EMPLOYMENT TRIBUNALS

Claimant: Mr Daron Parker

Respondent: DPD Group UK Limited

FINAL HEARING

Heard at: Birmingham **On:** 11 & 12 August 2021

Before: Employment Judge Camp

Appearances
For the claimant: Mr T Gracka, lay representative (consultant)
For the respondent: Mr P Bownes, solicitor

RESERVED JUDGMENT

(1) The claimant's dismissal was fair and his unfair dismissal claim fails.

(2) The claimant was not dismissed in breach of contract and his wrongful dismissal claim also fails.

REASONS

Introduction

1. The claimant was employed by the respondent parcel delivery business as an HGV driver, based at its Peterborough depot, from 25 September 2017 until his summary dismissal with effect on 20 April 2020. The given reason for dismissal was gross misconduct, namely making an unauthorised stop on 18 March 2020. He claims unfair and wrongful dismissal.

Issues & law

2. In relation to whether the claimant was unfairly dismissed, there are two main issues I [the Employment Judge] have to decide.

    - What was the principal reason for dismissal and was it a reason relating to the claimant's conduct?
    - Was the dismissal fair or unfair in all the circumstances, in accordance with equity and the substantial merits of the case, pursuant to section 98(4) of the Employment Rights Act 1996 ("ERA")?

Deciding those two main issues may involve me looking at the following subsidiary issues:

2.1 did the respondent genuinely believe the claimant guilty of the misconduct alleged?

2.2 did the respondent have reasonable grounds on which to sustain that belief?

2.3 had the respondent carried out as much investigation into the matter as was reasonable in the circumstances at the final stage at which it formed that belief?

2.4 did the respondent in deciding that dismissal was the appropriate sanction and in relation to all other matters, including the procedure followed, act as a reasonable employer might have done, i.e. within the so-called 'band of reasonable responses'?

3. I have not dealt with the other unfair dismissal issues that would have arisen had I decided the claimant was unfairly dismissed.

4. The relevant law relating to unfair dismissal appears substantially in the issues as set out above. My starting point was the wording of ERA section 98 itself. I also had in mind the well-known 'Burchell test', originally expounded in British Home Stores Limited v Burchell [1978] IRLR 379. I note that the burden of proving 'general reasonableness' under ERA section 98(4) is not on the employer as it was when Burchell was decided; the burden of proving a potentially fair reason under subsection (1) is [on the employer], but the burden is neutral under subsection (4).

5. In relation to ERA section 98(4), I am considering the whole of the well-known passage from the judgment of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test. That test, which I may also call the "*band of reasonableness*" test, applies in all circumstances, to both procedural and substantive questions.

6. Hand in hand with the fact that the band of reasonableness test applies is the fact that I may not substitute my view of what should have been done for that of the reasonable employer. I have to guard myself against slipping "*into the substitution mindset*" (London Ambulance Service NHS Trust v Small [2009] IRLR 563 at paragraph 43) and to remind myself that only if the respondent acted as no reasonable employer could have done was the dismissal unfair. Nevertheless (see Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677): the 'band of reasonable responses' test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend the tribunal's consideration simply to be a matter of procedural box-ticking.

7. This is a 'gross misconduct' case and in Arriva Trains v Conant [2011] UKEAT 0043_11_2212 (22 December 2011), the EAT provided a helpful summary of the law to be applied by employment tribunals in such cases in paragraphs 23 to 32 of their Judgment, paragraphs that will be deemed to be incorporated into my decision.

8. In relation to the issue of fairness under ERA section 98(4), I also take into account the ACAS Code of Practice on Disciplinary and Grievance procedures, at the same time bearing in mind that compliance or non-compliance with the Code is not determinative of that – or any other – issue.

9. The only 'live' issue in relation to the complaint of wrongful dismissal [breach of contract in failing to give notice of dismissal or pay in lieu of notice] is: did the claimant fundamentally breach the contract of employment by an act of gross misconduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed gross misconduct.

10. There is no particular magic in the words, "gross misconduct". They are just a convenient shorthand for [something like]: conduct of the employee so serious it constitutes a fundamental or repudiatory breach of the contract of employment. A fundamental or repudiatory breach is one going to the root of the contract; one (to use the language of some of the cases) evincing an intention on the part of the contract-breaker no longer to be bound by the contract's terms. I find it helpful to think of it as conduct on the part of the employee that breaches the so-called trust and confidence term, i.e. conduct without reasonable and proper cause that is calculated or likely to destroy or seriously to damage the relationship of trust and confidence term between employer and employee.

11. In considering whether there was gross misconduct, I am not concerned, as I am in relation to unfair dismissal, with what the respondent believed, reasonably or otherwise, nor with whether the respondent acted within the 'band of reasonable responses'; I am conscious of the different approaches that I need to take to, on the one hand, determining liability for unfair dismissal and, on the other, the wrongful dismissal complaint.

The facts

12. The essential facts are not materially in dispute, or, to the extent they are, there is no sensible evidential basis upon which the claimant can dispute them.

    12.1 Within the respondent's disciplinary procedure, which had been drawn to the claimant's attention before the events with which this claim is concerned (even if he never looked at it), the following are given as examples of gross misconduct: "*Leaving vehicle unattended (except in pursuance of duties)*"; "*Found to be off designated route … without permission*"; "*Unauthorised stop en route (linehaul vehicles only)*" [applicable to the claimant at the relevant time].

    12.2 The claimant had had various bits of training, including induction training, at which it had been emphasised that drivers must not stop on route without obtaining authorisation to do so.

    12.3 The respondent's 2019 Driver Handbook, which the claimant had specifically been trained on and acknowledged receipt of in March 2019, contained a "*no stopping procedure*" which included the following:

    - *Routes must be followed without making any unauthorised stops.*
    - *If a driver needs to stop, the Traffic Office must be informed immediately via the in-cab phone, who will authorise the stop.*

    12.4 The reasons the respondent takes stopping without authorisation so seriously – and they seem to me to be perfectly good ones – include: protecting drivers and protecting the respondent from theft of goods and vehicles, its vehicles being

liveried and capable of being used for dishonest purposes by people pretending to be from the respondent, leading to damage to its reputation.

12.5 The incident that led to the claimant's dismissal occurred overnight from 17 to 18 March 2020. He had set off from his base in Peterborough in the afternoon or early evening of the 17th, had travelled to Oldbury, where a new trailer had been loaded, and had then gone to the respondent's depot in Snetterton, Norfolk. He had passed through Coventry, along the A14 past Lutterworth and Kettering, the A505 in Cambridgeshire, and the A11 past Bury St Edmunds, ending up in Snetterton at about 1.20 am. He set off from the depot in Snetterton to head back to Peterborough, now with an empty trailer, at between twenty and quarter to three in the morning.

12.6 The claimant stopped for approximately 16 minutes, without prior or retrospective authorisation and without speaking to the respondent's Traffic Office, at a service station a mile or less from the Snetterton depot. This was, on any view, an unauthorised stop. The claimant has always admitted that he made it, and therefore (although he may not have appreciated this) that he was potentially guilty of gross misconduct. The relevant issue during the subsequent disciplinary process was always what mitigating factors there were: why he made the stop and why he didn't telephone the Traffic Office to tell them about it.

12.7 Between the Snetterton depot and the service station, there was a roundabout that the claimant could have driven around to return to the depot if there was a need for him to stop somewhere for a good reason so soon after setting off.

12.8 In the respondent's vehicles, there is an electronic device to be activated when a driver sets off on the journey. It was not activated when the claimant set off from the Snetterton depot but only when he left the service station.

12.9 While the claimant was travelling between the service station and his Peterborough base, an attendant from the service station apparently telephoned the police to say that an HGV driver had attempted to buy a bottle of whisky. The police in turn contacted the respondent. As a result of this, the claimant was breathalysed as soon as he arrived at Peterborough. The test showed he had not been drinking at all. During the proceedings, a lot of time and energy has been devoted by the claimant and on his behalf to this issue. For example, he has sought to demonstrate that the service station in question does not sell alcoholic drinks and has complained – unjustifiably I think – about the breathalyser test. Scepticism has also been expressed as to whether it is really true that the respondent was given this information by a service station attendant via the police. The claimant has in my view been misguided in relation to this. It is one of a number of irrelevant details he seems to have become fixated on.

12.9.1 The fact that he was unable to buy a bottle of whisky would not necessarily have stopped him from trying to do so.

12.9.2 He was not disciplined for trying to buy alcohol or for drinking – his breathalyser test result has never been questioned by the respondent.

12.9.3 The respondent found out about the stop somehow – it would not automatically have known about it, because no one routinely went through the detailed records of journeys that are recorded on its automated systems.

12.9.4 What would anyone have had to gain from making this up?

12.10 The claimant was suspended on 19 March 2020 on full pay pending investigations into an at-that-stage-alleged unauthorised stop. The suspension and investigation was conducted by a Mr Belsten, then Linehaul Operations Manager – Designate. On or before 21 March 2020 the claimant received a letter confirming his suspension and the reasons for it and an invitation to a formal investigatory meeting.

12.11 On 21 March 2020, the claimant sent the respondent an email and letter providing an explanation for what had occurred. He wrote that he had stopped because the trim on a wheel arch had come off and he needed to stop in a safe and well lit place to put it back on. He has consistently said and written something similar throughout.

12.12 There was an investigatory meeting on 25 March 2020 between the claimant and Mr Belsten, with the claimant's adult son acting as an interpreter, conducted via Google Hangouts (a telephone and video conferencing electronic application, similar to Skype) because of the Covid-related 'lockdown'. It was recorded and there are minutes prepared from the recording, to which I refer.

12.13 By a letter of 9 April 2020, the claimant was invited to a disciplinary hearing, again to be conducted via Google Hangouts. I refer to that letter, and to the enclosures that went with it, which included all documents on which the respondent intended to rely, including the minutes of the investigatory meeting. The hearing took place on 16 April 2020 and was conducted by Mr S Dunkley, Linehaul Operations Manager. Again: the claimant had his son as his interpreter; the hearing was recorded and there are minutes, to which I refer, in particular the parts of them highlighted in Mr Dunkley's witness statement. Mr Dunkley had previously had very few dealings with the claimant.

12.14 Mr Dunkley's decision to dismiss the claimant summarily for "*performing an unauthorised stop on your route*" was given in a letter dated 20 April 2020, which speaks for itself.

12.15 The claimant appealed and I refer to his undated letter of appeal and to an email he sent on 4 May 2020 to the individual conducting the appeal hearing, Miss S Husein [then Hayward], Head of Linehaul. The appeal hearing eventually took place via Google Hangouts on 6 May 2020 and I once again refer to the minutes and in particular to the parts of them highlighted in Miss Husein's witness statement. Miss Husein had had no significant prior dealings with the claimant at all.

12.16 Miss Husein told me, and I accept (having no good reason to doubt her), that she had previously dealt with disciplinaries and disciplinary appeals involving unauthorised stops and the outcome had invariably been dismissal.

12.17 Some evidence was put before me of instances where drivers for the respondent had been found guilty of making unauthorised stops and ended up not being dismissed. However:

12.17.1 none of those instances involved Mr Dunkley or Miss Husein as the disciplinary or appeal officer;

12.17.2 as best I can tell from the (understandably) limited paperwork provided, in each case there were significant mitigating factors not present in the claimant's case;

12.17.3 they serve only to demonstrate how seriously the respondent takes unauthorised stops, with dismissal always seemingly being the starting point in terms of sanction.

12.18 After the appeal hearing, Miss Husein had someone from the respondent who dealt with its mobile telephony provider, EE, check whether there were network issues in the Snetterton area at the time of the claimant's authorised stop, and it was confirmed that there were not.

12.19 Neither Miss Husein nor Mr Dunkley had any discernible axe to grind against the claimant, nor was there anything discernibly untoward about the way in which they conducted the disciplinary and appeal hearings.

12.20 I refer to Miss Husein's outcome letter dated 11 May 2020 dismissing the claimant's first appeal.

12.21 There was a further appeal, also unsuccessful, by letter of 16 May 2020, and a second and final appeal hearing, dealt with by a Mrs Hughes. There was no witness evidence from her, not even a statement. However:

12.21.1 the course of the second appeal is fully documented, including a transcript of the second appeal hearing of 28 May 2020;

12.21.2 the claimant had made no particular allegations of unfairness in relation to that second appeal hearing, except as to its outcome;

12.21.3 from the transcript and other documentary evidence, I can see nothing significantly wrong with what happened at that hearing, nor more generally in relation to the second appeal;

12.21.4 the evidence provides no basis for me to think that Mrs Hughes made her decision for any reasons other than those set out in her appeal outcome letter of 12 June 2020.

13. The evidence before me consisted of: a file of documents with around 330 pages in it; some additional documents provided by the claimant at the start of the hearing, which were largely irrelevant and certainly did not have the importance the claimant put on them; the witness statements and oral witness evidence of Mr Dunkley, Miss Husein, and the claimant.

14. The claimant gave his oral evidence in Polish, through a Tribunal-appointed interpreter. I had read his statement before the start of the hearing and I was concerned that:

    14.1 it was in English, without a Polish version and without any kind of statement at the end of it to the effect that it had been translated into Polish for him before he signed it;

    14.2 it did not read to me as if it was in the claimant's own words in translation (as it might have been – the claimant's son is fluent in English and, as I understand it, his representative's, Mr Gracka's, mother tongue is Polish) but as something that had been completely written for him by someone more accustomed than him to preparing witness statements for use in Tribunals, in their words;

    14.3 there appeared to be some contradictions between some of the things set out in the statement and things he had previously said and written.

15. I therefore directed that before we started to hear from any witnesses, the claimant should, in private but accompanied by Mr Gracka, go through his statement with the interpreter, line by line, noting any errors, so that they could be identified at the start of his oral evidence and so that Mr Gracka could be sure of the case he was to put to the respondent's witnesses (who were to give their evidence before the claimant) in cross-examination. What I was particularly keen to avoid was the regrettably common situation where a witness is challenged on something in his statement and seeks to disown what is written there.

16. My direction caused a delay to the start of the hearing of over an hour, which was a little surprising given that the claimant's statement was only 8 ½ double-spaced pages long, but perhaps demonstrates how thoroughly it was gone through. The claimant confirmed to me at the start of his oral evidence that his statement had been translated for him into Polish line by line by the interpreter, as I had requested, and that there were no mistakes at all in it.

17. There was nothing particularly noteworthy about the respondent's witnesses' evidence, either in terms of its contents or in the way in which it was given. The oral evidence of Mr Dunkley and Miss Husein was substantially consistent with what was in their witness statements and in the response and neither of them was significantly undermined in cross-examination.

18. The same cannot be said of the claimant. Making all allowances for the fact that he gave evidence through an interpreter and for things being 'lost in translation', and for nervousness and so on, and taking full account of the fact that people can be inaccurate in one part of their evidence without this necessarily making all their evidence suspect, I found him a most unsatisfactory witness. He contradicted himself, at the time of the events with which this claim is concerned, during the proceedings, and in Tribunal; he told me things that simply couldn't be true; a few times he seemed to be making things up as he went along. The overall impression I gained was of someone convinced that he had been treated unfairly and that he deserved to win, someone who was at times genuinely confused, but who at others was less concerned with whether what he was telling me was accurate than with whether it would (he thought) help or hinder his case. Although I am unsure as to whether he was ever wilfully lying – he may well have persuaded himself in the moment that what he wanted to be true, but which wasn't,

was indeed true – I am afraid I do not accept anything he said about matters in dispute where it was not adequately corroborated by other evidence.

19. I shall now give some examples from the claimant's evidence – a far from comprehensive list – of what I've just been referring to. In the course of doing so, I shall be going into some of the key evidence in detail, showing why the claimant's version of events could not and cannot be trusted.

20. One of the main pillars of the claimant's defence was that he believed he was entitled to stop without authorisation on 18 March 2020.

    20.1 In his email and letter of 21 March 2020, he alleged he had been told in training "*that stopping with an empty trailer would not need authorisation / be an issue*".

    20.2 In both the investigatory meeting and disciplinary hearing, he alleged he had been told during his induction training in 2017 by someone whose name he couldn't remember – but who was not someone called Michael Faraday who he also mentioned[1] –that he didn't have to call the Traffic Office if he had an empty trailer and the stop was up to 15 minutes long. He did not explain why he hadn't called when the stop was approaching this 15 minute deadline.

    20.3 In his undated appeal letter, he stated "*I was never told that I had to ring in, when on empty trailer, when I was to stop up to 15 minutes*".

    20.4 In the first appeal hearing, he repeated the allegation that in training he was told he was allowed to stop for 15 minutes without having to call if he didn't have a load. He again could not explain why he hadn't called given that he stopped for over 15 minutes.

    20.5 In his appeal letter of 16 May 2020, he stated that when without a load, "*you can stop for a short while in a safe place and you do not need to call so as not to block the line because it is busy*".

    20.6 In the second appeal meeting, the claimant (through his son) stated that a trainer called Gabrielle[2], during training in February 2020, "*said that it was okay to stop for fifteen minutes if you're empty and that there wouldn't be any consequences or any … punishment*". He has been unable to explain why he didn't mention this previously. He also told me during the hearing that the person who had told him about this supposed 15-minute stop policy was called Geoff or Jeff and that they had told him this in 2019.

    20.7 He also told Mrs Hughes at the second appeal hearing that if he hadn't been suspended he would have told his manager about what had happened on his next working day after 18 March 2020. He has not explained why he would have

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[1] Initially the claimant said it was him, but he subsequently said, with apparent certainty, that it wasn't.

[2] In his witness statement, he alleges that this is a transcription error and that he actually said "Michael". I suppose it is just about possible that the transcriber could mishear "Michael" as "Gabrielle", but it doesn't seem very likely. In any event, he definitely did say that he was told about this in 2020, whereas he had previously been clear that he had been told "*years ago*", in 2017.

done this given that, on his own case, he did not realise there was anything requiring an explanation.

20.8 In his witness statement, he said he was "*personally informed*" by Michael Faraday (not Geoff/Jeff or someone whose name he couldn't remember or Gabrielle) that "*it was ok to stop without authorisation when a vehicle is empty*". He suggested that he knew from training in March 2020 and his induction course in 2017 "*that stopping en-route is not officially permissible without gaining prior authorisation*", but that he had understood there was what he referred to as the respondent's "*unofficial stop policy – namely that the truck needed to be empty and the stop … no longer than 15 minutes*". He had previously suggested that he was unaware of the official policy until told about it during the investigatory and disciplinary process. I have already referred to what he put in his undated appeal letter about his state of knowledge. When asked which was right – the account given in the witness statement or the suggestion that he didn't know he was officially supposed to get phone authorisation for every stop, he tried to suggest that both were; he made no attempt to account for the contradiction; he seemed not to see that there was a contradiction.

20.9 At one point during the Tribunal final hearing, he said he had in his possession, at home, a relevant page from the respondent's employee handbook that was missing from the bundle, to the effect that he could stop for up to 15 minutes with an empty load without phoning in. That this was completely new and surprising evidence, which had never been mentioned before, which completely contradicted large swathes of his other evidence, and which begged the unanswerable question 'why was that page never put before the respondent during the disciplinary process, nor put before the Tribunal during these proceedings?', escaped him.

20.10 During cross-examination, he said various further contradictory things:

20.10.1 that he was told in training that he positively should not call the traffic office for a short stop if he had no load (i.e. if his trailer was empty);

20.10.2 that he thought he could do a short stop without authorisation even if he had a load;

20.10.3 that he was not sure what if any difference there was between the rules that applied when he had a load versus when he didn't;

20.10.4 that he thought he needn't call into the traffic office if he stopped for less than 15 minutes even with a full load;

20.10.5 that if he had a short stop he would report what had happened the next day;

20.10.6 that there were no differences between the rules applicable when carrying a full versus an empty load.

21. A related aspect of his case was his assertion that he did not need to call the Traffic Office.

21.1 In the claimant's email and letter of 21 March 2020, he suggested – without saying so in terms – that he had not attempted to call the Traffic Office on 18 March 2020, because he didn't think he needed to. He gave similar evidence at the investigatory meeting.

21.2 At the disciplinary hearing, he explicitly said – through his son – that he did not call anyone "*because he was frustrated that it* [the mudguard / trim on the wheel arch] *fell off as it's happened before*". He also alleged he had been told in the same training session something about not blocking the line to the Traffic Office when it's busy.

21.3 Neither in his undated appeal letter, nor in his email of 4 May 2020 (containing, in his words, what "*At the appeal hearing, I would like to focus on*") did he suggest he had attempted to call the Traffic Office.

21.4 In the first appeal hearing, for the first time, there was a suggestion that he did not call, or – possibly – that he had tried to call but unsuccessfully so (the claimant, through his son, said contradictory things about this during the hearing), because of mobile network problems. He has not explained why he tried to call, given that on his case there was no need for him to do so; nor has he explained why he didn't mention trying to call and alleged network problems before.

21.5 In his appeal letter of 16 May 2020 he said explicitly that he had made one – and "*only one*" – attempt to contact the Traffic Office on 18 March 2020, but also stated that he "*made the mistake of not calling*".

21.6 In the second appeal meeting, the claimant's son on the claimant's behalf said, "*my Dad did try to phone … but on the phone in the cab it said it was engaged so when he tried to call … it said engaged … and he has a picture of the phone if you would like to see it, he can send it over through email*". When taken to this in cross-examination, the claimant insisted that the problem was that the network was down and sought to explain his son's words by saying that perhaps his son had misunderstood. Such a misunderstanding is improbable.

21.7 Later during the second appeal meeting, he was asked about the picture he had referred to. Apparently it showed that the telephone network was down. He was unable satisfactorily to explain to Mrs Hughes: why he took the photo in the first place, given that he (allegedly) had no idea that he was being accused of having committed a disciplinary offence of stopping without obtaining telephone authorisation on 18 March 2020; why he had not provided it to Mr Dunkley or mentioned it to Mr Belsten. He also could not explain to me why it had not been included in the bundle of documents put before me.

21.8 In his witness statement, he said that he "*tried to call in to the office a couple of times but the network appeared to be down*", without mentioning the existence of his photo, or acknowledging his previous suggestions that he hadn't tried to call at all, or had tried to call but only once.

22. There was a lot of evidence about checking wheel nuts, something of no significance in itself, but what the claimant said is illustrative.

22.1 The claimant suggested throughout the investigatory and disciplinary process that one of the things that he had done when he stopped at the services in

Snetterton was to check his wheel nuts. He seemed to be under the impression, something he persisted with at this final hearing, that because a tyre had been changed on his lorry he was obliged to check the torque on the wheel nuts every 40 to 80 km. This does seem to have been a genuine misunderstanding on his part.

22.2 However, he could not really explain why, in any event, he would be checking the wheel nuts a mile out from the Snetterton depot; nor how he could check the torque on the wheel nuts without an appropriate tool.

22.3 He was taken to the log of his journey on 17 to 18 March 2020 and it was pointed out to him that he hadn't stopped every 40 to 80 km, or – to check his wheel nuts – at all. When asked to explain this, he started to suggest that there was nowhere safe to stop on his entire route. When I pointed out to him that that was implausible given what his route was, described earlier (with parts of which I am familiar), he was unable to answer.

23. The final example concerns the reason for dismissal.

23.1 The claimant's case on paper is that the real reason he was dismissed was because the respondent (quoting from his witness statement and then the Particulars of Claim attached to the claim form) "*wanted to reduce its workforce of drivers, particularly those with long service, and was looking for reasons to terminate contracts*" to enable the respondent "*to be more flexible in terms of being able to terminate contracts under governmental policies surrounding* [the] *impact of governmental lockdown, or for other unfair reason*". In the Particulars of Claim, he made specific reference to a particular driver who had been employed for 15 years and who had been dismissed.

23.2 The claimant was cross-examined about this, starting with the obvious point that he did not have long service. He said that the respondent was getting rid of drivers with more than 2 years' service. He accepted that that would have meant getting rid of hundreds of drivers.

23.3 He suggested (Mr Gracka having previously put this allegation to Mr Dunkley in cross-examination; that being the first time any such allegation had been made by the claimant or on his behalf) that what the respondent was actually doing was getting rid of existing drivers and bringing in cheaper Rumanian ones. He didn't explain:

23.3.1 why that hadn't been brought up before;

23.3.2 nor what it had to do with flexibility and lockdown;

23.3.3 nor why it meant the respondent wanted to get rid of those with more than 2 years' service (who would, of course, be harder to get rid of than those with less than 2 years' service);

23.3.4 nor why he had no evidence at all beyond his own say-so to support his allegations;

23.3.5 nor why he had never provided any details of his allegations, for example the names of people who had been dismissed and roughly when they had been dismissed.

23.4 It seems to me that if there was any truth in what the claimant was saying, he would know dozens of drivers who had, like him, been dismissed from whom he could and would have obtained at least an email or letter or informal statement of some kind.

Decision on the issues

24. I shall deal with unfair dismissal first.

25. It is clear beyond a shadow of a doubt that that the reason for dismissal – the reason in Mr Dunkley's and Miss Husein's mind – was a genuine belief in the claimant's guilt of a gross misconduct offence. Mr Dunkley appeared almost bewildered and incredulous when the claimant's case – as it developed – to the effect that the respondent wanted to replace existing drivers with cheaper Rumanian alternatives – was put to them. Mr Dunkley pointed out that he had nothing to do with contracts with new drivers and that the respondent celebrates long service. The allegation was not even put to Miss Husein – who was senior to Mr Dunkley and would surely have been better placed to comment on this allegation. She was also not cross-examined on her evidence in her statement that there is a shortage of HGV drivers in the UK, something that is so well known I think I would anyway have been able to take judicial notice of it. The claimant's suggestion that he was dismissed as part of a secret plan to replace drivers with cheaper Rumanian ones is inherently incredible and is completely unsubstantiated.

26. Did the respondent have reasonable grounds to sustain its belief in guilt? In a word: yes. As I pointed out earlier in these Reasons, there was never any dispute that the claimant was guilty of a gross misconduct disciplinary offence. Given this, the investigation that was undertaken, which included a reasonably length investigatory interview and then (by the end of the entire process) three further interviews with the claimant, during which he had every opportunity to put forward anything and everything he wanted to, was reasonably thorough; and I note in this respect that the relevant evidence put before me by the claimant after more than a year of Tribunal proceedings is not significantly greater than that put before the respondent. What was relevant to the respondent (as to me in relation to wrongful dismissal – see below) is what mitigation there was – and the onus was on the claimant, reasonably and probably necessarily so, to come up with evidence to back that up. Instead, particularly in relation to the first appeal, the claimant chose to focus on irrelevancies, such as the allegation, found by Mr Dunkley to be unproven, that he had attempted to purchase alcohol, and the claimant's belief that he was being framed by Mr Belsen. Mr Belsen did not need to, and did not, frame him: he all along, for all intents and purposes, admitted his guilt.

27. In terms of procedure, I can see no basis for criticising the respondent to any significant extent. By having a second full appeal, the respondent did more than merely comply with the ACAS code.

28. The real issue all along has been whether it was within the band of reasonable responses for the respondent to dismiss. It seems to me that in the absence of significant mitigating factors it was, given that the claimant was guilty of something

specified in the respondent's written policies and procedures as gross misconduct, and given that it was in practice something the respondent invariably took very seriously, and given that there were perfectly good reasons for it being a gross misconduct offence to be taken very seriously. Had the claimant persuaded the respondent during the disciplinary process that he genuinely had been told at training he did not need to call the Traffic Office and/or that he had made concerted attempts to call them on 20 March 2020, then I might possibly have decided that dismissal was unreasonably harsh; but he didn't. Given the evidence the claimant presented to the respondent and the case (or, rather, multiple different cases) he put forward, the respondent's – Mr Dunkley's, Miss Husein's, and Mrs Hughes's – conclusions are unsurprising and were entirely reasonable.

29. In short, the dismissal was fair in accordance with ERA sections 98(1) and (4).

30. Turning to wrongful dismissal, I was, at the start of the hearing, expecting to find my decision-making on this much more difficult than it has proved to be. In so far as I had preliminary views on the wrongful dismissal claim, they were in the claimant's favour. However, I am afraid that I have been left by the end of this hearing in much the same position as the respondent's decision-makers. Like them, my starting point is that the claimant has done something that is deemed gross misconduct within the respondent's policies and procedures. I have also become persuaded, as indicated above, that it was eminently reasonable for making unauthorised stops to be deemed gross misconduct. Although whether or not an employee is guilty of a fundamental breach of contract, entitling the employer to dismiss summarily, is a matter for objective assessment by the Tribunal, what is or is not so serious as to be fundamental varies from employment to employment and the employer's views – expressed through its policies and procedures – and its general practice are highly relevant.

31. I do not accept that the claimant made any attempt to notify the Traffic office, nor that he was unaware of the requirement to do so in relation to any and every stop. I am unsure why he did not do so, but it may well have been, as his son said on his behalf at one stage, that it was because he was angry or frustrated that the mudguard / trim of the wheel arch had yet again come off his lorry; or it may have been because he couldn't be bothered and thought he would get away with it. Certainly, I am not satisfied that it was for any good reason. He did not tell the truth to the respondent, nor show any genuine contrition (despite his son's best efforts to paint him as sorry for what he had done).

32. All in all, the claimant acted in a way that breached trust and confidence between the respondent and him; and by doing that repudiated the contract of employment. The respondent was entitled to dismiss him without notice and his wrongful dismissal claim fails.

Employment Judge Camp

4 November 2021