



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Eaton

**First Respondent:** TJX Europe Limited

**Heard on:** 20 and 21 July 2022 – Reserved to 3 August 2022

**Before:** Employment Judge Hindmarch

## **Appearances**

For the Claimant: In person

For the First Respondent: Mr Sangha - Counsel

## **JUDGMENT**

1. The complaint of unfair dismissal is not well-founded and is dismissed.
2. Any complaint of wrongful dismissal is not well-founded and is dismissed.

## **REASONS**

3. This case came before me for a 2-day hearing by CVP on 20 and 21 July 2022. I reserved my decision to 3 August 2022.
4. The Claimant was a litigant in person. The Respondent was represented by Counsel, Mr Sangha. I had a witness statement for the Claimant. There were 3 witness statements on the issue of liability for the Respondent – Peter Hodgetts, Assistant General Manager, Martin King, Assistant General Manager, and Elizabeth Dennis, European Head of Risk Management.
5. There was a bundle of documents with 893 pages in total.
6. On the second day of the hearing the Claimant asked that I view some CCTV images of the Respondent's premises and showing some of the incidents which led to dismissal. I viewed the CCTV images as requested.
7. On the first day of the hearing Mr Hodgetts and Mr King gave evidence. On the second day of the hearing Mrs Dennis and the Claimant gave evidence. I heard oral submissions from the Claimant. Mr Sangha relied on written submissions.

8. By an ET1 filed on 23 September 2021, following a period of ACAS early conciliation from 25 August 2021 to 27 August 2021, the Claimant brought a complaint of unfair dismissal. The Respondent accepts it dismissed the Claimant; it says for gross misconduct.
9. At the outset of the hearing, I identified the issues I would need to decide. Given the Respondent accepted dismissing the Claimant, it would be for the Respondent to show the reason for dismissal and that the reason was a potentially fair reason within the Employment Rights Act 1996. In misconduct dismissals the Tribunal would be considering whether the Respondent had formed a genuine belief (in the Claimant's misconduct), that that belief was held on reasonable grounds and that it had been formed after the Respondent had conducted a reasonable investigation. I would also need to consider whether dismissal was a reasonable sanction. I explained there was a band of reasonable responses open to an employer and that I would not substitute my view for that of a reasonable employer.
10. This was a case where the facts giving rise to the dismissal were not in dispute. It was the interpretation of and response to these facts that caused the Claimant to believe he had been unfairly treated. I found all witnesses to be truthful and to be doing their best to assist me. In this Judgment I refer to any employees of DHL (who are not a party to these proceedings) by their initials only.
11. The Respondent is a subsidiary of TJX Companies. The Respondent has stores across the UK and Europe and has warehouses serving these stores. HDL, the logistic company, has a haulage contract with the Respondent. DHL has an office and its own vehicles at the Respondent's sites.
12. The Claimant commenced employment with the Respondent at its Walsall based distribution site on 11 April 2011. He held the role of Health and Safety Manager.
13. On Friday 5 March 2021 COVID-19 restrictions were in place and the Walsall warehouse was running at a limited capacity. On this date, Mr Hodgetts was working off site and received a request from a colleague to arrange for some stock to be sent to the Respondent's E-commerce operation. Mr Hodgetts contacted Mr Freeman who was on site and who held the role of Seconded Shift Operation Manager. Mr Hodgetts requested that Mr Freeman load the pallets and to ask the Claimant, who was also on site, to assist. Mr Hodgetts was of the view that certain tasks involved in the exercise were not within Mr Freeman's skillset, but he knew the Claimant had the requisite skills. (in particular the Claimant could open the bay door and operate the lifting deck). Mr Hodgetts informed Mr Freeman it was not an urgent task and if the Claimant was unable to help to let him know. At no point did Mr Hodgetts consider that the Claimant would use a vehicle belonging to a third party as this was simply not a common practice within the Respondent's organisation. Mr Hodgett's understood that about 50 pallets were to be collected from the building (over 3 floors) and that once the pallets were on a trailer, DHL would take over any transportation of the pallets.
14. In evidence, the Claimant accepted that no part of the instruction he received from Mr Freeman involved driving a DHL vehicle. He understood he was to assist in loading a trailer and took it upon himself to use the DHL tug.

15. Mr Freeman later informed Mr Hodgetts the task had been completed.
16. At 14:00 PM that day, there was a conference call involving the Claimant and other managers. During that call, the Claimant joked with Mr Ian Ratcliffe, General Manager, that he (the Claimant) was not paid enough for the task he and Mr Freeman had completed earlier that day. Mr Ratcliffe thanked the Claimant for his work. Mr Hodgetts was late in attending the call and missed that part of the conversation.
17. The Claimant freely admits he accessed and drove a DHL vehicle in completing the task in question. He says there were no DHL personnel on site on that day, and that he called a member of DHL's staff (SG) and requested the location of the keys to the DHL vehicles. He obtained the keys from the DHL on-site office. He believes SG was aware he was going to drive it and that he therefore authorised him to do so. He used a DHL tug and trailer unit. He moved the tug 4 times and parked it.
18. On Monday 8 March 2021, Mr Hodgetts received a call from Mr Ratcliffe. Mr Ratcliffe referred to the conference call that had taken place on the Friday afternoon and the fact the Claimant had said he had used a DHL vehicle. Mr Ratcliffe asked Mr Hodgetts if he had given the Claimant permission to do so. Mr Hodgetts had not given any such permission. He had not spoken directly to the Claimant about the task. He had asked Mr Freeman to do the task and to seek the Claimant's assistance.
19. It was agreed that Mr Ratcliffe would speak to Mr Entwistle (the Respondent's AVP Outbound Logistics) who was responsible for the movement of goods relationship with DHL and who might better understand if any of the Respondent's employees were authorised to use a DHL vehicle.
20. Mr Entwistle confirmed that no-one employed by the Respondent was insured to drive DHL's vehicles.
21. Mr Hodgetts formed the view that an investigation was necessary, and he spoke with the Respondent's Human Resources Team.
22. The Claimant was asked to attend an investigation meeting with Mr Hodgetts on the afternoon of 8 March 2021. The handwritten minutes are at pages 91-106 of the bundle. Mr Hodgetts invited the Claimant to tell him about the task on 5 March 2021. The Claimant confirmed he had telephoned a DHL employee to obtain the key to a DHL shunter vehicle which he then used as there was no one from DHL on site. He admitted driving the DHL shunter vehicle and trailer unit. The Claimant said he held a class 1 driving licence, and he was qualified to drive the vehicle. The Claimant said if he had been aware he was not insured to drive the vehicle he would not have done so. Both Mr Hodgetts and the Claimant signed the notes as being a true reflection of their discussion. The Claimant said he had carried out visual checks on the vehicle before using it but had not recorded anything in writing. The Claimant expressed surprise that a formal investigation meeting was taking place.
23. There was a short break and the meeting re-commenced. Mr Hodgetts had some further questions about the Claimant's use of a Respondent owned vehicle on 5

March 2021. The Claimant admitted using this vehicle and again doing visual checks before use, but not recording these anywhere in writing.

24. After a brief adjournment Mr Hodgetts informed the Claimant he was being suspended from work whilst further investigation was carried out. The Claimant told Mr Hodgetts to 'do your investigation properly this time'. This was a reference to a previous disciplinary matter the Claimant had faced where Mr Hodgetts was the investigator.
25. A suspension letter was hand delivered to the Claimant that day. A copy of this is at pages 89-90 of the bundle. It confirms an allegation of 'breach of health and safety specifically the use of the shunter unit...and failure to complete...checks prior to use'. The suspension was on full pay and benefits and said to be a neutral act.
26. Later on 8 March 2021 Mr Hodgetts met with Mr Freeman. The notes are at pages 107-116 and are again signed by both as a true record. Again, Mr Hodgetts asked Mr Freeman to describe the task on 5 March. Mr Freeman said the Claimant had agreed to assist, was on the phone to someone about keys, had been into the office and used the DHL vehicle. He believed that as Health and Safety Manager the Claimant would know whether he should use the vehicle. Mr Freeman was also suspended.
27. On 9 March 2021, Mr Hodgetts met with Mr Roberts, the Respondents Outbound Logistics Manager. The notes are at pages 117-123. Mr Roberts did not believe any of the Respondent's employees were trained to move DHL's shunter units. He confirmed if no DHL driver was on site it could be arranged to bring one in or use an agency driver.
28. On 9 March 2021, Mr Hodgetts also met SG, the DHL employee with whom the Claimant had spoken on 5 March 2021. The notes of the meeting are at pages 124-138 and are again signed by both. SG confirmed he was not on site on 5 March however, the Claimant had called him saying that he needed to move a trailer and was 'desperate to get the task done', and could he use the DHL tug. SG said he had historically trained the Claimant on the tug (before the Claimant worked for the Respondent) but the tugs were different (newer) models, so they discussed this. SG confirmed all shunter drivers underwent frequent training. He confirmed he had told the Claimant where to obtain the key (from the DHL on-site office).
29. On 10 March 2021, Mr Hodgetts met with Mr Ratcliffe. The notes are at pages 139-145 and signed as a true record. He said the Claimant had told him on the 5 March 2021 conference call that he had driven various vehicles that morning, including DHL owned ones, and that he had thanked him for getting the work done. However, he had since reflected on matters and was concerned about any health and safety implications.
30. Also on 10 March 2021, Mr Hodgetts spoke with the DHL Shift Manager, LJ. The notes are at pages 147-155. She was not on site on 5 March but was told on the morning of 8 March by SG that the DHL tug had been utilised. She expressed surprise but said SG had told her the driver was not a 'random person' and was trained.

31. On 10 March 2021, Mr Hodgetts emailed AH, an employee of DHL, asking a number of questions regarding whether the Respondent's employees were authorised to use DHL vehicles and about training and Safe Systems of Work. A copy of the email is at page 441. AH replied on 11 March 2021 (page 441) also confirming that the Respondents employees would only be able to drive DHL vehicles if they held a relevant licence, and they had undertaken the DHL training and tests and that it would not be common practice.
32. On 11 March 2021, Mr Hodgetts met with Mr Havon, Security Guard. He confirmed the trucks that had left site on 5 March and the notes are at pages 156-162, but added little to the issues concerning the Claimant.
33. Also on 11 March 2021, Mr Hodgetts met with Mr Matloob, Trainer/Forklift Trainer. The notes are at pages 164-171. Mr Matloob described the training required for drivers and the processes required for the checking of vehicles pre-use. He was of the view the quickest time in which one could properly complete pre vehicle checks was 5 minutes, but longer for other vehicles.
34. On 12 March 2021, Mr Hodgetts met with Mr Entwistle. The notes are at pages 172-177. Mr Entwistle confirmed he had reached out to DHL and that due to insurance issues no one from the Respondent should drive a DHL vehicle. In 7 years he had never known this occur.
35. On 15 March 2021, Mr Hodgetts met with SG again and the notes are at pages 178-185. The conversation was to clarify a few points.
36. On 17 and 18 March 2021, Mr Hodgetts met with the Claimant. A copy of the notes are at pages 190-278. The notes are signed as a true record. The Claimant referenced a number of occasions where he had driven and shunted in the yard for DHL. He said he was experienced and saw no issue with driving the vehicle on 5 March 2021 and he had not thought to ask DHL to send a driver. He did a visual check of the vehicle and believed there to be no risk. At the end the Claimant suggested that Mr Hodgetts was not impartial and that someone else should take over the investigation. Mr Hodgetts took advice from the Respondent's HR team and decided it was appropriate for him to continue.
37. On 22 March 2021, Mr Hodgetts again met with the Claimant. The notes, signed as a true record, are at pages 279-299.
38. During his meetings with Mr Hodgetts the Claimant admitted that he had tried to use one of the Respondent owned counter balance trucks and 2 power pallet trucks but had found them to be unusable and had moved onto other equipment. He had not completed the Respondent's Vehicle Off Road processes for reporting any defects or reported any defects to the manufacturers. In cross-examination the Claimant said that the counter balance truck did not in fact have any defect. As regards the power pallet trucks he could not engage the bar. He did not know precisely what the issue was. The Claimant also admitted to failing to wear safety boots.
39. During the investigation and whilst on site the Claimant and Mr Hodgetts viewed the Respondent's CCTV footage of 5 March 2021.

40. On 23 March 2021, Mr Hodgetts again met with Mr Freeman. The notes are at pages 300-356. They had a recap of the events of 5 March.
41. On 23 March 2021, Mr Hodgetts met with Mr Critch, a Project Manager. This concerned the Claimant's contention that he had driven vehicles in the yard on previous occasions. The notes are at pages 357-362. Mr Critch had a recollection of this occurring but said it was not a DHL vehicle.
42. Similarly on 23 March 2021, Mr Hodgetts spoke with Mr Tidyman. The notes are at pages 363-368. Mr Tidyman could not recall any occasion where the Claimant had driven any HGV vehicle.
43. Mr Hodgetts determined there was a disciplinary case to answer. In his mind the most serious matter was the Claimant using the DHL vehicle, however, he felt there was also other health and safety acts or omissions that needed airing at a disciplinary hearing.
44. On 29 March 2021, Mr Hodgetts met with the Claimant again. The notes are signed as a true record and are at pages 369-375. The notes are signed but have some slight additions by the Claimant. Mr Hodgetts informed the Claimant that he had completed his investigation and that it was his belief there was a disciplinary case to answer. He explained he would be handing matters over to Mr Martin King who would be touch and that any documentation would need to be sent to the Claimant's home address. Mr Hodgetts confirmed the Claimant would continue to be suspended.
45. On the same day, Mr Hodgetts met with Mr Freeman and also informed him that a disciplinary case was to be pursued. The notes are at pages 376-381.
46. The disciplinary hearing was initially scheduled for 8 April 2021 however the Claimant went on sick leave, so it was postponed.
47. On 27 June 2021, the Respondent invited the Claimant to a disciplinary hearing on 1 July by letter signed by Mr King. A copy is at pages 382-383. The letter confirmed there were 5 allegations as follows
  1. "Failure to follow company policies and procedures, specifically a potential health and safety breach of using a DHL tug and a trailer\_unit on Friday 5<sup>th</sup> March 2021
  2. Failure to follow company policies and procedures, specifically potential health and safety breaches, in relation to pre use checks not being conducted or recorded on Friday 5<sup>th</sup> March 2021 for: -
    - Counter balance truck (CBT)
    - Power pallet truck (PPT)
    - DHL tug and trailer unit

3. Failure to follow company policies and procedures, specifically potential health and safety breaches in relation to failing to report potentially damaged/faulty machinery through the vehicle off road (VOR) process on Friday 5<sup>th</sup> March 2021 for: -
    - CBT with a potential door fault
    - PPT with a potential bull bar fault
    - PPT with a potential standing plate fault
  4. Failure to follow company policies and procedures, specifically a potential health and safety breach through failing to comply with multiple SSOW's with regards to wearing the appropriate PPE for the tasks conducted and equipment used on Friday 5<sup>th</sup> March 2021.
  5. Failure to follow company policies and procedures, specifically potential breach of access control, in relation to gaining access by physical contact and potential forced entry into the DHL transport office on Friday 5<sup>th</sup> March 2021."
40. A copy of the Respondents Health and Safety Policy was in the bundle at pages 819-823. It provides that employees have to 'take reasonable care for the Health and Safety of themselves and for other person who may be affected by their acts or omissions at work', that they should wear appropriate safety equipment, and that they should 'immediately...report...defective equipment...to the Duty Manager'. It also provides that Managers have a duty to provide and maintain risk assessments, safe systems of work and a safe and healthy working environment. Managers should 'set a personal example and carry out (their) own work in a safe manner'.
41. The Respondent's Disciplinary Policy was also in the bundle at pages 824-833. It provides that gross misconduct 'is a serious breach of contract that is likely to prejudice (the Respondent) or its reputation, or irreparably damage the working relationship between (an employee) and (the Respondent)'. It provides a list of examples including 'a serious breach of health and safety rules'.
42. The letter stated the allegations could constitute gross misconduct and an outcome could be summary dismissed. The letter confirmed the statutory right to be accompanied and enclosed the Respondent's disciplinary policy and an Investigation Report prepared by Mr Hodgetts.
43. It transpires the documents were mistakenly delivered to the Claimant's neighbour's address. This greatly distressed the Claimant. The Respondent does not know how or why this occurred but says the documents were safely and securely sealed. The Respondent offered an apology to the Claimant for this.

44. A copy of the Investigation Report is at pages 384-678. It has 96 Appendices. The Appendices included images of the vehicles driven by the Claimant on 5 March 2021, vehicle pre-use check sheets to be completed by drivers, Safe System of Work (SSOW) forms/checklists, a CCTV log showing timings and activities on 5 March revealed by the Respondent's CCTV, and CCTV screenshots, the meeting notes taken during the investigation and emails sent and received during the investigation.
45. One of the emails – Appendix 54, pages 549-550, records that DHL's supply chain team had spoken with their employee SG on the morning of 8 March 2021. They were concerned the Claimant was not signed off on their (DHL's) Safe System of Work and did not hold their up-to-date driver assessment so should not be using their vehicles and they made it clear any such practise should cease with immediate effect. This was emailed to Mr Hodgetts on 12 March 2021.
46. The disciplinary hearing took place on 1 July 2022. The Claimant attended with his trade union representative Mr Tatlow. The decision maker for the Respondent was Mr King. Mr King is the manager of the Respondent's site in Stoke. Ms Pass from the Respondent's HR team was the note-taker. In advance of the disciplinary hearing Mr King spent a number of hours preparing.
47. At the outset of the disciplinary hearing, the Claimant produced a pre-prepared statement, a copy of which is at pages 680-689. The statement was signed by Mr Tatlow. The statement referred to the Claimant's experience and his 'can-do' attitude. The statement argued that Mr Hodgetts should not have acted as the investigation officer, as he was the one who had given instructions on the morning of 5 March 2021 for the task to be done. It argued there was low risk due to the site having limited personnel due to the COVID-19 restrictions. It said the Respondent owned vehicles that the Claimant chose not to use were not faulty, but rather that the Claimant was dissatisfied with how they engaged, and hence there were no faults to report. Where the Claimant had intended to report issues to the manufacturer he had overlooked this on the morning of Monday 8 March due to other tasks. It argued with no DHL personnel on site on 5 March, and with the Claimant's experience and having obtained authorisation from SG, the Claimant had done nothing wrong in driving the DHL vehicle.
48. The statement referenced a previous disciplinary investigation conducted by Mr Hodgetts concerning the Claimant (in 2020) and suggested there was a vendetta on the part of Mr Hodgetts.
49. The handwritten notes of the disciplinary hearing are at ages 690-711. These bear some additions by the Claimant but are signed by him. At the end of the hearing, Mr King informed the Claimant he would need to do some further investigation and that the Claimant would remain suspended.
50. By way of further investigation on 7 July 2021, Mr King met with Ian Ratcliffe. The notes are at pages 713-715. He asked Mr Ratcliffe if he saw any issue in Mr Hodgetts being appointed investigator. Mr Ratcliffe did not.



51. On 8 July 2021, Mr King met with Mr Hodgetts. The notes are at pages 717-721. Mr King questioned Mr Hodgetts as to his partiality. Mr Hodgetts was of the view that his investigation was balanced and proportionate.
52. On 9 July 2021, Mr King met with Mr Brown, AVP of Risk. He stated the lack of insurance to drive DHL vehicles was a serious concern for him. The notes are at pages 725-727.
53. On 15 July 2021, the disciplinary hearing re-commenced with the same persons present as on 1 July 2021. The notes are at pages 731-738, again bearing some comments made by the Claimant. At the hearing Mr King delivered his outcome which he read out from a pre-prepared statement, a copy of which is at pages 722-724.
54. On 20 July 2021, Mr King sent the dismissal letter to the Claimant. A copy is at pages 740-743.
55. Mr King found Mr Hodgetts to be impartial. He concluded that Mr Hodgetts had not spoken directly to the Claimant about the task on 5 March 2021 and that he was not the decision maker in terms of the disciplinary decision and sanction.
56. Mr King found the allegations largely proven, not least because of the Claimant's admissions. He did not find the 5<sup>th</sup> allegation proven (regarding gaining of access to the DHL offices).
57. Mr King considered the Claimant's role of Health and Safety Manager, as requiring the Claimant to set a standard to others. He considered the provisions in the Respondent's Health and Safety Policy which had not been adhered to. He concluded the Claimant had set a bad example and had exposed the Respondent business to safety risks.
58. Mr King considered the appropriate sanction was summary dismissal. Mr King took into account the Claimant's length of service and disciplinary record. Despite the Claimant's assertion he had done nothing wrong, Mr King concluded he ought to have appreciated the conduct was in fact wrong. The Claimant's last day of employment was confirmed to be 15 July 2021. He was offered the right of appeal.
59. In cross-examination of Mr King the Claimant contended there was an example of inconsistent treatment at another of the Respondent's sites where an FLM (first line manager) had used a Counter Balance truck without training or authorisation and had not been dismissed but instead, received a final written warning. Mr King recalled the matter although said he had not been the dismissing officer and the matter was not comparable given the allegations the Claimant faced involved a third party vehicle belonging to DHL.
60. The Claimant appealed in writing. A copy of the (undated) letter of appeal is at pages 744-745. His trade union representative prepared a written statement in advance of the appeal hearing, a copy of which is at pages 749-759.
61. In summary, the statement argued that the investigation was procedurally flawed, Mr Hodgetts himself implicated in the event and that the allegations at their highest were misconduct not gross misconduct.

62. The Respondent appointed Mrs Dennis to hear the appeal. Mrs Dennis had had little contact with the Claimant prior to her role as appeals officer. She spent several hours preparing.
63. The appeal hearing took place on 26 August 2021. The Claimant attended with Mr Tatlow. The note-taker was Ms Conaty. The notes appear at pages 764-769. An amended version with the Claimant's comments is at pages 776-784.
64. Mr Tatlow read from the pre-prepared statement. He stated the Claimant had an unblemished disciplinary record. The Claimant asserted that had Mr Hodgetts not asked him to assist Mr Freeman on 5 March, he would not have been dismissed. He also made the point that whilst he had been shown the CCTV footage during the investigation (at a time when he was in a poor mental and physical state) he had not received a copy of it.
65. Mrs Dennis adjourned the appeal hearing in order to investigate further.
66. On 31 August 2021, Mrs Dennis met with Mr Ratcliffe. The notes are at pages 791-793. He confirmed the Claimant had been the subject of previous disciplinary action.
67. On 1 September 2021, Mrs Dennis met with Mr Hodgetts. The notes are at pages 794-797. Mrs Dennis asked Mr Hodgetts to explain the events of 5 March 2021 and asked him about the investigation he conducted.
68. On 2 September 2021, Mrs Dennis met with Mr Brown. The notes are at pages 798-799. He described the Respondent's risk management measures and the issue with a lack of insurance for the driving of the DHL vehicles.
69. On 6 September 2021, Mrs Dennis met with Mr King. The notes are at pages 800-801. He informed her that the Claimant had not asked him if they could view the CCTV. He had himself seen some of the CCTV footage but, given the Claimant's admissions, had not found it particularly persuasive.
70. Mrs Dennis re-commenced the appeal hearing on 8 September 2021. The Claimant attended with Mr Tatlow. The minutes are at pages 769-775. The version bearing the Claimant's amendments is at pages 784-790.
71. Mrs Dennis asked the Claimant about his previous disciplinary record. He confirmed he had in fact been the subject of a previous disciplinary sanction. She asked him about occasions where he had said he had previously moved a vehicle in the yard. She clarified a number of further points with him.
72. At the end of the meeting, Mrs Dennis explained she needed more time to reach her conclusion on the appeal.
73. On 15 September 2021, Mrs Dennis sent her decision in writing to the Claimant. A copy of the letter is at pages 802-807. She decided not to uphold the appeal. She found the Claimant's actions on 5 March 2021 were carried out with the aim of helping the business, but that he, as Health and Safety Manager, was the 'guardian and conscience for the site' and should have followed the relevant policies and

procedures. In her view the Claimant ought to have appreciated what he did was wrong and that he had offered no reasonable explanation for acting as he did.

74. The Claimant later requested the notes from the investigations that Mrs Dennis had conducted. These were provided to him in December 2021.
75. The bundle contained a copy of the Respondent's Culture Document – at pages 834-853. This refers to effective leaders being 'risk-takers' and mistakes being acceptable. I mention this document here as it is something the Claimant relied on in his cross-examination of the Respondent's witnesses. In essence the Claimant suggested he should have been forgiven in light of these 'values' and that he had been taking a risk to get the task done.

## **SUBMISSIONS**

76. As stated above I had written submission from Mr Sangha on behalf of the Respondent. I do not intend to release these in their entirety but in short the Respondent contended the dismissal was fair, it acted reasonably in treating the Claimant's conduct as sufficient for dismissal and it followed a fair procedure. The Claimant does not dispute the conduct in question and that conduct was the reason for dismissal. The issues for the Claimant were the fairness of the investigation and whether the sanction of dismissal was within the band of reasonable responses.
77. In the Respondent's submission there was a thorough investigation and Mr Hodgetts was impartial. The allegations, individually and collectively, were serious. The sanction was well within the band of reasonable responses.
78. The Claimant made oral submissions. His position was he had been asked to get the task done. He carried out what he described as 'dynamic risk assessment's and there were no defects to report. He felt he had been honest from the start, and it was his own honesty that led to his downfall. He felt no-one else would have been dismissed in the same circumstances. The Claimant's position was that a final written warning would have been appropriate, rather than dismissal.

## **THE LAW**

79. S98 Employment Rights Act 1996 provides
- 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 principle reason) for the dismissal, and
    - b) that it is either a reason falling within subsection (2) or...
  - 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. “

80. British Home Stores Ltd v Burchell (1978) IRLR 379 sets out the important test in conduct cases. There are 3 questions 1) Did the Respondent genuinely believe the Claimant was guilty of the alleged misconduct 2) Did the Respondent have genuine grounds to suspect the Claimant was guilty 3) Did the Respondent carry out a reasonable investigation before making a final decision about the Claimant's guilt.

81. The Tribunal must decide whether the Respondent's decision to dismiss the Claimant fell within the range of reasonable responses that a reasonable employer in the same circumstances and in that business might have adopted (Iceland Frozen Foods Ltd v Jones (1982) IRLR 439). This 'range of reasonable responses' test applies to both the sanction imposed, in this case dismissal, and the investigation that the Respondent conducted (Sainsburys Supermarkets Ltd v Hitt (2003) IRLR 2). The Tribunal must not substitute its views for those of a reasonable employer.

## CONCLUSIONS

82. Turning to the first issue – has the Respondent shown the reason for dismissal? The Respondent sets great store by health and safety given the nature of its business, its employment of the Claimant in the role of Health and Safety Manager and its Health and Safety Policy and Disciplinary Rules as set out above. The Respondent came to a conclusion that the Claimant had shown a serious disregard for health and safety in the choices that he made on 5 March 2021. Given the Claimant's lack of appreciation of his own wrongdoing, the Respondent found the working relationship between it and the Claimant as its employee had been 'irreparably damaged' (using the words from the Respondent's Disciplinary Policy).

83. The Claimant does not dispute he was dismissed because of his actions on 5 March 2021. It follows that the Respondent has shown that the Claimant's conduct was the reason for his dismissal. Conduct is a potentially fair reason for dismissal under S98(2) of the Employment Rights Act 1998.

84. Turning now to the question of procedural fairness. I find there was a thorough investigation. The Investigation Report ran to many pages with many Appendices. I find Mr Hodgetts was perfectly entitled to act as investigator. Firstly, he did not have 'skin in the game' as the Claimant put it. He did not speak directly to the Claimant on the morning of 5 March 2021 and had no knowledge or anticipation that the Claimant would act as he did. More importantly, whilst Mr Hodgetts concluded at the end of his investigation that there was a disciplinary case to

another, he was not the decision maker. That was Mr King, and the Claimant did not suggest that he was impartial.

85. The Claimant also argued that none of the allegations, even collectively, were sufficiently serious to amount to gross misconduct. The Respondent's Disciplinary Policy does refer to gross misconduct requiring a 'serious breach of health and safety' (my emphasis). The Claimant asserts there were few staff on site, there was no risk and no accident or injury followed. He refers to the situation being 'unprecedented'.
86. Having listened carefully to Mr King and Mrs Dennis about their reasoning I find the allegations were serious. I agree with them that as Health and Safety Manager, the Claimant should have known better. The Claimant drove the DHL vehicle when he had no authorisation or insurance, he did not report issues he had with the Respondent's own vehicles, and he failed to document the required vehicle checks meaning the Respondent had incomplete records of vehicle usage. The fact there was no accident or incident is irrelevant and frankly a good thing likely assisted by the small number of personnel on site. The Claimant's actions were reckless.
87. The Claimant says he did not receive the CCTV footage and that he did not receive Mrs Dennis' investigation notes until well after the appeal hearing. It was not in dispute that the Claimant viewed the CCTV footage during the investigation. The Investigation Report contained a detailed narrative of what the CCTV footage showed and still images. Mr King gave uncontested evidence that the Claimant (and his trade union representative) did not ask to see the CCTV footage again at the disciplinary hearing. I cannot find there was any unfairness in the footage not being disclosed to the Claimant. As to Mrs Dennis' interview notes, yes these were not shared with the Claimant, but she did meet him at the reconvened appeal hearing and put to him any matters that had arisen.
88. To the extent the Claimant was contending that others had done similar things to him and not lost their jobs, this did not turn out to be the case. The only incidence the Claimant put to Mr King concerned an employee in a junior role to that held by the Claimant and who had not in fact driven a third-party vehicle as the Claimant had done. The Claimant also suggested others had not been dismissed for failing to wear PPE. We had no precise details of these individuals, however, failing to wear safety boots was only one of the allegations the Claimant faced, and he was in the unique role of Health and Safety Manager. There was no evidence of inconsistent treatment.
89. In conclusion, therefore I find the dismissal was procedurally fair. There was a genuine belief in guilt, at the end of a reasonable and thorough investigation and dismissal was a reasonable sanction. I have some sympathy with the Claimant that perhaps an alternative might have been the imposition of a final written warning, however a dismissal in these circumstances was within the band of reasonable responses.
90. Mr Sangha's submissions also addressed the issue of wrongful dismissal. It was unclear to me from the ET1 that the Claimant was in fact pursuing this head of claim however, for completeness, I do not uphold any complaint of wrongful dismissal. The conduct of the Claimant clearly constituted behaviour which wholly and

fundamentally breached his contract of employment entitling the Respondent to dismiss him without notice.

Employment Judge Hindmarch

4 August 2022