EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Hornsby	**v**	Next Distribution Limited

Heard at: Leeds Employment Tribunal (via CVP) **On**: 11 August 2021

Before: Employment Judge Norris sitting alone

Representation:
Claimant: Ms M Martin, Counsel
Respondent: Mr P Sands, Solicitor

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is not well-founded and is dismissed.
2. His complaint of wrongful dismissal is well-founded and succeeds.
3. His complaints of failure to make a redundancy payment and deductions from wages are dismissed on withdrawal.

REASONS

Background

1. The Claimant worked for the Respondent from 8 October 2007 until his dismissal for alleged gross misconduct on 19 January 2021 following an incident earlier that month with a colleague, to whom I shall refer as PH. Both men worked as HGV 1 Drivers. The Respondent is a subsidiary of Next PLC, the well-known retailer which has a logistics function, including a complex of warehouses in Elmsall, where the Claimant and PH were based.

2. Between March and April 2021, the Claimant entered ACAS Early Conciliation. He lodged a claim with the Leeds Employment Tribunal on 12 April 2021 complaining of unfair and wrongful dismissal, failure to pay a redundancy payment, pay arrears and "other payments". The Respondent defended the claim by ET3 submitted on 11 May 2021.

Case progress and conduct of the Hearing

3. It does not appear there was any hearing to case manage the matter but the parties were sent (and appear to have complied with) standard directions issued when the notice of claim was sent out. The Claimant served a witness statement and the Respondent had two witnesses, both of whom also served statements: Mr Gledhill, Transport Operation Manager, who dismissed the Claimant, and Ms

Nicholas-Pethick, Central Transport Manager, who heard the Claimant's appeal. A virtual bundle of just over 400 pages was emailed to me in advance of the Hearing. Ms Martin had also produced a skeleton argument.

4. The Hearing started at 10.00 on 11 August 2021 by CVP. Mr Gledhill answered a small number of supplemental questions in chief and was then cross-examined until the lunch break with a short adjournment mid-morning; Ms Nicholas-Pethick was cross-examined in the afternoon before a further short break and then the Claimant gave evidence himself. There had been occasional challenges in accessing the Hearing and by the end of the evidence it was nearly 17.30. By agreement I ordered the parties to send (updated) written submissions by 16.00 on 20 August and reserved my decision.

5. There was an issue with the CCTV footage of the incident on 6 January 2021 that led to the Claimant's dismissal. At the point we ended the Hearing, it had been established that the Respondent had disclosed a shortened version and Mr Sands had been repeatedly unable to access – and hence to show - the full footage, and I was unable to watch it when he forwarded it to me. Following the Hearing, I was however able to download and watch it all, and the parties confirmed when forwarding their submissions that neither wished to reconvene to put the fuller footage to any of the witnesses. There are also two pieces of video footage which the Claimant captured using his mobile phone. I have had regard to each of them, and to all the written and oral evidence before me, in making this decision.

6. I record that Ms Martin on behalf of the Claimant formally confirmed he pursues only unfair and wrongful dismissal complaints; the complaints of failure to make a redundancy payment and/or deductions from wages are accordingly dismissed on withdrawal.

Submissions/The Law

7. As I have noted above, both parties were invited to and did provide submissions in writing and while I do not replicate them in their entirety here, I have read them and refer to them below on particularly salient points. In line with the Court of Appeal's decision in *DPP Law Limited v Greenberg*[1] I similarly do not identify every piece of evidence which I have taken into account in reaching my conclusions.

8. It appears that the parties agree the initial burden of proof is with the Respondent to show the reason or, if more than one, the principal reason, for dismissal. Such reason must have been "potentially fair" within the meaning of sections 98(1)(a) and 98(2) Employment Rights Act 1996 (ERA). Conduct is one such potentially fair reason.

9. If the Tribunal is satisfied that the Respondent has shown a potentially fair reason, it will proceed to consider the reasonableness of the decision to dismiss applying the test (at section 98(4) ERA):

[1] [2021] EWCA Civ 672

a) …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 sufficient reason for dismissing the employee;
(b) …in accordance with equity and the substantial merits of the case.

At this stage, the burden of proof is neutral.

10. In considering a claim for unfair dismissal it is not for the Tribunal to substitute its own opinion for that of the employer. See e.g. *London Ambulance Service v Small*[2], in which Mummery LJ summarised the Tribunal's "*essential terms of inquiry*" in such a case as:

"*whether, in all the circumstances, the [employer] carried out a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that [the employee] was guilty of misconduct. If satisfied of the [employer's] fair conduct of the dismissal in those respects, the ET then had to decide whether the dismissal of [the employee] was a reasonable response to the misconduct*".

Mummery LJ also noted that in such cases there are often related issues such as contributory fault and breach of contract, as indeed there are here, and that these may require additional findings of fact that are not the same as those that relate to the fairness or otherwise of the dismissal.

11. I was referred by the Claimant to the cases of *BHS v Burchell*[3]*, Iceland Frozen Foods v Jones*[4] (confirming that the band of reasonable responses test applies to each strand of the *Burchell* test or, as it was described above, the Tribunal's essential strands of enquiry), *Tesco Stores Ltd v S*[5] (in relation to exploration by the employer of potentially mitigatory factors), and to the ACAS Code of Practice (in particular, paragraph 9 relating to the necessary scope of allegations and their potential consequences). In addition I was referred by the Respondent to *Mbubaegbu v Homerton University Hospital NHS Foundation Trust*[6] (dismissal may be fair following a series of acts of misconduct, even where none of those acts itself constitutes gross misconduct; however, the test for wrongful dismissal is whether the employee committed a repudiatory breach of contract and therefore requires findings of fact as to whether any breach(es) is/are sufficiently serious to justify summary dismissal).

12. Where applicable, the standard of proof throughout is the usual civil standard of the balance of probabilities.

Findings of fact

<u>History between the Claimant and PH</u>

13. It is common ground that the Claimant and PH had had an acrimonious relationship over a number of years, with grievances and counter-grievances submitted. The Claimant has indicated in internal documentation that they had

[2] [2009] IRLR 563 CA
[3] [1980] ICR 303, EAT
[4] [1983] ICR 17
[5] UKEATS/0040/19/SS
[6] UKEAT/0218/17

been on good terms until PH told the Claimant he had said he had a dental appointment on Friday 13 June 2014, the inference being that he had misrepresented this to management in order to get out of a run known as "double Granthams" on that date; the run consequently fell to be performed by the Claimant.

14. The Claimant has stated that on 13 June 2013, when he was booking off, PH stood next to him and the Claimant said, "I thought you were going to the dentist." He claimed that this prompted PH to go "berserk", shouting at the Claimant with a profanity-laden outburst. The Claimant said he could not believe how angry PH was, nor that none of the supervisors or managers had addressed PH's attitude or anger towards him. I refer to this as the "Double Granthams incident".

15. The Claimant apparently did not raise a formal grievance about the Double Granthams incident at the time or indeed until in or around November 2016, by which time he claimed there had been a number of further incidents between him and PH, in each case the Claimant saying PH had been the aggressor or instigator:

    a. On Christmas Eve 2014, PH had forcefully pushed open a door by which the Claimant was standing, wrenching the Claimant's wrist which was resting on the door handle, and then behaving in an offensive and angry manner towards the Claimant both within the security office and then in the car park afterwards.

       In relation to the latter part of the incident, it was said that PH expressed the hope that the Claimant's wife and the Claimant himself would be "fucking gang raped by niggers". He is then alleged to have said to the Claimant "You are my problem, go and fucking die". I refer to this as the "Christmas 2014 incident".

       The Claimant said he had initially decided that he would put in a grievance but felt it would be PH's word against his; however, he spoke to colleagues and they told him that PH's head was "screwed up" after his army service and recommended that the Claimant leave him alone or things would get worse. The Claimant said that he tried to avoid PH after this.

    b. On 21 April 2015, PH drove past the Claimant several times, with his head out of the window "laughing like a complete madman".

    c. On 2 October 2015, the Claimant was in the drivers' room, talking to another driver with his back to the entrance when he heard whispering from behind which he did not understand. Before he could turn round, he was pushed so violently that he nearly headbutted the driver who was some three feet away. The Claimant turned to see PH, who indicated that he wanted to get some paperwork from the counter. The Claimant called PH a "dickhead" and said, "I don't know what your problem is". PH replied, "It's only about five foot, my fucking problem". Again, the Claimant considered putting in a grievance but did not do so; PH however submitted a grievance because the Claimant had called him a "dickhead". I refer to this as the "Counter incident".

d. On 11 April 2016, PH laughed "scarily" at the Claimant and nodded his head in the drivers' room.

e. On 23 May 2016, PH parked up next to the Claimant, who had asked a manager for a meeting to discuss PH's conduct towards him. As that meeting had not been arranged, the Claimant asked PH directly what his problem was, to which PH replied again that the Claimant should "fuck off and die", calling the Claimant a "little twat" and a "piece of shit".

f. On 11 November 2016, PH called out to the Claimant, "Hey up, are you still depressed", "Are you back on the vino" and "I said, are you still depressed?" I refer to this as the "November 2016 Incident".

The Claimant said he had been required to take a breath test at work some seven weeks earlier following a report that he was drinking heavily in the evenings before an early morning start. He suggested that it was too much of a coincidence for PH to ask if he was "back on the vino", the inference being that it was PH who had called the Next hotline to get the Claimant into trouble in September 2016. This also followed somebody reporting the Claimant to the hotline in June 2015, when it was alleged he was at an airport but claiming to be off sick; and his and his girlfriend's cars had been vandalised at the Claimant's home address. It is clear that the Claimant believed the instigator of all these problems was PH.

16. In a document headed "Grievance Statement" (apparently prepared in response to PH's grievance following the Counter incident) and dated 21 October 2015, the Claimant had said that he was leaning against a counter, talking to another driver, when somebody behind him whispered, "Excuse me". The Claimant said he thought that the person "wanted store directions" and responded, "Hang on, I'm talking". He was then "shooved" (presumably, shoved) from behind with sufficient force that he was "stood up" and had to take a step forward to get his balance. The Claimant had not mentioned in that statement that he called PH a dickhead.

17. For his part, as I have noted, PH had put in at least one grievance against the Claimant (I gather in relation to the Counter incident) and in November 2015, Mr Cass, then Transport Duty Manager for the Respondent, had emailed a colleague, Ms Stokes, about the conflict between the two men, seeking assistance. Mr Cass had attached the grievance from PH to his email but it was not in the bundle before me. Mr Cass observed that the issue was not as straightforward as it seemed. He said he was struggling to secure evidence from colleagues to give him the full picture of what had happened. However, he had spoken to the Claimant, who had apparently complained that:

a. PH had damaged his car;
b. In the past PH had confronted him, made threats and racist comments;
c. They had had words when PH "dodged a run" that was then allocated to the Claimant.

18. In or around November 2015 it appears the Claimant had played a covert audio recording to Mr Cass of a conversation with PH, which Mr Cass said did not mirror PH's claims (it is not clear whether he meant to say it did not mirror the Claimant's claims, given that the complaint was by PH and was that the Claimant called PH

a dickhead - the Claimant admitted having done so) although Mr Cass did not go into further detail; but he also said that the Claimant did not want PH to know he was recording their conversations. It is also not clear what advice or assistance, if any, Ms Stokes gave or what the outcome was of PH's grievance.

19. It is however clear that the Claimant's narrative had changed in two aspects as to the Counter Incident in the year between his Grievance Statement of October 2015 and the raising of a formal grievance over a year later: the level of force allegedly used by PH had increased from causing the Claimant to stand up and take a step forward to steady himself to a push so violent that he nearly collided with someone a metre away; and that rather than the Claimant expressly hearing someone say "excuse me" but refusing to move because he was talking, he had changed this to hearing only vague whispering. Both those things were, I find, designed to put the Claimant in a better light and PH in a worse one.

20. There is an entry in what appears to be an online HR notes database, dated November 2016 that reads: "[The Claimant] did not feel comfortable proceeding with the grievance as he was unsure what outcome he wanted and whether if he decided on an outcome this would aggravate the issue or provide a resolution. Informal advice was given to [the Claimant] both in managing the situation, what we can and can't do, what the grievance process involves, and then also for anything outside of work to speak either to the police or a solicitor for further guidance". It does not appear that the Claimant did ever speak to the police or a solicitor; or if he did, those communications were not evidenced in the bundle before me.

21. An entry the following month reads: "[The Claimant] alleged that he had been bullied and intimidated by another driver, and that the other driver was actively "going after" him, such as inappropriate comments, opening a door on him, shoving him etc. when investigated the claims were not substantiated and both drivers appear to have been less than professional with one another. Some issues are historcial [sic] and therefore no longer appropriate to take action on. So strict guidelines issued to both of what will be deemed appropriate, any further incidents could result in both being forwarded to a DP [presumably, disciplinary procedure]."

22. It appears that this entry followed the Claimant submitting a document on 3 December 2016 that repeated the allegation about the November 2016 incident, which he then asked to be investigated as a formal grievance. A meeting was conducted with the Claimant by a Senior Duty Transport Manager Ms Calton. I observe that in this instance, as with several other records of meetings held concerning the Claimant, it would have been very helpful to have had the notes typed up as they are not entirely legible. I have done my best with the handwritten versions.

23. Ms Calton asked the Claimant more than once about any history with PH and he repeated what he had said about the November 2016 incident. The Claimant was asked whether there had been any previous falling out or other reasons and he referred to PH having pushed him (I infer that this was the Counter incident). Ms Calton asked how that had been dealt with. The Claimant said ,"Informally and PH not wishing to take further". Ms Carter asked "OK, any other incidents?" to which the Claimant replied, "No".

24. Ms Calton then asked, “Anything could have sparked change?” to which the Claimant described the Double Granthams incident in 2014. He did not mention the Christmas 2014 incident or anything about the specific and highly abusive language that he had alleged PH had used towards him on that occasion.

25. Ms Calton conducted a hearing with PH. PH described the Double Granthams incident (though suggesting it had occurred in October 2014) and acknowledged that on Christmas Eve 2014 he had pushed open a door, hitting the Claimant, although he said he had not appreciated that the Claimant was there and had apologised, but that the Claimant had then kicked his leg. He said that in the car park afterwards, the Claimant had been standing under the cameras, pulling faces and making “trumping” noises at him. PH confirmed that he had not reported any of this; he also asserted that the Claimant would know CCTV is erased after a month.

26. PH also recalled the Counter incident, saying that in October 2015, he had asked the Claimant to move so that he could get to his paperwork, to which the Claimant had replied that there was plenty of room, and PH had caught him slightly as he reached for the documents. He claimed that the Claimant had called him a “fucking dickhead” four times and wouldn't move. PH described himself as “livid” and said he had considered leaving the business.

27. PH then went on to say that in or around December 2015, some drivers joined the Respondent who had previously worked at Tesco (where the Claimant had worked previously) and when they found out about the Counter incident, they told PH that there was a queue (the writing here is very difficult to read) of people wanting to “punch” the Claimant. PH also said he had been told by an ex-Tesco driver called Gary Mutton that he and the Claimant had had an altercation in which the Claimant had “had a go at him” but it was Mr Mutton who was sacked; PH said he felt the Claimant was trying to provoke him in a similar way. Ms Calton told PH that if there were any further incidents, he was not to respond but must report it. In terms of the Counter incident, PH said he had “brushed” the Claimant who had then “given [him] verbal and shouted” as if he had been pushed, swearing at PH who denied swearing in return.

28. In relation to the November 2016 incident, PH said that he passed the Claimant and waved to him but that the Claimant had responded by pulling a face and pulling his ears, “walking like he was disabled”, so that PH had asked “Are you depressed or on the drink?” He alleged that the Claimant had also approached him in the car park on an earlier occasion and asked PH what was wrong with him, to which PH had told the Claimant to leave him alone and closed his window.

29. It appears that a person called L Clark had been asked to make a statement about the later part of the Christmas 2014 incident but in it, they denied having seen anything of the kind complained of. They continued, “I was asked on 05/01/2017 at 3.30 in question between two driver one kicks the other when the door was opened”. It is unclear precisely what this statement means but it does not appear to support either the Claimant or PH’s versions of events.

30. A Ms Byrne, Loss Prevention Officer, also made a statement about the November 2016 incident. She said that she had walked into the yard with PH and had heard

him say to the Claimant, "'Are you still depressed?' then again 'Are you still depressed?' pressing for an answer'. She continued: "I walked round the back of the two trailers. I didn't think anything of it at the time in the manner it was said. I don't recall anything else from this incident." Ms Byrne had made a contemporaneous statement on 11 November 2016 in almost exactly the same terms.

31. In other words, Ms Byrne's recollection was only that PH asked the Claimant – twice – whether he was still depressed and not that he had interposed a question about the Claimant being "back on the vino" and indeed it makes more sense to conclude that he would, in pressing for an answer, preface the same question with "I said…" before repeating it; however, since PH accepted asking additionally "Are you on the drink?" it appears that he did make some reference in the conversation to the Claimant having been drinking. However, Ms Byrne's observation was that the incident was not particularly noteworthy, or, by inference, aggressive.

32. Another person, who I infer was a Mr Silcock, was interviewed and told Ms Calton that he had on one occasion seen the Claimant and PH together at the counter, "having a bit of banter between each other". He first said he saw PH "which looked like he had pushed [the Claimant]" but then continued, "but I can't swear to him pushing him as it was such a long time ago". He was asked "Did it look like playful banter?" and replied, "Yes". He said that then words were exchanged which were a "bit heated, not friendly but not aggression" and that as far as he was aware there was no malice between them. Although he had said he was not sure whether PH had in fact pushed the Claimant, he was nonetheless asked, slightly obscurely, "Was the pushing aggressive or something that there was an issue?" and replied, "It didn't come across to me as it was". Again, by inference because there is no date specified for this incident, I conclude this related to the Counter incident in 2015.

33. Ms Calton called the Claimant back to the meeting on or around 18 January 2017 and explained the contents of the statements she had taken. She further explained that she could do nothing about the "historical stuff", to which the Claimant replied, "I know". She told the Claimant that she would be speaking to PH (and did so the following day) but also said that she advised the men to give each other a wide berth and to report anything else that happened. She noted that the Respondent had CCTV and audio and encouraged the Claimant to make reports (including directly for her attention) in real time and not months afterwards, reassuring him that the Respondent would be more vigilant and repeating that the Claimant needed to raise things with management if any further incidents occurred, as such behaviour would not be tolerated.

34. When Ms Calton spoke to PH he acknowledged that he should not have asked the Claimant if he was depressed. He was similarly encouraged to keep away from the Claimant and to report any further incidents.

35. In an outcome letter dated 24 January 2017 following the Claimant's grievance, Ms Calton confirmed that there were differing accounts of what had happened in the November 2016 incident, but that neither the Claimant nor PH's alleged behaviour would be tolerated. She concluded, "I have confirmed to both yourself and the other party of standards, behaviour and conduct to be followed, and also

confirmed the professionalism I expect both [sic]. I have also confirmed the correct escalation processes to both yourself and your colleague should anything further happen, but I trust this not to be the case".

36. In August 2017, an incident arose involving the Claimant and Mr Silcock. Reports were made that Mr Silcock had made heated allegations that the Claimant had cut him up on the road, causing him to brake hard, and claimed that the Claimant had done something similar to somebody else previously. Mr Silcock denied having said anything to the Claimant but a witness confirmed that this was not true and that it all seemed "inappropriate and the tone wasn't right". Another witness said that there had been no aggression, but a third said there had been a little bit, with Mr Silcock calling the Claimant a "dick" and repeatedly suggesting, over a period of around five minutes, that the Claimant had cut him up.

37. When the Respondent's management interviewed Mr Silcock, he admitted to having confronted the Claimant over two occasions when he alleged the Claimant had driven in front of him and then slowed down deliberately, claiming this was in retaliation for Mr Silcock declining to give a statement over one of the incidents between the Claimant and PH. He agreed he had called the Claimant a "dick driver" but alleged that when he asked the Claimant why he had carried out the manoeuvre, the response was "because it was you". Mr Silcock claimed to have a witness to the Claimant's words and to the fact that the Claimant was "smirking" as he said this. It does not appear that the witness, Mr Hall, was asked specifically whether he had overheard those words or seen the Claimant smirk at Mr Silcock.

38. Other witnesses said that Mr Silcock had been "slightly aggressive" to the Claimant and, to the contrary that there had been no aggression on Mr Silcock's part, that it appeared to be a playground spat between the two men and that it was not one-sided.

39. At his investigation hearing into the matter, Mr Silcock claimed that the Claimant was still holding a grudge after two years, having come to him with "the hump", shouting at Mr Silcock after he had said he did not see much in the altercation between the Claimant and PH. However, Mr Silcock demonstrated considerable contrition at his own behaviour and was subsequently given a final written warning for aggression following a disciplinary hearing.

40. In May 2019, Mr Gledhill had cause to deal with a further incident between the Claimant and PH. I refer to this as the May 2019 incident. According to Mr Gledhill's handwritten notes, CCTV footage from 8 May 2019 showed PH standing with another colleague, Mr Krupop. As the Claimant walked past PH, he turned towards him and appeared to be trying to get a reaction from PH, which PH ignored; then two seconds later the Claimant was seen stepping back and moving forward again, once more waiting for a reaction from PH. Mr Krupop had given a statement describing the Claimant's behaviour as "bizarre". Mr Gledhill considered the Claimant's actions to be provocative, given that the Claimant said he wanted nothing to do with PH. Additionally, there was an allegation that the Claimant had made derogatory comments towards Mr Silcock. The Claimant was suspended.

41. In an investigation meeting, Mr Silcock claimed that the Claimant had mocked and laughed at him, repeating "I want my mummy" and calling Mr Silcock a "big girl's blouse" while pretending to be on the phone, subsequently laughing again and pulling faces at him. When the allegation was put to the Claimant, he replied that he had been walking past Mr Silcock, who had said to him, "You are so childish". The Claimant expressed himself puzzled by this and said he had not responded. He said that if anyone was intimidating him, he would follow the advice given to him by a transport manager and keep calm, smile and walk away.

42. PH submitted a handwritten statement, the date of which has been obscured in the bundle by the photocopying. He described an increase in hostilities between June and August 2018, with the Claimant refusing to speak to him, pulling faces, clutching his genital area and making noises, miming with his finger someone having their throat cut and following PH towards his home outside working hours. PH said he had reported the miming to Ms Calton, because he believed it would have been caught on CCTV, but she did not revert to him before leaving the Respondent. PH had submitted a grievance in November (no detail was given in this document).

43. PH alleged that in December 2018, the Claimant had pulled up alongside him, speaking in a camp manner and calling him an "army gay boy". In March and April 2019, the Claimant had passed PH showing him two fingers and in May 2019, PH had submitted a further grievance.

44. Mr Krupop gave a statement on 15 May 2019. He said that he and PH were standing apart from each other, Mr Krupop leaning against the counter and PH leaning with his back against a window. The Claimant came towards them and instead of walking forwards between them, he turned sideways facing PH and walked "with his arms like a space invader", pulling a face at PH. PH ignored the Claimant's behaviour, but Mr Krupop said he thought it was bizarre and asked, "What the fuck was all that about?" PH told him to ignore the Claimant and that there was something wrong with him. At the end of the discussion Mr Krupop said, "If you'd have seen it, you'd think it's not a joke, that's just wrong".

45. The Claimant was interviewed by Mr Gledhill and flatly denied using the words alleged or indeed any words to Mr Silcock. He denied that Mr Silcock's body language appeared on the footage to have changed in response to something the Claimant had said. In relation to the May 2019 incident, the Claimant denied swinging his arms to provoke PH and indeed asserted that he wanted to avoid PH at all costs. He denied having turned to face PH, claiming to have been looking out of the window. It appears (though the writing is difficult to read) that the Claimant then described an unrelated incident in 2016 with another Company's driver who had punched him following a disagreement about parking.

46. The Claimant was referred to a disciplinary hearing, which was conducted on 19 and 21 June 2019 by Mr Colbourne, Recycling Centre Manager, Mr Colbourne dismissed the allegations against the Claimant in connection with Mr Silcock's complaints (of which there was no corroborative footage) but gave the Claimant a 12-month written warning for his conduct in connection with PH, for which it appears he says he had found "proof beyond doubt in [his] mind". It seems that the Claimant did not appeal this decision.

Mediation meeting

47. On 19 July 2019, Ms Mudford, the Claimant (and presumably PH's) line manager conducted a mediation meeting with the two men. She said that both of them had raised concerns separately to her, but, essentially, that she was not going to go over old ground in the investigation; her declared expectation was to "walk away… with an element of professionalism". She told both men "Let's drop the silliness". She repeated to the Claimant – who asked if she had read the records from 2015 - that she was not going to dig up the past and asked what actions he wanted PH to stop. He replied, "Stop winking. Stop being sarcastic", and in response to her question "Is there anything else PH does to you", said "No". For his part, PH said that he was happy to draw a line in the sand. Both men said that they could do their job in a professional manner without sarcasm. Ms Mudford said she was not going to spend ages looking into facial expressions.

48. However, the Claimant then raised the allegation of the racist comment from the Christmas 2014 incident (though according to the notes, he again said 2015). Ms Mudford replied once more that she was not going to go back to 2015 and that the Claimant should have reported the incident to the police as a hate crime. She said she expected both men to behave "like grown ups" and be professional. In other words, she said, there were three options:

    i) Be civil to one another;
    ii) Don't speak to one another;
    iii) Ms Mudford would formally separate the men, to different sites.

49. PH responded that he would prefer option 1. The Claimant said he would also do option 1 if he had "an answer to 2015". Ms Mudford repeated once more that this was not an option, and the Claimant then agreed to option i) above. The men began arguing again at this point, and Ms Mudford observed that they were going round in circles; she said, "It stops now – winking, sarcastic comments etc. I won't entertain any more minor complaints about childish behaviour. [You] need to be professional". She proposed that they should not make eye contact or speak unless it was necessary for the job and warned them, "If we have to reconvene, I will have to take formal action".

50. There is no written outcome from the mediation in the bundle. Although the Claimant says, therefore, that there was to be a follow-up meeting, I cannot see anywhere that this was suggested and indeed, it appears that Ms Mudford had made her position clear. Nonetheless, in August 2019, PH raised a grievance against the Claimant contending that he had resumed his "face pulling antics" in an attempt to provoke a reaction, on which somebody (presumably Ms Mudford) has hand-written "Addressed by mediation with [the Claimant]". It is unclear whether the mediation meeting had itself been delayed or whether Ms Mudford was simply categorising the matter as something she had addressed in that session.

51. In March 2020, the Claimant also raised a grievance, once again in relation to incidents stretching back over many months, this time from September to December 2019 and then again on 12 March 2020 following PH's return from sick leave. Once again, the allegations against PH were of laughing, winking, sounding the horn and waving at the Claimant, which the Claimant described as "constant harassing behaviour" and "intimidation". In a letter dated 18 February

2020 (apparently a typographical error for 18 March 2020), Central Transport Manager Mr Stewart sent what might be described as a robust response, telling the Claimant that while he understood there was a "perceived on-going issue" between the two men, the grounds of complaint were insufficient for him to justify spending more management time on them and that given the issues facing the business in dealing with the pandemic, neither he nor any of his staff would be dealing with it. However, he concluded, "If there is a serious escalation in this matter in the meantime, please inform your Line Manager".

52. It might be inferred that there was no such escalation because the next documented incident in the bundle is the one on 6 January 2021, which ultimately led to both the Claimant's and PH's dismissal.

Incident 6 January 2021

53. I have had the benefit of watching both the Respondent's mounted static CCTV camera, which provided video footage of the incident only, and the footage from the Claimant's phone, which also includes audio. I make the following findings based on the static camera footage:

    a. The Claimant's vehicle entered the car park first, followed by that of PH. The camera is apparently mounted on a post on the far side from the entrance as it takes in a broad sweep of the car park. The car park was fairly, but not completely, full and had six lines of parked cars, all of which had the front of the car facing out: one line was to the Claimant's right as he came in, there were two back-to-back lines of cars to his immediate left and a sixth line to his far left. It appears that between the lines of cars there are three bi-directional lanes. Between three and five people in high visibility vests can be seen in the top right-hand corner of the car park (from the camera's position), some distance from where the incident took place.

    b. The Claimant appeared to be driving very slowly on entering the car park, because by the time he had passed five or so cars, a vehicle on its way out had driven the entire length of the line to the exit (some 25-30 cars). As the Claimant arrived at roughly the midpoint of the row to his left, he pulled across into the right-hand lane in a manner clearly preparatory to reversing into an available space on his left-hand side. Before he could do so however, PH sped up and drove facing forwards into that space.

    c. Since the space was in the back to back line and had a second free space immediately in front of it, had PH continued forwards, he would have been correctly parked and the Claimant could have completed his reversing manoeuvre, also "nose out". However, PH stayed in the first available space, parked nose first in the space that the Claimant had clearly been intending to use.

    d. Although other spaces were visible, including one some five along in the same line and another some six along from that, the Claimant did not continue to park his car. Instead, he reversed into the lane so that he was effectively back at the start of his manoeuvre, and blocking PH in. The two men initially remained in that position in their vehicles.

e. After more than 20 seconds had elapsed, PH got out and can be seen busying himself at his car. Still blocking the rear of PH's car, the Claimant then got out of his driver's side and walked round his car, filming PH as he did so on his mobile phone. It appears PH walked quite quickly up to the Claimant and knocked the phone from his hand. The Claimant bent to pick it up as PH retreated a few paces but then the Claimant walked towards him and the two men "squared up" to one another, standing almost nose to nose. After a few seconds, PH moved back again and the men separated, with the Claimant backing up to the passenger side of his car, apparently continuing to film PH on his phone.

f. PH returned to his driver's door and remained standing by it while the Claimant filmed him. It appears that he took something out of the car and placed it on the ground between him and the Claimant, later repositioning it nearer the Claimant but never approaching nearer than the end of his car. The Claimant bent to film the object, which was not visible from the static camera.

g. Some three minutes after the men entered the car park, PH got back in his car; the Claimant continued to stand at the front nearside of his own vehicle, filming PH sitting in his own driver's seat. This remained the position for a further 80 seconds, whereupon PH pulled forward through the space then in front of his car, did a three-point turn in the lanes between that line of cars and the next, and then drove back, nose first, into the original contested space. All the while, the Claimant continued to film him.

h. After another ten seconds or so, PH got out of his car, took something from the rear seats and possibly the boot and passenger seat, finally returning to the back of his own car and hoisting a bag onto his shoulder before walking back down the car park, away from the camera, towards the exit. The Claimant followed quite closely after him, filming continuously. PH turned back towards the Claimant twice, on the second occasion apparently brandishing a carrier bag, and then walked out of the car park. The Claimant stood by the rear of his vehicle, filming PH until he was through the gates and out of sight, just over seven minutes after the cars first entered the car park. The Claimant returned to his car and drove past several empty spaces before, as the footage ends, reversing into a space in the far single line.

54. I return below to the Claimant's own footage taken from his mobile phone. However, the static CCTV footage was all that was considered by the Respondent in the disciplinary and appeal hearings.

55. PH was interviewed that afternoon in connection with "inappropriate and threatening behaviour towards a colleague". He claimed to have believed that the Claimant's car had been coming out of the space when he drove into it, because (he said) he had not followed anyone in, and also claimed not to have realised that it was the Claimant whose vehicle then blocked him in until he got out of his own car to see who was taking pictures. He asserted that as the Claimant was filming PH, his car and bag, he had dropped his mobile phone, kicked the bag and lunged towards PH with an aggressive gesture. PH said he

had followed the advice given previously and returned to his car, turning it around so that the front-facing camera in his car was now filming the Claimant, who himself continued to film PH on his phone without speaking. PH claimed to have told the Claimant about his own camera. He told the interviewer that he had not reported this incident because he had been told to ignore the Claimant and stop complaining, but it was part of a pattern of behaviour on the Claimant's part including making ape noises and howling like a wolf, usually when nobody was there to witness it. PH did however identify another driver, Mr Sagaar/Saagar, and Mr Silcock, as potential witnesses.

56. PH said he did not know well but had met a driver called Gary Mutton. PH's explanation for having a carrier bag with the word Mutton written on it was that he reuses bags from home that have been used to freeze meat. He denied that he had put the bag in front of the Claimant with the word "Mutton" visible. PH was forwarded to a disciplinary hearing.

57. The following day, the Claimant submitted a grievance against PH, in the same terms and complaining about the same dates/incidents as the one described at paragraph 51 above. The Claimant was seen in relation to the 6 January incident by a different investigator on 10 January 2021, initially with the same allegation as had been put to PH: "inappropriate and threatening behaviour towards a colleague".

58. The Claimant indicated that he got out to film PH when he saw him put the carrier bag on the floor. He said PH had punched his phone out of his hand and then sat in the car before carrying out the three-point turn. The Claimant relayed what PH had said to him and said that PH had deliberately turned the Tesco carrier bag round so that the Claimant could see the word Mutton written on it. The Claimant said this happened again when they were at the counter subsequently, and then the Claimant had reported the car park incident. He said there were two reasons for him recording PH: his failure to reverse into the space as required by the Respondent (and intentionally blocking the Claimant from doing so); and because he had placed the Tesco bag on the ground behind the rear of his car.

59. The Claimant said that PH knocked the mobile phone out of the Claimant's hand and that he himself "may have reacted" by standing within two metres of PH. He alleged that PH had said, "What are you going to do about it, go for it, do it, you're not gonna do nowt are you, not a thing". He said that if the situation were to recur, he would not approach PH. The Claimant denied that his own behaviour had been threatening, saying it was a "[knee] jerk reaction" to "aggro" that he had experienced from PH since 2014. The Claimant was also referred to a disciplinary hearing.

60. Mr Gledhill conducted both disciplinary hearings. The handwriting in the notes is difficult to read and there is no typed copy. However, it appears the Claimant told Mr Gledhill what had transpired in the car park, broadly in line with the mobile phone footage he had taken.

61. The Claimant was asked why he had not gone on to park elsewhere, given there were other empty spaces. He told Mr Gledhill that he had thought PH was going to pull into the space in front of the one where he parked, and waited a few minutes for him to do so. The Claimant said when it was clear PH was not going

to move forward, the Claimant got out of his car and videoed it because PH had not reverse-parked, contravening the Respondent's guidelines.

62. It was clear in the Claimant's disciplinary hearing (from what can be read of the notes) that Mr Gledhill considered what he believed to be relevant GDPR/data protection provisions and that it is unlawful to film another person without their consent. As such, he indicated that whatever had been videoed did not form part of the investigation.

63. In their separate hearings, Mr Gledhill dismissed both PH and the Claimant. In the "Reasons for Outcome" section on the Claimant's form it appears he has written "CCTV footage shows [the Claimant] inappropriately videoing [PH] without consent and as such [PH] took exception knocking the phone from [the Claimant]'s hand – both parties then came together for a period of five seconds with threatening and inappropriate behaviour shown by both parties – [the Claimant] continued to video other party in breach of GDPR".

64. In a separate document (and confirmed in his witness statement and oral evidence) Mr Gledhill focused on the fact that the Claimant continued to video PH for over five minutes, despite knowing that PH did not consent to this, as evidenced by the fact he knocked the phone out of the Claimant's hand. The Claimant moved towards PH in an aggressive manner so that the two were face to face, without social distancing, for just over five seconds. Both could have moved away from one another, but the Claimant stood his ground and continued filming PH even when the latter was turning his car round and while he was leaving the scene.

65. The Claimant appealed on the basis that he had not been informed about GDPR by the Respondent; his behaviour was "defiant, the constant harassment and bullying since 2014" and the decision was too harsh compared to another incident (of which no details were given).

66. Ms Nicholas-Pethick heard the appeals of both PH and the Claimant, dismissing them both. In particular, her conclusion was that the Claimant's actions in "squaring up to another colleague face to face and continuing to film someone who does not want to be filmed" was deemed threatening and unacceptable, and she noted that he had had the capacity to "diffuse" (presumably, defuse) the situation by walking away but he had failed to do so. The Claimant's grievance was also investigated, by the Transport Operations Manager Ms Camplin, and rejected.

Findings and conclusions – unfair dismissal

67. It was not suggested and nor did the evidence show that the Respondent had any other motive for dismissing the Claimant than his alleged conduct; indeed Ms Martin accepted on his behalf that this was the reason for dismissal and I find accordingly.

68. Ms Martin makes a number of submissions however as to the fairness of that decision, which I deal with in turn:

    a. Failure to consider the history between the Claimant and PH (reasonableness of the investigation)

i) I agree that in considering this matter, the history between the two men is an essential and relevant issue, and for that reason I have set it out in such detail above.

ii) I do not accept that the Respondent failed to consider it however, or that Mr Gledhill (whose unchallenged evidence is that he has considerable experience in conducting disciplinary hearings) had only a cursory understanding of what had taken place. I accept that Mr Gledhill has summarised that history quite briefly, but on the face of it accurately, as follows:

"I was aware that PH and the Claimant had a history of taunting and raising complaints against each other. Their previous behaviours were all of a similar nature including name calling, pushing, mocking, winking and blowing kisses at each other, pulling faces, sounding their lorry's horns at each other, etc. Occasionally their misconduct would be on a more serious scale for example verbally threatening language and intimidation. They had each raised a number of grievances against the other which had taken up a lot of the HR resources over the previous 5 years or more. I considered both of their behaviours extremely immature and unprofessional and was shocked that such behaviour could persist in any business."

iii) Ms Martin contends that this extract and, more specifically, Mr Gledhill's responses in cross-examination, demonstrate the Respondent has failed to understand the seriousness of the Claimant's grievances. As I have set out, the chronology shows however that the Claimant did not raise those grievances contemporaneously; consequently they could not be investigated in a timely fashion and (so far as his interaction with PH was concerned) none was ever proven.

iv) Indeed I have noted above that despite having considered (on his own account) doing so earlier, the Claimant did not raise a grievance until late 2016 about the Double Granthams incident in June 2014, the Christmas 2014 incident or the Counter incident in 2015 (though PH did raise a grievance about the latter); and that the entry on the Claimant's file indicates that when these incidents were investigated, his complaints were not substantiated. The most significant aspects of the complaints by the Claimant - and in particular, the alleged physical harm and subsequent racist and violent language of the Christmas 2014 incident - had not been put to PH and cannot be assumed to have taken place as either man describes; both have been found to lack credibility when the Respondent was investigating incidents that **were** reported. I return to this below.

iv) I have also found that by the time of the grievance in November 2016, the Claimant's narrative had changed subtly from thirteen

months previously, in a manner that arguably (at least in some aspects) put him in a better light and PH in a worse light.

v) Mr Gledhill had also considered the mediation between the Claimant and PH that had taken place in 2019 and the exhortation from Ms Munford for both men to behave with an element of professionalism and to cease childish behaviours. Just a month later, PH raised a grievance against the Claimant and within seven months, the Claimant raised one against PH with a litany of minor complaints (waving, laughing, sounding his horn and flashing his lights at the Claimant). Further, Mr Gledhill himself had been the manager to investigate the May 2019 incident that resulted in the Claimant's 12-month written warning (not appealed) for harassing PH.

vi) Consideration of the men's history therefore shows that it was the Claimant who had received this, the only warning imposed for the interactions between him and PH, and that it had been based not on an unsubstantiated complaint from PH but on CCTV footage and evidence including the statement of an unconnected third party who had been prompted to ask of the Claimant's behaviour "What the fuck was that all about?" and said that it was "bizarre" and "just wrong". Mr Gledhill considered and Mr Colbourne found that this constituted misconduct on the Claimant's part. Neither believed the Claimant's explanation for his conduct in that incident.

vii) Accordingly, while Ms Martin is correct in her submission that Ms Ridgeway, who conducted the investigation into the 6 January incident, did not explore the "agro" mentioned by the Claimant, Mr Gledhill, who reached the decision to dismiss, was very familiar with their background. In his Decision Making Summary, in answer to the question "Outcome Options – what have you considered and why?" Mr Gledill has written "previous history. Provocation". I accept Ms Martin's submission in terms that this gives little insight, but in what I believe was his summing up to the Claimant during the disciplinary hearing, point 17 commences "I know you have mentioned your prior history with the third party and the fact that they have provoked you by taking the car space". He continued at point 18: "This however does not condone your actions and give you the right to act in the manner you did. Not only videoing him without consent under GDPR but reacting in an aggressive manner when the third party knocked the phone from your hand as they took exception to the filming". This I find was a reference to the Claimant advancing towards PH until they were almost if not actually touching, and then not stepping back for a few seconds.

viii) Further, in cross-examination, Ms Martin put to Mr Gledhill that PH had also raised the men's past history in his own disciplinary hearing, which Mr Gledhill agreed he had done; Mr Gledhill added that he had read the personnel files again and had noted "a lot of grievance/counter-grievance, each blaming the other". Indeed, he

said that he could not understand how the situation had been dragging on for that many years without a resolution.

ix) I also accept that Ms Nicholas-Pethick had looked through the personnel files at least to the extent that she was familiar with the issues raised in the mediation by all sides and the subsequent grievances raised. In cross-examination she agreed there was a long history between the two men but said that both were to blame for a lot of the "culture" and it had been very difficult to differentiate between who was at fault and who was not. She considered that both had been at fault and both had behaved inappropriately. Accordingly, while she had considered the history, she rejected it as being relevant to the incident before her.

x) I consider that these were conclusions that were open to a reasonable employer, properly considering the evidence; they demonstrate that the history **was** considered both at disciplinary and appeal stage; and in the circumstances, this submission is substantively rejected.

b. Failure to consider the Claimant's mobile phone footage (reasonableness of the investigation)

i) I accept the submission that this was a failing on the part of Mr Gledhill, who was apparently confused as to the ambit and reach of the GDPR in this context and appears to have taken inadequate steps to clarify the legal position. When he was asked which article of the Regulations were being breached, he replied that since he is not a lawyer, he had no idea. I do not make detailed findings on the legal points raised by Ms Martin, but I consider it highly unlikely that the Claimant was in the position of either a data processor or data controller and hence consider that there was very likely (as a matter of fact) **not** to have been a breach of the GDPR by him in filming PH on his phone.

ii) In cross-examination Mr Gledhill appeared further to confuse the question of whether the footage was "relevant" with the issue of whether it had been legitimately taken. He said that as far as he was concerned, PH had made it quite clear that he did not give his consent to be filmed, because he had knocked the phone out of the Claimant's hand. When he was asked why a lack of consent would suggest that he should not watch it, he said he did not think it was "relevant". However, he went on to say that he believed he would be breaching GDPR if he watched it because it had been taken without PH's consent and was accordingly illegal.

iii) Later in his cross-examination, Mr Gledhill said however that he had in fact gone online to check the issue of consent and he observed that he had put the point to the Claimant in the disciplinary hearing. Though it is difficult to read, the note in the bundle appears to say, "Are you aware of GDPR? … Are you aware that DP [presumably, data protection] involves taking video? Quote, 'Under GDPR,

consent has to meet the following standard of [being] freely given in [being] informed'".[7] Mr Gledhill established that the Claimant had not asked for PH's consent when he got out of his car and started filming, and for that reason, the Claimant's footage was not used as part of the investigation.

iv) This submission is therefore accepted. I return below to the significance of this failure in the overall fairness of the decision to dismiss.

c. Dismissal partly because of alleged breach of GDPR (substantive unfairness)

i) I accept Ms Martin's submissions that Mr Gledhill had failed to consider whether the Regulations were even applicable; he failed to take into account whether the Claimant had had any training on the Regulations and if so, whether his conduct contravened that training; and he failed to take into account the fact that the Claimant had previously covertly recorded PH and informed his manager Mr Cass of his propensity to do so (paragraph 18 above). He also, as a matter of fact, failed to consider whether PH's car camera would have put him in similar breach and did not charge him with a similar offence; but then, nor did PH put forward any footage, so far as the evidence in the bundle goes.

ii) Ms Nicholas-Pethick's evidence on this was also inconsistent. While she accepted in her written witness statement that in the Claimant's file, she could find only that he had received training on use of social media but nothing on data protection specifically, in cross-examination she expressed herself satisfied that the Claimant **had** been trained and that he had also been told that videoing without consent was not permitted under the Respondent's policies. In fact, despite many pages of irrelevant training paperwork, neither the Respondent's data protection policy nor any confirmation of the Claimant's having received training in relation to either social media or data protection was in the bundle. I am satisfied on the balance of probabilities that the Respondent has a data protection policy; a serious breach thereof is one of the non-exhaustive examples of gross misconduct in the disciplinary policy which would suggest at least that a policy exists, but I consider it highly unlikely that it would cover filming colleagues on a personal mobile phone in the staff car park and in any event, there is no evidence before me that the Claimant had received training on it. I find on balance of probabilities that he did not.

iii) While the GDPR themselves would not have been in force at the time in November 2015 when the Claimant told Mr Cass of the earlier covert recording, the Data Protection Act was. If managers

[7] Elsewhere, what is presumably a list of questions that Mr Gledhill intended to (and did) ask includes "Under GDPR consent has to meet the following standards of being "freely given, specific and informed"."

had considered this such a fundamental breach of privacy, it would have been expected that the Claimant would at a minimum have been given guidance to cease doing it, if not a warning, for such breach. Instead, Mr Cass stated that he had listened to the Claimant's recording, and did not suggest that he reprimanded the Claimant at all, nor as I have noted above is there any response in the bundle from HR to the effect that the Claimant should cease his covert recording. Ms Nicholas-Pethick agreed that this would have been expected and that it was at least arguable that a failure in 2015 to tell the Claimant he was breaking the rules could have led him to believe this was acceptable.

iv) I am satisfied however that so far as Mr Gledhill was concerned, what he meant by "breach of GDPR" was the Claimant's act of videoing PH without his consent and against his wishes, to which I return below. I am further satisfied from his witness statement that Mr Gledhill considered this was done by the Claimant with the specific aim of antagonising PH or seeking to get retaliation from him. That is the context and content of the alleged "GDPR breach".

v) In any event, so far as Mr Gledhill was concerned, I find that this was a minor part of the Claimant's overall conduct on that occasion towards PH, all of which Mr Gledhill considered provocative and unprofessional. The specifics of a breach of GDPR as such were certainly not clarified to the Claimant but I find that what Mr Gledhill meant by this was related to the lack of consent, and that it was not unreasonable for him to reject the Claimant's assertion that he had not appreciated PH objected to the filming, based on the fact that early on in the incident PH had knocked the phone out of the Claimant's hand. The Claimant had nonetheless picked it up and continued to film – overtly - for a sustained period.

vi) Mr Gledhill's overall thinking was set out under the heading "reasons for decision" and read as follows: "1) Both parties could have diffused [defused] situation + left scene but didn't; 2) [Claimant] videoed 3rd party for over 5 minutes well aware he didn't have consent – to such extent 3rd party knocked phone from [Claimant] hand – potentially capturing reg plate personal details without consent; 3) After phone knocked from hand CCTV shows CH move towards 3rd party in an aggressive manner + go face 2 face – NO SOCIAL DISTANCING for a period of just over 5 seconds; 6) [sic] Both parties once again could have moved away in their cars but didn't [Claimant] stood his ground 3rd party turned car around and forward faced in front of [Claimant]; 7) [Claimant] continued to video the 3rd party until the 3rd party left scene in breach of GDPR[8]; 8) CCTV clearly shows various other car spaces nearby". I have also noted above (at paragraph 68(a)(vii)) the summing up given by Mr Gledhill at the disciplinary hearing.

[8] This is not happily phrased but I consider it to mean that the Claimant continued to video PH in breach of the GDPR rather than that PH was in breach of the GDPR by leaving

vii) Finally, on this point, Ms Nicholas-Pethick's evidence showed that she considered the Claimant's recording of PH to be unwanted and antagonistic even if the Claimant might not have been aware of the Respondent's data protection policy (as to which I have found he was not and that in any event it would have been unlikely to cover these precise circumstances of filming in the car park, particularly given that the Respondent itself uses CCTV there).

d. Failure to conclude the Claimant's outstanding grievance in advance of the disciplinary hearing (procedural unfairness).

i) In contrast to the accuracy of the submission in relation to consideration of the past history, I accept the submission that the Respondent did not conclude the Claimant's outstanding grievance prior to the disciplinary hearing. This was the grievance which he had submitted in March 2020 (paragraph 51 above) as to which he had originally been told it would not be dealt with because, in terms, it was a litany of minor complaints and the Respondent was focussing on its response to the COVID-19 pandemic. It was resubmitted the day after the incident in question.

ii) That grievance was subsequently heard on 23 February 2021 and the outcome sent to the Claimant on 22 March, rejecting it. The basis for the rejection was two-fold; issues prior to 2019 had been dealt with contemporaneously or through the mediation and would not be revisited, and issues arising since the mediation could not be substantiated. No footage or other evidence was available. Given the short storage life of the CCTV footage that might have been obtained in support of the complaint when it was originally submitted in March 2020, the only element which might have been supported even at that stage was an allegation that on 12 March 2020, PH waved and laughed as the Claimant passed him, repeating this behaviour and sounding his horn several times. However, given the lapse of time, it was all dismissed.

69. Ms Martin's final submission was in relation to the sanction (i.e. reasonableness of the outcome). I have considered whether, taken as a whole, the defects identified render the decision to dismiss unfair. I have concluded that they do not. I have concluded that:

i) The Respondent's decision-makers did take the history between the Claimant and PH into account.

ii) The Respondent (particularly Mr Gledhill as the first decision-maker) failed to watch the Claimant's mobile footage. However, he did watch the car park CCTV and formed his view of what had taken place from that. Further, he invited the Claimant to tell him what had happened during the incident and allowed the Claimant to set out in detail his version of events, including quoting what PH had said to him. The mobile footage would have corroborated those quotes (which Mr Gledhill did not challenge), but

otherwise would have added nothing to Mr Gledhill's understanding of the incident as seen from the CCTV. In circumstances where the Claimant was all too aware of PH's objection to the footage being recorded on his mobile phone, and while, contrary to Mr Gledhill's belief, that footage was certainly relevant, a failure to consider it was not unreasonable or in any event so unreasonable as to put the investigation as a whole outside the band of reasonable responses (*Tesco Stores Limited v S*) for any employer in similar circumstances including being of similar size and resources to the Respondent.

iii) I find that the principal reason for the dismissal was the Claimant's conduct in videoing PH without his consent, continuing to do so after he must have been aware of that lack of consent (because PH knocked the phone out of the Claimant's hand) and then squaring up to PH in breach of social distancing rules. Mr Gledhill's mistaken belief as to the GDPR was, as I have found, a minor aspect of his consideration of the Claimant's conduct overall and not a standalone breach; in any event, that error was remedied on appeal. GDPR breach appears to have formed no part of Ms Nicolas-Pethick's appeal decision but she did uphold Mr Gledhill's findings that the Claimant's conduct taken as a whole, including overtly recording PH on his mobile phone in the face of PH's obvious objection, was both provocative and irresponsible including but not limited to the background of the global pandemic.

iv) Finally, the failure to consider the outstanding grievance prior to the disciplinary hearing was similarly not fatal to the fairness of the latter. I consider it notable that in what I have described as a robust response when it was originally raised (paragraph 51 above) Mr Stewart expressly told the Claimant that if there was any serious escalation in the matter, he was to inform his Line Manager. If the Claimant had genuinely considered the taking of his parking space to amount to a "serious escalation", he had been told what he should do about it but instead took matters into his own hands. As soon as he did then report the matter, it is clear from the bundle that a manager named Andrew (surname not given but possibly Dyer):

a. took the complaint very seriously, encouraging the Claimant to speak and making a detailed file note of what he said;

b. clarified the significance of the "Mutton" bag, which was naturally mystifying otherwise to anyone not familiar with the history;

c. left the Claimant to give a full statement while he went (with a witness) to speak to PH;

d. established that PH did have a bag with Mutton written on it;

e. went quickly to watch and secure the CCTV footage of the car park;

f. suspended PH; and

g. also prompted the investigation into the Claimant's own conduct during the incident, based on the CCTV footage he had seen and the Claimant's admission that he had "faced up" to PH in the car park.

70. Ms Martin contends that the Respondent acted unreasonably in failing to investigate the Claimant's grievances. I have found that this is not an entirely accurate summation of the Respondent's approach to the long history between the two men. I accept that it is the function of an HR department to manage the "human resources" of a business, and of its managers to do likewise; but this was a situation that was perpetuated by two men, both of whom were found to be culpable in the incidents that were proved to have taken place. While it appears no action was taken against PH in relation to the November 2016 incident, this was for a number of reasons including that there was no contemporaneous complaint that was pursued by the Claimant – he was "not comfortable" doing so. When the Claimant later asked for it to be investigated formally, and while there was a witness to the words used by PH as I have set out above, it was PH's case that the Claimant was making faces and walking in a strange fashion, to which he was responding. It was by then not possible to have collected evidence but the Claimant was, not for the last time, advised to raise issues contemporaneously and not "months afterwards" (paragraphs 20 and 33 above). This was advice that it seems the Claimant failed to take. It is also the case that both PH and the Claimant agreed at the mediation with Ms Mudford that the behaviour of which each of them complained would cease and that they would work civilly together. Even at that stage, the Claimant initially cavilled at such agreement, but did eventually accept that re-opening historic allegations was not an option.

71. By contrast, when the Claimant at an early stage did raise Mr Silcock's behaviour towards him, the Respondent investigated promptly and took action, imposing a final written warning on Mr Silcock, even though his behaviour was also said to have been provoked by the Claimant's own conduct (though out of work - paragraph 38 above). It cannot be said that no reasonable employer would have acted this way and hence it was not unreasonable for the Respondent, particularly in the later stages of the employment relationship and given its urgent need to focus on COVID-related issues, to tell the Claimant that it would not investigate issues that were already significantly out of time and which were comparatively insignificant in nature even if they could have been proved (waving, laughing etc). This takes into account the size and no doubt considerable resources of the Respondent.

72. I do not accept that the Claimant was the sole victim in these incidents or indeed that on some occasions he was the victim at all; it was not all "one-way traffic" even though the Claimant relies on allegations of a pattern of continuing harassment by PH over a number of years as giving grounds for his reaction in January 2021. As I have noted above, the only person of the two (Claimant/PH) who was given a warning of any description was the Claimant, and this was after his own childish behaviour of pulling faces and walking in a silly manner, as the Respondent found, to provoke PH; it could reasonably be concluded from that incident that the Claimant was not afraid of PH but was trying on that occasion to

irritate or provoke him. That warning must have expired only six months or so before the incident on 6 January 2021.

73. As to the assertion that the Claimant made, that he had been repeatedly assaulted by PH, I gather he includes in that assertion the action of PH in knocking the Claimant's phone from his hands in the car park on 6 January. I do not hesitate to condemn that action; but it must be said that the Claimant had no business filming PH in the first place, and that was also the Respondent's conclusion which again was not unreasonable in all the circumstances.

74. On the footage that the Respondent's decision-makers saw, the Claimant blocked PH's car from reversing back out and pulled up behind him, rather than driving off to another parking space and promptly reporting what had happened as he had been repeatedly advised. PH did not leave his car for around 23 seconds. The Claimant was at no risk from him at this stage. Once PH did get out of the car, I accept it was within reasonable bounds for the Respondent to reach the conclusion that the Claimant was holding up his phone and filming PH in a manner that was likely to be - and indeed was - provocative; PH knocked it from his grasp. Again, rather than stop filming and go back to his car for his own protection (if he was in fear), the Claimant picked his phone up and started filming again, moving towards PH until the latter backed off some seconds later. The Claimant then returned as I have noted above to stand by his car for several minutes, continuing to film until PH was out of sight.

75. In the circumstances, the Respondent's investigation, while not perfect, was within the band of reasonable responses. Further, Mr Gledhill and subsequently Ms Nicholas-Pethick had a genuine and reasonable belief in the Claimant's misconduct. Misconduct is a potentially fair reason for dismissal and indeed in this case, in line with *Mbubaegbu,* even though it was not gross misconduct in and of itself (as I discuss below) that belief puts the decision to dismiss in the band of reasonable responses. The decision-makers' view was that the Claimant and PH would not change their behaviour in the future. This was a reasonable view based on the past history despite several managers' repeated encouragement to the parties, ignored to the end, to resolve their differences and conduct themselves professionally and like adults. While some employers in the same circumstances might have given the parties a warning but retained them in employment and (for example) moved them both to other sites as Ms Mudford had posited in 2019, it was also open to a reasonable employer to dismiss. The complaint of unfair dismissal is not well-founded.

76. I add for completeness that had I not found the investigation overall to come within the band of reasonable responses, so that it rendered the decision to dismiss unfair procedurally, I would have found that such failures as there were made no difference to the ultimate decision. I have had the advantage, which Mr Gledhill denied himself, of seeing and hearing what was said by PH during the incident. There is no doubt in my mind that he knew very well who he was following and what he was doing when he drove into the car park space that the Claimant was about to use; that even if that had been a legitimate move to make, PH could and should have driven on into the space in front so that he parked facing outwards in line with the car park rules; based on the footage I have seen, PH did not, as he asserted, need to reverse back out to straighten his vehicle up (and indeed, subsequently, he did not do so). His explanation for the "Mutton"

bag - that it was used by his wife to store mutton in the freezer - was a poorly constructed and totally incredible lie. It was clearly something that he used to provoke the Claimant. PH was most certainly not without blame for what occurred thereafter

77. Nonetheless, again, once PH had taken the parking space, and with the numerous other spaces available, it was open to the Claimant to just drive on, park up and, as soon as he got into the gatehouse, report PH for the initial act of taking "his" space. Instead, the Claimant's conduct, standing in what can only be described as an eerie silence for several minutes, filming PH when he manifestly did not want to be filmed, was however unusual at best and the Respondent rightly considered it both provocative and, against the background of lockdown, irresponsible. The Claimant put himself in that position and chose to remain there. It cannot be said that no reasonable employer would find the Claimant's behaviour inappropriate and/or threatening. I do not accept Ms Martin's submission that PH pushed and shoved the Claimant as well as knocking the phone from his hand. Although the phone footage is cut at that point, the mounted camera shows that this part of the incident takes just a moment.

78. Had the Respondent dealt with the Claimant's outstanding grievance(s) before the disciplinary hearing, it would reasonably have dismissed them as it subsequently did and it would have gone on to dismiss the Claimant, even if all the procedural defects had been addressed. In all the circumstances, even if I am wrong on my principal finding that the dismissal was within the band of reasonable responses, I find there would have been 100% *Polkey* reduction to any compensation that might have been awarded if the dismissal was procedurally unfair. As such, in light of my findings that the dismissal was fair, or if not, the outcome would have been the same in any event if such minor procedural unfairness as I have found had been corrected, I do not need to go on to consider contributory fault.

Findings and conclusions on wrongful dismissal

79. As I have noted above however, the approach in a complaint of wrongful dismissal is different from that in an unfair dismissal complaint. In an unfair dismissal complaint, the Tribunal must not substitute its own opinion. In a wrongful dismissal complaint, the Tribunal is required to decide whether the Claimant's conduct was such as to justify his dismissal without notice.

80. I have concluded that it was not. The Claimant's actions on 6 January 2021 were such as to amount to misconduct. They were not such as to amount to gross misconduct. I accept that his actions in continuing to film PH even after the latter had knocked his phone out of his hand, over a prolonged period during which PH spent much of the time in his own vehicle and, as I have said, with the Claimant in silence throughout, were provocative, highly unnecessary and contrary to what the Claimant had been repeatedly told, which was to report any serious escalation to his line management, as well as being in breach of social distancing rules. That the Claimant had been himself initially provoked by PH taking his space is clear; but thereafter, the way that the incident unfolded was very largely down to the Claimant, notwithstanding PH's puerile behaviour with the carrier bag and verbal goading of the Claimant by the references to the Claimant having had a "few drinks" and being "on it" again.

81. PH's language throughout the incident while the Claimant was filming him is however neither highly offensive nor does it contain any of the extreme racist language of which the Claimant accuses him in the past. As the Claimant starts filming him (in the first clip) he asks "Ayup Chris, how you doing? How you doing Chris?" before knocking the phone from his hand. It is the Claimant who then appears to advance towards PH and it is PH who appears to back off first, around nine seconds later. Having been told that the business was focusing on COVID-related matters and mindful of the fact that a national lockdown was in place, it was foolish at best for the Claimant to maintain an engagement which brought him into such close proximity to PH. Further, while the Claimant had not previously been told by management that covert recording was wrong (as he arguably should have been) and/or potentially a data protection breach, on 6 January 2021 his recording was not only overt but, as Ms Nicholas-Pethick observes, the phone was held high so that it clearly demonstrated the Claimant was filming PH, and I consider that this was an attempt to goad PH. I do not accept that the Claimant began filming PH because of the carrier bag with "Mutton" on the side; the bag was towards the back of PH's car on the ground when the Claimant was in the driver's seat of his car – i.e. the width of his car plus a further metre or so was blocking his view of the ground the other side, and when he got out, as has been noted by Ms Nicholas-Pethick, the Claimant was initially holding his phone up filming PH's face, only directing it to the bag as PH walked towards him to knock the phone away. As I have noted in paragraph 61 above, the Claimant told Mr Gledhill that the reason he got out to film PH was PH's failure to park in accordance with the car park policy. That was not the Claimant's business to police. I infer that he wanted to get PH into trouble and/or knew that PH would be provoked, as indeed he clearly was.

82. After the Claimant has picked the phone up again, (in the second clip) PH smiles and it appears that he pretends initially to be filming the Claimant back. He laughs and waves towards the Claimant and says "You're on film with the car anyway. Had a good Christmas? No?" The Claimant remains silent. PH then asks "Had a few drinks? You been on it again? You've not kicked the habit yet?" So PH was goading the Claimant in return, but the Claimant remained where he was and did not get back in his own car, speak himself or cease filming.

83. PH returned to his car for over a minute before completing the manoeuvre that put his car the right way round in the space. The Claimant continued to film him for nearly five and a half minutes, standing silently beside his car throughout and even when PH walked the length of the car park to the gates. I do not accept the Claimant's assertion that he did so because he knew that PH had not finished abusing him or that the last time they met, PH had said he wanted the Claimant and his wife to be gang-raped (as both the Claimant said in answer to my question and Ms Martin contended in her submissions). On the Claimant's account, that had happened over six years earlier and had not been repeated. The content of the conversation on every occasion since 2014 and particularly on 6 January was of an entirely different order, even taking the Claimant's case at its highest.

84. I also do not accept that the Respondent failed to deal with the issues between the men. I remind myself that in 2019, the Claimant agreed to "option 1" as the outcome of the mediation, namely that the two would be civil to one another. Ms Mudford made the position plain as I have set out above: "It stops now – winking, sarcastic comments etc. I won't entertain any more minor complaints about

childish behaviour. [You] need to be professional". PH asked the Claimant "Is that what you want?" and the Claimant replied "Yes". Ms Mudford then said, "OK, let's agree you don't make eye contact, speak etc unless it's necessary for the job". She warned, "If we have to reconvene, I will have to take formal action". From the chronology above, it will be clear that this was far from the first time the two had been told what was expected of them and what the outcome might be if they did not heed the warnings.

85. As I have also set out above (paragraph 50) I have not seen anything to support the Claimant's assertion that Ms Mudford was in effect inviting further complaints or offering a further meeting; on the contrary, she made it clear that she did not want or expect the two to occupy management time any further. While as the Claimant suggests, management and HR officers might reasonably be expected to intervene in disputes as part of their general remit, it was laid out very clearly to both the Claimant and PH that their use of management time was excessive and would not be tolerated further for what was indeed by and large a succession of minor complaints, presented *en bloc* weeks, months or even years after the events alleged. Nonetheless, and despite having been told not to make eye contact and to notify senior managers if the dispute between them worsened, I find that on 6 January 2021, the Claimant did "face up to" PH and that that was wrong; the Claimant himself admitted that he would not behave in that way again. The Claimant also admitted that when he started filming, he did not think that PH's reaction would be, smiling, to ask him if he had had a Happy Christmas, but when it was, the Claimant did not stop filming. By a bare margin, however, taking into account the element of provocation from PH that started the incident, I conclude that the Claimant's actions did not amount to gross misconduct.

86. Accordingly, while the dismissal was fair (the Respondent passed the *Burchell* test, followed a fair procedure when taken as a whole and imposed a sanction of dismissal that fell within the band of reasonable responses given its finding of misconduct), the Claimant's conduct did not amount to a repudiatory breach of his contract of employment entitling the Respondent to dismiss him without notice.

87. In the circumstances, the Claimant's claim of wrongful dismissal is well-founded and succeeds. The Respondent is ordered to pay the Claimant a sum equivalent to his notice pay. That should be capable of calculation by the parties. If it is not, they are ordered to notify the Tribunal within 21 days of the date this Judgment with Reasons is sent to them, so that a Remedy Hearing can be fixed.

Employment Judge Norris
Date: 4 October 2021