Case Number: 3324318/2016

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr M Grabowski	v	**Bradford Swissport Ltd**

FINAL HEARING

Heard at: **Watford** **On:** **25 & 26 July 2017**

Before: Employment Judge Bartlett

Appearances:

For the Claimant: **in person**
For the Respondent: **Mr Rogers, Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. I find that the claimant was not unfairly dismissed. I find that the respondent dismissed the claimant for the reason of conduct and that this is a potentially fair reason for dismissal. I find that the respondent has discharged the burden of proof to establish that in the circumstances the dismissal was fair. In particular I find that the respondent satisfies the steps set out in **British Homes Stores Limited v Burchell [1978] IRLR 379.**

2. Therefore the claimant's claim is dismissed on all counts.

REASONS

The issues

3. The claimant is Mr Grabowski. He was employed by the respondent, Bradford Swissport Ltd, from 1 March 2009 until his dismissal on 19 May 2016. He was employed as a warehouse operative. This role involves a variety of duties which included but was not limited to carrying out x-ray scanning.

4. It is not in dispute that the claimant was dismissed by the respondent. The claimant claims that the dismissal was unfair.

5. The issues relating to liability in this case are:

   5.1 What was the reason for the claimant's dismissal – section 98(1) of the Employment Rights Act 1996?

   5.2 Was this reason potentially fair – section 98(2) of the ERA?

   5.3 Was the dismissal procedurally fair?

   5.4 Was the dismissal within the range of reasonable responses open to the employer?

6. **British Homes Stores Limited v Burchell [1978] IRLR 379** sets out a three limbed test which must be applied to misconduct dismissals:

   6.1 Did the employer believe the employee to be guilty of misconduct at the time of dismissal?

   6.2 Did the employer have in mind reasonable grounds on which to sustain that belief?

   6.3 When the employer formed that belief had it carried out a reasonable investigation in the circumstances?

Background

7. On the evening of 10 May 2016 the claimant was at work. His shift was due to end at 10pm and at approximately 21:30 he commenced working on the x-ray scanning of a milk delivery. Initially he helped a colleague, Mr Bogulawski, load two "skips" of the milk on the CASI conveyor belt. After loading all the milk onto the CASI belt, the claimant went to the x-ray scanning booth. The claimant claims that he reviewed all the x-ray images of the milk to the required standard to check for prohibited items. The respondent claims that, for a number of reasons, the claimant could have reviewed the milk to the required standard.

8. The CASI belt meets the x-ray scanner belt and there is a small join. The milk started to build up at the entrance to the x-ray scanner and some of it started to leak and burst. This resulted in a milk spillage.

9. The respondent claims that the milk spillage caused damage to the electronic x-ray tank of the machine. This needed to be replaced and the repair of the machine cost £8,790.76 with the scanner being out of use for 4.5 weeks. The claimant disputes that any or this level of damage occurred to the machine.

10. The respondent claims that:

10.1 the loading of the milk was not consistent with company procedures and resulted in the damage to the scanner.

10.2 the claimant was not able to obtain sufficiently detailed x-ray pictures of the scanned load as a result of the density and volume of the loading. This was a breach of the respondent's safety and security procedures

10.3 the claimant had failed to complete the scanning log when he had scanned the load. This was a breach of the respondent's security procedures

11. The claimant was suspended on 11 May 2016.

12. On 13 May 2016 the claimant received written confirmation of his suspension and an invitation to a disciplinary meeting. These letters identified two allegations against the claimant:

> *"10th May approx. 21:30 – 22:00: Failing to comply with company safety and security procedures causing x-ray scanner 2 to be seriously damaged by a spillage milk*
>
> *… 6th May approx. 23:20 – 23:30: failing to comply with a reasonable request from Team Leader Martin Edmonds not to 'freewheel' media."*

13. The disciplinary meeting took place on 18 May 2016. Written minutes of that meeting were taken by the respondent. The claimant attended the disciplinary meeting accompanied by two trade union representatives, Mr Terry Pugh and Ms Viv Chambers.

14. The meeting was reconvened on 19 May 2016 when Mr Young summarily dismissed the claimant for gross misconduct. This was confirmed in writing in a letter dated 20 May 2016.

15. The claimant appealed this dismissal. An appeal meeting was scheduled for 7 June 2016. The claimant attended this meeting but he had been released from hospital after suffering sepsis and the meeting was rescheduled to 16 June 2016 as a result of the claimant's ill-health.

16. The claimant attended the 16 June 2016 meeting over one hour late and due to other commitments of the chair of the meeting, Mr Westbrook, the meeting could not go ahead and it was rescheduled for 23 June 2016.

17. On 23 June 2016 the claimant did not turn up at the allocated time of 10 am and the meeting proceeded in his absence but in the presence of his trade union rep.

18. On 27 June 2016 the claimant was notified in writing that his appeal was unsuccessful.

Evidence

19. Mr Jonathan Young appeared as a witness for the respondent. Mr Young is the security and facilities manager at the Heathrow International Airport Consolidation Centre in West Drayton. Mr Young chaired the disciplinary and dismissal meeting on 18 and 19 May 2016.

20. Mr Young's evidence was that security reviews were undertaken regularly this included reviews of all the screening at least once a week, an aim to review CCTV of screening once a day, he carried out a security walkabout once per month and in addition there were audits from 3rd parties including the Civil Aviation Authority and a company employed by the respondent to do such audits.

21. Mr Young's evidence was that the claimant had not screened the milk on 10 May 2016 to the required standard and it had not been documented as it should have been. It was his opinion that the CASI belt was overloaded with milk which meant that it touched the sides of the scanner and spilt. In addition the belt was overloaded from a screening point of view because he did not accept that given the speed at which the items went through the scanner that the dark images the milk would have produced could have been screened properly. He expected one item at a time to be screened. He accepted that the policies did not say that items had to be screened one at a time but milk is very dense and he was not convinced that the images were reviewed to the appropriate standard.

22. It was Mr Young's evidence that milk must be reviewed one at a time and reviewed with the enhanced function to be reviewed to the required standard. Mr Young also stated that he gave the claimant the opportunity to explain in the disciplinary meeting how he had scanned the milk to the required standard and that he had an open mind at that time. However the claimant did not explain how he had adequately scanned it.

23. The claimant put it to Mr Young that the x-ray machine had the ability to store 20,000 images and why have those not been reviewed as part of the investigation. Mr Young stated that the machine did not have that facility.

24. Mr Young's evidence was that in October 2013 the Department of Transport had served the respondent with a notice that they had to screen milk with the enhanced function and that was in his mind when he was considering the claimant's situation.

25. The claimant put it to Mr Young that he could not see on the CCTV that the claimant was not seated in the x-ray booth. Mr Young stated that he believed that the claimant was standing. The claimant put it to Mr Young that the chairs and tables in the x-ray booth were twice as high as normal and it was impossible to determine if an individual was sat or stood. Mr Young maintained that he believed the claimant was standing.

26. In cross-examination Mr Young accepted that different x-ray scanner operators could carry out scanning in a different manner.

27. Mr Young accepted that the respondent had not been able to find documentation to support the claim that the claimant had attended CASI belt training. However he believed that the claimant had attended the training because he was in work on the day of training and Terry Pugh, the claimant's trade union representative, had a personal crusade to ensure that all belt operators were trained.

28. It was put to Mr Young that several of the statements from the claimant's colleagues supported his claim that he was under pressure to complete the milk scanning. Mr Young denied that the evidence he had reviewed supported that. If there had been such evidence he would have taken those allegations very seriously. CCTV showed that there were 3 members of staff available at the time the scanning was carried out.

29. I put it to Mr Young that the CASI belt document referred to above set out that operation of the belt should always be supervised by a floor manager for a shift manager and that none was visible in the CCTV. Mr Young stated that the guidance had been implemented when the machines were new but as years went on they did not adhere to it all the time. At the date of the incident it was near the end of the shift and the floor managers would have been doing paperwork and the handover and so would not have been available.

30. I asked Mr Young if he assumed that as the milk was dense it would be opaque on the x-ray images and they would need enhancement. Mr Young said that he did and he thought that it was opaque and he had in mind the deficiency notice they had been issued with in 2013 and that in the 6 months preceding 10 May 2016 there had been 2 incidences of prohibited items being found.

31. Mr Young accepted that there were no rules that x-ray scanners had to stay in the x-ray booth. He said there was nothing in writing but that is what he saw in audits and that it was covered in the exam.

32. Mr Westbrook, general manager for the respondent appeared as a witness.

33. Mr Westbrook's evidence was that as part of his investigation into the claimant's case he had carried out considerable research which included reviewing the CCTV footage and speaking to a number of managers of the respondent. As a result of this investigation Mr Westbrook had concluded that there was no evidence that the claimant was using the belt in accordance with long-standing procedures adopted by employees of the respondent. Mr Westbrook said that he thought the CCTV was clear that the claimant was standing away from the x-ray review screen. Mr Westbrook's evidence was that he had to concerns from the cc TV footage. This showed the claimant loading from one side and Mr Boglowski loading from another side. His concerns were that liquid should not be placed

lying down and that the CASI belt needed gaps for the laser scanner to operate but the machine was on override so this would not have happened.

34. Mr Westbrook stated that it was his belief that if Christophe had done the loading and the claimant had remained in the x-ray booth it would not have been overloaded.

35. The claimant asked Mr Westbrook on what basis he said that the claimant had to use the enhancement features of the x-ray scanner. Mr Westbrook responded that he is aware of images, training and the claimant's pass rates of such. He said that he knew the claimant did not apply what he was trained to do. Mr Westbrook's evidence was that with the claimant's experience and length of service he should have used enhancement features and sat down to scan.

36. The claimant asked Mr Westbrook how he did not comply with safety procedures and he responded that the CCTV showed that the milk was leaving the claimant's hand in an uncontrolled manner but it was more than that and the scanning was insufficient which put everyone at Heathrow at risk.

37. It was Mr Westbrook's opinion that if the Civil Aviation Authority had reviewed the CCTV footage of this incident the respondent would have been given a deficiency rating and their contract would have been closed down.

38. The minutes of the disciplinary and dismissal meeting on 18 and 19 May set out that Mr Young asked the claimant "*can you tell me how you were under pressure or stress with the situation? How did you become aware and how it impacted you?."* The claimant responded "*I don't think any FLM told me directly. But Monica told me that Francisco told her about rejection*."

39. When the meeting was reconvened on 19 May 2016 with all the original attendees. Mr young stated "*I'm not convinced that you security screened material properly to the company's standards. I also believe that you have caused damage to company property by the manner you loaded the belt incorrectly. This constitutes gross misconduct and leads to you [sic] summary dismissal today.*" In respect of the 2nd allegation Mr Young said he would not take any action against the claimant.

40. A written outcome letter was sent to the claimant dated 20 May 2016 by Mr Young. This set out the following:

> *"after hearing your explanation and going through the CCTV footage and statements, I was convinced that you are not under any work pressure as you did not speak to any manager who could give you sense of urgency to complete the tasks. It was your own decision to come out of the security booth and load the belt with your colleague Krystof to speed up the process.*

The manner in which you loaded the belt was not consistent with the procedure we follow at the company. You loaded the belt from a distance and speed which caused congestion at the belt. Based on this, I reasonably believe that your manner of loading the belt cause the spillage of the milk on the belt. This caused damage to the scanner belt and costed the company a huge sum to repair the scanner belt.

In addition, I am also satisfied that the milk bottles being the stock to be screened for prohibited items, were pushed through the scanner belt in bulk without scanning them to the company's required standards.

After careful consideration of the above, it is clear that your actions have caused damage to company property and you failed to adhere to the required security (scanning) standards of the company, which are classed as gross misconduct offences."

41. The claimant appeared as a witness and was asked a significant number of questions in cross-examination by Mr Rogers. I also asked the claimant a number of questions and more detail about his responses is provided in my decision below.

42. The claimant did not accept that audits of the respondent's activities were undertaken as frequently as claimed. He did not accept that the way the items had been placed in the x-ray scanner and reviewed would result in the respondent losing its contract with Heathrow.

43. The claimant did not accept that he had received CASI belt training as the respondent claimed. It was put to the claimant that if the correct procedure was followed then items would not build up at the entrance to the x-ray scanner. The claimant said that was not correct and items built up all the time.

44. The claimant's evidence was that he was sat down to review the x-ray images in the x-ray booth. His evidence was that he did review the milk properly because the items did not overlap and he could clearly see the shape of the bottles. If there was anything to be concerned about a red square will automatically appear on the x-ray. The appellant's evidence was that just because the milk was dense did not mean that it required enhancement. Only if the milk overlapped would enhancements be required. The claimant's evidence was that the milk would not have appeared as opaque because it was not overlapping. He said that the images in the bundle showing opaque parts of milk x-ray scanned were from a scanner that was on different settings that were not normally used for a product such as milk and were not used by the claimant on 10 May 2016. His evidence was he did not understand how Mr Young and Mr Westbrook could maintain that the milk would have appeared opaque because he carried out x-ray scanning regularly and they did not and therefore he had more experience on the issue.

45. The claimant accepted that he had not been told by managers to rush but that a manager had spoken to Monica and therefore he was aware that the job need to be carried out quickly.

46. In addition to the written and oral evidence I viewed two CCTV clips in open court with Mr Rogers and the claimant. The first clip showed the claimant loading the milk onto the first CASI belt. The 2nd clip showed the milk coming out of the x-ray scanner machine.

Submissions

47. Mr Rogers relied on a detailed written submissions which he supplemented with oral submissions. I will not repeat these here however some points from the oral submissions can be summarised briefly as follows:

47.1 Security is a critical factor in the respondent's operation. It is vital to ensure the safety of all the passengers travelling through Heathrow on an annual basis and or staff members. Further, security is of the utmost importance to the respondent retaining its contracts to operate at Heathrow. As a result of the importance of security numerous regular audits are carried out by the respondent, the Civil Aviation Authority and an independent company employed by the respondent to carry out audits. This must be taken into account when assessing the reasonableness of the respondent's behaviour;

47.2 The claimant was an experienced operative. He had been employed for over 9 years and he had undergone training in the detection of prohibited items and x-ray scanning;

47.3 The loading/unloading CASI belt document sets out that items must be loaded one at a time with gaps left between items. The claimant failed to do this. Instead he loaded the milk at a pace without gaps;

47.4 The speed and volume with which the milk was loaded onto the CASI belt and therefore the amount that went through the x-ray scanner and how quickly it went through entitled the respondent to conclude that the milk had not been properly reviewed. This was supported by the the claimant not having been sat in the x-ray booth. The claimant did not use the enhancement function on the x-ray screen which Mr Young and Mr Westbrook concluded was required.

48. As the claimant was unrepresented I tried to help him formulate his submissions. These can be summarised as follows:

48.1 his actions on 10 May 2017 were in line with how he and other employees carried out their duties every day;

48.2 there was no set procedure about how to scan items and it was at his discretion to decide how it was appropriate to screen them;

48.3 he was not trained on the CASI belt and instead operated it how he had learnt on the job and from the instruction of managers;

48.4 the decision to dismiss him was predetermined. He had complained about his manager Maher harassing him in the past and he had told him that he should start looking for a job immediately after the incident;

48.5 the claimant did not accept there was evidence that the machine was damaged and incurred the costs of repair as claimed. He had talked to L3 who provided the machine on 3 occasions and they had not confirmed the amount of damage incurred. The evidence provided by the respondent only included a quote and not an invoice;

48.6 the investigation was not reasonable because:

48.6.1 CCTV footage from only 2 cameras had been reviewed and there were other cameras in the area;

48.6.2 the x-ray scanner could store images of scanned items and this could have been reviewed as part of the investigation;

48.6.3 no check was made about the late delivery on 10 May 2016 and therefore his claim that he was under time pressure was not fully investigated;

48.6.4 he prepared the handwritten statement immediately after the incident without knowing what the allegations were against him and this was not fair;

48.6.5 the claimant was informed of the wrong start time for the 3rd appeal meeting and therefore him not being allowed to attend made the process unfair.

Decision

49. I have considered all of the evidence in the round in coming to my decision even if it is not referred to expressly in this judgement.

50. I find that the respondent operates in a particular environment in which security concerns are paramount. I accept that a breach of safety procedures could have catastrophic consequences for the public at large and for the respondent's commercial contracts.

51. I find that the respondent's "Heathrow Consolidation Centre Airport Supplies Security Programme" document sets out that "*failure to comply with the security standards could result in removal from Heathrow airport Limited's known supplier scheme.*" At section 2.3 it sets out "*to ensure full compliance with legislation*

100% of goods for airside locations at the airport are screened by x-ray to ensure that they do not contain any prohibited articles."

52. I do not find that the unloading/loading CASI belt document dated 29 February 2016 sets out an accurate reflection of the way in which the CASI belt must be operated. This is because Mr Young's own evidence about the requirement that operation must be supervised by a floor manager or shift manager was not a requirement which the respondent enforced and he said this document set out the initial rules when the machines were first used some years ago and they had since been relaxed. Therefore I do not accept that this document sets out a formal procedure that must be used to load the CASI belt.

53. I do not accept that the respondent had or communicated a strict policy about how items were loaded onto the CASI belt and how they were x-ray scanned and reviewed.

54. This is because Mr Young in his own evidence accepted that x-ray scanners may review items in different ways.

55. In addition the respondent has not provided evidence that there was a rule that x-ray scanner operators have to remain in the x-ray booth. I find that such a requirement could not be implemented because on the claimant's evidence that on a shift he undertook a variety of different tasks and x-ray scanning was just one of those. Therefore there was no defined time when the claimant should have been in the x-ray booth.

56. As a result I find that there was a discretion afforded to employees like the claimant as to how they carried out the tasks. However the overriding requirements that always had to be satisfied was that all the goods were security cleared and work was carried out safely.

57. I find that the respondent has not established that the claimant undertook CASI belt training. I do not accept that the oral evidence of Mr Young is sufficient to counter the claimant's position that he had not undertaken it. I find that the claimant did undertake x-ray scanner training, that it as national training and that he had to pass a test which he did. I accept his evidence that this was harder than real-life situations and that he repeated this training on several occasions.

58. Having reviewed the CCTV footage I consider that it clearly shows that a large volume of milk was placed on a relatively short part of a conveyor belt, the first CASI belt. The first CCTV clip shows the milk going down that CASI belt and disappearing through flaps. The 2nd CCTV clip (which shows the end belt coming out of the x-ray machine) shows the milk coming out as a large mass with no real distinction between the milk packages. I must state that the CCTV footage is clear and of good quality.

59. I find that it was the claimant's responsibility to operate the x-ray belt. The x-ray belt is operated manually by the individual in the x-ray booth. The claimant was

the x-ray scanner for the milk load and the CCTV footage shows that when the milk was being loaded onto the CASI belt the claimant was not in the x-ray booth. I find that the CCTV footage is clear evidence of all of this.

Did the respondent believe the claimant was guilty of misconduct at the time of dismissal?

60. I do not accept the claimant's submission that the outcome was predetermined. The claimant submitted that Maher Shahen should not have led the investigation because the claimant had previously claimed that Mr Shahen had discriminated against him and was not independent. I find there is no evidence to suggest that Mr Shahen led the investigation or influenced the investigation. I accept that the initial statement taken from the claimant was taken by Mr Shahen and the initial decision to dismiss and that there was a case to answer was taken by Mr Shahen. However after that stage the investigation was handed over to Mr Young and I find that Mr Shahen had no significant part in it. I also find there is insufficient evidence to establish that the outcome was predetermined for any other reason.

Did the respondent have in mind reasonable grounds to sustain its belief that the claimant had committed gross misconduct?

61. I do not accept the claimant's claim that the scanner was not damaged as the respondent claims. I find that the x-ray scanner incurred significant damage as a result of the milk spill which cost in the region of £8000 to repair. I do not accept any argument put forward by the claimant that the documents from L3 relating to cost of repair were manufactured. I find that Mr Young and Mr Westbrook had sufficient evidence before them to conclude that those costs had been incurred. The claimant accepted that £8000 was a huge sum of money.

62. I heard evidence on whether or not the milk would have appeared as an opaque image on the x-ray machine. If it had appeared as an opaque image then the enhancement functions of the x-ray machine would have had to have been used to review the milk properly to see if it concealed prohibited items. It was undisputed by the claimant that the enhancement functions had not been used.

63. It was the claimant's case at the hearing that he did not need to use the enhancement functions because the milk as it had been loaded onto the CASI belt would not have appeared opaque and to the contrary it would have been a translucent orange. Any prohibited items would have been obvious because they would have been an opaque image in the translucent orange. As a result this means that the x-ray review could be undertaken quickly.

64. The bundle included various x-ray scanned images of milk. I asked the claimant various questions about these. His evidence was that double layered milk standing upright would include opaque spots and enhancement would be used for them. However the milk that he reviewed on 10 May 2016 was lying down, it was in single layered packs of 3 cartons. Therefore the milk would not have appeared opaque. I find that the claimant is knowledgeable about how items

would appear on an x-ray scanner. He was employed by the respondent and carried out this function for a number of years. I accept his evidence that if all the milk that had been loaded had been lying down it would only have had opaque patches if it had contained prohibited items. I accept that this would allow a reasonably quick review of the x-ray scans and that enhancement would not be needed. However having reviewed the CCTV footage I find that not all the milk was lying down, I counted a minimum of 2 packs of 3 milk cartons which were put on the CASI belt in an upright position. Therefore it was reasonable for the respondent to conclude that there was a real risk that those items could have contained opaque patches.

65. However the real issue with the claimant's evidence about the scanning is that he did not provide the explanation that he provided at the hearing to the respondent as part of the dismissal meetings. I find that Mr Young asked the appellant a number of questions about how the scanning was completed and how it could have been scanned. The questions were specific and another question was very open-ended. The appellant did not provide an explanation of the sort he provided to the tribunal. He said that it he did not use enhancements but he did not put across the point that enhancements were unnecessary because the milk would not have been opaque and this was because the milk was at such a volume that it was not required.

66. Mr Young's evidence was that his belief was that milk was dense and therefore opaque patches would have appeared and enhancements were required. He formed this belief at least in part because of a deficiency notice that had been issued to the respondent in October 2013 on the very issue of milk density requiring enhanced scanning. I find this is a reasonable basis for Mr Young's belief. As the appellant did not claim that the milk did not appear opaque this was not an issue that Mr Young or Mr Westbrook would have investigated. As the claimant failed to raise this issue as part of the disciplinary process I consider it reasonable that the respondent did not consider it.

67. In addition I accept Mr Westbrook's evidence that there were a number of reasons why he came to his decision that the x-ray scanning had not been adequate. These included the volume of the milk which would have appeared in the x-ray frame and the speed with which the milk was sent through the x-ray scanner (and this was in control of the claimant who operated that belt). Therefore I find that the respondent held a genuine and reasonable belief that the claimant had not x-ray scanned all the milk appropriately.

68. The CCTV footage is not clear as to whether the claimant is sat or standing in the x-ray scanner booth. I do not accept that Mr Young or Mr Westbrook would have been able to conclude to a reasonable standard whether the claimant was sat or standing in there. I do not accept that it is necessary to sit down to review the footage properly. Many individuals prefer to work at workstations whether they are office desks or cash tills, for example, by standing up. Many studies show that standing up improves performance. However the CCTV footage clearly shows that the claimant is not in the x-ray scanner booth for very long at all and that he goes in and out quickly on several occasions. This is of course understandable because by this time the claimant was aware that there was a

problem with the milk spillage and was most likely very concerned about that. I find that the CCTV footage is a reasonable basis on which the respondent could conclude that the claimant was not undertaking an appropriate review of the scanned items. It is also a reasonable basis on which it could conclude that the claimant had loaded the milk onto the CASI belt in conjunction with Mr Boguloawski at too high a volume and when this was combined with him not being in the x-ray booth at the necessary time, which the claimant with his experience would have known he needed to be in the x-ray booth to operate the x-ray belt, led to the milk building up, spilling and causing damage to the machine.

69. I find that the CCTV footage clearly show that the claimant did not complete the scanned log. The CCTV footage shows that the claimant was not in the x-ray booth when the label was being held up, if he had been in the booth he would have been able to write the details in the scan log. It seems that this is one of the very unfortunate situations where the claimant took one course of action which was helping to load the milk and this resulted in several other events, including the spillage of the milk which he became concerned about and therefore affected how he x-ray scanned the milk and his ability to complete the scan log. Events seem to have spiralled out of control.

70. I find that no evidence before Mr Young or Mr Westbrook supported the claimant's claim that he was placed under pressure to complete the scanning. The claimant's own evidence was that he was not spoken to by a manager but that he was aware of time pressure from what a manager had told a colleague. I find that Mr Young and Mr Westbrook acted reasonably in prefering the evidence from other employees that there was no communication to the claimant to rush and that there was time to complete the scanning before the end of the shift such that there was no practical need to rush. Therefore I find that Mr Young and Mr Westbrook reasonably rejected that claim.

71. I find that Mr Young and Mr Westbrook relying on the evidence before them had reasonable evidence to conclude that the claimant had committed gross misconduct.

When the employer formed that belief had it carried out a reasonable investigation in the circumstances?

72. I find that prior to the decision to dismiss the claimant Mr Young undertook an investigation in which he reviewed CCTV footage of the incidents and reviewed statements from other workers who were present at the incident. In addition I find that the claimant was notified in advance of the dismissal meeting with the allegations made against him. I find that the claimant attended the dismissal meeting with 2 trade union representatives and he was given the opportunity to put his case. I find that Mr Young put all the allegations to the claimant and gave him and his trade union representatives the opportunity to respond.

73. I recognise that the claimant claims that additional CCTV footage should have been obtained. He also submitted that the witness statements from work colleagues were not written by them and did not reflect what they would have said. However, I find that the respondent undertook a reasonable investigation. Statements were taken from colleagues and reviewed. Very clear CCTV footage was obtained and viewed in the presence of the claimant and his trade union representative. The claimant was given the opportunity to explain what happened and answer the respondent's questions in the dismissal meeting.

74. I accept Mr Young's evidence that the x-ray scanner did not have the functionality activated to store images of what had been reviewed in the past. This was supported by the claimant's evidence in response to my questions that he had not seen past images on the machine and that this functionality was not used by the respondent. Therefore I find that as the functionality was not available it could not have been a requirement of a reasonable investigation.

75. I do not accept that a reasonable investigation required the respondent to check on the late delivery. I accept Mr Young's and Mr Westbrook's evidence that they considered the statements from employees working at the time of the incident and that Mr Westbrook had spoken to managers and that all of this evidence indicated that no time pressure had been applied to the claimant. I consider that Mr Young and Mr Westbrook reviewing all of this evidence was a reasonable investigation and they were not required to check status to support the claimant's claim that he had been under pressure to process the load quickly.

76. Therefore I find that the process the respondent followed was fair.

Does the respondent's decision to dismiss fall within the band of reasonable responses?

77. This legal test gives the respondent a margin in which it can make decisions. The test is not whether another employer would have acted differently and it is not whether I would have made a different decision. The tribunal must not substitute its judgement for that of the employer. The test is whether or not the respondent's actions fall within the band of reasonable responses of a reasonable employer. This test applies to both the decision to dismiss and the procedure by which the decision was reached.

78. I find that I must take into account the critical nature of security compliance at the respondent and as part of that I accept that Mr Young's evidence establishes that the respondent had a very strict compliance attitude. I find that this goes more towards the issue about adequate x-ray scanning rather than the loading of the machine.

79. I find that the mere loading of the machine and the damage to it would not be a sufficient reason to dismiss.

80. In addition I find that the failure to complete the scan log would not be a sufficient reason to dismiss. This is because I accept the claimant's oral evidence that

Maher Shahen took away the scan log at the end of the incident so the claimant could not complete it.

81. However when I consider that the circumstances of the loading of the machine, which involved the claimant helping to load the machine and loading it quickly when there is nobody to operate the x-ray belt because that was his role, combined with the reasonable conclusion that the milk had not been or could not have been adequately x-ray scanned I find that the decision is within the band of reasonable responses.

Procedural fairness

82. I gave careful consideration to whether or not the invitation to the dismissal meeting fully identified the respondent's concerns about the failure to adequately x-ray scan the milk. The claimant was asked a number of questions about how he adequately x-ray scanned the milk at the meeting. Neither the claimant nor his representatives asked for an adjournment or for more time to answer the questions. The dismissal letter sets out:

> *"I reasonably believe that your manner of loading the belt cause the spillage of the milk on the belt. This caused damage to the scanner belt and costed the company a huge sum of money to repair the scanner belt.*
>
> *In addition, I am also satisfied that the milk bottles being the stock to be screened for prohibited items, were pushed through the scanner belt in bulk without scanning them to the company's required security standards."*

83. I note that the 18 May 2016 meeting was reconvened the next day and therefore the claimant had opportunity at the start of the 19 May 2016 meeting to further address the respondent's concerns about adequate screening and he failed to do so. I find that the claimant did not address the issue about adequate x-ray screening in his appeal letter. Instead that appeal was focused solely on the grounds that he had worked to normal company standards and should not be punished as a result. It was open for the claimant to address this issue and he failed to do so.

84. The claimant had a good reason not to attend the first appeal meeting. However he had no good reason to be late for the 2nd appeal meeting. I recognise that the claimant's evidence is that he was informed by the respondent of the incorrect time for the 3rd appeal meeting. However when I asked the claimant if he had discussed the time with Terry Pugh he said that he had and that Terry had thought it was 10 AM but the claimant thought it was 11 AM because of what the respondent had said. In these circumstances I find that the onus is on the claimant to ensure that he clarified and attended the appeal meeting at the correct time. I do not consider that the respondent's failure to adjourn the appeal meeting again particularly in light of the claimant's failure to attend the 2nd appeal meeting because of lateness is unreasonable or a breach of the ACAS code. The

3rd appeal meeting went ahead in the claimant's absence but his union representative attended.

85. Therefore I find that the respondent's dismissal and appeal process was not procedurally unfair

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Employment Judge Bartlett

Date: 18 August 2017

Sent to the parties on:

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For the Tribunal:

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