EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**AND**	**RESPONDENT**
Mr S.G. Millar		**Reiser (UK) Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at Port Talbot Justice Centre, Harbourside Road, Port Talbot, SA13 1SB on:

Monday, 2nd September 2024,
Tuesday, the 3rd September 2024 and
Wednesday, the 4th September 2024

Employment Judge: **Mr David Harris**

Members: **Mrs Jacqueline Beard**
Mr Peter Charles

Representation:

For the Claimant: **Mr George Pollitt (Counsel)**

For the Respondents: **Miss Charlotte Elves (Counsel)**

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent on the 21st March 2023.

2. The Claimant was wrongfully dismissed by the Respondent on the 21st March 2023.

REASONS

The claims

1. By his Claim Form presented to the Tribunal on the 25th August 2023, the Claimant brings claims of unfair dismissal, wrongful dismissal, unlawful deduction of wages and a failure to allow the Claimant to exercise the right to be accompanied at an internal appeal against the decision to dismiss him.

2. At the start of the final hearing on the 2nd September 2024 it was decided that the Tribunal would hear and determine the liability issues in respect of the unfair dismissal and wrongful dismissal claims. Mr Pollitt, counsel for the Claimant, informed the Tribunal that the Claimant was no longer pursuing the claim relating to the alleged failure on the part of the Respondent to allow him to exercise the right to be accompanied at the internal appeal.

The background

3. The Claimant was employed by the Respondent as a Territory Sales Manager dealing with the sale of processing and packaging equipment from June 2018 until the date of his dismissal on the 21st March 2023.

4. The Respondent is a company that has traded for more than 60 years as a supplier of processing and packaging solutions for the food industry. The company employs 89 people in Great Britain.

5. On the 9th March 2023, the Claimant was invited to a disciplinary hearing that was going to take place on the 16th March 2023. It is the Claimant's case that the news of the disciplinary hearing came out of the blue. It is his case that he had an exemplary working history with the Respondent and that he had never faced any disciplinary proceedings before March 2023 nor had any complaints about his performance ever been made.

6. In response to the invitation to the disciplinary hearing, the Claimant instructed solicitors who wrote to the Respondent on the 15th March 2023 requesting a postponement of the disciplinary hearing to allow the Respondent to provide particulars of the allegations made against the Claimant and to give the Respondent time to fully investigate the allegations.

7. The Respondent agreed to postpone the disciplinary hearing until the 20th March 2023. The hearing was conducted by Mr Ed Hewitt on behalf of the Respondent and also present at the hearing was Mr Toni Parfitt (the Respondent's Head of Human Relations) as a note taker.

8. It is the Claimant's case that he was presented with vague and unparticularised allegations of misconduct, which made it difficult for him to provide a meaningful response.

9. On the 22nd March 2023, some 2 days after the disciplinary hearing, the Claimant was dismissed for gross misconduct. He contends that the dismissal was unfair and that, in addition, it amounted to a wrongful dismissal.

10. The Respondent accepts that the Claimant was dismissed on the 22nd March 2023 and it contends that the dismissal was fair and was not wrongful.

Directions on the law

11. Section 94(1) of the Employment Rights Act 1996 ('the Act') provides that an employee has the right not to be unfairly dismissed by his employer.

12. Sections 98(1), (2) and (3) of the Act set out, as follows, the potentially fair reasons (or principal reasons) for dismissing an employee:-

> **(1) In determining … whether the dismissal or 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,**
> **(c) is that the employee was redundant, or**

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)-

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

13. This being a case in which the reason given by the Respondent for dismissing the Claimant was gross misconduct, it is for the Respondent to show, on the balance of probability, that conduct was the reason for dismissal or, if not conduct, that it was some other potentially fair reason. The Respondent only needs to have a genuine belief in the Claimant's misconduct; the belief does not have to be correct or justified (*Trust Houses Forte Leisure Ltd v. Aquilar* [1976] IRLR 251).

14. The starting point for the Tribunal, when considering the reason for a dismissal, is to identify the "set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee" (*Abernethy v. Mott, Hay & Anderson* [1974] ICR 323. In *UPS Ltd v. Harrison UKEAT/0038/11*, the EAT stated that the correct approach for the Tribunal is, firstly, to make factual findings as to the employer's reasons for dismissal and, secondly, then to decide how the employer's reasons are best characterised in terms of the statutory reasons in section 98(1) of the Act.

15. Having regard to the case of *ASLEF v. Brady* [2006] IRLR 576, the Tribunal reminded itself that a potentially fair reason for a dismissal can be a pretext for dismissal for other reasons and, in such a situation the Tribunal will be entitled to find that the statutory reason put forward by the employer was not the real reason. Ultimately, it is for the employer to prove that the potentially fair reason is the real reason for the dismissal.

16. Where an employer discharges the burden of establishing a potentially fair reason for the dismissal under section 98(1) of the Act, the Tribunal must then decide if the employer acted reasonably in treating it as a sufficient reason for dismissing the employee. The starting point for determining whether a dismissal for misconduct is fair is the following statutory test set out in section 98(4) of the Act:

> **(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.**

17. The authorities establish that the Tribunal should undertake the following four-stage analysis in relation to conduct dismissals:

17.1 whether the employer genuinely believed the employee to be guilty of misconduct;

17.2 whether the employer had reasonable grounds for that belief;

17.3 whether the belief was based on a reasonable investigation;

17.4 whether dismissal was within the band of reasonable responses open to a reasonable employer.

18. The first three stages are derived from the case of *British Home Stores Ltd v. Burchell* [1978] IRLR 379 (commonly referred to as the *Burchell* test).

19. According to the *Burchell* test, a dismissal for misconduct will only be fair if, at the time of dismissal, the employer believed the employee to be guilty of misconduct, the employer had reasonable grounds for believing that the employee was guilty of that misconduct and at the time it held that belief it had carried out as much investigation as was reasonable.

20. Although the EAT in *Burchell* said that it was for the employer to establish that the test was satisfied, it is now clear from the authorities that the burden is neither on the employer or the employee but is "neutral" (*Boys and Girls Welfare Society v. McDonald* [1996] IRLR 129).

21. The employer does not have to prove that the employee was actually guilty of the misconduct. The Tribunal has to assess (on a "neutral" burden of proof) whether the employer had a genuine and reasonable belief in it, based on a reasonable investigation. Only facts available at the time of the decision to dismiss are relevant. A dismissal may be fair even if the employee is later shown not to have been guilty of the alleged misconduct. This is to be contrasted with wrongful dismissal claims, where the burden is on the employer to prove on the balance of probabilities that the employee was actually guilty of gross misconduct. The parties may also rely at trial on facts which came to light after the dismissal.

22. When considering whether an employer had a genuine belief based on reasonable grounds, the Tribunal must inevitably have regard to the material on which the employer's purported belief was based. However, the question is not whether the Tribunal would have believed the employee to be guilty based on that material, but whether the employer acted reasonably in forming that belief. The question of whether the employer acted reasonably is to be judged objectively.

23. The Tribunal must also decide (on a "neutral" burden of proof) whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v. Jones* [1982] IRLR 439). The range of reasonable responses test applies both to the decision to dismiss and to the investigation (*Sainsbury's Supermarkets Ltd v. Hitt* [2003] IRLR 23). This means that the Tribunal has to decide whether the investigation was reasonable, not whether it would have investigated things differently.

24. For the purposes of the *Burchell* test, it is irrelevant whether or not the Tribunal would have dismissed the employee if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer. The Tribunal must decide whether the employer's decision to dismiss was within the range of reasonable responses that a reasonable employer might have adopted. The Tribunal should not base its decision on its own findings of fact as to the employee's guilt or innocence, but should review the reasonableness of the decision to dismiss based on what the employer believed, and whether it had reasonable grounds for that belief based on a reasonable investigation (*Foley v. Post Office; Midland Bank plc v. Madden* [2000] IRLR 827).

25. In *Quadrant Catering Ltd v. Smith* UKEAT/0363/10, the EAT made clear that dismissal need not be the option of last resort before it will fall within the range of reasonable responses. That the employer might also have reasonably pursued other sanctions, short of dismissal, will not, in and of itself, make the dismissal outside the range of reasonable responses.

26. It is clear from the authorities that a reasonable investigation is a key part of the *Burchell* test of fairness in misconduct dismissals. The Tribunal reminds itself, once again, that it should not substitute its own view of what a reasonable investigation should be; it should ask whether the employer's actions were within the range of reasonable responses.

27. The degree of investigation required very much depends on the circumstances. The Court of Appeal in *Shrestha v. Genesis Housing Association Ltd* [2015] EWCA Civ 94 made it clear that it is not necessary for an employer to extensively investigate each line of defence advanced by an employee. What is important is the reasonableness of the investigation as a whole. The employer should assess its approach to the investigation by taking account of the strength of the prima facie case against the employee, the seriousness of the allegations and their potential to blight the employee's future.

28. It was pointed out in *Ilea v. Gravett* [1998] IRLR 497 that:

> **"At one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required, is likely to increase."**

29. In *A v. B* [2003] IRLR 405, it was stated that the employer's investigation should be particularly rigorous when the charges are particularly serious or the effect on the employee is far-reaching. Elias J made the following points:

    29.1 Serious allegations of criminal misbehaviour must always be the subject of the most careful investigation (at least where they are disputed), bearing in mind that the investigation is usually being conducted by laymen and not lawyers.

    29.2 Even in the most serious cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial. However, careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as they should on the evidence directed towards proving the charges.

29.3 This is particularly the case where, as is frequently the situation, the employee is suspended and had been denied the opportunity of being able to contact potentially relevant witnesses.

29.4 Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.

29.5 In cases that may result in dismissal, particularly where the employee has been suspended and therefore has no access to witnesses during the investigation, the investigation should not simply be a search for evidence against the employee, but should also include evidence that may point towards innocence.

30. In interpreting the statutory requirement for reasonableness, the authorities show that a requirement has developed that, in order to act reasonably, an employer must follow a fair procedure when dismissing an employee. In relation to misconduct dismissals, this includes following the Acas Code.

31. The Tribunal must take the Acas Code into account, where relevant, when deciding whether an employer has acted reasonably in relation to the procedure followed and any warnings given prior to dismissal (see section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992).

32. According to the Acas Code, before dismissing for misconduct, an employer should:

32.1 Investigate the issues.

32.2 Inform the employee of the issues in writing.

32.3 Conduct a disciplinary hearing or meeting with the employee.

32.4 Inform the employee of the decision in writing.

32.5 Give the employee a right of appeal.

33. The Acas Code recommends two particular steps in the context of conducting a disciplinary hearing:

33.1 Employers should, at the start of the hearing, explain the complaint against the employee and go through the evidence that has been gathered.

33.2 Employees should be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses.

34. Furthermore, where an employer has its own internal disciplinary procedure, a failure to follow it will often render a dismissal unfair (see *Stoker v. Lancashire County Council* [1992] IRLR 75 and *Blundell v. Christie Hospital NHS Trust* [1995] UKEAT/496/94. However, this is not inevitable, even in the case of a contractual procedure (*Westminster City Council v. Cabaj* [1996] ICR 960). It is for the Tribunal to assess whether any failure to follow an internal disciplinary procedure is so significant as to amount to unfairness (*Sharkey v. Lloyds Bank plc* UKEAT/0005/15).

35. The case of *Polkey v. AE Dayton Services Ltd* [1987] IRLR 503 established the following principles:

35.1 Where a dismissal is procedurally unfair, the employer cannot invoke a “no difference rule” to establish that the dismissal is fair, in effect arguing that the dismissal should be regarded as fair because it would have made no difference to the outcome. This means that procedurally

unfair dismissals will be unfair (save in cases where a fair procedure would have been utterly futile).

35.2 Having found that the dismissal was unfair because of the procedural failing, the Tribunal should consider reducing the amount of compensation to reflect the chance that there would have been a fair dismissal if the dismissal had not been procedurally unfair (commonly referred to as the *Polkey* deduction).

36. The key principles in assessing procedural fairness in misconduct cases are as follows:

36.1 The employee should know the case against them.

36.2 The employee should know that they are at risk of dismissal.

36.3 The employee should be allowed to make representations (usually at a disciplinary hearing).

36.4 The employee should be allowed a right of appeal.

37. An important aspect of procedural fairness in misconduct cases is that the employee should know the case against them (*Byrne v. BOC Ltd* [1992] IRLR 505). This is important both at the stage that charges are put, and when the employee is provided with evidence said to support the allegations.

38. Paragraph 9 of the Acas Code provides as follows:

> **"If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."**

39. In *Hussain v. Elonex plc* [1999] IRLR 420, the Court of Appeal held that failure to disclose witness statements to an employee will not be fatal, so long as the employee knows the substance of the case against them:

> **"There is no universal requirement of natural justice or general principle of law that an employee must be shown in all cases copies of witness statements obtained by an employer about the employee's conduct. It is a matter of what is fair and reasonable in each case."**

40. This being a case in which the Respondent's dismissal decision-maker, Mr Ed Hewitt, took the view that it was necessary to preserve the anonymity of those individuals who had made complaints about the Claimant's conduct, the Tribunal reminded itself that it should consider why there was a need for anonymity and carry out a balancing act between that perceived need and the need of the employee being investigated to know the details of the case against them (*Surry County Council v. Henderson* UKEAT/0326/05).

41. When considering whether a procedural flaw affects fairness, it is necessary for the Tribunal to consider the flaw in context, in the light of the whole facts and circumstances, and ask whether or not the employee was unduly prejudiced. Procedural issues do not sit in a vacuum and should be considered together with the reason for dismissal, in assessing whether, in all the circumstances, the employer acted reasonably in treating the reason as a sufficient reason for dismissal (*Taylor v. OCS Group Ltd* [2006] IRLR 613).

42. This being a case in which the reason given by the Respondent for dismissal was "gross misconduct", the Tribunal directs itself as follows in relation to that term. The term "gross misconduct" connotes the most serious types of misconduct warranting instant dismissal without any previous warnings. For the purposes of wrongful dismissal claims, gross misconduct may also be used to justify dismissal without notice.

43. The Acas Code states, at paragraph 23:

> **"Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct."**

44. Gross misconduct has been described as conduct that "so undermines the relationship of trust and confidence … that [the employer] should no longer be required to retain [the employee] in his employment" (*Neary v. Dean of Westminster* [1996] IRLR 288). What constitutes gross misconduct is a mixed question of fact and law. In *Sandwell & West Birmingham Hospitals NHS Trust v. Westwood* UKEAT/0032/09, the EAT held that gross misconduct involves either deliberate wrongdoing or gross negligence. In *West v. Percy Community Centre* UKEAT/0101/15, the EAT noted that "gross misconduct" is a label applied by the courts and tribunals in determining contractual issues. Where conduct was alleged as a ground of dismissal in an unfair dismissal claim, the Tribunal does not have to consider whether it was gross misconduct before it can reach a conclusion as to fairness. The two concepts are separate but closely related.

45. In *Hope v. British Medical Association* EA-2021-000187, the EAT held that whether the dismissal was fair under section 98(4) of the Act depended on whether the employer had acted reasonably in treating the conduct as a sufficient reason for dismissal. It did not depend on characterising the conduct as "gross misconduct". Whether conduct amounted to gross misconduct was a separate contractual question, although it was one of the circumstances that could be taken into account when determining the statutory question under section 98(4).

46. In *Mbubaegbu v. Homerton University NHS Foundation Trust* UKEAT/0218/17, the EAT held that there need not be one single act, or even single allegation, forming the basis of the finding of gross misconduct. As a matter of law, it is permissible for an employer to rely on a serious of acts, none of which, taken alone, would be capable of amounting to misconduct.

47. This being a case in which the Respondent submits that had a fair process been followed, the Claimant would have been dismissed in any event, the Tribunal directs itself as follows in respect of the *Polkey* principle. In the case of *Polkey*, the House of Lords stated that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome. This allows the Tribunal to make a realistic assessment of loss according to what might have occurred in the future. The chances of the actual employer, not a hypothetical reasonable employer, dismissing the employee have to be assessed. This requires consideration of the employer's likely thought processes and the evidence that would have been available to it. The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened using its common sense, experience and sense of justice (*Software 2000 Ltd v. Andrews & others* UKEAT/0533/06).

48. Where a Tribunal finds, in a conduct case, that no reasonable employer could have fairly dismissed the employee, there is no need to go through a detailed analysis of the *Software 2000* process before ruling out a *Polkey* deduction (*Jagex Ltd v. McCambridge* UKEAT/0041/19). In *Jagex*, the EAT found that it was inherent in the Tribunal's reasoning that following a fair procedure would not have made the dismissal fair, and this was sufficient to amount to the correct approach.

49. The evidence relied on by the Tribunal when making a *Polkey* deduction, if one is to be made, need not emanate solely from the employer's evidence or cross-examination of the claimant's witnesses. Rather the Tribunal must have regard to all the evidence when making its assessment, including any evidence from the claimant. However, there must be some evidence to support a *Polkey* deduction. In *Compass Group plc v. Ayodele* [2011] IRLR 802, the EAT upheld a tribunal's refusal to make a *Polkey* deduction where the employer had not made any submissions, adduced any evidence, or cross-examined any witnesses as to the period of loss. The EAT held that, while it is for the employee to prove their loss, it is for the employer to put forward any arguments under *Polkey* and to support them with evidence.

50. There may be varying degrees of evidence on which the Tribunal may base its conclusion. In some cases, it may be possible for the Tribunal to conclude, on the balance of probabilities, that the employee would or would not have been dismissed fairly. In other cases, there may be insufficient reliable evidence to enable the Tribunal to reach such a conclusion, but there may be sufficient evidence for it to conclude that there must have been some realistic chance that the employee would have been dismissed fairly (*Wilkinson v. Driver and Vehicle Standards Agency* [2022] EAT 23).

51. The Tribunal may not refuse to consider a *Polkey* deduction simply on the basis that it considers the employer's behaviour to be unreasonable, as this would have a punitive effect on the employer.

52. There are no formal limits around the nature of a *Polkey* deduction. The Tribunal's duty is to award what is just and equitable. Depending on the facts, a *Polkey* deduction may be expressed as any of the following:

    52.1 The Tribunal may find that it is certain (a 100% chance) that the employee would have been dismissed by the end of a

certain period (and therefore award compensation only up to that date).

52.2 The Tribunal may find that the employment relationship would have continued unaffected for a certain period but thereafter there was a percentage chance that the employee would have ceased to be employed.

52.3 The Tribunal might not identify any set period of continued employment but instead might assess the percentage likelihood of the employment terminating.

53. In addition to contending that this is a case, in the event of a finding of unfair dismissal, that there should be a *Polkey* deduction, the Respondent also contends, separately from its *Polkey* submissions, that the Claimant's conduct contributed to his dismissal.

54. The basic award may be reduced where a claimant's conduct before dismissal is such that it would be just and equitable to reduce the award. There is no need for the conduct to have caused or contributed to dismissal or for the employer even to have known about it at the time of dismissal.

55. In relation to the compensatory award, where the Tribunal finds that the dismissal "was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding" (section 123(6) of the Act). This creates a mandatory duty on the Tribunal to consider making a reduction for contributory fault in any case where it has found contributory conduct by the employee or has found facts which could appropriately support such a conclusion.

56. The reduction for contributory fault can be anything up to and including 100%.

57. In *Nelson v. BBC (No. 2)* [1979] IRLR 346, the Court of Appeal set out three factors that must be present for the compensatory award to be reduced for contributory fault:

    57.1 The claimant's conduct must be culpable or blameworthy.

    57.2 It must have actually caused or contributed to the dismissal.

    57.3 The reduction must be just and equitable.

58. In *Steen v. ASP Packaging Ltd* UKEAT/23/13, the EAT held that the Tribunal must consider the following four questions:

    58.1 What was the conduct which was said to give rise to possible contributory fault?

    58.2 Was that conduct blameworthy, irrespective of the employer's view on the matter?

    58.3 For the purposes of section 123(6), did the blameworthy conduct cause or contribute to the dismissal?

    58.4 If so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

59. In assessing any reduction for contributory fault, the Tribunal must consider in isolation whether the claimant's conduct was blameworthy and not be influenced by the respondent's conduct. Any conduct on the part of a claimant can be taken into account in determining the extent of contributory fault, providing it is blameworthy and contributed in some way to the dismissal. The contributory conduct does not have to be the principal reason for dismissal as long as it was one of the reasons.

60. The Tribunal also directed itself that it should not ignore mitigating factors when deciding on contributory fault.

61. Lastly, when the Tribunal considers the question whether a *Polkey* deduction should be made and the question whether a reduction should be made for contributory fault, as is contended in this case by the Respondent, the Tribunal directed itself that it can make a *Polkey* deduction and a contributory fault reduction in the same case, as they are intended to cover different things. A *Polkey* deduction is intended to assess the amount of loss attributable to the unfair dismissal, and should be considered first. Contributory fault is intended to reflect the amount by which compensable loss should be reduced to take account of the employee's conduct. If both a *Polkey* deduction and a contributory fault reduction is to be made, the Tribunal must clearly explain why both are being made and the basis for each. It is also necessary to avoid any element of double-counting of the same factors in a way which is unfairly detrimental to the claimant (*Wilkinson v. Driver and Vehicle Standards Agency* [2022] EAT 23).

The evidence

62. The Tribunal heard oral evidence from three witnesses. For the Respondent, the Tribunal first of all heard from Mr Ed Hewitt. Mr Hewitt is the Respondent's Director of Sales and from June 2018 (at the start of the Claimant's employment) to October 2022 he had been the Claimant's line manager. It was Mr Hewitt who took the decision to dismiss the Claimant following the disciplinary hearing that took place on the 20th March 2023. Mr Hewitt's witness statement, which he signed and dated at the start of his oral evidence, stood as his evidence-in-chief and he was then cross-examined by Mr Pollitt.

63. The second witness called by the Respondent to give oral evidence was Mr Richard Watson. He is the Respondent's Managing Director and it was he that conducted the Claimant's internal appeal against the decision to dismiss him. Mr Watson's witness

statement, which he signed and dated at the start of his oral evidence, stood as his evidence-in-chief and he was then cross-examined by Mr Pollitt.

64. The last person from whom the Tribunal heard oral evidence was the Claimant. His witness statement, which he signed and dated at the start of his oral evidence, stood as his evidence-in-chief and he was then cross-examined by Miss Elves.

65. In addition to hearing oral evidence from the witnesses named above, the Tribunal was also provided with a 327-page main hearing bundle. In addition to the main hearing bundle, a supplemental hearing bundle was produced for the Tribunal, which ran to 23 pages. During the course of the hearing a written agenda for a meeting by the Respondent's Advisory Board on the 15th December 2022 was disclosed by the Respondent and was added to the supplemental hearing bundle, thereby increasing the page count of that bundle to 61 pages. The Tribunal read and considered the documents within the main and hearing bundle to which the parties made reference during the hearing. The page numbers of those documents were as follows:

17 (main bundle);
23 (main bundle);
73-74 (main bundle);
117-127 (main bundle);
160 (main bundle);
164-165 (main bundle);
166 (main bundle);
170-183 (main bundle);
191-195 (main bundle);
197-232 (main bundle);
241-243 (main bundle);
279-282 (main bundle);
287-289 (main bundle)
321-327 (main bundle);
16-17 (supplemental bundle);
21-23 (supplemental bundle).

66. Save for the pleadings, which were read and considered by the Tribunal, the Tribunal did not read and consider documents in the hearing bundles to which they were not taken by the parties during the final hearing.

Evaluation of the evidence and findings of fact

67. The Claimant began his employment with the Respondent on the 7th June 2018. Though the quotation is lengthy, it is helpful at this stage, in light of the issues to come, to set out the following provisions from the Respondent's "Employee Handbook", which was available to the Claimant from the outset of his employment, relating to capability and disciplinary procedures in order to compare the Respondent's actual treatment of the Claimant with the Respondent's own written procedures for dealing with capability and disciplinary issues.

> **PERFORMANCE APPRAISAL**
> **Each employee will be formally appraised on an annual basis at the end of the calendar year. This will involve an exchange of views between the employee and their immediate manager. A written summary will be produced which is intended to be a fair representation of the dialogue and will be referred to as a working document throughout the intervening periods.**
> **…**
> **Appraisal interviews should be carried out by the job holder's immediate manager on a one-to-one basis. Guidelines will be given to managers and employees on what to expect.**
> **…**
> **Approximately 4 weeks prior to the appraisal interview, managers should inform their team informally that appraisals are due. Employees will be given a preparation form for completion and to see the appraisal form to anticipate the types of questions to be asked.**
>
> **CAPABILITY**
> **This procedure runs parallel with, but is not part of, the disciplinary procedure. The Company recognises that poor job performance and incapability cannot be treated as 'disciplinary offences'.**
> **The first stage in dealing with poor performance is to determine whether the matter is one of capability or misconduct. Incapability is where the employee has received all necessary training but still cannot achieve a satisfactory level of performance through no fault of their own, for example, as a result of poor health. If on the other hand, the employee fails to reach the required standard of performance as a**

result of carelessness, negligence or lack of effort this will be treated under the disciplinary procedure as misconduct.

Initial Counselling Session

Your Line Manager will investigate the cause of your poor performance. Causes could include, for example, lack of communication or problematic working relationships. The manager carrying out this initial counselling will give you factual examples of your unsatisfactory performance and you will be asked for your explanation, which will subsequently be followed up and checked where appropriate.

The aim of the discussion will be to resolve the shortcomings in performance and encourage improvement and to sustain it. If required, the manager will confirm the discussion in writing. Where the reason for unsatisfactory performance is lack of the required skills, you will, where practicable, be assisted through training and be given reasonable tie to reach the required standard of performance …

Formal Warnings

Where, despite support, you are unable to reach the required standard of performance, the consequence of any failure to meet this standard should be explained to you in writing as follows:

First written warning …

Final written warning …

Dismissal …

Appeals …

DISCIPLINE AND DISMISSAL

… The following procedure will be applied fairly in all instances where disciplinary action is regarded by the management as necessary save to the extent that a minor reprimand is given for any minor act of misconduct committed by an employee.

The Company reserves the right to implement the procedure at any stage as set out below taking into account the alleged misconduct of an employee. You will not usually be dismissed for a first disciplinary offence.

This procedure is entirely non-contractual and does not form part of your contract of employment.

…

In cases of minor misconduct or unsatisfactory performance the manager will discuss the issue with you, informally to improve the situation. However, if the matter is more serious or where informal discussions have not resolved the situation then formal action will be taken.

…

Investigation

Any matter that is reasonably suspected or believed to contravene any of the Company's policies or rules or may otherwise be a disciplinary matter will be investigated promptly to establish the facts of the case.

Invitation to Disciplinary Hearing

If, upon completion of an investigation, there are reasonable grounds to believe that you have committed an act of misconduct, you will be invited to attend a disciplinary hearing. In the event of a disciplinary hearing taking place the Company will:

- **give you a minimum of two working days' advance notice of the hearing;**
- **tell you the purpose of the hearing and that it will be held under the Company's disciplinary procedure;**
- **explain your right to be accompanied at the hearing by a work colleague or trade union official …;**
- **give you written details of the nature of the alleged misconduct, the possible consequences; and**
- **provide you will all relevant information (which should include statements taken from any fellow employees or other persons that the Company intends to rely upon against the employee) not less than two working days in advance of the hearing.**

…

<u>The Disciplinary Hearing</u>

A disciplinary hearing will normally be conducted by your line manager together with another Company representative who will take notes of the meeting. If an investigation was carried out, then the person who carried out that investigation will not be directly involved in the disciplinary hearing, although they may present any supporting facts and material to the disciplinary hearing. You will be entitled to be given a full explanation of the case and be informed of the content of any statements provided by witnesses … The Company may adjourn the disciplinary proceedings if it appears necessary or desirable to do so (including for the purpose of gathering further information).

…

<u>GROSS MISCONDUCT</u>

Gross misconduct is misconduct of such a serious and fundamental nature that it breaches the contractual relationship between you and the Company. In the event that you commit an act of gross misconduct, the Company will be entitled to summarily terminate your contract of employment without notice or pay in lieu of notice.

The Company considers the following matters as amount to gross misconduct:

- **…**
- **wilful refusal to obey a reasonable management instruction or serious insubordination;**
- **…**

This list is not exhaustive.

Other acts of misconduct may come within the general definition of gross misconduct.

…

<u>INVESTIGATION</u>

The Company will follow this investigation procedure alongside the disciplinary procedure. The purpose of the separate investigation

procedure is to allow any alleged or suspected misconduct on the part of an employee to be investigated impartially. All the facts of the particular case will be established before any decision is taken as to whether or not there are sufficient grounds to invoke the disciplinary procedure.

When to Carry Out an Investigation

An investigation will be carried out to establish the facts of the case. In some cases this may involve holding an investigatory meeting with employee. The investigation will only include collating evidence that will be used at the disciplinary hearing – i.e. where the matter is routine or straightforward, there will be no need to conduct a separate investigation (for example, if the problem relates to repeated poor timekeeping and there is a clear record of the occasions when you arrived late for work).

The investigation procedure should not be used in cases where it is thought that your job performance may be unsatisfactory. The Company's capability procedure will be applicable in these circumstances.

Who will Carry Out the Investigation?

If the disciplinary procedure is invoked following an investigation, then were practicable the person who carries out the disciplinary procedure will not be the same person who conducted the investigation.

…

The Actual Investigation Procedure

In investigating your alleged misconduct, the manager will:

- **examine any relevant written records, for example previous disciplinary warnings, appraisal reports, and manager's notes;**
- **…**
- **talk privately and in confidence to any employees who may have evidence relating to your alleged misconduct or who may have been witness to any relevant incident, and produce an accurate written summary of any such evidence;**
- **seek the consent of any such employee to use the summary of the evidence so collated as a signed written statement;**
- **conduct an investigatory interview with you, making sure that you know that the purpose of the interview is to establish the facts and that the interview is not part of the Company's disciplinary procedure;**
- **take an objective and balanced view of any information that comes to light, and avoid allowing personal views, opinions, and likes or dislikes to influence the assessment of your conduct.**

…

Following the Investigation

At the conclusion of the investigation, the person conducting the investigation will recommend whether or not it is appropriate for disciplinary action to be taken against you. You will be notified in writing of the decision.

> **Where it is decided to start disciplinary action, you will be given full details in writing of the case against you and invited to attend a disciplinary hearing.**
> **Witness Statements**
> **Where disciplinary proceedings are started following an investigation and where evidence about your alleged misconduct has been obtained from third parties in the form of written statements, either the statements themselves or a summary of their content will be given to you at the time you are invited to the hearing. However, the Company reserves the right to conceal the identity of any or all of the parties if there is a legitimate reason to do so, such as where there may be a risk to the safety of others if the identity of witnesses is disclosed. In those circumstances, the Company will consider providing a summary of the information to you.**

68. There was no dispute between the parties that for the first few years of the Claimant's employment with the Respondent there were no concerns about his performance or conduct .

69. There was, however, a dispute between the parties as to the scope of the Claimant's responsibilities for managing sales with customers in his region. In particular, there was a dispute as to whether the Claimant was responsible for managing sales at the sites of two customers, namely Kepak and Dunbia. In paragraph 21 of his witness statement, Mr Hewitt stated that he had introduced the Claimant to Kepak but "*they would end up coming to me directly because they were used to the sort of service that they had come to expect, having worked with me previously, and* [the Claimant] *was unwilling or unable to step up to the responsibility.*" There was no evidence from Kepak as to why they returned to Mr Hewitt following the introduction of the Claimant to them. It seemed highly likely to the Tribunal (bearing in mind the contents of the minutes of the Respondent's Advisory Board meeting on the 8th October 2021) that, over time, Kepak had developed a strong relationship with Mr Hewitt and they simply preferred to deal with him rather than the Claimant notwithstanding Mr Hewitt's introduction of the Claimant to them. The Tribunal was, therefore, unable to find that the Claimant was responsible for managing sales at Kepak. A practice had developed, which Mr Hewitt appeared to have condoned, of Kepak continuing to deal with Mr Hewitt rather than the Claimant. In the judgment of the

Tribunal, it was unfair to criticise the Claimant for that state of affairs.

70. As to Dunbia, there was very little evidence before the Tribunal as to where responsibility lay for managing sales to them. It is right to say that some of the people interviewed by Mr Watson as part of the internal appeal process following the Claimant's dismissal commented upon the goings-on at Dunbia, but for the reasons set out below, it is the judgment of the Tribunal that those interviews are to be treated with caution. Given that it was such a fundamental part of the Respondent's case, in respect of the issue of contributory fault, as to where responsibility lay for managing sales to Kepak and Dunbia, it was a surprise to the Tribunal that the Respondent failed to provide a clear evidential basis for its criticisms of the Claimant's performance in relation to those customers. There was nothing in writing specifying that the Claimant was responsible for those customers and there had been no written warnings or criticisms of the Claimant by the Respondent, prior to his dismissal on the 20th March 2023, to the effect that there were failings on his part in respect of his treatment of those customers.

71. The first documented concerns about the Claimant's performance appeared in the minutes of a meeting by the Respondent's Advisory Board on the 8th October 2021. These were meetings that were attended by Mr Watson but not by Mr Hewitt save for a meeting that took place in December 2023 (following the Claimant's dismissal). No minutes were taken at that December 2023 meeting because the usual minute-taker was not available for the meeting. The Tribunal was surprised that minutes of the December 2023 were not taken by someone else. It was the view of the Tribunal that no satisfactory explanation was provided by the Respondent as to why no minutes existed for that meeting following the Claimant's dismissal.

72. The minutes of the Advisory Board's meeting on the 8th October 2021 contained the following passage concerning the Claimant's performance:

> **"*Simon Millar's lack of confidence was a big contrast to his peers.***
> - ***Patrick and Darius recalled a confident or capable Simon pre-pandemic.***
> - ***Richard noted that when Simon brings in teammates, he often takes a back seat and lets the teammate run the meeting (e.g. Customer Center)***
> - ***Darius noted some poor communication from Simon recently. A recent test was unsuccessful and Darius did not know what happened. Simon did not appreciate the need to understand why the test was unsuccessful.***
> - ***Richard has not given up on Simon; we want him to succeed.***
> - ***Simon is not lazy; he is doing the work; he is often doing it alone and failing. He needs to embrace help.***
> - ***Simon has Ed's former territory. Ed has spent a lot of time with him lately.***
> - ***Simon has been here 3.5 years and thinks that he is doing well.***
> - ***Sold: 1 new Vemag and 18 Seydelmann (all Morrison's).***
> - ***Ed needs to travel with Simon more; Daris said he has an opportunity to ride-along with Simon in the coming period with a scheduled visit to Morrison's.***
> - ***Richard and Ed remain committed to helping Simon. Simon needs to know that Richard and Ed are concerned about his performance and are committed to helping him succeed.*****"**

73. The "Richard" referred to in the minutes is Mr Richard Watson and the "Ed" referred to is Mr Ed Hewitt. Despite the concerns that were raised at the meeting of the Advisory Board on the 8th October 2021 about the Claimant's performance, no action was taken by the Respondent under its written capability procedures at any stage prior to sending the Claimant the invitation to the disciplinary hearing on the 9th March 2023.

74. The evidence from Mr Hewitt was that the Claimant was spoken to informally by Mr Hewitt and the line manager who replaced Mr Hewitt (namely, Mr Adam Hodson) but no written record was made of those discussions with the Claimant.

75. The evidence from the Claimant was that there had been no discussions with him about his performance or his conduct by anyone, in a management position or otherwise, regarding his performance or conduct until he received the invitation to the disciplinary hearing on the 9th March 2023. In the absence of any written evidence whatsoever in support of the Respondent's case that the Claimant had been spoken to in the past about his performance and conduct, the Tribunal accepted the Claimant's case that nobody had ever approached him to discuss or complain about his performance or conduct. The Tribunal accepted the Claimant's case that the invitation dated the 9th March 2023 to the disciplinary hearing came as a bolt from the blue.

76. There was a further Advisory Board meeting on the 22nd April 2022 at which the Claimant's name cropped up again. The minutes contain the following entry regarding the Claimant's performance:

> **"*Millar – no progress, happening around him. Have all his supporters now disappeared? What does Fitch think?***

77. The next meeting of the Advisory Board was on the 14th October 2022. The Claimant's performance was discussed again at that meeting and the minutes contain the following entry:

> **"*Simon – still a concern; does not prevent sales; guys like him; no new customers; RW not ready to cut him (timing); ST's position was unclear.*"**

78. Mr Watson was asked what was meant when it was recorded in the minutes that he, Mr Watson, was "*not ready to cut*" the Claimant and the relevance of the reference in the minutes to "*timing*". Mr Watson stated that "*cut him*" was shorthand for dismissing the Claimant. He stated that there had been a discussion at the meeting about the Claimant's performance and whether he should be dismissed and the decision was to give the Claimant more time to see if his performance improved. No action, however, was taken by the Respondent under its written capability procedures.

79. The last meeting of the Respondent's Advisory Board prior to the Claimant's dismissal was a meeting that took place on the 3rd March 2023. That was six days before the Claimant was invited to the disciplinary hearing by Mr Hewitt on the 9th March 2023. The minutes of the March meeting contain the following entry regarding the Claimant:

> **"*Millar will hit his numbers, but is of no value to the business.***
> ***…***
> ***Need to … replace***
> ***…***
> ***Simon"***

80. In his oral evidence to the Tribunal, Mr Watson stated that there had been a discussion at the March 2023 meeting about replacing the Claimant. Mr Watson was reluctant to accept that a decision was taken at that meeting to get rid of the Claimant but the Tribunal was satisfied that that was the case. The Tribunal found that a decision was made at the Respondent's Advisory Board meeting on the 3rd March 2023 that the time had come to dismiss the Claimant due to ongoing concerns about his performance.

81. What followed, in the judgment of the Tribunal, was a quite brazen sham disciplinary procedure by the Respondent in which it had been pre-determined by the Respondent that the Claimant would be dismissed, that decision having been taken at the Advisory Board meeting on the 3rd March 2023.

82. Mr Watson, who had been present at the Advisory Board meeting on the 3rd March 2023 when it had been decided that the Claimant would be dismissed, stated in his written evidence that Mr Hewitt was appointed to investigate the Claimant's "conduct". Why the Claimant's conduct fell to be investigated at that stage was not clear to the Tribunal given that it was clear from the Advisory Board's minutes of their meetings that the concerns had been about the Claimant's performance and not his conduct. Mr Watson went on to say in his written evidence that Mr Hewitt "*considered a series of reports of different individuals within the business, to*

enable him to get a fair picture of [the Claimant's] *conduct and behaviour*". That evidence was wrong and misleading when considered in the light of Mr Hewitt's evidence and the concessions that he made that he had not, in fact, carried out anything resembling an investigation into the Claimant's conduct.

83. In his written evidence, Mr Hewitt stated as follows:

> **14. Whilst I had been aware of friction between [the Claimant] and certain members of the team, the report from board level was that there was a general consensus that [the Claimant]:**
> **a. lacked the technical knowledge of Reiser products to deal confidently with customers;**
> **b. would purposely mislead others about how much involvement he had on projects;**
> **c. was unwilling to get involved with some key potential customers within his territory, causing a big loss in revenue to the business; and**
> **d. was unavailable or unwilling to assist the service team.**

84. It was not clear to the Tribunal what "*report from board level*" Mr Hewitt was referring to in his written evidence. The minutes from the Advisory Board meetings that had been disclosed by the Respondent contained none of the "conduct" issues mentioned by Mr Hewitt in paragraph 14 of his witness statement. No meetings from any other Board meetings having been disclosed by the Respondent, it was simply unclear where, and from whom, Mr Hewitt had obtained this information. Mr Watson, in his oral evidence, was not able to cast any light upon it.

85. The reference by Mr Hewitt to a "report" from the Board would suggest a formal written document or some formal discussion but there was nothing in the documentary evidence that supported Mr Hewitt's recollection, apparently from his memory, that the Board had had any concerns about the Claimant's conduct as opposed to his performance. In the absence of any such documentary evidence from the Board, the Tribunal was unable to find that Mr

Hewitt's recollection as to the concerns about the Claimant's conduct in March 2023 was reliable.

86. If there had been genuine concerns by the Advisory Board or any other Board about the Claimant's conduct, it seemed to the Tribunal that it would have been likely that they would have been well documented. In the absence of any documented concerns by any of the Respondent's Boards about the Claimant's conduct, the Tribunal found that the Respondent did not have genuine concerns about the Claimant's conduct in March 2023. There had undoubtedly been concerns, discussed at the Advisory Board meetings, about his performance but not his conduct.

87. It remained, therefore, a mystery to the Tribunal as to where Mr Hewitt got his information from concerning the Claimant's conduct that he referred to in paragraph 14 of his witness statement but, having been given that information from some unknown source he went on to say in paragraph 15 of his witness statement that it was decided that he should "*carry out the investigation and deal with a disciplinary hearing*". Mr Hewitt was making it clear, by what he said in paragraph 15 of his witness statement, that there was going to be a disciplinary come what may. The possibility that Mr Hewitt's investigation might result in a decision that a disciplinary hearing was not necessary was not something that Mr Hewitt contemplated. He did not say that he would deal with "*any*" disciplinary hearing. He was to deal with a disciplinary hearing. That was not surprising to the Tribunal given its findings that it had been pre-determined by the Respondent that the Claimant was to be dismissed.

88. Having been tasked with carrying out an investigation into misconduct allegations against the Claimant (it being unclear to the Tribunal for the reasons set out above as to where those allegations had come from) and the subsequent disciplinary hearing, the Tribunal was keen to hear what sort of investigation was carried out by Mr Hewitt before he dealt with the disciplinary

hearing. It soon became clear, however, that Mr Hewitt did not carry out an investigation at all.

89. In paragraph 16 of his witness statement, Mr Hewitt stated:

> **16. In terms of the investigation, the evidence was already there. I had previously been approached by a range of individuals who had complained about [the Claimant] and his conduct, and so it was these reports that I used to consider the disciplinary action to take.**

90. There were a number of problems with paragraph 16 of Mr Hewitt's witness statement. Firstly, it was misleading for him to say that the "*evidence was already there*". What he was referring to as "*evidence*" was his memory of discussions with certain individuals about the Claimant. There was no other evidence that was "*already there*". There was no documented evidence of any kind. The second problem with paragraph 16 of Mr Hewitt's witness statement is that it was clear that he was completely reliant upon his memory of verbal complaints about the Claimant's conduct that had been made in the past. He gave one historical example concerning a project that had been carried out in 2020 and some undated complaints that had allegedly been made by Mike Carrington (a packaging specialist) and Adam Hodson (the Claimant's most recent line manager) but no other details whatsoever as to who had complained about the Claimant, when the complaints had been made or precisely what the complaints had been about. His evidence as to these alleged complaints was generalised and vague. That was not too surprising given the fact that Mr Hewitt accepted in his evidence that he had not made any note or kept any record of the complaints that he had received about the Claimant.

91. The third problem with paragraph 16 of Mr Hewitt's witness statement related to his use of the expression "*these reports*". Regrettably, that too was misleading because it transpired that

what he was referring to was ad hoc verbal complaints and not anything more formal such as a written report or written complaint.

92. The case presented by Mr Hewitt was that it was his memory of these verbal complaints made about the Claimant that formed his investigation into the Claimant's conduct.

93. Against that background it was not surprising that Mr Hewitt conceded in his oral evidence that he did not carry out a 'new' investigation following his appointment as an investigator into the Claimant's conduct. In the judgment of the Tribunal, that was a proper and fair concession for Mr Hewitt to have made. His case was that the verbal complaints that had been made to him about the Claimant's conduct were sufficient, without more, for him to move to the next stage, which was the disciplinary hearing. In addition to failing to carry out an investigation into the Claimant's conduct, Mr Hewitt did not carry out any investigatory interview with the Claimant. His failure to carry out an investigation and his failure to carry out an investigatory interview amounted to blatant non-compliance with the Respondent's own written investigatory procedures. No satisfactory reason was advanced by Mr Hewitt as to why the Respondent's written investigatory procedures were disregarded.

94. Having reached the conclusion that he had a sufficient bank of memories from which he could dredge up the verbal complaints that had been made about the Claimant's conduct over time (in the case of the historical example, going back 3 years) and his own memories of problems he had personally experienced with the Claimant, Mr Hewitt decided to invite the Claimant to a disciplinary hearing. His letter to the Claimant is dated the 9th March 2023 and it stated as follows:

> **Invitation to Formal Disciplinary Meeting**
> **I write to invite you to a meeting with me at 13:00 on Thursday 16th March 2023 … At the meeting we will discuss concerns that I continue to have regarding your conduct. You will recall that we have discussed such matters on an informal basis on various occasions in**

the past. However, following a number of further reports, I now consider it is necessary to address this issue formally.
The purpose of the meeting is to discuss your working relationships with other members of staff to understand why there appears to be a breakdown of communication and collaboration, and to consider if and how this can be resolved.
During the meeting we will discuss the following matters:

1. **Your unwillingness to communicate effectively with certain members of management and other members of staff.**
2. **Your unwillingness to collaborate with your team, and wider management, leading to decreased productivity and morale.**
3. **Your treatment of and/or communication with other team members.**
4. **A potential breakdown in your relationship with key members of the business and team.**
5. **A potential breakdown in your relationship with Reiser UK suppliers.**
6. **Unwillingness to build and develop relationships with key customers within your territory.**

Please find enclosed copies of the following documents that will be considered at the meeting:

- **Reiser Mission Statement.**

If there are any other documents that you consider are relevant to these matters and which I should consider at the meeting, please let me know.
You are entitled to be accompanied …
After discussing the concerns with you at the meeting and reviewing any further relevant information, I will consider and confirm what (if any) action should be taken. I will confirm my decision to you in writing after the meeting.
If proven, these allegations could amount to misconduct or poor performance and potentially gross misconduct. It is therefore possible that the hearing could result in a range of sanctions, including a formal written warning, the implementation of a performance improvement plan and/or dismissal.
Due to the serious nature of some of the allegations you are suspended from work until the meeting date to enable us to complete a thorough investigation. As these allegations may constitute gross misconduct, I must advise you that this could result in your dismissal from Reiser.
…
Please be aware that this is a suspension pending investigation and, as such, is not a disciplinary action. The overriding objective of the investigation is to establish the facts and reach a resolution.

95. Given that Mr Hewitt was working from memories of verbal complaints that had been made about the Claimant over time and his memory of his own dealings with the Claimant, it is not too surprising that the invitation to the disciplinary hearing was vague. It is also not surprising that the Claimant, upon reading the letter, would not have a clear understanding of the misconduct that was being alleged against him. Given the lack of detail given by Mr Hewitt in his letter inviting the Claimant to the disciplinary hearing, it was hardly surprising that the Claimant's solicitors, who had been instructed by the Claimant after receipt of Mr Hewitt's letter, wrote to the Respondent in the following terms:

> **"… It is clear that Reiser UK has failed to adequately set out the allegations facing our client, or to provide him with any evidence for him to consider ahead of the meeting. This is unreasonable and a breach of the Acas Code of Practice.**
> **From our client's perspective it remains to be seen as to what, if any investigation has been carried out[1] …**
> **On our client's behalf we must now request the <u>postponement</u> of the meeting, so that the complaints against our client can be more fully particularised as per our client's request and a proper investigation carried out if it is considered that the complaints have any merit at all."**

96. The Respondent's solicitors responded as follows to that request for details of the complaints made against the Claimant:

> **We write in response to your letter of today's date …**
> **In the circumstances, our client is willing to postpone the disciplinary hearing until <u>3pm on Monday 20 March 2023</u>** …
> **We consider that Mr Millar has ample detail of the allegations to allow him to prepare for the hearing and further detail will be discussed with him at the hearing as necessary …**

97. The Claimant's request for details of the complaints alleged to have been made against him was ignored and the disciplinary hearing proceeded without any details being given to the Claimant. There was an opportunity for the Respondent to have said to the Claimant's solicitors that there had been no investigation into the Claimant's conduct and that the disciplinary proceedings were

[1] It being unbeknownst, at that stage, that Mr Hewitt had not carried out an investigation.

founded upon Mr Hewitt's memories of verbal complaints made about the Claimant over time and his own dealings with the Claimant but that opportunity was not taken.

98. The disciplinary hearing proceeded on the 20th March 2023. The decision to dismiss the Claimant had, the Tribunal is satisfied, already been made by that date. Given that the Respondent had not provided the Claimant with details or clarification of the allegations of misconduct made against him, it is not surprising that the Claimant was defensive during the disciplinary hearing. That was interpreted by the Respondent as unwillingness on the part of the Claimant to participate in a discussion about his conduct whereas the reality was that the Claimant did not know, because it had not been made clear to him by the Respondent, what allegations of misconduct he faced. The Tribunal took the view that it would have been difficult for the Claimant to engage when it had not been made clear to him what it was that he was being required to engage with.

99. It is regrettable to note that during the disciplinary hearing, Mr Hewitt misled the Claimant. Mr Hewitt stated that the Respondent had "*written and verbal evidence*" relating to the Claimant's conduct but that was wrong. There was no written evidence. It was misleading of Mr Hewitt to say that there was. This was a disciplinary hearing that was proceeding solely on the basis of what Mr Hewitt remembered from past conversations he had had with other people and his memory of his own dealings with the Claimant. Mr Hewitt had not even made any written notes of those conversations or verbal complaints after being tasked to investigate the Claimant's conduct. He was proceeding entirely on the basis of what he could remember about complaints concerning the Claimant's conduct and his memory of his own dealings with the Claimant.

100. Another unsatisfactory aspect of Mr Hewitt's conduct of the disciplinary hearing was that he was not willing to give the Claimant the names of people who, it was alleged, had complained about the Claimant. He stated: "*I am not prepared to name names on the basis of a duty of care*". It is not clear to the Tribunal what he meant by that. As he had not carried out any investigation, he had not been made aware that any witness wished to remain anonymous. He had not spoken to any potential witness following his appointment as investigator into the Claimant's conduct and so he did not know whether any potential witness wished to remain anonymous. Furthermore, no allegation has ever been made against the Claimant that he had ever used or threatened violence to any person or had exhibited intimidatory behaviours towards any colleagues. In the judgment of the Tribunal there was no satisfactory reason why the Claimant could not be given the names of those who it was said had complained against him if there had been complaints made against him.

101. At one point during the disciplinary hearing, according to the Respondent's note of the hearing, there was a bizarre exchange between Mr Hewitt and the Claimant. The Claimant said to Mr Hewitt, regarding the level of information that he had been given about the allegations of misconduct that had been made against him: "*I have nothing to go on. No information or names"*. That was a factually correct assertion by the Claimant. It was Mr Hewitt's response that was bizarre:

> **"Names and details are not always relevant, general awareness that you need to modify your behaviours."**

Mr Hewitt appeared to be saying that the disciplinary hearing could proceed without the Claimant being given any details of the complaints that had been made against him or the names of those who had made those complaints.

102. The disciplinary hearing lasted for some 30 minutes. It is evident from the Respondent's note of the hearing that the Claimant became increasingly frustrated with the lack of information that he was being given as to the complaints that it was said had been

made against him. Out of frustration he ended up saying "*no comment*" to some of the questions put to him by Mr Hewitt. The hearing came to an end without any details of any complaints being put to the Claimant.

103. The day after the disciplinary hearing Mr Hewitt sent the dismissal letter to the Claimant.

> **I am writing to confirm the decision taken at the disciplinary hearing …**
> **…**
> **The meeting was convened because of allegations relating to your conduct, specifically in relation to the following allegations as set out in your invitation letter:**
> 1. **Your unwillingness to communicate effectively with certain members of management and other members of staff.**
> 2. **Your unwillingness to collaborate with your team, and wider management, leading to decreased productivity and morale.**
> 3. **Your treatment of and/or communication with other team members.**
> 4. **A potential breakdown in your relationship with key members of the business and team.**
> 5. **A potential breakdown in your relationship with Reiser UK suppliers.**
> 6. **Unwillingness to build and develop relationships with key customers within your territory.**
>
> **At the meeting, you were provided with an opportunity to ask questions, comment on the issues and to put forward any explanation for the matters identified as allegedly amounting to gross misconduct. You explained that:**
> - **You have no recollection of ever being spoken to in relation to any concerns from anyone at Reiser.**
> - **You mentioned that you had nothing to go on and no information or names.**
> - **You denied that you had been actively seeking alternative employment and that you had stated that you would not be OK whilst working at Reiser.**
> - **You did not comment on the written or verbal evidence from you where you state that you could not work with myself.**
> - **You did not comment on the statement that any challenge or feedback given to you is met with a complete lack of communication from you for a period of time.**
> - **You did not recall why you had been contacting colleagues despite being explicitly asked not to during your suspension from the business.**

- **You had no comment when questioned about your behaviours relating to your lack of involvement at customer sites when engineers were present.**
- **You had no comment on my statement of the fact that at the last three board meetings your ability to fulfil your role has been questioned due to your behaviours and the subsequent lack of relationships with multiple colleagues, suppliers and customers.**

Taking all of this into consideration, I have found the allegations of gross misconduct against you to be substantiated. In particular, it was proven on the balance of probabilities that your relationships have broken down with key members of the business including senior members of management, multiple suppliers, and multiple colleagues as discussed during the meeting.

Examples were given to the best of my abilities whilst ensuring a duty of care for colleagues at the same time. It is my belief that this break down of relationships in so many key business areas over a period of time, now impedes your ability to be able to carry out your role effectively.

This letter therefore gives you formal notification of the termination of your employment for gross misconduct.

104. On the 29th March 2023, the Claimant, through his solicitors, wrote to the Respondent giving notice of his appeal against the decision that had been made by Mr Hewitt to dismiss him. The appeal letter stated that there had been both procedural unfairness and substantive unfairness in the way that the Claimant had been treated by Mr Hewitt. The letter gave full particulars of the allegations of procedural and substantive unfairness.

105. The date fixed by the Respondent for the appeal hearing was the 17th April 2023. The person appointed by the Respondent to deal with the Claimant's appeal was Mr Watson even though Mr Watson had been present at the meeting of the Advisory Board on the 3rd March 2023 when it had been decided to dismiss the Claimant.

106. The Claimant wished to be accompanied at the appeal hearing by either Adam Hodson or James Bristow. Having been informed that the Claimant wished either of those two men to accompany him at the forthcoming appeal hearing, Mr Watson spoke to them. The

content of Mr Watson's discussions with Mr Hodson and Mr Bristow was not contemporaneously recorded but the outcome was that both Mr Hodson and Mr Bristow indicated to Mr Watson that they did not wish to be involved in the appeal. The appeal then went ahead without the Claimant being accompanied. Though he had initially included, as an allegation of procedural unfairness in his unfair dismissal claim, a failure on the part of the Respondent to ensure that he was accompanied at the appeal hearing, that was no longer pursued as an allegation by the Claimant at the final hearing.

107. The appeal hearing went ahead on the 17th April 2023. Mr Watson stated in paragraph 28 of his witness statement that he found the Claimant to be "*exceptionally difficult and unhelpful in the meeting*" and he "*appeared unwilling to engage in any meaningful way with the appeal*". The Tribunal was left in no doubt that the reason for the Claimant's presentation at the appeal hearing was the continuing lack of information and details regarding the allegation of gross misconduct that Mr Hewitt had found to be substantiated. The following exchange from the Respondent's note of the appeal hearing illustrates the problem that the Claimant faced:

> **Claimant:** **"*You're asking, Richard, what you're asking me to do is, is start guessing, and I'm not. I'm not going to start guessing so either you provide me with information and my solicitor with information so that we may try to get some understanding, or you're asking me to guess and I'm not going to do that.*"**

That was an opportunity for Mr Watson to provide the Claimant with details of the allegation of gross misconduct but that was not what Mr Watson did. His response was as follows:

> **Mr Watson:** **"*OK. What do you believe is the issue?*"**

In short, Mr Watson appeared to be asking the Claimant to provide the details of the case against him. Mr Watson went on to give the following explanation as to why no details of the allegation of gross misconduct were being provided to the Claimant:

Mr Watson: ***"I am here to hear an appeal … I will not give evidence or anything else, that's not my role here, mine … is to hear your appeal."***

108. Though Mr Watson, during the appeal hearing, saw his role as being passive and requiring no more than just listening to what the Claimant wished to say in support of his appeal, he seems to have reflected upon that after the appeal because his actions thereafter were far from passive.

109. Over the period from the 26th April 2023 to the 17th May 2023 Mr Watson interviewed nine employees of the Respondent (namely, Ian Locker, James Bristow, Jason Price, James Giles, Mike Carrington, Adam Hodson, Nick Hart, Gary Fox and Mike Wall) and two of the Respondent's suppliers (namely, Richard Conway and Darius Kubica) about the Claimant. At the start of each interview, the interviewee was informed that it was intended to be a fact finding interview about the Claimant and that the interviewee's honest input was required. The notes of each interview are set out in the main hearing bundle.

110. The interviewees were asked about their working relationship with the Claimant and to give examples of their interactions with him.

111. Mr Watson's conclusions from the interviews were set out in paragraph 37 of his witness statement:

> **37. In summary, from a substantive perspective, I found that the initial complaints received had been substantiated by Ed's investigation, and that, collectively, that they amounted to gross misconduct warranting dismissal in the circumstances.**

112. The Tribunal found there to be a number of problems with paragraph 37 of Mr Watson's witness statement. Firstly, his reference to "*the initial complaints*" is problematic. The "*initial complaints*" were nothing more than Mr Hewitt's recollection of verbal complaints that he had received over time about the Claimant and which he had decided not to document in any way. No details of those complaints had been provided by Mr Hewitt to the Claimant and so it is difficult to understand how Mr Watson was able to understand what those complaints had been. Secondly, Mr Watson's reference to "*Ed's investigation*" is also problematic. The Tribunal has found that there was no investigation by Mr Hewitt following his appointment as investigator of the Claimant's conduct. In the absence of an investigation by Mr Hewitt, it cannot be said that complaints were substantiated by Mr Hewitt's investigation.

113. There are further problems arising from Watson's interviews with the nine employees and two suppliers about the Claimant. Firstly, each of the interviews took place after the Claimant had been dismissed. Given the timing and content of the interviews, as a matter of irresistible inference, each of the interviewees would have known that the Claimant had been dismissed by then. They were being approached, post-dismissal, by the Respondent's Managing Director to ask for their views about the Claimant and to give examples of interactions that they had had with him. It seems naïve of Mr Watson to believe that the content of the interviews would be unaffected by the knowledge that the Respondent had already dismissed the Claimant. His request for honest input did not, in the judgment of the Tribunal, adequately address the risk that those being interviewed might wish to give the Respondent information that supported the decision to dismiss the Claimant rather than information that undermined the Respondent's decision to dismiss the Claimant. That risk is not something that Mr Watson appeared to consider when assessing the content of the interviews.

114. Secondly, Mr Watson did not disclose the notes of the interviews with the nine employees and two suppliers to the Claimant. In the absence of doing so and in the absence of inviting the Claimant to attend a further appeal hearing, Mr Watson was none-the-wiser as to what the Claimant's response might have been to the content of

the interviews. The notes of the interviews were only disclosed to the Claimant during the course of these proceedings. Mr Watson decided to make his decision in respect of the appeal without giving the Claimant an opportunity to comment upon the content of the interviews and knowing, full well, that one of the Claimant's main complaints was that he had not been given any information about the complaints against him. No satisfactory explanation was forthcoming from Mr Watson for his failure to provide the Claimant with the notes of the interviews.

115. On the 30th May 2023, Mr Watson wrote to the Claimant with the outcome of the appeal. He upheld Mr Hewitt's decision to dismiss the Claimant. Mr Watson found that there had been no procedural unfairness in the disciplinary process leading up to the dismissal and he found that there was no substantive unfairness in the decision to dismiss. To the astonishment of the Tribunal, Mr Watson maintained in his oral evidence that there had been a fair investigation by Mr Hewitt into the Claimant's conduct. The Tribunal was driven to the conclusion that Mr Watson, having been present at the Advisory Board's meeting on the 3rd March 2023 when it was decided to dismiss the Claimant, simply turned a blind eye to the procedural irregularities and unfairness that followed that decision.

The parties' submissions

116. The parties' closing submissions were helpfully set out in writing with some supplementary oral submissions. Mr Pollitt and Miss Elves addressed the issues identified below and clearly set out their respective cases in relation to those issues.

The decision

117. There is no dispute in this case that the Claimant was dismissed on the 21st March 2023 and that the reason given by the

Respondent for the dismissal was gross misconduct. The issues in the unfair dismissal claim are therefore as follows:

117.1 what was the reason or principal reason for the dismissal?

117.2 was it a potentially fair reason?

117.3 did the Respondent genuinely believed the Claimant to be guilty of misconduct?

117.4 did the Respondent have reasonable grounds for that belief?

117.5 was the belief based on a reasonable investigation?

117.6 was the Claimant's dismissal within the band of reasonable responses open to a reasonable employer?

117.7 did the Respondent follow a fair procedure?

117.8 should there be a *Polkey* deduction?

117.9 Was there blameworthy conduct on the part of the Claimant that caused or contributed to his dismissal?

118. On the basis of its evaluation of the evidence, its findings of fact and having directed itself on the law as set out above, the Tribunal's conclusions on the issues referred to above are as follows:

118.1 The reason for the Claimant's dismissal was concerns over his performance, not his conduct. The Tribunal's finding of fact was that the decision to dismiss the Claimant over concerns regarding his performance was made at the meeting of the Respondent's Advisory Board on the 3rd March 2023. The Respondent had not discharged the burden of proving that the reason for the Claimant's dismissal was gross misconduct.

118.2 The reason for the Claimant's dismissal (namely, concerns over his performance) was a potentially fair reason under section 98(2)(a) of the Act though it was not the reason that was given to the Claimant by the Respondent for his dismissal on the 21st March 2023.

118.3 The Tribunal found (the burden of proof being neutral) that the Respondent did not genuinely believe that the Claimant was guilty of gross misconduct. The Tribunal's finding has been that the reason for the Claimant's dismissal was concerns over his performance and that the decision to dismiss was taken at the Advisory Board's meeting before the Respondent initiated the disciplinary process against the Claimant. There being no documented instances of any misconduct on the part of the Claimant since the start of his employment in June 2018 until the invitation on the 9th March 2023 to the disciplinary hearing, the Tribunal found that the Respondent did not genuinely believe that the Claimant was guilty of misconduct or gross misconduct.

118.4 Applying the neutral burden of proof, the Tribunal found that there were no reasonable grounds for believing the Claimant to be guilty of misconduct or gross misconduct. Judged objectively, the Respondent did not act reasonably in forming the belief that the Claimant was guilty of gross misconduct based upon the unparticularised and undocumented recollections by Mr Hewitt of verbal conversations in the past with third parties about the Claimant's conduct and his memory of his own dealings with the Claimant.

118.5 The belief that the Claimant was guilty of gross misconduct was not based on a reasonable investigation (applying the neutral burden of proof). There simply was no investigation. Mr Hewitt was given the job of investigating the Claimant's conduct but he did not carry out any investigation. He was of the view that an investigation could be dispensed with because he was able to remember verbal conversations (without any written notes or records being made) he had had with people in the past when complaints about the Claimant had been made and also remember his own dealings with

the Claimant. The Tribunal found that a reasonable employer would not have regarded 'no investigation' as a 'reasonable investigation' in the circumstances of this case.

118.6 Applying the neutral burden of proof, the Tribunal found that the Respondent's decision to dismiss the Claimant over concerns about his performance was not within the range of reasonable responses that a reasonable employer might have adopted. In the judgment of the Tribunal, the range of reasonable responses that a reasonable employer might have adopted to concerns over the Claimant's performance would have included counselling, compliance with the employer's capability procedures, support to improve performance followed by warnings if the performance did not improve but not dismissal.

118.7 Applying the neutral burden of proof, the Tribunal found that the Respondent's procedure in relation to the dismissal of the Claimant was unfair, and egregiously so, for the following reasons:

- There was no investigation by Mr Hewitt into the Claimant's conduct.

- The Claimant was not informed by Mr Hewitt that he had not investigated the Claimant's conduct.

- Mr Hewitt misled the Claimant at the disciplinary hearing by telling the Claimant that he had written evidence of complaints about the Claimant.

- The Claimant was not informed by Mr Hewitt that the allegations of misconduct were based upon Mr Hewitt's recollection of verbal complaints made in the past or his memory of his own dealings with the Claimant.

- The Claimant was not given adequate details of the allegations of misconduct that he faced with the result that he did not know the case against him.

- Mr Hewitt should not have been both investigator and decision-maker.

- The Claimant was not informed at the appeal stage of the details of the allegations that had been made against him.

- The notes of the interviews conducted by Mr Watson as part of the appeal process were withheld from the Claimant thereby depriving him of the opportunity of commenting upon them.

- Though the Respondent's written procedures on disciplinary matters did not have contractual status, the Respondent did not have a satisfactory explanation as to why they were disregarded in the Claimant's case.

- The Respondent should have initiated its capability procedure given the concerns about the Claimant's performance.

- In the absence of an investigation by Mr Hewitt, it could not have been clear to Mr Watson that the details he obtained from his interviews were what Mr Hewitt had in mind when he dismissed the Claimant.

- Mr Watson should not have conducted the appeal given that he had been present at the Advisory Board meeting on the 3rd March 2023 when it was decided to dismiss the Claimant over concerns about his performance.

118.8 In the judgment of the Tribunal, this is not a suitable case for a *Polkey* reduction. There is no evidential basis upon which the Tribunal could properly conclude that there was a chance that the Claimant would have been dismissed if the Claimant had followed a fair process in place of the sham disciplinary process embarked upon by Mr Hewitt. Given the finding that the reason to dismiss the Claimant

was the concerns over his performance which had never been raised with the Claimant before his dismissal, the Tribunal has to consider what would have occurred if the Respondent had adopted a fair procedure in respect of those concerns. A fair procedure would have been to counsel the Claimant, to have followed the Respondent's capability procedures, to inform him about the concerns over his performance and to provide support for him. A fair process would not have been to resort to the disciplinary process without first engaging the capability process. The Tribunal could not be confident that the Claimant would have been resistant to counselling and support and would not have made efforts to improve his performance. The Tribunal could not conclude with confidence that there was a chance that the use of a fair procedure in tackling the concerns over the Claimant's performance would have resulted in the Claimant's dismissal. Further, in the judgment of the Tribunal, it would not be safe to conclude that the content of the interviews conducted by Mr Watson, post-dismissal of the Claimant, would have been in identical terms if those interviews had been conducted at the appropriate stage: namely, the investigatory stage before the disciplinary hearing. In the judgment of the Tribunal, the risk of confirmation bias being expressed in interviews that were conducted in the knowledge that the Claimant had already been dismissed was very real. Given that risk, it is the judgment of the Tribunal that the content of the interviews carried out by Mr Watson has to be treated with extreme caution and it is not so simple as to say, as the Respondent does in its closing submissions, that the interviews would have been precisely the same if they had been carried out at the appropriate time.

118.9 Lastly, the Tribunal was unable to find blameworthy conduct on the part of the Claimant that caused or contributed to his dismissal. Given the Tribunal's findings in respect of where responsibility lay for managing sales to Kepak and Dunbia, as set out above, the Tribunal was unable to find that there had been a failure on the part of the Claimant to perform sales activity at Dunbia and Kepak that amounted to blameworthy conduct. Furthermore, it is not clear that the blameworthy conduct

alleged by the Respondent against the Claimant (see paragraph 47 of Miss Elves' written closing submissions) caused or contributed to his dismissal. The decision to dismiss the Claimant was made at the meeting of the Advisory Board on the 3rd March 2023 and the reason for the dismissal was concerns over the Claimant's performance, not his conduct. In those circumstances, the Tribunal did not find that the blameworthy conduct alleged by the Respondent against the Claimant caused or contributed to his dismissal.

119. In relation to the claim of wrongful dismissal, it is for the Respondent to prove that the Claimant was guilty of the gross misconduct that led to his dismissal. The Tribunal's finding is that the Respondent has not discharged that burden of proof. The Respondent's evidence has shown that the reason for the Claimant's dismissal was concerns over his performance, not his conduct, and, having regard to the grossly unfair procedure adopted by the Respondent in respect of the disciplinary process (including the appeal), the Respondent has not established that the Claimant was guilty of the gross misconduct that was said to be the reason for his dismissal. Accordingly, the claim of wrongful dismissal succeeds.

120. The case shall now be listed for a remedies hearing, to include representations on section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. It shall also be confirmed at the remedies hearing as to whether the Claimant is pursuing the unlawful deduction of wages claim and, if so, how that claim is put.

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Employment Judge David Harris

Dated: 29th September 2024

Judgment entered in Register
and copies sent to parties on 1 October 2024

for Secretary of the Tribunals Mr N Roche

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