Case Number: 3200759/2016

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EMPLOYMENT TRIBUNALS

Claimant: **Mr G Lambeth**

Respondent: **S Walsh & Son Ltd**

Heard at: **East London Hearing Centre**

On: **7-10 & 14-15 November 2017**

Before: **Employment Judge Brown**

Members: **Ms J Owen**
Mr G Tomey

Representation

Claimant: Mr T Bowles (Solicitor)

Respondent: Ms K Moss (Counsel)

JUDGMENT

1. The unanimous judgment of the Employment Tribunal is that:-

(1) The Respondent dismissed the Claimant automatically unfairly under *s100 Employment Rights Act 1996.*

(2) Had the Respondent acted fairly, the Respondent would not have dismissed the Claimant.

(3) The Claimant did not contribute to his dismissal.

(4) The Respondent failed to comply with the ACAS code and it is appropriate that compensation is uplifted by 20%.

(5) By consent, upon the parties reaching agreement on confidential terms, the Tribunal gives no judgment on remedy and the Claimant's claim for remedy is dismissed.

REASONS

1 The Claimant brought claims of automatically unfair dismissal for health and safety reasons under *s100 Employment Rights Act 1996*, automatic unfair dismissal because of a protected disclosure under *s103A Employment Rights Act 1996* and ordinary unfair dismissal under *s98 Employment Rights Act 1996*, against the Respondent, his former employer.

List of Issues

2 The parties agreed the issues to be determined at the start of the hearing. They were:-

Whistleblowing dismissal (ss.43B and 103A ERA 1996)

2.1 On 6 May 2016 was the Claimant's conversation with Lee Gullen:

2.1.1 A disclosure of information, as opposed to an allegation or a statement of position;

2.1.2 In his reasonable belief, made in the public interest;

2.1.3 In his reasonable belief tending to show that a person (the Respondent) was likely to fail to comply with a legal obligation to which it is subject (being health and safety laws relating to driving times)?

2.2 If so, both ss.43B and 43C ERA 1996 conditions have been satisfied and so the conversation was a protected disclosure.

2.3 Was the Claimant dismissed for the reason or principal reason that he made a protected disclosure, contrary to s.103A ERA 1996?

Health and Safety Dismissal (s.100 EAR 1996)

2.4 On 6 May 2016, at around 10am, were there circumstances of danger which the Claimant believed were serious and imminent?

2.5 Was any such belief on the part of the Claimant reasonable?

2.6 Did the Claimant take or propose to take steps to protect himself or other persons from the danger? Or did he take steps to communicate those circumstances to the Respondent (via Lee Gullen) by appropriate means?

2.7 Were the steps taken by the Claimant or proposed to be taken by the Claimant appropriate by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at

the time?

2.8 If the answers to paragraphs 4 to 7 above are affirmative, was the Respondent's sole or principal reason for dismissal was that the Claimant had taken or proposed to take such steps?

Ordinary Unfair Dismissal (ss.94 and 98 ERA 1996)

2.9 Was the reason for the dismissal related to the Claimant's conduct or some other substantial reason justifying dismissal and therefore potentially fair under s.98(2) ERA 1996?

2.10 Was the dismissal within the range of reasonable responses for the Respondent, and therefore fair under s.98(4) ERA 1996 considering:

2.10.1 Did the Respondent have a genuine belief that the Claimant had committed gross misconduct?

2.10.2 Were there reasonable grounds for that belief:

2.10.2.1 Was the Claimant issued with a reasonable instruction on 6 May 2016?

2.10.2.2 Ten out of eleven other drivers assigned to the same job completed the job comfortably?

2.10.2.3 Did the Claimant unreasonably refuse to comply with that instruction?

2.10.2.4 Would the Claimant's insubordination have become known to other drivers?

2.10.2.5 Was the Respondent guilty of treating two truly parallel cases inconsistently, by giving another driver (Horscroft) a written warning rather than dismissing him?

2.10.3 Did the Respondent undertake an investigation within the range of reasonable investigations, including checking the tracker, tachograph records and the traffic reports; and undertaking a disciplinary process and appeal?

2.10.4 The size and administrative resources of the Respondent's undertaking;

2.10.5 Was the dismissal procedurally fair, considering:

2.10.5.1 There was a disciplinary hearing on 9 May 2016;

2.10.5.2 There was subsequently an appeal hearing;

2.10.5.3 The Claimant was accompanied at both meetings;

2.10.5.4 Was the Claimant given the opportunity to read and sign meeting minutes taken at the disciplinary hearing? Did that make any difference to the fairness of the procedure?

Remedy (to be dealt with at the liability hearing)

2.11 If the Claimant is successful on the whistle-blowing complaint, were the disclosures made in good faith or should there be a deduction of up to 25% pursuant to s.123(6A) ERA 1996?

2.12 If the Claimant succeeds on any part of his claim, (a) to what extent was the dismissal caused or contributed to by the action of the Claimant (s.123(6) ERA 1996) (the Respondent contends 100%); (b) to what extent is a Polkey reduction justified to reflect the inevitability of a fair dismissal?

2.13 Did either party fail to comply with the ACAS Code of Practice? If so, should there be an increase or reduction in compensation of up to 25%?

3 The Tribunal heard evidence from the Claimant. For the Respondent, the Tribunal heard evidence from Mr Lee Gullen, Transport Manager; Mr Nathan Hopgood, Senior Transport Manager and dismissing officer; Mr Tim Wheeler, Finance Director of the Respondent and Appeal Officer; and Mr Roland Barber, Transport Consultant. There was a bundle of documents, to which some documents were added during the course of the hearing. Both parties made submissions. It was agreed that the Tribunal would decide the matters of liability, including Polkey and contributory fault, first, and that a remedy hearing would be held after judgment on liability, if the Claimant succeeded in any of his claims.

Relevant Facts

4 The Respondent is a company specialising in the collection, removal, disposal and/or recycling of waste materials, from building sites, to appropriate tipping facilities in Britain. It has around 140 employees, including around 70 HGV truck drivers, 4 directors, 6 senior managers and other managers and administrative staff.

5 In 2016 the Respondent company's turnover was around £25m, although its turnover was higher in the years immediately before and after.

6 The Respondent employed the Claimant as a tipper truck driver from April 2003 until 10 May 2016; 13 complete years. The Claimant has held an HGV licence since 1982. He also worked for the Respondent from 1994 until 2002, another 8 years. This was not part of his continuous service.

7 Since 1982 the Claimant has worked as an HGV driver, apart from a 3 to 4 year period in the late 1980s when he worked as a bus driver. He is a very experienced HGV driver and was one of the most experienced HGV drivers employed by the

Respondent.

8 On 4 April 2011, Dereck Breeze, one of the Respondent's Transport Managers, gave the Claimant a Stage 1 Improvement Notice which said that it would stay on the Claimant's record for 6 months and then, if the criteria in it were met, it would be removed. The Improvement Notice was issued because of:

> "unsatisfactory performance in respect of:
>
> - Spending time at the tip site on your last load and not returning to your depot or not going for another load on … 23rd and 25th March 2011
>
> - Tipping your last load at Rainham at 1pm when you had ample driving hours and time to pick up an extra load and tip. 11 Feb 2011" (p.31CC)

It was not in dispute that that Improvement Notice had expired after 6 months.

9 On 6 March 2013 Mr Breeze gave the Claimant an Improvement Notice, which was stated to be equivalent to a first written warning, for leaving the Respondent's depot at 5:30am, in violation of the Respondent's site licence. The Notice said that it would stay on the Claimant's record for 12 months. Again, it was not in dispute that this warning had expired after 12 months and, therefore, was not live at the time of the matters in question in this case.

10 In evidence to the Tribunal, Mr Hopgood, Senior Transport Manager and dismissing officer, accepted that the Claimant's 2011 disciplinary matters were similar to the Claimant's actions on 6 May 2016.
11

12 HGV drivers are subject to the provisions of EC Regulation 561/2006, which requires that, amongst other things:-

12.1 After 4 ½ hours driving, whether continuous or accumulative, a driver must take an uninterrupted break of at least 45 minutes. Alternatively, the break can be replaced by a break of at least 15 minutes, followed by a break of 30 minutes.

12.2 A driver's daily driving time shall not exceed 9 hours; however, the daily driving time may be extended to 10 hours not more than twice in one week.

13 The Respondent employs 4 Transport Managers to oversee its HGV fleet and compliance systems, including compliance with driver's hours.

14 The Respondent's HGV vehicles are fitted with tachographs and Transport Managers have access to a tachograph analysis system, which measures its drivers' driving distances and times.

15 Transport Managers are required to undergo training and obtain a Manager's Certificate of Professional Competence. The role of a Transport Manager is defined by

the *Goods Vehicle (Licensing of Operators) Act 1995* and certain provisions of the *Senior Traffic Commissioners Statutory Document No. 3*: Failure by a Transport Manager to comply with the requirements of their duties or the *Statutory Document No. 3* may result in the Transport Manager being called to a public inquiry held by the Traffic Commissioner, which could result in the Transport Manager being disqualified from acting or being employed as Transport Manager.

16 Lee Gullen was employed as a Transport Manager by the Respondent. He was responsible for allocating work to the Respondent's drivers and knew what work was available for drivers to undertake each day. Mr Gullen allocated work to drivers on the basis that the work allocated would not exceed the driving hours allowed under the Driver's Hours and Working Time Directive Regulations.

17 One of the Respondent's contracts in 2016 was a contract for the collection of hazardous soil from Tilbury Docks and transportation of it to an authorised hazardous material site in Peterborough.

18 Most of the Respondent's drivers worked on this contract on at least some occasions. Mr Gullen considered that the round trip from Tilbury Docks to Peterborough and back, including tipping material at Peterborough, took around 4 hours, based on experience of the contract. He considered that the journey from Tilbury Docks to Peterborough took 1 ½ hours.

19 It was not in dispute that drivers are responsible for ensuring that they drive within legal limits for driving set down by Working Time Directives and Regulations. Transport Managers and employers of the drivers also have responsibility to ensure that drivers drive according to the Regulations. If drivers do not drive according to Working Time Directives and Regulations, and do not take appropriate rest breaks and, as a result, have accidents, drivers risk losing their licences and being prosecuted for criminal offences. Working Time Directives and Regulations with regard to driving time form part of UK health and safety legislation. It follows that part of their aim is to ensure the health and safety of HGV drivers and other road users.

20 On 5 May 2016, the Claimant and some other drivers were allocated to drive two trips taking contaminated waste from Tilbury Docks to Peterborough. On that day, 5 May, after his first trip, the Claimant considered that he would not have enough driving time left in the day to complete a second trip from Tilbury to Peterborough. He telephoned the Respondent's Transport Managers to tell them this and was given other work to do instead. Other drivers were also re-routed that day.

21 The Respondent told the Employment Tribunal that there was a traffic accident on the Peterborough route that day.

22 The Claimant was not aware of the accident and had not experienced unusual traffic conditions when he contracted the Respondent on 5 May to say that he did not have sufficient driving time to complete the second trip within legal limits. The Tribunal accepted the Claimant's evidence about this.

23 The Claimant normally drove the same truck each day and was familiar with its speed and capabilities. He considered that his truck was slower than other trucks in

the fleet, particularly going up hill. Its maximum speed was limited, in any event, to 54mph, whereas other trucks were limited to 56mph.

24 Also on 5 May 2016, another of the Respondent's drivers, Mark Horscroft, was tasked with taking two loads from Tilbury to Peterborough. He was en route to Peterborough with his second load, but turned back on the M11 and returned to the Respondent's deport with the load, without contacting the Respondent at all. Mr Horscroft was called to a disciplinary meeting on 9 May 2016 by Nathan Hopgood, Senior Transport Manager. The notes of the disciplinary meeting (p.35a) record:

> "Mark was asked why you drove to Peterborough with his 2nd load and turned round on the M11 and returned back to the depot loaded.
>
> Mark replied that he thought he would run out of hours and panicked.
>
> Mark was asked why he never informed his office of the problem.
>
> Mark replied that in hindsight he should have done so but was very worried about going over his driving hours.
>
> Mark was informed that he would receive a written warning regarding his failure to inform his Manager and he accepted that he was in the wrong.
>
> He was also informed that he still had enough time to carry out his work as he is allowed to drive 10 hours twice a week this would have allowed him to complete his work." (p.35A)

25 On 10 May 2016, Mr Hopgood issued Mr Horscroft with a 3 month written warning for returning his vehicle to the depot loaded when nearer to the tip facility without calling the office to discuss (p.35B).

26 Mr Hopgood told the Tribunal, in evidence, that Mr Horscroft did not have enough time that day to complete the second trip, because of an accident on the route. However, the Tribunal did not accept that evidence. It is clear from the contemporaneous note of Mr Horscroft's disciplinary meeting that Mr Hopgood told him that he had had time to complete the second trip on the day; no mention was made in the meeting notes of any traffic problems.

27 Mr Hopgood also told the Tribunal that Mr Horscroft knew that he had done wrong and had apologised. However, again, it is clear from the notes of the meeting that Mr Horscroft only apologised for not having contacted the office. Mr Horscroft did not apologise, nor did he acknowledge, his failure to complete two trips when Mr Hopgood told him that he did have enough time because he had an extra hour to complete the second trip.

28 On 6 May 2016, the Claimant was tasked with taking two loads of contaminated soil to Peterborough. His truck was preloaded the previous evening, so his outward journey was from Rainham rather than Tilbury. The Claimant arrived at work at 4:40am, ready for a 5am start. Another driver, Keith Barnard, asked the Claimant if he could follow the Claimant, as Mr Barnard was unsure of the route to Peterborough.

The Tribunal accepted the Claimant's evidence about this. As a result, the Claimant waited for Mr Barnard and they both left the Respondent's Rainham yard at 5:13am. The Claimant arrived at the Peterborough tip at 7:19am, 2 hours and 6 minutes later. Mr Barnard again asked to follow the Claimant on the return journey and both men left Peterborough at 7:47am. The Claimant decided to take his 45 minute break at Bishop Stortford, at the Birchanger Services. He considered that there were few other places available for rest breaks, as the A13 was being widened at the time and lay bys on that road were, therefore, closed.

29 At about 9:45am the Claimant contacted Lee Gullen on his two way radio. He told Mr Gullen that he was at Birchanger and that he did not believe that he would have time to drive back to Tilbury and then again to Peterborough and back, within the time remaining that day, within legal driving limits. The Claimant asked Mr Gullen to give him alternative work. Mr Gullen said that the Claimant did have enough driving time to complete the second Peterborough trip and back and that he should do this. He said that the Claimant should come back to the yard if the Claimant was not going to go to Peterborough. The Claimant said that he did not think that he had time and did not want to do the second trip.

30 Mr Hopgood told the Tribunal that, while the conversation between the Claimant and Mr Gullen could be heard in the Transport Managers' office, Mr Hopgood did not hear what the Claimant was saying and only heard what Mr Gullen was saying.

31 The two way radio is an open channel, whereby drivers are connected to Transport Managers. Other drivers can hear conversations between Transport Managers and drivers. However, it was unclear from the evidence at the Tribunal whether other drivers do listen into the detail of conversations between other drivers and Transport Managers which do not concern them.

32 The Claimant attempted to contact Mr Gullen again at about 10:30am, at the end of his break, via the two way radio, but was unable to do so. He eventually contacted Mr Gullen by telephone. Mr Hopgood told the Tribunal that he spoke to the Claimant on the telephone. In his witness statement, Mr Hopgood said that he had heard Mr Gullen on the telephone saying to the person on the telephone that he did have enough time to get loaded and go back to Peterborough. In his witness statement, Mr Hopgood said that he had heard Mr Gullen saying: 'Are you refusing to go back for your second load?' In his witness statement Mr Hopgood said:

> "Mr Gullen then informed me that Mr George Lambeth (driver) was refusing to go back to Tilbury for a second load, so I took over the telephone from Mr Gullen and spoke directly to Mr Lambeth". I said 'Why are you refusing to get your second load?' Mr Lambeth replied, 'I don't have enough driving time'. I said, 'Where are you?' And he replied, 'At the services, I've had my break'.

This conversation on the telephone, therefore, was after the Claimant had had his break.

33 Mr Hopgood told the Tribunal that he had said to the Claimant that the Claimant had 4 ½ hours available, with the option of adding an extra hour to his driving time, as he was allowed to drive for 10 hours twice a week, but that the Claimant said that he

was not going to do it and Mr Hopgood told him, then, to come back to the yard and to the office. In evidence, Mr Gullen confirmed that there had been two separate conversations: one on the two way radio and one on the telephone.

34 There was a dispute between the parties as to whether the Claimant's stated belief that he did not have enough time to complete the second journey within his permitted driving hours was reasonable. The Claimant told the Tribunal that his lorry was slower than other lorries in the Respondent's fleet and that, as a driver of 30 years HGV driving experience, he genuinely considered that he did not have enough time to complete the second trip when he called from the Birchanger services. He said that, when he had told the Respondent on 5 May that he did not have enough time to complete the second trip, the Respondent had given him other work and that the Claimant was unaware that there had been any special traffic circumstances on 5 May which would have meant that, by contrast, the second trip on 6 May was more possible. The Claimant said that he was still at Birchanger and he did not believe that he had enough time, in the 5 hours 30 minutes remaining available to him to go back to Tilbury from Birchanger and then to Peterborough and back.

35 The Respondent contended that, because the Claimant had taken his break at Birchanger early, he could also have added the remaining time before his first 45 minute break. The Claimant denied that this was possible. He said that he had never been told that this could be done. It is clear from the evidence that, when the Claimant spoke to Mr Hopgood, Mr Hopgood told the Claimant that he had 4 ½ hours, plus one hour, remaining. Mr Hopgood did not say to the Claimant that the Claimant could also add on whatever time he would have had remaining before his first 45 minute break if he had taken that break slightly early.

36 The Tribunal accepted the Claimant's evidence that he was not aware - and had never been told - that he could add on additional unused time before his first 45 minute break to the end of the driving day.

37 The Respondent contended that 10 other drivers had completed second trips in a maximum of 4 hours 20 minutes that day and that, therefore, the Claimant was unreasonable in his assertion that he would be able to complete the second trip in the 5 hours 30 minutes available to him. However, the Tribunal finds that Mr Barnard, who was also at Birchanger, took 50 minutes to drive from Birchanger to Tilbury. If, which is reasonable to assume, the Claimant had taken the same time to drive from Birchanger to Tilbury, he would have had 4 hours 40 minutes for the round trip to Peterborough. That round trip is about 200 miles. On the Respondent's own evidence, the average speed of the Claimant's lorry on the first run, starting at 5:17am, was 45 miles per hour. At that speed, it would have taken the Claimant, not including a drive to any break point and back, 267 minutes out of the 280 minutes he had remaining. So, only if the Claimant managed to maintain a speed of 45 minutes, that is the same speed that he had achieved on a trip starting at 5:17am, would he have completed the trip in that time with 13 minutes to spare, assuming no delays on the later trip. The Respondent denied that the Claimant would be likely to take longer to complete a round trip to Peterborough starting at 11:30am, than one starting at 5:17am.

38 Mr Hopgood was cross-examined about health and safety and driving hours. He agreed that it was a driver's responsibility to ensure that the driver drives within

regulation hours. He agreed that health and safety rules were there for a good reason, so that, if an employer sought to put a driver beyond legal hours, that would put the driver in danger. Mr Hopgood agreed that, if a driver thought that they were not going to make a trip within allowable hours, he would not ask a driver to take a chance. He said that he did believe, however, that the Claimant could complete the trip within the allowable hours on 6 May. Mr Hopgood also agreed that, in his mind, the trip to Peterborough took 1 ½ hours each way, or 3 hours both ways, rather than over 2 hours which it had taken the Claimant on a single trip.

39 When the Claimant arrived back at the Respondent's yard on 6 May, Mr Hopgood handed him a suspension letter, inviting him to a disciplinary meeting on Monday 9 May 2016 (p.34). The letter said:

> "At this meeting the question of disciplinary action against you, including dismissal if gross misconduct is found, in accordance with the Company Disciplinary Procedure, will be considered with regard to:
>
> Refusing to follow an instruction from the office over the two way radio."

The letter told the Claimant of his right to be accompanied.

40 Mr Hopgood told the Tribunal that Mr Hopgood carried out an investigation into the disciplinary allegation against the Claimant. However, Mr Hopgood did not take a witness statement from Lee Gullen, or any of the other drivers. He did not speak to the Claimant to carry out an investigatory interview, or to obtain a witness statement from the Claimant. Mr Hopgood told the Tribunal that he gathered Fleet Reports and had established that all the other drivers had completed two whole trips in 8 hours 22 minutes. He did not look at the difference between the time of the first and second trips. Mr Hopgood said he had obtained copies of the Fleet Reports, but he did not give these to the Claimant in advance of the disciplinary hearing. Mr Hopgood did not establish the average speed of the other drivers, or of the Claimant.

41 Mr Hopgood had responsibility for disciplinary matters at the Respondent, but had not been given training in carrying out disciplinary investigations and hearings at that time. Mr Wheeler, the company's Director, told the Tribunal that the Respondent did buy in HR expertise for what he described as "serious disciplinary matters", for example assault and also for discrimination allegations.

42 Mr Hopgood told the Tribunal that he briefed Mr Wheeler, at the time, about the allegations against the Claimant and the fact that the Claimant was being called to a disciplinary hearing.

43 The Claimant attended a disciplinary hearing on 9 May 2016 (p.32). Mr Hopgood also saw Mr Horscroft that day and told him he would receive a written warning.

44 At the disciplinary hearing, Mr Hopgood said that the Claimant had been asked by two Transport Managers to complete two loads to Peterborough and that, after the Claimant had refused several times, he was told to return to the depot. Mr Hopgood asked the Claimant to explain his actions. The Claimant responded that, in his opinion,

it was not possible within the driving hours and he did not want to break the law or get the company into trouble. Mr Hopgood said that other drivers had completed the task well within the legal hours. The Claimant said that his vehicle were slower than the others and he had asked to get it checked out. Mr Hopgood said that another driver driving the same model of truck had left one hour after the Claimant and had finished by 4pm. At the end of the meeting Mr Hopgood said that:

> "… all the comments and reasons would be looked at a meeting with a director or directors and a decision would be made as to the outcome and [the Claimant] would be contacted …" (p.33).

45 Mr Hopgood gave evidence to the Tribunal about his discussions with Mr Wheeler, Director, after the disciplinary meeting. Mr Hopgood said that he had told Mr Wheeler the facts and what the Claimant and he had discussed. Mr Hopgood told Mr Wheeler that the Claimant had refused to go back for a second load when Mr Hopgood thought it was safe to do so and Mr Hopgood said that Mr Wheeler agreed that the Claimant could have gone back for a second trip. Mr Hopgood was asked, in his evidence to the Tribunal, who took the decision to dismiss and he said, "I think me and Mr Wheeler agreed to do that".

46 Mr Wheeler was also cross-examined about his involvement in the decision to dismiss. He said that Mr Hopgood did not brief him on the decision to dismiss. Mr Wheeler said that Mr Hopgood had briefed him only on the facts and procedure.

47 The Tribunal preferred Mr Hopgood's evidence, which was corroborated by notes of the disciplinary meeting. It found that Mr Hopgood and Mr Wheeler took the decision to dismiss the Claimant, together.

48 On 10 May 2016 Mr Hopgood wrote to the Claimant, dismissing him. He said:

> "Further to your disciplinary meeting held on Monday 9th May 2016 regarding your refusal to follow an instruction issued to you by the Transport Office over the two way radio, I write to confirm that we have come to a decision that your employment with S Walsh & Sons Limited be terminated."

Mr Hopgood said that the Claimant was dismissed without notice on 10 May 2016. He said that the Claimant had the right to appeal and said the notice of appeal should be sent to either Tim Wheeler, Nick Walsh, or Richard Walsh (p.36.

49 The Tribunal observed that the wording of the dismissal letter stated that, "**We** have come to a decision to dismiss". The letter did not explain any considerations taken into account in coming to the decision to dismiss. It did not mention the Claimant's long service with the Respondent. In evidence, Mr Hopgood was asked about whether he considered any sanction other than dismissal. He replied, rather vaguely, "It crossed my mind".

50 Mr Hopgood said that the instruction given to the Claimant on an open two way radio was different because it was an open channel, with 96 other drivers listening. He said this in evidence to the Tribunal. Mr Hopgood seemed to suggest that the Claimant's actions were particularly serious because he refused to undertake a second

load on a two way radio, when other drivers could hear. This apparently aggravating feature was not put to the Claimant during the disciplinary meeting. He was not given the opportunity to address it in the disciplinary meeting. He was not given any opportunity to address Mr Hopgood's later-stated concern that many other drivers would have heard the Claimant's refusal to undertake a second load. In any event, as the Tribunal has already found, Mr Hopgood did not listen to what the Claimant had said on the two way radio. His own conversation with the Claimant was on the telephone.

51 The Claimant appealed against the decision to dismiss by letter of 12 May 2016 (p.37CC).

52 Mr Wheeler conducted the appeal hearing on 18 May 2016. Mr Wheeler agreed, in evidence at the Tribunal, that other Directors could have heard the appeal, including Nick and Richard Walsh, the former owners of the company. Mr Wheeler told the Tribunal that he had previous HR experience and he decided to conduct the appeal, taking into account the availability of other Directors. He did not explain what, in fact, was the availability of the other directors, however.

53 The Claimant brought documents to the appeal hearing which included a document from the Health & Safety Executive entitled, "Driving at Work" and a Google map's calculation of the driving time which the Claimant would have had to undertake on 6 May. Mr Wheeler did not take copies of these documents at the time. The Tribunal accepted the Claimant's evidence that Mr Wheeler ignored these documents. It found that, if Mr Wheeler had been interested in the Claimant's documents, he would have retained copies of them.

54 In his witness statement to the Tribunal, Mr Wheeler said that he took witness statements from Lee Gullen and Nathan Hopgood and that he reviewed witness reports in respect of traffic conditions and other driver communications. No records of these were included in the Tribunal bundle and none were given to the Claimant, either before, or at, the appeal hearing. When asked about these witness reports and witness statements in evidence, Mr Wheeler said he had spoken to Mr Gullen and Mr Hopgood and had relayed, as a recap, their accounts to the Claimant, at the start of the appeal hearing.

55 The notes of the appeal hearing do not record that Mr Wheeler told the Claimant that he was relaying to him the statements of Mr Hopgood or Mr Gullen, or indeed any other witness reports of traffic conditions, or driver communications. The notes of the meeting simply record that Mr Wheeler summarised the facts of the day in question.

56 In the appeal hearing the Claimant, again, asserted that he did not believe that he had sufficient time to complete the second trip. Mr Wheeler did not put to the Claimant that he had refused an instruction over the two way radio, when other drivers could hear, and might be influenced by what the Claimant was doing.

57 The Claimant stated that his truck was slower than other vehicles. Mr Wheeler asked the Claimant why he had asked to be allocated with a different second load on 5 May. The Claimant said that this was due to driving time. Mr Wheeler undertook to check the circumstances with other Transport Managers, to check the Claimant's

previous infringements.

58 The Claimant said that the decision was harsh, based on years of good service and good conduct. Mr Wheeler undertook to check the Claimant's disciplinary record (pgs.38 to 40).

59 Mr Wheeler did check the Claimant's infringements and did speak to Transport Managers about the events of 5 May.

60 On 23 May 2016, Mr Wheeler wrote to the Claimant, upholding the original decision to dismiss for gross misconduct. He said that, based on evidence provided at the original disciplinary hearing, the grounds presented by the Claimant at the appeal hearing and subsequent evidence that Mr Wheeler had gathered, Mr Wheeler had concluded that the Claimant's request to be given a different job was not justified and was pre-emptive. He said that he had no option but to conclude that the Claimant had refused to follow a reasonable management instruction, which constituted gross misconduct. Mr Wheeler said, in evidence to the Tribunal, that he had not taken into account the Claimant's long service in coming to a decision to dismiss. He said that it was not relevant to gross misconduct which was sufficiently serious.

61 Mr Gullen initially told the Tribunal that, when the Claimant contacted the office to ask for other work on 6 May 2016, there was no work available, but other work became available later that day. Later in his evidence, Mr Gullen said that the Respondent had alternative work around the Tilbury area, which he could have put the Claimant on. He said, however, that he had set the Claimant tasks for the day which he considered achievable. Mr Gullen said that, if he gave the Claimant different work, he would have had to change the work for everyone. Mr Gullen did not know whether there was any further load available for the Claimant to collect after 10am from Tilbury.

62 The Respondent has a disciplinary procedure in its company handbook, PRP 11. It sets out examples of gross misconduct which include: "failure to carry out a reasonable and lawful direct instruction given by a superior during working hours". With regard to appeals, the procedure stated: "The appeal must be conducted without unreasonable delay by a director or a higher level of management or manager not previously involved in the case".

Relevant Law

63 By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer

64 *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Conduct is a potentially fair reason for dismissal.

65 By *s100(1)(e) ERA 1996* it is automatically unfair to dismiss an employee if the reason or principal reason for dismissal is that, " in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger." For the purposes of *subsection (1)(e*), whether steps which an employee took (or proposed to

take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time (*s100(2))*.

66 However, where the reason for dismissal is that specified in *s100(1)(e) ERA*, the employee shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking them.

67 In *Oudahar v Esporta Group Ltd* [2011] IRLR 730, EAT, the EAT stated that Employment Tribunals should apply *s.100(1)(e) ERA 1996* in two stages (paragraphs [25] – [26] of the judgment. First, the tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or did he take appropriate steps to communicate those circumstances to his employer by appropriate means? If those criteria are not satisfied, *s.100(1)(e)* is not engaged. Second, if the criteria are made out, the tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee had taken or proposed to take such steps. If it was, then the dismissal must be regarded as unfair.

68 The mere fact that an employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that an employee should be protected from dismissal if he took or proposed to take steps falling within *s.100(1)(e).*

69 In *Oudahar*, the EAT said that *s100* directs the Tribunal to consider the employee's state of mind, not whether the employer agreed with the employee. Furthermore, Parliament must have intended to give employees the protection provided for in the *EC Framework Health and Safety Directive Art 11.4*, protecting the employee so long as he acts honestly and reasonably in the circumstances covered by the statutory provisions. If an employee was liable to dismissal merely because the employer disagreed with his account of the facts or his opinion as to the action required, the statutory provisions would give the employee little protection [29] –[30].

70 The EAT also commented that, in *Balfour Kilpatrick Ltd v Acheson* [2003] IRLR 683, the EAT (Elias P) rejected an argument that, if an employer genuinely considered that the actions of the employees were not related to health and safety but were an attempt to extract money for not pay, then the ET would not be justified in concluding that the dismissal was for a health and safety reason. Elias P said, "We think this argument fails. It does not establish that the employer is not dismissing for the protected action, but rather that he would in addition also dismiss for other absences where the employees were not pursuing the protected purpose. It seems to us that he is still dismissing the workforce because they are taking the protected action even although he is not concerned about that fact and would dismiss them for absences for a host of other reasons. … The fact that the employer was dismissing because of the failure to return to work is immaterial. He knew what the employees were asserting the reason to be. Had we found that to have been a protected reason then we would have

concluded that the dismissals were for that reason. .. Moreover, we consider it likely that an employer would be equally liable if he had the opportunity to find out the reason for the absence and chosen not to take it. This ought in our view, to be the position in order to give effective implementation of the Directive." [31] – [36].

71 An employee who makes a "protected disclosure" is also given protection against his employer dismissing him, by reason of having made such a protected disclosure by *s103A ERA 1996,*

"103A Protected disclosure
An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

72 In order for an employee to have been automatically unfairly dismissed under *s103A ERA*, the reason or principal reason for dismissal must be that the Claimant had made one or more protected disclosures.

73 The meaning of "protected disclosure" is defined in section 43A of the ERA 1996:

"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

74 "Qualifying disclosures" are defined by section *43B ERA 1996*.

"43B Disclosures qualifying for protection
In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following—
….
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…
..
(d) that the health and safety of any individual has been, is being, or is likely to be endangered.. "

75 The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations), *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR [24] – [25]; *Kilraine v LB Wandsworth* [2016] IRLR 422. The disclosure must, considered in context, be sufficient to indicate the legal obligation in relation to which the Claimant believes that there has been or is likely to be non compliance, F*incham v HM Prison Service* EAT 19 December 2002, unrep; *Western Union Payment Services UK Limited v Anastasiou* EAT 21 February 2014, unrep.
76

77 If the employee does not come within the automatically unfair provisions and the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

78 In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

79 Under *Burchell* the Employment Tribunal must consider whether or not the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer had, in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

80 The Employment Tribunal also considers whether the employer's decision to dismiss was within a range of reasonable responses to the misconduct.

81 In applying each of these tests the Employment Tribunal allows a broad band of reasonable responses to the employer. *Iceland Frozen Foods v Jones* [1982] IRLR 439

82 The band of reasonable responses test applies as much to the Respondent's investigation as it does to the decision to dismiss: *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23, LJ Mummery, giving the judgment of the Court, para 30.

83 It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA. This last point was emphasised in *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

84 A failure to follow the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures will be taken into account in determining the reasonableness of a dismissal under *s98(4) ERA 1996 – s207 TULCRA 1992.*

85 The Code includes the following paragraphs:

[6] In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

[9] If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include witness statements, with the notification.

[27] The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.

86 If either the employer or the employee fails to follow the Code, the Tribunal can adjust any award for unfair dismissal either upwards or downwards, respectively, if it considers it just and equitable to do so in all the circumstances, *s207A TULRCA 1992*.

87 A decision to dismiss an employee may be unfair if it is inconsistent with the practice or policy of the employer with regard to other employees, but only in limited circumstances. In *Hadjioannou –v- Coral Casinos Limited [1981] IRLR 382,* at paragraph 25, the Employment Appeal Tribunal stated that Tribunals should scrutinize arguments based upon disparity with particular care. It is only in the following limited circumstances that the argument is likely to be relevant:

a. that an employee has been led by the employer to believe that such conduct will either be overlooked or at least not dealt with by the sanction of dismissal;
b. the evidence supports an inference that the purported reason is not the real or genuine reason for the dismissal or;
c. evidence as to the decision made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to dismiss the employee for that misconduct.
The EAT commented there will not be many cases in which the evidence shows that there were other disciplinary cases at the same employer which were truly similar or sufficiently similar to allow an employee to argue unfair inconsistency in dismissal decisions.

Polkey
88 If the Tribunal determines that the dismissal is unfair the Tribunal may go on to consider the percentage chance that the employee would have been fairly dismissed, *Polkey v AE Dayton Services Limited* [1988] ICR 142.

89 In *Gover v Propertycare Limited [2006] ICR 1073*, the Court of Appeal held that the *Polkey* principle does not only apply to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason. Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date. In making an assessment Tribunals should apply the principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825.

Contributory Fault
90 Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it reduces any compensatory award by such proportion as it considers just and equitable having regard to that finding, *s123(6) ERA 1996. Optikinetics Limited v Whooley* [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - *W Devis & Sons Limited v Atkins* [1977] ICR 662.

91 In *Nelson v BBC (No 2)* [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:
(a) The relevant action must be culpable and blameworthy
(b) It must actually have caused or contributed to the dismissal

(c) It must be just and equitable to reduce the award by the proportion specified.

Discussion and decision

S100 Employment Rights Act

92 The Tribunal considered whether there were circumstances of danger which the Claimant reasonably believed to be serious and imminent. The Tribunal found that the Claimant believed that there were circumstances of danger. The Tribunal found that the Claimant genuinely and honestly believed that he could not complete the trip in the maximum driving hours available to him under the EC Regulations for maximum driving hours in a day.

93 The Tribunal found that the Claimant had believed that he could not complete the same second trip the previous day and knew that the Respondent had accepted the Claimant's assertion, that day, that he could not and had given him alternative work.

94 The Claimant was a driver with 30 years' experience. He knew his lorry and the speed that it was capable of maintaining. The Tribunal decided that the Claimant was in the best position to judge the likely length of the trip. Even on the Respondent's ex post facto calculation of the average speed of the Claimant's truck on the early morning trip, the Respondent calculated the average speed to be 45mph. If the Claimant had maintained that speed and had absolutely no delays he would, the Tribunal found, have completed the 240 mile journey from Birchanger services, with only 13 minutes to spare. Over a 200 mile round trip that margin of time is very small. The Claimant believed that he could not complete the 240 mile trip in 5 ½ hours. Tribunal found that the Claimant's estimate of the time the trip was likely to take and his belief that he could not complete the trip in 5 hours 30 minutes, including a break, were reasonable and honest.

95 The Tribunal concluded that the Claimant did believe and did say to the Respondent that he would be in breach of health and safety legislation if he undertook the trip. The Tribunal decided that he believed that he would be in breach of legislation designed to protect both drivers and other road users and that the Claimant believed that there were circumstances of danger which were serious. The danger of driving for too long without a break is serious enough to be prohibited by health and safety legislation and the Claimant specifically referred to health and safety requirements when he spoke to the Respondent.

96 The Tribunal considered whether the Claimant reasonably believed that the circumstances of danger were imminent. The Respondent contended that the circumstances of danger were not imminent because it would have been a long time before the Claimant would be likely to go over his driving time; and that the Claimant could easily have set out on the journey and turned back later if necessary. On the facts, however, the Respondent never offered the Claimant that option. The Claimant was told to, either, undertake the trip, or to come back to the office. On the facts, the Respondent instructed the Claimant to set out on a trip which the Claimant believed he would not complete in the time legally allowable to him. Certainly, the commencement of the second Peterborough trip was imminent. It would be starting within an hour after Birchanger, which was about 50 minutes from Tilbury.

97 The Tribunal therefore concluded that the Claimant reasonably believed that the danger was imminent; in that the Claimant was imminently starting a task which he reasonably believed was likely to be in breach of health and safety guidelines. The Claimant reasonably assessed the task on which he was about to embark and the Tribunal decided that *s100 ERA* does not apply, only, to a dangerous situation which poses an immediate danger as soon as commenced, but tasks which will be likely to pose a danger after they are embarked upon.

98 The Tribunal then went on to consider whether the Claimant took, or proposed to take, appropriate steps to protect himself or other persons from danger.

99 The Claimant contacted the Respondent, not once, but twice, to relay his concerns and to ask for other work. The Tribunal found that that was an appropriate step for the Claimant to take. He contacted the Respondent and proposed not to take a journey he believed would be in breach of health and safety legislation and asked to be given other work. He did not refuse to work. He sought alternative work. He followed the procedure that he had used the previous day and which had been acceptable to the Respondent the previous day.

100 The Respondent contended that the Claimant discussed the matter with the Respondent over the two way radio and that other drivers could hear. The two way radio was provided by the Respondent to communicate with drivers. The Claimant used the means of communication provided to him. In any event, the Tribunal found that the Claimant also telephoned the Respondent and spoke to Mr Hopgood on the telephone, not on the two way radio, and Mr Hopgood issued the ultimatum to come back to the depot on the telephone.

101 Furthermore, the Respondent did not provide any mechanism for resolution of disagreements about driving time for the Claimant to use. The Respondent gave the Claimant two options only; not to do the second run and come back to the office, or to undertake the run which the Claimant believed would be in breach of health and safety regulations. The Claimant took the only available option to him, which was not to undertake the second run. If the Respondent had provided some other means of resolution or a mechanism resolution, then circumstances may have been different, but they were not.

102 It was quite clear that the Respondent dismissed the Claimant for refusing to undertake the second trip, which he had clearly said he believed would be in breach of health and safety legislation. That was the sole or principal reason for dismissal. the Tribunal found that the Claimant was automatically unfairly dismissed under *s100 Employment Rights Act 1996*.

103 With regard to *s103A ERA 1996*, the Tribunal considered whether the Claimant disclosed information to the Respondent which, in his reasonable belief, was made in the public interest and tended to show, either that a person has failed, was failing or was likely to fail to comply with any legal obligation to which he was subject, or that the health and safety of any individual had been, was being, or was likely to be endangered.

104 The Claimant did disclose information to the Respondent. He told them that he was at Birchanger Services and that he believed he would be in breach of health and safety legislation if he undertook the second trip. That was in the public interest – the relevant Driving Time legislation is for the protection of individual and public safety - and the disclosure of information showed both a potential failure to comply with the legal obligation to which the Claimant was subject and that the health and safety of an individual would be endangered.

105 However, the Tribunal found that the sole or principal reason for the Respondent dismissing the Claimant was not him making the disclosure but his failure to undertake the second trip. The dismissal was unfair under *s100 ERA* but not unfair under *s103A ERA.*

106 If the Tribunal was wrong about the dismissal being automatically unfair, the Tribunal went on to consider whether the dismissal was also unfair under the provisions of *s98 ERA 1996*. The Tribunal found that the reason or principal reason for dismissal was the fact that the Claimant had declined to undertake a second trip on the two way radio. That was the reason set out in the suspension letter and the letter of dismissal. That was a matter of conduct (if it was not automatically unfair).

107 The Tribunal considered whether the Respondent carried out a reasonable investigation before coming to the decision to dismiss. It found that the Respondent did not. Mr Hopgood carried out little or no investigation prior to the disciplinary hearing. While the allegation was a refusal to follow an instruction from the office over a two way radio, it was Mr Gullen who had had the conversation on the two way radio. Mr Hopgood did not hear what was being said by the Claimant on the two way radio. Mr Hopgood was only privy to the conversation on the telephone. Mr Hopgood did not take a statement from Mr Gullen. In the disciplinary meeting, Mr Hopgood did not put to the Claimant that the Claimant had said things on the radio that others could hear and be influenced by. Mr Hopgood did not get the Claimant's answer to that allegation.

108 Mr Hopgood did not give the Claimant any records, either before, or during, the meeting. There was no reference, in the minutes of the meeting, to records being given to the Claimant of Fleetmatic, or other, mileage reports. In any event, Mr Hopgood was involved in the index event. He had spoken to the Claimant on the telephone and the Tribunal considered that it was far outside the band of reasonable responses - and contrary to the principles of natural justice - for Mr Hopgood to be the person making a decision as to the appropriate sanction for the alleged event.

109 The company is a medium size company, with an annual turnover, at the time, of £25m. It has 140 employees. The company had bought in, on other occasions, HR expertise for serious disciplinary matters. Given that the Claimant was being disciplined for a matter of potential gross misconduct, then this was a serious disciplinary matter and the Respondent could equally have obtained HR input on this occasion, to ensure an independent decision-maker. Furthermore, the Tribunal considered that the conduct of the appeal was well outside the band of reasonable responses. It did not remedy any of the unfairness of the disciplinary hearing. Mr Wheeler took the dismissal decision jointly with Mr Hopgood; the contemporaneous documents bear this out. There was, therefore, no appeal to an independent person as required under the Respondent's disciplinary procedure and under the ACAS code

of Practice. Again, the company had the resources and the personnel to provide an alternative appeal manager. The Respondent provided no evidence as to why either of the Walsh brothers could not have conducted the appeal hearing.

110 Mr Wheeler told the Tribunal, in his witness statement, that he undertook an investigation and obtained statements before the appeal, but the Tribunal found that he took no notes of these and failed to disclose them to the Claimant. The procedure adopted failed to gather relevant evidence and failed to put the evidence and allegations to the Claimant. It failed to give the Claimant an opportunity to address the Respondent's reported concerns about the two way radio and failed to provide an independent decision-maker. The Respondent breached the provisions of the ACAS Code; it did not give the Claimant written records for the disciplinary hearing, the investigator was not different to the disciplinary officer, when the Respondent did have means to provide a different officer and the appeal officer was not independent when, again, other options were available to the Respondent.

111 Furthermore, the Tribunal considered that the Respondent did not have reasonable evidence before it made its decision to dismiss. It did not gather any evidence; in particular it took no witness statement from Lee Gullen and neither Mr Hopgood, nor Mr Wheeler, was therefore clear about what was said on the two way radio. They did not have the Claimant's evidence or input on what other drivers would have believed, or heard, over the two way radio. This allegation was not put to the Claimant, by either Mr Hopgood or Mr Wheeler, in the meetings.

112 The Tribunal found that dismissal was also outside the band of reasonable responses. This was a case in which the Respondent had acted very differently in cases which were truly similar.

113 Mr Horscroft failed to comply with an instruction given to him to complete two trips when, in the Respondent's opinion, Mr Horscroft did have time to undertake the two trips. That was clear from the notes of Mr Horscroft's disciplinary meeting. Mr Horscroft did not apologise for failing to carry out two trips in the time. He apologised for failing to contact the Respondent to tell them what he was doing, which was an aggravating feature. Mr Horscroft was given only a first written warning for 3 months for conduct which was essentially the same as the Claimant's. The Claimant's penalty of dismissal was grossly different to Mr Horscroft's.

114 Furthermore, the Respondent had given the Claimant alternative work on another day when the Claimant had said he could not undertake the identical trip and, on previous occasions, in 2011, when the Claimant had failed to return for a second trip and had not completed duties assigned to him, he had been given only a first written warning for six months. In evidence to the Tribunal, Mr Hopgood accepted that those 2011 matters were similar to the Claimant's actions on 6 May 2016. Based on the Respondent's previous conduct, even regarding the Claimant's previous conduct, therefore, the Tribunal found that the Claimant could not have known that he was likely to be dismissed for refusing to undertake a second trip on 6 May when he said that he was likely to be in breach of Working Time Regulations.

115 For all those reasons, the dismissal was also unfair under *s98 Employment Rights Act 1996*. Mr Hopgood further acted unreasonably and unfairly, we found, in

failing to consider alternatives to dismissal, despite the Claimant's clean record and long service. The Tribunal did not accept that Mr Hopgood considered alternatives. His answer about this in evidence was vague: "It crossed my mind." The answer was unconvincing and the Tribunal found that there was no evidence in the letter of dismissal that any mitigation was considered.

116 Furthermore, Mr Wheeler told the Tribunal that he had not considered the Claimant's service and good record and said he did not think it was relevant. In the case of the Claimant's long service and his clean record, the Tribunal decided that it was outside the band of reasonable responses not to consider alternatives to dismissal and not to consider that these mitigating factors were relevant.

117 With regard to Polkey, the Tribunal concluded that Polkey was not relevant in the case of automatically unfair dismissal. In any event, in the case of ordinary unfair dismissal, the Tribunal decided that, even if the Respondent had adopted a fair procedure, rather than its serially unfair process, the Respondent acting fairly would not have dismissed the Claimant, but would have treated him consistently with Mr Horscroft, who received only a 3 month warning.

118 With regard to contributory fault, the Tribunal has found that the Claimant acted honestly and reasonably and asked for alternative work. He did not contribute to his dismissal.

119 With regard to general unfair dismissal, the Claimant gave the Respondent an opportunity to give him alternative work, whereas Mr Horscroft did not and failed to contact the Respondent at all. The Claimant acted honestly and reasonably and did not contribute to his dismissal. His conduct was not culpable in the way that Mr Horscroft's was, in the circumstances that Mr Horscroft failed to contact the Respondent, or to offer to do any alternative work.

120 With regard to the ACAS Code, there were significant failures in the Respondent's disciplinary process. There was not a complete failure in that the Respondent did give the Claimant a meeting before the decision to dismiss and did give the Claimant an appeal hearing. However, the value of both those meetings was reduced by the lack of independence of both the hearing officers. Accordingly, given the very serious and significant failures in the Respondent's process, the Tribunal considered that it was appropriate to make a 20% uplift on compensation.

Employment Judge Brown

6 December 2017