EMPLOYMENT TRIBUNALS

Claimant: **Mr. W Louton**

Respondent: **Hovis Limited**

Heard at: **Nottingham – Conducted by Cloud Video Platform**

On: **28th September 2020**
9th October 2020 (In Chambers)

Before: **Employment Judge Heap**

Representatives

Claimant: **Mr. E Webb - Counsel**
Respondent: **Mr. M White - Counsel**

RESERVED JUDGMENT

1. The complaint of unfair dismissal fails and is dismissed.

2. The complaint of wrongful dismissal is well founded and succeeds and the Respondent is Ordered to pay to the Claimant the sum of **£5,964.84** in respect of it.

REASONS

BACKGROUND AND THE ISSUES

1. This is a claim brought by Mr. Wilfred Louton (hereinafter referred to as "The Claimant") against his now former employer, Hovis Limited (hereinafter referred to as "The Respondent").

2. The Claimant presented this claim by way of an ET1 Claim Form which was received by the Employment Tribunal Service on 5th May 2020. That presentation followed the Claimant having entered into ACAS Early Conciliation between 25th March and 8th April 2020. The complaints pursued are ones of unfair dismissal and wrongful dismissal.

THE HEARING

3. The hearing was held by way of Cloud Video Platform ("CVP") due to the ongoing Covid-19 pandemic and I am satisfied that we were able to undertake an effective hearing via that medium.

4. Prior to the hearing, the Claimant's solicitors made an application to postpone and relist the hearing and for two additional witnesses to be called on his side. That application was refused by Employment Judge Adkinson who also refused permission for the additional witnesses to be called. The Claimant's solicitors indicated that they intended to revisit the application at the outset of the hearing before me but Mr. Webb made plain that he did not intend to raise those matters further and so I say no more about them.

5. I discussed the issues with the parties at the outset of the claim and helpfully a draft list of issues had been prepared. I raised with Mr. Webb whether the Claimant was relying on any argument as to inconsistency of treatment as, although that did not feature in the list of issues, it did appear to be a point which the Claimant relied upon in his witness statement. Mr. Webb confirmed that no point was advanced in that regard. Moreover, although not abandoning the point completely Mr. Webb indicated that he did not pursue with force what was previously a central plank of the Claimant's case that those with long service were targeted for removal from the Respondent company.

6. The hearing of the claim was listed for one day. Unfortunately, that proved insufficient to enable me to deliberate and give oral Judgment after hearing the evidence and submissions, which concluded just after 5.15 p.m. Accordingly, this Judgment was reserved and I thank the parties for their patience in awaiting the same.

7. Before taking my decision, I have taken into account all the evidence contained within the hearing bundle as agreed between the parties; front facing camera ("FFC") footage from the Claimant's wagon; the witness evidence that I have heard and the helpful submissions from Mr. Webb on behalf of the Claimant and Mr. White on behalf of the Respondent.

8. In terms of the witness evidence, I heard from the Claimant on his own behalf and from Carl Jarvis, Brian Hall and Nicholas Taylor on behalf of the Respondent. Mr. Jarvis was the investigating officer, Mr. Hall the dismissing officer and Mr. Taylor dealt with the Claimant's appeal against dismissal.

THE LAW

9. Before turning to my findings of fact, it is necessary for me to set out a brief statement of the law which I shall in turn apply to those facts as I have found them to be.

Complaints of Unfair Dismissal

10. Section 94 of the Employment Rights Act 1996 ("ERA 1996") creates the right not to be unfairly dismissed.

11. Section 98 deals with the general provisions with regard to fairness and provides that one of the potentially fair reasons for dismissing an employee is on the grounds of that employee's conduct. The burden is upon the employer to satisfy the Tribunal on that question and they must be satisfied that the reason advanced by the employer for dismissal is the reason asserted by them; that it is a potentially fair reason for dismissal falling under either Section 98(1) or 98(2) ERA 1996 and, further, that it was capable of justifying the

dismissal of the employee. A reason for dismissal should be viewed in the context of the set of facts known to the employer or the beliefs held by him, which cause him to dismiss the employee (**Abernethy v Mott, Hay & Anderson 1974 ICR 323, CA**).

12. It is therefore for the employer to satisfy the Tribunal as to the reason for dismissal. If they are not able to do so, then a finding of unfair dismissal will follow.

13. If an Employment Tribunal is satisfied that there was a potentially fair reason for dismissal and that that is the reason advanced by the employer, then it will go on to consider whether the employer acted fairly and reasonably in treating that reason as a sufficient reason to dismiss.

14. The all-important question of fairness is contained with Section 98(4) ERA 1996 which provides as follows:

> *"(4) Where the employer has fulfilled the requirements of subsection (1),* (in this case that they have shown that the reason for dismissal was conduct) *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."*

15. The burden is no longer upon the employer alone to establish that the requirements of Section 98(4) are fulfilled in respect of the dismissal. That is now a neutral burden.

16. In conduct cases, a Tribunal is required to look at whether the employer carried out a reasonable investigation from which they were able to form a reasonable belief, on reasonable grounds, as to the employee's guilt in the misconduct complained of (**British Home Stores v Burchell [1980] ICR, 303 EAT**).

17. An Employment Tribunal hearing a case of this nature is not permitted to substitute its judgment for that of the employer. Instead it must judge the employer's processes and decision making by the yardstick of the reasonable employer and can only say that a dismissal was unfair if either falls outside the range (or band) of reasonable responses open to the reasonable employer.

18. Many employees will be able to point to something the employer could have done differently, or indeed better, but that is not the test. The question for the Tribunal is whether the employer acted within the range of reasonable responses open to it or, turning that question around, could it be said that no

reasonable employer would have done as this employer did?

Wrongful Dismissal

19. A different test is to be applied to a claim of wrongful dismissal, that is a dismissal said to be in breach of a statutory or contractual right to notice. The Tribunal is seized of jurisdiction to consider such claims under the Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994.

20. The test to be applied in such a claim is not whether the employer had a reasonable belief upon reasonable grounds that the employee had committed an act or acts of gross misconduct but, rather, it requires the Tribunal itself to determine whether the employer has established that the employee acted in repudiatory breach of contract such as to entitle the employer to summarily dismiss him or her. This requires the Tribunal to undertake an evaluation of the evidence before it and to reach its own conclusions as to what took place. The Tribunal's obligation to determine this question is not one that is simply parasitic on the employer's findings (see **Phiri v Surrey & Borders Partnership NHS Foundation Trust UKEAT/0025/15 and Cameron v East Coast Mainline Company Ltd UKEAT/0301/17**).

21. The Tribunal must then go on to consider, having reached conclusions as to what in fact took place, whether that was sufficiently serious as to amount to gross misconduct and to permit the employer to terminate the contract of employment without notice.

FINDINGS OF FACT

22. I turn now to my findings of fact based on the evidence that I have seen and heard during the course of this hearing. I should observe that I have confined my findings of fact to those matters which are necessary to determine the complaints before me.

23. The Claimant was employed by the Respondent as a Radial Driver. At the time of the termination of his employment on 7th January 2020 he had been employed for just over a period of 18 years, albeit that a short period had been spent working for a different company by the name of Premier Foods. The Claimant's employment had been continuous throughout, however, as a result of the effect of the Transfer of Undertakings (Protection of Employment) Regulations.

24. The Respondent is a large bread manufacturer and, as referred to above, employed the Claimant as part of a number of drivers that it has to carry out deliveries.

25. The Respondent has a Smoking Policy which is contained within its health and safety policy (see page 57 of the hearing bundle). The Smoking Policy makes plain that smoking in work vehicles is prohibited and amounts to a criminal offence. It also makes it clear that smoking is only permitted in designated areas and that a failure to comply with the policy would result in disciplinary action which could include dismissal.

26. That is unsurprising given that it is not in dispute that the Respondent could have faced prosecution and a not insignificant fine for any employee found to be in breach of the relevant legislation.

27. It is not in dispute that the Claimant was aware of the Smoking Policy and the fact that the Respondent considered any breach to be a serious matter.

28. On 27th December 2019 the Claimant was undertaking his driving duties for the Respondent and was driving along the northbound section of the M1 motorway. During a short part of that journey he was passed by the Respondent's Logistics Manager, Mr. Jas Sittre, who was driving his own car accompanied by his wife.

29. Later that day Mr. Sittre made a telephone call to the Respondent and reported that both he and his wife had observed the Claimant smoking in the company vehicle that he was using at the time. The matter was reported to Carl Jarvis who is the Logistics Operations Support Manager for the Respondent. I accept the evidence of Mr. Jarvis that he had no axe to grind with the Claimant. Particularly, I accept his evidence that there was nothing remarkable about an earlier discussion that he had had with the Claimant regarding a period of sickness absence and that he had not made any threats to withhold the Claimant's pay during that time.

30. Mr. Jarvis was aware of the Smoking Policy and that smoking in a company vehicle amounted to a criminal offence and so I accept that he understandably considered it necessary to investigate what Mr. Sittre had told him.

31. Whilst Mr. Jarvis was subordinate to Mr. Sittre, I am satisfied from the evidence that that did not alter the way in which he dealt with the investigation and, as I shall come to, he did not merely take what he had been told at face value and took steps to look into the veracity of what Mr. Sittre said that he had observed.

32. Mr. Jarvis had been told by Mr. Sittre details of the registration plate of the vehicle that he said that he had observed the Claimant driving at the time. Contrary to the assertions made by Mr. Webb, I do not accept that Mr. Jarvis accepted the account of Mr. Sittre without question. Whilst he did not ask him if he might in fact have been mistaken, I accept that Mr. Sittre made plain that he was quite certain as to what he had seen and Mr. Jarvis took steps to verify as far as he could at that stage what had been reported to him. Particularly, he checked on the Respondent's Microlise system that the registration number given to him by Mr. Sittre matched the vehicle allocated to the Claimant that day. He found that it did. Moreover, he checked on the same systems where the Claimant had been on the day in question and found that this was supportive of Mr. Sittre's account that he had seen the Claimant's vehicle on a certain northbound stretch of the M1 motorway.

33. Mr. Jarvis therefore determined that the Claimant should be suspended pending further investigation. The Respondent's disciplinary policy provides that suspension may take place where the presence of the employee may be prejudicial to operations during the investigation (see page 50 of the hearing bundle).

34. I accept the account of Mr. Jarvis that he considered that not suspending the Claimant may be prejudicial because he was suspected of having committed a criminal offence and in breach of the Respondent's Smoking Policy.

35. The Claimant's suspension was communicated to him upon his arrival back at the Respondent's site by another manager, Mr. Flinton, because Mr. Jarvis was otherwise engaged. Mr. Flinton provided to the Claimant a Notice of Suspension (page 58 of the hearing bundle). The Notice of Suspension set out the allegation made against the Claimant – that is that he was alleged to have been smoking in a company vehicle – and details of the next steps. That included the fact that he would be invited to an investigatory meeting; that he was entitled to be accompanied at that meeting; that he might thereafter be required to attend a disciplinary hearing and that there were a range of sanctions that might result. Those sanctions ranged from no action being taken through a full spectrum of warnings to dismissal with or without notice.

36. On the same day as the incident in question Mr. Jarvis also asked Mr. Flinton and a team leader, Mr. Smith, to check the Claimant's vehicle to see if they could see any evidence of smoking having taken place. That is not, in my view, consistent with Mr. Webb's contention that Mr. Jarvis accepted the account of Mr. Sittre without question.

37. Both Mr. Flinton and Mr. Smith reported back with brief statements to Mr. Jarvis to confirm that they had not seen any evidence of smoking when they inspected the vehicle that the Claimant had been using that day (pages 59 and 60 of the hearing bundle). Mr. Smith reported that he had seen dust in the vehicle but that having run his finger into it he could not see traces of any smoking and he could also not smell smoke in the cab. The issue of dust was relevant as it demonstrated that the Claimant had not cleaned out the cab of the vehicle, comprehensively at least, either before or when he returned it. Mr. Smith similarly reported that he had found no trace of cigarettes or the smell of them in the vehicle.

38. On 30th December 2019 Mr. Jarvis wrote to the Claimant confirming his suspension (see page 61 of the hearing bundle). That confirmed that the suspension was on full pay; again set out the basis of the allegation and invited the Claimant to attend an investigatory meeting on 2nd January 2020.

39. In the meantime, on 31st December 2019 Mr. Jarvis met with Mr. Sittre to obtain a more detailed account of his report of having seen the Claimant smoking. Mr. Jarvis began the meeting by asking an open ended question inviting Mr. Sittre to talk him through his version of events.

40. In short terms Mr. Sittre said that he had seen a driver who he believed to be the Claimant as he was driving on the M1 motorway and that his wife had told him that the driver of the vehicle was smoking. He said that he had then observed that for himself and had also undertaken a manoeuvre which had allowed him to again get a further view of the Claimant in the cab and that he had again seen him smoking. When asked, Mr. Sittre said that he believed that the cigarette was a roll up. Mr. Sittre also provided a sketch of the position of his vehicle compared with one that the Claimant was driving (see page 68 of the hearing bundle).

41. Contrary to the assertion made by Mr. Webb that Mr. Jarvis did not enquire if Mr. Sittre could be mistaken, he specifically asked him whether he was sure that it was a cigarette that he had seen (page 66 of the hearing bundle) to which Mr. Sittre replied that he was "100%" sure. Mr. Sittre was also asked by Amy Allen, a Human Resources ("HR") Adviser accompanying Mr. Jarvis, if it had been raining or whether there was anything to obstruct his view of the Claimant. Mr. Sittre replied in the negative. Again, those questions are not indicative of Mr. Sittre's account being accepted without question as Mr. Webb contends.

42. Mr. Jarvis asked if Mr. Sittre's wife would be prepared to give a statement and was told that she would. Although Mr. Jarvis indicated that he would contact Mrs. Sittre directly, as it transpired he did not do so and she simply sent an email to him setting out her statement (see page 72 of he hearing bundle). In that brief statement she said that she had clearly seen the driver smoking; had informed her husband; that he had seen the same thing and described her husband slowing down so as to look again at what they had just seen.

43. Mr. Webb is critical that Mr. Jarvis did not contact Mrs. Sittre personally and, in effect, the request for a statement must have come via her husband who was the main witness. He is also critical that Mr. Jarvis did not check that it was definitely Mrs. Sittre who was the author of the email and ensured that someone else (presumably Mr. Sittre) had not typed it for her. I accept the account given by Mr. Jarvis that he did not feel it necessary to do so given that the email came from an account bearing the name of Mrs. Sittre and that there was no reason to assume that she had not written it. It was not outside the band of reasonable responses for Mr. Jarvis not to have contacted Mrs. Sittre directly after receipt of the email given those circumstances and the fact that she had already given him her account.

44. The day before he received the email Mr. Jarvis had met with the Claimant for his investigatory meeting. Ms. Allen was again present as HR support and the Claimant was accompanied by his Trade Union representative, Mr. Roe.

45. Mr. Webb is again critical of the way in which Mr. Jarvis approached the questions that he had for the Claimant and that this suggested that he had already accepted Mr. Sittre's account. However, it is plain from reading the minutes of the meeting that Mr. Jarvis was only referring to what Mr. Sittre had told him as an allegation and asked him for the Claimant's account. Indeed, it is difficult to know what else Mr. Jarvis could have done other than ask the Claimant for his version of events as to the allegation made against him by Mr. Sittre.

46. The Claimant denied that he had smoked in a vehicle and so Mr. Jarvis asked him if he could think why Mr. Sittre would have made the allegation. The Claimant replied "No, I can't. Honest No" (see page 69 of the hearing bundle).

47. I consider it notable that the Claimant did not mention at this stage – or as I shall come to at any other point - what, until this hearing at least, was a central plank of his case that Mr. Sittre was targeting long standing employees for dismissal. Despite that, he gave Mr. Jarvis no indication as to why Mr. Sittre might have made up the allegation.

48. Moreover, the Claimant also made no mention of another matter that was to become one upon which not insignificant reliance was placed which is that the statement of Mr. Sittre refers to the Claimant having held the cigarette that it was claimed that he was smoking in his right hand. It is the Claimant's case that he only uses his left hand to smoke. However, whilst I am satisfied that the Claimant had the opportunity to raise that issue with Mr. Jarvis neither he nor Mr. Roe did so either at this stage or any other during the internal disciplinary process.

49. The Claimant accepted during the meeting that he was aware that smoking in a vehicle was illegal (see page 69 of the hearing bundle).

50. Mr. Jarvis asked the Claimant what type of cigarettes he smoked and the Claimant confirmed it to be roll up cigarettes. He also questioned the Claimant as to whether he drove with his windows down. The Claimant confirmed that he did so "rain or shine" and that he would always drive with the windows down to around nose height. Both of those things were consistent with the account that Mr. Sittre had given to Mr. Jarvis.

51. At the close of the meeting Mr. Jarvis confirmed that the Claimant would remain on suspension for the time being. I am satisfied that both the Claimant and his Trade Union representative were given ample opportunity to raise any matters that they needed to during the meeting.

52. Mr. Webb contends that Mr. Jarvis should have interviewed Mr. Sittre again after the meeting with the Claimant to put to him the Claimant's denial and to see if he was sure about what he had seen. However, it is difficult to see what could have been achieved by that. Mr. Sittre had already told Mr. Jarvis that he was "100%" sure about what he had seen; he had confirmed that there was nothing obstructing his view, including the weather conditions; the Claimant had not referred to using a different hand to smoke than that reported by Mr. Sittre and he had made no suggestion at all that there may have been anything to motivate Mr. Sittre to make a false allegation. Therefore, I accept that there was nothing to revert to Mr. Sittre on. Mr. Jarvis simply had two contrary accounts and had to consider those against the other evidence from the investigation.

53. On 3rd January 2020 Mr. Jarvis completed his investigation report. By that time he had also viewed the front facing camera footage ("FFC footage") from the Claimant's vehicle from 27th December 2019. The FFC footage showed the view from the front of the Claimant's cab out onto the M1 motorway. I have viewed that footage as part of these proceedings.

54. I am satisfied that in the reasonable view of Mr. Jarvis, the FFC footage supported the account given by Mr. Sittre that he had been on the same stretch of the M1 as the Claimant at the material time. I also accept Mr. Jarvis' evidence that the footage also supported the account that Mr. Sittre gave as to the manoeuvre that he had performed to get another look at the Claimant as he had pulled out into the second hand lane to overtake Mr. Sittre's vehicle.

55. I accept that in Mr. Jarvis' reasonable view that gave further credence to the account given to him by Mr. Sittre.

56. Mr. Webb points to the fact that the FFC footage does not show evidence of any smoke in the cab and therefore that pointed to the fact that the Claimant had not been smoking in the vehicle as Mr. Sittre had reported. However, I accept the evidence of Mr. Jarvis that the purpose of the FFC is to show footage facing out of the cab onto the road and it would only be in certain conditions – such as where it was very sunny – that there might be a reflection back into the cab from the windscreen of the vehicle. Those were not the conditions on 27th December 2019 and the Claimant's own evidence was that it was overcast.

57. Moreover, I accept the evidence of Mr. Jarvis that given that the Claimant, even on his own account, had the window open that could have accounted for smoke being taken out of the cab. I therefore accept that the lack of smoke on the FFC footage did not in the view of Mr. Jarvis support the Claimant's account that he had not been smoking in the vehicle.

58. Following the review of the FFC footage and the other investigatory steps undertaken, Mr. Jarvis produced an investigation report in which he recommended that the matter be escalated for consideration under a disciplinary process.

59. The conclusions of the report, which are at page 74 of the hearing bundle, said this:

> *"Although WL* [the Claimant] *has denied that he was smoking in a company vehicle on the day of the allegation, I can find no evidence beyond reasonable doubt to disbelieve the allegation made by 2 witnesses. After viewing the FFC footage from the vehicle at the time of the allegation it is clear that JS's vehicle did in fact pull alongside the Hovis vehicle as described in his statement. As one of the witnesses is a creditable senior manager within the Hovis business I recommend that the case is pushed forward to a DP hearing".*

60. Mr. Webb is crucial of the fact that the conclusions of Mr. Jarvis referred to Mr. Sittre being a senior manager and that that was indicative of the fact that he had simply accepted his account without question on account of his seniority. I accept the evidence of Mr. Jarvis that that was not the case and I remind myself that the Claimant had given no reason at all even when specifically asked to suggest why Mr. Sittre may have given an inaccurate or false account.

61. Mr. Webb is also critical of the fact that the conclusions made no reference to the statements of Messrs. Flinton and Smith which suggested no wrongdoing by the Claimant. I am satisfied that the conclusions simply provided the rationale of Mr. Jarvis for recommending an escalation to a disciplinary stage and that all of the relevant information was sent to Brian Hall – who was to deal with that stage of the process – and that included the statements in question. All of the necessary information was therefore before Mr. Hall for review before he took his own decision about matters (see particularly page 76 of the hearing bundle which makes it plain that the statements of Messrs. Flinton and Smith were contained in the investigatory report pack).

62. Mr. Hall wrote to the Claimant on 3rd January 2020 to invite him to a disciplinary hearing which was scheduled for 7th January 2020 (see pages 77 and 78 of the hearing bundle). The letter set out details of the allegations against the Claimant; set out his right of accompaniment and made it clear that one of the sanctions which may be imposed was dismissal.

63. The letter made it plain that it enclosed the following documents:

a. The Respondent's disciplinary policy;
b. The notes of the investigation meeting on 2nd January 2020;
c. The witness statements obtained during the investigation;
d. The sketch or illustration prepared by Mr. Sittre;
e. The summary of the Claimant's tachograph for 27th December 2019; and
f. The Respondent's Smoking Policy.

64. It is the Claimant's case that none of those documents were enclosed and that he did not receive any of the evidence which was to be referred to at the disciplinary hearing. I did not accept that evidence. The Claimant would clearly have seen from the letter that there were enclosures referred to. It would also have been plain that those enclosures were important. In view of that there is no logical explanation why the Claimant would not have raised that point and obtained the copies either before or at the very latest at the outset of the disciplinary hearing. He did not do so and neither did his Trade Union Representative who attended with him despite Mr. Hall asking at the very beginning of the hearing if the Claimant had received the pack of information and was happy with the contents. There was no better opportunity than that for the Claimant to say that he had not received the enclosures. I am therefore satisfied that the documents were enclosed with the letter as indicated within it and that the Claimant had all of the relevant evidence collated during the investigation before the disciplinary hearing.

65. The Claimant attended the disciplinary hearing on 7th January 2020. He was again accompanied by Mr. Roe and Ms. Downs was in attendance as HR support and to take notes. At the hearing Mr. Hall set out the basis of the allegations against the Claimant and asked him for his account. Again, I do not accept that that – or Mr. Hall's later reference to Mr. Sittre as a senior manager – gives rise to any suggestion that the account of Mr. Sittre was automatically accepted without question. I accepted Mr. Hall's evidence that he too was a senior manager and that he was not subordinate to Mr. Sittre.

66. Mr. Hall also told the Claimant that Mr. Sittre was sure that he had seen him smoking and asked him if there was any reason he could think of that Mr. Sittre would say that if it was not true. That was a natural question to have asked in the circumstances and where the Claimant was denying having been smoking at the time and Mr. Sittre was "100%" sure that he had been. The Claimant replied in response to that question the following:

"No I don't know why. You know him better than I do but no I don't know why."

67. Again, I do not find it credible that the Claimant would not mention again the issue of the alleged targeting of long standing employees upon which he now relies and which had so much emphasis in his witness statement. The Claimant was aware that he was facing disciplinary action with the possibility of dismissal and I find it lacking in credibility that he would not raise this issue,

particularly given that he was asked directly by Mr. Hall if there was any reason he could think of that Mr. Sittre would make the allegation up.

68. The Claimant also accepted at the hearing that he was aware of the Smoking Policy and how seriously the Respondent took that policy (see pages 79 and 80 of the hearing bundle).

69. Much has been made of a discussion which then took place about an earlier allegation that had been made against the Claimant about smoking on 9th December 2019 which he contends was in fact the real reason for his dismissal. That, in my view, has become something of a red herring in these proceedings. The Claimant raised that he had previously been alleged to have been smoking on site (albeit not in a company vehicle). The reason for raising this earlier incident appeared to be that it would demonstrate that the Claimant did not smoke in even his own vehicle because he had pulled his car up outside the Respondent's site to have a cigarette on that occasion. The Claimant invited Mr. Hall to review the footage from the CCTV cameras of that incident which had occurred a short time before the events of 27th December 2019.

70. The Claimant was asked about that occasion whether he had pulled up his vehicle merely to smoke or whether he had also been on his mobile telephone. The Claimant said that he was not. The issue of the mobile telephone and whether the Claimant was using it or on the telephone whilst he was standing outside smoking was returned to again twice before an adjournment during which Mr. Hall reviewed the CCTV footage as proposed by the Claimant. On each occasion the Claimant said that he had not been using his mobile telephone whilst he was smoking.

71. The relevance of that issue is that when Mr. Hall reviewed the footage during the adjournment he saw that the Claimant had been using his mobile telephone when he had stopped to smoke outside the company premises. He considered in view of that that the Claimant had been less than forthcoming about the events of that particular incident. He saw that a relevant to the veracity of the Claimant's account of the events of 27th December but I am satisfied that it was no more than and the Claimant was not dismissed because of the earlier incident or because Mr. Hall considered that he was being untruthful about what had in fact occurred on 9th December.

72. Mr. Hall did not share the CCTV footage with the Claimant but that is not of significance given that it was a side issue and neither the Claimant nor Mr. Roe asked to see it. They similarly did not request to view the FFC footage although Mr. Hall specifically said that that could be shared with them.

73. Other matters raised by the Claimant were the lack of evidence of smoking in the vehicle when it was inspected by Messrs. Flinton and Smith and the fact that Mr. Roe believed that Mr. Sittre could have been mistaken. I am satisfied that Mr. Hall took those matters into account but that in his view the balance of evidence suggested that the Claimant had been smoking as observed by Mr. Sittre.

74. I am satisfied that Mr. Hall in fact actively tried to determine if there may be another explanation for what Mr. Sittre had seen. Particularly, he referred to previous cases where such allegations had been made where it had transpired that the person involved had a pen or something else in their hand. Mr. Hall

sought to determine if that could have been the case with the Claimant by asking him if he had had anything in his hand. The Claimant answered in the negative.

75. That question is not consistent with the Claimant's position that Mr. Hall only looked for evidence of his guilt. The fact that the Claimant said that he had nothing in his hand is also not consistent with his position in these proceedings that he always eats mints when driving and that may be what Mr. Sittre had seen as he moved his hand towards his mouth to eat one. However, that was not raised with Mr. Hall so he could not take the matter further.

76. At the close of the hearing Mr. Hall determined that the Claimant was to be summarily dismissed. I am satisfied that during the adjournment he considered matters as well as watching the CCTV footage and so the fact that he delivered his decision at the close of the hearing was not, as is suggested, indicative of a pre-determined decision. The adjournment for that purpose was close to an hour in length.

77. The rationale of Mr. Hall as delivered to the Claimant at the close of the hearing was as follows:

"Okay, so I have to make a decision on reasonable belief as to whether Jas' allegation is correct. You have confirmed that there is no reason why Jas would single you out and say something that was not true. There is also a third party in the car that made the initial allegation. Jas made sure by watching you so that he was clear in his own mind of what he could see. Jas is 100% clear that he saw you smoking. I have to decide on reasonable doubt. We have found that on 9 December you gave me an untrue account of what you did when you stopped you (sic) *car at the front of the building. You have worked here for 18 years and are currently on a FWW. This is a gross misconduct case so I cannot use a good previous record as mitigation. I have no reason to believe that Jas would make this up".*

78. Mr. Hall also commented that he also did not believe that Mr. Sittre would have been mistaken.

79. He therefore told the Claimant that he was being summarily dismissed and explained his right of appeal.

80. It is abundantly clear from the evidence of Mr. Hall, which I accept, and all of the contemporaneous documentation that the reason for dismissal was as a result of the events of 27th December 2019 and not anything to do with the earlier allegation about smoking for which the Claimant was exonerated.

81. Mr. Hall wrote to the Claimant on 10th January 2020 confirming his summary dismissal. Again, it is abundantly clear from that letter that the reason for dismissal was the allegation that the Claimant had been smoking in a company vehicle.

82. Mr. Hall's letter set out the summary facts which had led him to reach the decision that he had and, in brief terms, those were these:

a. That it had been categorically confirmed that the Claimant was the driver of the vehicle that Mr. Sittre had observed;

b. That Mrs. Sittre had made the initial observation about smoking and she would have had a good view from the passenger seat and ample time to check as they drove alongside;

c. That Mr. Sittre had then decided to check for himself and that account was supported by the FFC footage;

d. That both Mr. and Mrs. Sittre were certain about what they had seen and were not mistaken and that the Claimant had offered no explanation why he or his wife would make the allegation up;

e. That he did not accept the Claimant's position that it was not possible to see a driver in the cab of a vehicle from a normal car;

f. That the Claimant was aware of the Smoking Policy and his actions had been a serious breach of it; and

g. The Claimant's actions could have brought the Respondent into disrepute.

83. Mr. Hall indicated that he had considered the Claimant's overall record and length of service and that there was little mitigation as he had a live final written warning. He therefore concluded that the sanction he had decided to impose was reasonable.

84. The letter finally set out the Claimant's right of appeal and how that could be exercised.

85. The Claimant submitted an appeal against dismissal by way of a letter received by the Respondent on 14th January 2021 (see page 87 of the bundle). The appeal letter was brief and set out two grounds of appeal which were that the decision was biased and that none of the points that the Claimant had raised had been taken into consideration. However, as I shall come to, by the time of the appeal hearing the scope of the appeal expanded and the Claimant was permitted to put those additional points.

86. However, again even at the appeal stage the Claimant did not mention anything about his hitherto held position that Mr. Sittre was making the allegation up because of his targeting of long standing employees. I am satisfied that there is no evidence whatsoever to support the Claimant's position that long standing employees were targeted and if there was any basis to that, the Claimant would have raised the matter at the appeal stage by the very latest. Even if, which I do not accept, the Claimant felt prevented from raising the matter earlier in case that in some way affected his prospects of keeping his job, by the appeal stage he had already been dismissed and clearly had nothing to lose. If there was a genuine issue with long standing employees being targeted by Mr. Sittre then it is clear that the Claimant would have deployed that in his defence against the allegations.

87. The Claimant was invited to an appeal hearing with Nick Taylor, the site manager, He had had no previous involvement in matters. A letter sent to him on 15th January 2020 arranged the appeal hearing for 21st January 2020 and advised him of his right of appeal (see page 88 of the hearing bundle). He was accompanied by Joanna Richardson, a full time Trade Union official, and Mr. Roe although the latter was asked not to speak as Mrs. Richardson was

going to be the Claimant's representative.

88. Much of the appeal hearing focused on the assertion that Mr. Sittre would not have been able to see the Claimant smoking in the cab of his vehicle. Before the hearing took place the Claimant's Trade Union representative set out some research that she had undertaken (see page 89 of the hearing bundle) which she said suggested that it would not have been possible to see the driver in the cab because of the size that his face would have been in the rear view mirror. However, I accept the evidence of Mr. Hall that he did not consider that to be relevant because the dimensions that were set out in that paper related to a view in the rear-view mirror and Mr. Sittre's report dealt with an entirely different viewpoint.

89. I do not accept the suggestion that there was any hostility from Mr. Taylor during the hearing. I accept his evidence that there was not and the suggestion to the contrary is certainly not borne out by the notes of the meeting which appear at pages 95 to 100 of the hearing bundle.

90. As a great deal of the focus of the appeal was that it would not have been possible for the driver of the cab to have been seen smoking, Mr. Taylor determined that he wanted to get into the vehicle in question and view that for himself. I am satisfied that that is indicative of Mr. Taylor taking the matters raised by the Claimant seriously and testing what had been said by Mr. and Mrs. Sittre.

91. He therefore determined that he would seek to reconstruct the position of the Claimant's vehicle as against Mr. Sittre's vehicle so as to see what it was possible to observe of the driver of the cab of the former.

92. In doing so, he asked Mr. Hall to roll up a cigarette and sit in the drivers seat of the vehicle that the Claimant had been using on 27th December 2019. Using the illustration previously prepared by Mr. Sittre (a copy of which had been sent to the Claimant on 3rd January 2020) he asked Mr. Sittre to pull his vehicle into position alongside Mr. Hall so that he could see if it was possible to see the driver and, if so, if it was possible to see a rolled up cigarette in his hand.

93. Mr. Webb is critical of the involvement of Mr. Hall and Mr. Sittre in the reconstruction. However, I am satisfied that they were not involved in any way which could have "corrupted" the reconstruction. Mr. Hall was only involved to roll a cigarette (because he was the only person that Mr. Taylor knew that smoked roll up cigarettes) and sit in the cab of the vehicle. Mr. Sittre was only used to bring his car around and position it where Mr. Taylor directed. As it was Mr. Sittre's own vehicle it was logical that he would be used in that regard. If not, then I have no doubt that the fact that a different vehicle had been used would have been deployed as a suggestion that the reconstruction was flawed.

94. Mr. Taylor sat both in the passenger seat of Mr. Sittre's vehicle (to observe what Mrs. Sittre could have seen) and the drivers seat where Mr. Sittre had been sitting. He took photographs from both positions on his mobile telephone.

95. Whilst the Claimant and the Trade Union representatives who were present at the appeal hearing were not involved in that reconstruction – and in hindsight it would have been preferable for them to have been present – I am satisfied that that did not cause unfairness because the details were explained to them at the appeal hearing and they were shown photographs taken by Mr. Taylor on his mobile telephone about what he had been able to see of the driver in the lorry cab. The Claimant raised no issue at that time, contrary to the position before me at the hearing, that Mr. Hall was seated in a different way to the way that he sat and so the view would have been very different.

96. I am satisfied that he had the opportunity to raise such a matter had he wished to do so. Equally, contrary to his position at this hearing before me the Claimant did not raise any suggestion with Mr. Taylor that he only smoked with his left hand. I can see no reason why he would not have done that given that the photographs clearly show Mr. Hall holding the roll up cigarette in his right hand.

97. I accept from the photographs at pages 92 and 94 of the hearing bundle that a cigarette can be visibly seen in the hand of the driver and that Mr. Hall had observed that that was the case. Although I accept the representations of Mr. Webb that this was not a perfect reconstruction because the vehicles were not moving at the same speed, I remind myself that the Respondent is only held to a standard of reasonableness. I do not consider it outside the band of reasonable responses for the reconstruction to have taken place as it did. It would be wholly impracticable, as seems to be suggested, for it to have been undertaken on the motorway at the same speed as the vehicles had been travelling on 27th December 2019. Trying to recreate those exact same conditions could well, it seems to me, have posed a safety risk.

98. Mr. Webb is also critical of the fact that Mr. Taylor did not undertake what he refers to as other "experiments". In addition to the one that I have already referred to immediately above he is critical that Mr. Taylor did not take up a suggestion made by Mrs. Richardson that he go and look in her vehicle to see that there would be signs of smoking because she smoked roll up cigarettes in her own car. I am satisfied that the state of Mrs. Richardson's vehicle was not relevant to what had occurred in the vehicle that the Claimant had been using on 27th December 2019.

99. Mr. Taylor also made reference to "the Venturi effect" which he said could have explained the lack of cigarette ash in the vehicle as it had been pulled out of the window and that if the Claimant had had the window I am satisfied that that was raised from Mr. Taylor's own knowledge and in reply to points made by him and on his behalf by Mrs. Richardson. Mrs. Richardson said that he agreed with him about the issue of the smoke but not about the ash (see page 100 of the hearing bundle).

100. At the close of the hearing Mr. Taylor confirmed that he would let the Claimant know the outcome in writing. I am satisfied that he spent time after that time considering the evidence before him before reaching his conclusions.

101. Mr. Taylor confirmed the outcome of the appeal against dismissal on 3rd February 2020 which was to uphold the dismissal (see pages 101 to 103 of the hearing bundle).

102. That outcome letter dealt with each of the six separate points that the Claimant or Mrs. Richardson had raised on his behalf and the relevant parts said this:

"As a result of my findings and after careful consideration, it was my decision to uphold the above decision of gross misconduct and the decision to summarily dismiss you for the following reasons:

You were not dismissed for a different incident on which you were previously questioned about smoking on the public footpath in front of the Bakery. The only reason the incident was questioned and referred to in both your disciplinary and appeal hearings was because you brought it up. The outcome letter you received makes no reference to this forming any part of your reason for dismissal.

An allegation and witness statement made by a third party will be given the same due consideration as that of an employee[1].

A third party (Mrs. Sittre), travelling in the passenger seat of Jas Sittre's car, made the initial observation and was absolutely clear that she witnessed you smoking whilst driving a Hovis vehicle. Mrs. Sittre's view of the driver, from the passenger seat of the car, would have been good as the car overtook you and, as she was not driving, she would have had ample time to be confident of her assertion. As we discussed Mrs. Sittre would have been approximately only two meters (sic) *away from you and looking at you in a direct line and not through a mirror. During the adjournment, by way of further investigation, I put myself in the passenger seat of Mr. Sittre's car with the same vehicle you were during in a similar relative positional arrangement. Your driving position was occupied by an individual holding a roll up cigarette in the manner described by Mrs. Sittre. In this reconstruction I confirmed that from both the car passenger and the driver position there was a clear view of the cigarette as described by Mrs. Sittre in her statement. I took photographs of what I could see when seated in the car and you viewed them after we reconvened from the adjournment of your appeal.*

Two managers did confirm that the vehicle that you drove did not smell of smoke and there was no ash present. However, as we discussed, you had your window down enough to draw out the smell of smoke and dispose of ash with still having two junctions on the motorway to return to sire before the vehicle was inspected. We also covered the Venturi theory and discussed that in a moving vehicle there is relatively higher static pressure of the air inside the cab with the air outside the vehicle rushing past at a lower pressure. Therefore, the air from inside the cab naturally flows outwards through the open window. So when smoking inside the vehicle with the window partly down, as described by the witness statements, all of the smoke and cigarette particles will be drawn out of the open window due to the air going from relatively high to a low pressure environment.

Having been made aware of Mrs. Sittre's allegation, Mr. Sittre says that he took the decision to check for himself and that account is strengthened by the FFC camera footage from your vehicle. Whilst you did not accept our offer during the hearing to see the footage from your vehicle from 27th December 2019, it is clear from that footage that Mr. Sittre makes the manoeuvre he

[1] This was in response to a submission made about the statement from Mrs. Sittre.

describes specifically to allow himself the best possible views of you to confirm the allegation before he reported the event.

Both Mr. and Mrs. Sittre are certain about what they saw of that day and that they weren't mistaken as suggested by you. It was previously discussed and agreed at the disciplinary between all parties that there is no reason that Mr. Sittre would make this up or any allegation against you. There is no suggestion that Mrs. Sittre would do that either.

I find Mr. Hall's conclusion reasonable that what Mr. Sittre and his wife saw was accurate. From my own review of the matter, I too have come to the same conclusion.

Your actions were a serious breach of the Company Smoking policy, amounting to gross misconduct, a policy which you confirm you were fully aware of prior to this incident, and as Mr. Hall set out, such actions could well have had a detrimental effect on Hovis' reputation.

Before reaching the decision to uphold your dismissal, I carefully considered the available evidence, including the explanations and points raised by you at the appeal hearing and took into account your overall employment record, including your length of service. I note that you had a live disciplinary warning on your file demonstrating your previous conduct offered little mitigation to this sanction. I believe that dismissal was proportionate and reasonable in all the circumstances including the seriousness of the misconduct."

103. That concluded the Claimant's right of appeal under the Respondent's internal processes and thereafter he issued the proceedings which now come before me for determination.

CONCLUSIONS

104. Insofar as I have not already done so, I now deal with my conclusions in relation to each of the complaints before me. I deal with each complaint separately because they do, of course, have different tests to be applied and differing burdens of proof.

105. I begin with the unfair dismissal claim. The first question in that regard is whether the Respondent has persuaded me, the burden being on them to do so, that there was a potentially fair reason to dismiss the Claimant and that that reason was conduct. I have no hesitation in determining that the Respondent has discharged that burden. The Claimant does not suggest any other reason for dismissal other than conduct nor was one put by Mr. Webb to the Respondent's witnesses.

106. Moreover, it is clear that the matters operating in the mind of Mr. Hall were the allegations as to the Claimant's alleged smoking. I am satisfied that the reason for dismissal was therefore conduct.

107. However, that is not the end of the matter and I turn now to the question of whether the dismissal was fair or unfair having regard to the provisions of Section 98(4) ERA 1996. The burden in this regard is a neutral one.

108. Applying the principles under the **Burchell** test, I consider firstly whether the Respondent was able to form a reasonable belief, after reasonable investigation, as to the Claimant's guilt in the allegations against him. I am satisfied that the investigation was a reasonable one. Whilst Mr. Webb is critical that Mr. Jarvis did not interview Mrs. Sittre himself I accept for the reasons that I have already given that he had no reason to believe that the email that she wrote did not come from her or that she was influenced by anyone in writing it.

109. Mr. Jarvis also did not, as suggested, accept the word of Mr. Sittre without question. He directed Mr. Flinton and Mr. Smith to inspect the Company vehicle immediately on the Claimant's return to site. He also investigated the statement of Mr. Sittre by checking the Respondent's records to ensure that the Claimant was the driver of the vehicle in question; that he was where Mr. Sittre said that he had seen him and he also reviewed the FFC footage. It is difficult to see what more Mr. Jarvis could have been expected to investigate before the matter was passed to Mr. Hall for further consideration.

110. Mr. Hall was provided with all the relevant material from Mr. Jarvis's investigation for his review. He did not end matters there, however, and when new matters were raised by the Claimant at the disciplinary hearing about the previous smoking allegation he also went away and investigated those matters for himself.

111. I am therefore satisfied that there was reasonable and sufficient investigation and that the scope that that investigation took fell within the band of reasonable responses open to a reasonable employer.

112. I turn then to the question of whether, from that investigation, the Respondent had sufficient to form a reasonable belief on reasonable grounds in the Claimant's guilt in the allegations against him. I am satisfied that they did. Insofar as Mr. Hall was concerned he had accounts from Mr. and Mrs. Sittre that they had seen the Claimant smoking in his company vehicle. Mr. Sittre had been able to identify that it was a roll up cigarette that was being smoked which was the type that the Claimant used and that his window was down which was consistent with the Claimant's own account. The Claimant had been identified by Mr. Jarvis as the driver of that vehicle from the Respondent's records. Both Mr. and Mrs. Sittre had confirmed that they were entirely certain about what they had seen and that their vision had not been obscured by bad weather or other conditions. Their statements had, in Mr. Hall's reasonable view, been corroborated by looking at the FFC footage which confirmed the manoeuvre that Mr. Sittre had described doing in his own vehicle to get a second look at the Claimant. The Claimant had confirmed that he had nothing in his hand at the time that may have been confused with a cigarette and he had given Mr. Hall no reason whatsoever that Mr. Sittre might have to make the allegation up. Whilst the statements of Mr. Flinton and Mr. Smith did not support the allegation I accept that they also did not disprove it given that the Claimant had been driving with the window down and had a further period before he got back to the site which could have taken away the smell of smoke.

113. Having regard to all of those matters, I am satisfied that Mr. Hall was able to form a reasonable belief, on reasonable grounds, that the Claimant had been smoking as was alleged. In view of the weight of evidence, he was entitled to prefer that to the account given by the Claimant.

114. Similarly, Mr. Taylor also conducted further investigation when additional matters were raised by the Claimant or his representative at the appeal stage. Whilst Mr. Webb is critical of the way in which that was conducted but, for the reasons that I have already given above, I am satisfied that that caused no unfairness to the Claimant and was a matter which fell within the band of reasonable responses.

115. Mr. Taylor was also able to form a reasonable belief that the allegation against the Claimant was made out and that Mr. Hall had not, therefore, made an unfair decision.

116. I turn then to the sanction and question of the sanction and whether dismissal was within the band of reasonable responses open to a reasonable employer. I remind myself that in respect of the unfair dismissal complaint I must not substitute my view for that of the employer and what I need to consider is not whether every employer would have dismissed the Claimant, but merely whether no reasonable employer would have done so.

117. It does not appear to be suggested that dismissal was not a sanction open to Mr. Hall only that dismissal was not in the band of reasonable responses because the Claimant was not guilty of smoking on 27th December. The Smoking Policy makes it plain that dismissal for a breach is a possible sanction. That is unsurprising given that smoking in a company vehicle in the way in which it was alleged that the Claimant had been is a criminal offence and it could have resulted in prosecution and a fine for the Respondent. I am satisfied that summary dismissal was therefore a sanction which fell within the band of reasonable responses and that the Claimant was alive to that fact.

118. I am therefore satisfied for all of those reasons the claim of unfair dismissal is not well founded and it is dismissed.

119. I turn finally, for completeness, to the specific allegations of unfairness made by the Claimant and which feed into the question of fairness under Section 98(4) ERA 1996. The first of those matters is that it is alleged that there was no proper investigation by Mr. Jarvis. Mr. Webb submits that the evidence of Mr. Sittre was not properly challenged and Mrs. Sittre was not called to give a direct account and challenged on that. For the reasons that I have already given in my finds of fact above, I do not accept that criticism.

120. Mr. Webb also submits that the Claimant did not have all available evidence before the disciplinary hearing and that important evidence such as that of Messrs. Flinton and Smith was ignored. As I have already set out above, I am satisfied that the Claimant did have all of the relevant evidence before his meeting with Mr. Hall and that that was included with the letter of 3rd January 2020. I am also satisfied that no evidence was ignored but in the view of Mr. Hall and Mr. Taylor, there was a greater weight of evidence in support of the allegation and the statements of Mr. Flinton and Mr. Hall were not decisive that the Claimant had not been smoking because the drivers window had been open which could have accounted for what they had seen.

121. Mr. Webb also contends that there was a one sided investigation. He again relies on the discounting of the evidence of Mr. Flinton and Mr. Smith. I have already dealt with that above. He also relies on the fact that the FFC footage did not show evidence of smoking but, as I have already dealt with above, I am satisfied that that was taken into account but that Mr. Jarvis had concluded that it would not show a reflection into the cab unless it was a sunny day. It was overcast on the day in question.

122. Mr. Webb is also critical of the use of Mr. Hall and Mr. Sittre in the reconstruction at the appeal hearing. I have already dealt in my findings of fact above my conclusion that that caused no unfairness to the Claimant. He also contends that the reconstruction was flawed because Mr. Hall had been wearing a hi-vis vest but the Claimant was not; Mr. Hall had the window all the way down; he was not seated in the same position as the Claimant would have been and he also had the cigarette in his right hand rather than his left. None of those matters were raised with Mr. Hall and, specifically, at no stage did the Claimant say that he only smoked with his left hand. Had those matters been referred to but ignored then that may be a different issue but Mr. Hall could not be expected to guess that those were factors unless Mr. Roe or the Claimant actually told him. I remind myself of course that they were shown the photographs and had the opportunity to raise any of those issues.

123. It is further submitted on behalf of the Claimant that there was unfairness in the reconstruction because it was not recreated at the speed that the Claimant and Mr, Sittra had been travelling at on the day in question. For the reasons that I have already given above, that would have been very difficult and potentially unsafe and the fact that that did not happen was not something which fell outside the range of reasonable responses.

124. Mr. Webb also contends that there was an insufficiently robust challenge to the statements of Mr. and Mrs. Sittre. He contends that suspension had been a knee jerk reaction but I am satisfied from the evidence of Mr. Jarvis that he considered that necessary because the substance of the allegation was that the Claimant had committed a criminal offence.

125. He also contends that Mr. Sittre should have been challenged on why he had completed his additional manoeuvre because that was indicative of the fact that he had not been sure of what he had seen. I am satisfied that Mr. Sittre was asked appropriate questions by Mr. Jarvis and Ms. Allen to seek to ascertain whether he may have been mistaken – such as the visibility and weather conditions that day – and at no time during the disciplinary process did the Claimant or his representatives raise that the issue of the manoeuvre was indicative of the fact that Mr. Sittre could not be sure of what he had seen. That was also not put in cross examination.

126. Mr. Webb further submits that it would have been impossible for Mr. Sittre to have seen the Claimant as he alleged and that after he had denied smoking the Respondent should have gone back to Mr. Sittre to challenge the veracity of his account. I do not accept that it was unreasonable for that not to have taken place given that Mr. Sittre had made plain that he was “100%” sure as to what he had seen and Mr. Taylor dealt with the reconstruction that I have referred to above to test that point when it was raised by the Claimant. Mr.

Webb also contends that I may wish to use my own experience to determine how difficult it is to see into the cab of a vehicle on the motorway. However, I am simply determining the actions of the Respondent against the test of reasonableness and not what I may or may not have seen in completely different circumstances in the past.

127. It is also advanced by Mr. Webb that the investigation report was demonstrative of the fact that evidence in support of the Claimant was not properly considered. He refers specifically to the statements of Mr. Flinton and Mr. Smith and the lack of smoke on the FFC footage. I have already dealt with that point at paragraphs 56, 57 and 61 above and I need not repeat those findings here. I am satisfied that this issue did not cause unfairness to the Claimant or undermine the investigation.

128. Mr. Webb also contends that Mr. Jarvis has placed the burden of proving that he had not been smoking onto the Claimant. I am satisfied that that was not the case. Mr. Jarvis simply put the allegation to the Claimant; asked him for his account and when it was clear that there was a total conflict between that account and the one given by Mr. Sittre asked him if he could think of a reason why that might be. There was nothing impermissible or inappropriate about that and it is difficult to see what else Mr. Jarvis could have done. I do not doubt that if he had not asked the Claimant whether he could think of any reason that Mr. Sittre may have made the allegation up (given that he had said that he was 100% certain about what he had seen) that would have attracted significant criticism. It would have course potentially denied the Claimant the opportunity to raise the issue of Mr. Sittre allegedly targeting long standing employees had the Claimant been minded to provide that explanation.

129. Similar assertions as to the burden to disprove the allegation being place don the Claimant are made of Mr. Hall at the disciplinary hearing. I do not accept those criticisms any more than I do of the actions of and questions asked by Mr. Jarvis.

130. It is also submitted that inappropriate weight was placed on the fact that Mr. Sittre was a senior manager by both Mr. Jarvis and Mr. Hall such that his account was automatically believed over the Claimant. For the reasons that I have already given above, I do not accept those criticism and, particularly, I have accepted Mr. Hall's evidence that he is also a senior manager and that accordingly the status of Mr. Sittre played no part in his decision.

131. Mr. Webb also contends that unfair weight was placed on the earlier smoking incident on 9th December 2019 and that that was in fact the reason for dismissal. I am satisfied that that was only looked into because it was specifically raised by the Claimant and that the reason for raising the issue of whether he had been on his mobile telephone at the time was relevant to his position that he had stopped his car solely to smoke. Mr. Hall viewed the Claimant as being less than candid when it transpired that his repeated statements that he had not been using his phone was not accurate. However, that was not the reason for his dismissal as I have already dealt with above.

132. Mr. Webb is also critical of the fact that Mr. Hall was able to deliver his decision at the disciplinary hearing and contends that that was indicative of a predetermination of the outcome. For the reasons that I have already given, I do not accept that position. There was a lengthy adjournment during the course of the hearing during which I am satisfied that Mr. Hall considered the

evidence and his decision. Other aspects of the way in which Mr. Hall dealt with the matter – such as adjourning to review the CCTV after the Claimant raised the issue of the earlier smoking allegation – was not indicative of a closed mindset or a predetermined decision.

133. The Claimant also submits that there was reference to the FFC footage at the disciplinary hearing but nothing was said about the lack of smoke on that footage which supported his account that he was not smoking. However, neither the Claimant nor his Trade Union representative raised any issue about the fact that, as is now said to be the case, smoke would have been able to be seen on that footage. I am satisfied that there was the opportunity to raise that had it been seen as an issue at that time.

134. Finally, Mr. Webb also submits that the dismissal was procedurally unfair because there had been adjournments to obtain further evidence. I do not accept that submission because the adjournments in both the disciplinary and appeal hearings were as a direct result of matters that the Claimant raised or which were raised on his behalf and which were looked into so as to ensure fairness to him. If they had simply been ignored or dismissed out of hand I have no doubt that the Claimant would be relying on that as evidence of unfairness.

135. I am satisfied that none of those specific challenges set out above caused unfairness to the Claimant or undermined the process or decisions reached. Again, therefore, the claim of unfair dismissal fails and is dismissed.

136. I turn then to the wrongful dismissal complaint. I must firstly be satisfied in this regard that on the basis of the evidence before me the Claimant acted as the Respondent contends he did on 27th December 2019 – that is that he was smoking in his company vehicle.

137. This aspect of the claim is not parasitic on my findings and conclusions on the unfair dismissal claim because rather than the test of reasonableness and reasonable belief, the burden is on the Respondent to satisfy me on the balance of probabilities that the Claimant was guilty of the misconduct alleged. I am required to make my own findings in that regard as to what happened.

138. The problem here for the Respondent is that which I observed to Mr. White at the outset of the hearing – the Respondent has not called anyone who was an actual witness to the events of 27th December 2019. There were only three people present on 27th December 2019 – the Claimant; Mr. Sittre and Mrs. Sittre. The Claimant has given evidence and been cross examined. However, I have not heard on behalf of the Respondent from either Mr. or Mrs. Sittre who are the only individuals who would be able to provide a first hand account of what they saw on 27th December 2019. I was therefore unable to evaluate their credibility against that of the Claimant.

139. Whilst it is true to say that there was supporting evidence that the Claimant had been smoking such as the footage corroborating the manoeuvre that Mr. Sittre took in his own vehicle, that falls far short of my being able to find as a fact that the Claimant was, on the balance of probabilities, smoking on 27th December 2019. Particularly, there is evidence that mitigates against that position such as the statements of Messrs. Flinton and Smith and, without being able to evaluate the evidence of the only first hand witnesses to the matter for myself, I can make no finding of fact that the Claimant was smoking

as alleged by the Respondent.

140. I should remark that had I been satisfied that the Claimant had been smoking on 27th December 2019 in a company vehicle then I would have concluded that that amounted to conduct which was so serious that it entitled the Respondent to summarily dismiss him. That is because what was alleged would have been a criminal offence; it could have resulted in the Respondent being prosecuted and fined and the Smoking Policy was clear on how the Respondent viewed such conduct and the seriousness of breach of that policy.

141. However, I have not and cannot find on the facts based on the evidence before me that the Claimant was guilty of smoking in a company vehicle on 27th December 2019 and it follows that the wrongful dismissal complaint is well founded and it succeeds.

REMEDY

142. I turn then to the appropriate remedy in this case. It is not in dispute that the Claimant was entitled to 12 weeks' notice of termination of employment given that he had at the point of his dismissal been employed by the Respondent for some 18 full years.

143. It has not been put to the Claimant that the figures contained within his schedule of loss (page 35.1 and 35.5 of the hearing bundle) as to his net weekly pay of £497.07 are incorrect and so the relevant figure as to compensation for wrongful dismissal is in the sum of £5,964.84. The Respondent is therefore Ordered to pay that sum to the Claimant.

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Employment Judge Heap

Date: 24th October 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
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