EMPLOYMENT TRIBUNALS

Claimant: **Mr S Lewins**
Respondent: **Sainsbury's Supermarkets Ltd**

HELD AT: Newcastle Employment Tribunal by CVP ON: 14 October 2022

BEFORE: Employment Judge McCluskey

REPRESENTATION

Claimant: In person
Respondent: Ms E Wheeler, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the complaint of unfair dismissal is not well-founded. This means the respondent fairly dismissed the claimant.

REASONS

Introduction

1. The claimant was an online delivery driver employed by the respondent. He claims that his dismissal on 14 January 2022 was unfair. ACAS was notified under the early conciliation procedure on 6 April 2022 and the certificate was issued on 17 May 2022. The ET1 was presented on 15 June 2022. The ET3 was received by the tribunal on 20 July 2022.

Claims and issues

2. The claimant has brought a claim for unfair dismissal, The claimant's ET1 stated that he felt that "there was a campaign by management to dismiss me by any means necessary as I had previously raised concerns over health and

safety infractions". No further detail was provided by the claimant. At the outset of the hearing the claimant was asked whether he advanced a claim of automatic unfair dismissal because he had made a protected disclosure (whistleblowing), noting that beyond the statement above no further detail had been provided by the claimant about such a claim.

3. The claimant confirmed that his claim was that he had been unfairly dismissed because of conduct issues which had been blown out of proportion. He did not claim automatic unfair dismissal because he had made a protected disclosure (whistleblowing).

4. The parties agreed that the reason for dismissal was conduct. On that basis the liability issues to be determined were identified as:

    (i) did the respondent reasonably believe that the claimant committed the misconduct?

    (ii) was that belief held on reasonable grounds?

    (iii) was there a fair and reasonable investigation?

    (iv) did the respondent act reasonably in all the circumstances in treating it as sufficient reason to dismiss the claimant.

Procedure, documents and evidence heard

5. The tribunal heard evidence from the claimant. The tribunal heard from the following witnesses on behalf of the respondents: Barbara Reece, the claimant's manager, Tom Shaw, the dismissing manager and Tony Reynolds, the decision maker in relation to the claimant's fair treatment allegations.

6. There was a tribunal bundle of approximately 350 pages. Both parties made oral closing submissions. The tribunal informed the parties that unless a document was referred to by a witness in their witness statement or the tribunal was taken to a document in the bundle it would not be read.

Fact-findings

7. The respondent is a large national retailer The claimant started his employment on 11 September 2019. At the time of his dismissal, he was employed as an online deliver driver. He had held this post for around 2.5 years before his dismissal on 14 January 2022.

8. On 25 May 2021 the claimant was invited to attend an investigation meeting. The meeting was to discuss allegations of misconduct in connection with a driver accident, company vehicle damage and failure to report in accordance with the respondent's incident reporting process.

9. The meeting took place on 8 June 2021 with manager Naomi Richardson, Customer and Trading Manager. After an investigation, Ms Richardson decided that the matter should proceed to a disciplinary hearing. The disciplinary hearing took place on 17 June 2021 with Andy Wills Customer and Trading Manager. Following that hearing, the claimant was issued with a written warning, for failure to report damage to his vehicle, in line with the respondent's reporting policy. The warning was to remain live for 12 months. The claimant did not appeal the decision.

10. On 20 September 2021 the claimant was invited to attend an investigation meeting. The meeting was to discuss allegations of misconduct in connection with a driver accident, company vehicle damage and failure to report in accordance with the respondent's digital incident reporting process (page 90-91). The claimant was given the opportunity to bring a work colleague or trade union representative to the meeting. The investigation meeting was held on 23 September 2021 with Naomi Richardson, Customer and Trading Manager. The claimant agreed that there was damage to his delivery van but said that he did not know about it and was not aware that it had happened on his shift. Following the investigation meeting the respondent decided that the matter should proceed to a disciplinary hearing.

11. On 24 September 2021 the respondent wrote to the claimant to invite him to attend a disciplinary hearing (pages 124-125). The letter stated that the allegations of misconduct against him were "Online driver accident – company vehicle damage. Online driver – failure to report an accident. Failure to report: damage not logged on digital vehicle check prior to departure was present on return to store". The letter advised the claimant of his right to be accompanied by a work colleague or trade union representative.

12. The disciplinary hearing was held on 4 October 2021 with Barbara Reece, Customer and Trading Manager. The claimant attended with his union representative Joanne Wilson. At the hearing the claimant admitted that the damage happened on his shift but stated that he was unaware of the damage. He stated that he had not followed the respondent's reporting procedures as he was unaware of the damage.

13. On 5 October 2021 the respondent wrote to the claimant with the outcome of the disciplinary hearing. He was issued with a final written warning and removed from driver duties (page 140-141) The reasons given to the claimant were that although the claimant stated that he was unaware of the damage, he admitted that it happened on his shift. The respondent considered that the claimant had been aware of the damage and was in breach of policy in not reporting this. The final written warning was to remain live for 12 months. The claimant appealed this decision. An appeal manager was appointed. The claimant stated that he did not wish this appeal manager to hear his appeal. With the claimant's agreement a new appeal manager, Margaret Massey, Operations Manager, was appointed.

14. On 27 October 2021 the claimant attended an appeal hearing with Ms Massey. The claimant was given an opportunity to bring a companion but chose to attend alone. In advance of the hearing the claimant provided a list of appeal points which were discussed at the hearing.

15. On 30 October 2021 the respondent wrote to the claimant with the outcome of the disciplinary appeal hearing (pages 185-189) Ms Massey addressed each of the appeal points raised by the claimant in her outcome letter. One of the appeal points was that the claimant believed Ms Reece had a personal vendetta against him. Ms Massey did not agree with this. She supported Ms Reece's belief that the claimant was aware of the damage to his vehicle. Ms Massey confirmed that the final written warning was upheld.

16. On 16 November 2021 the claimant successfully completed training with a driver service manager. The training outcome was the claimant could drive safely and abide by legal speed limits. He then returned to driving duties.

17. On 6 December 2021 the claimant was invited to attend an investigation meeting. The meeting was to discuss and allegation that on 4 December 2021 the claimant was driving in excess of 30% over the legal speed limit, in breach of the respondent's speeding policy. The claimant was provided with a report from the respondent's Masternaut tracking system which showed the details of the speeding and maps and photos which showed where the speeding had occurred.

18. The investigation meeting was held on 9 December 2021 with Andy Wills, Customer and Trading Manager. The claimant attended with his union representative, Joanne Wilson. At the investigation meeting the claimant admitted to speeding as alleged and said it was an oversight. Following the investigation meeting the claimant decided that the matter should proceed to a disciplinary hearing.

19. On 11 December 2021 the respondent wrote to the claimant to invite him to attend a disciplinary hearing. The letter stated that the allegation against him was that on 4 December 2021 the claimant was driving his delivery van in excess of 30% over the legal speed limit, in breach of the respondent's speeding policy. The letter stated that a possible outcome of the hearing could be his dismissal. The letter advised the claimant of his right to be accompanied by a work colleague or trade union representative.

20. The disciplinary hearing was held on 14 December 2021 with Tom Shaw, Customer and Trading Manager. The claimant attended with his union representative Joanne Wilson. At the hearing the claimant admitted to speeding. He stated that the speeding was an oversight. He said he was running late that day but that was not an excuse. Following an adjournment Mr Shaw notified the claimant, on conclusion of the disciplinary hearing on 14 December 2021, that his employment was being terminated with notice.

21. In reaching his decision to dismiss, Mr Shaw considered the outcome options of reissuing the final written warning or dismissal with notice. He noted that the claimant had a live final written warning for conduct.

22. The reasons given to the claimant at the hearing for his dismissal were that he had completed training with a driver service manager on 16 November 2021 and shown he could abide by legal speed limits and drive safely, but he had chosen not to do so; it was not an excuse to be running late and he had not contacted the store to alert them that he was running late; two **p**revious recorded conversations with the claimant earlier this year about speeding had not had the desired result, despite the claimant having signed agreed action points; and speeding put himself and others at risk.

23. On 16 December 2021 the respondent wrote to the claimant confirming his dismissal with notice and giving the reasons provided to the claimant at the disciplinary hearing. The letter advised the claimant of his right to appeal. The claimant did not appeal the decision. The claimant's employment terminated on 14 January 2022.

24. On 14 December 2021, after the disciplinary hearing which terminated the claimant's employment with notice, the claimant wrote to the respondent with a fair treatment complaint, in accordance with the respondent's fair treatment policy. He alleged that his manager Ms Reece had tried to "manage me out of the door" over the last 6 months. He stated that he believed it stemmed from

him raising concerns over health and safety, compliance and risk assessment matters. He set out various allegations against Ms Reece (page 231).

25. On 21 December 2021 the respondent wrote to the claimant to invite him to attend a fair treatment meeting to investigate the concerns he had raised. The letter advised the claimant of his right to be accompanied by a work colleague or trade union representative.

26. On 31 December 2021 the claimant attended the fair treatment meeting with Tony Reynolds, Operations Manager to discuss the fair treatment allegations. He was accompanied by his trade union representative Joanne Wison. He was given an opportunity to raise his concerns in the meeting.

27. Thereafter, Mr Reynolds met with Ms Reece to investigate the allegations made. Mr Reynolds carried out a review of the procedure followed by the respondent in relation to both the formal warnings for misconduct given to the claimant and the informal discussions about misconduct held with the claimant, in 2021.

28. On 11 January 2022 Mr Reynolds wrote to the claimant with his fair treatment decision (pages 309-320).

29. Mr Reynolds found that a speeding report was produced daily for all colleagues and there was a respondent speeding policy. Mr Reynolds reviewed the application of the speeding policy and found it to be applied consistently to colleagues, including a colleague of the claimant to whom the claimant referred. Mr Reynolds found that in relation to a previous speeding incident involving the claimant, before the incident which resulted in his dismissal, the speeding policy had been followed for the claimant.

30. Mr Reynolds found that the respondent's policies and procedures had been followed in relation to the claimant's previous formal warnings for misconduct. This included the final written warning given by Ms Reece, which decision had been upheld on appeal by Ms Massey.

31. Mr Reynolds found that a further 2 informal records of discussion had taken place with the claimant to coach and support him in relation to vehicle check compliance and click and collect policies. Mr Reynolds concluded that the respondent had taken steps to support and coach the claimant through varying scenarios, rather than go straight to formal action after each incident. Mr Reynolds found that informal discussion, rather than formal disciplinary action, had also taken place with a colleague of the claimant and that there was no inconsistency of treatment with the claimant.

32. Mr Reynolds concluded that Ms Reece had not tried to manage the claimant out of the door over the last 6 months. Mr Reynolds concluded that the other concerns raised by the claimant in his fair treatment complaint, which he said were health and safety, compliance or risk assessment concerns, had been dealt with appropriately by the respondent at the relevant time.

33. The claimant did not appeal the fair treatment decision.

Law

34. Section 94 of the Employment Rights Act 1996 (the ERA) provides that an employee has the right not to be unfairly dismissed.

35. Section 98 of the ERA sets out that for a dismissal to be fair, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98 (1) or (2) of the ERA.

36. A reason relating to the conduct of the employee is one of the potentially fair reasons for dismissal (section 98(2)(b) of the ERA).

37. In terms of section 98(4) of the ERA, if the tribunal was satisfied that the respondent has established a potentially fair reason for dismissal, it must then determine the question of whether the dismissal was fair or unfair having regard to the matters set out in section 98(4) (a) and (b): whether taking into account the size and administrative resources of the employer, it acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee and the equity and substantial merits of the case.

38. Once it is established that the claimant was dismissed for a potentially fair reason relating to conduct the test of the substantive fairness outlined in **British Home Stores Limited v Burchell 1978 IRLR 380** is relevant to the question of whether it was reasonable for the respondent to treat that reason as sufficient to justify dismissal.

39. When applying the **Burchell** test, the tribunal should consider three issues: a. whether the employer genuinely believed that the employee was guilty of misconduct; b. did the employer have in its mind reasonable grounds on which to sustain that belief and c. at the stage at which the employer formed the belief on those grounds had the employer carried out as much investigation into the matter as was reasonable in the circumstances?

40. The ultimate test in determining the application at section 98(4) is whether the dismissal fell within the "band of reasonable responses", a test which reflects the fact that inevitably there may be different decisions reached by different employers in the same circumstances (see **British Leyland (UK Limited) v Swift** 1981 IRLR 91).

41. In applying section 98(4) of the ERA, the tribunal must not substitute its own view of the matter for that of the employer but must apply an objective test of whether the dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer (see I**celand Frozen Foods Limited v Jones [1982] IRLR 439**, **Post Office v Foley and HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827CA**).

42. There is always an area of discretion within which a respondent may decide on a range of disciplinary sanctions all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable but whether or not the dismissal was reasonable (see **Boys & Girls Welfare Society v McDonald [1996] IRLR 129**).

Conclusions

Reason for dismissal

43. The first issue is what was the reason for dismissal? The tribunal found that the reason for dismissal was misconduct ie the respondent's belief that on 4 December 2021 the claimant was driving his delivery van in excess of 30% over the legal speed limit, in breach of the respondent's speeding policy.

Misconduct investigation

44. The next question is the three stages in the **BHS v Burchell** case. First, did the respondent reasonably believe that the claimant committed the misconduct, ie that on 4 December 2021 the claimant was driving his delivery van in excess of 30% over the legal speed limit, in breach of the respondent's speeding policy. The tribunal found that they did.

45. Second, was that belief held on reasonable grounds? The tribunal found that it was. The claimant had admitted at the investigation meeting and at the disciplinary hearing that on 4 December 2021 he had been driving his van in excess of 30% over the legal speed limit and that was in breach of the respondent's speeding policy. This was supported by the report from the respondent's Masternaut tracking system which showed the details of the speeding and maps and photos which showed where the speeding had occurred. These had been provided to the claimant at the investigation stage.

46. Third, was there a fair and reasonable investigation? The tribunal found that there was. The respondent held an investigation meeting with the claimant. In advance of the hearing the claimant was told of the allegation against him and provided with supporting documentation in the form of the report from the respondent's Masternaut tracking system which showed the details of the speeding and maps and photos which showed where the speeding had occurred. The claimant was given the opportunity to bring a companion to the meeting and chose to do so. At the investigation meeting the claimant was given an opportunity to respond to the allegation. The claimant admitted that he had been speeding as alleged and as set out in the Masternaut tracking system report and the maps and photos shown to him.

Procedure generally

47. As regards procedure generally, the tribunal found that the dismissal procedure followed was reasonable. The respondent carried out an investigation meeting with the claimant, as set out above. The claimant was then invited in writing to a disciplinary hearing. The letter inviting him to the meeting set out the allegation against him, enclosed the supporting documentation provided to him previously and told him that one outcome of the hearing could be his dismissal from employment. The letter also told the claimant that he could bring a representative to the meeting. At the disciplinary hearing the claimant and his representative were given an opportunity to present his case to the respondent. The respondent adjourned the hearing to consider the claimant's case before reaching a decision. After the adjournment the claimant was informed of the outcome of his case, namely that he was to be dismissed. He was provided with reasons for his dismissal.The respondent wrote to the claimant to confirm his dismissal with notice. The dismissal letter confirmed the claimant's right of appeal.

48. The claimant chose not to appeal the dismissal decision using the respondent's disciplinary policy. The claimant did however bring a fair treatment complaint against Ms Reece. Although Ms Reece had not been involved in the decision to dismiss, she had given the claimant a final written warning for misconduct on 5 October 2021 for failure to report damage to his vehicle. This was a live warning at the time of the claimant's dismissal. She had also had an informal discussion with the claimant abut vehicle check compliance and click and collect policies. The summary of the claimant's fair treatment complaint was that he had raised what he considered to be health and safety, compliance or

risk assessment concerns and Ms Reece had then tried to manage him out of the business.

49. The claimant attended a fair treatment meeting with Mr Reynolds and was accompanied at the meeting by his representative. Each of the allegations which the claimant made were considered by Mr Reynolds who also carried out an investigation with Ms Reece, investigated the previous formal misconduct warnings and informal misconduct discussions with the claimant and investigated the other matters raised by the claimant which he said were health and safety, compliance or risk assessment concerns. and were dealt with appropriately by the respondent at the relevant time.

50. On 11 and 12 January 2022 the respondent wrote to the claimant. The claimant's allegation that Ms Reece had tried to manage him out of the door over the previous 6 months was not upheld. The claimant's allegation that his previous formal misconduct warnings had not followed the respondent's policies and procedures was not upheld. The claimant's allegation that his health and safety, compliance or risk assessment concerns were not dealt with appropriately was not upheld. The claimant's allegation that he had not been treated consistently with other colleagues, who he said received lesser or no disciplinary sanction for similar offences, was not upheld. The claimant was given an opportunity to appeal the decision but chose not to do so.

51. As regards the fair treatment procedure, the tribunal found that Mr Reynolds had carried out a reasonable procedure, including a thorough investigation before reaching his decision.

Sanction

52. Finally, the question is whether dismissal was a fair sanction. Could a reasonable employer have decided to dismiss for driving in excess of 30% over the legal speed limit? The tribunal found that they could.

53. The claimant already had a live final written warning for misconduct; the claimant had completed training with a driver service manager on 16 November 2021 and shown he could abide by legal speed limits and drive safely, but chose not do so by speeding on 4 December 2021; the two previous recorded conversations with the claimant earlier in 2021 about speeding had not had the desired result of preventing further speeding, despite the claimant having signed agreed action points; the claimant had admitted that it was not an excuse for speeding to be running late and the respondent noted that the claimant had not contacted the store to alert them that he was running late; and speeding put himself and others at risk.

54. The tribunal was satisfied that in considering whether or not to dismiss Mr Shaw had considered alternatives to dismissal, including that the claimant was on a live final written warning for conduct matters; the claimant had completed training with a driver service manager on 16 November 2021 and shown he could abide by legal speed limits and drive safely, but chose not do so by speeding on 4 December 2021; and that two previous recorded conversations with the claimant earlier in 2021 about speeding had not had the desired result of preventing further speeding, despite the claimant having signed agreed action points.

55. The claimant asserted that the two earlier formal warnings he had been given on 17 June 2021 (first written warning) and 5 October 2021 (final written warning) should have been dealt with more leniently. If that had been the case he asserted, he would not have been on a live final written warning prior to the speeding incident on 4 December 2022 and he would not have been dismissed. The tribunal noted that the two previous formal warnings had been issued following a full disciplinary process, including the upholding of the final written warning on appeal.

56. In connection with the claimant's assertion about the two previous live disciplinary warnings the tribunal had regard to **Co-operative Retail Services Ltd v Lucas EAT 145/93**. The EAT in **Lucas** noted that, as a general rule, it is not for the tribunal to sit in judgment on whether a final warning was reasonably given, but it is entitled to satisfy itself that the warning was issued in good faith and that there were prima facie grounds for it. In particular, if there is anything to suggest that the warning was issued for an oblique motive or if it was manifestly inappropriate, the tribunal could take that into account in determining the fairness of a later dismissal in reliance on that warning.

57. This was confirmed in **Davies v Sandwell Metropolitan Borough Council 2013 IRLR 374, CA, where** Lord Justice Mummery said that the starting point should always be S.98(4) ERA, the question being whether 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, it is not for the tribunal to reopen the final warning and consider whether it was legally valid or a nullity. And thirdly, the questions of whether the warning was issued in good faith, whether there were prima facie grounds for imposing it, and whether it was 'manifestly inappropriate,' are all relevant to the question of whether dismissal was reasonable, having regard, among other things, to the circumstances of the warning.

58. The tribunal was satisfied that the previous formal warnings, which remained live, had been issued in good faith and there were prima facie grounds for them. The tribunal was satisfied that there was nothing to suggest that the previous warnings were manifestly inappropriate such that further enquiry was required by the tribunal.

59. The claimant asserted that there had been an inconsistency of treatment between him and another employee whom the claimant asserted had committed similar misconduct offences and had not been disciplined to the same extent as the claimant. The tribunal noted that Mr Reynolds investigated this matter as part of the fair treatment investigation. Mr Reynolds found that the other employee's driving incidents, to which the claimant had referred, had been dealt with in line with the respondent's policies. Mr Reynolds also noted that there had been informal discussions with the claimant about misconduct matters, as an alternative to formal disciplinary action. In other words, like the other employee, the claimant had not been formally disciplined for every misconduct misdemeanour committed by him. Mr Reynolds was satisfied that there was no inconsistency of treatment between the claimant and the other employee.

60. The tribunal has set out above that it was satisfied the respondent had shown the reason for the claimant's dismissal was conduct. The tribunal has also set

out above its conclusion that Mr Shaw had reasonable grounds upon which to sustain his belief in the claimant's misconduct. The tribunal reminded itself that the question it must ask itself is not whether the tribunal would have dismissed the claimant. The tribunal must ask whether the respondent's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted (**Iceland Frozen Foods Ltd v Jones 1983 ICR 17**). The tribunal decided that, in the circumstances of this case, that the respondent's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted. The dismissal was fair. Having reached this conclusion, the tribunal did not consider it necessary to go onto determine the question of remedy.

61. The Tribunal therefore dismisses the claimant's claim for unfair dismissal.

Employment Judge McCluskey

Date: 8 November 2022