EMPLOYMENT TRIBUNALS

Claimant: **Mr P Marshall**

Respondent: **Hovis Limited**

Heard at: **Nottingham** **On:** **8 October 2020**

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

Representatives

Claimant: **Mr S Gittins of Counsel**
Respondent: **Mr Z Sammour of Counsel**

JUDGMENT

The Employment Tribunal Judge gave judgment as follows:

1. The claim of unfair dismissal is not well founded and is dismissed.

REASONS

The claim

1. The Claimant submitted his claim on 4 June 2020 after a period of early conciliation from 7 April 2020 to 7 May 2020. He was employed by the Respondent as a Radial Driver from 10 February 2014 until 8 January 2020.

2. On 25 October 2019 and 25 November 2019, the Claimant was involved in two accidents for which he admitted he was at fault. The first accident occurred when a previous final written warning given to him in October 2018 was still current.

3. The Claimant claims his dismissal was unfair pursuant to Sections 94 and 98 of the Employment Rights Act 1996 (ERA) in that, inter alia, the Respondent failed to provide him with training as advised in the investigation of the first accident, the Respondent failed to deal with the first accident quickly enough, the dismissing officer did not fully understand the situation and had not considered matters appropriately. Further, the Respondent failed to consider alternative outcomes and the dismissing officer should have considered and taken into account the circumstances surrounding the final written warning given to the Claimant in October 2018. Alternatively, the Claimant contends that the Respondent did not hold a genuine belief that the allegations were true, that belief was not held on reasonable grounds and the Respondent was negligent in allowing the Claimant to continue driving whilst he went through the disciplinary process.

The evidence

4. I heard evidence for the Respondent from Mr B Hall, Operations Manager and dismissing officer, Mr N Taylor, Site Manager and appeal officer, and from the Claimant and Mr P Roe, his union representative. All witnesses produced written witness statements and were cross-examined.

5. There was also an agreed bundle of documents extending to 142 pages and references to page numbers in this judgment are to page numbers in the bundle.

The law

6. Section 98(1) ERA provides:

> "(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."

7. Section 98(2) ERA provides:

> "(2) A reason falls within this subsection if it-
>
> (b) relates to the conduct of the employee."

8. Section 98(4) ERA provides:-

> "(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."

9. In **British Home Stores Limited v Burchell** [1978] IRLR 379 it was held that in conduct dismissals the relevant questions are:

> (i) Did the Respondent have a reasonable belief that the Claimant was guilty of the misconduct?

(ii) Did the Respondent have reasonable grounds for that belief?

(iii) Did the Respondent carry out such investigation into the misconduct as was reasonable in the circumstances?

(iv) Did the decision to dismiss the Claimant fall within the range of reasonable responses?

Oral evidence

10. Mr Hall confirmed he chaired the disciplinary hearing of the Claimant which led to the final written warning confirmed on 29 October 2018 (page 50). At page 51 it is confirmed that, at the time of this disciplinary hearing, the Claimant had a live written warning dating from March 2018 for unacceptable conduct. Mr Hall took the final written warning into consideration when reaching his decision. He accepted that, had he been dealing with the October 2019 accident only, one option could have been to extend that final written warning for a further period of time but he considered that the second accident in November 2019 was relevant to his decision. He was questioned about the accident on 25 October 2019 at Birmingham Prison. He freely accepted that, as there was no third party property damaged but there was damage to a company vehicle, this could have been considered as a level 4 incident which did not necessarily mean there would be a disciplinary hearing (page 56). He confirmed his view in the final sentence at paragraph 21 of his witness statement which said:

> "Health and safety of our drivers and other road users are paramount and by continuing to allow the Claimant to drive I considered could put him and others at risk."

11. In the dismissal letter at page 119 Mr Hall confirmed his view that he had grave concerns around the decisions the Claimant had made whilst driving company owned vehicles which had the potential to cause serious injury or harm to either himself or another road user.

12. Mr Taylor accepted that the e-mail exchange at page 79 showed a significant delay between the first investigatory interview and the invitation to the disciplinary hearing. He said this was due to the HR adviser who dealt with incidents of this kind being on holiday when asked to arrange a disciplinary hearing and a further delay of ten days after she returned from holiday before she sent the invitation out. Mr Taylor further accepted that the reassessment recommended by Mr Flinton, who carried out the investigation into both accidents, should have been actioned sooner. He confirmed, however, that reassessment did not amount to further training. It involved one of the Respondent's assessors sitting in the vehicle with the Claimant while he drove on one of his rounds and reporting back to him and the Respondent. He accepted that the Claimant's driver assessment report on 25 February 2016 (page 70) rated the Claimant as above average with skilful ability at that time.

13. The Claimant has suggested that the second accident was due in part to the fact that he had received inadequate training on a new vehicle he was driving at the time. As this was raised by the Claimant at the appeal hearing, Mr Taylor requested information on what training he had received (page 135). He said he requested this information as he was concerned there might be more incidents with these vehicles. Mr Taylor responded to the suggestion by the Claimant at the reconvened appeal hearing on 24 January 2020 (page 127). He had noted that the Respondent's drivers were involved in 17 accidents in 2019 and 3 in January 2020 which was similar to the number of accidents in 2018 and 2019. Mr Taylor noted that the Claimant had had 20 days' driving the new vehicle which was largely the same as the older vehicle apart from extra safety features.

14. When asked further about the fact the Claimant had not been reassessed he accepted that potentially he might not have had the second accident had that reassessment taken place. He also confirmed that if the Claimant had been suspended he might not have had the second accident in November 2019 but his decision was based on the risk of further accidents. Further, he said that if the Claimant's final written warning had expired this would have had a bearing on his decision although there was no guarantee this decision would have been any different.

15. I accepted the evidence of Mr Hall and Mr Taylor as being reliable. They did not seek to avoid questions about the level of the Claimant's accident within the Respondent's policy, the delay between the investigation and disciplinary hearing or the relevance of the final written warning. In particular, Mr Taylor accepted that there was potential, and he put it no higher than that, for the second accident being avoided had the Claimant had a reassessment or been suspended.

16. To the Claimant's credit, he acknowledged that, having driven lorries for the Respondent for over 5 years, he was an experienced driver and was expected to drive with due care and attention. He was aware that accidents could amount to disciplinary matters as a result of the written warning he received for driving with undue care and attention on 27 February 2018 resulting in damage to two of the Respondent's vehicles at its Nottingham site (page 48). He further accepted that the allegations set out in the Respondent's letter of 29 October 2018 (page 50) were serious allegations which would have presented Mr Hall, who chaired that disciplinary hearing, with an opportunity to "put the boot in" and dismiss him but the Claimant then went on to say that Mr Hall had fallen short of finding that the circumstances which led to his final written warning were gross misconduct and he did not think Mr Hall gave him the benefit of the doubt. This is despite Mr Hall quite clearly concluding (page 51) that he was unable to prefer one party's version of events to the other. The Claimant then agreed that he had allowed a conversation with a Tesco employee to escalate to a point where his behaviours were deemed aggressive by the Respondent's customer. He said he did not appeal against the final written warning because he had not been dismissed. He suffers from anxiety and did not want to deal with an appeal in circumstances where he was still employed.

17. Referring to his driver assessment report at page 46, he said the assessment lasted for 30 minutes and that he did not drive more carefully when an assessor was sitting in the lorry with him. He criticised his training (page 52) as being little more than a 5 minute briefing to him and other drivers about what various switches and buttons did in the lorry and having issues with brakes noted. Subsequently, he said that driving the vehicle for 20 days did not give enough time to get used to it but he had made no reference to this in his disciplinary hearing. Further, in his appeal, he did not say that the training was insufficient.

18. The Claimant further accepted he had confirmed that in hindsight the accident at Birmingham Prison could have been avoided had he asked for a Banksman to assist him when he was reversing. Although his pleadings and statement refer to Mr Flinton's assessment, it specifically said he should be reassessed and further training is not mentioned anywhere. He further acknowledged it concludes that he should be invited to a disciplinary hearing (page 65). In relation to the invitation to a disciplinary hearing at page 80, the Claimant said, for the first time, he thought this was a forgery typed later to support the Respondent's case. He further accepted that, at page 91, he could have avoided the second accident in November 2019, that it was his fault and he said there was plenty there to conclude he was driving with undue care and attention.

19. The Claimant gave evidence that he thought Mr Hall was just going through the motions and had already made his mind up. He made reference to private matters relating to his family and seemed to be placing some reliance on these issues in mitigation. When pressed, however, he had to accept that Mr Hall asked him about these private family issues and whether they had affected him to which he replied in the negative but refused to give any further information about them (page 114). He acknowledged that Mr Hall may have asked about these private issues because he thought it might be relevant.

20. There was also some disagreement about an accident Mr Taylor made reference to from the schedule at page 133. The Claimant said this was another forgery because he did not have this accident. He said he told Mr Taylor about this every time he raised it in the appeal hearing but there was no reference to this in the appeal notes which were not challenged. Further, the question of whether this accident occurred was not put to Mr Taylor.

21. Despite all the relevant documents referring to a recommendation that the Claimant should have a reassessment for his driving, he persisted in arguing that this meant that he should have received further training. He said that had he received further training after the accident in October 2019 perhaps the second accident would not have happened. I did not find this to be a credible argument because, firstly, the Claimant is a professional driver who had several weeks experience of driving the new vehicle and, secondly, he said that when he had an assessor with him in the lorry, he drove no differently to how he would drive when alone. Further, the two accidents were entirely different in nature. One was reversing into a bollard and the second one was pulling into the path of another vehicle on the open road.

22. The Claimant also raised the argument that he was dismissed to save money to help fund a pay rise for the other drivers. I found this to be a fanciful and unfounded argument especially as this was never put to the Respondent's witnesses.

23. I have noted that a number of matters raised by the Claimant were raised for the first time at the hearing. Where these relate to matters which are not recorded in the previously unchallenged minutes of meetings or related to documents which the Claimant now claims were forgeries, the Claimant's cause is not helped by such late allegations. This does not persuade me that the Claimant's evidence is reliable and, since these allegations were not put to the Respondent's witnesses, Mr Gittins would clearly have been taken by surprise and be deprived of actually putting these matters to them.

24. In relation to Mr Roe's evidence I found it to be neither credible nor particularly relevant. His witness statement began "Pat's dismissal was nothing less than disgraceful. He accumulated a number of disciplinary penalties through management's punitive measures". At no time does he actually explain what those punitive measures were. His statement continues with reference to a verbal warning the Claimant was given for phoning in tired. This is the only time this particular issue has been mentioned in these proceedings. At paragraph 3 of his witness statement, Mr Roe said "Pat was assaulted by a Tesco driver at the premises of Quinton Tesco. The Tesco driver intentionally drove his truck into Pat as he attempted to push his stack of bread through the gates of Tesco". This seems to be hearsay evidence based entirely on what the Claimant told him. At paragraph 4, he seems to introduce the argument that the Claimant was running out of driving hours when he was trying to deliver his order ahead of other drivers. I cannot find any reference to this anywhere else. He concludes his statement with the following paragraph, "I believe the decision to sack Pat was already decided at Christmas and the only reason his disciplinary was rearranged till the new year was that they didn't want to be seen as sacking someone just before Christmas". Again, this argument is not made anywhere else.

25. I regret that Mr Roe's statement being so emotionally charged with so much hearsay evidence, it did not figure highly in my deliberations.

26. For the above reasons, wherever there was a dispute in the evidence, I preferred the evidence of the Respondent's witnesses.

The facts

27. In relation to the issues before me, I find the following facts:

(a) The Claimant was employed by the Respondent as a Radial Driver delivering bread and associated products to the Respondent's customers.

(b) The Claimant was involved in an accident whilst driving for which he was at fault on 27 February 2018 for which he received a written warning. He did not appeal against that warning and admitted he was at fault.

(c) On 29 October 2018, the Claimant was given a final written

warning, his previous warning still being live, for aggressive behaviour at a customer's site on 24 and 27 September 2018. He did not appeal against this final written warning which was specifically noted as expiring on 25 October 2019 (page 51).

(d) On 25 October 2019, the Claimant was involved in another accident when reversing at Birmingham Prison. He accepted that he was at fault in failing to seek assistance when reversing in a tight space resulting in damage to the vehicle he was driving. There was a detailed investigation of this accident by Mr Flinton, who suggested further driver assessment and that a disciplinary hearing should be held.

(e) Due to staff holidays, there was a delay in arranging the disciplinary hearing. That invitation was sent on 14 November 2019 by first class post but not actioned by the Claimant who did not attend the arranged hearing on 22 November 2019.

(f) On 25 November 2019, the Claimant had a second, more serious accident, when he pulled onto a dual carriageway from a slip road causing a collision with a third party and damage to both vehicles. The Claimant accepted he was at fault. The accident was again investigated by Mr Flinton who recommended a disciplinary hearing.

(g) By letter dated 4 December 2019, the Claimant was invited to attend a disciplinary hearing which would consider allegations of driving without due care and attention in both accidents. He attended the hearing on 16 December 2019 with Mr Roe but was late (for good reason) and Mr Hall did not have time to proceed. Due to holidays and other commitments, the hearing was rearranged for 8 January 2020. The Claimant attended with Mr Roe.

(h) During the hearing, the Claimant accepted responsibility for the accidents. In relation to the second accident, Mr Roe offered the explanation that the Claimant had made "a bad judgment call". The Claimant mentioned family problems which had caused him to have sleeping problems on the "odd night". Mr Hall tried to investigate whether this had affected the Claimant but he did not want to talk about the problems saying "it's private". Mr Hall considered his decision for almost an hour and when the hearing reconvened advised the Claimant he was to be dismissed with notice. The full reasons were sent to the Claimant by letter dated 16 January 2020 (page 117).

(i) The Claimant appealed against his dismissal and Mr Taylor chaired the appeal hearing on 21 January 2020. The Claimant attended with Mr Roe. In response to the Claimant's suggestion that his training had been inadequate, Mr Taylor requested a copy of his training record and he also considered the fact that the recommendation by Mr Flinton that he had a further driver assessment had not been actioned. He also considered the training on the new vehicle which the Claimant had attended and which he accepted was largely to explain the additional safety features on the new vehicles. The appeal was not upheld. The decision was confirmed by letter dated 3 February 2020 (page 137).

Submissions

28. For the Claimant, Mr Gittins regarded the issue of the final written warning as of great significance. He said the letter issuing that warning was ambiguous and it was unclear as to when time began to run. Did it expire at the end of 25 October 2019 or the beginning of the day? Such ambiguity should be construed against the Respondent so that the warning had expired by the time of the first accident, should not have been taken into account and the Claimant should not have been dismissed.

29. Secondly, if the Claimant had been assessed after the first accident, something in his driving might have become apparent and pointed out to him so that the second accident would not have happened.

30. He also suggested an accident in 2019 which Mr Taylor mentioned in the appeal hearing did not take place which meant the Respondent's evidence was not wholly reliable. (I note the appeal minutes show the Claimant did not dispute this accident when Mr Taylor raised it.)

31. Mr Gittins further argued that the Respondent did not have a reasonable belief that the Claimant was an unsafe driver or they would have suspended him pending a disciplinary hearing and so dismissal was not a reasonable response.

32. For the Respondent, Mr Sammour submitted that the evidence was clear that the outcome of the disciplinary and appeal hearings was not predetermined. There were reasonable grounds for believing in the Claimant's misconduct and the Claimant had accepted the investigation reports provided grounds for a reasonable employer to conclude he had been driving without due care and attention.

33. He said there was no ambiguity in the letter confirming the final written warning as it was clear from its terms that it had not expired at the time of the first accident. Further, it was wrong to conclude that a driver who had two accidents would not have caused the second one if he had had training or a reassessment. He further submitted that the Claimant's argument that the alleged accident in March 2019 had been made up by Mr Taylor could not be sustained as it was not raised in the appeal or anywhere else before the hearing.

34. In summary, Mr Sammour submitted that the decision to dismiss fell within the band of reasonable responses.

Conclusions

35. I first consider the relevance of the final written warning confirmed to the Claimant by letter dated 29 October 2018. It cannot be said to be ambiguous. It clearly sets out that the warning will "expire, for the purposes of disciplinary, on 25 October 2019". In my view, this clearly means it will expire at midnight on that day and not the day before. An event which may happen on a certain day can happen at any time during that day as with the Claimant's accident on 25 October 2019. Thus, I find that this case can be distinguished from the decision in **Bevan Ashford v Malin** [1995] ICR 463, relied on by Mr Gittins, where the wording was certainly ambiguous and properly construed against the employer**.**

36. The Claimant argues he should not have been given that warning. He said he did not appeal because he had kept his job and did not wish to deal with the stress of going through an appeal; yet over a year later he suggests it was wrong to be given a final written warning as the incidents which occurred were not his fault. I do not accept Mr Gittins' argument that, by analogy, I should adopt the reasoning in **Lock v Connell Estate Agents** [1994] IRLR 444 and find that, since appealing a disciplinary decision was not reasonably required in order to mitigate an employee's loss, the failure of the Claimant to appeal the final written warning should not be held against him now. The two scenarios are quite different. In relation to the final written warning, the Claimant also argues that Mr Taylor should have effectively reopened it. That sanction was applied as a result of conduct that had occurred more than a year previously and which the Claimant did not appeal. Mr Sammour submits, and I agree, it is beyond any common sense limit to expect an appeal officer dealing with a disciplinary matter to reopen a closed investigation in these circumstances (**Gray Dunn and Co v Edwards** [1980] IRLR 23

37. With respect to the Claimant it is, in any event, not an argument which is sustainable. If the final written warning had been given wrongly on the basis that his explanations had not been accepted, he could still have appealed knowing, as he did, that his job was safe. Accordingly, I dismiss any argument that the Respondent should have reconsidered the sanction imposed in October 2018.

28. Considering the requirements set out in **Burchell**, based on the Claimant's admission that he was at fault for both accidents in October and November 2019, it follows I must find that the Respondent had a reasonable belief in his misconduct. Further, both accidents had resulted in damage to company vehicles and the second one to a third party's vehicle. This was supported by photographs of the damage caused at each incident as well as the Claimant's admissions in respect of each one.

29. Whether there was a reasonable investigation involves the investigation by Mr Flinton and the disciplinary process itself. Mr Flinton's investigations are comprehensive. They include interviews with the Claimant where he talks about what he would have done with the benefit of hindsight, showing poor judgment and being at fault. The investigations encompassed an assessment of the damage to property as evidenced by the photographs in the bundle. It is evident from the minutes of the disciplinary hearing that Mr Hall gave the Claimant every opportunity to explain his actions. It is notable that when the Claimant hints at matters in his private life which might have had a bearing on his driving, he refused to explain what these were when asked by Mr Hall. Mr Hall's letter of dismissal clearly sets out his reasoning for his decision. He concentrates on safety and the risk of the Claimant being involved in further incidents. He makes reference to his reliance on the final written warning and to what might have happened if it had not still been live. He further considers and explains the alternative sanctions he could have considered and to the Claimant's previous disciplinary record and his service with the Respondent. The Claimant did not raise any of these matters in the appeal hearing.

30. Mr Sammour also makes the point that the Claimant's procedural criticism in his witness statement that Mr Hall's decision to dismiss him had been predetermined, had not been included in his claim and was not subject to an amendment application. Based on his evidence before me, I find that the

Claimant's evidence that he "felt" the outcome was predetermined lacks any substance at all because no evidence given orally or in the documents before support that allegation.

32. The same applies to Mr Taylor's evidence. He did not simply dismiss the Claimant's assertions as to his driving record or any other matter. He sought further information about the Claimant's training record and the accidents he had been involved in. He clearly took these matters into consideration. The Claimant takes issue with the schedule of incidents in which he had been involved saying he knows nothing about an accident which allegedly occurred in March 2019. It is a pity that this was not raised before the hearing. His stated protestations about this accident in the appeal hearing are not supported by the appeal notes which he has not taken issue with.

33. I have previously referred to the disciplinary and appeal hearings and to the allegation by the Claimant that Mr Hall's decision was predetermined. There is ample evidence to the contrary. Both officers clearly took account of the Claimant's comments and Mr Taylor, in particular, made further enquiries as a result of them. I see no evidence of unfairness, unreasonableness or predetermination in those proceedings.

34. I have also considered the point raised by the Claimant that there was a considerable delay between the first accident and the eventual disciplinary hearing. That delay, in part, is explained by an employee's absence on holiday and the Claimant not attending the first scheduled disciplinary hearing. I would add that I view his allegation that he did not receive the invitation and that the letter in the bundle is a forgery designed to fit the Respondent's case with considerable scepticism. In **RSPCA v Cruden** [1986] ICR 205, the Employment Appeal Tribunal found that an unjustifiable delay of 7 months made an otherwise fair dismissal unfair. The delay in this case was very much less and does not affect the reasonableness of the Respondent's actions.

35. Finally, I consider whether the decision to dismiss fell within the range of responses of a reasonable employer. It is not for me to substitute my own view as to whether this was a correct decision. I must, however, satisfy myself as to the Respondent's reasoning in respect of the consideration given to all factors surrounding the dismissal. The question is whether it was open to a reasonable employer to dismiss an employee in these circumstances. In considering this I bear in mind the decision in **London Ambulance Service NHS Trust v Small** [2009] IRLR 563.

36. The Claimant in this case had been involved in at least 3 accidents in less than 2 years. He accepted fault in all of them. At the time of his accident on 25 October 2019, he still had a live final written warning in which he had been informed of the potential consequences of any further conduct issues which included dismissal. In the disciplinary hearings, other potential sanctions were considered as was his previous disciplinary record and his length of service. Mr Taylor was of the view that the number of accidents indicated a pattern which could question the Claimant's safety on the road. There is a question mark over a fourth accident in March 2019 which the Claimant said, without any supporting evidence, did not occur. I do not consider this would have affected the view of a reasonable employer in the circumstances.

37. This is a case where the Claimant admitted fault for several accidents. He had a live written warning for aggressive behaviour. The outcome was not

predetermined either by Mr Hall or Mr Taylor. Other sanctions were considered as was the Claimant's employment record. Dismissal was not the only sanction available to the Respondent. However, I find that in this case it was a sanction which fell within the range of reasonable responses and a fair dismissal.

38. For the above reasons I dismiss the claim.

Employment Judge M Butler

Date 9 November 2020