



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Lawrence

**Respondent:** Muller UK & Ireland Group LLP

**Heard at:** Manchester (remotely, by CVP)

**On:** 30 June 2021  
31 July 2021

**Before:** Employment Judge Warren

## REPRESENTATION:

**Claimant:** Mr A Macmillan of Counsel

**Respondent:** Mr D Piddington of Counsel

# JUDGMENT

The judgment of the Tribunal is that:

1. The claim for wrongful dismissal is dismissed.
2. The claim of unfair dismissal is dismissed.

# REASONS

## Background

1. By an ET1 claim form presented to the Tribunal on 19 June 2020 the claimant, Mr Neil Lawrence alleged that the respondent had unfairly dismissed him for gross misconduct and in breach of contract failed to give him notice/notice pay.
2. The respondent in a response asserted that the claimant was guilty of gross misconduct and was not therefore contractually entitled to notice pay, and further that he had been dismissed fairly for misconduct, a potentially fair reason within the Employment Rights Act 1996 (“ERA”).

## The Evidence

3. I received an agreed bundle with more than 550 pages within it. I had written witness statements from the claimant and from the respondent’s witnesses, Miss

McNamara and Mr N McCabe, all of whom gave evidence and were cross examined. I reached my conclusions based on the evidential test, the balance of probabilities.

4. The evidential burden, as always in an unfair dismissal case, lay with the respondent to show the reason for dismissal, and their belief in that reason, and then took into account that the burden of proof became neutral between the parties.

5. There was an agreed List of Issues and subsequent to the hearing the parties presented 47 pages of submissions. I have taken all of those submissions into account in reaching my conclusions.

6. When considering the evidence, I concluded, on the balance of probabilities, that the witness statements of the respondent and their live evidence was the more credible. The claimant, I found to be the less reliable witness.

7. Whilst not going through every piece of evidence individually, I would simply say at this stage that one example of his lack of reliability was that the claimant asserted that the database searched by the respondent for up-to-date safety documentation, was on Q-Pulse. He asserted that he had never received formal training on working on Q-Pulse and nor had he been instructed during his employment to use it to store important documents such as the evacuation plan. The claimant asserted that he stored his documents on the S drive instead. The evidence before the Tribunal was that Carole McNamara had confirmed a search of the S drive had come back empty and the appeals officer had carried out his own search of the S drive and, like Ms McNamara, had not found the fire evacuation plan which the claimant asserted he had put there.

8. I found both Ms McNamara and Mr McCabe (the appeals officer) to be straightforward and credible witnesses. If neither of them could find the fire evacuation plan on the S drive then it would be fair to say that it was not there, particularly as Mr McCabe made use of the company's IT department to assist him.

### **List of Issues**

9. The issues for the Tribunal to determine are as follows:

#### Wrongful Dismissal

- (1) Did the claimant's conduct amount to gross misconduct? (If so, the respondent was entitled to terminate the contract without notice).
- (2) What, if any, damages should the claimant receive for being dismissed without notice?

#### Unfair Dismissal

- (3) The respondent understands there is no dispute as to the reason for dismissal:
  - 3.1 Conduct – a potentially fair reason within the meaning of section 98(2)(b) Employment Rights Act 1996.

- (4) Did the respondent act reasonably in the circumstances (having regard to the size and administrative resources of the respondent) and in accordance with equity and the substantial merits of the case, in treating conduct as a sufficient reason for dismissing the claimant (section 98(4) Employment Rights Act 1996)?
  - 4.1 Did the alleged conduct of the claimant amount to gross misconduct as relied upon by the respondent?
  - 4.2 Did the respondent have a genuine belief in the claimant's alleged gross misconduct, namely that he seriously neglected his duties and/or seriously or deliberately breached his contract of employment and/or operating procedures as follows:
    - 4.2.1 Failure to maintain and/or update the emergency action plan;
    - 4.2.2 Failure to maintain and/or update the fire evacuation report;
    - 4.2.3 Inaccurately and/or misrepresenting a self assessment of the emergency management procedure, by scoring it as 98% compliant i.e. fully compliant in all areas, when it was in fact 52% compliant;
    - 4.2.4 Fail to carry out/implement actions required following a fire risk assessment in 2017?
  - 4.3 Did the respondent have reasonable grounds for its belief?
  - 4.4 Did the respondent conduct a reasonable investigation into the alleged gross misconduct?
- (5) If so, did the decision to dismiss fall within the band of reasonable responses open to a reasonable employer in the circumstances?
- (6) Has the respondent followed a fair procedure? The claimant contends that the following rendered the procedure unfair:
  - 6.1 Dismissing the claimant in his absence;
  - 6.2 The decision to dismiss was predetermined or in the alternative disseminated to parties, being the Accounts Department, prior to the claimant receiving his dismissal letter.
  - 6.3 The respondent's alleged failure to carry out an alleged reasonable search for documents;
  - 6.4 The respondent failing to provide the claimant with access to search information, including his work laptop, in support of his case;

- 6.5 The alleged significant delay between the dismissal and the appeal outcome; and
- 6.6 The decision to dismiss and to uphold the dismissal was not made impartially by the disciplinary officer and the appeals officer, or in the alternative Human Resources were involved in making the decision.

### Remedy

- (7) If the claimant is successful, to what remedy is he entitled?
  - 7.1 Is it just and equitable to reduce any compensatory award (section 123 Employment Rights Act 1996)?
  - 7.2 If the Tribunal finds that a fair procedure has not been followed, would the claimant have been dismissed even if a fair procedure had been followed (**Polkey v A E Dayton Services Limited [1978] ICR 142**).
  - 7.3 Did the claimant cause or contribute to his dismissal and if so, by how much?

### **The Facts**

10. The claimant was employed by the respondent as a Health, Safety and Environmental Manager at their Manchester dairy. He was responsible for the safety and wellbeing of around 260 employees. He commenced employment on 21 August 2017 and had a detailed contract of employment (pages 54-66). Mr Lawrence is a qualified solicitor and also holds a National General Certificate in Occupational Health and Safety and was an experienced health and safety practitioner. Prior to being employed by the respondent he had undertaken some work for them as a self-employed consultant.

11. Following a fire at the dairy on 28 September 2019, on around 3 October 2019, Mr Beckers, site lead at the dairy, asked Mr Lawrence to produce the emergency action plan and the fire evacuation report, Mr Beckers had concerns as both contained numerous errors. A meeting was called with the claimant, where the claimant confirmed that in relation to the fire evacuation report he had forgotten about producing it and had “dropped the ball” (page 184 of the bundle). As a result the claimant was suspended (page 186).

12. On 23 October 2019 the Health and Safety Manager and members of his team carried out a self assessment at the dairy and scored its emergency management as 52% compliant (page 226).

13. Emergency management is a plan to ensure the site has mitigated its risk in the event of an emergency and to ensure the safety of the staff working there, the environment and the business. The claimant had last updated an assessment of the dairy’s emergency management on 19 September 2019, one month earlier, and had scored the dairy as being 98% compliant (pages 101-104 of the bundle). The same group then carried out a fire risk assessment (pages 214-226). A number of non compliance matters were found and they further found that actions required from

a fire risk assessment carried out in April 2017 (when the claimant was responsible for updating the same as a self-employed consultant) were still outstanding.

14. Mr Bates, interim site lead at a different dairy, investigated and produced a report (pages 250-253) which recommended the claimant be entered into the disciplinary process for:

- (1) Failing to produce an up-to-date fire evacuation procedure;
- (2) Failing to produce an up-to-date emergency action plan; and
- (3) Inaccurate and/or misrepresenting a self-assessment of the emergency management procedure.

15. The investigation report was handed to Carole McNamara, who had been employed by Muller for almost four years at that point, and was employed as site lead at the Bells Hill dairy – she was site lead with responsibility for the general management of the dairy and the 234 employees who worked there. She was completely unaware of what had happened until the time she was asked to carry out the disciplinary hearing and had not been involved either in the investigation or the incident.

16. The claimant was invited to a disciplinary hearing on 27 November 2019 (pages 258-260). Included with the invitation were the investigation documents and witness statements.

17. On 24 November 2019 the claimant wrote a lengthy letter to Ms McNamara commencing on the documentation she had supplied. In particular he said that the emergency action plan (pages 87-89) that had been reviewed by Darren Beckers on 3 October was not the most up-to-date version. The claimant said he had an up-to-date copy of the document which he had completed in February 2019 and that he had a copy on a portable hard drive. It is fair to say that if he did have such a copy on his hard drive, it has never been produced, either within the investigation, the disciplinary hearing, the appeal or the Tribunal hearing.

18. The claimant went on to say that the fire evacuation report sheet should not have included the words “assembly point” but was otherwise correct, and that the self assessment he last amended on 19 September 2019 and it was not a finished document and was a work in progress. He considered that the assessment of the emergency management completed by Mr Hooskings, a Health and Safety Manager, and Mr Watson, a Senior Health and Safety Manager, with a score of 52%, was wrong.

19. On 25 November 2019 the claimant asked for a large volume of documentation and asked that the disciplinary hearing be postponed. Ms McNamara, with the help of Ms Johnson from Human Resources, gathered the further documentation requested and postponed the hearing.

20. On 13 December 2019 Ms McNamara sent the further documentation and information that the claimant had requested to him, and invited him to a disciplinary hearing on 19 December 2019 (pages 282-285).

21. Around 16 December 2019 the claimant provided a sick note confirming he was not fit for work for a period of four weeks with work related stress. Two days later on 18 December 2019 Ms McNamara wrote to say it was appropriate to conclude the disciplinary process because the work related stress was most likely because of his ongoing disciplinary process and the fact that he had been suspended for over two months. The date was moved to 7 January 2020. The claimant was told that if he did not attend he could make written representations but that if he did not attend the disciplinary hearing would go ahead in his absence.

22. On 3 January 2010 the claimant requested further documents, including an up-to-date version of the emergency action plan, a signed copy of the meeting notes from 12 November 2019, 21 documents prepared with Mr Watson at a point when he was still a self-employed consultant, documentation in respect of health and safety matters presented to Muller's insurers following a fire in February 2018, and the qualifications and experience of individuals who had carried out the fire risk assessment on 23 October 2019. Ms McNamara thought that the claimant was trying to delay the disciplinary hearing and muddy the waters. The documents he was requesting were not relevant to the allegations that were subject to the disciplinary. She decided that the disciplinary hearing on 7 January 2020 would go ahead. She held it on 7 and 10 January 2020 in the claimant's absence, and she had with her a member of HR, Ms Wilson, taking notes.

23. Ms McNamara found that the claimant had been asked for some documents on 3 October 2019, specifically a fire evacuation report and an emergency action plan. The claimant presented an emergency action plan that was out of date, giving the employees the wrong instructions should there be a fire, and containing contact details for employees for who no longer worked for the respondent. The fire evacuation plan referred to nine assembly points when there were only three. The claimant agreed that the content of the documents was inaccurate but instead said that there was an up-to-date emergency action plan. He added that Ms Thorpe, the Business Development Manager, had presented the out of date emergency action plan on 3 October and not him; and that he did not have access to Q-Pulse where the out of date emergency action plan was held.

24. The claimant had said to Ms McNamara in a letter dated 24 November 2019 that he had a copy of the current procedure on a portable hard drive (page 261). He has never presented an up-to-date emergency action plan to this date. When questioned, Ms Thorpe insisted that it was the claimant who had presented the documents to Mr Beckers and that she had not. Ms McNamara further found that the claimant did have access to Q-Pulse, a Q-Pulse administrator provided screenshots confirming that he had been active on the software and that he had an account. The claimant insisted that although he had access to Q-Pulse he had never been taught how to use it and was unaware of its purpose for storing important documents.

25. Ms McNamara found it unacceptable that the emergency action plan and fire evacuation report did not reflect the basic number of assembly points. The report signposted colleagues in the wrong direction in the event of a fire. The claimant accepted he was responsible for maintaining for these documents (because he said he had updated the emergency action plan). Ms McNamara found that his failure to maintain and update the documents meant that he had put colleagues' lives at risk and found this to be serious neglect of his duties and a gross misconduct offence.

26. Ms McNamara went on to consider the self assessment updated by the claimant on 19 September 2019. She found his responses when questioned about this during the investigation to indicate a lack of knowledge and control over a very important document. The document was clearly inaccurate. By way of example she indicated that the claimant had written that not all departments at the dairy had registers in place i.e. were non compliant, but later in the document he confirmed full compliance in all areas, which was contradictory. Muller's Group Health and Safety Manager scored the dairy as 52% compliant compared to the claimant, who reported it as 98%. The claimant was an experienced health and safety professional and was considered to have seriously neglected his duties by giving a wrong score to the site.

27. Finally, Ms McNamara turned to the fire risk assessment dated 23 October 2019 and found a significant number of areas of non compliance outstanding since 2017. She considered them to be the claimant's responsibility.

28. Overall Ms McNamara found the claimant guilty of gross misconduct. When considering the appropriate sanction, she found that the claimant was an experienced and qualified health and safety professional who had seriously neglected his duties. There appeared to be no mitigation and she decided he should be dismissed without notice. When challenged she confirmed that this was her decision alone, although it was taken at a time when she had an HR representative present with her.

29. Ms Johnson in HR drafted the outcome letter based on Ms McNamara's findings (pages 301-308). The letter of dismissal was sent to the claimant explaining the reasons for his dismissal (pages 329-344).

30. On 3 January 2020 the claimant raised a grievance against Ms McNamara (pages 297-298). In effect he indicated that she had refused to provide him with relevant documentation and had lied in correspondence. Ms McNamara dealt with this grievance as part of the disciplinary. She replied in the outcome letter of the disciplinary with the outcome of the as well. She found that there had been a thorough search for all relevant documentation and if relevant it had been sent to the claimant for comment. She also found that she had made an error in her letter dated 13 December 2019 when she had indicated that the claimant had not asked for an updated version of the emergency action plan. She later realised this was a mistake because the claimant had raised that the document being reviewed by Mr Beckers was not the correct one. She apologised to the claimant in the letter for her mistake.

31. The claimant appealed against his dismissal and the appeal was given to Mr Norman McCabe, the Senior Operations Manager, who also holds an IOSH Managing Safety qualification.

32. The claimant appealed around 13 February 2020 against his dismissal and included seven grounds of appeal:

- (1) The documentation that had been considered by Ms McNamara during the disciplinary process was out of date and current documentation had not been considered;
- (2) The crisis management plan updated on 7 February 2019 had not been considered;

- (3) The fire evacuation procedures and fire safety training had been completed by all colleagues at the depot prior to the claimant's dismissal;
- (4) Training materials had not been disclosed or considered during the disciplinary process;
- (5) A fire risk assessment carried out in 2017 had not been considered at the time the assessment of the emergency management was carried out on 23 October 2019. If it had been the emergency management would not have been scored at 52% but would have been scored at a very similar if not the same as the claimant's 98% scoring;
- (6) Colleagues who transferred from the Foston site did so after the operational control conformance survey fire safety document of April 2019 was completed, and this was therefore not relevant; and
- (7) A spot check was carried out of training records which were found to be correct but in any event training fell to Mr Beckers, the site lead, and not to the claimant.

33. The appeal was heard by telephone on 1 April 2020 and Ms Bryant from Human Resources took notes and provided advice on process. The claimant was offered but declined to have a companion with him.

34. The claimant based his appeal on there being up-to-date documents on the S drive and that if they had been considered there is no doubt he would not have been dismissed. In particular he asserted that there was an up-to-date direct evacuation procedure and a crisis management procedure. The appeal was adjourned and Mr McCabe carried out a search for those documents. He also spoke to Mr Beckers, Mr Watson and Mr Westland. With the help of IT and Human Resources he carried out an extensive search of the S drive. He was unable to find an up-to-date emergency action plan or fire evacuation procedure, but he did send all of the documents that he found to the claimant for his comments.

35. On 18 May 2020 the claimant emailed requesting a large number of additional documents. These were all beyond those which had been requested on 1 April 2020 in the appeal hearing. Mr McCabe discussed by telephone with the claimant the further documents on 16 July 2020. He considered some of them to be irrelevant.

36. Mr McCabe then considered the claimant's appeal. The first ground of appeal was that Ms McNamara had only considered documentation which was out of date. The crisis management plan updated on 7 February 2019 had not been considered during the disciplinary process. The claimant asserted that this was on the S drive. The crisis management plan last updated on 7 February 2019 was found and given to the claimant. There was, however, no fire evacuation procedure found. The claimant seemed to suggest that the crisis management plan was an appropriate substitute for the out of date fire evacuation procedure because it told colleagues what to do when there was a fire. Mr McCabe considered this but found it did not have any information regarding the Manchester depot's evacuation procedure or what colleagues should do in the event of a fire that was specific to the Manchester depot. He had been unable to find a fire evacuation procedure on the S drive despite the claimant's assertion that there was an up-to-date version. He believed



that the claimant had never actually created or updated the emergency evacuation plan.

37. The claimant maintained that he and Mr Watson had updated documentation together at a Holiday Inn hotel in mid April 2019, including the fire evacuation plan. Mr McCabe had discussed this with Mr Watson and he confirmed that was not right: whilst they began updating documents together, at the end of the meeting they were incomplete and it was agreed that the claimant would take them away, download them onto the S drive, and get approval from the site senior leadership team. Mr Watson confirmed that following the meeting at the Holiday Inn the claimant had not taken any further action and the documents were not on the S drive. Although the claimant alleged that Mr Watson was lying, Mr McCabe found on the balance of probabilities that Mr Watson had no reason to lie.

38. The claimant's second ground of appeal was that the crisis management plan had not been considered or disclosed before the decision to dismiss him was made by Ms McNamara. The claimant said that if the crisis management plan had been reviewed it would have become clear that it was the Technical team rather than Health and Safety who were responsible for the aspect that the claimant was being held accountable for. The crisis management plan, it was noted, had been drafted by the claimant, and the document confirmed that "the Health and Safety Manager will be responsible for the maintenance of his/her site major incident control manual". The claimant had therefore listed himself as the responsible person. Mr McCabe considered that even if Ms McNamara had considered this it would have made no difference to the decision to dismiss because the claimant had failed to maintain and update the emergency action plan, the fire evacuation report and his self assessment of the emergency management of the depot was inaccurate. The crisis management plan had nothing to do with these other documents so was irrelevant.

39. The claimant's third and fourth grounds of appeal were that training materials, including toolbox talks, had not been disclosed or considered as part of the disciplinary. The claimant said that at the time of his suspension all of the colleagues at the Manchester dairy site had received training on fire information. Mr McCabe considered the materials and toolbox talks and found they contained generic fire information but nothing specific to Manchester. Mr McCabe found them to be inadequate, inaccurate and in need of update. Although the claimant alleged that they were relevant to the decision to dismiss him, at the appeal hearing he confirmed he had never seen the site induction materials. Mr McCabe considered them to be irrelevant to the decision to dismiss the claimant.

40. The fifth ground of appeal was that following a fire in 2018 a fire risk assessment carried out in 2017 had been given to the insurers and they had written to say they were satisfied all issues had been dealt with. The claimant therefore suggested that Mr Hooskings and Mr Watson's assessment of the emergency management for Manchester depot which they scored at 52% was wrong. The claimant attempted to help Mr McCabe find a fire risk assessment in 2017 on the S drive, but he was unable to do so. Mr McCabe considered that even if the company had been satisfied at the Manchester depot, because both health and safety professionals were able to give examples of tangible non conformities, the insurance company's position was irrelevant.

41. The sixth ground of appeal was that Ms McNamara had found that the claimant had not carried out training with colleagues who had transferred from the Foston site. They had confirmed they had not received training despite the Operational Control Conformance Survey safety documents of April 2019 confirming all colleagues had been trained. The claimant appeal on this point was upheld because Mr McCabe found that the colleagues from Foston joined the Manchester site after the survey.

42. The seventh ground of appeal was that a spot check had been carried out on training records in the Production Department and they were found to be correct. Mr McCabe considered the claimant still responsible for improving standards and actively developing a safety culture.

43. In conclusion Mr McCabe found that the claimant had failed to maintain and/or update the fire evacuation procedure and emergency action plan which could have had serious implications for employees at Muller. He also found that the claimant had inaccurately misrepresented a self assessment of the emergency management at the Manchester depot, and as such had seriously neglected his duties. He decided to uphold the dismissal.

44. During the disciplinary appeal hearing on 1 April 2020 the claimant raised other issues. In particular he felt it was unjust for Ms McNamara to respond to complaints about herself in the disciplinary outcome letter. Further, he received a letter dated 27 January which mentioned his P45 three days before receiving the letter confirming he was dismissed, and finally that he had never seen a role profile for Health and Safety Manager so was unclear where his responsibilities lay. He further raised the fact that his grievance against Mr Beckers, which he had issued on 18 November 2019, was the motive for the disciplinary action being taken. None of these points related either to the reason for the dismissal or had been suggested to be unfair during the process leading up to his dismissal or his appeal.

45. Mr McCabe did deal with these points and addressed them. In particular, the claimant had accepted throughout the process that he was responsible for the emergency action plan, the fire evacuation report and the self assessment of the emergency management plan. Whether or not he knew the detail of his role, was therefore irrelevant. He was dismissed for failing to maintain/update documents that he was responsible for. He also noted that the claimant had been suspended prior to him raising the grievance against Mr Beckers, and that Mr Beckers did not conduct the investigation, disciplinary or make the decision to dismiss the claimant. The events which led to the claimant's dismissal all occurred prior to the grievance against Mr Beckers. Mr McCabe did find that Ms McNamara had made the decision to dismiss the claimant on 10 January 2020, but the outcome letter had not been sent until 30 January 2020. By administrative error, the company had sent the claimant his P45 three days before he received the outcome letter. He considered that to be an unfortunate administrative error but that nothing had occurred that was untoward.

46. The claimant has suggested that the investigation meeting procedure was flawed because the disciplinary procedure of the respondent (paragraph 11.1) usually allows for employees to be accompanied during the investigation procedure. The claimant wanted to be accompanied by Mr Norton, but he did not have the details of Mr Norton and asked Mr Bates to provide those details.

47. On 17 October at the investigation meeting the claimant wished to be accompanied by Mr Norton, but he had not received the details of Mr Norton to arrange for him to accompany him. It transpired in any event that that Mr Norton was on holiday. He asked that the meeting be postponed so that he could be accompanied, but Mr Bates told the claimant that the meeting would recommend disciplinary action if he wished to postpone it, so the claimant reluctantly proceeded with the meeting in the absence of Mr Norton. However, the meeting did not conclude the investigation and he was invited to a further meeting on 1 November 2019, but Mr Norton refused to attend. It was adjourned to enable him to find someone to accompany him, which he duly did. The meeting took place on 12 November 2019 and the claimant was accompanied by Scott Splindley, an Operational Excellence Lead.

48. The claimant had been invited to a disciplinary hearing to take place on 27 November 2019 and he had received a bundle of documents which professed to include all the relevant documentation for the hearing. On 25 November 2019 the claimant requested that the witness statement of Mr Beesley be included, noted that the role profiles provided were unsigned and he felt did not accurately reflect the extent of his role, some of the documents were not the current documents and referred to the Foston site rather than the Manchester dairy, and the statements of the witnesses were all unsigned. He also requested some additional documents to prepare for his disciplinary. Those documents were disclosed in due course, but failed to include what he described as the up-to-date fire evacuation plan.

49. On 13 December 2019 the claimant received a letter with copies of some of the documents he had asked for. The disciplinary hearing was now set for 19 December 2019 but on 16 December 2016 the claimant's doctor stated he would be unable to work for a period of four weeks. The respondent acknowledged the fit note and agreed to rearrange the meeting one more time, suggesting 7 January 2020. This was still within the period of his sick note.

50. On 30 January 2020 the claimant had received the outcome letter confirming that the allegations had been upheld and that he was summarily dismissed for gross misconduct effective from 30 January 2020 and he would not be receiving his notice payment. The claimant was given a right of appeal which he duly exercised.

## **The Law**

### Unfair Dismissal

51. Section 98 Employment Rights Act 1996 provides:-

- (1) "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
  - a) the reason (or if more than one, the principal reason) for the dismissal; and
  - b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

- (2) A reason falls within this subsection if it –
  - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  - b) relates to the conduct of the employee.”
- (4) “Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
  - a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
  - b) shall be determined in accordance with equity and the substantial merits of the case.”

52. It is for the employer to show the reason for dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the misconduct alleged. British Home Stores v Burchell 1978 IRLR 379. The tribunal must consider whether that belief is based on reasonable grounds after having carried out a reasonable investigation but in answering these two questions the burden of proof is neutral.

53. In the words of the guidance offered in Iceland Frozen Foods v Jones 1982 IRLR 439:-

- a) the starting point should always be the words of section 98(4) themselves;
- b) in applying the section, the Tribunal must consider the reasonableness of the employer’s conduct, not simply whether they consider the dismissal to be fair;
- c) in judging the reasonableness of the dismissal, the Tribunal must not substitute its decision as to what is the right course to adopt for that of the employer;
- d) in many (though not all) cases there is a band of reasonable responses to the employee’s conduct within which one employer might take one view, another quite reasonably take another;
- e) the function of the Tribunal is to determine in the particular circumstances of each case whether 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.

- f) The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

54. The Court of Appeal in Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 3 concluded that the band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

55. The Tribunal has considered the provisions of the ACAS code of Practice to disciplinary and grievance procedures.

#### Wrongful Dismissal

56. "Wrongful dismissal" is a complaint that the employer has dismissed the claimant in breach of contract, almost always without a period of notice to which the claimant was entitled. If the contract was for a fixed term with no provision for early termination, the period will be the unexpired part of the term. If the contract was (like the great majority of employment contracts) indefinite in duration, a Tribunal should assume that the employer would, on the date on which it terminated it, have done so in the way most beneficial to itself, usually by giving the minimum period of notice permitted under the contract to terminate it: Lavarack v Woods of Colchester Limited [1967] 1 QBD 278 (CA).

57. The issue which commonly arises on a complaint of wrongful dismissal is whether the employer was entitled to dismiss without notice because of gross misconduct by the claimant, or other conduct which under the terms of the contract entitled the employer to dismiss in that way. If at trial it proves that there was such conduct, the defence will succeed, even if the conduct had not been known at the time of dismissal: Boston Deep Sea Fishing and Ice Co v Ansell [1888] ChD. 339 (CA). This principle applied even where (a) the misconduct only came to light because the defendant, having given 12 months' notice to dismiss the claimant as redundant, and motivated by its financial and commercial interests, set about looking for evidence to justify summary dismissal; (b) the defendant was in anticipatory or actual breach of the contract by deciding to cease making salary payments, or by failing to make such payments, before it summarily dismissed the claimant; (c) the breaches (use of the defendant's e-mail system to send pornographic messages) had taken place over five years before the summary dismissal; and (d) some of the breaches were discovered only several months after the summary dismissal: Williams v Leeds United Football Club [2015] EWHC 376 (QB).

58. In the absence of an express term defining the circumstances in which the employer may dismiss, summary dismissal is permissible only if the claimant's conduct amounted to repudiatory or fundamental breach of contract: Laws v London Chronicle Limited [1959] 1 WLR 698 and Wilson v Racher [1974] ICR 428. "To draw a distinction between gross misconduct and repudiatory conduct evincing an intention no longer to be bound by the contract is in my judgment to make a distinction without a real difference. It may be more common in employment cases to deal with gross misconduct, but that is essentially a form of repudiatory conduct": per Ward LJ in Briscoe v Lubrizol [2002] IRLR 607.

59. In assessing the seriousness of any breach, it is necessary to consider all the relevant circumstances including the nature of the contract and the relationship it creates, the nature of the contractual term that has been breached, the nature and degree of the breach and the consequences of the breach: Valilas v Januzaj [2014] EWCA Civ 436. In the context of employment contracts the relevant circumstances include “the nature of the business and the position held by the employee”: Jupiter General Insurance Co Limited v Shroff [1937] 3 AER 67.

60. The conduct need not be dishonest. It is enough for it to be conduct of such a grave and weighty character as to amount to a breach of the confidential relationship: Sinclair v Neighbour [1967] 2 QB 279 (where the manager of a betting shop took cash from the till to gamble with, knowing that his employer would not have given permission, but put in an IOU. CA held that although the employer has not pleaded dishonesty it did not matter whether the behaviour was so labelled or not; it was in any event seriously inconsistent with his duty).

61. As an alternative to deliberate wrongdoing, gross misconduct may also consist of very considerable negligence, traditionally called “gross negligence”: a relatively modern example in this context is in Dietmann v Brent London Borough Council [1988] ICR 842.

62. While unfair dismissal is a purely statutory concept, for the purpose of which the Tribunal is required to consider what a reasonable employer would have done, and must not substitute its own views, wrongful dismissal rests on the common law, and a Tribunal trying such a claim is required to make its own determination of whether or not the claimant’s conduct entitled the employer to dismiss without notice.

### **Submissions**

63. The submissions in this case amounted to 23 pages on behalf of the claimant and 20 pages on behalf of the respondent. It may be felt that for a two day case these were somewhat lengthy and detailed. I do not intend to cite every argument contained within them, but confirm that all were considered in reaching my conclusions

#### Claimant's Submissions

64. Briefly, on behalf of the claimant, the claimant pleads that he was unfairly dismissed, that the process to dismiss him was tainted by bias and the hearing hurried without good reason. He was improperly restricted in the scope of evidence he was permitted to request. He was not accommodated during a period of certified illness to supply written submissions, but his request was read and ignored. The decision was then taken in conversation with HR, but the precise details of how that decision was handled are murky. It was not a dictated decision even though that is what the record of the disciplinary reflects.

65. As to whether the claimant was properly dismissed without notice under the terms of his contract, there should have been better policies in place that were updated. It is not clear that it was the claimant’s direct responsibility to ensure that because there were many fingers in the health and safety pie. Whilst it could be argued that it fell naturally on the claimant’s shoulders to be ultimately responsible as the senior manager, there seems no sound contractual basis for identifying a policy

failure as a gross negligence issue, still less an assessment of compliance that other individuals disagree with. Particularly those who did not have the claimant's specific qualification in fire risk assessment. The claimant's case is that if it were misconduct or performance then it was not gross misconduct. It could not have been lawful to strip him of his contractual notice. His case had been that he had been developing the policies in tandem with many others that needed updating. He had no specific instruction that the work should be completed by the date the claimant's line manager requested it. Nor was it clear that it would have been the claimant who had a specific site evacuation policy at his fingertips, and although involved in high level coordination he was not involved in training workers on evacuation drills and the contractual consultation meetings had led to a shift in his role away from operational work towards liaising with Government agencies and taking on other liabilities for the business.

### Respondent's Submissions

66. The respondent's submissions were that they had clearly established on the balance of probabilities that the claimant was seriously negligent in his duties and/or in breach of contract. The claimant did present an outdated emergency action plan and fire evacuation report on 3 October. He had not updated the two reports. During his suspension it was alleged that this was "partway through". In the appeal he relied upon the crisis management policy. This did not provide the level of detail required. The documents presented exposed the respondent to unreasonable risk and posed a risk to employees' health and safety. There were important reasons why the documents should have been accurate and up to date, including the claimant's own report while acting as a consultant and the independent fire risk assessment report in April 2017. The claimant insisted that there was an up-to-date document on the S drive, but none could be located even with the assistance of the respondent's IT department.

67. The self assessment report completed by the claimant in September 2019 represented that the site was fully compliant in all areas save for one. A subsequent review undertaken by experienced health and safety managers revealed a self assessment score of almost half that supplied by the claimant. The fire risk assessment undertaken in October 2019 revealed non compliance, and Mr Watson's email dated January 2020 detailed those issues raised in the 2017 fire risk assessment report which had not been addressed.

68. Such conduct clearly amounted to gross misconduct as defined within the respondent's disciplinary policy (page 77) and therefore the claimant was seriously negligent in his duties and/or in breach of contract.

### **Conclusions**

69. I have read all of the submissions in detail and deal with only those matters which are set out in the agreed List of Issues.

### Wrongful Dismissal

#### *Did the claimant's conduct amount to gross misconduct?*

70. The claimant, during the course of the investigation, disciplinary and appeal, admitted that he took responsibility, and indeed had given himself responsibility, for

at least some of the safety plans. He claimed that up-to-date plans were on a hard drive in his possession, and on the S drive. The respondent took his position seriously and searched the S drive, not only Ms McNamara but also Mr McCabe with the assistance of the IT department. None of them found any up-to-date fire evacuation plan which would have provided the employees with guidance to safely exit the building in the event of there being a fire. The claimant's role, whilst not strictly defined, was as Health and Safety Manager. Without a detailed description of his role he was responsible for these policies and he had not updated them. Mr McCabe was entitled to rely on the evidence he received from Mr Watson (who appears to have had no axe to grind at all) that the claimant took the policies away to update them and load them onto the S drive, but the claimant did not do so.

71. Such failure in the hands of a senior manager amounts to gross misconduct and there was therefore no wrongful dismissal because the respondent was entitled to terminate the contract without notice.

#### Unfair Dismissal

72. The reason for the dismissal was in effect agreed between the parties as conduct, which is potentially fair.

- (1) Did the respondent act reasonably in the circumstances having regard to the size and administrative resources of the respondent and in accordance with equity and the substantial merits of the case in treating conduct as a sufficient reason for dismissing the claimant?
- (2) Did the alleged conduct of the claimant amount to gross misconduct as relied upon by the respondent?

73. There is clearly evidence that the dismissing officer, Ms McNamara, had a genuine belief in the claimant's misconduct. No alternative suggestion was made about the reason for her decision was discussed in the evidence. Her evidence that this was her decision in the presence of an HR representative with whom the case was discussed is credible.

74. Ms McNamara clearly had grounds for her decision: the issue is whether they were reasonable. She was able to look at the outdated reports that were supplied to her and the investigation report, including the claimant's responses and the witness statements (with reference to "I've dropped the ball"). She instigated a search for the document which the claimant alleged was on the S drive rather than in Q-Pulse. She could not find such a document. She knew that the claimant had suggested that he had a copy of it on a detachable hard drive. The claimant never produced it. She had the claimant's self assessment and that undertaken by other experienced Health and Safety Managers within about five weeks, and it was clear that the other Health and Safety Managers did not agree with the claimant's self assessment. It was only late in the day that the claimant suggested that the self assessment was incomplete. It is hard to see how that could be the case when he had scored it a 98%.

75. Subsequent risk assessments were undertaken by other experienced Health and Safety Managers and they found various fire safety related issues which were still outstanding from a 2017 fire risk assessment. Mr Watson had indicated that



whilst they had met and discussed updating the documents, the claimant had taken them away to actually undertake the update. The updated documents could not be found on the S drive as the claimant asserted.

76. The claimant did not have access to Mr Norton at the first investigative meeting. He did accept that he had the ability to respond to all of the questions raised. This gentleman is a qualified lawyer as well as being a senior manager, and whilst he initially said that his representative would have been able to access documentation on his behalf, he later retracted that suggestion. He did not ask Mr Norton to undertake a search for documents on his behalf, although it would seem that Mr Norton would have been able to access the S Drive, and he did not ask that the respondent interview Mr Norton if he had known something which would have assisted.

77. The claimant asked for a huge amount of documentation by way of disclosure. He received documents that existed and accepted under cross examination that he had asked for documents that he knew did not exist, for example signed role profiles (one of his complaints being that they did not exist).

78. The respondent submitted, and I agree, that much of the claimant's request for disclosure was a "fishing expedition". The respondent supplied some documentation where it existed and where they considered it to be reasonable and proportionate to do so. Where they did not it was clearly set out why they did not consider such documentation be relevant (282-283). The claimant had always said that he had no role profile which he had signed. To request signed copies therefore was inappropriate. He was provided with a copy of the search that confirmed that there was no emergency action plan on the S drive (page 323). He was given documentation that related to Foston dairy, and it was explained to him that this was for comparison's sake. Although there was no dispute over the accuracy of the meeting minutes from 12 November 2019, the claimant insisted that he had to have signed copies before he was willing to proceed. He did not explain the relevance of system documents that he had prepared with Mr Watson, but he did suggest he had a copy of a portable hard drive with these documents on. They were never produced by him. The claimant asked for evidence of the qualifications of Calcut Hooskings and Mr Watson. As they were in positions within the company, this would not have assisted his case.

79. The belief of the dismissing officer that the claimant was guilty of gross negligence/misconduct was entirely reasonable in the circumstances.

#### Band of reasonable responses

80. The nature of the allegations and finding against the claimant were more than one incident but evidence of sustained neglect. Ms McNamara knew the standards expected from health, safety and environment managers, and she was site lead. The claimant's duties related to health and safety at a large dairy site. Any failure by a health, safety and environment manager to ensure that risk assessments are up to date and plans for evacuation accurate could put others at risk. It was reasonable for Ms McNamara to believe that she could not trust the claimant.

81. There was subsequently an independent appeal with Mr McCabe who had had no prior involvement in the disciplinary or the investigation. He only knew the

claimant: the claimant did not work or answer to Mr McCabe. He re-examined the circumstances, carried out further enquiries, obtained further evidence, heard the claimant who was not represented or accompanied at the meeting but who had waived that right (he had in fact been accompanied at the second investigation meeting).

82. Ms McNamara considered the claimant had a clean disciplinary record before making the decision to dismiss and considered his length of service, which was in any event unremarkable.

#### Procedural Fairness

83. The claimant raised a number of alleged procedural failings. The claimant was dismissed in his absence, which the respondent admits. However, the claimant was absent from work with work related stress following his suspension and the ongoing disciplinary procedure. The claimant had managed to provide written representations in relation to two grievances and a further repeated request for documentation, and was given the opportunity to provide written representations in advance of the disciplinary hearing. He chose not to do so. The claimant had, by the date of the disciplinary hearing, been suspended for three months and had already been scheduled on an earlier date and adjourned at the claimant's request.

#### Predetermined decision

84. I find that Ms McNamara was an entirely independent manager who gave impressive evidence. She chose to look into the claimant's case further before making a decision, and accepted and apologised for a mistake (minor) in a letter that she had written. The decision to dismiss was made by her on her own on 10 January 2020. Between then and 30 January 2020 the outcome letter was drafted and there was an administrative error that resulted in Payroll sending the claimant the P45 before the decision to dismiss had been communicated to him. Whilst that was unfortunate, Ms McNamara was entirely credible in her evidence at Tribunal that she had made the decision on 10 January, and it is clear this was purely an error. It was insufficient to make the procedure unfair.

85. The claimant alleged that there was a failure to carry out a reasonable search for documentation. It is clear that both Mr McCabe and Ms McNamara and the IT department searched the S drive for the documents which the claimant said were there. Even on the claimant's case there were some documents which he was requesting which he knew did not exist, e.g. signed job roles. Nobody could find the documents that he sought. The claimant told the investigation in any event that he had copies of these documents on a portable hard drive, although he has never produced them. Whilst the claimant made demands of the respondent for these documents, and he believed allegedly that they were on the S drive, he had never asked the respondent to allow him access to the S drive to locate the documents personally, nor could he explain why they could not find them, or that he did not ask Mr Norton to look on the S drive on his behalf.

86. Point 6.5 on the List of Issues alleges significant delay between the dismissal and the appeal outcome. That was indeed the case. However, the appeal when it was heard by Mr McCabe was heard openly. The claimant has not explained how the delay prejudiced his case in any way, and some of the delay was caused by his

requests for additional documentation, and others by Mr McCabe choosing to investigate further. Such delay did not make the dismissal unfair procedurally.

87. The decision to dismiss and to uphold the dismissal was alleged not to be made impartially by the disciplinary officer and appeals officer and in the alternative Human Resources were involved in making the decision. The evidence I read and heard led me to the conclusion that both the disciplining and appeal officers were entirely independent and impartial. Neither had had prior dealings with the claimant or had been involved in the investigation. Ms McNamara did deal with a grievance raised by the claimant, but that was because the grievance related to the procedure that she was following in relation to the dismissal. Ms McNamara further conceded that Mr Bates (investigator) may have been perceived by the claimant as being hostile, which she subsequently clarified as being due to his frustrations at the claimant's apparent refusal to engage in the investigation.

88. I do not find, in the light of the factual matrix set out above, that this was an unfair dismissal. I therefore dismiss the claims of unfair dismissal and wrongful dismissal as unsubstantiated.

89. By way of conclusion I would like to thank both advocates for their very detailed submissions, both of which played a considerable part in my deliberations.

90. I apologise for the late delivery of this judgement and regret to say that I have been unwell.

---

Employment Judge Warren  
Date:24 February 2022

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON  
28 February 2022

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.