



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101696/2022

Held in Glasgow on 27, 28 and 30 September 2022

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**Employment Judge S MacLean**

**Mr P Flockhart**

**Claimant  
Represented by:  
Mr R Dorrian -  
Solicitor**

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**Hoyer Gas and Petroleum Logistics Limited**

**Respondent  
Represented by:  
Mr S Peacock -  
Solicitor**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims are dismissed.

### REASONS

#### Background

1. In the claim form sent to the Employment Tribunal on 30 March 2022, the  
20 claimant complains of automatic unfair dismissal asserting that the real  
reason for his dismissal was because of his trade union activities.  
Alternatively, he asserts that the respondent acted unreasonably in  
dismissing him because the decision and the procedures that it adopted did  
not fall within the band of reasonable responses. The claimant also contends  
25 that the respondent failed to pay him notice pay and was in breach of contract.  
The claimant seeks compensation.
2. In the response the respondent admitted dismissing the claimant. The  
respondent asserts that the reason for dismissal was gross misconduct and  
that a fair and reasonable process in all the circumstances was followed. The  
30 respondent says that the decision to dismiss was within the band of

reasonable responses. The respondent denies that the claimant was dismissed for any trade union activities.

3. On 7 July 2022, the complaint of automatic unfair dismissal was withdrawn. That claim was dismissed under rule 52 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
4. At the final hearing, the Tribunal heard evidence from Jaime Matheson, location transport manager and Gillian Findlay, operations manager. The claimant gave evidence on his own account.
5. The witnesses were referred to documents in a joint file of documents prepared by the parties for the final hearing.
6. The Tribunal has set out facts as found that are essential to the Tribunal's reasons or to an understanding of important parts of evidence. The Tribunal carefully considered the submissions during its deliberations and has dealt with the points made in submissions whilst setting out the facts, law and the application of the law to those facts. It should not be taken that a point was overlooked, or facts ignored, because a fact or submission is not part of the reasons in the way it was presented to the Tribunal by a party.

### **The Issues**

7. At the final hearing, it was conceded that the reason or principle reason for the claimant's dismissal was conduct which is a potentially fair reason. Accordingly, the issues to be determined by the Tribunal are as follows:
  - a. As it was agreed that the reason for dismissal was conduct, the Tribunal will need to decide whether the respondent genuinely believed the claimant committed misconduct.
  - b. If so did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide in particular whether
    - i. there were reasonable grounds for that belief;

- ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
  - iii. the respondent otherwise acted in a procedurally fair manner; and
  - 5 iv. was dismissal was within the range of reasonable responses.
- c. The claimant seeks a compensatory reward, how much should it be?
- d. In relation to wrongful dismissal the Tribunal has to decide:
- i. what was the claimant's notice period;
  - ii. was the claimant paid for that notice period;
  - 10 iii. if not, was the claimant in repudiatory breach of contract?

### Relevant Law

8. Section 98 of the Employment Rights Act 1996 (the ERA) sets out how a Tribunal should approach the question of whether a dismissal is fair. Section 98(1) and (2) provides that the employer must show the reason for the dismissal and that it is one of the potentially fair reasons. If the employer is successful, the Tribunal must then determine whether the dismissal is fair or unfair under sections 98(4).
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9. The Tribunal was referred to *British Home Stores Ltd v Burchell* [1978] IRLR 379 where it was established that a dismissal on grounds of conduct will be fair in the following circumstances:
- 20
- a. at the time of dismissal, the employer believed the employee to be guilty of misconduct;
  - b. at the time of the dismissal the employer had reasonable grounds for believing that the employee was guilty of misconduct;
  - 25 c. at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

10. The Tribunal was also referred to:

- 5 a. *Abernethy v Mott, Hay and Anderson* [1974] ICR 323 where a reason for the dismissal of an employee was defined as a set of facts known to the employer or may be of beliefs held by him which causes him to dismiss the employee.
- 10 b. *Beat v Croyden Health Services NHS Trust* [2017] IRLR 748 where Lord Justice Underhill stated that the essential point is that the “reason” for the dismissal denotes the factor or factors operating on the mind of the decision maker which caused them to take that decision.
- c. In relation to the need for a reasonable investigation the Tribunal was referred to *Polkey v AE Dayton Services* [1988] ICR 142; *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ94; *ILEA v Gravett* [1988] IRLR 497.
- 15 d. *Sainsbury’s Plc v Hitt* [2003] IRLR 223 which provided that the band of reasonable responses test applies to all aspects of the disciplinary procedure.
- 20 e. *West v Percy Community Centre* [2016]UKEAT 0101/15/2001 the EAT said that unfair dismissal and gross misconduct are closely related but need to be kept separate. Unfair dismissal is a statutory question to be answered by factual enquiry. Gross misconduct is a label applied by the court in determining contractual issues although it may be a trigger for other actions to proceed to determine a claim under section 98(4) of the ERA.
- 25 f. *Eastman Homes Partnership Ltd v Cunningham* UKEAT/0272/13 which provided that a Tribunal must consider whether it was reasonable for the employer to have regarded the acts as amounting to gross misconduct.
- 30 g. *Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR854 a finding a gross misconduct does not lead inevitably to a fair dismissal as it

gave no scope for consideration of whether the mitigating factors rendered the dismissal unfair, such as long service, the consequences, and previous unblemished record.

5 h. *Hope v British Medical Association* [2022] IRLR 206 which held that the test under section 98(4) of the ERA depended in whether the employer acted reasonably in treating the conduct as a sufficient reason for dismissal; it did not depend on characterising the conduct as gross misconduct. Whether that conduct amounted to gross misconduct was a separate contractual concept, although it was one of the circumstances that could be taken into account when  
10 determining the statutory test.

i. *West Midlands Co-operative Society Ltd v Tipton* [1986] ICR192 which held that employers must act fairly in relation to the whole of the dismissal procedures.

15 11. A claim in respect of contract may be pursued in the Employment Tribunal under the Employment Tribunal's (Extension of Jurisdiction (Scotland) Order 1994) provided that it is outstanding on termination of employment.

12. An employer may be entitled to dismiss an employee without notice where the contract includes a pay in lieu of notice clause or where the employee has  
20 committed a repudiatory breach of their employment contract. The question of what level of misconduct is required for an employee's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal.

13. In *Adesokan v Sainsbury's Supermarkets Ltd* [2017] EWCA CIV 22 the Court of Appeal explained that: "dishonesty and other deliberate actions which  
25 poison the relationship will obviously fall into the gross misconduct category but so in an appropriate case can an act of gross negligence."

14. In cases of gross negligence, the question is whether the negligent dereliction of duty was so grave and weighty as to amount to justification for summary dismissal.

15. *British Bakeries Ltd v O' Brien* UKEAT/1479/00 held that in determining whether something is gross misconduct justifying summary dismissal, all the circumstances of the case will be relevant, including whether that type of conduct is listed in the employer's disciplinary policy, or company handbook as amounting to gross misconduct. However, just because the conduct is listed as being gross misconduct in a contract or a contractual disciplinary procedure, does not mean that summary dismissal will automatically be justified if the employee conducts themselves in that way. The Tribunal must also consider whether the conduct is sufficiently serious to be repudiatory.
16. In respect of a wrongful dismissal claim the Tribunal must consider whether a breach of contract occurred. In an unfair dismissal claim the Tribunal must consider the fairness of the dismissal (*Rawson v Robert Norman Associates Ltd* [2014] 1WLUK647).
17. A dismissal may be wrongful but not unfair (see *Weston Recovery Services v Fischer* UKEAT/0062/10).

## Findings in fact

### *Background*

18. The Tribunal makes the following findings in fact.
19. The respondent is a limited company having its head office in Huddersfield. The respondent employs around 1384 employees in Great Britain. The respondent operates a site at Grangemouth.
20. Since June 2007 the claimant has held a LGV class 1 driver licence. In December 2021 he had no penalty points on his driving licence and had not been involved in any driving or work-related accidents. The claimant is a highly trained and experienced LGV class 1 driver.
21. The respondent employed the claimant from 20 June 2017. His primary duty was transporting fuel in a 14 tonne (unladen weight) tanker to petrol stations. The claimant's job description provides the key purpose as providing safe, effective and efficient LGV driving and service to the respondent, ensuring

that the product (fuel) being carried is transported, observing legal, customer, site, and company requirements.

22. The respondent issued the claimant with written particulars of terms of employment. Clause 18 sets out the disciplinary policy and procedures. Examples listed of conduct that would be regarded as gross misconduct which may lead to dismissal without notice or pay in lieu of notice include “grossly negligent, reckless, or dangerous behaviour or driving, including leaving a vehicle unattended during the course of loading or discharging that vehicle.”
23. Clause 26 of the written particulars of terms of employment provides that after completion of the probationary period and up to five years’ service, the respondent required to give the claimant notice of one calendar month.

*Incident on 15 December 2021*

24. On 15 December 2021 at around 6:20am while travelling along the A814 Clydeside Expressway towards Glasgow city centre, the claimant was involved in a road traffic accident with a third party vehicle, a Hyundai i20. The incident was captured on the tanker’s forward-facing camera (FFC).
25. The claimant executed a manoeuvre after double solid white lines to move from the outside lane to the inside lane, where a third party vehicle was driving alongside the tanker. The contact with the third party vehicle spun it round, wedged perpendicular against the front of the tanker’s cab and being shunted for around 46 seconds with the front lights facing the central reservation. The claimant guided the third part vehicle to a slip road. When the vehicles were stationary the claimant exited the cab.
26. From the scene of the incident the claimant telephoned the respondent’s call centre controller to report that he had an accident and the police had been called. The claimant confirmed that he had completed his delivery of fuel. He had a FFC on the tanker. The claimant said that he thought the third party was “trying to beat him”. The claimant also said that he indicated left into the inside lane when he heard a noise. The claimant said that the third party was “coming from another part... he’s obviously going to join the dual carriage

way". The claimant reversed the tanker to allow the third party vehicle to move his vehicle from the front of the tanker.

27. The claimant and the third party spoke to the police. The claimant contacted the call centre controller afterwards. He provided the third party's details and advised of the discussion. The claimant said:

"He's coming off a slip from Scotstoun and I had to join the dual carriageway. I mean he told me himself and in front of the police that he came level with me. He tried to beat me. I think he's tried to pass me. He's come out in front of me and I've nicked his backend and it has spun round and I think he's [unclear] unit."

28. The claimant reported that there were no injuries. There was no damage to the third party vehicle, but there were a couple of scratches on the tanker bumper. No one was breathalysed by the police as no one was injured. The claimant confirmed that the third party lived locally and knew the area. The claimant reiterated that he had indicated to go left into the inside as he was passing the Scotstoun slip. Before he knew it, the claimant could hear screeching and noticed the third party vehicle. The claimant said, "Because there wasn't anything there and then there was". It was not safe to stop on the dual carriageway, so the claimant indicated to go off at a slip road. The claimant guided the third party and came to a stop. The claimant helped the third party out of the passenger side as the driver side was against the front of the tanker's cab.

29. The claimant returned to the Grangemouth depot where he waited for a drug and alcohol test organised by the call centre controller. He spoke to his line manager, Sheryll Ure, location transport manager who asked how he was feeling. She also asked if he could make another delivery. The claimant said that he was still awaiting a drug and alcohol test. Ms Ure said that was fine. She had not realised that it was outstanding. The claimant told Ms Ure that the lines went from one line to broken lines. The third party vehicle joined at the slip road.



*Investigation*

30. On 22 December 2021 the claimant was invited to an investigation meeting with Ms Ure. Also attending the investigation meeting was Lauren Thomas who took notes. Ms Ure had obtained FCC footage in four thirty second clips.
- 5 31. She showed the claimant the FCC footage and asked him to talk her through it. The FCC footage showed the claimant travelling in the outside lane of a slip road with chevrons on the inside lane. The outside lane then merged with an inside lane. The claimant was unable to manoeuvre to the inside lane as there was a solid double white line which continued eventually becoming a  
10 dual carriage way with broken white lines. Ms Ure asked the claimant to clarify his previous comments to her on the day of the incident.
32. The claimant acknowledged that there were solid double white lines end separating the inside and outside lanes and when he was executing his manoeuvre the third party was in the inside lane alongside the tanker. The  
15 claimant referred to the third party driver admitting to speeding up to undercut him. Ms Ure replayed the FCC footage and said where the solid white lines run out and the claimant started to move into the inside lane the third party was already in front of the tanker's cab.
33. Ms Ure replayed the FCC footage on numerous occasions. The claimant was  
20 asked what checks he had carried out. The claimant said that he used his mirror before he indicated. He could not recall whether he had checked any headlights in his mirror. He said that if he had seen headlights he would not have moved over. The claimant was asked how he could have missed the third party driver. He said that it could have been in a blind spot. The claimant  
25 was then asked why the claimant had not braked sooner as it took 20 seconds for him to do so. The claimant reiterated that he always checked his mirrors and did not know how he had missed the third party driver. The claimant said that he heard the screeching of tyres and could not stop on the dual carriageway. The claimant then said that he reversed the tanker to allow the  
30 third party to move his vehicle. The third party driver got into the vehicle and drove off. The claimant reiterated that the third party vehicle was not there,

then he was, and that the claimant did all of his manoeuvres checks. The claimant said that he was thankful that the third party was fine. The claimant was informed that he would be suspended until the matter was looked into further. The claimant reiterated that he had never been in an accident before  
5 either in a car or a tanker. The claimant was assured that it was a precautionary investigation.

34. On 22 December 2021 Ms Ure wrote to the claimant confirming his suspension on basic pay due to the seriousness of the matter.

*Disciplinary Hearing*

- 10 35. On 7 January 2022 Jaime Matheson, location transport manager at Stanlow, Ellesmere Port wrote to the claimant advising him that he required to attend a disciplinary hearing on 12 January 2022. Ms Matheson was independent. She had no previous involvement and was not part of the claimant's line management structure.

- 15 36. Ms Matheson advised the claimant that she would consider one count of "gross misconduct in that on Wednesday 15 December 2021 you were grossly negligent in your driving duties when you collided with the third party vehicle on the A814."

- 20 37. Enclosed with the letter was a copy of the notes of the investigation meeting on 22 December 2021; a hand-drawn diagram made by the claimant; and nine Google map photographs of the road network. The claimant was informed that given the seriousness of the allegation, summary dismissal was a potential outcome if gross misconduct was established. The claimant was also told that he would remain on suspension. The claimant was told how to  
25 obtain a copy of the disciplinary policy and informed of his right to be accompanied by a work colleague, shop steward, or trade union representative.

- 30 38. Ms Matheson conducted the disciplinary hearing on 12 January 2022. Lyn Turner, trade union official accompanied the claimant. Naomi Kidd, HR advisor, attended via Teams to take notes.

39. Ms Matheson advised that since the investigation meeting she had obtained an audio recording of the claimant's telephone calls with the call centre controller. The disciplinary hearing was adjourned to allow the claimant and Mr Turner to listen to the audio recording. Neither the claimant nor Mr Turner asked to see the FFC footage during the adjournment.
40. When the disciplinary hearing reconvened 20 minutes later before the viewing the FCC footage the claimant was invited to explain what happened. The claimant said that he did not see the third party vehicle at all. He always checked his mirrors and indicated. He did not see anything in the blind spot. The third party driver told him that he sped up as the claimant indicated to go into the inside lane. The claimant thought that he had clipped the backend and the third party vehicle ended up in front. The claimant did not feel anything because it was a small vehicle but he heard the screeching noise. When he looked at the passenger side he saw the third party vehicle. The claimant could not stop on the dual carriageway as there was no hard shoulder. He thought he came off at the next exit. The claimant said that he was not irate. The police were called. The police said it was not a serious accident. The claimant told the police that he had been indicating and that the police said it was a blind spot. The claimant confirmed that it was the first shift of the week and that he was fully rested. He did not understand why the anti-collision brakes did not come on. Ms Matheson said that she could not answer that. She would clarify the position with the fleet engineer.
41. Ms Matheson then played the FFC footage. The claimant confirmed that he was travelling along the single carriageway and at that point it merged with another carriageway forming a dual carriageway heading towards the city centre.
42. The FCC footage showed that the third party vehicle was established in the inside lane of the dual carriageway before the claimant executed the manoeuvre to move from the outside lane to the inside lane. The claimant said that the third party driver could have cut across, maybe he was in the wrong lane. They would never know. The claimant said that he kept checking at every point and there was no vehicle.

43. There were blind spots on the tanker. The claimant said that the third party driver was in his blind side when he tried to speed up to get passed the claimant. Mr Turner asked if Ms Matheson had spoken to the third party driver. Ms Matheson said she had not.

5 44. Ms Matheson referred to the FCC footage showing the third party driver travelling along the inside lane of the dual carriageway and the claimant approaching on the outside lane and merging. Ms Matheson said that the claimant was a professional driver in a fourteen tonne tanker. She said the third party driver had two options, either to slam on his brakes or speed up.  
10 The claimant said that the third party driver must have been under his mirror as he did not see him. The claimant said that it was not malicious and that he was disappointed that it had come to gross misconduct. He had always driven at high standards and he had never had an accident in his life. The claimant reiterated he always used his mirrors. Ms Matheson said that while the claimant had said that the third party had joined the dual carriageway, the  
15 FCC footage showed that the third party was already travelling in the inside lane in the same direction as the claimant towards the city centre. Ms Matheson said that from the FCC footage the third party vehicle was slightly ahead of the claimant and she assumed that the claimant was indicating. The  
20 third party vehicle was already in the inside lane and had no way of pulling off. No matter what the third party did it would have been a similar outcome for him.

45. The FCC footage showed the claimant to have clipped the third party driver and spun his vehicle round and it was now perpendicular to the tanker's cab.  
25 Ms Matheson referred to the speed at which the claimant was travelling at the point of impact (49mph). The claimant said that the third party vehicle was still in his blind spot. It was only when he heard the screeching that he started to slow down. Ms Matheson pointed out that the third party vehicle was wedged against the tanker. The claimant was still travelling at 49mph then  
30 48mph then 45 mph. Ms Matheson commented that the drop in speed did not suggest that the claimant was putting his foot on the brake but rather it was the resistance of the third party vehicle which was slowing down the tanker.

She suggested it was only when a van passed on the outside lane and put his hazard lights on that the claimant realised that there was something wrong. The claimant maintained that he dropped speed when he saw the third party vehicle. The claimant confirmed that he was not listening to the radio. He realised that the third party vehicle was attached to his tanker before seeing the van with the hazards. The claimant said that he was dropping speed as he had to watch what he was doing and there was a bit of snow. The claimant said it was an accident. Ms Matheson said that she knew that the claimant, “did not intentionally do this”. The claimant confirmed that he put his hazard lights on when he stopped. The claimant said that he got out of his cab and opened the passenger door of the third party vehicle. The third party driver climbed over the central console and got out. They were both shaken up. The claimant said that the third party driver asked if he should move his vehicle to make it safer. The claimant reversed the tanker backwards about three feet. The third party driver moved his vehicle and drove off. Mr Turner reiterated that without a statement from the third party driver it would not be known why he decided to drive off. The claimant then confirmed that the police arrived and that he had telephoned the call centre.

46. Mr Turner said that the claimant was a professional and had no errors on his licence. There were blind spots in his tanker. There were personal issues relating to his mother’s health. Mr Turner considered that dismissal was beyond a reasonable response. There were no injuries and little damage to the vehicle. The claimant reiterated that he did the right thing by gradually braking. It would not have been appropriate to brake hard. The claimant did not suggest any comparator cases. The disciplinary hearing was adjourned for an hour.

47. During the adjournment Ms Matheson sought advice from the fleet engineer. She was informed that because the claimant was in control of the tanker the anti-collision brake would not have come on. As the impact was on the side of the vehicle there would be no buzzer.

48. Ms Matheson then considered all the evidence before her and the claimant’s representations. The claimant was a fully trained professional driver. He had

not been previously involved in a road traffic accident. She believed that the claimant had performed a progressive manoeuvre; he had indicated his intention to move to the inside lane, when the solid white lines became broken, he executed the manoeuvre. The third party was alongside the tanker. The claimant said that he did not see the third party vehicle but became aware of it when he heard tyres screeching. Ms Matheson accepted that there were blind spots; this was more reason in her view for the claimant not to have executed the manoeuvre until he was confident that it was safe to do so. From the FCC footage she considered that the third party had been in the inside lane for some time and was trapped when the claimant started to execute the manoeuvre. She believed that the claimant failed to look properly or at all before the manoeuvre. She also believed the initial slow deceleration of the tanker was due to resistance rather than the claimant applying the brakes.

15 49. Ms Matheson felt that she had lost trust and confidence in the claimant as a professional driver. She considered whether there was an alternative sanction to dismissal. She decided there was not. Ms Matheson did not believe that the claimant took ownership of his actions as he blamed the third party driver. While the incident did not result in serious damage or injury Ms Matheson felt that from the FCC footage the outcome could have been catastrophic and substantially more serious in outcome.

20 50. She concluded that the third party was in his rightful lane and there to be seen. The claimant failed to check or to do so with the degree of care required for an extended period when contemplating then executing a progressive manoeuvre. The third party was then shunted for a relatively extensive time. Given the nature of the respondent's business Ms Matheson decided that the claimant's driving was grossly negligent and that he should be dismissed without notice.

25 51. When the disciplinary hearing reconvened Ms Matheson said that she had spoken to a fleet engineer and explained the advice given. Ms Matheson advised that having considered all the evidence and explanation and representation including the claimant's length of service, employment record,

and general behaviour she considered that the claimant was a fully trained driver and should be observing how other drivers are behaving and staying away from possible dangers. The claimant should be prepared for the unexpected on the roads and apply his Smiths training as appropriate. Consideration should also be taken of not only the direct consequences of this incident but also the potential more serious consequences that could have occurred as a result of the claimant's actions.

52. Ms Matheson said that the claimant had failed to notice a third party vehicle travelling in the inside lane as the carriageways joined. He also failed to notice immediately once contact had been made and that the third party vehicle had spun round and was stuck to the front of his tanker. The claimant then continued to drive along the dual carriageway unaware of the vehicle until eventually stopping some 46 seconds later. The claimant also reversed his vehicle onto a live slip lane having agreed to do so with the third party.

53. Ms Matheson concluded that the claimant was "negligent in his driving duties" when he made contact with the third party vehicle on the A814 and so his actions count as gross misconduct. The claimant was advised of the decision to terminate his contract with immediate effect and of his right of appeal. The claimant was advised of his right of appeal.

54. By letter dated 14 January 2022, Ms Matheson wrote to the claimant confirming the decision. The letter reiterated that she had concluded that the claimant had been "negligent in his driving duties" when he collided with the third party vehicle and that this constituted gross misconduct. The reason stated in the letter was:

"The reason for my decision is that you failed to notice the third party vehicle travelling in the inside lane as two carriageways merged, and subsequently also failed to notice immediately once you had made contact, that the third party vehicle had rotated and was wedged in front of your vehicle. You then continued to drive along the carriageway with the third party vehicle in the same position for a further 46 seconds before you brought your vehicle to a complete stop."

*Grounds of Appeal*

55. On 17 January 2022 the claimant appealed against the “gross misconduct dismissal”.

56. The grounds of appeal were as follows:

- 5 a. Dismissal was beyond a reasonable response and showed a lack of consistency with other employee’s RTAs. The outcome of the disciplinary hearing was already prejudged. The investigation meeting had one purpose and that was to show and exaggerate the incident itself.
- 10 b. No one mentioned during the investigation about the claimant’s own health and wellbeing having had an RTA.
- c. If the accident was of great concern originally, why was he asked to do further deliveries even though he had not done a “drug or alcohol test”?
- 15 d. No criminal charges were brought against the claimant by the police; they stated it was a minor accident and that the claimant’s vehicle had many blind spots.
- e. No third party statement was sought with regards to the accident.
- f. The tanker had no damage nor did the anti-collision system kick in.
- 20 The explanation provided by management was hard for the claimant to comprehend.

*Appeal Hearing*

57. The claimant attended an appeal hearing conducted Gillian Findlay, operations manager (North). Mr Turner accompanied him. Robert Dyal, human resources manager, was also present and took notes.

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58. The appeal hearing had been rescheduled to allow the claimant to amend and correct the notes of the disciplinary hearing that had been provided to him.



Ms Findlay understood that the amended note included all the points that the claimant wanted recorded.

59. At the appeal hearing Ms Findlay addressed each of the points that had been raised by the claimant in his grounds of appeal.

5 60. Mr Turner said that there was no consistency between the decision in the claimant's case and the respondent's response to other incidents on the same day that the claimant had been dismissed. Another driver had been involved in an RTA where a bumper had been ripped off and also a driver had been cross-contaminated, neither of which had resulted in any formal action being taken. In the claimant's case there had been no damage to the vehicle and  
10 no statement had been taken from the third party. The claimant referred to a former named colleague who had previously driven into the back of a trailer. This had not been considered gross misconduct. The claimant reiterated that his accident involved a couple of dents to the third party vehicle and that these  
15 had been caused by them driving across a solid double white line marking.

61. The claimant said that throughout the investigation everyone had referred to the incident lasting 46 seconds but it had not lasted that long. The third party driver had admitted to him and the police that he had sped up to try and get in front of the tanker. The claimant reiterated that he had never had an  
20 accident like this while working for the respondent.

62. Ms Findlay referred to the FCC footage, she asked why the claimant did not accept the length of time. The claimant said that he was not aware of the third party vehicle at all until he had heard the tyres screeching. He then had seen it in his mirror when it spun round. Ms Findlay referred to the FCC footage and said that it appeared to last for 46 seconds from the impact.  
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63. Discussion turned to whether the disciplinary hearing was prejudged. Mr Turner referred to the disciplinary hearing notes which repeatedly referred to Ms Matheson's opinion and belief rather than getting the best explanation from the claimant. He said the questions put to the claimant had been  
30 negative. It felt he was always going to be dismissed. The claimant said that he felt that he had done a great job by gently braking when he realised he

was pushing the third party vehicle. He had taken about 22-23 seconds to guide the third party in and he could not have stopped where he was. There had been no damage to the third party vehicle other than a few dents to the door.

5 64. Turning to the investigation meeting, the claimant said that the whole incident had been blown out of proportion. Mr Turner said that the claimant did not deny the accident. Mr Turner found it hard to believe why he the claimant was being summarily dismissed.

10 65. In relation to asking about the claimant's health and wellbeing the claimant was referred to the investigation notes where Ms Ure asked how the claimant was feeling. The claimant acknowledged this.

15 66. There was then discussion about the claimant being asked to make deliveries even though he had not had a drug and alcohol test. Ms Findlay explained that the seriousness of the incident had not been appreciated when Ms Ure had asked the claimant to do a further delivery on 15 December 2021. This only became apparent once the FFC footage had been reviewed. Ms Ure had also been unaware that the claimant had not had his drug and alcohol test and on being informed of that she had confirmed that was fine.

20 67. Discussion then turned to the absence of criminal charges and the view of the police. Ms Findlay raised the lack of clarity about the decision to move the third party vehicle. Mr Turner asked if the third party had made an insurance claim against the respondent to which Ms Findlay replied that she believed that was the case. Ms Findlay said that the fact that no criminal charges had been made against the claimant did not mean that there should be no action taken by his employer. Mr Turner felt that, in the absence of criminal charges, summary dismissal was beyond reasonable. Mr Turner was shocked at the decision in the absence of a police incident number or a statement of a third party. Ms Findlay confirmed that a statement had not since been received from the third party and that Ms Matheson's view had been that the FFC footage provided sufficient evidence upon which to base her decision. Mr  
25  
30 Turner felt that that meant that the decision had been taken without the full

facts. The claimant said that there was no impact registered from the incident. Ms Findlay replied that this was because both vehicles were travelling at similar speed. Mr Turner said that although the anti-collision warning system does not react when the driver is in control, the sensors should still have come on. The claimant said that it normally activates when you just get close to another vehicle.

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68. The claimant said that the decision was harsh. Mr Turner said that he was shocked by the decision. Accidents happen every day and this was an accident.

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69. After the appeal hearing Ms Findlay made enquiries about other road traffic incidents. In particular the incident to which she had been referred at the appeal hearing. Ms Findlay spoke to Ms Ure and understood that in relation to the incident referred to that there had been partial blame by both parties. Ms Findlay did not consider that the circumstances were similar to that of the claimant's case.

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70. On 10 February 2022 Ms Findlay wrote to the claimant advising that she had considered the grounds of appeal against Ms Matheson's decision to summarily dismiss the claimant on account that his actions constituted gross misconduct. She advising as follows:

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"The outcome of any disciplinary process will depend on the specific circumstances of the individual case and whilst no criminal charges have been made against you following this incident, it does not mean that no action should be taken in respect of your employment. Disciplinary outcomes do not need to follow a particular sequence and in cases of gross negligence, which may be regarded as gross misconduct, a decision to summarily dismiss an employee may be appropriate. In this case the decision to dismiss you followed a thorough investigation and a disciplinary hearing was within the band of responses.

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It was confirmed during the hearing that your manager did enquire about your wellbeing on meeting you following the incident and also that their initial

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request that you do another delivery had been made in error as they had not appreciated that your drug and alcohol test was outstanding at the time.

The hearing was undertaken by an independent manager who was not based in Grangemouth and does not support the BP contract and consequently has  
5 no knowledge of your role and activities as shop steward. For this reason I am confident this played no part in her deliberations or ultimate decisions.

It is for those reasons that I decided not to uphold your appeal and do not intend to take any further action in relation to your appeal hearing and consider this matter concluded.”

10 71. At the date of termination, the claimant was 61 years of age. The claimant had four years of continuous service. The claimant’s gross weekly wage was £770.84 and his net weekly wage was £568.96. The claimant was also participated in an auto-enrolment pension scheme.

15 72. The claimant obtained new employment on 26 January 2022. His gross weekly wage is £634.50 and his net weekly wage is £500.98.

*Observations on witnesses and conflict of evidence*

20 73. From the above findings in fact it may be taken that the Tribunal considered that Ms Matheson and Ms Findlay gave their evidence honestly based on their recollection of events which were consistent with the contemporaneous documents and the FFC footage that had been reviewed during the disciplinary process.

25 74. Ms Matheson was unfamiliar with the location of the incident. She considered the FFC footage carefully and had a clear understanding what it was demonstrating. While the claimant was unknown to Ms Matheson, the Tribunal did not form the impression that Ms Matheson had any enmity towards him. The claimant was known to Ms Findlay as she recruited him. The Tribunal’s impression was that the claimant and Ms Findlay had a good relationship and there was no animosity. She was familiar with the location of the incident.

75. Turning to the claimant's evidence, the Tribunal had no doubt that the claimant was a committed and hardworking employee. He was proud of his professionalism and unblemished driving record. The claimant gave his evidence in a polite, calm and measured manner. The Tribunal felt however that he was reluctant to make any concessions which were unhelpful to his case.
76. At the final hearing the FFC footage was replayed on various occasions. It was undisputed that the FFC footage was shown to the claimant during the investigation meeting, the disciplinary hearing, and the appeal hearing. The parties also provided a transcript of the audio recording of the telephone conversations between the claimant and the call centre controller on 15 December 2021. While the transcript was not available during the disciplinary process there was no dispute that it accurately reflected the audio recording that were available and considered during the disciplinary process.
77. There was conflicting evidence about the claimant seeing the third party driver before the impact. The claimant's evidence at the final hearing was that he saw the third party vehicle on the slip road and the third party executed an unsafe manoeuvre effectively crossing a lane over chevrons close to a raised reservation, to then join the dual carriageway. The claimant then heard screeching tyres. At that point he saw the third party vehicle in front of the tanker's cab. The claimant said that when he spoke to the third party driver, he admitted to speeding up to undercut the claimant.
78. The respondent did not accept the claimant's evidence. The respondent's position was that the claimant did not mention this during the disciplinary process or at any time before the final hearing. In any event the respondent said that on the balance of probabilities the third party did not enter the dual carriageway as suggested. It was not mentioned to the call centre controller, Ms Ure, Ms Matheson or Ms Findlay. If this has happened, it was remarkable that the claimant did not mention it during the disciplinary process. In any event it did not absolve the claimant of gross negligent driving.

79. The Tribunal considered from the notes of the investigation meeting. While Ms Ure recorded the claimant having previously mentioned to her that the third party vehicle joined “at the slip road” it is not noted that the claimant said he saw the third party at this point. When shown the FFC footage, the claimant accepted that the third party vehicle was already in the inside lane in front of the tanker’s cab the when the solid white lines ended. The claimant made no any reference to having previously seen the third party vehicle or to that vehicle having cut across chevrons. During the first telephone call with the call centre controller, the claimant did not say that he saw the third party driver before impact. The claimant does mention in the second telephone call that the third party was local; what the third party driver told him; that the third party was coming off a slip from Scotstoun; was joining the dual carriageway; and had sped up to get passed the claimant when the claimant nicked the back end of the third party vehicle. The claimant made no reference to having seen the third party driver. The focus of the discussion was that the claimant had not seen the third party and that the third party could have been in a blind spot. When invited to provide an explanation at the disciplinary hearing, the claimant did not state that he observed the third party before the incident. He again alluded what the third party could have done. The claimant reiterated that he did not see the third party driver, having checked his mirrors.
80. While the claimant said at the final hearing that he saw the third party on the slip road before the incident, the Tribunal was not convinced that the claimant actually did so as he did not expressly state this at the time. The third party lived in Scotstoun and was likely have approached the Clydeside Expressway from that direction. Had events happened as the claimant said the Tribunal considered that it was more likely than not that the claimant would have said so at the time. There would have been no reason for him not to do so. The claimant did not say on the day of the incident that he saw the third party driver on the slip road and that the third party executed an unsafe manoeuvre (crossing chevrons) nor did the claimant mention this when viewing the FFC footage at the investigation meeting. The claimant did not ask for earlier FFC footage to be obtained. The respondent did not request this as it did not understand the claimant to have seen the third party vehicle before impact at

which point the third party vehicle was travelling in the inside lane of the dual carriageway. The Tribunal's impression was that the claimant has with the passage of time reconstructed what with hindsight he now believed happened from comments made by the third party on the day of the incident.

5 81. The Tribunal did not consider that it was in any event a material factor given that the claimant accepted that when the white lines were solid the third party was already travelling on the inside lane of the dual carriageway. Accordingly, the third party was in the inside lane before the claimant was permitted to execute the manoeuvre.

10 82. During her evidence Ms Matheson accepted that in the note of the disciplinary hearing and in her letter dated 14 January 2022 she referred to concluding that the claimant had been "negligent" in his driving duties when he collided with a third party vehicle on 15 December 2021, which constituted gross misconduct. She said that she had inadvertently missed out the word "gross".  
15 She believed that the claimant's driving amounted to an act of gross misconduct. The Tribunal considered that the claimant understood this as his grounds of appeal were headed "appeal against gross misconduct dismissal". Ms Findlay also referred to not upholding the appeal against the decision to summarily dismiss the claimant on account of his actions being found to  
20 constitute gross misconduct.

### **Deliberations**

83. The Tribunal referred to the issues to be determined and the relevant law.

#### *Unfair Dismissal*

84. The Tribunal noted that in relation to the unfair dismissal claim the critical  
25 question for the claimant was whether his dismissal was fair in terms of section 98 of the ERA.

85. It was agreed that the reason for dismissal was conduct which is a potential fair reason for dismissal under section 98(2)(b) of the ERA.

86. Ms Matheson confirmed in evidence that at the disciplinary hearing she believed the claimant failed to notice a third party vehicle travelling in the inside lane; he also failed to notice immediately when contact had been made that the third party vehicle spun round and was stuck to the front of the tanker's cab; and the claimant did not slow down enough before reaching a complete stop. Ms Matheson said that the claimant's conduct was the reason why she dismissed him. The Tribunal was satisfied that the respondent had shown the reason for dismissal was conduct. The Tribunal therefore concluded that the respondent was successful in establishing that the dismissal was for a potentially fair reason.
87. The Tribunal then considered determine whether the dismissal was fair or unfair under section 98(4) and the guidance set out in *Burchell* (above).
88. Mr Dorrian submitted that the respondent did not have a genuine belief that the claimant had committed the gross misconduct. He said that Ms Matheson acknowledged at the disciplinary hearing that the claimant did not "intentionally do this". She also stated at the end of the disciplinary hearing and in her letter confirming the decision that she concluded that the claimant had been "negligent in his driving duties".
89. Gross misconduct is a contractual concept. Unfair dismissal is a statutory concept which considers the reasonableness of the employer's belief.
90. The Tribunal therefore considered that the first issue to be determined, the burden of proof being neutral, was whether the respondent had reasonable grounds for the belief in the alleged misconduct and at the time it formed that belief had the respondent carried out as much investigation as was reasonable in the circumstances?
91. The Tribunal was satisfied that when the claimant was dismissed Ms Matheson believed that the claimant had been involved in a collision with a third party vehicle. Additionally the claimant had failed to notice the third party driver in the inside lane or when he made contact, rotated and was wedged in front of the tanker. She also believed that the claimant did not decelerated



quickly enough as he drove with the third party in the same position for a for a further 46 seconds along the dual carriageway before coming to a stop.

- 5 92. The Tribunal was mindful that it could not substitute its own view as to whether a reasonable investigation was carried out or embark on an analysis of the quality of the evidence obtained so as to lead to its own view of the evidence resulting in its conclusion as to what a disciplinary manager ought to have found as opposed to applying a range of reasonable responses tests to the investigation carried out by the respondent leading to its conclusion to dismiss the claimant.
- 10 93. The Tribunal turned to consider the investigation in this case. The investigation was carried out by Ms Ure, the claimant's line manager. Ms Ure had spoken to the claimant on the day of the incident. No notes were taken of any preliminary discussion between them. The claimant was not suspended. Ms Ure asked the claimant if he would complete another delivery  
15 but did not require this when informed that he was awaiting a drug and alcohol test. The Tribunal accepted that from this discussion, the claimant's demeanour and the limited damage to the tanker that Ms Ure did not consider that there was potential gross misconduct. However, the incident was sufficiently serious for Ms Ure to obtain the FFC footage.
- 20 94. The Tribunal noted that, having reviewed the FFC footage, Ms Ure considered that there was a discrepancy between what she had understood on 15 December 2021 and what the FFC footage demonstrated. The claimant was invited to a investigation meeting on 22 December 2021 to view the FCC footage and provide comments and an explanation.
- 25 95. At the investigation meeting Ms Ure showed the claimant the FFC footage on three occasions while he talked through it. She also raised with the claimant the discrepancy between the FFC footage and the diagram that he drew. Ms Ure indicated that there would need to be further investigation and confirmed that, due to the seriousness, the claimant would be suspended. The claimant  
30 was advised that depending on the outcome it may progress to a disciplinary hearing. The Tribunal considered that having reviewed the FFC footage and

obtained the claimant's comments Ms Ure considered that the conduct was serious.

5 96. Following the investigation meeting, Google Maps photographs of the road network were been printed. They along with the claimant's hand drawn diagram and the investigation meeting notes were sent to the claimant when he was invited by Ms Matheson to attend the disciplinary hearing on 12 January 2022. The claimant was told that the allegation was that he was grossly negligent in his driving duties and that this could be considered gross misconduct. The invitation did not provide means for the claimant to access  
10 to the FFC footage.

15 97. Ms Matheson viewed the FCC footage before the disciplinary hearing. She had also obtained the audio recording of the telephone conversations with the claimant and the call centre controller on 12 December 2021. The disciplinary hearing was adjourned to allow the claimant and Mr Turner to listen to the audio recording. The FFC footage was available. Neither the claimant nor Mr Turner asked to review this during the adjournment. It was played on several occasions during the disciplinary hearing. The claimant was informed that he could ask for an adjournment at any time.

20 98. The investigation continued during the disciplinary hearing. The claimant did not challenge the accuracy of the note of the investigation meeting. He was invited to say what happened.

25 99. The claimant reiterated that he did not see the third party vehicle at all. He always checked his mirrors. He did not see anything in the blind spot. The claimant said that the third party driver told him that he sped up as the claimant indicated. The claimant clipped the back end of the third party vehicle which ended up in front of the tanker. The claimant did not feel anything on impact but he did hear a screeching noise. At that point he saw the third party vehicle but could not stop on the dual carriageway. There was no hard shoulder to pull over. The claimant said that the damage was minor and no one was hurt.  
30 The police had been called and said it was not a serious accident. The claimant had told the police he was indicating and that the police had said

there was a blind spot. Ms Matheson checked the claimant had been fully rested. The claimant raised the issue of anti-collision brakes not coming on. Ms Matheson said that she would look into this.

5 100. Having heard the claimant's explanation, Ms Matheson showed the claimant the FFC footage. He was invited to talk Ms Matheson through it. The claimant's position was that he did not see the third party vehicle in the inside lane despite it being alongside his tanker when he started to cross to the inside lane after the double solid white lines ended. The first he was aware of the third party vehicle was when he heard a screeching noise form the third party vehicle being shunted down the inside lane, perpendicular to the tanker's cab. The claimant explained that the third party may have been in a blind spot. He also raised the issue of anti-collision system on the tanker.

10 101. In relation to the third party speeding up, Ms Matheson asked the claimant about the third party's options: to brake or speed up when trapped between the tanker and the wall during the manoeuvre. She also asked about the time taken to come to a stop after the impact. She explored whether the initial deceleration was due to the resistance from shunting the third party vehicle rather than the claimant applying the brakes.

15 102. During the adjournment, Ms Matheson took advice from the fleet engineer regarding the anti-collision brakes. The advice explained to her was that whilst the driver was "in control" of the vehicle (e.g., indicating) the system did not activate.

20 103. Although Mr Turner had raised at the disciplinary hearing whether a statement from the third party had been obtained Ms Matheson did not pursue this. It was not disputed that the respondent had the third party's details. Mr Dorrian said that Ms Matheson should have contacted the third party driver to assess who was to blame.

25 104. While the Tribunal accepted that a statement could have been obtained from the third party and indeed some other employers may have done so, it could not say that Ms Matheson's decision not to do so fell out with the band of reasonable responses. She was able to view the FCC footage. The claimant

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accepted that the third party vehicle was travelling in the inside line before the claimant executed his manoeuvre to move to the inside lane. Ms Matheson acknowledged that the third party had told the claimant that he had sped up in the inside lane to undertake the tanker. She discussed this with the claimant and asked about the third party's options. The claimant said that he did not see the third party vehicle before impact. His explanation was that there may well have been a blind spot. The claimant's position was that he saw the third party vehicle after he heard screeching. At that point the third party vehicle was perpendicular to tanker's cab.

105. The Tribunal considered that Ms Matheson accepted what the claimant said at the disciplinary hearing which was broadly similar to his position at the investigation meeting. She considered that when the claimant executed the manoeuvre and crossed the central line to the inside lane of the dual carriageway, the third party was trapped between the tanker and a wall leaving him with the only option of braking or speeding up to attempt to clear the front of the tanker.

106. Ms Matheson also accepted that there may well have been blind spots. However she considered that the claimant should not have executed the manoeuvre until he was sure that it was safe for him to do so. Also having regard to the mirror system on the tanker; for the third party be in the inside lane alongside the tanker, it must have been there for some time before the claimant needed to execute the manoeuvre rather than momentarily concealed in any blind spot.

107. Mr Dorrian said that Ms Matheson could have requested FFC footage preceding the incident. The claimant viewed the FFC footage on 22 December 2021. He did not suggest at that time (or indeed at all during the internal proceedings) that the earlier FCC footage should be obtained. His position was that he did not see the third party vehicle until after he heard screeching. The Tribunal considered that it was not unreasonable in these circumstances for earlier FCC footage not to be requested given that there was a limited time for making such requests and there was no obvious reason for doing so at the investigation meeting.

108. The Tribunal accepted that Ms Matheson could have obtained a police incident report. The Tribunal did not consider that it was unreasonable for her not to have done so. The circumstances were unusual. When the police arrived at the scene of the incident both vehicles had been moved. There was minimal damage to the vehicles and no injuries. The police did not breathalyse, drug test or charge either party. The police were therefore relying on the information provided by the claimant and the third party. The respondent already had contemporaneous audio recording of the claimant's position. The Tribunal therefore felt that little would have been added by obtaining the police incident report.
109. Mr Dorrian submitted that Ms Matheson did not have sufficient information to properly assess who was to blame for the accident. He suggested that she should have obtained a specialist report from a road traffic accident specialist and taken photographs of the locus to mark where specifically the action had occurred. This was particularly so given that she was maintaining that the claimant was to blame for the accident.
110. While the Tribunal accepted that Ms Matheson had no specialist knowledge of accident investigation or driving tankers, she had access to the FCC footage which, in the Tribunals' view, allowed her to view objectively where the third party vehicle was before the claimant executed his manoeuvre to move into the inside lane of the dual carriageway and how the third party vehicle became perpendicular to the tanker's cab and was shunted for some distance.
111. Mr Dorrian argued that Ms Matheson should have taken photographs of the place where the incident happened and allowed the claimant an opportunity to mark the photographs to explain how the incident occurred. While it would have been open to Ms Matheson to have done that the Tribunal considered that it was understandable that this was not done given the images obtained by from Google maps and the discussion that took place while reviewing the FCC footage.

112. Given that the claimant was provided with the investigation meeting notes; given an opportunity to listen to the audio recording; and view the FFC footage, the Tribunal did not consider that there was any further reasonable investigation to be undertaken by Ms Matheson.
- 5 113. The Tribunal acknowledged that, while other employers may have acted differently, it could not conclude that the investigation carried out by the respondent up to and including the disciplinary hearing did not fall within the range of reasonable responses that a reasonable employer might have adopted.
- 10 114. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been reached.
115. As regards the investigation and the conduct of the disciplinary hearing, for the reasons previously indicated the Tribunal was satisfied that there had  
15 been a reasonable investigation.
116. The claimant was aware of the case against him. Ms Ure had no involvement after her investigation. Ms Matheson was not involved in the claimant's line management structure. She carried out further investigation; obtaining the audio recording and taking advice from the fleet engineer. At the disciplinary  
20 hearing the claimant was given an opportunity to explain his position and comment on any mitigating circumstances. The claimant was represented throughout the internal process.
117. The letter inviting the claimant to the disciplinary hearing advised how to obtain a copy of the disciplinary policy and warned that summary dismissal  
25 was a potential disciplinary outcome.
118. Ms Matheson believed the claimant had executed a manoeuvre without being satisfied that it was safe to do so. The claimant confirmed that the third party vehicle was in the inside lane before the claimant moved into it. While Ms Matheson accepted that there may be blind spots, she did not consider that  
30 the claimant had acted with the degree of care required when contemplating

and then executing this manoeuvre. As a result the third party was shunted for a relatively extensive period along the carriageway perpendicular to the tanker's cab. Given the nature of the respondent's business, and the potential consequences of the action, the Tribunal considered that Ms Matheson had reasonable grounds for believing what she did and had carried out sufficient investigation.

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119. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeals stage, is relevant to the reasonableness of the whole dismissal process.

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120. The Tribunal then considered the appeal process. The Tribunal was satisfied that Ms Findlay who considered the appeal had no previous involvement. She was senior to Ms Matheson. The claimant was represented at the appeal hearing by his trade union representative. Ms Findlay went through the FCC footage at the appeal hearing and the claimant was invited to talk her through it. His explanation was substantially the same as earlier in the disciplinary proceedings.

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121. At the appeal hearing Ms Findlay considered all the points that were raised by the claimant in his grounds of appeal. At this stage the claimant raised a comparator case with Ms Findlay. He had not suggested any previous comparator cases to Ms Matheson and she was aware of none. Ms Findlay was already familiar with the comparator case. Her understanding was that it involved a road traffic accident where both parties were to blame in different circumstances. She did not consider that it was comparable to the claimant's case. She was unaware of any other cases that were reasonably comparable.

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122. During the appeal hearing Ms Findlay asked the claimant if he had been unaware of the third party vehicle until he heard the tyre screeching. The claimant confirmed the position as the third party had sped up to undertake and was right under the claimant's blind spot. Ms Findlay asked the claimant to confirm if once he had been aware of the third party he had continued to push the vehicle for a further 22 to 23 seconds. The claimant advised that this was what he had been told to do in a situation where he was slowing

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down but was unable to stop in the immediate location. Ms Findlay also explored with the claimant the concern that Ms Ure had asked the claimant to undertake their work when he had returned to the Grangemouth site. Ms Findlay clarified that this request had been made before Ms Ure knew that the drug and alcohol test had not been completed and that the FFC footage had not been made available.

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123. There was also discussion about the circumstances over moving the vehicles. Ms Findlay confirmed that she believed that the third party had made an insurance claim. She accepted that the claimant had not been charged by the police. She said that that would not of itself mean that the employer could not take action.

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124. The Tribunal was satisfied that Ms Findlay had considered all the points raised at the appeal hearing. Ms Findlay considered that the disciplinary process depended on the specific circumstances of the individual cases. She addressed each of the points raised by the claimant in her letter to him dated 10 February 2022. She confirmed that she had decided not to uphold the appeal. The claimant was provided with a copy of the appeal notes. The Tribunal was satisfied that the respondent had carried out a reasonable and proper procedure at each stage of the disciplinary process including the appeals stage.

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125. The Tribunal then considered the decision to dismiss the claimant. The Tribunal was mindful that the question was not whether the Tribunal would have dismissed the claimant but whether the respondent's decision to dismiss him fell within the range of reasonable responses that a reasonable employer in those circumstances and that business might have adopted.

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126. While a spreadsheet was produced of drivers involved in road traffic accidents there was no evidence before the Tribunal of other cases in truly parallel circumstances where the respondent did not dismiss. The Tribunal's impression was that while the disciplinary policy set out in advance conduct that might be considered gross misconduct the respondent did not shut it mind

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and deliver an automatic conclusion but took into account the facts of the case against the background to that policy.

127. The Tribunal observed that it was agreed that there was no history of misconduct by the claimant. The claimant was well regarded by the respondent and had no previous record of accidents. Neither party was injured and the damage to the vehicles was minor. The incident involved a professional driver of a tanker and a third party vehicle being shunted along a dual carriageway, perpendicular to the tanker's cab. The Tribunal did not consider that Ms Matheson's decision to dismiss was pre-determined or an automatic conclusion.

128. The claimant denied misconduct. He did not concede that his conduct on 15 December 2021 was in any way inappropriate or that in retrospect he would have acted differently. The Tribunal's impression was that the claimant appeared impassive about the FCC footage. His focus was on the third party and not what he could or would have done differently. The Tribunal was satisfied that Ms Matheson took into consideration the mitigating factors put forward by the claimant before arriving at her decision. The evidence was that the third party driver was already in the inside lane of the dual carriageway when the claimant executed the manoeuvre. The Tribunal concluded that the respondent's decision to dismiss the claimant fell within band of reasonable responses which a reasonable employer might have adopted.

129. The Tribunal concluded that the dismissal was fair and, having reached this conclusion, the Tribunal did not consider it necessary to go on to consider the question of remedy. The unfair dismissal claim is dismissed.

#### 25 *Wrongful Dismissal*

130. The Tribunal then turned to consider the wrongful dismissal claim. This is a different complaint to that of unfair dismissal. The reasonableness or otherwise of the respondent's action is irrelevant. The question for the Tribunal was whether the claimant was guilty of conduct so serious as to amount to repudiatory breach of the employment entitling the respondent to summarily terminate the contract?

131. Under clause 26 of the written particulars of terms of employment the claimant is entitled to notice of one calendar month of termination of his employment. The claimant received no notice or payment in place of it.
- 5 132. The Tribunal then considered if the claimant was in repudiatory breach of contract.
133. Clause 18 of the written particulars of terms of employment includes examples of gross misconduct as “grossly negligent, reckless, or dangerous behaviour or driving”.
- 10 134. From the FCC footage showed that the third party vehicle was established in the inside lane of the dual carriageway before the claimant executed the manoeuvre to move from the outside lane to the inside lane. There were blind spots on the tanker of which the claimant was aware. He nonetheless executed the manoeuvre and continued to drive. He was unaware of the third party vehicle until he heard screeching with the third party vehicle wedged perpendicular to the tanker cab. The claimant then became aware of the third party vehicle and gradually applied the brakes before eventually coming to a stop in a slip road. While the damage sustained was minor, the incident was serious in that it involved a third party vehicle being shunted along a dual carriageway while other vehicles were overtaking in the outside lane. The Tribunal considered that this conduct was serious enough to fall within the examples provided as gross misconduct in the written particulars of terms of employment.
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- 25 135. The Tribunal therefore concluded that the claimant’s conduct was so serious as to amount to repudiatory breach of contract entitling the respondent to summarily dismiss him. The wrongful dismissal claim is dismissed.

30 **Employment Judge: S Maclean**  
**Date of Judgment: 18 November 2022**  
**Entered in register: 21 November 2022**  
**and copied to parties**