



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Oliver

**Respondent:** The Cotswold Distilling Company Ltd

**Heard at:** Midlands West by CVP

**On:** 24 and 25  
November 2021

**Before:** Employment Judge Woffenden

## Representation

Claimant: In Person

Respondent: Mr J Franklin of Counsel

# RESERVED JUDGMENT

The claimant's claim of unfair dismissal fails and is dismissed.

# REASONS

## Introduction

1 The claimant was employed by the respondent, latterly as a senior distiller, from 17 August 2015 to 14 October 2021 when he was dismissed with immediate effect for gross misconduct. On 5 January 2021 he presented a claim to the tribunal in which he complained his dismissal was unfair.

## Issues

2 The list of issues agreed during the course of the hearing was as follows:

2.1 What was the principal reason for dismissal? Was the claimant dismissed for the potentially fair reason of conduct, in this case the claimant deviated from protocol (i.e., by applying steam too soon and without checking that the coils of the still were fully covered by liquid (on 2 occasions on 19 September 2020); falsified paperwork on 19 September 2020 by intentionally recording timings that would be consistent with correct operating protocols; the claimant was dishonest in his account given during the initial investigation on 22

September 2020 in relation to his shift on 19 September 2020. The tribunal will need to decide if the respondent genuinely believed that the claimant had committed misconduct.

2.2 If the dismissal was because of “misconduct”, did the respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss the claimant ; The tribunal will need to decide whether

- (i) The respondent had reasonable grounds for its belief that the claimant had committed misconduct;
- (ii) At the time that belief was formed had the respondent carried out as much investigation as was reasonable in the circumstances?
- (iii) The respondent otherwise acted in a procedurally fair manner?

2.3 Was the decision to dismiss the Claimant within the range of reasonable responses?

2.4 If the Claimant is found to have been unfairly dismissed:

2.4.1 What are his alleged losses;

2.4.2 Has there been any unreasonable failure to mitigate the alleged losses:

2.4.3 Should any adjustment be made to any award of compensation to take into account of any contributory fault/conduct on his part?

### **Procedure Documents and Evidence Heard**

3 I heard evidence from the claimant .A witness statement from his partner (Ms Newport) was received into evidence but Mr Franklin did not cross-examine her.

4 On behalf of the respondent I heard from Mr N Franchino ( the respondent’s production director and investigating officer), Mr S Owen ( the respondent’s finance director and dismissing officer) and Mr D Szor ( the respondent’s founder chief executive officer and majority shareholder and the appeals officer ) .

5 There was an agreed bundle of documents of 118 pages. I have considered only those documents to which I was referred by the parties in their witness statements or under cross -examination.

6 The claimant had not prepared a schedule of loss as ordered by the tribunal or disclosed documents relevant to remedy and the respondent (though represented throughout) had failed to take any action in relation to his noncompliance .The hearing therefore had to be confined to liability only. However I permitted cross-examination on the issue of contributory fault.

### **Fact Finding**

7 The respondent makes gin and whisky. It has been trading for the last eight years. It has 54 employees. It has no dedicated HR resource . Staff employment matters are managed by Ms M Crowson( the respondent’s operations director) and the respondent uses external employment law advisers (‘Mentor’). Mr

Franchino is the Production Director and there are 5 other distillers , one of whom is on shift at a time.

8 The claimant commenced employment on 17 August 2015 as an assistant distiller. He was recruited by Mr Szor. In January 2018 he was promoted to senior distiller on a salary of £30000 a year. He was 28 at the time of his dismissal.

9 The respondent had an Employee Handbook ('the Handbook') which formed part of the claimant's terms and conditions of employment . The Handbook had a section containing a disciplinary policy and procedure .Under the heading '*Investigation Meetings*' it said '*Depending on the circumstances, you may be required to attend Investigation Meetings before a decision is taken to invoke the disciplinary procedure. An investigation meeting is an informal meeting and so you are not permitted to be accompanied unless you are under the age of 18( when a parent or guardian will be permitted).*' Under the heading '*Gross Misconduct*' there was a non-exhaustive list of examples of behaviour the respondent viewed as gross misconduct likely to result in dismissal without notice which included '*theft, dishonesty or fraud*' and '*falsification of records or other company documents ,including those relating to obtaining employment*' .

10 To achieve consistency of product it is important that all distillers consistently operate in the same way. Some Standard Operating Procedures ('SOPs') for the respondent's operations were initially written in 2015/16 , one of which was entitled 'Brewing Protocol.' During the distilling process steam is used to heat the product in the stills and the Brewing Protocol sets out under the heading 'Still Operation' eleven 'basic rules for still operation' the second of which is expressed as '*NO Liquid, no steam ( ensure coils do not run dry)*'.

11 Although the SOPs were (or had been) in writing, the way the respondent's procedures ( as devised by Mr Franchino) were to be carried out was communicated to staff through initial training via verbal instruction demonstration and supervision and changes were passed on by email. Mr Franchino had trained the claimant .Steam is used to heat the product in the still. It is common ground that steam should not be applied to the coils in the stills until they are covered with liquid. If this happens, the flavour of the product and the efficiency of the distilling operation can be adversely affected .If the steam is applied early i.e. before the coils are covered, the still runs more quickly. The distillers record on a form the (many) details of each day's distilling operation, including the timings of the various processes.

12 Mr Franchino had conducted an appraisal with the claimant on 14 January 2020.He recorded under the section headed '*Manager Comments*' ,'*In general pleased with Gus's performance .However ,with caveat that disappointed re protocol changes so NOC issued.*' An 'NOC' is a note of concern but it is common ground no such note was ever issued to the claimant. Mr Franchino's witness statement expressed his belief that it related to unauthorised departures from the Brewing Protocol but . The claimant signed the appraisal form the same day and made no comments under the section headed '*Employee comments.*'

13 On Saturday 19 September 2020 the claimant was on a double shift working from 7 am to 9 pm. He was responsible for the distillation process. If work was finished before 9pm staff were permitted to leave early.

14 On 20 September 2020 Mr Franchino was working on production and was concerned by the high temperature of the gin distillate .He suspected that the claimant had used a valve (which appeared to have been recently used ) to cool the still which had been made to operate at too high a temperature to reduce the time of the distilling process and ,although the valve had been returned to its original position, the cooling process had been disrupted. He looked at the records for the previous day's production and noted the still was reported as turned off at 8 pm but the alarm was set at 8.12 pm and Mr Franchino did not think it was possible to do everything that needed to be done before the alarm was set in a little over 10 minutes. He thought this meant the still had been turned off earlier than the recorded time, and that the process had taken less than the time it should have done ( about 5 ½ hours).

15 The claimant's next shift was 22 September 2020.On his arrival he was called in to what was described to him as an informal investigatory meeting with Mr Franchino. Typed notes were made of all the investigation disciplinary and appeal meetings which ensued. The claimant has not disputed the accuracy of those notes. At the meeting on 22 September 2020 Mr Franchino said he had checked the paperwork which showed the still was turned off at 8 pm and the alarms set at 8.12 pm which he did not believe was possible and if it was possible he would like to know how it had been achieved. He said the shutdown ( process) should have been 30 minutes on a double shift and he was suspicious that it ( the process) had been run fast to get out early. The claimant denied moving the valve. He said that he could get out in 15 minutes from shutting down 'Mary'. Mr Franchino said he would like to see it shut down in 15 minutes start to finish and the average shutdown was between 30 to 45 minutes and it took 5 ½ hours for each run of the still (11 hours in total ) to which had to be added the time for charge (1 hour) adding up to 13 hours with no time for discharge. He said he thought the run would take till 8.30pm and could not see how it could be '*that time without intent*' and he had to question things. He said he would be trying today to see if he could do it. The claimant is recorded as saying '*I understand .I question things, you know I do. I would sign something to say that I was not outside protocol .Sometimes it just happens. This was one of those times.*' Mr Franchino said he have to be '*going like lightening to get it all done*' . The claimant said to '*discharge Mary boiler compressor finish the paperwork close the windows, alarms 15 minutes comfortably no rushing protocols just rushing to get home.*' Mr Franchino closed the meeting by saying it was an informal investigation to '*try and understand what had happened*' and asked the claimant if there was anything he'd like to add or have written down and the claimant confirmed he had nothing he wanted written down.

16 After that meeting the claimant asked for an informal meeting with Ms Crowson. He asked her why Mr Franchino had conducted the investigation .She said because it was a technical matter and its purpose was to '*get to the bottom of what happened*'. The claimant said he had felt bamboozled in the absence of notice of the meeting ,Mr Franchino's statements were lengthy and ,although he was given time to answer, he was a bit shocked by the situation and didn't say everything he wanted to. She said notice of an investigation meeting was not required but understood it might have caught him off guard .She understood his comment about lengthy statements but attributed this to lack of previous experience -it was a '*learning curve*' and '*something we can improve on.*' She mentioned Mr Franchino said he had ongoing problems with the claimant deviating from protocol which the claimant said was '*years ago*'.

17 By a letter dated 2 October 2020 Mr Franchino required the claimant to attend another investigation meeting on 5 October 2020 *'Due to further evidence ,we believe that you purposefully misled the investigation of 22/9/2020 ,which was held due to concerns that operational protocols had not been adhered to during your shift of 19/09/2020.'* It said he would be given the opportunity to explain *'certain discrepancies'* that remained from the investigation. No information was given about the further evidence or the operational protocols in question , and the discrepancies were not identified. The records completed by the claimant showed that the still had finished charging at 7.25 am on the first run and at 1.55 pm on the second run and had been switched off by 8.00 pm. Mr Franchino had established the alarm had been set by 8.12 pm. The alarm is set after shutdown which Mr Franchino thought ( after making enquiries with another distiller ) would take about 30 minutes and not the 15 minutes represented by the claimant at the first investigation meeting. He had also obtained some photographs from CCTV stills of what the claimant had done during the shift.

18 Mr Franchino conducted the second investigatory meeting with Ms Crowson on 5 October 2020. He said it was an opportunity to provide a *'sort of background explanation.'* He said there were three distinct allegations : first the claimant had misled the initial investigation with his account of the shutdown, secondly that he had knowingly departed from certain protocols on the Saturday shift particularly with charging and applying steam to the still ,and thirdly the falsification of production paperwork. Mr Franchino said he had timed the still discharge and looked at the CCTV logs of the evening. He reminded the claimant he had said it could be done *'comfortably'* in 15 minutes. He said the still was not off at 8.00 pm but at 7.42 pm and the alarm was set at 8.12 pm.

19 The claimant denied having intentionally misled the investigation and had (mis) recollected it which he attributed to the number of shifts he had worked. Mr Franchino made it clear that 5 minutes out was fine because it was not an exact science but this was *'significantly off.'* He put to the claimant that he had maintained a story that Mr Franchino had felt could not possibly be done and when he checked it ,it *'just wasn't.'* The claimant said he had to hold his hands up if that was the case. He said they (the shifts) all blurred into one and Mr Franchino had come at him with a lot of information and maybe he had got on the defensive .He ended by saying *'Yeah that's completely my bad.'* Mr Franchino then turned to the second allegation .Mr Franchino put to him that he had applied steam to the still well in advance of when it should have been and the claimant agreed. Mr Franchino put to him that when he put the steam on he had not looked at the coils but just shut the door and put the steam on which was not how the still should be run and a definite violation of protocol and misleading the initial investigation. He said *'Yep, no fair enough, its hard to quantify the amount of steam that went on but it did not matter 'even if it was an inch or the whole thing.'* Ms Crowson asked him why he had broken with protocol if he was saying that was what he had done .He attributed it to *'trying to push the work ethic too far.'* He was asked if there was anything specific on that day but said no *'just wanting to be effective I guess, but not properly.'*

20 As far as the third allegation was concerned Mr Franchino pointed out the recorded timings correlated to how things should have been done and that the paperwork had been filled out to support correct work procedures when incorrect things had been done. He pointed out the paperwork was the only way problems could be tracked and so had to be accurate. He felt they were intentionally misleading because they represented what should have been done. The claimant

was asked why he filled out the paperwork with those times and said he did not fill in the paperwork at the time and he needed to change his habits. Mr Franchino reiterated that misleading paperwork was not helpful to production. He asked the claimant if he accepted his behaviour was unacceptable and he said he did. He confirmed when asked he did not want to add anymore. Mr Franchino asked about any mitigating circumstances and was reminded by Ms Crowson that protocol had been brought up at the claimant's appraisal which she described as evidence he had been picked up on it before. The claimant was referred to the note on the appraisal but neither he or Mr Franchino could recall exactly what it was about. Mr Franchino thought it was about mashing and the claimant thought it was about something else and the subject matter was left unresolved.

21 Mr Franchino then returned to the question of mitigating circumstances and asked whether anything had happened on the day '*pet died or something.*' The claimant said no. He confirmed he had no other questions, nor did he want the respondent to consider any other evidence or speak to any other witnesses as part of the investigation .

22 On 5 October 2020 Ms Crowson asked Mr Owen to conduct the claimant's disciplinary hearing.

23 On 7 October 2020 Mr Franchino wrote to the claimant setting out three allegations:

*'1) That you were dishonest in your account given during the initial investigation on 22/09/2020 of your conduct during your shift of 19/09/2020.*

*2) That you deviated from operational protocols .*

*3) That you falsified production paperwork on 19/09/2020 by intentionally recording timings that would be consistent with operating under standard procedures ,rather than the evidenced timings of various actions as seen in the investigation of 5/10/2020. '*

24 The letter went on to say that the position of senior distiller was of critical importance in the company and the conduct alleged above '*has caused*' a severe breakdown of trust and confidence. It was viewed by the company to be gross misconduct and may result in summary dismissal following a disciplinary meeting on 13 October 2020 which he was required to attend. He was informed of his suspension. Details of the evidence and notes of the investigation meetings were provided together with a copy of the respondent's disciplinary procedure. Any comments or amendments to the notes were to be provided by 12 October 2020.

25 On 13 October 2020 Mr Owen held the disciplinary hearing with the claimant. He stated the allegations were : deviation from the operational protocols ,falsification of the paperwork to make it consistent with how the claimant should have been running the process and dishonesty in his account in the initial investigation on 22 September which taken altogether was considered to be gross misconduct. He asked the claimant if ,having seen the evidence, there was anything he wanted to go over or clarified. The claimant had prepared and read out a written statement. He denied dishonesty at the investigation meeting on 22 September 2020 .He had been caught off guard felt ambushed and a bit confused. He had told the truth as he recalled the shift. In relation to deviation from operational protocols he said he had made a mistake but it was not deliberate ;he had been trying to get everything ready for Mr Franchino on the

next shift. He had not intentionally falsified paperwork or filled it out incorrectly but recorded the times he believed to be correct. He had '*missed a step*' and made a mistake which led to incorrect paperwork but it was not intentional falsification and he was not intentionally dishonest. He referred to his personal circumstances -buying a house to be nearer to work; the pandemic had increased his anxiety about his partner's health; and certain events involving his partner's relatives. Increasing pressure at work and home led him to make a mistake for which he apologised. When asked if he understood the importance of protocols and following them for the consistency of the product he said he did not believe there was an actual protocol and every time a protocol was changed there should be a meeting and everyone signed at the meeting to eliminate '*argument*'.

26 On 14 October 2020 Mr Owen wrote to the claimant to confirm he was dismissed. He said after careful consideration of the claimant's representations he had found his explanation unconvincing and inconsistent with the results of the investigation. He said it was '*clear*' that he had deviated from operational protocols and completed the paperwork as if he had. He had told Mr Franchino that he had not done this. He then had ample opportunity to '*clear*' his mind and admit to any breaches of protocol or mistakes before the evidence was presented to him at the investigation meeting on 6 October 2020. He had chosen not to do so and he believed the claimant had thought it was not serious until he was called to attend that meeting at which he admitted he had deviated from protocol and agreed his paperwork may have been inaccurate but suggested he had attempted to complete it accurately and it was not a conscious attempt to hide the deviation. Mr Owen said that he believed he had deviated from operational protocols and made no effort to accurately reflect what had happened in the paperwork and when questioned about it at the investigation meeting sought to hide the truth. This was gross misconduct because it had led to a breakdown in trust in his doing a key role in production, working alone and with sole responsibility for the process. The respondent would pay him in lieu of two months' notice as a '*gesture of goodwill*' although he was entitled to dismiss him summarily. He told the claimant about the right of appeal to Mr Szor.

27 In his witness statement Mr Owen's evidence was that he had concluded the claimant had deviated from operating protocols as admitted by him. I asked him to identify the protocols to which he was referring and he told me he had concluded that the claimant had applied steam early to the still to speed up its operation which was a deviation from protocol and he did not consider this an error of judgment because it happened twice i.e. on each production run. He had considered the claimant's explanation that he recorded the timings he believed to be correct as unrealistic, knowing how important it was to stick to protocols. He concluded that the claimant, having departed from the protocol, would have known that the recorded timings were incorrect. As far as the third allegation was concerned he concluded that the claimant had changed his story from the first investigation meeting to the second, when presented with the evidence and that the explanations provided at the second investigation meeting were implausible. At the disciplinary hearing he had offered no valid mitigation, rather a long list of excuses for his actions. Under cross-examination Mr Owen was asked why he had found there was no valid mitigation but a list of excuses which were not compelling. Mr Owen said that a number of explanations had been put forward such as his partner's asthma and he had taken these circumstances into account but concluded that this and any stress the claimant was under explained why he might have wanted to get out of work early but not why he had done what

he did. He considered that the claimant had been with the respondent for many years when deciding if the claimant should be dismissed. Although this was not in his witness statement or his letter of 14 October 2020 he told me he also took into account that there had been what he described as 'issues' with the claimant in the past and that he should have received a warning. He told me he had not considered any alternatives to dismissal because of the seriousness of the three allegations. He would have considered the imposition of a final written warning if there had only been one allegation against the claimant but what he described as the 'cover up' and falsification of paperwork were too serious.

28 On 20 October 2020 the claimant wrote a letter to Mr Szor setting out his grounds of appeal which were '*the flaws and shortcomings in the investigative procedure and process carried out by Mr Franchino*' and '*The inadequate consideration given to my mitigating statements at the disciplinary meeting held by Mr Stan Owen – Finance Director. These have been described as “uncompelling” but there are aspects of its conclusions in which, in my opinion, some unsound assumptions have been made as a result of the flawed investigation procedure.*' He said there was no excuse for his deviation from protocol. He said he admitted to a serious indiscretion and behaviour of which he was ashamed but was '*atypical*' and would not recur. He also accepted what he did merited a '*serious final warning*' and '*even perhaps temporary demotion*' until it could be seen that the behaviour was a '*one-off deviation*' and the 'dent to trustworthiness '*was smoothed.*' He asked that Mr Szor '*advise*' a '*more humane and humanitarian*' approach.

29 By a letter dated 23 October 2020 Mr Szor invited the claimant to a disciplinary appeal meeting on 28 October 2020. He had Mr Owen's letter to the claimant dated 14 October 2020 and the minutes of the disciplinary hearing. He saw his role as to examine Mr Owen's decision.

30 The appeal meeting took place on 28 October 2020. The claimant read out his letter of 20 October 2020. He complained about the approach Mr Franchino had taken to the first investigation meeting with reference to ACAS guidance on investigations and the absence of training on investigations. He referred to the stress caused by his suspension and lack of consideration for his mental well-being and the lack of compassion shown by Mr Franchino as far as mitigating circumstances were concerned. He said the outcome he wanted was reinstatement with a lesser sanction such as a written warning or appropriate compensation and a reference. The claimant made no criticism of Mr Szor in his witness statement; he said '*there is no doubt that I was afforded every opportunity to air my grievances about processes and mitigation to Mr Szor and he undertook to consider all my comments.*'

31 Unbeknown to the claimant and as emerged during the tribunal hearing, having received the claimant's letter of 20 October 2020, Mr Szor met with Mr Owen and met with him again after the appeal meeting. They had discussed the evidence and what had come up at the appeal meeting. Although he told me he had taken into account what Mr Owen had said in deciding the outcome of the claimant's appeal he did not tell the claimant that he had met with Mr Owen or tell him what Mr Owen had said to him. He told me the respondent was a small company and it was difficult not to be involved with people on a daily basis. He accepted that it would have been fair to have told the claimant what Mr Owen had said.



32 On 4 November 2020 Mr Szor wrote to the claimant to inform him that he had decided to uphold the decision to dismiss him. He told the claimant that the respondent took advice from a third party in relation to employment advice and it was followed to the letter. The respondent had complied with the ACAS Code and ACAS advice to employees and employers was just advice. As far as mitigating circumstances were concerned he said the claimant had been asked twice in the second investigation meeting if there were any mitigating circumstances and said no. He said the claimant had been given plenty of opportunity to speak up and could have done so at the meeting with Ms Crowson. He said bringing it up at the disciplinary meeting and appeal could be regarded as a last ditch defence and *'too little too late.'* He said the points made about the investigation and mitigation did not give him cause to consider the original decision to dismiss was unreasonable or that the procedure followed had given the claimant anything less than an ample opportunity to make whatever explanation or representation he wished to make prior to the decision to dismiss.

33 In his witness statement Mr Szor's evidence ( which I accept) was that he felt that the claimant's personal circumstances could not excuse his conduct as a senior distiller knowing the nature of manufacturing process involving expensive and potentially dangerous substances required strict attention to detail and full compliance with operational protocols and that he found no reason to overturn the decision to dismiss.

34 The claimant notified ACAS on 9 November 2020 and was issued with an ACAS certificate on 9 December 2020 .He presented his claim to the tribunal on 5 January 2021.

### **The Law**

35 Section 98(1) and (2) of ERA provide that:

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal; and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(b) relates to the conduct of the employee.”

Section 98(4) of ERA provides that:

“(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

36 In conduct cases the tribunal derives considerable assistance from the test set out in the case of **British Home Stores Ltd -v- Burchell [1978] IRLR 379 EAT**, namely: (i) did the employer believe that the employee was guilty of misconduct; (ii) did the employer have reasonable grounds for that belief; (iii) had the employer carried out as much investigation into the matter as was reasonable in all the circumstances. The first question goes to the reason for the dismissal. The burden of showing a potentially fair reason is on the employer. The second and third questions go to the question of reasonableness under Section 98(4) ERA and the burden of proof is neutral.

37 It was held in the case of **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA** that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. In **Shrestha v Genesis Housing Association Ltd [2015] EWCA 94** it was made clear that the investigation should be looked at as a whole when assessing the question of reasonableness.

38 I remind myself that it is not for the tribunal to substitute its view of what was the right course for the employer to adopt. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 EAT**). In the case of **Taylor v OCS Group Ltd [2006] EWCA Civ 702** tribunals were reminded they should consider the fairness of the whole of the process. They will determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness or not of the decision-maker the overall process was fair, notwithstanding any deficiencies at an early stage. Tribunals should consider the procedural issues together with the reason for dismissal. The two impact on each other and the tribunal's task is to decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.

39 The ACAS Code of Practice :Disciplinary and Grievance Procedures (2015) ('the Code') which tribunals are required to take into account when considering relevant cases states at paragraph 5 that '*It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of a investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*' It also says that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearings. Paragraph 24 says that '*Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might*

*include things such as theft or fraud, physical violence, gross negligence or serious insubordination.* It also states at paragraph 27 that in relation to appeals that any appeal *'should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.'* ACAS has published a guide to supplement the statutory guidance provided by the Code. It has no statutory force but provides detailed guidance on the application of the Code. It says that when investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner and that it is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against.

40 In Adeshokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22 Elias LJ discussed (in the context of a claim of wrongful dismissal) when misconduct could be described as gross such that it entitled an employer to dismiss an employee summarily. He said at paragraph 23 *'The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence.'*

## **Submissions**

41 I thank Mr Franklin for his written and oral submissions and the claimant for his oral submissions which I have carefully considered.

## **Conclusions**

### Issue 2.1 What was the Principal Reason for Dismissal

42 I conclude that the respondent has shown the principal reason for the claimant's dismissal. Mr Owen genuinely believed that on 19 September 2020 the claimant had deviated from protocol twice by applying steam early to the still to speed up its operation, had deliberately recorded timings in the paperwork to make it look like protocol had been adhered to and during the first investigation meeting on 22 September 2020 had been dishonest in his account of what had happened during the shift on 19 September 2020 which related to the claimant's conduct.

### Issue 2.2(i) Reasonable Grounds For Belief

43 I conclude that in relation to deviation from protocol by applying steam early to the still to speed up its operation the claimant had agreed he had applied steam early at the second investigation meeting with Mr Franchino. He did not retract or deny this at the disciplinary meeting with Mr Owen. He told Mr Owen he had made a mistake and that it was not deliberate but Mr Owen did not find that explanation compelling and inconsistent with the results of the investigation. In my judgment in rejecting the claimant's explanation he was entitled to consider that the claimant had deviated twice on 19 September 2020 and that the paperwork completed by the claimant which contained timings which were consistent with the claimant having run the process correctly (not incorrectly) and the inconsistency between what the claimant had said at the first investigation meeting (when the speed of certain processes were discussed and the claimant said he would sign something to say he was not outside protocol) and the admission at the second investigation meeting that he had deviated from protocol. As far as the deliberate recording of timings in the paperwork to make it

look like the protocol had been adhered to, his explanation to Mr Franchino at the second investigation meeting was that he had not filled in the forms at the time and recorded the times he believed to be correct ;he told Mr Owen he had not intentionally falsified them but had made a mistake. It was reasonable for Mr Owen to conclude that this was not credible when the times recorded by the claimant corresponded to the times that ought to have been recorded had he not deviated from protocol and he had admitted deviating from protocol and would have therefore known they were incorrect. As far as the third allegation was concerned the claimant's explanations at the second investigation meeting for having given the account of the shutdown at the shift on 19 September 2020 (when he represented to Mr Franchino that he had adhered to protocols and also 'comfortably' managed to shut down in 15 minutes) were mis recollections due to the number of shifts he had worked and he had got on the defensive because Mr Franchino had come at him with a lot of information. At the disciplinary hearing the claimant's explanations were that he was caught off guard felt ambushed and a bit confused. The shift in question was the last shift he had worked only 2 days before and Mr Franchino had been clearly seeking to obtain from the claimant an account of what had happened on that shift to try and establish what had happened. Mr Owen was entitled to reject these as implausible. At the disciplinary hearing the claimant also referred to his personal circumstances which Mr Owen was entitled to reject as not being compelling because they did not provide an adequate explanation for what he did . In his witness statement the claimant 's evidence was that his comments about the length of time for shutdown as 15 minutes were purely speculative rather than recollection but this was not the explanation he gave at the second investigation interview or the disciplinary hearing.

#### Issue 2.2 (ii) Reasonable Investigation

44 The claimant in his claim form made the following specific complaints about the investigation: lack of prior notice of the first investigatory meeting ;that it was not conducted in the right manner and that he was bombarded with information; and the respondent did not follow ACAS guidelines about the investigation.

45 The Code does not impose a requirement that prior notice of an investigatory meeting is given to an employee. The claimant has complained of being caught off guard but did not ask for a postponement or more time to consider his responses and engaged with the questions put to him. As far as the way the investigation was conducted by Mr Franchino the claimant complains of the amount of talking he did at the first investigation meeting but that is not sufficient to render the investigation outside the range of reasonable responses. What Mr Franchino was asking the claimant to do was to provide an account of how he managed to achieve the times recorded while doing everything which needed to be done. This was the first investigation meeting carried out without delay to try and understand what had happened on the day in question. The claimant has complained that Ms Crowson would have been preferable to Mr Franchino as investigator but under cross -examination said it would have been fairer if he had not led the investigation but he could have attended to ask questions on technical matters. He explained in cross examination that would have been fairer because he found Mr Franchino intimidating. I do not accept that criticism; the respondent acting reasonably in having as an investigator the person it felt was best placed to investigate technical matters namely the production director.

46 Mr Franchino, having rejected his original hypothesis about the valve, carried out further investigations and then gave the claimant written notice of the second investigation meeting. The claimant did not complain that he was not given enough notice or needed more information about its purpose. He was given a full and fair opportunity to engage with the new evidence which Mr Franchino had obtained. As the ACAS Guidance says when conducting an investigation care should be taken to deal with the employee in a fair and reasonable manner and Mr Franchino's isolated comment at the second investigation meeting in relation to mitigating circumstances was sarcastic or a misplaced attempt at humour. Neither have a place in an investigation meeting, the purpose of which is to look for evidence which supports the employee's case as well as evidence against. However, it alone does not render the investigation outside the range of reasonable responses. The claimant subsequently did prepare a statement which he used at the disciplinary hearing setting out the mitigating circumstances he wanted to put forward. The claimant made admissions at the second investigation meeting and, in the light of his comments, that he had no other questions, nor did he want the respondent to consider any other evidence or speak to any other witnesses as part of the investigation, I conclude that a reasonable employer could conclude no further investigation was necessary. The entire investigation was carried out without delay. I conclude that looking at the investigation as a whole it was within the range of reasonable responses.

#### Issue 2.2 (iii) Procedure

47 As far as the fairness of the procedure is concerned an employee should be notified that there is a disciplinary case to answer and that notification should contain sufficient information about the alleged misconduct to enable the employee to prepare together with copies of any written evidence (paragraph 9 of the Code).

48 In this case Mr Franchino's letter of 7 October 2020 failed to identify which protocols it is alleged the claimant deviated from or how the claimant allegedly deviated from them. However, the claimant has not complained that he did not know what the allegations were or that he had insufficient information to enable him to prepare for the disciplinary hearing and he admitted to Mr Franchino that he had applied steam to the still well in advance of when it should have been and when he put the steam on he had not looked at the coils but just shut the door and that these were deviations from protocol. He did not deny that he had done so at the disciplinary hearing but said it was a mistake.

49 The claimant was afforded an appeal and makes no complaint about the conduct of the appeal by Mr Szor. I have carefully considered whether the discussions which took place between Mr Owen and Mr Szor meant that he did not come to his decision making with an open mind. It would have been preferable for no such discussions to have taken place but I accept that in an organization of the size of the respondent contact between Mr Owen and Mr Szor was inevitable and such contact as there was concerning the claimant's appeal concerned evidence, not interventions by or representations made by Mr Owen concerning the outcome. The claimant was given the opportunity during the appeal to fully state his grounds for appealing and was heard by Mr Szor.

50 I conclude that the overall procedure adopted by the respondent was fair.

#### Issue 2.3 Dismissal Within the Range of Reasonable Responses

51 Breach of protocols by employees (whether written or unwritten) is not to be found in the respondent's (non-exhaustive ) examples of gross misconduct ,nor do they ( or their breach) figure in any disciplinary rule .If great importance is attached by the respondent to adherence to the protocols it would be reasonable to expect that they are codified so they are clear to everyone and the consequences of breach spelled out. It would also be reasonable to expect that instances of non-compliance result in investigation and (if appropriate) disciplinary action which is properly recorded. The claimant was aware of the existence of protocols and admitted his deviation from protocol but a reasonable employer would not regard this alone as sufficient reason to dismiss the claimant.

52 In relation to the other allegations (dishonesty i.e. in misleading the investigation and the falsification of records) both fall within the respondent's examples of gross misconduct in the respondent's disciplinary policy. Those were the disciplinary offences which Mr Owen considered so serious as to warrant dismissal. In considering whether to dismiss the claimant a reasonable employer would have given little weight to the claimant's past 'issues' in the absence of any note of concern having actually been issued to the claimant and (from the notes of the second investigation meeting ) no clarity about what it would have been issued for. However, I conclude that Mr Owens acted reasonably in treating the two allegations together with the deviation from protocol ( which happened twice) as sufficient reason for dismissing the claimant because the claimant was a senior and experienced with the distiller doing a key role in production, working alone and with sole responsibility for the process and the necessary trust and confidence in him had broken down. He considered the gravity of the offences outweighed the claimant's length of service and the mitigating circumstances did not justify his actions, though they might have explained why he wanted to leave work early. The claimant himself considered in his grounds of appeal that a final written warning was warranted for his conduct. If a final written warning was merited for the conduct in question it is difficult to see how dismissal could be said to fall out with the range of reasonable responses available to a reasonable employer.

53 The dismissal was fair and I therefore dismiss the claimant's claim;

Employment Judge Woffenden  
Date 23/02/2022

