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EMPLOYMENT TRIBUNALS

Claimant: **Mr P Wicker**

Respondent: **XPO Logistics**

Heard at: **East London Hearing Centre**

On: **Wednesday 30 October 2019 and Tuesday 7 January 2020**

Before: **Employment Judge Martin (sitting alone)**

Representation

Claimant: Ms K Anderson (Counsel)

Respondent: Ms K Bailey (Employment Consultant)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The Claimant's complaint of breach of contract (notice pay) is not well founded and is hereby dismissed.

(2) The Claimant's complaint of unfair dismissal is well founded and the Claimant is awarded compensation in the sum of £1804.11

REASONS

Introduction

1 The Claimant gave evidence on his own behalf. Mr Stewart Beaton and Mr John March, trade union representatives, also gave evidence on behalf of the Claimant. Mr Iain Coole, Fuel Operations Manager and Mr Ian Carruthers, Account Director, gave evidence on behalf of the Respondent. The Tribunal were provided with an agreed bundle of documents marked Appendix 1. A further small bundle of documents was produced for the remedies hearing.

The law

2 The Tribunal considered the following legislation and case law:-

2.1 Section 98(1) of the Employment Rights Act 1996:
"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal…"

2.2 Section 98(2) ERA 1996:

"A reason falls within this sub-section if it –

…

(b) Relates to the conduct of the employee …"

2.3 Section 98(4) ERA 1996:

"… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) Shall be determined in accordance with equity and the substantial merits of the case."

2.4 Section 122(2) ERA 1996:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

2.5 Section 123(1) of the Employment Rights Act 1996:

"… The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

2.6 Section 123(4) ERA 1996:

> "In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…"

2.7 Section 123(6) ERA 1996:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

3 The case of *British Homes Stores Ltd v Burchell* [1978] IRLR 379 the EAT held that in cases of misconduct the employer must show that it had reasonable belief that the employee was guilty of misconduct and that that belief was based on reasonable grounds and had followed a reasonable investigation.

4 The case of *Sainsbury's Supermarkets Ltd v Hitt* [2002] EWCA Civ. 1588 held that the Tribunal has to consider whether the investigation fell within the range of reasonable investigations that a reasonable employer may have adopted.

5 The case of *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ. 94 held that whilst an employer has to consider any defences advanced by an employee the extent to which it is necessary to investigate them depends on the circumstances as a whole.

6 The case of *Graham v Secretary of State for Work and Pensions (Job Centre Plus)* 2012 IRLR 759 in particular paragraphs 35 and 36.

7 The case of *Louies v Coventry Hood and Seating Co Ltd* [1990] ICR 54 where the EAT held that the employer did have reasonable grounds to sustain the belief that the employee had committed misconduct and that it carried out such investigation as was reasonable dismissal nevertheless was dismissal a fair sanction in the circumstances.

8 In the case of *ILEA v Gravett* [1988] IRLR 497 the EAT observed that there are a range of enquiries with regard to reasonableness of the investigation from situations where an employee is virtually caught in the act to those where the situation is one of pure inference. The amount of investigation depends on the situation.

9 The case of *Retarded Children's Aid Society v Day* [1978] IRLR 128 where Lord Denning held: "It is good sense and reasonable that, in the ordinary way for a first offence you should not dismiss a man on the instant without any warning or giving him a further chance."

10 The case of *Post Office v Fennell* [1981] IRLR 221 where the Court of Appeal held that the emphasis should be on the word "equity" in S98(4) of the Employment Rights Act 1996: "employees who misbehave in much the same way should have

meted out to them much the same punishment, so where a man is penalised more heavily than others who have committed similar offences in the past the employer has not acted reasonably in treating whatever the offence as a sufficient reason for dismissal".

11 The case of Paul v East Surrey District Health Authority [1995] IRLR 305 where the Court of Appeal warned to heed the warning in the case of *Hiadjiouannou v Coral Casinos Ltd* [1981] IRLR 352 which made it clear that arguments on disparity have to be considered very carefully to ensure that the circumstances are truly similar circumstances.

12 The case of *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 where the EAT emphasised that it is important that tribunals did not substitute their own reason for that of the employer. The issue that had to be decided was whether that was the response was a reasonable response for any reasonable employer to take in those circumstances.

13 The case of *City and County of Swansea v Gayle* UKEAT/0501/12 which held that procedural irregularities which impact on the employer's decision to dismiss only should affect the fairness of the dismissal.

14 The case of *Adesokan v Sainsbury's Supermarkets Ltd* [2017] EWCA Civ. 22 which held that a claimant's negligence was so grave and weighty as to amount to a justification for summary dismissal.

15 The case of *Polkey v AE Dayton Services Ltd* [1988] where the House of Lords held that the compensation can be reduced and can be reduced to nil.

16 The case of *Scope v Thornett* [2007] IRLR 155 which considered whether or not evidence was so speculative that the Tribunal could not say what would happen.

17 The case of *Nelson v BBC (No. 2)* [1980] where the Court of Appeal held that the tribunal has to look at whether the Claimant contributed to his own dismissal; whether his conduct was blameworthy; and whether his compensation should be reduced on just and equitable grounds.

18 The case of *Hollier v Plysu Ltd* [1983] IRLR 260 holds that both the basic award and compensatory award can be reduced. It set out scales for reducing any award depending on whether the employee was 100% to blame or where the employer is hardly to blame then compensation might only be reduced 25%.

19 The case of Rao v Civil Aviation Authority [1994] IRLR 240 which held that it is permissible to make reductions under both sections, section 123(1) and section 123(6) of the Employment Rights Act 1996.

The issues

20 The parties had largely agreed a list of issues largely set out below.

21 The Tribunal had to consider the reason for dismissal; whether it was a fair reason which fell within section 98(2) of the Employment Rights Act 1996. The reason was pleaded as conduct. The Tribunal had to consider where the Respondent had a reasonable belief based on reasonable grounds that the Claimant had committed an act of gross misconduct after having undertaken a reasonable investigation.

22 The Tribunal also had to consider whether the Respondent had followed a fair procedure and whether there was any breach of the ACAS Code.

23 Finally, the Tribunal had to consider whether dismissal was a reasonable response in the circumstances of the case, in particular whether the Claimant was treated differently to the way the Respondent treated other employees in similar circumstances.

24 In relation to the complaint of breach of contract, the Tribunal had to consider whether the Respondent was entitled to dismiss the Claimant for gross misconduct and whether they could prove on the balance of probabilities that the Claimant had committed an act of gross misconduct. The Tribunal had to consider what, if any, notice the Claimant was entitled to.

25 In relation to remedy, the Tribunal had to consider what loss the Claimant had suffered and over what period; whether the Claimant acted reasonably in mitigating his loss; whether the Claimant might have been fairly dismissed in any event and if so, what was the chance of that happening and whether the Claimant had contributed in any way to his dismissal.

Findings of fact

26 The Claimant was employed by the Respondent as an HGV Tanker Driver since 2014. His employment transferred from Harvest. His period of continuous employment commenced in March 2008.

27 The Claimant is a qualified ADR Driver and has a Petroleum Driver Passport, as is noted at page 75 of the bundle. His role was to make deliveries of fuel to customers, such that when he was driving he either had a full tank of fuel or there were fumes of combustible fuel in his tanker on his return.

28 The Claimant had a clean disciplinary record during his 10 years of service.

29 The Claimant had a good relationship with his manager Christopher Chatterton.

30 The Claimant's monthly gross income was £173 a week and his net weekly income was £658.40 a week.

31 He worked overtime, but did not work away from home. He has a young family.

32 The Respondent's Code of Conduct is at pages 34-41 of the bundle. It sets out the procedure to be adopted in cases of disciplinary action.

33 It states at page 35 that the amount of investigation required will depend on the particular circumstances, with allegations of serious misconduct likely to require more detailed investigation. It states that the extent of the investigation does not have to be forensic; it should be whatever is reasonable in the circumstances to ensure that the relevant facts are established. It says this will allow the investigating manager to properly review the case so that the employee understands the case they have to answer.

34 The code of conduct sets out what amounts to acts of gross misconduct. It states, as is normal practice, that the list is not exhaustive. At page 41, it states that committing any act which may endanger persons or property may amount to gross misconduct. The example used is bridge bashing.

35 In September 2018, one of the Claimant's colleagues was dismissed for a blameworthy road accident. Mr Beaton, the Claimant's trade union representative, was that employee's union representative at the hearing. That employee accepted responsibility for the incident. The vehicle was fully loaded and extensive damage. The vehicle apparently ended up across two lanes of traffic. The incident could have been catastrophic. Mr Beaton said in evidence that this was the second incident for that driver. The employee was dismissed.

36 The Claimant was involved in an incident on 9 November 2018. He was returning from his last delivery so his vehicle was not loaded but would have contained combustible fuels. The Claimant said that he joined the A12 and shortly afterwards suffered a sneezing fit. He said that when he stopped sneezing, he realised that there was a third party vehicle stationary at the side of the road and not in a lay-by. He said it was encroaching onto his lane with the rear end sticking out. The Claimant said that he was not able to move into the outside lane and started breaking, but hit the back hand corner of vehicle. His breaking documents produced showed that the Claimant reduced his speed in a few minutes from 87mph to 52mph.

37 The Claimant said that he has an anti-breaking system and auto lane assist but neither of the alarms came on.

38 As is normal procedure when an incident occurs, the Claimant contacted the office and waited for the police and paramedics. The Claimant did not have any drugs or alcohol in his system. The Claimant says that he was shaken up. He was advised by Mr Beaton, his union representative, not to go to the de-brief because he was so shaken up.

39 Before the de-brief the Claimant called the Respondent's insurers SOPP and SOPP to report the accident. The Claimant said that he thought he told them that he had a sneezing fit and collided with the lorry which was stationary and sticking out. The report from SOPP and SOPP refers to a PH not a PW contacting them and refers to the Claimant having a sneezing fit which caused him to veer off the road (p.88a).

40 The Claimant attended the de-brief.

41 On 13 November 2018 the Claimant attended an investigatory meeting. He was accompanied by his trade union representative, Mr Beaton. He was handed the invite letter at the meeting, page 57 of the bundle.

42 The investigatory meeting was conducted by Mr Chatterton. The notes are at pages 58-60c of the bundle.

43 The Claimant said during the investigatory meeting that he had had breaks and was rested. He said he was travelling at normal speed and there was not much traffic. He said he had a sneezing fit and that he had had a cold beforehand. He said there was no red triangle and the driver of the stationary vehicle was at an angle and that he had to swerve. He said that he did not know if the anti-collision came on. He said that the police had been called, a tachograph had been done and there was no indication as to what action the police would take. Photographs were taken of the incident which were shown to the Claimant. The Claimant said at the investigatory meeting that it was not a hard shoulder but a lay-by and the lorry was obstructing on to his lane.

44 At the investigatory meeting the Claimant raised the issue about the SOPP and SOPP report. He said that it was inaccurate as it referred to him veering off the road and it referred to M PW. Mr Chatterton said that he would look to correct it. At that meeting the Claimant raised an issue about the lack of dash cameras in his truck. During the investigatory meeting Mr Chatterton said he would look at Google Maps and the layout. Mr Chatterton said he would contact the police and try and resolve matters quickly.

45 The Claimant said that Mr Chatterton had told him that as he had a clean record and it was his first accident he would be allowed back to work soon.

46 The Respondent said that their view was that Mr Chatterton would not have said that because the investigation had to be undertaken and was ongoing.

47 The Claimant was suspended on 13 November 2018 (p.62).

48 On 19 November 2018 Mr Chatterton spoke to PC Davis. The note of that discussion is at page 63 of the bundle. It is signed by Mr Chatterton and dated 19 November 2018. He states that he contacted PC Davis on 19 November to request evidence regarding the road traffic accident involving the Claimant. It states that PC Davis informed Mr Chatterton that the investigation was concluded and the accident report findings had been forwarded to his superior. It is stated that the report had to be authorised before publication and that the crash report would be made available to the Respondent and their insurers. It also states that, at that stage, the PC could not share the information. It then notes that he was asked if any information could be shared verbally and that Mr Chatterton then makes a note of the information provided as follows:

> "There was no issue about alcohol or drugs; there was a strip at the side of the A12 in place of a hard shoulder; the 3rd party stationary vehicle was not encroaching into lane 1; that the road was straight. It also says that there was a warning triangle at the scene; and states that there was a 3rd party witness to the accident, who saw the imminent impact and reacted by breaking harshly and that as a result their dash cam started to record the accident. It also states that the Claimant would not be criminally prosecuted and was being sent on a driving course due to careless driving."

49 On 3 December 2018 the Claimant was offered the opportunity to attend a safe and considerate driving course. The letter is at page 63a. It refers to the incident and states that the Claimant was driving without due care and attention in relation to the incident and that there is sufficient evidence to take proceedings. It gives the Claimant the option of either booking on a safe and considerate driving course or taking a fixed penalty fine or requesting a court hearing.

50 The Claimant accepted option 1 and went on the course. During the course of the hearing in his evidence, the Claimant was unable to explain why, if he contested he was driving without due care and attention, he did not contest the offence and go to court.

51 A second investigatory meeting took place on 20 December. It was again conducted by Mr Chatterton. The Claimant was again accompanied by Mr Beaton, his trade union representative. Minutes of that meeting are at pages 66-69 of the bundle.

52 In evidence to the Tribunal the Claimant said that Mr Chatterton was not, contrary to what he said, keeping him updated with developments. The Claimant said that he had to contact Mr Chatterton. He did however acknowledge that Mr Chatterton did return his calls on a couple of occasions. In evidence the Claimant said that nevertheless he was being kept updated by Mr Beaton, his trade union representative.

53 At the second investigatory meeting the Claimant complained about the lack of contact. During the course of the second investigatory meeting Mr Chatterton referred to his conversation with PC Davis. However, he did not produce a copy of the note of that conversation. At the meeting, Mr Chatterton explained that PC Davis had not written a note and that he could not get the crash report, but that he had had a verbal discussion with PC Davis. Mr Chatterton then asked the Claimant some questions about the incident. He asked what the police had said at the scene. The Claimant indicated that he could not recall. He was also asked whether there were any distractions at the time and said that there was not.

54 There was then a discussion about what tests the police had undertaken at the scene when they had turned up.

55 Mr Chatterton then referred to third party footage which he had been told about by PC Davis. The Claimant said that he himself did not have a dash cam so he could not record the incident. Mr Chatterton said that the third party witness had indicated that he had had to break. There then followed a discussion about what the third party could see. The meeting was then adjourned and reconvened.

56 When the meeting was reconvened Mr Chatterton said that he needed to see a copy of the crash report and continued the suspension.

57 At the investigatory meeting Mr Chatterton did not go through the other matters which had been discussed verbally with PC Davis and which formed part of his conversation with PC Davis as referred at page 63 of the bundle.

58 The Claimant's representative complained about the timescales involved and asked when they were going to be able to proceed and if they could proceed with what they got. Mr Chatterton said that he wait until early January to see if he got the crash report and if not, then he would look to go ahead.

59 On 9 January 2019 the Claimant raised an issue with the Respondent's HR department complaining about the delays in the investigation and the lack of contact. He asked them to intervene (p.70 of the bundle).

60 In evidence to the Tribunal, the Claimant and Mr Beaton, his trade union representative, both said that the Claimant agreed to go ahead with the disciplinary hearing without the crash report and without the third party witness statement referred to in that report.

61 Mr Chatterton proceeded to produce an investigation report. His report is at pages 73-74 of the bundle. In his investigation report he indicates that the crash report is integral, but has not been provided by the police. He says that this was the reason for the delays in the investigation. He refers to the conflict between the Claimant's evidence and that of PC Davis. In particular, he refers to the various areas of conflict relating to the stationary vehicle:- whether it was encroaching onto the lane; whether there was a warning triangle; the fact that the Claimant says that he did not see the vehicle; and PC Davis's reference to third party footage. The report also notes that the Claimant went on an awareness course for driving without due care and attention. Mr Chatterton recommends proceeding to a disciplinary hearing. He raises concerns about why the Claimant did not see or anticipate the collision despite his sneezing fit. He raise concerns about not receiving the crash report, but refers to a verbal account given by PC Davis. Mr Chatterton indicates that there were good road conditions at the time.

62 On 14 January 2019 the Claimant was invited to a disciplinary meeting which was held by Mr Poole. The Claimant was provided with a number of documents which included a record of the conversation between Mr Chatterton and PC Davis dated 19 November 2018. The bundle of documents also included various photographs and the code of conduct (p.117-118 of the bundle). The letter did not include the crash report which did not form part of the documents placed before the disciplinary hearing nor did it include any third party witness statement.

63 The Claimant attended the disciplinary hearing with Mr Beaton, his trade union representative. The notes of the disciplinary hearing are at pages 119-129 of the bundle.

64 At the disciplinary hearing the Claimant was asked about his sneezing fit, the road conditions and breaks taken. A discussion then took place about where the stationary vehicle was parked. The Claimant said that it was slightly over the white line. There was a discussion about the photos which had been produced and the speed. As a result of the latter, the Respondent agreed to get some documents relating to the vehicle. A discussion also took place about the actual incident including when the Claimant noticed the vehicle and what other vehicles were doing. The Claimant said he did not take any action to move out. He said that he could not remember who was in front of him. He also said he did not see any warning triangle.

65 The note of the discussion with PC Davis was read out. The Claimant said that he did not see any warning triangle and the vehicle was encroaching. He raised concerns about reading a written statement from PC Davis. He argued that the note must have been written after the investigatory meeting because it was not presented at the investigatory meeting. The Claimant's representative asked for the note to be removed. Then followed a discussion about the fact that the Claimant did not have a dash camera. The meeting was adjourned.

66 When the meeting was reconvened Mr Coole asked the Claimant why he did not see the vehicle until just before the impact. The Claimant said that he did not see the vehicle until he stopped sneezing as his eyes had been closed. A further adjournment took place for Mr Coole to obtain the vehicle information.

67 During the disciplinary meeting the Claimant said he did not see the vehicle because he was only on the road for a couple of minutes. The Claimant complained about the lack of contact with the Respondent during his suspension. The Respondent indicated that there was a concern about the severity of the incident and adjourned the meeting to get further information.

68 The disciplinary meeting was reconvened on 23 January 2019. The Claimant was again represented by Mr Beaton, his trade union representative. The notes of the meeting are at page 130-133 of the bundle. Further documents were produced from that meeting showing the vehicle speed; the breaking trace analysis. The Respondent gave the Claimant the opportunity to adjourn the meeting to review those documents. When the meeting was reconvened the Claimant's representative said that that did not show there was harsh breaking impact. He said the vehicle was slowing down. The Claimant's representative referred to the anti-collision and lane assist which did not come on.

69 Mr Coole said that he had checked with Mr Chatterton about the conversation with PC Davis. He said that Mr Chatterton had confirmed that it had been written down at the time and it was an accurate record. Mr Beaton complained that it was not signed by the poolice officer and should not form part of the evidence. The Claimant accepted, during the meeting, that he had not slowed down in time because he had not seen the vehicle, but said he had not been able to do so because he had been sneezing. He confirmed that he had been on a driver's awareness course. The meeting was adjourned and reconvened. After the meeting was reconvened the Claimant apologised for the incident and the cost to the vehicle.

70 The Respondent dismissed the Claimant for a blameworthy road traffic accident. Mr Coole noted that there were no external factors; it was a good road; and although the Claimant had a sneezing fit, he did not attempt to slow down or take evasive action. He also referred to the fact that the police apportioned blame to the Claimant and he was put on a driving awareness course. He indicated that the accident could have been fatal and substantial damage was caused to the vehicle.

71 The Claimant's representative raised the issue about different treatment with another employee who was given a final written warning, when he had contaminated a site which he said caused substantially more damage and was more costly.

72 The Claimant was advised that he had the right to appeal against his decision.

73 Neither the Claimant nor the Claimant's representative asked, at any stage, during the course of the disciplinary meeting to adjourn the meeting to await the outcome of the crash report and third party witness statement referred to in that report. However, the Respondent did not offer the Claimant an opportunity to adjourn the meeting to await the crash report either.

74 In evidence to the Tribunal the Claimant accepted that he had a good relationship with Mr Chatterton and did not suggest that he thought Mr Chatterton was lying about the note of the discussion with PC Davis. He was concerned that it had not been signed by PC Davis and produced in evidence. He did raise concerns about when it was written.

75 The Respondent wrote to the Claimant on 24 January 2019 to confirm the Claimant's dismissal. He was dismissed for a blameworthy road traffic accident. The letter of dismissal is at pages 134-135 of the bundle. It effectively confirms the matters indicated at the end of the disciplinary hearing as the reasons for the dismissal. The Claimant was advised that he had the right of appeal. The Claimant was dismissed for gross misconduct.

76 On 28 January 2019, the Claimant appealed against the decision to dismiss him. His letter of appeal is at pages 136-137 of the bundle. His grounds of appeal were that he was concerned about the length of the suspension and delays in the investigation. He indicated that he was told the investigation would be quick. He also raised concerns about the inclusion of the record of the discussion between Mr Chatterton and PC Davis. He stated that document should not have been taken into account. He also raises concerns about the reasons given for his dismissal.

77 An appeal hearing took place on 13 February 2019. The appeal was heard by Mr Ian Carruthers. The Claimant was again represented by the same trade union representative Mr Beaton. The notes of that appeal hearing are at pages 139-141 of the bundle. Handwritten notes of that meeting have been produced as well.

78 At the appeal hearing the Claimant raised issue about the lack of contact during his suspension. His representative raised various issues, in particular the fact that the conversation between Mr Chatterton and PC Davis had been included in the disciplinary pack and had not been produced at the second investigatory meeting. He also raised an issue about the lack of a dash cam in the Claimant's vehicle and the fact that further documents had to be obtained relating to the vehicle during the course of the disciplinary hearing. The Claimant's representative also referred to a difference in treatment between the Claimant and other employees, in particular another employee who had been involved in the contamination of a site. The meeting was adjourned.

79 Mr Carruthers undertook some further investigations following the adjournment of the appeal hearing.

80 He investigated the matter further with Mr Coole. The minutes of those investigations are at page 150(a) and (b). He asked Mr Coole about the delay and

reasons for the delay and about the crash report. He also asked about obtaining the third party statement from the other driver, but was told this was not possible due to data protection.

81 Mr Carruthers also interviewed Mr Chatterton as part of his investigation into the appeal. The minutes of that discussion are at pages 150c-e of the bundle. Mr Chatterton said that he had not told the Claimant that he would get his job back but told him that he had to go through the process. A discussion took place about contact during the period of the Claimant's suspension. There then followed a discussion about proceeding to a disciplinary hearing without the crash report. Mr Chatterton said that the Claimant and his representative both wanted to go ahead without the report. Mr Chatterton said that he had still not received the crash report. He confirmed that the note of his conversation with PC Davis was an accurate note of that discussion.

82 Another employee was given a final written warning for an incident in March 2019. The letter is at page 150f of the bundle. In that case it was the first accident for the employee. However, the Respondent took into account a number of mitigating factors, in particular as the accident had happened because the employee had been trying to avoid another driver, so the incident had happened because the employee was taking evasive action. In evidence, Mr Beaton acknowledged that the employee had caused the accident because he had been taking evasive action to avoid another vehicle which he is why he had run into the vehicle in front.

83 On 14 March 2019 the appeal hearing was reconvened. The Claimant was again represented by Mr Beaton. The notes of that meeting are at pages 151-154 of the bundle. At that reconvened appeal meeting, Mr Carruthers referred to the further investigations which he had undertaken with Mr Coole and Mr Chatterton. He also referred to the cases referred at the earlier hearing and said that there was no difference in treatment. He explained that the other incidents were all different. He explained that the appeal was not upheld.

84 On 15 March 2019, the Respondent wrote to the Claimant to confirm the outcome of the appeal hearing. That letter is at pages 155-158 of the bundle. It deals with and dismisses each of the points raised in the appeal. The appeal is dismissed and the decision to dismiss for gross misconduct is upheld.

85 During the course of the hearing Mr Beaton referred to another employee who was not dismissed but given a final written warning for a blameworthy road traffic offence. However, he acknowledged that that was due errors in the procedure.

86 Initially, the Claimant was seeking reinstatement. He said at the first hearing in October that was the remedy he was seeking. However, by the time of the reconvened Hearing today, 7 January, the Claimant said that he was not seeking reinstatement but was instead seeking compensation.

87 The Claimant has signed up with a number of employment agencies and contacted a number of people about work. He has not been able to obtain a permanent job. He has worked in a number of temporary posts from about mid-March onwards, largely on average at a lower rate of pay. From about September 2019, he started working on a self-employed basis.

88 He produced a schedule of loss which was discussed as to exactly what sums he was claiming for in the Tribunal. He said that for the first five and a half weeks up to 8 March he had not obtained alternative employment, but then started temporary employment with various different companies, and had an ongoing average loss per week of £218.66 a week. He then had a period at the end of July 2019 to 5 August of two weeks when he was not doing any temporary work.

89 From 25 August 2019, he became self-employed and his losses, over that period up to the date of the Hearing, from what he would have earned with the Respondent were £3,515.19.

90 After some discussion with the parties those figures have largely been agreed between them.

91 The Respondent produced a document from a website suggesting that there was a shortage of haulage drivers. The Tribunal heard evidence from both of the Claimant's trade union representatives who were in Tribunal. They did not necessarily agree with the information contained in that report. They said that they had not heard of this website, having both worked in the industry for a long time. Both of the representatives however made it clear that the role that the Claimant did was different to general haulage. General haulage was generally at a much lower rate of pay and usually involved a lot of working away which the Claimant said he was not prepared to do. Both of the representatives indicated that there was a real shortage of work in the field the Claimant worked in. They said in evidence that there were not a lot of jobs in that particular sector of the Industry. The Tribunal having heard that evidence accepted that the Claimant did act reasonably in mitigating his loss.

Submissions

92 Both parties submitted written submissions.

93 The Claimant's representative submitted that the dismissal was unfair. She raised a number of issues regarding the investigation. She says these issues should have been raised as part of the investigation with PC Davis. However, most of the questions that she raised were not raised by the Claimant or his trade union representative at any stage during the investigation or more importantly, the disciplinary hearing or appeal hearing. The Claimant's representative also submitted that the dismissal was unfair. She referred to the circumstances of the case including the Claimant's record and long service, but also the Respondent's treatment of others. She said that a fair procedure had not been followed under the ACAS Code of Conduct.

94 The Respondent's representative said that the Claimant had been fairly dismissed. She said that a fair and reasonable investigation had been undertaken. She also submitted that dismissal was a reasonable response in the circumstances bearing in mind the Claimant's job. She said that none of the cases referred to by the Claimant or indeed the Respondent were truly similar to that of the Claimant.

Conclusions

95 This Tribunal finds that the Claimant was dismissed for gross misconduct for a blameworthy road traffic accident.

96 Conduct is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

97 The Tribunal finds that the Respondent did undertake a reasonable investigation into the incident. They undertook two investigatory meetings with the Claimant and undertook other investigations and spoke to the police officer involved. They did not manage to obtain a copy of the crash report to we refer further in due course. However, this Tribunal finds that the Respondent undertook as much investigation as they could into the incident with the police, but could not obtain a copy of the crash report nor the third party statement referred to in that report.

98 The Tribunal notes that the Claimant was a professional driver. The Tribunal finds that his conduct in committing the incident was an act of gross misconduct. The Claimant clearly accepted responsibility for this incident as he agreed to go on a driving course for driving without due care and attention. He acknowledged that he actually caused the incident. The real issue was whether or not he was to blame. Since he had already accepted that, by attending the driving course for driving without due care and attention for this incident, it is difficult to see how he could argue that it was anything other than act of misconduct on his part. The Respondent's code of conduct makes it clear that such incidents could amount to gross misconduct. Indeed it is quite clear that such incidents have, in the past, amounted to gross misconduct as drivers have been dismissed for blameworthy road traffic accidents.

99 The Tribunal accepts that the Respondent did have reasonable grounds to believe that the Claimant had committed an act of gross misconduct. They had evidence from the police to which we will refer further in due course. They also had evidence that the Claimant was sent on and went on a driving course for driving without due care and attention, so in their minds the police clearly considered that the Claimant was at fault for the incident. Indeed, the Claimant himself appears to have acknowledged that on the basis that he attended the course for driving without due care and attention in relation to the incident.

100 The Tribunal therefore accepts that the Respondent did have a reasonable belief that the Claimant had committed an act of gross misconduct. The Claimant admitted that he had caused the incident. The only question was whether or not he was to blame. On the basis of the evidence from the police, and the Claimant's own attendance at the course for driving without due care and attention, the Tribunal finds that the Respondent had sufficient evidence that they could reasonably believe that the Claimant was responsible for the incident.

101 The Tribunal do have some concerns about the procedure adopted by the Respondent, albeit not major concerns. The Tribunal thinks they could have done thigs a little better.

102 By the time of the second investigatory meeting the investigating officer for the Respondent had discussed the matter with PC Davis and made a note of that conversation. However, the investigating officer did not provide a copy of that note to the Claimant at the second investigatory meeting and only discussed part of the evidence from that discussion with the Claimant at that meeting. However, the Tribunal accept that the document did form part of the documents provided to the Claimant before the disciplinary hearing and the Claimant had the opportunity to comment on the document at the disciplinary hearing. Indeed he could have sought an adjournment of the disciplinary hearing on that basis, but chose not to do so.

103 Further, although the Claimant raised an issue about the note being part of the disciplinary hearing, neither he nor his trade union representative raised the sort of issues that are now being raised by his legal representative at this Hearing. During the disciplinary and appeal hearings, the Claimant and his trade union representative simply sought to object to the use of the document as part of the evidence. They did not comment in any detail whatsoever on the contents of the document and never mentioned any of the various questions that his counsel suggests should have been put to the police officer by Mr Chatterton at the time.

104 The Tribunal is concerned that the Respondent proceeded without the crash report, which also included the third party witness statement. The Tribunal accepts that that was the reason for the delay in the investigation was because the Respondent was awaiting the investigation report which, as the Tribunal understands, has still not been received by the Respondent.

105 The Tribunal is nevertheless concerned as to whether or not the Respondent should have waited further to get the crash report or to seek written information from the police. However, neither the Claimant nor his representative objected to proceeding without the crash report. Indeed, it would appear they were pushing to proceed to the disciplinary hearing without that report.

106 The Claimant did not seek an adjournment of the disciplinary hearing to obtain the crash report, but the other side of that, is that the disciplinary officer did not give the Claimant the opportunity to adjourn the disciplinary meeting to obtain the crash report either.

107 The Tribunal do not consider the Respondent were as proactive as they could have been providing support to the Claimant during his suspension, but it is quite clear the Claimant was being updated by both the Respondent and his trade union representative. The Tribunal does not consider there was any breach of the ACAS Code of Conduct.

108 For those reasons, the Tribunal does consider the dismissal was unfair particularly in relation to the way the Respondent dealt with the record of the conversation with PC Davis. The Claimant was not given a proper opportunity to dispute that evidence during the investigatory process, although he was provided with it by the time of the disciplinary hearing and was given adequate opportunity to dispute it then but did not do so.

109 For those reasons, the Tribunal consider that the dismissal was unfair. However, the Tribunal finds that, even if the Claimant had been given a proper opportunity, there was sufficient evidence for the Respondent to consider dismissal. The Claimant was given the opportunity to challenge the evidence. Nevertheless, the Tribunal has considered that if the Respondent had followed a fairer procedure, there is a very slim chance that the Claimant might not have been dismissed. The Tribunal has assessed that chance at 15%.

110 The Tribunal consider that the Claimant did contribute to his own dismissal. He caused the accident for which he was effectively dismissed. He accepted it was his responsibility by attending a course on driving without due care and attention. The Tribunal also note that the Claimant's conduct in not challenging the evidence of PC Davis at the disciplinary hearing could have contributed to his dismissal as well. His only objection appeared to be the inclusion of the note at all. For these reasons the Tribunal considers that the Claimant was 75% to blame for his own dismissal.

111 The Claimant is accordingly awarded compensation for unfair dismissal as follows:-

<u>Basic award</u>			
10 years at £525			£5,250.00
Less contribution at 75%	£3,937.50		
Total basic award			£1,312.50
<u>Compensatory award</u>			
Loss of earnings 24 January 2019 to 8 March 2019 5.5 weeks at £658.66		£3,622.63	
11 March 2019-26 July 2019 -19 weeks at at an average income weekly loss £218.66		£4,154.54	
29 July – 9 August Loss of earnings for two weeks at £658.66		£1,317.32	
25 August – 22 December 2019 21 weeks agreed loss from what he would Have earned with respondent.		£3,515.19	
Loss of statutory rights		£500.00	
Subtotal			£1,3109.68
Deduct 85% Polkey deduction		£1,1143.23	
Subtotal			£1,966.45

Deduct 75% contribution	£1,474.84	
Total compensatory award		£491.61
Total award on compensation for Unfair dismissal		£1,804.11

Employment Judge Martin

13 February 2020