EMPLOYMENT TRIBUNALS

Claimant: **Mr A Scaife**

Respondent: **Love Sofas Limited**

Heard at: **Leeds** **On:** **19 September 2017**

Before: **Employment Judge Bright (sitting alone)**

Representation
Claimant: Mr N Coombes (solicitor)
Respondent: Mr M West (solicitor)

JUDGMENT

The claimant was unfairly dismissed. It is just and equitable to reduce by 100% any compensation for unfair dismissal, by reason of his contribution to his dismissal and the likelihood that he would have been dismissed fairly in any event.

The claimant's claim for damages for breach of contract fails and is dismissed.

REASONS

The claim

1. By a claim form submitted on 3 May 2017 the claimant claimed unfair dismissal and damages for breach of contract in respect of notice pay.

The issues

2. At the outset of the hearing it was agreed that the issues to be decided in the claim were:

2.1. Did the respondent have a genuine belief in the claimant's misconduct, formed on reasonable grounds following a reasonable investigation?

2.2. Did the respondent follow a fair procedure in accordance with the ACAS Code? In particular, was it necessary to suspend the claimant for an investigation to take place and were the dismissing officer and appeal officer independent of each other?

2.3. Did the respondent give proper consideration to the claimant's arguments in mitigation that he had had no training in manual handling, that he always unloaded containers in that manner and/or that it was a genuine accident?

2.4. Did the respondent consider alternatives to dismissal?

2.5. If the dismissal was unfair, did the claimant contribute to or cause his own dismissal by culpable and blameworthy conduct and, if so, should any compensation be reduced accordingly?

2.6. If the dismissal was unfair, would the claimant have been dismissed in any event had a fair process been followed? If so, should any compensation be reduced accordingly?

2.7. If the dismissal was unfair, did the claimant fail to mitigate his losses such that the respondent could not be held liable for the full amounts claimed?

2.8. Did the claimant commit gross misconduct, such that the respondent was entitled to summarily dismiss him without notice?

2.9. If not, to how much notice was he entitled and what damages are payable?

Submissions

3. Mr Coombes made detailed submissions on behalf of the claimant which I have considered carefully but do not rehearse here in full. In essence, it was submitted that:
   3.1. There was no evidence that the claimant pushed the containers out of the lorry deliberately. There was no evidence of damage to goods and insufficient evidence for the respondent to conclude that the claimant was guilty of misconduct or gross misconduct;
   3.2. The respondent took the view prior to the claimant's suspension that he was guilty and the disciplinary process was not reasonable. Mrs Prashad suspended the claimant, started the investigation and heard the disciplinary hearing, in breach of the respondent's own procedure. The claimant was given insufficient notice of the hearing and the CCTV footage was not disclosed in advance. The claimant's alleged failure to put an item to the side to be inspected for damage did not form part of the disciplinary or appeal charges. The appeal did not cure the procedural defects as Mr Prashad had been involved from the outset and the outcome was a foregone conclusion.
   3.3. The respondent did not take account of the claimant's arguments in mitigation that: the goods were tightly packed and accidentally fell out in that manner; he had not been trained in how to unload the goods; the respondent had a lax attitude towards health and safety
   3.4. The conduct which was the subject of the allegation was not within the class of gross misconduct and dismissal was outside the range of reasonable responses. The claimant's conduct did not go to the root of

the contract such as to justify summary dismissal. One week's notice pay was offered to the claimant, with no explanation.

3.5. The claimant was off sick for a period of time for which he cannot claim loss of wages. However he made reasonable efforts to return to work and his losses therefore continued after his return to work.

3.6. The failure to separate power in the dismissal, with both Mr and Mrs Prashad involved throughout, was in breach of the ACAS code and there should therefore be an uplift to any compensation.

4. Mr West made detailed oral submissions on behalf of the respondent, which I have considered with equal care, but do not rehearse here in full. In essence it was submitted that:

4.1. The respondent had a genuine belief in the claimant's misconduct. The claimant was a team leader, in charge of unloading the vehicle, had unloaded over 500 containers previously and the respondent was satisfied that he knew how to do it. The respondent accepted that the first item to fall out did so accidentally. However, the respondent concluded from the CCTV footage that the claimant's subsequent behavior was misconduct. The claimant conceded that, from the CCTV footage, it could be concluded that the behavior was deliberate and that the respondent was entitled to reach that conclusion.

4.2. The disciplinary procedure was within the range of reasonable responses. The respondent became aware of the CCTV footage the day after the event, and took the decision to suspend the claimant, as a precautionary measure, at that point. The claimant had 5 days' notice of the disciplinary hearing, and did not complain of lack of time to prepare. The CCTV footage was made available before the disciplinary hearing and the claimant did not request additional time to view it. The respondent is a small, family firm, with a limited number of people to conduct disciplinary hearings.

4.3. The choice of sanction should be viewed in light of the respondent's belief that the claimant's behavior was deliberate, as he showed no remorse or acknowledgement of wrongdoing, made no apology and there was no indication he would behave differently in the future.

4.4. In the circumstances, it was within the band of reasonable responses to dismiss the claimant. The claimant's failure to set the items aside for inspection allowed the respondent to conclude that his actions were deliberate. Items worth hundreds of pounds were potentially being damaged.

4.5. In the alternative, if the claimant's dismissal was unfair, he contributed substantially to his dismissal by his actions there should be a substantial reduction to the basic and compensatory awards. If there were procedural failings, the claimant would have been dismissed for the same offence within the same or similar timescale in any event.

4.6. The size and resources of the respondent's business should be taken into account in relation to the procedure followed and whether any breach of the ACAS procedure was unreasonable. There is no basis for an uplift.

4.7. The claimant secured alternative employment at a better rate of pay before the date of his appeal. However, an accident at home rendered him unable to work through June 2017. He cannot claim compensation for loss of wages for the time he was off sick. He was subsequently offered permanent full time employment at a higher rate of pay, but

chose to work only 3 days per week. He is not entitled to compensation from the respondent for any loss of earnings thereafter.

4.8. He was paid for one week's notice. However he acted in fundamental breach of his contract of employment and the respondent was therefore entitled to summarily dismiss him for gross misconduct without notice, so no damages are payable.

Evidence

5. The claimant gave evidence on his own behalf and called Mr J Brown, a former colleague.

6. The respondent called:

6.1. Mr G Prashad, General Manager,
6.2. Mrs C Prashad, Director, and
6.3. Mr D Hodgson, Warehouse Manager.

7. The parties presented an agreed bundle of documents, to which additional documents were added at the outset of the hearing at pages 93 to 96. References to page numbers in these reasons are references to pages in the agreed bundle.

8. The respondent showed the hearing the CCTV footage ("CCTV 1") of the incident which led to the misconduct allegations against the claimant. The respondent also began, without warning, to show the hearing additional CCTV footage ("CCTV2"). That footage had not previously been shown to the claimant or his representative but, after being given an opportunity to watch it, the claimant had no objection to its admission. That additional CCTV footage was therefore also shown to the hearing.

Findings of fact in relation to unfair dismissal liability

9. I made the following findings of fact on the evidence. Where there was a conflict of evidence I have resolved it, on the balance of probabilities, in accordance with the following findings.

10. The respondent is a small company with very limited human resources capability. Mrs Prashad is responsible for human resources but is one of only two directors, with her husband Mr Prashad. Although there are a factory manager, a warehouse manager and some supervisors, Mr and Mrs Prashad are the only managers with routine responsibility for disciplinary matters.

11. I find that the claimant started work for the respondent on 28 July 2014, as set out in his contract of employment (page 30) and confirmed by the letter at page 51A. He was promoted to the role of supervisor, but that title was later changed to team leader when Mr Kershaw, the new factory manager, was appointed.

12. Mr Kershaw viewed CCTV1 and reported to Mr and Mrs Prashad on 3 February 2017 that the claimant had been behaving in a way which damaged stock. The CCTV footage showed the claimant with a colleague, Mr Parker, and some temporary workers unloading furniture from the back of a container

on a lorry. It showed the first box falling out of the container and the employees jumping out of the way. As the claimant moved further inside the container and out of view of the camera, the footage showed further boxes rolling out of the back of the container and falling to the floor.

13. Mr and Mrs Prashad agreed that the claimant and Mr Parker should be suspended while they investigated. Mrs Prashad sent the claimant a letter dated 3 February 2017 confirming his suspension because "company property was damaged during the course of your duties".

14. I find that the investigation was limited to a few discussions, firstly between Mr and Mrs Prashad as to what the CCTV showed and then with Mr Kershaw and Mr Hodgson. I find it surprising that no notes were taken of any of those discussions, as they were part of a formal disciplinary investigation. I accepted Mrs Prashad's evidence that she did not interview any other warehouse staff because she considered that the CCTV footage was sufficient to establish the facts of what had happened.

15. I find that Mr and Mrs Prashad concluded, from the CCTV footage, that stock would inevitably have been damaged by the way in which it was being unloaded by the claimant. I accepted Mrs Prashad's evidence that they were genuinely appalled by what they saw on CCTV1.

16. The claimant was sent an invitation on 6 February 2017 to attend a disciplinary meeting on 8 February 2017 to discuss the allegation of "damage to company property during the course of your duties".

17. The respondent's disciplinary policy set out examples of gross misconduct (page 47), including "3. Deliberate and serious damage to R's property". Mr Coombes submitted that there was no evidence of damage to property and that the allegation of 'damage to property' in the disciplinary invite letter was not substantiated by the respondent. The respondent's witnesses accepted that they were unable to obtain at the time, or produce today, concrete evidence of damage. However, I accepted their evidence that the damaged stock could not be identified because the claimant had allowed it to be sent into the warehouse mixed in with undamaged stock.

18. Mr Coombes submitted that the claimant had insufficient notice of the disciplinary hearing. I find that 2 days' notice was given, in breach of the company's non-contractual disciplinary procedure. There was insufficient evidence for me to find that there was any particular reason for the short time period. However, the claimant did not request more time to prepare and it is not clear from the evidence that he would have put his case any differently had it been granted.

19. As Mrs Prashad carried out the investigation, it was intended that Mr Prashad would conduct the disciplinary hearing on 8 February 2017. However, Mr Prashad was stuck in traffic on the motorway at the time of the disciplinary meeting, so Mrs Prashad took over. She accepted in cross examination that she could have postponed the meeting, and was unable to offer any reason as to why she had not done so. I find from the notes of the meeting (pages 66 and 67) that Mrs Prashad had already concluded from the CCTV footage that the claimant was at fault and was expecting the claimant to acknowledge his wrongdoing and apologize. I accepted Mrs Prashad's undisputed

evidence that, on a previous occasion when the claimant had caused damage by driving a fork lift truck without a license, she had not disciplined the claimant because he had acknowledged his wrongdoing and apologized.

20. The claimant complained that he had not been sent CCTV1 prior to the disciplinary hearing. It was not disputed that he watched that footage at the outset of the disciplinary hearing and did not request additional time to consider how to respond to the footage. However, I agreed with Mr Coombes' submission that it was 'sprung' on the claimant and that, had it been shown to him at the investigation stage or before the disciplinary hearing, he might have had time to reflect and formulate an apology. Instead, at the hearing, he denied any wrongdoing and stated that containers were always unloaded in that manner. I find that, had the claimant had the opportunity to reflect, rather than react defensively, the outcome might have been different.

21. Mrs Prashad did not accept the claimant's explanation that containers were always unloaded in that manner and that the stock was tightly packed. I accepted her evidence that the normal procedure, when an item was accidentally dropped, was for the team leader to direct that the item be put to one side. It could then be checked, rather than disappearing into the warehouse mixed with undamaged stock. I accepted Mrs Prashad's evidence that she concluded, from the claimant's failure to direct that the boxes which had fallen should be set aside, that he was trying to cover up his misconduct and that the tightness of packing was not an issue. There was insufficient evidence for me to find that that inference was put to the claimant at the disciplinary hearing or that he had an opportunity to explain why he had not put the stock to one side.

22. I find that the grounds for Mrs Prashad's decision were the CCTV footage, combined with the claimant's refusal to apologize or acknowledge any wrongdoing as team leader. I accepted that she concluded that he had deliberately pushed stock out of the lorry in a manner which risked damage. Although Mr Prashad at this hearing stated that they accepted that the first box to fall was an accident, the notes of the disciplinary hearing include the first box as part of the misconduct. I find that Mrs Prashad did not make a distinction between the first and subsequent boxes.

23. In the absence of any other explanation for the claimant's behavior, Mrs Prashad concluded that it was an expression of his annoyance with Mr Kershaw. Mr Kershaw had introduced a number of changes at the respondent, including stopping employees using their mobile phones while at work. Mr Prashad believed that the warehouse staff were feeling "a bit touchy" about it. There was insufficient evidence for me to find that that allegation was put to the claimant during the disciplinary meeting.

24. Mrs Prashad determined that the claimant should be dismissed. His employment was terminated on 8 February 2017 summarily for gross misconduct.

25. The claimant was notified by letter dated 13 February 2017 (page 68 to 68A) that he was dismissed for damage to company property. Mr Coombes drew my attention to the difference between the reason given for his dismissal at the time and that put forward by the respondent in response to his

employment tribunal claim ("throwing furniture from the back of the container"). However, I find that the difference is immaterial, as it was clear to everyone throughout the process that it was the behavior shown on CCTV1 (which the respondent assumed had damaged property) which constituted the alleged misconduct.

26. The claimant notified the respondent by text message that he wished to appeal against his dismissal. Mr Prashad heard the appeal, but the claimant did not put forward any grounds of appeal other than the grounds relied on at the disciplinary hearing; that the boxes were tightly packed and were always unloaded in that manner. I accepted that Mr Prashad did not take into account the first box, but focused on the subsequent boxes. I accepted Mr Prashad's evidence that the claimant had unloaded a total of around 560 containers during his career with the respondent, of which around 50% were unloaded with Mr Hodgkins' assistance and at least 30 with the assistance of Mr Prashad himself. I accepted Mr Prashad's evidence that had never seen the claimant unload stock in the manner shown on CCTV1. Mr Prashad did not therefore accept the claimant's argument. I accepted Mr Prashad's evidence that he was waiting for an apology or remorse and the claimant's lack of either led him to conclude that the behaviour was malicious.

27. The claimant was notified by a letter dated 3 March 2017 (page 72) from Mrs Prashad that his appeal had not been successful.

28. I accepted the evidence of Mrs and Mr Prashad that, had the claimant acknowledged wrongdoing, apologized or shown any remorse, they would have considered another sanction such as a warning. However, the claimant's complete lack of indication that he would do anything differently in the future made alternatives to dismissal inappropriate. I accepted that Mr Prashad rejected the possibility of demoting the claimant because of the respondent's small workforce and the effect on dynamics.

29. Despite summarily dismissing him without notice, the respondent paid the claimant one week's payment in lieu of notice. Mrs Prashad suggested the payment was a "gesture of goodwill", although I found it surprising in the circumstances. The claimant was entitled in his contract to two weeks' notice, except in circumstances where he was dismissed for gross misconduct.

30. The claimant started work for a company called SBE Ltd on 14 February 2017 (page 93) but then did not work from 24 February 2017 until 12 June 2017 because of back problems following an accident at home. He returned to work for SBE Ltd on 12 June 2017. The claimant says that, on returning to work in June, he was not fit to work full time and therefore opted to work part time (24 hours per week). The letter from SBE Ltd (page 93) makes it clear that there was full time work available and they would have preferred for him to work full time. There was insufficient medical evidence to show the connection between the back injury and part time working, and the respondent argued, and I agree, that the claimant chose to work part time, when there was a full-time job available, and therefore failed to fully mitigate his loss. In any event, the accident in which he injured his back would clearly have occurred in any event and the respondent cannot be liable for loss of his full-time wages in circumstances where he would only have been working part time for them had he not been dismissed.

Findings of fact in relation to unfair dismissal remedy and wrongful dismissal

31. The claimant submitted in these proceedings that: he had not been trained in manual handling; stock was always unloaded in the manner shown in CCTV1; and that the boxes falling was a genuine accident.

32. CCTV1 showed stock falling off the back of the container in an uncontrolled manner on a number of occasions. I found, from the evidence of all three of the respondent's witnesses, that the claimant had been trained in how to unload containers by his manager and had been competently doing so for the duration of his employment. The respondent accepted that unloading containers was not easy but that the employees worked out a system for unloading and the manager showed them the best way to do it. The claimant did not deny being shown how to unload items and the arguments about generic 'manual handling' training were not therefore relevant. Nor, in my view, was the argument about the respondent's health and safety practices generally.

33. I accepted that CCTV2 showed the correct method of unloading: the employee inside the lorry pushed the box across the floor of the container to two employees standing either side of the platform at the rear; those two used a pallet as a 'staging post' to receive the box, before lowering it to the floor and inserting the blade of an upright trolley under it to move it away from the lorry. At no stage was the box in CCTV2 out of the employees' control or in danger of free-falling.

34. I concluded from the evidence that the first box shown falling on CCTV1 may have been a genuine accident, but further boxes falling in that manner could not have been genuine accidents. The claimant and Mr Parker were either allowing the boxes to fall intending them to be damaged or, more likely in my view, being reckless or careless as to whether they were damaged. I also find from the CCTV footage that it must have been obvious to the claimant that the contents of the boxes were likely to be damaged by the impact. The claimant was the team leader on the day and was expected to put stock which was potentially damaged to one side for inspection. The CCTV shows that the claimant did not put or ask anyone to put any of the boxes aside. The respondent would therefore be unable to identify the potentially damaged stock and would not know that it had been unloaded in that manner. I infer from the claimant's failure to put the boxes to one side that he knew his behavior in pushing or allowing the boxes to fall off the container was wrong. The claimant was the team leader, charged with responsibility for unloading stock. I find that, in these circumstances, the intentional or reckless pushing or allowing of boxes of stock to fall off the back of the container in the manner shown is conduct in line with the examples of gross misconduct listed at page 47, including deliberate and serious damage to company property. It is behavior which goes to the heart of the trust between employer and employee and therefore, to the heart of the contract between them.

35. The claimant has argued throughout these proceedings that he did not do anything wrong. Although showing the CCTV to the claimant before the disciplinary hearing might have led to a different outcome (as set out above), I find from his continued denial that he would have been unlikely to acknowledge wrongdoing or apologize even if he had had more time to reflect

after seeing CCTV1. I conclude that the outcome would therefore have been the same had he had more time and he would have been dismissed in any event.

The law

36. I had regard to Section 98 of the Employment Rights Act 1996 ("ERA 1996"). The onus is on the employer to show the actual or principal reason for dismissal. Conduct is a potentially fair reason for dismissal falling within section 98(2) ERA 1996.

37. In determining whether the employer acted reasonably or unreasonably in dismissing for the reason given, the burden of proof is neutral and it is for the tribunal to decide. Section 98(4) ERA 1996 reads

> *The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.*

38. The test of whether or not the employer acted reasonably is an objective one, that is tribunals must determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. The Tribunal must determine whether the employer's actions fell within the range of reasonable responses open to a reasonable employer in the circumstances (**Iceland Frozen Foods Limited v Jones [1983] ICR 17** (approved by the Court of Appeal in **Post Office v Foley, HSBC Bank PLC (formerly Midland Bank PLC) v Madden [2000] IRLR 827**)). The Tribunal must not substitute its decision for that of the respondent. The range of reasonable responses test (the need for the tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether the employee was fairly and reasonably dismissed (**Sainsbury Supermarkets Limited v Hitt [2003] IRLR 23**).

39. In determining the fairness of a dismissal for alleged misconduct, the Tribunal should normally apply the case of **British Home Stores Ltd v Burchell [1978] IRLR 379**. The Tribunal should consider whether the respondent entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This lays down a three stage test: 1) the employer must establish that he genuinely did believe that the employee was guilty of misconduct; 2) that belief must have been formed on reasonable grounds; and 3) the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The burden of proof is on the employer on point (1) but it is neutral on the other two points (**Boys and Girls Welfare Society v McDonald [1996] IRLR 129; Sheffield Health and Social Care NHS Trust v Crabtree [2009] UKEAT/331/09**). Whether or not the employee is actually guilty of the misconduct is not relevant to the fairness of the dismissal.

40. In deciding whether a conduct dismissal falls within the range of reasonable

responses, a Tribunal may also consider whether:

40.1. The respondent gave sufficient regard to arguments in mitigation;

40.2. The respondent gave consideration to alternatives to dismissal;

40.3. The respondent followed a fair procedure, in accordance with the ACAS Code on Disciplinary and Grievance Procedures. In particular, paragraph 6 of the ACAS Code provides that, in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing. Paragraph 9 provides that the employee should normally be provided with copies of any written evidence. Paragraph 27 states that the appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.

41. In determining the reasonableness of an employer's decision to dismiss, the tribunal may only take account of those facts or beliefs which were known to the employer at the time of the dismissal. The employee's assessment of his own behaviour is irrelevant.

42. In considering the issue of contribution under s122(2) ERA 1996 and s123(6) ERA 1996, a three stage approach is set out in **Nelson v BBC (No2) [1979] IRLR 346**, namely that there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy, there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by the action that was culpable or blameworthy, and finally, that there must be a finding that it is just and equitable to reduce the assessment of the claimant's loss to a specified extent.

43. The case of **Polkey v AE Dayton Services Ltd [1988] ICR 142**, concerns whether, if the dismissal was unfair, the claimant would have been dismissed in any event had a fair process been followed.

44. To determine the claim for breach of contract in respect of notice pay, the Tribunal must decide whether the respondent was entitled to summarily dismiss the claimant and, therefore, whether the claimant's behavior amounted to gross misconduct.

Determination of the issues

45. I find that Mr and Mrs Prashad genuinely believed that the claimant maliciously pushed the boxes off the container and damaged stock. They had seen the CCTV footage but were unable to identify the damage because the claimant did not set the boxes to one side. That, combined with the claimant's lack of acknowledgement or apology, despite him being a team leader, led them to conclude that his behavior was malicious. I find that they had reasonable grounds on which to conclude that the claimant had committed gross misconduct.

46. Mr and Mrs Prashad reached their conclusion on the basis of the CCTV

evidence. Although the other investigation was minimal, in a case where there is CCTV footage showing an employee behaving in a manner which must have caused damage, the focus of any investigation is inevitably the reason for the behaviour. That question was explored with the claimant at the disciplinary and appeal hearing, although the assumption that it had something to do with Mr Kershaw was not put to him. The claimant did not dispute what the CCTV showed, rather its interpretation. The investigation Mrs Prashad carried out, talking to Mr Hodgson and relying on her husband's experience of unloading containers with the claimant, led her to the genuine conclusion that the claimant's explanation was unconvincing. I find that, in the circumstances, the investigation carried out by Mrs Prashad was reasonable and met the test set out in **Burchell.**

47. Regarding the disciplinary procedure, I find that the lines between Mrs Prashad's investigatory role and her disciplinary role were blurred and that her own knowledge of the business and the claimant were brought to bear on her decision but not fully explained to the claimant. The disciplinary procedure, though not contractual, contained a clear delineation of roles: investigation by line manager; disciplinary hearing by senior manager; appeal to no less senior person (identified as Mrs Prashad in the contract). In the claimant's case, however, Mr and Mrs Prashad effectivelyacted as one mind throughout the suspension, investigation, disciplinary and appeal stages. Once Mr and Mrs Prashad had viewed CCTV1, the only way the claimant could have retained his job was by acknowledging wrongdoing and apologizing. No other interpretation of the CCTV footage was considered and there was no independent second opinion available at the appeal stage.

48. In a company of the size and administrative resources of the respondent, keeping a clear separation of responsibilities can be difficult. Paragraphs 6 and 27 of the ACAS Code acknowledge that difficulty with the words "where practicable" and "wherever possible". However, in this case there were others, such as Mr Kershaw or Mr Hodgson, who could have assisted with the investigation. There could have been a clearer distinction made between decision makers. There was no clear reason why the disciplinary procedure was not followed. I find that the failure to more clearly delineate the roles or follow the process set out in the company's disciplinary procedure was not reasonable in the circumstances, even taking into account the small size and administrative resources of the respondent.

49. I find that the decision to suspend the claimant, given his position as team leader, was not outside the range of reasonable responses in the circumstances and the suspension was for a very short time. Nor was the short notice given to the claimant for the disciplinary hearing. Although not in accordance with the disciplinary procedure, I find that it was not unreasonable given the nature of the allegations and size and administrative resources of the respondent.

50. I find that the failure to show the claimant the CCTV footage until the start of the disciplinary hearing put the claimant at a disadvantage. In theory, given what happened previously with the forklift truck incident, the claimant might have formulated an apology. On the evidence of both Mr and Mrs Prashad, had he done so and showed some remorse, in all likelihood he would not have been dismissed and there would have been some lesser sanction. It was his complete failure to acknowledge wrongdoing and refusal to apologize

which resulted in alternatives to dismissal being rejected. There was insufficient evidence of any good reason as to why the claimant was not shown the CCTV footage at an earlier time. Given the importance of the CCTV footage and Mr and Mrs Prashad's interpretation of that film, I consider that a reasonable employer would be unlikely to have denied the claimant the opportunity to view it until the outset of the disciplinary hearing. Despite the small size and administrative resources of the respondent, I find that the failure to provide that evidence earlier fell just outside the range of reasonable responses.

51. I find that the claimant did not argue at the disciplinary or appeal hearings that he had not been trained in manual handling and the respondent did not consider that line of mitigation. However, the respondent did consider the claimant's argument that containers were always unloaded in that manner. The respondent rejected that argument because of the weight of evidence that the claimant had unloaded containers properly throughout his employment. The respondent rejected the argument that it was an accident because of the CCTV footage. I find that the respondent's conclusions were ones which a reasonable employer could reach in the circumstances. I find that the respondent's decision that alternatives to dismissal were not appropriate because of the claimant's lack of insight was reasonable in the circumstances. A team leader who was capable of treating stock in that manner would be a risk to the success of the business.

52. In conclusion, I find that the lack of independence of the officers and the lack of prior access to the key CCTV footage were unreasonable breaches of the ACAS Code in the circumstances. Taking account of all the relevant circumstances, the procedure followed by the respondent was not within the range of reasonable responses of a reasonable employer. The claimant's dismissal was therefore unfair according to section 98(4) ERA.

53. However, as set out in my findings of fact on unfair dismissal remedy above, I find that the claimant's behavior in pushing or allowing the boxes to fall off the container was intentional or reckless. I consider that it was culpable and blameworthy behaviour and I find that it was the sole cause of the claimant's dismissal. I consider, in the circumstances and in accordance with sections 122(2) and 123(6) ERA that it would be just and equitable to reduce any compensation awarded under sections 119 and 123 ERA by 100% to reflect that contribution.

54. In addition, given the claimant's ongoing refusal to acknowledge any wrongdoing, I conclude that even if the respondent had shown him the CCTV footage in advance, he would nevertheless have refused to apologise or show any remorse. Separately, even if the respondent had brought in other managers or outside parties to manage the investigation and disciplinary process more independently, I consider that the claimant would not have changed his stance. Even if the procedure had complied with the ACAS procedure and been a fair one, therefore I conclude that the outcome for the claimant would have been the same. He would not have apologised or acknowledged any wrongdoing and the respondent would therefore have reasonably concluded that it could not continue to employ him because of the risk of recurrence. I therefore find that, under the principles in **Polkey**, there is a 100% likelihood that the claimant would have been dismissed in any event. I conclude that it would be just and equitable for any compensation

awarded to the claimant to be reduced by 100% as a result.

Breach of contract

55. As set out above, I conclude that the claimant's actions were misconduct which went to the heart of the contract of employment between himself and the respondent. That conduct fell within the type of conduct classified as gross misconduct in the disciplinary procedure and the respondent was therefore entitled to dismiss the claimant without notice in the circumstances. The claimant was not entitled to notice or a payment in lieu of notice and the respondent has not breached the claimant's contract of employment.

Employment Judge Bright

Date: 30 October 2017