done occasionally".*

34. The Claimant clarified that Mr James had said this and that two colleagues, Andy Rooney and Mark Sinclair would confirm this. He claimed throughout the meeting that Mark Sinclair reverse loaded on occasion. In the course of reviewing the CCTV footage, he took issue with whether it replicated exactly the view from the cab of his vehicle. He said,

> *"You don't know what I can see"*

And then,

> *"You can't say what I could or couldn't see".*

35. During the meeting they returned to the training event at which Mr James had allegedly said that reverse loading was permissible. Asked when this was, the Claimant said,

> *"Around January time. Cliff kept going to the toilet – I think he had some stomach upset at the time. I presumed that because Cliff said that we could reverse load, that it was correct. He said it and Dela was there. Prior to that I have never reverse loaded."*

36. The Claimant's subsequently stated that reverse loading,

> *"Saves the guys legs"*

And a few moments later,

> *"I got information that will blow this out of the water. But I won't share this now".*

37. Ms Maher returned to this at the end of the meeting asking the Claimant to disclose any relevant information that might inform her investigation. The Claimant declined stating,

> *"No, I prefer to save it".*

38. In a follow up email to Ms Maher the Claimant requested, amongst other things, that she speak with Mr Hayes whom he said had been party to a conversation with himself, Mr Sinclair and Mr Rooney during which they had discussed and acknowledged that Mr James had said during a training course that reverse loading was permissible in certain situations. Mr Sinclair and Mr Rooney had been interviewed by Ms Maher on 12 June 2019. Although their interviews pre-date the Claimant's Investigation Meeting on 17 June 2019, they were each specifically asked about the Respondent's Policy on reverse loading, specifically whether they had heard Mr James say that it was acceptable to reverse load in certain

situations. Both were clear that reverse loading was impermissible and denied having heard Mr James, or anyone else, state that reverse loading might occasionally be acceptable. As noted already, Mr James was not re-interviewed by Ms Maher.

39. Ms Maher's evidence is that Mr Hayes was not interviewed because he left the Respondent's employment in August 2019 and thereafter was not subject to any ongoing obligation of trust and confidence. I accept her evidence that this was in accordance with the Respondent's practice. I find that Mr Hayes would have been on sick leave when Mr Sinclair and Mr Rooney were interviewed.

40. In his submissions, the Claimant highlighted what he saw as an inconsistency between Ms Maher's failure to speak with Mr Hayes and her actions in interviewing Bernice Taylor by telephone on 7 February 2019. Ms Taylor is not employed by the Respondent, rather she is engaged by an Agency to provide relief cover when the regular Depot Cleaner is absent. She had been present on 13 July 2018 when the Claimant and Ms Moreland had spoken and described the Claimant as, *"on a mission", "quite angry", "having a go and ranting".* Ms Taylor said that she had been made to feel very uncomfortable. She described the Claimant as *"being a bully",* that Ms Moreland was upset, and that *"I would have been upset too if someone was having a go at me like that".* Ms Taylor was the only person who directly witnessed the incident on 13 July 2018.

41. Ms Maher explained that she had needed to secure Ms Taylor's Agency's consent to speak to her. By the time Ms Maher spoke with Ms Taylor nearly seven months had elapsed since the events in question, albeit Ms Taylor provided a fairly emphatic account in which she identified the Claimant as the clear aggressor in the matter.

42. Ms Maher's final meeting was with the Claimant, being a second Investigatory Meeting on 17 June 2019. Her resulting Investigation Report is dated 5 September 2019 and runs to some 22 pages excluding Appendices. The Claimant did not question Ms Maher on the Report itself. Even a brief review of the Report confirms that it is a well-structured and thorough document that sets out the disciplinary concerns and the Claimant's Grievances in some detail before going on to set out the findings of the Investigation. The Report does so with specific reference to the statements and evidence collated in the course of the Investigation, quoting from these where relevant. The Report sets out clearly and in balanced terms the Claimant's responses to the Respondent's concerns as well as the concerns which form the basis of his Grievances. It is commendably thorough in that regard.

43. In section 8.3 of the Investigation Report, Ms Maher acknowledged that the Investigation had been protracted and that the length of time taken to complete the Investigation was not within the desired timescales. She noted that it had not been a simple disciplinary matter but involved a Grievance which had comprised of 21 discrete allegations. She stated

that various individuals' annual leave and the Respondent's health issues had also been a factor.

44. On 1 October 2019, Mr Coleman wrote to the Claimant inviting him to attend a Disciplinary Hearing on the basis that Ms Maher had identified that there was a disciplinary case to answer. Mr Coleman confirmed that the Hearing would also consider the Grievances raised by the Claimant and that the CCTV footage from 13 July 2018 would be available. Mr Coleman invited the Claimant to let him know in the event there was any additional evidence or witnesses that he wished to rely on at the Hearing. In the event, the Claimant wrote to Mr Coleman on 10 October 2019 to suggest that six witnesses should be spoken to, including Mr Hayes in relation to reverse loading. In his letter of 1 October 2019 Mr Coleman reminded the Claimant of his right to be accompanied and of the role of any companion. Finally, he warned the Claimant that summary dismissal was a potential outcome, albeit no decision would be taken before the Claimant had the opportunity to put forward his case.

45. The combined Disciplinary and Grievance Hearing was originally scheduled for 16 October 2019 but the Claimant was certified unfit for work by his GP with anxiety and depression leading to a further referral to Medigold.

46. On 23 October 2019, Mr Goodchild emailed Ms Maher to clarify/correct a particular matter. He did not seek to correct his comments on 17 June 2019 that reverse loading was a *"no, no"*, though I note for completeness that he did say on 17 June 2019 that it could be done if risk assessed and in certain narrow lanes.

47. On 25 October 2019, the Claimant contacted the Respondent's HR Team to complain that he had witnessed Mr Sinclair and Mr Rooney committing unsafe working practices on 24 October 2019. The matters was looked into by Mr Lancaster, who concluded that neither individual had committed unsafe reversing practices.

48. Medigold reported again on 6 November 2019 that the Claimant effectively recognised that the ongoing uncertainty was exacerbating his medical situation, albeit he was also concerned and stressed by what he believed was the Respondent's failure to speak to all of his named witnesses. Further emails ensued between himself and Ms Maher. Adrian Pritchard, Ross Goodchild and Mark Spencer were then interviewed and written statements prepared and submitted for Mr Coleman's further consideration.

49. The Disciplinary Hearing eventually went ahead on 17 December 2019, albeit an email from the Claimant to Sarah Macintosh, Human Resources Manager, on 16 December 2019 evidences that he continued to be certified unfit for work by his GP. The Claimant described himself as not being *"mentally strong enough to represent myself properly".*

50. The Claimant was not accompanied at the Disciplinary Hearing, though Ms MacIntosh had additionally offered him the option on 16 December 2019 to be accompanied by someone other than an employee of the Respondent in order to provide him with emotional support if that would assist him.

51. The Disciplinary Hearing notes evidence that the Claimant confirmed at the outset of the hearing that he was content to proceed. At Tribunal the Claimant only asked limited questions of Mr Coleman as to the conduct of the Hearing itself. The Hearing minutes evidence that it was conducted as one might expect and that Mr Coleman took particular care to ensure the Claimant understood the matters that were under consideration and how the Hearing would be conducted, and that he also endeavoured to try to put the Claimant at his ease notwithstanding the inevitably stressful situation he was facing. Ms Maher attended the Hearing to present her Report and so that she could be questioned about it.

52. The Disciplinary Hearing minutes run to some 14 pages. The Hearing itself lasted 2 hours and 45 minutes, including any breaks in the Hearing.

53. As regards the events of 13 July 2018, the Claimant said, *"I regret the incident"*. When asked by Mr Coleman whether he recognised that the way he was said by Ms Taylor to have conducted himself was not right, he responded, *"I acknowledge that"*. He also said that he expected to be sacked in respect of the reverse loading concerns. He invited the Hearing to have regard to the impact which his parents' deaths had on him, his exemplary record, *"and also my points regarding Cliff James."* He also showed Mr Coleman an award he had received whilst serving in the Army, which he felt evidenced his good character and also provided confirmation that he did not have an issue with authority.

54. Mr Coleman's decision was confirmed in a letter dated 18 December 2019 signed by Ms MacIntosh. The findings and conclusions are briefly recorded in the letter as follows:

> *"Having considered all the evidence, Brendon came to a reasonable belief on the balance of probabilities that the allegations are both proven and we deemed these to constitute gross misconduct on both counts. Even taking into consideration your mitigation, Brendon decided that the most appropriate sanction is dismissal with immediate effect."*

55. The reference to "we" deeming the allegations to constitute gross misconduct is consistent with comments elsewhere in the letter which blur the lines slightly in terms of Ms MacIntosh's stated role being limited to providing HR advice rather than being involved in the decision itself. On the other hand, Mr Coleman himself gave every indication in his evidence at Tribunal that it was his decision alone to dismiss the Claimant and that he has considerable experience of handling disciplinaries. He said that in cases involving a serious breach of health and safety he normally dismisses the employee. He stated that he is consistent in his approach

and that this is understood by the Union. He described a more recent incident when a vehicle hit a lamp post due to lack of attention where his decision was to dismiss the driver of the vehicle, though he could not recall another case referred to by the Claimant involving an employee called Bob Parr.

56. The Claimant was informed by Ms MacIntosh in her letter of 18 December 2019 of his right to appeal against his dismissal, but he did not exercise this right. I accept his evidence that he did not feel mentally strong enough to do so and that he felt it was in both his own and his family's best interests not to pursue the matter further.

Law and Conclusions

57. Subject to any qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer (section 94 of the Employment Rights Act 1996 ('ERA')).

58. In determining whether dismissal of an employee is fair or unfair, it is for an employer to establish a potentially fair reason for the dismissal (section 98 ERA). Conduct is a potentially fair reason for dismissal (section 98(2)(b) ERA).

59. Despite the Claimant's assertions that Ms Moreland and/or Mr James had bullied him and then retaliated against him when he raised concerns about their conduct, there is no evidence before me that Ms Maher or Mr Coleman were influenced in their respective tasks by either individual or that they had approached Ms Moreland and Mr James' evidence uncritically. On the contrary, Ms Maher presented the conflicting accounts in balanced terms and, of course, Ms Moreland's account of events on 13 July 2018 was corroborated by Ms Taylor. Even if Mr James had acted in bad faith and his stated concerns in relation to the Claimant's driving had been an act of retaliation rather than borne of any genuine concerns on his part (for the avoidance of doubt, something in respect of which I do not express any view), the CCTV footage evidently provided grounds for concern in relation to the Claimant's driving practices on 12 July 2018, concerns which were not only supported by Mr Liddell after he had reviewed the footage but in due course by the Claimant's own witnesses, including Mr Goodchild who described reverse loading as a "no-no" in most situations. Moreover, whilst the Claimant's case was that Mr James had said that reverse loading could be acceptable in certain situations, the Claimant had also said that he was "bang to rights" and that he expected to be sacked. I am satisfied that in reaching his decision that the Claimant should be dismissed from the Respondent's employment, Mr Coleman believed the Claimant to be guilty of misconduct and in such circumstances that the Respondent has discharged the burden upon it in these proceedings to establish a potentially fair reason for dismissal. Further, that the first limb of the Burchell 'test' is met, namely that Mr Coleman's belief in the Claimant's guilt was genuinely held. The stated findings and conclusions can be criticised for the brevity with which they

were expressed, but that does not detract from my conclusion that Mr Coleman genuinely believed the Claimant to have behaved aggressively towards Ms Moreland on 13 July 2018 and to have engaged in unsafe reversing practices on 12 July 2018. I do not consider that Mr Coleman's stated reasons for dismissing the Claimant were a sham or concealed his real reasons for dismissing the Claimant. Amongst other things, I accept Ms Jennings' submission that it is inexplicable why the Respondent would have embarked upon a 17-month long process if it had an agenda to remove the Claimant. I also have regard to the careful and thorough way in which Mr Coleman explored the issues with the Claimant at the hearing on 17 December 2019. The minutes do not support that Mr Coleman had a hidden agenda.

60. On the basis that there was a potentially fair reason for dismissal, the fairness or otherwise of the dismissal falls to be determined in accordance with section 98(4) ERA, namely 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, a question which is to be determined in accordance with equity and the substantial merits of the case. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that the Acas Code of Practice on Disciplinary and Grievance Procedures is admissible in evidence and shall be taken into account in determining questions to which it relates.

61. In the often-cited Judgment of the Employment Appeal Tribunal in Burchell, Arnold J said,

"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct), entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds on which to sustain that belief. And thirdly, we think, the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage on which he formed that belief on those grounds, and carry out as much investigation into the matter as is reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus in demonstrating those three matters, we think, they must not be examined further.

…the Tribunal has to consider whether there was a genuine belief on the part of the employer that the employee was guilty of the alleged misconduct, whether that belief was reasonably founded as a result of the employer carrying out a reasonable investigation, whether a reasonable employer would have dismissed the employee for that misconduct."

62. I firstly consider whether Mr Coleman's belief that the Claimant was guilty of misconduct was arrived at following a reasonable investigation.

63. Paragraph 5 of the Acas Code states,

"It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case".

The Respondent's Disciplinary Procedure also emphasised the importance of a timely investigation.

64. In my judgment, whatever the complexities presented by a combined disciplinary and grievance investigation, and even allowing for delays as a result of potential witnesses being on leave, the process took an unreasonable length of time. The Claimant was suspended for 17 months before being dismissed. Ms Maher interviewed Ms Moreland and the Claimant within a few weeks of the events of 13 July 2018, but it would take seven months for the only independent witness to the events that day, Ms Taylor, to be interviewed. There is no satisfactory explanation for this delay, certainly there was no evidence before the Tribunal that Ms Maher or the Respondent had been thwarted by Ms Taylor's agency in their efforts to speak to her and secure a statement from her. Where, as here, the events in issue could only be resolved by interviewing those directly involved and others who had witnessed the events or their aftermath, there was an obvious need to move swiftly to secure people's accounts before recollections faded, but also to guard against the possibility that those who would be in a position to provide statements to any investigation might continue to discuss the matter amongst themselves with the resulting risk that recollections might be tainted by such discussions.

65. It is inexplicable why it took the Respondent approximately four months to begin to act on Mr James' concerns in relation to the Claimant's reversing practices after he first reported these on 18 July 2018 and, even then, why a further five months elapsed after Mr Liddell had reviewed the CCTV footage and offered the view on 27 November 2018 that the Claimant's driving on 12 July 2018 was potentially in breach of the Respondent's policy. Whilst rumours may have reached the Claimant early on that Mr James was speaking to colleagues about his driving, by the time he was formally notified that his reversing practices were to investigated he had been suspended from his duties for over nine months. Even then, he was not immediately informed of the specific concerns or when they were said to have arisen. It was only on 17 June 2019, eleven months after Mr James first reported his concerns that the Claimant was shown the CCTV footage and accordingly would have been made aware that the concerns related to his reversing on 12 July 2018. All of the documents in this case, including the Investigation Meeting and Disciplinary Hearing minutes, evidence that the Claimant was left to defend himself by reference to the available CCTV footage, which he said did not necessarily fully reflect the

view he had from the cab of the vehicle. Having re-read the Investigation Meeting and Disciplinary Hearing minutes I am unable to identify any point at which the Claimant offered a direct account of the events of 12 July 2018. In her submissions in relation to *Polkey*, Ms Jennings suggested that the Claimant had not been disadvantaged by any delay, on the contrary that he had retained his job longer than he might otherwise have done had the Respondent progressed the matter in a more timely manner. I disagree. In my judgment there was a lost opportunity for the Claimant to offer a timely account of his actions on 12 July 2018, potentially on the strength of his direct recollection of the events that day, including for example any issues in his personal or work life that may have impacted his concentration or driving on that occasion. Instead, the minutes evidence that he offered his views as to what he would have done. Likewise, there was a lost opportunity to speak to the two Loaders that day for their timely accounts of the round and whether for example they felt any signalling concerns were well founded, their own responsibility or otherwise in the matter, and their understanding as to why reverse loading had taken place during the round. Instead, one of the Loaders, Mr Rooney was not interviewed about the matter until 12 June 2019, when he was not asked in terms about the events of 12 July 2018 or shown the CCTV footage in question. The other Loader, Mr Mulcher was never interviewed in the matter. And for reasons that are unclear, whilst Mr James was interviewed about the events of 13 July 2018, even though he had not directly witnessed them, he was not interviewed in relation to the driving concerns even though his email had led to an investigation and notwithstanding the Claimant alleged that Mr James had said in January that year that reverse loading was permissible In my judgment these were material delays and omissions which potentially prejudiced the Claimant's ability to defend himself against allegations of misconduct and which in my judgment render his dismissal unfair.

66. The fact that Ms Maher produced a thorough, well-crafted and balanced investigation report did not serve to rectify those fundamental shortcomings in the process, though it is something I attach weight to in terms of coming to a view as to what would or might have happened but for but the unfairness in question.

67. In concluding that the Claimant was unfairly dismissed I also have regard to the summary terms in which Mr Coleman's findings and conclusions were expressed, even though I consider that his conduct of the disciplinary hearing itself is beyond criticism. I further weigh in the balance that by October 2019 the Claimant was said by his GP to be suffering with anxiety and depression. However sensitively Mr Coleman conducted the hearing, and regardless of the fact the hearing minutes evidence that the Claimant was able to make extensive representations, in my judgment there was additional unfairness to the Claimant in having to wait 17 months to have his case heard and believing that his ability to put his case had been compromised by his impaired mental wellbeing.

68. Pursuant to section 123(1) ERA, where a Tribunal upholds a complaint of unfair dismissal it may award such compensation as it considers just and equitable in the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal. In accordance with the well-established principles in Polkey the Tribunal may make a just and equitable reduction in any compensatory award under section 123(1) to reflect the likelihood that the employee's employment would still have terminated in any event. The Tribunal may additionally have regard to any contributory conduct on the part of an employee and reflect such conduct in a reduction in the basic and compensatory awards (sections 122(2) and 123(6) ERA). In relation to the basic award, in Lenlyn UK Limited v Kular UKEAT/0108/16/DM the Employment Appeal Tribunal said that in cases where both Polkey and contributory fault arise, a Tribunal must clearly articulate the factors which lead to their decisions and if those factors are the same the Tribunal needs to also consider and articulate whether and if so why, both types of deduction are appropriate given the risk of the Claimant being penalised twice for the same conduct.

69. This is a case in which it is not in my judgment too speculative an exercise to determine what would or could have happened. On the contrary, I am confident, having regard in particular to the entirety of the evidence, not least the Respondent's documented policies and standards, reinforced through annual training, the Claimant's own admissions in the course of the disciplinary proceedings, the widely held views of the Claimant's colleagues that reverse loading was contrary to the Respondent's documented policy (or, in the words of Mr Goodchild, a "no-no"), Mr Coleman's firm and consistent approach in cases involving health and safety breaches, and also drawing upon common sense, experience and justice, that there was a high likelihood that the Claimant would have been dismissed but for the failings identified above. There was significant contributory conduct on his part. However, in the final analysis, I cannot be absolutely certain that the Claimant would have been dismissed. I have described the majority of the delays and omissions in this case as material, or substantive, as opposed to merely procedural with no consequences in terms of the eventual outcome. I cannot say with certainty that the Claimant would have been dismissed had his own contemporaneous account of the events of 12 July 2018, as well as those of the two Loaders, been secured on a more timely basis and had the Claimant participated in the disciplinary hearing in a stronger state of mind. I consider that Mr Coleman's failure to articulate his findings and conclusions in more detail than he did made little or no difference to the outcome, not least in circumstances where it seems to have had no bearing on the Claimant's decision not to appeal against his dismissal. However, the Claimant's failure to appeal his dismissal was a reflection of his impaired mental health which I consider was directly impacted by the length of time for which he was suspended and had the threat of dismissal hanging over him. Whilst I accept Mr Coleman's evidence that he takes a firm and consistent stance in relation to health and safety breaches, I also weigh in the balance that a reasonable employer will consider every case on its individual facts and merits. In this case, Mr Coleman did not have

the benefit of the Claimant and his colleagues' immediate or timely recollections of the events of 12 July 2018. Indeed, he effectively did not have their direct accounts at all, rather the Claimant's account of what he would have done. In all the circumstances, having regard to the Claimant's culpability in the matter, the Respondent's clearly documented policy and standards in relation to reversing practices, including reverse loading, the training given on the need to act on clear signals, and Mr Coleman's firm and consistent stance in relation to health and safety breaches, as well as the Respondent's need to maintain public confidence in the safety of its operations (particularly in the context of an historic fatality involving a Council refuse vehicle), I consider that it would be just and equitable to make a reduction of 75% each to the basic and compensatory awards to reflect both the likelihood of dismissal and the Claimant's contributory fault in the matter, both of which are rooted in the same conduct on his part.

70. The case will be listed for a remedy hearing with a time estimate of two hours. Notice of that hearing will follow separately together with any relevant case management orders.

21 July 2021

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Employment Judge Tynan

Sent to the parties on: ..13th Aug 2021.
THY

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For the Tribunal Office