EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr D Moore	Howden Joinery People Services Ltd

Heard at: **CVP** **On: 18, 19, 20 October 2021**
Before: **Employment Judge Davies**

Appearances
For the Claimant: **Ms A Smith (counsel)**
For the Respondent: **Mr A Webster (counsel)**

JUDGMENT having been sent to the parties on 21 October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was a complaint of unfair dismissal brought by the Claimant, Mr D Moore, against his former employer, Howden Joinery People Services Ltd. The Claimant was represented by Ms A Smith (counsel) and the Respondent was represented by Mr A Webster (counsel).

2. There was an agreed file of documents. I heard evidence from the Claimant and Mr Bulmer and Mr Clarkson on his behalf. For the Respondent I heard from Mr L Fillingham (former Transport Supervisor), Mr M Ford (Transport Manager) and Mr C Nissen (National Transport Manager).

The Claims and Issues

3. The issues to be decided at this hearing were:

Unfair dismissal

3.1 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

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

3.2.1 there were reasonable grounds for that belief;
3.2.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
3.2.3 the Respondent otherwise acted in a procedurally fair manner;
3.2.4 dismissal was within the range of reasonable responses.

Remedy

3.3 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.4 If so, should the Claimant's compensation be reduced? By how much?
3.5 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
3.6 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
3.7 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

4. Issues relating to reinstatement, re-engagement, mitigation and the calculation of compensation will now be determined at a separate remedy hearing.

The Facts

5. The Respondent is a manufacturer and supplier of kitchen and joinery products. The Claimant worked at its Goole Distribution Centre as an LGV driver from December 1996.

6. The Respondent had a disciplinary and appeals procedure. It placed significant emphasis on consistency and fairness. Six fundamental principles were set out at the start of the policy, including (1) that the company would try to resolve the situation by fair and reasonable means, in a uniform manner; (2) that managers would at all times when implementing the procedure do their utmost to display a consistent, fair and equitable approach towards disciplinary issues; and (3) that the procedure would only be used where it was clearly necessary, its purpose being an aid to improvement rather than punishment. In the section on implementing the disciplinary procedure, it was made clear that managers "must ensure that all decisions reached are fair and consistent." Managers must also ensure that full documentation, including notes of meetings and telephone calls were kept at all stages. The policy gave examples of conduct that might be regarded as gross misconduct. One of those was, "serious breaches of health and safety rules, policies and procedures, potentially endangering the safety of the individual, others or the reputation of the company."

7. The staff handbook contained a health and safety policy statement, which contained generic statements of principle and intent by the Respondent.

8. LGV drivers were provided with a driver handbook. It included a section on loading and securing chipboard loads. This was said to reflect the company's Standard Operating Procedure ("SOP"), although I was not provided with a copy of that. The handbook made clear that six lifts of chipboard should be secured with 12 ratchet straps and provided a diagram illustrating three straps across the top of each lift

and one strap through the middle. The handbook did not say that failure to comply with any of its contents was or might be regarded as a disciplinary matter. The introduction said that the company "asked" drivers to follow safe working methods. The Claimant accepted that he knew he was required to comply with this strapping policy and that under the policy six lifts of chipboard should be secured with 12 straps as described.

9. Before the incident that gives rise to this claim, the Claimant had more than 20 years' service for the Respondent as an LGV driver during which he had no accidents and a clean disciplinary record.

10. On 14 July 2020 the Claimant had an accident while carrying out a delivery in Scotland. His vehicle tipped over. According to the subsequent investigation report by Mr Fillingham (see below) the load was still secured afterwards. Thankfully the Claimant suffered only relatively minor injuries. He was released from hospital late that evening and spent the night in Scotland. He drove to work the next day where he had an accident meeting with Mr Fillingham. No note was kept.

11. The Claimant was absent until Tuesday, 21 July 2020, when he did work in the yard. He was interviewed by Mr Fillingham about the accident with a notetaker present that day. Mr Fillingham asked the Claimant for his version of events and how the board had been loaded and secured. The Claimant immediately said he had loaded it, "2–2–2 with nine straps." He said that he knew the road in question well. He had been doing about 20 miles an hour and had used the foot and exhaust brakes to slow himself down. He had no issues at all with the load. He was asked if he had anything else to say. He explained, "I know the corner goes right and it pushes you left but when I pressed the exhaust brake at third time I pressed it down it kicked in." Mr Fillingham asked him whether the back end moved when the exhaust brake engaged and he said that it came on hard when he got to the corner and it pushed left. He said that he had done that run more than a hundred times and never had an issue with it. Mr Fillingham did not ask the Claimant any questions about the strapping or discuss the Respondent's policy about that with him, for example by asking him if he was aware of what was required or why he had not complied with it.

12. Mr Fillingham said in cross-examination that he understood the Claimant was saying that the exhaust brake may have caused the accident. He did not look into that at all, for example by having the brakes checked. After the interview, the Claimant did a delivery in the works van and then drove on to Scotland to collect his belongings. When he returned to the yard in the evening he was suspended by Mr Ford. Mr Ford and Mr Fillingham had evidently had a discussion, although no notes were kept of it and it was not mentioned in either of their witness statements. Mr Ford said in cross-examination that Mr Fillingham told him that it was alleged that the Claimant had committed a major health and safety breach and that he was therefore suspended in accordance with the disciplinary policy. That was Mr Ford's decision.

13. The letter of suspension referred to "serious breach of health and safety rules, policies and procedures, potentially endangering the safety of an individual, others or the reputation of the company" – clearly a direct quote from the disciplinary

policy examples of gross misconduct. The letter explained that this referred to the road traffic accident on 14 July 2020, but did not specify what the Claimant was alleged to have done in breach of health and safety.

14. After interviewing the Claimant, Mr Fillingham did not speak to anybody else. He reviewed the Claimant's training record, which showed that in July 2019 he had done refresher training that included chipboard securing as one of 34 modules covered. Mr Fillingham also looked at the Microlise daily report. That is based on data recorded from the vehicle, such as driving time, acceleration, fuel consumption and speed. For 14 July 2020 the Claimant scored grade A, the highest grade, given for excellent and efficient driving. Mr Fillingham also reviewed his tachograph data, dashcam footage and photographs. He reviewed a Transport Risk Control Observation Sheet, apparently used by managers to perform spot checks with drivers. Mr Fillingham had used it with the Claimant on 6 July 2020. The second page of the sheet replicates the strapping diagram in the driver Handbook. There were no markings at all on that page of the sheet and nothing to suggest there had been any discussion of it between the Claimant and Mr Fillingham on 6 July 2020. However, it conveniently set out the strapping policy as recorded in the driver Handbook.

15. In his witness statement Mr Fillingham said that he concluded that the Claimant was aware that the Respondent's "health and safety procedure" required 12 straps to be used and that the Claimant had used nine. He had failed to follow that procedure and was involved in an accident which could have had serious consequences. He concluded that there was a "case to answer" and that disciplinary proceedings should be instigated. It was not for him to make a final decision whether the Claimant had committed gross misconduct. Mr Fillingham's witness statement had all the hallmarks of being drafted with legal advice and using more legal language and concepts. The contemporaneous documents presented a somewhat different picture.

16. Mr Fillingham produced a brief investigation record on 29 July 2020. The details of the allegation were said to be a "breach in health and safety for strapping and securing loads to the correct SOP (Gross Misconduct)." In a section labelled findings, Mr Fillingham wrote, "A breach in H&S for not using the correct number of ratchet and straps as per company policy and SOP. This is gross misconduct as all areas of training and securing procedures are signed. And been a part of the H&S team signing off other members of staff on the observation check sheets that shows the procedure. Looking at the speed and times on the vehicle camera footage and cross referencing with the Microlise reports he was travelling at 23.7 mph on a 40 mph carriageway before the first corner, this shows him slowing down from 37.9 mph. The load was still in trailer when the vehicle had rested on its side, as the pictures show."

17. It is clear that Mr Fillingham did reach and express a conclusion that the Claimant had committed gross misconduct, which was outside the scope of his remit. Mr Fillingham's findings made no reference to what the Claimant had said about the exhaust brake.

18. On 4 August 2020 the Claimant was invited to a disciplinary hearing. The letter set out the same generic allegation that was contained in the suspension letter.

The Claimant was provided with the investigation report and the documents Mr Fillingham had reviewed. Mr Ford said in evidence to the Tribunal that the alleged breach of health and safety was a failure to comply with the SOP in relation to strapping. The letter did not say so, but it was clear that the Claimant in fact understood that the allegation was about a breach of the strapping policy. He was asked at the start of the disciplinary hearing whether he knew why he was there and he confirmed that it was for breaking the company policy on strapping.

19. The disciplinary hearing took place on 10 August 2020. Mr Ford conducted the hearing with Ms Thorpe from HR as note taker. The Claimant attended with Mr Clarkson his trade union representative. In cross-examination, Mr Ford said that he was not concerned that Mr Fillingham had overstepped the mark in expressing a view that the Claimant had committed gross misconduct. He was not concerned that Mr Fillingham had not put specific allegations to the Claimant - he may have done, but it was not recorded in the notes. He accepted that he had not asked Mr Fillingham whether he had done so. Mr Ford was not concerned that Mr Fillingham had carried out no investigations into what the Claimant had said about the exhaust brake because it was not relevant.

20. As already noted, the Claimant confirmed at the outset that he knew he was at the hearing for breaking company policy in relation to strapping. Mr Ford responded that it was "for a breach of health and safety." The Claimant said that if he had been stopped by the police he would have been, "okay legally" although he did understand the company policy. Mr Ford simply responded, "We have a company policy which we must follow." In cross-examination, it was put to Mr Ford that this was an absolute for him, and he agreed. Mr Ford agreed that the Claimant was accused of endangering people by his actions and that if he had complied with the law that would dramatically reduce the chance of his endangering people. Mr Ford also agreed that if the Claimant had broken the law it could have made it even more serious. He agreed that if the Claimant was complying with the law, that therefore potentially impacted how serious his breach was. It was suggested to him that the fact he was so dismissive of the Claimant's point showed that he had entered the process with a closed mind. He disagreed. However, this was one of a number of instances when, as Ms Smith put it, Mr Ford appeared to "shut down" points that the Claimant put forward. At the time he did not consider whether the Claimant's load was secured in a way that complied with the law and he did not take that into account in assessing the seriousness of what he had done.

21. Mr Ford asked the Claimant for his account of events on 14 July 2020. The Claimant made clear that he had put nine straps on his load. He had done the run hundreds of times before. On that stretch of road the first bend was to the right and then it came round to the left. Where he went over there is an adverse camber. He was using the third stage of the exhaust brake because he was trying to get his Microlise score to an A. That was because there was an ongoing redundancy process and he thought Microlise scores might be used to select people for redundancy. The third stage of the exhaust brake kicked in quite hard. It was the only thing he did differently. It came on very severely.

22. In cross-examination Mr Ford accepted that he understood that the Claimant was saying he had used the exhaust brake in order to reduce his Microlise score, and

that the exhaust brake kicking in severely might have caused the accident. Mr Ford did not carry out any investigation into that.

23. Mr Ford then asked the Claimant why he had used nine straps when company policy was 12. The Claimant accepted that he had broken company policy and apologised profusely. He said that he had been driving for 20 years and had never had any problems with the strapping before. The load did not move but the wagon did. As an experienced driver he believed that the load was legally and securely strapped. He questioned whether there was any scientific evidence that the middle straps supported the load and said that some people said it was overkill. Mr Ford said that he could see where the Claimant was coming from, but the company policy stated 12. In cross-examination Mr Ford accepted that this indicated that his view in the meeting was that the company policy stated 12 and that was the end of the matter, and he agreed that it was.

24. After saying that the company policy said 12, Mr Ford said that if the accident had been far worse, with somebody else involved, it could have been serious and Mr Ford's licence would have been at risk. Mr Ford was apparently drawing a link between the strapping and the accident, although there was no evidence before him that the use of nine straps had cause or contributed to the accident.

25. Mr Ford then asked the Claimant questions about whether the exhaust brake had fulfilled its duties and how the Claimant had slowed the vehicle. He confirmed that the Claimant had been doing 23.7 mph at the point of the accident and asked whether that was the speed he would follow every time. The Claimant said, "yes, thereabouts." Mr Ford did not explore with the Claimant whether that speed was too fast.

26. Mr Clarkson asked Mr Ford to take into account the Claimant's length of service and driving experience and his admission of wrongdoing in relation to the company policy. He said that others used nine straps instead of 12. Although not reflected in the notes, it was common ground in the oral evidence that Mr Ford asked the Claimant for names of other people who did that, and the Claimant declined to provide any. Mr Ford's evidence was that because the Claimant had not provided any names, he could not investigate this further. In cross-examination he accepted that he had not taken HR advice about whether he should look into this; he had not spoken to any other drivers or managers to ask whether this was common practice; he had not done any spot checks or asked for those to be done; and he had not carried out any other investigations to find out whether it was indeed common to use nine straps instead of 12. I noted that one of the documents in the disciplinary pack was the Transport Risk Control Observation Sheet, apparently used by managers for carrying out spot checks on drivers, half of which was devoted to the chipboard loading and strapping requirements. That would have been an obvious source to investigate what the Claimant was saying. Mr Ford accepted in cross-examination that if lots of drivers were strapping in the same way, this that would potentially affect the seriousness of the Claimant's conduct.

27. Mr Ford decided to adjourn the meeting to carry out more investigations. It is not clear what those investigations were. He did obtain an expert report prepared by Wincanton into the accident. That was produced without the investigator speaking

to the Claimant. The investigator expressed a tentative view that the Claimant's speed could have been "just slightly too high" and speculated that a "very slight shift" in the load might have contributed to the vehicle tipping. He said that the calculated critical speed was in the order of 26mph and that the safe speed of travel would have been "in the order of" 20mph. He noted that the Claimant had been travelling 23mph. There was a reference to the vehicle's deceleration on approaching the bend, and the fact that the exhaust brake might "possibly" have been used, but no consideration at all of whether the use of the third stage exhaust brake might in fact account for the vehicle tipping. The author also referred to the Claimant's driving generally in the 45 minutes prior to the accident as "very good", "steady and careful", appearing to be in "no rush" and normally presenting as a "low risk." The report was expressly stated to be legally privileged and to be for the purpose of advice and information for litigation review.

28. Mr Ford sent it to the Claimant when inviting him to the reconvened disciplinary hearing. However, at the outset of that reconvened hearing on 14 August 2020 (after watching the dashcam footage from the day in question with the Claimant) Mr Clarkson objected to reliance being placed on the expert report, which was not prepared for this purpose and had not formed part of the disciplinary hearing. After a 40-minute adjournment Mr Ford agreed not to take it into account. No further evidence or information arising from Mr Ford's purported further investigations or enquiries was referred to. According to the type-written notes, Mr Ford then simply told the Claimant that, without using the Wincanton report, he had a reasonable belief that the Claimant was travelling too fast for the road conditions with the load he was carrying and that it was clearly evident that the load was not strapped in line with company policy. The company took load safety very seriously and it was always critical for the safety of drivers and members of the public that this was adhered to. Any breach of this was seen as gross misconduct. I noted that the handwritten notes simply said "Not going to use document. Still have reasonable belief that you have driven too fast, and were driving without correct strapping." That difference indicates that the fuller, type-written notes must not be construed as if they were a verbatim record or a legal document.

29. Both Mr Clarkson and the Claimant said that they disagreed with what Mr Ford said about speed. The Claimant pointed out that Mr Ford did not drive an HGV. Mr Ford simply said that it was his "reasonable belief." He did not at that point say that his belief about the Claimant's speed had no bearing on his decision.

30. After a break, Mr Ford announced his decision. He noted the Claimant's long-standing record and high level of experience but said that he had decided the Claimant should be summarily dismissed. He said that he had considered whether an alternative sanction was appropriate but that this incident was a serious breach of health and safety.

31. In cross-examination, the Claimant accepted that Mr Ford made clear in the meeting that the reason he was dismissing him was because of the strapping.

32. Both the Claimant and Mr Clarkson asked Mr Ford whether anybody else had influenced his decision. Mr Ford said that they had not. The Claimant explained in his evidence that Mr Ford's demeanour was completely different in the second disciplinary meeting. His unchallenged evidence was that between the two disciplinary meetings, during a conversation about correcting the notes, Mr Ford

told him that he wanted the investigation concluded and the Claimant back in work as soon as possible. Mr Ford's evidence was that if his demeanour had changed, it was because he did not like having to dismiss somebody.

33. Mr Ford confirmed the Claimant's summary dismissal in a letter dated 17 August 2020. This letter specified for the first time that the matters of concern regarding the Claimant's conduct were, "a serious breach of health and safety rules, specifically for failing to strap and secure his load in line with company procedures on 14 July 2020." Mr Ford recorded his reasoning essentially as being that the Claimant admitted using nine straps when the policy specified 12, that this was gross misconduct and that the appropriate sanction was summary dismissal. Mr Ford's evidence was that he dismissed the Claimant because of a serious breach of health and safety relating to strapping. He said that his belief the Claimant was travelling too fast was not the reason. He was asked why he had mentioned it and he could not provide an explanation. It was put to Mr Ford that the Claimant had been honest and apologetic, and had talked about legal requirements and the exhaust brake. Mr Ford could have taken these into account to reduce the seriousness of the Claimant's conduct. Mr Ford said initially that they were not in his conclusions, but he had taken them into account. Later in his oral evidence, he said that he had not taken into account what the Claimant said about the exhaust brake, about other people using nine straps and about nine straps being legally compliant.

34. In the light of the documentary and oral evidence, I made the following findings about Mr Ford's approach and decision-making.

35. I found that Mr Ford had a closed mindset from the outset. His thinking was that the policy required 12 straps not nine, the Claimant admitted using nine, that was a serious breach of health and safety and therefore the Claimant must be dismissed. In making that finding I took into account the following:
    35.1 Comments made by Mr Ford during the disciplinary hearing, for example about having a policy that they must follow, and the comments of that kind referred to above;
    35.2 What Mr Ford accepted in cross-examination, essentially that the policy was 12, the Claimant used nine, and that was the end of the matter.
    35.3 The fact that this seemed to reflect the reasoning Mr Ford used in his outcome letter and when giving his decision in the disciplinary hearing itself.
    35.4 Mr Ford's evidence about whether he took into account the points raised by the Claimant was inconsistent. I find that he did not. For example, he did not carry out any investigation of whether other people were using nine straps instead of 12, although he accepted in cross-examination that that was relevant to the seriousness of the Claimant's conduct. The fact that the Claimant had not provided names did not prevent Mr Ford from investigating the point, as was explored with him in cross-examination. All manner of enquiries could have been made without names and it was entirely understandable why the Claimant might not want to point the finger at particular colleagues, when he was facing dismissal for doing the same thing. It is different from referring as comparators to people who have already been subjected to a disciplinary process by the employer.
    35.5 Mr Ford did not really explore with the Claimant questions relating to mitigation or sanction. He did not ask him whether he would do anything

differently or how he might act in the future. There was no real exploration or explanation of why summary dismissal was necessary or appropriate and another sanction was not.

35.6 All of those features pointed to Mr Ford having the view that it started and ended with the use of 9 straps in breach of policy and that the inevitable outcome from that was summary dismissal.

36. However, I did find that Mr Ford genuinely believed that the Claimant had committed misconduct. The suggestion that he was put under pressure to dismiss or that this was really a money saving exercise because of the ongoing redundancy process was essentially speculation on the Claimant's behalf. The Claimant did not identify an evidential basis for it. His view was based on the comment Mr Ford made about the Claimant returning to work when they spoke between the two disciplinary meetings, and his perception that there was a change in Mr Ford's demeanour at the start of the second meeting. Mr Ford seemed to accept that there was a change, but he said that it happened during the second meeting, when he realised he had to dismiss the Claimant. I find that there was a change and that it was at the start of the meeting. The explanation was the explanation Mr Ford gave - his demeanour had changed because he was about to dismiss the Claimant. The reason it changed at the start of the meeting was because he knew from the start that that was what he was going to do. It was plain on the evidence that the decision had been taken before the meeting started. There was no exploration in the meeting of whether this was misconduct or what the appropriate sanction was. It was quite obvious that a decision had been reached and I find that Mr Ford was uncomfortable because he was about to have to give that decision. The reason for Mr Ford's change in demeanour was because he was about to dismiss the Claimant, not because he was pressured to do so in order to save money.

37. It seems to me that an important part of this was the Wincanton report. That appears to have been the only new information obtained by Mr Ford between the two disciplinary meetings. This also explains Mr Ford's reference to the Claimant's speed. The most likely explanation is that Mr Ford had made the decision he was going to dismiss the Claimant based in part on the Wincanton report. The Wincanton report made two speculative criticisms of the Claimant, one of which was that he might have been going very slightly too fast. I find that Mr Ford was going to use that to support his decision. When he started the meeting, he had to deal with the objection to the report being used at all, and eventually agreed not to rely on it. However, he still had it in his mind and attempted to rely on the same point about speed in any event, but without reference to the report. However, as the Claimant accepted, he did make clear during the meeting that really he was dismissing him because of the strapping. That is consistent with my finding about his closed mind all along. Therefore, I find that Mr Ford did genuinely believe that the Claimant had committed misconduct by using nine straps instead of 12 in breach of the policy, and that is why he dismissed him.

38. The Claimant appealed against his dismissal. He said that he admitted not following the Transport Risk Control Observation Sheet document, but that he did implement a strapping arrangement in keeping with the load restriction limits of the straps used and with industry standards. He said that his use of the exhaust brake had not been fully covered in the decision-making process. Having driven

the route many times and not used the exhaust brake system, he believed this could have had an adverse impact on his being able to take the bend. He said that drivers' work activities had not been monitored using the Observation Sheet, to establish the extent of compliance with the document. He referred to his conversation with Mr Ford on 7 August 2020 and asked what outside sources had influenced Mr Ford's decision. He said that he was aware of numerous incidents where there had been a serious breach of health and safety and people had not been dismissed. He noted that the redundancy exercise scheduled to be finalised on 14 August 2020 had been postponed until after his disciplinary process had been concluded, and suggested that this delay was manufactured to save the company money and unfairly affected his treatment at the disciplinary hearing.

39. Mr Nissen conducted the appeal, with Ms Webster from HR. The hearing took place on 2 September 2020. The Claimant attended with Mr Clarkson. Mr Nissen dealt with the appeal as a review not as a re-hearing. Mr Nissen was aware that the Claimant had made points (1) that other people use nine straps instead of 12; (2) that he was complying with the legal requirements for strapping; and (3) that he thought that the use of his exhaust brake and the way it had kicked in hard at the third stage might have been the cause of the accident. Mr Nissen was aware that no investigation had been carried out into those points and he did not carry any investigation out himself, before or after the appeal hearing.

40. At the appeal hearing the Claimant started with his point about the redundancy process and whether that had influenced the outcome. Mr Nissen said to him that it had nothing to do with it. It was put to Mr Nissen in cross-examination that this was an example of him shutting the Claimant down. He was not asking the Claimant about his point or seeing what the concern was so that he could look into it. He was providing an answer to it without actually having carried out any investigation. Mr Nissen responded that the redundancy process was paused, they were going to make 15 people redundant and he did not want to make somebody unnecessarily redundant if in fact the Claimant's dismissal were upheld. It was put to Mr Nissen that the point the Claimant was making was that Mr Ford, who had made the decision to dismiss him, had been influenced by being able to save the cost of making a person redundant. Mr Nissen's evidence was that he was involved in the redundancy process so he did not have to look that far. It was put to him again that the Claimant's point was, "Why did Mr Ford dismiss me? Was he influenced in some way by saving money?" and that that could only be addressed by investigating with Mr Ford whether that had been an influence on him in dismissing the Claimant. Mr Nissen accepted that he had not investigated that with Mr Ford.

41. The Claimant then made his point about the change in Mr Ford's demeanour. Mr Nissen asked Mr Ford about that by phone after the hearing. He did not make any note of that conversation and he did not tell the Claimant about it. It formed the basis of Mr Nissen's conclusion that the reason for the change in demeanour was Mr Ford's feeling of uncomfortableness about having to dismiss the Claimant.

42. During the appeal hearing, the Claimant named people he said had committed serious breaches of health and safety and had been treated more leniently than him. I found Mr Nissen's evidence about this wholly unconvincing. In his witness statement, again a document that has the hallmarks of being written with legal advice, he said, "I did the read-across exercise and I did not consider the

examples given relevant." However, in the appeal outcome letter written at the time he said, "As discussed with you at the hearing I am not in a position to comment on any case other than yours and I would not be taking these into account when taking my decision." In cross-examination it was put to him that that was completely contrary to what he said in his witness statement. At that stage he said that he had *not* carried out the read-across exercise, HR had done it and they had discussed it with him by phone. I found his evidence about what had been discussed by phone extremely vague. No notes were kept of such a discussion. I was not provided with any evidence from HR or otherwise about how this read-across exercise was carried out. The letter written at the time was completely unambiguous. It did not say, "We can't tell you about other people because of their privacy or confidentiality concerns but we'll look into it." It said words to the effect "I told you at the hearing that we would not take these into account and we are not doing". In view of the inconsistency between the witness statement and the oral evidence, the vagueness of the oral evidence, and the inconsistency of both compared with the document that was written at the time, I find that the accurate position is as set out in the document written at the time. Mr Nissen did not investigate the Claimant's comparators. It seems that that has been done since: see further below.

43. Returning to the appeal hearing, the Claimant again made the point that other people used nine straps instead of 12. Indeed at one point he said that nine out of 10 drivers did it. At one stage he drew a contrast with some Covid-related breaches and Mr Nissen's response to that was, "Let's not forget that the wagon went over." The Claimant pointed out that that was not what he had been dismissed for. Ms Smith asked Mr Nissen about that comment in cross-examination. Mr Nissen accepted that he made the comment and that it was a reference to the severity of the incident. It was put to him that Mr Ford had said that he was *not* taking into account the fact that the vehicle had tipped. Mr Nissen was asked whether he had taken it into account and his answer was, "I was gauging the severity of the incident based on the outcome of what actually happened". That seemed to me to be a clear indication that Mr Nissen *was* taking into account in assessing the seriousness of the Claimant's conduct the fact that he had been involved in an accident in which the vehicle had tipped. He was asked about it a little bit more and his final comment was that it was in the back of his mind but not the ultimate decision. I noted that in his witness statement Mr Nissen expressed the view that dismissal was an appropriate sanction and he explained that the Claimant had breached clear health and safety procedures and was subsequently involved in a road traffic accident where a vehicle turned over, there was significant damage and it could have been fatal. He added in his witness statement that it was not established that the accident was caused by the breach, but he said that the failure could have had serious consequences. Weighing all the evidence, I find that Mr Nissen was taking into account the fact that the wagon had tipped in assessing the seriousness of what the Claimant had done. That was clear from what he said at the appeal hearing and it was clear from his answers to Ms Smith. I place more weight on those than his carefully drafted witness statement.

44. There was no evidence before Mr Nissen that the use of nine straps was a causative factor in the tipping of the vehicle. His evidence was that he did not read the Wincanton report, which provided a speculative suggestion that there might

have been a link. The evidence before him was that the load was still secured after the vehicle had tipped, and the Claimant's account that the load had not moved.

45. The notes of the appeal hearing indicated that Mr Nissen's mindset in the appeal was very much like Mr Ford's. The appeal hearing does not reveal Mr Nissen asking Mr Moore about what his concerns were, exploring them, or taking them away to look into them. It is more of an exercise in Mr Nissen answering those concerns there and then. One further example is that the Claimant raised the point that Mr Ford had said at the disciplinary hearing that he believed the Claimant had been going too fast. Mr Nissen's immediate response was, "You weren't dismissed for speeding." Both the Claimant and Mr Clarkson were insistent and persistent in (correctly) saying this was said at the disciplinary hearing. This led Mr Nissen eventually to say, "Are you saying that Mr Ford is lying?" Obviously, any reading of the notes of the disciplinary hearing would have made clear that Mr Ford had indeed referred to a reasonable belief that the Claimant was speeding, but rather than acknowledging or engaging with that, Mr Nissen was suggesting that the Claimant was accusing Mr Ford of lying. Mr Nissen was asked about this in his cross-examination and he was asked how he had decided whether or not Mr Ford had taken the speed of the vehicle into account. Mr Nissen said that it was, "In the letter" and the letter was the "final document." He was asked how that helped in him knowing whether something that had been said at the disciplinary hearing had been taken into account or not and he acknowledged that it did not help. It was put to him that instead of looking into a point that had been properly raised, he resorted to saying that the Claimant was accusing Mr Ford of lying. His answer was that that was not how it was meant. This is one example of a more general tendency of Mr Nissen to shut down rather than engage with and explore the points that were being raised.

46. The Claimant told Mr Nissen that nine out of 10 drivers were using nine straps instead of 12. Mr Nissen's answer to that was, "We have the rules for a reason" and then he asked the Claimant whether there was anything else. He did not carry out any further investigation or consideration of this point that nine out of 10 drivers were doing the same thing and it is not referred to in the appeal outcome letter.

47. The process, therefore, was that the Claimant wrote an appeal letter. Mr Nissen did not carry out any investigations before the appeal hearing. He conducted the appeal hearing in the way described above. After the hearing, the only investigation carried out was a conversation with Mr Ford about a change in his demeanour. That was not documented. Mr Nissen sent an outcome letter dismissing the Claimant's appeal on 4 September 2020. He dealt briefly with the Claimant's written appeal points. He said that it was irrelevant whether the Claimant had complied with the legal requirements for strapping; this was about policy only. As far as the exhaust brake was concerned, the Claimant had not raised concerns before and he had had training on it. As noted above, Mr Nissen wrote that he was not considering the other people the Claimant had identified who had breached health and safety, and he said that Mr Ford had not been influenced by anyone else. He was troubled because he was going to have a difficult conversation with the Claimant.

Legal principles

48. So far as unfair dismissal is concerned, s 98 Employment Rights Act 1996 provides, so far as material, as follows:

> **98 General**
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it –
> …
> (b) relates to the conduct of the employee,
> …
> …
> (4) 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.
> …

49. It is well-established that in a claim for unfair dismissal based on a dismissal for misconduct, the issues to be determined having regard to s 98 are: did the employer have a genuine belief in misconduct; was that belief based on reasonable grounds; and when the belief was formed had the employer carried out such investigation as was reasonable in all the circumstances: see *British Home Stores Ltd v Burchell* [1980] ICR 303? Furthermore, the question for the Tribunal is whether dismissal was within the range of reasonable responses open to the employer. The range of reasonable responses test applies to all aspects of the decision to dismiss, including the procedure followed: see *Foley v Post Office; HSBC v Madden* [2000] ICR 1293; *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23. That means the Tribunal must not substitute its view for that of the Respondent. The Tribunal's role is not to decide whether the Claimant was guilty of the conduct alleged, but to consider whether the Respondent believed that he was, based on reasonable grounds and following a reasonable investigation.

50. Inconsistency of punishment may give rise to a finding of unfair dismissal, in three particular situations: where the employee has been led to believe that certain conduct will not lead to dismissal; where evidence of other cases being dealt with more leniently supports a complaint that the conduct was not the real reason for dismissal; and where decisions made in truly comparable circumstances indicated that it is not reasonable to dismiss: see *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352, EAT. Tribunals must approach the third category with care; there will not be many cases where the evidence supports the proposition that the cases

are truly similar, or sufficiently similar to afford a basis for the comparison: see *MBNA Ltd v Jones* [2015] UKEAT 0120_15_0109.

51. Where the Tribunal considers that there is a chance that the employee would have been fairly dismissed in any event, then the compensation awarded may be reduced accordingly: *Polkey v A E Dayton Services Ltd* [1987] 3 All ER 974. Guidance on how to approach that issue is set out in the case of *Software 2000 Ltd v Andrews* [2007] IRLR 568.

52. Pursuant to s 122(2) and s 123(6) Employment Rights Act 1996, both the basic and compensatory awards for unfair dismissal may be reduced because of conduct by the employee. Under s 123(6) the relevant conduct must be culpable or blameworthy; it must actually have caused or contributed to the dismissal; and it must be just and equitable to reduce the award by the proportion specified: see *Nelson v BBC (No 2)* [1980] ICR 110 CA. By contrast, the basic award can be reduced where conduct of the Claimant before the dismissal makes that just and equitable. There is no requirement that the conduct should have caused or contributed to the dismissal. In *Hollier v Plysu* [1983] IRLR 260 the EAT suggested broad categories of reductions: 100% where the employee is wholly to blame; 75% where the employee is mainly to blame; 50% where the employee is equally to blame and 25% where the employee is slightly to blame.

Application of the Law to the Facts

53. I turn to the issues, applying those principles to the findings of fact above. I start with the reason for dismissal. That is a question of fact. For the reasons set out in detail above, I find that the reason for dismissal was conduct. Mr Ford held a genuine belief that the Claimant had committed misconduct, by using nine straps instead of 12, in breach of the Respondent's policy.

54. The next question is whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss. I find that it did not. The reasonableness of the investigation, grounds for concluding that there was misconduct, and procedure all overlap and I deal with them together. Fundamentally, I find that the process in this case was outside the range of what a reasonable employer might have done because it was approached by the decision-maker with a closed mind. The approach was that nine straps were used instead of 12 and that was the start and end of it - this was a serious breach and the Claimant should be summarily dismissed for it. That meant that there was no proper consideration of the points the Claimant was advancing. In particular:

    54.1 There was no consideration of whether the Claimant was right in saying that lots of other people were doing the same thing, which Mr Ford accepted was relevant to the seriousness of the Claimant's conduct. If there was a widespread of people using nine straps but nobody else was disciplined for it and if spot checks were being carried out but no action was being taken against anyone else, that would potentially also be relevant to the appropriate sanction
    54.2 There was no consideration of whether the legal requirements for strapping the load were complied with and whether that might affect the seriousness

of what was done, the extent to which the public were endangered or the appropriate sanction.

54.3 The context for a finding that this was outside the range of reasonable responses is the significant emphasis in the Respondent's disciplinary process on consistency, fairness and equity. If the employee was saying that lots of people did the same and he was the only one being disciplined for it, that emphasis in the disciplinary process is relevant to what was within the range of reasonable responses.

54.4 There was no proper consideration of sanction and why summary dismissal was appropriate. In his written summary Mr Ford paid lip service to the Claimant's length of service and experience, but there was no exploration with the Claimant of what he might do differently in the future, what would happen if a final written warning were given, or whether there was anything else that could be done such as moving the Claimant to alternative duties or re-training. Further there was no explanation why after more than 20 years' unblemished service and faced with somebody who acknowledged wrongdoing straightaway and apologised for it, the only course of action available was summary dismissal.

55. The flawed and unreasonable approach was not corrected at the appeal stage. That was a review not a re-hearing and, again as explained in detail above, Mr Nissen's mind was also closed. He did not consider the Claimant's grounds of appeal with an open mind. In particular:

55.1 The Claimant raised with him the concern that nine out of 10 drivers were using nine straps instead of 12 and Mr Nissen did not consider or investigate that at all, or consider how it might affect the seriousness of the conduct or the appropriate sanction.

55.2 The Claimant identified other people he said had committed serious health and safety breaches and not been dismissed and Mr Nissen did not look into those, in the context of a policy that repeatedly mandated consistency and fairness.

55.3 Mr Nissen did not review the appropriateness of the sanction taking into account the factors identified by the Claimant. Further, he was clearly influenced by the fact that the vehicle had tipped and his belief that this affected the severity of the conduct. There was no evidential basis before him to enable him reasonably to reach that view.

56. I do *not* find that no reasonable employer could have dismissed the Claimant for his breach of policy by using nine straps when the policy required 12. I find that on the facts of this case, the process followed in assessing whether the Claimant should be dismissed for doing so was so flawed that it was outside the range of what was reasonable. No reasonable employer would dismiss in such circumstances.

Polkey and contributory fault

57. It is necessary to make further findings of fact for the purposes of deciding whether there is a chance that the Claimant would have been fairly dismissed in any event and whether he contributed to his dismissal by culpable and blameworthy conduct. I make the following further findings.

58. The failure to use 12 straps, in breach of policy, was culpable and blameworthy. The Claimant knew about the policy and he knew that he was meant to comply with it. The fact that it may have been more than was legally required does not affect that. It was his employer's policy and his employer was entitled to require him to comply with it. As Mr Webster submitted, this is the haulage industry, which can be dangerous and requires a proper approach to safety.

59. However, I find that the use of nine straps instead of 12 was widespread. The Claimant gave evidence that it was, and I also heard evidence to that effect from Mr Bulmer, a driver with the Respondent for 33 years. Mr Bulmer explained that he had seen numerous people do it and indeed he had done it himself in the past. There was a change in his evidence. He initially answered Mr Webster's question suggesting that he had used nine straps before a change in policy. In re-examination he said that he had changed his practice after the Claimant's dismissal. I could see that in answering Mr Webster's question he may well not quite have understood whether he was being asked about whether it was the change in policy that *prompted* the change. I preferred what he said in his re-examination answer. That seemed to me to have a ring of truth to it. It was seeing the Claimant being dismissed that made him realise he needed to change his practice.

60. The Respondent did not provide evidence about how widespread the practice was, for example information from the Observation Check Sheets that were apparently used, or from other drivers or managers in the depots. There was nothing to suggest anyone had actually looked into whether the practice was widespread. On the balance of probabilities, I accept the evidence of the Claimant and Mr Bulmer that it was widespread at the time.

61. The people identified by the Claimant as comparators who he says committed serious health and safety breaches and were not dismissed are relevant at this stage, although they weren't looked into by Mr Nissen. I did not find that any of them was truly comparable. Mr Webster explored this in detail with the witnesses. For one reason or another, each comparator was sufficiently different that no useful reliance can be placed on them. Leaving aside the strapping issue, the examples do not present a picture of an employer that has singled the Claimant out, or treated him out of kilter with the way it treats other people who commit similar health and safety breaches. There were no instances of people who had failed to follow the company policy on strapping since this policy had been introduced. Examples relating to strapping took place some time ago before this policy was introduced and/or were in the yard where the speed limit is much lower and the public do not have access. The rest of the examples were different types of conduct and different types of breach. Some of the employees were not professional drivers. Most of the incidents took place some time ago. One driver was pulled over by the authorities and his strapping was found to have been compliant with the Respondent's policy but not compliant with the law. That is different from the Claimant's case because it is harder for an employer to discipline an employee who was following the employer's policy. The other incident which was perhaps was closest to the Claimant's, was the person who hit a bollard and then drove a vehicle with obviously defective steering on the highway. That was potentially a similar sort of situation, driving with a potentially dangerous vehicle on the highway. But it happened nine years ago, and there is a limit to the weight

that can be placed on it, when looking at whether there was a lack of consistency in the approach to the Claimant nine years later.

62. I turn then to the question whether there is a chance that the Claimant would have been fairly dismissed in any event. It is for the Respondent to prove on the balance of probabilities there is. I am not satisfied on the evidence before me that I can reach such a conclusion. If there had been a fair process there would have been proper consideration of whether other people were using the incorrect number of straps and whether it was widespread to use nine instead of 12. I have found that it was widespread. A fair process would have considered the impact of that on seriousness and the appropriate sanction. There would have been proper consideration of how serious the Claimant's breach was, whether it endangered life and whether compliance with the legal minimum affected that. There would have been proper consideration of sanction, including a proper exploration with the Claimant of whether he would do anything differently, how he might behave in the future and how his 23 years' unblemished service with a clean disciplinary record should be taken into account. Alternatives to dismissal would have been considered. If all of those things had been done, I am not satisfied on the balance of probabilities that there is a chance that the Claimant would have been fairly dismissed in any event. The evidence is too uncertain and speculative, and I was not provided with concrete evidence from the Respondent about what it would have done and why.

63. However, as far as contributory fault is concerned, I have made a clear finding that what the Claimant did was culpable and blameworthy. In my view this falls into the category of the Claimant being 50% to blame. He knew he should have complied with the policy and he did not comply with it, but at the same time the use of nine straps for such loads was widespread. It did not cause the accident, and met the legal minimum standard. That is relevant to whether or not it was endangering life and to what extent. I consider that it is just and equitable to reduce both his basic and his compensatory awards by 50% in the light of that culpable conduct that contributed to the dismissal.

Employment Judge Davies
17 November 2021