EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104098/2018

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Heard in Glasgow on the 15, 16 and 17 October 2018

Employment Judge: Lucy Wiseman
Members: Mr Ashraf
Martha McAllister

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Ms Fiona Ingram — **Claimant**
Represented by:
Ms D Flanagan - Solicitor

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JHP Transport Ltd — **Respondent**
Represented by:
Mr T Muirhead - Consultant

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 18 April 25 2018 alleging she had been discriminated against because of the protected characteristic of sex. The claimant set out in the claim form that she had been employed as an HGV Class 1 Driver with the respondent and that she had been dismissed. The claimant considered this less favourable treatment in circumstances where named comparators had also had accidents and 30 caused damage.

2. The respondent entered a response admitting the claimant had been dismissed but denying the allegations of discrimination. The respondent asserted the claimant had had five accidents in a short period of time and had 35 been dismissed because there had been no improvement following additional

training and there was a risk to health and safety. The respondent admitted other (male) drivers had had accidents but these were far fewer in number.

3. We heard evidence from the claimant and Mr Richard Sims, a former employee of the respondent. We also heard from Mr John Campbell, Operations and Transport Manager who dismissed the claimant; Mr Kevin Miller, Driver/Trainer with the respondent and Ms Kimberley McCrimmon, HGV Class 1 Driver with the respondent.

4. We were also referred to a jointly produced bundle of documents. We, on the basis of the evidence before us we made the following material findings of fact.

Findings of fact

5. The respondent is a haulage business providing refrigerated and ambient road haulage, storage and distribution services throughout the UK and Europe. The respondent employs approximately 80/90 employees at its base in Lanark.

6. The respondent company is owned by Mr James (Jim) Prentice. Mr Prentice's son, James, also works in the business.

7. The respondent company recruits employees to train as HGV Class 1 and 2 Drivers. These drivers have a 1 – 2 week induction with Mr Kevin Miller once qualified. The respondent company also recruits qualified drivers. These drivers receive a 45 minute assessment, and are expected to be able to carry out the driving required in the job.

8. The claimant qualified as an HGV Class 1 Driver in April 2016. She initially did agency work and was placed at the respondent company. The claimant liked the company and took the opportunity of a permanent position when one arose in February 2017.

9. The respondent, having recruited an agency worker, would have been due to pay the Agency a fee. The respondent avoided paying this fee by recruiting the claimant to Farm Field Fresh Ltd in January 2017.

10. Mr Jim Prentice and Mr James Warnock are the shareholders of Farm Field Fresh Ltd (page 179). The company employs 18 employees. Mr John Campbell is the Operations and Transport Manager for both companies.

11. The claimant commenced employment with the respondent on 24 February 2017. She was employed by the respondent until the termination of her employment on 27 November 2017.

12. The respondent received an email dated 20 March 2017 (page 70) from Mr Anthony Hearn, Transport Manager at Fowler Welch. The email concerned the claimant and alleged she had been abusive on site. The claimant was asked to leave the site. She did so, but ran out of driving time, so another driver from the respondent company had to meet her and drive her load back.

13. The email from Mr Hearn was in the following terms:

> "*We have had issues with a JHP driver this morning, she has been abusive towards our shunter, Goods In and towards Angela. We had advised her that we would get someone to assist her as soon as we could and she has consistently been calling the transport office and shouting at which ever member of the team answered the phone. The reason being that she is too short to reach the straps and strap the load and I have been advised by goods in that this occurred on Friday too. I have contacted John at JHP and advised him of this and that she was to get an empty curtain, leave site and is not to be sent back in here...*"

14. Mr John Campbell, Operations and Transport Manager, spoke to the claimant regarding this incident. Fowler Welch is the respondent's biggest client and not only had there been an incident, but the claimant was not allowed back on site. Mr Campbell dismissed the claimant.

15. The claimant wrote out her account of the incident (pages 73 – 76) and also wrote a document explaining what it meant to her to work for the respondent (pages 77 – 78). The claimant spoke to James Prentice and asked him to speak to his father to give her a second chance.

16. The claimant was subsequently invited to meet with Mr Jim Prentice. The claimant was reinstated but required to do some additional training with Mr Kevin Miller to improve her reversing.

17. Mr Miller spent time with the claimant initially in the yard practising reversing and he then accompanied her out on delivery runs to different sites to improve her reversing. Mr Miller suggested to the claimant that she get the vehicle straighter before reversing. The claimant would briefly accept this advice, but then reverted to her old ways which meant she was coming into the reverse at more of an angle and it was this that was causing the problem.

18. The claimant was also permitted to come to the yard in her own time to practice reversing. Mr Campbell and other drivers would give advice and assistance if they were available. The claimant returned to her duties after the training with Mr Miller.

19. An incident occurred on 8 August 2017 (page 84) when the claimant mis-judged a reverse between two trailers and gouged a tear in the side of one of the trailers. The trailer was a refrigerated trailer and so the cost of the damage was increased because the whole panel required to be replaced. Mr Campbell spoke to the claimant after this incident and told her to take her time.

20. A second incident occurred on the 30 August 2017 (page 93) when the claimant got lost on the way to Kettle Produce. The claimant attempted to turn round and in doing so knocked down and tore the road signs out of the ground. The claimant was unaware of this and continued to Kettle Produce.

21. The incident was reported to the respondent by Kettle Produce. Mr Campbell carried out an investigation to establish the claimant was on duty and that it was her vehicle. Mr Campbell spoke to the claimant who confirmed she had missed the turn for Kettle Produce and had tried to turn round, but it had been

too tight. Mr Campbell told the claimant that if a turn was too tight it caused the trailer to roll back. Mr Campbell reported the damage to the road signs to the local authority.

22. A third incident occurred on 31 August 2017 when the claimant arrived at the Kettle Produce yard (page 95). The claimant reversed to pick up a trailer but missed the pin. The claimant was driving a Volvo cab for the first time and had not realised the air suspension did not raise the cab high enough to engage the pin. Mr Campbell spoke to the clamant regarding this matter. The claimant accepted responsibility for this incident and offered to pay the excess of £1200. The approximate cost of the repair is £4000/5000.

23. A fourth incident occurred on 13 September 2017 (page 206). The claimant was at a service station and reversed into a space between two trailers. The claimant's vehicle rolled back and knocked the mirror off one of the other vehicles.

24. Mr Campbell noticed this damage and looked at the dashboard camera which showed how the accident had happened. Mr Campbell spoke to the claimant regarding this matter. The accident was caused by a mis-judgment of the claimant and he told her she needed to take more care. The claimant had had additional training but there did not appear to be any improvement. Mr Campbell warned the claimant about any further incidents.

25. A fifth incident occurred on 25 November 2017 (page 100). The incident occurred when the claimant reversed into a loading bay and got too close to the markers lining the bay. This resulted in the mud flap being torn off the vehicle.

26. Mr Campbell was off on the day of the incident. He returned to work on Monday 27 November and contacted the claimant by telephone. Mr Campbell referred to the incident with the mudguard and informed the claimant she was being dismissed with immediate effect because there was no sign of improvement and the risk of something more serious happening.

27. The claimant sent an email to Ms Charlene Welch, HR Manager on 28 November (page 104) referring to the phone call from Mr Campbell informing her that she had been dismissed with immediate effect. The claimant noted she had not had any warnings and that the manner of dismissal did not comply with the ACAS Code of Practice. The claimant believed she had been dismissed for the mudguard incident and queried why others who had done the same had not been dismissed.

28. Ms Welch replied by email the same day (page 106) saying she was in the process of writing to the claimant, but as the claimant had less than one year's employment, and having regard to the numerous incidents and damage caused, the company could not continue to let this happen.

29. Ms Welch wrote to the claimant on 29 November (page 109) confirming her employment had been terminated with immediate effect on 27 November 2017. This was because of continuous damage to the respondent's vehicles and for health and safety reasons. The letter referred to help and guidance being given to the claimant, but the damage had continued.

30. The respondent accepted it was not uncommon for drivers to have accidents. Mr Campbell had placed a noticeboard in the office with photographs of damage caused to various vehicles and an indicative cost of repairing the damage. He hoped this would impress upon the drivers the need for care.

31. The respondent listed on page 203 details of the claimant's named comparators, details of the incidents, the cost of repairs and any other relevant information.

32. Mr David Munro was employed with Farm Field Fresh as an HGV Class 1 Driver. A copy of Mr Munro's pay slip and P45 were produced at pages 180 and 181. The respondent accepted he had left a trailer brake on and thereby caused damage to tyres. This cost £1200 to repair, of which Mr Munro paid £600. Approximately 16 months later Mr Munro caused damage to two vehicles. This cost £1900 to repair. Mr Campbell was in the middle of investigating this incident when Mr Munro resigned.

33. Mr Gary Black was also employed by Farm Field Fresh as an HGV Class 1 Driver. Mr Black's offer of employment with Farm Field Fresh was produced at page 190 and his contract of employment at page 184. He commenced employment on 1 January 2014 and is still employed. Mr Black clipped a large stone with his vehicle, causing minimal damage which cost £100 to repair.

34. Mr Scott Rauttenberg was employed with Farm Field Fresh as an HGV Class 1 Driver. His P45 was produced at page 193. Mr Rauttenberg missed the pin and caused damage of £4000. He resigned shortly after this incident.

35. Mr Corrie Miller was employed with the respondent as an HGV Class 1 Driver from 2 June 2017 and is still employed. He has had three incidents – trailer jammed and blew three tyres; pheasant damaged visor and tyre blow out - which the respondent accepted were not his fault.

36. The respondent distinguished the claimant's comparators on the basis they had not had as many incidents as the claimant and there had not been any issue regarding lack of improvement.

37. The respondent's drivers are predominantly male employees. The respondent employed a female driver prior to the claimant. Ms Kim McCrimmon was subsequently recruited by the respondent and carried out her HGV Class 2 and 1 qualifications with the respondent. Ms McCrimmon has had two incidents whereby she has damaged lights, and has paid towards the repair costs.

38. The respondent has recently undertaken a recruitment exercise for ten drivers, two of which are female.

39. The claimant obtained agency work immediately following her dismissal. She is currently employed as an HGV Class 1 Driver with Turners Haulage.

Credibility and notes on the evidence

40. The claimant, during the course of her evidence, sought to explain in detail each of the incidents. The claimant, in the opinion of the Tribunal,

endeavoured to minimise the incidents which had taken place and to place blame for them on others.

41. The claimant rejected the allegation she had been abusive at the Fowler Welch site and she provided an extensive document setting out the background to the incident and to explain the reason for her frustration. Similarly, with each of the five subsequent incidents the claimant, whilst on the one hand saying each incident had been her fault, sought to blame others. For example, in relation to the incident on the way to Kettle Produce when the claimant had got lost, we heard that another driver had stopped to help her and give directions. According to the claimant it was the other driver who had suggested she turn, and he assisted her to do so. The claimant implied the other driver was to blame for suggesting she turn the vehicle. She also sought to excuse what had happened by saying she had no experience of country roads and doing turns and was not familiar with the vehicle she was driving. The claimant did not know she had hit the road signs.

42. The claimant insisted, in respect of missing the pin, she should have been told about the vehicle not lifting high enough.

43. The claimant accepted, in relation to ripping off the mudguard, that she had been told to get out of the cab to look, but she not done so.

44. The claimant sought to minimise the incidents by comparing the cost of damage to the cost of other accidents (she had heard about). The claimant, in her evidence, referred to the tear in the side of another vehicle (on 8 August) as just being a “small” tear. The tear may well have been small but the claimant had pierced a refrigerated panel and therefore the damage and cost of repair were not insignificant. We considered that in focusing on the scale of damage and cost of repair, the claimant sought to deflect attention from the real issues which were (a) that the incidents all occurred when the claimant was reversing the vehicle; (b) she had had more training than any other driver; (c) she was not showing any improvement and (d) there was a health and safety risk with continued accidents. Mr Campbell referred, for example, to

the road signs having been knocked over and questioned what would have happened if that had been a person.

45. The respondent accepted cost will be a factor for them to consider, but in the claimant's case it was not a determinative factor because it was the number of incidents in a short period of time, the lack of improvement and the health and safety risks which underlined the decision to dismiss.

46. The claimant told the Tribunal that following the first dismissal she had been told by James Price that it would not have happened if she had been a man. This evidence was not tested in cross examination. We did not however consider the comment to be a material fact in circumstances where there was no evidence to suggest James Price was involved in the decision-making process in this case. Furthermore, the claimant accepted the second dismissal was not related to the first.

47. There were several disputes between the evidence of the claimant and Mr Campbell. We preferred the evidence of Mr Campbell to that of the claimant. The claimant asserted that when she returned to the yard following the incident with the mud flap, Mr Campbell told her he had no issues with her driving and that she had proven herself with the long distance runs. She could not understand why Mr Campbell's view had changed over the weekend.

48. Mr Campbell disputed this and we noted the claimant, in her evidence, undermined herself when she referred to Mr Campbell having been on holiday that day.

49. The respondent produced additional information regarding the claimant's named comparators (page 203). One incident/comparator was identified as "the Volvo Incident". The respondent was unable to find any information regarding the incident. The claimant, during her evidence, suggested she remembered the incident involved a Polish driver who had knocked into a pole. The claimant was unable to provide any further, or more specific, information. We concluded, in these circumstances, that this could not be

relied upon because (i) it lacked sufficient detail, and (ii) the claimant accepted the respondent had not been given notice of this prior to the Hearing.

50. Mr Richard Sims is an experienced HGV Class 1 Driver who worked for the respondent for approximately 7 years. He understood from the claimant that she had been dismissed for taking the mud flap off the vehicle. He considered this unfair because others had done the same thing and not been dismissed. Mr Sims told the claimant what he knew of other drivers' incidents having heard chat about this in the yard. We did not doubt Mr Sims told us what he had heard, but he accepted that his evidence was based on general discussion in the yard and not on direct knowledge of the incidents. Furthermore, the claimant's evidence was based on what Mr Sims had told her.

51. There was a suggestion Mr Sims and the claimant were/are in a relationship, but we did not consider this had any relevance whatsoever to these proceedings.

52. We found Mr Campbell to be a credible and reliable witness. We accepted he had not formally warned the claimant prior to dismissal, but he had told the claimant she was "on thin ice" and any further incident might be her last. Mr Campbell described the mudflap incident as a last straw. All of the incidents involved the claimant reversing: she had received extra training to assist her reversing but had subsequently had a series of incidents all caused in the same manner. Mr Campbell considered there was a health and safety risk in each incident and with no improvement the risk was increasing.

53. We also found Mr Kevin Miller to be a credible and reliable witness. We accepted he had spent two weeks training the claimant regarding reversing. The claimant, in her evidence to this Tribunal, told us that she had not needed two weeks training. The instructions of Mr Miller "clicked" with her and she "got it" that she had to turn the steering wheel more quickly. However, both Mr Miller and the claimant referred to the claimant falling back into her old ways regarding reversing.

54. Ms Kim McCrimmon was a credible and straightforward witness. She had not experienced any difficulties with the respondent.

55. There was a dispute between the parties regarding whether Mr. Munro, Mr Black and Mr Rauttenberg were employees of the respondent or Farm Field Fresh Ltd. We decided as a matter of fact that they were employed by Farm Field Fresh Ltd.

56. There was a further dispute regarding the issue of whether the respondent and Farm Field Fresh Ltd were associated employers. We acknowledged the evidence suggested the companies worked closely together, however we concluded, having regard to the terms of section 231 Employment Rights Act 19996 that the companies were not associated employees.

Claimant's submissions

57. Ms Flanagan submitted this was a complaint of direct discrimination in terms of section 13 Equality Act. The less favourable treatment concerned the dismissal of the claimant. Ms Flanagan referred to section 136 Equality Act and the burden of proof provisions.

58. Ms Flanagan noted the claimant could rely on an actual or hypothetical comparator for the purposes of establishing less favourable treatment, and there must be no material difference in the circumstances of the claimant and the comparator (section 23 Equality Act). Ms Flanagan referred to the case of **Chief Constable of West Yorkshire v Vento 2001 IRLR 124** as authority for the proposition that in constructing an inference of the hypothetical case a Tribunal could rely on how the employer treated actual, unidentical, but not wholly dissimilar cases. This approach had been adopted in **Balamoody v United Kingdom General Council for Nursing, Midwifery and Health Visiting 2001 EWCA Civ 2097.**

59. Ms Flanagan also referred the Tribunal to the case **Igen v Wong 2005 ICR 931** as approved by the Supreme Court in **Hewage v Grampian Health Board 2012 IRLR 870**.

60. Ms Flanagan invited the Tribunal to prefer the evidence of the claimant to that of the respondent's witnesses. Ms Flanagan submitted Mr Campbell had not given a credible account of why he had dismissed the claimant and was not able to explain why he had changed his mind over the weekend of the 25 and 26 November. Ms Flanagan described Mr Miller as having very defensive body language during cross examination and that he had stuck to the mantra of the claimant having had difficulty with reversing.

61. Ms Flanagan set out the findings of fact she invited the Tribunal to make and these included that the claimant had received 3.5 days of training and not 2 weeks as suggested by the respondent; Mr Campbell had reassured the claimant he had no issue with her driving and the claimant was shocked at being dismissed. Ms Flanagan also invited the Tribunal to accept Mr Sims' evidence that Mr Munro had fallen asleep at the wheel and this had not been on the list of information provided by the respondent. Furthermore, the claimant had given evidence regarding the un-named comparator (number 4 on the respondent's list) and told the Tribunal it had been a Polish driver who had crashed into a pole.

62. Ms Flanagan accepted that comparators (e), (f) and (g) on the respondent's list had not been substantiated.

63. It was submitted the claimant's dismissal was unfavourable treatment. The comparators were male employees who had also caused damage and been in accidents but had not been dismissed.

64. Ms Flanagan submitted the comparators were employees of the respondent and despite Farm Field Fresh Ltd existing as a separate company, the Tribunal should not accept the fiction that the companies were separate entities. There had been evidence of employees switching between the two companies, using the same vehicles and being subject to the same management and disciplinary structures. Ms Flanagan in particular pointed to the following:

- in the ET3 the respondent did not deny the comparators identified in the ET1 were employees;

- Jim Prentice is the owner of both companies, although only a co-owner of Farm Field Fresh Ltd;

- Mr Campbell is the Operations Manager for both companies;

- the contracts governing employees of each are identical;

- The claimant was contracted to Farm Field Fresh for four weeks to avoid paying an agency fee;

- in a letter to Mr Munro (page 139) the respondent wrote to him on JHP headed paper and referred to him being aware that "prior to you leaving JHP" and

- Mr Sims spoke of a colleague suddenly being transferred to Farm Field Fresh.

65. Ms Flanagan submitted that if the named comparators were employees of Farm Field Fresh, then the claimant, in the alternative, relied on a hypothetical comparator and relied on the evidence of how the actual comparators were treated to demonstrate how a hypothetical comparator would have been treated. The hypothetical comparator would be a man, employed by the respondent, who had been involved in 5 accidents, some of them minor, in less than a year.

66. Ms Flanagan submitted there were facts before the Tribunal from which it could decide, in the absence of any other explanation, that discrimination had occurred. Further, inferences could be drawn from the gender make-up of the respondent's drivers and the facts and circumstances of the case in general.

67. The burden, it was submitted, had shifted to the respondent to demonstrate the reason for the discriminatory treatment. The respondent had failed to demonstrate a credible or cogent reason for the claimant's dismissal. The claimant was informed by Mr Campbell on 24 November that she was doing well and there were no issues. Mr Campbell decided, over the course of the weekend, to dismiss the claimant. There was no warning, no procedure and it had not been demonstrated that the reason was the respondent's health and safety concerns.

68. Ms Flanagan invited the Tribunal to uphold the claim and to make an award of compensation for injury to feelings as set out in the schedule of loss.

Respondent's submissions

69. Mr Muirhead noted the claim was one of direct discrimination and that the claimant compared herself to actual comparators (David Munro, Gary Black, Scott Rauttenberg, an unnamed agency driver, an unnamed and unspecified driver of a Volvo and Mr Corrie Miller – Mr Willie Gillespie having been withdrawn by the claimant during the hearing). In the alternative the claimant relied on a hypothetical comparator, and relied on the treatment alleged to have been applied to the actual comparators.

70. Mr Muirhead set out the findings of fact he considered should be made and these included, in particular, that the respondent is entitled to expect a basic level of skill from qualified HGV Class 1 Drivers and that the driver will be able to drive competently and safely; the claimant was given a second chance and up to two weeks additional training plus time in the yard to practice reversing; as the driver of the vehicle the claimant was responsible for each of the five accidents and the respondent had good cause to dismiss the claimant because there was no sign of improvement and this represented an unacceptable risk to health and safety.

71. Mr Muirhead invited the Tribunal to find the claimant was not an entirely credible witness because during the course of her evidence she appeared very reluctant to accept responsibility for the accidents, for example, implying

the other driver helping her turn on the road had somehow been at fault. Also, the claimant had attempted to argue that the incidents were not her fault because the respondent should have helped her more, for example by telling her the Volvo cab did not lift high enough to engage the pin.

5 72. Mr Muirhead referred to section 23 Equality Act which provides there must be no material differences between the circumstances of a claimant and the comparator in each case. In **Hewage v Grampian Health Board 2012 IRLR 870** it was said that whether the comparison is sufficiently similar will be a question of fact and degree for the Tribunal.

10 73. Mr Muirhead submitted that even on the claimant's own evidence, the circumstances of her chosen comparators came nowhere near being materially the same as the claimant's. At best, the claimant suggested David Munro had 3 incidents. This was disputed and Mr Muirhead invited the Tribunal to prefer the respondent's evidence that there had been two
15 accidents. The other drivers named had only had single incidents; with the exception of Mr Corrie Miller who had had three accidents, but the respondent was satisfied that none were his fault. Crucially, none of the comparators had anywhere near the claimant's record of 5 incidents without any apparent sign of improvement.

20 74. The claimant, it was submitted, appeared to have fixated on the cost of the relevant repairs, and whilst this was a factor any business would naturally take into account, it was not the reason for the claimant's dismissal. The claimant was dismissed for her poor record of accidents with no sign of improvement.

75. Mr Muirhead invited the Tribunal to accept Mr Campbell's evidence that Mr
25 Munro and Mr Rauttenberg had resigned before he could complete his investigations, and that it was possible they would have been dismissed had they not done so.

76. Mr Muirhead further submitted the comparators were not (with the exception of Mr Corrie Miller) the respondent's employees and therefore the Tribunal

must take this into account in assessing whether the circumstances of the comparators were materially different.

77. Mr Muirhead submitted the claimant had not discharged the initial burden of showing facts from which an inference could be taken that discrimination may have occurred. If however the Tribunal found the initial burden had been discharged, he submitted the respondent had shown the reason for the treatment, which was not discriminatory.

78. The claimant's case was based on hearsay and speculation: she could not give direct evidence about the accidents of the other drivers, but could only say what she had been told by Mr Sims, or what she had heard being discussed by others.

79. Mr Muirhead submitted the claimant had entirely missed the point in respect of her dismissal: namely that it was not about the cost of the damage, or the seriousness, but about her repeated record of incidents without any sign of improvement, despite training and support, representing in the respondent's mind an unacceptable risk to health and safety. The respondent did not discriminate against the claimant. The respondent has a record of employing female Class 1 drivers, and has recruited two more to undertake training. The claimant was in fact given more chances than any other male driver employed by the respondent.

80. The claimant's comparators were (with the exception of Mr Corrie Miller) not employed by the respondent, but with Farm Field Fresh Ltd. Mr Sims, the claimant's witness, agreed he believed this to be the case. It was submitted that it could not be said the respondent treated the claimant less favourably than others who were not in fact employees of the respondent. The respondent is a separate company from Farm Field Fresh Ltd: they were not associated employers within the meaning of section 231 Employment Rights Act because neither was a company of which the other (directly or indirectly) had control, and both were companies of which a third person (directly or indirectly) had control. Mr Jim Prentice has a 50% shareholding in Farm Field Fresh Ltd and is sole shareholder of the respondent. Mr Muirhead submitted

that no evidence had been led that the companies were, in practice, associated.

81. Mr Muirhead invited the Tribunal to dismiss the claim. However, if the claim was successful he submitted the claimant had sought and obtained work promptly after her dismissal and it could be inferred from this that she had not, as claimed, been “devastated” by her dismissal. Any compensation should therefore be in the lower band.

82. Mr Muirhead, in response to the claimant’s submissions, invited the Tribunal to prefer the evidence of Mr Campbell.

Discussion and Decision

83. We firstly had regard to the terms of section 13 Equality Act which provide that a person discriminates against another if, because of a protected characteristic, s/he treats that other less favourably than s/he treats or would treat others.

84. Section 23 Equality Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

85. Section 136 Equality Act provides that this section applies to any proceedings relating to a contravention of this Act. If there are facts from which the court could decide in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred. We had regard to the cases of **Igen v Wong** (above) and **Hewage v Grampian Health Board** (above) regarding the way in which Tribunals should approach the drawing of inferences.

86. The claimant claimed to have been treated less favourably by the respondent, in comparison to named comparators, and a hypothetical comparator, when the respondent dismissed her. The respondent admitted it had dismissed the claimant, but sought to argue this was not less favourable treatment when

compared to the treatment of others, and to argue the reason for the dismissal was not because of the claimant's sex.

87. We, before turning to the facts of this case, had regard to the case of **Shamoon Chief Constable of the Royal Ulster Constabulary** (above) where it was said that the "circumstances" relevant for a comparison include those that the alleged discriminator takes into account when deciding to treat the claimant as it did.

88. We also had regard to the Equalities and Human Rights Commission Employment Code where it makes clear that the circumstances of the claimant and the comparator need not be identical in every way, but rather what matters is that the circumstances which are relevant to the claimant's treatment are the same or nearly the same for the claimant and the comparator.

89. We had regard to the comparators used by the claimant. The claimant named 7 comparators as listed on page 203. The comparators were David Munro, Gary Black, Scott Rauttenberg, Willie Gillespie, the Volvo incident, Agency Driver and Corrie Miller. The claimant, during the course of her evidence, withdrew Willie Gillespie from the list of comparators. The claimant invited the Tribunal to accept the Volvo incident concerned a Polish driver who had hit a pole but we could not accept this in circumstances where it was not put to other witnesses, and where Ms Flanagan, in her submission, accepted comparators (e) - the Volvo incident, (f) - the agency driver and (g) - Corrie Miller, had not been substantiated. This meant the comparators relied upon by the claimant were David Munro, Gary Black and Scott Rauttenberg.

90. The three comparators were employees of Farm Field Fresh Ltd and we deal with this point below. David Munro had two accidents: he left a trailer brake on and damaged tyres in January 2016 (cost of repair £1200) and he damaged two vehicles on 1 May 2017 (cost of repair £1900). He resigned before Mr Campbell had completed his investigation into the second incident. The claimant (based on what Mr Sims had told her) invited the Tribunal to believe Mr Munro had had another accident whereby he had fallen asleep and

collided with another vehicle. We preferred the evidence of the respondent regarding this matter for two reasons. We considered that if the claimant did not accept the information provided in page 203, she could have raised it prior to the hearing and sought further information. Further, the claimant could not provide any details, beyond the bald assertion that this had happened and we were not satisfied that this was a separate incident to the one listed on page 203 as having happened in May 2017.

91. Gary Black clipped a large stone and caused damage of £100 to the vehicle in September 2017.

92. Scott Rauttenberg missed the pin and caused damage of £4,060 in December 2016. He resigned shortly after this incident and before Mr Campbell had completed his investigation.

93. We, having clarified the actual comparators being relied upon by the claimant and their circumstances, considered (a) whether the comparators were employees of the respondent and if not, whether they were employees of an associated employer and (b) whether there was any material difference between the circumstances relating to their cases and that of the claimant.

94. We found as a matter of fact that David Munro, Gary Black and Scott Rauttenberg were, or had been, employed by Farm Field Fresh Ltd. We preferred the evidence of the respondent, supported by the documentation, to that of the claimant. In addition to this, Mr Sims, the claimant's witness, told the Tribunal he believed these men had been employed by Farm Field Fresh Ltd.

95. There was no dispute regarding the fact the respondent is a company wholly owned by Mr Jim Prentice. Farm Field Fresh Ltd is a company owned by Mr Jim Prentice and Mr James Warnock.

96. There was no real clarity regarding the day-to-day relationship between the respondent company and Farm Field Fresh Ltd. Mr Campbell was the Operations and Transport Manager for both companies, and he recruited for both companies. Some of the drivers from Farm Field Fresh Ltd were clearly

known to the respondent's drivers and some of the same, or similar, documentation was used. Mr Sims spoke of a driver from Farm Field Fresh driving his vehicle after he had finished his run. We also heard the claimant started at Farm Field Fresh Ltd and moved to the respondent after a month.

5 97. We concluded that notwithstanding there was evidence of some relationship between the companies, there was insufficient evidence to undermine the documentation indicating the companies were separate companies.

98. Mr Muirhead referred the Tribunal to section 231 Employment Rights Act where the term "associated employers" is defined. The section provides that:

10 "*For the purposes of this Act any two employers shall be treated as associated if (a) one is a company of which the other (directly or indirectly) has control, or (b) both are companies of which a third person (directly or indirectly) has control, and "associated employer" shall be construed accordingly."*

15 99. We were satisfied, having had regard to the definition set out in section 231 and the evidence before the Tribunal, that David Munro, Gary Black and Scott Rauttenberg were employed by Farm Field Fresh Ltd; and, the respondent company and Farm Field Fresh Ltd were not associated employers. We considered this was the first material difference between the claimant and the

20 named comparators.

100. We next considered the circumstances of the claimant and the named comparators. We noted the claimant had five accidents in a period of four months: David Munro had two accidents in a period of 16 months and Mr Black and Mr Rauttenberg had one accident. The difference in the number of

25 accidents the claimant had, compared to the number of accidents the actual comparators had had was the second material difference in the circumstances of the cases.

101. We next had regard to the fact the claimant had had more training than the actual comparators. Mr Kevin Miller told the Tribunal that drivers trained by

30 the respondent receive up to two weeks training with him once they've

qualified and that drivers who are recruited as qualified drivers receive a 45 minute assessment. Mr Miller was asked the following question in cross examination: how often do qualified drivers get training? Mr Miller responded that he had never had a qualified driver come to him for extra training. The claimant was the only qualified driver who had received up to two weeks additional training from Mr Miller in order to improve her reversing skills. This was the third material difference between the circumstances of the claimant and the actual comparators.

102. The claimant asserted the comparators had had accidents costing much more to repair than her accidents. We could not accept this assertion in circumstances where missing the pin cost in the region of £4000/5000 to repair, and the damage to the refrigerated panel meant the whole panel had to be replaced.

103. We concluded, having had regard to the above factors, that the claimant was not able to demonstrate the respondent had treated her less favourably that it did, or would, treat others. We reached that conclusion for two reasons: firstly, because the actual comparators were not employed by the respondent, or an associated employer. It could not therefore be said the respondent had treated others less favourably. Secondly, if we have erred in the first conclusion and the actual comparators were employees of the respondent or an associated employer, there were material differences between the claimant's circumstances and those of her comparators. Those material differences were that the claimant had had many more accidents than any of the comparators and she had had additional training, which no other qualified driver had had.

104. The claimant also sought to rely on a hypothetical comparator to show how a man would have been treated in the same circumstances. Ms Flanagan submitted the hypothetical comparator would be a man, employed by the respondent for the same length of time as the claimant, who had had five accidents of the same or a similar nature to the claimant. Ms Flanagan referred the Tribunal to the cases of **Chief Constable of West Yorkshire v**

Vento and **Balamoody v United Kingdom General Council for Nursing Midwifery and Health Visiting** as authority for her proposition (which we accepted) that the Tribunal should, when considering how an hypothetical comparator would have been treated, look to evidence of how others had been treated.

105. In ***Vento*** it was stated "*the Tribunal did not err in constructing an inference of the hypothetical case from how the employers treated actual, unidentical, but not wholly dissimilar cases. Where there is no evidence as to the treatment of an actual male comparator whose position is wholly akin to the applicant's, a Tribunal has to construct a picture of how a hypothetical male comparator would have been treated in comparable surrounding circumstances. Inferences will frequently need to be drawn. One permissible way of judging a question such as that is to see how unidentical but not wholly dissimilar cases were treated in relation to other individual cases. It is not required that a minutely exact actual comparator has to be found. If that were the case then isolated cases of discrimination would almost invariably go uncompensated."*

106. In the ***Balamoody*** case it was stated: "If the applicant can point to an actual comparator whose circumstances are the same or not materially different from his own, then so much the better. Frequently, however, there may be no actual comparator whom it can be shown has been treated more favourably than the applicant. In those circumstances it is necessary to construct a hypothetical comparator to show how a person of the other racial group would have been treated. This is a matter of law because it goes to the manner in which the Tribunal is to approach a case. If a hypothetical comparator is required and a Tribunal does not direct itself to the need for that control group against which to test the alleged discriminatory treatment, then the Tribunal would err in principle."

107. Ms Flanagan invited the Tribunal to look at the evidence regarding how the actual comparators had been treated, and use that evidence to form a view regarding how a hypothetical comparator would have been treated. Further,

Ms Flanagan invited the Tribunal to draw inferences from the gender make up of the drivers and from the facts and circumstances of the case in general.

108. We have set out above the circumstances of the actual comparators insofar as David Munro had two accidents in a period of 16 months; Gary Black had one accident and Scott Rauttenberg had one accident. In addition to this we had regard to Mr Campbell's evidence that (a) David Munro and Scott Rauttenberg had resigned before the conclusion of his investigation into the incident and (b) a number of drivers had previously been dismissed for accidents. Mr Campbell gave three examples: Mr Sam Borland was dismissed for consistently driving without the digicard in; Mr McKenzie was dismissed for causing an accident and Mr Willie Gillespie was dismissed for dropping a trailer.

109. We also had regard to Mr Miller's evidence regarding training and the fact that he had not ever previously been asked to give a qualified driver additional training. We inferred from this that the claimant had in this regard been more favourably treated than other male drivers.

110. We accepted Mr Muirhead's submission that it was reasonable for the respondent, when recruiting a qualified driver, to expect them to be able to carry out the driving duties required in the job.

111. We accepted a hypothetical driver would be a male driver, recruited by the respondent as a qualified driver, who had five accidents in a period of four months. We asked ourselves, having regard to the way in which the actual comparators were treated, and the evidence of Mr Campbell and Mr Miller, how the respondent would have treated the hypothetical comparator in those circumstances. We were entirely satisfied the hypothetical comparator would have been dismissed by the respondent. We say that because the respondent's concerns with five accidents in a period of four months, all of which occurred because of driver fault when reversing, would have been the same. We accepted the respondent's position that with every accident there is a growing risk regarding health and safety.

112. The respondent accepted accidents will happen. Mr Campbell put the photographs of damage to vehicles and cost of repairs on the noticeboard to encourage all drivers to take extra care. There was no magic number of accidents above which a driver would be dismissed, but it was a question of fact and degree. Mr Campbell accepted cost to the respondent was a factor but above all else the issue was safety.

113. The claimant was – and a hypothetical comparator would have been – given additional training to focus on reversing, but she subsequently had five accidents all of which occurred when reversing. There was no sign the claimant's reversing was improving and this was a cause of concern for the respondent. The respondent would equally have been concerned about this with a hypothetical comparator.

114. We concluded a hypothetical comparator would have been treated in the same way as the claimant and would have been dismissed. The respondent would have been concerned that notwithstanding additional training, five accidents occurred in four months due to driver fault when reversing. There was no sign of improvement and the respondent would have had the same concern regarding risk/health and safety. We did not consider the fact the respondent did not dismiss male drivers who had had less accidents, over a longer period and not all when reversing undermined that decision.

115. We, in reaching our decision in this case, did have regard to the gender-balance of the respondent's driver workforce. However, we did not consider the mere fact that most of the drivers were male was of itself sufficient. The respondent was able to demonstrate they employ female drivers and have recruited two more (in a total of 10) to train as HGV Class 1 drivers.

116. We decided the claimant was not treated less favourably than the actual or hypothetical comparators. We decided to dismiss the complaint of direct discrimination.

5 **Employment Judge: L Wiseman**
Date of Judgment: 07 November 2018
Entered in register: 08 November 2018
and copied to parties