EMPLOYMENT TRIBUNALS

Claimant: **Ms Roche**

Respondent: **Speedy Asset Services Limited**

Heard at: **Cardiff** **On: 23 January 2020**

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

Representation:
Claimant: In person
Respondent: Mr Moore

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant was unfairly dismissed. For the purpose of unfair dismissal remedy any compensatory award will be subject to a 30% reduction to reflect the likelihood of the claimant being fairly dismissed had the respondent followed a fair procedure. The claimant contributed to her own dismissal and any basic or compensatory award will be subject to a 25% reduction.

REASONS

Introduction

1. The claimant worked for the respondent as a transport coordinator from 19 December 2016 until her summary dismissal on 21 May 2019 for alleged gross misconduct. By way of a claim form presented on 25 September 2019 the claimant brought a complaint of unfair dismissal. By way of a response form submitted on 17 October 2019 the respondent disputes the claim.

2. I received a bundle extending to 239 pages. I received a written statement and heard oral evidence from the claimant. The claimant also relied on a written statement from Ms Potts which the respondent did not object to being placed before me. For the respondent I received written statements and heard evidence from Gareth Jones (at the time the Transport Compliance Manager and who

conducted the disciplinary hearing), and Neil Newsome (Sales Director and who heard the claimant's appeal).

3. Both parties agreed to provide written closing submissions with judgment being reserved to be delivered in writing. I have taken all submissions into account. It was agreed that the hearing and reserved judgment would deal with liability and liability related remedy issues only of whether (if the claimant was unfairly dismissed) there should be any deductions for contributory fault and/or to assess the likelihood, if a fair procedure had been followed, of the claimant having been fairly dismissed in any event (often called a "*Polkey"* deduction). The amount of any compensation awarded to the claimant would then be assessed at a future date.

4. The claimant's witness statement asserted that she was denied her manager, JS, appearing as a witness which meant that she could not show the tribunal that she was subject to a conspiracy. In fact, the correspondence between the tribunal and the claimant stated that if the claimant wished to pursue an application for a witness order she would have to set out the relevance of the evidence, what efforts had been made to seek voluntary attendance from JS, and with a warning that if she called a witness via a witness order the risk it could pose if her own witness then gave evidence unfavourable to her case. The claimant acknowledged at the hearing that it had been open to her to comply with those instructions and make a fresh application for a witness order. She accepted that she had not done so due to the stresses of preparing her case. There was no repeated application at the hearing itself.

5. An issue between the parties is the interpretation to be given to Government guidance on drivers' hours. At the hearing Mr Moore stated that fresh guidance had recently been issued but he did not have a copy to hand. I stated that if a party sought to add additional documents it would require an application to be made unless the other party agreed. The document was not forthcoming on the day. The respondent seeks to add it by way of an attachment to their closing submissions. The purpose of closing submissions is not to add new evidence and I have not taken the document into account (and indeed it may well not be relevant in any event to the test I have to apply).

Findings of fact

6. Applying the balance of probabilities, I make the following findings of fact.

7. In or around May 2017 the claimant submitted a report and a diary entries complaining about the behaviour of JS, the Regional Transport Manager [63]. She attended an interview with investigating officers and on 29 June 2017 JS was issued with a letter of concern about his management style [193 -195].

23 August 2018

8. On 23 August 2018 the claimant was given permission by managers AB and JS to use a 7.5 tonne work vehicle for a personal house move. During the course of the house move the claimant reversed the vehicle striking and damaging a

garage belonging to a member of the public. She left the scene and did not report the incident to work.

First disciplinary hearing and final written warning

9. The owner of the garage reported the incident. The claimant attended an investigation meeting with JS on 10 September 2018 [96-102]. On 12 September 2018 the claimant attended a disciplinary hearing conducted by JG, Transport Coordinator. The disciplinary allegations brought were: a failure to follow procedure, specifically in relation to the reporting of accidents; serious levels of unacceptable behaviours in relation to the events following the accident; and breach of trust. At that hearing the claimant read out and handed in a statement setting out the mitigating factors behind the events of 23 August 2018. The hearing script and notes are at [196-205]. The claimant's handwritten mitigation statement is at [225 – 236].

10. On 5 October JG wrote to the claimant with the outcome of that first disciplinary hearing [104- 105]. He stated:

"Your response to the allegations was that at the time of the accident you were under a lot of stress, both at work and in your personal life. You understand that the procedure for reporting accidents, but state that due to the amount of stress you were under, you did not report the accident. It was confirmed that you had prior approval from your line manager to use the company vehicle but failed to report this incident.

You went on to say that you did not realise that you had caused damage as you had pulled over and checked the company vehicle and could see no visible damage. But on the video you were heard saying that you had hit it. You also admitted this later on in the meeting.

You went on to explain the reasons for the stress due to issues affecting your personal life. You also explained that you had not previously driven the route where the incident took place.

You went on to state that you could not condone your behaviour and apologised for this, putting it down to the stress that you were under at the time.

After listening to the evidence presented and your responses I did not deem it necessary to undertake any further investigations. Therefore, the meeting was adjourned to give the matter full consideration of all the facts and evidence available.

Following the adjournment and having given full consideration to all the facts and evidence available it was my decision to uphold the allegations as listed above.

I reviewed the documentation and the answers you gave in the meeting and explained that due to the serious nature of the allegations, dismissal was an option that was open to me. I took into consideration the mitigating circumstances that you put forward.

As a result it was my decision to issue you with a Final Written Warning which will remain on file for 12 months and explained that there must be an immediate and sustained improvement with regards to your adherence to all Company procedures.

If there are any other incidents identified in the future regarding your conduct or any other concerns further disciplinary action may be taken which could ultimately lead to your dismissal."

11. The claimant did not pursue an appeal.

12. The claimant was absent on sick leave from December 2018 to 15 April 2019 due to cancer treatment.

Second disciplinary investigation

13. In the meantime, in January 2019, unknown to the claimant at the time, an internal audit was conducted by Mr Jones at the Newport Depot. Part of Mr Jones' audit included ensuring that that respondent was complying with EU rules on drivers' hours which were recorded via a tachograph card. As part of that depot audit, and having run a missing mileage report, Mr Jones became aware that on 23 August 2018 the claimant had driven the vehicle for 44 minutes without inserting her tachograph card.

14. On 15 April 2019 the claimant attended a return to work meeting with JS. JS said he had been asked to tell her that someone was investigating a previous incident involving her. The claimant went to speak with AB who told her that it was related to the garage incident.

15. On 15 May 2019 the claimant was then called to an investigation meeting conducted by AR. The notes are at [117 - 122]. The claimant was told the reason for the meeting was not using a tacho card when driving a 7.5t vehicle and that this had been brought to light at the latest transport audit carried out Jan 2019. The claimant accepted in the interview that she was aware of the laws regarding driving without a tacho card and the implications that arise from missing mileage on the tacho master. It was put to the claimant that she had driven the truck initially with the card inserted at 18:42 but she had withdrawn it at 21:20 and that at 21:22 it was driven for a further 44 minutes without the card inserted. The claimant's response was recorded as:

"Can explain. Previous investigation with disciplinary action taken. Was under extreme stress at the time and forgot to re-insert card. When realised that no card had been inserted, did not re-inserted card. Believing was going to be sacked for previous disciplinary continued to drive vehicle. This was out of pure stress I was under at time of incident."

16. The claimant was asked why she had taken the card out when she knew it was breaking the law. She responded to state:

"Unsure why took card out and was in fear of losing job. Other person was helping her move and potentially taking vehicle back for her but did not. Hence card was removed. Person didn't take vehicle back so MR did so, without inserting card as this was the last thing on her mind."

17. It was put to the claimant that the fact there was no tacho card inserted would have flashed on the dashboard. The claimant said:

"Does not recall as was under a lot of stress at the time and was already concerned over the previous disciplinary."

18. The claimant was asked if she would have been able to safely drive and she said:

"Don't recall as friend in cab with her. Extremely stressed and just drove vehicle. Offered AR copies of note from previous disciplinary. Understand where AR is coming from as logically makes no sense."

19. The claimant was asked whether she realised driving the truck without a tacho card inserted was breaking the law and she said:

"Yes it was not taken out to break the law, it was the situation I found myself in due to the events of that evening."

20. AR completed an investigation report [123] recommending that the claimant face a formal disciplinary. AR stated that the claimant had broken transport law and this could affect Newport MSC's O License (Operating License).

Second disciplinary hearing and the decision to dismiss

21. The disciplinary hearing took place on 21 May 2019 conducted by Mr Jones. The claimant was accompanied by a colleague, Ms Potts. The allegation faced was "*breach of tachograph regulations due to removal of tachograph card whilst driving a company vehicle*." The invitation to the disciplinary hearing [126] stated that the live final written warning issued on 5 October 2018 would be taken into consideration. It also said:

"This hearing is your opportunity to respond to the allegations and put forward any mitigating circumstances that you feel should be taken into consideration. Please bring to the hearing all information you wish to be considered."

22. The hearing notes and script are at [127-137]. They record Mr Jones asking the claimant what she meant by her previous statement of "worried about previous disciplinary meeting". The response is recorded as:

"Margaret referred to notes. Attached."

23. The claimant was asked again why she drove without a card and she said:

"Another driver turned up and was going to drive back. I ejected my card and continued move my items to and from my house, the driver didn't end up driving

so I did however completely forgot to reinsert my card. My journey was from home straight back to depot."

24. It was put to the claimant that the vehicle would have flashed a warning and she said:

"*I don't recall the warning and can only put it down to my state of mind."*

25. The claimant said that she believed she was safe to drive.

26. The claimant said she had not received training on tacho master or transport compliance other than e-learning. Mr Jones showed her a transport bullet signed by the claimant on 13 November 2017 which was said to acknowledge transport managers responsibilities.

27. Mr Jones adjourned the meeting between 11:35 and 12:40 when he returned to tell the claimant that her conduct was classed as gross misconduct and she was being summarily dismissed. The decision was confirmed by letter on 24 May 2019 [138]. The letter stated:

"I have based this decision on the fact that you were aware of your responsibilities due to being in the role of a Transport Co-ordinator and the fact that the vehicle would have alerted you that the tachograph card was not inserted."

28. In his witness statement Mr Jones says he considered the claimant had committed gross misconduct because her actions could have resulted in the depot losing its Operating License, that the claimant was aware of the regulations and her responsibilities and would have been alerted to the fact that the tachograph card was not inserted. He said he did not find the claimant's explanation that she was not aware of the rules very convincing and observed that the claimant had sent infringement letters out to other drivers when they had breached the rules (for example [163]).

29. In his witness statement he also said:

"Ms Roche had already been issued with a final written warning in October 2018 for a failure to comply with Speedy's accident reporting rules which was in contravention of the Road Traffic Act 1988. Given that this later event also involved non-compliance with regulatory rules and potentially jeopardised Speedy's Operating Licence, I considered that dismissal was the most appropriate sanction."

30. The claimant said in her evidence that at this second disciplinary hearing she tried to read out a copy of the notes that she submitted at her earlier disciplinary hearing on 5 October 2018 and which outlined her mitigating circumstances which had been taken into account at that previous hearing. The claimant said she was told by Mr Jones twice that she did not need to read them out. She stated that she therefore handed them in by way of evidence but that she did not think that they were taken into account. They are not referred to in the dismissal letter.

31. In his oral evidence Mr Jones accepted that the claimant had offered him some handwritten notes in the disciplinary hearing. He said that he did not think they were relevant because the claimant was saying she had removed the tacho card because she was stressed due to a disciplinary but that disciplinary had not yet taken place (the disciplinary hearing conducted by JS). Mr Jones accepted that he had told the claimant that he did not think the notes were relevant. He did not give any evidence to say he recalled reading them. He said that he did take the claimant's wellbeing into account in terms of mitigation.

32. On the balance of probabilities, I consider it likely that the claimant did hand over her handwritten notes of her mitigating circumstances that she had used at the first disciplinary hearing. The contemporaneous meeting minutes refer to them being "attached." Also, again applying the balance of probabilities, I consider it likely that Mr Jones did not read the notes (and did not allow the claimant to fully read them out to him) as he did not consider them relevant. I return to this in my conclusions below.

33. In his oral evidence Mr Jones stated that in reaching his decision he had felt disappointed with the claimant's integrity. He said he considered the claimant had knowingly broken the law as she had knowingly initially used and then had later ejected the tacho card. He said that this suggested to him that the claimant had made a decision to break the law or remove the driver ID from that vehicle.

34. By way of clarification, I asked Mr Jones how the earlier final written warning had slotted into his analysis. I asked this as his decision letter did not refer to the earlier final written warning, but his witness statement did. He said that when the claimant was involved in the reversing incident she did not stop to report it and removed the tacho card. He said the driver's details disappear. He said he felt that in knowingly taking the tacho card out the claimant was trying to hide the incident with the garage and who was driving the vehicle.

35. In his oral evidence Mr Jones also explained that the missing mileage was flagged on his January 2019 audit because there had been no comments added on the system explaining what it related to. He said that JS should have picked up on this prior to the audit (as should the claimant) as transport managers and coordinators should record and add comments on missing mileage on a monthly basis. Mr Jones said that once it came to light at his audit, he reported it and AR was asked to undertake an investigation. JS was instructed to update the missing mileage report which, Mr Jones stated, JS did with a comment to the effect that the driver had ejected the card.

Appeal

36. On 29 May 2019 the claimant lodged an appeal [140 – 142]. The appeal hearing took place on 10 June 2019 conducted by Mr Newsome. The hearing notes are at [143 -154].

37. In her the appeal grounds the claimant said that she was disputing that she had in fact breached transport law, referring to exemptions and derogations published by the DVSA which were said to include "*a person moving house and goods carried by non profit making groups or registered charities*."

38. The claimant also raised the question of why the allegation had not been dealt with during the first disciplinary process, pointing out that during the first investigation meeting in that first process JS had given her a printout containing information which also showed the vehicle had been driven without a tacho card [94 – 95]. She said it would have been part of his transport manager responsibilities to address it. She alleged that it was part of a conspiracy to get her dismissed.

39. The claimant disputed the relevance of the bulletin relating to Transport Managers responsibilities signed by her as she said she was a transport coordinator and not a transport manager.

40. The claimant also complained that she had been treated differently to JS who she alleged had been previously stopped and reported for towing without an appropriate license and towing a 2000lt fuel bowser without ADR certification. She said he had not been dismissed but had in fact been promoted.

41. In her appeal grounds the claimant also complained that Mr Jones had prevented her explaining her mitigating circumstances and that they had not been taken into account when the decision to dismiss her was reached. She pointed out that at the first disciplinary hearing JG had taken them into account and that if it was relevant for that first disciplinary hearing it would be relevant for the second.

42. Mr Newsome spoke with Mr Jones [155 to 157]. Mr Jones told Mr Newsome that the claimant was in breach of EU Directive 561/2006 and that the exemption did not apply as the claimant was driving a commercial vehicle. The notes also record Mr Jones saying (to the best extent that I can decipher the handwriting):

"MR read out statement strain she was under

Borrowed a vehicle, during period was reversing the vehicle & backed into a garage & this was recorded & she said shit I need to go. This was a previous investigation/disciplinary.

She tried to say this was a reason why she took tachograph out. This is illegal.

HGV1 driver professional illegal to drive without a card, [?] warning sign…"

43. HR spoke with JS and told Mr Newsome that JS had stated he was not aware initially that the claimant had breached tachograph rules. Mr Newsome did not speak directly with JS and there are no records of exactly what was said between HR and JS or what documents JS was shown. Mr Newsome did not ask HR for any information about how similar infringements may have been dealt with.

44. On 24 June 2019 Mr Newsome turned down the claimant's appeal [158 – 159]. Mr Newsome explained the claimant was considered to be in breach of the tachograph regulations in EU directive 561/2006. He said that the exemption did not apply. He said the claimant's role as a transport coordinator meant she was responsible for monitoring and dealing with drivers in the tachograph system. The letter said Mr Newsome had spoken with JS (he accepted in evidence he

had not done so directly) and that JS had stated he was not aware in the first investigation that a breach of the tachograph rules had taken place. Mr Newsome stated that the notes of the disciplinary hearing with Mr Jones did not contain reference to the claimant's notes of her mitigating circumstances. He found no reason to suppose that Mr Jones had not genuinely made the decision to dismiss the claimant during the adjournment and that he did not consider it had been predetermined. In his oral evidence at the hearing before Mr Jones said that JS had been towing a water bowser not a fuel bowser without the correct license. He said he did not deal with the misconduct process but that if he had been asked he would have viewed JS's actions as gross misconduct.

45. On 10 September 2019 the claimant emailed the DVSA asking for their opinion as to whether she was in breach of tachograph rules [160]. The response dated 19 September said [162]:

"There is a tachograph exemption for using a 71/2 tonne vehicle when used for the sole purposes of moving house (excerpted below). Whether or not this exemption would apply to you, would depend on the circumstances and the goods being carried and based on the facts as stated by yourself to an officer; If and when encountered by a DVSA or Police Officer. We cannot therefore, establish whether you have broken any law."

The Respondent's disciplinary policy

46. The respondent's disciplinary policy states that at the disciplinary hearing:

"*You will be able to respond and present any evidence of your own* [41]"

It also states in respect of final written warnings:

"… A final written warning may be issued in the case of more serious misconduct or failure to comply with standards which do not amount to gross misconduct but which are considered serious enough to warrant a final written warning. It may also be used in instances of Gross Misconduct and issued as an alternative to dismissal. It will be recorded on your employee record for a period of twelve months and will normally be removed after this time as long as there have been no further offences and satisfactory improvement has been achieved and maintained. The warning will specify that the consequences of a failure to comply with expectations moving forward will normally result in dismissal."

47. In respect of dismissal it states:

"This is the fourth and final stage of the formal process. It is the appropriate stage to proceed to where further offences have occurred and there is a final written warning is still in effect. Dismissals at this stage are with notice pay, except in the case of gross misconduct."

48. Paragraph 6.8 [45] sets out the effect of a warning and says:

"warnings will set out the nature of the misconduct, the change in behaviour required, the period for which the warning will remain active, and the likely consequences of further misconduct in that active period."

The issues to be determined

49. The issues for me to determine were as follows:

(a) What was the reason or principal reason for dismissal? The respondent relies the potentially fair reason relating to the claimant's conduct.

(b) If a potentially fair reason was show, was the dismissal fair or unfair under section 98(4)?

(c) If the dismissal was unfair, whilst the wider remedy related issues are to be determined at a future hearing (if necessary), it is helpful to decide at the liability stage:

(i) Should there be any deduction for contributory fault?

(ii) Should there be any reduction to the compensatory award on the basis that a fair procedure would have resulted in a fair dismissal in any event?

Relevant legal principles

Misconduct Dismissals

50. Section 94 of the Employment Rights Act 1996 ("ERA") gives an employee the right not to be unfairly dismissed by their employer. Section 98 ERA provides, in so far as it 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…

(4) Where the employer has fulfilled the requirements of subsection (1), 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."

51. Under section 98(1)(a) of ERA it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. A reason may be a potentially fair reason under section 98(2)(b) if it relates to the conduct of the employee. If the employer fails to show a potentially fair reason, then the dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied. At the section 98(4) stage the burden of proof is neutral.

52. In a misconduct case the correct approach under section 98(4) was summarised in Turner v East Midlands Trains Limited [2013] ICR 525. The most important point is that the test to be applied is the range or band of reasonable responses. This test originated in British Home Stores v Burchell [1980] ICR 303 and was subsequently approved in a number of decisions of the Court of Appeal. The "Burchell test" involves consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of these questions is "yes", the tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses.

53. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.)

54. It has long been established, in relation to a reasonable investigation, that an employer needs to acquaint itself with all relevant facts before taking its decision. Viscount Dilhourne said in *W Devis & Sons Ltd v Atkins [1977] IRLR 314*:-

"The employer cannot be said to have acted reasonably if he reached his conclusion 'in consequence of ignoring matters which he ought reasonably to have known and which would have shown that the reason was insufficient'."

55. In *W Weddel & Company Ltd v Tepper [1989] IRLR 96*, it was held that:-

" … [employers] do not have regard to equity or the substantial merits of the case if they jump to conclusions which would have been reasonable to postpone in all the circumstances until they had, in the words of the [employment] tribunal in this case 'gathered further evidence' or, in the words of Arnold J in the ***Burchell*** *case, 'carried out as much investigation into the matter as was reasonable in all the circumstances of the case'. That means they must act reasonably in all the circumstances, and must make reasonable enquiries appropriate to the circumstances. If they formed their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably … ."*

56. I have also reminded myself of the decision of South West Trains v McDonnell [2003] EAT/0052/03/RH and in particular:

"Whilst not only unfair it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or where arguably unfair. Whilst, of course, an individual component on the facts of a particular case may vitiate the whole process the question which the Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances was the investigation as a whole unfair?"

57. In Strouthos v London Underground Limited it was emphasised that disciplinary charges against an employee should be precisely framed and that normally only those matters formally identified as the disciplinary allegations should form the basis for a dismissal.

58. The appeal is to be treated as part and parcel of the dismissal process: Taylor v OCS Group [2006] IRLR.

59. It is important that in carrying out the exercise under section 98(4) the tribunal does not substitute its own decision for that of the employer. The focus must be on the reasonableness of the employer's conduct such as the fairness of the investigation, dismissal and appeal and not on whether the employee has suffered an injustice: Iceland Frozen Foods v Jones [1982] IRLR 439. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

60. A finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances: Brito-Babapulle v Ealing Hospital NHS Trust [2014] EWCA Civ 1626. Generally, to be gross misconduct the misconduct should so undermine trust and confidence that the employer should no longer be required to retain the employee in employment: Neary & Neary v Dean of Westminster [1999] IRLR 283. Thus, in the context of section 98(4), even if the "Burchell test" is met, it is for the tribunal to consider:

(a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct; and

(b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, matters such as the employee's length of service and disciplinary record are relevant as is his/her attitude towards his/her conduct.

The impact of an earlier disciplinary warning

61. In Wincanton Group Plc v Stone [2013] IRLR 178 the law was summarised:

(a) A tribunal must always begin by remembering that it is considering a question of dismissal to which Section 98, and in particular Section 98(4), applies. Thus the focus is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal.

(b) If a tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid.

(c) If the earlier warning is not valid it cannot and should not be relied upon subsequently.

(d) Where the earlier warning is *valid,* then:-

- The tribunal should take into account the fact of that warning.
- A tribunal should take into account the fact of any proceedings that may affect the validity of that warning, such as an ongoing internal appeal.
- It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the tribunal is satisfied as to the invalidity of the warning.
- It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore tribunal should be alert to give proper value to all those matters.
- Nor is it wrong for a tribunal to take account of the employer's treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.
- A tribunal must always remember that it is the employer's act that is to be considered in the light of Section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any

misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

62. In Davies v Sandwell Metropolitan Council [2013] IRLR 374 CA Mummery LJ stated:

"First, the guiding principle in determining whether a dismissal is fair or unfair in cases where there has been a prior final warning does not originate in the cases, which are but instances of the application of s98(4) to particular sets of facts. The broad test laid down in s98(4) is whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstances of the final written warning, as sufficient to dismiss the claimant.

Secondly, in answering that question, it is not the function of the ET to reopen the final warning and rule on an issue raised by the claimant as to whether the final written warning should, or should not, have been issued and whether it was a legally valid warning or a "nullity." The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct.

Thirdly, it is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material factors in assessing the reasonableness of the decision to dismiss by reference to, inter alia, the circumstance of the final warning.

63. In Sweeney (deceased) v Strathclyde Fire Board (2013) UKEAT/0029/13 the Employment Appeal Tribunal (EAT) addressed the situation where the conduct for which the claimant was ultimately dismissed occurred before the conduct for which the claimant had received a still live final written warning. To explain, the claimant in that case was charged with a criminal assault. After the alleged assault took place but before the final disposal of the criminal proceedings the claimant was separately given a final written warning for unauthorised absence from his post. He was then subject to a disciplinary hearing arising out of the charges relating to the earlier criminal assault and was dismissed. In the decision to dismiss the employer took into account the final written warning. The employer's handbook said that disciplinary action was cumulative so that if an employee had an outstanding warning on their record any future action had to be at least at the next level on the disciplinary scale.

64. The EAT said:

"36 In my opinion, the respondent was entitled to take into account all that happened on the record of the claimant. Mr Napier's submissions about the ACAS Code are to be preferred to those of Mr Bryce. The Code does not deal with the situation with which the respondent was faced. Similarly, the cases of ***Airbus*** *and* ***Thomas v Diosynth*** *are not in point. They do not deal with the same situation. I do not accept Mr Bryce's argument that the final written warning requires to be construed as referring only to misconduct taking place*

after the date of the warning. Rather I accept Mr Napier's position broadly to the effect that a written warning final or otherwise is a fact which a reasonable employer is entitled to have in mind. In this case the respondent dealt with the disciplinary offence relating to absence before the claimant pleaded guilty to assault. The respondent was aware from the claimant's position at the internal appeal that the claimant regarded the matters as linked, both being due to pressure in his life. The fact is however that the respondent dealt with the matters separately as they became aware of them. There was no argument from the claimant at the disciplinary procedure regarding the absence offence that other matters were current and all should be dealt with together. The respondent's policy on multiple incidents of misconduct happening during the subsistence of a warning is clear. Plainly a reasonable employer will not be hidebound by policy and will require to consider each case on its own facts. Such an employer will however be entitled to abide by its policy unless there is good reason why it should not.

In the present case, the respondent had a policy which would involve a person who committed misconduct while on a final written warning being dismissed, depending always on the nature of the misconduct. In the present case, the claimant committed two acts of misconduct. One was the behaviour which resulted in the criminal convictions; the other was the unauthorised absence. The respondent found each of them to be conduct which merited a final written warning and it was not argued before me that the respondent had acted unreasonably in so doing. It seems to me that the respondent was entitled to regard the facts, which were that the claimant had committed both of these acts of misconduct, as leading to a situation in which he put at risk his continued employment. The respondent considered all of the mitigating circumstances, including his many years of good service and his explanation for the criminal convictions. Nevertheless, it took the view the policy which dictated that a person who had committed more than one offence which merited a final written warning would require to be dismissed should not be displaced, despite the mitigating factors. I appreciate that the policy is directed towards a second act of misconduct during the period in which a final warning is live. I do not accept Mr Bryce's analysis of the nature of a warning. While it is correct to argue that a warning is an admonition that tells the employee that future misconduct will have certain consequences, it is in my opinion more than that. It is also a recording of misconduct in the mind of both employer and employee. Mr Napier submitted that a warning is 'Janus like' in that it looks both ways. I accept that submission. I am of the view that the respondent was entitled to look at the claimant's record when deciding on the disposal in the disciplinary procedure relating to the criminal convictions. The respondent was entitled to take notice of a finding of misconduct which was marked by the imposition of a final written warning. In my opinion the respondent was absolutely entitled to proceed as they did. That being so it cannot be said under Section 98(4) that the respondent acted unreasonably when one considers all the circumstances of the case ... ."

65. Overall, I also bear in mind the summary of the task of an employment tribunal as set out by the EAT in Bandara v British Broadcasting Corporation UKEAT/0335/15/JQJ that:

"It must start from the employer's reason for dismissal. It is to ask whether the employer acted reasonably in treating it as a sufficient reason for dismissal. It will consider each aspect of the employer's actions and conclusions, which in a conduct case will include the employer's investigation, disciplinary process, factual findings and sanction. If the employer took into account a final written warning, it will consider that as part of its evaluation… It will apply across the broad the standard of the reasonable employer, recognising that there is often a range of ways in which a reasonable employer can act but also that the range is not infinite. It will be careful to apply the standard of the reasonable employer not substituting its own conclusion."

The Acas Code of Practice on Disciplinary and Grievance Procedures

66. Any provision of a relevant ACAS Code of Practice which appears to the tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The Acas Code says:

"9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. The 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…

12… At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this."

Discussion and Conclusions

67. Applying the legal principles outlined above to the relevant findings of fact made, I reach the following conclusions to determine the issues in the case.

The reason for the dismissal?

68. It was said in Abernethy v Mott Hay and Anderson [1974] ICR 323 that: "*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee"*

69. In my judgment, based on all the evidence before me including the oral evidence, the facts and beliefs held by Mr Jones that caused him to dismiss the claimant were multifactorial in that:

(a) He believed that the claimant, in driving the vehicle in question on 23 August 2018 without a tachograph card inserted, was in breach of

European regulations and was the type of action that could compromise the respondent's operating license. In that regard he also believed that the claimant knew her tachograph card was not inserted and that she was aware that she should insert her tachograph card when driving the respondent's vehicles;

(b) He knew that the claimant had received a final written warning (that was still live) for failing to report that when driving the same vehicle on the same date she had collided with a garage belonging to a member of the public;

(c) He believed that the claimant in ejecting her tachograph card had made a deliberate decision to remove her driver ID from the vehicle as part of the claimant trying to hide the incident with the garage and who was driving the vehicle in question;

(d) He considered that the events in conjunction with those relating to the final written warning showed a pattern of the claimant not complying with regulatory requirements and displaying a lack of integrity.

70. I accept and find that the decision to dismiss for these reasons was made by Mr Jones himself. I do not find it established on the evidence before me that he acted as part of some form of conspiracy or pre-determined plan with JS or others to find a way to dismiss the claimant. Mr Jones' reasoning all relates to the conduct of the claimant and therefore the respondent has established that the reason or principal reason for dismissal was conduct. A reason relating to conduct is a potentially fair reason for dismissal. I therefore have to apply the test under section 98(4). I remind myself that I must not substitute my own decision for that of the respondent and that my focus must be on the reasonableness of the respondent's conduct applying the band of reasonable responses.

Fairness

Genuine belief?

71. I am satisfied that Mr Jones genuinely believed that the claimant was guilty of misconduct in relation to the events of 23 August 2018 as summarised in paragraph 69 above.

Reasonable grounds for belief based on a reasonable investigation?

72. I have to consider whether Mr Jones had reasonable grounds for those beliefs having followed a reasonable investigation and a reasonably fair procedure.

73. The conclusion that the claimant drove the vehicle without a tacho card inserted in breach of European regulations is a point of contention between the parties. The claimant considers that her circumstances that day fell within an exemption; the respondent does not. The question for me, however, is what Mr Jones believed and whether that belief was based on reasonable grounds. Regulation (EC) No 561/2006 [178 – 180] of the European Parliament and of the Council explains in its preamble the importance and intention of setting clear rules for the road transport

sector and drivers engaged in road transport on matters such as driving times, breaks and rest periods. Article 2(1) provides that the Regulation applies to the carriage by road *"(a) of goods where the maximum permissible mass of the vehicle, including any trailer, or semi-trailer, exceeds 3.5 tonnes."* Article 3 disapplies the Regulation to *"(h) vehicles or combinations of vehicles with a maximum permissible mass* ***not exceeding 7.5 tonnes used for the non-commercial carriage of goods****"* [my emphasis].

74. The domestic guidance at the time on the Gov.uk website for drivers' hours and tachographs stated:

"The EU rules (Regulation (EC) 561/2006) apply to drivers of most vehicles used for the carriage of goods -defined as goods or burden of any description… where the maximum permissible weight of the vehicle, including any trailer or semi-trailer, exceeds 3.5 tonnes… It is however not necessary for a vehicle to be laden for it to be in scope of the EC/AETR rules…

The EU rules grant Member States the power to apply derogations to further specific categories of vehicles and drivers while on national only journeys. The following derogations have been implemented in the UK…

Vehicles or combinations of vehicles with a maximum permissible mass not exceeding 7.5 tonnes used for the non-commercial carriage of goods*.*

Examples could include a person moving house and goods carried by a non-profit making group or registered charity.

European Court of Justice case law provides that the term non-commercial also applies to the carriage of goods by a private individual for their own purposes purely as part of a hobby where that hobby is in part financed by financial contributions from external persons or undertakings and where no payment is made for the carriage of goods per se."

75. The claimant argues the vehicle was being used for the non-commercial carriage of goods and that she fell within the example given of a person moving house. She did, however, argue this before Mr Jones. She raised it for the first time at appeal stage. During the investigation stage the claimant had acknowledged she understood the laws relating to driving without a tacho card, the implications of driving and recording mileage, the laws relating to infringement and that she realised that driving a 7.5+ tonne truck without a tacho card in was breaking the law. She did not say the tacho card laws did not apply to her; she simply said due to extreme stress she forgot to reinsert it. Before Mr Jones she again confirmed she was aware of transport rules and EU rules of drivers regulations. She did not dispute his assertion that she was fully aware that she should have had her card inserted. Mr Jones' evidence was that he believed the claimant fell within the regulatory requirement of having to drive with a tacho card inserted because, irrespective of whether she was using the vehicle for domestic purposes, it was driven under an Operator's License and was therefore always a commercial vehicle irrespective of the purpose for which it was being used.

76. As I have said, the question for me is whether Mr Jones had reasonable grounds based on a reasonable investigation for believing the claimant to be in breach of the EU regulation. I find that he did. His interpretation of the regulation is one that is plausible and accords with the aim of the regulations to regulate the driving hours of those working in the road transport sector (who would be driving vehicles under an Operator's License). At the time in question he was Transport Compliance Manager and it was a matter within his professional understanding and remit. Further, the claimant at the time had not put a contrary case to him or the investigating officer.

77. The claimant raised it at appeal stage and Mr Newsome discussed it with Mr Jones who was both the disciplining officer and the Transport Compliance Manager. It was not within Mr Newsome's expertise and it was reasonable for him to rely upon the expertise of Mr Jones.

78. At the investigatory stage, the claimant did not deny that she was aware she was driving without her card inserted. She said she was under extreme stress, forgot to re-insert it and when she realised it was not inserted she did not re-insert it (out of stress and the belief she was already going to be sacked). At the hearing before me the respondent produced photographs of the alleged vehicle and the location of the dashboard alert. The claimant denied that this was the correct vehicle. Again, however, I am concerned with what Mr Jones believed at the time of reaching his decision. The claimant did not say at that time she was unable to see any alert in the vehicle. She simply said she could not recall the warning and put it down to her state of mind at the time. There were therefore reasonable grounds for Mr Jones' belief that the claimant drove knowing she did not have her tacho card inserted.

79. As above, at the time of the claimant's investigation meeting and disciplinary hearing she did not dispute that she should have had her tachograph card inserted or her knowledge of transport rules and EU rules. She did, however, say to Mr Jones that she had not received training on tacho master or transport compliance other than e-learning. Mr Jones showed her a transport bulletin signed by the claimant on 13 November 2017 [73] setting out transport manager's responsibilities for agency drivers that includes such matters as monitoring tachograph infringements. At the hearing before me the claimant said this was not relevant as she was a transport coordinator not a manager and also it related to agency drivers. Again, what matters is what was before, or reasonably should have been before Mr Jones at the time he made his decision. Based on the claimant's own admissions, and his understanding at the time of the claimant's role and responsibilities, there were reasonable grounds for Mr Jones' belief.

80. The terms of the final written warning stand as a matter of fact and that it was known by Mr Jones is not in dispute.

81. The belief that the claimant had made a deliberate decision to remove her driver ID from the vehicle as part of the claimant trying to hide the incident with the garage, and who was driving, is not an allegation that was directly put to the claimant whether at the investigation stage, in the invitation to the disciplinary hearing or at the disciplinary hearing. The claimant had said, in her general account, that she took the card out at her new home as someone helping her move was potentially going to return the vehicle to the depot and, when she ended up having to drive it herself, she was stressed and forgot to reinsert it. An allegation of deceit or taking

steps to hide evidence of wrongdoing is a serious one. In my view, any reasonable employer acting fairly would have put the allegation squarely to the claimant so that she could respond and put forward any evidence. The case law referred to above and the Acas Code of Practice confirm this. This points towards unfairness.

82. Moreover, in forming this belief (and his related belief that there was a pattern of the claimant displaying a lack of integrity) Mr Jones was in effect in part re-opening or at the very least substantially overlapping with the previous disciplinary proceedings conducted by JG in relation to the garage collision. He was making an express finding that the claimant had deliberately taken steps to conceal her involvement and that she lacked integrity by both deliberately not reporting the collision and in taking steps to hide her identity as driver. In relation to the garage collision, that is not on the face of it an express conclusion that JG reached and would fly somewhat in the face of JG's acceptance of the claimant's mitigation evidence that she was behaving out of character due to high stress. There is a real potential difference between an individual burying their head in the sand and not reporting a collision because they are stressed and scared of the consequences compared with an individual proactively taking steps to remove evidence and hide their identity and responsibility for the collision.

83. There is no absolute bar to an employer re-opening an earlier disciplinary finding[1]. But it would have to be a reasonable step within the reasonable range of responses in the particular circumstances. In the way it was undertaken by Mr Jones I do not consider it would fall within the band of reasonable responses. A fair starting point for a reasonable employer would have to involve exploring what evidence was before JG, why he reached the decisions that he did and what, if anything, was now being brought forward by way of new evidence or new information about the gravity of the situation or the claimant's conduct and/or the genuineness of the claimant's mitigation relating to the garage collision that would justify it fairly being reassessed. Such an assessment and decision making process was not undertaken here. It fell outside the band of reasonableness.

84. Further, if Mr Jones was going to conclude the claimant removed the tacho card to hide her identity and therefore responsibility for the garage collision a reasonable investigation by any reasonable employer would have to involve collating evidence about, and an analysis, of the timeline of events and what other evidence there would be to show or disprove that the claimant was seeking to hide her identity as driver. The claimant's evidence placed before Mr Jones at the time was that she removed the tacho card later when she was at her new home, and therefore on the face of it not at the scene of the garage collision. Mr Jones also referred in his oral evidence to having seen (at the time of the disciplinary hearing) the video footage from inside the vehicle which showed the claimant reacting emotionally to the garage collision. That would require a reasonable employer to analyse whether the claimant would then really remove the tacho card to hide her identity or whether it supported the claimant's alternative account that she removed the tacho card later because she thought someone else was going to return the vehicle to the depot. Again, no such assessment was undertaken. It fell outside the band of reasonable responses.

[1] See for example Christou and Ward v London Borough of Haringey [2013] EWCA Civ 178

85. I therefore do not find that Mr Jones' belief that the claimant made a deliberate decision to remove her driver ID from the vehicle as part of trying to hide the garage collision and who was driving and that she displayed a pattern of a lack of integrity was, applying the range of reasonable responses test, a reasonable belief based on having conducted a reasonable investigation.

86. Turning to the final factors operating in Mr Jones' mind, his belief that the claimant had shown a pattern of behaviour in not complying with regulatory requirements was reasonably held. However, the implications of this bearing in mind that the events all happened on the same evening, I return to below.

Other issues relating to procedural fairness

87. Turning to some more general points about the procedure adopted, I have found as a matter of fact that Mr Jones did not let the claimant read out her handwritten notes that she wanted to rely on in mitigation and that he also did not read them as he did not consider them relevant. In my judgment any reasonable employer would have read the notes and taken them into account. The notes set out the claimant's account of the run up to the day in question prepared for, and taken into account, at the first disciplinary hearing when the claimant was given a final written warning. In very short form they set out, from the claimant's perspective, that she had been feeling overloaded in work, that she had serious problems in her home life including having to move house quickly and in secret to flee domestic violence and a threat of being made homeless. She talked about the day of the move being made even more stressful as it was unclear on the morning whether the property transaction would go through and people she thought were going to help her with the move were dropping out. She explained that when she struck the garage she was seeking to reverse the vehicle on a road she had not driven on before and that she panicked and did not report it as she thought she would lose her job.

88. In my view, a reasonable disciplinary manager, if he had read the notes, would have been able to understand, despite what I accept was poorly referenced short hand on the part of the claimant to "previous investigation with disciplinary action taken" that when she said she was under extreme stress at the time and forgot to re-insert the card that she was saying she thought the same mitigating circumstances about why she was feeling so stressed that day and why she may not have been acting in a fully rational way should be taken into account when assessing her conduct in driving without a tacho card as it was when assessing her conduct in failing to report the collision. A failure to reasonably take into account the claimant's mitigation evidence is, in my judgment, by itself a key and significant factor pointing towards unfairness. If it was relevant to why the claimant did not report the collision, it was potentially relevant to (i) whether she knew/ for what duration she knew she was driving without a tacho card inserted and (ii) why she continued to drive without the tacho card inserted (iii) whether she drove without the tacho card inserted because of her emotional state and a sense she was going to lose her job anyway because of the collision or because she was seeking to cover up the collision. It was relevant to how Mr Jones may therefore view the seriousness of her actions in respect of the tacho card. At the appeal stage Mr Newsome also failed to properly appreciate this point and the failing was therefore not remedied at appeal.

89. Turning to the appeal, I do not, consider that Mr Newsome's enquiries via HR with JS as to JS' earlier knowledge of the claimant driving without the tacho card inserted were sufficient. This is of importance given Mr Jones' view it was part of the claimant seeking to hide her involvement in the earlier collision. If Mr Newsome was not going to speak directly with JS it was more incumbent on him to have control over exactly what was put to JS and what his responses were. There is no paperwork relating to this. It is not known exactly what was put to JS. It is not known if he was shown the printout that he himself had given the claimant in the first disciplinary investigation which shows her driving without the card inserted. It is not known whether he picked up the missing mileage on his own monthly audits that Mr Jones stated that JS should have been undertaken and if so, why he took no action or indeed failed to notice it. It is not known to what extent this information was or was not apparent to JG when he made his own disciplinary decision. Any reasonable employer, bearing in mind what was operating in Mr Jones' mind when decided to dismiss the claimant, would have taken and properly recorded such evidential enquiries.

The final written warning

90. A somewhat unusual aspect of this case is that the final written warning and the subsequent disciplinary procedures for driving without a tacho card inserted all relate to events on one particular evening. It is therefore not the kind of case where the respondent can say the claimant was given a warning about future conduct, she failed to take it on board, and committed a further act of misconduct resulting in a decision to dismiss. As is understandable, the respondent's disciplinary policy is largely predicated upon that more usual scenario.

91. In my judgment, what Mr Jones was seeking to do, as part of his finding that the claimant had deliberately removed the tacho card, was to re-open or at least substantially overlap with previous assessment of the garage collision and reach a wider conclusion that not reporting the collision and removing the tacho card were part of a deliberate ploy to remove the claimant's identity as driver and in turn say the claimant's displayed a pattern of a lack of integrity. It was not simply that he was of the view that because the claimant had not reported the collision it made it more likely that she had knowingly removed her tachograph card. He was instead of the view that it was all part of one attempt to cover the collision up. In terms of sanction, he was not directly imposing a new replacement sanction for the garage collision but instead took such a route, in part, indirectly by taking the live final written warning into account in deciding to dismiss.

92. As I have already said, there is also no complete bar on an employer re-opening an earlier disciplinary finding. Likewise, the final written warning was valid and Mr Jones was entitled to take it into account[2]. The fact that the final written warning was not administered until after the day of the events in question does not operate as an absolute bar but its context together with the overlap with JG's earlier disciplinary process forms part of my overall assessment of fairness under section 98(4).

[2] See Sweeney (deceased) v Strathclyde Fire Board (2013) UKEAT/0029/13 above

93. In my judgment, a reasonable employer would factor into the equation that, given the events all related to the one night in question, this was not a scenario in which the claimant could have received a final written warning and had the chance to improve before committing a further offence. Both offences had already been committed by the time of the first disciplinary hearing. Whilst again there no absolute bar to the movement from a final written warning to dismissal in such a scenario, it is a factor a reasonable employer would take into account. There was nothing before me to show Mr Jones had thought about that. Moreover, bearing in mind the particularly unusual features of this case, when taking the final written warning into account when deciding to dismiss any reasonable employer would have taken the type of steps that I have already outlined above. For example, exploring what was before JS and JG and taken into account in their decision making process, in weighing any competing factors and providing a clear rationale as to why dismissal following the final written warning was the appropriate step, and evaluating and explaining why mitigation that was accepted for the process before JG was now not considered effective to temper against dismissal in the second process. I do not find on the evidence before me that Mr Jones did so and this was outside the range of how a reasonable investigator and decision maker would conduct themselves in such circumstances. I do not accept on the findings of fact that I have made that Mr Jones' analysis was simply the totting up of two similar types of offence, as is put forward by the respondent in their submissions. His oral evidence was far more nuanced than that.

Summary

94. Taking a step back, looking at the case overall and reminding myself of the test I must apply, I do not consider, having regard to the conduct reason shown by the respondent, and in accordance with equity and the substantial merits of the case, that the respondent acted reasonably in treating it as a sufficient reason for dismissing the claimant. The respondent's investigation, and decisions reached based on that investigation, including the wholesale failure to take into account the claimant's mitigation evidence, and to not clearly put the totality of the allegations being faced clearly to the claimant took the respondent outside the bands of a reasonable response. There was nothing before me to suggest that the respondent lacked the resources to take the steps identified.

Remedy Issue - "Polkey"

95. Under Section 123 of the Employment Rights Act 1996: "*the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."*

96. It has been established since Polkey v AE Dayton Services Ltd [1988] ICR 142 that in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his or her employment. Although this inherently involves a degree of

speculation, tribunals should not shy away from that exercise. A similar exercise was also required by what was then section 98A(2) (part of the now repealed statutory dispute resolution procedures), and the guidance given by the Employment Appeal Tribunal in paragraph 54 of Software 2000 Limited v Andrews [2007] IRLR 568 remains of assistance (although the burden expressly placed on the employer by section 98A(2) is not to be found in section 123(1).

97. This exercise requires me to assess whether, had there been a fair investigation and procedure, it would have been within the band of reasonable responses to dismiss the claimant for these matters rather that impose a lesser disciplinary punishment and, if so, how likely that outcome was. I have to consider not a hypothetical fair employer, but the actions of the employer who is before me, on the assumption that the employer would this time have acted fairly. Could the employer have fairly dismissed and, if so, what were the chances that it would have done so?

98. I further note that a deduction can be made both for contributory conduct and *Polkey* but when assessing those contributions the fact that a contribution has already been made or will be made under one heading may well affect the amount of the deduction to be applied under the other heading.

99. In my judgment, the respondent, acting fairly could potentially have fairly dismissed the claimant. Taking the allegations at their most straightforward, the final written warning was valid, and for a serious matter of failing to report a collision in a works vehicle that would have led to dismissal but for the mitigation of the claimant's life circumstances which were taken into account. It then came to light that there were reasonable grounds for suspecting she had also driven the vehicle in contravention of the tachograph rules. If that had not been known before (which the respondent should have more fully considered) it was legitimate to investigate it. The second investigation reasonably concluded that the claimant knowingly had driven the vehicle without a tacho card inserted and reasonably concluded that the claimant would have known that contravened regulations which could potentially have implications for the respondent's Operators License (albeit there was no evidence it actually did). The respondent, acting fairly, would have had to take into account the claimant's mitigation evidence and explained why, even though it mitigated against dismissal during the first process, it did not during the second despite the events occurring on the same day. It would also have had to explain why moving from final written warning to dismissal was seen as appropriate when the events had all happened on the same day such that this was not a scenario where the claimant had the opportunity to learn from the final written warning but still went on to make other regulatory breaches. I accept it is potentially possible they could have followed such a process and decided to fairly dismiss the claimant. I also do not wholesale rule out the potential for the respondent to have fairly dismissed the claimant on the wider misconduct allegations operating in the mind of Mr Jones albeit as set out above there are various investigatory steps that would have been needed and their careful evaluation viz a viz the first disciplinary process and the final written warning.

100. I do not accept the respondent's submission that any errors were futile in affecting the decision to dismiss or that compensation should be limited to the time taken to rectify any procedural errors.

101. That a fair procedure would have resulted in the claimant's dismissal is far from certain. Proper enquiries with JS and JG could potentially bring to light that they were in fact aware of the claimant having driven without the tacho card inserted but that it was not considered relevant or was not taken forward for some reason; it is there to be seen on the vehicle printout. This may have caused the respondent to revisit whether to pursue the second disciplinary procedure or the sanction applied. When the claimant's mitigation evidence was taken into account, the decision maker may have decided in the unusual circumstances pertaining that the events related to the same night, to accept the mitigation as JG had done for the second allegation too and apply no greater sanction. Or the decision maker may have decided not to apply the sanction of dismissal bearing in mind this was not a final written warning that gave the claimant the opportunity to learn and improve before the second event took place. JS was not dismissed for his own regulatory breach (even though Mr Jones said he personally would have considered it gross misconduct). This shows the range of ways managers within the respondent may react to such a scenario.

102. Investigations may have convinced the respondent that it was implausible that the claimant removed the tacho card with the purpose of trying to remove her identity as driver at the time of the collision with the garage. That may have affected the seriousness with which the claimant's conduct overall was viewed. Or a view may have been taking when looking at the overlap between the two procedures and what had or had not been encompassed in the first process that it was not appropriate to add in, or find established, or apply a sanction for the overarching allegation that the events were part of the claimant seeking to hide her identity as driver and that she had displayed an overall pattern of a lack of integrity.

103. Assessing it as best as I can I therefore apply a deduction to the future compensatory award to reflect the chance that a fair procedure would have resulted in the same outcome of dismissal of **30%**.

Contributory fault

104. Section 122(2) of the Employment Rights act says:

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

105. Section 123(6) supplements section 123(1) (set out above in relation to Polkey) to say:

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

106. For the basic award there is no requirement for a causative relationship between the conduct and the dismissal. The compensatory award does require a causal

connection. The employee's conduct need only be a factor in the dismissal; it need not be the direct and sole cause.

107. In Steen v ASP Packaging Ltd [2014] ICR 56 the Employment Appeal Tribunal suggested the following should be assessed:

(a) What is the conduct which is said to give rise to possible contributory fault?

(b) Is that conduct blameworthy? The tribunal has to assess as a matter of fact what the employee actually did or failed to do (not what the employer believed).

(c) Did any such blameworthy conduct cause or contribute to the dismissal to any extent (this is only relevant to the compensatory award)?

(d) If so, to what extent should the award be reduced and to what extent is it just and equitable to reduce it? Here the EAT noted that "A separate question arises in respect of section 122 where the tribunal *has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so."*

108. In Nelson v BBC No 2 [1980] ICR 110 it was said:

"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But is also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."

109. Here I have to assess the facts for myself. Applying the balance of probabilities, I accept that the claimant was very stressed on the day in question, particularly due to her domestic circumstances. Her reversing of the respondent's vehicle led to her striking the garage. She became even more stressed and emotional, could not face dealing with the scene, and left the scene, panicking that she would lose her job (which would no doubt affect her domestic circumstances too) if it came to light. I accept that in not reporting the accident she was not acting rationally because of her overly emotional state and also that it was blameworthy conduct. I also find, again on the balance of probabilities, that the claimant ejected her card because she initially thought that someone else was going to return the vehicle to the depot. The claimant knew, when thinking rationally, that the respondent expected her to drive with a tacho card inserted. She had done so earlier that day. I accept the claimant became aware at some point as she drove along that she did not have her

tacho card inserted. She admitted that at the investigation meeting and in her oral evidence before me. I do not find on the balance of probabilities that the claimant so drove as a deliberate ploy to try to cover up her identity as driver at the time of the garage collision. The evidence before me does not show on the balance of probabilities that the tacho card was removed at that point. The claimant would also have been aware that the footage in the cab showed her driving at the time of the collision. In my view it is likely the claimant was in a heightened state of distress, was contemplating the potential loss of her job for striking the garage and in the scheme of things, as she saw them at that time, was indifferent to any additional harm that driving without a tacho card was going to cause in her overall circumstances so she did not stop and rectify its omission. If she thought about it rationally she would have known the importance to the respondent of driving with a tacho card inserted. Again, this is blameworthy conduct.

110. In relation to any reduction to the compensatory award the claimant's blameworthy conduct outlined did cause or contribute to the decision to dismiss her. However, I also bear in mind, particularly considering what is just and equitable, that the claimant's conduct in not reporting the collision (on the face of it in my view the more serious conduct) had been addressed by the final written warning and what led to the dismissal was the apparent belated discovery the claimant had also driven without her tacho card inserted. There were also mitigating circumstances. In all the circumstances I have decided it is just and equitable to make a reduction to both the future basic award and the compensatory award to the extent of **25%** to reflect the claimant's contribution to her unfair dismissal

In summary

111. In summary, the claimant was unfairly dismissed. At the remedy stage any compensatory award is to be subject to a deduction of 30% applying the Polkey principle. The claimant's basic award and compensatory award is to be subject to a deduction of 25% for contributory fault. I will issue a separate case management order in relation to steps needed to get this case ready for a remedy hearing.

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Employment Judge Harfield
Dated: 7 July 2020

JUDGMENT SENT TO THE PARTIES ON 10 July 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS