EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102663/16

Held in Glasgow on 21, 22, 23 & 24 August 2017

Employment Judge: Frances Eccles
Members: Elizabeth Farrell
Kenneth McKenna

Mr Thomas Addis — **Claimant**
Represented by:
Mr C Heggie - Solicitor

Andrew Muirhead & Sons Limited — **Respondents**
Represented by:
Mr M McLaughlin - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed by the respondents.

REASONS

BACKGROUND

1. The claim was presented on 8 June 2016. The claimant complained of unfair dismissal. The claim was resisted. In their response dated 8 July 2016 the respondents gave misconduct as the reason for the claimant's dismissal. The respondents denied any unfairness. In his ET1, the claimant

disputed that the respondents had reasonable grounds upon which to dismiss him for misconduct. He challenged the reason advanced by the respondents for his dismissal. The claimant averred that the real reason, or at least one of the reasons, for his dismissal was an earlier Employment Tribunal claim brought against the respondents. The claimant did not pursue this point before the Tribunal. The claimant also averred in his ET1 that another employee accused of the same misconduct was not dismissed but issued with a final written warning. The claimant averred that the difference in treatment was unreasonable and made his dismissal unfair. The respondents claimed that they were entitled to treat the claimant and the other employee differently having regard to the claimant`s final written warning and the other employee`s length of service.

2. At the Hearing the claimant was represented by Mr C Heggie, Solicitor. The respondents were represented by Mr M McLaughlin, Solicitor. The parties provided the Tribunal with a Joint Bundle of Productions to which one document (P109) was added during the Hearing. The Tribunal heard evidence from Callum MacInnes, Group HR for the Scottish Leather Group; Sean Duffin, Finishing Production Manager; Alistair Thomson, Engineering Manager; David Currie, Production Manager & Raymond Gosland, Technical Director. The claimant gave evidence and called Robert Duncan, Wet End Operative to give evidence on his behalf.

FINDINGS IN FACT

3. The Tribunal found the following material facts to be admitted or proved; the claimant was employed by the respondents as a Wet End Operative from 23 March 2000 to 21 March 2016 when he was dismissed. At the date of his dismissal the claimant was aged 32. His average rate of pay was £461.84 per week with an average take home pay of £359 per week. The respondents manufacture leather. Their main customers are in the airline and transport industries. They are part of the Scottish Leather Group Ltd

from which they receive HR support. They employ around 100 people at their site in Dalmarnock, Glasgow.

4. The claimant was employed in the dyeing part of the manufacturing process – known as the Wet End. He worked with another employee, Robert Duncan. The claimant had worked with Robert Duncan throughout his employment with the respondents. Robert Duncan has been employed by the respondents for 30 years. Both the claimant and Robert Duncan were experienced and skilled operatives. They worked with minimum supervision. Operatives on the Wet End, including the claimant and Robert Duncan, were required to follow the respondents' Standard Operating Procedures for Wet Drums ("SOP") (P69 to P76).

5. Around October 2015 the respondents commissioned a study of the Wet End. The report was commissioned in part due to concerns over the amount of overtime worked by the claimant and Robert Duncan. Another employee, Brian Duncan undertook the study and produced a report (P33 to P35) in which he proposed changes to the Wet End that would result in a reduction in the overtime worked by the claimant and Robert Duncan. The claimant and Robert Duncan were very unhappy about the proposed changes, in particular given that they would result in a reduction in their take home pay. The respondents consulted with the Wet End Operatives including the claimant and Robert Duncan. The claimant and Robert Duncan both raised a Grievance. Following a Hearing on 23 November 2015 their Grievances were not upheld. (P36 to P38). They both appealed against the outcome of their Grievances (P41). Following a Hearing on 16 December 2015 their Appeals were not upheld (P44 to P45). They presented claims to the Employment Tribunal for breach of contract.

6. On 27 November 2015, the claimant was invited to a Disciplinary Hearing (P39 to P40) in relation to an alleged serious breach of confidence and/or serious act of insubordination. It was alleged that the claimant had been found reading a book in the chemical store when he was supposed to be

working. The claimant attended a Disciplinary Hearing and on 4 December 2015 received a Final Written Warning for a serious breach of confidence and a serious act of insubordination amounting to gross misconduct (P42 to P43). The claimant was advised by Alistair Thomson, Engineering Manager, who conducted the Disciplinary Hearing, that he had considered dismissal given the serious nature of the alleged misconduct but given his display of remorse and regret for his actions had decided to issue him with a Final Written Warning. The claimant was informed of his right to appeal against the Final Written Warning. He accepted the Final Written Warning. He did not appeal it. The claimant was informed that the letter confirming his Final Written Warning would be placed in his personnel file and would normally be disregarded after a period of 12 months provided there was no recurrence and that the likely consequence of insufficient improvement, recurrence or failure to meet the required standard could result in further action being taken against him.

7. The respondents introduced the proposed changes to the Wet End from 25 January 2016. This included changes to the shift patterns of Robert Duncan and the claimant. Robert Duncan told other employees including Sean Duffin, Line Manager of the Wet End, that he and the claimant were particularly unhappy that Brian Duncan would now be responsible for the completion of process sheets for the dye drums. On 28 January 2016, an error came to light in the Wet End which resulted in 50 hides being dyed the wrong colour - light blue instead of charcoal. The hides had been dyed light blue in dye drum 9. The process sheet for drum 9 (P65) was found to contain errors. It detailed the dye colour as light blue and the number of hides as 1. The process sheet (P65) had been completed by Brian Duncan. The respondents instructed Alistair Thomson to investigate the error. The hides had a value of around £5,000 and had been ordered by a valued export client. After the error came to light responsibility for completing process sheets was passed back to the claimant and Robert Duncan.

8. As part of his investigation Alistair Thomson interviewed employees who worked on the Wet End. He conducted the interviews on 8 February 2016. At his interview, Sean Duffin (P46 to P47) explained to Alistair Thomson that he became aware that the wrong dye had been applied to 50 hides and that the process sheet for the batch of hides in question (P65) contained the wrong dye colour. Sean Duffin expressed confusion as to why Robert Duncan and the claimant had not picked up on the error on the process sheet (P65) while undertaking other parts of the Wet End such as weighing chemicals, adding chemicals to the drum and checking dye penetration and shade. Alastair Thomson interviewed the clamant (P49 to P52). In response to a request that he describe the process for checking colour in the dye drum, the claimant referred to the production batch card – known as the workline. The workline for the batch of hides in question (P66) correctly identified the dye colour as charcoal. When asked whether he worked with both the process sheet and the workline for each drum, the claimant explained that the practice was to follow the process sheet and not the workline. He explained that Brian Duncan had been running off the process sheets and that although they had picked up a few similar mistakes this one must have been missed. He suggested that this was why responsibility for the process sheets had been passed back to him and Robert Duncan. Alistair Thomson questioned the claimant about whether he should have picked up the error when checking the shade. The claimant agreed that this was possible but explained that there was "*a lot going on*". The claimant attributed the mistake to errors in the process sheet (P65).

9. Alistair Thomson interviewed Robert Duncan (P53 to P56). In response to questions about the process for checking colour in the dye drum, Robert Duncan confirmed that he worked off both the workline and the process sheet. He explained that the dye colour was taken from the process sheet. He questioned the wisdom of having people with limited experience complete process sheets when he and the claimant had been completing them for years without any issues. He pointed out that responsibility for completing the process sheets had been passed back to him and the

claimant. When questioned by Alistair Thomson about checking the dye colour against a master pattern, Robert Duncan explained that it was well known that blues and blacks were not checked and that in any event even if the colour had been checked the error would not have been picked up. Robert Duncan denied that they were always provided with a Production Input Sheet – known as a work schedule – and which for the day in question (P67) gave the colour for drum 9 as charcoal. He explained that in any event information on the work schedule changed all the time. He denied any responsibility for the error. He referred to someone else printing out the wrong process sheet. He claimed that the mistake was no surprise given the changes implemented by the respondents. He claimed that it was up to management and not him to train people. He claimed that he had no reason to double check the sheets. He claimed that the management team had admitted their mistake of removing responsibility for the process sheets from him and the claimant. He pointed out that the error was made following the changes. He claimed that he had just followed the process sheet (P65) and that it had never happened before. He claimed that Sean Duffin should be asked about the number of mistakes spotted by him and the claimant.

10. Alistair Thomson interviewed Brian Duncan (P57 to P58). He admitted to being confused about the Wet End. He explained that he had only given the claimant and Robert Duncan a test sheet at the time to allow them to weigh the chemicals and not the dye. He was unaware of whether the claimant and Robert Duncan were continuing to follow their normal practice and expressed concern about Robert Duncan stating in response to his requests for help; "*I'm not telling you, that's your job. I will just do what you tell me*".

11. Alistair Thomson met with Sean Duffin again on 26 February 2016 (P59 to P61). When asked what he thought had gone wrong, Sean Duffin explained that over the past few weeks the Operatives had been carrying out a different process which resulted in test sheets being printed and that on this occasion the wrong dye had been selected. Sean Duffin was of the opinion that there were adequate quality control measures in place to have

highlighted the mistake at the start and during the process. Sean Duffin identified a number of quality controls in the Wet End. They included checking the dye code on the process sheet against the dye code on the work line in accordance with SOP 3.4.3; checking the dye code on the work line with the master pattern; the dye penetration check in accordance with SOP 3.5.5 and colour checking at the end of the process in terms of SOP 3.5.6. Sean Duffin referred Alistair Thomson to the process sheet for the batch in question (P65). It recorded either Robert Duncan or the claimant having completed each stage of the Wet End. Sean Duffin was of the opinion that if each stage of the Wet End had been completed the error would have been spotted. Sean Duffin described it as a strange coincidence that the mistake had occurred during the week when the shift patterns changed. He referred to Robert Duncan and the claimant being unhappy about the changes. He referred to comments made in recent weeks by Robert Duncan to himself and Brian Duncan that he and the claimant would "*just do as we`re told*". Sean Duffin expressed concern that Robert Duncan and the claimant may have recognised the problem and carried on regardless.

12. Alistair Thomson prepared a report of his investigation dated 26 February 2016 (P62 to P64). He summarised his findings as follows: -

- *Brian Duncan appears to have mixed the dye code and dressing code which has led to the wrong dye being stated on the process sheet. There is no evidence to suggest that this was anything other than an error, however, the mistake is serious in nature and could have had serious consequences. I have noted that Brian is not experienced in this process and suggests that he was only providing support to "fill in a gap in the process". Brian states that when he asked the more experienced Robert Duncan for help he replied by saying "I`m not telling you, that`s your job, I will just do what you tell me".*

Brian stated that he was only looking for some support following some shift changes.

- *It would appear that there are sufficient cross checks in the standard operating procedures to identify and eliminate errors such as the one highlighted above. It would appear that the two Operators Robert Duncan and Thomas Addis did not carry out the checks that they should have. Both are experienced Operators who confirmed that they have `caught" errors in the process on occasions in the past. The Production Manager suggests this error should have been identified by them.*

- *The Operators have failed to carry out a check of gathering the process sheet and ensuring the dye code matches the dye code on the workline – SOP 3.4.3. Had this check been carried out then the error would have been identified immediately.*

- *Robert Duncan has signed the Process Sheet to say that he has checked the master pattern for compatibility. Had he carried out the check that he signed to say that he completed then he would have immediately identified that the master pattern (which is referenced in the workline) is for Charcoal colour as opposed to the Light Blue. The master pattern cannot be checked without reference to the workline. Reference to the workline would have immediately disclosed that the required dye was charcoal not blue. Therefore it would appear that this check was not carried out, despite Robert Duncan signing to say he did.*

- *It appears likely that neither Operator carried out check 3.5.5 (Dye Penetration Check) from the SOP, as had this check*

been carried out, then once again the error would have been identified.

- *It appears likely that Colour Checking (3.5.6 from the SOP) has not been carried out. Thomas Addis has signed to say that he has carried out this check. Once again had this check been carried out then the error would have been identified.*

- *Thomas Addis has also signed the workline which states that the colour is Charcoal (as opposed to the Light Blue stated on the Process Sheet).*

- *Sean Duffin, Production Manager, would have expected Operators as experienced as Robert and Thomas to have identified there was an issue and also stated that he felt it was a strange coincidence that this incident occurred in the week after Robert and Thomas's shift changed and that they weren`t happy about their shifts changing.*

- *Sean raised concerns that they may have recognised that an error had been made and carried out processing regardless, disregarding the quality checks and controls that are in place.*

- *The error has the potential cost of around £5,000 and also has the potential to damage relations with a key export customer*.

13. Alistair Thomson recommended that disciplinary action should be taken against Brian Duncan, Robert Duncan and the claimant. In relation to Robert Duncan and the claimant, Alistair Thomson recommended disciplinary action over their apparent failure to follow a number of the SOPs designed to spot exactly this type of error and which gave him serious cause for concern. He was of the view that had they carried out the checks then the error would have been identified and rectified. He considered it

unusual that experienced Operatives would fail to identify such an error and was concerned that the incident had occurred during the week following the shift change in the face of strong resistance from both Robert Duncan and the claimant. He referred to Robert Duncan being particularly unhappy about the shift change and his frequent reference to the lack of training and experience of those now tasked to produce the process sheet. Alistair Thomson commented that this was all the more reason for Robert Duncan and the claimant, as two very experienced Operatives in the Wet End, to carry out checks with more diligence than usual.

14. Alistair Thomson reported that there was significant evidence to suggest that both Robert Duncan and the claimant recognised the error and chose to ignore it. He identified as a possible motive the desire to show management in a very public and expensive way that the shift changes were ill conceived and should not have been made. He concluded that if they had noticed the error and chose to ignore it that their behaviour could also be viewed as a willful and excessive waste of materials likely to affect the smooth running of the respondents' business. Alistair Thomson identified the possibility that the Operatives had carried out the various checks in good faith but had failed to identify the mistake. He concluded that this could constitute gross negligence. He also identified the possibility that checks were not carried out and the error went unnoticed. He concluded that this could constitute a serious breach of confidence.

15. By letter dated 29 February 2016 (P77 to P78) the claimant was invited by David Currie, Production Manager to a Disciplinary Hearing. In his letter (P77 to P78) David Curie advised the claimant *inter alia* as follows: -

> "*I write further to the recent investigation into allegations which may suggest a failure to follow standard operating procedures; falsification of records; a wilful and excessive waste of materials which could be viewed as acts likely to affect the smooth running of the Company;*

gross negligence, carelessness or incompetence; and/or a serious breach of confidence".

16. David Currie informed the claimant that the purpose of the Disciplinary Hearing was to give him an opportunity to respond to the allegations made against him. In his letter, he provided the claimant with information about the allegations against him as follows;

"*Further particulars of these allegations being that on 28 January 2016, you signed a process sheet indicating that you had carried out required production checks but that you failed to carry out required checks, you also failed to carry out checks which form part of the standard operating procedure, which resulted in 50 hides, worth around £5,000, being dyed blue rather than charcoal. The hides were for a key customer of ours in the USA. Failing to supply our key customers with their orders has the potential to have a significant detrimental impact on our business.*

It is alleged that you may have noticed an error made by one of your colleagues, but chose to ignore this due to ongoing issues caused by changes in shifts that you disagreed with and used this as an opportunity to demonstrate that the changes should not have been made. Had the required checks been carried out, a mistake made on the process sheet would have been highlighted and could have been rectified."

17. David Currie provided the claimant with copies of Alistair Thomson's interviews with Sean Duffin (P46 to P48) & (P59 to P61), Robert Duncan (P53 to P56), Brian Duncan (P57 to P58) and himself (P49 to P52); Alistair Thomson's report (P62 to P64); the work line (P66); the process sheet (P65) and the SOP (P69 to P76).

18. The claimant was informed by David Currie that the allegations were very serious and potentially amounted to gross misconduct. The claimant was informed that the outcome of the Disciplinary Hearing could include

dismissal. The claimant was reminded by David Currie that he had been issued with a Final Written Warning on 2 December 2015 and that this might be considered when making a decision. David Currie advised the claimant that he could bring documentary evidence to the Disciplinary Hearing and that he had the right to be accompanied by a workplace colleague or a representative from the trade union.

19. The claimant attended a Disciplinary Hearing on 10 March 2016. David Currie was accompanied by Rhona Macinnes, an HR Officer with the Scottish Leather Group Ltd. The claimant was accompanied by Steve Farrell of the Community Union. David Currie informed the claimant that this was his opportunity to respond to the allegations made against him. He referred to the allegation identified in his letter to the claimant of 29 February 2016 (P77 to P78). In response to a request from David Currie to talk him through the Wet End, the claimant referred to the process sheet (P65) produced by Brian Duncan. He explained that this was all they had worked off. He stated that they did not see the workline (P66) attached to it but instead followed the process sheet produced by Brian Duncan (P65). He stated that when they did get the workline they would "*marry them up, compare them and staple them so we knew it'd marry up*". The claimant confirmed that he would add information from the dye sheet to the computer spreadsheet. The claimant confirmed that he had checked the pH by opening drum 9, checking the pH and closing it again. He confirmed that he had added information to the computer spreadsheet (P68). He stated that he might not have gone to the computer straight away. He explained that the spreadsheet "*moves along*" as you enter information and you might not always see the first few columns of the spreadsheet. He agreed that the spreadsheet (P68) contains the colour of the dye – which for the day in question was charcoal. He explained that in the morning they were getting the process sheet down to the drums and were not on the computer. He explained that the computer did not play a big part in the day. He stated that it was "*all about what we are doing on that sheet*". The claimant referred to the errors spotted since the process sheet was completed by other

employees including Brian Duncan. He explained that errors were reported to Sean Duffin who suggested that responsibility for the process sheets should revert to him and Robert Duncan. The claimant explained that he had never been taught to check blues and blacks against the master pattern. He explained that "*we do good work and we know our colours, it might be hard to believe but we do*".

20. The claimant confirmed that he had undertaken each of the steps on the process sheet with his initial against (P65). This included a shade check. When questioned about when he first saw the workline (P66) the claimant explained that they had been "*trying to be a day in front or whatever so we print it off, get the sheet and marry it up with the workline. The workline goes with the hides and they are loaded overnight*." He explained that he had last seen the workline (P66) on the drum. David Currie observed that the claimant had initialed the workline (P66) on 28 January 2016. The claimant explained that he had initialed and added the reading 6.5 to the workline (P66) the following day. When questioned by David Currie as to whether he had paid due attention to what he was signing, the claimant explained that he would "*have done eight drums that day so I might just have battered through them*". When questioned about whether he was provided with the work schedule (P67), the claimant replied that it changed daily.

21. David Currie questioned the claimant as to whether it was conceivable that two experienced Operatives could have failed to notice the error during a 12-hour shift given that there were no blue batches planned for that day and there was no reference to light blue dye anywhere except on the process sheet (P65). The claimant replied that the computer was not a *"big part of our day".* He explained that the error had just not been caught. He explained that they were constantly down at the drums and were not spending hours at the computer. He explained that they just do "*a flying visit*" to record the pH or temperature. He explained that they hardly look at the work schedule (P67). He explained that it was only used if they did not

get any worklines. He explained that he did not to look at it. He claimed that cross checking was not fundamental to the Wet End for blues and blacks. The claimant confirmed that he was aware of Brian Duncan having asked for help. He claimed that they had shown him "*how to do all of this*". When questioned about Brian Duncan asking for help, the claimant replied "*I know the bit you're talking about, where he said about Rab and I know where you're coming from*". When questioned by David Currie about whether it would have been worthwhile to double check Brian Duncan's work, the claimant stated "*Obviously now it might have been because this has happened but if we were doing our job instead of someone else then this wouldn't have happened*". He described the incident as a "*genuine miss*". At the close of the Hearing Steve Farrell referred to Sean Duffin's relationship with the claimant and Robert Duncan as an "*ulterior motive*" for the disciplinary action. He suggested that with hindsight Sean Duffin should have "*kept his mouth shut*". The respondents produced a written record of the Disciplinary Hearing (P79 to P84).

22. David Currie decided to interview Sean Duffin before making any decision. He met with Sean Duffin on 16 March 2016. He questioned Sean Duffin about general compliance by Operatives with the requirement to check dye colours against master patterns; SOPs and work schedules. Sean Duffin confirmed that Operatives were expected to comply with the above requirements. He agreed that the work schedule was an important part of the Operative's day. He described the claimant and Robert Duncan as being "*aware of what batches are in each of the drums*" and "*always on the ball*". He identified other mistakes spotted that week. When asked by David Currie whether he thought the error was missed deliberately Sean Duffin replied; "*I don't think so, but Robert did say that due to the overtime being taken away by management, they'll do exactly what they are told to do*". Sean Duffin confirmed that Robert Duncan made the comment to him. When questioned about the context of the comment Sean Duffin said; "*I think that they just felt as if they had been shafted by the company and didn`t feel valued anymore. To be fair, I thought this was a passing*

comment and I don`t think that they`d necessarily follow it through". He confirmed that on occasions work lines are signed the following day and there is no obligation to sign them if they are incorrect. He confirmed that the computer plays a big part in the Operative's daily workload. He confirmed that Operatives are at the computer regularly, visiting it multiple times each day. Sean Duffin agreed with David Currie that the incident seemed strange given the expertise of the Operatives. The respondents produced a written record of David Currie`s interview with Sean Duffin (P89 to P92).

23. David Currie had regard to the workline (P66), work schedule (P67) and spreadsheet (P68) for the day in question all of which contained the correct dye code and colour for drum 9. He had regard to the various opportunities during the Wet End when the error could have been noticed including the information on the work sheet (P67) and computer spreadsheet (P68). He had regard to the fact that there were no hides to be dyed blue on the day in question. He had regard to the level of experience of the claimant in the Wet End. He had regard to the information obtained during the investigation. He did not accept the claimant's position that he did not check the work line (P66) at any stage during the Wet End or notice the error when signing it. He found the claimant's position that he and Robert Duncan had already noticed a number of mistakes that week but had failed to spot Brian Duncan's mistake to be inconsistent. He concluded that the claimant's motive for ignoring the mistake was his disgruntlement at operational changes and desire to make a point to management. He took into account that the respondents had consulted with the claimant about proposed changes and that the changes were not implemented until the Grievance procedure was completed. He took into account the claimant's level of experience and length of service. He took into account Sean Duffin's comments when interviewed during the investigation and after the Disciplinary Hearing. Having considered all the information available to him, David Curie concluded that the error was not missed by accident or as the result of negligence on the part of the claimant. David Currie was satisfied

that the claimant was guilty of gross misconduct by deliberately ignoring the error made by Brian Duncan and failing to take corrective action. He concluded that Robert Duncan was guilty of the same misconduct.

24. David Currie was reluctant to dismiss either Operative. He took advice from Callum MacInnes of HR at the Scottish Leather Group Ltd. He was advised that both Operatives had live Final Written Warnings on their files. The claimant's Final Written Warning (P42 to P43) was, as referred to above, for "*a serious breach of confidence and a serious act of insubordination*". The Final Written Warning on Robert Duncan's file (P32) was for unacceptable levels of attendance following a Level 2 Written Warning with the further absence following a pattern of absence on the first day of the working week. Robert Duncan was notified of the Final Written Warning in a letter dated 24 April 2015 (P32) which stated that the warning was "*given on account of your misconduct*". Robert Duncan was informed that the warning would normally be disregarded after a period of 12 months provided there was no recurrence. The improvement required by Robert Duncan was identified in Sean Duffin's letter (P32) as follows;

"*With immediate effect and subsequently maintained, you will have no periods of absence or lateness during your 12-month sanction. You will also ensure that all Company Policies and Procedures are adhered to. For further details on the Absence Reporting and Time Keeping Procedure please refer to the Employee Handbook*".

25. When deciding how to sanction the claimant and Robert Duncan, David Currie considered the serious nature of their misconduct on 28 January 2016 of deliberately ignoring Brian Duncan's mistake and failing to take corrective action to avoid costs estimated at £5,000 and potential damage to customer relations. He considered the Final Written Warning (P42 to 43) on each of their files. He noted that the claimant's Final Written Warning was for serious misconduct. In these circumstances, he did not consider that a further Final Written Warning was an appropriate sanction. He

concluded that dismissal was appropriate. He wrote to the claimant confirming his decision on 21 March 2016 (P85 to P88). In his letter (P85 to P88), David Currie gave his reasons for deciding that the claimant should be dismissed as follows;

"*I have reached the conclusion that it is more likely than not that you noticed the error made by one of your colleagues, but chose to ignore this. Following the consideration of the evidence, it is inconceivable that an experienced and skilled operator, such as you would fail to notice so many clear indicators at various points in the wet end process and it is therefore my belief that you did notice the error on the process sheet but chose not to highlight this to management. I consider that your actions are likely to have been motivated by your clear disgruntlement caused by recent changes in the department. In my view it is likely that you did not bring this error to management`s attention in order to highlight that the management team were wrong to change the process.*

During my investigations, I noted the correct batch information, as stated on the workline, had been entered into the dye drum schedule and spreadsheet. These entries did not match the information on the process sheet. The process sheet stated blue whilst the spreadsheet and drum schedule stated charcoal. In addition, the schedule for 28 January 2016 did not contain any blue batches allocated to any of the drums. I have also noted that the process sheet in question is a test sheet with only one hide allocated to the batch. During the meeting, you talked me through the process and stated that the dye drum spreadsheet and schedule are updated by you and your colleague, Robert Duncan. The error would have been apparent on that spreadsheet and I would expect an operator with your experience to notice such an error. In addition, the responsibility for allocating batches to drums lies with you and your colleague. This

part of the process provided another opportunity for the error to be identified.

We then discussed the checks which you are responsible for carrying out on a day to day basis. You stated that the results of two of these checks are then recorded by you on a spreadsheet. So this part of the process contained another two occasions where you would have accessed the spreadsheet to input information relevant to the batch in question. The entry for this batch stated "charcoal" but you both knew that the drum contained blue dye. When challenged on this point you stated that "it doesn`t play a big part in the day it`s all about what we`re doing on that sheet." This was not a satisfactory response. All employees are expected to be vigilant during their daily work and these were other opportunities for you to note that you were processing the hides in the wrong colour. In addition, we discussed the fact that you had signed the process sheet which states "light blue" and the workline which states "charcoal". You stated that you signed the workline the following day but dated the workline with the date on which you carried out the relevant work. I would again, have expected you to note the difference in the two colours. I would also have expected you to notice either that there was no workline for a light blue batch, or that there was workline for a charcoal batch which had not been processed. This, again would have highlighted the error which had been made.

You also said that your working day is busy and that you don`t always have a lot of time at the computer. I took it that this was an explanation for why you and Robert would have missed repeated opportunities to observe that on the spreadsheet that the correct colour was charcoal. I asked Sean about this and whilst he confirmed that the beginning of the day and process can be quite hectic, after the first hour things slow down and there is ample opportunity to take

more time at the computer to input information and to take account of changes to the schedule.

Throughout our discussion, you noted on several occasions that the only information which you pay attention to is that which is contained within the process sheet I believe that, as an experienced operator, you would not have been oblivious or somehow blinded to the other sources of information which were available to you all of which were telling you that the colour for this batch was charcoal. It is inconceivable that you would not have noticed this error at some point during the day given the many opportunities that you had to do so.

Before arriving at my conclusions I considered the following facts:

- *The batch information had been input into the dye drum schedule as batch 73108, dye code 414 (charcoal) yet this batch was still processed as a dye code 15 (blue).*

- *The batch information had been input into the spreadsheet as drum nine, 50 Charcoal 33238, process 15, dye code 414 (charcoal), however this batch was still processed as a dye code 15 (blue).*

- *The weekly/daily schedule, allocated to dye drum number nine for Thursday is batch No 73108, 50 Charcoal, substance 1mm, wet white raw material. This batch was still processed as a dye code 15 (blue).*

- *There were no blue batches allocated to any drums that day.*

- *The batch had a test process sheet allocated to it, there was 1 hide attached to this sheet weighing 231kgs. Given 1 hide*

should weigh 4.5-5.5kgs I would have expected you to check, possibly via the workline, to confirm how may hides should be in the batch. I would have also expected you to have asked why this was the only test sheet processed that day, and why it did not have relevant information relating to the batch,

- *I fail to accept that you would just process what it says on the process sheet and quite readily accept any lack of knowledge of what should be in the vessel in the first place. This probably ties in the daily schedule, but this does not make any sense to me and would be considered unacceptable by management or by general standards of practice.*

- *It is implausible that one person could have an "off day" to this degree and miss so many opportunities to highlight the error, however for two people. Yourself and your work partner Robert, both affected and unhappy about the changes in the department, to miss this error is in my view absolutely inconceivable.*

I also considered the points that you raised during the investigation and the hearing.

You explained that you focussed solely on the process sheet and did not look at the workline at all despite the fact that a copy was stapled to the back of the process sheet and another was attached to the drum. It is not credible that you would not have taken the time at any stage in a long process to at least glance at the workline to re-assure yourself that the two pieces of paper matched. Previously you and Robert produced the process sheets and so you were well used to comparing the two pieces of paper.

You said that you had spotted other mistakes that Brian made that week and you flagged these up to Sean. The point is presumably that if you had flagged up other mistakes why would you let the other one through. Sean Duffin has no knowledge of the various mistakes of Brian`s that you say he made in the same week and which you raised with Sean. He told me that you did spot a mistake of Derek McCreadie`s related to the wrong weight of chemicals but that you did not flag with him that Brian had made mistakes with process sheets.

Even if I was to accept that you did flag up other mistakes that Brian had made, that makes it even harder to accept that you would not have gone out of your way to double check the process sheets against the workline, the spreadsheet and the drum schedule. If I accept what you say then you were aware that mistakes were being made. It may be that the level of disenchantment felt by you and Robert at the shift changes were heightened by each mistake that you observed and you perhaps decided to make a point by letting the latest mistake through. You may have thought that only when the company incurred financial loss as a result of a mistake would it be forced to agree with your view that the changes were not working.

As it is I accept what Sean and Brian have both said and I do not accept that you did flag up 3-4 mistakes of Brian`s in the week of the blue/charcoal mistake.

Had you made management aware of the error when you noticed it, this would have highlighted the error at a much earlier stage in the process and prevented management time being wasted in identifying the root cause, and trying to resolve the issue. Furthermore, the mis-dyed hides had an estimated financial value of £5,000 as well as the potential to risk the relationship with a key client of ours in the USA,

which could have put future orders at risk. In my view this was an incredibly risky way of proving a point to management".

For all of the foregoing reasons I believe that your actions were an act of gross misconduct. I considered whether any alternatives to summary dismissal would be appropriate in these circumstances. I first of all considered that you have fifteen years of service, However, having taken into account that you were issued with a Final Written Warning for a serious breach of confidence and a serious act of insubordination in December 2015 [the final written warning was issued as an alternative to summary dismissal], I do not feel that an alternative sanction is appropriate in this instance. You will therefore be summarily dismissed with immediate effect."

26. David Currie advised the claimant of his right to appeal against his dismissal. He provided the claimant with a note of the Disciplinary Hearing (P79 to P84)).

27. Callum MacInnes advised David Currie that the Final Written Warning issued to Robert Duncan (P32) related to capability as opposed to conduct and on that basis it would be inappropriate to take it into account when deciding how to sanction Robert Duncan in response to the incident on 28 January 2016. David Currie had regard to Robert Duncan's length of service. He decided that in the circumstances Robert Duncan should be issued with a Final Written Warning for his misconduct on 28 January 2016. David Currie wrote to Robert Duncan by letter dated 21 March 2016 (P92a to P92d) to confirm his decision to issue him with a Final Written Warning for gross misconduct. The reasons given in his letter (P92a to P92d) for issuing Robert Duncan with a Final Written Warning were as follows:-

"*For all of the foregoing reasons I believe that your actions were an act of gross misconduct. Before making a decision on the most appropriate sanction, I considered any mitigating factors. I*

considered your live warning for your attendance levels, however do not feel that warning should be considered in this instance because the current process relates to misconduct not capability. I considered that other than the aforementioned warning for attendance you have no live warnings on your file. I considered that you have 33 years service, which is far in excess of most employees within the Company. Given these mitigating factors I have decided that it would be more appropriate to issue you with a Level 3 – Final Written Warning as an alternative sanction to summary dismissal. I would like to make it clear though Robert that had you not had such a long length of service along with no relevant warnings on your file, you would have been summary dismissed.

There is an implied trust between the Company and all of its employees. You are trusted to behave and to work professionally without direct supervision and to follow the procedures which are set out for the process. Whilst you may be unhappy at the changes that were made to the shift pattern, there was a period of full consultation over a number of weeks during which you were given the opportunity to oppose the changes. Ultimately the outcome was not what you wanted but nevertheless it is incumbent on you to get over that disappointment and maintain the required standards of conduct. We must also be able to trust that you will be proactive in maintaining the Company's high standards and making a positive contribution to the production process. With immediate effect, I expect your conduct to improve such that you report any errors, potential errors, or anything about the process which is noteworthy to a member of the management team; do not allow peronal feelings to cloud your professional judgment and act in the best interest of the Company at all times. I expect you to demonstrate exemplary behavior throughout the period of your sanction and beyond; that you will adhere to all Company policies; and that you will act in the best interests of the Company at all times".

28. The claimant appealed against the decision to dismiss him by letter dated 23 March 2016 (P93). His appeal was on the following grounds: -

> "(i) *Severity of Award: (the award was both punitive, accumulative and perverse in relation to the full facts available)*
>
> *(ii) Procedural: It is my opinion that there has been several breaches of internal procedure and ACAS guidelines that I will allude to in full detail at my appeal hearing.*
>
> *(iii) Any Other Substantial Reason: I fundamentally believe that there has been a third party influence on the decision*".

29. The claimant was invited to attend an Appeal Hearing on 26 April 2016 before Raymond Gosland, Technical Director by letter dated 18 April 2016 (P94 to P95). The claimant was informed that the Appeal Hearing would be convened to hear and consider whatever points he wished to put forward with respect to his appeal and that if there were any grounds for his appeal other than already stated, he should provide written representations to Raymond Gosland before the Appeal Hearing. The claimant was informed of his right to be accompanied by a workplace colleague or a representative. The claimant was informed that the Appeal Hearing had the power to overturn the decision made, impose different disciplinary sanctions, or uphold the original decision. The claimant was informed that the decision of the Appeal Hearing would be final.

30. The claimant attended the Appeal Hearing on 26 April 2016 before Raymond Gosland, who was accompanied by Callum MacInnes. The claimant was accompanied by Steve Farrell. In advance of the Appeal Hearing, the claimant was provided with a copy of David Currie's interview with Sean Duffin on 16 March 2016 (P89 to P92). At the Appeal Hearing, Steve Farrell submitted that the respondents were "*hell bent*" on thinking

that the claimant had missed the mistake because of concerns over the implementation of new shift patterns and operational changes. He referred to Sean Duffin's involvement and the claimant's claim to the Employment Tribunal for breach of contract. He suggested that "*on balance of probability*" the respondents had "*manipulated this situation*". He referred to Sean Duffin's comment to David Currie that he did not think that the claimant and Robert Duncan had missed the error deliberately. He disputed that David Currie had sufficient evidence on which to conclude that the claimant was guilty of gross misconduct. He referred to the claimant and Robert Duncan consistently raising concerns to Sean Duffin. He submitted that David Currie had attached more weight to the view of Sean Duffin than to that of the claimant and Robert Duncan. The claimant referred to his length of service and upset at being accused of deliberately missing Brian Duncan's mistake. He denied that he would ever jeopardise his job.

31. Raymond Gosland was not persuaded that he should overturn the decision to dismiss the claimant. Having considered all the information before him and the submissions made on the claimant's behalf he decided to uphold the original decision. He was satisfied that David Currie was entitled to conclude from the evidence before him that the claimant had noticed but ignored the mistake made by Brian Duncan and that alternatives having been considered, the claimant's conduct was sufficiently serious to justify dismissal. Raymond Gosland wrote to the claimant by letter dated 3 May 2016 (P100 to P102) setting out his reasons for refusing his Appeal as follows: -

> "*You have stated that you feel that the sanction that was issued was too severe. It is my belief that the sanction was appropriate for the act of gross misconduct that was found to have been committed. In my view there was more than sufficient evidence for David Currie to conclude on the balance of probabilities that the mistake was spotted but deliberately not flagged up.*

Further, in terms of the reasonableness of the process I was reassured that David Currie considered an alternate sanction before deciding on dismissal as is best practice in such circumstances. I do not believe this decision was perverse, as was suggested, in relation to the full facts available. On the contrary, it would appear that David has considered this complex situation and made a decision on what he felt was reasonable with regards to the information before him including all the information from both the investigation meetings and disciplinary hearing. This was clearly not a decision which was reached hastily. It is clear that David examined the evidence carefully but ultimately felt that the numerous opportunities that a very experienced operative had to spot this error that were not taken pointed to you having looked the other way. He sets that out very clearly in the letter of dismissal.

I found the argument from the Union that David Currie held Sean Duffin`s opinion in higher regard than yours contradictory. Earlier on in the meting it was stated by the Union that David did not take Sean`s opinion into account when he passed comment on whether or not he felt the error was missed deliberately. When there was divergence on an issue of fact it was David`s role to supply the correct weighting to the differing accounts and decide on balance which was more likely to be true or accurate. This is not always an easy task but I am content that he approached the issue properly in this case.

The next point of appeal was the view that there were several breaches of internal procedure and ACAS guidelines. When commenting further on this the Union referenced the fact that you were not suspended following the allegations. The Union also questioned why you were allowed to complete your shift before being informed of your dismissal. Regarding not being suspended; this decision was taken at the discretion of management and I do not

believe it has impacted on the overall decision in this case. That you were not suspended does not in any way undermine the process or the decision reached. It certainly does not lead to a conclusion that the company did not believe the allegations to be serious. Furthermore I do not believe that the time of when you were informed of your dismissal has any significant bearing on the outcome. There is no good time or place to inform someone that they are summarily dismissed.

You stated that your third point of appeal was for some other substantial reason. You stated that you fundamentally believe that there has been a third party influence on the decision. Your union representative stated that "on the balance of probability that the Company has manipulated this situation". I do not believe this is a credible assertion. Your representative alluded to Sean Duffin manipulating your dismissal due to an outstanding grievance that was raised. This suggestion was in direct conflict with another point of appeal that your representative made when he stated that Sean was asked if you and your colleague had missed the error deliberately and Sean stated "I don`t think so, but Robert did say that due to the overtime being taken away by management, they`ll do exactly what they are told to do". When making my decision I had to consider how likely it would be that Sean would make such a statement if he was trying to manipulate a situation that would lead to you being wrongly accused of carrying out an act that you did not carry out. It could be argued that in that instance Sean was defending your actions, whilst still making the point that his view was inconclusive. There was no other evidence presented that could have led me to the view that there was any third party influence. Furthermore, I can assure you that I will allow no third party influence in my decision.

I have enclosed two copies of the notes taken during the meeting and would ask you to review them, make any comments you may have in the margin area before signing and returning one copy to me for your file."

32. The claimant was ill with acute stress following his dismissal until 12 July 2016 (P107). During this period, he was in receipt of Employment & Support Allowance. He then sought alternative employment and applied for a number of posts. In July 2016, he was interviewed by Parcelnet for a position as a self-employed courier. He obtained employment with Parcelnet from 24 September 2016. Since then he has been in receipt of an income equivalent to his income from employment with the respondents (P105 to P106).

SUBMISSIONS

RESPONDENTS' SUBMISSIONS

33. Mr Mclaughlin for the respondents submitted that, based on the evidence before it, the Tribunal should find that the respondents were entitled to conclude that the claimant was guilty of deliberately ignoring the mistake made in relation to dye colour. Mr McLaughlin submitted that there was sufficient evidence to show that the claimant and Robert Duncan were aggrieved about the operational changes that resulted in Brian Duncan completing the process sheet. He referred to their remarks about the mistake occurring after responsibility for that part of the Wet End was removed from them. He cautioned against preferring the claimant's evidence before the Tribunal to the evidence before the respondents when David Currie made the decision to dismiss him. In particular, he referred to the claimant's attempts to distance himself from remarks made by Robert Duncan to suggest that they would "*work to rule*" after the changes were introduced. Before the Tribunal, submitted McLaughlin, the claimant sought to argue that he was his "*own man*". This was not his position during the

investigation and disciplinary process however and the statements made by Robert Duncan applied equally to the claimant. Similarly, submitted Mr McLaughlin, the Tribunal should not treat the evidence of Sean Duffin regarding the remarks made by Robert Duncan as no more than gossip. The Tribunal should find that remarks were made by Robert Duncan to Sean Duffin and that David Currie was entitled to conclude that Robert Duncan was speaking for both himself and the claimant. The evidence did not support the claimant's position that Sean Duffin had it "*in for them*" submitted Mr McLaughlin and his alleged change of mind, which Mr McLaughlin did not accept, was only one factor to be considered by David Currie when deciding whether dismissal was appropriate. Every piece of paper in the Wet End should have been cross checked submitted Mr McLaughlin. Without distancing himself from this practice, submitted Mr McLaughlin, it would be impossible for the claimant to explain how he missed the discrepancy.

34. Mr McLaughlin questioned whether any criticism had been made by the claimant of the investigation undertaken by the respondents. While he accepted that there was reference to alleged procedural flaws in the claimant`s grounds of appeal, he submitted that this point was not pursued. Criticism by the claimant that he did not receive notes of Sean Duffin`s interview with David Currie (P89 to P92) did not amount to a procedural flaw submitted Mr McLaughlin. Had the claimant been afforded the opportunity to respond to the notes from the interview with Sean Duffin at a further Disciplinary Hearing, it is unclear what if anything he would have been able to do to improve his position. If anything, submitted Mr McLaughlin, the evidence of Sean Duffin in relation to matters such as checking the master pattern and compliance with SOPs placed him in a worse position. The claimant submitted Mr McLaughlin was not prejudiced. In any event submitted Mr McLaughlin it was apparent that the claimant had a copy of Sean Duffin`s statement (P89 to P91) by the time of his Appeal Hearing and no points were taken in relation to anything Sean Duffin said during the course of that interview or of any prejudice caused to the claimant at the

Appeal Hearing. Any failure to provide the claimant with a copy of the interview note before a decision was made by David Currie submitted Mr McLaughlin was not a procedural flaw and certainly not sufficiently material to make the decision to dismiss the claimant unfair. In any event, submitted Mr McLaughlin, Sean Duffin was a witness to the incident and not the decision maker. His opinion, or subsequent change of opinion, was only one factor which David Currie took into account. David Currie had an obligation to weigh up the various factors, attach the appropriate weight to each factor and reach a conclusion. He had to consider the totality of the evidence.

35. Mr McLaughlin submitted that given the weight of evidence before David Currie on which he based his decision to dismiss the claimant it was difficult to see how the decision could fall outwith the band of reasonable responses. Mr McLaughlin submitted that in terms of the case of **Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23** the band of reasonable responses test applied to all stages of the procedure including the investigation. David Currie was entitled to conclude from the investigation that the claimant was guilty of an act of gross misconduct. It would be wrong, submitted Mr McLaughlin to proceed on the basis that David Currie only considered the possibility of the claimant deliberately ignoring the mistake and not the other possibilities including negligent oversight identified by Alistair Thomson following his investigation. The claimant accepted, submitted Mr McLaughlin, that if he had deliberately failed to report the error his conduct would amount to gross misconduct. There was nothing raised at the Appeal of any substance, submitted Mr McLaughlin, that required Raymond Gosland to overturn the decision. There was no evidence of any procedural flaw.

36. In relation to the issue of equity and comparison of treatment, Mr McLaughlin referred the Tribunal to the following authorities: -

Lynock v Cereal Packaging Ltd 1988 ICR 670
Paul v East Surrey District Health Authority 1995 IRLR 305 &

37. Mr McLaughlin submitted that as regards Robert Duncan`s Final Written Warning (P92a to 92d) the question to be asked by the Tribunal was whether in overall terms the respondents' decision to treat it as relating to capability and not misconduct fell within the band of reasonable responses. Referring to the case of **Lynock** (*supra*) Mr McLaughlin submitted that the respondents were entitled to proceed on the basis that the Warning issued to Robert Duncan (P92a to 92d) should not have been labelled as relating to misconduct or treated as a disciplinary manner. There was no evidence, submitted Mr McLaughlin, of Robert Duncan having been issued with the Warning for a false absence or that such a possibility was posited. While there may have been a suspicion raised from the timing of absences on the first working day of the week, there were no findings of wrongdoing to support a Warning for misconduct. As a matter of law, submitted Mr McLaughlin a Final Written Warning for misconduct could not be given in the circumstances of absence due to capability. David Currie was therefore entitled to rely on the advice of Callum MacInnes when deciding to treat the Final Written Warning issued to Robert Duncan (P92a to 92d) as relating capability and not misconduct.

38. Mr McLaughlin submitted that when deciding whether to dismiss Robert Duncan and the claimant, the respondents were entitled to look beyond the analogous nature of the misconduct. Referring to the case of **Paul** (*supra*), Mr McLaughlin submitted that an employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. In the present case, the claimant had a Final Written Warning for gross misconduct (P42 to P43) which he had not challenged. While Robert Duncan also had a Final Written Warning (P92a to 92d) it was, for the reasons submitted above, for capability and not misconduct. The respondents were also entitled, submitted Mr McLaughlin, to take into account Robert Duncan`s length of service which was twice as long as that

of the claimant and totaled three decades of employment with the respondents. These two things saved Robert Duncan from dismissal, submitted Mr McLaughlin. The surrounding circumstances were materially different. The Tribunal must look at the issue of equity in the round and conclude that in all the circumstances the claimant`s dismissal was fair within the meaning of Section 98(4) of the Employment Rights Act 1996. If the clamant is found to have been unfairly dismissed, submitted Mr McLaughlin, any compensation awarded should be reduced by 50% to reflect his level of contribution.

CLAIMANT'S SUBMISSIONS

39. Mr Heggie for the claimant referred the Tribunal to the case of **Graham v The Secretary of State for Work and Pensions (Jobcentre Plus) 2012 EWCA Civ 903** in which Lord Justice Aikens in the Court of Appeal restated (at paragraph 35) the principles to be found in **British Home Stores v Burchell 1980 ICR 303**, as follows: -

> "*once it is established that employers reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employers conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief*."

40. The claimant does not dispute that the reason for his dismissal was misconduct and that this was a "valid" reason for the purposes of the Employment Rights Act 1996. Likewise, submitted Mr Heggie, the claimant does not dispute that there was a full investigation undertaken by the respondents in advance of the decision to dismiss him and that David Currie had a genuine belief in his guilt. What the claimant disputes is whether,

based on the evidence before him, David Currie had reasonable grounds for believing that the he was guilty. Mr Heggie submitted that it would be an error of law to apply the band of reasonable responses approach at this stage of the **Burchell** test. It is only if the respondents have satisfied each stage of **Burchell**, submitted Mr Heggie, that the Tribunal should consider whether the decision made by the respondents fell within the band of reasonable responses. This is not something that the Tribunal will have to consider, submitted Mr Heggie, given that the respondents have failed to show that David Currie had a reasonable belief that the claimant was guilty of deliberately ignoring the wrong dye colour.

41. Mr Heggie referred to the evidence upon which the respondents had relied and reminded the Tribunal of the claimant's response to each point. Failure to compare the dye colour with the master pattern was not the claimant's responsibility as he was second on shift that day; the claimant was entitled to rely on only the process sheet (P65) when checking the Ph and shade during the dyeing process; the claimant signed the workline (P66) with a number of similar documents on the day after the incident when the damage had been done; Operatives pay little attention to the production sheet (P67) and there was no evidence of it being handed to the claimant on the day in question; the column of the spreadsheet (P68) detailing dye colour does not always appear on the screen and time spent at the computer was limited. The claimant's explanations were perfectly reasonable submitted Mr Heggie. Similarly, submitted Mr Heggie, the criticism levelled at the claimant that he failed to cross reference documents was unfounded. The Tribunal should also have regard to the claimant's evidence that he was entitled to rely on the process sheet (P65) and that the volume of work he was expected to undertake on any given day limited his opportunities to notice errors in any of the nine drums used to dye hides.

42. Mr Heggie submitted that there had been a strong suggestion in the respondents' submission and in points put to the claimant that if he was unhappy about remarks made by Robert Duncan he should have done

more to protect his position. Mr Heggie submitted that the claimant did distance himself from the comments made by Robert Duncan and he was not obliged to do more. In any event, submitted Mr Heggie, there was a flaw in the investigation in circumstances where the respondents did not explore with the claimant whether he associated himself with the remarks. In this context, Mr Heggie referred the Tribunal to the various statements made by Sean Duffin about alleged remarks regarding the attitude of the claimant and Robert Duncan to their work. Mr Heggie submitted that the remarks started as no more than workplace gossip based on a comment made by Brian Duncan (P60 to P61); they were followed by Sean Duffin referring to a statement allegedly made to him by Robert Duncan that they would do "*exactly what they were told to do*" and ended with Sean Duffin pulling back from any earlier suggestion that the Operatives had deliberately missed the error (P91). Mr Heggie submitted that, given the contradictions in Sean Duffin's position, too much weight was attached to what Robert Duncan was alleged to have said and to Sean Duffin's observation that it was a strange coincidence for the incident to a have occurred during the week after the shift change (P63).

43. Mr Heggie submitted that the respondents focused on the possibility of the mistake being deliberately ignored. They did not pursue the alternatives identified by Alistair Thomson in his report (P62 to P64) that the mistake may have been missed due to an oversight caused by negligence or failure to complete checks. The focus of the respondents, submitted Mr Heggie was on both Operatives recognising but choosing to ignore the error, their motive being to show management in a very public and expensive way that the shift changes were ill-conceived and should not have been made. The Tribunal should conclude, submitted Mr Heggie, that what Sean Duffin said at the start of the investigation was not just one of a number of factors taken into account by the respondents but was magnified and weighed very heavily in the decision to dismiss the claimant. Mr Heggie accepted that there was a background to the change in shifts and reduction in wages. The respondents however failed to consider that both Operatives indicated

during the investigation that they were just going to get on with their work. In these circumstances, submitted Mr Heggie the respondents did not have reasonable grounds for believing that the claimant was guilty of deliberately failing to report the error.

44. If the respondents did have reasonable grounds upon which to conclude the claimant was guilty of misconduct, the decision to dismiss submitted Mr Heggie was outwith the band of reasonable responses. On the issue of equity and its application to consistency of treatment, Mr Heggie referred the Tribunal to the case of **The Post Office v Fennell 1981 IRLR 221** and in particular Lord Justice Brandon`s remarks at paragraph 12 where he states that: -

> "*I would stress in subsection (3) of s.57 the words in brackets "having regard to equity and the substantial merits of the case". It seems to me that the expression "equity" as there used comprehends the concept of employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that an Industrial Tribunal is entitled to say that, where that is not done, and one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal*."

45. Mr Heggie submitted that the Final Written Warning issued to Robert Duncan was not issued in relation to genuine ill health as in the case of **Lynock** (*supra)*. There was a clear implication that Robert Duncan had been "*swinging the lead*". There was an element of misconduct. Mr Heggie questioned whether the claimant`s Final Written Warning had in fact been issued for gross misconduct (P43 to P43). While accepting that the Final Written Warnings were not identical, he submitted that the circumstances were sufficiently similar for the respondents to have imposed the same sanction. If culpability between the two Operatives was an issue, submitted

Mr Heggie, it would appear from the evidence that Robert Duncan was the more culpable of the two.

46. The remedy sought by the claimant at the time of presenting his claim was re-instatement. By the time of the Hearing he sought compensation only. Mr Heggie referred the Tribunal to the claimant's evidence regarding mitigation of loss and the Schedule of Loss in the Joint Bundle with supporting documentation (P103 to P109).

ISSUES

47. The issues to be determined by the Tribunal were as follows: -

(1) What was the reason for the claimant`s dismissal?

(2) Was the reason a potentially fair reason?

(3) Did the respondents in all the circumstances (including their size and administrative resources), act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant?

(4) Was the claimant`s dismissal fair or unfair having regard to the equity and substantial merits of the case in particular given that the claimant`s former colleague, Robert Duncan, was not dismissed?

(5) If the claimant was unfairly dismissed what if any compensation should be awarded to him having regard to issues including any contribution?

DISCUSSION & DELIBERATIONS

48. In terms of Section 94 of the Employment Rights Act 1996 ("ERA 1996") the claimant had the right not to be unfairly dismissed. In terms of Section 98 of ERA 1996, it is for the respondents to show the reason (or, if more than one, the principal reason) for the claimant`s dismissal. It was not in dispute that the claimant was dismissed for ignoring a mistake made by another employee and deliberately failing to bring it to the respondents' attention. As the reason for dismissal related to the claimant's conduct it was a potentially fair reason in terms of Section 98(2)(b) of ERA 1996.

49. When determining whether the claimant`s dismissal was fair or unfair for a reason relating to his conduct, the Tribunal had regard to Section 98(4) of ERA 1996 and whether in the circumstances (including the size and administrative resources of the respondents' undertaking) the respondents acted reasonably or unreasonably in treating the claimant`s conduct as a sufficient reason for dismissing him. This must be determined in accordance with equity and the substantial merits of the case.

50. The reason for dismissal being conduct related, the Tribunal had regard to the three-fold test set out in the case of **Burchell v British Home Stores Ltd 1980 ICR 303** in terms of which the respondents must show that it believed the employee was guilty of misconduct; it had in mind reasonable grounds upon which to sustain that belief and at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances. While the tests in the case of **Graham** (*supra*) are identified in different order to those in **Burchell** (*supra*), they involve essentially the same considerations.

51. In this case the claimant did not dispute that David Currie believed that he had ignored the mistake made by Brian Duncan and had deliberately failed to bring it to the respondents' attention. Similarly, the claimant did not

challenge to any material extent the respondents' position that the investigation undertaken by Alistair Thomson was sufficiently thorough.

52. The claimant did, however, dispute that the investigation undertaken by Alistair Thomson had uncovered sufficient evidence to provide David Currie with reasonable grounds upon which to sustain his belief in the claimant's guilt.

53. The Tribunal had regard to the information before David Currie when he concluded that the claimant was guilty of the misconduct in question. This information was obtained from the investigation undertaken by Alistair Thomson, the evidence of the claimant at the Disciplinary Hearing and the interview with Sean Duffin following the Disciplinary Hearing. The Tribunal was satisfied that the information before David Currie was sufficient for him to reasonably conclude that the claimant was guilty of ignoring the mistake made by Brian Duncan and deliberately failing to bring it to the respondents' attention. He was entitled to conclude from the information before him that there were sufficient opportunities during the Wet End for the claimant to have noticed the error made by Brian Duncan. David Currie concluded that if the claimant had, as he claimed, played an active part in the Wet End that day that he could not have failed to notice that the wrong dye had been added to drum 9. He had regard to the fact that after the wrong dye had been added to the drum the claimant completed pH and shade tests on the hides; that at regular intervals during the process he had worked on the computer spreadsheet (P68) which showed the dye as charcoal and that at the end of the process he had signed the workline (P66) which again showed the dye as charcoal. The claimant did not deny that he had undertaken the above stages in the process. He sought to explain how he had failed to notice the mistake. The Tribunal was satisfied that David Currie was entitled to reject the claimant's explanations given his level of experience and knowledge of the Wet End. He rejected as implausible the claimant's explanation that he would not have checked the workline (P66) during the Wet End in particular given that the process sheet completed by

Brian Duncan (P65) was incomplete in relation to the number of hides. David Currie also considered the worksheet (P67) recording the work for the day in question which not only recorded the dye colour for drum 9 as charcoal but did not record any other hides being dyed blue that day. There was no evidence of the worksheet having been changed for the day in question (P67). David Currie concluded that the claimant could not have missed the mistake. Having regard to the totality of evidence before him, this was not unreasonable.

54. The Tribunal was not persuaded that David Currie failed to take into account Sean Duffin's remark to him at interview (P91) that he did not think the error was missed deliberately. He also considered the information provided by Sean Duffin during the investigation. He took Sean Duffin's various remarks and observations into account before concluding that on balance the claimant had ignored the mistake. The claimant did not suggest that Sean Duffin's final remark on the subject should have been a decisive factor in David Currie's deliberations. It was one factor which he considered. David Currie concluded that it was outweighed by the other information before him of the opportunities available to the claimant to notice the error. This was not unreasonable.

55. The credibility of the respondents' witnesses was not challenged in any material way before the Tribunal and the claimant did not pursue the allegation made by his representative during the Disciplinary procedure that Sean Duffin had in some way sought to damage the claimant's position with the respondents. This position was in any event inconsistent with Sean Duffin's remark when interviewed by David Currie and there was no evidence of any animosity towards the claimant before the Tribunal. David Currie gave evidence of being reluctant to dismiss the claimant and open to finding an alternative sanction.

56. David Currie also concluded from the information before him that the claimant was motivated by his sense of grievance over the operational

changes introduced by the respondents. The Tribunal was satisfied that again having regard to the totality of the information before David Currie that he was entitled to reach this conclusion. It was not in dispute that the claimant and Robert Duncan were very unhappy about the changes that had resulted in some of their duties passing to Operatives including Brain Duncan who were far less experienced than them and a reduction in their pay. David Currie had evidence of remarks being made by Robert Duncan that he and the claimant would "*do exactly what we are told to do*". This was consistent with the claimant only following the process sheet (P65) regardless of any errors it contained. At his Disciplinary Hearing the claimant did not seek to distance himself from the remarks made by Robert Duncan about their shared position in relation to operational changes. He commented that the mistake would not have occurred had changes not been made. He commented on responsibility for process sheets reverting to him and Robert Duncan following the mistake. The Tribunal was satisfied that it was not unreasonable in these circumstances for David Currie to conclude that the claimant had a motive for ignoring the mistake and that like Robert Duncan he wanted to prove to management that the operational changes were misconceived. The Tribunal was not persuaded that David Currie was required to question the claimant in any greater detail about the views expressed by Robert Duncan. David Currie was entitled to conclude from his remarks during the Disciplinary Hearing that the claimant was aware of the them and that they were in line with his own views.

57. The Tribunal was also not persuaded that the respondents acted unreasonably by not giving the claimant an opportunity to comment on the David Currie's interview with Sean Duffin before the decision was made to dismiss him. From the evidence before the Tribunal it was unclear what the claimant would have said in response to the remarks which could have assisted him. Most of the interview involved Sean Duffin confirming the number of opportunities available during the Wet End to notice errors and as referred to above, David Currie took into account the remark made by Sean Duffin about whether the error could have been missed deliberately. It

was not in dispute by the time of the Appeal Hearing the claimant was in possession of the statement (P89-92). The Tribunal was not persuaded that any issues could have been raised by the claimant in response to the interview with Sean Duffin that would have resulted in a different outcome and avoided dismissal.

58. In all the circumstances the Tribunal was satisfied that based on the information before him David Currie had reasonable grounds upon which to sustain his belief in the claimant's guilt.

59. The respondents having reasonably concluded that the claimant was guilty of misconduct, the Tribunal went on to consider the sanction of dismissal. In the case of **Iceland Frozen Foods Ltd v Jones 1983 ICR 17** Justice Brian-Wilkinson stated that it was the function of the Tribunal to determine whether an employer's decision to dismiss an employee falls within the band of reasonable responses. It was not in dispute that the misconduct with which the claimant was charged was sufficiently serious to justify dismissal. In this case however, the claimant`s colleague who was found guilty of the same misconduct had not been dismissed. According to the claimant this was unreasonable and made his dismissal unfair. The Tribunal considered the issue of inconsistency of treatment when determining whether the claimant's dismissal was fair or unfair in accordance equity and the substantial merits of the case.

60. In the case of **Post Office v Fennell** (*supra*), the claimant was dismissed for striking a colleague during a quarrel in the canteen. His dismissal was found to be unfair because the Post Office had acted differently in comparable cases. The decision to dismiss was found to go "*beyond the bounds of fairness*". Lord Justice Brandon emphasised however the latitude that exists in the way in which an individual employer is entitled to deal with such cases.

61. The Tribunal was not persuaded that in this case that the circumstances of the claimant and Robert Duncan were sufficiently similar to make the claimant's dismissal unfair. The Tribunal accepted the respondents' evidence that there was a distinction to be drawn between the Final Written Warnings issued to both employees and that significantly the Final Written Warning issued to Robert Duncan (P92a to P92d) related to capability and not misconduct. While it was not in dispute that the Final Written Warning (P92a to P92d) referred to misconduct, the Tribunal accepted the respondents' evidence that this was incorrect labelling. Similarly, the Tribunal accepted the respondents' evidence that while the Final Written Warning (P92a to P92d) referred to the timing of recent absences, there had been no finding of misconduct at the stage of issuing the Warning. As referred to above, the Tribunal found on balance that David Currie was reluctant to dismiss either employee. Given the serious nature of the misconduct in question and the outstanding Final Written Warning which had been issued to the claimant as an alternative to dismissal for gross misconduct, David Currie not unreasonably concluded that dismissal on this occasion could not be avoided. Robert Duncan's situation was different. He had a Final Written Warning relating to capability. He also had more than thirty years' service, almost double that of the claimant, which David Currie considered relevant to the question of whether it was appropriate to dismiss him. It was in these circumstances that he decided that a Final Written Warning for misconduct was an appropriate sanction for Robert Duncan.

62. The Tribunal was satisfied that David Currie considered the mitigating circumstances of the claimant and Robert Duncan before deciding whether or not to dismiss them. They were both experienced Operatives. They both had a sense of grievance over the decision to alter their work pattern and remove certain duties from them resulting in a reduction in their pay. There was no finding that Robert Duncan was more to blame than the claimant for the incident. The claimant did not suggest during the disciplinary process that Robert Duncan was responsible for applying the dye. They had both been responsible for the Wet End on the day in question and had both been

responsible for undertaking tasks which would have drawn to their attention the mistake in dye colour. Unlike the claimant however Robert Duncan did not have a Final Written Warning for misconduct. He also had more than thirty years' service. Their circumstances were sufficiently different to justify a different sanction for the same act of misconduct.

CONCLUSION

63. The Tribunal was satisfied that in the circumstances of his case, the respondents acted reasonably in treating the claimant's misconduct as a sufficient reason for dismissing him and that his dismissal was fair in accordance with equity and the substantial merits of his case.

Employment Judge:	Frances Eccles
Date of Judgment:	18 September 2017
Entered in register: and copied to parties	19 September 2017