EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Abdelhakim Echouafni	**v**	**DHL Supply Chain Limited**

Heard at: Watford **On:** 12 & 13 February 2018

Before: Employment Judge S Bedeau

Appearances
For the Claimant: Mr R Clement, Counsel.
For the Respondent: Mr G Baker, Counsel.

RESERVED JUDGMENT

1. The claimant's unfair dismissal claim is not well-founded and is dismissed.

2. The claimant's claim of wrongful dismissal has not been proved and is dismissed.

3. The provisional remedy hearing listed on 23 July 2018 is vacated.

RESERVED REASONS

1. By a claim form presented to the tribunal on 10 April 2017, the claimant made claims of unfair dismissal and wrongful dismissal or breach of contract arising out of the termination of his employment with the respondent as a HGV driver after nearly 10 years' service.

2. In the response presented to the tribunal on 22 May 2017, it is averred that the claimant was dismissed for gross misconduct; that the respondent conducted a reasonable investigation and had reasonable grounds for concluding that the claimant was guilty of the offences alleged. Dismissal fell within the range of reasonable responses. Alternatively, if unfairly dismissed, the claimant contributed to his dismissal. If dismissal was procedurally unfair, then following a fair procedure the claimant would have been dismissed in any event.

The issues

3. Unfair dismissal

The issues in respect of this claim are as follows:

3.1 Has the respondent shown the reason for dismissal? The respondent states that the reason is gross misconduct due to the claimant's alleged:

3.1.1 Deliberate or serious breaches of conduct, standards/rules and regulations (the claimant's alleged failure to report a road traffic accident at the first practical opportunity); and

3.1.1 Gross negligence which causes, or has the potential to cause, unacceptable loss, damage or injury (contrary to the defensive driving techniques that the claimant had been trained in – without due care and attention).

Following a collision between a vehicle driven by the claimant and another vehicle on 7 December 2016.

3.2 Was the reason for dismissal (conduct) a potentially fair one?

3.3 Was the dismissal procedurally fair? The claimant alleges failures in procedure, such as, failures to explain to him fully of the charges against him and their definitions in order that he could prepare and present his case fully.

3.4 Was dismissal within the range of reasonable responses? The claimant claims that due to his long good record the worst sanction he should have received was a written warning.

3.5 If dismissal is deemed procedurally unfair, would the claimant have been dismissed in any case?

3.5.1 If yes, should compensation be reduced?

3.5.1.1 If yes, by how much?

3.6 If dismissal is deemed unfair, did the claimant's conduct contribute to his dismissal?

3.6.1. If yes, should compensation be reduced?

3.6.1.1 If yes, by how much?

4. Wrongful dismissal

4.1 Did the claimant's conduct amount to a repudiatory breach?

4.1.1 If no, is he entitled to notice pay?

4.1.2 If yes, how much?

The evidence

5. I heard evidence from the claimant who called Mr Ernest Hand, RMT Trade Union representative, as a witness.

6. On behalf of the respondent evidence was given by Mr Chris Jones, transport manager and by Mr Dave Starling, general manager.

7. In addition to the oral evidence the parties adduced a joint bundle of documents comprising 153 pages. References will be made to the documents as numbered in the joint bundle.

Findings of fact

8. The respondent is a logistics business providing distribution services to major businesses and organisations. It operates from many locations in the United Kingdom and is part of the DHL Group of companies. One of its sites is in Neasden, north west London.

9. On 2 July 2007, the claimant commenced employment with the respondent. He worked as a HGV driver driving a 32 tonne lorry delivering goods to Marks & Spencer stores within the London area. Up until the termination of his employment he had a clean disciplinary record and had attended many training sessions.

10. On 16 July 2015, he attended an accident and bump briefing training session on the procedure a driver must follow in the event of an accident. Along with the training the drivers were given a card on what to do in the event of an accident, referred to as an 'At scene bump card'. It states that it should be completed for all incidents, however, minor; it instructs the driver to find a safe place to wait away from moving traffic after an accident; to remain calm even if provoked by other parties and not to argue; and to call the emergency services if anyone is injured or there is serious damage to vehicles or property. The bump card should be used to "record information, exchange details and take details of witnesses". It advises the driver that under s.154 Road Traffic Act 1988, third parties are obliged to give their name, address, registration number and insurance details. If a camera is available that a photograph should be taken of the scene from different angles covering "signs, skid marks and damage to vehicles".

11. Of importance for the purpose of this case are paragraphs 7 and 8 in the bump card. They state the following:

> "7 Call claims on 0844 2480895 to register the accident within an hour, ideally from the scene if it is safe to do so.
>
> 8 Contact your depot supervisor as soon as it is practical to do so." (pages 68-69 of the joint bundle)

12. The respondent's disciplinary policy sets out the procedure to follow in cases of conduct. In its non-exhaustive list of examples of gross misconduct, it includes:

> "Deliberate or serious breaches of conduct, standards/rules and regulations.
>
> Gross negligence which causes, or has the potential to cause, unacceptable loss, damage or injury."

13. Gross misconduct may result in summary dismissal. The policy also sets out procedures in respect of disciplinary investigations, disciplinary hearings and appeals. (pages 141-152)

14. The reporting of an accident within an hour to the respondent's insurers is called the 'golden hour'. I also find that the respondent requires its drivers to contact its office at Neasden within the hour to report an accident or when it is practical to do so.

15. Each of the respondent's lorries has a tracking device that records the movement of its vehicle. It is referred to as 'Isotrak'. It can also be used to communicate with the respondent's depot via the use of text messages. The depot can then respond to the messages.

16. At or around 9.25am on 7 December 2016, an accident occurred while the claimant was travelling along the A3205 on his way towards making a delivery to Marks & Spencer's store in Brixton. At that time he was in Battersea. The road surface condition was wet. A driver of a 7.5 tonne van was immediately in front of his vehicle, travelling in the same direction. At a set of traffic lights that driver applied the brakes to his vehicle and stopped. However, the claimant's vehicle collided into the rear of the lorry. No one was hurt. The driver of the van exited his vehicle and inspected it. He realised that there was no damage and indicated as much to the claimant and then drove off. The claimant moved his vehicle forward to test the brakes and determined that the brakes were working. He then exited his vehicle and inspected it for damage. He determined that the damage was cosmetic and drove to the M&S store in Brixton arriving there at or around 10am that morning. While there he carried out a further inspection of his vehicle and set off from the store at 11.25am for the depot.

17. He arrived at the Neasden depot at 12.50pm and spoke to Mr Chris Jones, transport manager, about the accident who directed him to speak to Mr Ryan Smith, transport controller.

18. At the depot the claimant completed an incident first contact form at 1.30pm together with Mr Smith. It is recorded that he told Mr Smith wrote the following:

> "The driver reported on return to the yard he was involved in RTC (road traffic collision). Driver he was en-route to M&S Brixton Road after leaving M&S Fulham Island when a TP (third party) Luton van stopped in front of him. Driver states he pressed the brakes but the lorry continued into the back of the TP vehicle. He stated the TP driver got out to look at his vehicle then proceeded without exchanging details. Therefore our driver proceeded with his deliveries."

19. On the form the following exchange is recorded, "RS" is Mr Smith and "HE" is the claimant:

> "RS: What are the contributing facts of this incident?
> HE: Wet road conditions and the brakes locked.
> RS: If the brakes locked did you notice this before the incident or afterwards?
> HE: No as you didn't harsh brake afterwards.
> RS: If the brakes locked during **these** incident, why didn't you contact the office and raise concerns the vehicle might be defective?
> HE: Firstly after the incident I was shocked and secondly could not find a safe place to pull over. Phone battery was flat as well.
> RS: Therefore you inspected the vehicle after the impact. Why did you (not) ask Brixton Road store if you could use their phone?
> HE: It didn't cross my mind.
> RS: My concern the vehicle damage could have been a risk to other road users as well as pedestrians. Were you distracted before the impact? Using a mobile phone or not focusing on the road as an example looking at bystanders?
> HE: While in the cab I looked out the window and didn't see any parts hanging or on the road. I was not using my mobile or distract from the road. The traffic light on the left was out of view as the road bends and the traffic light on the right was blocked by the TP van.
> RS: If there was no visual damage would you have **report** the incident with the brakes?
> HE: Yes of course as it dangerous.
> RS: Therefore if it was dangerous why did you continue driving?
> HE: I did emergency brake before leaving the yard and always in order. I wasn't sure if the wet road conditions was the reason the brakes locked or when you use the emergency brakes.
> RS: Do you know the reporting procedures when involved in an incident?
> HE: Yes.
> RS: If your battery on your phone was flat you could have used an Isotrak message to notify us." (pages 38-41)

20. In the motor incident form again completed by the claimant and Mr Smith a drawing of the scene of the accident is given as well as a brief account. The claimant wrote that the brakes locked and the lorry kept moving forward into the back of the third-party vehicle which was shunted forwards

on impact. The driver of that vehicle after inspecting it indicated to him that there was no damage and drove off. (pages 43-45)

21. As a result of what was said by the claimant, he was suspended from work on full pay and sent a letter confirming his suspension dated the same day, 7 December 2016. The suspension was to allow for a full and detailed investigation to be carried out into whether possible disciplinary offences were committed. He was informed that;

> "On 7 December 2016 it is alleged that you were driving PN14 SZW without due care and attention and drove into the back of another vehicle. This is in contrary to the defensive driving techniques you have been trained in.
>
> This allegation constitutes a breach of our disciplinary policy section 6.1 –
>
> - Deliberate or serious breaches of conduct, standards/rules and regulations.
> - Gross negligence which causes, or has the potential to cause, unacceptable loss, damage or injury."

22. The claimant was warned that as the allegations were very serious they could constitute gross misconduct which could lead to his possible dismissal without notice. He is advised that at the investigation meeting he could bring a work colleague or trade union representative and that his suspension did not constitute a disciplinary action. (pages 47-48)

23. In the letter dated 13 December 2016, sent by Mr Suhag Patel, senior traffic controller, the claimant was informed that he was required to attend an investigation meeting on Monday 19 December 2016 at 12 noon. Mr Patel repeated the allegations as in the suspension letter. (pages 49-50)

24. The claimant attended the investigation meeting in the company of a work colleague, Mr Kevin O'Brien. In attendance were Mr Patel and Mr Andrew Smith, human resources resolution manager and note taker. From the notes of the meeting the claimant said that he was driving behind the 7.5 tonne third party vehicle at 30 miles per hour. Reference to 30 miles per hour should be 30 kilometres per hour, that is 19 miles per hour. Mr O'Brien said that the claimant said that the brakes had failed him and that the vehicles momentum continued forward. He also said that after checking the lorry at Brixton there was minimal damage so he decided that he would report the accident on his return to Neasden. He also said that it was not the brakes but the road surface because the claimant had braked but the lorry kept skidding. The claimant was asked whether he considered using M&S store's telephone at the first practical opportunity, to which he responded by saying that he did not because it was not a major accident. There was nothing in any policy document stating that he was required to call the depot using a store's telephone. He admitted having numerous driver training sessions over 18 years. This included Smiths training on reporting accidents. He acknowledged that he had to report an accident to the office when it was practical to do so within the

'golden hour'. It was also emphasised by Mr Dave Starling, general manager, and Mr Patel at the last coffee meeting the drivers had with them.

25. Mr O'Brien said that he found the words "gross negligence" "a little bit harsh" and added that under the circumstances the claimant had no safe place to stop so he continued on his journey to the next store at Brixton and as he deemed the vehicle was road worthy for use. He decided it was practical to report the matter when he returned to Neasden.

26. Mr Patel put to the claimant that according to the information from the video footage, it was not icy on the roads and that from the third- party vehicle's brake lights coming on, the required time when to apply an emergency stop was 4 seconds. The claimant said that 4 seconds was sufficient time to stop the vehicle but the vehicle kept skidding. Mr O'Brien said that the claimant was a careful driver and that he had never been found to have been reckless. He did not feel that the claimant's actions could be described as intentional. (pages 51-56)

27. In a letter dated 22 December 2016, sent by Mr Jones to the claimant, he was invited to attend a disciplinary hearing as Mr Patel had determined that there was a case to answer. The case the claimant had to meet was stated as follows:

> "On 7 December it is alleged that you drove vehicle PN14 SZW without due care and attention and collided with the rear of a third-party vehicle. This is contrary to the defensive driving techniques that you have been trained in.
>
> It is also alleged that, on the same date, you failed to report a road traffic accident at the first practical opportunity which is in breach of the Accident and Bump Card Brief, dated 16 July 2015.
>
> These allegations constitute a breach of our disciplinary policy section 6.1.
>
> - Deliberate or serious breaches of conduct, standards/rules and regulations.
>
> - Gross negligence which causes, or has the potential to cause, unacceptable loss, damage or injury.
>
> The above allegations are very serious and could constitute gross misconduct for which the disciplinary action could be up to summary dismissal."

28. He was informed that the hearing would take place on 30 December 2016 at 11am and was advised that he could be accompanied by either a work colleague or a trade union official. The letter was accompanied by several documents. These were: disciplinary policy; investigation meeting notes of 19 December 2016; accident investigation pack, including alcohol test consent form and bump card; four photographs; Tachomaster print out 7 December 2016; Isotrak printout 7 December 2016; copy of defect 5342 form 79, inspection sheet and brake sheet test, trailer 1147; spectrum report on brakes, brakes 7; training record document, including OPS35 dated 20 April 2016, driver development assessment dated 21 July 2016;

accident bump cards brief 17 May 2013 and scene bump card and 'golden hour' brief 16 July 2016. (pages 57-59)

29. In the driving assessment form OPS35 dated 20 April 2016, the claimant is described as displaying a confident and good attitude; complied with the Smiths system during his driving and that there were no areas recommended for training. (pages 64-65)

30. In the driver development assessment dated 21 July 2016, it was noted by the assessor, that the claimant tended to drive too close, two seconds, to the vehicle ahead. He was spoken to about it by the assessor and thereafter he kept a good distance. (pages 66-67)

31. The results of alcohol testing on 7 December 2016, was negative. (page 70-71)

32. In relation to the Tachomaster information, this showed at 0746 and at 0925 on 7 December 2016, the claimant braked harshly. (pages 72-73)

33. From the Isotrak information it is clear that between 9 and 10 o'clock in the morning of 7 December 2016, the claimant was driving at or around 30 kilometres per hour. (page 74)

34. There were no faults found on the trailer. (page 76-78)

35. When the brakes were tested no fault was found. (page 79)

36. At the disciplinary hearing the claimant attended in the company of Mr O'Brien. Miss Michelle Walsh was the human resources representative. The disciplinary hearing was conducted by Mr Chris Jones, transport manager. Notes were taken. The claimant said that he drove looking for a safe place and that the nearest place to park his vehicle was at the Brixton store. He repeated what he said during the investigation meeting that while at the store he checked the lorry and it was fit for purpose as it only sustained cosmetic damage. He decided to report it when he return to Neasden as his could not use his mobile phone. He said that on the day in question it was not a clear sky and it was cold, the ground was wet and he was driving carefully. The speed limit was 30 miles per hour. He said that the Luton van braked harshly and was not expecting it, so he braked harshly to stop his vehicle but it did not stop as it kept skidding and it went into the back of the van in front. The time of the accident was 9.25 in the morning. He was then asked by Mr Jones to talk him through what happened after the accident including the next delivery to which the claimant replied:

> "When I was in Brixton, I met the staff and gave him paperwork. I unload all the goods; I had my break there at 10 o'clock. I arrived at 10 o'clock had my break and then unloaded. I left Brixton at 11.25 and I come back to the depot at 12.50. When I come back I docked my trailer and parked my unit and I walked straight away in the office and I met SK. I reported to him the accident and he asked me to speak with Mr Jones. Chris Jones asked me to go and site down with Ryan

> Smith and complete the accident form. When I finished reporting with Ryan, he told me I was suspended and he provided me with the letter and took me to the main door exit."

37. The claimant was shown the photographs of the damage to the vehicle on the left side front, above the lights and that the cost of repair was £12,349.82. This included replacing the damaged part, painting and labour costs. They then viewed the video of the accident recorded from the cab of the lorry. This showed a van with a tailgate driving some distance ahead of the claimant's vehicle. On approach to a set of traffic lights it braked and stopped at the lights but the driver did not apply the hand brake. The claimant's vehicle then drove into the back of the Luton van which was shunted forwards some distance of about 20-30 feet when it vehicle stopped. Mr O'Brien asked:

> "In what way does the company claim the driver was contrary to techniques? Failed to report a road traffic incident at the first practical opportunity, reporting the accident at the first practical opportunity is a matter of judgement in this case. Given the above circumstances AE deemed it practical to return to base. Deliberate or serious breaches of conduct. What does the company see as a deliberate attempt by AE to breach the rules or company regulations?"

38. Mr Jones replied that the letter stated deliberate or serious. At that point Mr O'Brien asked for an adjournment which was granted for 27 minutes. After the adjournment Mr O'Brien repeated that the location of the accident meant that there was no safe place for the claimant to park his vehicle and that there was no damage to the third-party vehicle. The driver of it inspected his vehicle and then drove off. As the company vehicle appeared fit for purpose and the damage appeared to be cosmetic, the claimant decided to report the accident on his return to the depot. At no point did he try to hide that fact. There was no deliberate attempt to breach any of the company's rules or procedures. Mr O'Brien asked Mr Jones to define what was meant by gross negligence. At that point Mr Jones adjourned the meeting to decide on the outcome. (page 81-87)

39. Mr Jones told me in evidence and I do make this finding of fact, that he took time to consider his decision as the claimant had a clean disciplinary record and had worked for the respondent for nearly 10 years. There was a good relationship between the two of them and he wanted time to decide on the allegations. He convened a meeting with the claimant and his trade union representative on 5 January 2017. On that occasion he gave his reason for concluding that the claimant was guilty of gross misconduct. He stated the following:

> "After careful consideration of the evidence, statements and notes pertaining to the disciplinary case, I have reasonable belief of the following:
>
> - You carried out your vehicle checks at the start of your shift and found no faults.

- No faults with the vehicle, other than damage to the cab, cab mounts and various other parts as per the spectrum estimate were found post incident.
- No faults were found with the trailer on post incident inspection.
- The tyres on the unit and trailer were within legal limits as per the post incident inspection and your vehicle checks (OPS13).
- That the road condition at the time of the incident was wet but it was not raining.
- The weather forecast for London on 7 December 2016 was for a temperature range of +2ºC to +11ºC.
- The traction unit, PN14 SZW, and trailer 1147 are fitted with ABS (anti-lock breaks) and that there is no evidence to suggest either failed.
- The third-party vehicle you collided with stopped within a reasonable distance and there was no evidence of an unusually slippery road surface by the way the third party vehicle stopped.
- Prior to the incident, your following distance, in time was approximately 3.5 to 4 seconds. As per both the FCC video timer and mobile phone stopwatch used in the disciplinary hearing on 30 December 2016.
- You were travelling at 30 miles per hour (KPH) and the road speed limit was 30 miles per hour.
- There was little, if any loss of speed before impact, as demonstrated by the CCTV footage and vehicle repair estimate.
- You conducted a visual inspection of the damage to the traction unit PN14 SZW on scene at the incident point and then moved on.
- You felt “shocked” by the incident immediately afterwards.
- You continued on the remainder of your route and delivered to Brixton M&S, took a brake and then return to Neasden.
- You then reported the incident on return to Neasden DC.
- In mitigation, you presented the road surface was wet in the initial investigation and probably icy in the hearing.
- You stated you were showing good caution and had factored in the weather, the weather and road conditions in his approach to his driving on that day.
- You stated he applied the brakes but they locked and the vehicle slid into the rear of the third party.
- With regard to the incident reporting, you said you conducted a visual inspection of the vehicle (PN14 SZW) and felt the vehicle “fit for purpose”. I do not find this reasonable, as you are not an engineer and

after such an evidently hard impact, assistance should have been sought. Hakim stated that there was no safe place to stop.

- The near side lane, even though a "bus lane" would have been safe and, under the circumstances a reasonable place to seek assistance. In fact, as is evident in the forward facing camera footage, the near side lane is a bus and goods vehicle lane. This I have confirmed via a google search.

- You also presented a practical opportunity to report an incident is a matter of judgement. I agree but you are also trained in the importance of Golden hour reporting and arrived at the next delivery point well within the hour. It is reasonable to expect the incident to have been reported there, especially you felt shocked by the incident.

- Isotrak, the store phone, a pay phone, a borrowed phone, there are a number of reasonable ways you could have contacted Neasden at this point but you chose not to. In this instance I find this a deliberate non-conformity of the brief and training which you have received.

- With regard to the incident itself the vehicle which you struck performed a perfectly reasonable stop when the traffic lights changed to amber. This vehicle did not slide but stopped in a straight line before the lights with little drama.

- After the impact the vehicle was pushed some distance through the traffic lights and when the brakes were applied again, as indicated by the brake lights, stopped again efficiently. There have been no faults found with the braking system of PN14 SZW and trailer 1147, both of which are fitted with anti-lock-brakes.

- There is no audible sound of locked brakes or sliding on the forward-facing camera footage. There is little or no loss of speed evident in the forward-facing camera footage prior to impact. All evidence is contrary to your statement that the road was slippery and that you performed an emergency brake.

- The time from the brake lights appearing to the impact was approximately 3.5 to 4 seconds. 4 seconds is the minimum recommended travelling distance under Smiths training, in poor weather, this should be increased.

- You stated you were showing caution due to weather and road conditions yet was travelling at the speed limit and at the minimum recommended travelling distance to the vehicle in front, for good conditions. This I find to be contrary to the training which you have received. I also have reasonable belief, based on the above, that you were not showing due care and attention and this lack of due care was the cause of the incident.

- I therefore find that this is both a serious breach of conduct and standards, driving without due care and attention, which has caused unacceptable loss, damage and had the potential to cause injury and I am summarily dismissing you from your position with immediate effect.

- You have the right to appeal my decision. Your appeal should be made in writing or email to Dave Starling, General Manager Transport within 5 working days. Further details are on the outcome letter which you will receive." (pages 89-92)

40. The outcome of the meeting was followed by a letter dated the same date by Mr Jones sent to the claimant confirming that the allegations were proved and that he had been summarily dismissed without notice on the grounds of misconduct. His last date of employment was 5 January 2017. The claimant was also informed of his right of appeal to Mr Starling within the stipulated timeframe. Mr Jones' reasons given at the adjourned hearing, were also attached. (page 93-95)

41. The claimant submitted his appeal on 7 January 2017 to Mr Starling stating the following:

> "I'm appealing on the ground of severe punishment, misinterpretation of the fact and misconduct.
>
> The Neasden Union representative Mr Ernie Hand will be dealing with my appeal, can you please provide him with any documents needed." (page 96)

42. The claimant expanded on his grounds of appeal in a letter to Mr Starling dated 16 January 2017, in which he set out the history of his employment with the respondent and his professionalism as a driver. He stated that the accident on 7 December 2016 did not constitute gross misconduct nor gross negligence as he had kept his distance and controlled his speed. He broke harshly and did not do anything wrong. The lorry skidded when he braked. He referred to a meeting in November 2016 with Mr Starling and Mr Patel during which, in answer to a question who an accident should be reported to first, Mr Starling replied that it should be the office on the day of the accident. The claimant asserted that on the 7 December 2016, he had followed that instruction. The accident was not serious, therefore, he should be given the opportunity to improve as he had been driving for 16 years. (page 98a-98b)

43. The appeal hearing was held on 23 January 2017. The claimant attended in the company of Mr Ernest Hand, RMT representative. Also present were Mr Starling and Mr John Williams as HR representative and note taker. The claimant maintained that he did apply the brakes prior to impact and that the Isotrak information supported him. Mr Hand said that the bump card information was never viewed as an instruction, only as a request. He also raised the definition of gross negligence and that the dictionary definition states that "Is a conscious and voluntary disregard of the need to use reasonable care". He asked the question "What the company deemed to be reasonable care?". The claimant repeated that he had, after the accident, checked the vehicle and as the damage was minimal, he decided to drive to M&S Brixton and conducted a further check. Mr Starling responded by saying:

> "One of the reasons the golden hour is in place and allows to ring the office [is] for us to understand what has happened and to assess what we do next and because you chose not to ring us you drove truck back here based on you looking at it. On further inspection when back here the cab was twisted. You had hit the other vehicle with that much force it had twisted the cab and you could have serious accident on the way back."

44. The claimant then gave an account of the meeting in November 2016 at which Mr Starling was present, in particular, the driver advice on reporting an accident. He repeated his conduct on the day in question, and that his assessment of the damage was that it was cosmetic. In 10 years he had never had an accident or problem with anyone.

45. Mr Hand then made submissions on the claimant as a person and as a driver, and that he had not been guilty of the allegations. He said that the respondent had not answered the question, what it considered to be gross negligence. Mr Starling responded by saying that his answer would be in his outcome decision. (pages 99-107)

46. On 30 January 2017, Mr Starling sent the claimant his outcome letter dismissing the appeal. He addressed the three points in the grounds of appeal, namely severe punishment; misrepresentation of the facts; and misconduct. With reference to gross negligence, Mr Starling stated that this was explained by Mr Jones at the meeting on 5 January 2017 by reference to serious breach of conduct and standards, driving without due care and attention which had caused unacceptable loss, damage and had the potential to cause injury. In his letter Mr Starling wrote under the subheading "decision", the following:

> "After careful deliberation, I have decided that the original disciplinary action of dismissal will remain. The reasons the disciplinary action remains are as follows:
>
> - You represented no new evidence that would mitigate the original decision and those points you did raise in your appeal have been considered, see below response:
>
> - In the circumstances I believe the severity of the punishment was adequate given the nature of the allegation.
>
> - I considered the facts of this case and believe that a reasonable investigation and fair process had been applied. I have reviewed the evidence and do not believe there is any misinterpretation of facts.
>
> - In my opinion these allegations are considered serious and would therefore be considered an act of gross misconduct and not misconduct. The briefing you received on the bump card was clear and you signed to say that you understood the instruction, a fundamental part of our operating and safety procedures.
>
> - I considered your length of service with the company however it does not mitigate the fact that I believe you were driving without due care and

attention, which resulted in a road traffic accident and your failure to comply with the bump card procedures and reporting of the accident.

- The incident was very serious and could have potentially injured yourself or members of the public by you driving without due care and attention. You showed no regard to your Smiths defensive driving training or annual driving assessment.

- You chose to continue to drive a defective vehicle onwards to another delivery and then back to the site without informing the office, completing the bump card procedures and following the golden hour process following the accident. In my opinion you have been given sufficient training/briefing of the bump card procedures and reporting of road accidents.

- My decision is final and there is no further right to appeal, this therefore concludes the appeal process." (page 108-110)

47. Mr Starling told me that he did take into account the claimant's clean disciplinary record in arriving at his decision. I do accept his evidence.

Submissions

48. I have taken the submissions by Mr Clement, counsel on behalf of the claimant and by Mr Baker, counsel on behalf of the respondent. I do not propose to repeat their submissions herein as they are contained in very detailed written documents and they added to their written submissions orally. In adopting this view, I have regard to rule 62(5) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. In addition, I have also taken into account the cases they have referred me to.

The law

49. I have taken into account section 98(2) and 98(4 and do bear in mind the judgment in the cases of British Home Stores v Burchell [1978] IRLR 378, a well-known judgment of the Employment Appeal Tribunal and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, a judgment of the Court of Appeal, that the reasonable responses test applies also to the investigation.

50. In the Burchell case, it was held that where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who dismissed the employee on the ground of the misconduct in question, entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements: first, there must be established the fact of that belief, namely that the employer did believe it; second, it must be shown that the employer had in his or her mind reasonable grounds upon which to sustain that belief; and third, the

employer, at the stage at which he or she formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

51. Can consider whether the process by which the employer arrived at the decision to dismiss had been reasonable, Whitbread plc v Hall [2001] ICR 699, a judgment of the Court of Appeal.

52. I have taken into account the guidance given by Mr Justice Brown-Wilkinson in the case of Iceland Frozen Foods Ltd Jones [1983] ICR 17, a judgment of the EAT, on the approach to take when considering section 98(4) ERA 1996 and to avoid adopting the substitution mindset.

53. On avoiding being engaged in the substitution mindset was again emphasised by the Court of Appeal in the case of London Ambulance Service v Small [2009] IRLR 563. It emphasised that the tribunal's role is to focus its fact-finding on the employer's conduct of the dismissal and not to conduct a re-hearing of the facts which formed the basis of the employer's decision to dismiss. Its role is to objectively review the fairness of the employee's dismissal.

54. In the case of Paul v East Surrey District Health Authority [1995] IRLR 305, CA, Baldham LJ held:

> "And an employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely."

55. In relation to wrongful dismissal, the tribunal has to ask whether the employee was 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 UKEAT0366/09.

Conclusions

56. The issues are clearly set out in the agreed document referred to earlier in this judgment. There is no dispute that the claimant was dismissed for conduct as the reason was in connection with his driving and failure to report an accident when it was practical to do so. I am satisfied that there was a reasonable investigation. There was the initial investigation conducted by Mr Smith followed by Mr Patel. Before Mr Patel the claimant was represented by Mr O'Brien. There was then a disciplinary hearing before Mr Jones at which the claimant was again represented by

Mr O'Brien. The claimant had copies of the documents relevant to the disciplinary hearing. He gave his accounts of what had happened. Further, he exercised his right of appeal and was represented by Mr Hand of the RMT Trade Union.

57. Were there reasonable grounds for concluding that the claimant was guilty of the allegations? I am satisfied that Mr Jones, upon considering the claimant's accounts and watching the CCTV footage, reasonably concluded that the claimant did not apply the brakes nor did he engage in any emergency stop. There was no appreciable slowing down of the vehicle on approach to the Luton van. The van had come to a stop in a reasonable manner and the claimant was driving too close to it once the driver of it applied the brakes. In wet road conditions a greater distance between the vehicle in front than 4 seconds was required in order to drive safely.

58. The claimant could have parked his vehicle on the left-hand side of the road by the bus stop or could have used the Brixton M&S Store's telephone to inform the depot of the accident. The vehicle he was driving was 32 tonnes and it was important for the claimant and the safety of the public that it was roadworthy. The claimant was not an engineer, therefore, it was not within his remit to determine whether the vehicle was safe to drive. As it turned out, according to Mr Starling, the cab was twisted and there was damage requiring costs to be incurred of over £12,000. The claimant deliberately decided not to contact the office until he returned to the depot.

59. Was dismissal within the range of reasonable responses? As the respondent has its own disciplinary policy and applied the relevant charges in the context of this case. If proved, they constituted gross misconduct entitling the respondent to either to terminate summarily with or without pay. It chose to terminate summarily without pay in lieu of notice. Both Mr Jones and Mr Starling took into account the claimant's length of service and clean driving record. Mr Jones took some time to consider the outcome knowing of the claimant's employment history and background. It was in his case an in the case of Mr Starling a well reasoned decision.

60. It is not my role to place myself in the shoes of the reasonable employer. What I do say is that the decision to dismiss the claimant is not outside the range of reasonable responses available to a reasonable employer. The effective date of termination was on the 5 January 2017. Accordingly, the claimant's unfair dismissal claim is not well-founded and is dismissed.

61. Having regard to the respondent's disciplinary policy and having put the disciplinary allegations to the claimant and found them to have been proved, considering all the evidence as I must, I have come to the conclusion that the respondent had not by its conduct, repudiated the claimant's contract of employment thereby entitling him to payment in lieu

of notice. It follows that the claimant's wrongful dismissal claim has not been proved and is dismissed.

62. The provisional remedy hearing listed on 23 July 2018 is vacated.

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Employment Judge S Bedeau

Date: 1 June 2018

Sent to the parties on: .....

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For the Tribunal Office