EMPLOYMENT TRIBUNALS

Claimant: Ms G Hall

Respondent: Blackpool Transport Services Limited

Heard at: Liverpool **On:** 14 July 2021

Before: Employment Judge Horne

Representatives
For the claimant: Mr G Airey, solicitor For
the respondent: Mr W Griffiths, counsel

Judgment was sent to the parties on 19 July 2021. The claimant has requested written reasons in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013. The following reasons are accordingly provided:

REASONS

Introduction

1. These are the reasons for a judgment which was announced at a hearing on the Cloud Video Platform. Neither party objected to the format of the hearing.
2. This is a sad case involving a reliable and well-liked bus driver who was dismissed for gross misconduct. As the claimant's solicitor has forcefully put it, her conduct over a period of 50 minutes has cost her a job which she had done faithfully for 32 years.

Complaints and issues

3. By a claim form presented on 22 March 2021, the claimant raised a complaint of unfair dismissal, contrary to section 94 of the Employment Rights Act 1996. She also brought a claim for damages for breach of contract, but that claim was dismissed following withdrawal at the hearing.
4. The parties cooperated well to identify the real issue in dispute. I start with the common ground. The claimant had the right not to be unfairly dismissed by the respondent. On 14 December 2020, the respondent dismissed her. Although,

looking at the claim form, it appeared that the claimant was suggesting that the respondent had ulterior motives for dismissing the claimant, Mr Airey confirmed at the outset of the hearing that there would be no dispute about the reason for dismissal. It was because of her conduct on 5 December 2020. I have to decide whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss her.

5. Further issues would arise in relation to remedy if I found the dismissal to be unfair. As it turned out, I did not need to determine those issues.

Evidence

6. I read an electronic bundle of 169 pages.

7. The respondent called three witnesses to give oral evidence. These were Mr Stewart Blair, Mr Steve Cullen and Mrs Jane Cole. The claimant gave oral evidence on her own behalf. All four witnesses confirmed the truth of their written statements and answered questions.

Procedural issue

8. One procedural issue arose during the course of the hearing. The issue was raised part-way through the oral evidence of Mrs Cole. The topic under discussion was the claimant's explanation for her conduct. The claimant had maintained throughout the disciplinary process that she had had behaved as she did because she was panicking about her mother. In their oral evidence, Mr Cullen and Mrs Cole told me that they did not believe that explanation. On the claimant's behalf, Mr Airey raised a procedural objection. He reminded me of the respondent's written grounds for resisting the claim. These were attached to the respondent's ET3 response form. These grounds summarised and "noted" the explanation that the claimant gave for her conduct. They did not positively assert that the respondent had rejected that explanation. His argument was that the respondent was attempting to depart from its "pleaded case".

Facts

9. The respondent is a bus company with about 600 employees.

10. The claimant began employment with the respondent as a bus driver on 5 December 1988. She drove buses for the respondent for over thirty years. According to an appraisal carried out on 24 November 2018, she was reliable, popular with her colleagues and had a good attitude to safety. In short, she was considered to be a very good bus driver.

11. On 1 October 2020, the respondent's board of directors issued a written policy prohibiting the use of personal electronic devices whilst driving. The policy summarised the relevant law in this way:

> "Under existing law a person may be regarded as "driving" a vehicle while the engine is running, and the vehicle is stationary or in motion."

12. The policy concluded:

> "Failure to comply with any part of this policy may be deemed as gross misconduct and may lead to disciplinary action being taken against them up to and including dismissal."

13. One of the respondent's bus routes runs between Cleveleys Park and Tesco Mereside. The final stop is inside the Tesco car park.

14. On 5 December 2020, the claimant was driving that route. Her bus was due to reach the Tesco stop at 6.41pm. Once at the terminus, she was expected to check the bus, drive out of the Tesco car park and then back to the depot. She had a template "Defect Card" form on which to record her checks and write in the time at which she had left the bus.

15. Having finished her route, the claimant returned to the depot and got out of the bus, leaving the completed Defect Card. She then left work.

16. An inspector observed the bus entering the depot and logged the arrival time at 6.41pm. That was, of course, the time at which the bus was supposed to have been arriving at Tesco Mereside.

17. The early arrival was reported to Mr Stewart Blair, the Staff and Customer Support Supervisor. Mr Blair examined the vehicle tracking system, called "Traffilog". According to Traffilog, the bus had run ahead of schedule and had not entered the Tesco Mereside site at all.

18. Mr Blair decided to investigate further. On 6 December 2020, he requested the CCTV footage from the bus. Initial examination of the footage revealed that the claimant had not only been passing bus stops earlier than the scheduled time, but had also been using her mobile phone whilst driving.

19. The claimant was suspended and invited to an investigation meeting. Before that meeting could take place, Mr Blair looked again at the CCTV footage and discovered further matters of concern. The meeting was postponed and the scope of the investigation was widened.

20. Here is a summary of what the CCTV showed:

    20.1. On four occasions the claimant could be seen to be using a mobile phone underneath the steering wheel whilst the engine of the bus was running, including times when the bus was in motion;

    20.2. The claimant was seen driving her vehicle whilst wearing her highvisibility jacket;

    20.3. Whilst the claimant was driving along Langdale Road, she appeared to be standing, leaning against the edge of her seat, and reaching up to change the destination blind;

    20.4. The bus did not enter the Tesco Mereside car park for the final stop, but continued straight on towards the depot;

    20.5. Whilst approaching traffic lights on Bloomfield Road, at a speed of about 6 miles per hour, the claimant could be seen filling in the Defect Card; and

    20.6. The claimant got out of the bus at 6.41pm at the depot.

21. Mr Blair also examined the Defect Card. It contained an entry in the claimant's handwriting, stating that she had left the bus at 6.51pm. That would be the approximate time that the claimant would have arrived at the depot if her bus had

stopped at Tesco Mereside at the correct time. As it was, the entry was incorrect: the claimant had actually left the bus at 6.41pm.

22. The re-scheduled investigation meeting took place on 14 December 2020. Mr Blair chaired the meeting. The claimant was accompanied by a workplace colleague. Before being taken through the detail of the CCTV footage, the claimant was asked if she had had any problems on the evening in question. Her answers were written into the minute of the meeting. The note read:

> "I had a call on my break from my brother asking me if my mum was with me, he had been round and she wasn't there. He had then been round and saw her through the window and she didn't get up. He said she didn't look right, turned out though it was nothing."

23. The claimant was asked why she was using her phone with the engine running. She explained that she had panicked. According to the minute of the meeting, the claimant telephoned her mother once she finished work and her mother confirmed that she was alright. She added that her mother was "my absolute world".

24. The claimant was given the opportunity to view the CCTV footage for herself, but declined.

25. Having heard the claimant's explanation, Mr Blair decided that the next step should be a disciplinary meeting. The claimant was given a letter inviting her to a disciplinary meeting the next day. The letter set out six allegations of potential gross misconduct:

"

- on four occasions using an electronic device in the driving cab, while the engine was running;
- on four occasions leaving timing points early, above two minutes;
- on four occasions driving in a manner which could be deemed dangerous;
- wearing Hi-Vis when driving in service;
- failing to complete the registered route by not entering Tesco;
- falsifying a legal document, i.e. defect card."

26. Something needs to be said about the fourth disciplinary allegation. It is the claimant's case that wearing a high visibility jacket was a trivial matter and that the inclusion of this allegation demonstrated that Mr Blair was trying to throw in as many allegations as possible to see if one would stick. That was not the way in which Mr Blair saw it. The claimant had been driving at night. Her high-visibility jacket had reflective strips. When she was wearing the jacket behind the wheel, those strips would reflect the light from oncoming vehicle headlights. The reflected light would then be visible to the claimant as a reflection in the bus windscreen. Those images would impair her vision of the road. That was why drivers were prohibited from wearing their high visibility jackets whilst driving.

27. This was not the first time that a driver had been disciplined for using a mobile device whilst driving. Approximately three years earlier, the respondent had taken against these two drivers:

27.1. On 20 July 2017, Mr Michael Costello, a driver and training supervisor, received a final written warning for using a mobile phone whilst in charge of a stationary bus. The engine had been running, but the disciplinary manager accepted that Mr Costello had genuinely believed that the engine was switched off. In addition to the warning, Mr Costello was demoted and his salary was reduced.

27.2. On 5 December 2017, another bus driver, Mr Jordan Garnett, attended a disciplinary meeting to discuss an allegation that he had used an Apple wristwatch whilst driving. He admitted taking his hands away from the steering wheel to cancel an alarm on his watch. He was given a written warning and removed from the lead driver roster.

28. The Manager responsible for chairing the disciplinary meeting was Mr Steve Cullen. Prior to the meeting he received a pack of information which included the CCTV footage and the minute of the investigation meeting. Mr Cullen was not involved in the previous misconduct cases. There was no reference to them in the disciplinary pack. Nor was there a copy of the claimant's 2018 appraisal.

29. The claimant's disciplinary meeting went ahead on 15 December 2020. The claimant was accompanied by a trade union representative.

30. Mr Cullen asked the claimant about the use of her mobile phone. She replied,

> "I had a missed call on my phone from my brother. On my break I called him back and he asked me if Mum was with me because he had been round and she wasn't there. I said that no she wasn't, and she had probably just gone for a walk on it to the shop. He hasn't been in the house since March due to Covid, he only goes to the window as I'm the only person in her bubble he went later on that day he went to the window, she was sat down and didn't get up when he came to the window. The message to ask if she was okay if she hadn't got up, I asked what he meant he just said she wasn't right.
>
> I panicked then, I had less than an hour left to go. I wasn't due to go around that night so didn't want to call her and panic her because she knew I was at work I got two more texts from him, asking me what he could do I just said "I don't know".
>
> When I finished, I called her straightaway and she said she was all right.."

31. When asked why she had not just telephoned her brother at a safe moment, the claimant replied, "I have gone over this a million times in my mind, what did he mean… I didn't want to call her and panic her."

32. The claimant acknowledged that she had the option of leaving the bus part-way through the route if she could not drive it safely, but explained that she did not do so because she only had 40 minutes left of her shift.

33. The claimant was given a further opportunity to view the CCTV footage, but again declined.

34. Mr Cullen then asked the claimant directly whether she considered her actions to amount to gross misconduct. The claimant replied that they did. She expressed remorse and offered to undergo retraining if she could keep her job.

35. The meeting was then adjourned whilst Mr Cullen thought about his decision. His normal starting point, even for gross misconduct, would be a warning of some kind. He would then look at the severity of the conduct to see if the sanction should be escalated to dismissal. What troubled Mr Cullen about the claimant's case was that it was not just a single act of gross misconduct, but several.

36. Mr Cullen had no reason to disbelieve the claimant's account that her brother had called her about her mother. He did not, however, believe that the claimant had panicked as much as she was telling him. In particular, he did not think that panic was the explanation for her repeated use of the phone and her dangerous activities whilst the bus was in motion. Having viewed the CCTV footage for himself, and in particular the footage of her on the phone to her brother, it did not appear to him that she was behaving in a panicky way. If she was so worried about her mother, he thought, she could have stopped the bus and telephoned her brother. He also had regard to the fact that the claimant had falsified the timings on the Defect Card. It appeared to him that the claimant was trying to cover her tracks.

37. Mr Cullen did not think that the claimant's (disbelieved) panic defence was misconduct in itself. He was disciplining her for her conduct inside the bus and not for the explanation that she subsequently gave for it.

38. In assessing the seriousness of the claimant's conduct, Mr Cullen took into account that they could bring the respondent into disrepute with the Traffic Commissioner. It was a condition of the respondent's operator's licence that they would complete each bus route. If stops were missed or run early, the Traffic Commissioner had power to revoke the operator's licence.

39. Having taken all these matters into account, as well as the claimant's length of service, Mr Cullen decided that the appropriate sanction was dismissal. When the meeting reconvened, Mr Cullen informed the claimant that her employment was being terminated. His decision was confirmed by letter the following day.

40. The claimant appealed against her dismissal. Her appeal letter reminded the respondent of her long service and asked for leniency.

41. The appeal was considered by the Managing Director, Mrs Jane Cole. Prior to 5 December 2020, Mrs Cole and the claimant had had a good working relationship and the claimant had found her approachable.

42. An appeal meeting took place on 22 December 2020. The claimant, accompanied by two trade union representatives, told Mrs Cole about her good appraisal and her commitment to the company. She reiterated her explanation that her actions on 5

December had been caused by worry about her mother, and added that she had better support measures in place to avoid such a crisis arising in future. She asked for another chance.

43. By the time of the meeting, Mrs Cole had viewed the CCTV footage. Her impression was that it was lucky that nobody had been injured or worse. Like Mr Cullen, she did not believe that the claimant's worries about her mother had

overcome her ability to drive safely. She thought that the claimant had had safe opportunities to telephone her mother. Alternatively, as Mrs Cole saw it, the claimant could have stopped the bus and asked for a colleague to come and relieve her so that she could go directly to her mother's house. Mrs Cole was also anxious to avoid setting a precedent. In Mrs Cole's opinion, the message needed to go out to other drivers that this kind of behaviour could not be tolerated. She also thought that there was a danger of harming the respondent's reputation with the Traffic Commissioner. Despite the claimant's long service and good record, Mrs Cole considered that the only sanction that had been available to Mr Cullen was dismissal.

44. Because of the nature of the claimant's conduct, the respondent was obliged to report the claimant to the Traffic Commissioner. In due course the claimant attended a hearing on 13 May 2021. Having heard the claimant, and read a number of glowing testimonials, the Traffic Commissioner decided that the claimant's Public Service Vehicle Driver's Licence should be suspended for one week. By this time, the claimant had found a job with another bus company. She had booked annual leave for the first week in June. The Traffic Commissioner fixed the period of suspension to coincide with her holiday.

45. I have no doubt that the duration and timing of the suspension period was deliberate. The claimant's conduct could not be seen to be condoned, but the Traffic Commissioner clearly thought that the claimant had already suffered enough.

46. The Traffic Commissioner did not take any action against the respondent arising out of the events of 5 December 2020. Nor, to the respondent's knowledge, has any member of the public ever complained.

Relevant law

47. Section 98 of ERA provides, so far as is relevant:

> (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-
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> (a) the reason (or, if more than one, the principal reason) for the dismissal and
>
> (b) that 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.
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> (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.

48. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

49. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

50. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

51. There may be circumstances where a dismissal is unfair because the employer has treated two employees inconsistently for the same misconduct. However, for a dismissal to be unfair, the circumstances must be truly comparable: *Hadjiouannou v. Coral Casinos Ltd* [1981] IRLR 352.

52. Where an employee has committed gross misconduct for which they have been dismissed, it does not automatically follow that the employer acted reasonably in treating the misconduct as a sufficient reason for dismissal. Before deciding on the fairness of the dismissal, the tribunal must consider whether the sanction was within the range of reasonable responses: *Brito-Babapulle v. Ealing Hospital NHS Trust* UKEAT 0358/12.

53. Serious allegations of criminal misbehaviour must always be the subject of the most careful investigation. Employers cannot be required to put in place the safeguards of a criminal trial, but they can be expected to look for evidence that might point towards an employee's innocence as well as evidence that might suggest their guilt: *A v. B* [2003] IRLR 405, EAT.

54. Tribunals assessing the reasonableness of a misconduct dismissal may have regard to the fact that the dismissal may blight the employee's career: *Salford Royal NHS Foundation Trust v. Roldan* [2010] EWCA Civ 522.

<u>Overriding objective</u>

55. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective of dealing with cases fairly and justly. The overriding objective includes, where practicable, placing the parties on an equal footing, saving expense, and dealing with cases in ways that are proportionate to the importance and complexity of the issues. Tribunals must seek to achieve the overriding objective in the exercise of any powers given to them under the rules.

Importance of amendments

56. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

57. In *Chandok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> "
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> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

Conclusions

Procedural issue

58. I start with the procedural issue. It relates to the evidence of Mr Cullen and Mrs Cole that they did not believe the claimant's explanation for her conduct. Can I find as a fact that they reached this conclusion? Or am I constrained to disregard that evidence, and assess the reasonableness of the dismissal decision based on the assumed fact that the claimant's explanation was believed?

59. Before expressing my conclusion, I ought to correct any potential misunderstanding of what this dispute is about. It is important to be clear about what is meant by the

word, "believe" and the phrase "did not believe". Without proper context, their meaning can be ambiguous. If an employer says to an employee, "I do not believe you", they may be accusing the employee of telling a complete pack of lies. Often, however, the meaning is more nuanced. The employer may accept that the employee is telling the truth about certain things that have happened, but nevertheless reject the employee's argument that those events explain the employee's conduct. In this case, Mr Cullen and Mrs Cole reached the latter conclusion. Nobody is suggesting that the claimant fabricated the whole story. They believed that the claimant's brother had told the claimant that their mother did not look well, and that the claimant was concerned. What they could not accept was that she was panicking to the extent that she could not drive safely.

60. In my view, there is no procedural unfairness in my making that finding. The respondent's grounds for resisting the claim did not state that the claimant's explanation had been accepted. Nor did the document carry that implication. The claimant's explanation was reported not as an agreed fact, but as something that the claimant had said. The word "noted" indicated a degree of care to avoid expressing an opinion about whether or not the claimant's explanation was correct.

61. The grounds of resistance did not positively contend that any part of the explanation had been *disbelieved* either, but it was not necessary for the ET3 response to make that assertion in order to resist the claim. What the respondent is required to do at the time of presenting its response is to put forward the essence of its case. Where the complaint is one of unfair dismissal, the essence of the respondent's case is its potentially fair reason for dismissal, together with the essential facts upon which it argues that it acted reasonably in treating that reason as sufficient to dismiss. Where the reason for dismissal was the claimant's conduct, the response may need to set out, in broad terms, what the conduct was, the respondent's grounds for believing that the claimant had behaved in that way, and summarise the investigative and disciplinary process. The response does not have to set out the entire factual narrative. In particular, the respondent does not have to say, at that stage, what conclusion the dismissing manager reached about the explanation the employee put forward about that conduct.

62. In this case, the claimant was not dismissed for providing an allegedly false explanation to the investigator. She was dismissed for her conduct inside the bus. The significance of her explanation being rejected was that it deprived her of mitigation that she might otherwise have had. The respondent's ET3 response does not need to be amended in order to allow the respondent to put forward that contention.

Reasonableness

63. I now turn to the substantive issue. Did the respondent act reasonably or unreasonably in treating the claimant's conduct on 5 December 2020 as a sufficient reason to dismiss her.

64. A number of factors must be borne in mind. First, the respondent is a large employer. It can be expected to devote considerable resources to investigating alleged misconduct and to exploring alternative sanctions. Second, the claimant's conduct was such that, if the respondent dismissed her for it, she might struggle to

find another job in the same line of work. (As it turned out, she has since found another driving job, but the respondent was not to know that.) Third, the claimant was a long-serving employee with a clean disciplinary record. The respondent could reasonably be expected to ask itself why, with so much to lose, the claimant would choose to behave in the way she did. That question was something that any reasonable employer would be required to address.

65. Weighing on the other side of the balance were other factors. The respondent operates in a regulated environment. Its operator's licence depended on adherence to standards of safety and service delivery. The specific rule against using a mobile phone whilst driving mirrored the criminal law. Where those standards were contravened, the respondent was reasonably entitled to take tough measures to safeguard its licence. Another important factor was safety. Bus drivers are in charge of a lethal piece of machinery. The respondent had to be able to take steps to ensure that drivers did not put members of the public at risk.

66. With those general factors in mind, I turn to some of the questions commonly asked by tribunals considering the reasonableness of a dismissal.

67. There is no dispute that the respondent genuinely believed that the claimant had committed misconduct. Within the space of 50 minutes on 5 December 2020, the claimant did six different things, each of which fell below the standards of behaviour expected of bus driver.

68. Nor can it be sensibly argued that the respondent did not have reasonable grounds for its belief. The conduct was captured on CCTV or in documentary records and was admitted by the claimant.

69. There is one element of the respondent's belief that is the subject of challenge. That is not the belief that the claimant had committed misconduct, but the respondent's rejection of the claimant's explanation for it. In my view, Mr Cullen and Mrs Cole did have reasonable grounds for thinking that the claimant had not panicked as much as she was telling them. In particular:

    69.1. It was open to them to conclude that, if the claimant really thought it was an emergency, she would have stopped and telephoned her brother or her mother. Her bus was ahead of schedule. A quick call would not have caused any disruption.

    69.2. Moreover, Mr Cullen and Mrs Cole had the advantage of having observed the claimant on CCTV. They could form an impression about how panicky her movements appeared to be. Nobody suggested that I should look at the CCTV for myself in order to test whether the footage could support that conclusion. The claimant had an opportunity to look at it, but declined.

    69.3. Mr Cullen had a reasonable basis for thinking that the claimant had sought to cover her tracks. She had falsely recorded her arrival time on the Defect Card. That kind of subterfuge will inevitably make it harder for managers to accept the explanation that is later put forward.

70. The respondent carried out a reasonable investigation. The need to search for evidence was limited owing to the fact that the claimant admitted what she had done.

71. The process contained the expected procedural safeguards. It is unnecessary for me to repeat the procedure that the respondent followed. All I need do is turn to some particular aspects of the investigation that the claimant says was flawed:

    71.1. *Predetermined decision.* The claimant argues the decision to dismiss her had already been made before she had a chance to give her side of the story. On her behalf, Mr Airey points to the inclusion of the high visibility jacket amongst the list of disciplinary allegations. For the reasons I have already given, this was genuinely believed by the respondent to be an important safety concern. Its inclusion does not tell me that the respondent was looking to throw as many allegations as possible against her.

    71.2. *Failure to include the claimant's appraisal in the original disciplinary pack.* In my view, this was not a serious failing in the investigation. The claimant's appraisal was arguably a source of mitigation which Mr Cullen could take into account. But it was not directly relevant to the conduct for which she was dismissed. The claimant had the assistance of a trade union representative at the disciplinary meeting. If she thought it was relevant, the union representative could have referred to the appraisal then. In any case, the omission was effectively remedied on appeal, when Mrs Cole had the appraisal information in front of her.

    71.3. *Failure to include in the disciplinary pack the examples of lesser sanctions given to colleagues in 2017.* I cannot criticise the respondent for not putting examples of other sanctions in the disciplinary pack. The circumstances of Mr Costello and Mr Garnett were not truly comparable to those of the claimant. The main distinguishing feature was the sheer number of different unsafe practices that the claimant had been caught doing. A further explanation for any inconsistency in treatment was the introduction in 2010 of the written policy on using personal electronic devices whilst driving.

72. The next question is whether or not the sanction of dismissal was within the range of reasonable responses. (That is not, of course, the same question as whether or not I would have dismissed the claimant for the same conduct. That is not my decision to make.)

73. When considering the reasonableness of the sanction, the parties each invite me to draw conclusions from the penalty imposed by the Traffic Commissioner. The respondent says that it indicates that the claimant's conduct was so serious that the Traffic Commissioner thought the claimant unfit to drive. That is an unrealistic interpretation of the decision. It does not explain why the Traffic Commissioner thought that the claimant would be unfit to drive during her week's holiday and would then become fit again when she got back to work. On the claimant's behalf, Mr Airey argues that the Traffic Commissioner's penalty demonstrates that the offence was relatively minor and that the Traffic Commissioner thought the dismissal unduly harsh. I do not agree with that assessment either. By the time of the Traffic Commissioner's hearing, the claimant had already lost her job of 32 years. It is plain to me that the Traffic Commissioner thought she had suffered enough.

74. The claimant argues that the sanction was unreasonable because of its inconsistency with the treatment of Mr Costello and Mr Garnett. For the same reasons that I have already given, I do not think that the cases are comparable. Any inconsistency would not take the claimant's sanction outside the reasonable range.

75. Finally, the claimant criticises Mr Cullen for not considering alternatives to dismissal. My finding was that he did. His starting point was a warning, even for gross misconduct. Because of his opinion of the severity of the claimant's actions, he did not think a warning was appropriate.

76. I now step back and ask myself whether the respondent acted reasonably or unreasonably in treating the claimant's conduct as sufficient to dismiss. In my view the respondent acted reasonably. The dismissal was therefore fair.

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Employment Judge Horne

4 August 2021

SENT TO THE PARTIES ON
6 August 2021

FOR THE TRIBUNAL OFFICE