Case No: 1600338/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr Stuart Trigg

Respondents Sky In-home Services Limited

Heard at: Mold **On:** 7 & 8 February 2017

Before: Employment Judge T V Ryan
Members:
Representation:
Claimant: Mr Sheppard (Counsel)
Respondent: Mr Grey (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is that the respondent dismissed the claimant fairly on 6th January 2016 for a reason related to his conduct. The claimant's claim of unfair dismissal is not well-founded, fails and is dismissed.

REASONS

1. The Issues

The issues were agreed with the parties at the outset, in a claim where the Claimant was dismissed for a reason related to his conduct and he accepted that this was the reason, as follows:

1.1 Whether the Dismissing Officer Jonathan Green had a reasonable and genuine belief that the Claimant was guilty of gross misconduct in breaching several of the Claimant's health and safety rules.

1.2 Whether at the time that Mr Green made that decision there had been and he based his decision upon a reasonable investigation.

1.3 Whether dismissal fell within the band of reasonable responses of a reasonable employer, and indeed whether all of the Respondent's actions can be said to satisfy that test.

1.4 With regard to reasonableness the Claimant takes issue with how the decision can have been reasonable when he claims:

1.4.1 The length of the investigation and suspension was excessive and unreasonable.

1.4.2 The decision was inconsistent in that both he and others in the past had committed breaches of health and safety rules without being disciplined.

1.4.3 He was not made aware of the seriousness of the alleged offences.

1.4.4 He was not given full disclosure of all of the allegations against him specifically with regard to using a hand held device whilst in control of a vehicle; the Claimant will say this was effectively a new allegation put to him at the disciplinary hearing.

1.4.5 That he was not given adequate notice of the disciplinary hearing.

1.5 In the event of a finding that the dismissal was unfair, whether and to what extent any risk facing the Claimant of his being fairly dismissed ought to be reflected in the making of a compensatory award and whether his conduct and the principals of justice and equity suggest there ought to be deductions from either or both the Basic and Compensatory Awards.

2. **The Facts**

2.1 Cast List. The following employees of the Respondent featured in the evidence and/or documentation which documentation is provided in a Trial Bundle to which all page references refer.

Clarke, Stephen – Team Manager (who completed the Team Field Companion on 14 November 2015 pages 186 – 199)

Green, Jonathan – A Team Manager and the Disciplining Officer (a witness at the final hearing)

Hassall, Phil – Team Manager (who completed the Team Field Companion on 1 November 2015 at pages 171 – 178 and who certified certain ladders as not fit for purpose).

Hebden, David – Regional Manager and Appeals Officer (a witness at the final hearing)

Hughes, Alan – Former Team Manager

Hughes (nee Thomas), Karen – Investigating Officer

Kelly, Kris – Health and Safety Assessor (completed an assessment on 2 July 2015 at pages 154 – 161).

Maddock, Steven – HR

Reincke, Ben – Former Team Manager until March/April 2010 (a witness at the final hearing)

Trigg, Stuart – Claimant (who gave evidence at the final hearing)

Yoxall, Mark – Health and Safety Assessor

2.2 Abbreviations:

2.2.1 MFT Mobile Field Technology – an iPad on which operates recorded their activities
2.2.2 PPE Personal Protective Equipment
2.2.3 TMFC TM Field Companion. A risk assessment report prepared by an assessor
2.2.4 ROD Record of Discussion
2.2.5 SSOW Safe System of Work

2.3 The respondent's documentation included:

2.3.1 Health and Safety Policies Documents and Guidance pages 49 – 103.
2.3.2 Van Fleet Policy 104 – 139.
2.3.3 Conduct Policy 140 – 144 (Gross Misconduct at 143).
2.3.4 Statement of Particulars of Employment 40 – 48.
2.3.5 Extract from Driver Handbook 145-147.

I found the following facts:

2.4 The Respondent is a large employer providing installation and servicing, of and in respect of, Sky equipment at customers' premises. It has in effect a number of written Policies and Procedures which are specific as to how operatives employed by it are to carry out their duties at customers' premises including their homes. The provision of services is at all times to be to brand standard to ensure the quality of the service, the safety of its employees, and the satisfaction of customers. The brand standard dictated the Respondent's work ethic and its operatives were trained to it. The operatives were provided with documentation, instructions, guidance, and supervision with a view to ensuring the highest standard of service to customers in line with the Respondent's stated ethic. Specifically the Respondent wished to ensure that customers would appreciate that work carried out on their premises had been carried out in accordance with a high specification by the Respondent's engineers such as it would not be mistaken for work by a third party contractor. To reinforce this integral aspect of the Respondent's operations it specifically confirmed in its written policies, and emphasised in training, that breaches of health and safety requirements would be viewed seriously, could lead to disciplinary action and may result in dismissal for gross misconduct. Compliance with safe standards was not an adjunct or incidental aspect of the Respondent's service. Compliance with the Respondent's stated working practices was a requirement of the job of its service operatives; it was not advisory or optional; it was integral, the respondent expecting and requiring that their operatives worked in a particular way.

2.5 The Claimant commenced his employment with the Respondent on 16 March 2009 and his employment was terminated for a reason related to his conduct, namely breaches of health and safety policies rules and standards on the 6 January 2016. The Claimant received the statement of terms and conditions, driver handbook, extracts from the relevant policies, manuals and guidance. The Claimant received full and appropriate training in the Respondent's health and safety and working procedures. The Claimant was conversant with and

experienced in the exercise of the Respondent's service activities and requirements. He was aware at all times of the strict requirement to follow the Respondent's policies and that failure to do so could lead to disciplinary action which may well lead to dismissal in some circumstances.

2.6 The Claimant had however on occasion allowed his standards to slip and on some occasions prior to the events leading to his dismissal he received informal counselling from his Team Supervisor which did not lead to disciplinary action; those incidents were not comparable with the breaches for which he was ultimately dismissed. Those instances were relatively minor and the Claimant was in no doubt that more serious breach of the policies and rules could jeopardise his continued employment. He was not subject to any formal disciplinary warnings at the date of his dismissal.

2.7 The Claimant alleged that on three specific occasions his superiors effectively turned a blind eye to poor health and safety practice. He alleged that Ben Reincke instructed him to stand on the roof of his van on an occasion in 2011 but I find this to be an unreliable recollection or allegation on his part and do not accept it; Mr Reincke was not engaged as his Team Manager in 2011 but had already moved on to another role and the records insofar as they exist relating to the Claimant's visit to the premises in question are inconsistent with the Claimant's allegation. The Claimant's recollection of events in respect of "one occasion" while doing a job in Shrewsbury and on another occasion in Welshpool were vague, unsubstantiated and unreliable when considered in the context of available documentation and the way in which he described the events under cross examination. The claimant did not establish to my satisfaction that he was ever instructed by a Team Manager to, for example, "just get it done" in reference to a job or to "nip up" a ladder in contravention of the Respondent's required standards.

2.8 On 14 November 2015 the Claimant was observed by Stephen Clarke working at a customer's house. He was seen to be drilling above his eye level while standing on the fourth rung of a ladder without wearing any arrest equipment or appropriate PPE. There is an incident report which commences at page 186 where Mr Clarke's initial observation is summarised in detail at page 190. When asked, the Claimant confirmed that he was in breach of several health and safety policy specifications with regard to his manner of working. He had drilled an appropriate eye bolt hole into the wall which ought to have received a securing mechanism for the fall arrest equipment but he did not utilise it. He had set up his combination ladder as a single section instead of an "A" frame; he was using a ladder that had been condemned on a

previous health and safety assessment by Mr Hassall as being unfit for use; he was not wearing full arrest equipment or a hard hat; he was drilling above not only shoulder height but eye level without wearing eye protection and in such a position as to compromise his balance. On being questioned by Mr Clarke the Claimant was able not only to describe all of his many breaches of the Respondent's specification as to safe working practices but to explain what he ought properly to have done and why the method he chose to operate under jeopardised his safety, the customer's property, and the business reputation including by potentially creating an impact not only on workload but team members amongst other things. He stated that his breaches "would cause his team stress after placing trust in our following of H & S Procedures". The Claimant's answers to questions were text book correct answers as to how he ought to have operated and why, as well as the risks caused by failures such as his breaches.

2.9 The Claimant was suspended from work on 17 November 2015 and he was told that this was because of the serious nature of the breaches of health and safety rules which were explained to him and with which he was fully conversant as explained above.

2.10 On 27 November 2015 and 18 December 2015 he was interviewed by Ms Hughes who carried out appropriate other enquiries and investigations of all those from whom evidence ought to be obtained in respect of these matters and who considered the appropriate policies and procedures that applied. Such was the perceived seriousness of the matter that the investigation was prolonged and extended into an investigation into the Claimant's recording of his work on the MFT. Comparison was made between the MFT records prepared by the Claimant as to the times he started and finished various jobs or arrived on each site and the Respondent's own telemetric records produced at least in part by GPS tracking of the Claimant's vehicle. There were many and varied apparent discrepancies between the times recorded by the Claimant as to his arriving and leaving sites and the telemetric recording of the position of the vehicle in which he was driving. The Claimant was also questioned at the investigatory stage as to his use of the MFT, a hand held device, whilst his vehicle was shown by the available records to be in transit.

2.11 During the course of interviews and subsequently at the disciplinary hearing, and after that the appeal hearing, the Claimant repeatedly admitted and apologised for his serial breaches of health and safety rules. He admitted that on occasion he would use the hand held device without pulling over to the side of the road and turning off the ignition of the vehicle for example whilst in stationary traffic at traffic

lights; he accepts that this too is technically a breach of the rules and of good driving practice. He also conceded that he could not fully explain some of the discrepancies between the MFT recordings that he made and the Respondent's recordings of his van's movement shown by the telemetrics.

2.12 On 24 December 2015 the Respondent wrote to the Claimant inviting him to a disciplinary hearing to consider five allegations which were set out in full. The letter is at pages 274 – 275. The allegations are specific and relate to serial job numbers which were given to him and included failures to use PPE, use of a ladder that was unfit for use, failing to follow safe procedures with regard to the use of a combination ladder specifically drilling above eye level, failing to accurately record job data on the MFT and using a hand held device whilst driving. He was informed that these allegations if found to be true would constitute gross misconduct which may lead to dismissal. He was sent approximately 27 documents comprising an investigation summary, notes of interview, photographs, job summaries, RODs, risk assessments, policies, procedures and correspondence. He was sent the conduct policy. He was advised of his right to be accompanied. The hearing was to be on 6 January 2016.

2.13 The allegations facing the claimant and for which he was ultimately dismissed were:

2.13.1 Breach of Health & Safety for failing to follow full fall arrest process and procedures whilst working from a Combination ladder on job 125624341. Specifically failing to use a ladder mate, microcline, harness, eyebolt, ratchet strap, Y-Hand, rope, cows-tail, rope grab, hardhat and gloves.

2.13.2 Breach of health and safety by using a ladder which had been condemned as unfit for use at the recent safety equipment check dated 04/11/2015 on job number 125624341.

2.13.3 Breach of health and safety by failing to follow process and procedure for safe Combination ladder working practice on job number 125624341. Specifically drilling and raising hands above eye level to work.

2.13.4 Failing to accurately record job data on MFT. Specifically on job number 125577629 which was recorded as being on site 47 minutes prior to physical arrival.

2.13.5 Breach of the Sky Van Fleet Policy section 5.2 Driving within the law. Specifically using a hand held device whilst driving to complete job 125604178

2.14 The Claimant received the above invitation on 4 January 2016 and prepared for it by reference to the documentation before him, most of which if not all of which had either been shown to him during the course of the investigation or which was prepared from the interviews held with him and others during the investigation. The Claimant did not read each and every policy document but his knowledge of them was self evident from the answers that he gave in interview (and at the tribunal). He did check the other documentation. He had not realised until that point that the Respondent was attaching such importance to his use of a hand held device whilst driving but its significance ought to have been clear from the invitation letter of 24 December 2015. The period of investigation (14th November 2015 to 6th January 2016) was protracted at least in part because of the number of matters that came to light requiring enquiry and the amount of paperwork that was relevant.

2.15 The disciplinary hearing took place on 6 January 2016 and was chaired by Mr Greene. The Claimant was asked if he had received the documentation and whether he wanted time to obtain a representative. The Claimant stated that he did not wish to have a representative but he wanted to proceed with the matter; he did not request a postponement or adjournment or any additional time to consider his position. During the course of the hearing he was asked appropriate questions to establish whether or not he was responsible for the behaviour that amounted to the disciplinary charges set out in the letter of 24 December 2015. He was asked whether and what circumstances he wished to have taken into account. The Claimant attempted to explain his conduct but made full and frank admissions of fault in respect of each of the allegations albeit he still could not fully explain the inconsistencies between the telemetrics and his MFT recordings and his only concession with regard to using a hand held device whilst driving was that it may have been whilst he was in stationary traffic. He asked Mr. Greene to take into account the fact that he had a clean disciplinary record. He did not give the specifics of the three occasions when he says Team Managers instructed him to compromise health and safety rules and which he now shows inconsistency in the respondent's approach; Mr. Greene was unaware of them.

2.16 Before reaching a decision Mr. Greene considered the investigation report, the documentation provided and all that had been said by the

claimant. He assumed that the claimant had a clean disciplinary record and whilst he considered that as a given he did not think that it was sufficient mitigation. The Claimant was dismissed at the conclusion of the meeting on 6 January 2016.

2.17 The Respondent wrote to the Claimant on 7 January 2016 confirming the dismissal (page 295). Mr Greene's rationale for his conclusion is set out at page 293 and that had been explained to the Claimant at the disciplinary hearing.

2.18 The Claimant appealed against his dismissal by letter dated 18 January 2016 (page 306), his grounds of appeal being that the suspension period was too lengthy, the seriousness of the accusation was not made clear to him and the decision was unfair. The alleged unfairness related to his having a good employment record and having provided excellent customer service, that his work record, attitude, statistics, efforts, age and personal status were mitigating circumstances which had been overlooked. He felt that this being a first offence the decision was "incredibly harsh" and inconsistent. He felt the allegation of using a hand held device whilst driving was "new and unannounced" and that his explanation had been ignored.

2.19 The Claimant's view is that he was guilty of misconduct that justified a disciplinary sanction within the range of written warning to final written warning. This was the view he expressed to the tribunal and I find it was his view at the time of the disciplinary proceedings. The claimant was complacent, if not plain naïve, at the time of the disciplinary investigation and disciplinary hearing. From the evidence available to me I find that he presented to Mr. Greene as someone who took a chance on compromising safety by taking shortcuts believing that he could talk his way out of any serious implications by apologising, acknowledging what he ought to have done which, because he already knew it and admitted fault, would result in a serious sanction short of dismissal. I find that he did not present as an operative who was under any misapprehension as to what was required of him but rather one who honoured or dishonoured health and safety rules and the respondent's specifications at his convenience not expecting to be held to account.

2.20 The Claimant attended an appeal hearing on 27 January 2016 which was chaired by Mr Hebden; the notes of the appeal hearing are at page 321. Mr Hebden's outcome is at page 351 dated 2 March 2016 when Mr Hebden set out how he had addressed the grounds of appeal. He did not allow the appeal but upheld the decision to dismiss the claimant.

2.21 I conclude that both Mr Greene and Mr Hebden considered the Claimant's mitigating circumstances but did not consider that those circumstances were sufficient to fully militate against what they considered to be the appropriate sanction, namely dismissal. There was some confusion in the evidence given as to whether or not either or both of them gave any consideration to the claimant's mitigating circumstances. Having heard from them and seen the notes and correspondence it is clear that the word "considered" was used in different ways by them. I find that in fact they listened to all that the Claimant had to say in mitigation; they assumed that there was a clean disciplinary record without having to check the records because they would have been told if this was not the case and they accepted the Claimant's statement in that regard; in the light of the admitted and self-evident breaches of rules and regulations however they did not consider that the mitigating circumstances were sufficient to in fact mitigate against dismissal. They weighed the mitigation in the balance but found it lacking and at that stage did not take it further into account. Their view was that the claimant's mitigation was inadequate in all the circumstances such that despite it they could not support the claimant's continued employment. Whenever Messrs Greene and Hebden said in evidence that they did not consider mitigating circumstances they meant that they did not find that those circumstances were sufficient to alter the decision to dismiss. That is the only way of making sense of their evidence and the documents produced. Without criticising Mr. Sheppard, counsel for the claimant, at all I found the questioning on this aspect confused the witnesses and the overall purport of their evidence in relation to mitigation is as stated above. Furthermore whilst the claimant asserted that he had learned a lesson and would not re-offend against the rules Mr. Greene did not believe that this was sufficient; it came about only because the claimant had been caught and in any event he had always known the rule, the risks of breaching the rules and that he ought not have acted as he did. Neither Mr Greene nor Mr Hebden was convinced by the claimant's assertions about future conduct if retained in employment not least because he showed no compelling reason for his having taken shortcuts in the past. I found Messrs Greene and Hebden to be credible, cogent and reliable (in terms of the other evidence including documents).

2.22 At no stage prior to these proceedings did the Claimant refer to the inconsistency with regard to the three specific historic allegations that he made against his Team Managers when he said they turned a blind eye to minor breaches of policy. The Claimant had been pulled up for breaches of policy in the July prior to the key incident and was given informal counselling in respect of it by his supervisor on the site, but that breach was reasonably considered to be minor in comparison

with the breaches discovered on the 14 November 2015. The breach on that date in July was not truly comparable with the claimant's breaches on 14th November 2015.

2.23 I concluded by way of findings of fact that the Claimant's chosen method of working on 14 November 2015 was wholly contrary to what he knew to be the safe procedure and it therefore created a known risk in circumstances where he also knew that he risked dismissal for gross misconduct notwithstanding the mitigation he put forward. It was a blatant and wilful disregard of the Respondent's requirements and a deliberate failure on his part to comply with the appropriate working practices. He was taking shortcuts. He was found out. In the face of overwhelming evidence and having been caught red-handed he owned up but without contrition or displaying an attitude of likely future reform that either Mr. Greene or Mr. Hebden found convincing.

3. **The Law**

3.1 Section 94 Employment Rights Act 1996 (ERA) states that an employee has the right not to be unfairly dismissed, while Section 98 ERA sets out what is meant by fairness in this context in general. Section 98(2) ERA lists the potentially fair reasons for an employee's dismissal, and these reasons include reasons related to the conduct of the employee (Section 98(2) (b) ERA). Section 98(4) provides that once an employer has fulfilled the requirement to show that the dismissal was for a potentially fair reason the Tribunal must determine whether in all circumstances the employer acted reasonably in treating that reason as sufficient reason for dismissal determined in accordance with equity and the substantial merits of the case.

3.2 Case law has established that the essential terms of enquiry for the Employment Tribunal are whether, in all the circumstances, the employer carried out a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of the dismissal in those respects, the Employment Tribunal then has to decide whether the dismissal of the employee was a reasonable response to the misconduct. The Tribunal must determine whether, in all the circumstances, the decision to dismiss fell within the band of reasonable response of a reasonable employer; if it falls within the band the dismissal is fair but if it does not then the dismissal is unfair.

3.3 Questions of procedural fairness and reasonableness of sanction (dismissal) are to be determined by reference to the range of reasonable responses test also.

3.4 The Tribunal must not substitute its judgment for that of the employer, finding in effect what it would have done, what its preferred sanction would have been if it, the Tribunal, had been the employer; that is not a consideration. The test is one of objectively assessed reasonableness. The Tribunal must avoid what is referred to as a "substitution mindset"; the band of reasonable responses is not limited to that which a reasonable employer might have done. The question is whether what the employer did fell within the range of reasonable responses. The Tribunal must assess the reasonable responses open to an employer and decide whether a Respondent's actions fell inside or outside that band but they must not attempt to lay down what they consider to be the only permissible standard of a reasonable employer.

3.5 It may be appropriate to reduce an award by applying a percentage reduction to the compensatory award to reflect the risk facing a Claimant of being fairly dismissed or to limit the period of any award of losses to reflect this risk, estimating how long a Claimant might have been employed had he not been unfairly dismissed, in circumstances where the Respondent would or might have dismissed the Claimant. I must consider all relevant evidence and in assessing compensation I appreciate that there is bound to be a degree of uncertainty and speculation but I ought not to be put off the exercise because of its speculative nature.

3.6 Where a Tribunal finds that a Claimant's conduct before dismissal was such that it would be just and equitable to reduce a basic award it may do so (Section 122 ERA). Where a Tribunal finds that dismissal was to any extent caused or contributed to by any action of the Complainant it shall reduce any compensatory award by such amount as it considers just and equitable having regard to that finding (Section 123 ERA). In doing so a Tribunal must address four questions.

3.6.1 What was the conduct giving rise to the possible reduction?
3.6.2 Was that conduct blameworthy?
3.6.3 Did the blameworthy conduct cause or contribute to the dismissal?
3.6.4 To what extent should the award be reduced?

3.7 The above deals with the statutory ground of unfair dismissal but different legal considerations are to be taken into account in respect of

allegations of breach of contract. Commonly when an employee is summarily dismissed for gross misconduct he or she will claim a breach of contract namely that he or she was dismissed without being given contractual notice. A written statement of employment particulars of employment ought to specify the contractual notice period. The giving of such notice is at least in part dependent on due compliance by the employee with the terms of the contract. Every contract of employment is based on a foundation of trust and confidence and there is an implied term of trust and confidence that neither party will act in a way designed to have the effect of seriously damaging or destroying the relationship. With regard to any allegation of breach of contract the Tribunal must decide whether the employer was entitled to dismiss without giving otherwise due notice; that will usually depend on a finding as to whether or not the Claimant's conduct was in prior breach of contract. If an employee commits a repudiatory breach of contract such as a breach of the implied term of trust and confidence and/or gross misconduct then an employer is not bound by the notice provisions. An act of gross misconduct would normally be considered to be a repudiatory breach. A breach of trust and confidence is a repudiatory breach.

4. **Application of Law to Facts:**

4.1 *Did the Dismissing Officer Jonathan Green have a reasonable and genuine belief that the Claimant was guilty of gross misconduct in breaching several of the Claimant's health and safety rules?* Yes, and that belief was shared by Mr Hebden. The claimant admitted most of the breaches for which he was dismissed, namely those relating to the inspection in November 2015. He gave a partial admission in respect use of the hand held device while driving by admitting, not the particular event alleged but that on occasion he did so when in stationary traffic and that this might explain the allegation; even doing that is a breach of the law and the respondent's known rules. He could not explain disparities in his time recordings which were shown in the documentary evidence.

4.2 *At the time that Mr Green made that decision had there been, and did he base his decision upon, a reasonable investigation?* Yes. The investigation was thorough. The claimant complained about how long it went on for but that substantiates the diligence of the investigator who looked into several aspects of the claimant's working practices which appeared to be deficient or at least in need of enquiry and explanation. The investigation included interviews with all relevant

witnesses and interrogation of the available records. The claimant was interviewed and the provisional findings and evidence were put to him. He was given an opportunity at the investigation to give any exculpatory explanation he wished to and what he did say was taken into account during the investigation. Both Mr Greene and Mr. Hebden considered the investigation documentation and went on to question the claimant in order to satisfy themselves respectively as to what happened, why, and what ought to be done about it; that formed part of the investigation. The investigation was reasonable. The respondent relied upon it including upon the claimant's admissions and submissions. I find that there was nothing omitted that ought to reasonably have been included.

4.3 *Did dismissal fall within the band of reasonable responses of a reasonable employer, and indeed did all of the Respondent's actions satisfy that test?* A wilful breach of a number of health and safety rules, and an employee adopting working practices that knowingly contradict an employer's known and trained ethic and requirements must fall within such a band. The claimant showed a disregard for performing the job for which he was employed in that he only partially fulfilled his obligations to the respondent; he installed equipment at a customer's house, he recorded his movements, he used a hand held devise provided for him but he did all of this according to his convenience and contrary to the respondent's brand standard. The respondent was not obliged to condone this. Various options were open to it. It is not for me to consider what I would have done or whether I sympathise with the claimant in view of his admission and mitigation; it would not matter if I had felt that the decision to dismiss was a hard one. The issue relates to a band of reasonable responses. Dismissal fell into that band in the circumstances I have found above.

4.4 *With regard to reasonableness the Claimant raised issue with how the decision could have been reasonable in the light of the points below. Did the respondent act reasonably:*

4.4.1 "The length of the investigation and suspension was excessive and unreasonable". Whilst the period of time that the investigation was in progress and the consequential lengthy suspension was unfortunate for the claimant, in that more allegations came to light, nevertheless it did not give rise to any unfairness to him. It cannot be said to be unfair if the investigation was thorough and it was. While it was unfortunate for the claimant that more matters came to light during it than had been known at the date of suspension he was provided with available details and given an opportunity to address them both during the investigation and at the disciplinary hearing. It was

reasonable of the respondent to table all of the serious allegations in respect of which it found evidence and which it reasonably considered merited disciplinary action. It might have been unfair and unreasonable to fore-shorten the investigation with the risk of further or later proceedings if and when the other matters came to light. The length of the investigation did not in and of itself give rise to unfairness.

4.4.2 *"The decision was inconsistent in that both he and others in the past had committed breaches of health and safety rules without being disciplined".* The claimant has not proved, and the respondent has disproved, that the respondent turned a blind eye to breaches of health and safety comparable to this committed by the claimant. In fact the claimant proved that the respondent treated each event on its own merits and used discretion appropriately when, in the pervious July, it had only given guidance to the claimant for a relatively minor misdemeanour.

4.4.3 *"He was not made aware of the seriousness of the alleged offences".* It was clear to me that despite the claimant's protestations he was in no doubt that the allegations could lead to his dismissal. That was clear from his training. It was clearly stated in the disciplinary invitation letter. The fact that the claimant thought dismissal was unlikely or that he could talk his way out of the risk is not the point. He was made aware of the risk; he misjudged it. He got his tactics and approach wrong through a misplaced sense of self-confidence, or at least in so far as he failed to persuade Mr. Greene.

4.4.4 *"He was not given full disclosure of all of the allegations against him specifically with regard to using a hand held device whilst in control of a vehicle; the Claimant will say this was effectively a new allegation put to him at the disciplinary hearing."* The respondent disclosed sufficient information to the claimant to allow him the opportunity to prepare to meet the allegations he faced and upon which Mr. Greene could decide, having heard from the claimant. This is so not least in the light of the claimant's admissions. The claimant admitted on occasion using a handheld device in stationary traffic. He ought not to have so used it. The records showed he had at least done that and the claimant's admission reasonably seemed to bear that out.

4.4.5 *"He was not given adequate notice of the disciplinary hearing"*. The claimant was given relatively short notice but he did not ask for more time or a postponement when he was given such an

opportunity. There is no evidence to suggest that any reasonable request would have been refused. The claimant gave every impression that he wanted to get on with the hearing. The respondent did not act unreasonably in taking the claimant at his apparent word which I paraphrase as his being ready, able and willing to proceed with the hearing as planned.

4.5 The claimant was, and knew he was, employed to both provide a service and to provide it in a specified way. He knew the significance of the "way". That "way" was an essential and integral part of the claimant's obligation and duty to the respondent. The claimant deliberately acted contrary to the "way". In doing so the claimant breached his contract of employment. His conduct both undermined the relationship and was in itself an act of gross misconduct. In those circumstances the respondent was entitled to dismiss the claimant (and to do so without giving him contractual notice or pay in lieu thereof). Even if the dismissal had been unfair in any respect then I would have considered making a substantial reduction in both the Basic and Compensatory awards because of the claimant's blameworthy conduct and the principles of justice and equity. The claimant brought the dismissal upon himself. He took chances both as regards the way in which he chose to work and how he addressed the disciplinary investigation and hearings. He chose badly. Had he not known what was expected of him one would have expected consideration of remedial training by the respondent as an available alternative to dismissal; that was not the case. Had he shown a convincing resolve to amend his bad practices then again one might expect other considerations to come to the respondent's mind; he did not. The respondent reasonably concluded that the claimant acted wilfully knowing the risks and only made a formal apology when caught red-handed with no good or compelling reason for his admitted and witnessed (by eye witness or documentary evidence) conduct.

4.6 In conclusion the respondent dismissed the claimant fairly for a reason related to his conduct.

Employment Judge T V Ryan
Dated: 7th March 2017

JUDGMENT SENT TO THE PARTIES ON

20 March 2017

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.