Case No: 1304270/2017
1304272/2017
1304274/2017

EMPLOYMENT TRIBUNALS

Claimants: **Mr M Genus and Mr M Kelly**

Respondent: **Fortem Solutions Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: **Birmingham** **On: 16 and 17 July 2018 and in chambers on 18 and 25 July 2018**

Before: **Employment Judge Kelly**

Representation
Claimants: Ms M Owen of counsel
Respondent: Mr A Mellis of counsel

JUDGMENT

The judgment of the Tribunal is that:

Mr Genus and Mr Kelly were unfairly dismissed

REASONS

1. Mr Genus and Mr Kelly brought claims of unfair dismissal on 2 December 2017.

2. The agreed issues in relation to their claims are set out in the Appendix to this Judgment. This is a final version of the agreed issues after several revisions during the course of the Hearing. We considered liability only at this Hearing.

3. For the claimant, we heard oral evidence from Mr Genus, Mr Kelly and JB, who was a work colleague of the claimants, hearing companion and trade union representative of an unrecognised union. For the respondent, we heard oral evidence from CC, Operations Director and disciplinary officer, and MG, Director of Operations and appeal officer.

4. We were given a bundle of documents of over 469 pages, the attached list of issues, a chronology, cast list and respondent's skeleton argument.

5. We were refered to the cases of *Hadjioannou v Coral Casinos [1981] IRLR 352* and *Charles v NHS Business Services Authority UKEAT/0150/15.* In preliminary case management, the parties were referred to the case of *Sainsburys Supermarkets v Hitt [2002] EWCA Civ 1688*.

6. Both parties agreed that, apart from the claimants, persons referred to in this Judgment would be referred to by their initials only.

7. References to "the Hearing" are to the Tribunal Hearing, to page numbers are to numbers of the Hearing bundle, and to paragraphs are to paragraphs in this Judgment.

What happened

8. We make the following findings of fact relevant to the issues in dispute.

9. The respondent is in business as a national property solutions provider with its core services consisting of repairs and maintenance, energy services, and planned and project work. It has in the region of 860 employees. The claimants worked on the respondent's contract with Birmingham City Council. They were engaged in responsive property repairs and were each provided with a company van.

10. Mr Genus started work with the respondent on 11 Aug 1997 and Mr Kelly started work on 1 Aug 1994. Until the events leading to their dismissals, they had no disciplinary or performance issues. Their employments ended on 11 Jul 2017 by reason of gross misconduct, namely private use of company vehicle on a number of occasions.

11. The vehicles which the claimants used were fitted with tracking devices. The respondent began an investigation into the claimants' use of their company vans, as demonstrated by tracker records, in February 2017, after an anonymous complaint about an issue which the parties agreed was not relevant to the issues in the claims. This investigation resulted in the respondent finding examples of vehicle tracker information which it considered showed that the claimants had breached its vehicle use policy on private use of company vehicles.

12. Between 16 Jan 2017 and 17 Feb 2017, Mr Genus had used his company van to travel to his mother's house seven times (once including collecting a sick note for a colleague) which he said, in the disciplinary proceedings was on the way home, once he stopped off at shops on the way home (Castle Road West), and once he drove 20 minutes out of his way on a private errand on the way home (Nimmings Road). In the Hearing, Mr Genus accepted that his mother's house was not exactly on the way home. This fact is demonstrated by documents printed off as part of the disciplinary investigation.

13. Between 28 Jan 2017 and 6 Mar 2017, Mr Kelly had used his company van as follows:

    13.1. On 28 Jan, to watch his son play football while he was on call;

    13.2. On 28 Jan, 29 Jan and 10 Feb, he parked up his van at his niece's house near his home as there were works on his road causing a traffic disturbance;

    13.3. On 30 Jan, to go to a supermarket. In his investigation meeting (p322) he said that he was on call at this time, but the tracker report, produced during the disciplinary process, showed that he was not call. Rather he went home at the end of the working day and then went out again to a supermarket in his company vehicle;

    13.4. On 3 Feb, 10 Feb and 6 Mar, to go a supermarket on the way home from work;

    13.5. On 6 Feb, to go to a supermarket. As for 30 Jan, he went home at the end of the working day and then went out again to a supermarket in his company vehicle;

    13.6. On 9 Feb, to go to the barbers on his way home.

Respondent information regarding use of company vehicles

14. The respondent had a driver and vehicle policy ("driver policy") which set out at section B (p120) that company vans may be provided for the performance of working duties and that, where provided, "vans are exclusively for company business and may not under any circumstances, be used for private purposes other than for ordinary commuting. Unauthorised use of a company vehicle is deemed to be gross misconduct and may result in dismissal."

15. In the Hearing, the claimants denied that they had seen this document prior to it being supplied during the disciplinary proceedings. It was only available on the respondent's "hub" to which the claimants did not have access on their PDA's. However, the answers and submissions given by the claimants during the disciplinary proceedings was to the effect that the policy was unclear rather than that they had not seen it.

16. In the Hearing, MG stated that the driver policy was given to all staff who TUPE transferred to the respondent in 2010. The claimants formed part of this transfer, but denied receiving the policy then. The respondent produced no other evidence that this happened and this assertion was not included in MG's witness statement. We do not accept that this took place.

17. The respondent produced letters of 1 April 2011, addressed to the claimants at their respective home addresses, headed "Private use of company vans – policy refresher" which stated that "company vans may not, under any circumstances, be used for private travel". The letter went on to say that it would invalidate the insurance and exposed the respondent and employee to serious tax consequences. It stated "It is important you understand that private use of a Company vehicle is considered gross misconduct and…will lead to disciplinary action." In their disciplinary hearings, both claimants denied receiving the letter. Because the respondent was able to produce copies of these letters addressed to each claimant respectively, we accept that they were sent to them and received by them.

18. Both claimants signed an "Employee Asset" form when they collected a new company van. That signed in 2013 by the claimants said "VANS ONLY – I understand that this vehicle has been provided for business use only and that private use will be at the discretion of a …Director and then only with express written permission". (We do not consider that the form signed on 17 Feb 2017 is relevant as this post dates the dates of alleged misconduct highlighted in the disciplinary investigation.) Both claimants said that they did not read the "small print" on the asset form prior to signing, that they had to sign to get their new vehicle issued and that they were not given a copy to take away and read. We consider that the claimants should have been aware of the contents of these forms as they signed them.

19. The respondent's disciplinary policy listed examples of gross misconduct including "unauthorised use of a company vehicle".

20. It was respondent's case that operatives were given information about use of company vehicles at "Tool Box Talks". However, this was denied by the claimants and the respondent did not produce any evidence to show that this subject had been covered at talks attended by the claimants. Therefore we do not accept that the subject was coverered

21. In February 2018, at the request of Unite Union, CC sent to operatives a communication including about company vehicle use. This stated:

    "Company Vehicles are provided for business use only and under no circumstances are vehicles to be used for personal use – this includes out of hours working and call out.

    For clarity, personal use is classed as any journey that is not to/from your place of work, this includes "stopping off" on the way to/from work…

    Private Use of a Company vehicle is considered a Gross Misconduct offence under the Company disciplinary policy, a copy of which is available on the Hub.

    If anyone requires further clarity regarding company vehicle use please refer to the Driver vehicle policy and handbook available on the Hub. If for any reason for are unable to access any of the policies/documents on the Hub please contact your superviser in the first instance".

Mr Genus investigation and disciplinary meetings

22. In his investigation meeting of 27 Feb 2017 (p144), Mr Genus said he thought he was allowed to go out of his way in a company vehicle on his way home. He admitted he sometimes stopped at places on his way home.

23. In his investigation meeting of 8 April 2017 (p155), Mr Genus confirmed that he knew he could not use the works van for any other reason than work. He said that he was not the only person who did not go straight home and asked if they would pull up everyone else. He said "I interpreted it that if you needed to go to the shop on the way home it was OK. He repeatedly justified his use of the van by saying that it was on his way home, including his visits to his mother.

24. In his disciplinary meeting of 4 Jul 2017 (p201), Mr Genus said he did not think the personal use was a problem if it was on the way home as long as he "wasn't taking advantage". He said his understanding of business use was "Basically parking up and then went back out – didn't think it was a problem on the way home". His companion pointed out that Mr Genus's father had recently passed away and he had to care for his mother. Mr Genus said that he did not make anyone aware of the circumstances as he didn't think he was doing anything wrong.

25. In his disciplinary meeting on 11 Jul 2017 (p225):

    25.1. Mr Genus's companion, JB, said that mangers and operatives misinterpreted the vehicle policy in that it did not clarify out of hours work (OOH) or ordinary shifts. He stated that if an operative was working OOH, he was on business use and it was not unreasonable to have the van with him. The company witness, LC, replied "There's no question of OOH with [Mr Genus]". She did not correct JB's interpretation and therefore appeared to accept it.

    25.2. Mr Genus was asked if he travelled home from work in his van, would he consider visiting a friend or going to a shop out of his way was business use. He replied "I wouldn't have thought so". He was asked if he went out of his way and he answered "Yes".

    25.3. Mr Genus said that some of the "private use" was visiting his mother because of the death of his father. "Not all of it though".

    25.4. Mr Genus apologized and said he did not know what he was doing was wrong.

    25.5. CC said he appreciated it was difficult times with the death of Mr Genus's father "but the business wasn't aware of the situation". Mr Genus said "I thought you knew my dad had passed, the office would have known".

    25.6. Mr Genus said all the private use was on the way home except one (to Nimmings Road).

    25.7. CC relied on Mr Genus's admission of personal use of a company vehicle, his signing for the policies, having had the drivers policy and the letter sent in 2011 which he said clearly state that private use is not acceptable; Mr Genus did not raise his concerns with his supervisor or seek to gain any consent for private use. He said "Taking all this into account I do not accept that you were not aware of the personal use and it is my view that you have knowingly breached this policy on numerous occasion". He concluded that this was gross misconduct and he was dismissing Mr Mr Genus. Mr Mr Genus said "Paul knew about my dad. Will it happen to everyone else?"

Mr Kelly investigation and disciplinary meetings

26. In Mr Kelly's investigation meeting of 11 Apr 2017, Mr Kelly said that he was finding questions about his movements in his van "really tedious, 95% of the workforce do stuff on their way home". He said there was nothing wrong with this. He said he had checked and "the Tax people say that parking a vehicle at home then using it is private use, that is not what I'm

doing. When I'm on call I can't see the problem in using it while I'm waiting for a call. I can't see the use in going out in my car then rushing back home to pick up the van…"

27. In Mr Kelly's disciplinary hearing of 4 Jul 2017:

    27.1. Mr Kelly said he would not class a visit to the supermarket, hairdressers and his son's football as business travel. He was asked why he used the van for these reasons. He said that the supermarket and hairdresser were on his way home and that he went to the football match because he was on OOH and went to watch his son play football. "Other managers have said that as long as the van is with us we can go straight to the jobs on call". He was not willing to name these managers and was told the respondent could not look into it if it did not have names.

    27.2. The company witness said it was reasonable to stop at a shop if on way to or from a job, but going out of the way or making it a regular occurrence was not OK. Mr Kelly said he thought going out in the van when you were on call was OK. His companion said that this issue had never been made clear.

    27.3. Mr Kelly said he was rushed to sign the asset form with Carrie saying "just sign them". He acknowledged that he was at fault for not reading the documents.

28. After the first disciplinary hearing, Mr Kelly was sent the record of an investigation interview CC had with the claimants' manager, PH. It said that PH "communicated emails regarding…personal use of the van at [Tool Box Talks] with the team, but does not have evidence of this on the signed register". It did not comment on what PH understood the rules on private use to be nor what he told operatives about use of company vans. We find that these questions was not put to him.

29. In Mr Kelly's disciplinary hearing of 10 Jul 2017:

    29.1. Mr Kelly asked if the respondent had checked "the rest of the trackers including gas". The company witness said that they had done, but this was not the case, except for routine random checks.

30. In Mr Kelly's disciplinary hearing of 11 Jul 2017:

    30.1. He said that previous managers had allowed them to do what they did. He said no-one understood that pulling over to use a shop was misuse of the van.

    30.2. The company witness said that "stopping for a toilet break and if need a drink and driving past the shop on occasion – no-one will mind. Going out of your way is not ok." Mr Kelly said that managers had said it was OK to use the van when working OOH. He said he did not think he needed permission to go to the football.

    30.3. CC noted that as part of the investigation there was reference to OOH and non OOH.

    30.4. Mr Kelly said "You've got rid of all the Managers and filled it with people from the North. I won't name people who left". JB's evidence in the Hearing was that a lot of the managers were no longer there so it was pointless to give managers' names as they could not have been spoken to.

    30.5. CC gave his decision to dismiss Mr Kelly: "you admitted private use and said you were unclear on the rules, you signed the policy but hadn't been given a chance to read it, different rules because of OOH and that previous managers allowed you to do it. You signed to confirm you had read and understood driver vehicle policy, your responsibility to read and understand driver vehicle policy, you responsibility read and seek clarity before you sign. You didn't check if you could attend your son's football match in the van, you made the decision yourself. Whilst you state that you do not recall receiving the letter in 2011, this was sent to your home address, it is my belief you received this. Both the letter and the policies very clearly state private use is not acceptable, there is no mention that OOH is different. Taking this into account I do not accept your

mitigation and it is my view have knowingly breached this policy on numerous occasions."

31. In his dismissal letters (p232 and p408), CC did not take into account the possibility of any misunderstandings around the rules on private use of company vehicles or give any explanation of why he thought that there could no misunderstanding. He simply relied on the driver policy and 2011 refresher letter as clearly stating that private use was unacceptable and constituted gross misconduct.

32. In the dismissal letter to Mr Genus, CC noted that, due to a family bereavement, Mr Genus had used his company vehicle to visit his mother and on other unrelated occasions. He said that, while sympathetic to Mr Genus' situation, he relied on Mr Genus knowledge of the no private use policy. He said "You did not discuss any support requirements with your supervisor regarding your personal situation. Had you done so we would have been in a position to review other options available to you that did not result in you using your vehicle for private use, in contravention of the policy".

Appeals

33. Both claimants appealed the decision to dismiss them on the following grounds:

    33.1. Not given opportunity to correct any actions;

    33.2. The policies and procedures were not understood by employees or managers due to the conflicting way they were interpreted;

    33.3. His union had requested clarification of the policies and what is deemed "usual journey home"

    33.4. He had had no previous disciplinary sanctions;

    33.5. Fraudulent intent by usage of the vehicle for private use had not been spelled out in training or induction, but he made every effort to correct the points once it was raised in the investigation;

    33.6. (A complaint about investigating the tracker which was not pursued at the Hearing).

34. Additional points made at Mr Genus's appeal hearing on 15 Aug 2017 (p238) were:

    34.1. Mr Genus' 20 years of service with a good record.

    34.2. By an employee representative, "When managers allow you to do it because they are aware of it, it made [Mr Genus] think he was allowed to do it …We thought the trackers were checked weekly". She added that the vehicle use policy was never enforced and "mangers allowed it to happen".

    34.3. Mr Genus "complied after the first meeting".

    34.4. Mr Genus was having a difficult time when his father died and he was given no support. Mr Genus's manager knew his dad had died.

    34.5. Mr Genus brought up two colleagues who had received verbal warnings for "the same offence" as his. They were TM and CL. TM and CL both worked on the same contract as the claimants.

    34.6. MG investigated the circumstances of TM and CL. MG spoke to MP, the manager of CL. MP said the warning was given because CL had stopped to get a newspaper or something like that and it was a "one off" offence.

34.7. MG spoke to CT, TM's line manager about the warning given to TM. CT said that the investigation into TM was mainly about his time keeping but also related to stopping at a friend's house on the way home.

34.8. MG's conclusion of his conversations with MP and TM was that the line managers knew what the vehicle policy was as shown by the fact that verbal warnings were given for private use. He did not ask them what they said to operatives about the policy.

34.9. MG said that he had checked Mr Genus's behaviour since the first meeting and Mr Genus had reverted back to his old usage on OOH. Mr Genus replied "It was on OOH" and said he did change.

34.9.1. What led MG to make this comment about Mr Genus reverting back to old usage was that MG had found six instances of "private use" by Mr Genus in May and June 2017 on tracker reports. All of these instances were when Mr Genus was working OOH. MG did not put to Mr Genus the additional occasions in May and June 2017 on which he relied to conclude that Mr Genus had reverted to his previous behaviour. However, Mr Genus knew that MG was referring to his using the van for OOH work because he stated this.

34.9.2. In the Hearing, under re-examination, MG said his view that Mr Genus reverted to his previous behaviour played a part in his decision. He was asked what he would have done if he had found the tracker showed that Mr Genus had not used the van for private use in May and June. He said that his decision would still have been the same because there was a breach of the policy.

35. Additional points at Mr Kelly's appeal hearing were:

35.1. Mr Kelly's 24 years of service with no warnings.

35.2. JB said the respondent needed to give clarity on policies and procedures as "the guys are not clear on them" especially private use of vans and the correct use of vans on OOH "as they are told to keep the vans with them". He said "I don't know if I can stop at a shop on the way home so if I don't know what chance the guys have".

35.3. Mr Kelly said his understanding of private use was driving home, parking up, and getting back in the van for a private errand, but that private use was not calling into a shop on the way home.

Rejection of appeals

36. MG rejected the appeals. In his appeal outcome letters (p285 and p419):

36.1. MG addressed the appeal point that the policies were not understood by employees or managers by simply stating that he was satisfied that the policies were clear in terms of the company vehicles could only be used for business use. He provided no explanation of this understanding and did not address the evidence of confusion over the policy which had been presented to him. In particular, he did not comment on OOH usage of a company van and explain why this was clearly private use and how operatives should have known this.

36.2. MG informed Mr Kelly that "following my review of the systems you continued to break the Company policy and procedures there was no change in your behaviour as alleged". MG informed Mr Genus: "following my review of the systems I could see that you had indeed stopped …using the vehicle for unauthorized usage; however, after a short period of time you reverted to breaking the Company policies and procedures".

36.3. MG noted that Mr Genus had said that due to a family bereavement he had used the company vehicle for private use. MG continued that the relevant documents confirmed that all private use of a company vehicle is misconduct.

37. MG did not look into whether Mr Kelly's behaviour had changed after the disciplinary interviews. In the Hearing, MG said that this was because the issue was not raised by Mr Kelly. He then said that he must have gone away and checked because he referred to it in his appeal outcome letter. Regarding Mr Genus, MG said that his understanding that Mr Genus' behaviour had reverted to private use played a part in his decision to dismiss but, even if Mr Genus had permanently corrected his conduct after the disciplinary interviews, he would still have upheld the appeal for breach of policy.

Mitigation

38. The claimants' long service and clean records were raised on their behalf during the disciplinary process.

39. The only reference to mitigation in CC's dismissal letter for both claimants was: "Having evaluated this allegation [IE private use of vehicle] and mitigation offered by yourself, it is my view there is a pattern of private use of a company vehicle and that you have knowingly breached this policy on numerous occasions." We do not consider that this gives any indication of having considered length of service and clean records as these are not referred to. CC was given an opportunity in re-examination to say that he took Mr Genus's long length of service and clean record into account as mitigation but failed to mention it.

40. In his appeal outcome letters (p285 and p419), MG did not address the issue of the claimants having no previous disciplinary sanctions (but only addressed the second half of the appeal point). In the Hearing, he said he took it into account.

Respondent's evidence of other dismissals

41. The respondent produced documents in the bundle relating to 10 other dismissals for personal use of company vehicle, none of which were among those working on the same contract as the claimants. None of the circumstances were identical to those of the claimants. We do not consider that any of the circumstances were sufficiently similar to be comparable with the cases of the claimants'. In our view, most seemed more flagrant or serious than the claimants' cases, involving additional issues such as falsification of time sheets, multiple journeys after having parked the van at home, long journeys, journeys during annual leave and sickness absence, speeding or dismissal following a final written warning for the same offence.

Evidence relating to Mr Genus's visits to his mother

42. Under cross examination, when it was put to Mr Genus that he was not saying he had asked the respondent if he could visit his mother, Mr Genus replied that he had been doing it for 20 odd years. He insisted that the business did know of the situation. It was put to him that telling the respondent his father had died was not the same as asking for support. Mr Genus replied that he did not ask respondent to do anything; he did not know support was available.

43. CC told the Hearing that Mr Genus did not tell anyone about his mother, and that he did not check with PH what he knew on this question. CC was asked: "If PH knew [IE about Mr Genus' mother], allowances should have been made?" He replied "Yes, for that scenario, but not other issues".

Further investigations

44. By way of further investigation, CC spoke to senior managers informally about their understanding of the drivers' policy. These conversations were not noted nor shared with the claimants. CC said he thought the policy clear but checked because of the pressure he was getting around its clarity. He said all the senior managers said that private use was not allowed; there was business use and private use. He could not recall if he asked them about whether stopping to buy a drink was allowed.

45. There was no investigation of what managers may have told operatives about business and private use of company vans, nor of what other operatives understood the position to be.

The law

46. Under section 94(1) Employment Rights Act 1996 ("ERA"), an employee has the right not to be unfairly dismissed by his employer.

47. Under section 98(1) ERA, in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

48. Under section 98(4) ERA, where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

49. In *British Home Stores v Burchell 1980 ICR 303*, dealing with unfair dismissal for misconduct, the EAT stated that the employer must show:

    49.1. it believed the employee guilty of misconduct;

    49.2. it had in mind reasonable grounds upon which to sustain that belief; and

    49.3. at the stage at which that belief was formed on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

50. In *Iceland Frozen Foods v Jones 1983 ICR 17*, the EAT determined that in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what was the right course to adopt for the employer; in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether, in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair.

51. It was confirmed in *J Sainsbury v Hitt* that the "range of reasonable responses" test applies to the procedure by which the decision to dismiss is reached.

52. Under s123(6) ERA, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to the finding.

53. Under s122(2) ERA, where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce the amount accordingly.

54. In *Hollyer v Plysu 1983 IRLR 260*, the EAT suggested that contribution should be assessed broadly and should generally fall within the following categories: wholly to blame (100%); largely to blame (75%), employer and employee equally to blame (50%); slightly to blame (25%).

Conclusions

55. The claimants accepted that the reason for dismissal was misconduct.

56. We accept that the respondent had a genuine belief in that misconduct; CC and MG genuinely believed that the claimants had used their company vehicles for private use, contrary to policy.

57. Looking at the *Burchell* test, this case is about whether the respondent had carried out as much investigation as was reasonable in the circumstances, when it formed its belief in the claimants' misconduct. This is addressed in paragraphs 4 and 6 of the List of Issues.

<u>Were there reasonable grounds for the respondent's belief in the misconduct?</u>

58. We consider that the claimants were aware of the information provided about private use of company vehicles in the driver policy, whether or not they obtained that information from the actual policy document. They knew that vans were for company business and could not be used for private purposes (other than ordinary commuting). In their disciplinary processes, they did not deny this and the information which they provided about their understanding of the rules reflected it. They had also received the 2011 policy refresher letters which stated the rule about private travel. It was reasonable for CC and MG to conclude that the claimants both knew this rule.

59. However, this basic rule provides no explanation of how it should be applied in practice. In fact, the policy documents did not provide any explanation of what private use was and what business use was. The February 2018 communication is starkly contrasting with previous communications in commenting, for the first time, on OOH work and stopping off on the way to and from work. We consider that there would have been no need to issue this communication if the interpretation of the rules was clear. The communication was contradictory with the information given by the company representative in the disciplinary proceedings in that it says that stopping off on a journey was not allowed and the vehicle could not be used for OOH time.

60. We consider that there was confusion as to how the rule on private use of vans should be interpreted and that this confusion was brought to the disciplinary officers' attention:

 60.1. In Mr Genus' disciplinary process:

  60.1.1. Mr Genus repeatedly stated that he thought he was allowed to use the company van to stop off on the way home from work and that everyone did this. He stated his understanding that private use of the company van was to go home, park it, and then use it to go out again.

  60.1.2. JB stated that managers and operatives misinterpreted the policy in relation to OOH work, and that it was reasonable to use the company van for private travel when on call out. The company witness impliedly accepted this.

  60.1.3. A different employee representative said that managers allowed operatives to use the van for private use, as the operatives thought the trackers were checked weekly and they would have been pulled up if it were not allowed.

 60.2. In Mr Kelly's disciplinary process:

  60.2.1. Mr Kelly stated that he was following the tax authority guidelines that parking a company vehicle at home and then using it was private use and that he could not see a problem with having the van with him while he was on call.

  60.2.2. He expressed the understanding that calling somewhere on the way home was not private use.

  60.2.3. The company witness stated that it was permissible to stop at a shop on the way to or from a job or when driving past.

  60.2.4. Mr Kelly's companion said that it had never been made clear that using the van when on call was unacceptable.

61. We consider that it would have been reasonable for CC and/or MG to have looked into this expressed confusion, particularly when the company witness was making statements which diverged with their view. We consider that, when he interviewed PH, CC had ample opportunity to ask PH what he understood the private vehicle use policy details to be and what he communicated to his reports about it. However, these questions were not asked.

62. Equally, MG could have put the same questions to MP and TM when he interviewed them, but he failed to do so.

63. We accept that it was reasonable for the respondent not to ask past managers about their practices because Mr Kelly would not provide names and the managers had left.

64. The respondent did no more than a random check on employees' trackers. If it had looked at them more comprehensively, it could have investigated the assertions of the claimants that everyone was using their vans for what the respondent was now classing as private use. Common "misuse" would have suggested that there was a genuine widespread misunderstanding of the rules.

65. The respondent failed to carry out a complete and reasonable investigation into the issue of confusion over what business and private use was.

66. There is no indication in the disciplinary outcome letters nor the appeal outcome letters that CC and MG gave any credence to the confusion over the rules which was being brought to their attention by both claimants, their companions and the company representative. They gave no explanation as to why they thought the rules clear. They appear to have been blind to the issue.

67. However, although there was insufficient investigation of the understanding of the meaning of business and private vehicle use, we still consider that CC and MG reasonably concluded that the claimants knowingly breached the driver policy. This is because, even on the claimants' understanding of the rules around private use, the claimants did contravene them:

    67.1. On 11 Jul 2017, Mr Genus said that visiting a friend or going out of his way on the way home was not business use and he confirmed that he did go out of his way. Mr Genus admitted he went out of his way on his journey home to go to Nimmings Road.

    67.2. At his appeal hearing, Mr Kelly said he understood private use to be driving home, parking up and getting back in the van to use it for a personal errand. Mr Kelly in fact, while not on call, drove his van home and parked it and went out in it again on a private trip on two occasions.

68. We consider that, given the evidence given by the claimants on this point and the tracker records, CC and MG had enough information reasonably to reach their conclusions on this point and that there was an adequate investigation into this issue before they did so.

69. Therefore, we consider that there was no unfair dismissal under the *Burchell* test.

<u>Was the sanction within the band of reasonable responses?</u>

70. The next issue on the List of Issues addresses the test in *Iceland Frozen Foods v Jones* and *J Sainsbury v Hitt* as to whether the sanction of dismissal was within the band of reasonable responses.

Length of service and clean disciplinary records

71. We find that neither CC nor MG took the claimants' long service and clean disciplinary records into account in making their decisions, given the evidence in paragraphs 39 and 40. Although MG said in the Hearing he took it into account, if he had done so, we would have expected some comment in the appeal outcome letter, but that only dealt with the second half of this appeal point. We do not consider that this failure is within the range of reasonable

responses of an employer. Both claimants had exceptionally long service with clean records and any reasonable employer would have taken this into account.

Ambiguity of policy documents

72. On the question of the ambiguity of the policy documents, we consider, as above, that the rules were misunderstood, and that neither CC nor MG took this into account. However, given that both claimants, on their admitted understanding of the rules breached them, we find that this does not take the sanction outside the band of reasonable responses.

No opportunity to remedy behaviour/Mr Genus change of behaviour

73. On the question of the claimants not being given opportunity to remedy their behaviour and Mr Genus remedying his behaviour: when a gross misconduct occurs, there is no requirement for the employer to give employees an opportunity to do remedy the behaviour. However, MG did take this issue into account in his decision. In the appeal outcome letters, he commented on his findings on this. He said that his understanding of Mr Genus' conduct played a part in his decision to uphold Mr Genus' dismissal. Therefore, MG made the issue relevant to his decision. We consider that MG's decision making on this issue was flawed in respect of both claimants:

    73.1. For Mr Kelly, we do not accept that MG looked at any tracker evidence to check this point. The reason for this conclusion is that his initial response on this point in the Hearing was that he did not do so because Mr Kelly did not raise it. If he did not look at the evidence, he could not reasonably have concluded that Mr Kelly failed to change his behaviour.

    73.2. For Mr Genus, MG took into account Mr Genus' use of the company vehicle while on call. As we have set out above, the understandings of the operatives over use of the vehicle while on call was not investigated and nor did MG give any proper consideration to this issue. Further, a company representative implied that OOH use was treated differently. We do not consider it reasonable to rely on evidence of OOH use when this was not properly investigated or considered.

74. We consider that MG's failure to investigate and consider this point adequately in respect of Mr Genus or to investigate it at all in respect of Mr Kelly is serious when MG said he took the point into account. We consider that MG's statement in re-examination that he would have made the same decision to dismiss whatever cannot be relied on given that he was defending his and the respondent's position.

75. We do not consider that this failure of investigation and consideration is within the range of reasonable responses of an employer.

The nature of the private van use

76. On the question of the specific use to which the van was put:

    76.1. In respect of Mr Kelly, he twice used the van after taking it home which he understood was against the rules. This was a pattern of conduct. On this point, dismissal was within the band of reasonable responses.

    76.2. In respect of Mr Genus, most of the trips of which the respondent disapproved were to visit his mother:

        76.2.1. Although Mr Genus kept relying on the fact that this was on the way home, he admitted that it was not exactly on the way home. He admitted that, travelling home from work, going out of his way to visit a friend would not be business use.

        76.2.2. We heard no evidence at all that he told the respondent anything except that his father was dead. He admitted that he never asked for support from the respondent with his mother.

76.2.3. Although CC agreed in the Hearing that "If PH knew, allowances should have been made", it was not clear what it was that PH would have known and what allowances he thought should have been made.

76.2.4. CC did in fact address Mr Genus' family situation in the dismissal letter. He acknowledged the family situation but noted that Mr Genus did not discuss any support requirements with his supervisor and had he done so, options may have been available to that he did not use his vehicle for private use. He felt that, notwithstanding the family circumstances, private use was unacceptable.

76.2.5. It is clear from MG's appeal outcome letter that he did take into account that some of Mr Genus's private vehicle use was for a family bereavement but that he felt that no form of private use was allowed.

76.2.6. We must not substitute our view of the situation for that of the respondent and consider that CC and MG did take the family circumstances into account but still concluded that this was unacceptable private use. Their view was within the range of reasonable responses.

76.2.7. We take into account that Mr Genus's use of the company van to visit his mother was not exactly on the way home and his admission that, travelling home from work, going out of his way to visit a friend would not be business use. On this basis, he accepted that his visits to his mother were not business use. We take into account that both CC and MG took into account the family circumstances and still found these trips to Mr Genus's mother to be unacceptable. We therefore consider that it was within the range of reasonable responses for the respondent to take Mr Genus's trips to his mother into account in the dismissal decision. There was also one incident of Mr Genus going 20 minutes out of his way on a private trip in his van. Therefore, we consider that dismissal was within the band of reasonable responses when considering the nature of the use of the company van.

Inconsistency of treatment

77. On the question of inconsistency of treatment, on the evidence, TM and CL's private use was found to be one off whereas the claimants' private use was not one off (as explained in para 76). Therefore, they were not appropriate comparators and the treatment of the claimants was not inconsistent. We do not consider that the 10 comparators produced by the respondent can be relied on to show inconsistency of treatment as their circumstances were different and they were all dismissed.

78. On this point, dismissal was within the band of reasonable responses.

<u>Procedural unfairness</u>

79. CC failed to inform the claimants that he had spoken to various managers about the meaning of the drivers policy. We do not consider this material because the managers simply confirmed CC's view.

80. MG failed to put to Mr Genus the additional occasions in May and June 2017 he relied on to conclude that Mr Genus had reverted to his previous behaviour. However, Mr Genus was aware that these were all OOH working and said this. We cannot see that his knowing the dates MG was referring to would have allowed him to say any more than this. Therefore, this was not material.

Finding of unfair dismissal

81. We find that the claimants were unfairly dismissed because their length of service and clean disciplinary records were not taken into account in the dismissal and appeal decisions (para 71) and because MG did not properly investigate and consider the claimants' post initial investigation behaviour and yet he took it into account in his decision to uphold the dismissal decisions (para 73-75).

Remedy issues

Polkey deduction

We will hear from the parties on this point at the Remedy Hearing which has been listed.

Contributory fault

82. Both claimants substantially caused their dismissals by knowingly contravening the respondent's policy on private use of company vehicles, for which they were dismissed. Their actions were blameworthy. Therefore, we must consider what reduction in the compensatory award would be just and equitable, having regard to our finding.

83. The claimants accepted that, if the dismissals were found unfair on any ground other than the policy not being made clear, there may be an element of contribution. They did not suggest any figure. The respondent said that the contribution element was significant and that, for Mr Kelly, it should be 100%.

84. On the findings which we have made that both claimants knowingly breached the driver policy, we cannot see that there is a justification in finding a different contribution level for either of them.

85. We consider that there was significant amount of contribution as they were both dismissed for something which they knowingly did wrong. However, we have found that the respondent did not deal fairly with two long standing employees (para 81).

86. We will make a reduction for contributory fault after dealing with the *Polkey* issue.

Other remedy issues

87. These will be addressed at the Remedy Hearing.

Settlement

88. We trust that the parties will take advantage of the period of time waiting for the Remedy Hearing to actively consider settlement of the claims so that the Remedy Hearing can be avoided.

Appendix
Agreed List of Issues

1. Was the reason for the claimants' dismissal their conduct? Misconduct is relied upon by the respondent. It is accepted by the claimants that misconduct is the reason for dismissal.
    a. Noted

2. Did the respondent have a genuine belief in that misconduct
    a. The claimants admitted the activities in the disciplinary hearings

3. Were there reasonable grounds for that genuine belief? It is disputed that the respondent had reasonable grounds for finding that the claimants *knowingly* breached the Driver and Vehicle Policy.
    a. The claimants signed documents outlining vehicle use is restricted and referring to the Driver and Vehicle Policy. Both claimants agreed their vehicle use was private use in the disciplinary hearings.

4. Had the respondent carried out an investigation reasonable in all the circumstances? The claimants allege that the respondents failed to do a reasonable investigation by failing to look into the following:

    a. There was confusion across the workforce as to the meaning of the policy;
        i. There was no evidence provided that anybody was unclear or had sought clarification of the meaning of the policy; the policy was clear
    b. The majority of operatives also used vehicles as the claimants did, in terms of "private use";
        i. This was not relevant to with whether the claimants' actions breached the policy
    c. The claimants told the respondent that previous managers had permitted "private use" historically, and so condoned the claimants understanding of the policy.
        i. Save for one example, no evidence or information was given about who these managers were or when this was allowed. The one example was not relevant and not a manager.

5. Was the sanction of dismissal within the band of reasonable responses given:

    a. The claimants' length of service;
    b. The claimants' clean disciplinary record;
    c. The ambiguity of the policy documents;
    d. The claimants were not given an opportunity to remedy their behaviour;
    e. Mr Genus did change his behaviour;
    f. The claimants' "private use" of the van was generally just stopping on the way home. In particular, Mr Genus' use was mainly relating to assisting his mother;
    g. Inconsistency of treatment (comparators of TM and CL?
        i. The policy provided for the claimants' actions to be gross misconduct, the actions were not one-off; the other cases were not comparable

6. Were the claimants' dismissals procedurally unfair? Specifically, were their dismissals rendered unfair by:

    a. the failure of CC to inform them that he had spoken with various managers as part of the investigation (natural justice point);
    b. (regarding Mr Genus) the failure of MG to specifically put to Mr Genus the additional occasions in May and June 2017 that MG relied upon to conclude that Mr Genus had "reverted" to his previous behaviour?

7. Did the claimants contribute to their dismissal so as to attract a reduction pursuant to s123(6) ERA 1996?
    a. Their actions were admitted

8. If the claimants were unfairly dismissed, would it be just and equitable to reduce any compensation pursuant to *Polkey*.
    a. If any procedural matters ought to have been done differently the claimants would still have been dismissed
    b. (Regarding Mr Genus) specifically, MG's decision to uphold the dismissal would not have changed, even if Mr Genus' behaviour following the investigation had been blameless.

9. Can the respondents demonstrate that the claimants have not mitigated their losses?
    a. There is no evidence that Mr Kelly has applied for any jobs, only that he has searched for some

10. The claimants claim reinstatement or re-engagement.
    a. The claimants' roles have been filled as it would not be practicable to leave them unfilled; the claimants' actions have contributed to their dismissal

Signed by Employment Judge Kelly

09/08/2018