EMPLOYMENT TRIBUNALS

Claimant: **Alexandru Milea**

Respondent: **DHL Services Limited**

Heard at: **London South via CVP On: 15/11/2022**

Before: **Employment Judge Krepski**

Representation:
Claimant: **Mr Barklem – Counsel**

Respondent: **Ms Rumble – Counsel**

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is well-founded. This means the Respondent unfairly dismissed the Claimant. The Claimant is awarded a basic award of £1,998.50 and a compensatory award of £2,594.88.

2. The Claimant's complaint of breach of contract is not well-founded and is dismissed.

REASONS

Preamble

1. This was a claim for unfair dismissal and wrongful dismissal.

2. The Claimant initially made his claim against DHL Supply Chain Limited. Ms Rumble indicated that the Claimant was actually employed by DHL Services Limited and invited me to amend the Respondent accordingly. Mr Barklem consented to this course of action.

3. Pursuant to Rule 34 of the Employment Tribunals Rules of Procedure 2013, I substituted the Respondent DHL Supply Chain Limited for DHL Services Limited.

4. In the course of the hearing, I heard oral evidence from the Claimant, from Ms Nicola Hack (disciplinary hearing officer) and from Mr Gareth Bailey (appeal hearing officer).

5. I also considered a main bundle of 261 pages and an additional witness statement bundle of 28 pages. References to page numbers are references to the main bundle.

Background

6. The Claimant was employed by the Respondent from 4th January 2016 to 15th February 2022. He was initially employed as a driver's mate before becoming a van driver, and then an HGV driver.

7. The Respondent is a global logistics services provider operating across many sites in the UK.

8. This claim stems from an incident in January 2022.

9. What follows are findings of fact I have reached on the balance of probabilities. Only findings of fact relevant to the issues, and those necessary for me to determine, have been referred to in this judgment. It has not been necessary, nor would it be proportionate, to determine each and every fact in dispute.

10. I have not referred to every document I read and/or was directed or taken to in the findings below, but that does not mean it was not considered, if it was referenced to in a witness statement/evidence.

Findings of fact – Incident

11. The incident in question relates to the Claimant and a co-worker, AT, both of whom worked at the Respondent's Gatwick depot.

12. Prior to the incident, on 14th December 2021, the Claimant was asked by managers to offer AT support in his role as First Line Manager of the Gatwick depot.

13. On 2nd January 2022, AT sent a message to a work WhatsApp group stating "*After a huge amount of complaints that came in my name I resign from being manager in Gatwick. As of tomorrow Alex Milea will be in charge of Gatwick. Any problems report to him. Bless you all"* (page 258).

14. Over the next few days, AT showed up at the Gatwick depot stating he would not work and the Claimant would have to do his work for him.

15. On 17th January 2022, the Claimant drove himself and AT to a meeting in Enfield, in a van provided by the Respondent, as AT did not have a driving licence.

16. The meeting itself passed without incident and the Claimant began to drive himself and AT back to the Gatwick depot.

17. In the course of that return journey, AT began to speak to the Claimant in an increasingly derogatory tone calling him a liar, AT's dog and making threatening remarks towards the Claimant and his family.

18. The Claimant gave differing accounts in relation to what followed:

19. In his witness statement, he stated that AT then spat in his face and on his glasses. The Claimant therefore pulled onto the hard shoulder. Having pulled over, the Claimant used the "hands-free" feature of his phone in order to call the First Line Manager at the Peterborough depot, MM.

20. When giving oral evidence, the Claimant stated several times that he made the phone call during the course of a heated exchange, and that the moment MM hung up, AT spat at the Claimant. It was only then he pulled onto the hard shoulder

21. MM was not interviewed in relation to this, though he did provide a witness statement (page 117). MM states that the Claimant told him over the phone that he and AT needed something clarifying. AT then asked a question regarding work. After answering it, MM told both occupants of the vehicle to calm down. The Claimant replied to MM saying they were only having a conversation and not to worry.

22. I find that it is more likely that the phone call preceded AT spitting at the Claimant. I find it unlikely both that the Claimant would have phoned MM shortly after being spat on, and also that he would not have mentioned this to MM.

23. The Respondent's "Mobile Device Safety Policy" (page 63) states that any use of a mobile device when operating a commercial vehicle is expressly forbidden, unless it is safely parked and the engine turned off.

24. After AT had spat at the Claimant, the Claimant pulled onto the hard shoulder because some of the spittle had landed onto his glasses which needed cleaning, and to tell AT to get out of the van. AT replied with "make me" or words to that effect.

25. AT didn't exit the van, and the Claimant continued to drive the two of them back to Gatwick and, for those last 20 minutes of the journey, AT said nothing to the Claimant but turned up the radio.

26. The Claimant then stated that upon parking the van at Gatwick, AT immediately started punching him and put him in a headlock without provocation. AT denied punching the Claimant but does not deny putting the Claimant in a headlock, and states that he did this because the Claimant tried to push him out of the van.

27. I believe that AT put the Claimant in a headlock and punched him as a result of the Claimant first attempting to push the AT out of the van. This is what AT stated the Claimant did during his hearings with the Respondent.

28. I find this more likely than not because it would explain the sudden escalation by AT, especially given the previous 20 minutes of journey during which AT made no threatening comments or actions, but also because the Claimant had previously told AT to get out of the van whilst on the hard shoulder.

29. After the two of them exited the van, the Claimant phoned the police who arrested AT and took him into custody, though ultimately no further action was taken.

30. The Claimant also sent a picture of the facial injuries he sustained in the attack from AT, as well as a crime reference number, to his Regional Manager, AE (page 259).

31. The Respondent's disciplinary policy gives, under section 1.1, examples of acts of gross misconduct which includes "*Fighting, or physical assault, or abusive/threatening behavior[sic]*".

Findings of fact – Suspension and investigation hearing

32. On 18th January 2022, the Claimant received a telephone call from AE stating that he was suspended pending an investigation into the previous day's incident.

33. The Claimant received a letter dated 18th January 2022 (page 90) which stated "*You will be invited to attend an investigation meeting, to which you will be able to bring someone to accompany you who may be either a work colleague or a trade union representative*".

34. The Claimant was then invited, via an email dated 20th January 2022 (page 90) to that investigation meeting, which again stated "*You may be accompanied at this Investigation Meeting by either a trade union representative or work colleague. Should you wish to be accompanied, it is your responsibility to make the arrangements with this person and inform them of the date, time and location of the meeting.*"

35. The meeting was led by WM (First Line Manager for the Basingstoke Depot) and notes of that meeting were taken (pages 94 to 104).

36. On page 94, the front page of the Claimant's disciplinary investigation meeting notes the wrong date is provided. The date printed is 22nd December 2021, however the meeting was actually held on 24th January 2022.

37. The investigation meeting notes (page 95) ask, at 2a, "*Is the employee entitled to a representative who can be either a work colleague or a trade union representative, at this investigation meeting (dependent on site policy and practice)?*" The Claimant was entitled to a representative, however the answer to that question was noted as "No".

38. Question 2b(ii) however, states "*If a representative is not present, is the employee happy to proceed with the meeting without a representative?*", to which the answer "Yes" is noted.

39. I find that the Claimant was happy to proceed with this meeting without a representative, having been informed of his right to have one in the two pieces of correspondence described above.

Findings of fact – Disciplinary hearing

40. Following the investigation meeting, the Claimant received a letter (page 119) dated 3rd February 2022 inviting him to a disciplinary hearing on 8th February which was subsequently re-scheduled to 11th February 2022.

41. Whilst the Claimant was provided with various documents (page 121) he was *not* provided with a copy of the notes from AT's investigation meeting.

42. The disciplinary hearing was conducted by Ms Nicola Hack and the Claimant was represented by his union representative.

43. The meeting was held on 11th February 2022 between 9:15am and 10:42am, and was reconvened at 9:56am on 15th February 2022.

44. At the reconvened meeting, Ms Hack read from a prepared statement (pages 136-148) stating that the Claimant was to be summarily dismissed.

45. The Claimant then received a disciplinary outcome letter on 17th February 2022 (page 158) confirming that he was dismissed on the grounds of gross misconduct:

"I am satisfied that both you and your colleague had a part to play in the events that unfolded on the 17th of 7 January 2022 and that accountability sits with both parties. I also believe that since the incident there has been a significant breakdown in trust and confidence in the employer and employee relationship based on the actions that took place that day. As a result my decision is to terminate your employment for the collective breaches in policies outlined:

1. *Disciplinary and grievance policy section 1.1, fighting or physical assault*
2. *Disciplinary and grievance policy section 1.1 Threatening or abusive language*
3. *Breach of the company mobile phone device safety policy section 1*
4. *Ddisciplinary[sic] and grievance policy section 1.1 deliberate, repeated or serious breaches of health and safety"*[1].

46. Ms Hack drew the above conclusions from the following findings (page 157) which she described as "parts", using the same numbering.

47. In relation to Part 1: "*During your hearing, you stated that you were the recipient of an unprovoked attack in a company vehicle upon returning to*

[1] Numbering was not present in the original text, but has been added for ease of reading.

Gatwick. You alleged that upon pulling into the parking area, you applied the handbrake and your colleague began to throw several punches in a confined enclosed space without warning. Your colleague has stated that you entered his personal space with a view to removing him from the vehicle, which escalated to a point where you were engaged in a headlock. Your colleague had stated you had pushed forward with your head towards them, you continued to push forward in order to reach for the door handle and eject your colleague from the van. Direct physical contact between two colleagues under these circumstances is not acceptable. It is my reasonable belief that there has been physical contact made by both parties within the van, and that this is in breach of the disciplinary and grievance policy section 1.1, fighting or physical assault".

48. Ms Hack, in oral evidence, stated that she believed the Claimant entered the personal space of AT which resulted in the headlock and the resulting physical altercation.

49. In relation to Parts 2 and 4, the following is stated: "[Y]*ou have admitted to stopping on the hard shoulder of a live motorway with the intention to eject your colleague from the vehicle, potentially placing them in imminent danger and which could have been perceived by your colleague as threatening behavior[sic]. As the driver of the vehicle, you have breached your responsibilities under both health and safety policy and SSOW. You stated during the investigation that you had pulled over due to the perceived aggressive nature of your colleague and that they had allegedly spat at you. Your decision to perform this maneuver[sic] on a live carriageway, by your own admission was an unsafe act and you subsequently made the decision to continue your journey without seeking assistance or pulling off the motorway at the next available safe area. You had advised your colleague of your intention prior to completing the stop on the hard shoulder causing them to fear for their own safety. This is also a breach of the disciplinary and grievance policy section 1.1 Threatening or abusive language.*"

50. Ms Hack clarified in oral evidence that she did not believe the Claimant was dealing with an emergency at the time he went onto the hard shoulder.

51. In relation to Part 3, she found the following: "*Looking at the third part of the allegation relating to a mobile phone call made during the journey, you confirmed you had made this call whilst operating the company vehicle. You stated that your phone was in a pocket in the van and that you used "Hey google" to initiate the call. Both colleagues confirm that at the point the phone call was made this led to an increase in tension within the vehicle for differing reasons. [MM] the recipient of the call has stated that*

during the course of that conversation he had to ask both you and your colleague to calm down. It is my reasonable belief that this phone call was not required to be made at this time nor was it appropriate to do so, whilst you were driving. The call could have been made later when it was safe to do so and as outlined in the policy below when the vehicle was safely parked. […]"

52. Ms Hack clarified whilst giving oral evidence that, whilst it isn't clear from the meeting notes whether the car was moving or not at the time of the phone call being made, the meeting notes were not a verbatim transcript. It was clear from the conversation she had with the Claimant that the phone call happened whilst the vehicle was moving.

53. Ms Hack also stated that she did not feel the argument needing to be diffused by means of a telephone call constituted an emergency, and that this therefore did not form an exception to the default position as dictated by the Respondent's mobile phone policy. As such, she believed that the Claimant ought to have pulled over at motorway services or taken the next exit in order to have made such a phone call.

54. Lastly, whilst it would have been preferable for Ms Hack to have explicitly stated that she considered sanctions other than dismissal in her notes and/or outcome letter, Ms Hack provided oral evidence she did, in fact, consider exercising her discretion and not imposing a sanction of dismissal for what she deemed to be gross misconduct, during the disciplinary hearing.

Findings of fact – Appeal

55. The Claimant appealed Ms Hack's decision (page 160).

56. The Respondent's Disciplinary and Grievance Policy states (page 55) that an appeal hearing will consider whether:

- the [disciplinary] hearing involved a full and thorough consideration of the facts and evidence;
- proper procedures were observed;
- the findings were fair and reasonable;
- the penalty imposed properly reflected the gravity or seriousness of the matter; and whether
- mitigating factors were fully considered.

57. An appeal hearing was held on 8th March 2022 conducted by Mr Bailey (page 177). The Claimant was again represented by a trade union representative.

58. During that appeal hearing, it became clear that no attempt had been made to acquire CCTV footage of the incident on 17th January 2022.

59. On 11th April 2022, the appeal hearing reconvened and Mr Bailey informed the Claimant that his appeal was not upheld.

60. Towards the end of the meeting (page 223), Mr Bailey stated that he asked to see a copy of the CCTV. He stated that "*the site do not have it but the security manager who viewed it said that all it showed was 2 persons getting out of the passenger side of the vehicle and then one of those people immediately being on the phone to someone*".

61. In a letter dated 13th April 2022 and headed "outcome of Appeal Hearing", Mr Bailey wrote: "*Points raised above have identified some process failures that need to be addressed however, the reasons the disciplinary action remains are that no new evidence or justification was presented at the appeal hearing and although you are claiming that you were attacked, the fact remains that you were involved in an altercation resulting in physical contact and this is a breach of the Disciplinary & Grievance policy, specifically fighting or physical assault. My decision is final and there is no further right to appeal, this therefore concludes the appeal process*".

62. Mr Bailey stated, whilst giving oral evidence, that he considered the original grounds of dismissal and the fact that the Claimant was, in his view, unable to bring any new evidence or any new mitigation that would lead Mr Bailey to believe that was the wrong decision.

63. However when asked in oral evidence whether he just adopted Ms Hack's reasoning as opposed to reconsidering it, Mr Bailey stated he didn't understand what there was to reconsider; there was a physical altercation, the Respondent's policy states that that is a serious breach and will result in a summary dismissal.

Discussion – Unfair dismissal

64. The Respondent relies on s98(2)(b) Employment Rights Act 1996 (conduct) in relation to its potentially fair reason for the Claimant's dismissal.

65. The burden to show the reason rests with the Respondent.

66. Subject to showing a reason, I need to consider whether the dismissal was fair or unfair. The test is from the well-known case of British Home Stores Limited v Burchell [1978] IRLR 379:

    a. Did the Respondent genuinely believe that the Claimant was guilty of misconduct?
    b. If so, was that belief based on reasonable grounds?
    c. Had the employer carried out such investigation into the matter as was reasonable?
    d. Did the employer follow a reasonably fair procedure?
    e. Was it within the band of reasonable responses to dismiss the Claimant?

67. I must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. The range of reasonable responses applies both to the substantive decision to dismiss and to the procedure (Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23).

68. It is immaterial how I would have handled the events or what decision I would have made, and I must not substitute my view for that of the reasonable employer (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, and London Ambulance Service NHS Trust v Small [2009] IRLR 563).

69. I heard submissions from Mr Barklem and Ms Rumble in relation to the above.

70. Mr Barklem pointed out, in relation to Part 1 of the allegations, that Ms Hack does not make any findings in her disciplinary meeting outcome letter. Ms Hack simply states what Claimant's and AT's version of events were and concludes "*Any direct physical contact between two colleagues under these circumstances is not acceptable. It is my reasonable belief that there has been physical contact by both parties within the van, and that this is in breach of the disciplinary and grievance policy section 1.1, fighting or physical assault*".

71. Whilst Ms Hack stated in oral evidence that she believed the Claimant's actions had been the genesis of this altercation by trying to push AT out of the van, this cannot reasonably be inferred from her written findings. Ms Hack does not make clear whose version of events she accepts and simply concludes that both colleagues were involved in a physical altercation. She seemingly ascribes equal blame to both parties and does not state who instigated this portion of the incident. I find that it is crucial to

determine who started this particular physical altercation, since the Claimant was saying that he was the victim of an unprovoked attack.

72. This was also not remedied on appeal. Mr Bailey's letter stated "*although you are claiming that you were attacked, the fact remains that you were involved in an altercation resulting in physical contact and this is a breach of the Disciplinary & Grievance policy, specifically fighting or physical assault*". Again, there is no finding as to who is to blame for the altercation. The Disciplinary & Grievance policy could not have been intended to punish those who are innocent victims of a physical assault, and yet Mr Bailey made no finding as to whether the Claimant was a genuine victim or not.

73. The Respondent has therefore not shown that it genuinely believed that the Claimant was guilty in respect of this aspect of the misconduct or that such a belief was based on reasonable grounds. Additionally, it is a procedural failing to not let the Claimant know precisely what criticisms/allegations he must address in an appeal hearing. I find that no reasonable employer would have acted in this way.

74. Mr Barklem also criticised the analysis by Ms Hack of Part 2. Mr Barklem noted that Ms Hack initially says that the Claimant "*admitted to stopping on the hard shoulder of a live motorway with the intention to eject [his] colleague from the vehicle, potentially placing them in imminent danger and which **could** have been perceived as threatening behaviour*" (emphasis added). Mr Barklem noted the usage of the word "could" and submitted that the mere possibility of something being perceived as threatening behaviour could not reach the threshold for gross misconduct.

75. Further on in that same paragraph, however, Ms Hack states "*You had advised your colleague of your intention prior to completing the stop on the hard shoulder causing them to fear for their own safety. This is also a breach of the disciplinary and grievance policy section 1.1 Threatening or abusive language".* I am satisfied, based on this later sentence, that Ms Hack had a genuine belief that the colleague feared for his own safety, thus believed it was gross misconduct, and that this was based on reasonable grounds.

76. Mr Barklem also submitted that the criticisms of the Claimant for pulling onto the hard shoulder in Part 4 were misplaced, because this was an emergency situation. Ms Rumble submitted, however, and I accept, that the Respondent had to consider both accounts given to it. Having considered them, it doubted the Claimant's claims that he had pulled over due to the aggressive nature of his colleague and doubted that he had spat at the Claimant. As such, the Respondent had reasonable grounds on which to base their genuine belief that this was not an emergency

situation, and so stopping on the hard shoulder was deemed gross misconduct.

77. Mr Barklem's stated that Ms Hack was wrong to criticise the Claimant's use of the mobile phone in Part 3 on the basis that it increased tension in the van, because the purpose behind the Claimant's usage of the phone was to *decrease* tension. I noted, however, that Ms Hack also had another criticism, namely that the phone call was, in any event, not required. Ms Rumble pointed out that Ms Hack made it clear that she was having to judge the contrasting accounts of the Claimant and AT and that she doubted the Claimant's claim that the phone call was required to be made at that time. In the circumstances, therefore, I find that this was a reasonable belief that there was gross misconduct on the part of the Claimant.

78. Mr Barklem also submitted that Ms Hack had failed to consider whether the findings amounted to gross misconduct and warranted summary dismissal, as opposed to a lesser sanction. I am satisfied, however, on the basis of the oral evidence she gave, that Ms Hack considered and rejected the possibility of a lesser sanction, despite not providing the reasoning for this in her outcome letter.

79. Mr Bailey, however, when cross-examined by Mr Barklem, stated that he didn't understand what there was to reconsider (in relation to sanction); he stated that was a physical altercation and the policy stated that was a serious breach which will result in summary dismissal. This is despite the Respondent's policies saying that appeal hearings should ensure "*the penalty imposed properly reflected the gravity or seriousness of the matter"*. Mr Barklem ought to have considered whether it was proper to impose a sanction of summary dismissal, or whether some lesser sanction would have sufficed, and I find his failure to do so means that the Respondent did not follow a reasonably fair procedure.

80. Criticism of the Respondent was made on the basis that it failed to secure CCTV of the area or even a written statement of the person who managed to view it before it was lost. I am satisfied, however, that the CCTV would have been of extremely limited evidential value since the alleged misconduct occurred either on the open road or within the van, the inside of which could apparently not be seen on the CCTV. As such, I do not find this to be significant issue that impacted the fairness of the procedure.

81. I find that other procedural irregularities, such as the meeting notes with their contradictory answers relating to employee representatives, the Claimant not being provided with a copy of AT's investigation meeting notes, etc., whilst regrettable, would not have rendered an otherwise reasonably fair procedure, unfair.

82. Having considered the above, I find that the Claimant was unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.

Discussion – Polkey

83. I invited submissions from both Mr Barklem and Ms Rumble as to whether, if I concluded that the Claimant had been unfairly dismissed, I should consider making an adjustment to the compensation on the grounds that if a fair process had been followed by the Respondent, the Claimant might have been *fairly* dismissed in accordance with the principles in Polkey v AE Dayton Services Ltd [1987].

84. In terms of possible outcomes, I may find that the claimant would clearly have been retained if proper procedures had been adopted, in which case no reduction ought to be made. Second, I may conclude that the dismissal would have occurred in any event, with a possible delay to allow for a fair procedure. This may result in a limited compensatory award only to take account of any additional period for which the employee would have been employed had the proper procedure been adopted. Third, it may be impossible to say what would have happened, and I should make a percentage assessment of the likelihood that the employee would have been retained.

85. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand (Hill v Governing Body of Great Tey Primary School [2013] IRLR 274).

86. I find that if the Respondent had laid out its allegation in relation to Part 1 properly, and considered whether a lesser sanction could have been imposed on appeal, there is a very substantial chance that they would still have dismissed the claimant. I do not regard it as inevitable that it would have dismissed him, but I find it to be very likely. In making that assessment, I take into account how seriously the Respondent took the Claimant's actions, the multiple acts of gross misconduct and the competing evidential accounts it had to consider.

87. I therefore consider that there is an 85% chance that the Claimant would still have been dismissed and the dismissal would have been within the range of reasonable responses.

Discussion – Contributory conduct

88. I was also addressed on the issue of contributory conduct. The Tribunal may reduce the basic and/or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

89. Section 122(2) provides as follows:

"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."

90. Section 123(6) provides 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."

91. The Claimant's conduct that gave rise to contributory fault is the blameworthy conduct of his use of the mobile phone whilst driving. I find that the conduct is objectively culpable, that it contributed to the Claimant's dismissal and that it is just and equitable to reduce both basic and compensatory awards in the amount of 50%.

Discussion – Wrongful dismissal

92. An employee is entitled to be given notice of his dismissal in accordance with the terms of his contract unless he has committed gross misconduct in which case dismissal can usually be effected summarily.

93. Where a claimant has been dismissed without the appropriate contractual notice, the claimant is entitled to claim the damages which are the equivalent to wages he would have earned between the time of the actual termination and the time at which the contract might lawfully have been terminated.

94. In contrast to the Claimant's claim of unfair dismissal, I must decide whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

95. The Claimant's actions capable of amounting to gross misconduct can be summarised as follows. The Claimant had:

    i. Been involved in a physical altercation with a colleague after the journey;
    ii. Engaged in aggressive and/or threatening behaviour towards a colleague whilst driving a company vehicle;
    iii. Whilst driving, made a phone call on a mobile device; and
    iv. Went onto the hard shoulder outside the reasons given in rule 271 of the highway code (i.e. where there was not an emergency).

96. In relation to Part 1, having found that the Claimant started the physical altercation with AT by attempting to push him out of the van at the end of the journey, the fact that he could have simply exited the van at that point and walked away from him, and noting that the Respondent's Disciplinary and Grievance policy gives "*Fighting, or physical assault, or abusive/threatening behaviour*" as an example of gross misconduct, I find that the Claimant's actions in this regard constituted gross misconduct.

97. In relation to Part 3, it is uncontested that the Claimant made a phone call whilst driving a company vehicle. The question is whether he was in an emergency situation which meant that that he was justified in making that call which would ordinarily be in breach of the Respondent's Mobile Device Safety Policy. I find that although there was no doubt a heated exchange taking place between the Claimant and AT, this did not rise to the level of an emergency. Whilst verbal threats had come from AT towards the Claimant, they were not so serious that he stopped the vehicle, attempt to tell the recipient of the phone call that he was in danger or phone the emergency services. Ultimately I find the phone call was either an attempt to cool a heated exchange or simply to prove a point. As such, I find that the Claimant's use of his mobile phone, in breach of the Respondent's Mobile Device Safety Policy, and in the absence of an emergency, was gross misconduct.

98. In relation to Part 4, I found that the Claimant pulled onto the hard shoulder in order to clean his glasses of spittle as well as to tell AT to leave the car. I am satisfied that cleaning one's glasses, that one requires in order to drive, is a valid reason for using the hard shoulder and so does not amount to gross misconduct.

99. In relation to Part 2, I do not find that the Claimant acted in an aggressive and/or threatening manner by pulling onto the hard shoulder and asking AT to leave. As stated above, I find that the Claimant pulled onto the hard shoulder in order to clean his glasses which I find to be justified. In any event, having been spat on, asking AT to leave at that point would *not* have been unjustified in the circumstances. In any event, AT was *not*

required to leave the car. As such, having considered all of the above, I do not find that this action amounts to gross misconduct.

Remedy

Unfair Dismissal – Basic Award	£3,997.00
Minus Contributory conduct deduction (50%)	*-£1,998.50*
Grand total Basic Award	***£1,998.50***
Unfair Dismissal – Compensatory Award	
i. Loss of income 39.14 weeks	39.14 x £676.46= £26,476.64
ii. Income since dismissal	£9,716.31
A: Loss of income from dismissal to date of hearing	£16,760.33
B: Future loss of income for 6 months	£17,587.96
C: Loss of statutory rights	£250
D: Sub-Total compensatory award (A+B+C)	£34,598.29
E: *Minus Polkey deduction (D x 85%)*	*-£29,408.54*
F: Sub-Total compensatory award minus Polkey (D **–** E)	£5,189.75
G: *Minus Contributory conduct deduction (F x 50%)*	*-£2,594.87*
Grand total compensatory award (F – G)	***£2,594.88***

Employment Judge Krepski

11 December 2022