EMPLOYMENT TRIBUNALS

Claimant: Mr. K Taak

Respondent: DPD Group UK Limited

Heard at: Midlands West

On: 20 and 21 May 2024 (Hybrid hearing)

Before: Employment Judge C Knowles

Representation
Claimant: Ms. S Cashell (Counsel)
Respondent: Mr. P Bownes (Solicitor)

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well-founded and is dismissed.

2. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.

REASONS

1. The claimant was employed by the respondent from 17 February 1997 until his dismissal without notice on 7 October 2022. The claimant notified ACAS for the purposes of early conciliation on 14 December 2022, and a certificate was issued on 25 January 2023. The claimant presented his claim form on 21 February 2023.

2. I had to decide the claimant's claims for unfair dismissal and breach of contract (notice pay – "wrongful dismissal"). Claims for holiday pay, a redundancy payment, and for unlawful deduction from wages were dismissed on withdrawal and form part of a separate judgment.

Documents, evidence and procedure

3. The final hearing had initially been listed to take place by video. At the claimant's request, it proceeded as a hybrid hearing, with the Claimant attending the tribunal in person.

4. It was agreed at the start of the hearing that the tribunal should decide issues of liability first (and I decided that this should include Polkey and contributory fault). I discussed with the parties' representatives what the issues were in the claims, and it was agreed that the issues I had to decide were those I have set out below. Before I heard evidence Ms. Cashell confirmed that in relation to the unfair dismissal claim, the claimant did accept that the reason for dismissal had been the potentially fair reason of conduct and that he was not suggesting that was a "sham" reason. He did not accept that dismissal for that reason was within the range of reasonable responses or fair.

5. In order to decide the issues, I was provided with an agreed hearing bundle of 459 pages. Where I refer to page numbers in these reasons, I am referring to pages of that agreed hearing bundle unless I say otherwise. I explained to the parties that (in addition to the claim form, grounds of claim, response form and grounds of resistance), I would read the documents referred to in witness statements, documents they specifically asked me to read before I started to hear evidence, or documents to which they referred me during the course of evidence. I have read and taken into account all of those documents in reaching my decision, even if I do not make specific reference to each and every such document in these reasons.

6. I was provided with witness statements from the following witnesses, which I read prior to hearing oral evidence:

    (a) Guiliano Silvestri (**Mr. Silvestri**), employed by the Respondent as Head of PMO (Project Management Office) and Client Services.

    (b) Sharon Hughes (**Ms. Hughes**), employed by the Respondent as Director of People & Talent.

    (c) Kulvinder Taak (**the Claimant**).

7. I also heard oral evidence under cross-examination from each of these witnesses.

8. On behalf of the claimant, Ms. Cashell provided me with a cast list, chronology and Skeleton Argument, which I read. I also heard oral submissions on behalf of the claimant and the respondent. The two-day listing was not sufficient to allow for deliberations and judgment. Submissions did not finish until 3.45pm on the second day of the hearing, and I therefore had to reserve my decision.

Issues

9. It was agreed that the issues that I had to decide were as follows.

1 Unfair dismissal

1.1 The respondent and the claimant agreed that the reason for dismissal was the potentially fair reason of conduct.

1.2 Did the respondent genuinely believe the claimant had committed misconduct?

1.3 Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating misconduct as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. The Tribunal will consider, in particular:

1.3.1 Whether there were reasonable grounds for that belief;

1.3.2 Whether at the time the belief was formed the respondent had carried out a reasonable investigation;

1.3.3 Whether the respondent otherwise acted in a procedurally fair manner;

1.3.4 Whether the respondent took into account the January 2022 first and final written warning, and if it did, whether it was entitled to do so. The claimant says that the respondent was not entitled to take the warning into account because there had been no prima facie grounds to issue a warning and / or it had been manifestly inappropriate, and the warning was not for a similar offence.

1.3.5 Whether dismissal was within the range of reasonable responses.

2 Polkey and Contributory Fault

If the Tribunal finds that the dismissal was unfair:

2.1 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so what chance?

2.2 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

2.3 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2.4 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3 Wrongful dismissal / Notice pay

It is agreed that the claimant's notice period was 3 months and that the claimant was not paid for his notice period. The respondent says that it was entitled to dismiss the claimant without notice because he had dishonestly failed to notify the respondent of his disqualification from driving. The Tribunal will decide:

3.1 Did the claimant fail to notify the respondent that he had been disqualified from driving, and if so did he do so dishonestly? Was that so serious that the respondent was entitled to dismiss him without notice?

Findings of Fact

10. I have reached the following findings of fact on the balance of probabilities. I deal first with the findings of fact relevant to the unfair dismissal claim, and I have then included a short additional section which includes my additional findings of fact which are relevant to the wrongful dismissal claim (or would be relevant to contributory fault, if applicable).

11. The respondent is a large parcel delivery business that provides services to customers in over 30 countries. The claimant commenced employment with the respondent in February 1997 as a Hub Operative. He promoted to supervisor and then in August 1998 to Hub Operations Manager. In March 2001, the claimant transferred to the IT Department and became a trainee Helpdesk Technician (p103-117). His contract of employment included reference to the fact that "*anyone who disregards the Company's Rules arbitrarily, interrupts the work of the organisation and / or causes damage or inconvenience to the Company and / or his /her fellow employees, renders himself / herself liable to disciplinary action."*

12. With effect from 12 February 2018, the claimant was promoted to the role of IT Operations Night Shift Manager, based at the respondent's Oldbury Hub3 site. This role involved supporting hub operations with any technical concerns in devices, IT infrastructure and connectivity. The letter offering the claimant the role explained that he would be entitled to benefits as set out in the letter. The letter then went on to say that the respondent would provide the claimant with a company vehicle "*for use during your employment"* (p119). I will refer to the vehicle that was provided to the claimant as the claimant's company car.

13. On 10 May 2019, the respondent's HR team sent an email to the claimant, titled "*Company Car & CIL Policy – Urgent Action required"* (p142). The email included a link to the company car & cash in lieu policy ("**v3 of the Company Car Policy"**). The email stated: "*it is important that you read and understand the policy and the process for reporting and dealing with accidents",* and the claimant was asked to complete the electronic sign off on the last page of v3 of the Company Car Policy.

14. V3 of the Company Car Policy stated (amongst other things):

"1. Introduction and Purpose

1.1 Many of the issues covered in this handbook are legal, whilst all are company policy. It is important that you fully acquaint yourself with the Company Car procedures and that you comply at all times. Failure to comply will result in disciplinary action.

1.2 This Company Car procedures handbook is applicable to all allocated Company Car users, for both their own allocated vehicle and any substitute vehicles. This handbook also applies to employees who are not allocated a company vehicle but have occasional use for business purposes.

…

1.3 *If you have any further questions relating to Company Car driving, you should contact DPD Transport Department…."* The telephone and email contact details were provided.

"*2. Duties of Drivers.*

…..2.7 All Company Cars driven on company business must be driven in a safe and legal manner, so as not to endanger you, your passengers, or any other road users (see Section 9).

2.8 if you receive a fixed penalty notice fine, it is your responsibility to either pay the fine or dispute it in writing. Failure to pay the fine will usually result in the fine being doubled after 14 days. Under no circumstances will the company be liable for fines received.

If a fixed penalty notice is received by DPDgroup Transport Department, the Company Car driver will be sent the penalty notice or NOIP (Notice of Intended Prosecution) via e-mail from the Parking Offences email ….You must confirm back to this e-mail once you have paid the fine."

"3. Insurance Conditions (Company Cars only)

3.1 Company Cars are insured on a group policy.

3.5 Authorised users as defined as:

a. The person to whom the car is allocated as long as they have had their licence checked as per the company procedures (see below).

….c. Any member of the allocated drivers immediate family (spouse or children) who have at least 12 months recent (ended in the last 3 months) driving experience in the UK or Ireland, whose driving licence displays the same address as the allocated users.

3.6 Company Licence check procedures:

Every driver who qualifies to drive as per the above definitions must have their licence checked by DPDgroup at least once a quarter. DPDgroup's Preferred option is to have the drivers details entered onto and checked by the company's preferred licence check company. This will then enable checks to be conducted for three years without the need for the driver to do anything more. If this is not done then an quarterly check must be conducted by the transport department using the DVLA website or phone check service. If the driver receives any driving conviction then it is their responsibility to inform their line manager and e-mail the company car ambassadors…….This also includes those authorised to drive the Company Car."

"9. Safe Driving.

9.1 All cars driven whether on Company business should be driven in a safe, legal and considerate manner at all times.

…9.4 Any Driver reported for bad or dangerous driving will be subject to disciplinary action in line with the company procedures.

9.5 Any driver of company vehicles, including [cash-in lieu] *drivers, who are caught speeding whilst on company business, may be subject to disciplinary action under the DPD disciplinary procedure.*

All speeding fines must be reported to your Line Manager. The preferred driving licence provider will report any issues with driving licences to the transport department if any changes show on the quarterly Licence checks."

"12. Cash in Lieu.

12.4 Once the CIL option has been taken, you must meet all the costs of operating your own car, including the fitment of a mobile hands free system. Your CIL vehicle must not be more than six years old and must be registered in your name only.

….12.8 Those who take the CIL option will still be subject to driving licence checks and should have held a full UK driving licence for a minimum of 12 months with recent and regular driving experience. If the driver receives any driving conviction that it is their responsibility to inform their Line Manager and e-mail the Company Car Ambassadors…."

15. "DAVIS" was the respondent's preferred licence check company. Where employees with a company car (or who received cash-in-lieu of a company car and used their own personal car when on company business) did not authorise Davis to carry out the quarterly check on their licence, that employee would have to provide a relevant code from DVLA to the transport department each quarter in order for the transport department to complete the quarterly check referred to in paragraph 3.6. Giving permission to DAVIS therefore removed the need for the employee to be involved in each and every quarterly check.

16. On 25 June 2019, the claimant gave permission to DAVIS to verify and review his driving licence record held by DVLA (p144).

17. In January 2020, the respondent issued the tenth update of its discipline and grievance procedure (p36-101). The introduction to the procedure said that: "*The Company rules and procedures are to be followed by everyone throughout the business. Anyone who disregards the rules arbitrarily or interrupts the work of the organisation and / or causes danger or inconvenience to the company and / or to his or her fellow employees renders himself / herself liable to disciplinary action."* Section 9.1 of the disciplinary procedure addressed gross misconduct. It set out examples of gross misconduct, but made clear that the list was not exhaustive. Some of the examples on the list were: conduct whether inside or outside working

hours which in the reasonable opinion of the Company may adversely affect the company's business reputation or which reflects on the employee's suitability to perform the type of work for which they are employed; breakdown of trust and confidence. Section 10 of the procedure addressed the disciplinary hearing. It set out a list of things that decision-makers must "*always consider",* and these included "*any active disciplinary warnings that relate to the case (not expired warnings or warnings for unrelated offences)"* and length of service. Section 12 dealt with appeals, and paragraph 12.2 set out that appeals must be made in writing and within 48 hours of receipt of the letter confirming the outcome of the hearing.

18. In September 2020, the claimant's line manager changed. Whilst the claimant's new line manager, Mr. Hammond, made some changes to the way in which the IT Operations team worked, given the issues that I had to decide I found that it was not necessary for me to make detailed findings as to what these changes involved. The claimant was critical of the changes in his witness statement, but Mr. Hammond did not play any part in the decision to dismiss the claimant, or in the disciplinary or appeal process that led to his dismissal.

19. On 8 June 2021, Mr. Hammond emailed the claimant notifying him that Hinckley Hub support was now covered by a different support team and that there was no need for him to travel there for work. Mr. Hammond told the claimant to work from home where possible and when not, to work from the Oldbury IT office (p382). I find that the reference to occasions when working from home was not possible was a reference to the fact that the nature of the claimant's role as IT Operations Night Shift Manager meant that sometimes he would have to attend the hub location in order to deal with a particular IT issue, and that when he did so that would be at night.

20. On 20 August 2021, a speed camera photographed the claimant's company car driving at 48mph in a 40mph zone. On 24 August 2021, the central ticket office of the West Midlands Police sent to Zenith Vehicles Contracts Limited (**Zenith**), a notice of intended prosecution, asking Zenith to identify the driver. Zenith was the company that leased the car to the claimant (p260-1). Zenith notified the police that the vehicle was leased to the respondent.

21. On 16 September 2021, the claimant's driving licence was endorsed with three penalty points (effective until 16 November 2023) due to a speeding conviction (p268).

<u>Matters leading to the first and final written warning</u>

22. On 17 September 2021, Mr. Hammond suspended the claimant, before lifting the suspension the following day. Mr. Hammond told the claimant this had been due to discrepancies noticed on his expense account but that the incident had been resolved. At around this time, Mr. Silvestri carried out some investigation into the claimant's submission of fuel expenses, before handing it over to a different colleague and taking no further part in the

investigation or disciplinary proceedings leading up to the first and final written warning.

23. On 19 October 2021, having been asked to return an outdated laptop to the respondent, the claimant used a USB device to transfer files from that laptop onto a new MacBook.

24. On 17 November 2021, the claimant attended an investigation with Darren Martin regarding expense claims and the use of the USB (p329-336). The claimant accepted that he had used a USB to transfer files, but said that he had used a company USB, and that he had had no choice but to use it or to lose his data. When it was suggested to him that the respondent's IT user policy was that USBs should no longer be used, that he could have uploaded the information to the cloud, and that he should have been aware of the IT policy, the claimant said that the policy must have changed and that he would like to see a copy of it (p334). He accepted that he had received an email that said he should not use "personal USBs" but said that he believed that the USB he used was a company USB as it was branded (p335). The claimant denied that the IT charter that he had signed had precluded the use of any USB without prior permission from the IT security department (p335).

25. On 16 December 2021, the claimant attended a disciplinary hearing chaired by Carol Soulsby, relating to the use of the USB, the receipt of a monthly travel allowance when he had a fully expensed company car, and expense claims (p337-347). With regards to the USB, the claimant accepted that he had been aware of the respondent's DPD charter, but said that the version that he had signed had not mentioned that he could not use a USB in his laptop, only that it needed to be confirmed or verified by a manager (p339). He said that he had not used a personal device, but had used a company supplied USB that had been issued to him "*when we had the yearly dna meetings, this was one of the gifts along with a mug and other gifts"* (p339). It was the respondent's position during this disciplinary process that the USB only bore the respondent's name because it had been issued as a marketing tool some years earlier.

26. A further disciplinary hearing took place on 22 December 2021 (p348-356), again chaired by Ms. Soulsby. She provided the claimant with a copy of the DL06 IT charter which she believed he had signed on 13 August 2020, before using a USB device on a company laptop on 13 October 2020. The claimant disputed that he had signed this version of the charter, saying that he had signed an IT admin charter. The disciplinary hearing was adjourned.

27. The disciplinary hearing reconvened on 12 January 2022, again chaired by Ms. Soulsby (p360-373). By this time, the respondent had provided further documents to the claimant. The claimant said that whilst he had signed a charter in July / August 2020 it "*did not consist of any usb or any external device being plugged into any company property. There is no mention of that"* (p360). Ms. Soulsby suggested to the claimant that the documents

that the respondent had provided showed that the claimant should have been aware that he was not allowed to use a USB device (p361-2). The claimant said that the respondent had issued him with the USB, that he was not sure when the respondent had stopped issuing them, that it was about 3 or 4 years old ("*it's been a while."* He said that his team had used USBs up to 2020, but then also that his team still used them "today" (p366), but then clarified that the team he managed were not still using them but that he had seen others in the business using them (p368). He accepted that it might be that those people had been authorised to use them. At the conclusion of the disciplinary hearing, Ms. Soulsby told the claimant that she was issuing him with a first and final written warning. In relation to the USB stick, she concluded that he had used an unauthorised USB stick to transfer data between two business laptops and that given his experience and all the communications within the IT department she believed he was aware that he should not have used the unauthorised USB stick on 19 October 2021. She also found that the claimant had been overpaid allowances and that he would need to repay those.

28. On 13 January 2022, Ms. Soulsby wrote to the claimant confirming her decision to issue a first and final written warning for unauthorised use of a USB stick on 19 October 2021 (p374-5). The letter stated that:

    "*this is a first final warning as to your future conduct in accordance with the Company Discipline Procedure, to which I draw your attention. You should be in no doubt that any recurrence of this offence within the next 12 months will render you liable to more serious disciplinary action up to and including dismissal.*

    If no further related breach of discipline occurs within the next 12 months this warning will be disregarded from your personal record."

29. This was the first disciplinary sanction that the claimant had received during his employment with the respondent.

30. The claimant did not suggest in his claim form that this warning had not been issued in good faith, and I find that Ms. Soulsby did issue it in good faith. The notes that were in the bundle of the meetings with Ms. Soulsby suggest that the claimant did not dispute that there was an IT charter precluding the use of USBs without prior permission, but he disputed he had been aware of it. The notes and Ms. Soulsby's decision letter are consistent with her having genuinely believed that the claimant had been aware that he must not use a USB without prior permission. He was a senior member of staff working in IT himself.

31. On 14 January 2022, the claimant submitted an appeal against the warning (p376-8). On 24 January 2022, an appeal hearing took place, chaired by Paul Everett, Head of IT Security. On 1 February 2022, Mr. Everett wrote to the claimant dismissing his appeal against the warning (p145-6). Mr. Everett found that the IT User Charter was updated regularly and issued by means of updates via the Marketing Department where employees were asked to familiarise themselves with the content. The claimant had

suggested he had been out of the business and had chosen not to read updates on his return but to delete them. It was down to the claimant to read and understand his obligations. Mr. Everett found that every time that the claimant signed on to a DPD UK device or server it made clear that by using the machine the claimant was bound by the terms of the IT User Charter, and that in using the machine he indicated his continued acceptance of the Acceptable Use / IT User Charter. The overpayment of the travel allowance did not form part of the reason for issuing the warning.

32. Again, the claimant did not suggest in his claim form that Mr. Everett's decision on appeal had not been issued in good faith, and I find that it was issued in good faith. Mr. Everett's decision letter is consistent with him having had a genuine belief that if the claimant hadn't been aware that he should not use a USB without prior permission then that was the result of his own failure to familiarise himself with his obligations.

33. On 3 February 2022, the respondent wrote to the claimant notifying him that a decision had been taken that the claimant had not in fact been overpaid allowances (p147).

Redundancy exercise

34. On 17 March 2022, the claimant attended a meeting with his line manager Mr. Hammond, and David Bowen, People & Talent Manager, that his role was at risk of redundancy. This was confirmed in a letter of the same date (p386-7). On 6 April 2022, in an email from Mr. Bowen to the claimant, the respondent confirmed that a decision had been taken to "*place the current redundancy exercise on a temporary hold"* (p389). The email stated that "*we will not be removing the 'at risk' situation, as there remains the potential for your role to be considered redundancy and the current exercise may resume in coming weeks. However, what this does mean is that the 30 consultation period is on hold and that no decision regarding the outcome will be made in the short term…"*

35. In June 2022, Mr. Hammond left the respondent's employment, and Paul Everett became the claimant's line manager.

Further endorsement of the claimant's driving licence

36. On 7 March 2022, the claimant had renewed his permission to DAVIS to carry out checks on his driving licence. Such permission was valid to 7 March 2025 (p148-9).

37. On 23 March 2022, the claimant's driving licence was endorsed with a further three penalty points (effective until 13 August 2024) due to a further speeding conviction (p268).

Version 4 of the Company Car Drivers Policy

38. In March 2022, the respondent introduced a new version of the Company Car Drivers Policy ("**v4 of the Company Car Policy**"). That stated (amongst other things) (p150-151):

> "*This policy applies to all employees of DPDgroup UK Limited who are required to drive either a company car or commercial vehicle during their employment. This policy is in addition to and not in replacement of the company car procedures or any other related document.*
>
> *Company Vehicles of all descriptions must be driven in a safe, legal and courteous manner so as not to endanger the safety of themselves, their passengers, other road users or pedestrians. When driving a company vehicle you are a representative of the company and should act as an ambassador. Any actions which bring the company into disrepute will be treated as gross misconduct in line with the Company Disciplinary Procedure. Full details are included in the Company Car Handbook and the Company Transport Procedures Manual.*
>
> *…..Prior To issuing an employee with a company vehicle, managers must ensure that a valid driving licence has been produced.*
>
> *…Employees must declare any current driving convictions or penalty points on their application form and this must be verified by the recruiting manager. If in doubt, please check with the Transport Department.*
>
> *…1. Where Employees are required to drive as part of their normal duties, the loss of their driving licence is a serious issue, with possible implications in respect of continued employment. Whilst all cases will be treated on their individual merits. The following principles are designed for employees who accumulate points over a given period.*
>
> *….*
>
> *4. During the period of disqualification company car or cash in lieu payments will be withdrawn by the Company.*
>
> *…6. Any employee who is required to drive a company vehicle, and loses their licence and fails to disclose this will be subject to the Company disciplinary procedure for Gross Misconduct."*

Claimant's conviction and disqualification from driving

39. In the meantime, on 21 February 2022, a summons had been issued, requiring the claimant to attend Birmingham Magistrates' Court on 23 March 2022 for a case management hearing (p263). This related to the alleged speeding incident on 20 August 2021, and an allegation that on 7 December 2021, having been required by the police to give information relating to the identity of the driver, the claimant had failed to do so. On 30 May 2022, the claimant was notified that a trial would take place on 27 July 2022 (p264-5).

40. On 27 July 2022, the Magistrates' found that the claimant guilty of failing to give information relating to the identity of the driver on 21 August 2021. As the claimant's driving licence was already endorsed with six penalty points, he faced disqualification due to the conviction resulting in a further six penalty points. The Magistrates adjourned the hearing on the grounds that there may be mitigating circumstances, including exceptional hardship, why

the claimant should not be disqualified from driving or only disqualified for a shorter period. The case was adjourned so that the claimant could come to court to give evidence about his circumstances (p266).

41. On 26 August 2022, the claimant attended the Magistrates' Court in the morning. Due to the number of penalty points already endorsed on his licence he was disqualified from driving. The date of conviction and disqualification was entered onto the claimant's licence as 27 July 2022 (p268).

Claimant's communication with the respondent's Fleet Management

42. At 14.56 on 26 August 2022 the Claimant emailed Jo Whale, who worked in the respondent's Transport Department (p154):

"*I just wanted to find out what's the process in returning the company car and accepting the allowance? As I am mainly working remotely, and haven't used the vehicle as much.*

If in future a need to take the company car can I do that..?

Your advise would be very helpful?"

43. The reference to the "allowance" was to the fact if an employee who was entitled to a company car chose instead to use their own private vehicle, they could claim a cash allowance in lieu of a company car (**CIL**). The claimant's email did not make any reference to the fact that he had recently been convicted and / or disqualified from driving.

44. On 30 August, Ms. Whale emailed the claimant saying that she could arrange for his car to go back to Zenith if he no longer needed it, and asking him to confirm when was best to collect (p153). She said that she could share the CIL form with him, and that: "*you will need to provide the V5 or lease for the vehicle (which has to be in your name) and the insurance document showing business over."* Ms. Whale's reference to "*business over"* was obviously a typographical error, and this should have read "*insurance cover."* Ms. Whale sent a further email on the same date saying that he could take a company car after 12 months cash-in-lieu. The claimant emailed Ms. Whale later that day, saying: "*Thanks for the advice, I will let you know once I have decided"* (p153). Again, he did not make any reference in that email to his conviction and / or disqualification.

45. On the same day, the claimant was invited to the respondent's 2022 Long Service Awards Ceremony, an event to recognise long-term serving employees (397-8). As part of the recognition of his long-service, the livery of one of the respondent's HGVs was painted with the claimant's name and the text "*25 years at DPD",* and he was photographed standing in front of the HGV holding a picture of the HGV with text underneath stating "*thank you for an outstanding 25 years service"* (p397).

46. On 2 September 2022, the claimant submitted an appeal to the Crown Court against his conviction and disqualification. On 14 September 2022, the claimant was notified that his appeal would be listed for a "mention" hearing on 29 September 2022 (p267). At the mention hearing on 29 September 2022, a Judge at Birmingham Crown Court suspended the claimant's disqualification pending his appeal to the Crown Court.

Disciplinary investigation by Mr. Everett

47. On 15 September 2022, Ms. Whale telephoned Mr. Everett to ask if he was the claimant's line manager. By this time, DAVIS had completed its quarterly check on the claimant's driving licence and Ms. Whale had found out from DAVIS about the claimant's conviction and disqualification from driving. Ms. Whale provided this information to Mr. Everett.

48. During the afternoon of 15 September 2022, Mr. Everett emailed the claimant asking him to attend a meeting at Hub 3 to discuss a potential disciplinary matter (p166). A meeting took place that evening between the claimant and Mr. Everett. Mr. Everett asked the claimant to explain discrepancies on his licence. The claimant admitted that he had been disqualified from driving and told Mr. Everett that he was appealing to the Crown Court on the basis he had not been the driver who had committed the speeding offence in August 2021. Mr. Everett showed the claimant v4 of the Company Car Policy, and informed the claimant that he would be suspended pending further investigation. Mr. Everett confirmed the claimant's suspension in writing that same day, in order to allow a full investigation to take place into the allegation that the claimant had failed to disclose a conviction to the respondent (p165-6).

49. Mr. Everett held a further meeting with the claimant on 16 September (p161-3). I accept that the summary within Mr. Everett's investigation report (p161-3) is an accurate summary of what was discussed. That is consistent with certain parts being in quotation marks, and with the fact that the claimant did not dispute the accuracy of that summary in the later disciplinary and appeal hearings. The claimant told Mr. Everett that the disqualification had been confirmed on 26 August, and showed him a letter from the DVLA. He told Mr. Everett that he was appealing to the Crown Court and had asked for his disqualification to be suspended. When asked what offences had led to him receiving points, the claimant said that he had been given six penalty points for failing to provide driver details in the time frame. He said that the letter had originally gone to Zenith and then the respondent, and he had not received it until some time in November 2021, by which time the police enforcement unit had already decided to take the matter to court. He said he had been convicted of a crime he did not commit and that he was appealing, and that he had been found guilty on inaccurate evidence provided. He said that the (other) penalty points he had received had all been for speeding.

50. During the meeting on 16 September, Mr. Everett asked the claimant why he had not advised anyone of his disqualification. I find that the claimant

said what is recorded in the notes, which is: "*because it is still in process with the court and I have requested a suspended sentence in order to fight this on the appeal date."* Mr. Everett asked the claimant whether, as he was in the possession of a company car, it was important to let the respondent know, and the claimant said: "*I worked on my appeal case within 15 days."* I find that at the meeting on 16 September, the claimant did not say that the reason he had not reported the disqualification to the respondent was that he didn't think he had to do because he had given consent for DAVIS to undertake the quarterly checks. Although the account that the claimant gave of this meeting at paragraph 44 of his witness statement was different in some respects to the summary in the investigation report, neither the summary nor paragraph 44 of the witness statement suggest that the explanation that the claimant gave at that meeting was that he did not think he needed to report a disqualification to the respondent at all, whether because he had given consent to DAVIS or for any other reason.

51. The claimant did say at the meeting on 16 September that he had never seen v4 of the Company Car Policy before the 15 September. He also said that he had not driven the car since his disqualification, and that if he had been required to attend a Hub, he would have asked his son or wife to drop him off.

52. On 19 September, the claimant's company car was collected from his home address.

53. A third investigation meeting took place between Mr. Everett and the claimant on 21 September, and I find that Mr. Everett's summary is an accurate summary of what was discussed (p163-4). Mr. Everett read to the claimant paragraph 3.6 of v3 of the Company Car Policy, and the claimant asked for a copy. He also read to the claimant a copy of the claimant's email to Ms. Whale on 26 August 2022, and asked the claimant to explain the rationale for that email and what had prompted him to send it, and whether he had known at the time that he was unable to drive. The claimant's response was that: "*I was focused on my appeal, I wanted to see what the options were available to me if the car was going to be sitting at home and not being used. There was no point keeping the car outside of my house. I didn't know if I could hand it back for six months. What is the process and if I hand it back now can I get it back in a few months time. I didn't put anything into the email about my disqualification as I was making an appeal."*

54. On the same date, Mr. Bowen informed the claimant that he should not attend the long service award ceremony on 23 September 2022 due to the fact that he was suspended (p394).

55. Mr. Everett prepared an investigation report. He concluded that the claimant had failed to notify the respondent of his disqualification, and that it had only come to light through DAVIS's quarterly checks. When questioned, the claimant had said he had not notified the respondent due to

the fact that he had lodged an appeal. There was evidence that the claimant had signed v3 of the Company Car Policy and he was therefore deemed to be aware of the requirements to notify the respondent of a conviction and loss of licence. Mr. Everett recommended that the matter proceed to a disciplinary hearing (p164).

Disciplinary hearing and decision to dismiss

56. On 27 September 2022, Mr. Silvestri sent a letter to the claimant inviting him to attend a disciplinary hearing on 30 September (p170-1). The letter stated that "*at this meeting the question of disciplinary action against you in accordance with the Company's disciplinary procedure will be considered with regard to: Failure to disclose disqualification of driving licence."* The letter set out a list of ten documents that would be considered at the hearing, including v3 of the Company Car Policy, a screenshot of the claimant's electronic signature confirmation (which was document 7 in the pack), the claimant's email to Ms. Whale on 26 August, and v4 of the Company Car Policy. The letter stated that the claimant had a right to be represented by his trade union representative or chosen friend or colleague from his place of work, and that "*you should be aware that sanction up to and including summary dismissal may result if the allegation against you is found."*

57. A disciplinary hearing took place on 30 September, chaired by Mr. Silvestri (p174-192). The claimant attended and Kristie Ware attended from HR. The meeting was recorded, and a transcript of that recording was later prepared. The hearing lasted for around 1 hour and 10 minutes, including a five-minute break. During the disciplinary hearing, the claimant was asked why he hadn't notified his line manager of his disqualification. The claimant said that he thought it was because he was not aware that was in the policy, and that Mr. Everett had gone away to find out if the claimant had ever signed a policy and had come back with information that he had signed a document in 2019 "*and I didn't."* The claimant accepted that he had been provided with an email saying that he had signed an electronic signature but that it was not clear which document he had signed, and he asked to be shown the content of the document.

58. Mr. Silvestri took the claimant to paragraph 3.6 of v3 of the Company Car Policy, and in particular the last two sentences, which stated that if a driver received any driving conviction it was their responsibility to inform their line manager and email the Company Car Ambassadors. The claimant's reply to this was: "*if endorsed."* Mr. Silvestri also referred to paragraphs 9.4 and 9.5 of v3 and suggested to the claimant that the pertinent point was that all speeding fines must be reported to the line manager. Mr. Silvestri said that this was the policy that the claimant had signed on 16 May 2019 and asked the claimant whether he had anything to say with regards to that. The claimant said that he wanted to see the document that he had signed. Mr. Silvestri agreed to take that away as a point to investigate further.

59. Mr. Silvestri went on to ask the claimant whether, even if he was not aware of the document, he did not think he had a need to tell his line manager

because he could no longer drive. The claimant replied: "*That's correct and the whole reason…I explained this to* [Mr. Everett] *I didn't tell him at the time I was convicted was because I was in the process of doing an appeal."* The claimant went on to say that "*I was too busy dealing with the appeal at the time and once I received the appeal the next day Paul called me to come into work and gave me the bad news that I have been suspended and I've provided information to him about my disqualification. And I did speak to transport the same day I came out of court on 26th of August".* The transcript shows that Mr. Silvestri interjected "*yeah"* and that the claimant then went on "*told them I'm basically convicted or sentence that day at 1:00 in the afternoon and then I spoke to Joe whale asking her what's the process."* I do not accept the claimant's suggestion, which he made for the first time under cross-examination, that the transcript has mis recorded the section after "*yeah"* as being something that he said rather than Mr. Silvestri. The claimant did not make that suggestion at any time in his witness statement, through counsel when she cross-examined Mr. Silvestri, or otherwise at any point before being cross-examined himself.

60. Mr. Silvestri then asked the claimant whether he had telephoned Ms. Whale or just emailed, and the claimant confirmed that he had just emailed. Mr. Silvestri then took the claimant to the email chain, which had not mentioned anything about the claimant's conviction or disqualification and sought to clarify with the claimant why he had not done so, and the claimant suggested that it was because he had been working on his appeal against conviction. Mr. Silvestri asked the claimant why he hadn't informed anyone of a pending potential conviction for driving from the date of the initial speeding offence in August 2021 until the check on 15 September 2022. The claimant said that by the time he had received the notification from the respondent / zenith in November 2021, the police had sent the matter to court, but that he had at that time provided his wife's details as being the driver. The claimant said that he had attended a first hearing on 30 May 2022, which had been adjourned for the police to verify the name of the driver that the claimant had given as driving the vehicle. There had then been a second hearing on 27th of July, when he had been asked further questions about who had been the driver, and he had been convicted on the basis that there had been a one letter difference between the name he had given, and the name on his wife's driving licence. He had then been disqualified on 26 August 2022.

61. Mr. Silvestri asked the claimant to explain his rationale for asking Ms. Whale the questions that he had done on the 26th August. The claimant said that he hadn't been aware whether he could keep the car for the next 5 months whilst he was "*on a ban",* or whether he needed to hand it back to work, so he had asked Ms. Whale what the process was. Mr. Silvani pointed out that in the claimant's email to Ms. Whale the claimant hadn't made any mention to Ms. Whale that he had been disqualified, and the claimant said that this was because he had been "*thinking along the lines of when an appeal case because I've been so I'm not under the impression that the appeal case would have gone through and I would have been ok."* The claimant said

that he wanted to ask the process on the basis of him handing the car back, and said that there was no point having the car on the drive and not being able to drive it. He said that the option would have been for his wife to drive but that she very rarely drove that car. Mr. Silvestri said "*but you've asked for the cash",* and the claimant said that he had wanted to see what the impact on his salary was going to be if he did hand the car back. Mr. Silvestri said that this could give the impression that knowing that he was disqualified and that he hadn't declared it "*I've got a car on the drive I can't use can I get the cash and still benefit financially knowing that I'm banned."* In other words, Mr. Silvestri was putting to the claimant that it looked like he had deliberately decided to find out if he could obtain a financial benefit from returning the car without disclosing to the respondent that he had been disqualified. The claimant's response was that he wondered if there would have been a major impact on his salary.

62. The claimant told Mr. Silvestri that he had appealed to the Crown Court on 2 September. The claimant said that he would have declared his disqualification to the respondent if it had been upheld on appeal, but that he would not have told the respondent about it if the appeal was successful, because DAVIS would have picked up on his licence regardless. He accepted that DAVIS's checks were done quarterly. He said that he had had a previous endorsement for speeding on 16 September 2021, and that he had not been picked up for not disclosing that to the respondent. He said that he thought that DAVIS would "*pick this up"* and notify the respondent. He said that the endorsement from September 2021 also followed a conviction at court, on that occasion for a speeding offence that had occurred in 2021. Mr. Silvestri said that there was a "*subtle difference"* because in September 2021 the claimant had received penalty points, whereas in 2022 he had received points and been disqualified, but he agreed to look further into the issue. The claimant showed Mr. Silvestri confirmation that his disqualification had now been suspended pending his appeal.

63. After a short break, Mr. Silvestri returned to the question of why the claimant had not disclosed his disqualification to Ms. Whale on 26 August, and the explanation that the claimant had given that it was because he was going through an appeal. In reply the claimant said: "*no I had intention to obviously explain and once the appeal was submitted, evidence gone through and the date was set, I attended the appeal so yes it's not the case I never had any intention or not, I was under the impression that the appeals would happen within two weeks, to what three maybe I would be able to resolve the matter."* Mr. Silvestri asked the claimant what would have happened if the respondent had required him to drive to a hub, and the claimant said that his wife was insured on the car, and that she could have driven him at any hour. Mr. Silvestri asked the claimant whether it had not occurred to him that he should inform his manager about his plan and the claimant said it had not, as he was under the impression that Davis would have informed the respondent. Mr. Silvestri referred again to v3 of the

Company Car Policy, and the claimant said that there was no indication that he had actually signed the document.

64. The claimant said that he would have notified the respondent if he had been convicted of "*drink driving, erratic driving or I don't know accidents or I've done something, I've done damage."* Mr. Silvestri asked the claimant what the difference was, given that he had received a criminal prosecution, and he asked the claimant "*why did you not tell people when you're convicted of bad driving."* The claimant said that it had not been bad driving, it had been points and a bad judgment by the Magistrates, which was why he was appealing. He did say that he could "*see where* [Mr. Silvestri was] *coming from"* and that he was not making excuses, but it had not crossed his mind "*because I was too wound up in dealing with the appeal case and trying to get the case heard and trying to get it resolved as possible."* He said that he had been concerned about the financial impact, his long-term driving, and as an individual in his circle of family and friends. He again said that it would have been his intention to notify the respondent, and to present a plan for how to deal with the disqualification, after his appeal was over. In the meantime, if he had been called on to attend a hub, he would have fulfilled that, even if it had required him to take a taxi.

65. The claimant said that he hadn't been aware he needed to tell his line manager of a conviction. He said that he accepted that the policy that Mr. Silvestri had provided to him did make it "*kind of clear that I should have notified the line manager".* He said he did not recall reading the whole policy in 2019, but that he had maybe quickly read it. He accepted that what he had signed for in 2019 may have been the same document that Mr. Silvestri was referring to and said that he had been "*too much stressed out"* when he had then been disqualified. Mr. Silvestri suggested to the claimant that he seemed to contradict himself by saying that on the one hand he had not realised he needed to report his conviction, but on the other hand that he would have reported it if he had been convicted of a drink driving offence. The claimant said that the process by which he had been convicted had been incorrect.

66. Towards the end of the hearing, the claimant said that he agreed that he should have been more responsible and let the respondent know, but that he had not thought of it at the time because he was not going to drive the car and did not drive the car on a daily basis to get to work or fulfil his duties and so there had been no impact on his work, and he worked mainly remotely.

67. Following the disciplinary hearing, Mr. Silvestri contacted Mr. Everett to check the point that the claimant had raised about it not being clear which policy he had signed for in 2019. Mr. Silvestri accepted that he would have discussed this with Mr. Everett because it was Mr. Everett who passed information to him. Mr. Everett sent an email to Mr. Silvestri that afternoon, providing screenshots of the email that the claimant had been sent in 2019, and the electronic sign off (p173). I find that the screenshots at pages 142-

3 were those contained at p173, but in a more legible format. The screenshots read together showed that on 16 May 2019, the claimant answered ""yes" to the question "I confirm that I have read and fully understood the Company Car Procedures document", and that the Company Car Procedures document being referred to was v3 of the Company Car Policy.

68. Mr. Everett did not play any further role in the disciplinary process. I accept that it was Mr. Silvestri took the decision to dismiss, and that he genuinely believed that the claimant had committed gross misconduct. Although Mr. Silvestri had, in September 2021, been involved in the early stage of an investigation into the claimant's fuel expenses, he had handed that over to a colleague and had nothing more to do with that investigation. I accept that those initial investigations that he had carried out in 2021 did not play any part in Mr. Silvestri's decision making in the disciplinary process in 2022, and nor did the potential redundancy exercise that the claimant had been notified of in March 2022. There was no evidence before me that Mr. Silvestri had been involved in that potential redundancy exercise, which had been placed on hold on 6 April 2022.

69. Mr. Silvestri sent a letter to the claimant on 6 October 2022, notifying the claimant that he was being dismissed due to gross misconduct (p195-7), and giving him 48 hours in which to appeal. Within the letter, Mr. Silvestri stated:

The hearing took into consideration all supporting evidence as listed, as well as all relevant points, raised and discussed during the disciplinary hearing.

…

From the point of receiving a criminal conviction and being disqualified from driving on 26/08/22, you failed to notify your line manager, with DPD only being made aware of your disqualification, through the quarterly licence check process, which led to your line manager being informed on 15/09/22.

The company car policy clearly states, that it is the responsibility of the driver, to notify their line manager and the transport department, if they receive any driving conviction. Section 3.6, of the Company Car Policy V3, clearly states this requirement.

Failure to do so, will be subject to disciplinary action, as stated in sections 9.4 & 9.5, of the Company Car Policy V3.

You were invited to respond to the allegation and the evidence presented, where you raised two specific points, directly linked to the evidence provided.

***Point 1 -** You questioned whether you had signed the company car policy V3, as the evidence provided (Doc 7) suggested you had electronically signed 'a' policy, but there was no evidence to confirm it was the actual company car policy V3.*

I can confirm the evidence provided (Doc 7), is correct and that you accepted and electronically signed the Company Car Policy V3 on 16/05/22. I also have evidence of the email sent to you, with the link to the policy.
I am satisfied that the evidence provided, validates that the Company Car policy V3, was issued to you and that you electronically signed the policy. Therefore knowing the requirement for all drivers to notify their line manager of any driving conviction.

***Point 2 -** You didn't think there was a need for you to inform your line manager of your disqualification, as you expected the quarterly licence check process to have reported previous SP30 convictions, received on 16/09/21 & 23/03/22.*

As previously confirmed, V3 of the Company Car Policy, sections 3.6 & 9.5, do state, any driver caught speeding whilst on company business, may be subject to disciplinary action and that all speeding fines must be reported to your line manager. It also states, the quarterly licence check process will report any issues to the Transport department (now known as Fleet).

There is no requirement for transport to notify your line manager of all speeding convictions. This requirement is for the driver to inform their line manager, as per the company car policy V3.

Transport informed your line manager of the discrepancy with your licence check, as you had been disqualified from driving which therefore rendered you unable to legally drive for the business, since your conviction and disqualification on 26/08/22.

I am satisfied the correct process and approach was followed and that the quarterly licence check process cannot be used as a reason for not notifying your line manager of your disqualification.

It was also clear from the evidence that you had actively contacted Transport on the same day of your conviction, asking for clarity on the process for returning the company car and accepting the CIL (Doc 8). This was an ideal opportunity for you to inform the business that you had been convicted and disqualified from driving, however you chose not disclose this information.

I have carefully considered all of the evidence and your response. As a result, I have reasonable belief that you intentionally failed to disclose the disqualification of your driving licence and due to the seriousness of the offence I believe I have no alternative but to summarily dismiss you on the grounds of gross misconduct and terminate your contract of employment with immediate effect…."

70. In reaching his decision, I find that Mr. Silvestri based his decision on v3 of the Company Car Policy, which he was satisfied the claimant had signed in 2019 having considered the evidence before him. He considered the point that the claimant had raised in the disciplinary hearing that he said he had not been aware he needed to notify his line manager because he had given consent to DAVIS to carry out quarterly checks. However, Mr. Silvestri took the view that the penultimate sentence of paragraph 3.6 of v3 of the

Company Car Policy imposed a clear obligation on the employee driver to notify their line manager and the transport department if they received a driving conviction, and that this, and the fact that disciplinary action could result from a failure to comply, was reinforced by the second part of paragraph 9.5. I find that he did consider whether the failure to report had been the result of a genuine mistake, or whether the claimant had intentionally failed to notify DAVIS knowing that he should do so. He concluded that the claimant's failure had been intentional, and an act of dishonesty. A key factor in his decision making was the fact that when the claimant had contacted the transport department on 26 August to ask about how to return the car and obtain cash in lieu, he had not mentioned in his emails the fact he had been disqualified.

71. The dismissal letter did not make any reference to the claimant's length of service. I accept Mr. Silvestri's evidence that he did consider that but that he did not include it in his outcome letter because, given his conclusion about what the claimant had done, he believed that the matter was so serious that trust and confidence had broken down and that the only appropriate sanction was dismissal. Whilst he did not expressly refer to "trust and confidence" in his dismissal letter, I accept that he genuinely believed that trust and confidence had broken down, and that this is what he was seeking to convey when he described the "*seriousness of the offence"* in his letter. I accept that he did have regard to all the matters that had been discussed at the disciplinary hearing, including the circumstances of the offence that had led to the disqualification. However, this was not a factor that weighed heavily with Mr. Silvestri, because his concern was the failure to report the disqualification, rather than the conviction that had led to the disqualification.

72. Mr. Silvestri did not take into account the claimant's earlier first and final written warning at the time that he reached his decision to dismiss.

First appeal

73. The claimant appealed against Mr. Silvestri's decision on 8 October (p200). He did not suggest that he had not had adequate time to consider his grounds of appeal, and he set out his grounds in his letter. In summary:

(a) He had not been aware that losing his driving licence would impact his employment as driving was not a requirement for him to carry out his job;

(b) He had given access to DAVIS to undertake quarterly checks, he had not reported a conviction in 2020 and nothing had been brought to his attention at that time about why he had not informed his line manager in accordance with the Company Car Policy, and he believed that he had been dismissed only to avoid redundancy.

(c) He had not been caught speeding during his shift or on company business. Whilst he was not able to drive, his wife could chauffeur him to work whenever required so it had not been his initial thought

to inform his line manager when the court had imposed a driving ban. He was currently appealing his conviction and his disqualification had been suspended pending appeal.

(d) He had served for over 25-years.

74. The appeal hearing took place on 18 October 2022, chaired by Steve Mills, Director of IT. Kathy Marklew attended from HR. The hearing was recorded and a transcript was produced (p213-226).

75. At the start of the hearing, the claimant presented a statement, which was read by Mr. Mills (p202-204). The statement expanded on the claimant's grounds of appeal. It stated that Mr. Silvestri had not acted fairly, and that there had been clear signs of prejudiced behaviour from Mr. Silvestri, who the claimant said had branded him a criminal by using examples of him committing burglary and drink driving to make a comparison with the claimant's conviction. The claimant said that he had not been convicted of a criminal offence. The claimant said that Mr. Silvestri had not presented him with a signed copy of v3 of the Company Car Policy, only an electronically signed page showing that the claimant had agreed for the preferred licence check company to conduct quarterly checks. The claimant said that paragraph 3.6 of the Company Car Policy only required a driver to report convictions if they had not given consent for the preferred licence check company to conduct checks. The claimant said that his disqualification had no bearing on his job, hence why the thought of informing his line manager of his disqualification was not necessary. The claimant said that paragraphs 9.4 and 9.5 of v3 of the Company Car policy had been overlooked, and poorly used as a reason to dismiss him unfairly and did not apply to his case. He suggested that the reason that he had not been "*pulled up"* on failing to disclose his convictions in 2020 was that his manager had known that the respondent's preferred licence check company would update the records systematically, and that the difference in 2022 was that the claimant was at risk of redundancy and so he had been accused of failing in his responsibilities so that the respondent could avoid redundancy.

76. Mr. Mills explored with the claimant what his main points of appeal were. The claimant told Mr. Mills that one of his main points of appeal was that in response to the claimant's request for a signed version of the company car policy, Mr. Silvestri had not provided him with an electronic signed document bearing the name of the document he had signed.

77. The claimant also said that because his line manager had not spoken to him about failing to report his speeding convictions in 2020 or 2021, the claimant felt that the system of quarterly checks by DAVIS was working well and that he did not have to do anything else, and that this was supported by paragraph 3.6 of v3 of the Company Car Policy. He said that the reference to it being the driver's responsibility to inform their line manager only applied to drivers who had not given permission to the preferred licence check

company to carry out the checks. A discussion took place about the meaning of paragraph 3.6. Mr. Mills noted that the claimant's argument was that paragraph 3.6 was ambiguous. I find that it was the claimant, and not Mr. Mills, who suggested that the paragraph was ambiguous, because that is consistent with the remainder of what Mr. Mills is noted to have said during the discussion, including where he is noted to have said: "*I think you interpreted it incorrectly."* Nevertheless, Mr. Mills did agree to seek a view from the respondent's legal counsel and compliance officer on whether he agreed with the claimant or with Mr. Mills about paragraph 3.6.

78. The claimant raised some other points, including that he wanted clarity on how what he had done was gross misconduct, that he believed he had been dismissed to avoid having to pay a redundancy payment, and that paragraphs 9.4 and 9.5 of v3 of the Company Car Policy did not apply to him. He accepted that he had not informed the respondent of his disqualification but said that "*I said I will do it as soon as I get the appeal through to the court."* He said that he had sent the email to Ms. Whale on 26 August as he just wanted to know the policy behind whether he could hand his car back in. Finally, the claimant said that his 25 years' service should be considered.

79. On 25 October 2022, Mr. Mills wrote to the claimant dismissing his appeal. Whilst I did not hear from Mr. Mills, having read the transcript of the appeal hearing and considered his outcome letter, I find that those to be consistent with Mr. Mills having had a genuine belief that the claimant had committed misconduct, and that he did have that genuine belief. Mr. Mills found that v3 of the Company Car Policy was clear that it was the claimant's responsibility to report any driving conviction to the respondent, and although he accepted that the first part of paragraph 9.5 had not applied to the claimant as he had not been driving on company business, this did not change the responsibility to report. Mr. Mills said that the fact that the claimant had an ongoing appeal against his conviction was not relevant, because the policy had required the claimant to report his conviction to the respondent. Mr. Mills was satisfied that the claimant had signed to confirm v3 of the Company Car Policy on 16 May 2019. He had considered the claimant's service and looked at his disciplinary record but noted that the claimant already had a final written warning for breach of security operating procedures and that this was not the first time he had shown a "*total disregard"* for the respondent's policy and process. Mr. Mills concluded that he had no choice but to uphold the original decision. He concluded that the other points that the claimant had raised had no bearing on the outcome of his decision and what was central to dismissal had been the claimant's lack of compliance with the respondent's company car policy (which he had found to be clear). Mr. Mills informed the claimant that he had 48 hours to make a further appeal.

80. Mr. Mills clearly had regard to the claimant's first and final written warning. As I did not hear evidence from Mr. Mills it was difficult to be sure about exactly how he had used this, but on the basis of his letter, I find that he

referred to this in explaining why he did not regard the claimant's long-service as a sufficiently mitigating factor to persuade him to overturn the dismissal.

Second appeal

81. On 26 October 2022, the claimant submitted his second appeal (p230-1). He said that the points raised in the dismissal letter showed no evidence of gross misconduct, as in respect of one point (paragraph 3.6), the respondent had not produced evidence of a signature and the policy together, and in respect of the second point (the reference to paragraph 9.5), the claimant had not been not caught speeding during his contracted working hours or on company business and so that clause did not apply. The claimant said that it had been Mr. Mills, and not the claimant himself, who had mentioned ambiguity in paragraph 3.6, and that: "*I made it clear that I understood the clause perfectly well without ambiguity."* The claimant said that he had not reported previous convictions (in November 2020 and May 2021) to his line manager and no action had been taken, and that his dismissal for failing to report the conviction from 2022 could only be seen as an opportunistic dismissal to avoid paying out a redundancy payment. He questioned why, if paragraph 3.6 required a driver to inform his line manager of convictions, this had not been picked up in 2020 and 2021. He also said that neither paragraph 3.6 nor paragraph 9.5 had mentioned that failure to report would be treated as gross misconduct. He said that he understood that there were many serious acts that an employee could commit that fell into the category of gross misconduct, but that failing to inform his line manager of his driving conviction was not one of them as it had no bearing on his job role. He referred to having 25 years' service and an exemplary record until the past 12 months, and to his previous suspension and warning having been unfounded.

82. On 24 November 2022, the claimant's appeal to the Crown Court against conviction was successful, and his disqualification was quashed.

83. The second appeal hearing took place on 28 November 2022. It was chaired by Ms. Hughes, and Andrew Lee from HR also attended. The hearing was again recorded, and a transcript was later produced, which I accept as accurate.

84. The claimant told Ms. Hughes that he had asked for more information from Mr. Silvestri and Mr. Mills about what he had done in order to cause some impact on the business. This was related to his point that he had not committed gross misconduct. He disputed the validity of the written warning for the use of the USB stick and that he had always been an exemplary employee in his 25-years of service. He said he had asked to see proof that what he had signed in 2019 had been v3 of the Company Car Policy. He said that paragraph 9.5 of that document did not apply because it only applied to driving on company business.

85. The claimant said that paragraph 3.6 did not require him to report his conviction to his line manager where he had given permission to DAVIS to carry out checks on his licence. He accepted that if he was driving a car on company business and got pulled over by the police or had an accident he would have a duty to report that to his line manager. Ms. Hughes asked the claimant some questions about this, and the claimant went on to say that if he had an accident on personal business, he would have dealt with it and would have repaired the car, but then accepted that if he had damaged the car, he would have reported that to the transport department even on personal use. He accepted that the car was a company car and that it belonged to the business at all times, whether he was on company business or personal. He said that if there had been any failure on the car, he had to report it not to his line manager but to the transport department. Ms. Hughes asked him why he thought it was different (i.e., why he was saying he didn't need to report to the respondent at all) for a conviction. The claimant said that the reason was that he had been convicted in 2020 and 2021 and that he had not been "*pulled up"* for not having reported these convictions to his line manager. He said that he felt that this was the normal way the company was working, and that DAVIS was informing the transport department of discrepancies on his licence.

86. Ms. Hughes asked the claimant whether he thought that a disqualification was different to having a conviction, and the claimant said yes, but that when he had been disqualified his wife could still use the car and he had been "*working on an appeal to the Crown Court."* He explained that on 29 September the disqualification had been suspended pending his appeal. The claimant said that in the three weeks between his disqualification and the respondent finding out about his disqualification, his wife had been using the car.

87. Ms. Hughes asked the claimant to talk her through the contact he had made with the transport department on 26 August. The claimant said that he had been on the bus back from court and that he had wanted to know what the process was "*as regarding to handing my car back cos I realised six month the car would have been parked on the drive it's not going to be in use firstly so I didn't want to keep in on so I explained this to her and I said I will not be needing the use of the car now, once the process going forward."* Ms. Hughes asked the claimant whether he had told Ms. Whale that he had lost his licence and the claimant said he had not. Ms. Hughes asked him why, and he said that this was because his case had not concluded yet. Ms. Hughes suggested to the claimant that it would have been reasonable for him to tell the transport department that he had lost his licence and was appealing, and the claimant said that he had not thought that far ahead: "*I just wanted to get the car out of my family and the car is actually the company's so I can work on the case going forward that's all it was that came to mind."* Ms. Hughes asked him why he hadn't then handed the car back. The claimant's response to this was that: "*cos then obviously um she said you can hand it back she gave me the advice on what needed to be done so the next week I filed a case with my Crown Court in order to find*

my appeal." Ms. Hughes told the claimant that she understood that losing his licence was "*quite traumatic"*, but that she was trying to understand why the claimant hadn't told the respondent about his situation and asked what he should do. Ms. Hughes said that if the claimant had told the respondent, then the car would have been taken away from him because he did not have a right to it if he did not have a licence to drive. The claimant said that this had not been the advice he had been given by the transport department, and MS Hughes asked again why he hadn't told the transport department he had been disqualified. After some further discussion, Ms. Hughes put to the claimant that it looked as though he had been expecting to get cash in lieu. The claimant initially denied this, but when Ms. Hughes said to him "*okay so you were just looking to hand the car back",* the claimant replied: "*Yeah I wants to know what's the allowance side of it if I hand the car back."*

88. Ms. Hughes noted that the claimant had a first and final warning. She said that the allegation relating to the failure to report the conviction was potentially gross misconduct on its own, and the claimant said he did not follow his because the non-use of the car for him had not impacted on his role. Ms. Hughes said that it was not the non-use of the car, it was the failure to report his conviction in accordance with the policy, and a conviction that had led to a disqualification.

89. The claimant brought up the fact that he had been placed at risk of redundancy, and said that "*I am not challenging the actions of the company"* but that it looked as though he had been dismissed to avoid a redundancy payment. Ms. Hughes again said that the allegation was potentially gross misconduct because it related to a company vehicle that he needed to be fully qualified, licenced and insured to drive. The claimant said that running through examples of gross misconduct they tended to be where there was harm to the business or putting the business at risk, which he had not done. He said that his dismissal was going to cause him problems going forward in any career that he chose, and that it was damaging.

90. Towards the end of the meeting, Ms. Hughes returned to the issue that the claimant had raised about signing the company car policy, and the claimant confirmed that he had signed the company car policy. He accepted that he had access to it, and Ms. Hughes showed the claimant the evidence in the pack which suggested that he had signed to say he had read and fully understood (v3 of the) Company Car Policy. The claimant did not dispute this evidence.

91. The claimant said that based on his time working at the respondent for 25 years, he felt that the decision was a "*very harsh and severe one and basically not fair …not reasonable…"*

92. Ms. Hughes wrote to the claimant on 13 December 2022 rejecting his second appeal against dismissal (p256-7). She referred to paragraphs 3.6 and 9.5 of v3 of the Company Car Policy and said that she did not accept the claimant's argument that the responsibility to report convictions lay with

the licence check provider only. She concluded that the policy was clear that it was the claimant's responsibility to report any conviction. She believed that the claimant had given a contradictory account when he had said but there was only an obligation to report if he was on company business, but then had stated that if his car had been damaged not on company business, he would have followed the procedure and reported it. She concluded that the redundancy exercise was completely unconnected to the dismissal. As to the claimant's arguments that the sanction had been too severe and that his length of service hadn't been taken into account, Ms. Hughes referred to the discussion that had taken place during the appeal hearing about why the claimant hadn't disclosed his disqualification to the transport administrator, and the claimant's account that he assumed that DAVIS would report to the respondent. She noted that when the claimant had contacted Ms. Whale to ask about returning the car and instead opting for cash in lieu, the reason he had given for wanting to return the car was that he was working from home and not using the vehicle much. She found that this contradicted what the claimant had said in the hearing and concluded that the claimant had willfully tried to hide the fact that he had been disqualified from driving and had sought instead to try and return the company car and receive a cash-in-lieu payment as an alternative.

93. I find that Ms. Hughes was careful to review the evidence she had been presented with and to reach her own decision, and that she did not simply "rubber stamp" the decision that Ms. Silvestri had reached. This is consistent with the fact that Ms. Hughes took time to reach a decision, rather than rushing to give it on the day of the appeal hearing, as she explained at the start of the appeal. I find that Ms. Hughes did give consideration to the claimant's argument that he did not believe that he needed to report the disqualification once he had given consent to DAVIS to carry out quarterly checks. She read v3 and v4 of the Company Car Policy, but I accept that she reached her decision that the claimant's obligations were clear, and that dismissal was appropriate based upon v3. She concluded that v3, and specifically paragraph 3.6, did impose an obligation upon the claimant to report his conviction and disqualification. She did give consideration to whether the claimant's failure was unintentional, or intentional, and she genuinely believed that he had intentionally tried to hide the fact that he had been disqualified from driving. Key factors in her decision making were the email that the claimant had sent to Ms. Whale on 26 August, and inconsistencies in the accounts that the claimant had given. On the one hand, the claimant had suggested he genuinely wanted to understand his options with the company car having been disqualified, but on the other hand he wasn't telling Ms. Whale about the disqualification. Ms. Hughes did not believe that the claimant's account was credible. She did give consideration to the fact that the claimant had not reported two other speeding convictions and had not been subjected to disciplinary action in respect of that, but she did not consider that undermined her interpretation of the policy, and she did not consider it relevant to include in the appeal letter.

94. Ms. Hughes' view was that the claimant's failure to disclose his disqualification was so serious as to amount to gross misconduct, and to warrant dismissal by itself. She did not rely on the first and final written warning in reaching her decision that the claimant's appeal should be rejected.

Further findings of fact (relevant to wrongful dismissal / contributory fault).

95. In deciding whether the respondent was entitled to dismiss the claimant without notice, I have to decide whether what the claimant actually did amounted to gross misconduct, or not. My findings about what the claimant actually did would also be relevant to any issue of contributory conduct / contributory fault if I found that there had been an unfair dismissal.

96. The claimant had been made aware of v3 of the Company Car Policy and had signed to confirm receipt of that policy (p142-3).

97. I find that the claimant was aware that v3 of the Company Car Policy required him to report a conviction and / or disqualification to the respondent. I reach this conclusion because:

    (a) When Mr. Everett's investigation started, the claimant's initial reaction to being asked why he had not disclosed his disqualification was that he was appealing his conviction. It was not that he did not believe he had to because he had given consent to DAVIS undertaking quarterly checks. If it had genuinely been the case that the claimant had not reported his disqualification because he did not know he had to, it is likely that he would have given this as his first explanation.

    (b) Further, looking at v3 of the Company Car Policy itself, whilst the wording of v3 of the company car policy, and in particular paragraphs 3.6 and 9.5 could have been better, the construction that the claimant was required to notify the respondent of convictions, even if he had given consent to DAVIS to conduct quarterly checks, makes more sense. Otherwise, the effect could have been that a driver would be convicted and disqualified from driving just after a quarterly check had been conducted, with the effect that the conviction and disqualification would not be picked up for a further three months. The purpose of the policy was clearly to make sure that the respondent was aware of issues that might affect its insurance cover, and / or the employee's suitability to have a company car.

    (c) As well as the fact that the claimant's initial response was not to suggest that he hadn't reported the disqualification because he believed it to be DAVIS's responsibility, the claimant gave some contradictory explanations during the disciplinary and appeal process, such as he would have reported the disqualification if it had been upheld on appeal. That suggests that he knew that he had a

responsibility to report, and that the responsibility did not simply lie with DAVIS.

(d) Against this, there is the fact that the claimant had not reported his speeding convictions dated 16 September 2021 and March 2022, and he had not been disciplined at that time, and the fact that he knew he had consented to DAVIS carrying out quarterly checks and so should have known that DAVIS would find out and tell the respondent about his disqualification at some point. However, I find that on balance what happened is that the claimant, who strongly (and correctly as it turned out) believed that he would be successful in overturning his conviction and disqualification, and who initially believed that would only take weeks, hoped that he would be able to have the disqualification quashed before the respondent found out. That he initially believed he may be able to resolve the appeal within a short time frame is consistent with what he said at the disciplinary hearing on 30 September 2022 when Mr. Silvestri was asking him why he had not informed the transport department in his email of 26 August that he had been convicted: "*I was under the impression that the appeals would happen within two weeks, to what three maybe I would be able to resolve the matter"* (p187).

98. I also find that the claimant deliberately decided not to tell the respondent that he had been disqualified, in the hope that he could quickly overturn the disqualification on appeal. He deliberately didn't disclose the fact that he had just been disqualified when he contacted Ms. Whale to ask whether he could return the car and receive a cash-in-lieu allowance instead. He gave a positive reason for wanting to return the vehicle which didn't mention the very reason that he was in fact making the enquiry. When Ms. Whale replied saying that to receive the cash in lieu allowance, he would need to provide the V5 or lease for his own vehicle and an insurance document, the claimant didn't reply at that stage to say that he wouldn't be able to do that as he had been disqualified. He instead said he would let Ms. Whale know "*once I have decided"* (p153).

Submissions

99. The claimant relied upon Ms. Cashell's Skeleton Argument, and her oral submissions. The respondent relied upon oral submissions. What is set out below is a summary of the submissions, but I took into account all of the detailed submissions made to me.

100. Ms. Cashell on behalf of the respondent referred me to case law set out in her Skeleton Argument, and submitted that:

(a) The reason for dismissal was not in dispute: the claimant was dismissed for conduct.

(b) However, the decision to dismiss for that reason had been wholly outside the range of reasonable responses. The reason was

insufficient to justify dismissal and the respondent had acted outside the range of reasonable responses in treating it as a sufficient reason to dismiss.

(c) In support of this submission, Ms. Cashell drew my attention to the following points in her Skeleton Argument:

i. The dismissal had to be placed in the context of what had happened prior to that (i.e., the process leading up to the first and final written warning and being placed at risk of redundancy). This represented a "*persistent intention to remove"* the claimant from the business. Mr. Everett had been the person who had suspended the claimant in September 2022 and had recommended that his case proceed to disciplinary.

ii. Driving a car was not required for the claimant's role as IT Operations Night Shift Manager. He was not a DPD driver and had been instructed by his manager to work from home. There was no contractual requirement for the claimant to drive or to report any driving convictions to the respondent or his line manager.

iii. V3 of the Company Car Policy did not require the claimant to disclose his driving convictions. The wording stated, in effect, that if the claimant consented to DAVIS reviewing his licence, no further action was required. The claimant had consented to DAVIS reviewing his licence and so it was not his responsibility to inform his line manager about any driving convictions; the responsibility rested with DAVIS. Insufficient consideration (if at all) had been given by Mr. Silvestri, Mr. Mills or Ms. Hughes as to the claimant's understanding. If the claimant's understanding was incorrect, the respondent's policy was clearly ambiguous and insufficient consideration (if at all) had been given to this.

iv. V3 of the Company Car Policy did not state that failing to disclose a driving conviction was gross misconduct which could result in dismissal.

v. The claimant had previously had speeding points which had been flagged on the system by DAVIS, and which the claimant had not disclosed and yet he had never been disciplined for not raising these directly with his line manager. The respondent had given the claimant a legitimate belief that such behaviour would not result in a disciplinary sanction, which further supported the claimant's understanding of the Company Car Policy.

vi. No consideration was given to the context surrounding the claimant's disqualification from driving and the miscarriage of justice that had occurred when the Magistrates had disqualified him. During the disciplinary hearing the claimant had explained that he had not disclosed the conviction as he was appealing the decision and his disqualification had been suspended. Pending the outcome of the appeal. At the final appeal hearing he informed Ms. Hughes that his disqualification had been overturned.

vii. The first and final written warning had been used by Mr. Mills as justification for the claimant's summary dismissal, despite it not having been considered by Mr. Silvestri or by Ms. Hughes at the time. To the extent that it was now being relied upon to justify the claimant's dismissal: (i) there were no prima facie grounds for imposing it and /or it was manifestly inappropriate to have imposed it; (ii) the disciplinary actions were in no way related and so it would be inappropriate for it to form any part of consideration in the second disciplinary.

viii. The claimant's 25-years of service and exemplary record up until 2022 should have been a heavy mitigating factor.

(d) In relation to the claim for wrongful dismissal, the claimant's actions had not actually constituted gross misconduct and the respondent was not entitled to dismiss him without notice.

(e) Further, in oral submissions, Ms. Cashell submitted that:

i. The respondent's witnesses could not speak to several elements of the claimant's previous treatment, but that had been dealt with by the claimant in his witness statement. Mr. Silvestri had initially investigated allegations of fraudulent expenses against the claimant and had got the ball rolling in gathering evidence. Likewise, Mr. Everett had suspended the claimant and investigated him in 2022 and had refused his appeal against the first disciplinary in 2022. Mr. Silvestri accepted that when considering the allegations against the claimant he relied upon the investigation report of Mr. Everett and in part discussions with Mr. Everett during the procedure. These background issues contributed to the claimant being dismissed and it was unreasonable in the circumstances.

ii. Driving was not required for the claimant's role as IT Operation Shift Manager. The claimant's understanding was that he received a company car or cash in lieu as a perk of his promotion, not because he was obliged to drive. Mr. Silvestri's evidence had been somewhat confused. He had accepted he did not consider whether working from home was

ongoing because his role did not require the claimant to work from home 100% of the time, but when questioned he said he was not aware of how often the claimant was required to travel to different depots. The claimant had said in evidence it was an irregular occurrence and in 2018 he had been required to go 4 times a year. Mr. Silvestri had incorrectly relied upon a suggestion that the claimant was required to drive and failed to consider if disqualification threatened his ability to do his role.

iii. Mr. Silvestri had failed to apply his mind to whether there was any contractual requirement to report driving convictions to his manager.

iv. There was clearly confusion as to which policy the claimant had been aware of, and Mr. Silvestri and Ms. Hughes appeared to have totally disregarded this aspect. The respondent had no record of the claimant signing v4 of the Company Car Policy and the claimant had stated in the investigation that he was not aware. Mr. Silvestri accepted that in the dismissal letter he had only referred to v3. Ms. Hughes said she had also considered v4, but that had not been put to the claimant in the appeal meeting or set out in the appeal letter. Any reliance on v4 would be unreasonable. Mr. Silvestri had also not considered the fact that the claimant had signed (for v3) a few years ago.

v. V3 of the Company Car Policy didn't require the claimant to disclose his driving convictions to the respondent. Whilst Mr. Silvestri and Ms. Hughes had maintained that the policy was clear, in the second appeal the claimant had made the point that Mr. Mills had acknowledged that the clause was ambiguous and that he had to check the position with the respondent after the hearing. It was inappropriate for Mr. Silvestri to rely on paragraph 9.4 of version 3 of the Company Car Policy, which related to bad or dangerous driving. It had also been inappropriate for him to refer to paragraph 9.5 of v3, which specifically related to individuals caught speeding on company business. Mr. Silvestri had been trying to justify a dismissal that was clearly unreasonable. Ms. Hughes' reliance on the claimant's views about the reporting of accidents, or paragraph 9.5, was misplaced.

vi. Even if the policy did impose an obligation on the claimant to report, there was clearly an ambiguity in the policy and no consideration had been given to whether the claimant was mistaken or confused due to the wording of the policy. Mr. Silvestri had refused to accept that there was any other possible interpretation of the wording.

vii. V3 of the Company Car Policy did not say that failure to report was gross misconduct and nor did the disciplinary policy say that. Whilst v4 of the Company Car Policy did say that, this was not the version relied upon by Mr. Silvestri and the evidence was that the claimant had not signed v4 and was not aware of it. In evidence, Mr. Silvestri had suggested that theft was gross misconduct, but this had not been the allegation against the claimant. It was unreasonable to dismiss where it had not been flagged to the claimant that this would warrant dismissal.

viii. Neither Mr. Silvestri nor Ms. Hughes had given consideration to the fact that the claimant had previously failed to disclose speeding convictions and had not been disciplined for that, and whether that supported the claimant's case about the way in which he interpreted the policy or had led him to believe that any breach of policy would be overlooked.

ix. Although Mr. Silvestri's evidence had been that he would have considered the circumstances of disqualification in deciding whether to dismiss, that did not appear to be the case from the dismissal letter. The fact the claimant's disqualification had been suspended pending appeal, and that his appeal had been successful, should have been relevant factors for consideration.

x. It had been inappropriate to consider the first and final written warning, as Mr. Mills had, and the claimant's 25-years' service was a heavy mitigating factor. Mr. Silvestri's evidence had been that he did not need to consider length of service in order to reach his conclusion. Ms. Hughes said that she had considered it but still felt the sanction was appropriate.

xi. When considering the claim for wrongful dismissal, the allegation against the claimant had never been that he had been dishonest or seeking to defraud. It had been that he had failed to disclose. Dishonesty had not been alleged at the time. Mr. Silvestri and Ms. Hughes had reached the conclusion that the claimant had deliberately misled the respondent when he made enquiries about returning the car on 26 August 2022, and had asked about a cash entitlement he was not entitled to. However, there was no evidence that the claimant had been aware of v4 of the Company Car Policy and the claimant had thought that was a perk he was entitled to have. He knew that DAVIS would report to the respondent, so it made no sense for him to withhold information. He knew DAVIS would report his conviction to the respondent. The tribunal needed to apply Ivey, and should find that the claimant was not objectively dishonest in failing to disclose

and that he should not have been dismissed summarily or at all.

xii. If the tribunal found that the dismissal was unfair, there should be no "Polkey" reduction. As to whether there should be any finding of contributory fault, that would to some extent depend on why the tribunal found the dismissal to be unfair. The claimant's primary point was that had not committed misconduct and it would not be just and equitable to make any reduction. If any reduction was made, it should be no more than 25% and it would be inappropriate to reduce by 100% as such cases should be rare and exceptional.

101. Mr. Bownes on behalf of the respondent submitted that:

(a) The starting point when considering the warning should be Wincanton Group Plc v Stone [2013] IRLR 178, in particular paragraph 37. The claimant had got nowhere near showing that there were no prima facie grounds or that it was manifestly inappropriate. These were high bars. In cross-examination the claimant had accepted that he had been aware of the IT policies and charters, he had made a list and agreed that a number of the policies restricted USB use. Descending further into the arena would be for the tribunal to go too far. It was not open to the tribunal to go behind that warning.

(b) The claimant had not come out well from his cross-examination. There had been a number of opportunities where seemingly quite consequential matters arose from the first time in cross-examination. There was no reason why they should not have arisen before. He had had two internal appeals and had taken no issue with the minutes of meetings. He had been professionally represented throughout. It had been absurd for the claimant to suggest that Magistrates courts could not deal with criminal matters and that should be taken into account when considering the claimant's credibility and what he was willing to say to deal with his own claim. His own witness statement referred to the police being involved. There were a number of occasions where the claimant had avoided answering questions, notably towards the end of his evidence, when asked whether it would be reasonable for a policy to have a particular meaning. The tribunal should conclude that the reason the claimant did not answer was because he knew what the answer was and he knew the spin he was putting on the policy was not a reasonable one. By contrast, the respondent's witnesses had been straightforward.

(c) The claimant now accepted that the reason for dismissal had been the potentially fair reason of conduct. The respondent's witnesses had genuinely believed the claimant had committed misconduct. In these circumstances, the claimant's cross-examination had been

instructive. His case on the face of it was that there had been no need for him to report because the policy had told him he did not need to, it was someone else's responsibility. However, it was quite surprising then how many times he had said throughout the process that he did intend to tell his employer and he would have told them if circumstances had been different, if he had been charged with something else. At one point he said he would have told them if a proper judge had convicted him. He had so little respect for Magistrates that he didn't agree with the conviction and decided not to do anything about it because he decided it was wrong. Nothing in the policy had any bearing on whether the claimant agreed with the conviction or not. It was curious if he believed he did not need to tell anyone why he said so many times that he was intending to, was going to, and the number of different reasons he gave for why he was not required to tell. It counted against his argument that the policy didn't apply and that it was wrong for the respondent to say it did. The wording in paragraph 3.6 of v3 of the Company Car Policy was clear. The absolute linkage that the claimant appears to have made in terms of saying it only applied when not signed up to DAVIS was not supported by the language of the actual clause or the remainder of the policy. There was no reason why different approaches would be taken. The policy clearly says you need to disclose any convictions.

(d) In terms of what has been said about previous issues of speeding, beyond anything else, the claimant accepted then and now that there is a significant difference between simply receiving points for speeding and being disqualified.

(e) Combining all those points with the various reasons given at the time with the email that the claimant sent to the transport department, it was clear where the respondent had got its reasonable belief from. The claimant had told the tribunal time and again that he was simply seeking advice as to his circumstances, but he had never explained the circumstances. He didn't set out what had happened and why he was contacting the transport department. If he had genuinely wanted advice, he would have done that. He did not. He said how do I return the car and get cash allowance. That was his initial reaction as soon as being on the bus back from court. It occurred to him to tell his employer that but not about his conviction. This was something that played significantly on minds of the decision makers.

(f) One of the other hurdles which the claimant had to get over (if his interpretation of the policy was the correct one) was that given that the checks DAVIS conducted were quarterly, it would be odd that the respondent would not find out about his disqualification for nearly three months. The claimant's suggestion that this was how the policy worked was absurd. The respondent (in its policy) was plainly putting the emphasis on needing to know.

(g) The tribunal should find that the respondent's belief in the claimant's misconduct was genuine and reasonable, and that the sanction was reasonable. The fact that the claimant said (in meetings) that the sanction was too severe indicates that he had some understanding he had committed misconduct because that would only be a relevant argument if he had committed misconduct. The claimant was a manager who the respondent had concluded had withheld information and where the evidence of what he had actually done was to seek to bolster his own financial position. In the circumstances it was reasonable to conclude that there was evidence of a breach of the policy and the claimant acting for his own pecuniary gain affecting trust and confidence and amounting to gross misconduct. Summary dismissal was fair and within the range of reasonable responses.

(h) In terms of taking into account the first and final written warning, Mr. Silvestri did not. The respondent submitted that the warning was largely relevant if the tribunal was considering Polkey. The claimant's argument that it could not be taken into account because it was not a similar offence would lead to surprising results. Ms. Hughes explained that fundamentally both incidents were breaches of the respondent's policies and procedures. These days the number of policies that large employers can have is almost countless. If a further breach of policy is not related, then some would could keep a cream warnings for individual policies tens of times and they could not be relied upon unless the further breach was very specific to that previous policy again. It would not have been inappropriate to consider the warning and if the tribunal found the dismissal to be unfair, the respondent would invite the tribunal to find that the claimant would have been fairly dismissed anyway because he would have been dismissed for "totting up" (i.e., for committing a further offence against the background of a first and final warning).

(i) If the tribunal found the dismissal to be unfair, the tribunal should also make a finding of contributory conduct and reduce the basic and compensatory awards by 100%. The dismissal had been entirely caused by the claimant. It was within his control what he did on 26 August and he chose not to tell his employer. If he had, he would not be here. Equally, if he had taken a different approach in the disciplinary proceedings, such as not repeatedly asserting that he had not been convicted of a criminal offence or not alleging he had been defamed. There was a pattern of the claimant not accepting responsibility. He had done the same in relation to the USB issue. He was an IT Operations Manager who claimed not to be aware of the IT policies despite knowing where they were. In relation to one of the speeding offences, he has at one point said he was only 1mph over when he was 6mph over because the speed limit had changed. He said his responsibility to report was not his responsibility because DAVIS could do it, up to 3 months later.

(j) As to wrongful dismissal, the claimant had committed gross misconduct. This was obviously a different test from unfair dismissal. The claimant's failure to follow policies, acting for his own pecuniary gain amounted to a breach of trust and confidence. It was gross misconduct sufficient to entitle the respondent to dismiss him without notice.

Law

Unfair Dismissal

102. It is for the employer to show the reason, or principal reason for dismissal (Section 98 (1) (a) of the Employment Rights Act 1996 (**ERA**)), and conduct is a potentially fair reason for dismissal (Section 98 (2) (b) ERA).

103. If the reason (or principal reason) is shown to be a potentially fair one, then when deciding whether the dismissal is fair or unfair, the tribunal must apply Section 98 (4) of the ERA, which says:

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

104. It is well established that where a dismissal is found to have been for a reason related to conduct, the tribunal should consider the matters identified in the case of British Home Stores Ltd v Burchell [1980] IRLR 303: (i) did the employer believe that the employee was guilty of misconduct; (ii) did the employer have in mind reasonable grounds on which to sustain that belief; (iii) at the stage at which that belief was formed on those grounds, had the employer carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

105. It is not for the tribunal to substitute its own decision for that of the employer (Iceland Frozen Foods Limited v Jones [1983] ICR 17). In applying Section 98 (4), the tribunal's role is to determine whether the employer acted in a manner in which a reasonable employer might have acted, even if the tribunal itself might have acted differently had it been the decision-maker. This "range of reasonable responses" test applies to the procedure adopted as well as to the decision to dismiss (Pinnington v City and County of Swansea & anor UKEAT/0561/03/MAA).

106. In Lock v Cardiff Railway Company Ltd [1998] IRLR 358, the EAT held that employees should be given due warning of which types of

misconduct will, on a first breach, lead to dismissal. A similar point was made in Meyer Dunmore International Ltd v Rogers [1978] IRLR 167, where the EAT rejected the employer's appeal that a summary dismissal for fighting had been unfair, holding that the employer was entitled to have a rule that employees engaged in fighting would be summarily dismissed, but provided that it was plainly and clearly set out and great publicity given to it so that employees knew that if they got involved in fighting they would be dismissed.

107. However, even if an employee is reasonably believed to have committed gross misconduct, that does not mean that the dismissal must then inevitably fall within the range of reasonable responses (Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854).

108. In Hadjioannou v Coral Casinos Ltd [1981] 352, the EAT held it may be relevant that an employee's treatment (in being dismissed) was not on a par with that meted out in other cases, if there was evidence that employees had been led by the employer to believe that certain categories of conduct will either be overlooked, or at least not dealt with by the sanction of dismissal.

109. Length of service may be relevant when deciding whether a decision to dismiss was reasonable (Strouthos v London Underground Ltd [2004] EWCA Civ 402). In Strouthos, the Court of Appeal also stated that it is a basic proposition in disciplinary proceedings that the charge against the employee facing dismissal should be precisely framed, and the evidence confined to the particulars given in the charge.

110. In Taylor v OCS Group [2006] IRLR 613, Lord Justice Smith explained that where an early stage of the process has been found to be unfair, the tribunal must examine the later stages with care "*to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker, the overall process was fair notwithstanding deficiencies at the early stage.*"

111. In Wincanton Group Plc v Stone [2013] IRLR 178 held that unless a previous warning was not issued in good faith nor with prima facie grounds for making it, then that warning will be valid. Where an earlier warning is valid, then, it is not for the tribunal to go behind that warning to hold that it should not have been issued. The tribunal is entitled to take into account the factual circumstances giving rise to the warning. A tribunal must always remember that it is the employer's act that is to be considered in the light of section 98 (4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

112. In Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135, the Court of Appeal held that it is legitimate for an employer to rely on a final warning when deciding whether to dismiss an employee, provided that the warning was issued in good faith, that there were at least prima facie grounds for imposing it and that it was not manifestly inappropriate to issue it. It is not the function of the tribunal to re-open the final warning and rule on whether it should or should not have been issued. The function of the tribunal is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct.

113. The tribunal should take into account the ACAS Code of Practice on discipline and grievance procedures (**the ACAS Code**) when deciding whether the decision was within the range of reasonable responses. Paragraph 2 of the Code says that fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary situations, and that these should be set down in writing, be specific and clear. Paragraph 9 says that if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing and the notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. Paragraph 24 says that disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct and that these may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination. The Code says that employees should have a right of appeal, and it is not prescriptive about the amount of time that must be offered to lodge an appeal. Nor is the ACAS Guide on Disciplinaries and Grievances at Work, though that suggests that five working days is commonly felt appropriate.

"Polkey"

114. A tribunal may reduce a compensatory award to reflect the chance that the employee may have been fairly dismissed in any case, had there been no unfairness. This is known as the "Polkey" principle, after the case of Polkey v AE Dayton Services Ltd [1987] IRLR 503.

115. In Hill v Governing Body of Great Tey Primary School [2013] IRLR 273, the EAT described the exercise as being predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The tribunal is not answering the question of what it would have done if it were the employer: it is assessing the chances of what the actual employer would have done if that employer had acted fairly.

Conduct / contributory fault

116. If the dismissal is found to be unfair, Section 122 (2) of the ERA says that where the tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the tribunal shall do so.

117. Section 123 (6) says that where the 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. In deciding whether to reduce compensation, it is only the employee's conduct which can be taken into account; the conduct of the employer is not relevant (Parker Foundry Ltd v Slack [1992] IRLR 11).

118. Conduct meriting a reduction under Section 122 (2) or section 123 (6) must be to at least some degree culpable or blameworthy, a point reiterated by the EAT in Sanha v Facilicom Cleaning Services Ltd [2020] UKEAT/0250/18. In Optikinetics v Whooley [1999] ICR 984, the EAT held that once the tribunal finds that there is blameworthy conduct on the part of an employee that caused or contributed to his dismissal, the tribunal must make a reduction in the compensatory award by such proportion as is just and equitable. By contrast, section 122 (2) gives the tribunal a wide discretion whether to make any reduction in the basic award.

119. Although 100% reduction in compensation can be permissible, such a result would be rare and a tribunal adopting such a course should spell out its reasons for doing so (a point made by the EAT in Lemonious v Church Commissioners UKEAT/0253/12 and Steen v ASP Packaging Ltd [2014] ICR 56).

Wrongful Dismissal

120. In deciding whether the respondent was entitled to dismiss the claimant without notice, the tribunal is not concerned with the reasonableness of the respondent's decision to dismiss but with the factual question, was the claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract (Enable Care and Home Support Ltd v Pearson UKEAT/0366/09/SM).

121. The tribunal's attention was drawn to the test of dishonesty set out in Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club) [2018] AC 391. When dishonesty is in question, the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. Then, whether that conduct was honest or dishonest is to be determined by the fact-finder applying the (objective) standards of

ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.

Conclusions

Was the Claimant unfairly dismissed?

122. The claimant accepted at the start of the hearing that the reason for dismissal was the potentially fair reason of conduct (Section 98 (2) (b) ERA). I have found that Mr. Silvestri genuinely believed that the claimant was guilty of misconduct, and that Mr. Mills and subsequently Ms. Hughes also genuinely believed this when they upheld the dismissal on appeal.

123. The evidence that Mr. Silvestri had suggested that the claimant had been sent v3 of the Company Car Policy in May 2019, and that he had signed to confirm that he had read and understood it on 16 May 2019. Mr. Silvestri gave consideration to the construction of v3 that the claimant argued for in the disciplinary hearing. His conclusion that v3 imposed an obligation on the claimant to report his conviction and disqualification was one that was open to a reasonable employer. The penultimate sentence in paragraph 3.6 of v3 of the Company Car Policy stated that: "*if the driver receives any driving conviction then it is their responsibility to inform their Line Manager and email the Company Car Ambassadors…..*" (p127). Mr. Silvestri's interpretation made more sense than the claimant's in the context of what the respondent was clearly trying to achieve with the policy. The advantage to an employee in giving consent to DAVIS to carry out quarterly checks was that they would be spared having to liaise with the transport department each quarter, but on the respondent's construction did not remove the requirement to notify the line manager of convictions. The construction that the claimant was arguing for at the disciplinary and appeal stage could have left the respondent in a situation where they (and their insurer) were unaware of an employee's conviction and / or disqualification from driving for almost three months. The first part of paragraph 9.5 did concern speeding on company business, but the second part of paragraph 9.5 stated (emphasis added): "***All*** *speeding fines must be reported to our Line Manager."*

124. Mr. Silvestri also had before him evidence that the claimant had contacted Ms. Whale in the transport department asking how he could return the car and obtain cash-in-lieu, on the very day that he had been disqualified from driving, but had failed to disclose that he had been disqualified and had instead given another reason for wanting to return the car. He had still not disclosed his disqualification in his second email, responding to Ms. Whale. In the circumstances, Mr. Silvestri was entitled to conclude that not only should the claimant have known that he was supposed to report his disqualification, but that this was evidence that the claimant had known he should report and had intentionally chosen not to do so.

125. The claimant submitted that the dismissal was not reasonable because the allegation set out in the invitation to the disciplinary hearing had been that the claimant had failed to disclose his disqualification, and dishonesty had not been alleged. However, the question of whether the claimant had deliberately failed to disclose his disqualification knowing that he should do so was one that went to the heart of the question of the claimant's culpability. Mr. Silvestri's consideration of the emails to Ms. Whale, and whether that was evidence of whether the claimant had acted dishonesty, in the sense of knowing that he should disclose his disqualification and choosing not to, was not outside the range of reasonable responses. The claimant had been provided with a copy of the emails with the invitation to the disciplinary hearing and had been given an opportunity to address them during the disciplinary hearing.

126. The procedure adopted was one that was within the range of reasonable responses. Whilst the requirement to submit an appeal within 48 hours of the decision was shorter than the suggestion in the ACAS Guidance, neither the Code nor the Guidance are prescriptive. The 48-hour timescale was in line with the respondent's own policy, and the claimant did not suggest in either of his appeals that he had not had adequate time to formulate his grounds of appeal.

127. I turn then to whether the sanction of dismissal imposed by Mr. Silvestri was one which a reasonable employer could have imposed, in all the circumstances, including the size and administrative resources of the respondent, and in accordance with equity and the substantial merits of the case. It is not for me to substitute my decision for that of the respondent.

128. I have found that neither the fact that Mr. Silvestri had been involved in investigating expenses in September 2021, nor the redundancy exercise, played any part in the decision to dismiss.

129. The claimant submitted that dismissal was not reasonable because v3 of the Company Car Policy did not state that failing to disclose a driving conviction was gross misconduct which could result in dismissal. This is correct, but the introductory section did state that failure to comply with the policy would result in disciplinary action, and the disciplinary procedure gave examples of gross misconduct which included a breakdown of mutual trust and confidence. Where, as here, Mr. Silvestri had concluded that the claimant had deliberately failed to disclose his disqualification and had done so even when seeking advice from Ms. Whale about how to return the car and take a cash allowance instead, it was within the range of reasonable responses for him to consider that such conduct in the part of a senior employee caused a breakdown in trust and confidence.

130. The claimant submitted that the decision to dismiss was not reasonable because, essentially, he had been led to legitimately believe that the respondent would not discipline him for failing to report a conviction due to the fact that he had received speeding convictions in September

2021 and March 2022 that he had not reported to the respondent, and no action had been taken. The reliance that the claimant placed at the disciplinary hearing upon his own failure to report these convictions was to support his argument that he did not know he had to report, which Mr. Silvestri had rejected. It was not outside the range of reasonable responses for Mr. Silvestri not to then give separate consideration to whether this might support a different argument by the claimant that had not been raised by him at the disciplinary hearing.

131. The claimant submitted that the decision to dismiss was not reasonable because no consideration was given to the context surrounding his disqualification, and the miscarriage of justice that had occurred. However, as I have found, Mr. Silvestri did consider the context, but this was not a factor that weighed heavily with him because the allegation against the claimant was not that he had been disqualified per se, but that, as an employee with a company car, he had failed to report that disqualification. A similar point arises with regards to whether it was outside the range of reasonable responses for Mr. Silvestri not to make further enquiries about whether the claimant was contractually required to drive as part of his role, and / or into how often he was required to attend a hub.

132. Mr. Silvestri did not take into account the first and final written warning, and so the question of whether he would have been entitled to take it into account does not arise at this stage.

133. The claimant submitted that his length of service should have been a heavy mitigating factor. I have found that Mr. Silvestri did consider the claimant's length of service, but that in light of his conclusion that trust and confidence had broken down, he did not consider it relevant to refer to the claimant's length of service in his letter. Mr. Silvestri's decision to dismiss, notwithstanding the claimant's long service, was one that was open to a reasonable employer.

134. The decision of Mr. Mills to uphold the dismissal on appeal was also within the range of responses open to a reasonable employer. He reached the same interpretation of paragraph 3.6 and the second part of paragraph 9.5 as Mr. Silvestri had done, and he also concluded that the claimant had known of v3 of the Company Car Policy and the requirement to report his conviction.

135. One of the points raised by the claimant in his appeal to Mr. Mills was his long service. Mr. Mills expressly considered the claimant's long-service, and in this context, he looked at his disciplinary record. He did not consider the claimant's long-service to be a sufficiently mitigating factor, noting that he had a previous first and final written warning for failing to follow the respondent's procedures, in that case related to use of USBs. I have found that the first and final written warning had been issued in good faith, and I conclude that Mr. Mills was entitled to have regard to it. The use of a USB stick against a background of the respondent having a policy that they

should not be used without authorisation, does provide *prima facie* grounds for issuing a warning. Whilst the claimant didn't accept he had signed the policy, and he described the warning in evidence as "*unfair"* and "*very harsh",* the evidence that was before the tribunal did not meet the threshold of showing that it was "manifestly inappropriate". In the circumstances, the thresholds described in Wincanton and Davies v Sandwell are not met. That does however leave the question of whether it was outside the range of reasonable responses for Mr. Mills to give consideration to the warning on the basis of the claimant's argument that it was not for a similar, or related, offence. The first and final warning letter stated that: "*if no further related breach of discipline occurs within the next 12 months this warning will be disregarded from your personal record."* Although the warning had been issued due to a breach of a different policy, it did relate to breach of one of the respondent's policies, and the alleged conduct in 2022 was also that the claimant had breached one of the respondent's policies. In the circumstances, I find that it was within the range of reasonable responses for the warning to be referred to where there had been a further allegation of a breach of one of the respondent's policies within 12 months.

136. I also find that the decision of Ms. Hughes to uphold the decision on appeal was also within the range of reasonable responses. I have found that whilst Ms. Hughes did read v4 of the Company Car Policy, she concluded that v3 made clear the claimant's obligations and that dismissal was appropriate based upon v3. She concluded that v3, and specifically paragraph 3.6, did impose an obligation upon the claimant to report his conviction and disqualification. I have found that she considered the points of appeal raised by the claimant before reaching her decision. Given the evidence before her, it was within the range of reasonable responses for her to conclude that the claimant had known that he was supposed to report his disqualification, and that he had intentionally failed to do so, including when he had contacted Ms. Whale to find out about returning the car and receiving CIL, and that the fact he had previously not been "pulled up" for failing to report two speeding convictions did not undermine that. In those circumstances, it was within the range of reasonable responses for her to consider that the dismissal should be upheld. She did not rely on the first and final written warning in doing so.

137. In conclusion, I find that the claimant was not unfairly dismissed. In the circumstances, I have not gone on to address issues of contributory conduct or "Polkey".

Breach of Contract ("Wrongful Dismissal")

138. Unlike in an unfair dismissal claim, where I must not to substitute my own decision for that of the employer, in the wrongful dismissal claim, I have to decide whether the claimant in fact committed a repudiatory breach of contract, entitling the respondent to dismiss him without notice. I have set out my additional findings of fact relevant to this claim at the end of the main findings of fact section of these reasons (above).

139. An employer needs to be able to place trust and confidence in a long-standing employee at management level. Having found that the claimant did understand that he had to report a conviction / disqualification to the respondent, and that he deliberately failed to report his disqualification, including when he decided to make enquiries about whether he could return the company car and obtain CIL instead, I have reached the conclusion that the claimant's conduct did breach the implied term of trust and confidence and that it amounted to a repudiatory breach. In those circumstances, the respondent was entitled to dismiss the claimant without notice, and the claim for wrongful dismissal (notice pay) is also dismissed.

Employment Judge **C Knowles**

Date 27 July 2024

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