



EMPLOYMENT TRIBUNALS

Claimant: Mr T Scott

Respondent: Plastic Omnium Ltd

Heard at: Nottingham via CVP **On:** 11, 12 May and 22 July 2022

Before:

Representation

Claimant: Mr Hirst (Counsel)

Respondent: Mr Lovejoy

RESERVED JUDGMENT

1. The complaint of unfair dismissal contrary to section 94 Employment Rights Act 1996 is not well founded. This means that the claimant was fairly dismissed.
2. The complaint for wrongful dismissal is not well founded. This means that this complaint is unsuccessful.

REASONS

Introduction

1. The claimant was employed as an Operator by the respondent. His role was to drive and operate forklift trucks. He claims that his dismissal for gross misconduct on 7 May 2021 was unfair and that he did not receive his notice pay. ACAS was notified of the early conciliation procedure on 2 July 2021 and the certificate was issued on 7 July 2021. The ET1 was presented on 28 July 2021. The ET3 was received by the tribunal on 1 September 2021.

Claims and Issues

2. The claimant was dismissed brought claims for unfair dismissal and unpaid notice pay. The tribunal was required to determine the following issues arising out of the unfair dismissal claim:

- 2.1. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
- 2.2. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide whether:
 - 2.2.1. there were reasonable grounds for that belief;
 - 2.2.2. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - 2.2.3. the respondent otherwise acted in a procedurally fair manner;
 - 2.2.4. dismissal was within the range of reasonable responses.

In respect of the notice pay claim, the tribunal had to determine the following issue:

- 2.3. Did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Procedure, documents and evidence heard

3. The tribunal heard evidence from the claimant. Evidence was also heard from the following witnesses on behalf of the claimant; Mr David Brennan, Mr Maxime Vogel and Mr Damian Lee. There was a tribunal bundle of approximately 525 pages, including a video of 18 minutes and 14 seconds in duration. In the event, the video was not played to the Tribunal by either party but stills of a number of relevant timings of the video were made available to the Tribunal by the respondent. The claimant provided a written skeleton argument and written submissions. The Tribunal carefully considered both the skeleton argument and submissions.

Fact-findings

4. The respondent is a large company which manufactures and assembles exterior automotive components. It employs 1322 people in Great Britain. One of its sites is located at Hams Hall in Birmingham. It was at this site that the claimant was employed as an Operator. His role was to drive and operate forklift trucks. He entered a contract of employment with the respondent on 4 February 2019. Prior to this date, he had worked at the Hams Hall site as an agency worker from December 2017 until the commencement of his contract of employment with the respondent.
5. The claimant's role involved using a fork-lift truck to move stillages around the respondent's site, and also load and unload these stillages from lorries. Stillages are heavy, rectangular steel cages which measure approximately four foot by four foot by five foot. They are also referred to as "bins" by those who work with them. They have slots on their base which are where the forks of a fork-lift truck are inserted into them. Each stillage also has four steel pins and four hollow cups. The steel pins are in the base of the stillage at each of its four corners. These steel pins enable stillages to be stacked on top of each other safely as, when stacked vertically, they slot into the four hollow cups of the stillage below.
6. If a forklift truck driver employed by the respondent is involved in an accident, they must "stop-call-wait". This involves stopping what they are doing, calling a supervisor and waiting for the supervisor. One of the objectives of this is to preserve the scene of the accident.
7. On 20 April 2021 at 10.04 a.m. the claimant was using a fork-lift to move empty stillages from a storage area in the Hams Hall yard and load them onto a lorry for

dispatch. He was involved in an accident which led to a number of stillages falling from a stack. This incident involved at least one stillage falling onto the roof of another forklift which was being driven by Mr Dewan Choudhury, a co-worker, who was also working in the yard at that point in time. Mr Choudhury was an agency worker. The fall of stillages caused some considerable damage to the fork-lift truck being driven by Mr Choudhury.

8. The incident was then investigated as follows. An initial statement was taken from the claimant by his team leader, Ms Florentina Anghel, at 10.35 a.m. on the day of the incident. The record of this meeting appears at pages 129 -130 of the bundle. The claimant was asked what caused the bin to fall and stated, "*I was destacking exf bin and as lifting the top two the top bin was not stacked properly.*" The tribunal should point out that "exf" in this quotation refers to exhaust finishers. When asked if anyone had been hit, the claimant stated, "*The bin fell on top of Dewan's truck.*" When asked if anyone had been hurt, the claimant stated, "*No just damaged truck.*"
9. As he was an agency worker Mr Dewan Choudhury was also interviewed about the incident at 11 a.m. on 20 April 2021 by Cara Czeryk, the onsite co-ordinator for the relevant employment agency. The notes of this meeting appear at pages 133-136 of the bundle.
10. Mr David Brennan, Warehouse Manager for the respondent, was appointed as the investigating officer on the day of the incident. He was appointed to this role by Mr Maxime Vogel, the Logistics Manager of the respondent. At the start of his investigation, the notes taken in the meetings between the claimant and Ms Florentina Anghel were passed to him. Mr Brennan also received the notes of the meeting between Mr Dewan Choudhury and Cara Czeryk.
11. Mr Brennan interviewed the claimant on 20 April 2021 (pages 137-139 of the bundle). Following this meeting the claimant was immediately suspended from work on full pay pending an investigation by the Company into potential gross misconduct (page 126 of the bundle).
12. Mr Brennan interviewed Mr Dewan Choudhury on 21 April 2021 (pages 140 to 141 of the bundle). On 22 April 2021 Mr Brennan interviewed two lorry drivers from a third party company, Amco, who were present in the Hams Hall yard at the time of the incident on 20 April 2021. They were Mr Darren Harvey and Mr Geoff Hubbard. The notes of these meetings appear at pages 142 and 143 of the bundle.
13. On 21 April 2021 Mr Brennan also interviewed three forklift truck drivers who were working in or around the yard at the time of the incident. These were Mr Kamran Khan, Mr Lawrence Boulsyridge and Mr Patrick McKilmurray. The notes of these meetings appear at pages 145, 145 and 150 of the bundle respectively.
14. On 27 April 2021 Mr Brennan interviewed Florentina Anghel (pages 146 to 147 of the bundle). Mr Kamran Khan and Mr Patrick McKilmurray were also interviewed for a second time that same day (pages 148 to 149 of the bundle and page 151 to 152 of the bundle).
15. On 28 April 2021 Mr Brennan interviewed Mr Thomas Harvey who was present in the gatehouse of the yard when the incident occurred and arrived at the scene shortly afterwards (page 157 to 158 of the bundle). Following the completion of his investigations Mr Brennan decided that the matter needed to be escalated to a disciplinary meeting. Mr Brennan did not however produce a written report of the findings of his investigations.
16. On 30 April 2021 the claimant was sent a letter inviting him to a disciplinary hearing scheduled for 5 May 2021 (pages 161-162 of the bundle). This letter stated:

“You are aware that the company has been investigating allegations of gross misconduct against you. These allegations are listed below and relate the incident that occurred in the yard on 20th April 2021:

- A flagrant disregard for safety precautions.*
- Negligence resulting in damage to company/ customer property.*
- A breach of trust & confidence, in that you were dishonest about the events surrounding the incident on 20th April 2021”*

The following documents were enclosed in the letter sent to the claimant:-

1. the statements from Mr Dewan Choudhury, Mr Patrick McKilmurray, Mr Kamran Khan, Mr Thomas Harvey, Mr Lawrence Boulsyridg, Mr Darren Harvey and Mr Geoff Hubbard discussed above,
2. a repair estimate in respect of the damage caused to Mr Choudhury’s forklift truck (page 153),
3. an email exchange regarding scrapped parts (pages 154 to 156),
4. the results of the claimant’s drug and alcohol tests (pages 127 to 128),
5. the claimant’s certificate of forklift training (page 280)
6. photographs of the scene of the incident (pages 229 to 230 and 273 to 279)
7. Stills of the CCTV footage of the incident (pages 163 to 228)
8. the respondent’s disciplinary policy (page 75 to 82).

The claimant was advised of his right to be accompanied to the disciplinary meeting by a fellow employee or trade union representative. The letter also advised him that a possible outcome of the hearing was dismissal.

17. On 5 May 2021 the claimant attended his disciplinary hearing and was accompanied by Mr Curtis Edwards, a fellow forklift truck driver. The meeting was chaired by Mr Maxime Vogel and Ms Helen Rodgers of the respondent’s HR department was also present to take notes (pages 231 to 240). The claimant was asked what happened on the 20 April 2021 and stated:

“I was loading a paint trailer (no10), Darren Harvey was the driver. I loaded a lot of stillages but still had room at the back of the trailer. There was a stack of 4 centre finishers, I took the top 3 and left them on the side, ready to load. I went to sort two L94 exhaust finisher bins out to load, as I came to lift them, the top one toppled over, they can’t have been stacked correctly. I still had my forks in the second so that one couldn’t fall. I was going to collect the first 2 to drop down, one toppled over and fell onto Dewan’s truck. The bin that was still on my forks I used to push out of the way the bin that had hit Dewan’s truck so that Dewan could get past his truck after he got out. He could just about open the door to exit his truck but he couldn’t get past the truck. I asked Dewan if he was ok and he said he was. I then picked up the 3 centre finishers and put them onto Darren’s truck as he needed to go. I said to Dewan what should we do and he said I should phone Florentina, which I did.

In this meeting, he was also questioned extensively by Mr Vogel about the CCTV footage of the incident and the discrepancies between it and his version of events. The claimant was shown the photograph on page 273 of the bundle and asked by Mr Vogel to account for how the stillage in the foreground of that photograph ended in that position following the accident. The claimant was unable to say. The claimant also stated in this meeting that that he felt he had been victimised and that similar incidents had happened with two other drivers in the past (page 237).

18. The meeting of 5 May 2021 adjourned late in the afternoon of that day and the claimant was asked to return for a reconvened meeting on 7 May 2021. The claimant attended the reconvened hearing and was again accompanied by Curtis Edwards. Mr Maxime Vogel and Helen Rodgers of the respondent’s HR department were again present.

19. Mr Vogel referred the claimant to the photographs on pages 241 and 242 of the bundle. These photographs are the same as that which appears on page 273 of the bundle which was previously shown to the claimant but they have hand written annotations on them. Mr Vogel referred to these photographs and said that mathematics showed it was impossible for the stillage to land where the claimant said it did. Mr Vogel offered the claimant two possible versions of events for how the incident on 20 April 2022 happened. Version One was that the claimant was driving dangerously and turning with the forks on his truck at height. Version Two was that the claimant was moving the stack of three centre finishers to the left of the stack of stillages that fell and that the whole stack of exhaust finisher stillages toppled over. The claimant rejected both possible versions of events and said that he had already told the truth about what had happened. The claimant's explanation was that the upward shunt caused by his forklift created momentum which led to the stillage in question to land where it did. At the end of this meeting Mr Vogel informed the claimant that his version of events was not mathematically possible and that he was being dismissed for gross misconduct. The Tribunal found that Mr Vogel's reference to mathematics was used as a figure of speech and was akin to saying that the claimant's version of events was not logically possible. Mr Vogel was a Logistics Manager and not a trained mathematician.
20. At this point, the Tribunal should also make clear that it did not accept the claimant's version of events, specifically that set out in paragraphs 13 to 19 of his witness statement, as it ran contrary to the CCTV evidence of the incident. The CCTV footage and stills show the claimant's forklift truck entering the storage area of the yard where the incident occurred at 10.04:08 a.m. At this point in time the claimant's forks are unladen. The claimant proceeded forwards towards the stack of stillages at 10.04:19 am. Stillages can be seen falling from a stack in the top right hand corner of the footage at 10.04:36 a.m. At 10.04:43 a.m. the claimant can be seen proceeding away from the stacks with three stillages on his forks. This CCTV footage and the corresponding stills contradict both the account the claimant gave to Mr Vogel but also the account contained at paragraphs 13 to 19 of the claimant's witness statement.
21. In the Tribunal's view, there was clearly insufficient time for the events contained in paragraphs 13 to 19 to have occurred in a timeframe that would match the CCTV evidence. The CCTV footage and stills show the claimant's forklift truck entering the storage area of the yard where the incident occurred at 10.04:08 a.m. By the claimant's evidence, he then claimed to have removed two stillages from a four stillage high stack by shunting his forks into the stack at the appropriate point. He then claimed he lifted these and started to reverse backwards. He claims that the supposed shunting movement of his forks engaging with the stillage caused the top stillage to topple off his forks and onto the fork-lift truck of Dewan Chaudhary. The stillages can be seen falling in the top right hand corner of the CCTV footage at 10.04:30 a.m. The claimant then claimed that he stopped and used the stillage that had not fallen off his forks to push the fallen stillage away as it was blocking Mr Chaudhary in his fork-lift truck. The claimant then claimed that both he and Mr Chaudhary moved the fallen stillage by hand. He then claimed that Mr Chaudhary phoned the claimant's team leader and that he spoke to her using Mr Chaudhary's mobile telephone. The claimant then claimed that as Mr Darren Harvey, a HGV driver, was in a rush to leave the yard, he loaded up three centre finishers onto his forklift truck in order to allow Mr Darren Harvey to leave. The CCTV footage shows the claimant proceeding away from the stacks with three stillages on his forks at 10.04:43 a.m. The logical consequence of this is that all the events that the claimant alleges to have happened following the fall of stillages until he left the stack with three stillages on his forks must have occurred within thirteen seconds. The Tribunal finds this implausible. As a consequence of this, the Tribunal finds that the claimant was dishonest about the events of the incident on 20th April 2021. This dishonesty inevitably made the subsequent investigation by Mr Vogel more difficult.

22. The CCTV evidence also showed that the claimant contravened the respondent's "stop-call-wait" policy as he continued to use his forklift truck to move a number of stillages at the scene of the incident up until 10.21 a.m. This alteration of the scene of the incident again made the subsequent investigation more difficult.
23. On 12 May 2021 the claimant was sent a letter informing him of his dismissal (page 243-245). This letter stated:

"The reason for your summary dismissal is that I believe you committed the following breaches in relation to an incident that occurred on 20th April 2021:

- *A flagrant disregard for safety precautions.*
- *Negligence resulting in damage to company/ customer property.*
- *A breach of trust & confidence, in that you were dishonest about the events surrounding the incident on 20th April 2021*

The Company believes that this conduct amounts to gross misconduct."

The letter also stated:

"Taking everything into consideration, I believe this incident occurred because you were driving dangerously and it could have been avoided if you were following the applicable safety precautions. Your actions posed a serious health and safety risk to both yourself and the other FLT driver that was working nearby. As a consequence of your negligence, the business has had to pay for the costs of damage to the FLT that was struck by the falling bin. I believe that you have also been dishonest with us from the start of the investigation about what really happened as the explanation you provided does not make mathematical sense.

In summary, I believe that your actions amounted to gross misconduct and that your employment should be terminated without notice."

The letter also informed the claimant of his right to appeal against the dismissal.

24. Although the letter informing the claimant of his dismissal stated that the business had to pay for the costs of damage to the fork-lift truck that was struck, this was not correct. Mr Brennan gave evidence that, as at the time of the hearing, this fork-lift truck had not been repaired. However, a quote for repairing the damaged fork-lift truck had been obtained which amounted to £6,396.85 (page 153 of the bundle). As the damaged fork-lift was a lease vehicle, Mr Brennan was under the impression this fork-lift truck would need to be repaired at some point in time.
25. On 13 May 2021 the claimant emailed the respondent informing it of his wish to appeal against his dismissal (page 247). A letter was sent to the respondent inviting him to an appeal hearing on 8 June 2021 (pages 252-253). It should be noted that this was a rescheduled appeal hearing as an earlier appeal hearing scheduled to take place on 25 May 2021 had to be postponed. The claimant was advised of his right to be accompanied to the disciplinary meeting by a fellow employee or trade union representative.
26. On 8 June 2021 the claimant attended his appeal hearing and was accompanied by Mr Curtis Edwards. The meeting was chaired by Mr Damian Lee, an Operations Manager of the respondent, and Ms Helen Martin, a HR manager of the respondent. The notes of this meeting were subsequently mislaid by the respondent, but the Tribunal is satisfied that Mr Lee's witness statement contains an accurate account of the meeting. The claimant did not deny that he had moved stillages but instead stated that he wanted the driver present on site to get away. Following this Mr Lee informed the claimant that he had no confidence that the claimant would not adhere to the "stop-call-wait" policy in the future and preserve the scene of accidents. After taking into

account Mr Vogel's two possible versions of the incident and also the claimant's possible explanation, Mr Lee decided that the claimant's version of events of events was not a reasonable explanation for what happened. Consequently, Mr Lee decided to uphold the decision of gross misconduct.

27. The outcome of the appeal was confirmed to the claimant by way of a letter dated 10 June 2021 (page 254). This stated:

“During the appeal hearing, you admitted that in the immediate aftermath of the Incident on 20th April, you had carried on working and had moved objects at the scene of the incident before any management had arrived to begin the investigation. As I explained to you, this made the investigation more difficult into what was already a serious matter. I believe that these actions alone constitute a breach of trust and confidence.

On consideration of your grounds of appeal and matters raised by you at the appeal hearing, I have decided to uphold the original decision following the disciplinary hearing to terminate your employment with Immediate effect from 7th May 2021.

The decision on this is final and there is no further right of appeal under the company's disciplinary policy.”

Law

28. In respect of the unfair dismissal claim, where the dismissal is admitted, the respondent has the burden of establishing that it dismissed the claimant for an admissible reason in accordance with section 98 (1) of the Employment Rights Act 1996. Misconduct is an admissible reason.
29. In a misconduct dismissal the Tribunal in determining the fairness of the dismissal considers the following factors in accordance with **BHS v Burchell (1978) IRLR 379** namely whether (a) the employer believed that the employee was guilty of misconduct; (b) the employer had reasonable grounds for believing that the employee was guilty of misconduct; and (c) at the time it held that belief it had carried out a reasonable investigation.
30. In terms of investigations into possible misconduct, there is no set rule as to the level of inquiry the employer should conduct into the employee's (suspected) misconduct in order to satisfy the test in **BHS v Burchell (1978) IRLR 379**. Thus, in **Miller v William Hill Organisation Ltd EAT 0336/12** the EAT acknowledged that there is a limit to the steps an employer should be expected to take to investigate an employee's alleged misconduct. How far an employer should go will depend on the circumstances of the case, including the amount of time involved, the expense and the consequences for the employee being dismissed. Similarly, **Salford Royal NHS Foundation Trust v Roldan 2010 ICR 1457 demonstrates that** it is particularly important to conduct a most careful investigation where the employee's reputation or ability to work in their chosen field is at risk.
31. In terms of the decision to dismiss, the Tribunal must consider whether the employer's decision to dismiss fell within the band of reasonable responses that a reasonable employer in those circumstances might have adopted. In **Iceland Frozen Foods Limited v Jones (1982) IRLR 439** Mr Justice Browne-Wilkinson summarised as follows:

“We consider that the authorities establish that in law the correct approach for the... tribunal to adopt in answering the question posed by s.98(4) is as follows:

- (1) *the starting point should always be the words of s.98(4) themselves;*
- (2) *in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the... tribunal) consider the dismissal to be fair;*
- (3) *in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
- (4) *in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
- (5) *the function of the... tribunal, as an industrial jury, 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."*

32. The range of reasonable responses test applies not only to the decision to dismiss but also to the investigation, meaning that the Tribunal must decide whether the investigation was reasonable and not whether it would have investigated things differently (**Sainsbury's Supermarket Limited v Hitt (2003) IRLR 23**). Thus, when assessing whether the employer adopted a reasonable procedure, tribunals will use the range of reasonable responses test that applies to substantive unfair dismissal claims. In **Sainsbury's Supermarket Limited v Hitt (2003) IRLR 23** Lord Justice Mummery stated:

"The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

33. In **Taylor v OCS Group Ltd 2006 ICR 1602** the Court of Appeal stressed that a tribunal's task under s.98(4) of the Employment Rights Act 1996 (ERA) is not simply to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal, as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, where the misconduct is of a less serious nature, so that the decision to dismiss is nearer the borderline, the tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. Further, the Tribunal must not substitute its own decision for that of the relevant decision-maker and decide how it would have responded had it been the employer (see **Foley v Post Office; HSBC Bank plc v Madden (2000) IRLR 82**).
34. In the case of **Hadjionannous v Coral Casinos (1981) IRLR 352** it was held that evidence of inconsistent treatment between employees is relevant in limited circumstances because two cases had to be truly parallel to compare (namely similar or sufficiently similar).
35. In respect of the notice pay claim, the claim is effectively a breach of contract claim under the jurisdiction of the Tribunal by virtue of section 3 of the Employment Tribunal's Extension of Jurisdiction (England & Wales) Order 1994. This provides:

Extension of jurisdiction

Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages or for a sum due, in respect of personal injuries) if – (a) the claim is

one to which section 131(2) of the 1978 Act applies and which a court in England Wales would under law for the time being in force have jurisdiction to hear and determine; (b) the claim is not one to which article 5 applies; and (c) the claim arises or is outstanding on termination of the employee's employment.

36. An employee cannot be summarily dismissed unless they have committed a repudiatory breach of contract, or if the employer had a contractual right to make a payment in lieu of notice. By reference to the IDS Employment Law Handbook Employment Tribunal Breach of Contract at paragraph 10.12 the following is recorded:-

*“The rule that only repudiatory breaches by employees will justify summary dismissal can be traced back to the Court of Appeal’s decision in **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698, CA**. In that case Lord Justice Evershed, then Master of the Rolls, thought that in order to amount to a repudiatory breach, the employee’s behaviour must disclose a deliberate intention to disregard the essential requirements of the contract. Some more recent cases have expressed the threshold for repudiation by reference to the implied term of mutual trust and confidence. In **Briscoe v Lubrizol Ltd 2002 IRLR 607, CA**, the Court of Appeal approved the test set out in **Neary and anor v Dean of Westminster 1999 IRLR 288, Special Commissioner (Westminster Abbey)**, where Lord Jauncey asserted that the conduct ‘must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment’. The Court of Appeal in **Briscoe** stressed that the employee’s conduct should be viewed objectively, and so an employee can repudiate the contract even without an intention to do so.”*

Legal Submissions

37. Counsel for the claimant provided detailed written submissions which were supplemented by oral submissions at the hearing. The respondent’s representative made oral submissions at the hearing. The Tribunal gave these submissions careful consideration before reaching its decision.

Conclusions

38. In order to reach its conclusions regarding the claimant’s unfair dismissal claim, the Tribunal returns to the issues it set out at the start of these written reasons. These were the pertinent issues that the Tribunal had to determine.
39. The first question is the reason for dismissal. The Tribunal finds that the reason is misconduct and that the motivating, albeit not sole, factor for the respondent deciding that the claimant had committed misconduct was the fact that the claimant was dishonest about his involvement in the incident on 20th April 2021 and also his dishonesty regarding tampering with the scene once the stillages had fallen.
40. The next questions originate from the three stages from the **BHS v Burchell** case. First, did the respondent reasonably believe that the claimant committed the misconduct, i.e. that he was dishonest about his involvement in the incident on 20th April 2021. The Tribunal finds that they did.
41. Second, was the belief held on reasonable grounds? The Tribunal finds that it was. The dismissing officer, Mr Vogel, had statements from Mr Dewan Choudhury, Mr Patrick McKilmurray, Mr Kamran Khan, Mr Thomas Harvey, Mr Lawrence Boulsyridg, Mr Darren Harvey and Mr Geoff Hubbard. Significantly, Mr Vogel was also in

possession of CCTV footage which showed clearly that the claimant's description of the incident was not plausible. This was apparent from the timings of the claimant entering and exiting the stacks which did not match with his description given to Mr Vogel during the disciplinary hearings. The CCTV footage also shows the claimant continuing to operate his fork-lift truck for some significant time after the stillages had fallen which was in contravention of the respondent's "stop-call-wait" policy. This on its own demonstrates a flagrant disregard of safety precautions. Mr Vogel was also in possession of a quotation which showed that the damage caused by the claimant to the company's fork-lift truck amounted to £6,396.85 (page 153 of the bundle). Although the CCTV footage did not show the stillages hitting the fork-lift truck used by Mr Chaudhury, there was no other plausible explanation for how this damage could have occurred other than by the actions of the claimant. The claimant argued that the dismissal was based on two unproven and different scenarios made up by Mr Vogel. The Tribunal rejects this. During the reconvened disciplinary hearing on 7 May 2021, Mr Vogel offered the claimant two possible versions of events for how the incident on 20 April 2022 happened. Version One was that the claimant was driving dangerously and turning with the forks on his truck at height. Version Two was that the claimant was moving the stack of three centre finishers to the left of the stack of stillages that fell and that the whole stack of exhaust finisher stillages toppled over. The claimant rejected both possible versions of events and at the end of the meeting Mr Vogel informed the claimant that his version of events was not mathematically possible and that he was being dismissed for gross misconduct. As previously stated, the Tribunal found that Mr Vogel's reference to mathematics was used as a figure of speech and was akin to saying that the claimant's version of events was not logically possible. Indeed, it was also clear that by this point in time, Mr Vogel had examined the CCTV footage in some detail with the claimant which further emphasised that the claimant's version of events was not plausible. The dismissal letter to the claimant (page 161-162) also clearly demonstrated the grounds for dismissal, that is:

*“- A flagrant disregard for safety precautions.
- Negligence resulting in damage to company/ customer property.
- A breach of trust & confidence, in that you were dishonest about the events surrounding the incident on 20th April 2021”*

The claimant also submitted that there were potentially missing health and safety notes and reports, the allegation being that these documents had not been disclosed by the respondent. There was no evidence to support this submission, indeed there was no evidence of the respondent acting dishonestly and so the Tribunal rejects this submission. In reaching this conclusion, the Tribunal also took into account the fact that the respondent had been entirely honest that notes in its possession which should have been disclosed could not be located and could well have been shredded i.e. the notes of the appeal hearing conducted by Mr Lee on 8 June 2021.

42. The next question is was there a fair and reasonable investigation? The Tribunal finds that there was. Mr David Brennan, Warehouse Manager for the respondent, was appointed as the investigating officer on the day of the incident. At the start of his investigation, the notes taken in the meetings between the claimant and Ms Florentina Anghel were passed to him. Mr Brennan also received the notes of the meeting between Mr Dewan Choudhury and Cara Czeryk. Mr Brennan interviewed the claimant on 20 April 2021 (pages 137-139 of the bundle). Mr Brennan interviewed Mr Dewan Choudhury on 21 April 2021 (pages 140 to 141 of the bundle). Mr Brennan interviewed two lorry drivers from a third party company, Amco, who were present in the yard at the time of the incident on 20 April 2021 (pages 142 and 143 of the bundle). They were Mr Darren Harvey and Mr Geoff Hubbard. On 21 April 2021 Mr Brennan interviewed three forklift truck drivers who were working in or around the yard at the time of the incident. These were Kamran Khan, Lawrence Boulsyridge and Patrick McKilmurray. The notes of these meetings appear at pages 145, 145 and 150 of the bundle respectively. On 27 April 2021 Mr Brennan interviewed Florentina Anghel (pages 146

to 147 of the bundle). Mr Kamran Khan and Mr Patrick McKilmurray were also interviewed for a second time that same day (pages 148 to 149 of the bundle and page 151 to 152 of the bundle). On 28 April 2021 Mr Brennan interviewed Mr Thomas Harvey who was present in the gatehouse of the yard when the incident occurred and arrived at the scene shortly afterwards (page 157 to 158 of the bundle). The claimant argued that all those present the incident ought to have been interviewed. The Tribunal finds that a reasonable employer could decide this was not necessary in light of the investigation which had been carried out and the evidence which had emerged. The dismissing officer, Mr Vogel, was entitled to take the view that interviewing all those present at the incident would add little, given the considerable number of individuals who had already been interviewed by Mr Bennett. This was especially true given the fact that the dismissing officer had CCTV footage in his possession covering part of the yard where the incident took place. The claimant also argued that the possibility that there might be a faulty stillage cup and/or pin which caused the incident was not investigated by the respondent. The claimant argued that two separate incidents involving a Mr Charlton and a Mr Meesham had occurred and that faulty stillages and/or pins were to blame for these events. There was documentation in the bundle at pages 107 to 125 regarding these incidents but there was, in the opinion of the Tribunal, no clear finding that a faulty cup or bin was to blame for either of these incidents. It is also noteworthy that the claimant failed to mention that there was any issue with any cup or pin either to Ms Florentina Anghel on the day of the incident or Mr Brennan when the incident was being investigated. In short, the Tribunal concluded that there was no evidence that a faulty cup or pin was to blame for this incident.

43. As regards procedure generally, the Tribunal find that the procedure followed was reasonable. The claimant was notified in a letter in advance of the disciplinary hearing of the allegations against him; he was advised he could bring a companion; a hearing was held at which he was able to put his case; he was informed of the outcome and his right of appeal, he was advised he could bring a companion to the appeal, he was informed of the outcome of his appeal promptly and in writing. The claimant submitted that there was not a sufficient splitting of roles between those responsible for the investigation of the incident and those responsible for the disciplinary hearing and dismissal. In short, it was submitted that Mr Vogel should not have presided over the disciplinary hearing as he had a major involvement in investigating the incident. The Tribunal rejects this argument. As the findings of fact demonstrate, Mr Brennan had responsibility for the investigation of this matter. Mr Brennan investigated the matter satisfactorily and undertook interviews with relevant witnesses. Following the completion of these investigations Mr Brennan decided that the matter needed to be escalated to a disciplinary meeting. It was submitted by the claimant that as Mr Vogel was present in the yard following the incident and had spoken to Mr Thomas Harvey, this could be seen as being involved in the investigation of the incident and consequently Mr Vogel ought not to have acted as chair of the disciplinary meeting. The Tribunal rejects this. Mr Vogel gave evidence that he was present in the yard after the incident but only for the purpose of checking whether the incident might affect the operation of the respondent's business. Mr Vogel admitted that he spoke with Mr Thomas Harvey in order to ascertain whether business operations might need to be paused for a few hours following the incident. The Tribunal accepted this evidence as credible and was satisfied that Mr Vogel played no significant part in the investigation of the incident. In short, the Tribunal is satisfied that both the company's internal disciplinary procedure and the ACAS code were complied with.
44. It was also submitted that the claimant was treated differently from other workers, specifically Messer's Meesham, Charlton, Choudhury and Darren Harvey. Evidence of inconsistent treatment between workers is relevant in limited circumstances because the cases have to be truly parallel to compare i.e. similar or sufficiently similar. The claimant's case is significantly different as he caused damage to property, contravened the "stop-call-wait" policy, and was then dishonest with the respondent

about the incident. The Tribunal therefore finds that the claimant's case is neither similar or sufficiently similar to the individuals identified.

45. Finally, the question is whether dismissal was a fair sanction. Could a reasonable employer have decided to dismiss in a similar instance? It should be noted that it is not for the Tribunal to substitute their view of what the respondent ought to have done. The Tribunal can only interfere and declare a dismissal to be unfair if the respondent's decision to dismiss is one that fell outside the range of reasonable responses in the circumstances. Although the claimant had worked as an employee for the respondent since 2019 and had a clean disciplinary record, this was a serious offence. The Tribunal has detailed above how it found that the employer had an honest belief that the claimant disregarded safety precautions, damaged property and was dishonest about the incident on 20th April 2021. This was a serious incident and the respondent's investigation was made more difficult by the claimant's dishonesty about the incident and events surrounding it. Dismissal was within the range of reasonable responses.
46. In respect of the notice pay claim, the Tribunal has to determine whether the claimant did something so serious that the respondent was entitled to dismiss without notice? The Tribunal finds that the claimant's dishonesty about the incident and his involvement in it, undermined the trust and confidence inherent in the contract of employment that he had with the respondent. Consequently, the respondent was justified in summarily dismissing the respondent.

Tribunal Judge McTigue, sitting as an Employment Judge

Date: 27th September 2022