EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Williams	**v**	J O'Doherty Haulage Ltd

Heard at: Watford Employment Tribunal **On:** 4 and 5 November 2021

Before: Employment Judge Quill (Sitting Alone)

Appearances
For the Claimant: Ms M Stanley, counsel
For the respondent: Mr P Clarke, consultant

JUDGMENT having been sent to the parties on 2 December 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

The Hearing

1. This was a two-day case which was held in person. I had an agreed bundle of documents of 265 pages. I had it in both hard copy format and electronically.

2. On the claimant's side there were two witnesses, himself and Mr Jamie Fullerton. Each had produced a written statement; each of those were cross examined and their evidence concluded before lunch on Day 1.

3. The live witnesses for the respondent were Mr Kieran O'Doherty, Mr Alan Smith, Mr Faheem Kahn and Mr Matt Tyler. In Mr Smith's case, it was the statement dated 15 February 2020, a 2 page document with 15 paragraphs, that was relied on by the Respondent and which he swore to as his evidence. The one page 26 April statement by him was not relied on by the Respondent as evidence (although it was a document which I had read). Subject to that, those four witnesses each had produced a written statement, and were cross examined.

4. The Respondent had also handed up a statement form Jamie Fullerton. He was not called as a witness by the Respondent. It was the same statement which is discussed in the findings of fact below (the one purportedly given by him to the Respondent during the grievance investigation). However, all I need say for now is that that I did not treat that document as witness evidence

on behalf of the Respondent from Mr Fullerton.

5. I was not prepared to accept the unsigned hard copy document in the name of Gary Ainger as witness evidence. There was an apparently signed document from him in the document bundle (also purportedly gathered during the grievance process, in February 2020, which was pre-litigation) which parties were free to comment on and ask questions about. However, I was not satisfied that Mr Ainger had authorised the unsigned document to be relied upon as witness evidence in employment tribunal proceedings (or any other litigation).

6. I was given a witness statement from Jim Whearty which was signed. I was willing to take that into account, giving it such weight as I saw fit, taking into account that he had not attended and sworn to the statement and answered questions.

7. Apparently a statement from Marcel Nicula (also dated 5 February 2020) was amongst those sent to the Claimant by way of exchange. However, that was not amongst the statements handed in by the Respondent at the start of the hearing and was not relied on by the Respondent as witness evidence. In any event, as with the other documents dated 5 February 2020, there was a version in the hearing bundle and parties were free to comment on it and ask questions about it.

8. Witness evidence concluded on Day 1 and submissions and oral judgment with reasons were on Day 2.

The Claims

9. There are two claims, automatic unfair dismissal contrary to s.103A of the Employment Rights Act and ordinary unfair dismissal. It is accepted that the claimant was an employee and that he had at least two years' service and that he was dismissed and that the claim was brought in time. Based on the claim form and the response form it is conceivable that there is a potentially a dispute about the start date of continuous employment which might turn on the claimant's employment status from 2012 to January 2018. It was agreed with the parties that the parties would not need to deal with that potential dispute at the liability phase of this hearing, and it would be addressed in the remedy phase if necessary.

The issues

10. The list of issues that was agreed on Day 1 was as follows:

    a. Did the claimant's grievance letter and attachment dated 25 January 2020, which is at pages 50 to 55 of the bundle, meet the statutory definition of protected disclosure?

    b. If so, was the principal reason that the claimant was dismissed that he had made that protected disclosure?

    c. Alternatively, has the respondent shown that the principal reason that the claimant was dismissed was that he had failed to follow a reasonable management instruction namely, to attend a disciplinary hearing on 17

March 2020.

i. If so, is that a reason related to the claimant's conduct or, alternatively as per the grounds of response, is it for some other substantial reason.

ii. If so, was the dismissal fair or unfair in accordance with the Employment Rights Act s.98(4) and in particular did the respondent in all respects act within the so called band of reasonable responses

11. If either complaint succeeds, what remedy should be awarded.

The facts

12. The respondent is a haulage company employing around 45 people. One of the witnesses in this case is Kieran O'Doherty who is a director and who is the son of Jim O'Doherty, one of the other directors. Where I refer to Mr O'Doherty below, I am referring to Mr Kieran O'Doherty unless otherwise stated.

13. Matt Tyler is transport and HR manager for the respondent. He has a senior role but he is not a director. He is more junior in the hierarchy than either of the O'Dohertys. Mr Alan Smith is a transport controller and he is more junior than Mr Tyler.

14. The claimant became an employee of the respondent by no later than 1 January 2018, having done regular work for the Respondent previously. (The parties do not agree about whether that was as an employee, or as an independent contractor.) His job title was driver. He drove HGV vehicles for the respondent for potentially up to 56 hours per week at times allocated to him on days Monday to Saturday each week. The claimant is a good driver and he had no disciplinary allegations against him prior to the events which are the subject matter of this claim.

15. The claimant is aware that the respondent's requirements - which are based on its understanding of regulatory obligations - were that a vehicle check be done every day by the driver before driving the vehicle out of the yard. The claimant was aware that at least two of the respondent's drivers had been dismissed for having allegedly failed to do these checks.

16. As well as actually doing the check, the driver was required to complete a defect check sheet. An example of the claimant having done this paperwork is at page 42 of the bundle and is dated 6 January 2020. The top half of the form requires the driver's name and the vehicle registration and the date and the mileage reading to be completed, There are approximately 30 check boxes to be completed to show that the driver is asserting that they have actually carried out particular checks on the vehicle. If any defects are discovered then the driver must not take the vehicle out of the yard and, instead, they must report the defect immediately to the respondent. If the checks were completed satisfactorily then the driver would write "nil" in the box and sign the form and then the form would be taken out with the driver during that day's work and at the end of the day, on return to the yard, the driver would go to the office and leave the form in an in-tray.

17. One of Mr Tyler's duties was that he would check that these forms were all

completed and that they were stored appropriately. The respondent was obliged to keep records of these checks having been done. Mr Tyler was absent from work for around about a month and returning to work on 18 January 2020.

18. The claimant's evidence, which I accept, is that sometimes the forms were not completed fully by the drivers. The claimant did not allege that he was aware of drivers having failed to complete the relevant check and of this coming to the respondent's attention and the respondent taking no action. Rather the claimant's account (which I accept) was that sometimes the paperwork was not completed correctly and the respondent did not treat that as evidence that the check itself had not been done and did not decide that disciplinary action or dismissal was required.

19. Mr Tyler's evidence, which I accept on this point, is that there is a significant difference between, on the one hand, a driver having done the relevant vehicle check but then failed to complete the paperwork fully and, on the other hand, the driver having failed to do the check at all. Furthermore, a driver who submitted paperwork which suggested that the check had been done when, in fact, it had not been done would potentially at least be deliberately attempting to deceive the respondent over an important matter. So, if he noted an incomplete form, but was satisfied the check had been done, he would speak to the driver, and tell them to correct it and to make sure to complete it properly in future. However, if he believed that the check had not been done and/or that false statements had been made on a form, then that would potentially be treated as serious misconduct.

20. It is convenient to first discuss the document at pages 50-55. This is a letter sent by the claimant dated 25 January 2020 with the heading "Formal grievance". The respondent accepts that it received this letter. It was addressed to Mr Tyler. The letter stated that it referred to events in the week commencing 13 January. The letter itself is pages 50 and 51, the attachment to it is pages 52-55.

    a. Paragraph 1 of the attachment refers briefly to matters on Monday 13 and Tuesday 14 January.

    b. Paragraph 11 referred briefly to Thursday and Friday, 16 and 17 January.

    c. Paragraph 12 refers to the Monday of the following week, 20 January. Other than that, the statement and attachment relate to the claimant's allegations of what occurred on 15 January 2020, a Wednesday.

21. At the respondent's yard there are two weigh bridges, one for vehicles exiting the yard and the other for vehicles returning to it. In between the two weigh bridges, there is a building which contains offices. There are windows in the building which allow the occupants to speak to the drivers while the drivers are in their vehicles waiting on the weigh bridge. Mr Smith typically works in the office and at a level that is level with the drivers' cabs.

22. Mr O'Doherty has an office upstairs in the same building. The office in which Mr Smith works is divided by a counter. The counter does not have a door or flap for a person to walk through. The room is therefore divided in two. One side can be called a drivers' side because drivers can enter the office

from the yard on that side, for example when they need to place paperwork in the in-tray. The other side, the side on which Mr Smith sits, has its own separate entrance. For somebody to get from one side of the office to the other they would either have to go out the office, walk round externally and re-enter through the other door, or alternatively, they have to climb or jump over the counter.

23. In summary, the claimant's allegations, as per his 25 January document, were as follows. He says:

    a. He returned to the site on the evening of 15 January 2020 and, while he was on the weigh bridge, Mr O'Doherty spoke to him. After the claimant attempted to answer Mr O'Doherty's question, Mr O'Doherty replied by saying, "I don't know why you're being a smart cunt".

    b. The claimant was angered by this. He drove his lorry into the yard and then went up to the transport office entering on the driver's side to object to what had been said. On the claimant's account, Mr O'Doherty was on the other side of the counter (Mr Smith's side) and then jumped over the counter in order to square up to the Claimant.

    c. Amongst other things, a physical assault occurred whereby Mr O'Doherty grabbed the claimant by his clothing and, in the course of the struggle, the claimant was sent to the floor while Mr O'Doherty was still holding the claimant's clothes which ripped.

    d. Mr Smith was present throughout all of this and, while the incident was still ongoing, Mr Jamie Fullerton (another driver who had been on the same job as the claimant, and returned to the yard in his own vehicle, immediately behind the Claimant's) entered the room.

    e. The various individuals then left the office but the argument carried on outside and was witnessed, at this stage, in addition to the people already mentioned, by a security guard.

24. In connection with 15 January 2020, the claimant makes allegations about other things which he says were said by Mr O'Doherty relating to some or all of the drivers. He also claims that Mr O'Doherty knocked the security guard over in an effort to try to get at the claimant. The claimant's account is that, as well as being distressed by the incident, and as well as having had his clothes torn, he was also bruised as a result of Mr O'Doherty's actions.

25. The claimant made a report to police. His evidence is that he thinks it was approximately two weeks after 15 January 2020. I do not have the exact dates, but my inference is that the complaint to police was made later than 25 January 2020 document. The 25 January document neither refers to the claimant already having been to the police nor intending to do so. Discussions between the claimant and the police carried on until April; the police were not, in the claimant's opinion proactive. The police told him that they regarded the matter as being at most a common assault and they also said to him that they potentially regarded it as being more of an employment or private matter rather than a criminal matter.

26. I accept the claimant's evidence that he was told by the police that they had

not received any CCTV footage from the respondent. The respondent's evidence to this Tribunal was that whilst there is CCTV within the office itself, that is live imaging only and is not recording so the only recording that existed, according to the respondent, was recordings of outside in the yard. I accept the respondent's evidence on those two points.

27. The respondent states that it does not have recordings of the yard for 15 January anymore because they were supplied to the police. I am not satisfied that that is the case. No documentary evidence to support the respondent's claim to have supplied a CCTV recording to police has been supplied to me.

28. Later on during the grievance proceedings, Mr Tyler and Mr Kahn have asserted that they had viewed the CCTV footage. Their evidence is that when they viewed the CCTV footage of the yard it did not expressly contradict the account given by the claimant, rather their evidence was that because of the positions of vehicles blocking the cameras, and/or camera angles, etc, there was no CCTV evidence which positively supported the claimant's version of events.

29. It is now necessary to go back in time to 8 January 2020. The document in the bundle at page 43 is, as the claimant accepts, his defective check form for that date. The top half of the document is completed. All the relevant boxes are ticked to indicate that the checks have been done. The bottom half does not have "nil" written in the relevant space to indicate expressly that there were no defects and nor does it have the claimant's signature. The claimant accepts that he did drive his vehicle on 8 January 2020.

30. Exactly one week after 8 January is 15 January and that is the date, as just mentioned, on which the claimant alleges he was assaulted by Mr O'Doherty.

31. On 15 January, after the alleged incident described in the claimant's 25 January document, the claimant had a meeting with Mr O'Doherty and some other drivers. On the following two days, Thursday and Friday, the claimant carried on working.

32. 18 January was a Saturday and that was the day that Mr Tyler returned to work from his sickness absence. Mr Tyler checked the defect sheets that had been submitted by the drivers during his absence including the claimant's one for 8 January. Mr Tyler does not recollect whether there were other drivers, apart from the Claimant, who had also failed to complete a form correctly, eg by failing to sign it. He thinks that there might have been.

33. His opinion, however, is that where a form is not completed correctly and that is the only issue then that is more of a matter of, in his words, "education". That is, speaking to the driver and reminding the driver of his or her responsibilities. However, his evidence to the Tribunal was that that was not the issue in the claimant's case. He said it was not simply a case of incorrect paperwork. His evidence to the Tribunal was that another employee had alerted him to the fact that one of the respondent's drivers had not been doing their vehicle checks at all. His evidence to the Tribunal was that this person did not know the name of the driver in question and so he, Mr Tyler, had viewed the CCTV footage for the approximate time period in question to see whether he could identify any driver who had not done their checks. His evidence to the Tribunal was that on viewing the footage for 8 January 2020,

he saw the claimant on CCTV sitting in his vehicle for around 20 minutes before driving out of the yard. Mr Tyler's account to the Tribunal was that - based on this evidence - he was sure that the claimant had not completed the checks on that particular day. He mentions the reason for his belief is that is that the checks cannot be done while sitting in the cab. The checks require the driver to walk physically around the vehicle checking the relevant parts of the vehicles on the outside to see that there are no defects. Had the claimant done that, according to Mr Tyler, it would have been visible on the CCTV.

34. The particular account of anyone telling Mr Tyler that a driver (whose name was unknown to the person making the report) had failed to carry out defect checks is not in Mr Tyler's witness statement and is not in any of the documents in the hearing bundle including the grounds of response. The same can be said about the suggestion that Mr Tyler viewed the CCTV on 18 January 2020 and formed the opinion based on CCTV that the claimant had not carried out his checks.

35. On Monday 20 January, the claimant attended work and met Mr Tyler. The claimant was suspended on full pay by Mr Tyler. A suspension letter of that date is in the bundle at pages 46 and 47. The letter informs the claimant that he is being suspended on full pay for an investigation to take place in relation to allegations of failure to complete the vehicle checks on 8 January and completing the vehicle defect check sheet when in fact he had not done the checks on the vehicle. The letter told him he was required to make himself available during normal working hours while suspended and that the duration of the suspension would only be for so long as it took to complete the investigation.

36. The letter told the claimant that he must not contact other employees and he must not contact customers while suspended and that doing so would be a disciplinary matter. It asked for either a witness statement or contact details of any person who could potentially assist the claimant's case and Mr Tyler said that he would be willing to contact any such person.

37. By letter dated 23 January 2020, Mr Tyler invited the claimant to a disciplinary hearing to be held 28 January 2020. The allegations were the same as those mentioned in the suspension letter and it said that if the allegations were substantiated, they would be treated as gross misconduct. The letter gave a list of documents which were to be used at the hearing. It did not supply a copy of those documents. Only two items were mentioned. One was the defect check list for 8 January 2020 and the other was a copy of CCTV footage which the letter said would be available for viewing at the hearing. The letter said that if the claimant failed to attend the disciplinary hearing without giving advance notification or good reason then the non-attendance would be treated as a separate issue of misconduct. It was after the claimant had received and read the 23 January letter that the claimant lodged his formal grievance dated 25 January which I have discussed above. In the grievance letter, the claimant said that he believed the disciplinary issue against him (and the suspension) was a direct result of the incident of 15 January 2020 and he said that the company was aggressively seeking to discredit him. The letter said that the grievance had to be addressed before the disciplinary proceedings could continue.

38. The 28 January meeting therefore did not take place. In preparation for that planned meeting on 28 January, Mr Tyler had prepared a document which he had intended would be used during the hearing as his own aide memoir or checklist. According to that document the claimant was going to be asked to give his version of events for 8 January and near the beginning of the meeting - after the allegations had been read out in full and that after the employee's first response had been noted - the CCTV footage would be played and claimant would be asked to comment on that CCTV footage. This document does not refer to what the CCTV footage allegedly shows in Mr Tyler's opinion and nor do the other documents in the bundle.

39. On 3 February 2020, Mr Tyler sent an email to the claimant (which appears at pages 59-63 of the bundle) which stated that Mr Tyler would be the person dealing with the grievance. It gave a brief outline of the respondent's grievance policy and invited the claimant to a meeting on 5 February 2020. That meeting took place. Then on 6 February Mr Tyler wrote to the claimant and sent a three-page outcome letter which is pages 75-77 in the bundle.

40. In summary, all of the points in the grievance were rejected and the outcome letter stated that the respondent did not accept that there had been a physical assault or verbal or physical abuse towards the claimant or to anybody else.

    a. The outcome letter asserted that Mr Tyler had viewed CCTV images inside the office and the yard. The first part of this claim cannot be true because - on the respondent's account to this Tribunal, which I have accepted - there is not any CCTV recording inside the office, only live CCTV images.

    b. The outcome letter states that Mr Tyler had spoken to Mr O'Doherty, Mr Smith, the security guard, Mr Fullerton and the other driver. At this stage the claimant did not receive any statements from any of those individuals. There is in the bundle at pages 64 through to 72 what purports to be signed statements from each of those dated 5 February 2020.

    c. I am satisfied that, before sending the grievance outcome letter, Mr Tyler had spoken to both Mr Smith and Mr O'Doherty.

    d. Mr Fullerton's evidence to the Tribunal was that it was not until 13 February 2020 that he, Mr Fullerton, was asked to sign the statement which appears in this hearing bundle and the statement was not produced after he had first of all been interviewed. I accept Mr Fullerton's evidence on this point. For that reason I am not satisfied that either of the statements of the other driver or the statement of the security guard were signed on 5 February 2020 or that they were produced after Mr Tyler had formally interviewed them.

    e. The formatting of all the statements in the bundle is similar. They each have a similar format to that which would be used in a Court or Tribunal hearing, for example. The claimant or the person who has brought the grievance is referred to employee (rather than claimant) but the company itself is referred to as respondent. There are double bars around the heading "witness statement" and there is a statement of truth at the end of them.

f. I accept Mr Tyler's evidence that he is the person who put the documents in that particular format. It is claimed by Mr Tyler and Mr O'Doherty that Mr O'Doherty typed up his own version, sent it to Mr Tyler by email. No such email has been disclosed. I do not accept that (even if it was done at all) it was done by 5 February and then reformatted by Mr Tyler on 5 February and all signed on the same date.

g. If there were emails between Mr Tyler and Mr O'Doherty attaching a draft statement (and, later, an amended version) then these were relevant documents which ought to have been disclosed to the claimant during this litigation. They would have been relevant to the issue of what Mr O'Doherty had said and when he had said it, in the period not long after the alleged assault. Had such an email (or emails) existed it would have been very simple and straightforward for that to be disclosed to the claimant's side and if decided it was appropriate to have been put in the bundle.

h. Be that as it may, the statements for Mr Smith and Mr O'Doherty dated 5 February 2020 are each the same statements that have been used by them as their evidence in chief in these proceedings. In other words, they have each sworn that the contents of those statements are true.

41. On 13 February, the claimant sent an email to the respondent appealing against the grievance outcome and stating that the claimant had reason to believe that a fair and proper investigation had not taken place. Mr Kahn, the company accounts manager, was the person who was to deal with the appeal. Mr Kahn wrote to the claimant by letter dated 14 February 2020 inviting him to an appeal meeting on 18 February. The claimant replied to say that there was not enough time to prepare and asked for it to take place on or after 27 February. His email requesting this had been sent to Mr Tyler because it was Mr Tyler who had forwarded Mr Kahn's letter. Mr Tyler sent an email reply stating that the hearing would now take place on 27 February.

42. That meeting did take place and the claimant was accompanied by a union representative. By letter dated 2 March 2020 the appeal was rejected. In response to the claimant's request for the CCTV footage which had been specifically referred to in Mr Tyler's letter, Mr Kahn stated that the respondent would not provide that and asserted the belief that doing so would be a breach of data protection legislation.

43. The witness statements which the Respondent maintains were prepared for the grievance are in the hearing bundle for this Tribunal hearing at pages 64-72. The claimant had been requesting the statements prior or as part of his appeal and they had not been supplied to him prior or during the appeal meeting. The documents at pages 64-72 were sent to him for the first time with the grievance appeal outcome letter. The appeal outcome letter mentioned that the only two people available to do the appeal who were more senior than Mr Tyler were either Mr O'Doherty (which clearly was inappropriate) or else Mr Kahn.

44. On 2 March, the same day as the grievance appeal outcome letter, Mr Tyler wrote to the claimant to say that now the grievance was concluded it was time to resume the outstanding disciplinary matter and that the hearing would take place on 6 March 2020.

45. Both the grievance meeting and the grievance appeal meeting had been audio recorded and this 2 March letter stated that potentially the disciplinary hearing would also be audio recorded rather than having a note taker present. The letter reminded the claimant of his right to be accompanied but did not otherwise repeat the contents of the 23 January 2020 letter. It was, however, clear to the claimant that the disciplinary hearing on 6 March 2020 was to consider the same matters that had been flagged up in that 23 January 2020 letter as being for the proposed 28 January 2020 disciplinary hearing.

46. By email dated 5 March the claimant asked for the meeting to be rescheduled until after Friday 13 March in order for him to have representation. The email asserted that it was good practice to allow such postponement. My inference from the letter is that the claimant was seeking to refer to the ACAS Code of Practice.

47. The email did not say that the postponement request was for any other reason. In particular, it did not say that the claimant would be unwilling to attend the disciplinary hearing regardless of when it took place &/or regardless whether he could arrange to be accompanied.

48. The claimant submitted a data subject access request around 8 March 2020. On 11 March 2020, he wrote to Mr Tyler in response to the 2 March letter. This is in the bundle, it is a three-page letter, starting at page 93. Amongst other things it states that the claimant believed that Mr O'Doherty had led management to aggressively seek the claimant's dismissal. The letter said that the claimant would not be attending the disciplinary hearing as there was a complete breakdown of trust. It said that he believed that further dealings with the respondent would be subject to malicious abuse of power. He believed, he said, that the respondent would go to any lengths to remove him. He said that for those reasons he would not go to the disciplinary hearing. He did not suggest circumstances in which he would go to any disciplinary hearing or continue with the disciplinary proceedings. In particular, for example, the claimant did not ask for a different hearing officer.

49. By email dated 13 March 2020 at 12:26, Mr Tyler acknowledged receipt of the claimant's 11 March letter and sent a reply which was copied to the claimant's union representative. The email said that the claimant was on paid suspension and that attendance at the hearing on 13 March 2020 was regarded as a reasonable requirement from the respondent. It said that if the claimant failed to attend, the respondent would consider removing pay.

50. The claimant did not attend the meeting at 2pm on 13 March. By letter dated 13 March, Mr Tyler wrote to say that the hearing had now been rescheduled for 17 March. He referred back to 23 January letter which had stated that non-attendance at the hearing without notification or good reason would be a separate issue of misconduct. The letter stated that the rescheduled hearing was to discuss the original issues and added that the claimant's non-attendance at the 13 March hearing would also be considered. The email also stated that if the claimant failed to attend on 17 March without notification or good reason then that would be treated as a second act of misconduct and that his employment would be terminated. It said that if the claimant had a genuine reason for being unable to attend then it was important to write to Mr Tyler to explain the circumstances and the letter offered the claimant the

opportunity to contact Mr Tyler to discuss further.

51. The claimant received this letter and he replied by letter of 15 March. His letter stated that "It would appear you have not read my previous letter dated 11 March which clearly states a number of points of good reasons." My finding is that that was a rhetorical device on the claimant's part. The claimant was not genuinely under the impression that Mr Tyler had not read or received the 11 March letter. As mentioned, Mr Tyler had replied by email specifically responding to that 11 March letter.

52. The claimant's two-page letter (pages 98 and 99 of the bundle) reiterated the points the claimant had previously made and stated that he would not be attending a disciplinary hearing at all. The letter said the claimant would "be taking this matter to an Industrial Tribunal". The letter acknowledged that the claimant was aware that by not attending the disciplinary hearing the respondent might, purportedly at least, terminate his employment for that reason, ie non-attendance. The claimant stated that if the respondent did take that course of action (terminating him for non-attendance), then that would be achieving - in the claimant's opinion - what the respondent had set out to do all along and what Mr O'Doherty and Mr Tyler had been trying to do, namely remove him from the company because of the (alleged) events of 15 January.

53. On 26 March, in the evening, the claimant sent an email to Mr Tyler, copying in his own union representative. He stated he was not attending the hearing the following day because he did not believe he would get a fair and just hearing. He reiterated that he intended to bring tribunal proceedings and he commented that, if the 13 March letter had been intended to give him a final written warning, then that was not appropriate because the disciplinary procedure had not been followed by issuing such a warning.

54. The claimant did not attend on 17 March. By letter dated 19 March, the respondent dismissed the claimant with immediate effect. According to the claimant's subsequent appeal letter the claimant received the dismissal letter on 21 March 2020. The dismissal letter from Mr Tyler is at pages 101 and 102 of the bundle. It refers back to the previous invitation letters of 23 January, 2 March and 13 March and points out that the 13 March letter had stated that non-attendance on 17 March would be treated as separate misconduct. It referred back to the fact that the first scheduled meeting had been postponed because of the claimant's grievance and that the second scheduled meeting for 6 March had been postponed at the claimant's request to allow the claimant to be accompanied. It referred back to the claimant's failure to attend on 13 March and acknowledged that the claimant had written in advance to state reasons for not attending on that date; the letter said that Mr Tyler had not found those reasons to be satisfactory. The letter went on to say that Mr Tyler was satisfied that the claimant had received all of the notification letters for the hearings and gave reasons for that belief. (In any event, in these Tribunal proceedings, the claimant does not dispute that he did in fact receive all of the invitation letters.)

55. On the second page of the dismissal letter, it states that despite clear warnings the claimant had not attended the rescheduled hearing on 17 March and did not contact the respondent to provide satisfactory reasons for non-

attendance. It is asserted that this was a failure to obey reasonable instructions and that this was a further act of misconduct. I am satisfied that the dismissal letter was not suggesting that the claimant had failed to supply any reasons at all for the non-attendance on 17 March but rather was stating that the reasons given were not satisfactory. They were indeed the same reasons which the claimant had given for not attending on 13 March 2020 and which Mr Tyler had already decided and informed the claimant of his opinion that those were not satisfactory reasons.

56. The dismissal letter continued to say that Mr Tyler had carefully reviewed all the facts and circumstances and that he had decided to terminate the claimant's employment. The letter went on to say that Mr Tyler's opinion was that the circumstances were such that the claimant was not entitled to notice. His reasons for making that particular assertion, according to the letter, were that he said the original allegations regarding 8 January 2020 had been matters which would have amounted to gross misconduct. The letter informed the claimant of his right to appeal.

57. By letter dated 25 March 2020, the claimant exercised his right to appeal by writing to Jim Whearty, the plant manager. The letter contained only one specific ground of appeal, namely that the claimant had sent the 16 March 2020 email which - the claimant said - outlined satisfactory and good reasons for non-attendance. On 26 March, Mr Whearty sent an email to the claimant. The email acknowledged receipt of the appeal. It asserted that because of the Covid pandemic it would not be possible to arrange a hearing in person and that, instead, Mr Whearty would deal with the appeal in writing. He asked the claimant to submit detailed grounds of appeal by close of business on Tuesday 31 March. The letter stated that if he did not hear from the claimant then he would deal with the appeal based on the letter of 25 March. The email stated that Mr Whearty regretted the departure from normal procedure but that it would be months before a personal hearing could be arranged and that therefore the proposed method was most appropriate.

58. The claimant did not reply to Mr Whearty's email. In other words, he did not ask for an in-person hearing. He did not ask for a telephone hearing. He did not ask for an extension of time to submit more detailed grounds of appeal and he did not submit any grounds of appeal. Mr Whearty did not give evidence. There is a signed statement from him dated 26 April 2021. I am willing to give it such weight as I see fit and, when deciding how much weight to give it, I take into account that no particular reason for his non-attendance has been offered. Mr Whearty's statement very briefly summarises what his more detailed two-page appeal outcome letter says. However, of course, his non-attendance means that the claimant's side have been deprived of the opportunity to cross-examine him generally including in relation to what he did or did not know about the extent to which, if at all, the 15 January 2020 incident was the real reason for the disciplinary actions and/or the claimant's dismissal.

59. In any event, as per the appeal outcome letter dated 1 April 2020, the respondent addressed the one and only ground that had been specifically raised in the appeal, namely the claimant's suggestion that the respondent had ignored his correspondence. The appeal outcome letter stated, correctly in my view, that the responses received from the Claimant had been taken

into account by Mr Tyler. Mr Whearty said had been Mr Tyler's opinion that the claimant's reasons for not attending were not satisfactory and Mr Whearty agreed with Mr Tyler about that. He upheld the dismissal and rejected the appeal.

The law

60. In relation to protected disclosures the qualifying disclosure is defined by s.43B of the Employment Rights Act.

> (1) In this part a qualifying disclosure means any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:
>
> (a) That a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) That a person has failed, is failing or is likely to fail to comply with any legal obligations to which he is subject; …
>
> (d) That the health or safety of any individual has been, is being or is likely to be endangered; or …
>
> (f) That information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

61. There must be a disclosure of information. A disclosure of information can be made as part of making an allegation, see for example Kilraine v London Borough of Wandsworth. Neutral Citation Number: [2018] EWCA Civ 1436

62. In order for a communication to be a qualifying disclosure it has to have sufficient factual content and specificity such as to be capable of tending to show one of the matters listed in s43B(1). In the reasonable belief of the worker, the information must tend to show one of those matters. To be clear that is two questions: does the worker have the belief? And, if so, is it a reasonable one? Likewise, the worker must believe at the time of making the disclosure that the disclosure is made in public interest and the belief must be reasonable. Again, this is two steps: did the worker believe that at the time? and, if so, is the belief a reasonable one?

63. The public interest parts of the requirement were considered in Chesterton Global Ltd v Nurmohamed. Neutral Citation Number: [2017] EWCA Civ 979. Some of the relevant points that were highlighted are:

    a. the Tribunal has to ask whether the worker believed at the time that they were making it that the disclosure was in the public interest and whether, if so, that belief was reasonable.

    b. The Tribunal must not substitute its own view of whether the disclosure was in the public interest for that of the worker. The Tribunal might need to form its own view on that question as part of its analysis of what (on the balance of probabilities) the employee believed at the time, but it is not the Tribunal's view that is determinative.

    c. The necessary belief is simply that the disclosure is in the public interest. The particular reason(s) that the worker believes that it is in the public

interest are not of the essence. What matters is that the claimant's subjective belief was objectively reasonable.

d. While the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be the predominant motive for making the disclosure.

e. Parliament has deliberately chosen to not define the phrase "in the public interest" and the reason for that is that it is Parliament's intention to leave it to Employment Tribunals to apply that phrase as a matter of educated impression.

64. A protected disclosure is a qualifying disclosure which is made by a worker in accordance with any of s.43C to 43H.

65. Employees are protected against being dismissed for making a protected disclosure by s.103A Employment Rights Act which says: "An employee who is dismissed shall be regarded for the purposes of this part" in other words part X "as unfairly dismissed if the reason or if more than one the principal reason for the dismissal is that the employee made a protected disclosure."

66. It is for the respondent to prove what its reason was for dismissing an employee. However, if the Tribunal decides that the reason or the principal reason for the claimant's dismissal was something other than a protected disclosure, then the claim for breach of s.103A will fail even if the Tribunal decides that the dismissal was for a reason that is different for the one put forward by the employer, see for example Kuzel v Roche Products Ltd Neutral Citation Number: [2008] EWCA Civ 380.

67. Evidence that the employer has acted in a high-handed or unreasonable or peremptory fashion or has deliberately turned a blind eye to evidence that the employee was not guilty of, for example, wrongdoing are not necessarily as sufficient pieces of evidence for the employee to succeed under s.103A. The relevance of such evidence, if any, is only if they support an inference that the employer's purported reason for dismissal was not the true reason for the dismissal. As per the Supreme Court decision in Royal Mail Group Ltd v Jhuti [2019] UKSC 55, if the real reason for the dismissal is hidden from the dismissal decision maker behind an invented reason it is the Tribunal's duty to look behind the invented reason. So, for example, if a senior manager (or director) wants to get rid of an employee and that person tricks or deceive the decision maker into making decisions that cause the dismissal, then it is the senior manager's motives for wanting to get rid of the employee that will potentially be attributed to the employer as the dismissal reason under s.103A (and potentially under s.98 in some circumstances).

68. An employer can potentially be acting lawfully if it dismisses an employee solely because of the non-protected aspects of the manner in which the whistleblower conducted themselves while making the disclosure. Tribunals must treat any such claim by an employer with great caution.

69. Section98 of the Employment Rights Act 1996 says, in part:

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.

70. So the respondent bears the burden of proving on the balance of probabilities that the claimant was dismissed for the reason which the employer relies on. The well known excerpt from Abernethy v Mott Hay & Anderson is worth reading out in the circumstances of this case.

> "The reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it that is evidence at any rate against the employer as to the real reason but it does not necessarily constitute the real reason. The employer may knowingly give a reason different from the real reason out of kindness or because he might have difficulty in proving the facts that actually led him to dismiss or he may describe his reasons wrongly through some mistake or language of law."

71. There are various other reasons for an employer to wrongly describe a reason including attempts to hide for example an automatically unfair reason for dismissal.

72. However, provided the respondent does persuade me that the claimant was dismissed for the reason which it relies on and that the reason falls within one of the categories in s.98(1) or (2), then it is necessary for me to consider fairness generally. Neither side has the burden of proof on that. In considering the question of reasonableness, I must analyse whether the respondent had a reasonable basis to believe that the claimant had committed the misconduct in question. It is also necessary to consider whether the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, it is necessary to consider whether this particular respondent's decision to dismiss this particular employee fell within the band of reasonable responses in all of the circumstances. The band of reasonable responses test applies not just to the decision to dismiss; it is also the test to be used when deciding whether the procedure by which that decision was reached was reasonable, see for example Sainsbury's Supermarkets v Hitt.

73. It is not the role of the Tribunal to assess the evidence and to decide whether the claimant should or not have been dismissed or to decide whether the claimant did or did not commit in a conduct case the misconduct in question. It is not the Tribunal's role to substitute its decisions for the decisions made

by the respondent.

74. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account when it is relevant to a question arising under the proceedings. That Code includes sections dealing with, for example, warnings.

75. There are some issues, some types of conduct, which are so serious that dismissal for a one-off act of that type is potentially reasonable. There are other types of conduct for which a dismissal for a one-off act would not be fair but it might be fair taking into account any prior written warning. In Wincanton Group v Stone Appeal No. UKEAT/0011/12, the EAT gave a summary of the law of the relevance of warnings, where the employee claims unfair dismissal, and the employer relies on conduct as its allegedly fair reason. The Tribunal should take into account the fact of the warning, the fact of any proceedings that may affect the validity of warning such as an internal appeal. The Tribunal should generally not go behind a warning and it will be going behind a warning to hold that the warning should not have been issued or, for example, that it should not have been a final warning (should have been a lesser warning). It is not necessarily going behind a warning to take into account the factual circumstances which gave rise to the warning and whether there were considerable differences between the circumstances which gave rise to the first warning and those which led to the dismissal. That is something which can be considered. A degree of similarity between incident which led to the warning and the incident which led to the dismissal might potentially make a more severe penalty reasonable for the later incident than would have been reasonable for a "first offence". Correspondingly, significantly different factual circumstances might potentially lead a tribunal to decide that it had been unreasonable to take into account the previous warning when deciding to dismiss.

76. It is not wrong for a Tribunal to take into account the employer's treatment of similar matters in relation to other employees, but a Tribunal must always remember that is the employer's dismissal that is to be considered in the light of s.98(4). The Court of Appeal reviewed warning cases in Davies v Sandwell Borough Council Neutral Citation Number: [2013] EWCA Civ 135. A Tribunal assessing an unfair dismissal claim can, in an appropriate case, decide that the sanction of a final written warning for a prior incident was a manifestly inappropriate sanction. A Tribunal should only take that step if there is something that is drawn to the Tribunal's attention which enables it to conclude that the sanction plainly ought not to have been imposed. This requires more than simply deciding that the sanction of final written warning had been outside the band of reasonable responses. Subject to the comments above, where a final written warning is live then the issue of whether the decision to dismiss was fair or unfair requires consideration as part of the consideration of s.98(4) of whether in a particular case it was reasonable for the employer to treat the conduct reason taken together with the circumstances of the final written warning as being sufficient to dismiss the claimant.

Conclusions

77. Firstly, in relation to the protected disclosure issue, it is clear on the face of

the documents at pages 50 through to 55 that they do allege that a criminal offence has been committed. Some form of alleged assault is described and also some alleged criminal damage to the Claimant's clothes. There is also, on the face of the documents an alleged breach of a legal obligation, for example the breach of the employer's duty of care to its employees. Taken literally at least there is also an allegation that health and safety has been endangered in that according to the claimant, the claimant had been physically. The letter also makes clear that the information that he is disclosing is that these matters were allegedly being covered up.

78. The claimant did genuinely believe that the information disclosed by his document tended to show criminal offences, breaches of legal obligation, endangerment of health and safety, and that those matters were being concealed. My finding is that his belief was a reasonable one. It was reasonable for him to believe that the letter did expressly and clearly disclose such matters.

79. The public interest test which I have to apply is that discussed in Chesterton. It is not simply a "numbers game"; that is, it is not as simple as deciding how many people were potentially affected, and deciding if that is a big enough number for the public interest to be engaged (as opposed to merely the private interests of some persons.) It is not the case that as long as at least one other person - apart from the claimant - is affected then that is automatically something that is in the public interest; on the other hand, nor is it the case, that, so long as it is only the respondent's employees affected (and nobody else), then it is automatically not in the public interest. In this case the respondent had about 45 employees. The person who is accused of wrongdoing occupied a senior position in the company. The implication of the claimant's disclosure is that if anybody had stood up to being criticised by Mr O'Doherty having foul and abusive language directed towards them by way of abuse/criticism, then the respondent generally (or Mr O'Doherty) in particular might react very badly and potentially violently to that. For what it is worth the respondent, does work on the HS2 contract, which is a large and important publicly funded piece of work. However, of more direct relevance is that the respondent sends drivers out on to the public roads driving HGV vehicles. If it were hypothetically true that those drivers were being abused and beaten by management then it would clearly be in the public interest for that type of wrongdoing to be disclosed.

80. By cross-examination questions, at least, the respondent suggested that perhaps the police had decided it was not in the public interest to prosecute. No evidence that the police's decision not to prosecute was because they thought the matter failed the public interest test (as opposed to a belief that there was insufficient evidence or some other reason for not prosecution) was produced. However, in any event it falls to me to make my own decision on the public interest part of the test, and I would not be obliged to take the same view that either the police or the Crown Prosecution Service had taken. In any event, the alleged crime(s) was not the only disclosure.

81. If the claimant did not believe that the events on 15 January were (substantially) as he described them then he could not, in my opinion, in these particular circumstances, also believe that the disclosures were in the public interest. In particular, if the claimant's 25 January letter was nothing

other than a trumped up attempt to thwart or delay the disciplinary proceedings then it would not be appropriate for me to make a finding that the claimant actually believed that disclosure was in the public interest. Furthermore, in those circumstances, I would find it was not reasonable for the claimant to believe that the disclosure was in the public interest. It therefore follows it is necessary for me to make some findings about what the Claimant genuinely believes happened on 15 January. To a large extent, this requires me to make findings about what actually did happen then.

82. One thing for me to take account of is that, in a heated argument, when things are not written down straightaway afterwards memories can differ, without either party necessarily lying. I put into this category any differences of opinion over whether Mr O'Doherty actually leapt over the counter to get closer to the claimant on the driver's side (which is the claimant's version of events) or whether in fact he was already on the driver's side of the counter when (as Mr O'Doherty and Mr Smith both claimed). Similarly, there is disagreement about who came into the office during the confrontation and about whether Mr Smith followed the protagonists out of the office and into the yard; I can put the differing evidence on those points down to differences of recollection.

83. However, in my opinion, it is not possible to reconcile on the one hand the claimant's account that he was grabbed violently and held on for a period of time, during which he went to the ground and his clothes were ripped, with, on the other hand, the accounts of Mr O'Doherty and Mr Smith that nothing happened other than a shouting match.

84. I take into account that the claimant has always been adamant that the CCTV footage would support his case and I take into account that the claimant went to the police. Even after the grievance was rejected the claimant continued to demand to see the CCTV footage. If the claimant was simply making up his own version of events, he would be taking a big risk in going to the police especially after the respondent had told him that - according to them - they possessed CCTV footage which the claimant to prove that he was not telling the truth. (That is certainly one reading of the outcome letter and the appeal outcome letter, though it is not the position the Respondent has maintained in these proceedings, as set out in the findings of fact).

85. I take into account - based on Mr Fullerton's evidence - that the respondent produced at least one witness statement to the Claimant, in connection with the grievance, that was not what it appeared to be on its face. At the very least ,Mr Fullerton's statement was not signed on 5 February 2020 and was not based on a formal interview or an interview with Mr Fullerton before the statement was written.

86. I take into account that I have not been satisfied with the respondent's account about the whereabouts of the CCTV or its reasons for being unable to disclose it during this litigation.

87. I take into account that I have seen no internal emails going back and forth between Mr Tyler and O'Doherty and Mr Smith about the incident on 15 January, or about the grievance, or about the interviews said to have been done as part of grievance investigation, and I have seen no emails to/from the others said to have agreed the contents of witness statements for the

grievance.

88. I also take into account that Mr Smith's evidence orally at the hearing was that whatever had happened on 15 January had been sufficiently serious for him to be concerned about whether the claimant was going to come back to work the following day and that he wanted to speak specifically to the claimant on 15 January, after the incident, to try to make sure that the claimant would come back to work the following day.

89. While the evidence I have just described would not necessarily be sufficient to prove beyond a reasonable doubt that the claimant was physically assaulted and/or that his clothing was torn on 15 January, I am satisfied on the balance of probabilities that that is what happened.

90. Although it is not strictly necessary for my decision, about whether the Claimant had a genuine belief that he was making a disclosure which was in the public interest, on the balance of probabilities:

    a. I reject the assertion in Mr O'Doherty's statements that the encounter finished with the claimant turning round to Mr O'Doherty and saying words to the effect of "*I'm going to take you to court and let's see how much money I can get out of you*".

    b. I am satisfied that what led to the claimant driving his lorry quickly from the weigh bridge into the yard and then quickly going up to the office to confront Mr O'Doherty is that Mr O'Doherty had spoken to the claimant using foul and abusive language and that the claimant had regarded this as a sign of immense disrespect towards not just the claimant but also his colleagues as well.

91. I am therefore satisfied that the public interest test is met. The claimant wrote his 25 January letter genuinely believing the contents to be true and genuinely believing the disclosure to be in the public interest. My decision is that his belief was a reasonable one. He may or may not have got some of the details of the incident wrong or alternatively he may have them all 100% right, but in any event the central points of his grievance document were correct and it was reasonable for him to think that if Mr O'Doherty was willing to treat the claimant like that then he was potentially willing to treat other people in the same way and that it was in the public interest that Mr O'Doherty's violent conduct be disclosed. Therefore, the 25 January document meets all the requirements to be a protected disclosure and it is a protected disclosure. I therefore need to decide whether or not it was a principal reason for dismissal.

92. It makes sense for me to consider that question alongside the arguments under s.98.

93. For the avoidance of doubt, the respondent has not alleged that the claimant was disciplined for his part in 15 January incident. On the contrary the respondent's position has been that the 15 January incident was not important as far as they were concerned and that immediately afterwards their concern was to keep the claimant on their books because he was a good and much needed driver.

94. I do not believe Mr Tyler's account that somebody had told him that an unnamed driver was not doing safety checks. Had this been true, there would have been a record of it contemporaneously and/or it would have been raised sooner during this litigation.

95. I do believe that - for whatever reason – Mr Tyler looked at the CCTV for 8 January 2020. The respondent's witnesses have denied that Mr Smith or Mr O'Doherty told Mr Tyler to look at CCTV in relation to the claimant (for any day) or to investigate the defect check form dated 8 January. It is there not appropriate for me to speculate about whether either of them had good reasons to put Mr Tyler on notice that there was something about the claimant's vehicle checks that needed to be investigated further. Mr Smith and Mr O'Doherty both gave evidence that they regarded the claimant as a good driver. However, based on the contemporaneous documents, Mr Tyler had viewed CCTV for 8 January, believed that it showed something relevant, and planned to show this to the Claimant during the investigation. Indeed, the documents imply that he was proposing to first get the Claimant's account on the record, and then show him the CCTV.

96. I am satisfied from the evidence that at the time the claimant was suspended the allegation against him was that which was described in the 20 January and 23 January letter. In other words, the allegation was not simply that the claimant had incorrectly filled out the paperwork. It was being specifically and clearly alleged by the respondent that the allegation was that the claimant had not done the vehicle check at all and, also, that he had dishonestly represented that he had done so.

97. I am satisfied by the evidence that Mr Tyler believed that the CCTV was such that there was some evidence on it which could potentially support the allegations just described. I accept Mr Tyler's oral evidence that his opinion was that the video showed the Claimant not outside the vehicle, and not doing the checks at the time they were supposed to be done.

98. He added that - hypothetically - the timings window for the checks could be confirmed accurately by comparing TACO readings (showing when the Claimant drove out of the yard) and the time the claimant had logged into the site by use of facial recognition software. Those are not matters that were referred to in the letters that were sent to the claimant in January about documents that were going to be used at the hearing and so therefore I am not going to take those into account.

99. However, the CCTV was mentioned in January and I am satisfied that at the very least Mr Tyler believed there was material on the CCTV that could be played to the claimant and his union representative during the hearing and that it would potentially show something that required an explanation from the claimant.

100. Ultimately both parties in these proceedings agree the claimant was not actually dismissed for the alleged wrongdoing on 8 January 2020. The respondent's case is that it raised the 8 January matter with the Claimant legitimately and that, having suspended him on full pay and having dealt with his grievance and his grievance appeal, it invited the Claimant to disciplinary hearings, but the Claimant failed to attend them. The respondent's case is that he was specifically dismissed for failing to attend the 17 March

disciplinary hearing (having also failed to attend on 13 March and having been granted postponements for 28 January and 6 March), not for 8 January events.

101. On the claimant's case the dismissal is put in alternative ways.

    a. That the principal reason for dismissal is the protected disclosure, in other words the 25 January 2020 document.

    b. Alternatively, that the dismissal it is something to do with the events of 15 January, such as a dislike of the claimant because of the way he treated Mr O'Doherty that day and/or a belief by the Respondent that it needed to cover up Mr O'Doherty's wrongdoing by discrediting the claimant.

102. Neither side therefore requires me to make specific findings as to whether there would have been reasonable grounds to dismiss the claimant for the events of 8 January 2020. In particular, neither sides' argument require me to make a decision about whether the CCTV footage (with or without other evidence) contained reasonable grounds for the Respondent to believe that the claimant deliberately failed to carry out his checks on that day.

103. On Day 1 of this hearing, I refused the respondent's application to admit some evidence which the respondent said was CCTV footage of 8 January. The claimant's side did not accept that it was actually footage of 8 January when in any event it had been disclosed to them only the day before the hearing and with insufficient time therefore to prepare to cross-examine on it and consider it generally. In any event, for the reasons just mentioned, whatever it is that the CCTV footage actually shows is of limited significance.

104. Of far more significance to the decisions which I do have to make is what caused Mr Tyler to examine the footage. As I have said, I have rejected his claim that it was some sort of tip off. The most likely reason, on the balance of probabilities, is that Mr Tyler decided to view the CCTV footage is that he had been asked to check up on the claimant for some reason.

105. I reject the claimant's argument that the specific reason for dismissing the claimant was the 25 January document. By that stage the claimant had already been suspended and he had already been invited to a disciplinary hearing and he had already been told that, at the disciplinary hearing, CCTV footage would be viewed. If hypothetically the respondent had planned to dismiss the claimant, which is one of the claimant's arguments, because of the events of 15 January and was planning to rely on 8 January as a sham reason, then any such plan must have been in place - on that logic - prior to 25 January. That is, such a hypothetical plan must have been formed by the time that the Claimant was suspended at the latest.

106. In fact, I am satisfied that the specific reasons that the respondent had for terminating the claimant's employment was the claimant's failure to attend the disciplinary hearings on 17 March. This was a reason related to the Claimant's conduct. He failed to attend, having been instructed by the Respondent that he was obliged to attend.

107. The chain of events had been started by other matters, but the claimant had had the opportunity to go to hearings and to put forward his side of things. If

the Claimant believed that the CCTV evidence was either false or inconclusive, then he had the opportunity to put forward those arguments at the hearings. He also had the opportunity to put forward arguments that he had indeed carried out his vehicle checks. The Claimant knew that the allegation was that he had failed to do so (and was not simply an allegation that the paperwork was incomplete). The Claimant had the opportunity to put forward his arguments that he had actually done the vehicle checks (and that the partially completed form was evidence that he had done the vehicle checks). He had the opportunity to say that the only flaw in his conduct was that he had forgotten to sign the documents. Related to that, he would have had the opportunity to put forward his argument that other employees had similarly failed to complete the forms fully and accurately and they had not been disciplined or dismissed.

108. The instruction for the Claimant to attend the hearing was not an unreasonable one.

109. Having decided that the reason for the claimant's actual dismissal was his non-attendance at the 17 March hearing, it is not appropriate for me to speculate on what might have happened had events happened differently. For example, I am not going to speculate on what might have happened if the claimant had attended a disciplinary hearing and put forward his arguments. There is insufficient evidence to persuade me about what would have happened in those particular circumstances. I do accept Mr Tyler's account that he regards inaccurate completion of the paperwork after a check having been done as being completely different to not doing the check at all (and then filing false paperwork). If the hypothetical hearing was a genuine and fair one, then the claimant might have persuaded the respondent he had done the check, and the possibility that he would have got no more than a warning. The other side of the same coin is that – as the claimant himself accepts - other drivers of the respondent had been dismissed in the past when they had not done the vehicle defect checks. So if the hypothetical hearing was a genuine and fair one, then Mr Tyler might have decided that the Claimant had not done the checks, and might have dismissed him for that reason. [The Claimant's case, of course, is that the hypothetical hearing was not going to be a genuine and fair one.]

110. Given that my decision is that the dismissal was that the claimant failed to attend the 17 March, it is necessary to consider whether there were reasonable grounds for the respondent to believe that he had failed to follow an instruction to attend. There were. It is not disputed that the claimant failed to attend. It is not disputed that he had received the letters described in the findings of fact, or that, at the time, he wrote several times to the respondent stating what his reasons were for not going to the meeting and he repeated those reasons in his appeal afterwards.

111. In terms of the procedure by which the decision was reached, my finding is that the procedure adopted was within the band of reasonable responses. There was no other information or evidence that the respondent needed to supply to the claimant about potentially dismissing him for that reason. The claimant had been told, initially in January, that he had to make himself available during his paid suspension and that he had to attend hearings when required. He was told the same thing on further occasions, in connection with

the 13 March hearing and again in connection with the 17 March hearing.

112. The Claimant had been given clear warning that not attending would potentially be a reason for terminating his employment.

113. The appeal was not done face to face but the appeal was done. It was done on the basis of written documents. The claimant did not ask for a face to face hearing. He did not ask for a hearing by telephone. He did not supply further information once he was offered the opportunity to do by Mr Whearty.

114. In terms of the appeal, potentially a different employer might have decided off its own bat and without being asked, that it would seek to arrange the hearing by telephone or some other remote two way communication. Another employer might have said that they would postpone the appeal hearing until after the pandemic restrictions permitted a face to face appeal hearing. However, it was within the band of reasonable responses for the respondent to assert clearly that it was going to deal with the appeal on paper. It sets out its reasons for dealing with it on paper and the claimant did not challenge those reasons at the time.

115. The dismissal for failure to attend a disciplinary meeting and for failing to comply with the instruction to attend such a meeting was within the band of reasonable responses. The respondent's instructions were not unreasonable in the circumstances. The circumstances included the fact that the claimant was still being paid and that he had been told as early as 20 January that he had to make himself available during work hours. He remained bound by the terms of his employment during his suspension.

116. The claimant's only argument for saying that the instruction was not a reasonable one is his belief that he was going to be dismissed anyway and that he was not going to receive a fair hearing. That is not a good enough justification for refusing to follow the instruction. He was being given – according to the Respondent - the opportunity to attend the hearing and to put forward his side of the story. The claimant has not alleged that he felt in any kind of physical danger if he attended the disciplinary hearing and he did, in fact, attend both his grievance hearing and his appeal against the grievance hearing. Both of these were during his suspension and both were after the 15 January incident. Furthermore, he attended work in the days immediately after 15 January as well.

117. Although the parties disagree about the status of, and significance of, the "warning" for failing to attend on 13 March, in my judgment, this is not really a case in which the Respondent's arguments about the reasonableness of the dismissal are along the lines of "Incident A would not merit dismissal for every employee, but this employer was already on a Final Warning because of Incident B and so dismissal was fair". The significance of the warning in this particular case, is that the Respondent, when deciding whether to dismiss, was entitled to (and did) form the opinion that the Claimant had been informed of the potential consequences of failing to attend the next hearing date.

118. The Claimant was told that he was regarded as having committed misconduct by not going on 13 March, but he was also told in the invitation to 17 March that he could put further written reasons in writing to Mr Tyler or he could

contact Mr Tyler and discuss the matter further. He did not do so. The Claimant simply reiterated the reasons which he knew the respondent had already rejected as not being good enough.

119. The respondent ultimately had to make a decision. If the Claimant would not come to a disciplinary hearing, then, to end the Claimant's suspension there were only two options. One was for the Respondent to return to claimant to work and decide not to take any further action in relation to the 8 January matter because the claimant had said he definitely was not going to attend any disciplinary hearing about that issue. The other alternative was to terminate the claimant's employment.

120. As I have already said, whether or not it would have been fair to terminate him for allegations in relation to 8 January 2020 is not the issue which I have to decide. Faced with the two alternatives for ending the suspension, it was not unreasonable to terminate the Claimant's employment because of his failure to attend on 17 March.

121. Thus, the dismissal was not unfair.

_____
Employment Judge Quill

Date: 29 January 2022

Judgment sent to the parties on

.....

.....
For the Tribunal office