EMPLOYMENT TRIBUNALS

Claimant: **Mr Sharpe**

Respondent: **Sepco International Limited**

Heard at: **Newcastle CFCTC** **On: 12 July 2023**

Before: **Employment Judge Newburn**

Representation:
Claimant: In person
Respondent: Ms D Henning (Solicitor)

RESERVED JUDGMENT

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

2. A remedy hearing will be listed to determine the remedy to be awarded, if this cannot be agreed between the parties

REASONS

Introduction

1. The Claimant brought a claim for unfair dismissal in relation to his employment. He claims that he was dismissed unfairly by the Respondent.

2. The Respondent contested the claim. It claimed that the Claimant resigned on 20 December 2022; in the alternative, the Respondent claimed the Claimant was fairly dismissed on the grounds of misconduct further to following a fair procedure.

The Hearing

3. The matter was listed as a one day video hearing. The Claimant represented himself and gave witness evidence on oath. The Respondent was represented by solicitors and I heard evidence from four witnesses for the Respondent; Mr Lavasani the Managing Director, Mr Garbutt - the Floor manager, Mr Brown – the Deputy Floor Manager (and the Claimant's direct line manager), and Mr Kassim – a Warehouse Operative.

4. The parties agreed a hearing bundle of 129 pages, references to numbers in these written reasons are references to page numbers in that bundle.

5. The timeframe was very tight and there were some technical difficulties with the video hearing. I advised the parties that I would make a reserved decision and, if appropriate we would return to deal with remedy in a further hearing. I informed the parties that I intended to deal with liability and issues regarding potential adjustments to any awards made. Accordingly the parties addressed me on the evidence on those issues in the hearing.

6. We were able to take evidence from all witnesses and hear submissions from both parties. This did not leave time for deliberation and a judgment leading to a reserved judgment.

Issues

7. The list of issues I had to decide were agreed as follows:

   7.1. Did the Claimant effectively resign from his employment with the Respondent or was he dismissed? The Respondent says the Claimant resigned.

   7.2. The Respondent says if the Claimant did not resign, the reason for dismissal was conduct which is a potentially fair reason (s.98(2)(b) Employment Rights Act 1996 (the ERA)).

   7.3. Was the dismissal fair taking into account section 98(4) ERA and in particular, did the Respondent act reasonably in all the circumstances in treating the Claimant's conduct as a sufficient reason for dismissal? In particular taking into account the test in British Home Stores v Burchell [1980] ICR 303, has the Respondent shown that:

      7.3.1. it had a genuine belief that the Claimant was guilty of misconduct?;
      7.3.2. it had in its mind reasonable grounds upon which to sustain that belief?; and,
      7.3.3. at the stage at which that belief was formed, it had carried out as much investigation into the matter as was reasonable in the circumstances?

   7.4. Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances, which include a previous final written warning? The Tribunal must be careful not to substitute its own view.

   7.5. If the Claimant's dismissal was unfair, is the Claimant entitled to a basic award and/or compensatory award, and, if so, should there be:

      7.5.1. any adjustment to either award as a consequence of any failure to follow procedure under the ACAS code?;
      7.5.2. any reduction or limit in the award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with Polkey?; and/or;
      7.5.3. any reduction to reflect any contributory fault on the Claimant's behalf towards his own dismissal?

Findings of Fact

8. Having heard all the evidence, both oral and documentary, and having regard to the submissions of the parties, I made the following findings of fact on the balance of probabilities. This Judgment is not a rehearsal of all the evidence heard, but is based on the salient parts of the evidence on which I has based my decision

9. The Respondent is a food wholesaler offering distribution services to food outlets across the UK. It is based at Boldon Colliery. The Claimant was employed as a HGV driver and had worked for the Respondent since May 2020. As with the other drivers employed by the Respondent, the Claimant made deliveries to customers at various locations doing a number of stops at each location to drop off deliveries. His work involved two "runs" a day, a morning run and an afternoon run.

10. The routes that the drivers would take for their runs would normally be posted on a board that all drivers would check before making their runs. Drivers would usually attend the board twice a day to check their runs, once in the morning and then again on their return to check the afternoon route.

11. The Claimant's evidence was that the driver's often discussed the routes with the route setter, and the routes were often changed as a result of these discussions.

12. Until his retirement in September 2022, a Mr Clennell had been employed with the Respondent and had been responsible for setting the driver's routes. After his retirement Mr Brown took over planning the routes. It was Mr Garbutt's evidence Mr Brown had been training with Mr Clennell to do so.

13. Mr Garbutt's evidence was that other employees, including the Claimant and the other drivers, (who were not management) were able to have a say in the route setting and Mr Brown was, and did delegate the route setting to other staff members. It was therefore common ground between the parties that the other employees would be involved with how the routes were set and it was not unusual for a route to be changed further to discussions between staff.

14. On 9 February 2022, the Claimant received a written warning regarding completion of vehicle checks and the receipt of a cheque which had not been completed correctly. The warning was stated to remain on his record for 6 months and that any potential further contractual breaches may have greater weight attached to them if further disciplinary actions occur while active. The warning expired on 8 August 2022. The Claimant did not receive any further warnings during his employment and there were no further active warnings on the Claimant's record thereafter.

15. On 6 October 2022, the Claimant informed Mr Garbutt he was unhappy with the run he had been asked to do. The Claimant believed the distribution of the runs as between himself and another driver to be unequal. The Claimant accepts he swore when he spoke to Mr Garbutt about this matter, although he states swearing was not an uncommon occurrence within the environment.

16. Shortly after the incident occurred on 6 October 2022 Mr Garbutt completed an incident report form, which appeared at page 65 of the bundle. Mr Garbutt did not submit his report to Mr Lavasani, and did not take further action in respect of this incident.

17. Notwithstanding his complaint to Mr Garbutt about the run, the Claimant did carry out the run as planned. At the end of the run however, the Claimant injured his ankle resulting in 4 weeks off work.

18. After incurring the injury the Claimant contacted Mr Garbutt to confirm the same. During this call the Claimant apologised for his behaviour, he accepted the way he had spoken to Mr Garbutt had been unacceptable.

19. The Claimant did not receive any formal disciplinary action about this incident. Mr Garbutt's oral evidence was that it had been his intention to do so however this did not happen due to external factors, those being a period of illness with Covid suffered by Mr Lavasani, followed by Mr Garbutt then contracting COVID.

20. Mr Garbutt confirmed in his oral evidence that the Respondent could however have followed up the incident with disciplinary action at some stage between 7 October 2022 and before 20 December 2022 but as at the date of dismissal that had not yet occurred.

<u>The 20 December 2022 incident</u>

21. On 20 December 2022, the Claimant returned from his morning run to review the board to check the details of is afternoon run. Mr Brown and Mr Garbutt were in the vicinity at the time.

22. The Claimant was unhappy with his afternoon route as it was set out on the board. He believed there to be in an inequality between his afternoon run and that of another driver. The Claimant's evidence was that he felt that this unfair route setting had been happening more frequently since Mr Clennell had left the Respondent. He believed there should be a fairer method for planning the routes in general.

23. Specifically on this day, he believed it would have been fairer to remove one of his three stops from his route and to give this to another driver who had only one stop.

24. The Claimant was agitated and angry about the run. Mr Brown was in the room at this time. The Claimant exclaimed loudly that he was unhappy, he shouted that the route was unfair, that he would not take the run, and that either the stop should come off his run or he would be going home.

25. The Respondent's witnesses described the Claimant to be agitated, raising his voice and waving his arms. Mr Brown's witness evidence was that notwithstanding this behaviour, he did not feel in any way threatened by the Claimant, the Claimant did not swear, and he would certainly not describe the Claimant's behaviour as abusive, simply angry and frustrated.

26. There was some discussion surrounding the exact words that were said between Mr Brown and the Claimant. Whilst the exact words used were not remembered or agreed, the evidence indicates that Mr Brown said words to the effect that the Claimant should either get on with his job or resign.

27. Mr Brown's witness evidence was that he told the Claimant that if he did not want to do the run then perhaps the job was not for him and he should consider resigning. Mr Garbutt's evidence was that he overheard Mr Brown telling the Claimant that the task was not unreasonable and that if the Claimant did not want to stay and work with the company he should hand in his notice.

28. The Claimant's evidence was that Mr Brown told him if he was not happy he should resign right now and that he was shocked by this comment and understood from this conversation that Mr Brown was telling him he had to resign.

29. The Claimant responded to Mr Brown however, again, the exact wording used was not clear or agreed; the Claimant's witness evidence was that he said "ok", Mr Garbutt stated that the Claimant said "Aye, ok I will then" and Mr Brown stated that the Claimant responded "right I'm going home". Further to this Mr Brown handed the Claimant a small bit of paper and told him to write out his resignation. The Claimant did not do this and left the room to go to the canteen.

30. Mr Kassim was in the canteen and gave witness evidence that the Claimant was clearly very upset and angry when he entered the canteen and stated he was leaving and would not be coming back. The Claimant started to collect his tupperware from the fridge and packing his scooter charger. Mr Garbutt stated that the Claimant would not normally remove these belongings and this indicated to him that the Claimant intended to resign and not return.

31. Mr Brown and Mr Garbutt completed hand written reports of the incident which appeared at pages 69 and 71 – 72 of the bundle. These reports were later typed up.

32. Mr Kassim completed a hand written report of the incident which he believed he completed wither the same day or a day later which appeared at page 74 of the bundle.

33. Mr Brown's evidence was that the Claimant's afternoon run route could not be changed as the Claimant had requested; this was for a few reasons, including the weight limit on the other driver's van and because some of the stops involved cash deliveries which the other driver was not permitted to take because he was agency staff.

34. The Claimant did not attend work the next day, 21 December 2022.

35. At 8am the following morning, 22 December 2022, the Claimant called Mr Garbutt to ask what would happen now. The Claimant would normally begin work at around 9am.

36. Mr Garbutt's evidence was that he believed the Claimant had resigned and this call was an attempt to get his job back.

37. During this call Mr Garbutt told the Claimant the incident was very serious and because he had acted in a similar manner before he would be dismissed and would hear from Mr Lavasani.

38. Mr Lavasani did not contract the Claimant further to this call and did not take a witness statement from him concerning the events of 20 December 2022.

39. Mr Lavasani's states in his witness statement:

> "*I didn't see the need for a disciplinary hearing, in fact I don't think I even thought about one, as Mr Sharpe had resigned and the letter dismissing him for gross misconduct was only for clarity.*"

40. On 23 December 2022 Mr Lavasani wrote a letter to the Claimant titled "Letter – confirming dismissal for gross misconduct" which appeared at page 75 of the bundle. The letter stated that the Claimant's conduct was "*deemed sufficient for dismissal on a charge of Gross Misconduct for insubordination and refusal to carry out the reasonable instruction of* [his] *line manager*".

41. The letter contained a paragraph which summarised the events of 20 December 2022, stating the Claimant refused to carry out a run, Mr Brown explained the run could not be changed as the Claimant had suggested and the run was reasonable; the Claimant

continued to argue with Mr Brown in front of other staff members causing a commotion. Mr Brown "suggested" the Claimant resign if he did not feel like he could carry out the instruction. The Claimant replied he would, took a sheet of paper to write out his notice and left to the canteen. In the canteen he voiced his grievances to other staff members, then left the premises and did not return to work.

42. The letter further stated:

"*because of your actions, and because this is not the first time you have done this exact thing in addition to still having an active formal waning on your record, you would not be returning to work for the company.*

I find your actions amount to gross misconduct under sections 2.4.8 and 2.4.11 of your contract, relating to insubordination and refusal to carry out management instruction, and I have therefore decided to summarily dismiss you from employment."

43. The letter provided that if the Claimant wished to appeal the decision, he had until 15 March 2023 to write to Mr Lavasani setting out his reasons for an appeal.

44. Also on 7 February 2023 Early Conciliation with ACAS began. This lasted until 23 February 2023. The Claimant submitted and ET1 to the Tribunal on 3 March 2023.

45. The Claimant obtained legal advice and thereafter on 7 February 2023 wrote a letter of appeal to Mr Lavasani setting out 4 points of appeal. Point 1 was that he was not refusing to carry out the run he wanted to address the issue as had been done in the past and determine a fairer route; point 2 related to the fact the Claimant did not believe the other driver was at his maximum weight limit when he was going to take his run that day, point 3 was that he had been informed other employees were distracted by the Claimant's shouting however the Claimant felt this had been blown out of proportion, and point 4 was that the disciplinary letter he received stated he already had a formal written warning – however this was incorrect.

46. The Respondent wrote a letter dated 13 March 2023, inviting the Claimant to an appeal hearing on 20 March 2023. The appeal would be dealt with by Mr Lavasani, with Mr Garbutt and another person would be in attendance.

47. At pages 80 – 98 of the bundle there was a transcript of the appeal hearing. In the hearing Mr Lavasani started by telling the Claimant that he would summarise the position, and then he would allow the Claimant 15 minutes to relay any concerns or challenges he had, and after that the Claimant would hear back from Mr Lavasani by letter. Mr Lavasani did however allow the Claimant to speak for more than the 15 minutes allotted to him at the end of the hearing, lasting about 45 minutes.

48. Mr Lavasani spoke first and went through each of the 4 points raised by the Clamant in his appeal letter and explained to the Claimant his findings and opinion on each of the points raised.

49. On the Claimant's appeal point 1 Mr Lavasani summarised the evidence in the incident reports he had stating that as far as he could tell no-one in the Claimant's position would have had a problem doing the job and that it was a fair run. He stated "*that is not just my opinion*" and that it was the opinion of the witnesses he had statements from.

50. Mr Lavasani explained to the Claimant that he had witness statements from staff which confirmed the Claimant had refused to carry out his work. Mr Lavasani was referring to the incident reports completed by Mr Brown, Mr Garbutt, and Mr Kassim.

51. The Claimant had not been provided with a copy of the incident reports. Mr Lavasani had a copy of the reports in the meeting. The Claimant stated that Mr Lavasani read out sections of the incident reports but he was not provided with a copy to read himself and did not receive a copy until disclosure took place in these proceedings.

52. Mr Lavasani confirmed in his evidence that he had not provided the Claimant with copies of the evidence upon which he had relied when making his decision to dismiss the Claimant.

53. Mr Lavasani stated in his oral evidence that this was because all the information the Claimant needed was set out in the summary of the reasons for his dismissal set out in the dismissal letter. He stated that he had taken a copy of the incident reports to the appeal hearing and, because he was sat in front of the Claimant in the appeal hearing the Claimant had sight of them. In the appeal notes Mr Lavasani discusses having read out parts of the statements to the Claimant during the hearing.

54. With respect to the Claimant's second appeal point Mr Lavasani told that Claimant that considering the weight of the van and the help the Claimant had to carry out the run "*I do not think* [the run] *was unreasonable*".

55. With respect to the Claimant's third appeal point Mr Lavasani stated "*in the letter you say that the information I'd been given had been fabricated. But actually, on subsequent investigations I've had that reaffirmed by different people*." He explained to the Claimant that the Claimant should have followed a grievance policy and that "*the way you conducted yourself was not following any of those rules and procedures, so it was outside…of the reasonable grounds of appealing the work that you'd done*."

56. With respect to the Claimant's fourth appeal point Mr Lavasani said that although it was correct that the Claimant did not have an active formal warning, this was incidental and "*was not really part of the grounds for dismissal*". He believed Mr Garbutt had been talking about the 6 October incident "*which had not proceeded to any sort of disciplinary because investigations had not yet been completed".*

57. Mr Lavasani then told the Claimant he had 15 minutes to speak. The Claimant expressed that it would be difficult for him to do so in 15 minutes. The Claimant was permitted to speak longer.

58. The Claimant highlighted that he did not agree with the accounts given regarding the words used on 20 December 2022, he highlighted there were discrepancies and he stated that he had been asked to resign on the spot by Mr Brown which had shocked him. He explained it was usual practice for drivers to have a conversation about the runs and this would result in a change to them, that he had reasons to want to change the run and he expected it would result in a discussion, however he was shocked and angry at Mr Brown's response that he must resign.

59. Mr Lavasani asked the Claimant to confirm his account of what was said on 20 December 2022.

60. The Claimant told Mr Lavasani that that he would not have refused to take the run, but that runs were often challenged and this resulted in changes. He explained at that time he believed the change in the run would have been more suitable, and that he had felt shocked by Mr Brown asking him to resign on the spot.

61. Mr Lavasani told the Claimant that he had reports from other people regarding the words used and criticised the Claimant for not providing his version of events sooner. He stated that he "*still did not have a complete picture of what had been said*".

62. The Claimant highlighted that he was not able to provide information prior to this appeal as he could only respond to the information that he had received and he had not been provided with anything.

63. Mr Lavasani stated that "*the situation I am left with is I have limited information of what happened from your part from you and a much more detailed documentation on the day and then on subsequent days from the other people who witnessed that situation*".

64. Mr Lavasani informed the Claimant that "*from an evidential point of view, that's difficult for me to accept the accounts now because the longer that time goes on the less accurate the information will be"*.

65. Mr Lavasani concluded by informing the Claimant that they had run over time and therefore he would "*look at it and send you a letter and you can decide what you want to do going forward*".

66. On 19 April 2023 Mr Lavasani wrote to the Claimant confirming the outcome of the appeal. The letter stated that the decision to dismiss was justified on the grounds of insubordination and gross misconduct. At this time these proceedings were already underway.

Submissions

67. The Respondent's representative provided written submissions and expanded upon them in oral submissions. The Respondent's representative submitted that the Claimant had resigned from his position. She stated this position was supported by the fact that the Claimant had referred to having a claim for constructive unfair dismissal, and that to have been provided with advice on constructive unfair dismissal, he must have informed ACAS that he had resigned. Furthermore, she cited the fact that his witness statement focussed on the events leading to the incident of 20 December 2022 and provided very little by way of information about the 20 December 2022 incident and thereafter; this, she said, indicated that the structure of the Claimant's witness statement was designed for a claim of constructive dismissal. Accordingly, the Respondent's representative averred this provided evidence that the Claimant had intended to resign.

68. In the alternative the Respondent submitted that the Claimant was dismissed fairly for gross misconduct and followed a fair process.

69. I was referred to the following cases:

    69.1. Smith v Perrys Motor Sales Ltd UKEAT/0252/17;
    69.2. Ali v Birmingham City Council UKEAT0303/08;
    69.3. Wallace v VTech SMT Ltd 2019;
    69.4. *British Home Stores -v- Burchell;* and,
    69.5. Charalambous v National Bank of Greece 2023 EAT 75

70. I invited the Respondent to address me on Kwik-Fit (GB) Ltd v Lineham [1992] ICR 183. She submitted the Claimant was clear in his actions of his desire to resign.

71. The Claimant's submissions were that he had not resigned but was dismissed. He had left work because he was angry and shocked that he believed Mr Brown had told him he should resign. He accepted his conversation with Mr Brown did not go well and that he was upset and angry, in hindsight he felt there was probably a better way to approach the situation however he felt that having been told to resign incited his response. Overall he said he did not believe his behaviour was so serious in the circumstances that it amounted to gross misconduct. He stated that he did not feel the process carried out by the Respondent in dismissing him was fair.

Relevant Law:

72. Section 94 ERA confers on employees the right not to be unfairly dismissed.

73. Section 98 ERA Act deals with the fairness of dismissals. There are two stages within section 98:

    (1) Firstly, the employer must show that it had a potentially fair reason for the dismissal within section 98(2).
    (2) Secondly, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the employer acted fairly or unfairly in dismissing for that reason under section 98(4).

74. Section 98(4) deals with the fairness of the dismissal generally and provides that, having regard to the reason shown by the employer, the question of whether the dismissal was fair or unfair, shall depend 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. This shall be determined in accordance with equity and the substantial merits of the case.

75. With regards to dismissals for misconduct; BHS v Burchell provides the Tribunal must decide:

    (1) whether the employer had a genuine belief in the employee's guilt;

    (2) if so, whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation; and,

    (3) if so, whether the decision to dismiss was reasonable.

76. In A v B [2003] IRLR 405, provides authority that in cases of misconduct, the employer's investigation should be particularly rigorous when the charges are particularly serious or the effect on the employee is far-reaching. This does not mean the Respondent is required to conduct an investigation to the standard of a criminal trial, simply that careful and conscientious investigation of the facts is necessary.

77. In Iceland Frozen Foods Ltd v Jones [1983] ICR 17, EAT, Mr Justice Browne-Wilkinson summarised the approach to unfair dismissal concisely as follows:

    "We consider that the authorities establish that in law the correct approach for the… Tribunal to adopt in answering the question posed by [section 98(4)] is as follows:

    "(1) the starting point should always be the words of [Section.98(4)] themselves;

    (2) in applying the section [a] Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… Tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct [a] Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the… Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

78. I am reminded by Sainsbury's Supermarkets Ltd v Hitt (2003)IRLR 23 that the Tribunal must not substitute its own view for that of a reasonable employer.

79. Spink v Express Foods Ltd [1990] IRLR 320 provides authority that as part of a fair procedure, an employee accused of misconduct must be informed of the charges against them so that they have the opportunity to put their case:

"*It is a fundamental part of a fair disciplinary procedure that an employee know the case against him. Fairness requires that someone accused should know the case to be met; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence and to adduce his own evidence and argue his case*."

80. Taylor v OCS Group Ltd [2006] IRLR 613(CA) established that if there are procedural flaws in the process followed by the employer, they should be considered alongside the reason for dismissal, when the Tribunal comes to assess whether in all of the circumstances, the employer acted reasonably in treating the reason as a sufficient one for dismissal. The Tribunal should consider the disciplinary process as a whole. If there was a defect in the process followed, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

81. In Kwik-Fit (GB) Limited v Lineham the EAT held that where words or actions of a resignation are unambiguous, an employer is entitled to treat them at face value, unless there are special circumstances which might indicate that the resignation might not be intended. This might arise out of personality conflicts or words spoken in the heat of the moment or under extreme pressure, or the character make-up of an employee.

82. The EAT commented that where such special circumstances do exist, employers should allow a reasonable period of time to elapse before accepting resignation at its face value; this may provide further insight into whether or not the employee truly intended to resign. The EAT indicated that a reasonable period of time is likely to be relatively short, such as a day or two.

83. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides that In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters (the "ACAS Code"). The Tribunal must consider whether the employer has failed to comply with that Code in relation to that matter, and if the Tribunal considers that failure was unreasonable, the Tribunal may, "*if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%*".

84. The ACAS Code sets out the steps that reasonable employers normally take when considering dismissing an employee for misconduct. The ACAS Code confirms these steps include conducting the necessary investigations, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter and allowing an appeal. Paragraph 23 of the code provides that 'a fair disciplinary process should always be followed before dismissing for gross misconduct'.

85. Paragraph 9 of the ACAS Code is headed "Inform the employee of the problem" and states: "*if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide any copies of any written evidence which may include any witness statements with the notification*."

86. Paragraph 12 of the ACAS code "Hold a meeting with the employee to discuss the problem" provides; "*Employers, employees and their companions should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this*."

Polkey

87. In Polkey v AE Dayton Services Ltd [1987] IRLR 503, the House of Lords held that a compensatory award may be reduced or limited to reflect the chance that the Claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome. A Tribunal should make a realistic assessment of loss according to what might have occurred in the future. The chances of the actual employer, not a hypothetical reasonable employer, dismissing the employee have to be assessed.

88. Software 2000 Ltd v Andrews and others UKEAT/0533/06 at paragraph 53 Elias J provided direction on how the Tribunal should approach Polkey as follows:

> "*The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice*."

89. A Tribunal may reduce the basic award if it finds that the employee's conduct before dismissal was such that it would be just and equitable to reduce it (section 122(2), ERA 1996).

90. Section 123(6) ERA provides that where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant , it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

91. In Nelson v BBC (No.2) [1979] IRLR 346 (CA), the Court of Appeal set out three factors that must be present for the compensatory award to be reduced for contributory fault:

1. The employee's conduct must be culpable or blameworthy.
2. It must have actually caused or contributed to the dismissal.
3. The reduction must be just and equitable.

92. In Steen v ASP Packaging Ltd UKEAT/23/13, the EAT held that an employment Tribunal must address the following:

1. What was the conduct which was said to give rise to possible contributory fault?
2. Was that conduct blameworthy, irrespective of the employer's view on the matter?
3. For the purposes of section 123(6), did the blameworthy conduct cause or contribute to the dismissal?
4. If so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

Conclusions

93. I will applied the law outlines above to the findings of fact I have made in order to answer the Issues.

Resignation

94. The Respondent submits that the Claimant resigned. The Respondent's submissions focussed on whether or not the resignation was unambiguous, and provided authority that where a resignation was made in the heat of the moment, an attempt to retract a resignation 12 days later would be considered too late.

95. It is common ground that the Claimant was angry and upset during the 20 December 2022 conversation. I find any statement and action made by the Claimant indicating a desire to resign was carried out in the heat of the moment. Accordingly, I find there were "special circumstances" as referred to in KwikFit v Lineham.

96. Having left work at around 3:30pm on 20 December 2022, he contacted his manager Mr Garbutt at 8am an hour before his normal work start time on 22 December 2022; this being less than a day and a half later.

97. Mr Garbutt's evidence was that he believed the Claimant had resigned and this call was his attempt to get his job back.

98. Thereafter, the Respondent carried out a disciplinary process resulting in the Claimant's dismissal suggesting that the Respondent understood or suspected the Claimant had changed/or wanted to change his position and did not wish to resign and Mr Lavasani's evidence was that that the Claimant's dismissal was to ensure the matter was clear.

99. In these circumstances I do not find that it reasonable for the Respondent to have considered the Claimant had intended to resign and I find the Claimant was dismissed.

Unfair Dismissal

100. I find that Mr Lavasani held a genuine belief that the Claimant had carried out the conduct as alleged and this belief was based upon an investigation which involved reviewing the Incident reports he had obtained, albeit it did not involve approaching the Claimant for his evidence before his initial decision to dismiss. I find that the Mr Lavasani

dismissed the Claimant further to his belief in the Claimant's misconduct. Whilst I find Mr Lavasani acted within the band of reasonable responses in treating this reason as sufficient to warrant dismissal, the Respondent did not follow a reasonable and fair procedure when dismissing the Claimant.

101. The Respondent did not invite the Claimant to a formal disciplinary hearing in accordance with the ACAS Code. It did not provide the Claimant the evidence upon which the decision to dismiss him was based in the form of the Incident reports. It did not permit him to process that evidence and respond to it. This Claimant was not given the opportunity to put his position and any mitigation to the Respondent before the decision to dismiss was made, he was not permitted to address the evidence against him. The Claimant was not provided with that evidence until it was disclosed in these proceedings, and was given only selected excepts of those reports which were read out to him from Mr Lavasani during the appeal hearing.

102. Whilst the Claimant was invited to an appeal and given the opportunity to make representations at that appeal hearing; the Respondent failed to provide the Claimant with the evidence upon which the decision to dismiss was based in advance, and instead Mr Lavasani read out selected excerpts from the documents to the Claimant during the appeal meeting. This is clearly inadequate and did not provide the Claimant with a fair opportunity to represent himself. The appeal hearing then did not remedy the initial failure to hold the dismissal meeting.

103. Whilst the Respondent is not an extremely large corporate body, providing the evidence in advance of a hearing, holding a hearing, and permitting the Claimant the opportunity to advance an explanation or offer mitigation were simple procedural steps. I find the procedure followed by the Respondent was not within the band of reasonable responses and the Respondent failed to comply with the ACAS code.

Polkey consideration

104. Mr Lavasani considered the way in which the Claimant had challenged his manager in the workplace (rather than raising the issue in a grievance), the effect the Claimant's outburst had on other staff, and the fact that the Claimant did not then come into work the following day at the Respondent's busiest period, meant that the actions of the Claimant in refusing the instruction to take the run amounted to gross misconduct.

105. Mr Lavasani's comments made in the appeal indicated that he considered the evidence against the Claimant was more compelling because it was taken at the time whereas, he had no contemporaneous evidence from the Claimant regarding the 20 December Incident.

106. Had a meeting been held with the Claimant before the decision to dismiss was made, and had the Claimant been afforded the time to review the evidence and prepare for a meeting, the Claimant would have had time to speak to other witnesses, fully prepare to represent himself, and his own evidence would also have been contemporaneous, where the dismissal meeting were to be held timeously.

107. Mr Lavasani would then have had the Claimant's contemporaneous account of the event to weigh against the other witnesses this would have allowed him to take more account of the Claimant's mitigating circumstances.

108. The Claimant's position was that his understanding of Mr Brown's words were that he had been told to resign by his manager. This would have given Mr Lavasani clearer

evidence as to why the Claimant had acted as he had in front of other staff and why he left and did not return the following day. Mr Lavasani would also have had more insight from the Claimant at that time into the reasoning for his initial refusal to carry out the instruction and his actions in front of the other staff in the cafeteria. This may have resulted in Mr Lavasani reducing the sanction.

109. It was clear from Mr Lavasani's evidence however that the way in which the Claimant acted when he refused to carry out the instruction, especially in light of the 6 October Incident was something he took very seriously.

110. Accordingly. I consider that even if a fair procedure had been followed and the Claimant had been able to provide his evidence to Mr Lavasani at an earlier stage during dismissal meeting, I do not consider there would be an overwhelming chance that this would have resulted in the sanction being reduced from dismissal. I find that there would have been an 80% chance that the Claimant would still have been dismissed had a fair procedure been followed.

Contributory conduct

111. I find that Claimant did contribute to his dismissal.

112. The Claimant's initial refusal to carry out the run allotted and the way in which he expressed this position – in an angry outburst in front of others - constituted a refusal to carry out an instruction given by his manager which contributed to his dismissal. I set this against the backdrop that the Claimant and other drivers often challenged the run given to them and this process was commonplace. I take consideration of the fact that the Claimant misunderstood Mr Brown's response and believing he had been asked to resign and his behaviour in going to the cafeteria and speaking about the incident in front of other staff members and thereafter leaving work was precipitated by this misunderstanding. It may have been with some better communication in the workplace regarding challenging the way in which the runs were set the Claimant may have followed an alternative route to discussing his problem. In considering all of these circumstances together I find it appropriate to reduce the Claimant's compensatory and basic award by 75%.

Remedy

113. I have provided my findings in order to assist the parties in any attempts they wish to make to resolve this matter through alternative dispute resolution. To provide the fullest picture I have included an indication of my considerations regarding the Respondent's failure to comply with the ACAS Code. If the question of remedy returns to me for a hearing I will hear argument from the parties before making a decision on the point.

114. I invite the parties, in the first instance, to endeavour to reach agreement on the appropriate remedy extra-judicially. Should they fail to do so, a Remedy Hearing will be arranged.

EMPLOYMENT JUDGE NEWBURN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 9 September 2023

JUDGMENT SENT TO THE PARTIES ON

.....3 October 2023.....

AND ENTERED IN THE REGISTER

.....

FOR THE TRIBUNAL