EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J. Richardson	v	West Midlands Trains Ltd

Heard at: Watford (by CVP) **On:** 22 and 27 September 2023

Before: Employment Judge Hunt

Appearances
For the Claimant: Mr A. MacMillan (counsel)
For the First Respondent: Mr A. Ohringer (counsel)

JUDGMENT

1. The claim of unfair dismissal under Part X of the Employment Rights Act 1996 is well-founded. The Claimant was unfairly dismissed by the Respondent.

2. The claim of wrongful dismissal is upheld. The Claimant was wrongfully dismissed by the Respondent.

3. The remedy for unfair dismissal and wrongful dismissal will be decided at a further hearing and will form the subject of a separate decision document.

REASONS

1. Reasons for the Tribunal's decision were given orally at the hearing of these claims. Written reasons were requested at the conclusion of that hearing. The Tribunal has therefore prepared this single document including both its written record of the decision and its reasons.

2. Since 4 April 2018 the Claimant had been employed by the Respondent as a train driver operating out of the Respondent's Bletchley depot. At the conclusion of a disciplinary process involving investigation and disciplinary hearing, he was summarily dismissed on 24 November 2022.

3. The Claimant has brought two claims against the Respondent. The first claim in time pleaded unfair dismissal and was given claim number 3300402/2023. That claim was received by the Tribunal on 14 January 2023. The second

claim, allotted number 3302080/2023, was received on 23 February 2023. It repeats the allegation of unfair dismissal and pleads wrongful dismissal also. Both claims were brought in time, on each occasion after pursuing ACAS' early conciliation procedure.

4. The claims have been consolidated and relate to the same facts. Accordingly, I have determined them together.

5. The Respondent asserts that the reason for the Claimant's dismissal was his misconduct. In his claim forms, the Claimant appeared to dispute this, alleging that the real reason may have been due to his raising of health and safety concerns or the Respondent's personal dislike of him. At this hearing, the Claimant confirmed that neither of those allegations were being pursued with any vigour. There is no objective evidence of the dismissal having been for any reason other than misconduct. There is a large body of evidence to show that it was due to misconduct, much of which will be detailed below, including admitted facts, documents and statements explaining how the Respondent arrived at its decision to dismiss the Claimant. Accordingly, I accept that the reason for dismissal was misconduct and that is the basis on which I will proceed to determine whether the dismissal was unfair and/or wrongful.

6. In making that determination, I had regard to a 237-page bundle, witness statements and oral evidence from the Claimant and the Respondent's dismissing and appeal officers, and submissions from each party's counsel. All references to page numbers in this decision document refer to the electronic page numbers of the PDF bundle. The numbering imprinted on the pages is not identical.

The Facts

7. The facts relevant to these claims have largely been agreed since the very beginning of the Claimant's disciplinary process. Certain important points of detail, referring principally to the Claimant's state of mind at key times, have not. In relation to the unfair dismissal claim, many of those details are not relevant as it is the reasonableness of the Respondent's decision-making process that is in issue, not my own view of events. However, the details are important to the wrongful dismissal claim and I will consequently make findings where necessary.

8. All of my findings are based on the balance of probabilities, in light of all the evidence that was available to me. A significant part of that evidence comprised of written minutes of meetings that, although they appear relatively complete and neither party has suggested the records were in any way inaccurate, may well not be verbatim recordings of what was said in those meetings. I have taken that fully into account in my decision.

9. Prior to commencing employment with the Respondent, the Claimant had a career of around 20 years in the rail industry. The Respondent is a large employer, operating sites across a significant part of the country, principally

in the Midlands and South East of England. It has a dedicated human resources department and comprehensive disciplinary policies. It trains its staff on them and has a suite of training modules and relevant information on its intranet.

10. The nature of his role means that the Claimant has relatively infrequent contact with any specific driver colleague. This case concerns his contact with one particular colleague, who I will refer to as Driver A.

11. The Claimant was dismissed for gross misconduct on the basis he bullied Driver A. He placed, firstly, a tarantula's shed exoskeleton (the "Exoskeleton"), and, secondly, on a later occasion, a shed snakeskin in her pigeonhole at work. The second occasion occurred after he had been told by Driver A she did not want to receive objects of that nature. Driver A raised a complaint, which resulted in the dismissal. The Claimant has maintained at all times that he had placed the items in the pigeonhole as a prank and had not appreciated Driver A's feelings or understood her request to desist.

12. The material facts leading up to the dismissal were as follows.

13. In mid-2022, sometime prior to 4 August (the precise date is both unknown and immaterial to this case), the Claimant was in a mess room with Driver A. They had a general conversation. DIY house projects were brought up. At some point, the issue of insects and/or spiders was brought up due to the Claimant occasionally looking after those his friend(s) kept as pets, along with a snake. There was much debate about the exact content of this conversation. All that is relevant to this case is the discussion of insects and/or spiders. I find that at some point Driver A indicated a certain dislike of, or squeamishness in relation to, insects and/or spiders (a precise finding as to which type of creature is immaterial to this case, as I will explain). This dislike was not elaborated upon. My finding is based on both parties' account of the conversation. Driver A described the conversation in her meeting with the Respondent's officer charged with investigating her complaint (p.78 of the bundle). Driver A states that she had let the Claimant know of her dislike of "insects" in the context of him talking about looking after his neighbour's pets, but her dislike was not the subject of the discussion. This is consistent with the Claimant's recollection of the conversation, recorded in the record of his separate meeting with the Respondent's investigating officer (p.80). The Claimant responded to a question about whether he was aware of Driver A's dislike of "insects" as follows: "*I must have done to some form of degree but not to the point where I thought it would cause her upset*". In the words of the Respondent's dismissing officer later on, something in that conversation "*planted a seed in [the Claimant's] head*" that led to him placing the items in Driver A's pigeonhole (p.123). In my view, that "seed" was her apparent squeamishness. Reference is made in most relevant documents to "insects" more frequently than to "spiders". I find that this is due to relevant people incorrectly eliding spiders with insects. Either way, it is clear to me that all parties to this case understood Driver A's dislike to extend to spiders, and

generally to other creatures described at the hearing as "creepy crawlies", including snakes. Otherwise, there would be no reason for either party to consider his actions pranks.

14. Following his conversation with Driver A, the Claimant sought to play a prank on her by placing the Exoskeleton in her pigeonhole on or around 4 August 2022. I find that the Claimant had hoped to elicit a reaction of momentary shock, followed by light-hearted relief on realisation that the object was merely a shed skin and not a live tarantula. I make this finding about the Claimant's intention on the balance of probabilities. It appears to me that it is largely agreed between the parties in any event as they both considered the incident to be a prank, which is a point I return to in my conclusions. The dismissing officer's acceptance that the act was intended to be a prank is clear from the record of the disciplinary meeting and is recorded in the dismissal letter (p.126). The acceptance is stated in terms by the appeal officer at paragraph 20 of his witness statement. The evidence shows the Respondent's officers understand the concept of pranking.

15. My finding on the Claimant's intention is supported by his explanation of events, succinctly expressed in the investigation meeting he attended: "*I was of the understanding, she got over the initial shock and thought of it as a joke*" (p.80). In questioning at the hearing before me, the Claimant stated that he felt it would have taken seconds to realise the Exoskeleton was not a real tarantula. The Respondent's dismissing and appeal officers claim they were uncertain as to what the Claimant's intentions had been, determining that he had intended to "shock" Driver A. They considered the intention to "shock" was serious.

16. Whatever the Claimant's intentions, Driver A was distressed by the episode and couldn't deal with the Exoskeleton; she required a colleague to clear it from her pigeonhole.

17. At some point afterwards, the Claimant was informed of this event by that colleague – a senior conductor. The Claimant asserts that he was not told of Driver A's strong feelings at the time; just that the Exoskeleton had been disposed of by their colleague. The Respondent doesn't contest this. I find it is likely that the Claimant would have realised that this was due to Driver A's dislike of spiders, of which he was aware, but accept that he considered it as part of the joke and did not appreciate the level of Driver A's upset.

18. Sometime later still, the Claimant encountered Driver A. The encounter appears to have been in a passageway, through which Driver A was seeking to gain access to her car. It was a brief encounter, during which a short conversation took place between the two about the Exoskeleton. There is a disagreement as to what was said and in which manner. As to what was said, it is accepted that the Claimant first raised the Exoskeleton and that Driver A called the Claimant "a fucking twat" in response. It is also agreed that the

Claimant raised the prospect of leaving a snakeskin on a later occasion. He believes the conversation ended there. Driver A's recollection was recorded as her saying "*no I would not like that and he said what you going to do report me? I said yes*" (p.78). The Respondent's dismissing officer came to the view that he preferred Driver A's account. That was in my view a perfectly reasonable finding. Indeed, I find it more likely to be accurate. Driver A had clear reason to recall the content of the conversation, and the Claimant's recollection was, on his own account, far less detailed.

19. The tone to that conversation is of great importance to this case. The Claimant's consistent position is that the tone had been "jokey" and he had not understood Driver A's genuine upset at finding the Exoskeleton or her request not to leave any further similar items in her pigeonhole. For instance in his investigation meeting he said "*I genuinely didn't [realise she was upset], I thought it was normal banter*" (p.81). In her interview with the Respondent's investigating officer, Driver A is recorded as saying: "*there was a lot of conflict that day, it was over the top banter*" (p.78).

20. The Respondent's dismissing officer found that the Claimant had understood Driver A's objection to the pranks, but chose to ignore it. The focus of the appeal was on the severity of sanction only, not the facts that had already been found, but the appeal officer still considered this issue to an extent. He appears not to have come to a firm view on the Claimant's intention. He looked at the issue from Driver A's perspective. She had told the Claimant to stop his pranks, he did not. From the meeting minutes, statement and questioning, I find that he believed either that the Claimant had understood the request or should have done. Essentially, he believed that Driver A should not have had to ask him again.

21. For my part, which is relevant only to the wrongful dismissal claim, I find on the balance of probabilities that the Claimant had been told not to repeat his actions in what he believed was a jocular fashion that might be described as "banter", so he did not take Driver A's words literally. He took it as part of the reaction he anticipated from his joke. When he saw Driver A for the first time after placing the Exoskeleton in her pigeonhole, he himself raised it immediately. On doing so, he was expecting a light-hearted reaction from her, in line with what he intended. Driver A called him a "fucking twat". However it might have been put, being called a "fucking twat" registered to him as precisely the sort of playful remark he was expecting, not a serious insult. It gave him the impression the brief exchange as a whole was not serious. "Banter" commonly involves saying things that are not genuinely meant. Several references were made both in the bundle and at the hearing of how the "culture" in the railway industry has evolved since the Claimant first started his career. The Claimant has been the subject of pranks himself. It is not difficult to imagine that similar such language might be, or might have been, unexceptional in his exchanges with fellow workers and not meant as a serious insult. Be that as it may, in this instance the Claimant plainly did not

feel insulted in any way. He showed no surprise, upset or took any action whatsoever in relation to the insult. A reaction similar to the one he expected occurred, and the words gave him the erroneous impression that Driver A was “playing along” with the joke. This explains why he had no great recollection of the exchange; he considered it just passing “banter”. Driver A adopted that particular description, albeit describing it as “*over the top*”. When the Claimant mentioned the snakeskin, he was likely already envisaging his subsequent prank. The details of the exchange therefore did not register in his memory. Very unfortunately for all concerned, all that he recalled of the conversation was the snakeskin. I stress that my focus in making this finding has necessarily been on identifying solely the Claimant’s subjective understanding of the conversation as that is the relevant issue for me at this point. I am not making any criticism of Driver A’s conduct or suggesting that she herself did not believe the message she intended to put across was clear.

22. At a later date, on or around 12 September 2022, the Claimant placed a snakeskin in Driver A’s pigeonhole. Driver A was once again distressed when she found it and reported the event orally to her line manager. There is no record of what was discussed at that meeting and it appears the manager was never asked by the Respondent to provide an account, despite the Claimant making such a request. Upon her manager’s suggestion, Driver A then reported the incident by email on 14 September 2022. Driver A's view of the events is provided in that email and in the minutes of her later meeting with the Respondent’s investigating officer. She was not consulted again at any stage of the disciplinary process. Neither was her line manager, although there appears to have been an unsuccessful attempt to arrange his attendance at the Claimant’s disciplinary hearing.

23. In her email complaint, sent on 14 September 2022, 2 days after finding the snakeskin, Driver A wrote as follows (p.103 of the bundle provides the complete text of this email). “*I thought the situation was dealt with, with mine and Jon Richardson’s conversation between me and him, but finding the snake skin has made me feel apprehensive and I have felt my concentration has been off the last few days whilst I’ve been trying to learn the Bedford’s. It’s not something I expect to come across when coming into work*”.

24. In the minutes of her meeting with the Respondent’s investigating officer, she referred notably to her upset at finding the Exoskeleton. “*He thought it would be a joke and its only a spider... I really don’t like spiders and had to ask friends at work if they can remove it. I had drafted an email to send after the first time but didn’t get round to sending it then the other item was left so I sent the formal complaint*” (p.77). A little later, she then said “*I really don’t like spiders, even house spiders I struggle to deal with. I do remember the conversation, he was saying his neighbour has snakes and insects and he sometimes looks after them*”. When asked to explain her feelings with the question “*Would you say you felt intimidated, bullied or harassed*”, Driver A responded “*All the above*” and became unsettled. She then said “*After telling him once already, it’s horrible, I don’t expect to come to work and there be a tarantula skin in my pigeon hole, I really don’t like them and I shouldn’t have*

to deal with that". Very little direct reference is made to the snakeskin or any particular upset that item, of itself, generated. I find it likely therefore that Driver A was most unsettled by the Exoskeleton and the fact that she felt her objection to the pranks had been ignored. She was not greatly distressed by the snakeskin itself, although it was plainly not a welcome discovery in her pigeonhole.

25. Driver A doesn't appear to have needed to take any time off work in response to either incident. The investigating officer's report suggests she may have done after the second incident (p.102), but this statement is expressly based on the Claimant's initial written complaint. The Claimant does not record there that she took any time off. According to the meeting minutes, the issue was not discussed at that meeting. In addition to my finding on the general nature of the report (addressed below), I therefore attach little weight to this statement and find that Driver A likely performed all her duties after both incidents, albeit her concentration may have been affected to an extent. Both in her email and at the investigation meeting, Driver A stated that the outcome she was seeking was for the Claimant's pranks to stop, nothing further.

26. Driver A's complaint resulted in an investigation being arranged. A fact-finding meeting with the Claimant took place on 15 September 2022. At the conclusion of the meeting, the Claimant was immediately suspended as a precautionary measure pending a full investigation. The suspension was confirmed in writing with an instruction to the Claimant not to attend his workplace without prior permission and not to "*have contact or discuss this case or your suspension with any work colleagues other than your representative or companion*" (p.73).

27. A formal investigation then took place that involved the investigating officer holding meetings with Driver A and the Claimant, on 27 and 28 September 2022 respectively. Minutes of these meetings were included in the bundle and I have already referred to extracts of these. At the meeting, the Claimant presented a written letter of apology. It began "*I would like to start this meeting, by offering my sincere apologies to [Driver A]*" (p.106). He knew Driver A would not be at the meeting (there was an attendance list on his invitation to the meeting (p.74)) and that he was not permitted to contact her directly. He said at the meeting "*I would like to, if possible, apologise to her directly*" (p.81). It is plain that the Claimant had intended both for his apologies to be transmitted to Driver A, and for the Respondent to note his apology.

28. Surprisingly, and alarmingly, the Respondent has not been able to confirm whether or not the letter or apology was ever transmitted to Driver A. I find on the balance of probabilities that it was not. The investigation meeting with Driver A was the day before that with the Claimant and she was not subsequently consulted. There has been no trace of the letter being passed on or of any reply being made by Driver A, whether to the Claimant or Respondent. Neither the apology itself, nor the letter, nor any reply to it, is referred to at all in the investigation report produced subsequently on 10 November 2022 (save that the letter was exhibited to it). No reference is made to the apology, or any reaction to it, in the email sent to the Claimant by the investigating officer on 4 October attaching draft minutes of their meeting,

which was only a few days after the apology was provided (p.107). The Claimant's email response reiterated that he hoped he had been "*able to convey in the meeting my sincere apologies to [Driver A]*", but no reply appears to have been given to that reminder.

29. A recommendation came out of the investigation, which was to conduct a disciplinary hearing. A copy of the investigation report was in the bundle (pp.99-110).

30. There was a clear error in this report. On the second page of the document in the "Background" section, the document records that a conversation had been held between the Claimant and Driver A in the mess room at Bletchley where insects were raised. I have already referred to this conversation above. The report states that this is "*firmly refuted by [Driver A], there was nothing of note to lead up to the events*". That is incorrect; from the minutes of her meeting with the investigating officer it is clear that it was accepted by Driver A that there had been a conversation in the mess room raising her dislike of insects and it was discussed at some length between her and the investigating officer.

31. There were also some firm findings made without recording issues that were disputed or accurately recording the Claimant's version of events. In the second bullet point in the same "Background" section, the officer fails to record that the Claimant did not accept the extent of the exchange concerning the snakeskin that Driver A alleges took place. This contrasts markedly to the approach taken in the preceding paragraph highlighted above.

32. Further down the report, under the heading "Findings", next to the third bullet point the report states that Driver A "*became very distressed and made this clear to Jonathan Richardson the following day*". The following bullet point repeats that Driver A made it "*quite clear that she felt shocked and intimidated*". Similar words are used in the "Conclusion" section of the report. The record of the Claimant's position was next to the sixth bullet point, where the report states the Claimant "*admitted intent to cause shock and claimed to be unaware of the full extent of his actions. He could not explain why he seemed to target [Driver A]*". The Claimant's view expressed at the investigation meeting had been that he had only intended to perform a joke, believed that Driver A had understood that and gave a reason why he had directed the joke at Driver A – during their conversation he had picked up "*to some form of degree*" that she didn't like spiders and thought he would play a joke on her (p.80). Next to the eighth bullet point, the report states that the Claimant "*admitted the fact that [Driver A] had been so enraged and upset that she called him a fucking twat*". He accepted the words used, but not the tone or the extent of Driver A's feelings. At the investigation meeting, he had clearly explained his belief the conversation was "*normal banter*" (p.81). Next to the tenth bullet point, the report states that the Claimant "*could not account for his targeting of only one of a possible 200 other colleagues*". As above, he had given an explanation at the investigation meeting.

33. No record of the Claimant having apologised for his actions appears in the report, save that the Claimant's written apology was exhibited to it.

34. In light of all the above, I find the report was noticeably one-sided. For reasons that will be explained later, this finding is not of major significance on its own, but is relevant in numerous respects. Nothing I say here is meant to detract from the upset that Driver A suffered or suggest that the investigating officer was not recording his understanding of her feelings. I simply draw attention to the fact that the Claimant's position was not accurately recorded, and in certain respects not at all.

35. The report's recommendation to proceed to a disciplinary hearing was accepted. A copy of the invitation letter was included in the bundle (p.91) and was largely repeated when the hearing was re-arranged for a later date (p.111). The first paragraph of both letters indicates to the Claimant that he had "*been charged with the following allegations of gross misconduct: Placing offending items in the pigeonhole allocated to a colleague, which has caused the individual to feel bullied, harassed and intimidated, in contravention of the WMT Bullying and Harassment Policy*".

36. The disciplinary hearing went ahead. The Claimant was given the opportunity to present his version of events at that hearing. He did so. The Respondent concluded that placing the Exoskeleton and snakeskin in Driver A's pigeonhole amounted to bullying, in circumstances where Driver A had asked the Claimant, after the first occasion, to desist. The Claimant was summarily dismissed for gross misconduct. Minutes of the meeting were included in the bundle (pp.113-125), together with a copy of the letter confirming the dismissal (pp.126-127).

37. The opening remark given by the Respondent's dismissing officer recognised that the meeting was to discuss "*a clause 9 charge*". As I understand it, "clause 9" is a well-understood reference to gross misconduct, referred to due to the Respondent's previous disciplinary policy.

38. The dismissing officer is recorded as saying the snakeskin "*isn't as shocking as the spider for me*" (p.117).

39. Importantly, the dismissing officer demonstrated his belief that an apology may well have been sufficient resolution to the matter: "*when you had your first interview and we talked about chances to resolve things informally there is a responsibility on you to say I get it, please let me sit down with her and give her a heartfelt apology and sort this out at this point*" (p.117). Later on, the dismissing officer again suggests that there may have been an opportunity to address matters through "*an informal process*" (p.118). He notes Driver A may not wish to sit down with the Claimant and hear that apology, but in response to a comment of the Claimant. He does not suggest this would be likely and had not discussed the issue with her.

40. Later still, the minutes of the meeting record once again the dismissing officer's view, even more clearly in this instance: "*I do think there is opportunities on both sides to deal with this informally, in my view*" (p.122). He goes on to state that he was "*not sure why [an informal process] didn't happen*". The dismissing officer describes the incident as a "*nasty prank*" (p.123).

41. At the meeting, there is a general discussion of pranking in the workplace, where the Claimant confirms that he has been subjected to pranks himself and accepts them as jokes (p.120).

42. The dismissing officer's findings are recorded as follows (p.124): "*Your intention was to shock [Driver A]… Placing a colleague into a state of shock as you suggest could have serious implications to [Driver A] and to the public and the travelling public*". The Claimant's actions "*can be considered as bullying*". He describes the pranks as "*unwanted and unwelcome jokes*". He then arrives at the following conclusion: "*Considering all the above, I find the case proven and a breach of trust and confidence has irretrievably broken down. Therefore, I consider this to be gross misconduct and dismissal. The charge of placing items in a pigeonhole allocated to a colleague, which has caused to individual to feel harassed, bullied and intimidated, in contravention of the harassment and bullying policy*".

43. The conclusions are reflected in similar terms in a letter confirming the outcome (pp.126 - 127). At the hearing, the dismissing officer confirmed the main reason he arrived at the decision to dismiss was that the Claimant had ignored Driver A's request to stop his pranks.

44. The Claimant appealed the dismissal, there was a further hearing and the dismissal was confirmed. The appeal officer stated in his statement and was clear at the hearing that the ground of appeal was against the severity of the sanction only and that he focused on that issue. In questioning at the hearing he confirmed he did not review the findings of bullying or gross misconduct. Nevertheless, he considered the Claimant's submissions about his motives and his understanding of Driver A's request to stop his pranks (which I have described above). Again, minutes of the hearing and a copy of the confirmation letter were included in the bundle (pp.134-145).

45. The appeal officer is recorded as stating: "*you raise a few points on process and informal and mediation and I can see why that would be a challenge but the driver after incident 1 raises it with you directly, she felt it had been dealt with and didn't informally go further as she informally raised it directly with you. And then it happens again and then it goes formal*" (p.140). It isn't entirely clear on first view what the first part of this excerpt means. On analysis, I find it is clearly a response to points raised by the Claimant's union representative, who highlighted numerous issues with how he perceived the Claimant's disciplinary process had been conducted. He raised a point that the Respondent's harassment and bullying policy had not been properly followed:

the informal process, including consideration of mediation, had not been engaged with after Driver A initially raised her complaint with her line manager, and there had been a general failure to pursue its main purpose of seeking to "*sort and resolve difficulties*" (pp.135-136). He raised a separate point about the conduct of the initial investigation, which are not dissimilar to my own observations above (p.139). These appear to be genuine concerns raised with some substance. The appeal officer had adjourned the hearing to consider them. I find on balance that the appeal officer recognised these issues and that he believed there had been scope for an informal resolution to Driver A's complaint, which was not pursued as far as it could have been. That is what I find he means when he is recorded as saying "*I can see why that would be a challenge*". The second part of the statement is clear that the appeal officer believed the first incident could have been settled informally, had matters gone no further.

46. The appeal officer repeats his view of the first incident (p.142): "*I do think there was a chance to resolve it*". He then said: "*It was raised formally, you've been through the process*".

47. The Respondent has two policies that are relevant to my decision. The first is the "harassment and bullying policy" with which I was provided a copy (beginning on p.172).

48. The Respondent's definition of bullying is outlined as follows (p.173):

Bullying may be characterised as persistent or isolated acts of offensive, intimidating, malicious or, insulting behaviour, an abuse or misuse of power intended to undermine, humiliate, denigrate or injure the recipient.

49. The policy states that (p.177):

Mediation can be a good way of dealing with bullying, discrimination or harassment situations depending on the nature of any allegations.

As part of the informal resolution or as outcome to the formal investigation, a mediation meeting may be recommended to resolve the matter between the two parties.

50. Two paragraphs further down, the policy states that (p.178):

Discrimination or bullying actions can range from unintentional misunderstandings and lack of awareness through to deliberate and malicious acts.

51. The concept of bullying as outlined in this policy is broad. It encompasses unintentional acts and envisages that an appropriate response to some instances of bullying might be nothing more than an informal meeting. Bullying acts need not necessarily result in any more serious outcome.

52. The Respondent also has a disciplinary policy (starting at p.150). The introduction of the policy states that:

    In cases in case of minor misconduct it may be appropriate for a manager to address this informally.

53. The Respondent's definitions of misconduct and gross misconduct are provided as follows (p.158):

    Misconduct: Any conduct which is not deemed to be gross misconduct (outlined below) will not normally lead to an employee being dismissed, where this is the first instance of a breach of discipline for minor or serious offences.

    Accordingly, serious offences can be considered as misconduct rather than gross misconduct.

    Gross misconduct: These are allegations, which if upheld at the disciplinary hearing, may cause the trust and confidence that must exist between the company and its employees to be breached and may result in an employee's dismissal.

    Examples of Gross Misconduct may include:

- *Persistent or deliberate discrimination or harassment or incitement to harass or discriminate on the grounds of race, sex or gender reassignment, religion, disability, age or sexual orientation.*
- *Bullying and harassment, which may include verbal abuse, physical assault or the threat of violence.*
- *Fighting, as the aggressor, in the workplace.*
- *Theft or Fraud.*
- *Serious insubordination or repeated failure to follow a reasonable instruction.*
- *Bringing the company into serious disrepute...*
- *Serious or repeated breaches of Health and Safety rules and procedures.*
- *Causing loss, damage or injury through serious negligence.*
- *Falsifying or failing to disclose relevant information concerning employment, including previous convictions not declared to the company.*

54. The policy then states that the list is not exhaustive. However, it is clear that the Respondent's definition of gross misconduct involves conduct that is of an extremely serious nature.

55. The policy provides for two processes for handling disciplinary issues: an informal and formal process. Section 5 of the policy addresses the process to

adopt when a formal disciplinary hearing has been arranged. Section 5.4 addresses the "outcomes/sanctions" that might be decided upon at the conclusion of a disciplinary hearing:

Where following an investigation it is not thought that counselling or informal action is a satisfactory way of dealing with the issue then the following formal disciplinary sanctions that may be awarded are as follows.

The informal and formal processes are therefore not mutually exclusive, which reflects the policy's intention to address issues of conduct and behaviour appropriately. There is a wide range of possible responses to any established acts of misconduct (whether gross or not), ranging from informal action, through to formal warnings, and ultimately dismissal.

56. Reading the two policies together, it is very clear that the Respondent does not consider all acts of bullying to constitute gross misconduct, or even serious misconduct. Of course serious incidents could be.

57. The Claimant had received a written warning for misconduct in accordance with this policy on 2 February 2022, which was due to remain in place for twelve months. It was therefore "extant" at the time of the Claimant's dismissal. It was taken into account in the decision to dismiss him, but was not given any great emphasis in that decision. In his witness statement, the dismissing officer states that it played no real part in his decision. The warning related to an operational incident involving stopping a train too far along a station platform, and how the Claimant had reported it. It was not related to bullying allegations.

The Issues

58. The parties very helpfully provided an agreed list of issues in advance of the hearing. I will focus on the unfair dismissal claim first, followed by the claim for wrongful dismissal. I have already established that the reason for dismissal was misconduct, which is a potentially fair reason for dismissal in accordance with s.98(2) of the Employment Rights Act 1996 (the "Act").

59. In relation to the unfair dismissal claim, did the Respondent act reasonably in all the circumstances in treating the Claimant's conduct as a sufficient reason for dismissal? This issue includes considering whether:

59.1 The Respondent had formed a genuine belief, on reasonable grounds, that the conduct was a sufficient reason for dismissal;

59.2 at the time the belief was formed, the Respondent had carried out a reasonable investigation into the Claimant's conduct;

59.3 the Respondent otherwise acted in a procedurally fair manner; and

59.4 the dismissal was within the range of reasonable responses.

60. In relation to the wrongful dismissal claim, did the Claimant's behaviour constitute a fundamental breach of his employment contract such as to entitle the Respondent to dismiss the Claimant without notice?

The Law

61. As to the law that is applicable to these claims, it is relatively straightforward. S.94 of the Act provides a right for an employee not to be unfairly dismissed. S.98 of the Act provides the framework within which that right is to be assessed. I note in particular s.98, ss.4, which is as follows:

    Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether 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.*

Conclusions

62. Firstly, I note that there is no dispute between the parties that the Claimant's actions were ill-judged pranks that amounted to misconduct. The Claimant has accepted his actions were inappropriate and unacceptable in the workplace. He has not disputed that he caused Driver A upset. Quite rightly, no party or witness has suggested that Driver A had done anything wrong or unusual at any stage leading up to the Claimant's dismissal. In fact, she has shown considerable bravery in promptly raising concerns about the Claimant's conduct and in seeking to have them resolved.

63. The issues for me to determine are whether it was fair or unfair for the Respondent to have dismissed the Claimant as a consequence of his actions, and whether it breached his employment contract to do so summarily. I will consider firstly the unfair dismissal claim, to determine whether the Respondent acted reasonably in reaching its decision. This question requires me to assess the Respondent's actions and decisions; not to decide what I think happened or what should have been the appropriate response to the Claimant's actions. Secondly, I will consider whether the Claimant was wrongfully dismissed. This question is distinct and requires me to make my own finding as to what occurred and whether the Claimant's conduct was so serious as to amount to a fundamental breach of his employment contract entitling the Respondent to dismiss him without notice.

Unfair Dismissal

64. Did the Respondent act reasonably in treating the Claimant's conduct as sufficient reason for dismissal? I find that it did not, taking into account at all

times the size and relative sophistication of the Respondent's undertaking. In summary, I find it did not hold a genuine belief, on reasonable grounds, that the Claimant's conduct was sufficient reason for dismissal. For similar reasons, the dismissal did not fall within the range of reasonable responses to that conduct. In reaching its decision, the Respondent adopted an unfair procedure, including by failing to take proper account of its disciplinary and harassment and bullying policies. I have some concerns with the manner in which the Respondent conducted its investigation, but I conclude that it was not unreasonable overall. However, my concerns likely contributed, at least in part, to the other failures that I have identified. Most of the failures I have found are intertwined and do not necessarily sit solely within one or other of the broad categories outlined in the list of issues. However, that is a helpful framework to breaking down my overall conclusion and I will follow it. Any one of those failings would have led me to find the claim of unfair dismissal well-founded.

Was the Respondent's investigation reasonable?

65. I am mindful that the standard of investigation needs only be reasonable in the circumstances, which is an employment environment where many relevant facts were not in dispute. I should not hold the Respondent to the standard of, for instance, a criminal investigation. However, it is important to bear in mind the seriousness of the allegation (gross misconduct) and potential sanction, which in this case was dismissal.

66. The Claimant submitted some specific concerns with regard to how the investigation had been run or more generally. I will outline what appear to me to be the two main ones.

67. Firstly, the Claimant's request to call witnesses had been unreasonably refused. Linked to this point, he was concerned about the Respondent's failure to test Driver A's evidence against that of the Claimant. She had given her account first in time on 27 September 2022. The following day, the Claimant had his meeting and disagreed with elements of what Driver A had said. The Claimant's account was not put to her to gauge her response.

68. Secondly, there had been an absence of investigation around the extent of training the Claimant had received on the Respondent's harassment and bullying policy; it was unfair for the Respondent to have expected the Claimant simply to be aware of appropriate workplace behaviour.

69. The Respondent submitted in response that both of these issues were relatively minor in the circumstances. The facts had been broadly agreed, any inconsistencies highlighted went to points of detail and statements had already been taken of the parties. The Claimant had undertaken induction training on harassment and bullying and should have been aware of appropriate conduct in the workplace. There was no need to do more in relation to the investigation.

70. I largely accept the Respondent's submissions and that the investigation conducted was reasonable overall. It was certainly not perfect, but that is not the standard to which the Respondent should be held. It would have been reasonable, for instance, to approach Driver A's line manager for his account of events. He was the first identified person that she contacted about the incidents and he would have been well-placed to comment on how she raised her concerns and whether informal resolution had been considered. It appears that the Respondent at least attempted to have the line manager attend the disciplinary hearing, although he ultimately did not. A statement could have been sought instead. The Respondent could also have sought views from Driver A on the Claimant's statement. Both witnesses called by the Respondent candidly accepted that either or both steps may have provided useful further information, albeit they found it rather unlikely.

71. Bearing in mind what was at stake, and the considerable importance of what exactly was said between Driver A and the Claimant after the first incident, it might have been sensible to have taken those steps. However, Driver A's line manager had not heard the conversation and Driver A had already given her account. it is not for me to make findings about what the Respondent might or should have done; I must decide whether what was done was reasonable. I find it was.

72. As to the harassment and bullying policy, training appears to have been given to the Claimant at some point in early 2018. He cannot recall ever receiving it. Questioning of the Respondent's witnesses showed that little emphasis appears to be placed on the training. Rather, employees are simply expected to be aware of professional standards of conduct. This case does not concern a particularly complex point of policy or expected behaviour, so there was nothing unreasonable in the Respondent deciding not to investigate whether specific policy training had taken place or not.

73. I also considered the investigation process as a whole, in light of the evidence, and I find that it was reasonable overall in the circumstances. However, there is a point arising from my findings of fact related to the investigation report to which I will now return. I have found it was noticeably one-sided, which is concerning. I am mindful however not to overstate the issue and hold the investigating officer to any higher standard of inquiry than the Respondent in general. I also bear in mind that the Claimant had the opportunity to correct any inaccuracies or potentially misleading statements at the disciplinary hearing. It is for those reasons that I do not consider it rendered the investigation process, as a whole, unreasonable. It may be relevant to other issues though, as I will now explain.

74. At the outset of the disciplinary process, the Respondent invited the Claimant to a fact-finding meeting at which he was suspended. He was told that there may be an allegation of harassment or bullying to answer. The next stage was the investigation, after which the report was produced. This document provides the basis for a decision on whether to send the matter to a disciplinary hearing, and on what grounds. If that is done, the report forms an important part of the disciplinary hearing bundle, and then the appeal bundle.

It is the first and main document that all of the Respondent's decision-makers read.

75. On reading that report and its findings, it is unsurprising that a disciplinary hearing was called. Similarly, due to the wording of the report, it was far more likely that the allegation the Respondent chose to pursue against the Claimant would have been gross misconduct (as happened), rather than "simple" misconduct.

76. This in turn impacts on the disciplinary hearing. The opening remark of the dismissing officer gives a reference to clause 9, which refers to a gross misconduct allegation. He was aware of the severity of the allegation from the outset, and the report gave him his first impression of the case.

77. The role of the report is therefore relatively wide-ranging, and I will refer to it again. But, at this point, all that I need to determine is whether the decisions taken by the Respondent were reasonable at each stage of the disciplinary process. It has a wide discretion on these issues. It was not irrational to consider bringing an allegation of gross misconduct, on the basis the officer considering it could reject the allegation and find, for instance, misconduct instead. The disciplinary and appeal hearings appear to have been reasonably well-conducted, impartial and were approached by the relevant officers with open minds. Ultimately, the drafting of the investigation report does not render any of the steps taken in the investigation process unreasonable.

<u>Did the Respondent hold a genuine belief, on reasonable grounds, that the Claimant's conduct was sufficiently serious to warrant dismissal?</u>

78. The Respondent's disciplinary policy explains when the Respondent considers dismissal will be considered appropriate for misconduct. Principally that is when an employee is found to have committed an act of gross misconduct, as in this case. It has not been suggested to me that, had the Claimant's conduct been considered simply "misconduct", he would have been dismissed. He had an extant written warning on his file at the time of his dismissal, but for an issue unrelated to bullying. For these reasons, as well as my conclusions below on the reasonableness of the decision to dismiss generally, I find that a finding of "misconduct" would not have constituted reasonable grounds for dismissal in this case. The answer to this question therefore turns on whether the Respondent had reasonable grounds for believing that the Claimant's conduct amounted to gross misconduct. I find that it did not.

79. It is not for me to determine whether the Claimant bullied Driver A. The Respondent has found he did, after considering its harassment and bullying policy, and that is a rational view. Regardless of classification, all parties have accepted the Claimant's pranks were unacceptable and could be considered misconduct. The Respondent held a genuine belief of that. I find however that

the Respondent did not have reasonable grounds for believing that the Claimant's actions amounted to *gross* misconduct.

80. The first reason for this finding relates to how the dismissing officer reached his conclusion that the Claimant had wilfully ignored Driver A's request to stop his pranks. This was the principal basis to his finding of gross misconduct.

81. The dismissing officer found that Driver A had clearly told the Claimant to stop his pranks, and that the Claimant had understood the message. The Claimant had asserted he couldn't recall that and that, as his conversation with Driver A had been "jokey" or "banter", involving saying things that weren't meant seriously, he had not appreciated or understood the message in any event. As to which words were spoken, the dismissing officer's finding was clearly reasonable. He assessed the available evidence and reached a rational view. As to the issue of the Claimant's understanding, this was just as critical to the dismissing officer's overall decision. The decision to make a finding of gross misconduct, and to dismiss on that basis, rested entirely on whose version of events the Respondent chose to believe.

82. In these circumstances, it was incumbent on the dismissing officer to conduct a full and proper analysis of the evidence available. I have already concluded that it was reasonable not to refer back to Driver A or her line manager for additional evidence; the two people involved had given their views. In this case, there were two documents giving Driver A's account – her short email complaint and the minutes of her meeting with the Respondent's investigating officer, stretching to just over two sides of A4 paper. In the latter, Driver A is recorded as stating that the tone of her exchange with the Clamant had been *"over the top banter*". This evidence supported the Claimant's position. I find this statement was overlooked by the Respondent. It is not referred to at any point in any of the other evidence before me. It raises doubt about how clear Driver A's message had been to the Claimant. Had the dismissing officer taken account of this statement, he may have decided to seek further views from Driver A. He may have reached the same decision. He may have decided to believe the Claimant. Either way, in light of the severity of the sanction, taking proper account of this evidence was crucial to making a rational and fair decision. It may be that the investigation report, which failed to refer to this evidence in its account of the exchange, or to present the situation as impartially as it could have, played a role in this oversight. All that matters is that I have found the evidence was overlooked, and I don't find that the decision would necessarily have been the same regardless of this.

83. The appeal officer, whilst not focusing on this issue, considered it to an extent during the course of the appeal. He either agreed with the dismissing officer or found that the Claimant should have properly understood Driver A's concern. In relation to the former finding, it suffers from the same failure to take account of this evidence. To make a finding that Driver A had been clear with her request such that the Claimant should have understood it, requires the same consideration of the tone of the conversation. It also formed no part

of the actual case for concluding gross misconduct and dismissal. In any event, the appeal officer was well aware that his role was not to reconsider the bullying allegation or gross misconduct findings afresh, which is at the heart of this particular issue.

84. In my view this conclusion is sufficient for me to find that the Respondent lacked reasonable grounds in the particular circumstances of this case for believing the Claimant had committed gross misconduct, but there are further factors that support this conclusion.

85. My second reason relates to the Respondent's assessment of the "shock" the prank could have caused. I have found that both the dismissing and appeal officers accepted that the Claimant had intended to perform pranks, no matter how poorly judged they proved. All parties appreciated what a prank was. Its purpose is to elicit a short-lived reaction of shock or surprise, followed by some sort of feeling of relief and good humour. A loose parallel in this case is planting the sort of rubber spider that is no doubt still available in any toy shop on someone's shoulder. By saying this, I don't intend to trivialise Driver A's upset and fully appreciate that in this case the Exoskeleton was genuine and well capable of causing greater shock. I simply wish to demonstrate that a prank is a common and well-understood phenomenon.

86. Despite this quite straightforward understanding, both officers have sought to an extent to "deconstruct" the nature of the Claimant's prank by exploring his intention behind it. They concluded he meant to "shock" Driver A, to a significant degree, a finding that was material to an extent to both of their decisions. In my view, this was a distinctly artificial process. Considered objectively, pranks are peculiar. Their purpose is to cause a degree of upset or discomfort, albeit fleeting. On that basis, many, if not all, pranks could be considered as bullying. That makes them no less commonplace. It is very clear, and the Claimant openly accepted at the hearing, that some pranks may well be considered by a reasonable employer to be so serious as to constitute gross misconduct. Plainly not all will, regardless of whether classed as bullying or not. There is a real conceptual difficulty in attempting to rationalise what a prank is, and why one would ever be acceptable, which is what has clearly led to the amount of exchanges between the dismissing officer, the appeal officer, the investigating officer and the Claimant about the purpose and intentions behind the prank in this case. I find it plainly unreasonable that at the conclusion of this rather contrived process, the Respondents' officers in this case took the Claimant's pranks as being intended, or capable of, inducing some sort of lasting state of considerable shock in Driver A, sufficient to potentially lead to catastrophic accident or significant business interruption. Such a conclusion is inconsistent with the officers' acceptance that the Claimant had sought to perform a prank, and bearing in mind the specific nature of these pranks, which involved passively placing the Exoskeleton and snakeskin in a pigeonhole in open view. It was open to view to other colleagues, but nobody who saw either object raised any concerns. Drivers are aware of their responsibilities and are expected to

declare if they are not in condition to drive. The sort of prank performed in this case was plainly very ill-judged but extremely unlikely in reality to have led to such serious impacts. Entirely unsurprisingly, it did not in fact result in anything of the sort. The finding might have been a reasonable conclusion had the Exoskeleton been concealed somewhere in Driver A's train cabin for instance, which would clearly be capable of being considered a far more serious prank, but the circumstances in this case are far removed from that.

87. This was not a reasonable ground on which to base, even in part, a belief in gross misconduct or that the sanction for any such finding should be dismissal. The dismissing officer stated at the hearing that this had been only a secondary consideration. On its own, therefore, I do not find this conclusion deprived the Respondent of reasonable grounds for its belief in gross misconduct. But it supports my overall conclusion.

88. My final reason in relation to this issue concerns the Respondent's assessment of the severity of the Claimant's actions, which is closely related to my finding on whether dismissal generally was within the range of reasonable responses to the Claimant's conduct. I will return to that point later.

89. The principal basis to the gross misconduct finding was that the Claimant purposefully decided to perform a second prank against Driver A's express wishes. To be clear, in my view it is perfectly rational to consider such a fact as being more serious than either prank in themselves. But the context of these particular pranks should not be ignored. They didn't involve any risk of physical harm to Driver A, they were not of an abusive nature, they were largely harmless, childish pranks. The second prank was by all accounts considerably less spooky than the first.

90. I have found as fact that both the dismissing and appeal officers believed that Driver A's complaint might have been capable of informal resolution. Whether or not that could in fact have been successfully explored is not relevant at this point. The officers' belief is what is important: neither viewed the Claimant's acts as of the sort that would preclude informal resolution. I appreciate that these comments were recorded in minutes of disciplinary and appeal meetings, made in advance of each officers' final consideration and decision. For that reason, I have approached this issue with some caution. The officers' beliefs give a very clear indication that neither considered the Claimant's actions to have been inherently of a very serious nature. The dismissing officer repeated his belief on several occasions, after having read an investigation report that was unfavourable to the Claimant and demonstrated good knowledge of the circumstances. The appeal officer came to a similar view after having had the added knowledge that the Claimant had by that point actually been dismissed, and the benefit of seeing the minutes of the disciplinary hearing and the dismissing officer's conclusions.

91. Informal resolution is clearly stated in the Respondent's disciplinary policy to be appropriate only in cases of minor misconduct. The harassment and bullying policy places more emphasis on informal resolution but remains clear that in serious cases the formal disciplinary process would be appropriate. It is difficult to see how situations in which informal resolution is envisaged can, on the same facts, also be considered to raise issues that are not only possibly serious misconduct, but so serious as to amount to potential gross misconduct warranting summary dismissal. In this particular case, the Respondent's belief that informal resolution, such as mediation, might have been an appropriate avenue to pursue was plainly a rational one. Driver A's sole stated concern was to ensure the pranks stopped. The Claimant had apologised on several occasions, stated that he had now understood Driver A's depth of feeling, had learnt a lot about appropriate behaviours generally and that he would stop his pranks. The Respondent can reasonably reject these assertions, choose a different course, possibly consider the Claimant's actions serious misconduct. But, on the particular facts of this case, it had no reasonable grounds to consider the Claimant's conduct was so serious as to amount to gross misconduct, akin to bullying acts involving assault or threats of violence. The shift right to the other end of the disciplinary sanction spectrum, bearing in mind the very serious acts that gross misconduct represents, is simply too great to be considered reasonable in my view. This conclusion could be framed in terms of the Respondent not holding a "genuine belief" in gross misconduct. When I turn to analysing the process followed overall below, I touch on this point further in expressing my view of how the finding of gross misconduct came to be made.

<u>Was the decision to dismiss within the range of reasonable responses to the Claimant's misconduct?</u>

92. In large part I have addressed this issue in my preceding conclusion and will repeat myself to an extent.

93. It is important to take a step back and look at the basic facts behind this case. The Claimant played two childish pranks, involving placing, firstly, a tarantula's shed exoskeleton, and, subsequently, a snakeskin in a colleague's pigeonhole. He himself is comfortable handling exotic pets. Neither item was concealed, could move or could cause any physical injury. He performed the pranks on a colleague who he suspected would have a brief uncomfortable reaction. Unfortunately for all, Driver A had far greater a reaction than he had anticipated. The first item was more life-like and understandably caused greater distress, as far as the item itself was concerned. Nevertheless, it was disposed of without difficulty by a different colleague, resulted in no particular disruption, and, had matters ended there, would have led no further.

94. However, matters did not end there. After a brief exchange about it, where Driver A sought to bring an end to the pranks, the Claimant placed a snakeskin in her pigeonhole. It was less life-like and less distressing. It was,

though, of more concern to Driver A because it made her feel more intimidated. She had believed she had clearly requested the Claimant not to perform any further pranks, indeed this very prank. Still, there was no doubt in Driver A's mind who was responsible. This was not a covert bullying campaign the Claimant had instigated to seek to unstable her. If he had had the chance, he likely would have raised it directly with Driver A the next time he saw her, as he had done previously, expecting to generate further "banter".

95. Again, no significant disruption was caused. Driver A's feelings of intimidation had understandably increased, and she quite rightly acted on that by asking her manager to resolve the issue. She showed courage to do so. There is no record of what exactly Driver A discussed with her manager, but her email is quite clear that her concern was to ensure the unwanted pranks were brought to an end. She did not suggest she wanted any particular sanction to ensue, that her working relationship with the Claimant had been destroyed, that she needed counselling, wished to be placed on lighter duties for a period, have some time off, or anything similar.

96. The Claimant immediately admitted what he did. As soon as he realised the distress he had caused he apologised for it and committed not to perform any further pranks. The Respondents' officers queried this, finding his apology insincere and that he had already had the opportunity to desist and shouldn't have needed to be told a second time. But this is not an incident where a manager or a colleague had had a quiet word in the Claimant's ear, or where he had been given any formal warning. It was after a brief informal exchange, the precise nature of which had been unclear, which had been described by both Driver A and the Claimant as "banter". Whether or not the Respondent's officers considered it sincere, he had apologised, and on numerous occasions. If he repeated his actions, the Claimant would no longer have any case to claim misunderstanding. There was nothing of note on his file to suggest he wholly misunderstood appropriate behaviour in the workplace. He had never performed pranks at work previously, although he had been subjected to them. His actions resulted in no serious hurt or consequence and, on any rational view, could not have done so.

97. Standing back, it is very difficult to see how this sequence of events comes close to warranting dismissal. As mentioned above, the Respondent's dismissing and appeal officers mooted whether an informal resolution to Driver A's complaint might have been possible. It was reasonable to consider that. I accept that intentionally performing pranks contrary to a direct request would render a matter more serious than the prank itself. But the nature of the childish pranks in this case, and that the second was less spooky, is important context. The pranks didn't involve any risk of physical harm to Driver A. They were not of an abusive nature. Even if the Respondent had properly reached the decision the Claimant wilfully ignored Driver A's request, I cannot accept that it would have been reasonable to consider the Claimant's actions overall as any greater than serious misconduct, not gross misconduct.

It is not for me to decide what sanction would have been appropriate, but it is clear that, for instance, a warning, final or otherwise, would have left nether the Claimant nor Respondent in no doubt as to the ramifications of the Claimant's future conduct. Of more direct relevance, even if the actions were to have been considered serious misconduct, dismissal would not have been within the range of reasonable sanctions. I reach that conclusion taking account of the Respondent's policies and the written warning on the Claimant's file, which was for an unrelated conduct issue that could not in my view have materially impacted on the severity of sanction in this case.

<u>Did the Respondent adopt a fair procedure in coming to its decision to dismiss?</u>

98. The Respondent has two policies relevant to this case. The first line of the disciplinary policy states: "*The primary aim of the disciplinary procedure is to improve employees' conduct and behaviour*" (p.156). The focus of the harassment and bullying policy is to ensure a healthy working environment. Both policies are intended to be flexible in how their outcomes are achieved, and both outline some informal processes that may be appropriate. There are understandably different policies and processes for pursuing informal or formal resolutions to situations, but they are not mutually exclusive. Informal action is considered a possible resolution to a formal process in both policies. The Respondent has a broad definition of bullying and envisages that not all instances of bullying will be serious, may be unintentional, and may be capable of swift, informal resolution.

99. In this case, the Respondent's dismissing and appeal officers both believed there was scope for informal resolution to Driver A's complaint. There was no evidence to show whether Driver A's line manager considered this at the outset and, if so, why he chose not to pursue mediation or some other informal course. It is not for me to determine what should have happened. It was not unreasonable or unfair to decide formal investigation was appropriate. At the outcome of the investigation, by the way he drafted the report, it is clear that the investigating officer did not have informal resolution on his mind. It was not unfair or unreasonable for him to have reached that view, despite the reservations I have about how he presented the situation in his report. These decisions were largely about process, not final outcome.

100. The Respondent's policies do not provide that either point should be the end to consideration of informal resolution. The Respondent's policies focus on improving behaviour and ensuring a healthy working environment, not on following any rigid course.

101. In this case, however, there is a clear suggestion from the evidence this is what happened. Once the "formal" route was chosen, the Respondent's officers felt there was no alternative but to pursue Driver A's complaint to a formal sanction. An allegation of bullying was made. It was considered to be potentially so serious as to amount to gross misconduct and a formal

disciplinary hearing was arranged. The allegation of gross misconduct was the object of the disciplinary hearing. At no point did any of the Respondent's officers refer back to Driver A to see if she might be willing to consider, for instance, mediation, despite the dismissing and appeal officers believing this might have been a sensible resolution to the matter. The dismissing officer stated: "*there are opportunities on both sides to deal with this informally, in my view, at the point of being suspended*" (p.122). He made a similar comment earlier in the meeting. The appeal officer referred repeatedly to how Driver A had wished for the complaint to be "*dealt with formally*" (p.141), despite having no knowledge of what was said at her meeting with her line manager, as if that was the end of any possibility of informal resolution. It is not clear to me why both officers thought the opportunity had passed. The conclusion I reach is that they approached matters as is there was a strict dichotomy in the disciplinary process between informal and formal resolution. Once the formal process had begun, there was no turning back. I do not place any great weight on this conclusion. In itself, it doesn't render any step the Respondent took unreasonable or unfair, but it supports my next findings, which are of more significance.

102. Nothing in the Respondent's policy requires bullying to be considered gross misconduct. On proper reading, it is only very serious bullying conduct that would be. However, that isn't how the issue has been viewed in this case. I find that once the Claimant's actions had been classified as bullying, a finding of gross misconduct flowed directly on, and dismissal from that. No assessment of the severity of the bullying itself was made, and whether it was so serious as to be akin to verbal abuse, physical assault or threats of violence, which are the examples given in the policy of bullying-related gross misconduct. This does not reflect the Respondent's policies.

103. I reach this conclusion on the basis that the disciplinary hearing was very much focused on seeking to establish whether or not the Claimant's actions could or should be classified as bullying. There is nothing unreasonable about seeking to establish that. But, once established, the actual severity of the bullying actions still needed to be properly considered. There was very little in the meeting minutes or dismissal letter that addressed the severity of the bullying, apart from the reference to public safety or wider business impacts, which the dismissing officer admitted were only secondary considerations (and which I have already found were not reasonable concerns to have had in this case). If it was considered as relevant to severity, the risk of repeat had not been referenced in the dismissing officer's conclusions or dismissal letter and could readily have been addressed by sanctions other than dismissal. Rather, the dismissal letter explains how the finding of bullying was made out, and then proceeds directly to say there has been an irretrievable breakdown in trust between the Respondent and Claimant. There is no reasoning in the minutes of the meeting or letter to explain how or why the particular bullying acts were considered so serious as to amount to gross misconduct, less still to have led to a complete breakdown of trust. The appeal officer referred to

the impacts of the actions on Driver A as being a consideration, but this was relevant to the severity of sanction, the issue he was considering. He was not assessing whether the particular acts of bullying were so serious as to amount to gross misconduct in the first place so didn't remedy this failure.

104. A final consideration is the issue of the Claimant's apology to Driver A. I have found as a fact that the Respondent never passed it on to her, despite being asked to do so. The Claimant had been specifically instructed not to contact her or anybody else in relation to the disciplinary proceedings, so had no obvious avenue of reaching out to her that would not open him up to criticism for breaching his employer's clear instruction. He was largely, if not entirely, reliant on the Respondent's investigation officer to do this for him. I can't see any good reason why the apology was not passed on and Driver A's reaction sought. When considering my findings on the noticeably one-sided tenor and content of the investigating officer's report, I find this issue particularly troubling. This is plainly one of the instances, in line with those recognised by both the Respondent's dismissing and appeal officers, where an opportunity to pursue an informal resolution to this matter was inexplicably missed. The Respondent therefore never had the opportunity to ask if Driver A wished to accept that apology as a resolution to her complaint, or as a first step to an informal resolution. If she had accepted, it is highly unlikely the disciplinary process would have proceeded any further. The dismissing officer stated at the hearing that he had asked whether the apology had been passed on, but never got an answer. It is unclear if that is a reference to when he asked the Claimant at that meeting, or to a separate enquiry. Either way, it cannot have been difficult to ask Driver A directly. On its face, this issue may seem relatively trivial. But on analysis, it is far more serious than that in my view. The Claimant's contact with Driver A was entirely dependent on the Respondent. He was instructed not to contact her. It might be said he could have chased up to check or sought to transmit his apology through other means (although it's not immediately clear how he could have done so in compliance with the Respondent's instructions). However, he asked for it to be passed on at his disciplinary meeting and prompted again by email a week later. He should not have had to do anything more and would have had no good reason to believe he had to. He asked for his apologies to be passed on, asked for mediation, asked for Driver A to be a witness at his hearing. He was not able himself to contact her or to seek her consent to any of these steps. Any one of them might have been capable of resolving Driver A's complaint or at least led to a materially different outcome. It may have been reasonable for the Respondent to turn down some of the Claimant's requests. However, it simply cannot be reasonable or fair for the Respondent to have failed to pass on his apology.

105. On a related point, the Claimant raised a specific complaint about the rationale the Respondent had for failing to give credence to the Claimant's apology, which I will address. The Respondent's dismissing officer had reached a view the Claimant's apology was insincere, in part on the basis that

he did not immediately seek to apologise when he was initially confronted with the allegation, whether directly or through his line manager. The Claimant's view was that he had been surprised by the allegation and was immediately suspended with an instruction not to contact anyone about the allegation. He presented his apology on the first occasion he believed he could and repeated it on several occasions. The dismissing officer's rationale was a little difficult to understand, but, ultimately, it appears to me this is a typical situation where the Respondent is entitled to a wide discretion on how to interpret events. On balance, it was not irrational for the Respondent to find the Claimant's apology insincere. But it had been given it doesn't excuse the Respondent from not having passed it on, genuine or not.

106. Taken together, these considerations lead me to conclude that the process the Respondent pursued in dismissing the Claimant was unreasonable and unfair overall. The Respondent failed to take proper account of its policies and failed in its basic duty to pass on the Claimant's apology to Driver A, which may well have led to a different outcome.

Wrongful Dismissal

107. Ultimately, my conclusions above in the unfair dismissal claim address also the wrongful dismissal claim. It was not reasonable to consider the Claimant's actions amounted to gross misconduct or to dismiss him for what he did. To my mind, this necessarily entails that the Claimant did not commit a fundamental breach of his employment contract sufficient for the Respondent to no longer be bound by it and to dismiss him without notice.

108. In any event, I have outlined my own findings of fact on the balance of probabilities and find that the Claimant's misconduct did not amount to gross misconduct or a fundamental breach of his contract. He performed two ill-judged pranks. The Exoskeleton he placed in Driver A's pigeonhole was distressing to her, but was ultimately harmless and easily disposed of. The snakeskin was less disturbing. The pranks were performed in open view. The Claimant intended to elicit a good-humoured reaction. He did not set out to upset or intimidate Driver A. He misunderstood her request to cease his pranks. He promptly apologised when he realised he had done wrong. He agreed his actions could be considered misconduct, but they were far from being so serious as to represent gross misconduct. I find his claim for wrongful dismissal must therefore also succeed.

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Employment Judge Hunt

Date: 24 October 2023

Sent to the parties on:
25 October 2023
For the Tribunal Office