EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. K. O'Kane	v	**DPD Group U.K. Limited**

Heard at: **Birmingham via CVP** **On:** **6 & 7 April 2022**

Before: **Employment Judge Wedderspoon**

Representation:

Claimant: **In Person**

Respondents: **Mr. Bownes, Solicitor**

JUDGMENT

1. The claim of unfair dismissal is not well founded and is dismissed.

REASONS

1. The Tribunal gave oral reasons to the parties on 7 April 2022. Following the delivery of the oral judgment none of the parties asked for written reasons. The claimant applied outside the 14 day time limit for written reasons on the basis that he was too unwell during the relevant period following to request written reasons. In the interests of justice, the Tribunal exercised its discretion to extend the time for the claimant to request written reasons.

2. By claim form dated 1 September 2020 the claimant brought a complaint of unfair dismissal.

3. The agreed list of issues previously identified by Employment Judge Hindmarch at a preliminary hearing (see page 462-466) are as follows :-

    a. Was the claimant was dismissed ?

    b. 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.

    c. 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:

        i. there were reasonable grounds for that belief;

ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
iii. the respondent otherwise acted in a procedurally fair manner;
iv. dismissal was within the range of reasonable responses.

4. Remedy for unfair dismissal

a. Does the claimant wish to be reinstated to their previous employment?

b. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

c. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

d. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

e. What should the terms of the re-engagement order be?

f. If there is a compensatory award, how much should it be? The Tribunal will decide:

    i. What financial losses has the dismissal caused the claimant?
    ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    iii. If not, for what period of loss should the claimant be compensated?
    iv. 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?
    v. If so, should the claimant's compensation be reduced? By how much?
    vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
    vii. Did the respondent or the claimant unreasonably fail to comply with it by ?
    viii. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
    ix. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
    x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
    xi. Does the statutory cap apply?

g. What basic award is payable to the claimant, if any?

h. 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?

The hearing

5. The Tribunal was provided with an electronic bundle of 542 pages. The respondent relied upon the witness evidence of Lewis Baum, Hub Manager; Gavin Dolan, Head of Local Operations and Andrew Lee, Head of People & Talent. The claimant gave evidence and relied upon the witness evidence of Dylan O'Kane and two anonymous witnesses. In the circumstances that the anonymous witnesses were not identified (and in respect of Mr. Dylan O'Kane) nor present to be cross examined the Tribunal attached minimal weight to their witness statements.

Credibility

6. The Tribunal found the claimant's evidence to be inconsistent and evasive. In the claimant's ET1 form the main points raised by the claimant were that (a)the sanction of dismissal was too severe and (b)he compared himself with another colleague who had also struck a bridge who had not been suspended or dismissed. Further the claimant stated that the decision was pre-determined. At the final hearing the focus of the claimant's case significantly changed. He put a number of questions to the respondent's witnesses about a lack of training and failure to risk assess the task he was performing at the time. This was a change to the case he had put in the disciplinary and appeal process and in his pleaded case.
7. Furthermore, during cross examination, when asked as to whether he was familiar with the process of dropping the height of his vehicle, the claimant was reluctant to admit that he knew how to adjust the height of his vehicle and the question had to be put several times before the claimant answered that he did in fact know. It was a simple question but the claimant appeared reluctant to answer it directly.
8. The claimant also stated in evidence he was fatigued by the communication he had with his manager on the phone just before he hit the bridge. This contradicted what the claimant told the respondent at page 237 of the documents when he informed the respondent he had been tired out as a result of checking the vehicles. The claimant raised for the first time in the tribunal hearing that it might have been a failure of the tug. The Tribunal contrasts this with the responses of the respondent's witnesses who answered the questions put by the claimant directly and if they did not know, conceded so. The tribunal found their evidence to be clear and credible.

Facts

9. The respondent is a parcel delivery business. The claimant was employed by the respondent from February 2013 as a line haul driver and since October 2015 has been a tug driver. His duties as a tug driver included manoeuvring trailers around the site yard safely and efficiently docking onto bays and docking off from bays and moving empty trailers from the site to Pargats as and when required by the yard manager.

10. For a period of three weeks prior to the incident on 22 June 2020, the claimant had taken a tug from the site to Pargats which required travelling

along a road and through a bridge. The claimant by his own estimate had done this hundreds of times. The Tribunal found the claimant to be an experienced driver with experience of using a tug and completing this task. The claimant had a class 1 driving licence (p206). He also attended a number of different courses including road risk module which includes training about hazard perception (page 35). The claimant also underwent training in movement of trailers between sites at p.49. At page 54 the claimant had a training course on prevention of bridge strikes in the context of trailers. At page 62 in 2015 the clamant underwent a linehaul course concerned with Linehaul which involved training on bridge strikes at page 69.

11. The claimant had received tug training. In the bundle from pages 160,161,162,163 includes the claimant's training records. The claimant signed at page 163 that he understood the training manual. At page 164 it is listed that a major incident includes a bridge strike. At the time of the incident the claimant had been a tug driver for 4 years. The training includes moving trailer in and out of the workshop which required a driver to lower the height of the vehicle; this required lowering the fifth wheel. The respondent did conduct generic risk assessments where it was considered appropriate but had not performed a risk assessment for the task of moving a tug from the site to Paragets. There is a bridge on site.

12. The Tribunal found that the claimant had been adequately trained concerning the hazard of bridge strikes. In the context of tugs the tribunal rejected the claimant's argument that there was a significant difference between trailers and tugs. Albeit that there is no hazard height markings on a tug, the principle is the same that when driving a tug a driver should take steps to ensure that the vehicle can clear the bridge. The claimant was familiar with the process of lowering the 5th wheel to do so as he had done on 100s of occasions in the three weeks leading up to 22 June and on about 20 to 30 occasions on the date in question.

13. The respondents' disciplinary policy at page 179 identifies serious negligence as including *"causing unacceptable loss damage or injury as an act of gross misconduct.*"

14. The cost of accidents was of significant importance to the respondent. At page 74 it was estimated that linehaul accidents on the road cost the company about £2million. It was a matter which the respondent took seriously so that on 8 February 2019 the CEO of the respondent emailed senior managers of the need to reduce accidents.

15. On 22 June 2020 the claimant was moving a tug to Pargats which required him to exit the site and travel along a highway. The claimant had to travel over a hump in the road and then travel to the bridge. Unfortunately, his tug struck a bridge causing over £10,000 damage to the tug. In his statement dated 22 June 2020 the claimant answered the question on the accident

form as who's at fault it was as *"self"* and signed this declaration page 209 stated *"it hadn't gone down"*.

16. On 25 June 2020 the claimant was suspended (page 224) pending investigation regarding an allegation that he had failed to carry out his duties to a satisfactory standard which resulted in him hitting a bridge (whilst attempting to pass under it) and causing damage to a trailer. The suspension letter stated that a sanction up to and including summary dismissal could result if the allegation against the claimant was well founded.

17. Mr. Kumar, Yard Manager undertook an investigation (page 195-223) and concluded that the claimant collided with the bridge on Roebuck Lane outside Hub 1 with extensive frontal damage to the trailer (page 195-205). The claimant completed a motor accident report form (page 208-211) which he signed confirming that he was responsible for the accident (page 211) During the investigation meeting the claimant stated he had been undertaking the role of moving empty trailer from the yard (A park) to Pragats for several weeks and was familiar with the route and the bridge he collided with. He said he thought he had dropped the trailer down but obviously couldn't have done (page 215). He admitted to moving hundreds of trailers in the past (page 216) and that on that particular date he moved 20 to 35 trailers (page 216,219). The value of the damage was £10,646.48 (page 226).

18. On 2 July 2020 the claimant was invited to attend a disciplinary hearing on 7 July 229-230. The claimant was provided with evidence obtained from the investigation and was informed he would be accompanied at the meeting and he was warned if the allegation was upheld he could be dismissed (page 229).

19. Mr. Baum chaired the disciplinary hearing. In 2017/2018 the claimant had stated that he was unhappy with the management style of Mr. Baum. Mr. Baum made the decision to summarily dismiss the claimant on 20 September 2019 (page 191-2) when he found that the claimant had failed to inform the respondent about the work he was undertaking for other companies (so to accurately time record his driving). The claimant appealed this decision and Mr. Dolan reinstated the claimant as a driver subject to a final written warning for 12 months (pages 193-4). IN the disciplinary hearing dated 7 July 2020neither the claimant or his trade union representative suggested that it was inappropriate for Mr. Baum to chair or that he was biased.

20. Prior to the hearing, Mr. Baum considered the evidence (pages 164-8; 195-228 and the CCTV footage).

21. At the disciplinary hearing on 7 July 2020 (pages 231-242) Nigel Newcombe Operations Manager attended as a management witness. The claimant

attended with his trade union representative Mr. Jackson. The claimant expressed that he was sorry for the incident. He stated he felt he was treated differently to another employee Mr. Gillespie who has also struck a bridge and had not been suspended. Mr. Baum informed the claimant that at this time the respondent's process for hubs was that suspension was the appropriate action pending investigation into such allegations. The respondent had always considered summary dismissal as a potential outcome for such offences The claimant said that he was tired because he as taking out empty trailers from the yard and was conducting security checks himself regarding the trailer being empty. He also stated he felt pressured whilst on the job because managers contacted him via his mobile phone to give him instructions. The claimant stated he dd not inform managers that he was tired or that he felt pressured. The claimant's trade union representative admitted that the incident was very serious and said if somebody's kiddie was walking under there (i.e. a bridge) or a mother with a pram and a brick fell off and killed them the company is in serious trouble". He stated that he thought the claimant should have been suspended straight away. The claimant dd not raise any issues at the hearing about his medical condition. Further the claimant did not challenge Mr. Baum when he stated that he had supported the claimant with first aid and other matters (page 240)

22. In response to the claimant's suggestion that he was being treated differently to Mr. Gillespie, Mr. Baum also explained that things were being differently since Mr. Gillespie's case in 2018.

23. Mr. Baum adjourned and considered the evidence. He found that the claimant was an experienced driver and had received extensive training (see p.34-163. He was assessed and received training in tug driving on 22 July 2019 and received a certificate of professional competence CPC and certification (p.148-163). The claimant was fully licensed to drive a number of vehicles until 2024. He was fully trained on how to lower the trailer to pass under a bridge and had done so 20 -30 times that day. He concluded that the claimant knew of the potentially life-threatening hazards involved and he had been grossly negligent. He took into account that the claimant had received training on the standards expected of him including the expectation for him to avoid accidents and prevent damage to the vehicles, the consequences of doing so and the prevention of bridge strikes including in relation to tired driving and what to do if tired (p.54-70). He concluded that the claimant had seriously failed to achieve the standard and skill expected from him and that he had recklessly failed to undertake the proper procedure when passing under the bridge. He concluded that security checks of a vehicle are part of the claimant's normal duties. There are no target times to complete tasks. Employees are encouraged to work efficiently but not unsafely. He concluded that the claimant was being communicated with via his mobile phone to give him instructions; this was standard practice. The respondent had launched an initiative in February 2019 to reduce the number of during incidents and cots which was promoted through emails (see page 293). He took account the extensive cost of the damage to the trailer and risk of significant injury to others. He took account

the claimant's length of service and apology but found the level of the claimant's negligence was too grave and destroyed the trust and confidence the respondent had in the claimant so determined to dismiss the claimant summarily for gross misconduct.

24. Mr. Baum re-convened the hearing on the same day and informed the claimant of his decision which was confirmed by letter dated 9 July 2020. The respondent sent a letter confirming the dismissal in a letter dated 7 July 2020. The respondent was not challenged by the claimant about this at the tribunal hearing. The Tribunal finds on the basis of the unchallenged evidence that this was an administrative error which was rectified by sending the claimant a letter dated 9 July 2020 (page 282-4).

25. The claimant appealed the decision to dismiss him. Mr. Baum was asked to look into the circumstances of Mr. Gillespie who had a bridge strike but was not suspended. He concluded that his circumstances were different from the claimant; it was Mr. Gillespie's first time on the road, the damage to the tug was not severe as the damage caused by the claimant's accident and Mr. Gillespie had not received appropriate training. The claimant accepted that Mr. Gillespie's case concerned less severe damage compared to his own.

26. The claimant appealed the severity of the sanction. He was invited to attend a disciplinary appeal hearing by telephone (page 246). Mr. Dolan considered all the evidence (p.164-168and 195-228); the CCTV footage, the disciplinary hearing minutes and the summary dismissal letter (p.231-244). He was aware of the training the claimant had undertaken and that his final written warning was still live (p.34-163, 193-194).

27. At the appeal hearing on 29 July 2020 (page 247-256 Michelle Cargill Secretary to Head of Hubs attended as a management witness. The claimant was accompanied by Mr. Palmer trade union representative. The claimant stated that the decision to dismiss was too severe; a better procedure could have been put in place to avoid accidents which was to wind down the legs of the vehicle rather than lowering the fifth wheel of the trailer; he felt under pressure to move the trailers faster; he was tired due to the physical nature of the role. He did not raise any thing about a medical condition. He did accept that he had failed to push down enough on the tug to clear the bridge (page 253).

28. Mr. Dolan considered that a bridge strike was a serious issue because of the need to protect health and safety of the public and the respondent's need to reduce accidents as a priority (p.291-3). In respect of the issue raised by the claimant as to the pressure at work, Mr. Dolan checked the claimant's work records and noted the claimant had completed less moves on 22 June compared to 8 and 15 June so his work level was not out of the ordinary on the day. The tug operation role is reasonably pressurised given the impact it has on operations but the claimant was experienced and aware of his working environment. He found the respondent's process was sufficient to lower the fifth wheel to avoid a bridge strike. He was trained adequately and experienced. The claimant was aware of the manoveure of the fifth wheel;

he had done this on many occasions on the date in question. He determined summary dismissal was appropriate in all the circumstances and confirmed this in his outcome letter dated 31 July 2020 (page 257-9).

29. Mr. Dolan said that the procedures changed following the incident with Mr. Gillespie; in his view the "Gillespie" incident should have been taken more seriously and that is why the claimant was suspended. Further the amount of damage caused by the claimant over £10,000 was more significant.

30. The claimant was offered a second right to appeal which he exercised on 4 August 2020 (page 260). The claimant was invited to a final appeal hearing scheduled for 3 September 2020 (page 261-3). Mr. Lee who chaired the hearing considered the evidence, minutes of the disciplinary hearing and appeal and the outcome letters (p.164-168, 195-205 and 215-263). At the hearing the claimant was accompanied by his trade union representative Mr. Palmer. The claimant stated that moving trailers across the road was not part of his normal duties; Mr. Gillespie had not been dismissed; he was under pressure to move trailers faster that night. He complained about the means of contact used to contact him that night namely by telephone. He did not raise any medical issues.

31. Mr. Lee considered the evidence and concluded that the claimant was fully aware. He needed to lower the 5th wheel to the correct height to avoid the bridge. and found that the claimant had the responsibility to ensure that he paid attention to his role. Instructions were communicated via phone and this method had no bearing on how he conducted the role. He was a trained professional driver in the possession of a CPC and received annual training on driving and was aware of the hazard of hitting a bridge. He rejected that this was not part of the claimant's role. The claimant did not raise before managers were biased. Project Nirvana pages 291-3 meant that departments should focus from February 2019 about reducing accidents in accordance with the email of Dwain McDonald on 8 February 2019. Other employees have been dismissed for similar incidents see page 285-290. Mr. Gillespie hit the bridge on his first outing and he did not receive the appropriate training. In comparison the claimant was trained and experienced linehaul and tug driver and completed the manoeuvre numerous times. The accident was avoidable and the claimant was blameworthy. He hit the bridge and the roof peeled back like a sardine. He upheld the decision of summary dismissal.

Submissions

32. The respondent prepared a written submission and supplemented it with oral submissions.

33. The respondent submitted that the claimant's pleaded case was limited to inconsistent treatment with Mr. Gillespie and a pre-determined decision. The latter point could not be pursued because none of the respondent's witnesses had been asked about this. The respondent case is that the claimant was guilty of gross misconduct and it was a fair dismissal. The respondent defines its policy of gross negligence in its disciplinary policy.

The claimant erred here because he failed to lower the vehicle down prior to proceeding through the bridge; a job he had done hundreds of times before. He has accepted that previously he had lowered the tug. The claimant is a trained and licensed driver who had been trained about the situation of a bridge and it is absurd to suggest that such training can only apply to on site work. The respondent submitted it was applicable generally to the claimant as a professional driver. In this case the tug was damaged to a value of over £10,000 and this amounted to a serious failure of what could be expected of the claimant's experience (see **Deitman**). The claimant's acts here were serious and neglectful omission. All aspects of the Burchell test are satisfied namely the claimant signed it was his fault on the accident form; he thought he had lowered the trainer but admitted he didn't. At the appeal hearing he said his hand was on the lever but didn't push it. The claimant said he was tired which he should have reported. The case of Mr. Gillespie could not be compared because as the claimant accepts it was the first time Mr. Gillespie had gone onto the road and the value of the damage to the tug was less. Procedurally the respondent considered the points made by the claimant; he was given two appeals; his was accompanied by his trade union representative. Due to the severity of the incident a different process would not have resulted in a different outcome. No breach of the ACAS code had been put to the witnesses. In any event the claimant was 100% to blame for the accident.

34. The claimant was given some time to gather his thoughts before making his submissions. The claimant submitted that he had not been assessed since about 2013/2014 on driving tugs despite the suggestion in the manual that he should be assessed annually. There was no training of him driving a tug on the road and no risk assessment. He did have to wind up the legs which makes a tug go faster. His hand was on the lever. He was initially dealt with under the local hub process and then he was dealt with under another process. The project of Nirvana was unknown to his manager Mr. Kumar. Mr. Gillespie hit the bridge in 2018 and it was said he wasn't trained. The claimant started at the same time and he had no training either. Generally, he had been trained to take a tractor unit on the road. He had followed procedures but following management instructions was a ticking time bomb. Nothing in place was put in place to avoid an accident like Mr. Gillespie's. He acted as a professional driver.

Law

35. Where the dismissal is admitted, the respondent has the burden of establishing that it dismissed the claimant for an admissible reason in accordance with section 98 (1) of the Employment Rights Act 1996. Misconduct is an admissible reason.

36. In a misconduct dismissal the Tribunal in determining the fairness of the dismissal considers the following factors in accordance with **BHS v Burchell (1978) IRLR 379** namely whether (a) the employer believed that the employee was guilty of misconduct; (b)the employer had reasonable grounds for believing that the employee was guilty of misconduct; and (c)at the time it held that belief it had carried out a reasonable investigation. The

Tribunal must also consider whether the employer's decision to dismiss fell within the band of reasonable responses that a reasonable employer in those circumstances might have adopted (**Iceland Frozen Foods Limited v Jones (1982) IRLR 439)**. The range of reasonable responses test applies not only to the decision to dismiss but also to the investigation, meaning that the Tribunal must decide whether the investigation was reasonable and not whether it would have investigated things differently (**Sainsbury's Supermarket Limited v Hitt (2003) IRLR 23**). Further the Tribunal must not substitute its own decision for that of the relevant decision-maker and decide how it would have responded had it been the employer (see **Folley v Post Office; HSBC Bank plc v Madden (2000) IRLR 82**).

37. The issue of procedural irregularities was considered by the Court of Appeal in the case of **Taylor v OCS Group (2006) EWCA Civ 702** which involved a claimant who was dismissed for misconduct. The tribunal found that the disciplinary process was fundamentally flawed because during the disciplinary hearing the claimant had been unable to understand the proceedings (the claimant was profoundly and pre-lingually deaf). Whilst the principal point on appeal was that tribunals in considering whether an appeal process cured the earlier defects should not ask whether the appeal was a review or a re-hearing the Court of Appeal went on to explain that in cases where there are procedural irregularities procedural fairness should not be considered separately from other issues. The Tribunal should consider the procedural issues together with the reason for the dismissal as the two impact upon each other and the tribunal's task is to decide whether in all the circumstances the employer acted reasonably in treating the reason as sufficient reason to dismiss. The Court of Appeal explained that in cases where the misconduct that founds the reason for dismissal is serious a tribunal might decide (after considering equity and the substantial merits of the case) that notwithstanding some procedural imperfections the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct is of less serious nature so that the decision to dismiss was nearer to the borderline, a tribunal might well conclude that a procedural deficiency had such an impact that the employer did not act reasonably in dismissing paragraph 48. This approach was re-iterate in the case of **NHS 24 v Pillar UKEATS/005/16** in which it was explained that the danger of treating procedural unfairness separately is that it can result in a failure to assess the gravity of the procedural defect. If there is no real relationship between an unfair step in the procedure and the ultimate outcome the impact of that procedural defect may well be far less than where an absence of any proper procedure led to substantive unfairness.."

38. The Tribunal notes the comments of the EAT in the case of **Philander v Leonard Cheshire Disability (2018) UKEAT/0275/17** where it was held that misconduct can be deliberate or inadvertent since it is long established principle that gross negligence as well as deliberate wrongdoing can amount to misconduct stated *"The dividing line between conduct and capability can be paper thin and even porous. Some behaviours or acts or omissions which fall within the definition of extreme negligence can be considered as either capability matters or conduct matters and can be properly described*

as either. The respondent in this case was entitled to consider the claimant's behaviour as conduct. It could also have concluded it was capability. Even if it had plumped for a capability label it would on the facts have been entitled to dismiss given the extensive recent training on the matters identified in the CQC report and the seriousness of the failings". Further in **Burdis v Dorset County Council (2018) UKEAT/0084/18** it was held that accepting subsection 98 (2) requires that the reason must relate to the conduct of the employee so there must be some personal culpability – "*I do not consider that the ET erred in finding that this might arise not solely from some wilful act but also serious neglect, omission or carelessness".*

39. In the case of **Deitman v Brent London Borough Council (1987) ICR 737** which concerned an employment case relating to a social worker, it was found that the phase "gross negligence" is unhelpful " *In a master and servant context I suggested to counsel in argument that a working definition might be a really serious failure to achieve the standard and skill and care objectively to be expected from a social worker of the grade and experience of the plaintiff..".*

40. In the case of **Hadjionannous v Coral Casinos (1981) IRLR 352** it was held that evidence of inconsistent treatment between employees is relevant in limited circumstances because two cases had to be truly parallel to compare (namely similar of sufficiently similar).

Conclusions

41. The Tribunal finds that the respondent has established an admissible reason for the claimant's dismissal namely misconduct for the following reasons: There is no dispute that the claimant had struck a bridge with his vehicle causing over £10,000 worth of damage for which he faced suspension and a disciplinary sanction. The roof of the vehicle was severely damaged and had opened like a "sardine can". At the time and following the email from the CEO in February 2019 the respondent had decided to focus on reducing accidents and consequent costs. Further, the respondent's disciplinary policy identifies gross misconduct as including serious negligence that causes unacceptable loss, damage or injury (page 179).

42. The claimant signed an accident report form on 22 June 2020 confirming that the accident was his fault. He stated that he thought the trailer was going to get under the bridge. Unfortunately, the trailer had gone up and collided with the bridge. He said that this was an accurate description of the accident (page 211). In his witness statement to the Tribunal at point 23 (of his bullet point statement) the claimant said he could not remember how he hit the bridge. The claimant admitted that he had lowered the tug before but did not have much time to manoeuvre. The Tribunal finds this involved some personal culpability because the claimant does admit that he must not have lowered the vehicle.

43. The Tribunal rejects the claimant's suggestion that he was not adequately trained in the task he was performing on 22 June 2020 and that the respondent could not reasonably believe that he was so trained. The claimant is an experienced driving professional. He has a class 1 driving

licence. He has undergone a significant amount of training in his role. In respect of tug training there is manual at page 77 to 174 setting out the tug procedures. At page 150 the claimant was signed off as competent following a tug observation on 22 July 2019 which stated that the claimant was aware to allow adequate clearance to stationary vehicles and objects. The Tribunal finds that this would include a bridge. Further by reason of his tug training the claimant needed to be aware of his surroundings which is a fundamental aspect of driving any vehicle; the tribunal finds such surroundings include a bridge on a highway. Furthermore, he had received general training as a professional driver as licenced on both tugs and linehaul and was sufficiently equipped him to undertake the task on 22 June. The claimant was also experienced in performing the said task; he had undertaken the task 100s of times over a period of three weeks and between 20 to 30 times on the day.

44. Further the Tribunal rejects the claimant's suggestion that a reasonable employer should have recognised the need for a specific risk assessment for the task of moving the tug to Paragets. The claimant was a professional driver; therefore was aware of the need to be aware of general surroundings on site and off and so to manoeuvre his vehicle including lowering its height where required including near a bridge.

45. The claimant conceded on the day of the accident that it was his fault. He stated that he thought he had lowered the vehicle but he hadn't.

46. The Tribunal concludes that the respondent reasonably concluded in the light of the claimant's training, general experience as a professional driver and experience of driving tugs 100s over three weeks before that the act of striking the bridge and his concession that he thought he had lowered the vehicle (but had not) was an act of misconduct by reason of gross negligence. The act had personal culpability due to the experience of the claimant as a driver and of undertaking the said task and on this occasions failed to carry it out properly thus resulting in significant damage to company property.

47. The claimant put forward a number of explanations for his conduct. At the hearings the claimant raised the difference of treatment with Mr. Gillespie. The Tribunal does not consider that the Gillespie case is parallel with the claimant's case. The damage Mr. Gillespie caused was less significant and it was his first trip out; this was the claimant's 20th to 30th visit that day and he had done this hundreds of time throughout the day. Further this was a different time period. In 2018 Mr. Gillespie collided with a bridge. By February 2019 the respondent was focusing on reducing accidents so that a more serious line was taken in any event. In effect it was viewed far more seriously by the respondent at the time of the claimant's accident.

48. In respect of the claimant's criticism of receiving instructions via telephone calls which he asserts a reasonable respondent could have found that this was an aggravating or cause of the accident. The Tribunal finds that the respondent was entitled to take account of the fact that the claimant had not

complained about telephone contact to managers and it appears to have been the most efficient means of instructing drivers.

49. In respect of the claimant's assertion that tiredness played a part; the claimant clarified this at the hearing as being the tiredness of a call just before the bridge. The claimant had not complained about tiredness on the day to managers.

50. The claimant raised the amount of work he had to do that day. Mr. Dolan did investigate the claimant's workload. He conducted a reasonable investigation and found that comparable to 2 other days the workload was standard and not increased. He also considered the claimant's allegation that a better procedure could be adopted rather than winding down the legs. He concluded in his experience and expertise that the procedure used by the respondent were adequate. He took account the claimant was aware of using lowering the fifth wheel.

51. Mr. Lee at the appeal further considered that numerous other individuals had been dismissed for similar incidents (p.285-290).

52. The Tribunal concludes that the respondent formed a reasonable belief on reason grounds of misconduct having undertaken a reasonable investigation in all the circumstances.

53. In terms of the procedure adopted in this case, the claimant had trade union support throughout the process. He was able to put his case to all three managers in the disciplinary process. However, his explanations were not accepted.

54. The Tribunal considers whether the sanction of dismissal was a fair one in all the circumstances. In reaching this conclusion, the Tribunal takes account of the context. At the material time accidents and their cost were being taken very seriously by the employer (in the context of the CEO's concern in February 2019 about the amount of accidents). It was a matter of priority for the respondent at this stage to reduce accidents and cost. The claimant was experienced and trained. The risk to the general public in the striking of a bridge presented a significant health and safety risk. Taking account that this was gross negligence and a one-off accident which the claimant committed it may be considered that it was harsh to dismiss the claimant. However, the Tribunal does not find that it was unfair in all the circumstances, nor did it fall outside the band a reasonable response. A reasonable employer taking account of the priority to reduce accidents, the significant damage caused to the respondent's property of over £10,000, the gross negligence involved in the accident could reasonably dismiss for this incident.

55. In the circumstances the tribunal finds that the claimant was fairly dismissed. The claim for unfair dismissal is not well founded and is dismissed.

Employment Judge Wedderspoon

10 July 2022

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.