EMPLOYMENT TRIBUNALS

Claimant: Mr D Brook

Respondent: Next Distribution Limited

Heard at: Leeds (by Cloud Video Platform) **On:** 28 January 2022

Before: Employment Judge Evans (sitting alone)

Representation
Claimant: Mr R Johns, Counsel
Respondent: Mr W-M Ho, Solicitor

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Cloud Video Platform. A face-to-face hearing was not held because all issues could be determined in a remote hearing.

JUDGMENT

1) The respondent unfairly dismissed the claimant.

2) The respondent is ordered to pay the claimant a basic award of **£9588** (nine thousand five hundred and eighty-eight pounds)**.**

3) The respondent is ordered to pay the claimant a compensatory award of **£853.50** (eight hundred and fifty-three pounds and fifty pence).

4) The recoupment regulations do not apply.

REASONS

Preamble

1. The claimant was dismissed by the respondent on 18 June 2021. He presented a claim of unfair dismissal to the Tribunal on 16 August 2021. The hearing of the claim took place on 28 January 2022 ("the Hearing").

2. The parties had agreed a bundle running to 189 pages ("the Bundle") and all references to page numbers are to those of the Bundle. By agreement, 3 wage slips of the claimant were admitted on the day of the Hearing. In addition, I had before me a schedule of loss prepared by the claimant and a counter-schedule prepared by the respondent.

3. Ms Camplin, a Transport Operations Manager, and Ms Nicholas-Pethick, a Central Transport Manager, gave evidence on behalf of the respondent. The claimant gave evidence on his own behalf and did not call any additional witnesses. A written witness statement had been prepared for each witness and they all also gave oral evidence after, in each case, affirming.

4. Mr Johns made oral submissions only. Mr Ho made his submissions for the respondent primarily by reference to written submissions provided on the day of the Hearing.

5. I had insufficient time to give my judgment with reasons on the day and I therefore reserved my decision.

The issues

6. The parties had not agreed a list of issues prior to the Hearing but the following list was agreed at the beginning of the day:

    1) What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

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

        a. there were reasonable grounds for that belief;
        b. at the time the belief was formed the respondent had carried out a reasonable investigation;
        c. the respondent otherwise acted in a procedurally fair manner;
        d. dismissal was within the range of reasonable responses.

    If the dismissal was unfair:

    3) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

    4) If so, should the claimant's compensation be reduced? By how much?

    5) Did the claimant cause or contribute to dismissal by blameworthy conduct?

    6) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

    7) Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

7. Initially, it was agreed that other remedy issues would (if relevant) be dealt with separately. However, it was agreed in a brief discussion after lunch that because remedies issues were not complicated – the claimant having found similar employment more or less immediately – other remedy issues would be dealt with at the same time. The claimant was therefore cross-examined in relation to remedy issues as well as in relation to liability issues and submissions were made in relation to liability and remedy issues.

8. This is a case in which the claimant was dismissed as a result of conduct which the respondent accepted was not in and of itself gross misconduct. He was dismissed because he had a live final written warning. At the beginning of the Hearing I therefore noted what Stein v Associated Dairies ltd [1982] IRLR 447 has to say about the circumstances in which a final written warning can be challenged when dismissal is prompted by a later lesser offence.

9. Mr Johns stated that the claimant would not seek to challenge the final written warning, i.e. he would not seek to argue, as it is put in Stein, that it was issued for "an oblique motive" or was "manifestly inappropriate". More generally, it was agreed that the appropriate approach to take to the way in which the final written warning and the later lesser offence had combined to result in the claimant's dismissal was that set out in Wincanton Group plc v Stone [2013] IRLR 178, EAT.

The Law

Unfair dismissal

10. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed. Section 98(1) of the 1996 Act provides that, when a Tribunal has to determine whether a dismissal is fair or unfair, it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). The burden of proof to show the reason and that it was a potentially fair reason is on the employer. A reason for dismissal is a set of facts known to or beliefs held by the employer which cause it to dismiss the employee.

11. If the employer persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

12. In considering this question the Tribunal must not put itself in the position of the employer and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the employer. Rather it must decide whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

13. When the reason for the dismissal is misconduct the Tribunal should have regard to the three-part test set out in British Home Stores Limited v Burchell [1980] ICR 303. First, the employer must show that it believed the employee was guilty of misconduct. This is relevant to the employer establishing a potentially fair reason for the dismissal under section 98(1) and the burden of proof is on the employer. Secondly, the Tribunal must consider whether the employer had reasonable grounds upon which to sustain its belief in the employee's guilt. Thirdly, the Tribunal must consider whether at the stage at which that belief was formed on those grounds the employer had carried out as much investigation into the matter as was reasonable in the circumstances. The second and third parts of the test are relevant to the question of reasonableness under section 98(4) and the burden of proof in relation to them is neutral.

14. As noted above, this is a case in which the claimant was dismissed as a result of a live final written warning being taken into account when a further disciplinary offence

allegedly took place. In Wincanton Group plc v Stone [2013] IRLR 178, EAT at para 37 Langstaff P gave the following summary of the law on warnings in misconduct cases:

> *We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of an earlier warning. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:*
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> *(1) The Tribunal should take into account the fact of that warning.*
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> *(2) A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.*
>
> *(3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.*
>
> *(4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.*
>
> *(5) Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.*
>
> *(6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur."*

15. Turning to the issue of Polkey, section 123(1) of the 1996 Act provides:

> *Subject to the provisions of this section and sections 124, 124A and 126, the amount*

of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal so far as that loss is attributable to action taken by the employer.

16. Therefore, if a Tribunal finds an unfair dismissal claim to be well founded, it must consider whether the compensatory award should be reduced to reflect the chance that the employee might have been fairly dismissed in any event at a later date or if a fair procedure had been used.

17. Turning to the question of contributory conduct, section 123(6) of the 1996 Act requires a Tribunal to reduce the amount of the compensatory award by such amount as it considers just and equitable if it concludes that an employee caused or contributed to their dismissal. In addition, section 122(2) requires a Tribunal to reduce the basic award if it considers that it would be just and equitable to do so in light of the employee's conduct prior to dismissal.

Submissions

18. The oral submissions of Mr Johns for the claimant may reasonably be summarised as follows:

    18.1. The facts of the act of misconduct leading to the claimant's dismissal were fundamentally different to those leading to the final written warning. The respondent should have taken this into account rather than slavishly following what it regarded as procedure by dismissing;

    18.2. So far as the second act of misconduct was concerned – the breach of the social media policy by a comment on the Yapster app and by comments on Facebook – there was in fact no misconduct;

    18.3. If there was misconduct, to dismiss was not reasonable. The claimant had never seen the policy by reference to which he was dismissed, he had been employed for 22 years and it was not reasonable to dismiss him even when he already had a final written warning for sending a single message in the vernacular to a colleague;

    18.4. The unreasonableness of the respondent's approach was illustrated by a "one-eyed" focus on finding evidence going to the claimant's guilt and ignoring disculpatory evidence;

    18.5. In relation to remedy, the appropriate approach to the payment in lieu of notice ("PILON") which had been paid was to take it into account in respect of the claimant's losses during what would have been his notice period but not subsequently. The claimant's approach generally had been that he would no longer be suffering ongoing losses 1 year after the termination of his employment.

19. Mr Ho relied primarily on his written submissions. I do not set them out in any detail here but they may reasonably be summarised as follows:

    19.1. The respondent's social media policy was "easily accessible" through an employee portal and the claimant's comment on Yapster was clearly a breach of it;

    19.2. The respondent's approach satisfied the various limbs of the Burchell test and the procedure followed generally was fair;

19.3. Dismissal was a reasonable sanction for the alleged misconduct;

19.4. If the dismissal were unfair, the claimant's compensation should be reduced by 100% for contributory conduct;

19.5. Further, the claimant had suffered no financial losses when the PILON was taken into account. He had within a matter of weeks obtained better paid employment.

20. The principal additional points made in Mr Ho's oral submissions may reasonably be summarised as follows:

20.1. The context for the offensive comment on Yapster was that the claimant had very recently received a final written warning. He should have been very aware of his surroundings at work. He might have thought his comment on Yapster was an inoffensive throwaway comment but the planning team worked hard and so comments about the rotas they prepared in a public forum were not appropriate – they were undermining;

20.2. Dismissal was within the terms of the respondent's policies because of the existence of the final written warning. Ms Camplin had explained that she had considered whether a lesser sanction was possible but had understood that was not open to her;

20.3. Even if the social media policy had not been drawn to his attention, it was available on the employee portal. It was not as though the claimant did not know where to find it. Mr Ho accepted, however, that there was no evidence beyond this relevant to the issue of whether the claimant knew about the existence of a social media policy;

20.4. The comment made on Yapster had clearly been intended to upset Mr Dyer, the distribution projects manager. The claimant would have known that the comment inappropriate without reference to the social media policy;

20.5. Ms Nicholas-Pethick had done enough at the appeal stage for the dismissal to be within the band of reasonable responses. Not all employers would have dismissed, but nevertheless the dismissal was within the range of reasonable responses;

20.6. So far as contribution was concerned, the claimant was the author of his own misfortunes. However, Mr Ho accepted that the culpable conduct which should be taken into account was only the Yapster comment, not the earlier conduct which had led to the tachograph offence.

Findings of fact

21. The claimant was employed by the respondent from March 1999 until his dismissal on 18 June 2021. He was initially employed as a warehouse operative but had been working as an LGV driver for around 4.5 years when he was dismissed.

22. The claimant was given a final written warning on 27 April 2021 by Ms Camplin ("the final written warning"). This was given for driving a unit on site without a tachograph card inserted in it. An appeal against the final written warning had been rejected by Ms Nicholas-Pethick in a letter dated 7 June 2021 (page 130).

23. On a date after 27 April but before 7 June 2021 (the parties could not be precise), the claimant made a comment on Yapster. This is an app which employees of the respondent have on their smart phones and which permits them to communicate with particular groups of employees of the respondent. The post was on the "Elmsall & Dearne LGV drivers" group.

24. Another driver, Philip Watson, had commented as follows on the "Elmsall & Dearne LGV drivers" group:

> *Planning have planned me in for 1800hrs Bristol which is out of band for c band after relatedly been informed I have a occupational health report stating 1500 hrs latest starts*

25. The claimant had replied to Mr Watson on the "Elmsall & Dearne LGV drivers" group saying (page 122):

> *Tell them to do one they should put u on your own rotar away from c band That way rest off c band dont get all your late starts Maybe go onto a band*

26. There was some discussion about who could see posts to this group. Ms Camplin thought that anyone who wanted to could click on it, indeed she thought any employee could look at the posts of any group, but when asked further questions her evidence was vague. The claimant was clear that only certain employees could see posts to this group – he said that when he opened the Yapster app he could only see a few groups. For example, he could not see groups relating to other drivers at other depots.

27. I prefer the evidence of the claimant in this respect and find that only employees whom an administrator had identified (whether individually or by reference to their membership of one or more groups) could see posts made to a particular group. I prefer his evidence for two reasons. First, his evidence was informed by practical experience of using the Yapster app and Ms Camplin made no significant reference to any such experience. Secondly, his evidence was inherently more likely. It would be surprising if all employees in a company employing 8500 people could see all posts in all groups. For example, it is inherently improbable that a driver such as the claimant would have been allowed access to posts made by senior managers within a senior management group. Thirdly, it is consistent with what was said at the investigation meeting (see [30] below).

28. I therefore find that the number of people who would have been able to see posts on the "Elmsall & Dearne LGV drivers" group would have been limited to the relevant drivers plus a few others (for example, members of the planning team). I also find that Ms Camplin would have been aware of this when she dealt with the matter.

29. On 11 June 2021 the respondent obtained screen shots of Facebook posts made by the claimant in relation to an accident involving a Next vehicle (pages 153 to 161). The claimant does not identify himself as working for the respondent in the posts or in his profile. A number of people are posting in relation to the accident which involved a car. The claimant's comments are to the effect that it does not appear from the position of the Next vehicle and the car that the accident was the fault of the Next driver.

30. An investigation meeting in relation to the Yapster comment took place on 25 May 2021 (page 110). The claimant said that the comment was "banter" and that he had not intended to be malicious. He said he did not know Yapster was a social media platform and that he was not aware of the respondent's social media policy (page 114). He only used the employee portal for payslips. He accepted his comment was "worded

incorrectly" but said he was "trying to help another driver". He said it would not happen again. The person conducting the investigation meeting noted that the post had been "seen by several members of staff" (page 117).

31. The social media policy (page 118) states:

> ***Purpose of the Policy***
>
> *This policy is intended to help all employees make appropriate decisions about the use of any online platform which can be used for networking or sharing information or opinions.*
>
> ***The scope of the policy***
>
> *All employees are expected to comply with this policy at all times to protect the privacy, confidentiality, interests of the Company and our services.*
>
> - *Employees must not make or permit any detrimental or derogatory statements about the Company, its Managers, employees, suppliers, its products or customers to be distributed or published in any form on the internet.*
> - *This includes posting comments, pictures, videos, blogging, using forums, sending private messages, endorsing other people's comments and re-tweeting/circulating posts.*
> - *It covers platforms like YouTube, LinkedIn, Facebook, Twitter, Instagram, Pinterest, Whatsapp, Yapster etc, or any other existing or new social media platforms including texting groups whether it is internal, external on a personal or work device.*

32. It went on to note that breaches of the policy might be dealt with under the disciplinary procedure. There are examples of inappropriate "prejudiced, discriminatory or extremist views including derogatory language" in the policy (page 120). Most have no relevance to the facts of this case, but reference is made to "demeaning" or "offensive" comments. The disciplinary procedure itself (page 31) does not refer expressly to the social media policy.

33. Ms Camplin invited the claimant to attend a disciplinary meeting by a letter dated 27 May 2021 (page 124) to discuss "an alleged breach of the social media policy". The meeting began on 9 June 2021. The claimant again said he had not seen the social media policy before making the post on Yapster (page 145), indeed did not know it existed (page 146). He apologised saying that his comment was not aimed at anyone (page 147). Mr Watson provided a brief letter (page 150) saying that the "comments were taken as banter and no offense was taken by myself. You could call it driver humor". The disciplinary hearing then resumed on 18 June 2021 and during the resumed hearing the claimant was asked about the Facebook posts.

34. After an adjournment to deliberate, Ms Camplin dismissed the claimant (page 167). The dismissal was confirmed by a letter dated 30 June 2021 (page 170). These documents do not set out clearly exactly why she decided to dismiss the claimant. However her witness statement (paragraphs 32 and 33) set out her reason for dismissing the claimant. She stated:

> *… I considered Mr Brook's remorse but reached the decision to dismiss Mr Brook on the basis that his breach of the social media policy (both in respect of the*

> *posts on Yapster and Facebook) amounted to further misconduct whilst he had a live final written warning on his file.*
>
> *[33] I took into account the fact that owing to Mr Brook's length of service, most of his friends on Facebook knew he worked at Next. I therefore felt that Mr Brook's Facebook post was a further example of Mr Brook's breaching the social media policy. That being said, I did consider Mr Brook's comment on Yapster to be a more serious breach of the social media policy, because of the wording used by Mr Brook, which was directed against members of the Transport Planning team.*

35. Ms Camplin was asked in her oral evidence what was wrong with the Facebook posts, and, specifically, how they breached the social media policy. She commented that the Facebook posts did not breach the social media policy but were inadvisable. She had been "trying to explain to Mr Brook how things can be perceived".

36. Ms Camplin was also asked why she had dismissed the claimant, given that it was accepted that the breach of the social media policy was relatively minor – she had said that if there had been no previous misconduct it might have resulted in a "verbal warning". Her answer was that to extend the previous final written warning and not dismiss "would have gone against our policy which states that the only exception to the rule" that a further disciplinary offence when an employee was on a final written warning would be in the situation where an employee on a final written warning had a period of absence that would normally have triggered a further warning (and so, cumulatively, dismissal).

37. I asked where the disciplinary policy said this. Neither she nor Mr Ho could identify anything in the policy which put things in quite these terms. I was pointed to page 34 which explained how acts of misconduct would be linked (under the heading Further instances of misconduct/incapability).

38. Ms Camplin was asked how the claimant should have known about the social media policy. She was unable to identify any steps that would have been taken to draw it to his attention but said that it was available through the employee portal – as was every policy relevant to them. There was a dropdown menu of all the policies. Ms Camplin was also unable to give any significant evidence about who had allegedly been upset by the Yapster comment.

39. Taking the evidence in the round, I find that the claimant was not aware of the existence of the social media policy and that the respondent had not taken reasonable steps to draw it to his attention. Simply making available a policy on a portal used by employees to access their payslips in insufficient.

40. Ms Nicholas-Pethick conducted the appeal against dismissal. In her witness statement at paragraph 3 she said that the appeal had been by way of a re-hearing but in her oral evidence she confirmed that in fact the appeal had been by way of a review: she had not considered everything afresh, but rather had simply reviewed Ms Camplin's decision in light of the appeal points raised by the claimant. These were in an email at page 168.

41. The appeal took place on 13 July 2021 and on 2 August 2021 Ms Nicholas-Pethick wrote to the claimant dismissing his appeal (page 179). She dealt with the various specific points raised in his email at page 168 as summarised by her at page 179 before upholding the decision to dismiss.

42. In her oral evidence Ms Nicholas-Pethick said that normally the breach of the social media policy committed in her view by the claimant would have resulted in a written

warning. When asked why it was in all the circumstances including the claimant having completed 21 years' service it was appropriate to dismiss she said:

> *Both offences were conduct offences and they were linked. Given he was on a live final written warning, in line of policy the next thing would be to dismiss. I believe that given the timeframe of previous final written warning to address conduct, that wasn't taken any notice of.*

Conclusions

43. The factual reason for the respondent's decision to dismiss the claimant was that he had made (1) the Yapster comment (2) the Facebook posts set out or referred to above, allegedly in breach of its social media policy. This factual reason related to the claimant's conduct. I conclude that both Ms Camplin and Ms Nicholas-Pethick genuinely believed at the time of the hearings they conducted that the claimant was guilty of misconduct, albeit the conduct in and of itself was not serious (on a "free-standing" basis their evidence was that it would have resulted in either a verbal or a first written warning).

44. Turning to the other Burchell questions, I consider whether the respondent had reasonable grounds for that belief. I conclude that the respondent did, just, so far as the Yapster comment is concerned: the claimant had suggested to Mr Watson to *Tell them to do one,* "them" referring to the planning team. In such a context "tell them to do one" really means "tell them to get lost". So what the claimant is saying to Mr Watson in front of a potential audience of a few drivers and one or more members of the planning team is "Tell the planning team to get lost" [i.e. that you are not going to do the rota they have proposed] before going on to suggest the kind of rota that Mr Watson might say he should be put on. Such a comment, made publicly, is slightly rude and may be regarded, just about, as being "detrimental or derogatory" or "offensive". As such, it should not have been made under the terms of the social media policy. However, the language used and sentiments expressed are mild. Further, the claimant was responding to Mr Watson in relation to concerns on the part of Mr Watson which the respondent has not suggested either that he was wrong to raise or that he was wrong to raise in the semi-public forum of Yapster. Further, the claimant was not directing his comments directly to the planning team, albeit at least one of them saw them.

45. Turning to the Facebook posts, I conclude that Ms Camplin who took the decision to dismiss did not have reasonable grounds for her belief that the claimant was guilty of misconduct in light of what she said in her oral evidence and what the social media policy says. She accepted that the posts did not breach the social media policy and observed that they were perhaps "inadvisable". Ms Nicholas-Pethick, given the limited scope of the appeal, did not at the time of hearing the appeal address her mind to this issue but her explanation in her oral evidence of why the Facebook posts were in breach of the social media policy was unconvincing.

46. Turning to the question of the investigation, the claimant did not raise any points of substance in relation to the investigation and I find that it was a reasonable one. Equally, I find that the respondent otherwise acted in a procedurally fair manner.

47. Turning to the final question of whether the dismissal was within the band of reasonable responses and, applying the principles from Wincanton as set out above, I proceed on the basis that the final written warning was valid and that the fact of it should be taken into account. Further, by the time of the final decision to dismiss, it cannot realistically be said that there were proceedings affecting its validity because the appeal against it was refused by a letter dated 7 June 2021 (page 130).

48. It should be noted, however, that the conduct giving rise to the final written warning – failing to use a tachograph card – was wholly unrelated to the subsequent conduct which resulted in dismissal – a breach of the respondent's social media policy. This is not a case where the claimant, having received a final written warning for a tachograph offence, promptly went out and committed further misconduct related to the use of his tachograph. The misconduct was very different indeed. It was also very minor.

49. Nevertheless, a final written warning "always implies … that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur".

50. Taking matters in the round, I have concluded that to dismiss the claimant was not within the band of reasonable responses, even when full account is taken of the fact that he was on a final written warning, when the following factors are cumulatively taken into account:

    50.1. The claimant was a very long-serving employee;

    50.2. The claimant was not aware of the social media policy and had not had its existence or contents drawn to his attention;

    50.3. The respondent did not have reasonable grounds for its belief in the claimant's guilt so far as the Facebook comments, which formed part of the reason to dismiss, were concerned;

    50.4. The misconduct when properly contextualised was very minor indeed, whether seen in terms of the social media policy or otherwise. The claimant had suggested in slightly rude terms how another driver might raise his own legitimate concerns with management in response to that other driver raising them in the semi-public but purely internal forum of Yapster. There was no objection by the respondent to the other driver raising his concerns in that way. It was only likely that a few employees had seen the comment by the claimant;

    50.5. That misconduct was wholly unrelated to the misconduct which had resulted in the final written warning.

51. The claimant was, therefore, unfairly dismissed. I have come to the conclusion conscious of the fact that Wincanton is a very formidable hurdle for an employee to overcome when they are challenging a dismissal of this kind. That is of course in addition to the fact that the band of reasonable responses test requires me not to substitute my own view for that of the employer. However, in the end, and with considerable caution, I have concluded that no reasonable employer would have dismissed such a long-serving employee for such a minor breach of a policy of which he was unaware even when he was on a final written warning.

52. Turning to Polkey issues, the dismissal was not unfair because of procedural failures and no reason has been put forward for why the claimant would have been fairly dismissed for other reasons. Indeed, I find that this would have been unlikely given the general shortage of drivers.

53. Turning to blameworthy conduct, I find that the Yapster comment was blameworthy conduct, albeit very mild, which contributed to the claimant's dismissal. In all the circumstances and taking due account of the nature of the conduct, it would be just and equitable to reduce the claimant's compensatory award by 25%. It would also be just and

equitable to reduce the basic award by the same percentage because of his conduct before dismissal.

Remedy

54. The claim does not wish to be re-employed by the respondent. The parties agreed that the claimant's basic award if unreduced would be £12784, I therefore order the respondent to pay the claimant a basic award of £9588.

55. Turning to the compensatory award, the claimant received a payment in lieu of notice of £8305.92. His net earnings and pension benefits during the 12-week notice period would have been less than that and he claims no loss in respect of that period. Equally, his earnings in that period do not mitigate his losses generally (Babcock FATA v Addison [1987] IRLR 173). What he claims is 40 weeks loss following that period at £92 a week (in respect of net wages) and £38.45 per week in respect of pension (£1538), plus loss of statutory rights of £500, bonus payments of £1500 and an Acas uplift (unexplained) of 25%. The claimant made no submissions in relation to the Acas uplift and I have not found any breach of a relevant code above, so no increase to any award is to be made on that basis.

56. The respondent's position is that the claimant should have been able to find similarly placed employment within his notice period, given the well-known shortage of drivers. Further, the respondent contends that his wage slips do not show that he has suffered any loss.

57. The wage slips provided in the Bundle show that his net pay from the respondent in the first three months of the current tax year (a period of 13 weeks) was £6386.21, so average net pay was £489.86. The respondent did a slightly different calculation in written submissions which produced an average weekly figure for the period February 2021 to June 2021 of £510.01 and so I rely on that figure. Mr Johns did not disagree with it in his submissions.

58. The wages slips provided in the Bundle and separately show that the claimant's net pay for the period August 2021 to December 2021 from his new employer, Asda, produced average net weekly pay of £556.59 – the calculation was set out in the respondent's closing submissions and was not disputed by Mr Johns. The claimant also explained in his oral evidence that from early January he was due to receive an additional £180 gross per month.

59. The claimant's schedule of loss is based on the claimant's role with the employer being paid at £552 a week net and that with the Asda at £454 net. However, neither of those figures reflect the payslips provided by the claimant. Looking at those, it appears that on average the claimant in fact earns around £45 net a week more in his current employment that when working for the respondent and that this figure will be increased by an additional £180 gross from January (around £25 a week net).

60. Overall, therefore, it appears that for the period from 10 September (the end of the claimant's notice period) to the end of 2021 (16 weeks) the claimant will have earned approximately £720 net (i.e. 16 x £45) more in wages than he would have done if he had remained in the employment of the respondent and that in the remaining 24 weeks for which he claims losses he will have earned £1680 net (i.e. 24 x £70) more. In total, therefore he will earn £2400 more in net wages in the 40-week period for which he claims loss than he would have been paid in wages if he had remained in the respondent's employment.

61. To be set against this is claimed pension loss of £38.45 per week (£1538 over the period of 40 weeks) and the bonus of £1500 (net). The principle of entitlement to these amounts is not challenged by the respondent in its counter-schedule – rather the respondent says that he should not receive compensation for them because he should have fully mitigated his loss by the end of his notice period. Further, £500 is claimed for the loss of statutory rights. This gives a total of £3538.

62. As noted, the respondent contends that no award should be made: the claimant should have been able to find other employment paying equally well within 12 weeks and so he has failed to mitigate his loss. I do not accept this argument: the claimant obtained very similar work on very similar pay more or less immediately. He has not failed to mitigate his loss.

63. The claimant's loss is therefore £3538 (pension, bonus and loss of statutory rights) less the £2400 of additional wages, which gives a net loss of £1138. That falls to be reduced by 25% for contributory fault and so the compensatory award payable to the claimant is £853.50.

Employment Judge Evans

Date: 2 February 2022

JUDGMENT SENT TO THE PARTIES ON

Date: 14 February 2022