EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105220/2016

Hearing Held at Aberdeen on 4, 5, and 12 April 2017

Employment Judge: I McFatridge (sitting alone)

Mr Brian Christie	**Claimant** **Represented by:** **Mr Lefevre** **Solicitor**
2 Sisters Red Meat Limited T/a McIntosh Donald	**Respondents** **Represented by:** **Mr Delaney** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is:

(One) The Claim of unfair dismissal succeeds and the respondents shall pay to the claimant a monetary award of Thirty Five Thousand and Twenty One Pounds and Three Pence (£35,021.03). The prescribed element in this case is Two Thousand, Nine Hundred and Seventy Two Pounds and Sixty Nine Pence (£2972.69) and covers the period between 4 February and 4 April 2017. The monetary award is Thirty Five Thousand and Twenty One Pounds and Three Pence (£35,021.03) and exceeds the prescribed element by Thirty Two Thousand and Forty Eight Pounds and Thirty Four Pence (£32,048.34).

(Two) The Claim of Breach of Contract (failure to pay notice pay) succeeds and the respondents shall pay to the claimant the sum of Six Thousand, Six Hundred and Eighty Eight Pounds and Fifty Six Pence (£6688.56) in respect of this.

(Three) The respondents shall pay the sum of One Thousand, Two Hundred Pounds (£1200) to the claimant in reimbursement of tribunal fees paid by him.

REASONS

1. The claimant submitted a claim to the Tribunal following the termination of his employment in which he claimed that he had been unfairly and/or wrongfully dismissed by the respondents. The respondents submitted a response in which they denied the claims. They accepted that the claimant had been dismissed but stated that he had been summarily dismissed for gross misconduct and that the dismissal was procedurally and substantively fair. At the hearing evidence was led on behalf of the respondents from Ken Napier their Systems Manager, Craig Anderson their Factory Manager and Alan McNaughton their Site Director. The claimant gave evidence on his own behalf. Both parties lodged a joint set of productions. These included a DVD recording of CCTV footage. This CCTV footage was shown to several of the witnesses and also was reviewed by me privately. On the basis of the evidence and the productions I found the following essential factual matters to be proved or agreed.

Findings In Fact

2. The respondents are a large food supplier which forms part of the 2 Sisters Food Group. The group trades as McIntosh Donald and on this particular site they have operated since 1966 as slaughterers of cattle and sheep. Formerly they had also slaughtered pigs. There are around 310 employees on the site. The claimant commenced employment with the respondents' predecessors at the age of 17 working initially in the Slaughter Hall as an Operator. The claimant then worked at

various jobs in the abattoir and over the years developed a number of skills. His job role progressed from Labourer to Grade 1 Slaughterman. In this role he assisted putting in a new sheep line in or about 1987. He then became Assistant Production Manager and eventually Production Manager being appointed to this role in or about 2006. In or about 2010 he voluntarily requested that he relinquish the role of Production Manager and took on a new role as Lairage Supervisor. This was a lower status role than Production Manager. As Lairage Supervisor the claimant reported to the Production Manager who was Mr Baillie.

3. The lairage is that part of the abattoir where the live animals first come in. Their paperwork requires to be checked and they are then held there and various checks carried out before they are moved through to the Slaughter Hall. The Lairage Supervisor is seen within the respondents as being an important role.

4. Over the years views of animal welfare have changed and animal welfare is now seen as first priority within the business. The claimant's role was to strive to improve standards in the lairage department. Over the years whether as Assistant Production Manager, Production Manager or Lairage Supervisor the claimant had been instrumental in constantly improving the respondents' animal welfare standards. He was one of the first of the respondents' employees to be trained as an Animal Welfare Officer. Animal Welfare Officer is a publicly recognised qualification. It is not a role as such within the respondent organisation but part of the respondents' animal welfare policy is that they have a number of members of staff trained as animal welfare officers. No matter what their role is their job is taken to involve promoting the highest animal welfare standards within the company.

5. As well as developing their own animal welfare policy from the 1990s onwards the respondents required to comply with the terms of the relevant legislation and also the requirement of their customers. Over the last few years the respondents' major customer has been Tesco who accounts for around 70-80% of their production. Another major customer they have is Marks & Spencer. Both of these organisations have their own animal welfare policies for suppliers. Certain excerpts of these were lodged (Tesco – 150-163, 153-174, Marks & Spencer –

175-195). All of the respondents' customers require the respondents to submit to regular audits. These can include unannounced audits. In addition Food Standards Scotland who are the government agency charged with animal welfare in this context may carry out inspections. Audits, whether announced or unannounced, are an extremely regular feature of working life at the respondents' site. There can be as many as four or five audits per month. For this reason the respondents' management have a policy which is promulgated to all staff to the effect the company must be *"audit ready"* at all times. What this means is that the company and its employees must, at all times, operate in such a way that if an auditor were to come in they would find 100% compliance.

6. As part of his role as an Animal Welfare Officer the client required to regularly attend refresher courses in order to update and retain this qualification. The claimant had attended four or five such refresher courses and at the date of his dismissal his qualification as Animal Welfare Officer was still current. In addition to this qualification the claimant required to have a certificate of competence in terms of the WATOK (Welfare of Animals at Time of Kill) Regulations promulgated under the auspices of Food Standards Scotland as indeed did all employees in the lairage who came into contact with live animals.

7. Prior to the events which led to his dismissal the claimant was very highly regarded by his employers and seen by them as the most highly qualified and experienced manager they had on animal welfare issues. For his part the claimant had generally good relations with all of his managers, some of whom like the claimant had worked for the respondents for many years.

8. As part of their policy of being audit ready at all times the respondents' management some years ago installed CCTV cameras at various points in the factory where processes were carried out. These were intended to be used as a management tool so as to ensure that good practice was followed at all times not just when a manager could be seen watching. The practice of installing such cameras was in recent years made mandatory by most of the respondents' customers who wished their auditors to have the opportunity to do checks so as to ensure that even between audits the highest standards of animal welfare were

being met. Typically an auditor from Tesco or Marks & Spencer would ask to look at six or seven CCTV excerpts selected randomly and check these so as to ensure that the respondents were acting in terms of their Code of Practice and that animal welfare standards were being met.

9. The respondents' managers tried to instill a culture within the respondents which gave animal welfare the highest priority. They made employees aware that one poor audit from one of their customers (sometimes termed a red flag audit) could result in that customer de-listing the respondents as a supplier. Effectively this would mean that all employees of the respondents would be at serious risk of losing their jobs. Even if a poor audit did not result in a de-listing of the respondents as a supplier, the respondents' customers operated a traffic light system. What this meant is that if the audit was poor but did not merit immediate de-listing the respondents would be placed on a higher level of surveillance and various other steps taken so as to ensure compliance in future. Within Tesco audits were described as blue, green, amber, red. Blue was a state of perfection which in the event the respondents have not yet met. Green was satisfactory. An amber would be unsatisfactory but would not result in immediate de-listing although two ambers in a row might. A red light was a serious matter which would more likely than not end up with the company being de-listed. Marks & Spencer operated a similar system where audits were described as bronze, silver, gold and fail.

10. For the above reasons audits were seen as an occasion of stress for the respondents' managers. In addition a manager whose department caused the respondents to be given a lower grade of audit could expect to be subject to criticism from other managers for effectively risking the site.

11. In general terms the way the lairage operates is that the haulier arrives and provides the paperwork for the animals which he has brought to the office. The animals are then unloaded to a reception pen and then moved to various holding pens where they are inspected by the staff at the lairage and the official veterinarian. This is an independent veterinary surgeon employed by a company separate from the respondents and is the person who makes the final decision on

whether or not the animal is fit to be slaughtered. The animal and appropriate paperwork is presented to the veterinary surgeon who carries out a physical check and then signs off to allow the animal to proceed. The lairage staff are then responsible for conveying the animal through to that part of the process where the animal is stunned immediately prior to slaughter. The stunning itself is the responsibility of the Slaughter Hall staff.

12. On 3 August 2016 the claimant, as was his usual practice came into work around 5.30am. Again as was his usual practice he checked with the office to check if there were any paperwork issues and dealt with any paperwork issues which had arisen. He would then go to inspect the animals and the pens and carry out various pre-production checks. This would involve various things such as ensuring that the animals had sufficient water and that the water had not been contaminated and that the animals had clean bedding. He would also get all the animals on to their feet so that they were on their feet and ready to be inspected when the official veterinarian arrived.

13. It was the usual practice to deal with sheep first. On the day in question there was a shortage of staff in the lairage and Slaughter Hall department. The Production Manager had agreed to a member of staff coming in late and so he would not be available to do the sheep and in addition one member of staff was on light duties. As a result of this the claimant's own department was somewhat short staffed. This was not a particularly unusual state of affairs. During the course of a day the claimant would often carry out a number of duties himself such as driving the forklift truck to unload lorries in order to substitute for staff who had not arrived or were unavailable for any reason. On this particular day one of the effects of the shortage of staff was that Jonathan Spence, one of the lairage operators was put on the sheep race. This is an area which the sheep pass through immediately before going to the stunning area. The sheep proceed through a narrowing pen which has low walls. At the end of this pen the sheep are effectively in single file and the sheep are then placed in a V-belt which is a kind of conveyor belt which lifts them by the shoulder. The floor then falls away and they are conveyed by the V-belt into the stunning area.

14. Up to this point the sheep have been travelling on their own legs and it is not particularly unusual for the sheep to need a bit of cajoling before the first one goes into the V-belt. It is a well-known animal welfare principle that in doing this the operator must not do anything which hurts the animal or causes it stress.

15. Mr Spence's job was to ensure the sheep flowed freely from the race into the V-belt.

16. Although the incident which involved the claimant and led to his dismissal took place earlier it is probably as well to deal with matters in the order in which the respondents became aware of them. At around 8.00am that day auditors employed by an independent auditing company acting on behalf of Tesco arrived at the site for an unannounced audit. As is usual word of their presence went round the site fairly quickly. One of the first things they did was look at CCTV footage for the last 90 days or so. They were shown the CCTV on a large monitor in the office of Mr Anderson, the Factory Manager. They chose various dates and times at random. One of the segments which they viewed showed one of the lairage employees, Mr Sandy Laird, behaving in a way which the auditors and managers present considered breached animal welfare standards. The incident had happened a month previously. Mr Laird had been moving sheep along a corridor between pens with a view to putting them in the pen at the end. The CCTV showed Mr Laird apparently forgetting to set the gate of the pen before leading the sheep along. The CCTV (which was viewed by the Tribunal) then shows Mr Laird realising his mistake and opening a pen gate and then having to turn round the sheep so they go back down the way they have come into the pen. In doing this he was seen grabbing various sheep and manhandling them backwards including one particular sheep where he can be seen lifting it up forcibly from behind and then throwing it behind him in such a way that the sheep ended up on its back on the ground with its four legs in the air. The sheep then turned over and walked into the pen without apparent difficulty. The managers present, Mr Napier and Mr Anderson were of the view that this showed Mr Laird behaving inappropriately and indicated to the auditors that they would be taking action.

17. In another CCTV excerpt the auditors noted that a sheep appeared to be lame. It is against Animal Welfare Standards to slaughter an animal which has been injured. The managers present contacted the procurement department to check on the paperwork associated with this particular sheep. Before the auditors left the management were able to provide the auditors with documentation showing that this sheep had been lame its entire life and that the official veterinary surgeon had indicated that it was fit to be slaughtered. If this had not been the case and the animal's paperwork did not show this pre-existing injury then this would have resulted in the respondents being disconform to the Code of Practice. As it happened the auditors were perfectly satisfied with the paperwork they were shown.

18. The auditors then started moving round the site. There were two auditors, a woman and a man. The man was in training. Visitors to the site such as auditors wear blue helmets so as to distinguish themselves from other types of employee. Generally managers wear red or orange helmets. The auditors were accompanied by Mr Baillie the Production Manager, Mr Anderson the Factory Manager and by Agata Wasielewicz who was employed by the respondents as a Vet. She had formerly worked as an official vet for an independent company but had been taken on by the respondents some time previously to assist them in maintaining animal welfare standards. During the inspection the group came to the area adjacent to the race where Jonathan Spence was working. Mr Anderson hung back and did not go with them to the walkway adjacent to the race but the others congregated in this area. There is a viewing platform adjacent to steps which lead up to the platform on which Jonathan Spence was working. The platform is around three feet below the level of the platform on which Mr Spence stood. The scene was captured by a CCTV camera which is positioned high up on the wall on the opposite side of the race from the platform. The angle of view from the camera is different from the angle of view from the viewing platform. The CCTV was viewed at various points during the Hearing and it shows the two auditors in their blue helmets standing on the steps leading up to the platform and Mr Baillie and Ms Wasielewicz standing on the platform. It can be seen that Mr Baillie and Ms Wasielewicz's heads are around two to three feet below the level of the heads of the auditors.

19. The CCTV shows Mr Spence having difficulty in persuading a sheep to go into the V-belt. The segment of video shown to the Hearing shows Mr Spence trying to persuade the sheep by tugging on its wool and grabbing its back leg. This carries on for a period of over 30 seconds. During this period Mr Baillie can be seen looking towards Mr Spence and then looking away as if he is having a conversation with Ms Wasielewicz. Eventually Mr Spence can be seen lifting up the sheep by its back legs and forcing it forward on to the V-belt. At around this point one of the auditors can be seen pointing with her hand and touching Mr Baillie with her other hand. Mr Baillie can then be seen moving quickly to get past the auditors and up on to the platform to talk to Mr Spence to stop him. There is no sound and it cannot be seen whether or not Mr Baillie says anything before the matter is highlighted to him by one of the auditors however I accepted the claimant's evidence that if he had said anything one would have expected the auditors and others to have reacted in some way and no reaction can be seen.

20. Having apparently had words with Mr Spence, Mr Baillie and the other members of the party then can be seen leaving the area leaving Mr Spence to put the remainder of the sheep through the race. Mr Spence then continued on duty for a further 25 minutes or so until all the sheep had gone through.

21. Following the incident with Mr Spence the audit continued. At the end of the day there was a wrap-up meeting which was attended by the auditors and managers. The outcome of the audit was also recorded in a summary document which was lodged (page 88). This document is headed Non-conformist and Observation Summary. It indicated that the status of the audit was amber. It set out in six boxes six points which were declared to be non-conforming. In the box next to two of these it stated that these were considered to be major instances of non-conformance. Major is the second highest (or worst) category of non-conformance. The only category above this is critical and if critical non-conformance is discovered then it is highly likely that the auditors would require production to cease until the matter was dealt with and the possibility of the respondents being de-listed would be high. One of the items of major non-conformance related to the incident with Mr Spence. It stated

"A Lairage Operator was seen suspending an animal off its back legs by the fleece until the slaughter Production Manager stepped in."

The other major non-conformance related to a technical issue regarding the stunning equipment. In order to ensure that the animal is properly stunned the equipment requires to record the amperage in each case which must be above a certain limit. In this case the equipment was seen operating 10 times and on two of these occasions the amperage was below the limit. This was due to a technical issue regarding the recording of amperages and in each case the animal was properly stunned and there was no actual impact on the welfare of the animal. That having been said the respondents subsequently purchased new equipment which would avoid this non-conformance re-occurring.

22. During the wrap-up meeting the auditors indicated that if Mr Baillie had not stepped in when he did then they would probably have recorded Mr Spence's actions as amounting to a critical non-conformance.

23. The respondents' managers Mr Anderson and Mr McNaughton who had attended the meeting were concerned that the audit had gone so badly. It was their view that disciplinary proceedings would require to be instigated against Mr Laird and against Mr Spence. They asked Mr Baillie to look through the CCTV footage to see if there were any other instances and thereafter contact the claimant as Lairage Supervisor with a view to the claimant carrying out a disciplinary investigation against Mr Laird and Mr Spence.

24. The following morning Mr Baillie looked through some CCTV footage. It is not clear exactly what he looked at but at some point during the morning he discovered footage which showed Mr Spence apparently mistreating another sheep in the race earlier on on 3 August. What concerned Mr Baillie was that during part of this time the claimant was standing on the platform adjacent to him and apparently looking at Mr Spence but not taking any action. He met with Mr Anderson who agreed that the claimant should become part of the investigation (i.e. a target of the investigation) rather than carrying out the investigation himself. Mr Anderson then

followed the company procedure which is that where a disciplinary investigation is carried out the employee will be suspended at that point. The claimant was then called to attend on Mr Baillie in his office. The claimant was aware that there had been issues the previous day with Mr Spence doing something to a sheep in front of the auditors and understood that he was to be doing the investigation. When the claimant was called in to Mr Baillie's office Mr Baillie showed him the CCTV involving the incident viewed by Mr Baillie and the auditors. He advised the claimant that it had been intended the claimant was to investigate this but Mr Baillie then stated that he had looked at earlier footage and showed the claimant the earlier CCTV footage. He told the claimant that he was now part of the investigation. The claimant was then told he was suspended and escorted off the premises.

25. The third piece of CCTV footage was also viewed several times during the course of the Hearing. It starts at 6:40:07. It shows Mr Spence manhandling a sheep to try to get it into the V-belt. After a couple of seconds the claimant is seen arriving and standing in the viewing area which is approximately three feet below the platform on which Mr Spence is standing. Mr Spence can clearly be seen on the CCTV camera pulling at the sheep and lifting it up by the back legs for a period of around 26 seconds. During this time one can see the back of the claimant's head. The claimant is leaning on the yellow railing and appears to be looking towards Mr Spence. From this angle it is clear that his view of the sheep would to some extent be impeded by Mr Spence's back from time to time although it would have been possible for him to see what was going on by looking round the side. Within the claimant's vision would also be a wall which appears to have some pipes on it. The platform is on the opposite side of the lairage area from pens 1 and 2 although I accepted the claimant's evidence that from there he would be able to see sheep in pens 1 and 2 because their tendency would be to bunch up along the back wall.

26. Whilst the claimant is there facing Mr Spence's back at the level of his waist Mr Spence can be clearly seen mishandling the sheep by pulling at and then eventually lifting it up by its rear legs.

27. In a letter dated 4 August 2016 Elaine Ord the Respondents' HR Manager wrote to the claimant inviting him to an investigation meeting. It was said to be in relation to *"breach of animal welfare legislation"*. The investigation was carried out by Mr Napier the Respondents' Service Manager. Mr Napier had also worked for the Respondents for a very long time and in the past had closely worked with the Claimant. The Claimant met with Mr Napier for an investigation meeting on 8 August. Prior to the meeting with the claimant Mr Napier had also conducted investigations in relation to Mr Spence and Mr Laird. He had also conducted a meeting with Mr Baillie. A note of Mr Napier's meeting with Mr Baillie was lodged (pages 91-92). The only reference in this meeting to the Claimant was towards the end when Mr Napier asks Mr Baillie *"when did you bring Brian Christie into this?"* He responded that he had done so on Wednesday 3 August 2016 during the audit and that he had told Mr Christie *"I can't believe he's had a sheep tail ended in front of the auditor"*. He then went on to say that the following day he had had a further conversation with the claimant when the claimant was asked to review CCTV footage. There was no discussion of the incidents which had taken place at around 6:40am involving Mr Spence and the claimant.

28. The claimant's investigation meeting with Mr Napier took place at 2:00pm. Mr Napier was accompanied by Steven Robertson who took notes. The claimant was not accompanied. Mr Robertson's notes were lodged (pages 93-95). Although the notes are not verbatim or complete I accepted that they were a reasonably accurate record of what was discussed at the meeting. The claimant was shown the CCTV. The claimant agreed that he should have seen what Mr Spence was doing if he was concentrating on Mr Spence but stated that he did not see what Mr Spence was doing. He agreed with a suggestion by Mr Napier that it was possible he had his eyes closed. He made it clear that if he had seen Mr Spence he would have taken action. This was accepted by Mr Napier. Mr Napier considered that this would be the case given his very lengthy knowledge of the Claimant. Towards the end of the meeting the Claimant became distraught. He made clear that if he had witnessed this he would have stopped it. He said that his reaction to the CCTV footage was that he was horrified that he had missed it and didn't pick up on it. He confirmed that he felt that he had let himself down responding "yes big time".

29. Mr Napier closed the meeting since he considered that the claimant was upset and it was appropriate to do so. Mr Napier considered that there was a case to answer. He believed that the claimant should have interjected and spoken to Mr Spence. He based his decision partly on the basis that if Mr Spence had been spoken to by the claimant at 6:40am then Mr Spence would not have behaved in the same way in front of the auditors at around 8:00pm. Mr Napier verbally reported to Mr Anderson that he considered that the claimant had a case to answer. He also confirmed the same for the Mr Laird and Mr Spence. The Tribunal did not hear any detail regarding the disciplinary process against Mr Spence or Mr Laird other than that this led to their dismissal. No disciplinary proceedings were instigated against Mr Baillie.

30. In a letter dated 10 August 2016 the claimant was invited to a disciplinary hearing on 12 August 2016. He was advised that the meeting would deal with the question of disciplinary action against him and that this would be considered with regard to

> *"Your failure to discharge your duties as a supervisor and animal welfare officer which led to the breach of animal welfare legislation".*

He was advised that if the allegations were upheld he could be found guilty of misconduct or gross misconduct and that he might be issued with a first or final warning or dismissed with or without notice in accordance with the company's disciplinary procedure. He was advised of his right to be accompanied.

31. The claimant duly attended a disciplinary meeting on 12 August which was chaired by Mr Craig Anderson, Factory Manager. Mr Anderson was accompanied by Elaine Ord, the respondents' HR Manager. The claimant was not accompanied. A note of the meeting was lodged (page 97-101). The claimant's position was that he had gone to look into pens 1 and 2 to make sure they were not overcrowded. He was asked if he had seen Jonathan Spence and stated that Jonathan Spence was standing in front of him so maybe obscured what he was doing. There was a lengthy discussion about whether or not the claimant was in the habit of viewing CCTV footage as a supervisor. The claimant's position was that when he had

been Production Manager he had had a large screen with full access to all the CCTV cameras in the production area. When he became a supervisor he no longer had direct access to CCTV. He accepted that he could watch the CCTV if he wanted but did not have it in his office. He would have to speak to one of the other supervisors. He indicated that normally he would ask one of the Slaughter Hall supervisors to check for him. Mr Anderson's position was that he did not believe that the claimant was contrite. He was well aware that the claimant had expressed contrition to Mr Napier at the investigation interview and had in fact broken down. Mr Anderson's position was that he was looking for something similar at this meeting which did not happen. Mr Anderson's final view was that the claimant had not deliberately ignored Mr Spence mistreating the animal. His position was that the claimant had simply not registered what was going on in front of him. Like Mr Napier, Mr Anderson was of the view that if the claimant had seen Mr Spence abusing an animal he would have intervened. He based this on his knowledge of the claimant gained over his many years working with him.

32. At the end of the hearing the claimant accepted that he should have noticed what Mr Spence was doing but simply hadn't. The meeting was adjourned for a short time and after this Mr Anderson stated that he had decided that the claimant should be dismissed. Whilst his position was that he did not believe the claimant had seen Mr Spence he believed that since the claimant was three feet away from Mr Spence and looking at him for *"35 seconds"* then he ought to have seen him. He also indicated that he was taking into account that the claimant was *"abdicating your duties as a Supervisor and Animal Welfare Officer"* in that he passed on issues to other supervisors because they had access to CCTV.

33. Immediately after the claimant's suspension the respondents had contacted Food Standards Scotland who are responsible for issuing certificates of competence. They had also contacted Tesco and Marks & Spencer direct. They advised Tesco and Marks & Spencer of the action they were taking. Tesco auditors in fact visited the premises for a further audit which took place on the same day as the claimant's disciplinary hearing. By the time of the disciplinary hearing the claimant's Certificate of Competence had been suspended by Food Standards Scotland. The result of the suspension meant that the claimant could not work in the Lairage or

Slaughter Hall area. Given that the claimant had considerable experience in all aspects of the respondents' processes there were other parts of the factory where he could have worked which did not require him to have a COC but where he had the appropriate experience and knowledge to work. These areas included driving a forklift, loading and packing.

34. Mr Anderson confirmed his decision to summarily dismiss the claimant without notice in a letter which was sent to the claimant on 15 August 2016. This was signed by Elaine Ord. It was lodged (page 105). The claimant was advised of his right to appeal.

35. In actual fact the claimant had submitted an appeal letter before this on 12 August. His appeal letter was lodged (page 104). It is probably as well to set out the claimant's appeal letter in full.

> *"Dear Alan,*
> *I can't believe I have to write an appeal letter, 42 years of faithful service gone in 21 seconds!! I do not condone in any way the mistreatment of any animal. I have helped in many ways on countless audits and have never been found wanting in my duties to make sure that each audit is completed successfully. Two days prior to this terrible incident that has led to my dismissal I was being highly praised by M & S I can quote 'this audit is of gold standard' but unfortunately we were almost delisted of which you are well aware of the circumstance and scraped pass with a bronze. Everyone at 2SFG is well aware of the pressures of an unannounced audit, as like any other audit I'm running about making sure all in your words is "TICKETY-BOO". I have let you down, 2SFG and myself down by not seeing a breach of animal welfare, 21 seconds I can't take back and 21 seconds I will never forget. I can only conclude by again stating most emphatically that I did not witness Jonathan Spence commit any breach of animal welfare, I thought every single person that knows me would have agreed I WOULD NOT ALLOW IT. I pride myself on being very good at my job. I spent over six years as Production Manager and not once did you or any other director have to*

reprimand me. We have been through and shared a lot of ups and downs together Alan and I hope you will take this into consideration when you make your decision to either reinstate me or up hold Craig Anderson's decision to terminate my employment."

36. On 26 August 2016 Elaine Ord, the respondents' HR Manager wrote to the claimant inviting him to an appeal hearing to take place on 31 August. This letter was lodged (page 111).

37. On 29 August Food Standards Scotland wrote to the claimant again confirming that his Certificate of Competence remains suspended.

38. The claimant duly attended the appeal meeting on 31 August.

39. The meeting was attended by the claimant who was accompanied by George Duncan the respondents' Senior Shop Steward. The meeting was conducted by Alan McNaughton the respondents' Site Director who was accompanied by Elaine Ord the respondents' HR Manager. A note of this meeting was lodged by the respondents (pages 116-117) however this has a page missing. A further minute was lodged (146-148) however this is incomplete and does not fully reflect what took place at this meeting. At some point fairly early in the meeting the claimant pointed out that he had not received the minutes of either the investigative meeting or the disciplinary meeting. Mr Napier had prepared a handwritten note of the investigation meeting which had been handed to Mr Anderson but otherwise the minutes of the investigation meeting had not been typed up. The claimant had not seen them. The claimant had not at this stage seen any minute of the disciplinary meeting at which he had been dismissed. Ms Ord initially told the claimant that he had seen these documents however when the claimant maintained his position Mr McNaughton suggested that Elaine Ord go to her office and obtain copies. Elaine Ord left. When she returned after approximately 10 minutes she advised that it would appear that the minutes had not in fact been typed up yet and she accepted that the claimant had not seen them.

40. Mr McNaughton's position was that he believed that the claimant must have seen what Mr Spence was doing and was not prepared to accept that he had not seen this. Mr McNaughton's view therefore differed from that of Mr Napier and Mr Anderson who had accepted that the claimant had not seen what Mr Spence was doing albeit their position was that he ought to have.

41. During the meeting the claimant requested that he be allowed to look at the CCTV again. Mr McNaughton accepted that this should happen. The meeting was then adjourned.

42. Subsequently the claimant was given the minutes of the investigative and disciplinary meetings which were lodged for the Tribunal. A meeting was also arranged to take place between the claimant and Mr Napier so that Mr Napier could show the claimant the CCTV footage again. This meeting took place on 2 September in the respondents' gatehouse. Mr Napier was accompanied by Steven Robertson of the respondents' HR department who took notes. A note of this meeting was lodged (pages 113-115). During the meeting the claimant viewed all three pieces of CCTV footage.

43. Following this meeting it would appear there was some informal discussion between Mr McNaughton and Mr Napier. On 5 September Ms Ord wrote to the claimant confirming that his appeal had not been successful. The letter was lodged (page 149). Within the letter is stated

> *"In coming to this decision, Alan McNaughton has reviewed all the evidence given, as well as close observance of the CCTV footage. In doing so he has taken into consideration the views of the Official Regulatory Body (Food Standard Scotland), who are responsible for the issue of all WATOK licenses, and the monitoring of compliance on our site. He has also taken into consideration the views of the external auditor and those of our major customers who we had to advise of this welfare breach due to the potential reputational damage both to the customer and our business."*

44. Following the termination of his employment the claimant received notice on or about 11 November that his Certificate of Competence had been revoked by Food Standards Scotland. The claimant appealed the revocation. His appeal was due to be heard in the Sheriff Court. As a condition of proceeding with his appeal he required to pay the court fees of £160. By this point the claimant was unemployed and in receipt of benefits totalling £73.10 per week. He did not envisage a return to the abattoir industry. He considered that in those circumstances it was not an appropriate use of his limited funds to pay the court dues and accordingly the appeal was dropped.

45. Following the termination of his employment the claimant registered for Jobseekers Allowance. He remained on Jobseekers Allowance until approximately three months prior to the Tribunal when he was signed off as he was unfit for work due to depression. He remains on benefits but the benefits he currently receives are on the basis that he is not fit to work. Despite this the claimant has since the date of his dismissal made numerous and concerted attempts to find work. He is registered with a number of job agencies. He has arranged to obtain details of vacancies through various applications on his telephone. He has lodged his CV with various agencies. He is prepared to accept work in various roles including cleaner, security guard and driver. Despite this he has been unable to find work. He has continued to seek work since being declared unfit. He considers that if he did find work this would assist with his depression. He feels that various factors militate against him finding work. These include the fact that he has worked for one employer in one industry for practically the whole of his working life, his age and the fact that he was dismissed for gross misconduct.

46. The claimant's gross weekly pay as at the termination of his employment was £2896.01 per month which equates to £668.31 per week gross. His net pay was £2154.66 per month. In addition to this his employers paid £144.81 as a pension contribution. An employee pension contribution of £115.84 is included in the calculation of his net pay. Adding back these two contributions gives monthly net remuneration of £2415.31 per month which equates to £557.38 per week. The

benefits received by the claimant have amounted to £73.10 per week from 12 October 2016 when he first signed on.

Matters Arising from the Evidence

47. I had absolutely no doubt that all of the witnesses were trying to give truthful evidence as they saw it. There was some difficulty with the recollection of some of the witnesses as to what they had known or believed at the time and what they now believed with the benefit of hindsight. In giving evidence most of the respondents' witnesses wished to justify the view they had taken of the CCTV footage which was shown many times. In addition a great deal of time was spent on what was essentially argument putting points justifying the position they took. As a result of this it was not always particularly easy to determine the exact course of events. So far as the appeal was concerned Mr McNaughton gave evidence initially to the effect that the only people present were himself, Ms Ord and the claimant. It was only after it was put to him in cross examination that he accepted that George Duncan the Senior Shop Steward was also present. It became clear that the minute of the various meetings were not particularly full and that particularly in the appeal various things had been said which were not minuted. In particular I accepted the claimant's evidence to the effect that he had raised the issue of lack of minutes and that Elaine Ord had initially stated that he had the minutes but had then left and finally admitted that the minutes had not been typed. Mr McNaughton accepted in his evidence that this might have been the case. The initial set of appeal minutes which were in the first bundle had a page missing and this page was, according to the claimant, only provided to him a few days before the hearing. Even with the additional page I was not prepared to accept that the appeal minutes were an accurate record of what took place at the appeal meeting.

48. During evidence the various witnesses made a number of concessions. The claimant readily accepted that although it is not mentioned specifically in the respondents' disciplinary policy it is well known throughout the factory that any breach of animal welfare provisions is likely to be treated as gross misconduct and may well result in dismissal. Both Mr Napier and Mr Anderson confirmed that their view having viewed the CCTV and spoken to the claimant was that the claimant

had not seen Mr Spence breach animal welfare. Both of them repeated several times their view to the effect that having known the claimant for many years they were absolutely satisfied if he had seen Mr Spence then he would have intervened. Mr McNaughton on the other hand indicated that in his view the CCTV clearly showed that the claimant must have seen what Mr Spence was doing and he proceeded on that basis.

49. I had some difficulty in pinning down the methodology by which Mr Napier's views were communicated to Mr Armstrong and Mr Napier and Mr Armstrong's views were communicated to Mr McNaughton. Mr Armstrong spoke of having the minutes of the investigation meeting but it appeared to me that what he may have been referring to was a handwritten document which the claimant then referred to in his evidence. It was clear that Mr McNaughton did not have the minutes of the disciplinary hearing at the time of the appeal. It did however appear to me that all three of the respondents' witnesses had discussed the issues involved around the claimant's dismissal at the time. I particularly noted that in his evidence Mr Armstrong gave as one of his reasons the claimant's assertion at the investigation meeting that when looking at CCTV he was *"clutching at straws"*. On being challenged Mr Armstrong did accept that in fact the claimant only used the phrase "clutching at straws" in the minute of the meeting which took place on 2 September, after his appeal meeting, when he viewed the CCTV in the gatehouse with Mr Napier. One result of this was that it was clear to me that although Mr McNaughton appears to have reached a different view on what the CCTV demonstrated from that of the other two managers this was not something which may have been apparent to him at the time.

50. During the hearing the respondents' representative made the point that neither in the ET1 nor at any point prior to the hearing had the claimant indicated that he wished to challenge the dismissal on procedural grounds. As a result the respondents had not sought to lead evidence from HR. I did take this point into consideration when considering matters however even taking this into account I was concerned that the exact procedures which had been followed were not particularly clear from the evidence which was before the Tribunal.

Issues

51. There were two claims before the Tribunal which both related to the claimant's dismissal. The claimant claimed that he was unfairly dismissed in terms of Sections 94-98 of the Employment Rights Act 1996. He also claimed that he was wrongfully dismissed at common law in that his contract was terminated without notice in circumstances where he was not guilty of the gross misconduct alleged. In the event that I found in favour of the claimant in respect of unfair dismissal I would require to decide remedy. In the event that I found in favour of the claimant in respect of his claim of wrongful dismissal the claimant would be entitled to his notice pay. If I found in favour of the claimant in relation to both claims I would require to take into account the fact that the claimant would now receive his notice pay in deciding the compensatory award in terms of his unfair dismissal claim. The respondents' position was that if I found in favour of the claimant in respect of unfair dismissal then any award should be reduced to take account of the claimant's contribution towards his own dismissal. It was also their position that if I were to find that the dismissal was unfair for procedural reasons then a ***Polkey*** reduction of 100% ought to be made on the basis that had such procedural defects not occurred the claimant would have been fairly dismissed in any event.

Discussion and Decision

52. Both parties made full submissions. The claimant's submissions being made in writing and supplemented orally. The respondents' representative indicated that the reason for dismissal was conduct which is a potentially fair reason falling within Section 98(2)(b). He referred to the well known ***Burchell*** test and indicated that all three limbs were satisfied. The claimant was accused of failing to discharge his duties as a Supervisor and Animal Welfare Officer which led to a breach of animal welfare legislation. It was his view that both of the decision makers in this case, Mr Armstrong and Mr McNaughton, had a genuine belief that the claimant was guilty of this. Whilst Mr Armstrong's view fell short of finding it proved that the claimant had seen what Mr Spence was doing Mr McNaughton was quite clear that in his view the claimant had seen what Mr Spence was doing and had chosen to do nothing. I was referred to the case of ***West Midlands Co-operative v Tipton***

[1986] ICR HL 192 as authority for the proposition that the view taken of the claimant's conduct by Mr McNaughton at the appeal stage was relevant. I was referred also to an excerpt from the IDS Handbook unfair dismissal at page 395 which states

> *"Nothing in principle prevents an employer's appeal panel upholding a decision to dismiss on a different basis from that on which the original decision was made."*

53. As I understood the respondents' position it was that by the time of the appeal the respondents had formed the view, in the person of Mr McNaughton that the claimant was guilty of seeing Mr Spence commit a breach of animal welfare and taking no action. As regards whether or not they were reasonable grounds for that view I was referred to the CCTV. The CCTV showed the claimant facing Mr Spence for 20-odd seconds from around three feet away. Although his eyes could not be seen his head and body orientation was such as to allow the appropriate inference to be drawn. It was suggested that the claimant's explanation of having been concerned with other matters was unlikely since the claimant would clearly be more interested in what the operative in front of him was doing. With regard to investigation it was the respondents' position that this quite clearly fell within the band of reasonable responses. The reality was that the matter turned on the CCTV and the view that the respondents took of this. The claimant was given the opportunity to view it on a number of occasions. Whilst Mr Baillie didn't say anything in his interview about the claimant's actions this was because Mr Baillie had not been there and there was really nothing more that could be said. The respondents' view was that quite clearly all three limbs of the ***Burchell*** test had been satisfied. On the issue of reasonableness I was cautioned about the importance of not substituting my own judgment for that of the respondents. The question was whether or not the respondents' response was within the band of reasonable responses. Whilst it was natural to have sympathy for the claimant given his very long service and whilst it might appear at first blush that the sanction was too harsh the matter had to take into consideration just how serious the misconduct was and the potential effects on the respondents. I was referred to a discussion in ***Harvey*** to the effect that in a case of gross misconduct

there may be little scope for length of service to be taken into account. The respondents' position which is stated to be absolutely central to their case was that the misconduct here amounted to the most serious misconduct that can take place in the workplace environment of the respondents. I was referred to a statement made by Mr McNaughton that animal welfare was *"top of the tree"* and indeed to the claimant's own ready acceptance that it was well known within the respondents that any breach of animal welfare be treated as gross misconduct. It was also the respondents' position that the conduct breached the absolute baseline imposed by the WATOK legislation and opened up the respondents to prosecution. It was the respondents' position that the claimant stood by and allowed a breach of animal welfare legislation to take place. His failure to intervene also led directly to a further breach taking place later that morning which had serious consequences which could have been much worse. The respondents referred to the claimant's acceptance that if he had seen Mr Spence behaving as he did then the appropriate action for the claimant would have been to remove Mr Spence from that role immediately.

54. The respondents' position was that the offence in this case went to the root of the claimant's role. It was like a postman not delivering mail. His job as Animal Welfare Officer was to ensure breaches of animal welfare didn't happen. It was the respondents' position that even if one looked at matters based on Mr Anderson's position then failure to intervene due to gross negligence would also go to the heart of what the claimant was employed to do. The respondents' representative also made the point that the claimant had not helped himself at the disciplinary. He noted Mr Anderson's view that the claimant did not show remorse or appreciation of the seriousness of the matter. He also noted that so far as the claimant accepted in his appeal letter that he let himself down he didn't help himself at the appeal and nowhere was there a recognition of concern for the animal concerned or for the business. The respondents' position was that there could not be more serious misconduct. It opened the respondents up to prosecution and caused issues with their major customers. I was referred to the case of ***Wincanton PLC v Atkinson and Marrison UKEAT0040/11*** as demonstrating that an employer may rely on the seriousness of potential consequences and if these consequences did not in fact ensue. In this case the respondents could potentially have lost the

Tesco contract and indeed been prosecuted. With regard to the issue of a potential comparison with Mr Baillie it was the respondents' position that no such comparison could be made. Mr Baillie did intervene. All of the parties involved including the Tesco auditors considered that Mr Baillie had acted appropriately. The respondents' representative indicated that in his view no proper comparison could be drawn in respect of the second major non-conformity identified in the Tesco audit which appeared to be due to a technical equipment issue. The respondents also made the point that the respondents had no real alternative to dismissal given that the claimant had his WATOK license suspended and then revoked and would not have been able to continue in his job. The respondents' representative indicated that his recollection was that neither Mr Anderson nor Mr McNaughton had been challenged in cross examination in respect of their assertions that there were no other jobs within the factory which the claimant could do. On checking my own notes I find that this is not the case. It was clearly put to Mr McNaughton that the claimant had worked with the forklift in the Hide Hall on packing and had been very good at it in the past. Mr McNaughton agreed *"that would be fair to say"*. It was not put to Mr Anderson. I consider I was entitled to accept the claimant and Mr McNaughton's evidence over that of Mr Anderson. The respondent also pointed out that the regulator had taken the same view of the claimant's conduct by revoking his Certificate of Competence. The respondent made the point that although the claimant had given evidence as to why he had not appealed there was no documentation to support this. On the issue of remedy should the Tribunal not be with the respondents then the respondents' representative pointed out that there was no allegation or procedural unfairness in the ET1. In any event, even if the Tribunal were to find that there was some procedural unfairness in for example the minutes of the appeal hearing not being complete or minutes of previous hearings not being available then this was minor and would not render the dismissal unfair. Even if the Tribunal did consider it rendered the dismissal unfair then it would not have affected the end result so that a 100% ***Polkey*** reduction would be appropriate. With regard to mitigation the respondents were critical of the paucity of the claimant's evidence regarding jobs he had actually applied for. Although the claimant had provided a long list there was only documentary evidence in respect of eight jobs. The respondents also made the point that it was difficult to see how the claimant could claim loss of

earnings in a role which he was not permitted to carry out because of his lack of a Certificate of Competence. It was also the respondents' view that even if the claimant had appealed his Certificate of Competence there was a low prospect of this being successful. Any new role the claimant was allocated to which did not involve him holding a Certificate of Competence would be at the rate for that job which would be lower than his previous rate of pay.

55. With regard to the claim of wrongful dismissal it was the respondents' position that the claimant was guilty of gross misconduct as could be seen from the CCTV and that he was therefore not entitled to notice pay. The respondents were entitled to terminate his contract of employment without notice.

56. The claimant's submissions concentrated on the issue of whether or not the dismissal was within the band of reasonable responses. The claimant pointed out that the respondents' case linking the claimant's behaviour to the poor audit score was based on the hypothesis that if the claimant had taken action at 6.40 then Mr Spence would not have behaved as he did at 8.00am. He pointed out that by 8.00am Mr Spence would have been aware of the audit and had seen the auditors and senior managers arrive yet still carried on to behave as he did. He pointed out that although Mr Napier and Mr Anderson had said that the auditors congratulated Mr Baillie on taking action when he did this was not borne out by their written report. It was also not borne out by the CCTV footage which indicated that Mr Spence's actions went on for some considerable time before he intervened and that it appeared that he only intervened when one of the auditors drew the matter to his attention. It was the claimant's position that there was a serious disparity in treatment between himself and Mr Baillie. On the first occasion there was only the claimant and Mr Spence there. On the second occasion there were far more people there. Whilst he accepted that no case had been raised on procedure he pointed out that the claimant's representative did not receive the full minutes until very shortly before the hearing and he also pointed out that the matter had been pursued in evidence with Mr McNaughton without objection from the respondents' representative. The claimant's representative indicated that if I was not with him then he ought to be permitted to amend the ET1 at this stage. Given that the matter was raised in the closing minutes of the hearing I did not consider that it

would be in the interests of justice to allow the claimant to make such an amendment particularly as I had not been presented with any written application or any indication as to what the amendment would consist of. The claimant's written representations expanded on the claimant's position to the effect that in all the circumstances dismissal was entirely outwith the band of reasonable responses. The claimant's representative also indicated that I should carefully distinguish between the two claims which were being made. It would be possible for me to find that the dismissal was within the band of reasonable responses and therefore fair in terms of Section 98(4) but also find that the claimant was not guilty of gross misconduct and had therefore been dismissed wrongfully. He made the point that the range of reasonable responses test does not mean that an employer has to behave perversely before a dismissal will be found to be unfair. He referred to the case of ***Robert Newbound v Thames Water Utilities Ltd [2015] EWCA civ 677***. In particular paragraph 61 where the point is made that

> *"The band of reasonable responses has been a stock phrase in employment law for over 30 years, but the band is not infinitely wide. It is important not to overlook Section 98(4)(b) of the 1996 Act which directs employment tribunals to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss 'in accordance with equity and the substantial merits of the case'. This provision, originally contained in Section 24(6) of the Industrial Relations Act 1971 indicates that in creating the statutory cause of action of unfair dismissal Parliament did not intend the Tribunal's consideration in a case of this kind to be a matter of procedural box ticking. As EJ Bedeau noted, an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer."*

57. The case in turn refers to the dicta of Burnton LJ in the case of ***Bowater v NW London Hospitals NHS Trust [2011] IRLR 331***. It was the claimant's position that ignoring the disparity argument the respondents sought to effectively side-step the issue of Mr Baillie's performance which in the claimant's view must be regarded as the cause of the respondents' problem with their major client Tesco. The

claimant's position was that the disparity argument in this case was of the second type identified in the Newbound case which is where two employees involved in the same incidents are treated differently. The claimant's representative pointed out that it was the respondents' position to "volunteer", the claimant's performance at 6:40 to their customers and FSS whilst Mr Baillie's performance on CCTV was effectively ignored.

58. The claimant's representative also drew attention to what he termed the "flawed appeal". In particular it is noted that the letter turning down the claimant's appeal indicates that Mr McNaughton had taken into account the views of various parties. It is noted that the claimant was not provided with information to the effect that Mr McNaughton would be seeking these views or taking them into account and the views of these parties was not communicated to the claimant in advance of the appeal so that the claimant had no opportunity of disputing them. The claimant is also highly critical of the minute of the meeting which was clearly inadequate. In his view this amounted to a failure to give the claimant a proper appeal and the dismissal would be unfair on that ground alone.

59. The claimant referred to the wrongful dismissal case and indicated that in his view the suggestion that the claimant was guilty of gross misconduct was not one which could be sustained. He referred to the reasoning of my colleague Employment Judge Hendry in a recent Employment Tribunal case ***Borowicki v Bluebird Buses Ltd*** ET case 4102514/16 which was a similar case where the two different claims had been made arising out of the same circumstances. On the issue of remedy the claimant's representative indicated that I should accept the claimant's evidence regarding the steps taken to mitigate his losses. He acknowledged that, as the claimant has accepted all along, the claimant was at fault in failing to notice what Mr Spence was doing but indicated that any contribution he made to his dismissal should result in a reduction of no more than 20%. The claimant lodged a Schedule of Loss in which he noted that his losses of wages up to the date of the Tribunal amounted to £9661.24. The claimant's position was that it would be appropriate to compensate the client for two years' future loss given that due to his circumstances his prospect of finding alternative work was fairly low.

Discussion and Decision

60. I shall deal first of all with the claim for unfair dismissal. Unfair dismissal is a statutory construct. Section 98 of the Employment Rights Act 1996 states

> "*(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."*

61. It appeared to be common ground between the parties that the reason for dismissal in this case was conduct which is a potentially fair reason falling within Section 98(2)(b) of the said Act. Having established a potentially fair reason for dismissal, I then required to consider the terms of Section 98(4). This states

> *"(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."*

62. As both parties recognised in their submissions when coming to my decision I required to bear in mind the wording of Section 98(4) and the way that this has been interpreted by the courts over the years. It is not for me to determine whether or not the claimant was guilty of conduct alleged or indeed any misconduct at all on the basis of examining the evidence against him. The role of the Tribunal is to look

at whether or not the respondents have acted reasonably in terms of Section 98(4). Considerable assistance is given to tribunals in relation to one aspect of this task by the well-known case of ***British Home Stores Ltd v Burchell [1978] IRLR 379 EAT***. In a case where an employee is dismissed because the employer suspects or believes that the employee has committed an act of misconduct the Employment Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This involves three elements. First there must be established by the employer the fact of that belief that the employer did believe it, second it must be shown that the employer had in his mind reasonable grounds on which to sustain that belief and third the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. In relation to the last point the case of ***Sainsbury's Supermarkets Ltd v Hitt*** makes it clear that when considering whether or not the investigation is reasonable the test to be applied is that of the range of reasonable responses. This test is well known in employment law and recognises that whilst some employers may choose to deal with matters in one way another employer might quite legitimately choose to deal with matters in a different way and provided in each case the response is within the range of reasonable responses then an Employment Tribunal will not interfere with the employer's decision.

63. In this case I found myself in some difficulty as it was clear that the employer in the person of Mr Anderson at the time he made the original decision to dismiss had a different view of precisely what the claimant was guilty of than did Mr McNaughton at the time of the appeal. It was clear that Mr Napier at the investigation stage and Mr Anderson at the dismissal stage both believed that the claimant had not in fact seen what Mr Spence was doing. They based their decision on the fact that in their view the claimant ought to have seen what Mr Spence was doing. Both witnesses were quite clear in their evidence during cross examination that they accepted he had not seen Mr Spence. In his minute of the meeting Mr Anderson is noted by the respondents' HR representative to have said that he could not prove that the claimant had seen what Mr Spence was doing. My understanding of

Mr Anderson's evidence was that in fact, as he said in cross examination, he did not believe the claimant had seen Mr Spence since he was certain that if the claimant had seen Mr Spence he would had taken some actions. On the other hand Mr McNaughton's view was that he was quite clear that the claimant had seen what Mr Spence was doing. Although at the end of the day it may be a distinction without a difference I consider that the important point in time to consider the issue is the point in time when the claimant was actually dismissed. Accordingly my view of the matter is that the actual belief of the respondents at the time of dismissal was that the claimant ought to have seen what Mr Spence was doing given that he was standing close by and looking in his direction. This belief was genuinely held by Mr Anderson.

64. So far as investigation is concerned the matter quite clearly turned on the CCTV and I do not consider that the respondents' investigation could in any way be said to be outwith the band of reasonable responses. It is well recognised that the degree of investigation which is required depends on the circumstances and in a situation where the respondents have CCTV covering the entire incident I do not consider they can be criticised for any failure in investigating beyond this. I did have some concern that the claimant raised the issue of what he could have seen from his vantage point which was some three feet below where Mr Spence was standing and facing Mr Spence's back. I accepted Mr Napier's evidence that he had himself gone down to the area in question and looked. His evidence was that he believed that the claimant could have seen what Mr Spence was doing even if as he later conceded he accepted that the claimant had not in fact done this. Mr McNaughton did not take this step nor did Mr Anderson. It is entirely unclear as to whether Mr Napier told Mr Anderson or Mr McNaughton what he had done. The methodology by which the content of Mr Napier's investigation was conveyed first of all to Mr Anderson and then to Mr McNaughton was somewhat opaque and I could not tell exactly what had been established. That having been said I do not consider that there was any failure in the investigation per se. With regard to whether the respondents had reasonable grounds to come to the belief they came to I did consider that both Mr Napier and Mr Anderson had reasonable grounds to come to the conclusion they did which was that the claimant ought to have seen Mr Spence behaving in breach of the animal welfare provision but had not. I did

not consider that Mr McNaughton had reasonable grounds for coming to the view which he apparently did which was that the claimant must have seen what Mr Spence was doing. As was pointed out by the claimant all that can be seen is the back of the claimant's head. Mr Spence would have been within his field of view but it is impossible to tell what the claimant was looking at. Given the relative positions of the claimant, Mr Spence, the sheep and the CCTV camera it is undoubtedly the case that the CCTV camera has a much better view of what Mr Spence was doing than the claimant would have had. In my view Mr McNaughton was not entitled to come to the view he did which was to the effect that the claimant had seen what Mr Spence was doing and decided to take no action. The fact that Mr Napier and Mr Anderson who viewed the same CCTV footage came to a different view from Mr McNaughton reinforces me in that belief. So far as the first strand of Section 98(4) is concerned my view therefore is that a reasonable employer would have come to the view that the claimant was in a position where he ought to have seen Mr Spence committing a breach of animal welfare but for whatever reason had not seen Mr Spence do this. So far as the subsidiary matters are concerned I also believed that the respondents were entitled to come to the view that had the claimant seen what Mr Spence was doing and intervened then in all likelihood the later incident where Mr Spence man-handled a sheep in view of the auditors would not have taken place.

65. The second strand of Section 98(4) relates to the simple question of whether the basis of the belief which they had come to as the claimant's guilt it was within the range of response of a reasonable employer to dismiss the claimant for this. I was referred to the recent EAT case of ***Weston Recovery Services v Fisher EAT0062/10*** to the effect that the only relevant question is whether the conduct was *"sufficient for dismissal according to the standards of a reasonable employer and whether dismissal accorded with equity and the substantial merits of the case"*.

66. I note that in this case the claimant accepted that it was well known throughout the respondents' site that breaches of animal welfare were dealt with extremely seriously. He accepted that it was well known that any breach of animal welfare would likely lead to dismissal. That having been said I did find it somewhat surprising that given the evidence from the respondents' witnesses that animal

welfare was "*top of the tree"* and that it was viewed in such a serious way that breaches of animal welfare did not feature in the list of matters which would potentially be viewed as gross misconduct in the respondents' disciplinary policy. In considering whether dismissal was within the range of reasonable responses for the misconduct which was found to have taken place it is also relevant to look at how the respondents deal with similar cases. This was a point which was emphasised by the claimant's representative. Having had the opportunity, as did the respondents, of viewing the incident which took place in front of the claimant and the incident which took place in Mr Baillie it is very hard to accept the respondents' justification for dealing with the claimant as a disciplinary matter whilst not dealing with Mr Baillie and indeed the veterinary officer, Ms Wasielewicz, in the same way. Had the incident with Mr Baillie stopped after 26 seconds which was as long as the incident with the claimant took place then Mr Baillie could have been accused of doing much the same as the claimant. Having viewed the CCTV it does appear very much to me as if Mr Baillie only intervened with Mr Spence after the matter was pointed out to him by the two auditors who were present. That having been said I consider that the differential treatment argument only takes one so far. Each case has to be looked at on its own individual merits. The issue is whether it is within the range of reasonable responses to dismiss the claimant and whilst the respondents' attitude to what appears to be similar conduct on the part of Mr Baillie informs that view, it is not decisive. Similarly the claimant raised issues of procedure. I quite accept that this was not foreshadowed in the ET1 and I do not make any finding that the dismissal was procedurally unfair. That having been said I do feel that the fact that the claimant did not receive minutes of the investigation and disciplinary before the disciplinary and appeal meeting and the lack of clarity as to how the findings of the investigation was conveyed add to my general unease as to the respondents' decision making process.

67. What was absolutely clear from the evidence was that the key matter which occurred on 3 August so far as the respondents were concerned was the later incident involving the auditors. The claimant was not involved in this incident at all. The respondents however appear to have decided at an extremely early stage that they would advise Tesco, M&S and FSS of the earlier incident involving the claimant. The respondents' processes are under continuous CCTV surveillance. I

did not understand it to be their position that they would normally go through the CCTV footage and in the event that anything untoward was discovered they would report the matter to their major customers and Food Standards Scotland. It appeared to me that at the root of this case is a massive non sequitur in that an incident occurred in front of the auditors, Mr Baillie and Ms Wasielewicz but that the claimant is declared to be a scapegoat for this. It appeared clear to me from Mr McNaughton's evidence that from quite an early stage the line he was taking with the respondents' customers and Food Standards Scotland was that a senior supervisor's head was going to roll. It appeared to me that by doing this the respondents sought to head off any criticism of them which might arise regarding the later incident and indeed this strategy appears to have been successful.

68. The claimant's representative made much of the claimant's 42 years of service. Equally the respondents' representative made the point that if the conduct merits summary dismissal then length of service does not really have much relevance. At the end of the day I considered that the question for me was whether on the basis of the factual findings made legitimately by Mr Anderson (which echoed those made by Mr Napier) it was within the band of reasonable responses for the respondents to dismiss the claimant. I bear in mind the various admonitions which have come from the Superior Courts over the years that it is not for me to substitute my judgment for that of the employer. I am also required to accept that the potential severity of consequences for the respondent of any misconduct is something which is highly relevant (***Wincanton PLC v Atkinson & Marrison***). Taking all these matters into account however what we have is an employee in a supervisory capacity who does not notice wrongdoing taking place in front of him. As a result he takes no action. It appeared to me that a reasonable employer would deal with this on the basis that it was a momentary lack of attention. In the context of the regulatory position in which the respondents find themselves it is a serious momentary lack of attention but having considered all the evidence carefully it is my view that no reasonable employer would dismiss in these circumstances.

69. The respondents do not have a rule that if an employee misbehaves in front of the Supervisor then the Supervisor is at fault. If they did then they would have taken

action against Mr Baillie. In this case they appeared to have taken a view of the seriousness of the claimant's conduct which was not warranted on the evidence.

70. I derived some support for this view from Mr Anderson's evidence. It was clear that he had some misgivings about the conclusion he had come to and this, in my view, is why in the minute of the meeting so much time is spent criticising the claimant for failure to take steps to view CCTV footage as a general rule. This was not something which was part of the allegation against the claimant and indeed seemed to have little relevance. It appeared to me that Mr Anderson was raising this as some kind of additional justification for the decision which he took to dismiss the claimant. I also consider that he was motivated by a similar consideration when he gave evidence to the effect that he was hoping that the claimant would break down and apologise at the disciplinary hearing in the same way as he had broken down and shown contrition at the investigation meeting. Mr Anderson, from his evidence was quite clearly aware that the claimant had broken down in tears at the meeting with Mr Napier and shown extreme contrition. It seemed to be somewhat bizarre when Mr Anderson gave evidence to the effect that things might have gone differently for the claimant had he behaved in a similar way at the disciplinary. At the end of the day to dismiss an employee for such momentary inattention was outwith the band of what was reasonable and I suspect that at bottom Mr Anderson realised this.

71. So far as Mr McNaughton's view in relation to the claimant's guilt is concerned I have already indicated that I do not believe he was entitled to come to that view on the basis of the evidence before him and therefore from whichever point of view one looks at it the terms of Section 98(4) have not been met by the respondents and the dismissal is unfair.

Wrongful Dismissal

72. In terms of his contract of employment and the statutory minimum notice terms provided for in the Employment Rights Act 1996 the claimant was entitled to 12 weeks' notice of termination of his employment. The respondents dismissed him without notice. It was their position that they were entitled to do so because the

claimant had committed an act of gross misconduct. The definition of gross misconduct is well known and summarised by Lord Evershed MR in the case of ***Laws v London Chronicle [1959] All ER 285*** where he said:

> *"If summary dismissal is claimed to be justifiable the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."*

One difference between the approach which the Tribunal should take to the issue of deciding whether or not dismissal is wrongful as opposed to whether or not the dismissal is unfair is that when looking at the issue of whether or not the dismissal is wrongful the Tribunal is required to form its own view as to the facts relating to the claimant's conduct. This is to be distinguished from the approach taken to a claim of statutory unfair dismissal where, as noted above, the focus is on the employers, the reasonableness of the employer's actings and whether or not they acted reasonably.

73. Looking at the issue from that point of view I consider that on the basis of the evidence and in particular the CCTV footage my view is much closer to the view taken by Mr Anderson and Mr Napier than the view taken by Mr McNaughton. My own view of having viewed the CCTV footage on numerous occasions is that all that can be shown is that the claimant is standing facing towards the area where Mr Spence is working. Indeed I would even go further than the view expressed by Mr Anderson and Mr Napier to the effect that I am not at all convinced that the claimant ought to have seen what Mr Spence was doing. My interpretation of the CCTV is that, as the claimant himself said, from the angles it would have been fairly difficult for him to see past Mr Spence and form a view as to what Mr Spence was doing to the animal. I also accepted the claimant's evidence, given to the Tribunal, to the effect that when he was going round the pens he was thinking about fixed items which would need to be sorted. He was looking at things like whether water troughs were full and whether the water was uncontaminated, whether there was enough straw, whether it was clean, whether all the various health and safety housekeeping issues were being dealt with. I consider it extremely likely that if the claimant had these things at the forefront of his mind

then whatever Mr Spence was doing with an animal would not have registered with him and it is probably going too far to suggest that it did. My view was that at most the claimant would have had an intermittent view of what Mr Spence was doing which was shielded by his back and the fact that the claimant's head level was some three feet below Mr Spence's head level. On the basis of my findings I consider it is not demonstrating that the claimant had disregarded the essential conditions of the contract of service. He was guilty of at most an oversight. There was certainly no repudiatory breach of contract and the respondents were not entitled to accept this by terminating his employment forthwith. The claim of wrongful dismissal therefore also succeeds.

Remedy

74. The claimant's representative produced a Schedule of Loss. So far as compensation for breach of contract is concerned the Claimant is entitled to be paid a sum equivalent to 12 weeks' notice amounting to **£6688.56** (12 x £557.38) as damages for breach of contract.

75. So far as unfair dismissal compensation is concerned I accepted the claimant is entitled to a basic award of **£13,891**. This is on the basis that he had 41 full years' service during 18 of which he was above the age of 41 which means he is entitled to 29 weeks' pay at the statutory maximum of £479 per week.

76. With regard to the calculation of the compensatory award the claimant sought his wage loss for the period from 4 November 2016 to 4 April 2017 amounting to five months on the basis that his net monthly remuneration was £2415.31 (£12,076.55). The monthly remuneration was calculated by adding back the employer's and employee's pension contributions. I accepted this calculation on the basis that this would also deal with the claimant's claim for pension loss. Given that I have awarded the Claimant his notice pay I consider that his wage loss only started twelve weeks after 4 November and that accordingly the wage loss to the date of tribunal amounts to **£5387.99**. (£12,076.55 - £6688.56).

77. The claimant also sought future wage loss. In his Schedule of Loss he noted that he was seeking 12 months' future loss however by the date of the Tribunal and in the claimant's submissions he indicated he was looking for 24 months' wage loss. I considered that before making the calculation of the compensatory award I required to address two issues raised by the respondents. The first of these relates to whether or not the claimant took appropriate steps to mitigate his loss. Despite the criticism of the respondents' agents I concluded that the claimant had provided sufficient evidence to the Tribunal that he was taking reasonable steps to mitigate his loss by finding other work. Like the respondents' representative I could not understand why he had not provided more documentary evidence of the various job sites he had registered on and the copies of the e-mails showing what the jobs he had put himself forward for. That having been said the claimant did give oral evidence about this and I decided that this evidence was credible and could be relied upon. It would however have been easier and spared the claimant some difficult questions had the documentary evidence been provided in the first place. The second relates to the fact that shortly after the incidents complained of and indeed before his dismissal the claimant's Certificate of Competence had been suspended and was subsequently revoked. I accepted the claimant's evidence regarding the reason he did not proceed with his appeal. The calculation of the compensatory award involves to some extent an exercise in probabilities in that I require to look at what probably would have happened had the claimant not been unfairly dismissed. My view of the matter is that had the claimant not been unfairly dismissed then in all likelihood the suspension of his Certificate of Competence would not have led to the revocation or if it had led to its revocation then such revocation would have been very quickly reversed on appeal. There was evidence to the effect that what is usually required is a short period of re-training. I also took into account that the claimant was multi-skilled and could have worked in other jobs in the factory whilst he was waiting for his Certificate of Competence to be restored. I decided that the best way to deal with the matter was on the assumption that if the claimant had not been dismissed then there may have had to work in a lesser paid role until his Certificate of Competence was restored and that this would have led to a reduction in net pay from £557.38 per week to £400 per week for a period of 12 weeks. The most practical way to deal with this is to

deduct the sum of £1888.56 (157.38 x 12) from the compensatory award calculated on the conventional basis.

78. As regards future loss I feel that the claimant's assessment that he will have some difficulty in obtaining other work is likely to be correct but given that the economy in Aberdeen is still relatively buoyant at least in the non-oil sectors I feel that future loss for a period of two years is a little excessive. I would be prepared to allow the claimant his wage loss for the period to the date of Tribunal together with 12 months' future loss. This is a total of seventeen months. Twelve months' future loss amounts to £28,904.28. From this I would deduct the sum of £1888.56 as discussed above to cover the lower wage paid until his Certificate of Competence was restored. This would give a total compensatory award figure of £27,015.72. To this I would add the sum of £400 for loss of statutory rights. This means the total compensatory award before deduction is **£32,803.71** (27015.72 + 400 + 5387.99).

79. It was the respondents' position that if I found that the dismissal had been unfair for procedural reasons I should reduce the compensatory award to take account of the ***Polkey*** principle on the basis that the claimant would have been fairly dismissed in any event had a fair procedure been carried out. In this case my view is that there was no possibility of the claimant being fairly dismissed had the respondents dealt with the matters properly and no ***Polkey*** deduction would therefore be made.

80. I was however urged by the respondents to reduce both the compensatory and the basic award to take account of the fact that the claimant contributed to his dismissal by his conduct.

81. With regard to the basic award the provisions regarding contribution are to be found in Section 122(2) of the Employment Rights Act 1996 which provides

> *"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."

82. The respondents' position was that the basic award should be reduced by 100% on this basis. The claimant's position was that any such reduction should amount to no more than 20%. My view taking all matters into consideration is that it would be just and equitable to reduce the amount of the basic award by 25%. The basic award is therefore reduced from £13,891 to **£10,418.25**

83. So far as the compensatory award is concerned provisions regarding contribution are contained in Section 123(6) of the said Act. This provides

"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."

I do find that the claimant's dismissal was contributed to by his conduct in that he was clearly guilty of a degree of inattention. Whilst in my view this fell far short of anything which would have caused a reasonable employer to dismiss him it certainly did contribute to the situation in which the claimant found himself. Considering matters in the round I believe that it would be appropriate to reduce the compensatory award by the same amount as the basic award namely 25%.

84. Overall therefore the total compensatory award is reduced from £32,803.71 to **£24,602.78**. The total basic award after reduction is £10,418.25. The total monetary award in respect of the claimant's unfair dismissal claim is therefore **£35,021.03.**

85. In addition as mentioned above I find that having been wrongfully dismissed the claimant is entitled to be paid 12 weeks' pay in lieu of notice amounting to £6688.56. The total compensation is therefore £41,709.59. In order to bring his claim the claimant is required to pay a fee of £1200 and I consider that he is entitled to reimbursement of this amount.

86. The claimant was in receipt of recoupable benefits. The prescribed element in this case is £2972.69 and covers the period between 4 February and 4 April 2017. The monetary award of £35,021.03 exceeds the prescribed element by £32,048.34.

Employment Judge: Ian McFatridge
Date of Judgment: 28 April 2017
Entered in register: 02 May 2017
and copied to parties