EMPLOYMENT TRIBUNALS

Claimant: Mr Stuart Ravald
Respondent: Biffa Waste Management Services Ltd

Heard at: Watford **On:** 21 and 22 March 2024

Before: Employment Judge Dick

Representation
Claimant: Mr Delvin Ravald (the claimant's brother)
Respondent: Mr Oliver Lawrence (counsel)

RESERVED JUDGMENT

The claimant was not unfairly dismissed. The complaint of unfair dismissal is not well-founded and the claim is dismissed.

REASONS

INTRODUCTION

1. The claimant worked for the respondent as a machine/vehicle operator at one of the respondent's waste sites. He was dismissed, for what the respondent says was misconduct, in the following circumstances. On 13 July 2021 the claimant had been issued with a final written warning following an accident on site involving the vehicle he had been driving ("the first incident"). On 17 November 2022, while the final written warning was still active, the claimant was observed operating a vehicle without wearing a seatbelt ("the second incident"). Following a disciplinary investigation and a hearing on 9 December 2022 he was dismissed with immediate effect and paid in lieu of notice. His later appeal against the dismissal was unsuccessful. His claim before the Tribunal is that the dismissal was unfair.

CLAIMS AND ISSUES

2. At the start of the hearing, I discussed the claim with parties. During the discussion, the claimant referred to being discriminated against. Although all discrimination claims had previously been dismissed upon withdrawal at preliminary hearings before other judges, I did explore this. I established that what the claimant meant by discrimination was inconsistent treatment, double standards and favouritism. He did not suggest there was any particular motivation for such treatment and explicitly did not allege that it had anything to do with any protected characteristic within the meaning of the Equality Act 2010 – race/sex/age etc. Although the claimant also relied in some respects on alleged health and safety failings on site, it was also clear to me in all the circumstances that he did not seek to bring a "public interest whistleblowing" claim. I was therefore satisfied that the only claim the claimant wished to pursue was one for unfair dismissal.

3. The issues for me to decide were as follows:

    a. *Reason* The parties agreed that the claimant was dismissed. What was the reason for the dismissal?
        i. The respondent said "cumulative misconduct" – in short, operating a compactor vehicle without wearing a seatbelt and bypassing a warning system (by engaging the seatbelt but putting it behind his back rather than over his body) having previously been given a final written warning.
        ii. The claimant suggested there might have been other reasons for the dismissal, perhaps including the fact he had complained about being bullied by a colleague.
        iii. The Tribunal would have to decide whether the respondent genuinely believed the claimant had committed misconduct.
    b. Fairness
        i. Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating the above reason as sufficient to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair would be in accordance with equity and the substantial merits of the case. It would decide, in particular, whether:
            1. there were reasonable grounds for that belief;
            2. at the time the belief was formed the respondent had carried out a reasonable investigation;
            3. the respondent otherwise acted in a procedurally fair manner;
            4. dismissal was within the range of reasonable responses.
        ii. The claimant's position was that:
            1. There was procedural unfairness in that he was denied representation at the disciplinary hearing and the appeal.
            2. It was unreasonable for the respondent to have taken the final written warning into account as the original decision had been flawed.

3. In any case, the decision to dismiss was disproportionate, particularly in light of the mitigation available to the claimant and the claimant having raised concerns about how the seatbelt worked and because the respondent had not treated other alleged breaches of health and safety seriously.

c. *Contributory fault and "Polkey"* If he was unfairly dismissed, did the claimant (as the respondent contended) contribute to his own dismissal and/or would he nevertheless have been dismissed even if a fair process had been followed. If so, should any damages due to the claimant be reduced to reflect this.

d. [Other aspects of remedy would be dealt with once the Tribunal had come to conclusions on the above questions.]

4. There were no issues as to the correct identity of the parties, whether the claim was presented in time or whether the claimant had the required two years' service.

PROCEDURE, EVIDENCE etc.

5. The claimant was represented by his brother, though he did also contribute personally during the course of the above discussions and in later submissions. I did however insist the only one person question the witnesses. The claimant was able to give instructions in writing to his brother during that part of the process and I did allow him to give oral instructions where that was not too disruptive; otherwise, the claimant was able to speak to his brother during the regular breaks which were taken. Though the claimant had told me that he might have a little trouble hearing, in the event he was able to hear everything. His brother was also available to help should the claimant have needed any assistance with the paperwork in the case.

6. The paperwork consisted of witness statements, an agreed bundle and a supplementary bundle prepared at the instance of the claimant which the respondent agreed could also go into evidence. I made sure everyone had copies of the bundles. I explained the procedure to the parties and told them that I would read the witness statements but they should not assume that I had read any of the documents in the bundles unless I was specifically referred to them in the course of evidence or submissions.

7. Before the evidence was called, I heard an application by the claimant to allow into evidence a number of supplementary statements he had prepared after the deadline for exchange of statements. The respondent objected to this application. I allowed the application, giving oral reasons for my decision. This written record of the decision is not intended to be written reasons, which were not requested at the hearing and so will only be provided if a written request is presented by either party within 14 days of the sending of this document.

8. After taking time to read the statements, I heard sworn evidence from the witnesses. As the burden was on the respondent to prove the reason for dismissal, the respondent's witnesses went first. In each case the usual procedure was adopted, i.e. their written statements stood as their evidence-in-chief and they were then cross-examined. The witnesses were, in order of their appearance:
    a. Mrs Rachel Hatcher – the respondent's National Operational Support Manager.
    b. Mrs Karin Dacosta – a commercial manager for the respondent.
    c. Mr John Devine – the respondent's General Regional Manager for the North.
    d. Mr Stuart Ravald – the claimant.

9. I then heard submissions, first on behalf of the respondent and then on behalf of the claimant, having indicated that that way round would be best so as to give the claimant's brother, who had no experience of conducting Tribunal proceedings, the opportunity to listen to the respondent's submissions before making his own. I would like to record here the Tribunal's thanks to the claimant's brother for his assistance during the course of the case. At the conclusion of submissions, I indicated to the parties that I would give a reserved judgment.

FACT FINDINGS

10. I find the following facts on the balance of probabilities. I do not seek to address every point in dispute between the parties, only those which are relevant to the issues that the Tribunal must consider in order to decide whether the claim succeeds or fails. In fact, many of the facts were not disputed in this case. Where that was so, I simply record those facts. Where there was a dispute between the parties which I needed to resolve, I indicate the nature of the dispute and give reasons for my findings. For some (but not all) of the points which I did not need to resolve, I indicate that specifically below and explain why.

11. The Claimant was employed from 19 February 2020 as a machine operator at the respondent's Eye landfill site. A significant part of his work involved operating a Caterpillar 826K compactor machine ("the compactor"), a large and heavy vehicle. The claimant had been properly trained in the machine's operation and there were no concerns about his competence. The compactor, as its name suggests, compacted freshly tipped waste on the site.

12. Part of the claimant's role driving the compactor was to direct other traffic (i.e. tipper trucks dumping waste) onto the site by radio. The claimant had two radios in the cab, each of which used a different channel. Channel 1 was specifically for the compactor operator to direct site traffic and had to be kept clear unless being used for that purpose. Channel 2 was used for general site communication. The claimant was concerned that Channel 2 was used inappropriately, for frivolous and sometimes insulting communications, which he found distracting. The respondent's view, as expressed for example by Mrs Hatcher, was that even communications which were not about work served a

useful purpose (so long as they were not inappropriate for the workplace) in allowing employees working alone in vehicles all day some "human interaction". It is of course possible for the claimant to have reasonably held the view that the communications were distracting and for the respondent to have held the view that the communications served a useful purpose. I take the view that resolving any factual dispute about whether there was an inappropriate volume or type of communications on the channel – i.e. deciding whether or not the claimant's complaint was justified – would not assist me in deciding whether the claimant was unfairly dismissed, because I conclude below that his complaint about the issue, whatever its merits, had no influence on the decision to dismiss him.

13. On 18 June 2021 the claimant was involved in the first incident. He reversed the compactor machine and collided with a stationary skip vehicle. No injuries or damage were caused. Following a disciplinary process, the claimant was found to have committed gross misconduct and was given a final written warning, which was still active at the time of his dismissal. As will become apparent below, the respondent took that warning into account when coming to the decision to dismiss the claimant. As part of his case before this Tribunal, the claimant challenged both the fairness in having been given the final warning and the fairness in the respondent then taking it into account when it made the later decision to dismiss him. It was therefore necessary for me to make some findings about the first incident and the disciplinary process which followed it.

14. On the day of the first incident, the claimant had received an extremely distressing phone call from a close family member. In order to take the call, he had turned down both his radios. After taking the call, he forgot to turn his radios back on. Another vehicle came to be directed on to the site. Usually this would have been done by the claimant, so he was not aware that there was another vehicle nearby – had, as is likely did in fact happen, anyone tried to inform him of the vehicle's presence on the radio, he would not have heard the warnings. The claimant reversed the compactor and made contact with the other vehicle.

15. On 8 July a disciplinary meeting, chaired by Mrs Hatcher, took place, the participants having viewed CCTV footage of the incident beforehand. During the course of the meeting, the claimant explained why his radios had been off. Although throughout the course of this case the claimant referred to the matter as a minor collision, which is right in the sense that no damage or injury were caused, I also find that the claimant was right when he accepted during the disciplinary hearing that he had made a mistake which could have been fatal (had, for example as suggested by the witnesses for the respondent, the other driver been out his cab). The claimant also accepted in that hearing that he had not looked in his 360-degree camera – which, indeed, he said, he never used (as he explained in his evidence to me, he preferred another of the cameras). I also find as a fact that the respondent had a genuine belief that, as Mrs Hatcher and Mr Devine told me, the claimant had reversed a long distance in one go, despite the proper procedure being only to reverse short distances. Although the claimant challenged Mr Devine's assertion that he had reversed 40 metres, the claimant was unable to say when I asked him how far he claimed

to have reversed – in other words I saw no evidence to suggest, even in hindsight, that the respondent could reasonably have formed any different view.

16. After taking time to consider the matter, Mrs Hatcher formed the view that the incident was sufficiently serious to have resulted in the claimant's dismissal. However, taking into account the remorse the claimant expressed and the mitigating circumstances (i.e the personal reasons for turning off his radios, although that alone was a breach of health and safety requirements), Mrs Hatcher considered that a final warning, accompanied by requirements to do refresher training, was appropriate. The final written warning, to have effect for 18 months, was sent to the claimant on 13 July 2021. I find as a fact that Mrs Hatcher's reasons for giving the final warning were genuinely as I have just set out and that she made the decision she did in good faith. I come to this conclusion having heard evidence from her and taking into account what seems to me the inherent reasonableness of her decision on the facts known to her (and accepted then by the claimant).

17. I further find that anybody else reviewing the first incident and the disciplinary outcome would properly have concluded that the outcome had been decided upon in good faith and was a reasonable decision. In light of the admissions the claimant made at the disciplinary hearing, it is impossible to see how any such person might have come to any other conclusion. Although it was part of the claimant's case before the Tribunal that others were to blame for directing the other vehicle onto the site, that was clearly a view he reached in hindsight – he did not express it at the time and chose not to appeal the decision to issue a final warning. It may well be, as the claimant said, that he chose not to appeal as he was just grateful to have kept his job. But that could not change any view that the respondent might reasonably have taken of the incident later. Even if others may also have been at fault, the fact was that the claimant had reversed the vehicle without looking properly, and had admitted doing so. I also accept Mr Devine's evidence to the effect that other employees on other sites had been dismissed for similar incidents – a reflection of the fact that two reasonable decision makers may reasonably take different views.

18. During the course of that first disciplinary hearing, the claimant raised a complaint about being bullied by other employees. Mrs Hatcher formed the view that this was unrelated to the disciplinary issue before her, and I accept having heard her evidence that her view was formed in good faith and was reasonable – again, it is difficult to see in the circumstances how any different view could reasonably have been formed. For the same reasons, I also accept her evidence that the fact the claimant had made the bullying complaint did not affect her decision on the disciplinary issue. The complaint of bullying was investigated separately, and upheld in part. To paraphrase, the respondent took the view that the bullying was six of one and half a dozen of the other, but agreed that the claimant had been inappropriately discouraged from raising a formal complaint by one person. I was not presented with any evidence that suggested that this conclusion was unreasonable. The claimant accepted this resolution, choosing not to appeal. None of the evidence I heard was capable of leading me to the conclusion that this complaint, which the respondent would reasonably have viewed as resolved (see below) had any bearing upon the

decision over a year later, to dismiss the claimant – I find as fact that it did not. I make the same finding as to the claimant's appeal against the decision to dismiss him (see also below).

19. Each day, before the claimant used the compactor, he would undertake a number of checks and would complete a check sheet, on which he could log any concerns (including about the seatbelt). A number of these check sheets were in the bundle of evidence.

20. I accept the evidence called by the respondent, which the claimant did not seriously dispute, that there were dangers inherent in a compactor operator not wearing a seatbelt. Although the machines move slowly, and so there is little risk of a direct injury to the operator from impact, the cab is larger than that of a car and any collision, for example, might knock the driver from their seat, causing injury indirectly. The driver would also no longer be in control of the vehicle in such circumstances, causing obvious danger. I also accept the respondent's witnesses' evidence that they took a breach of the requirement to wear a seatbelt seriously; they took this view for the reasons about safety which I have just set out. I also accept that the claimant genuinely held a belief (which he continues to hold) that not wearing the seatbelt was not a particularly serious matter.

21. The compactor had a light on top that illuminated to show anyone observing that the operator's seatbelt was engaged. (As Mr Devine explained, this was because, due the height of the cab, an observer doing checks would not be able to see whether the operator had their seatbelt on without climbing into the cab to see.) At some point before the second incident, Richard Hill, the respondent's site manager, noticed that the claimant had not been wearing his seatbelt. All were agreed that Mr Hill dealt with the matter by way of an informal warning. While recollections differed about the precise terms of the warning, the significant point is that the warning was given and that the respondent was aware of the circumstances of it by the time the second incident was investigated (indeed, as Mrs Hatcher explained, the details emerged during that investigation).

22. It came to the respondent's attention that on 17 November 2022 the claimant had (again) been operating the compactor without wearing the seatbelt. He had engaged the seatbelt without pulling it over his body, and was sitting on it. Because the seatbelt was engaged, the light described at para 21 above was illuminated, giving any observer the impression the claimant was wearing the belt, when in fact he was not. The claimant accepted that all of this this had happened from the outset of the respondent's investigation and during the course of this Tribunal claim. In his evidence the claimant suggested that it was not his intention to mislead, but he accepted that he had deliberately placed the belt as he had, and I find as a fact that he did that in order to illuminate the light, so that someone outside the cab would not know he was operating the compactor without wearing a seatbelt. There can be no other reason for him having done so and indeed he offered no such reason.

23. It was the claimant's case that he had initially been working with his seatbelt on when he needed to get out and urinate. He did this, and when he got back in the cab, he accepted, he had engaged the seatbelt and sat on it, so that it was not covering him. He later got out of the compactor and someone noticed that the seatbelt light on top of the compactor was still on. I accept the claimant's account. I also accept the claimant's evidence that on occasion he complained about the seatbelt informally, expressing his frustration over the radio; I note that he did not suggest he made any such complaint on 17 November. It may well be the case that, as the claimant said, the seatbelt was easier to pull out fully if it was on level ground (as it would be when tested – see below) and that the compactor may not have been on level ground when he got out to urinate. However, even had he raised that particular point during the disciplinary process (and it does not appear that he did), it would have remained the case that he had other options than to continue to operate the compactor without wearing the seatbelt, and there would still have been the point that he engaged the belt and sat on it so as to illuminate the light.

24. An investigatory meeting took place on 18 November 2022, chaired by Mr Nathan Lee, the respondent's Operations Manager. Mrs Hatcher took notes. The notes show the claimant accepting that he had checked his seatbelt in the morning and that there was no problem with it and accepting also that he only used his seatbelt about 70 to 80 % of the time. In his evidence to me, the claimant maintained, despite not challenging the accuracy of Mrs Hatcher's note, that he had only ever failed to wear his seatbelt twice – once before the informal warning and once on 17 November. I did not find it necessary to make findings on whether or not what he told me was correct. What was relevant for the purposes of my decision was whether the decision makers for the respondents at the disciplinary and appeal stages genuinely and reasonably believed that the claimant had admitted to not using his seatbelt 70 to 80 % of the time. I find that that they did so believe, in light of the evidence I heard from the respondent's witnesses, the clear notes from the meetings and the lack of any explanation from the claimant as to how that could have come to be noted if he had not said it. Following the investigatory meeting the claimant was suspended (on full pay) pending the outcome of the investigation. At the meeting it had become became clear that Mr Lee might be a witness to a material fact (in fact, the circumstances surrounding the informal warning referred to above at para 21) and so the investigation was taken over by Mrs Hatcher.

25. As part of the investigation the respondent obtained a witness statement from another employee who operated the compactor, which was in evidence in the bundle. The other employee said that the seatbelt was "temperamental" but usable. I accept the claimant's evidence that, in general, that employee might have had a little less trouble with the seatbelt as he is smaller than the claimant. The claimant explained in evidence that the difficulty he had with the seatbelt was not that it could not be pulled out at all (or else of course he would not have been able to fasten it then sit on it) but that he sometimes had trouble pulling it out as far as it needed to go to cover him. The other employee also confirmed that Finnings (the supplier and servicer of the compactor) had checked the seatbelt and confirmed that it was fine. The check sheets produced in evidence

showed that operators (in fact, the claimant) had noted concerns about the seatbelt on numerous occasions between April and November 2022; on four of those occasions, the respondent's managers had checked and found no fault. I accept the claimant's evidence that just because they experienced no difficulty, that did not mean that he did not – I accept that the claimant did from time to time have difficulty in fastening the seatbelt. I do not accept however (nor did the claimant suggest it) that it was ever impossible for him to fasten the belt around himself. It is however also right to say that the contractors who were responsible for the maintenance of the compactor repeatedly found that the seatbelt was operating properly. While the claimant said that that was never conveyed to him, I cannot see how that materially affects my decision in this case. Ultimately I accept that those making the disciplinary and appeal decisions were genuinely of the view, on the basis of the evidence before them, that the seatbelt might have been temperamental but that it worked.

26. Mrs Hatcher held another investigatory meeting on 25 November 2022. During that meeting the claimant said that he had "sat on" the seatbelt on previous occasions and agreed that Richard Hatcher had warned him not to do this. During that meeting the claimant raised a number of other concerns. These were also relied upon by the claimant before this Tribunal in support of his claim. I deal with these in more detail below, but in short they were:

    a. The bullying complaint referred to above.

    b. Concerns about the use of the radios for non-operational purposes – see above.

    c. For a period, there was no fire suppression system in place in the compactor.

    d. For three weeks the claimant had been asked to operate a different vehicle, a bulldozer, with only one day's training, which he thought inadequate.

    e. On 13th November 2022 the claimant had been driving past the site (outside of working hours) and noticed a fire. He alerted the fire brigade and then assisted them, exposing himself, he considered, to danger.

    f. He had also had to drive a vehicle with a damaged seat, jury-rigged with a reel of rope to allow him to see out, and had noticed a damaged headlight on a vehicle which had not been replaced.

    g. Regarding the first incident, which led to the claimant's final written warning, the same week another driver had been involved in a more serious incident but had not been disciplined.

27. The claimant made clear to Mrs Hatcher that he was not formally raising these points as grievances, but was drawing her attention to them on the basis that they were (in his view) more serious breaches than his own. I find, on the basis

of Mrs Hatcher's evidence, that she discussed these concerns with the claimant (in a separate meeting) and investigated them properly – they were in my judgment taken seriously and the claimant was in due course provided with a written response. I also accept that Mrs Hatcher decided in good faith that these issues were best investigated separately rather than as part of the disciplinary investigation into the claimant's actions.

28. Following Mrs Hatcher's investigation the matter was referred to Mrs Dacosta, who had experience of site management but no personal knowledge of the claimant. Mrs Dacosta was provided with documents complied in the course of Mrs Hatcher's investigation and was made aware of the circumstances of the final written warning previously issued to the claimant.

29. Mrs Dacosta chaired a disciplinary hearing on 9 December 2022. During the course of the hearing the claimant challenged certain details of the circumstances leading to the informal warning (see para 21 above) but agreed that he had been told not to operate the compactor without a seatbelt. The check sheets were considered, including the claimant's entries I refer to above, and it was noted that the claimant had made no entries about the seatbelt on the week commencing 14 November. (This would include the day of the second incident and the day after it.) In his evidence to me the claimant said that by the Friday morning, when the entry was made, he had forgotten about the problem with the seatbelt as he had not yet found out that he was under investigation. I accept that, but in my judgment it indicates that any problem with the seatbelt was likely minor. In the disciplinary hearing, the claimant said that the belt was temperamental and apologised repeatedly for his mistake. In the hearing before me, the claimant characterised this as an expression of remorse. In contrast, I find that Mrs Dacosta was entitled to conclude, as she in fact did, that the claimant's repeated characterisation of the incident as a minor incident (which continued during the course of the Tribunal hearing) demonstrated the opposite – a lack of real remorse, characterised by a fundamental denial that the mistake he had made was a serious one. To be clear, I find that the claimant's view that it was a minor mistake/incident was just as genuine as Mrs Dacosta's view that it was considerably more serious than that. Ms Dacosta adjourned the hearing for a short time to allow her to consider her decision.

30. Mrs Dacosta's evidence was that in making her decision she took account of the following: that the other employee had said the seatbelt was temperamental but that it worked; the reports showing that the seatbelt did in fact work; the fact that the claimant had previously admitted bypassing the light; and what she saw as the lack of remorse, leading her to conclude that the claimant did not appreciate the seriousness of the situation and was likely to repeat his actions given that he had been informally warned before. She decided that the claimant's conduct was misconduct, but not gross misconduct. (If anything, having seen the respondent's disciplinary policy, that decision was in my judgment somewhat generous to the claimant.) Given the existence of the live final written warning, Mrs Dacosta concluded that the misconduct warranted dismissal. I accept her evidence as I have just set it out, having heard the witness on oath, finding her honest, credible and reliable, and taking into

account the point that, in my judgment, the decision she made was not unreasonable in light of the facts known to her.

31. When the decision to dismiss was conveyed to the claimant there was no dispute that he made it clear, and in no uncertain terms, that he disagreed with the decision. I do not accept the submission made on behalf of the respondent that the manner in which the claimant expressed that disagreement (however trenchantly) assists me in my decision on this case.

32. I reject the suggestion put in cross-examination on behalf of the claimant that Mrs Dacosta did not approach her decision with an open mind. The evidence before me suggests that she approached her task in good faith and genuinely regarded her decision as all-but inevitable in the circumstances. I also accept her evidence that she only became aware of the bulk of what she characterised as the claimant's complaints of "neglect and favouritism" (i.e. the points set out above at para 26) after making her decision, as part of the preparation for this Tribunal case, and that even had she been aware of these her decision would have been the same. The complaints therefore played no part, in my judgment, in her decision to dismiss the claimant.

33. The claimant appealed against the decision to dismiss him. An appeal hearing was conducted by Mr Devine, who had no prior knowledge of the events or of the claimant. As well as the documents relating to Mrs Hatcher's investigation, Mr Devine also had Mrs Hatcher's note about the concerns raised by the claimant (para 26 above). Mr Devine's evidence about his decision was as follows. At the hearing Mr Devine discussed the case with the claimant. He considered that the claimant's assertion that he had not "purposely" connected the seatbelt behind his back showed that he was "not taking ownership of his actions". He considered the claimant's submissions: that his final warning had been approaching an end; that when he had been informally warned it had not been treated as a serious matter so it should not be so treated now; that there were double standards as to health and safety failings [i.e., the points at para 26 above]; that someone who admitted a mistake should get a warning. Mr Devine felt that the claimant had already had a warning. Like Mrs Dacosta, he too formed the view that the claimant saying sorry did not amount to an expression of true remorse. The other points about health and safety raised by the claimant had no bearing upon the claimant's decision to bypass the warning light. Mr Devine took account of the final written warning, the failure to respond to the informal warning, concluding that the claimant's attitude to health and safety was below the required standard, and that there would be a serious risk of a repeat should the claimant be permitted back on site. Mr Devine upheld the original decision to dismiss. He did not consider, contrary to what the claimant suggested, that the original investigation and decision had been rushed or inadequate. In his oral evidence, Mr Devine stressed that it was not just the claimant's failure to wear a seatbelt which concerned him, but what he considered to be the deliberate attempt to hide it by bypassing the mechanism. I accept all of Mr Devine's evidence as I have set it out above and in particular I accept that he made his decision in good faith based only upon the factors which he said he took into account. I reject any suggestion to the contrary made by on or on behalf of the claimant. I found Mr Devine to be an honest, credible

and reliable witness on the basis of my own view of his oral evidence and also because his account of events is consistent with the undisputed facts – as with Mrs Dacosta, the approach to the decision, and the decision he made, were in my judgment reasonable in the circumstances.

34. Regarding the claimant's concerns set out at para 26 above, in general I consider that there is no need to make detailed factual findings about these, given that I have already found that (i) the fact that the claimant raised the concerns did not influence the decisions of Mrs Dacosta and Mr Devine and (ii) the complaints were properly investigated and dealt with by the respondent. However, given that it was the claimant's case that the issues should have been taken into account (i.e. on the basis that since there were more serious failings, his misconduct did not merit dismissal) I do consider it necessary to make the following limited findings:

    a. At p 135 of the bundle is an email from the claimant, sent after raising the concerns about bullying during the disciplinary process for the second incident, saying that he had sorted the issues out for himself.

    b. I need make no further findings about the claimant's concerns about the use of the radios for non-operational purposes – see above.

    c. The parties agreed that for a period, there was no fire suppression system in place in the compactor. The claimant made clear at the investigatory meeting that it was not something which he "had an issue with". I also heard evidence from the respondent's witnesses that contingency measures had been put in place; despite challenge to this, to a limited extent, in cross-examination, I accept those witnesses' evidence. I note that the claimant made no complaint about this point until he was subject to disciplinary action.

    d. The respondent agreed that for three weeks the claimant had been asked to operate a different vehicle, a bulldozer, with one day's training. I accept Mrs Hatcher's evidence that the respondent considered this training to be adequate for an experienced machine operator like the claimant. Although the claimant had not taken a formal test, it was necessary for him (like any learner driver) to gain experience before doing so.

    e. On 13th November 2022 the claimant had been driving past the site (outside of working hours) and noticed a fire. He alerted the fire brigade and then assisted them, exposing himself, he considered, to some danger. I accept that the claimant genuinely felt that, to paraphrase, he got little thanks for his efforts.

    f. During the course of his employment, the claimant did drive a vehicle with a damaged seat, jury-rigged with a reel of rope to allow him to see out. He also noticed a damaged headlight on a vehicle and I accept his evidence that it was not replaced for some time. Although Mrs Hatcher could not say whether or not this had happened, I accept

her evidence that, if it had, in practice this would have caused little difficulty since the vehicle was used in daylight.

g. The respondent accepted that at around the time of the first incident there was another collision. In one aspect, I find, the incident might have been regarded as more serious than the first incident (in that damage was, as the claimant told me, in fact caused). The collision was between one of the respondent's vehicles, driven by one of its employees, and another vehicle driven by someone not employed by the respondent. The respondent agreed that its driver had not been subjected to disciplinary action. The reason for that, Mrs Hatcher told me, was simply that the respondent had fully investigated and formed the view that its driver had not been responsible; the visiting driver had admitted hitting his vehicle. Mrs Hatcher said that she had looked into the matter after the claimant raised it during the disciplinary procedure and I accept Mrs Hatcher's evidence on the issue. While I also accept that the claimant may now have a different view about who was in fact at fault, that seemed to be a view formed later, at least partly on the basis of what he had been told by others.

35. In his oral and written evidence the claimant referred to various other alleged breaches of health and safety. I need not set those out in detail here as there was no suggestion that the claimant reported them to the respondent, so they were not taken into account by Mrs Dacosta and Mr Devine. Their only potential relevance would be to the claimant's argument that as there were other breaches, his own should not have been taken so seriously. I address this point in my conclusions below. A similar point is that as part of his claim the claimant said that "scraper bars" were (in effect) not operational for some of the time he used the compactor. I saw no evidence that the claimant ever made a formal complaint about this and I accept Mrs Hatcher and Mr Devine's evidence that the respondent was of the view, having raised the matter with Finnings and the compactor's manufacturers, that it was safe to use the compactor without scraper bars.

36. The claimant also alleged that another employee had taken material off the site (i.e stolen from the respondent) but had not been disciplined. I do not consider it necessary to make findings about that. Even if such conduct were proved, it is so far removed from the claimant's conduct which is the real issue in this case that it is in my judgment irrelevant. In deciding this, I take account of Mrs Hatcher's evidence that to her knowledge the employee had actually asked permission from a manager.

37. I reject the wider suggestion, put explicitly to the respondent's witnesses, that there was some sort of conspiracy amongst the respondents' employees to have the claimant dismissed. No evidence was adduced which could in any way support such a claim, nor do the facts which I have found (most of which were not in dispute) naturally lead to such an inference.

38. The claimant did not take any issue with the disciplinary procedure adopted by the respondent, save for what he said was the denial of representation at the

disciplinary and appeal hearings. There was no dispute that the claimant had been made aware of his right to be accompanied at both meetings. In both cases, the lack of representation was raised with the claimant by the person chairing the process and the claimant did not ask for the hearings to be postponed. The claimant's evidence was that he had asked one person, a manager, to accompany him. For reasons that were not made clear to me, that person declined. The claimant then, I find, simply assumed that no other colleagues would have been willing to help him without actually asking them. It is clear to me from the notes in evidence that the claimant was able to get his case across well at the disciplinary and appeal hearings.

39. At the conclusion of the Tribunal hearing I was referred by the claimant's brother to four particular WhatsApp messages, sent to a group of which C was a part, by the person who he says bullied him. I was not assisted in making my decision by these messages. The messages contain complaints about the performance, rather than the safety, of the compactor. One message appears to be a reference to the writer's desire to remove the scraper bars from the compactor. Another contained a complaint about traffic on site. It was also suggested in cross examination to the respondent's witnesses that there was sometimes heavy traffic on the site due to only one of two weighbridges being operational. I accept that there was traffic on site at times, but I do not accept that that has any relevance to the issues I had to decide.

LAW

40. Section 94 of the Employment Rights Act 1996 "ERA" confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the employer (see s 95 ERA), but in this case the respondent admits that it dismissed the claimant.

41. S 98 ERA deals with the fairness of dismissals in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within section 98 (1) and (2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

42. So far as the first stage of fairness is concerned, S 98 ERA provides, so far as is relevant:

> (1) 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, and
> >
> > (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the

dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it— …

(b) relates to the conduct of the employee…

43. So in this case it is for the respondent to prove that the principal reason for the claimant's dismissal was misconduct.

44. The second stage of fairness is governed by s 98 (4) ERA:

> (4) … 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.

45. In deciding fairness, I therefore must have regard to the reason shown by the respondent and to the resources etc. of the respondent. In general, the assessment of fairness must be governed by the band of reasonable responses test set out by the EAT in *Iceland Frozen Foods Ltd* v *Jones* 1983 ICR 17. In applying s 98(4), it is not for me to substitute my judgment for that of the employer and to say what I would have done. Rather, I must determine whether in the particular circumstances of this case the decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer.

46. In a misconduct case, the Tribunal starts with the test set out by the EAT in *British Home Stores Ltd* v *Burchell* 1980 ICR 303. Broadly, the question is whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must show that:
    a. it believed the employee guilty of misconduct;
    b. it had in mind reasonable grounds upon which to sustain that belief; and
    c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

47. In considering (b) and (c) above it is however important to note that the *Burchell* test was formulated when the burden was on the employer to prove reasonableness – now that is no longer the case. The *Birchall* test also applies to the question whether it was reasonable for the employer to treat the reason as a sufficient reason to dismiss (although again the burden is not on the employer at that stage). In *Sainsbury's Supermarkets Ltd* v *Hitt* [2003] I.C.R. 111 the Court of Appeal held that the range of reasonable responses approach applies to the conduct of investigations as much as it applies to other

procedural and substantive aspects of the decision to dismiss for a conduct reason.

48. By operation of s 207 Trade Union and Labour Relations (Consolidation) Act 1992, any failure to take account of the ACAS Code of Practice on Discipline and Grievance Procedures will be relevant to the issue of the fairness of the dismissal. In summary, the Code provides that employers must normally:
    a. carry out an investigation to establish the facts;
    b. inform the employee of the problem;
    c. hold a meeting with the employee to discuss the problem;
    d. allow the employee to be accompanied at that meeting;
    e. decide on the appropriate action;
    f. provide the employee with an opportunity to appeal the decision.

49. It will also be relevant whether the employer followed their own procedures. Other points relevant to whether the employer acted within the band of reasonable responses may include: the nature of the allegations, the position of the employee and the size and resources of the employer. A meticulous investigation of the kind that would be done in a criminal enquiry is not required.

50. During the course of the hearing, I drew the parties' attention to *Davies* v *Sandwell Metropolitan Borough Council* [2013] EWCA Civ 135 and made sure the claimant and his brother had a copy and time to read it. In *Davies*, the Court of Appeal held that it is legitimate for an employer to rely on a final warning when deciding whether to dismiss an employee, provided that the warning was issued in good faith, that there were at least *prima facie* grounds for imposing it and that it was not manifestly inappropriate to issue it. Of course, even if those points are made out, i.e. the employer is *entitled* to take the final warning into account, *Davies* does not say that any dismissal based on the warning will automatically be fair – it will still be for the Tribunal to apply the fairness test in s 98(4) ERA in all the circumstances.

51. In the event that the dismissal was unfair, I would go on to consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in *Polkey* v *AE Dayton Services Ltd* [1987] UKHL 8.

52. I would also go on to consider whether any adjustment should be made to the compensation on the basis of "contributory fault", applying s 123(6) ERA: "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the [claimant], it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

CONCLUSIONS

53. On the basis of my factual findings above, the respondent has in my judgment proved that the reason for the dismissal was the claimant's misconduct. Having

accepted in particular the evidence of Mrs Dacosta, I find that this was in fact the only reason for her decision to dismiss the claimant. I find that neither the concerns which the claimant had raised as set out above at paragraph 26, nor any other such concerns, played any part in her decision. The same applies to Mr Devine's decision on appeal. In short, the respondent (i.e. Mrs Dacosta and then Mr Devine) genuinely believed the claimant had committed misconduct.

54. I move on now to the question of fairness, applying the second and third limbs of the *Burchell* test. The respondent (again both Mrs Dacosta and then Mr Devine) had in mind reasonable grounds upon which to sustain their belief – the claimant had admitted the misconduct and no other reasonable conclusion could in my judgment have been reached. The claimant knew he had to wear a seatbelt, and even if he encountered some difficulty in fastening it around himself, it was not impossible (and even if it was, he did not have to carry on). He took active steps to conceal the fact that he was not using a seatbelt.

55. At the stage at which the belief was formed, in my judgment as much investigation as was reasonable had been conducted, particularly in light of the fact that the claimant did not dispute the essence of the case against him. The respondent established the facts during an investigation, gave the claimant the opportunity to explain his conduct and took due account of the explanation. No material facts were raised at the hearing before me that should have been, but were not, covered by the investigation. Even had the claimant's concerns (summarised at para 26 above) been relevant – and in my judgment they were not – those concerns were investigated. Even in light of the respondent's considerable size and resources, the investigation was plainly proportionate in my judgment.

56. For the reasons set out at paragraph 38 above, I find that the claimant's one criticism about the fairness of the disciplinary and appeal procedures is not made out – both were procedurally fair in my judgment. The respondent followed the steps required by the ACAS guidance as set out above at para 48.

57. The final broad question for me is whether it was fair for the respondent to have treated the misconduct as grounds for dismissal, taking into account the band of reasonable responses test. For the following reasons, I find that dismissal was within the band of reasonable responses open to a reasonable employer.

58. The respondent was entitled in my judgment to take into account the final written warning issued after the first incident. On the basis of my findings above, it was issued in good faith, there were at least *prima facie* grounds for imposing it and it was not manifestly inappropriate to issue it. Indeed, I accept Mr Devine's suggestion that if anything the final warning was a lenient response, even taking into account the significant personal mitigation offered by the claimant. The deliberately turned off his radios (albeit for understandable reasons), forget to put them back on and then reversed a substantial distance without looking properly, causing an accident which could have had (though thankfully did not have) serious consequences. Even if the respondent had treated another employee leniently on the same week for a similar incident, that could not in my judgment have made its treatment of the claimant inappropriate,

but in any case I am satisfied that there were good reasons for the difference in treatment.

59. Being entitled to take the written warning into account, I find that in the circumstances of this case it was perfectly appropriate for the respondent to have taken it into account in the way it did when reaching the decision to dismiss. It was clear to me that Mrs Dacosta (and Mr Devine on appeal) took all relevant points, and not only the existence of the final written warning, into account. I find that not only were the reasons they gave genuine, but that the decisions they made were, at the very least, within the band of reasonable responses. I do not accept that the claimant's suggestion that he was near the end of the period of the final warning should have had a material impact – indeed, the respondent would still have been entitled to take account of the first incident even after that period. There was a fundamental difference of opinions, honestly held, between the claimant and the respondent. The claimant believed that not wearing a seatbelt was a minor matter, for which he deserved another chance (which, after the final written warning and the informal warning, would have been a fourth chance). The respondent believed that not wearing a seatbelt was a serious matter which was aggravated by the claimant's failure to respond to previous warnings and failure to accept that it was a serious matter. In my judgment the respondent's belief was very clearly one which a reasonable employer was entitled to hold. It was also well within the band of reasonable responses for the respondent to have considered that the claimant's claims of other breaches of health and safety requirements – even if they did have any merit – were not relevant to the decision to dismiss the claimant.

60. I do not doubt that the dismissal has had, as it turned out, serious personal consequences for the claimant, which he explained in his written and oral evidence. But in all the circumstances, in my judgment the respondent's decision to dismiss fell within the band of reasonable responses. The dismissal was therefore not unfair within the meaning of s 98 ERA.

61. Given the above findings I do not need to consider the application of *Polkey* or s 123(6) ERA to this case.

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Employment Judge **Dick**

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Date: 10 April 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
15 April 2024

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FOR THE TRIBUNAL OFFICE