



EMPLOYMENT TRIBUNALS

Claimant: Mr P Sale

Respondent: DHL International (UK) Ltd

Heard at: Watford - by video hearing

On: 6 March 2023

Before: Employment Judge K Hunt

Representation

Claimant: Mr West (solicitor)

Respondent: Miss Thomas (counsel)

RESERVED JUDGMENT

1. The claim for unfair dismissal is not well founded and the respondent's dismissal of the claimant was fair.
2. The respondent was not in breach of contract in summarily dismissing the claimant and the claim for wrongful dismissal fails.

REASONS

This is a reserved judgment following the final hearing on 6 March 2023, which was a remote hearing held by video.

Introduction

1. The claimant was employed as a HGV lorry driver by the respondent from 17 October 2016 to 1 February 2022, when he was dismissed by the respondent for gross misconduct following a road traffic accident (RTA) on 24 December 2021. The claimant claims wrongful and unfair dismissal. Acas early conciliation commenced on 5 April 2022 and the certificate was issued on 21 April 2022. The ET1 was issued on 27 April 2022. The respondent defends the claim and says that the dismissal was fair.

Claims and Issues

2. The Claimant has brought claims for wrongful and unfair dismissal. There was an agreed list of issues provided at a previous hearing and confirmed at the start of the hearing as follows:

Unfair Dismissal

2.1 It is agreed that the Claimant was summarily dismissed with an effective date of termination on 1 February 2022. Was the Claimant's dismissal for a potentially fair reason within s.98 Employment Rights Act 1996? In particular was the dismissal on the grounds of conduct?

2.2 Did the Respondent have a genuine belief that the Claimant was guilty of misconduct?

2.3 If so, at the time of dismissal did the Respondent have reasonable grounds upon which to sustain that belief?

2.4 At the stage at which that belief was formed on those grounds, had the Respondent carried out as much investigation into the matter as was reasonable in the circumstances?

2.5 Was the decision to dismiss upon that ground reasonable in all the circumstances having regard to:

- a. The size and administrative resources of the Respondent;
- b. Equity;
- c. The band of reasonable responses; and
- d. The internal procedure adopted for the dismissal having regard to the ACAS Code for Disciplinary proceedings.

Breach of Contract / Wrongful Dismissal

2.6 It is accepted that the Claimant was not paid his 5 weeks' notice pay. On the evidence before the Tribunal, did the Claimant's action(s) warrant summary dismissal?

Remedy

2.7 What is the Claimant's basic award entitlement?

2.8 What compensatory award is appropriate?

2.9 Has the Claimant taken reasonable steps to mitigate his loss?

2.10 Would the Claimant have been dismissed in any event justifying a Polkey deduction?

2.11 Did the Claimant contribute to his dismissal? If so is it just and equitable to reduce any compensation awarded to the Claimant (s.123 Employment Rights Act 1996)?

2.12 Should any compensation be uplifted for any breach of the ACAS Code?

Procedure, documents and evidence heard

3. There was a bundle of documents of 178 pages. At the outset of the hearing I asked the parties' representatives what key documents I needed to read prior to hearing oral evidence and that I would only read any additional documents in the bundle if directed to them during the hearing. The representatives identified a number of key documents at pages 63 to 83, pages 91 to 118, pages 130 to 144 and pages 147 to 149, which I read during an adjournment for reading.

4. The Tribunal was provided with witness statements and heard oral evidence from the claimant and from the following witnesses for the respondent: Mr Alex Brown (Transport Manager) and Mr Richard Crook (Director of Fleet).

5. Miss Thomas explained that the respondent's solicitor had also sent to the Tribunal two short pieces of cctv footage, which the representatives agreed would assist the Tribunal. There was a difficulty in uploading this footage onto the Tribunal platform and it was shared by Miss Thomas via her screen before oral evidence began. Unfortunately, though visible to all, due to a poor connection the cctv footage had the effect of a stop/start motion rather than continuous running. It was agreed that the same two pieces of footage would therefore be sent to me in order that I could view them over a better connection with continuous running, rather than the stop/start motion, which I did during a short adjournment before oral evidence began.

I also heard oral submissions from Mr West and Miss Thomas.

Fact-findings

6. I set out only findings of fact that are relevant to the issues and not on all points of dispute between the parties.

7. Mr Sale was employed by the Respondent as a Class 1 HGV lorry driver from 17 October 2016, having previously worked for the respondent for approximately 4 years as an agency driver.

8. On 29 December 2021 the respondent received a complaint from a third party road user relating to an incident on the evening of 24 December 2021 involving a DHL truck that took place on Mertyn Way near the respondent's Croydon depot. The incident occurred while the third party was standing by the open driver's door of his vehicle, which was parked on the side of the road and the door was hit by the truck as it drove past his vehicle causing damage to the door. The truck did not stop and the third party was unable to provide the registration of the DHL vehicle.

9. On or around 11 January 2022 the road user provided cctv footage that he had obtained of the incident from local premises to the respondent. The respondent was able to identify that the vehicle was an artic HGV lorry and that they had one in the area at that time, which according to their records was driven by Mr Sale.

10. On 14 January 2022 a meeting was arranged with Mr Sale and he was informed that information had come to light that he was involved in an accident and would be suspended pending further investigation. In response Mr Sale asked 'Was this what happened on the 24th?' and was told that he would be called in for an investigation and would be sent the details by email.

11. On 17 January 2022 a letter was sent to Mr Sale inviting him to an investigation meeting in relation to allegations of gross misconduct of i) *'deliberate or reckless damage of company or employee or customer property (e.g.dangerous driving) and ii) failure to report an accident.'*

12. On 19 January 2022 the investigation meeting took place and was chaired by Iain Laughland. Mr Laughland explained the purpose of the meeting was to gather information on what happened on 24 December 2021 and what he could recall, as they had a third party report through customer services that a vehicle hit their car and drove off.

13. Mr Sale was asked about his shift and route that day and during the meeting when asked if he recalled an accident en route replied 'no nothing' other than that he 'clipped a bollard'. He said there was some damage to his vehicle, towards the rear of the trailer, the mudguard was hanging off and the bar bent, which was pointed out to him when he arrived at his destination by another driver. Mr Sale was shown a photo and images of the damage to the car door and to his truck and a map indicating where the incident took place on Mertyn Way. Mr Sale confirmed he drove down there every night and did not think he hit anyone and did not recall seeing the driver or car door but noted from the images, it must have been open when he drove past as it was bent forward. He was shown the pace trackers from his vehicle including his speed averaging 20/21 miles an hour. Mr Sale stated he believed the speed limit along that road was 20 miles an hour, which was confirmed as correct.

14. Following a short adjournment, Mr Sale was shown CCTV footage of the incident during which Mr Sale commented 'why hasn't he shut his door'. Mr Laughland pointed out the other road user appeared to be getting something out of his car and waved his hand at Mr Sale. Mr Sale repeated that he could not remember hitting him whatsoever and when put to him that something had obviously happened as was seen in the video footage, said he had no idea at all. After a short adjournment, when asked if he wanted to add anything else, Mr Sale added that he would like to apologise to the guy he hit but he had no memory of hitting him. Mr Laughland explained that from the evidence and footage, there was a car in front with the door open and he would have slowed down as the driver was in his vision. He stated it was not good driving and potentially reckless and he would be referring it to a disciplinary hearing with an impartial manager who would decide on what action to take.

15. On 24 January 2022 a letter was sent to Mr Sale inviting him to a disciplinary hearing in relation to the allegation that: *'[he] was involved in an RTA on 24 December 2021 that [he] failed to stop at the scene and also to report the incident in a timely manner as per company policy'*. It was also stated that if proven the allegations could constitute a breach of the company disciplinary policy for gross misconduct in three areas, namely *'i) deliberate or reckless damage of company or employee or customer property (e.g.dangerous driving) or ii) bringing the company into disrepute or iii) neglect of duty'*. He was informed of the right to be accompanied. The letter included an appendix of 6 documents to be referred to at the hearing including investigation minutes, photos/pictures and emails from the third party. In his witness statement Mr Sale said that he had not been sent the emails, though in oral evidence he said he was not good with computers and when asked if he was saying he had not received them or had not accessed them, he clarified that he had not accessed them. I find that he was sent the documents prior to the hearing. He was also informed that at the disciplinary hearing, he would

have another opportunity to view the cctv he had viewed in the investigation meeting. In his evidence Mr Sale claimed that he had not been shown the second of 2 pieces of footage at the time and first saw it in these proceedings. In cross examination he was taken to notes of the disciplinary hearing, referring to showing the second cctv footage. When it was put to him that he had seen both sets of cctv at the disciplinary hearing, he said he could not remember but acknowledged that he had seen the cctv but could not say when and accepted it was possible that he did see the cctv. I find it more likely than not that Mr Sale did view the second cctv footage at the disciplinary and appeal hearings.

16. Mr Sale asked for more time to prepare for the disciplinary hearing scheduled for 27 January 2022 and to arrange for a companion to accompany him and it was rescheduled for 1 February 2022. The disciplinary hearing was chaired by Mr Alex Brown. Mr Sale was unaccompanied. This was raised by Mr Sale in the hearing. Mr Brown noted that he had been given a week to arrange that and he did explain the right to a rep and gave him some suggestions of who he could approach, a request to be accompanied by his wife having been refused. I find Mr Sale was given a reasonable opportunity to find a companion to accompany him.

17. Mr Brown explained the purpose of the hearing was to discuss the investigation into the incident on 24 December 2021 and the allegation as set out in the invitation letter. Mr Sale gave an account of his journey after leaving the depot and details of the incident, describing the car parked on the left and his driving around it, that he waved to the driver of the car to close his door, that the driver made an offensive hand gesture and swore at him and that Mr Sale went out across the central reservation, looked in his mirrors and could not see him, and saw only another vehicle behind him; that when damage to his truck was pointed out to him at his destination, he recalled that on the journey down another lorry hit a bollard and he went over it; he reported this over the phone at the time to his manager who told him to take another trailer.

18. Mr Sale said he was not aware of the 'golden hour', the respondent's procedure for reporting accidents within the first hour, as explained by Mr Brown in his evidence, though he had heard of 'bump cards' which are the cards to be completed as part of the 'golden hour' procedure and thought these were in the cab, a fact he repeated during his oral evidence as being where they were kept. It was put to Mr Brown in cross examination that Mr Sale had not breached company policy as he did report damage to his vehicle to his line manager, once he discovered it. Mr Brown disagreed because that was not the correct process. I find that Mr Sale was aware of bump cards and did not follow the correct process on this occasion, he did call his manager who did not specifically instruct him to do so, a point investigated by Mr Crook as part of the appeal.

19. During the disciplinary hearing Mr Brown looked over the pictures of the damage to the door and took Mr Sale through the cctv footage, noting what was happening and asking him questions about the distance to the car when he had seen the driver, the speed he was driving, whether at the time he could have stopped safely. Mr Sale agreed he was approximately 120 yards away when he could see the driver that he was travelling at 20 miles an hour and he could 'easily' have stopped safely. Carrying on with the footage, Mr Brown asked about the distance to the central reservation, which Mr Sale agreed was the length of the truck which is a '40 footer' or about 15/16 metres and when asked whether he thought with that distance he should have stopped and gone around him, Mr Sale said *'no because there was nothing coming the other way'* so he went over the

central reservation *'to get passed him and his door'*. Mr Sale also pointed out the moment when he said he was *'telling him to shut his door'* and the driver made an offensive gesture to him.

20. In responding to further questions in the disciplinary hearing, Mr Sale expressed the view that the car driver should not have been parked there, though it was pointed out there were no parking restrictions, that he thought he had gone out wide enough, having gone over the chevrons, that he thought he was travelling at an appropriate speed and that although he did not feel he hit the car at the time, he acknowledged that from the cctv he could see it now; he felt that he had taken reasonable precautions and when asked who he thought was to blame for the accident, he said *'him for leaving his door open'*.

21. When asked if he would do anything differently if it happened again, Mr Sale said he would *'go out further to allow more of the back end to go out'*. When asked about his speed, and whether he would do anything differently or thought it was suitable, he said he did not think *'[he] needed to slow down as [he] was far enough away from his car, he would have been able to run around the car'*. Mr Brown asked if he thought the driver had time to move out of the way, which Mr Sale confirmed saying *'he could have shut the door and moved around'*; in response to whether that was the driver's duty or Mr Sale's, he responded that *'It is not my job to shut his door'*. Mr Brown put it to Mr Sale that he was *'responsible for the safety of pedestrians and not putting them at risk'* and Mr Sale's response was that *'he put himself at risk'*. Mr Sale said he was surprised he couldn't see him, when asked by Mr Brown whether that worried him, he said that he *'couldn't see the door. [He] thought the driver had shut the door and gone around to the front of the car'* and that he *'just carried on and felt nothing.'*

22. Mr Sale had set out a list of points he wanted to raise relating to the investigation meeting and notes and the procedure and points relating to the incident and the damage to the truck and these were discussed including Mr Sale's suggestion that DHL should claim against the driver and that as it was christmas he may have been drinking. Mr Sale accepted that it was the accident involving his vehicle which caused damage to the car and again expressed that he didn't see or feel anything on that night and realised he needed to take more care and hoped DHL would give him second chance.

23. After an adjournment, Mr Brown asked if Mr Sale had anything else that he wanted to say and Mr Sale said that he was sorry for the accident. Mr Brown delivered his decision and reasons explaining the matters he had taken into consideration including that:

- He was satisfied from the cctv that the damage to the truck was caused by hitting the car because he did not give enough space
- That he could have made a reasonable assessment to avoid the accident by slowing down or stopping at a safe distance
- That he was not speeding but could have manoeuvred around the third party
- That he said he didn't see the man or the vehicle after passing and as a responsible driver he should have stopped to ensure he hadn't hit the pedestrian
- That it is important to DHL that all drivers carry out their duties in a safe and responsible way, taking into consideration their own safety and third parties' and on this occasion he failed to do that
- He failed to report it in line with policy

- While it doesn't appear any serious injury occurred, that was luck rather than judgment and this could have resulted in serious injury or fatality

Taking all that into consideration Mr Brown confirmed his decision to dismiss Mr Sale without notice. He confirmed he had the right to appeal the decision.

24. Mr Brown confirmed his decision in writing by a letter dated 4 February 2022, setting out the allegations and charges as set out prior to the disciplinary hearing, a brief summary of the evidence and matters discussed at the hearing and setting out Mr Brown's decision that based on the evidence at the hearing, it was his reasonable belief that Mr Sale had neglected his duty as a LGV 1 driver, drove in a way that is a danger to others and potentially himself, and brought the company into disrepute; that DHL prides itself on being a safety first company, and as a major logistics company road safety is absolutely vital and they must expect the very highest standards from employees especially those involved in driving LGV vehicles. That on this occasion Mr Sale had fallen short of these standards quite considerably and taking everything into account was summarily dismissed with effect from 1 February 2022.

25. In his evidence Mr Brown stated that he gave consideration to a sanction short of summary dismissal but was not satisfied that Mr Sale understood the severity of his actions and that serious injury could have been caused; that he had not shown remorse and concern and there was a risk of a repeated incident; and he was not comfortable with Mr Sale representing DHL when he would not accept responsibility for his actions or admit his wrongdoing. It was put to Mr Brown by Mr West in cross examination that Mr Sale did show remorse and concern taking him to comments made by Mr Sale at the investigation meeting and disciplinary meeting including comments recorded above that Mr Sale would want to apologise to the driver and would go out further, which Mr West suggested did show insight, so it was not true to say he showed no remorse or concern. Mr Brown accepted Mr Sale mentioned these comments in the meeting but that he *'flitters in and out of it'* and in Mr Brown's view did not believe it; he acknowledged in evidence that Mr Sale suggesting he would *'move out more'* shows something of insight but that Mr Sale followed it with the view he didn't feel he needed to slow down because he was already far enough away. I find on balance that Mr Brown's view of a degree of inconsistency or *'flitting in and out'* in the level of remorse or concern shown by Mr Sale was reasonable and is supported by the evidence and minutes of the meetings and to an extent by Mr Sale's oral evidence at the hearing, which I mention below.

26. It was also put to Mr Brown by Mr West that under the respondent's disciplinary policy a fair sanction would have been a written warning for a general misconduct charge of *'careless driving'* rather than the gross misconduct charge of *'dangerous driving'* relied on. Mr Brown disagreed and maintained in his evidence that was one of the charges but also bringing the company into disrepute and neglect of duty came under gross misconduct and that there was a future consideration in that it was not just the accident but Mr Sale's not wanting to accept the accident and blaming the third party, and bringing the company into disrepute merited the harsher sanction.

27. Mr Sale submitted an appeal in writing on 10 February 2022 raising nine points of appeal and was invited to an appeal hearing on 9 March 2023 and was informed

of his right to be accompanied. The appeal hearing was chaired by Mr Richard Crook.

28. Mr Crook was appointed to hear the appeal in part because Mr Sale had requested that the appeal manager be someone with experience of driving HGVs which Mr Crook was and because he was of appropriate seniority and had experience of dealing with appeals and had no prior knowledge of Mr Sale or the case and was impartial.

29. The appeal meeting was held on 9 March 2022 and Mr Sale was unaccompanied. During the meeting Mr Sale gave his account of the incident and the points of his appeal. Mr Crook asked if he had checked his rear view mirrors after passing the car and Mr Sale said he had and it was clear and he could not see the car door open or the driver. When asked if he was concerned he could not see him, Mr Sale said that he assumed he had closed the door and moved around the car. There was discussion over which part of the truck hit the car, Mr Sale suggested his cab was 7 to 8 feet clear of the car and did not accept that the car door was left swinging when he passed. Mr Crook asked if he would like to view the cctv footage, which they did. Mr Sale acknowledged that he could see it was the back of the trailer that hit the car.

30. Mr Crook put to Mr Sale that the car should have been seen as a hazard and that given the conditions, the distance and that there was a central reservation, the judgment realistically has to be that a lorry would have to come to an almost stop and make a very slow and careful manoeuvre around the car and the fact that there was a 'pedestrian' standing in the road makes it an even greater hazard and that this is what concerned him. Mr Sale's response was that he did not know if the driver had got back in his car, he wasn't visible and he could not see the car. When asked why he did not slow down, he replied '*why didn't he shut his door*'. When asked about his speed, Mr Sale expressed the view that 20 miles an hour was very slow for a lorry when going past something like that. Mr Crook disagreed and put it to Mr Sale that he could move out earlier and wider and should slow down for this type of hazard. Mr Sale maintained that when he went past, the cab and front of the trailer was over the central reservation and that it would have been far enough if '*the door wasn't open*'. It was put to Mr Sale that his job as a professional driver was to navigate and manage hazards and his responsibility to ensure safe passing of the hazard as a HGV driver and there was ample road space to do so.

30. The points of appeal raised by Mr Sale in relation to the disciplinary process and why he felt it was not fair were also discussed. There was no new evidence or mitigation put forward by Mr Sale. Mr Crook adjourned the meeting in order to carry out further investigation and explained that he would deliver his decision in writing.

31. Mr Crook wrote to Mr Sale by letter dated 14 March 2022. He set out in his letter a summary of the matters discussed at the appeal meeting and his findings on the points discussed and raised including the concerns raised with Mr Sale at the appeal hearing that in his belief not slowing down was what caused the accident and that his behaviour whilst driving and subsequently causing the accident was a neglect of duty. He confirmed his decision to uphold the decision to dismiss made by Mr Brown.

32. In his evidence Mr Crook stated that he felt Mr Sale took no accountability and showed no remorse for his actions and that he had no confidence that Mr Sale

would change his behaviour going forward if his appeal was upheld and he was reinstated. Mr West in cross examining Mr Crook put it to him referencing notes of the meetings that Mr Sale was showing remorse and insight. Mr Crook acknowledged that on those points referenced he was but maintained that in other areas Mr Sale didn't believe he did anything wrong and went back to saying it was not his fault and was the other driver's fault, so he went backwards and forwards on this. I have already found on a similar point made by Mr Brown that on balance the evidence supports that this was a reasonable view of Mr Sale's inconsistency in showing insight or remorse.

34. Mr West also put to Mr Cross that it was reasonable to assume that the driver would be round the side of the vehicle by the time the lorry was adjacent. Mr Cross disagreed and stated that as a professional driver of a 40 tonne vehicle you cannot assume anything when dealing with pedestrians or road hazards, as a professional you have to assume the worst.

35. Mr Cross's further evidence on re-examination was that as a professional driver you must make a very careful and slow manoeuvre to avoid an obstacle and have time to get around the vehicle and that to hit the vehicle, Mr Sale was driving too fast and too close. Mr Crook explained that as a professional HGV1 driver for 30 years you should at all times and especially when encountering a stationary vehicle and hazard, use mirrors whilst making a slow, careful and wide turn, that there are mirrors on the sides of the lorry and for Mr Sale to say he did not see the driver or the car or realise how close he was, was the greatest concern to him.

36. In response to cross examination by Miss Thomas during the hearing, Mr Sale confirmed that he felt he took reasonable precautions and thought he was travelling at an 'appropriate speed'. When it was put to him that in the disciplinary hearing he said the other driver was to blame for the accident, he responded that he '*did have his door open*'. In response to whether he still thought the other driver was responsible for the accident, Mr Sale initially replied that he thought he had '*given enough distance, on going past he looked in his nearside mirror and could not see the driver, the car or the door so he carried on through*'. When Miss Thomas put the question a second time, he confirmed '*no*'.

37. Under further cross examination Mr Sale maintained that the driver did leave himself at risk by standing in the road; that on seeing a hazard in the road he did not slow down as 19 miles an hour in any vehicle is quite slow; that looking in his nearside mirror he was adequately clear of the vehicle and at the time he did not know he had hit the vehicle. He accepted that he should be subject to a disciplinary penalty and accepted that if he had made contact with the driver it would have been a catastrophe. He acknowledged that in his appeal he had called the driver an idiot but stated in evidence, he would not do so now and would like to apologise to him. He accepted that at the appeal hearing Mr Crook could only know about things that he told him or said at the hearing.

38. When put to him by Miss Thomas in cross examination that it was part of the job as a professional driver to navigate problems on the road he agreed. In response to the further point that it was not good enough to say there would not have been an accident if the other party had not been there, his response was '*well there wouldn't have been*'. I find that Mr Sale's oral evidence at the hearing, though thoughtful at times and acknowledging in retrospect some remorse, nonetheless on balance lent some support to Mr Brown's and Mr Crook's reasonable belief that

Mr Sale was inconsistent in showing remorse and insight into the incident and his accountability for it.

Wrongful Dismissal – The Tribunal’s own findings

39 For the purposes of the wrongful dismissal/breach of contract claim, the Tribunal has considered its own view. The Tribunal finds that there was a road traffic accident on 24 December 2021 when the HGV lorry driven by Mr Sale hit a stationary vehicle parked on the side of the road. At the time the driver of the vehicle was standing by the door, which was open. The collision caused damage to the door and damage to a mudguard and bar towards the rear of Mr Sale’s HGV vehicle.

40 Based on the evidence of the CCTV footage and the evidence before me including minutes of meetings detailing discussion of the incident, Mr Sale’s own account of the accident during those meetings and evidence at the hearing I find on the balance of probabilities that: approaching the car Mr Sale was driving at 19/20 miles an hour in a 20 mile an hour zone, that he had seen the driver in the road and had seen the door was open, that he waved or gestured to him to close the door, that he did not slow down and that on moving out to go around the vehicle the distance was such that the rear of his trailer hit the car door leaving it swinging open and that having passed the car he could no longer see the driver or the car in his rearview mirror and did not stop. I find that Mr Sale caused the accident by his driving and that on the evidence this fell short of the standards expected of a professional HGV1 driver by the Respondent, who as a major logistics company has a legitimate requirement to hold and maintain very high standards of road safety to protect its drivers, other road users and its reputation.

41 I find that at the time and during the disciplinary investigation Mr Sale was reluctant to accept responsibility for the accident and consistently maintained he felt he was driving at an appropriate speed despite the hazard before him of the stationary car and driver standing next to an open door. I find that the expectation that the driver had time to move safely out of the way to the front of the car was an unreasonable assumption based on the CCTV footage and the distance of the HGV vehicle from the car and driver and the speed at which the HGV vehicle was travelling when the driver looked up and saw it approaching.

42 I find that Mr Sale was inconsistent in expressing remorse for causing the accident and showing insight into the seriousness, based on the evidence at the time and on his evidence at the hearing and that this was a contributing factor in his dismissal.

Law

Unfair Dismissal

43 The relevant provisions in relation to an unfair dismissal claim are found in section 98 of the Employment Rights Act 1996. Under s.98 (2)(b) a reason which ‘relates to the conduct of the employee’ is a potentially fair reason for dismissal. The question of whether it is fair or unfair appears in section 98(4):

“...The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted

reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

44. In *British Home Stores v Burchell* [1980] ICR 303, Mr Justice Arnold identified three considerations which arise in misconduct cases. Firstly, did the employer have a genuine belief that the employee was guilty of the misconduct in question? Secondly, was that belief based on reasonable grounds? Thirdly, had that belief been formed following such investigation into the matter as was reasonable in all the circumstances? This is commonly referred to as the ‘Burchell test’.

45. If in applying the Burchell test the answer to the questions posed is yes, the Tribunal must still determine whether the decision of the employer to dismiss the employee rather than impose a different disciplinary sanction (or no sanction at all) was a reasonable one. The Tribunal must not substitute its own view for that of the employer.

46. In considering the fairness of the dismissal the appeal should be treated as part and parcel of the dismissal process: *Taylor v OCS Group Limited* [2006] ICR 1602.

47. In the employment context “gross misconduct” is commonly used as shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, however, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances: *Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854.

48. Exactly what type of behaviour amounts to gross misconduct will depend upon the facts of the individual case.

49. It follows that in the statutory context of section 98(4), even if the Burchell test is met, the Tribunal must still consider the following:

a. Whether the employer acted within the band of reasonable responses in choosing to characterise the misconduct as gross misconduct, and if so

b. Whether the employer acted within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal.

50. On the latter question the employee’s length of service and disciplinary record are relevant (*Trusthouse Forte (Catering) Limited v Adonis* [1984] IRLR 382) as well as the attitude of the employee to his conduct (*Paul v East Surrey District Health Authority* [1995] IRLR 305).

Conclusions

51. I heard submissions from Mr West and Miss Thomas and as set out in the list of issues, it was agreed that the case of Burchell was engaged and the key issue was whether dismissal was within the range of reasonable responses. I was reminded that other employers may come to a different decision and that it was not for the Tribunal to substitute its own decision.

52. Mr West conceded in his submission that there was no great dispute over the disciplinary process and further that it was accepted that the respondent had a genuine belief that Mr Sale was guilty of misconduct, it was accepted that there were reasonable grounds to sustain that belief and it was accepted that there was a reasonable investigation carried out.

53. The key issue therefore is whether the decision to dismiss was fair and within the range of reasonable responses.

54. The fundamental facts are not in dispute, there was a road traffic accident on 24 December 2021 when the HGV lorry driven by Mr Sale hit a stationery vehicle parked on the side of the road. At the time the driver of the vehicle was standing by the door, which was open. The collision caused damage to the door and damage to a mudguard and bar towards the rear of Mr Sale's HGV vehicle.

55. I will nonetheless address each of the agreed issues in the case separately for ease of reference but note that each conclusion has been drawn taking account of all the evidence I have heard both in writing and orally.

56. Was the claimant's dismissal for a potentially fair reason under s.98(4) ERA 1996 and in particular was the claimant's dismissal on the grounds of his conduct? I consider the respondent's evidence is clear that the reason for the claimant's dismissal is due to the claimant's conduct relating to the road traffic accident on 24 December 2021, in which the claimant hit a stationery car parked by the side of the road, causing damage to the stationery vehicle and to the HGV lorry that he was driving.

57. The next issue to address is the Burchell test, did the respondent have a genuine belief that the claimant was guilty of misconduct based on reasonable grounds and had the respondent carried out a reasonable investigation that was sufficient? As indicated above, Mr West accepted in his submissions that the Burchell test was answered in the affirmative and this was not in dispute.

58. Though not in dispute, I add that based on my findings above, I consider this to be the case. There was an investigation by an independent manager; the claimant was shown cctv footage of the incident at the investigation hearing, the disciplinary hearing and the appeal hearing; at the disciplinary hearing, the hearing manager discussed the incident and went through the cctv in detail with the claimant, who had an opportunity to state his case and respond in full to concerns raised with him about the incident. The disciplinary hearing manager took into consideration the evidence of the investigation, the claimant's responses and representations at the disciplinary hearing and explained in full the reasons for his findings and his belief that the claimant was guilty of gross misconduct and confirmed this in writing.

59. Having concluded that the Burchell test is met, the next issue to consider is whether dismissal was a fair sanction in accordance with s.98(4) ERA 1996? To answer this question, I must consider whether categorising the incident and the claimant's conduct as gross misconduct was within the band of reasonable responses and, if so, whether dismissal as a sanction was also within that band.

60. The allegation of misconduct put to the claimant prior to the disciplinary hearing was that he *'was involved in an RTA on 24 December 2021 that [he] failed to stop at the scene and also to report the incident in a timely manner as per*

company policy'. The respondent in categorising the misconduct alleged as potential gross misconduct relies on 3 provisions in its disciplinary policy being: *i) deliberate or reckless damage of company or employee or customer property (e.g. dangerous driving) or ii) bringing the company into disrepute or iii) neglect of duty*'.

61. During the investigation and disciplinary and appeal hearing, each manager went through cctv footage of the incident with the claimant and questioned him closely on his recollection of what happened during the incident and what could be seen on the cctv footage. The circumstances of the incident based on the detailed viewings of the cctv during the disciplinary hearings are largely not disputed and the details were accepted and agreed by Mr Sale in those hearings as follows: that approaching the car Mr Sale was driving at 19/20 miles an hour in a 20 mile an hour zone, that he had seen the driver in the road and had seen the door was open, that he waved or gestured to him to close the door, that he had not slowed down and that the rear of his trailer had hit the car door leaving it swinging open and that having passed the car he could no longer see the driver or the car in his rearview mirror and did not stop.

62. In support of their assertion that the claimant's conduct amounted to gross misconduct, the Respondent contends that this was a serious incident involving damage to two vehicles, caused by Mr Sale's driving and that given the presence of the driver in the road, one that could have resulted in serious injury or fatality. The respondent makes the further assertion in the dismissal letter that as a logistics company road safety is vital and that Mr Sale had neglected his duty as a LGV 1 driver in this instance.

63. It was the respondent's evidence and had been put to Mr Sale during the disciplinary hearing and appeal that as a professional driver it was part of the job to navigate and manage hazards and when asked on more than one occasion why he did not slow down when approaching the car and having seen the driver standing in the road, in order to manoeuvre past the hazard, Mr Sale had maintained that he believed he was taking reasonable precautions and was driving at an appropriate speed and moved out at a wide enough distance to clear the car.

64. In further support of its assertion that Mr Sale's conduct amounted to gross misconduct, it was the respondent's evidence that Mr Sale did not recognise the seriousness of the incident, was unwilling at the time to accept he was at fault or take responsibility for it and sought to put blame on the driver of the car.

65. Mr West in his submissions on behalf of the claimant asserted that the incident could reasonably have been categorised as general misconduct and 'careless' driving rather than gross misconduct. This was rejected by Mr Brown in his evidence on the basis that the disciplinary case against Mr Sale was not only based on the gross misconduct of 'deliberate or reckless damage to property' but also bringing the company into disrepute and neglect of duty and that it was not just the accident but Mr Sale's not wanting to accept the accident and blaming the third party, that was taken into consideration.

66. In light of the circumstances described above in relation to the details of the incident and based on my findings and the evidence before me, I consider that to categorise the incident and Mr Sale's conduct as gross misconduct within the scope of the categories of gross misconduct set out in the respondent's disciplinary policy, was within the band of reasonable responses.

67. The final consideration is whether, having concluded that the respondent reasonably categorised the incident and the claimant's conduct as gross misconduct, dismissing the claimant was within the band of reasonable responses.

68. I find that it was. I have considered the evidence drawn from the disciplinary investigation and hearings and the oral evidence heard. In considering the fairness of the dismissal, I am also guided by the case of *Taylor v OCS Group* that the appeal should be treated as part and parcel of the dismissal process.

69. I consider that there were detailed discussions with Mr Sale during the disciplinary process, in an effort to understand his recollection of the incident and his explanation of his actions that resulted in hitting the car and whether he acknowledged or recognised any fault on his part or would do anything differently.

70. As indicated above the details of the incident as discussed with him in reviewing the cctv were largely accepted and agreed by Mr Sale at the time. However, contrary to this and to the concerns raised about the seriousness of the incident with him, the evidence shows that throughout the disciplinary and appeal hearing Mr Sale maintained the view that he had taken reasonable precautions, driven at an appropriate speed and did not see the need to slow down and felt he had given the car a wide enough berth.

71. A further concern on the part of Mr Brown was that Mr Sale also lay blame on the driver of the car rather than accept responsibility or fault himself. This point was discussed in some detail at the disciplinary hearing and when Mr Brown suggested that as a driver Mr Sale was responsible for the safety of pedestrians and not putting them at risk, Mr Sale had answered that the driver put himself at risk, a view he repeated. This was supported by the minutes of the disciplinary hearing as set out in my findings above.

72. In reaching his decision to dismiss, Mr Brown found that Mr Sale could have made a reasonable assessment to avoid the accident by slowing down or stopping at a safe distance. Mr Brown explained his reasons in full at the hearing and confirmed this in writing. In his evidence Mr Brown stated that he gave consideration to a sanction short of summary dismissal but was not satisfied that Mr Sale understood the severity of his actions and that serious injury could have been caused; that he had not shown remorse and concern and there was a risk of a repeated incident; and he was not comfortable with Mr Sale representing DHL when he would not accept responsibility for his actions or admit his wrongdoing.

73. Although Mr West challenged Mr Brown that Mr Sale did show remorse and insight into what happened, in my findings above I accepted Mr Brown's evidence that Mr Sale was inconsistent in this regard.

74. When hearing Mr Sale's appeal, in his evidence Mr Crook expressed similar concerns about Mr Sale's failure to acknowledge the severity of the incident, or his accountability as a professional driver, his inconsistency in showing remorse and insight into his actions, that in failing to slow down he caused the accident as he was driving too fast and too close and of great concern to Mr Crook that after passing the car and driver, Mr Sale said he was unable to see either, but did not stop to check. Having also considered the cctv with Mr Sale and taking account of the evidence and Mr Sale's representations at the appeal hearing, Mr Crook upheld

the decision to dismiss for the reasons set out in the appeal letter and summarised in the findings above.

75. I consider that the evidence of Mr Sale at the hearing on being cross examined by Miss Thomas, lends some support to the concerns of Mr Brown and Mr Crook and their belief that Mr Sale was inconsistent in showing remorse and insight into the incident and his accountability for it.

76. Taking into consideration all of the evidence and my findings and for the reasons outlined, I conclude that the respondent's decision to dismiss the claimant was within the band of reasonable responses and that the claimant's dismissal was fair.

77. Finally, I must consider the claim for wrongful dismissal and whether on the evidence before the Tribunal, the claimant's actions warrant summary dismissal. Having concluded that the claimant's dismissal was reasonably categorised as gross misconduct and that his dismissal was fair, it follows that the respondent was not in breach of contract in summarily dismissing the claimant without notice or pay in lieu of notice.

Employment Judge K Hunt

Date 17 March 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

27/3/2023

NG

FOR EMPLOYMENT TRIBUNALS