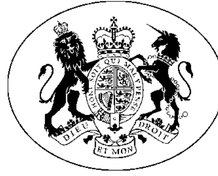

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr G Cahill	**AND**	Tarmac Building Products Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** **9 and 10 January 2017**

EMPLOYMENT JUDGE Woffenden

Representation
For the Claimant: Mr B Frew of Counsel
For the Respondent: Mr S Willey solicitor

JUDGMENT

JUDGMENT having been sent to the parties on 13 January 2017 and written reasons having been requested in accordance with Rule 62 (3) of the Employment Tribunal's Rules of Procedure 2013, the following reasons are provided:

REASONS

1 The claimant was employed by the respondent as an Area Manager from 21 November 2011 to 7 July 2016 when he was dismissed by the respondent for gross misconduct. On 22 October 2016 he presented a complaint of unfair dismissal.

2 There was an agreed bundle of documents (199 pages) to which was added the respondent's capability procedure (pages 200 to 209). The tribunal heard from the claimant who gave evidence by way of a witness statement supplemented by oral evidence. On behalf of the respondent the tribunal heard from John Breakwell (the respondent's national operations manager and the dismissing officer) and Robert Godfrey (the respondent's Senior Operations Manager for its Blocks Division and the appeals officer). The tribunal had regard

only to those documents to which it was referred in the witness statements or in cross examination.

3 At the commencement of the hearing the parties agreed a list of issues (liability and remedy) for the tribunal to determine which were as follows:

3.1 Has the respondent shown the reason for the claimant's dismissal?
3.2 Was it a reason within section 98 (2) Employment Rights Act 1996 ("ERA") (the respondent says it relates to the claimant's conduct)?
3.3 Did the respondent carry out a reasonably thorough investigation into the facts of the case?
3.4 Did the respondent hold a genuine belief that the claimant had committed the offence for which he was dismissed?
3.5 Were there reasonable grounds for the respondent to hold that belief?
3.6 Did the procedure used by the respondent to dismiss the claimant meet reasonable standards of fairness, and in particular was it in accordance with the provisions of the ACAS Code of Practice?

3.7 Was the outcome of the disciplinary process predetermined, so rendering that process pointless and therefore intrinsically unfair?

3.8 Did those conducting the disciplinary and appeal hearings misdirect themselves in relation to the issue of whether staff engaged by the claimant were trained or not, and if not did that invalidate their findings in relation to this allegation?

3.9 Did the respondent act reasonably in treating the reason for dismissal as the reason for dismissing the claimant?

3.10 Was the decision to dismiss the claimant within the range of reasonable response is available to the respondent on the facts of the case?

3.11 If the tribunal finds the dismissal of the claimant to be unfair, should there be any reduction in the basic and compensatory awards to reflect contributory fault on the part of the claimant, in accordance with section 122 (2) and section 123 (6) ERA and if so what should that reduction be?

3.12 If the dismissal is found to be unfair, should any award made to the claimant be adjusted in accordance with section 207 (A) TULR (C) Act 1992? The respondent did not contend that the claimant had not complied with the duty to mitigate his loss.

4 From the evidence it saw and heard the tribunal makes the following findings of fact:

4.1 The Respondent is a supplier of building materials. It is a part of the Tarmac Group of companies which employs approximately 7000 people in the UK. It has three divisions: Bagged Products; Blocks and Building Materials. The claimant worked in the Bagged Products division.

4.2 The claimant (who lives in Manchester) commenced work for the respondent in November 2011. He was the site manager at its Dewsbury site in Yorkshire. His line manager was John Breakwell. Stephen Breakwell (the latter's brother) is the respondent's assistant Operations Manager. The claimant had successfully managed the Dewsbury site and maintained all the necessary authorisation and health and safety records.

4.3 Towards the end of 2015 there was a company restructure and new area manager roles were introduced to be responsible for more than one site. Site managers were instructed to apply for area manager roles and the claimant was successful in his application for that of the Midlands Area Manager role. The Midlands area had sites at Croxden (Stoke-on-Trent) and Nuneaton (Warwickshire).

4.4 The claimant commenced work in the above role on 4 January 2016.He was paid £3326 net per month and had a company car private health care and the potential for a bonus. The claimant accepted under cross –examination that he had never asked for training in his new role or for clarification of his duties or responsibilities and that other than being responsible for 2 sites instead of I site (with the greater responsibility that entailed) the new role and his old role were largely the same although the number of employees had increased from 8 to 11.

4.5 The claimant's job description summarised his role as follows:
"manage the activities of a cluster of sites to deliver safe and efficient operations by leading site personnel to meet or improve upon targets for safety, cost, productivity, quality and delivery…… You will manage and be accountable for all site management systems, and ensure all accreditations, legislative requirements and documentations are maintained as required by auditing bodies. You will ensure all maintenance requirements are undertaken and plant and equipment is kept in an acceptable condition. You will also ensure that the site teams are managed appropriately and in accordance with Tarmac's HR policies e.g. Recruitment, training, succession planning, performance management, reviews, disciplinary and etc." It set out his accountabilities one of which was to "Achieve Tarmac safety performance targets". He was said to have "autonomy to manage all cluster operational and budgeted expenditure activities to deliver safety targets, and drive process improvement to ensure performance enhancement opportunities are achieved effectively and efficiently to meet business performance requirements." The site supervisor and site administrator reported directly to him. The operatives were his indirect reports. At the Nuneaton site there was a senior site supervisor (Dan Brown) and a site administrator (Geraldine Edwards).

4.6 Under the respondent's disciplinary procedure it is said (among other matters set out in a non-exhaustive list) that "Breach of health and safety regulations, including Tarmac Safety, Health and Environmental Policies and "Golden Rules"" justifies summary dismissal.

4.7 The respondent has a capability procedure which is to be followed where an employee fails to reach or maintain the required standards of performance in their role whether through a lack of knowledge skills or ability. Where a failure to perform is a matter of misconduct the capability procedure says this will be dealt with under the company's disciplinary procedure. The first stage in dealing with poor performance is said to be a determination of whether the matter is one of capability or conduct and this is said to be normally be ascertained by one-to-one discussion with the employee and/or an investigation.

4.8 The respondent's health and safety policy contains the following principle:
“Line management is responsible for Health and Safety implementation, communication and compliance. Whilst supported by a team of Health and Safety professionals, line management must ensure that:
All employees, managers and contractors are trained to work safely
Risk assessments are used by everyone working at Tarmac sites to identify, control and reduce all hazards
Everyone understands their role in health and safety and delivers on their responsibilities."

4.9 The respondent has had a Safety and Health Standard (SHE) for "Energy and Machinery Isolation" in place since 2012. Its aim is to "have effective arrangements in place to ensure that all machinery is isolated from all energy sources and is made safe before any maintenance or other work is carried out." It applies to all locations and activities. It is required that no maintenance, repair, and removal of the guard or other work shall be undertaken on any machinery before it has been securely isolated and made safe. This is said to be one of the respondent's "Safety Golden Rules”. In particular it is said that "isolators must be designed to enable them to be locked in the “off" position using a personal lock and tag." and “where machinery has been isolated, a warning notice shall be displayed at the point of isolation." It is the site manager’s responsibility to ensure arrangements are in place to meet the SHE’s requirements.

4.10 The respondent also has a SHE standard for "Induction, Competence and Authorisation. It was last updated in June 2014. Its aim is to ensure that employees are competent and authorise the work they undertake. Under it employees are only allowed to carry out work for which they are competent. Further employees must be authorised to carry out any work where there is a significant SHE risk or where specific competencies are required and such authorisations "shall be made in writing using the Tarmac Certificate of Authorisation form". For this purpose ‘authorised’ is defined as "permission from the Company, given in writing by a site manager (or nominated deputy) and

accepted by an individual, to allow them to undertake a specific job, task, duty or other activity. I accept the evidence of Mr Breakwell and Mr Godfrey that the respondent regards staff as untrained until they have been both trained and authorised as competent. Under cross-examination the claimant himself accepted this was its position.

4.11 On 25 May 2016 there was an accident at one of the respondent's sites as a result of which an employee suffered a broken arm and investigations showed that the accident was linked to a faulty isolation switch on a machine. The claimant and his site supervisor at the Nuneaton site participated in a telephone conference call the purpose of which was to tell them what had happened and get them to look at their own sites.

4.12 On 14 June 2016 the Nuneaton site was visited and a report was prepared setting out various concerns which could be loosely described as 'housekeeping 'problems.

4.13 On 17 June 2016 the respondent's engineering department visited the Nuneaton site and a report was prepared on it by Andy Holmes. He decided as a result of the problems he found there to stop production on the site. There were a number of serious issues including isolation switches which were not cutting off electricity supply to the relevant machines and light guards which were inoperative. Mr Holmes had asked the claimant for records of the weekly inspection of the guarding and emergency stop buttons. The only records of the requisite (weekly) Estop and guarding audits which could be found dated from 2012.Those records should have been held in a file known as File 14.

4.14 The respondent held an annual 'safety week' .The Nuneaton site was inspected by Jonathan Earl on 20 June 2016 and he prepared a site Safety Visit report which identified a number of remedial actions to be taken by the claimant.

4.15 On 23 June 2016 the claimant attended a meeting with Bevan Brown (UK Packed Products Director) Steve Breakwell and others .During the meeting the state of the site was discussed and remedial action to be taken by the claimant was identified. He left the Nuneaton site to return home to vote in the EU referendum. In the interim the decision was taken to suspend him. When he returned the site the next day he was informed of his suspension which was confirmed in writing in a letter to the claimant of that date. The letter (signed by Stephen Breakwell) said the purpose of the suspension was to enable the respondent to conduct the investigation impartially and fairly and "is in no way a form of disciplinary action against you." The letter concluded "as part of our investigation into this matter, we may also need to interview you to find out further information, and we will be in contact with you to arrange a meeting, for this purpose, if this is the case. In the meantime if you have any information that might be of assistance to the investigation, then please contact me by e-mail or

telephone." It is common ground that the claimant was not interviewed as part of the investigation nor did he provide any information.

4.16 On 30 June 2016 John Breakwell wrote to the claimant asking him to attend a disciplinary meeting on 4 July 2016. The allegations were as follows:
"Breach of health and safety regulations, including Tarmac Safety, Health and Environmental Policies at Nuneaton site
Serious breach of established Company policy and procedure and departmental practices, for example, those detailed in the Engineering report for June 2016 and the safety standard witnessed by visitors in June 2016
Loss of confidence and trust in you to uphold the Company's values and to ensure the safety and welfare of your team as production had been allowed to continue by yourself on the site."
He was warned that his conduct could amount to gross misconduct which might result in his dismissal without notice or pay in lieu of notice. He was informed of the right to be accompanied and given copies of the VFL safety visit report dated June 20, 2016, the Engineering report dated 17 June 2016, an e-mail from Stephen Breakwell to Samantha Bagshaw (an HR business partner) dated 27 June 2016, photos from the Nuneaton site taken in Safety week and the respondent's disciplinary procedure. He was asked to send any evidence he had relevant to the issues to be discussed at least 3 working days before the hearing.

4.17 A disciplinary hearing was conducted by John Breakwell on 4 July 2016 which the claimant attended on his own. Mr Breakwell was accompanied by Ms Bagshaw. Typed non verbatim notes were made of the meeting .The claimant said he would have expected an investigation meeting .He was asked if he wanted to be accompanied but declined and said he wanted to get it done. He admitted the problems with the machinery found by Mr Holmes which he said were historic. He accepted he had not asked for the Estop and guarding audits and that they had been carried out at Dewsbury. He explained at some length the various other matters he had had to attend to and various staffing issues and that he had been under pressure in relation to customers' orders and work had not always been taken away from his site when he had asked. He confirmed he had not documented the authorisation of staff as competent. He attributed his failure in relation to Estop and guarding to the necessity for 'fire fighting' and he thought he was doing what was best. Mr Breakwell told the claimant he was adjourning the hearing to make some (unspecified) further investigations. He attended the Nuneaton site the next day and interviewed three members of staff all of whom confirmed that they had not been assessed by the claimant and signed off as being competent. Notes of those interviews were prepared and sent to the claimant on the same day. He was also informed that the folder entitled File 14 Plant inspections would be brought to the hearing when it resumed on 7 July at the respondent's Dewsbury site.

4.18 The meeting began at 12 and concluded by 12.45. The File 14 was available on the desk but the claimant did not ask to look at its contents .There

was a 15 minute adjournment from 12.25 to 12 .40 after which Mr Breakwell announced his decision to dismiss the claimant summarily for gross misconduct and informed him of his right of appeal. A four-page letter was written to the claimant that same day which confirmed the outcome of the disciplinary hearings. He concluded 'I felt that the state of the light guards and the lack of checks on these has led to unsafe conditions at the site. This was even worse as the team were not sufficiently trained so were more likely to commit unsafe acts. When coupled together, these give me grave concern about your ability to uphold the Company values, especially around safety. I also believe that you have failed to follow Health and safety regulations, Company policies and departmental practices relating to safety.' Mr Breakwell referred in the letter to the pressures the claimant had said he felt under to fulfil orders for B&Q and that work he had asked to be taken off his site had not happened; that he had been 'firefighting' constantly and was short of labour and the agency used to supply agency workers was not very good. Having concluded that the claimant had committed the offences alleged against him (save for those relating to 'housekeeping' issues which he dismissed) Mr Breakwell then explained that he had to consider the appropriate sanction. The letter said that he had taken into account "the mitigating factors that you have put forward in support of your case and I have also considered the seriousness of this issue and the fact that it is considered to be gross misconduct." He said that "taking into account all of the above, I am of the view that the appropriate penalty in this case is summary dismissal without notice or pay in lieu of notice" and of particular concern to him was the claimant's unwillingness to accept responsibility or the seriousness of the problems found or to put the position right.

4.19 I accept Mr Breakwell's evidence that the allegations against the claimant in relation to housekeeping issues at the Nuneaton site played no part in Mr Breakwell's decision to dismiss him. I conclude on the balance of probabilities when he came to decide what penalty to impose Mr Breakwell did not consider the claimant's length of service or disciplinary record or any alternatives other than dismissal. He was not cross examined about any alleged failure on his part to comply with the Code (see paragraph 10 below).

4.20 The claimant appealed in a letter to Sarah Silburne dated 11 July 2016. The grounds of appeal were:

"1 Failure to carry out a full investigation
2 Failure to provide me with full information in relation to the allegations
3 Unreasonably short timescales which were not as stated in your policy
4 Inaccuracies in the documented notes from first meeting which were not a true reflection of the conversation
5 Failure to include all mitigating factors in the disciplinary outcome letter or to take these into account
6 Failure to substantiate within the outcome letter any consideration of sanctions other than dismissal

7 Lack of confidentiality in relation of my suspension
8 Genuineness of the original reason of the suspension."

The claimant also enclosed what he described as 'new evidence'. This was an email dated 7 April 2016 sent to Mr Steven Breakwell by Kevin Monk (an external maintenance engineer) about a quote for servicing the pallet conveyors at the Nuneaton site including the replacement sensor/reflector and brackets under the dispenser that 'sees the pallet on the conveyor' on Lines 1 2 and 3 and of broken termination boxes on Line 3.That email had been sent to the claimant and Mr Woods .Mr Woods had asked him if he was happy for the work to be done and having told him that it needed to be addressed 'asap' he had assumed Mr Woods would sort this out .It was not done and the isolator issues had been used against him as evidence of his failings. Mr Breakwell confirmed under cross-examination that if he had had sight of this email it would have made no difference to the approach which he took to the disciplinary because it concerned the pallet dispenser; the allegations against the claimant concerned a different part of the machinery.
The claimant said in his appeal letter that regarding the light guards and lack of checks leading to unsafe condition on the site he accepted he had overall responsibility but said day to day responsibility was the site manager's and responsibility for signing off staff as trained lay with the trainer(a competent person).

4.21 The claimant's appeal was heard by Bob Godfrey on 24 August 2016.The claimant was unaccompanied but Ms Silburne attended with Mr Godfrey and non verbatim manuscript notes were taken.

4.22 The approach Mr Godfrey took to the appeal was to undertake a review of the decision taken by Mr Breakwell rather than a rehearing. He confirmed under cross-examination that as far as the mitigating factors which Mr Breakwell had said he took into account he did not look into them himself but saw his role as seeing whether Mr Breakwell had done so. After the appeal hearing Mr Godfrey spoke to Stephen and John Breakwell, in the case of the latter to ask him to explain why he formed the view that dismissal was the only appropriate sanction .He made no notes of those discussions.

4.23 The claimant's appeal was not successful and Mr Godfrey confirmed the outcome to him in a letter of 9 September 2016 which dealt with each of the points the claimant raised. He concluded in particular that the claimant was "culpable for the lack of training that resulted in and trained operatives working in safety critical areas of the site. I noted that in your dismissal letter and the notes on the disciplinary process you admitted to allowing untrained employees work machinery on site; in my opinion this cannot be tolerated in any circumstances and falls way below the Tarmac philosophy of "Safety First". He concluded has his letter by stating "ultimately the admission that you allowed with prior knowledge untrained employees to work on machinery that has the potential to

cause harm if the operator is not aware of the correct ways of working is extremely serious. I consider this is the main point to justify your summary dismissal; this alone is a fundamental breach of safety and health regulations and policy." I accept Mr Godfrey's evidence that he did consider whether the claimant's failings were a matter of misconduct or capability and decided that it was the former because the claimant had done everything he should have done while he was managing the respondent's Dewsbury site.

4.24 The claimant obtained a new job with Valtris Chemicals in November 2016 but at a reduced salary of £1998 net a month and although there is the potential for salary and career progression this is subject to training and opportunity and it may take 6 to 12 months for him to complete his training and a further period (which he estimates at a year) before he will attain the salary and benefits he enjoyed with the respondent.

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

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

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

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

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed to do ,

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

It was held in the case of **Abernethy v Mott,Hay and Anderson [1974] IRLR 213 CA** that a reason for dismissal is a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee.

6 Section 98(4) of ERA provides that:

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

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

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

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

7 It was held in the case of **Sainsbury's Supermarkets Ltd v Hitt [2003]IRLR 23 CA** that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.

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

9 I remind myself that it is not for the tribunal to substitute its view of what was the right course for the employer to adopt. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair **(Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 EAT).**

10 I have considered the ACAS Code Disciplinary and Grievance Procedures 2015 ('the Code') which sets out principles for handling disciplinary and grievance situations in the workplace. Paragraphs 5 6 and 9 of the Code state that:

'5 It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

6 In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing. '

‘9 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’.

11 Under section 122 (2) ERA ‘Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

12 Under section 123 (6) ERA ‘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.’

13 In **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL** it was held that the question of whether the employee had suffered any injustice (i.e. whether the procedural irregularities really made any difference) was to be taken into account when assessing compensation.

14 Under section 207A of the Trade Union and Labour Relations Act 1992 if it appears to the employment tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies and the employer has failed to comply with that Code in relation to that matter and that failure was unreasonable the tribunal may if it considers it just and equitable in all the circumstances to do so increase any award it makes to the employee by no more than 25%.

15 I have read the respondent’s written skeleton and considered its contents and both parties’ oral submissions for which I am grateful.

16 Mr Frew submitted that the reason for the claimant’s dismissal was capability and not related to his conduct. However Mr Godfrey did consider whether the matters alleged against the claimant were conduct or capability. ‘Capability’ for the purposes of section 98(2) (a) is when the lack of capability is in some way inherent .The respondent believed that the claimant was not inherently incapable and had reasonable grounds for that belief because he had successfully carried out a very similar role before at the Dewsbury site and done what was asked of him in terms of safety. I conclude that the respondent dismissed the claimant because the light guards and isolation switches were inoperative there was a lack of the requisite Estop and guarding checks while the claimant was in post and untrained staff (in the sense I have referred to above)

were allowed to operate machinery in breach of the respondent's SHE standards and Health and Safety Policy. That reason related to the claimant's conduct.

17 The respondent carried out an investigation which was within the range of reasonable responses available. There was no real conflict about the essential facts of the allegations. Mr Frew has submitted that the claimant ought to have been interviewed as part of the investigation but he has not explained what difference this would have made or why it was unfair not to do so. Such a meeting is not a requirement of the Code .The claimant had the opportunity both at the disciplinary and appeal hearing to provide whatever explanation he wished to raise in mitigation and both Mr John Breakwell and Mr Godfrey made further investigations. Stephen Breakwell's role in the investigation was administrative in that he compiled the information gathered in the investigation. In my judgment although Mr John Breakwell carried out further investigations he did not act impermissibly as both investigator and dismissing officer.

18 Having carried out a reasonable investigation in all the circumstances I conclude that the respondent had a genuine belief in the guilt of the claimant and reasonable grounds for that belief.

19 There was no evidence before me upon which I could conclude or infer that the claimant's dismissal was in any way predetermined. As the claimant accepted under cross-examination it was only his belief that this was the case.

20 I found in paragraph 4.10 above that the respondent applies a specific interpretation to the meaning of 'untrained' staff and in the light of that finding I conclude there was no misdirection about that issue on the part of either Mr Breakwell or Mr Godfrey which would invalidate their findings in relation to that allegation.

21 The procedure which the respondent used to address the claiamnt's alleged misconduct was its disciplinary procedure. I conclude there were no failures to comply with the Code and that the procedure applied was within the range of reasonable responses. Mr Frew submitted that it was both substantively and procedurally unfair not to have provided the claimant with File 14 but it contained no documents which were relevant to the allegations and it was made available to him had he wished to look at it. If there was any other failure to provide the claimant with documents there is no evidence from which I could conclude that the claimant was thereby put to any disadvantage in responding to the allegations during the procedure such that the procedure was rendered unfair.

22 Having regard to the reason for the dismissal the respondent acted reasonably in dismissing the claimant for his misconduct. I have concluded that the decision to dismiss was within the band of reasonable responses available to

a reasonable employer. The SHEs and health and safety policy and disciplinary procedure (gross misconduct definition) emphasise the importance the respondent accorded to health and safety issues. The respondent had become concerned about isolation switches on machinery following the accident in May 2016 and had emphasised to the claimant the need to look at the position on his own sites. The respondent had concluded that on the balance of probabilities the claimant (as area manager responsible for health and safety issues on site) committed the misconduct alleged against him and had not accepted his own responsibility for the state of affairs .Mr Frew submitted that Mr Breakwell had not reasonably considered the mitigation which the claimant had been at pains to put forward at the disciplinary procedure and Mr Godfrey had had the same take on the claimant's mitigation. The decision to dismiss was therefore outside the range of reasonable responses. I conclude that although he did not set them out in the conclusion of letter of dismissal Mr Breakwell did consider the mitigating factors put forward by the claimant not least because the (lengthy) letter makes references to those matters the claimant put forward. Having done so and accorded weight to them he decided that the appropriate sanction was dismissal. I was concerned that no consideration was given to the claimant's previous clean disciplinary record and length of service prior to taking the decision to dismiss but in my judgement this omission is insufficient in and of itself to render the dismissal unfair. If I am wrong in that conclusion I conclude that had the respondent turned its mind to those factors given the seriousness with which the respondent regarded the claimant's conduct the outcome would not have been any different.

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

Signed by: ___________________________

Employment Judge Woffenden

10 APRIL 2017

Judgment sent to Parties on

13 APRIL 2017