EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr K Fila	**Veolia ES (UK) Limited**

Heard at: London Central **On**: 21 - 25 February 2019

Before: Employment Judge Lewis

Representation
For the Claimant: Mr M Wiencek, consultant
For the Respondent: Mrs J Smeaton, Counsel

Interpreter: Ms M Harris-Grzevyk

RESERVED JUDGMENT

1. The claim for unfair dismissal is not upheld.
2. The claim for wrongful dismissal is upheld and the claimant is awarded notice pay in the sum of £1791.68.

REASONS

Claims and issues

1. The claimant initially brought claims for unfair dismissal, notice pay and wages owed. The wages owed claim was for pay for time off in lieu and for overtime. At the start of the hearing, he withdrew his wages claim.

2. The remaining issues were as follows:

Unfair dismissal

2.1. Have the respondents shown the reason for the dismissal?

2.2. Was the dismissal fair or unfair, applying the band of reasonable responses? As part of that:

2.2.1. Following the three stage test in British Home Stores v Burchell:

2.2.1.1. Did the respondents genuinely believe the claimant was guilty of misconduct?

2.2.1.2. Did they hold that belief on reasonable grounds?

2.2.1.3. Did they carry out a proper and adequate investigation?

2.2.2. Was dismissal a fair sanction? This includes whether there was reliance on a final written warning which had not been given in good faith, where there were no prima facie grounds for it or it was manifestly inappropriate.

2.3. Was there a breach of the ACAS Code on Disciplinary and Grievance Procedures?

2.4. If the dismissal was unfair on procedural grounds, what is the chance that the respondents would have dismissed the claimant even if they had followed fair procedures and on what date?

2.5. Should there be any deduction from the basic award for conduct prior to dismissal or from the compensatory award for contributory fault?

2.6. If the claimant wins, remedy.

Notice

2.7. Whether the claimant committed gross misconduct.

Procedure

3. The claim was initially brought against three respondents. However, after the respondents confirmed that the correct employer at all times was the 1st respondent, Mr Fila withdrew his claims against the 2nd and 3rd respondents.

4. I heard from evidence from Mr Fila (the claimant). I also heard evidence from Martin Cooper and Wojciech Sawicki on the claimant's behalf. For Veolia ES (UK) Limited (the respondent), I heard evidence from Billy Brooker and Steve Morris. There was a joint file of 287 pages. Mrs Smeaton provided a short opening note and Mr Wiencek provided a written copy of his closing submissions. I was also shown some short video extracts in support of freeze frames 254 – 261 in the joint file.

5. A Polish interpreter attended to interpret when Mr Fila gave evidence. She remained in the room while the other witnesses gave evidence in case she

was needed, but Mr Fila did not ask her to interpret at those other times since he understood what was being said. Mr Fila confirmed he understood the content of his witness statement which was written in English.

6. Mr Morris was recalled by consent on day 3 to answer questions regarding whether the reason Veolia had bought Dennis Eagle vehicles rather than Mercedes vehicles in 2011/12 was because they were cheaper and also to answer further questions regarding the investigations into a more accurate on-board weighing system. Veolia wanted to supply two sheets listing the costs of components of the vehicles to support his evidence. Mr Wiencek objected because these simply listed information taken from original documents which he had not had the opportunity to check. I therefore decided not to allow in those documents as evidence and to reply simply on Mr Morris's oral evidence.

7. Everyone had agreed that closing submissions (final comments) would be made at the end of day 2 even though Mr Morris would come back to give evidence on day 3. Mr Fila said he did not require the interpreter for day 3. After Mr Morris's further evidence on day 3, Mrs Smeaton and Mr Wiencek each had the opportunity to make further comments.

Fact findings

8. Mr Fila was employed by Veolia ES (UK) Limited ('Veolia') as an HGV driver. He started on 16 March 2013. Mr Fila was dismissed for letting his vehicle go overweight.

9. Veolia had a contract with Westminster Council for collecting refuse in the Borough. Drivers were employed on eight-hour shifts. They were paid on a 'task and finish' basis, ie once they had completed their route, they were allowed to go home. They were still paid for the full shift. There is a maximum weight which vehicles are allowed to carry. The vehicle is weighed on a scale called a weighbridge when it arrives at the tip. The type of vehicle driven by Mr Fila should not have weighed more than 18 tons. At the time of Mr Fila's final written warning and his dismissal, everyone knew that the on-board weighing system was inaccurate and must not be relied on.

10. It was very important not to drive overweight vehicles for a number of reasons. It was a danger to health and safety. It might mean insurance was void if there was an accident. It increases fuel consumption and wear on tires. It causes damage to roads. Westminster Council also felt strongly about it.

11. In 2011/12, Veolia bought a new fleet of vehicles for Westminster. No single provider could provide 60 vehicles. Veolia therefore purchased roughly 36 vehicles manufactured by Dennis Eagle and 24 by Mercedes. The decision was made jointly by Veolia and Westminster. It is fairly common for a contracting local authority to get involved in such decisions. The Dennis Eagles were used for domestic waste and the Mercedes vehicles for recycling. As it happens, the Dennis Eagles were the more expensive vehicle.

For the last 12 months of his employment, Mr Fila was dealing with domestic waste and drove a Dennis Eagle vehicle.

12. Previously, Veolia had used either Dennis Eagle exclusively or Mercedes exclusively. It had not had any problems in the past with the on-board weighing systems. Therefore it was not expecting any problems with the new fleet.

13. With the new fleet, the on-board weighing systems turned out to be inaccurate. The Mercedes system was better than the Dennis Eagle system, but it was still not completely reliable. The on-board systems were built into the vehicles at the manufacturing stage. Mercedes used its own brand system. Dennis Eagle used a system made by an external company, VPG.

14. The Mercedes system was more reliable because it had a load cell, which spread the weight around the vehicle. On the Dennis Eagle vehicles, the weighing system was at the front, which was based on air suspension. The Mercedes system was ultimately considered useful enough to be worth keeping calibrated. There was no point calibrating the Dennis Eagle system because it turned out to be so inaccurate anyway.

15. Veolia was involved in discussions over 6 months with Dennis Eagle and with VPG over the problem, but they were unable to find a solution. They also looked at the possibility of compactor blades, but these also did not provide an accurate measure. It proved to be impossible to add on an accurate weighing system. The only way it could be done was to build in a mechanism at the time of manufacture. However, the fleet was only 18 months old. The vehicles would cost about £150,000 each to replace. Usually vehicles are replaced every six or seven years, so this was not considered a viable option.

16. Mr Fila says it must have been possible to find some kind of accurate on-board system. In particular, I was shown an email from a salesman at VPG to Eurolex Parners (Mr Fila's representatives) dated 18 October 2018 referring to the PM1155 Wasteweigh system and the Truckweigh overload protection system. The PM1155 is not particularly relevant because it is not designed to be retrofitted and should be built in at manufacture stage. The email says the Truckweigh system is not as accurate.

17. I accept that there was no accurate on-board weighing system which Veolia could have installed (short of getting new vehicles). Veolia spent 6 months talking to Dennis Eagle and VPG. Veolia wanted a solution. An email from a salesman and some product description sheets are not enough to prove to me that there was in fact a workable solution which Veolia had overlooked. It happens all the time that manufacturers advertise products with all kinds of features which turn out not to be compatible with existing machinery or can't do the job that is needed. If there was a solution, VPG would surely have wanted to tell Veolia about it.

18. As there was no accurate on-board weighing machinery, Veolia's solution was to make the drivers responsible for using their knowledge and experience

not to go overweight. In October 2014, Veolia introduced a zero tolerance policy on overweight vehicles. The zero tolerance policy was shown to drivers. The Policy started:

'All drivers must consider and make the necessary adjustments / alterations to their work to accommodate the load so as not to exceed the weight limit. It is important to consider either tipping earlier, twice and/or limit/reduce the on-board maximum gross weight.

Ensuring a vehicle is not overloaded is the responsibility of both the operator and the driver'

The Policy went on to set out the implications of overweight vehicles. It said that all drivers found to be driving an overweight vehicle would be referred to a disciplinary investigation 'for breach of section 71 of the Road Traffic Act 1988, company rules and local regulation, negligence and insubordination. These acts constitute gross misconduct and if proven may lead to dismissal from the company.'

19. There is no visual way of checking weight because volumes can of course consist of different materials. Mr Brooker and Mr Morris explained that drivers do the same route every day and become very familiar with the usual weight of the refuse they are collecting. They know where they should be on the route at any particular time. Being late on a route might indicate that more refuse than usual, is being collected. There would also be times of year when refuse levels are heavier than other times. Part of the drivers job is also to help load the vehicle so they would know themselves if they were lifting particularly heavy bags.

20. Drivers would need to go to the tip at least once each round and they should go twice if necessary. It would be unusual to have to go more than twice, but if needed, they should do so. If drivers went over their 8 hour shift for this reason, they were paid overtime. Overtime pay for this would never be refused.

21. Drivers could choose to go to the tip at any time. There was no rule that they must have collected a minimum weight of refuse before they could go. It was therefore a question of judgement and whether the driver chose to take the risk of letting the vehicle get too close to the maximum weight before going to the tip. Of course Veolia recognised the temptation was for drivers to avoid going twice to the tip if possible, because it meant they could finish work sooner but still get paid for the full eight hours.

22. How long it took to go to the tip varied according to traffic conditions. Mr Brooker said a return trip would not usually take more than 2 hours. Mr Fila said that it usually took him 2½ hours because his routes were in the North of Westminster.

23. Veolia gave toolbox talks and issued drivers with documents which emphasised the zero tolerance policy and the reasons for it. Mr Fila attended

these talks and received the documents. He knew that Veolia considered it very important. On 13 November 2014, Mr Fila signed a document stating 'I have been made aware of the serious consequences of driving an overweight vehicle. I will contact a manager should I have any issues and/or concerns with any part of the policy.'

24. Mr Fila did not think the policy was fair. By signing such documents, he did not agree that it was fair. However, as with the other drivers, he was given no choice.

25. In practice, Veolia did not dismiss a driver the first time he went overweight unless it was very extreme. Drivers who allowed their vehicle to become overweight would receive a final written warning. If they repeated the offence, while the warning was live, they would be dismissed.

26. Up until the new policy, there were approximately 20 to 25 overweights each month. After introduction of the zero tolerance policy, the overweights instantly reduced almost to zero. There is now an average of 1.5 overweights per month. To put these figures in context, there are about 3600 vehicles on the road in Westminster every month. Veolia employs about 180 drivers in Westminster and only three drivers including Mr Fila have been dismissed for breaking the zero tolerance policy since it was introduced.

27. Mr Fila says that Veolia was passing on its responsibility not to have overweight vehicles to the drivers without giving them the necessary tools accurately to weigh the vehicles. Veolia says this was true to an extent, but – as I have already mentioned - Mr Brooker and Mr Morris felt strongly that it was well within the capability of drivers to know if they had an unusually heavy load and to play it safe by going earlier to the tip. I asked why they could not have a rule that drivers must go twice to the tip or that they must go when they assessed their vehicle to be 75% full, which would leave more margin for error. Mr Morris said that there had been lengthy discussions with the union, but this type of suggestion had been unacceptable because it meant that drivers would have to go to the tip more than necessary on many occasions, and would lose the opportunity for leaving early. Although this sounds like getting paid for not working, it is in fact a form of compensation for the low pay on the job. Mr Brooker and Mr Morris added that the statistics showed that drivers generally, including Mr Fila, had no problem avoiding going overweight. Moreover, the pay system meant that they were paid and if necessary paid overtime for not taking risks. If a driver was having to work overtime repeatedly to avoid going overweight, the managers would look at his workload.

28. I asked Mr Morris whether the union had questioned whether there was really no accurate on-board weighing system. He said the union had not challenged that. Its main concern was that the zero-tolerance policy was not applied rigidly, that final warnings were given and that mitigating circumstances were taken into account.

29. On 10 July 2016, Mr Fila wrote to Gina Luckhurst in Human Resources. He raised various issues in his email including the issue of overweights. He asked how it was possible for drivers to be responsible for something they are not able to assess. On 14 July 2016, Ms Luckhurst emailed Mr Fila. She said she had passed his concerns onto his manager, Mr Brega, and he would go through them with Mr Fila. If Mr Fila felt his concerns had not been answered fully, he should let Ms Luckhurst know.

30. Mr Fila says Mr Riches or the foreman showed him the zero tolerance papers which he had signed. They said Mr Brega would talk to him when he came back from holiday, but Mr Brega did not do so. Mr Fila did not go back to Ms Luckhurst to say his concerns had not been answered.

Mr Fila's final written warning

31. On 5 June 2017, Mr Fila's vehicle was 500 kilos overweight. He went to the tip twice that day, but the vehicle was overweight on the first tip. This had been a surprise to him because he always tipped at the same point on his route.

32. Veolia gave Mr Fila a final written warning on 7 September 2017 for going overweight. The warning letter said that the final written warning would remain active for 12 months and that if it happened again, more serious disciplinary action could be taken which might lead to dismissal.

33. Mr Fila appealed. He said it was the first time ever that he had allowed a vehicle to go overweight and he had an excellent driving record for Veolia. He said there were no proper tools to measure weight and he had not allowed the vehicle to go overweight intentionally. He said Monday was a heavy day and he always did two loads to avoid overloading. He also complained that the zero tolerance policy only applied to Veolia in Westminster.

34. The appeal was heard by Mr De Grout, the Contract Manager. Mr De Grout rejected the appeal. He said drivers knew they had to make the necessary adjustments. Regarding Mr Fila's point that this was the first occasion he had driven an overweight vehicle, that was not correct because his personnel file 'showed a previous warning'. This was a reference to a letter referring to an overweight vehicle on 23 November 2013. No action had been taken at that time because Mr Fila had already tipped two loads. However he was reminded disciplinary action might be taken if he was overweight on any future occasions.

35. Mr Fila says that Mr De Grout wrongly relied on a 'warning' when rejecting his appeal against the final written warning of 7 September 2017. I do not read the notes of the appeal hearing and the letter rejecting the appeal as meaning that. Mr De Grout was simply correcting Mr Fila's assertion that he had never driven an overweight vehicle before. Neither Mr Brega, who gave the warning, nor Mr De Grout who upheld it, say they gave a final written warning because Mr Fila already had a previous warning. The reason for the

final written warning was simply that Mr Fila went over the weight limit which was contrary to the zero tolerance policy.

36. Mr Fila believes the final written warning was a disproportionate sanction because there was no weighing system available and because Veolia admitted he did not act deliberately.

37. On 30 October 2017, Mr Fila wrote to Ms Luckhurst about his final written warning. He said again that he felt he should not be given responsibility for something he could not check. He said his manager had advised him to drive to the tip when his vehicle was ¾ full, but that did not guarantee the vehicle did not exceed the maximum weight. He said his manager had told him he would be paid overtime if he had to drive to the tip more often, but on his last payslip he was only paid 5 hours overtime even though he did 13 hours.

38. Ms Luckhurst did not reply. She had left Veolia. Mr Fila did not chase the matter up.

39. Mr Fila said in the tribunal that Veolia often did not pay the full overtime worked and that there were often mistakes. He said his payslips would show many payments for Sundays, but he had never worked Sundays. He said these were in fact overtime payments. I was not sure from this whether there were occasionally mistakes on pay slips, which were later corrected, or whether some overtime was never paid. The evidence was not specific enough for me to reach a conclusion on this point.

Dismissal

40. Mr Fila had a routine. He had been driving the particular route since January 2017. He tipped twice on Mondays and once on Wednesdays and Fridays. On Mondays, he went over his 8 hours unless it was quiet because of school holidays. On Wednesdays and Fridays, he tended to finish early. That was common for many drivers. He was happy with that pattern and he did not complain to his managers about it.

41. On 16 January 2018, Mr Fila attended an investigation meeting with Andy Riches (Environmental Manager) for driving an overweight vehicle on Wednesday 3 January 2018. Mr Fila was asked if he wanted anyone to attend with him. He said no. Ms Marshall took non-verbatim notes.

42. Mr Riches said the vehicle was 200 kilos overweight. Mr Fila's shift started at 6 am that day. He had finished his shift at 10.40 am. Mr Fila said the records showed Mr Fila had gone to the tip once at 9.45 am. Mr Fila admitted these times were correct and that if he had gone to the tip twice, he would not have gone over. Mr Fila's shift officially finished at 2.30 so he was paid till then.

43. Mr Fila showed Mr Riches a note showing the discrepancies between the weighbridge weights and what the on-board weighing system showed, eg 17,280 kilo was recorded on the weighbridge when the on-board system

showed 14,900 kilo. Mr Riches said he would take this into consideration, but Mr Fila should remember that the scales did not work so he used them at his own risk.

44. Mr Fila handed in a note dated 16 January 2018 stating that he was a good and responsible driver. He said 'I do not feel that I broke the law, but only your policy. You need to be aware that implying such a strict policy I should be provided with appropriate tools to comply with it.'

45. The disciplinary hearing took place on 25 January 2018 in front of Billy Brooker, the Contract Manager. Mr Riches was present and Ms Marshall took the minutes. Mr Brooker asked Mr Fila if he would like anyone with him. Mr Fila said no and he was happy to continue.

46. Mr Fila accepted that he had gone overweight on the day in question. Mr Brooker pointed out that he was aware of the zero tolerance policy. Mr Fila answered that he had not broken the law. Mr Brooker said that he had broken company policy.

47. At the end of the disciplinary hearing, Mr Brooker told Mr Fila he was dismissed. He already had a final written warning. Veolia had a zero tolerance policy, but he had been overweight again. He could have gone to the tip one hour earlier and tipped twice if necessary. Mr Fila was told that he had the right of appeal within 5 days of receipt of the outcome letter.

48. Mr Brooker did not believe that Mr Fila had gone overweight intentionally, but he thought Mr Fila had taken a calculated risk. He believed Mr Fila could and should have taken steps to avoid the risk. Mr Brooker was convinced that drivers were able to judge if they were at risk of going overweight. The rounds were very repetitive. In the first 6 months after the zero tolerance policy was introduced, no one went overweight at all.

49. Mr Brooker did not know Mr Fila had made complaints to HR about the zero tolerance policy. But it would have made no difference because he believed drivers were able to avoid going overweight and there was no accurate on-board weighing system.

50. Mr Brooker knew it was very important not to go overweight. It could affect Veolia's operator's licence. It was also important to Veolia's client, Westminster Council.

51. The dismissal was confirmed in a short letter dated 26 January 2018. It simply stated that Mr Fila had been the driver of an overweight of vehicle on 3 January 2018. This was gross misconduct under the Company's disciplinary procedure and he would be summarily dismissed with immediate effect. The letter said he had the right of appeal. Mr Fila did not receive the letter at that point because it was sent to his previous address.

52. Mr Fila wrote a letter of appeal on 28 January 2018. He said again he disagreed with such a strict consequence for non-compliance. He said he had

no reliable tools to weigh the vehicle. He said he had mentioned this issue many times to his managers but nothing was done to resolve it. Mr Fila said he had an excellent driving record. He had not caused any accidents or damage while working for Veolia. He had not broken the law, only company policy.

53. Mr Fila's appeal was heard on 21 February 2018 by Steve Morris, Contracts Operations Manager. Ms Page was present from HR. Mr Fila took a work colleague with him, Mr Cooper. Before listening to the appeal, Mr Morris read the investigation pack, notes of the disciplinary and the letter of appeal.

54. At the start of the hearing, Mr Morris gave Mr Fila the dismissal letter and a short break for him to read it and discuss it with Mr Cooper.

55. When they returned to the meeting, Mr Fila said the disciplinary notes were inaccurate in some places. They suggested that he had said he knew it was a heavier load that Wednesday because there had been extra work on the Monday Bank Holiday. Mr Fila said this was inaccurate. He said he explained to Mr Brooker that he knew the extra work from Monday was collected on the Tuesday, so it was normal on the Wednesday.

56. Mr Cooper confirmed that many drivers did not accept the zero tolerance policy was fair and they had signed the documents only because they were given no choice. He said they felt they were now living on a knife edge because there were no accurate tools.

57. Mr Fila told Mr Morris about his complaint to Ms Luckhurst. Mr Morris did not feel that was particularly relevant. The complaint was that the on-board weighing system did not work, but everyone knew that.

58. Mr Morris rejected the appeal. He said that Veolia recognised that the on-board weighing system did not work, but this could not be rectified. Veolia had brought that to the drivers' attention. Mr Fila had signed the overweight policy and instructions. He failed to make any adjustments on the day, and overloaded his vehicle. Mr Morris said he had looked at Mr Fila's driving record. Mr Fila had a final written warning which was issued on 5 June 2018 and was still current.

59. I asked Mr Morris why he had considered Mr Fila's actions to be gross misconduct. Mr Morris said that some drivers deliberately took risks so as to finish early. However, he was not suggesting that Mr Fila had done this. Veolia generally treated it as gross misconduct because of the seriousness of the consequences.

60. Veolia's disciplinary policy and procedure says:
'An employee may be dismissed without previous warnings in cases where … the nominated manager empowered to dismiss is satisfied that a serious offence has been committed and that it is of a substantial and deliberate nature'

There is then a series of examples which include 'Negligence – any action, or failure to act, which represent blatant wilful disregard for safety or customer welfare and safety' and 'Serious Breach of Company or site rules on health and safety'. The respondents did not identify which, if any, of the examples they were relying on, and I cite these two examples as potentially the most relevant.

Law

Unfair dismissal

61. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), eg conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

62. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'

63. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:
(1) did the respondents genuinely believe the claimant was guilty of the alleged misconduct?
(2) did they hold that belief on reasonable grounds?
(3) did they carry out a proper and adequate investigation?

64. Finally, tribunals must decide whether it was reasonable for the respondents to dismiss the claimant for that reason.

65. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own decision. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

66. It is not appropriate for a tribunal to look behind a previous final warning if it was issued in good faith and is not manifestly inappropriate, ie there are prima facie grounds for it. Except in these circumstances, both the employer and the tribunal can regard the final warning as valid for the purpose of any dismissal arising from subsequent misconduct, provided that the subsequent misconduct is such that, when taken together with the final warning, the dismissal or the decision to dismiss is a reasonable one. (Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135 and Tower Hamlets Health Authority v Anthony [1989] IRLR 394, CA.)

67. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

68. The Code is also relevant to compensation. Under section 207A, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.

69. Under s122(2) of the Employment Rights Act 1996, the tribunal shall reduce the basic award where it considers that any conduct of the claimant before dismissal was such that it would be just and equitable to do so. Under s123(6), where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

Wrongful dismissal

70. It is wrongful dismissal to dismiss an employee without the notice required in the contract of employment unless the employee was dismissed for gross misconduct. In this case, the question is whether Mr Fila committed gross misconduct.

71. The usual test for gross misconduct is whether the employee has committed a 'repudiatory breach' of contract. Whether the employee's actions were serious enough depends on the circumstances including the nature of the business and the employee's position. An employer can give examples of gross misconduct in the contract of employment which might be particularly relevant in that business. However, as summary dismissal is such an extreme step, the examples need to be clear. In Robert Bates Wrekin Landscapes Ltd v Knight UKEAT/0164/13, the EAT said this:

> As a general rule, an employee is entitled to notice unless the employer can point to a repudiatory breach of contract. It is well established in the employment context that a repudiatory breach of contract is one which entails either wilful and deliberate contravention of an essential term of the contract or gross negligence

In Adesoken v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22, [2017] IRLR 346, the Court of Appeal said that in cases of gross negligence, summary dismissal is conceptually possible, but a court should be slow in practice to uphold it.

Conclusions

Unfair dismissal

72. .Veolia's reason for the dismissal was misconduct, ie that Mr Fila had driven his vehicle when it was 200 kilo overweight. Everyone agrees that was the reason. The question is whether it was a fair dismissal.

73. First, I will consider the three stage test in the case of BHS v Burchell. Stage 1: did Veolia genuinely believe Mr Fila was guilty of the misconduct? The answer is yes. Veolia did believe that.

74. Stage 2: did Veolia have reasonable grounds for that belief? The answer is yes. The weighbridge showed that Mr Fila's lorry was 200 kilo overweight. Mr Fila did not dispute that he was overweight. I do not think it matters that there was at one stage some confusion regarding whether Mr Fila was 220 kilo or 200 kilo overweight. That tiny difference made no difference to any decision.

75. Stage 3: did Veolia carry out a proper and adequate investigation? The answer is yes. Veolia had the information regarding how much the vehicle was overweight. They knew what time Mr Fila had started his shift, had gone to the tip and had finished his shift. The decision-makers checked with him that the times were accurate. They checked he was aware of the zero tolerance policy. They already knew that the on-board weighing system was inaccurate and could not be relied on. They had told the drivers that.

76. Veolia have therefore satisfied the three stages of BHS v Burchell.

77. The next question is whether there was a fair procedure generally. I find that there was. There was a separate investigation, disciplinary and appeal stage. There was a meeting each time. Different managers made the decisions at each stage. Mr Fila was notified in advance of the hearings. He knew what the allegations were against him. He was asked if he wanted to bring someone with him. It is true that he did not receive the dismissal letter until the start of the appeal hearing, but he had been told he was dismissed verbally at the end of the disciplinary hearing. He understood the issues. He was able to write his letter of appeal. The dismissal letter was very short and

said very little. He was given a short period to look at it and discuss it with Mr Cooper.

78. The next thing for me to think about is the final written warning. Veolia dismissed Mr Fila because he already had a final written warning. They would not have dismissed him otherwise. Mr Fila says the final written warning was unfair. Under the law, I am not allowed simply to consider whether the final written warning was 'fair'. I can only say that Veolia should have ignored the warning if it was not issued in good faith or if it was 'manifestly inappropriate' or if there were not 'prima facie' grounds for giving it. That is much more than simply 'unfair'.

79. There is no reason to believe the final written warning was not issued in good faith. I do not think it was 'manifestly inappropriate'. I think there were 'prima facie grounds for it'. Mr Fila had driven an overweight vehicle. Although he had not done this intentionally, he knew it was against company policy. He knew there was a zero tolerance policy. He had been told the reasons why the zero tolerance policy was important. Veolia had been unable to find an accurate on-board weighing system, but it had told drivers that they should go to the tip early and/or tip as often as necessary if in the slightest doubt. Even though the policy was said to be 'zero tolerance', Veolia had in fact given Mr Fila (and drivers generally) a second chance.

80. Mr Fila had the chance to appeal against his final written warning. He did so, but his appeal was also rejected. Mr Fila says that Mr De Grout, who heard the appeal, wrongly thought he already had a formal warning and was influenced by that fact. I don't agree. I think Mr De Grout only mentioned it because Mr Fila mistakenly told him this was the first time he had allowed a vehicle to go overweight. That was not why Mr Brega gave a final written warning or why Mr De Grout confirmed it. It was Veolia's policy since 2014 to give drivers who went overweight a final written warning.

81. The final question is whether dismissal was a fair sanction. By that I mean, was it reasonable of Veolia to dismiss Mr Fila in all the circumstances.

82. In my opinion, it was a harsh decision. If it had been up to me, I do not think I would have dismissed Mr Fila on this occasion. However, it is not up to me. The case law says I must consider whether a reasonable employer could have decided to dismiss Mr Fila. Unfortunately, the answer is yes. These are my reasons.

83. There were very important reasons not to go overweight. An overweight vehicle is a risk to the health and safety of the driver, other passengers and members of the public. If there is an accident, it may invalidate the insurance. It can jeopardise the operator's licence. The client, Westminster Council, felt strongly that it should not happen.

84. Veolia had been unable to find any accurate on-board weighing system. It had tried very hard. It spent 6 months in meetings with the vehicle manufacturer and with the manufacturer of the existing on-board system.

Veolia did not know at the time of buying the fleet that on-board systems which had worked in the past would no longer work. To get an accurate system would have involved buying new vehicles with a better system built-in at factory stage, but the fleet was only 18 months old and this would have cost around £10 million.

85. The only solution was to rely on the experience and judgment of the drivers. It was reasonable for Veolia to believe this was possible because the driving rounds were repetitive. Veolia could expect drivers to notice if the van was filling up sooner than the usual locations or if they were lifting bags which were heavier than usual. Of course drivers could not exactly assess the weight, but they could have a general idea. It would only be a risk if drivers were going close to the maximum. It was reasonable for Veolia to believe that the statistics proved drivers were capable of making the necessary estimates and being safe. In the first 6 months after the introduction of the zero tolerance policy, there were no overweights at all. Since then, there have been an average of only 1½ per month compared with 20 – 25 previously. Of those, there have only been 3 dismissals. That meant only 3 drivers in 4 years were unable to avoid going overweight twice. Mr Fila himself had shown he was able to avoid going overweight on numerous occasions.

86. The important point is that drivers were allowed to tip when they wanted and as often as they wanted. They were never told they had gone too often or unnecessarily. And if they went over their 8 hours as a result, they were paid overtime. I know Mr Fila says overtime was not always paid, but I did not have enough evidence of that. This means that Mr Fila could have decided to be very careful. The Union opposed Veolia making it compulsory to tip twice or at certain times. It wanted drivers to be able to decide when that was not necessary.

87. Although it was a zero tolerance policy, Mr Fila was still given a final written warning. It was 'live' for only 12 months.

88. Mr Fila knew what was expected of him since 2014. He had been given toolbox talks. He knew it was zero tolerance. I agree with him that he was forced to sign the policy if he wanted to keep his job. I am not saying that showed he agreed with it. But it showed he knew about it. When he was given the final written warning, the importance of the policy was made clear to him again.

89. On the day in question, Mr Fila finished at 10.40 am but he was paid till 2.30 pm. He had plenty of time to make another trip to the tip, even if it took two and a half hours. Even if the extra trip would have taken him over 8 hours, he would have been paid overtime.

90. It is true that Mr Fila's two complaints to Ms Luckhurst were not properly dealt with at the time. Mr Brooker did not know about the complaints. Mr Morris knew about one of them. However, I think a reasonable employer could decide that it was still reasonable to dismiss Mr Fila. The complaints simply stated Mr Fila's disagreement with the policy and his complaint that the

on-board weighing system did not work. Veolia knew it did not work. It did not change their view. Nor did his disagreement with the system change their view.

91. Mr Fila says that ensuring a vehicle is not overloaded should be the responsibility of Veolia as well as the drivers, but Veolia passed the whole responsibility onto the drivers. I know what he means, but Veolia did not entirely pass on the responsibility. Veolia took responsibility for setting the policy and enforcing it; for telling drivers they were allowed to tip when and as often as they thought necessary, and for paying overtime if that was the result.

92. For all these reasons, I find that the dismissal of Mr Fila was not unfair.

Notice pay claim

93. The legal basis for this claim is different from unfair dismissal. The question is only whether I think that under the law, Mr Fila committed gross misconduct.

94. I do not find Mr Fila was guilty of gross misconduct. Veolia accepts he did not deliberately or intentionally go overweight. He did not realise he was overweight. There was no blatant wilful disregard of the rules. Nor does the evidence does not indicate that he was reckless or careless or grossly negligent. Going to the tip once on Wednesdays had been enough up to that point. It was simply a misjudgement. He could have played safe by tipping earlier, but that does not mean his failure to do so amounted to gross misconduct. He is therefore entitled to be paid his notice pay.

95. The claimant's net weekly pay was £447.92. He was entitled to four weeks' notice. He is therefore entitled to £1791.68 notice pay.

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Employment Judge Lewis

Dated:. 12 March 2019

Judgment and Reasons sent to the parties on:

15 March 2019

For the Tribunal Office