EMPLOYMENT TRIBUNALS

Claimant: **Mr. Mark Thornley**

Respondents: **North West Leicestershire District Council**

Heard at: **Nottingham Employment Tribunal by Cloud Video Platform**

On: **16-19 May 2022**

Before: **Employment Judge Broughton (sitting alone)**

Representation

Claimant: **Mr. Harthen, Counsel**
Respondent: **Mr. Heard, Counsel**

JUDGMENT

Rule 69: Judgment amended under the Slip Rule
paragraph 145 amended to '3 occasions'

1) The Claimant's claim of unfair dismissal is well founded and succeeds.

2) A reduction of 50% is applied to the compensatory award under section 123(1) ERA

3) A reduction of 50% is applied to the basic award under section 122(2) ERA

Background

1. The judgment and the reasons were provided ex tempore to the parties on the last day of the hearing. These written reasons have been provided following an application made by the Claimant.

The Issues

2. The issues to be determined were agreed between the parties and are as follows:

Unfair dismissal

(i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"): The Respondent asserts that it was conduct.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

(iii) If the Claimant was unfairly dismissed and the remedy is compensation:

- *if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed. See: Polkey v AE Dayton Services Ltd [1987] UKHL 8;*
- *would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?*
- *did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)*

(iv) The claim under section 152 (1)(b) TULRA was withdrawn at the start of the hearing on the basis that the Claimant did not consider the evidence supported that claim.

Evidence

3. The Respondent is a district council with a duty to collect household waste, undertaken by its Waste Services Department. The Claimant was employed as Driver of refuse collection vehicles (RCV) and Crew Leader in the Waste Services department. The Claimant was also a local GMB trade union representative.

4. The Respondent produced video footage of the Claimant and the crew working with him, on the 3 July 2021. The 3 July 2021 is the date of the alleged misconduct for which the Claimant would ultimately be dismissed. The video footage was taken from a camera located on the RCV the Claimant was driving on the day in question. All of the Respondent's RCV's are fitted with on board external CCTV cameras.

5. The Claimant did not dispute the relevance of the footage or oppose its admissibility. I viewed the agreed extracts of the CCTV footage and took those into consideration.

Witnesses

6. The Claimant produced a witness statement and was cross-examined by the Respondent. He called a witness Mr C. Whyatt a full time Union Officer with the GMB, to give evidence, he had produced a witness statement and was cross examined.

7. The Respondent produced statements for and called the following witnesses who were cross examined by the Claimant; Ms Preston, Waste Services Team Manager, Mr Paul Sanders, Head of Community Services and Mr James Arnold, Strategic Director.

Documents

8. I was assisted by a bundle of documents initially numbering 318. The Respondent applied to include a further document, a copy of a statement of particulars of employment dated 6 May 2003. There was no dispute between the parties that the document was relevant to the issues and the Claimant raised no objection to its inclusion. The final bundle numbered 320 pages.

Preliminary issues

9. There was a dispute over the admissibility of a character reference included within the bundle by the Claimant. The Respondent objected to the inclusion of this document on the basis that it is not relevant to the issues in the case. It was not a document put before the disciplinary or appeal officer [page 318]. The 'character reference' consisted of an email from a union representative called Mr Finch. Within this email he set out his opinion of the Claimant as a colleague and the treatment he had received in connection with the dismissal and what he describes as the impact on other colleagues. It does not comment on the specific allegations relating to the disciplinary proceedings other than to allege in vague and general terms that other colleagues have done worse but he does not identify who, when or what they had done.

10. Counsel for the Claimant submits that the document is more than a character reference, it is from a work colleague and gives an indication of how the Claimant was perceived by the workforce. He submits that the Claimant's standing amongst and views of the Claimant's colleagues, are matters which the Tribunal is entitled to take into account in its consideration in terms of the reasonableness of the dismissal. Mr Harthen confirmed that the document was not relevant to any issue '*beyond reasonableness'*

11. I considered the submissions and gave my decision to the parties orally . I determined that the document was of no material relevance to the issues to be determined. It is not submitted that the Claimant presented this document to the Respondent during the course of the disciplinary or appeal process. The sender of the email asserts that he is expressing the opinion of other colleagues however they are not identified in the email and the only address on the email is the sender's. It is not the Respondent's case that the Claimant was not well regarded by his colleagues and therefore is not relevant even as rebuttal evidence. The allegations are that the Claimant committed serious health and safety breaches which

amounted to gross misconduct . I do not consider that how well regarded the Claimant was, in circumstances where his working relationships with colleagues was not a factor in the Respondent's decision, is going to assist in determining the issue of whether the Respondent's decision to dismiss fell within the band of reasonable responses. There is reference in this email to inconsistent treatment by the sender but the allegations are in such vague and general terms it adds nothing material to the Claimant's case. Further, this is not a signed statement or even a letter. It makes provocative statements such as the Claimant had been discarded like a piece of 'trash' however, the document being only an email is not signed and contains no statement of truth. The Claimant does not contend that the sender was not able to attend the hearing to give evidence if he considered he had relevant evidence to give. The Respondent would have no opportunity to challenge the statements made within this document. I determined that it was not in accordance with the overriding objective to allow this document to be admitted into evidence.

12. The case had been listed to be heard with Non-Legal Members. I understand that may have been because the claim included a complaint brought pursuant to section 152 (1)(b) ERA. That appears to have been an oversight, however the claim was in any event withdrawn and the Members were released without hearing any evidence. The case proceeded as a 'judge sit alone'.

Findings of fact

13. I have considered all the evidence but set out in this judgment only those findings of fact which I consider relevant to the determination of the issues. Unless stated otherwise all findings are based on a balance of probabilities. The reference to numbers in square brackets are to pages in the joint bundle.

14. The Claimant was employed by the Respondent from 6 May 2003 [p.319] as a relief HGV driver/loader.

15. The Claimant became a Crew Leader/ Driver in 2006 [p.50a]. This was in effect a promotion. In this role he was responsible for not only driving but ensuring the work of the crew members was carried out in a safe manner and for this he received an increase in his pay.

16. The job description [p.50c] includes the following;

- *Maintain an awareness of the Health and Safety of the crew members and public at all times and* ***ensure all crew act in a safe and efficient manner.*** *(Tribunal's own stress)*

17. The Drivers handbook [p.106] provides that;

- *The driver is fully responsible for their vehicle at all times*
- *Driver should* ***also ensure that reversing aids and lamps fitted to vehicles are working at all times*** *(Tribunal's own stress)*

18. A reversing aid includes the camera fitted to the rear of the lorry which allows the Driver to see the crew working at the rear of the vehicle when they are loading and the traffic. There is otherwise a 'blind spot' for the driver at the back of the lorry. The camera is therefore I find, clearly important for the Driver because it enables him to see what is happening at the rear of the vehicle when for example reversing.

Disciplinary procedure

19. The disciplinary procedure which applied to the Claimant, sets out a number of principles which the Respondent states that it will apply when implementing the policy.

    - *We will use procedures to help and encourage employees to improve rather than just a way of imposing a punishment*
    - *We will never dismiss an employee for a first disciplinary offence unless it is a case of gross misconduct*
    - *We will deal with issues* ***as thoroughly and promptly as possible***
    - *We will act consistently*
    - *There may be circumstances where in order to complete an investigation as swiftly and effectively as possible the employee under investigation may need to be suspended with pay.* ***A Head of Service must sanction suspension of this sort.***

      (Tribunal's own stress)

20. The policy sets out examples of gross misconduct which include [p.42 - 43];

    - *Conduct inside or outside the workplace which fundamentally breaches the working relationship of trust and confidence*
    - *Serious infringement of Health & Safety rules and procedures.*

Trade Union membership

21. The Claimant's Statement of Particulars issued on 25 April 2003 provide at paragraph 8 [p.320] as follows:

    "*This Authority, as your employer, supports the system of collective bargaining in every way and believes in the principles of solving industrial relations problems by discussion and agreement…"*

22. The Statement of particulars at [p.50b] state that.

    "… it is equally sensible for you, too, to be in membership of a trade union representing you on the appropriate negotiating body, and ***you are encouraged to do so.***

    You have the right to join a trade union and to take part in its activities. Details of the specified trade union and the appropriate negotiating body are contained in a copy of the Scheme of Conditions of Service available for reference in your department." (Tribunal's own stress)

The RCV

23. The particular type of RCV which the Claimant was driving on the relevant date, namely the 3 July 2020, is designed to be used with wheelie bins.

24. The rear of the RCV is fitted with 'lifters'. These are pieces of machinery fitted to the rear of the lorry, they have 3 sensors and when a wheelie bin is pushed toward them and attached by its handles, the device senses the bin, lifts it and tips the contents into the hopper.

25. It is not in dispute that there is a risk that someone pushing the wheelie bin toward the lifters may get their clothing caught by the lifters and in doing so be pulled up with the bin and tossed into the hopper.

Rave plates

26. The rave plate which operates at the back of an RCV across the hopper, can be raised or lowered.

27. When the rave plate is raised, the automatic compactor can work. The compactor compacts/ compresses the rubbish in the hopper. In summary;

a. when on automatic setting and the lifters are on manual, it only requires someone loading rubbish to press the relevant button once to work/start the compactor;

b. alternatively, the compactor and lifters can together be put on an automatic setting; the compactor then works after a set number of lifts of the lifters.

28. When the rave plate is in a lowered position, this allows the Loaders to get physically closer to the hopper. For safety reasons, the lifters are disabled, they will not work automatically which removes the risk of a person being caught by the lifters and tossed into the hopper. The compactor will also not operate without the relevant button being pressed for 10 seconds. In summary having the rave plate in a lowered position means;

a. It is safer when loading closer to the hopper; but

b. It is slower because a crew member has to stand and keep the button pressed to operate the compactor.

29. The Respondent have in place a 'task and finish' system which means that the Driver and crew on the RCV's are allowed to go home when the task/designated collections are finished and are still paid the same. This system I find in practice, may encourage, or incentivise the crew to work at a quicker rate, something which the Claimant alluded to in his evidence and an issue which we heard from Mr. C.Whyatt, he had expressed concern about because of the risk of the crew rushing to complete their work and increasing the chance of making mistakes.

Working practices

30. There is a document dated October 2011 within the bundle [p.127] which refers to crews on the cardboard collection vehicle using the rave plates in the '*up position'* and some of the crew using the plates in the '*lowered position*'. There is reference to the crew using them in the up position to save time and that there is going to be an assessment of the implications of that. I was not taken to the outcome of any assessment but that document indicates I find that the Respondent was aware that there were different working practices in place in terms of the positioning of the rave plate and of operating them in a way which would save the crew time.

26 February 2020 [p.156]

31. At a meeting with the Unions on 26 February 2020, the safety of two new vehicles which have buttons which require operating on the Driver's side of the vehicle (and thus require the person operating the button to stand in traffic), was discussed. The Claimant referred to this only being a problem now because the vehicle was being used on a 'round' rather than as a

shuttle vehicle. There was also as recorded, a discussion about a large bin (a slave bin) being fitted to the back of the vehicle to assist with the loading of cardboard .The Claimant's crew had been loading not only into the slave bin but direct into the hopper. Mr Curtis, the Transport Manager is recorded in the minutes [p.152] as stating;

" there is more chance of injury loading over the bin rather than putting into the bin …"

32. Mick Hughes is also recorded in the minutes as referring to this as;

*"…**massive breach** of H & S." (Tribunal's own stress)*

33. The Claimant is recorded as stating that the crew are adapting to get round the problem and refers to the difficulty when someone is waiting and the bin needs lifting.

34. The minutes of the meeting [p.153] record the group agreeing to continue to retrain staff, trial and monitor. There is no reference to any warning or other indication from the Transport Manager or Supervisors that disciplinary action may be the outcome of any further such breach of health and safety.

35. In response to a grievance raised by the Claimant, there is a report of what had been discussed at a follow up meeting on 27 February 2020 with the Claimant about this practice of loading over the slave bin, with David Cooper and Mr Hughes. Mr Hughes in his statement about what had been discussed, refers to having shown the crew members on 27 February what they had done *"wrong"* and referred to this as; "*an education exercise and not a case for any warnings".*

36. This incident on 26 February 2020 was only a few months before the incident on 3 July 2020 when the Claimant and his crew would do something similar i.e. loading into the hopper in a manner which was considered unsafe and in breach of health and safety procedures. I note that on 26 February 2020 however, the Respondent had chosen not to take any disciplinary action against the Claimant or the crew in respect of how they had been loading and had not issued any warning that a repeat of such behaviour may result not only in some disciplinary action, but potentially summary dismissal.

Joint Consultative meeting on 15 April 2020 [p.172]

37. There was then a joint consultative meeting between the Respondent and the recognised trade unions on 15 Aril 2020. This is a key meeting. It was agreed at this meeting how the RCV's would be operated on the 'cardboard rounds'.

38. It is not in dispute that the volume of the cardboard being generated by households during this period, was unprecedented. During the height of the Covid pandemic and periods of 'lock down', households were buying more products online and as a consequence generating large volumes of packaging. The 'cardboard' collections, given the volumes of and size of some of the packaging to be collected, was described by the Claimant as "*hell on earth*."

39. This was the first time the crew had used these particular RCV's fitted with lifters, to collect cardboard. The Claimant does not deny that he was aware that it was agreed at this meeting that the rave plates would be operated in the lowered position when the crew were loading cardboard for safety reasons. The Respondent was struggling with staffing numbers and were using agency staff to work on the cardboard rounds.

40. The Claimant was present at this meeting, along with Mr C. Whyatt, Ms Preston and Mr Paul Sanders amongst a number of others.

41. The notes of that record that ;

    " The group discussed health and safety of the rear lifters and it was agreed that they would be disabled and the loaders would load as per manufacturer training "

42. Although the minutes of the meeting refers to the loaders being disabled they do not state expressly that the lifters will be disabled by being put on manual operation or disabled automatically by putting the rave plate into a lowered position however, the Claimant does not dispute that he knew from this meeting that it was agreed that the cardboard collections would be carried out with a *lowered rave plate*. This would mean that the crew would have to operate the compactor by holding down the relevant button at the side of the RCV. This would take longer than working with the rave plate in the raised position.

43. The Claimant volunteered to help with the cardboard runs. There were to be 3 separate crews with each crew having its own crew leader . The Claimant volunteered to make sure the crews got the runs done but he does not accept that he took on a role as a supervisor for the other 2 crews, only that he agreed to collect any card they had missed. I accept that this was the limit of what the Claimant had agreed to do. The Claimant could not oversee the work of the other two crews because he was not physically on the rounds with them and they each had in any event, their own Crew Leader.

Joint consultative meeting on 1 July 2020 [p.186]

44. At a follow up joint consultative meeting on 1 July 2020 [p.186], the Claimant referred to the cardboard collections as hell but fed back that all the drivers were working to his 'standard'.

45. The Claimant did not report back that using the rave plate in the lowered position was not feasible and the crew needed or had, used it in the raised position because of the time it was taking to complete the collections.

Incident 3 July 2020

46. The wife of Mr Curtis, the Transport Manager reported that on their local residents' Facebook page there was report of a RCV 'zig zagging' on 3 July 2020, down the road. This was not the RCV driven by the Claimant, it was one of the other cardboard collection team.

47. I have heard evidence which I accept, from the Respondent (the Claimant is not in a position to put forward direct evidence to rebut it), that on receiving this complaint they checked the camera for the vehicle in question and found that the camera was not working. As a result they checked the cameras on the other two RCV's and it appeared that both those other 2 crews were loading over the rave plate (rather than having the rave plate in the lowered position).

48. Instead of taking immediate action, the Respondent adjusted the cameras on the RCV's to get a better view so they could be sure exactly what was happening. There is no dispute that the two crews were indeed loading over the rave plate.

49. Ms Preston gave undisputed evidence that she was made aware of this and that she then viewed the CCTV footage. What she considered to be more *'shocking'* than working over a raised rave plate, was that the Claimant was also seen standing on what looked like the rave plate to clean the rear camera [w/s para 43]. Ms Preston considered that this was very unsafe because the Claimant could have fallen into the hopper at the back of the RCV or fallen to the ground and either way injured himself, potentially very seriously.

50. Ms Preston's evidence in chief suggests that the cleaning of the camera was the reason she decided that the Claimant's conduct warranted suspension. Ms Preston clarified in answer to a question I put to her, that the decision to suspend was indeed because of the cleaning of the camera and not at that stage because of the issue with working over the raised rave plate.

51. The Claimant at this stage was the only person who was seen to have cleaned the rear camera in this manner .

52. The crew on the other RCV who had also been seen to load over the raised rave plate, included;

    - Mr Whyatt : an agency worker but who had been trained and worked as a Crew Leader i.e. he was responsible for the loaders working safely (*I refer throughout to the GMB union representative by his initial to avoid confusion with this different individual i.e. Mr **C.** Whyatt*) .

    - Mr Faulkes: a full time employee working as a Loader who had been trained on how to use the rave plate in the lowered position

    - An agency worker working as a Loader.

53. Mr Faulkes, who was employed by the Respondent, was not suspended.

Suspension

54. To suspend, pursuant to the Respondent's disciplinary policy requires the approval of Ms Preston's direct line manager who was and remains Mr Sanders. Ms Preston sent an email to Mr Sanders about the Claimant's conduct.

55. The email Ms Preston sent includes the following [p.190b];

    *"It would send a **very strong message** to everyone if we suspend which **would be very positive.** As you know, **the feeling is that in the past management have gone so far then folded at the last hurdle,** which is one of the reasons why staff do not report things."*

    (Tribunal's own stress)

56. Mr Sanders agreed to the suspension.

57. I asked Ms Preston to clarify what she had meant by the above comments in her email, and her evidence was that;

    "*Previous managers before me, I was told by staff working at the time – issues were never investigated properly";* and

    *"Lot of staff because they were use to how managers were previously, people have a chat about an issue and it's not raised as a serious concern – to suspend for breach of health and safety would show how seriously we are taking health and safety as a service . …staff would report and nothing would happen, **so there was a culture of not reporting and not grasping** – **I was trying to change the culture** so people would report things and they knew they would be dealt with"*

    (Tribunal's own stress)

58. Ms Preston confirmed that she felt this approach the claimant's case, could help to change the Respondent's culture in the Waste Services department regarding how seriously they deal with health and safety breaches.

59. There was no evidence, however, put before me that any efforts that had been made to communicate to staff that there was going to be a change in the culture and a change in the management approach towards health and safety. It is not the Respondent's position that staff were told that in future health and safety matters would be dealt with more seriously.

60. In terms of what the culture had been up to this point, I take into account a number of matters; Firstly, the Claimant was spoken to in February 2020 about loading over a rave plate but nothing was done in terms of any disciplinary sanction and that was only a couple of months prior to the 3 July 2020 incident. I also take into account that at the same time in July 2020 there was a long standing practice which, it is not in dispute, put the safety of staff at risk, of Driver's cleaning the cameras at the back of the RCV by standing on the back of the vehicle to reach them and for reasons which I shall come on to shortly in this judgment, I find that this practice was condoned by the Supervisors and the Transport Manager who I find on balance, turned a 'blind eye' to what was happening, despite this clearly being a health safety issue.

61. I also take into Ms. Preston's own impression and description of what I find on balance, can only be described as a culture in which health and safety had not been taken sufficiently seriously. A permissive culture which had developed within the Waste Services Department toward the enforcement of health and safety practices over the years.

62. At the meeting in April 2020 when the rave plates were discussed, there was no discussion about what sanction may be applied if this practice was not carried out, to highlight a change in culture/approach. Explaining what sanction may be applied would not reasonably be required where the disciplinary policy makes it clear that breaches of health and safety may result in disciplinary action. However, where despite what is written in policies the situation is that in practice health and safety breaches are routinely not taken seriously and acted upon and do not result in serious disciplinary action but where people are merely spoken to, where there is going to be a different approach taken, it is only reasonable and fair, that this change in approach should be made clear to staff.

63. What did not happen I find on the evidence as presented by the Respondent, was that the Respondent made it clear that the culture had changed, that staff could be expected to be disciplined or dismissed for health and safety violations and management would now *"grasp"* such issues going forward.

64. A memorandum was sent out to staff about a change in policy regarding the cleaning of the rear cameras after the incident on 3 July 2020 however, the unchallenged evidence of Mr C. Whyatt was that this was only as a result of what he said had to happen. It was not I find, action taken by the Respondent of its own volition, again indicative of a failure to appreciate the importance of communicating with staff. However, the memorandum still did not set out what the sanction could be for failing to clean the camera in the approved manner, to ensure that staff understood that a failure to do so (after years of condoning an unsafe practice), may lead to the loss of their employment. Ms Preston clarified that this was not made clear in the memorandum because the Unions may be '*unhappy*' about that sort of language, however, not only was that not put to Mr C. Whyatt, it is incumbent on an employer to ensure that staff understand what the consequences will be of a change in practice particularly in the context of the sort of historical culture described by Ms Preston.

65. The Claimant however, under cross examination accepted that that he understood that

health and safety was a serious issue. He was a union representative and he had an appreciation of the importance of good health and safety practices in the workplace. He had worked in this job for a significant period of time and he himself at the Joint consultative committee meeting on the 26 February 2020, mentioned having been caught himself on lifters in the past. He was therefore I find, well aware of the risks associated with loading on an RCV.

66. The Claimant did not argue at the disciplinary hearing that he had not done something wrong, his challenge was and remains, that the sanction was disproportionate.

67. The Respondent has not disclosed any emails between Ms Preston and Mr Sanders relating to Mr Whyatt or Mr Faulkes and any discussion about what should happen in relation to those individuals.

Investigation meeting : 28 July 2020 [p.194]

68. An investigation meeting took place with the Claimant on 28 July 2020 with Ms Preston . The Claimant was allowed to have a companion and Mr C.Whyatt accompanied him.

69. The Claimant gave various explanations at this investigation meeting about why he had not complied with the practice of the crew loading over a lowered rave plate on 3 July 2020. He talked about travelling with the rave plates up, about the need to reverse with the rave plates up and that it was an oversight not to then lower them when the crew were loading. However, I do not find that these were genuine reasons. I understand that it is correct that the rave plates needed to be raised when the vehicle is reversing but ultimately at the disciplinary hearing, the Claimant accepted that what he had been doing and how he had been operating the RCV was wrong.

Risk assessment

70. Ms Preston was informed by the Claimant at this investigation meeting, that in terms of cleaning the rear camera, there is no standard operating procedure (SOP) for cleaning them, that he had not seen a risk assessment and that every Driver does it the same way [p.197].

71. It is not in dispute that the Respondent did not have a SOP for how the Driver's should clean the rear cameras. There was in place a risk assessment which had been carried out in November 2017 by Ms Preston [p.132] . It related to the cleaning of the reversing camera however, it is not in dispute that this only covered how to clean the camera when the RCV is in the depot. It provides that the vehicle must be in a parking bay, engine switched off, ignition keys removed, and obtain from the workshop and use, high inspection steps or alternatively a brush on a stick ***if available.***

72. What the risk assessment does not deal with is a situation where the vehicle is on the road and the camera lens becomes dirty or dusty.

73. I find that it was a serious omission by the Respondent to not have in place, not only policies but equipment for the Drivers to deal safely while working with something as important and common place as cleaning the rear camera to ensure this driving aid on the vehicle is fully operational at all times.

74. Following this meeting, the Respondent then carried out a further risk assessment on 6 August 2020 [p.207] for cleaning the rear camera when the vehicle is away from the depot. All the Drivers were also now provided with equipment, namely a pole, to clean the camera which was otherwise out of reach.

75. By 6 August 2020, I find therefore that Ms Preston was aware that there had been as at the 3 July 2020, no relevant risk assessment in place for cleaning the cameras and no equipment provided for the Drivers to clean the cameras while out on the road.

The Petition

76. On the 13 August Mr C. Whyatt, submitted a petition from 13 colleagues including Mr Faulkes [p.210], who all confirmed that;

"We… confirm that the acceptable practice for cleaning the cameras has always been to disable the lifts and climb then in order the clean the cameras. Whether this was part of practical training or not, the management has been fully aware of the practice and it has been done by all members of staff driving the vehicle".

77. It was unclear to me whether the reference to '*disabling the lifters'* meant necessarily turning the lifters off the automatic mode onto the manual setting or switching off the vehicle altogether. I asked Ms Preston what her understanding had been, she clarified that she did not know or enquire what they meant by disabling the lifts because for her the issue was simply the climbing on the back of the vehicle. Her own evidence was therefore that she did not consider it relevant whether and how the lifters were disabled and did not investigate this further . However, and I will come onto this in more detail shortly, because this is not I find, how the management case was presented by Ms Preston to Mr. Sanders at the disciplinary hearing,

Other Interviews

78. By 19 August Ms Preston had interviewed Ian Curtis the Transport Manager. Mr Curtis informed Ms Preston that the Driver who had been seen 'zig zagging' in the road, had been dealt with. Ms Preston did not enquire here what sanction had been applied and there is no evidence before me of the severity of any sanction however, the Respondent does not assert that this individual was dismissed.

79. In the terms of the cleaning of the camera, Ian Curtis confirmed to Ms Preston in his investigation interview, that it was probably correct that all the Drivers cleaned the cameras as the Claimant does but he went on to talk about the safest option which would be to turn the vehicle off and take the keys out of the ignition. The Respondent could see I accept, from the CCTV that the Claimant had not turned off the vehicle or pressed the stop button, because the lifters were still able to be used and otherwise would be immobilised.

80. On 19 August Ms Preston met with Dave Cooper, a Supervisor. When asked about cleaning the cameras he replied that he does not know how they are cleaned because he is not on the road anymore but he would have done it 5 years ago when he was, however, no one had asked him about it and no one has ever been trained for it;

" no one has been told to do it – and no one has asked how to do it"

81. On the 19 August, Ms Preston also met with Martin Patrick, Waste and Recycling Supervisor [p. 218], who informed her that he would just leave his cameras dirty when he was on the road away from the depot. I note, however, that the Drivers Handbook at page 106 specifically provides that Drivers should ensure that reversing aides (and it is not in dispute that the rear camera is a reversing aid) should be working at all times. If the camera is therefore dirty, I cannot see how that can be considered to be '*working*' . There was no action taken by Ms. Preston or indeed any criticism by Ms. Preston toward Mr. Patrick in terms of his personal adherence or attitude toward this health and safety issue namely driving a RCV with cameras which were not fully operational.

82. Based on the information that Ms Preston now had from the petition and from the Supervisors and Transport Manager, Ms Preston now knew that there had been no training provided in terms of cleaning the rear camera, there was no risk assessment in place instructing the Drivers on how to clean the rear camera safely when they were away from the depot and the Drivers had not been provided with the necessary equipment to enable them to clean the cameras without climbing on the back of the vehicle. Further, as a result of her discussions with the Supervisors and the Transport Manager, the only reasonable conclusion to be drawn, was that those in those managerial and supervisory positions were either fully aware that this was the situation or had failed to find out what the Drivers were doing while away from the depot. I find that on balance, taking into consideration the petition, it was more likely to be the former. They had themselves driven RCV's and were aware of the need to have a clean rear camera, but had done nothing to ensure that the people they were managing and supervising were able to do this safely.

83. The only reasonable conclusion to be drawn from what Ms Preston now knew, was that the situation appeared to be that the Supervisors and Transport Manager, had condoned this practice, that they had turned a blind eye to how the Drivers were dealing the problem of cleaning their rear camera while out on the road. The Supervisors and the Transport Manager must have known there was no equipment for the Drivers to safely clean the camera and none of them alleged that they ever even asked the Drivers what they did when their rear cameras became dirty while out on the road driving.

84. The document headed 'Health and Safety Roles and Responsibilities' [page 74] provides that Team Managers must be familiar with safety legislation, codes of practice and safety precautions applicable to their activities. Further it provides that they must insist on employees and contractors observing safe working practices at all times.

85. The document 'Health and Safety Roles and Responsibilities' [page 83] also sets out what the rules and responsibilities are for those in a supervisory role, namely that they must also be familiar with legislation, health and safety and insist on employees and contractors observing safe working practices at all times.

86. I find that it was apparent therefore from what the Supervisors and Transport Manager said to Ms Preston, that they had not been complying with their own health and safety responsibilities.

87. There is however no suggestion by Ms Preston that there had been failings by the Supervisors' and/or Transport Manager. It is not the Respondent's case that it even considered taking any action in connection with the failure of the Transport Manager and/or Supervisors to ensure that there was a safe working practice in place with regard to the cleaning of the camera, their failure to report it or to audit it, in breach of their responsibilities as set out in the Health and Safety Roles and Responsibilities' policy document. Ms Preston did not give any evidence before this tribunal, that she even considered this.

88. I find that despite allegedly considering it important to change the culture, Ms Preston was focussed wholly on the Claimant in isolation and did not concern herself or even apply her mind, to whether other Drivers or those in managerial or supervisory positions, had committed acts which contravened good health and safety practice.

Second investigation 27 August 2020 [p.227]

89. During this second investigation meeting the Claimant refers to other people loading over the rave plate [p.228], Ms Preston explains to him that he was not suspended for that, that he was suspended because of climbing on the rate plate: " *CP states that the suspension*

was because of the climbing on the rave plate. She had never heard of if or seen it being done before".

90. The clear inference I find, from what she told the Claimant at this meeting, is that loading over the rave plate itself would not of itself, have resulted in suspension.

Investigation report

91. Ms Preston then prepared an investigation report on 1 September 2020 [p.230] .

92. It is notable that she clearly lays the blame on the Claimant for the camera cleaning issue [p.235];

"*MT is interested in H and S yet continued to climb onto the back of the wagon without disabling it to clean a camera that did not need cleaning at that point.* ***He is also aware that others do it but has never raised it as a concern****" Tribunal's own stress*

93. Ms Preston is clearly holding the Claimant responsible for also not raising with the Respondent that he and other Drivers are climbing on the back of the vehicles to clean the rear camera, rather than his superiors; the Supervisors and Transport Manager, or indeed his peers i.e. other Crew Leaders. Despite this being a practice which has been ongoing for years and known about, it is the Claimant only who she identified as blameworthy for not reporting it. There is no criticism within that report of those in more senior positions and no mention of their failure to deal with this or to report it as a concern. The blame is clearly and solely directed at the Claimant.

94. In her evidence before this Tribunal when asked in cross examination, in light of the petition from the 13 colleagues and the information she now had at this point about the lack of an SOP etcetera in respect of the camera cleaning issue, why this matter went forward to a disciplinary hearing, her evidence was that she had only received the petition shortly before the disciplinary hearing. She spoke to HR and on their advice this charge went forward to be dealt with at the disciplinary hearing. However, this implies that she was uncertain herself whether it should proceed to a disciplinary hearing however, if that is the case, that is not how she presented the case to Mr. Sanders. I find that on balance, she did not apply her mind to whether or not it was reasonable to pursue this charge against the Claimant.

95. In the management report, Ms. Preston underlines and emboldens the word '*disabled*' in the context of the 13 colleagues who signed the petition, stating that they had first disabled the lifters before climbing them to clean the camera [p.249].

96. Ms. Preston therefore chose to emphasise that the petitioners had said that they had ' disabled' the lifters when putting this allegation against the Claimant forward to the disciplinary hearing. Ms. Preston I find, was in doing so seeking to distinguish the Claimant's conduct from those colleagues who signed the petition by drawing the disciplining officer's attention to what appeared to be a difference in what they had done to ensure their safety before climbing on the back of the vehicle. This would suggest that the reason Ms. Preston decided to continue to proceed to put this allegation forward was not merely because of the proximity in time between receiving the petition and the hearing, but because she considered that there was a distinction between the conduct of the petitioners and the Claimant.

97. However, despite the emphasis on that distinction between the 13 petitioners and the method the Claimant followed in cleaning the camera, her evidence before this Tribunal was that she had not at the time considered it relevant whether or how they had disabled the lifters, that it was the climbing on the vehicle of itself which was the issue. If that was the case, then Ms. Preston fails in her investigation report to explain that but further fails to

explain why action was not taken against the other 13 colleagues who admitted to doing the same thing i.e., climbing on the back of the RCV to clean the camera. It is not in dispute that no action was taken against the other Drivers.

98. Further, Ms. Preston admitted in her evidence before this Tribunal, that she had taken no steps during her investigation to understand what the petitioners had meant by 'disabling' the lifters i.e. whether in fact they had done the same thing as the Claimant, which was having the lifters on a manual setting or something other. In response to a question I put to her, she clarified that the lifters could also be switched off manually and when asked whether those who signed the petition had switched off the lifters manually as the Claimant had done and or used the stop button, she accepted that she had made no attempt effort to establish whether what they had done was any different from what the Claimant had done;

"We had not established any of those because either way it was against our procedures – we did not want people climbing on the back of a wagon".

99. Ms. Preston could have, had she felt that this was relevant information/evidence to be placed before the disciplinary officer, simply spoken with the other Drivers or at least the 13 petitioners. Ms. Preston had spoken with the Transport Manager and the Supervisors, but despite having a petition from 13 employees, and despite how vague some of the evidence and information was that she had received from the Supervisors and the Transport Manager about what the practice was, at no point did she take the very simple and reasonable step of speaking to the Drivers to understand what the practice was, what equipment they had, how they had been operating in practice, who knew about this and so forth. In not doing that and not clarifying what the practice was, her report which is critical of the Claimant alone (but not the Transport Manager or Supervisors), and which implies a difference in how the Claimant was operating as compared to his colleagues, amounted to a serious failure by her to present a full and balanced picture.

100. In the absence of any satisfactory or convincing explanation, I consider that it is reasonable to draw an inference from the email she sent to Mr. Sanders at the outset when recommending suspension [p.190b], that Ms. Preston was intent on using the Claimant's situation as an opportunity to send a '*strong message'* to other staff. Ms. Preston was I find, so focused on the Claimant being made an example of, to show other staff how seriously the Respondent would now deal with health and safety breaches, she failed to carry out a reasonable investigation. She failed to take into consideration the responsibilities and culpability of others. She failed to interview key witnesses, namely the Drivers. She focused solely on the culpability of the Claimant and unfairly criticised him alone for not reporting the unsafe practices of his fellow Drivers. She presented as relevant, a difference in practice which she not only did she not consider relevant but she had failed to properly investigate. She did not present a fair and balanced picture to Mr. Sanders in her investigation report because she was intent on using the Claimant's situation as a quick way to effect a change in the culture, to send a 'strong message' to other staff. Further, she was mindful that management had previously been seen to '*fold'* in terms of carrying through to disciplinary sanctions and I find on balance, she did not want management to be seen to 'fold' in the case of the Claimant, regardless of the evidence she now had about the practice of cleaning the camera amongst the Drivers.

101. The investigation report set out 2 allegations for consideration [p.235]; the rave plate and the camera cleaning. Both those allegations are clearly the allegations put forward for determination at the disciplinary hearing.

Disciplinary hearing

102. Mr Sanders was Chair of the disciplinary hearing.

103. It is not in dispute that the Claimant was given a verbal warning in December 2018 for not wearing the correct PPE . This warning had expired by 3 July 2020.

104. No concerns were raised by the Claimant or his companion about Mr Sanders conducting the hearing. I heard from Mr. C. Whyatt who presented as a credible witness, that he had no concerns about Mr. Sanders carrying out what he described as a 'proper hearing' although ultimately he did not consider that the process had been carried out fairly.

105. The letter inviting the Claimant to the hearing lists the two allegations [p.239]. The letter however appears to classify the two allegations as amounting to one allegation of gross misconduct; " *I must advise you that* ***the allegation*** *falls under the category of gross misconduct"; and*

" if ***the allegation*** *is found proven the outcome could lead to your dismissal"*

(Tribunal's own stress).

106. The letter does not state that each act/charge is of itself gross misconduct or that each act may of itself result in dismissal. Within this letter the Claimant's conduct on the 3 July 2020 appears to be treated as one allegation of gross misconduct.

107. The management case is presented by Ms Preston.

Climbing to Clean Camera

108. Ms Preston accepted under cross examination that the petition **did** suggest that the Claimant was doing the same as everyone else. She also confirmed that none of those 13 colleagues who signed to say they did the same thing, faced any disciplinary action whatsoever and when asked why not, her answer was that;

" At the time it was accepted and confirmed that we did not have a procedure in place, the risk assessment was out of date and not sure if they had seen a risk assessment to clean the cameras so revised it and gave them the poles "

109. No disciplinary action was taken against any of the Claimant's colleagues who admitted to doing, she accepted, what appeared to be the same thing, because of reasons which I find, applied equally to the Claimant.

110. While it was objectively reasonable for the Respondent to decide not to take disciplinary action in these circumstances against the other Drivers, the reasons for not doing so fails to answer the question of why the Claimant continued to faced disciplinary proceedings for the same offence.

111. Ms Preston confirmed under cross examination that all those circumstances (i.e. not seeing any risk assessment etcetera) applied equally to the Claimant and when asked therefore why then the Claimant faced disciplinary action her answer was; "*on that and raising the rave plate".* When pressed to explain the rationale under cross examination, Ms Preston did not allege that the situations were different as between the Claimant and the petitioners, her explanation was only that;

" yes but the petition was shown to me just before the disciplinary hearing – it was going to go ahead and to be looked at a later date with regards to revising a risk assessment and procedures and giving those who did not have one, a pole"

112. Ms Preston referred in her investigation report, to Martin Patrick and David Cooper referring to the drivers having makeshift poles, how this is presented I find, implies that the drivers may have poles for cleaning the rear cameras. However, her evidence before this Tribunal was that they had to issue poles to *every driver* and confirmed in cross examination, that there was no evidence to suggest the Claimant had himself ever been given one before. The way she presented this to Mr Sanders was therefore I find, misleading and adverse to the Claimant.

113. Ms Preston sums up the management case [p.250] by referring to the cleaning and then states; "***there is more than one** serious breach of Health and Safety" (Tribunal's own stress)* but names the cleaning issue as the first. There is no indication by her when presenting the management case to Mr Sanders and outcome of the investigation process, that she considered the camera cleaning issue to be less serious than the incident with the rave plate (or indeed that the Claimant's situation was the same as his colleagues against whom no action was being taken).

114. Ms Preston very much presented the management case on the basis that the Claimant was culpable and that his situation was to be distinguished from that of his colleagues in terms of the camera cleaning issue. Based on her own evidence before this Tribunal, of what she understood at the time, the way she presented the situation, was unfair and misleading to the Claimant.

Disciplinary hearing

115. Mr Sanders was informed by Ms Preston that other crew members who had been seen loading over the rave plate were no longer working for the Respondent. This is what he had been informed by Ms Preston, however this was not correct. Mr Sanders gave evidence that he had understood that if they were members of the Respondent's workforce they were being investigated and if agency workers would be dealt with by the agency. He then conceded that he knew that the other crew were being dealt with by way of retraining;

"In a panic – we were on our knees on the collection of household waste- we had no choice- we had lost 30/40 % of the workforce – could only get staff via agency so staff were kept on and we retrained them properly again – the agencies were running dry"

116. This was not however explained to the Claimant at this hearing. The Claimant and Mr C. Whyatt were told by Ms Preston only that the temporary driver 'had gone'. Neither Ms Preston nor Mr Sanders explained the correct position .

117. Mr Sanders also conceded under cross examination that he knew what the position was with the other crew members because; " *I head up the service which is front facing – it is a daily challenge in resourcing".* He referred to needing to know what is happening because he needs to keep the service on the road and he met with the Waste Service Supervisors daily during the pandemic . Ms Preston reports directly into Mr Sanders.

118. Mr Sanders accepted that although consistency of treatment was an issue raised by the Claimant during the disciplinary hearing, what had happened about the other crew members was not disclosed to the Claimant. His explanation during cross examination was that; *"we had to keep the show on the road, we had to keep people safe and so retraining was essential".*

119. Mr. Sanders I find on balance, knew that the agency staff (including the Driver of the other crew caught loading over the rave plate) had been retained and that the decision had

been made to retain and retrain rather than lose their services because of the shortage of staff however, this was not disclosed to the Claimant.

120. Mr Sanders confirmed that the Respondent could select which agency to use however the agencies had only a few people on their books;

" *in June/July people started to go on holiday again – this put pressure on staff – we were under pressure to keep the show on the road and keep up cardboard collection…"*

121. Mr. Sanders admitted that he had not made any enquiries about whether other agency staff had been available.

122. The evidence of Mr Sanders when asked during cross examination whether the decision was made not to take action against Mr Faulkes, because of this same pressures, he did not deny this, responding that ;

"The council was on its knees – under huge pressure… staff deployed in August to deliver medical supplies- we were supporting vaccination programmes at testing centres – it was as busy as anything – 2020 was hell on earth …"

123. Mr. Sanders when asked about Mr. Faulkes under cross examination gave evidence that he should be suspended if he committed a serious breach of health and safety and he went on to say that he believed that Mr. Faulkes had been suspended in September 2020 and that he had expected the case to come to him, but he was not aware of how the investigation was going. He did not assert that despite the Claimant and Mr C.Whyatt raising concerns about the inconsistent treatment which the Claimant was receiving, he had made any actual enquires about what steps had been taken with regards to Mr Faulkes, whether he had been suspended and what stage the investigation had reached. Either Mr Sanders therefore knew that in fact Mr Faulkes had not been suspended or he was unaware of what the true position was because he had failed to make any enquiries of his direct report Ms Preston (who was present at the disciplinary hearing).

124. The evidence of Mr Sanders was however that he could not recall any discussion with Ms Preston about not suspending Mr Faulkes however, it is not in dispute that Ms Preston would have required his approval to suspend.

125. Given that Mr Sanders was Ms Preston's direct line manager, how closely he was involved in decisions about workforce planning and the problems around staff resourcing and that he would have had to approve any decision to suspend, I do not find it credible that Mr Sanders was not aware that Mr Faulkes had not been suspended and was still working, by the time of the Claimant's disciplinary hearing in September 2020.

126. Mr Faulkes would not be suspended until January 2021, and only after he had committed a further serious offence (during while using a mobile phone).

Decision to dismiss

127. The decision was made to dismiss the Claimant.

128. The letter setting out the decision to dismiss the Claimant is dated 25 September 2020 [p.266]. Mr Sanders does not state that the Claimant is not being dismissed in connection with the camera cleaning issue. I find that the only natural and obvious interpretation of the letter, is that the Claimant was being dismissed because of both charges;

"*The purpose of the hearing was for me to consider the allegation that you breached health*

and safety procedures by loading over the rave plate and allowing your crew to do this and by climbing up onto the back of the vehicle and rave plate to clean the cameras on the rear of the waste vehicle.

The allegation was presented under the category of gross misconduct in that it had.

- *Serious infringement of the Health & Safety rules and procedures.*
- *Conduct inside or outside the workplace which fundamentally breached the working relationship of trust and confidence.*

… I decided that you were guilty of gross misconduct

It is not disputed by either side that card was being loaded over the rave plate against health and safety procedures and training. You, by your very own admission, admit to climbing on the plate to clean the cameras."

129. Ms Preston set out in her investigation report that the Claimant had committed gross misconduct on 5 counts [p.251]; two of those would be upheld by Mr Sanders. The two counts as defined by Ms Preston, repeated and relied upon by Mr Sanders are:

> *"2. Serious infringement of Health and Safety rules and procedures which are;*
>
> *Loading over the raised rave plate **and** climbing on the back of a live wagon. Tribunal stress" (Tribunal stress)*
>
> Mr Sanders does not in his findings define misconduct count 2 (which he had upheld), as anything different from the definition given to it by Ms Preston i.e. that it includes **both** allegations/incidents.
>
> *3. Conduct inside or outside the working place which undermines the working relationship of trust and confidence;*

130. The Claimants evidence and that of Mr C. Whyatt, is that they understood the decision to dismiss was for two things; the way the Claimant had cleaned the rear camera and loading over the rave plate.

131. Mr Sanders gave evidence under cross examination that the reason for dismissal was the rave plate *only* but that the cleaning issue; "*reinforced"* his view that the Claimant had showed a disrespect for health and safety and further, a lack of ability to understand how dangerous it is at the back of a RCV. However, Mr Sanders still denied that the rave plate incident formed part of his decision.

132. On his own evidence however, he took the camera issue into account and it formed part of what was operating on his mind when forming a view on the culpability of the Claimant.

133. Under cross examination, he refused to engage with the question of why he had taken this view of the Claimant's attitude toward health and safety in these circumstances, where the Claimant had been doing the same as his colleagues and where there was no equipment to carry out the cleaning of the cameras outside the depot and no SOP, his response was that this.

"*did not form part of my decision, so I am not answering any more on that".*

134. The only inference I consider it reasonable to draw from that response, is that Mr Sanders failed or for whatever reason was not prepared to consider, this information about the wider

circumstances around the issue of the camera cleaning. I find that any reasonable employer acting reasonably, would have taken those circumstances into account when forming a view on the Claimant's attitude more generally to health and safety and specifically his appreciation of the risks involved in working at the rear of a RCV. Even if the camera issue was not the main reason for his decision, on his own evidence, these factors influenced his decision to a material extent.

135. Mr Sanders in response to a question from me, clarified that his understanding was that loading over the rave plate was the main reason behind the decision to suspend however this is directly inconsistent with the evidence of Ms Preston.

136. Mr Sanders confirmed that he was aware of the previous health and safety issue with loading over the rave plate (loading at the side of the slave bin) in February 2020 [p.247], although I appreciate that he did not deal with that incident (it was dealt with at a lower management level), he was unable to explain to me the distinction between what happened in February 2020 and the 3 July 2020. Further, although he did not know (and thus I infer had taken no steps to check) whether it had been made clear in April 2020 to staff what the consequences would now be for loading over rave plates where this was contrary to the SOP as communicated, Mr Sanders gave evidence that to have issued such a warning would not be consistent with how the Respondent manage staff. He considered that to issue such a warning would amount to threatening staff.

Appeal - 13 November 2020.

137. Mr Arnold dealt with the appeal.

138. In the management document produced for the purposes of the appeal by Mr Sanders [p.287] there is again reference to both charges. He does not state that the allegation about the camera cleaning issue was not upheld;

"it was not disputed by either side that card was being loaded over the rave plate against health and safety procedures and training. Mark admitted climbing on the back of the wagon and rave plate to clean the cameras – we saw video footage of this happening also.
…

I then concluded that a serious infringement of Health and Safety rules and procedures of this nature consistent gross misconduct and therefore my decision was to dismiss Mark."

139. The Claimant and Mr C.Whyatt raised throughout the hearing their view that there had been inconsistency in the treatment of the Claimant.

140. The Claimant specifically asks during the appeal hearing [p.291] about the other 3 crew members who loaded over the rave plate on 3 July 2020 and why they were not suspended. It was I find clear from the notes, that there was no willingness to engage in that ground of appeal. Mr Sanders who is in attendance, responds to a question asking about other cases as follows;

Mr C Whyatt: "Can you confirm how many people investigated and suspended and disciplined for loading over the RAVE plate. You have sat in same meetings"

Mr Sanders ; "I don't have that information. We are here to talk about MT today, not other disciplinary cases" [p.294]

141. There is a failure to engage and address the legitimate concern about consistency of

treatment for similar offences. I deal with the issues of consistency below in further detail given the importance of this issue to the Claimant's case.

142. There is considerable discussion about the camera cleaning issue at the appeal hearing. Mr Sanders is present and if he had decided that this was not a reason for dismissal, he would I find, have explained that this was the case. He does not do so. He does not correct the Claimant's understanding about why his employment had been terminated.

143. In the appeal outcome letter [p.306] Mr Arnold sets out his findings and this includes that the Claimant had climbed on the back of the lorry to clean the camera. I find that on a balance of probabilities, that Mr Arnold would not have set that out, if he had not understood that had not been a reason for the decision to dismiss. He goes on to say *the " allegations"* during the disciplinary hearing were gross misconduct and he upholds the decision. In his witness statement [w/s para 23] he states; "*I truly believe that we could have had an extremely serious accident as a result of the Claimant's dangerous practices…" .* Referring to practices rather practice in the singular.

144. Mr Arnold also in his evidence in chief states that after the appeal hearing he [w/s para 21] needed to consider two further issues; (1) how the Claimant's breach had been identified, because of the Claimant's allegations of targeting and (2) whether action had been taken against other employees.

145. Mr Arnold confirmed that although at the disciplinary hearing the Claimant had raised the case of an employee caught using a mobile phone while driving an HGV on 3 occasions and who had received only a final written warning, he did not look into that. He also accepted that he had not carried out any enquiries about what happened to the person who had been driving the RCV seen '*zig zagging'* across the road.

146. I find that, although inconsistency of treatment by the Respondent, with regard to breaches of health and safety by other employees, was at the forefront of the grounds of the Claimant's appeal, Mr Arnold failed to make further enquiries into the examples the Claimant and Mr C. Whyatt put forward. Mr Arnold considered that there was only one outstanding case, involving Mr Faulkes but he did not enquire about why he had not been suspended. Although the Head of HR was present at the appeal, he accepted that he had not asked HR for further information about other cases. He accepted under cross examination that he was told any further investigation would be dealt with consistency but that he had not asked about the specifics of any others cases and how those compared to assure himself that this was the case.

147. Ultimately when pressed to explain what other cases he had considered, to check the Claimant was receiving consistent treatment it became clear that he had not made any real enquiries or addressed his mind to this issue. When it was put to him that it appears that he had not looked at the cases of other employees when reaching his decision in the Claimant's case, he simply stated.

"I accept that position, but I was focused on the health and safety issues I was considering".

148. Mr Arnold in answer to a question I put to him about his understanding of the reason for dismissal, gave evidence that; " *I stated in the summary, I found the evidence clear, the Claimant had climbed on the vehicle but the key issue was loading over rave plate*", however he accepted that from the discussion at the appeal hearing, the Claimant probably thought that he had been dismissed for both the rave plate and camera cleaning issue and he was not able to identify anywhere within the notes of the appeal hearing, where it recorded him or indeed Mr Sander's explaining that the reason for dismissal was only because of the charge in connection with the rave plate incident.

149. I did not find the evidence of Mr Arnold to be clear nor credible on the issue of what he understood the reason for dismissal to be when he was dealing with the appeal. He upheld the decision to dismiss for; "…*serious breaches of health and safety regulations."*

150. Mr Arnold sets out in detail in his outcome letter his findings about the camera cleaning issue and he has failed to explain why he has done so if this had not formed part of the reason for his dismissal;

" *You did, as evidenced by the video recording on the vehicle (and by your own admission) climb on the rear of a vehicle to clean the rear camera. As a highly experienced worker, you were fully aware of the risk associated with this action. This amounted to a serious breach of health and safety instructions. On the balance of probability having studied the operations at the rear of the vehicle and the video evidence I conclude that you did perform the action of climbing on the back of the vehicle when the full built in safety divides were not engaged".*

151. I find that Mr Arnold was operating on the understanding that the Claimant had been dismissed both for the rave plate incident and the camera cleaning incident. He states in conclusion;

" Your behaviour and ***actions*** *in this situation amounted to a very serious breach of health and safety regulations…" Tribunal's own stress.*

Consistency – further relevant evidence on this issue

152. Mr Faulkes was a loader on the second crew who had also been seen loading over the rave place. He was not a crew leader but he was an experienced full time employee. The evidence of Ms Preston was that agency workers were allocated to work alongside such full time experienced employees in order that they could guide them.

153. It is not contended by the Respondent that Mr Faulkes was not aware that what he was doing was a breach of health and safety. It is not the contention of Mr Sanders or Mr Arnold that he should have been treated differently in terms of whether he should have been suspended.

154. Mr Faulkes however was not suspended when the Claimant was suspended, indeed he was not I find subject to any investigation process until several months later and only then after he had committed a further serious offence.

155. He was not subject to any disciplinary process until January 2021. The investigation meeting was held on the 18 February 2021 [p.311] and only then is the charge put to him of loading over the rave plate ; *" CP [Claire Preston] explained that she was investigating a couple of incidents.* ***The first goes back to July*** *and is about loading over the RAVE plates".*

(Tribunal stress)

156. Ms Preston when explaining under cross examination, the difference in treatment provided two explanations; (1) that there was a lack of capacity, by which she meant a lack of time for her to deal with his case and (2) Mr Faulkes was absent from work for a period. Neither of those explanations are satisfactory or credible.

157. Ms Preston in response to a question from me, clarified that Mr Faulkes had been absent for only a matter of weeks over that July 2020 to January 2021 period. The main reason she relied upon for taking no action against Mr Faulkes was lack of capacity however, she also went on to explain that what he had done in lifting over the rave plate; *" was not deemed an*

urgent investigation "

158. This I find further indicates that what prompted the suspension of the Claimant and what was considered to warrant an "*urgent investigation*" was the camera cleaning issue.

159. Ms Preston further clarified that Mr Faulkes, along with others, were retained by the Respondent and monitored by supervisors. The Claimant would also have been monitored had he remained working, via the cameras installed on the RCV's

160. I further find that the reasons put forward by Ms Preston are not credible for the following reasons;

160.1 In answer to a question I asked, to clarify what she meant by having a lack of capacity to deal with Mr Faulkes;

- *Ms Preston described having the support of a Head of HR and 4 business partners and administrative support, and while those individuals do not carry out disciplinary and grievances they do provide support and she does not allege that she sought their advice on how to ensure a prompt investigation into Mr Faulkes could be carried out*

- *Ms Preston clarified that here were other team managers who may have been able to assist with conducting the investigation. Although not sure how many had the appropriate experience out of the circa 50 team managers who usually conduct disciplinary and grievance proceedings for their own services, Ms Preston confirmed that she had not made any enquiries at the time about their availability to provide support. Ms Preston clarified that she was not able to give any explanation for not doing so.*

- *Mr Faulkes was not suspended pending an investigation. He was allowed to continue working. He had been retrained although it is not alleged by the Respondent that he had not already had the necessary training.*

- *Mr Faulkes was another employee who had allegedly carried out his job in such a way that he had put his own life and potentially the lives of others at risk and yet no immediate action was taken and for circa 6/7 months he continued to work as normal. It would not have taken much more time to conduct an investigation or disciplinary hearing with him. Ms Preston had already informed herself about the rave plate functions and the associated risks when dealing with the Claimant's case, there was video evidence of Mr Faulkes loading over the rave plate and therefore an investigation in those circumstances should have been fairly straight forward.*

- *The Respondent is not a small employer and has the benefit of an experienced HR function.*

- *Mr Faulkes is reported by a member of the public for using a mobile phone on 13 January 2020 while driving an HGV. The Respondent then finds the necessary capacity to start immediate disciplinary proceedings. It is only when Mr Faulkes is investigated for this offence so many months after the incident on 3 July 2020, does the Respondent also now deal with the rave plate issue.*

- *The Respondent's disciplinary policy provides that matters will be dealt with promptly*

- *Further, I note that in the appeal hearing [p.299], Mark Murphy the HR Director is recorded as stating that; " if half a dozen people breach health and safety regulations and we became aware, we would find the resources to investigate and suspend if*

appropriate and take appropriate action."

161. I find on a balance of probabilities, that the reason why the decision was taken not to suspend Mr Faulkes in July 2020 or take any disciplinary action against him, was because a view was taken by Ms Preston that what was the most serious offence was the cleaning of the camera and that the RCV issue of itself would not have been deemed as warranting such urgent action. Further, I find that because the Claimant was found to have committed both offences, it was the combined breach which was considered serious enough to warrant gross misconduct. I find that there was no intention to take any action other than carry out retraining, against Mr Faulkes. He was not suspended because the issue of the rave plate was not seen as so serious and no doubt the shortage of staff played a part in how Ms Preston and Mr Sanders decided to deal with it.

162. With regard to the agency staff, Ms Preston under cross examination was clear that the reason agency staff were not dismissed for loading over rave plates, was because the decision was taken to retain them;" *when we saw the footage* ***everyone*** *was brought in and given loading training* …"

163. This is consistent with her evidence in chief (w/s para 49)***; "****The second cardboard round was made up of two agency workers and one employee. Following the review of the CCTV footage the agency workers were retrained ."*

164. However, this is not consistent with what Ms Preston had said to the Claimant and his representative at the disciplinary hearing when she told them that;

" *The other crew was being led by a temporary driver* ***who has since gone****." Tribunal stress*

165. The driver had not gone, he had been retrained and retained. I find on balance of probabilities, that given Ms Preston reported to Mr Sanders and Mr Sanders was aware of the staffing issues which were so acute, they were aware that the driver had not 'gone' . Thus the Claimant and his representative were given incorrect information .

166. The approach the Respondent took toward Mr Whyatt is not only relevant to the issue of consistency of treatment but it is not consistent with a belief that loading over the rave plate is so serious that it amounts to a repudiatory breach of the employment contract. It is further evidence to support the finding that the rave plate was not the sole or indeed the principal reason for dismissal.

167. There is no dispute however between the parties that refuse collection is one of the most dangerous jobs in the country. There is no dispute that the Claimant was fully trained in how to carry out his role including on how to operate the RCV. The Claimant became a GMB representative and in this role attended regular joint meetings with the Respondent where health and safety issues were discussed.

168. The appeal was dismissed on 21 December 2020 and the decision by Mr Sanders to dismiss was upheld.

Relationship between Respondent and the GMB

169. The Claimant had withdrawn at the start of this Tribunal hearing, his claim that dismissal was on the grounds of his trade union activities but nonetheless Mr Sanders was questioned about this. He denied that this was a factor in his decision making. Mr C. Whyatt, gave evidence that he had a professional working relationship with Mr Sanders and that the animosity which he alleges he encountered because of his Trade Union activities, was not from Mr Sanders but managers at depot level, which included Ms Preston and Mr Curtis. It

was his evidence that he trusted Mr Sanders to do a '*proper job'* at the disciplinary hearing.

170. The Claimant was taken to his contract of employment [p.320] and [p.51b] and accepted that the provisions reflected the Respondent's approach to Trade Unions, namely that it encouraged their participation and involvement.

171. The Claimant also accepted that the Respondent held regular meetings with the recognised Trade Unions where there was discussion, debate and agreement and I find that Health and Safety was a standing item on the agenda, even if not always discussed at each meeting.

172. The Claimant and Mr C. Whyatt were taken during their evidence to various consultative committee meetings held between the management of the Respondent and the recognised Trade Unions. There were clearly some disagreements, some more serious than others**.** One issue which clearly caused a fair degree of disagreement was an issue about the wheel nuts on the vehicles and whose responsibility it is to tighten them. On 15 January 2020 there was a Consultative Committee meeting and those present included Mr Sanders, Ms Preston, Mr Hughes, the Claimant and Mr C. Whyatt amongst others [p.148]. The issue about the wheel nuts was discussed, The evidence of the Claimant was that disagreement over this issue created some animosity. The same issue was discussed again at a meeting on 26 February 2020 and the undisputed evidence of Mr C. Whyatt as that Mr Curtis indicated that if the Drivers did not take on this responsibility and insisted on it being done by the mechanics, this may lead to redundancies. Mr C. Whyatt clearly considered this to be a unreasonable if not threatening and matters became rather heated between Mr C .Whyatt and Mr Curtis so much so that Mr Sanders intervened. However, neither the Claimant nor Mr C. Whyatt are critical of the conduct of Mr Sanders during that meeting.

173. The Claimant put in a grievance in around 2020. He complained that he was asked by Mick Hughes what links he had to the Trade Union when he applied for a supervisor role. He was not appointed. He complains that his grievance was not dealt with, in that HR simply reported back that they had found that the interview had been carried out fairly. The Claimant did not appeal that decision and alleges that this was because he did not realise that he could, however I do not find with all his general work and Trade Union, this explanation is credible. He does not allege that Mr Sanders had any involvement in the matters he complained about.

174. The Claimant put in a second grievance on 27 February 2020. He asserts that he withdrew it on 5 March 2020 [p.169] because he had no confidence that it would be dealt with. This second grievance arose out of the issues raised about the safety of the vehicles being used to load cardboard, discussed at the Joint Trade Union Consultative Committee meeting on 26 February 2020 (see above). I accept the Claimant's undisputed evidence that he complained that Mr Hughes had accused him of being 'awkward' because of the safety issues the Claimant was raising.

175. The undisputed evidence of Mr C. Whyatt was that Mr Hughes had sent Mr C Whyatt an email informing him that he did not want to continue his membership with the GMB because the Claimant had been appointed as a GMB representative.

176. I find on the evidence and on a balance of probabilities, that there were some 'flash' points in the meetings between the Unions and the Respondent's management team about health and safety matter. That is perhaps not surprising and Mr C. Whyatt did not appear to consider that this was unusual. I also accept on the balance of probabilities however that there was an issue between the Claimant and Mick Hughes and that Mr Curtis may at times have been provocative in how he handled challenges from the Unions'. However, Mr C.Whyatt described his relationship with Mr Sanders as professional, he gave evidence that

he never saw any animosity displayed by Mr Sanders towards the Claimant and had no concerns that Mr Sanders would not carry out a proper disciplinary hearing. The Claimant gave evidence that he 'absolutely' got along with Mr Sanders and that he had made an assumption that the decision to dismiss was influenced by his Trade Union activities only because he was trying to understand why he was singled out.

177. There is no indication that Mr Hughes had any influence over the disciplinary process and its outcome and nor is there any allegation that Mr Sanders had an issue with the Claimant because of his Trade Union activities. There is no direct evidence and I do not find on the evidence that was presented that there are reasonable grounds to draw an inference that the decision made by Mr Sanders or indeed Mr Arnold, was because of or indeed in anyway influenced by the Claimant's Trade Union activities.

Legal principles

Unfair Dismissal

178. The starting point in terms of the relevant law in an unfair dismissal claim, is the statutory provisions set out in the Employment Rights Acy 1996 and those are as follows:

98 General.

(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

*(a)**the reason (or, if more than one, the principal reason**) for the dismissal, and*

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—
…..

(b)relates to the conduct of the employee,
…..

(3)In subsection (2)(a)—

(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.*

Tribunal stress

The reason for dismissal

179. It is up to the employer to show the reason for dismissal and that it was a potentially fair

one, that is it is a reason that falls within the scope of S.98(1) and (2) of the Employment Rights Act 1996 (ERA) and was capable of justifying the dismissal of the employee.

180. A *'reason for dismissal'* has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' : ***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*.**

181. The burden of proof on employers at this stage is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness.

182. As Lord Justice Griffiths put it in ***Gilham and ors v Kent County Council (No.2) 1985 ICR 233, CA***: '*The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason* ***could*** *justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to S.98(4)] and the question of reasonableness.' Tribunal stress*

183. If the Tribunal rejects an employer's asserted potentially fair reason for dismissal, finding that the reason could not have been the one operating on the employer's mind at the relevant time, the Tribunal is not obliged to go on and ascertain the real reason for dismissal if there is insufficient evidence to do so: ***Hertz (UK) Ltd v Ferrao EAT 0570/05*. In these circumstances, the dismissal will be unfair.**

184. Tribunals must also take account the genuinely held beliefs of the employer at the time of the dismissal. What a Tribunal must not do is put itself in the position of the employer and consider how it would have responded to the established reason for dismissal: ***Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA*,**.

185. The standard of the hypothetical reasonable employer is central to the section 98(4) assessment of reasonableness.

186. It is for the tribunals is to discover the *real reason* behind the dismissal by examining all the facts and beliefs that caused it.

More than one reason for dismissal

187. An employer may have more than one reason for dismissal and section 98 ERA refers to the *'reason (or, if more than one, the principal reason) for the dismissal'.* The ERA, requires an employer therefore to show the reason or, if there was more than one, the principal reason for the dismissal..

188. This reference to the 'principal reason' for dismissal is aimed at preventing employers from putting forward multiple reasons under different headings in the hope that one or two might be accepted by the tribunal: ***Smith v Glasgow City District Council 1987 ICR 796, HL*.**

189. In the Smith case, the tribunal found that the Council had not established the second charge against the employee (which was agreed to have been a particularly serious one). The House of Lords, upholding the Court of Session, held that the Council had failed to show what the principal reason for dismissal was and, in any case, it was not shown that the charge which was not established was neither the principal reason for dismissal nor formed part of the principal reason. Since what was at least an important part of the reason for dismissal was not made out at all, the tribunal should have found that the Council had failed

to show a reason and that the dismissal was consequently unfair;

"As the Employment Appeal Tribunal itself has pointed out, conclusion (1)(b) was one of the most serious of the allegations against Mr Smith. That allegation must, in my opinion, have formed, at the very least, an important part of the reason which the special committee had treated as sufficient for dismissing Mr Smith and which the industrial tribunal in its turn has accepted as justifying the dismissal of Mr Smith by the council. ***To accept as a reasonably sufficient reason for dismissal a reason which, at least, in respect of an important part was neither established in fact nor believed to be true on reasonable grounds is, in my opinion, an error of law.*** *The industrial tribunal fell into this error in this case". Tribunal's own stress*

190. As made clear in the Smith decision, where the employer has a number of different complaints against the employee, each of which forms part of its reason to dismiss, the tribunal must examine all those complaints because together they comprise the reason for dismissal. The tribunal must then go on to assess fairness under S.98(4) on the basis of that composite reason.

191. In ***Robinson v Combat Stress EAT 0310/14*** an employment tribunal identified three separate complaints, including one of sexual assault, which together formed the employer's reason for dismissal ('the composite reason'). The tribunal found that the investigation into the allegation of sexual assault was 'deeply flawed', but nevertheless concluded that dismissal based upon the remaining two complaints was fair. The EAT held that the tribunal had erred in side-lining the complaint of sexual assault (which was arguably the most serious) and looking separately at the other two complaints without appreciating that they were only part of the employer's reason for dismissal. The tribunal's reasoning that the employer could have come to a perfectly fair decision to dismiss if it had eliminated from its consideration the allegation of sexual assault, was undermined by the fact that the employer *had* taken that allegation into account. The tribunal should have considered not what it would have been reasonable and fair for an employer to have thought, but what the employer actually thought and whether, having regard to the totality of its reasons, dismissal was reasonable.

192. Similarly, in ***Broecker v Metroline Travel Ltd EAT 0124/16*** it was held that it was nothing to the point to consider what the employer would have been entitled to do if it had not acted unreasonably in relying on two of the examples of 'misconduct' which it did in fact rely on.

193. If, however, the employer is alleging different grounds for dismissal and that each ground justified dismissal independently of the others, it will be sufficient if at least one of the grounds is established provided that the tribunal finds that it was the principal reason for dismissal and that it would justify dismissal independently of the other grounds: ***Carlin v St Cuthbert's Co-operative Association Ltd 1974 IRLR 188, NIRC*****.**

194. In ***Tayeh v Barchester Healthcare Ltd 2013 ICR D23, CA*****,** the EAT held that where an employee faced disciplinary proceedings relating to more than one charge, a tribunal must consider whether the employer regarded the charges as being cumulative or standalone. If the charges were cumulative, in the sense that they formed a composite reason for dismissal, it would be fatal to the fairness of the dismissal if any significant charge were found to have been taken into account without reasonable grounds. If, however, each charge stood on its own as independent acts of gross misconduct each meriting dismissal, then they would require separate consideration in determining whether it was reasonable to dismiss.

Conduct

195. Conduct is a potentially fair reason for dismissal under Section 98(2)(b) ERA.

196. If the employer shows that conduct was potentially the reason, the Tribunal must then consider the test under section 98 (4) ERA, namely whether, in all the circumstances, including the size and administrative resources of the Respondent's undertaking, the Respondent acted reasonably or unreasonably in treating that reason, as a sufficient reason for dismissing the Claimant. The question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

197. In relation to conduct dismissals, the leading authority on fairness is the case of **BHS v Burchell [1978] IRLR 379**, which sets out a three part test namely:

(1*) Did the employer have a genuine belief in the employee's guilt?*
(2) Was that belief based on reasonable grounds?
(3) Were those grounds formed from a reasonable investigation?

198. The case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** makes it clear that the test which the tribunal must apply is whether dismissal was within the band of reasonable responses that a reasonable employer in the circumstances might have adopted

199. That 'band of reasonable responses' test also applies in assessing the reasonableness of the investigation: **Sainsbury's Supermarkets v Hitt [2003] IRLR 23.**

200. Inconsistency of punishment for misconduct may give rise to a finding of unfair dismissal, as the Court of Appeal recognised in ***Post Office v Fennell 1981 IRLR 221, CA***

201. Lord Justice Brandon cited the words *'having regard to equity and the substantial merits of the case'* (contained in the precursor to S.98(4) ERA) and said:

'*It seems to me that the expression "equity" as there used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that [a] tribunal is entitled to say that, where that is not done, and one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal.*'

202. Brandon LJ went on to make two further observations. First, it is for the tribunal to decide whether, on the facts, there was sufficient evidence of inconsistent treatment. As he pointed out, the tribunal would have less detailed information regarding other cases allegedly dealt with more leniently by the employer than the information in the case before it. His second point stressed that while a degree of consistency was necessary, there must also be considerable latitude in the way in which an individual employer deals with particular cases.

203. ***Hadjioannou v Coral Casinos Ltd 1981 IRLR 352, EAT*** accepted the argument that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances

- where employees have been led by an employer to believe that certain *conduct will not lead to dismissal*
- *where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason*

- *where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.*

204. The EAT in *Hadjioannou* went on to state that cases for comparison would have to be 'truly similar or sufficiently similar', rather than 'truly parallel'. The EAT in *Hadjioannou* stressed the danger inherent in attaching too much weight to consistency of treatment when the proper emphasis is on the 'particular circumstances of the individual employee's case'.

205. The EAT's decision in *Hadjioannou v Coral Casinos Ltd* was later endorsed by the Court of Appeal in ***Securicor Ltd v Smith 1989 IRLR 356, CA***: The Court of Appeal held the employee's dismissal to be fair on the ground that there was a clear and rational basis for distinguishing between the cases.

206. As the EAT observed in 'provided the assessment of the similarities and differences between different cases *was one which a reasonable employer could have made, the employment tribunal should not interfere even if its own assessment would have been different'.*

207. In ***Cooper v Leicester City Council ET Case No.2600763/19*** an employment tribunal found that dismissal was unfair not because of inconsistent treatment per se but because the employer failed to give adequate consideration to the employee's argument based on inconsistency at the appeal stage of the disciplinary procedure. It was held that it was within the range of reasonable responses for the Council to impose two different sanctions. However, the tribunal went on to find that the employee's dismissal was procedurally unfair because he had sought to raise the disparity point in his internal appeal but the Council had refused to engage with it.

Procedural Fairness

208. Where misconduct is admitted or the facts are not in dispute, it may not be necessary to carry out a full investigation: **Boys and Girls Welfare Society v McDonald [1996] IRLR 129.**

209. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: **Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23.**

Appeal

210. House of Lords in ***West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL*****,** :the employer's actions at the appeal stage are relevant to the reasonableness of the whole dismissal process.

211. Nothing in principle prevents an employer's appeal panel upholding a decision to dismiss on a different basis from that on which the original decision was made. For the dismissal to be fair, though, the employer must ensure that whatever grounds remain still justify dismissal. In ***Perry v Imperial College Healthcare NHS Trust EAT 0473/10***

212. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for conduct. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a tribunal when determining the reasonableness of a dismissal. The amount of any compensation to be awarded may be adjusted by up to 25% to reflect any failure to comply with a material provision of the ACAS code.

213. The House of Lords' decision in ***Polkey vAE Dayton Services Ltd 1988 ICR 142, HL*** establishes procedural fairness as an integral part of the reasonableness test under S.98(4). As stated by Lord Bridge in that case, where an employer fails to take the appropriate procedural steps, the one question a tribunal is not permitted to ask in applying the reasonableness test is whether it would have made any difference if the right procedure had been followed. That question is simply irrelevant to the issue of reasonableness although very relevant to the issue of compensation.

214. Not every procedural defect will render a dismissal unfair. For example, in ***D'Silva v Manchester Metropolitan University and ors EAT 0328/16*** **t**he EAT upheld an employment tribunal's conclusion that a flaw in the disciplinary process that rendered it 'not ideal' did not render the dismissal unfair.

Contributory fault

215. Section 123(6) of the Employment Rights Act 1996 (ERA) states that: '*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*.'

216. There is an equivalent provision for reduction of the basic award contained in S.122(2) ERA which provides merely that; "*where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal* ***shall*** *reduce or further reduce that amount accordingly"*

217. EAT in ***Optikinetics Ltd v Whooley 1999 ICR 984, EAT***, held that S.122(2) gives tribunals a wide discretion whether or not to reduce the basic award on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal and that this discretion allowed a tribunal to choose, in an appropriate case, to make no reduction at all. However, under S.123(6) where, to justify any reduction, the conduct in question must be shown to have *caused or contributed to the employee's dismissal*. This required the tribunal to consider what was the reason operating on the mind of the dismissing officer.

218. In ***Nelson v BBC (No.2) 1980 ICR 110, CA*****,** the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

- *the conduct must be culpable or blameworthy*
- *the conduct must have actually caused or contributed to the dismissal, and*
- *it must be just and equitable to reduce the award by the proportion specified.*

219. It is a prerequisite of a reduction of either a basic award under Section 122(2) or a compensatory award under Section 123(6), that the Tribunal find the conduct in question to have been blameworthy: **Sanha v Facilicom Cleaning Services Ltd UKEAT/0250/18/VP**

Submissions

220. I shall now set out the submissions of both parties. I have considered the written and oral submissions in full. The following is a summary only.

Claimant's submissions

221. The Claimant's counsel addressed me on two key areas: inconsistency and disproportionate sanction.

Inconsistency

222. It is in summary submitted that no coherent explanation has been put forward to explain the different approach to Mr Faulkes (a full time employee) or Mr Whyatt (an experienced agency worker) and there is no evidence of any enquiry into whether the agency staff were replaced or the agency was in a position to do so. Further, it is submitted that Ms Preston misled the Claimant and his Union representative as to what had happened to the other crew at the disciplinary hearing on 23 September 2020; either this was an honest mistake because Ms Preston was not particularly concerned with the other crew or this was deliberate to prevent the Claimant establishing inconsistency of treatment.

223. Mr Arnold undertook (para 21 w/s) to investigate whether action had been taken against other employees and later asserts (para 25) that he was satisfied that the action taken against the Claimant was consistent in respect of other employees but during cross examination conceded that he had carried out no investigation.

224. Counsel submits that whatever the reason for the more punitive treatment, whether related to workplace issues or the Respondent's incompetence, the Claimant was treated differently and without justification. In oral submissions he submitted that there was an absence of a clear and rational reason for the difference in treatment.

Disproportionate

225. Counsel for the Claimant submits that the Claimant had worked for 17 years for the Respondent and had a good employment record. The Claimant accepted that he should not have loaded over the rave plate and that this was 'contrary to his training and instruction' . The Claimant is not saying disciplinary proceeding were unjust in their entirely rather the gravity of the sanction.

226. Counsel refers to the risk of harm occurring was extremely low because the lifters would need to be switched on, the person would need to activate the sensors by being in the same /similar position to the wheelie bin and the compactor would have to be activated.

227. Counsel also refers to the issue of loading over the rave plate not having been considered a disciplinary matter prior to this incident in terms of the February incident , the response to to Mr Faulkes and no warning of what action would be taken by the Respondent if there was loading over the rave plate had been issued. Counsel with reference to ***Smith v Glasgow*** submits that the rave plate incident and the camera cleaning incident are similar allegations, and that this is not a case where one charge is minor and another major.

228. Counsel also refers to the failure to assess at the disciplinary hearing that the Claimant was blameless in terms of the cleaning of the camera but this incident continued to weigh against the Claimant and thus led to a disproportionate sanction.

Respondents' submissions

229. Counsel for the Respondent submits that the Respondent dismissed for the rave plate incident only. Counsel invites me to accept the evidence of Mr Sanders as to what was operating on his mind at the time and the content of the letter from Mr Sanders setting out the outcome of the disciplinary hearing [p. 266] which focusses he submits, on the allegation of loading over the rave plate. If against him on that submission, counsel submits that the

Respondent having genuinely believed in the misconduct of the Claimant in respect of both offences and that given that Mr Sanders view that the camera incident showed disrespect for the risks of working at the back of an RCV, we have what counsel for the Respondent described as; "*two related intertwined events to do with the Claimant*" which are concerned with the Claimant's alleged disrespect for the lorry and health and safety.

230. Counsel submits that dismissing for a combined finding of misconduct over the rave plates and camera was serious and the investigation and the outcome would be in band of reasonable responses.

231. Counsel argues that there can be no comparability issue if I find that the reason for dismissal was actually because of both the rave plate and the camera cleaning issue, because Mr Faulkes and Mr Whyatt were not involved in the camera cleaning issue and it must therefore follow that if the Tribunal find the reason was for a combined reason (ie rave plate and the cleaning issue) then any argument around unfairness on the grounds that the Claimant suffered inconsistent treatment, must necessarily fall away.

232. In terms of inconsistency of treatment, counsel submitted that Mr Sanders and Mr Arnold had not been cross examined on the issues of consistency around the treatment of the driver who was seen zig zagging the RVC and another employee caught using a mobile telephone while driving, and that as they had not had the chance to comment on those cases in cross examination, it would be unfair to find that these situations were comparable. I have a clear record that Mr Sanders was cross examined about the alleged inconsistent treatment of Mr Faulkes and the agency staff and what he was aware of at the disciplinary hearing and about Mr Faulkes being later subject to disciplinary proceedings for using his mobile telephone while driving. However, Mr Sanders was not cross examined about the treatment of the driver who had been zig zagging in the lorry and what he knew about that incident and on the consistency of that offence. Mr Sanders was also not cross examined about the other employee not being dismissed for using his mobile telephone while driving. My notes also confirm that Mr Arnold was cross examined about his understanding over what had happened to the other crew loading over the raised rave plate, the driver who had been caught using his mobile phone and been given a final warning and the Driver 'zig zagging' across a public road.

233. Counsel submits that in terms of the lack of warning of potential dismissal for not loading over the rave plate, he submits that while in his words, there is evidence from Ms Preston of what he described as a '*gear change'* in the approach, in terms of what the Claimant knew, there is an absence of evidence that Claimant did not think that it would lead to dismissal, taking into account his acceptance that the Respondent treated health had safety seriously, he had a supervisory function in respect of the crew and was aware of the importance of health and safety through his Trade Union involvement

234. Counsel for the Respondent referred to a number of authorities which I have considered***; British home Stores Ltd v Burchell [1978] IRLR 379, Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23, Iceland Frozen Foods Ltd v Jones [1982] 439, West Midlands Co-Operative Society Limited v Tipton [1986] IRLR 112 Post Office v Fennell [1981] IRLR 22, Paul v East Surrey District Health Authority [1995] IRLR 305, MBNA Ltd v Jones UKEAT/120/15, Hadjioannou and Paul v East Surrey District Health Authority [1981] IRLR 352, London Borough of Harron v Cunnignham [1996] IRLR 256/***

Conclusions and Analysis

(**a) Could the Respondent prove a potentially fair reason for dismissal on the balance of**

probabilities?

235. The section 152 claim was withdrawn because a view was taken at the outset of the hearing, that the evidence simply did not support that claim however, I am mindful that evidence can evolve during the course of a hearing and that it this was the reason it would be relevant to the 'ordinary' unfair dismissal claim. **.** However, I have taken into account that the Respondent encouraged Trade Union participation and membership. The Claimant was taken to documents [p.320] and [p.50b] which the Claimant accepted reflected the Respondent approach to Trade Union membership, namely that it encouraged it. Further, there were regular meetings between the Respondent's management team and the Trade Union representatives where there was clearly discussion, debate and at times, agreement including for example how to operate the rave plate during the cardboard runs in July 2020. Health and Safety matters were a standing item on the agenda for these meetings.

236. The Claimant described his relationship with Mr Sanders in positive terms and Mr Whyatt considered their relationship to be professional, he did not see any animosity shown by Mr Sanders toward the Claimant and he had trusted Mr Sanders to carry out a proper disciplinary process. The Claimant was also positive in terms of his view of his relationship with Mr Sanders.

237. There was an issue between the Claimant and Mr Hughes but it is not the Claimant's case that Mr Sanders was influenced by Mr Hughes in his decision to dismiss.

238. I conclude that the Claimant has not established on the evidence, that the reason for dismissal was on the grounds of or in any influenced by his Trade Union membership or activities.

239. As set out in my findings in some detail , I am not persuaded however that the reason for dismissal was only because of the issue of loading over the rave plate. Despite the evidence of Mr Sanders, I have made findings that the reason for dismissing the Claimant was because Mr Sanders held the belief at the time of dismissal, that the Claimant had been guilty of both loading over the rave plate and cleaning the camera by standing on the back of the RCV, offences which together I conclude he considered amounted to a serious breach of health and safety.

240. Mr Sanders and Mr Arnold did not give a credible account of what was operating on their minds at the time of the disciplinary and appeal stage, and the reasons why Mr Sanders decided to dismiss and why Mr Arnold upheld that decision was upheld.

241. The reason for dismissal was I conclude, as counsel for the Respondent puts it, for "two intertwined" events. If they had been treated by the Respondent as separate offences, this would have necessitated separate consideration of the seriousness of each in their own right and what sanction may apply if either or both charges were upheld. Neither at the dismissal nor appeal stage, did Mr Sanders or Mr Arnold address what they would have done if only one of the offences had been proven and whether separately they would have warranted dismissal and that is because what was operating on their mind I find, was that the Claimant committed both offences. They approached the sanction and the seriousness of the offences based on those '*composite reasons*.'

242. The principal reason for dismissal I conclude, was for a breach of health and safety, comprising two composite reasons or offences; the loading over the rave plate alongside on the same day, the camera cleaning issue. Both in the view of Mr Sanders showing a disregard for the risks associated with working at the rear of a RCV.

243. The potentially fair reason for dismissal was therefore the Claimant's conduct.

(b) Was the decision to dismiss fair, applying s.98(4) ERA 1996? .

244. As the charges were cumulative, in the sense that they formed a *composite reason,* it will be fatal to the fairness of the dismissal if any significant charge is found to have been taken into account without reasonable grounds: ***Smith v Glasgow City District Council 1987 ICR 796, HL*.**

245. I have considered not what it would have been reasonable and fair for an employer to have thought on the facts and evidence before it at the disciplinary, but what I find Mr Sanders actually thought and whether, having regard to the totality of his reasons, whether he believed those reasons to be true on reasonable grounds.

246. Mr Sanders approached the reason for dismissal by relying on both charges against the Claimant. He refers to them as together as amounting to a breach of health and safety; "*The purpose of the hearing was for me to consider* ***the allegation*** *that you breached health and safety by* …" and **"*The allegation* *was presented under category of GM*". *Tribunal stress*

247. Mr Sanders does not treat them as independent acts of gross misconduct in his letter of dismissal. He does not set out his decision in respect of each charge and what sanction should be applied to each. He does not state in the letter of dismissal, that the issue with the camera cleaning is not the main/principal reason for dismissal or that it did not form part of the main/principal reason part of the reason. The appeal letter also refers to the Claimant's actions amounting to; " ***a*** *very serious breach of health and safety regulations…"* without separating out the charges.

248. I conclude that while the charge of lifting over the rave plate *may* have justified dismissal independently of the camera issue, I would need to find that this was in fact the main or principal reason why Mr Sanders decided that the appropriate sanction was dismissal dismiss however, I do not conclude that it was: ***Carlin v St Cuthbert's Co-operative Association Ltd 1974 IRLR 188, NIRC.***

249. I am not satisfied that even if the rave plate incident could reasonably have been treated as gross misconduct (and I accept that the Claimant acknowledged the seriousness of it himself), the Respondent would have dismissed for this offence alone.

250. I take into consideration that here was a failure to take any action at all against Mr Faulkes. He was not even suspended. He was not subject to any investigation until several months later and only when he was seen by a member of the public driving while using his mobile telephone. For the reason set out in my findings, I do not accept that the reason for this was because of a lack of resource to initiate investigation or disciplinary proceedings. While Mr Faulkes was not a Crew Leader, he was an experienced and trained member of staff who had also loaded over the rave plate. The Crew Leader who was an agency worker had also been responsible for a crew who had loaded over the rate plate and yet his services were retained by the Respondent (as were the other agency staff who worked on those two crews) .

251. The lenient treatment of other staff who had done the same thing, does not support a conclusion that the Respondent would have dismissed the Claimant for that offence alone.

252. There was also no disciplinary action taken against any of the Claimant's colleagues who signed the petition and who accepted that they also cleaned the camera by standing on

the back of the RCV. This further supports the conclusion that it was the combined effect of the offences which persuaded Mr Sanders to treat the Claimant's attitude toward health and safety matters as gross misconduct. .

253. The two charges were not considered separately but rather it was the combined effect of them both which I am satisfied was operating on the mind of Mr Sanders when deciding on the appropriate sanction. I have arrived at that conclusion based in the following findings of fact;

253.1 Ms Preston stated that the reason for suspension was the camera cleaning incident and she communicated this to Mr Sanders whose approval she required to suspend. That this was the reason for suspension and not the issue with the rave plate, is confirmed in the investigation meeting notes of 27 August 2020 [228]. I do not accept Mr Sanders' evidence that suspension was because of the rave plate and consider that this was an attempt by him during this hearing, to move the focus away from the extent to which camera cleaning charge formed part of the reason for the suspension and in then the decision to dismiss.

253.2 In Ms Preston's evidence, [w/s para 43] she indicated the relative seriousness of the two offences when stating that the; "*most shockingly"* was the Claimant was seen climbing onto what was originally thought to be the rave Plate.

253.3 Ms Preston set out in her investigation report that the Claimant had committed gross misconduct on 5 counts [p.251] and the two upheld by Mr Sanders are were defined by Ms Preston as covering both charges.

253.4 Nowhere within the Respondent's minutes of the disciplinary hearing does it record Mr Sanders stating that camera cleaning charge is no longer a live issue and has not been upheld.

253.5 Although Mr Sanders focusses on the rave plate incident in his findings, in his summing up he refers to both allegations [p.264].

253.6 Within the disciplinary outcome letter Mr Sanders refers to *"the allegation"* of a breach of health and safety and defines what that breach is, by reference to both incidents.

254. I have also had regard to the fact that it was only in cross examination that Mr Sanders gave evidence that the decision to dismiss was only for the rave plate incident. This is not set out in his witness statement, in fact he refers to both charges [w/s para 14] and nor was this set out in the response to the claim.

255. Mr Sander's evidence followed on from Ms Preston, who under cross examination had accepted that the Claimant's position was not any different to those colleagues who signed the petition.

256. If Mr Sanders considered one offence to be more serious than the other, he does not identify which in his evidence in chief, the disciplinary outcome letter or in the invitation to the disciplinary hearing.

257. The Claimant and the evidence of Mr C. Whyatt as an experienced Trade Union representative, is that they both understood that the decision was made to dismiss because of both charges

258. The Claimant submitted an appeal against the decision to dismiss and at the hearing the Claimant and Mr C. Whyatt addressed both allegations in the context of the grounds of appeal and at no time did Mr Arnold correct them or otherwise explain that the dismissal was only because of the rave plate incident. Mr Arnold addresses both charges in the meeting and his outcome letter, the combined effect of which he clearly considers to amount to a breach of health and safety and to have justified dismissal..

259. In the management document produced for the purposes of the appeal by Mr Sanders [p.287] there is again reference to both charges .The natural and most obvious interpretation of that document is that it reads as if the two charges taken together amount to "*a serious infringement"* of health and safety.

260. The Respondent has failed to show out of the two charges what the *principal* reason for dismissal was. It has not been shown that the offence of climbing on the back of the lorry to clean the camera was not the principal reason for dismissal or that it did not form part of the principal reason as a composite reason.

261. Mr Sanders and Mr Arnold having reflected no doubt on the circumstances around the camera cleaning issue, have sought to persuade me that the camera issue was not the principal reason, nor formed part of the principal reason for dismissal. I am not persuaded. This was not I conclude the approach taken during the disciplinary or appeal process and that the two allegations together were treated as giving rise to gross misconduct and that this was the genuine composite reason.

Camera cleaning issue

262. I will turn now to whether Mr Sander's belief that the charge of cleaning the camera in breach of health and safety, was established, was a reasonable belief to hold and formed following a reasonable investigation.

263. The Claimant admitted to cleaning the camera by climbing onto the back of the lorry and indeed he was seen to have done .

264. Mr Sander's case as he argues it, is that he did not dismiss for that reason however counsel for the Respondent submits that if it was a combined reason, it still fell within the band of reasonable responses to dismiss because the Claimant did carry out the alleged act.

265. As I have set out in quite some detail in the above findings, the way in which the rear cameras were cleaned was unsafe however, it was condoned by direct management. It had been going on for years. The Drivers did not have the equipment to safely clean the cameras while on the road. The Respondent had failed to carry out a risk assessment or SOP which covers the cleaning of the camera while the vehicles are away from the depot. The Transport Manager and Supervisors knew this was happening but turned a blind eye. This was information obtained through the investigation process.

266. In those circumstances, it was outside the band of reasonable responses, to have formed a belief that this behaviour amounted to misconduct certainly not serious misconduct.

267. None of the Claimant's colleagues or his line managers, were alleged to have or charged with committing an offence of misconduct. It is also of course the case, that Mr Sanders and Mr Arnold before this tribunal, have given evidence that they did not dismiss because of the camera cleaning incident and they do not allege that it would have been fair to do so.

Rave plate

268. The Respondent had reasonable grounds to sustain the belief that the Claimant had committed an act of misconduct when loading over the rave plate. The Claimant does not dispute that what he did was wrong.

269. The belief that the Claimant had committed misconduct by cleaning the camera as he had, was not however based on reasonable grounds and this formed part of the employer's composite reason for dismissal. Counsel for the Respondent submits that the Respondent could have come to a perfectly fair decision to dismiss if it had eliminated from its consideration the allegation of the camera cleaning, however the facts are that Mr Sanders (and indeed Mr Arnold on appeal) *had* taken into account the camera cleaning incident and this formed the reason for dismissal and it is not for me to consider what it would have been reasonable and fair for Mr Sanders or Mr Arnold to have thought. At this stage I am concerned with what they did think at the time and the reasons why they acted as they did when assessing the reasonableness of the dismissal (although whether they would have still dismissed if there had been only one charge taken into consideration, is a matter which can be considered in terms of what compensation it may be just and equitable to award).

At the time the respondent formed the belief had it carried out a reasonable investigation ?

Camera

270. Ms Preston had not spoken to the other Drivers about how they had cleaned the cameras however, this deficiency was addressed by the Union in the petition which was presented . The evidence was presented to her and she does not and did not at the time, dispute its provenance. What was deficient with her investigation however, was the extent to which she established how those who signed the petition operated. She spoke with the direct line management but there are no follow up interviews with the Drivers. She reports back what the Transport Manager and Supervisors say about poles being provided and yet fails to speak to the Drivers to establish for example, who if any of them had been provided with equipment.

271. However, Ms Preston also failed to establish during her investigation what steps the Drivers took to disable the lifters. Her lack of investigation does not stand up to the lightest of scrutiny. I merely asked whether those other Drivers turned the lifters off with the manual button rather than the stop button, however she did not know and confirmed that she had not made any enquiries during her investigation.

272. Ms Preston accepted that it appeared that the other Drivers had done the same thing as the Claimant had done with respect to cleaning the rear camera but presented the management case to Mr Sanders in such a way that it inferred that the Claimant had operated differently to his colleagues and in a less safe manner. Ms Preston also presented the Claimant has even more blameworthy because he had not reported his fellow Drivers for working in the same way he had.

273. Ms Preston adopted a clearly partisan approach to the investigation. She was focussed wholly on establishing the culpability of the Claimant in order to send a message to staff., This agenda obscured the reasonableness with which she approached the whole process. The flaws and bias in the way in which she presented her findings to Mr Sanders, render the investigation outside the band of reasonable response.

274. Ms Preston's unwillingness for management to be seen to 'fold' meant that she failed to consider whether it would be reasonable to interview the other Drivers or indeed whether it was reasonable to proceed with the charge about the camera issue at all.

275. Ms Preston's failed to take reasonable steps to understand what the disabling process

was that had been employed by the petitioners and yet presented the situation to Mr Sanders in a way which she effectively accepted, was not supported by the very limited investigation she had carried out. This was outside the band of reasonable responses.

The decision Mr Sanders came to, that the Claimant was guilty on both charges, was not based on reasonable grounds. At the time the Respondent formed the belief, it had not carried out a reasonable investigation.

Was the decision to dismiss with the range of reasonable responses ?

276. The decision to dismiss was based on composite reasons; two alleged incidents which taken together lead to a decision that the Claimant had shown a serious disregard for health and safety.

277. I am not persuaded by the argument that the risk of harm by loading over the rave plate was low and thus the sanction which was applied was outside the band of reasonable responses. The risk may well have been low however, counsel for the Claimant accepted that the potential level of harm was serious. It is not in dispute that had a person been lifted into the compactor by the lifter, the result could have been serious injury if not a loss of life.

278. In respect of the camera issue; the Claimant was trying to ensure that his vehicle was safe on the road, that he could see the crew clearly and the public who may be at the back of the RCV and in doing so avoid a potentially serious, if not fatal accident. The camera is an important reversing aid to avoid a 'blind spot' . He had not been provided with the necessary equipment to perform this process safely. His direct line managers were aware and condoned the practice and the Respondent had failed to put in place any risk assessment or safe operating procedures.

279. That it was not fair to take disciplinary action with respect to this charge, let alone for this to form part of a composite reason leading to summary dismissal, is supported by the decision by the Respondent not to take any action whatsoever against any of the other Drivers who Ms Preston accepted, had operated in the same way. Ms Preston's own evidence is that the reason it proceeded to a disciplinary hearing was because the petition had only been received late in the day. Ms Sanders himself has during this course of this Tribunal hearing, attempted to maintain that this charge did not form part of the reason for dismissal.

280. In the circumstances, it was outside the band of reasonableness for the charge of cleaning the camera by climbing on the RCV, to have been upheld and to have formed part of the composite reason for dismissing for gross misconduct.

281. The Respondent has not established on the evidence, that it had or indeed that it would have dismissed for the rave plate incident alone.

282. I have considered the issue of consistency of treatment (aside from it as evidence regarding how seriously the individual charges were actually believed to be). Section 98(4)(b) ERA requires tribunals to determine the reasonableness of a dismissal 'in accordance with equity and the substantial merits of the case'. Equity, in this context, is equivalent to 'fair play' and is part of the reasonableness test, and it is relevant to consider how other employees have been treated.

283. Counsel for the Respondent submits that if this is a composite case, then there is no inconsistency because the cases are not sufficiently similar i.e. other colleagues had not committed both offences.

284. Even if the issue of loading over the rave plate, had been the principal reason for

dismissal (which is the Respondent's case), I am not persuaded that in the circumstances it would have been within the band of reasonable responses to have dismissed for it.

285. There was no action taken against Mr Faulkes whatsoever until circa 6 to 7 months later. The Respondent's position is not that it considered whether or not to do so and decided on a clear and rational basis, not to take any action: ***Securicor Ltd v Smith 1989 IRLR 356, CA***. The Respondent's position is that it was going to take action but at the time there was a lack of resources to enable it to do so. However, I have found that there was no intention of taking any action whatsoever against Mr Faulkes in connection with the rave plate (at least not until he committed a further offence many months later).

286. There is also the treatment toward the agency staff who also loaded over the rave plate (more importantly the Crew Leader), whose services were retained.

287. Further, if the reason was a shortage of staff, not only was this reason not explained at the disciplinary stage to allow the Claimant to address that during the disciplinary or at appeal when he raised issues of consistency, I am not persuaded that a reasonable employer acting within the band of reasonable responses, would have treated the individuals so differently. The Claimant was a long serving employee. The Respondent chose to retain agency staff and did not even issue a warning to Mr Faulkes .

288. Further, to treat this alone as gross misconduct would be inconsistent with how the Claimant was treated only a few months before in February 2020, when loading at the side of the slave bin contrary to instructions.

Appeal

289. Mr Arnold's own evidence around the reason for dismissal was vague however, if his evidence is to be accepted, he understood that the dismissal was for the rave plate only. While that was not the reason for dismissal but was only part of a composite reason, on the Respondent's own case, the appeal Chair had failed to even appreciate what the real reason for dismissal was.

290. The Claimant understood that he had been dismissed for both offences and that was the basis in which he put his appeal and argued it at the appeal hearing. If Mr Arnold understood that the only reason was the rave plate, it was outside the band of reasonable responses not to explain this to him. He accepts from the notes that the Claimant probably thought it was both reasons.

291. With respect to the consistency issue; Mr Arnold understood the point that the Claimant was trying to raise about consistency of treatment and committed to look into this further but then failed to do so. I conclude that no reasonable employer would have dismissed the consistency issues raised by the Claimant in the way Mr Arnold did, he simply failed to engage with that ground of appeal. This flaw in the appeal process alone would render the dismissal procedurally unfair and outside the band of reasonable responses.

292. Had Mr Arnold carried out a proper consideration of that ground of appeal as he had agreed to do, he would have realised that by November 2020, some 4 months after the relevant incidents, others who had committed similar offences had not been suspended or subject to any disciplinary action. The outcome of that appeal process may have been very different.

293. I do not consider the letter setting out the outcome of the disciplinary or appeal offends the ACAS code in terms of the reasons that were provided to the Claimant, because they do deal with both reasons.

294. In conclusion, the dismissal was both procedurally and substantively unfair.

The Claimant's claim that he was unfairly dismissed therefore succeeds.

Polkey Principle : section 123 (1) ERA

295. The Claimant's conduct in loading over the rave plate was blameworthy and he himself accepted that what he had done was wrong.

296. The reason for dismissal was for both offences and thus his admitted wrongdoing did contribute to the reason for dismissal however, I do not consider that it would be appropriate to reduce the compensation to be awarded to reflect the prospects that had there been a fair process, the outcome would have been the same.

297. The reason for dismissal was for both offences despite what is now being alleged by the Respondent. Given the approach the Respondent took to others who committed the same offence with the rave plate, I do not consider that it is possible to reach a finding on the chances of the outcome being the same had a fair process been followed.

Contributory fault : section 123 (6) ERA and section 122 (2) ERA

298. I now turn to consider however whether there should be a reduction to reflect the extent to which the Claimant's blameworthy actions contributed to the dismissal.

299. The Claimant's conduct in loading over the rave plate was blameworthy and he himself accepts that. The Claimant had been expressly told not to allow the crew to load over the rave plate and he admitted in cross examination that he knew it was a serious matter and he should not have done it.

300. The Claimant had volunteered to help ensure the collection of the cardboard run, he knew how the Respondent wanted to operate the RCV, he accepted he understood the importance of health and safety, he was vocal about health and safety in meetings and he had experience of the risks of being caught on the lifters.

301. The Claimant had the opportunity to raise the loading issue again at the 1 July 2020 meeting if he felt the standing instruction was not workable in practice but did not do so without any good reason. He modified the method of loading into the hopper without any reference to management.

302. Loading over the rave plate was part of the composite reason for dismissal, it contributed to the decision to dismiss.

303. In those circumstances therefore I consider that it is just and equitable to reflect his conduct which is blameworthy and conclude that it did contribute to his dismissal. I consider that an appropriate reduction would be 50% to both the **basic** and the **compensatory** award.

Acas uplift

304. In terms of any ACAS uplift, the parties have not addressed me on that and will have the opportunity to do so in light of the findings.

Remedy sought

305. The Claimant is not seeking re-engagement or reinstatement. The case will be listed

for a hearing to determine remedy.

Employment Judge Broughton

8 July 2022

Corrected Judgment issued on: 23 August 2022

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