Case Number: 2500595/2017

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr K McCarthy	**AND**	**AB Agri Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **Teesside** **On: 11 & 12 October 2017**

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

Appearances

For the Claimant: **Mr J Moores (Lay Representative)**
For the Respondent: **Miss O'Neill (Solicitor)**

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

1 The claimant in this case was represented by his lay representative Mr J Moores, who called the claimant to give evidence. The respondent was represented by its solicitor Miss O'Neill who called to give evidence Mr Rob Casson (Operations Manager), Mr Nick Vogels (Operations Manager) and Mr Brian Sutlieff (Operations Manager). There was an agreed bundle of documents marked R1, comprising an A4 ring binder containing 201 pages of documents. On the morning of the second day there were added to that bundle further documents numbered 201-208 inclusive.

2 The claimant and the three witnesses for the respondent had all prepared typed and signed witness statements. Those statements were taken "as read" by the

Employment Tribunal, subject to questions in cross-examination and questions from the Tribunal Judge.

3 By claim form presented on 9 June 2017, the claimant brought a complaint of unfair dismissal. The respondent defended the claim. In essence it arises out of the claimant's dismissal on or about 28 April 2017, for reasons which the respondent says related to his conduct. The respondent alleges in simple terms that the claimant entered a wrong computer code for a production run of animal feed and thereafter, having been told that there may have been an error, released the product to the customer without undertaking further checks and/or investigations as to the integrity of the product. The issues to be decided by the Tribunal were identified as:-

3.1 What was the respondent's reason for dismissing the claimant?

3.2 If misconduct:-

(a) did the respondent genuinely believe that the claimant had committed an act or acts of misconduct?

(b) were there reasonable grounds for that belief?

(c) had the respondent carried out an investigation which was reasonable in the circumstances?

3.3 Did the respondent follow a fair procedure before deciding to dismiss the claimant?

3.4 Was the decision to dismiss the claimant one which fell within the range of reasonable responses, open to a reasonable employer in all the circumstances?

3.5 If the dismissal was unfair because of a procedural defect, would the claimant have been dismissed in any event had a fair procedure been followed?

3.6 If the dismissal was unfair, to what extent if any did the claimant contribute towards his dismissal by his own conduct?

4 Before any evidence was given, the Tribunal explored with Mr Moores on behalf of the claimant as to whether there was any particular challenge (and if so what) to any of the issues at 3.2(a)-(c) inclusive above. Mr Moores conceded that the claimant had admitted entering the wrong code for the production of the animal feed and had thereafter authorised the release of that feed, having been notified of the possibility of an error. Mr Moores accepted that the respondent's witnesses did genuinely believe that the claimant had done so. Mr Moores conceded that there were reasonable grounds for that belief, particularly because the claimant had readily admitted the error in entering the wrong computer code and again readily admitted releasing the product thereafter. In terms of the subsequent investigation, Mr Moores was asked to identify anything which the

respondent had done, which it should not have done, or anything which it had not done, but should have done. Again Mr Moores accepted that the investigation carried out by the respondent was reasonable in all the circumstances. Mr Moores' challenge to the process which led to the claimant being dismissed was agreed to be based upon whether that decision to dismiss was one which fell within the range of reasonable responses. Mr Moores indicated that there was an element of inconsistency of treatment between the claimant and at least one other employee who had been treated differently in similar circumstances and also that the respondent's offer of a final written warning and demotion as an alternative to dismissal, had been withdrawn before the claimant had been given a reasonable opportunity to consider it.

5 Having heard the evidence of the claimant and the three witnesses for the respondent, having examined the documents to which it was referred and having carefully considered the closing submissions of Miss O'Neill and Mr Moores, the Tribunal made the following findings of fact on a balance of probabilities:-

5.1 The respondent company is engaged in the production of feed for agriculture, particularly for poultry and livestock. It has a number of manufacturing plants in the country, including one at Northallerton in North Yorkshire. That plant primarily manufactures bulk feed for pigs and poultry. It manufactures approximately 3,500 tonnes of feed each week in 3 tonne batches. The plant runs 24 hours a day, six days a week. The plant is heavily automated, with the weighing and the mixing and addition of ingredients controlled by a software programme called "Datastor". That is controlled and monitored by Process Control Operators in a control room.

5.2 The claimant was employed as a Production Manager at the Northallerton plant, reporting directly to the Site Operations Manager Mr Rob Casson. The claimant's role involved responsibility for eleven Process Operators and three Engineers, working on two shifts, six days a week. The claimant's duties included preparing production schedules based upon customer orders which were then passed on to the Control Room Operators who would programme Datastore to produce the required products batch by batch for the customer orders based upon the claimant's production schedules.

5.3 The claimant's employment with the respondent commenced on 18 August 2008. He was generally regarded as a loyal and competent employee, although he had something of a reputation as being somewhat "difficult" from time to time in terms of his attitude towards other employees. He had a clean disciplinary record.

5.4 One of the nutritional additives used in the production of pig feed is known as "Quantum Blue". The manner in which Quantum Blue is added to the production process, depends upon whether the end product is to be in meal form, or pellet form. When making pellets, the Quantum Blue is added at the fats coating stage, whereas if making meal there is no such stage and the Quantum Blue is added at the mixing stage. Because

Quantum Blue is an enzyme additive which helps release nutrients in the feed, the implications of it not being properly included in the mix are that the animal is unable to fully release the nutrients in the feed, which may result in malnourished animals.

5.5 In 2015, an error had been made in the production process which led to a failure to Quantum Blue being added to the production process. The feed was then despatched to the customer (Westgarth Brothers) and then fed to the customer's livestock. As a result, a large volume of livestock had to be slaughtered and a "multi million pound" claim was brought against the respondent. The employee within the respondent's organisation who was found to have been responsible for the original error was Mr Andrew Saddler. He was dismissed from his managerial post, but on appeal reinstated to a role which did not carry any supervisory or managerial responsibility.

5.6 Following on from that "Saddler" incident, the respondent embarked upon a retraining exercise for its production and managerial staff. Talks were given by nutritional experts with regard to the importance of ensuring that the correct additives were included and by manufacturing experts as to the stage at which they should be included. Whilst the precise details of the Saddler incident were only known to members of the management team, the Tribunal found that all of the production staff at Northallerton were likely to have been aware of the incident, its impact and the consequences for the staff at the Northallerton plant.

5.7 The claimant was somewhat disparaging of this retraining exercise, regarding the same as no more than "talks", which to him had little value.

5.8 On Monday, 12 December 2016 the claimant was at work in his capacity as Production Manager. One of the orders for which he was responsible was for pig feed for the Westgarth Brothers. The order was for 24 tonnes of pig feed in the formula DM65M + HL8. By genuine mistake, the claimant inserted into Datastor the code DM65P + HL8. The "M" code was for meal, whereas the "P" code was for pellet. The order was for meal, whereas the production code would produce pellet. The effect of this error was that Quantum Blue required in the product would not be added, as the Datastor system would not call for Quantum Blue until the fats coating stage of production. Because meal production does not go through that stage, then the Quantum Blue would not be added at all.

5.9 The meal was produced and at the end of the process loaded into a finished product bin designated as pellet product. In other words, there was meal in a pellet bin. The operative responsible for outloading, informed the claimant that there was meal in the pellet bin. Because Westgarth Brothers ordered both meal and pellet from time to time, the claimant authorised the release of the product as meal and it was despatched to the customer.

5.10 The claimant's case was that the Control Room Production Operator spotted his mistake and having confirmed with the Outloading Operators that the order was for meal rather than pellet, they switched the production mid-run, thereby by-passing the pellet compression process, so that the order remained as meal. They did not tell the claimant about the nature of the change they had carried out. However, the claimant accepted that he had been told about the original error and of the fact that meal had ended up in the pellet bin. The claimant accepted that he had not carried out any further investigation as to what had happened or how it may have impacted upon the finished product. He did not raise the matter with his Line Manager or anyone else in a position of authority before authorising release of the product. The claimant insisted that the Datastor process control batch records confirmed that the batches had been manufactured within specification and with all ingredients added within tolerance.

5.11 At the end of December the monthly stock-take disclosed that switching production mid-run meant that the Quantum Blue enzyme had been omitted from the formula, as it could only have been added after the pelletisation process, which does not take place in the production of meal.

5.12 The respondent decided to carry out a formal investigation into what had happened. Statements were obtained from two Control Room Operatives and from the Outloader Operative. Their statements were consistent as to what had happened. The error in the code had been recognised and those in the control room adjusted the process "to make it as meal to save on time and cover the mistake in production planning." It was said that the claimant had shown the Production Operatives how that could be done on an earlier occasion. It was acknowledged that Quantum Blue had not been added to the process and the Outloader stated that he informed the claimant that the product had been marked as pellet but should be meal and he then asked the claimant whether it should be loaded as meal and despatched. The claimant had told him that he should "go ahead and load it and despatch it".

5.13 By letter dated 26 January 2017 the claimant was suspended pending an investigation into the incident. He was invited to intend an investigation meeting on Monday, 30 January. The allegations were that he had put the company's reputation at risk by planning a product incorrectly, leaving the customer to receive something which had not been ordered. He had done so without checking and investigating, having known that the product may have been manufactured incorrectly.

5.14 The claimant prepared a formal statement for that investigation, a copy of which appears at page 97 in the bundle. The relevant extracts are as follows:-

> "1 It is clear I confused the codes and I accept responsibility for this.

2 I did not release the product to the customer. Despatch did not notice the mistake either and allowed the product to be delivered.

3 At worst I produced product that was not required at that point in time for customer order.

4 The product codes are very similar and easy to confuse."

The claimant goes on to acknowledge his confusion of the product codes but maintained that the formula was identical apart from the process to compress the meal into pellets. He accepted that the Quantum Blue had not been added, even though the batch card indicated that it had been added. The claimant maintained that he had never received detailed training about this and was not aware of the subtle difference in the production process. He insisted that it was incorrect to suggest that he had sanctioned the despatch of the product without checking and investigating with the full knowledge that the product had been manufactured incorrectly.

5.15 The investigation was carried out by the claimant's Line Manager, Mr Rob Casson. He arranged a further investigation meeting with the claimant at his home on 7 February. The purpose of that meeting was to further address something which had been said by the claimant at the first meeting, namely that he may suffer from dyslexia. Mr Casson then arranged for the claimant to see a specialist so that a report could be prepared into whether or not the claimant did indeed suffer from dyslexia and if so whether that may have impacted upon the incident. The dyslexia assessment was produced on 20 February and concluded that, whilst the claimant did show some signs of dyslexia, it was not severe and would not appear to have had any influence on the incident which happened.

5.16 Mr Casson concluded that there was a case to answer and decided that the matter should be referred for a disciplinary hearing. By letter dated 21 February Mr Casson invited the claimant to attend a disciplinary hearing on 27 February to answer allegations which Mr Casson advised may be regarded as "potential gross misconduct".

5.17 Mr Casson did not prepare a formal investigation report. He simply sent to Mr Vogels (the disciplinary officer) all of the statements and documents which he had examined himself and which he had gone through with the claimant. In cross-examination by Mr Moores, Mr Casson confirmed that he did not consider the claimant's behaviour to be a capability issue, but a "bad decision", which should properly be categorised as misconduct. Mr Casson accepted that all people make mistakes from time to time, but he regarded this as being a very serious matter, particularly because of the earlier Andrew Saddler incident in 2015. Mr Casson accepted that there was a difference between the original error in putting the wrong code into the Datastor and the subsequent conscious decision by the claimant to release the product, once the possibility of an error had been identified.

5.18 The disciplinary hearing was conducted before Mr Vogels, Operations Manager. He received the pack of information from Mr Casson and read that before the hearing itself. The claimant had again prepared a statement for the disciplinary hearing, a copy of which is at page 125-128 in the bundle. The contents were much the same as the one prepared for the investigation, but this time the claimant set out specific points in mitigation. Those include:-

> "1 I do not believe I have committed any acts that could be constituted as either gross misconduct or misconduct.
>
> 2 I do not believe I have been negligent.
>
> 3 I have never done anything intentionally to risk the company's reputation.
>
> 4 I have made mistakes in confusing product codes which does concern me. I have thought long and hard about why this could have happened. Possible contributory factors are:-
>
> (a) I have been working under a lot of pressure and stress;
>
> (b) they are to some extent typing errors which we all make from time to time;
>
> (c) the codes are very similar and I am aware that others have confused them."

The claimant goes on to refer to his eight years' previous good service and that he has always until then acted with the best interests of the company at heart and acted with honesty and integrity at all times.

5.19 Mr Vogels examined all of the evidence submitted by Mr Casson and also considered everything that was said to him by the claimant. There was no challenge by Mr Moores to the fairness of the procedure adopted by Mr Vogels. The claimant had originally asked for Mr Moores to attend the hearing with him, but that had been refused because Mr Moores was neither a work colleague nor a trade union representative. The claimant was accompanied by Mr Ian Watson, a work colleague. It is clear from the extensive notes of the meeting that the claimant was given a fair hearing. He was given the opportunity to challenge all of the evidence submitted by Mr Casson, to explain what had happened and to put forward his mitigation. The meeting lasted from 3:41pm until 5:55pm. Mr Vogels postponed the meeting so as to enable him to consider the evidence and decide upon the outcome. Having done so, he wrote to the claimant by letter dated 21 March (page 146-148). Mr Vogels concluded that the first allegation relating to the mistaken entry of the wrong code did not amount

to an act of gross misconduct, but rather an incident of poor planning. However, he considered the second allegation, relating to the release of the material, to be an act of gross negligence which amounted to gross misconduct. Mr Vogels then had to decide upon the sanction to be imposed upon the claimant. He was satisfied that the claimant's conduct would justify dismissal, but as an alternative he proposed that the claimant be given a final written warning together with a demotion which "would allow Kevin time to meet the standards required by the company."

5.20 The claimant was advised of his right to appeal and did so by letter dated 29 March 2017 (page 154-155). By then the claimant had not received details of any alternative role which was to be offered to him by way of demotion. A further meeting took place on 27 March 2017, at which the claimant was offered a role as a "Hygiene Operative". The claimant regarded that position as being one of a "Cleaner". In his appeal letter the claimant deals with "the job offer" as follows:-

> "At the meeting on Monday 27 March 2017 Rob Casson and Karen Ellin offered and proposed I accept a demotion to a job as a cleaner.
>
> 1 I am shocked that they consider this to be a suitable job for me. It is inappropriate and inconsistent with sanctions given to other people for similar but significantly more serious problems. I believe it to be grossly unfair.
>
> 2 I have not yet received a letter detailing the proposed job and its terms and conditions which I did not fully understand at the meeting.
>
> 3 I have worked for the company for over 8 years now and have an exemplary record. I genuinely want to continue working for the company. I went to the meeting believing that I would be offered an alternative management position that I was prepared to give serious consideration to."

In his summary the claimant again refers to the job offer as "completely inappropriate".

5.21 By letter dated 30 March, Mr Casson set out proposals with regard to the alternative role. Mr Casson's letter includes the following:-

> "In the meeting, I reiterated to you that Nick has found that your actions were serious enough to constitute gross misconduct and/or gross negligence and that there was a significant failure on your part in taking management responsibility. You are fully aware of the importance of formulations in animal feed and the massive risk to the Northallerton mill and the business as a whole for failure to operate a diligent production operation. The sanctions available to you were summary dismissal, dismissal with notice or demotion

> with a final written warning. As you are aware for the reasons set out in his letter, he wanted to offer you a chance of remaining in employment notwithstanding the seriousness of your actions. His view however was that the role of Production Manager is too business critical to risk such a significant lapse of judgment and chain of events occurring again in the future and that for the reasons he set out, you cannot currently be trusted to remain in a management role. I have therefore been identifying alternative roles which we may be able to offer you within the constraints set out above. As you are aware, the mill is operated with a lean staffing structure and the only vacancy I currently have available to offer you is that of a Hygiene Operator."

Mr Casson's letter concludes on page 159 with the following:-

> "I explained that should you refuse to accept this role, then the alternative sanction of dismissal will be substituted. Please let me know by Friday, 31 March 2017 of your decision."

Friday, 31 March was of course only one day after this letter was sent to the claimant by e-mail on 30 March.

5.22 The claimant's appeal was listed to be heard before Mr Sutlieff on 10 April. The claimant again submitted a detailed written statement, a copy of which appears at page 167-172 in the bundle. In his "summary", the claimant states:-

> "1 I strongly believe that the gross misconduct/gross negligence is a very unfair conclusion to draw given the facts and the evidence presented.
>
> 2 The alternative job offer is completely inappropriate and no attempt seems to have been made to find a suitable alternative job elsewhere in the company or to make any reasonable adjustments to take into account my dyslexia.
>
> 3 The sanctions proposed against me are totally inconsistent compared with other similar but serious cases.
>
> 4 The whole disciplinary process has been flawed and in clear breach of the company's disciplinary procedure. It has been extremely protracted unnecessarily.
>
> 5 I have a good record working for the company and yet this has not been taken into account at all."

5.23 The appeal meeting took place on 13 April. Minutes appear at page 173-183 in the bundle. Again, it is clear from those minutes that Mr Sutlieff conducted a thorough re-examination of all of the evidence presented by both Mr Casson and the claimant. Again, Mr Moores did not challenge the

fairness of the hearing before Mr Sutlieff. The Tribunal found that the claimant was again given every opportunity to challenge the evidence against him, to present his own evidence and to put forward his mitigation. Mr Sutlieff accepted that he conducted the appeal by way of a complete rehearing of the disciplinary hearing itself, rather than reconsidering the claimant's grounds of appeal. Having done so, Mr Sutlieff was satisfied that the claimant had not produced any new facts or information which were any different to those presented by him at the original disciplinary hearing. Mr Sutlieff too was concerned about the severity of the allegation but particularly with regard to the potential for further reputational damage to the respondent's business following on from the Andy Saddler incident in 2015. Mr Sutlieff's concern was again not so much directed towards the original error of inputting the wrong code, but the subsequent conscious decision by the claimant to release the product, knowing that there may have been an error in the production process.

5.24 Mr Sutlieff also considered the claimant's response to the offer of the alternative role. Mr Sutlieff accepted in cross-examination that nowhere in the minutes of the appeal hearing does the claimant actually say that he was not prepared to accept the alternative role. Similarly, nowhere does it say that the claimant was prepared to accept the role. Mr Sutlieff's evidence was that the claimant knew that he had until 31 March in which to either accept or reject the offer. The claimant knew that by rejecting the offer, he would be dismissed. Mr Sutlieff drew the Tribunal's attention to the claimant's consistent reference to the job offer as being "wholly inappropriate".

5.25 Mr Sutlieff dismissed the claimant's appeal and informed him of that by letter dated 25 April. Mr Sutlieff sets out in his letter the grounds of appeal and his reasons for dismissing the appeal. The Tribunal found that Mr Sutlieff had conducted a fair, reasonable and thorough appeal hearing at which he had addressed his mind fairly to all of the points raised by the claimant. Mr Sutlieff's conclusion at page 189 is as follows:-

> "For all of these reasons I consider that your actions did constitute gross misconduct/gross negligence, that there is insufficient mitigation to warrant a sanction less than dismissal and I therefore, having regard to your decision not to accept the alternative that was put to you – uphold the decision to terminate your employment."

5.26 The claimant presented his complaint to the Employment Tribunal on 9 June 2017.

The law

6 The statutory provisions engaged by the claimant's claim of unfair dismissal are set out in **sections 94 and 98 of the Employment Rights Act 1996**:-

S.94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

S.98 General

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

> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> (b) relates to the conduct of the employee,
> (c) is that the employee was redundant, or
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.**"**

7 The case law on the interpretation and application of section 98 was summarised by Lord Justice Aikens in **Orr v Milton Keynes Council [2011] EWCA-Civ-62** where he said:-

> "(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss the employee.
>
> (2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the real reason for dismissing the employee was one of those set out in the statute, or was of a kind that justified the dismissal of the employee holding the position he did.
>
> (3) Once the employer has established before the employment tribunal that the real reason for dismissing the employee was one within section 98(1)(d) ie that it was a valid reason, the tribunal has to go on to decide whether the dismissal was fair or unfair. That requires first and foremost the application of the statutory test set out in section 98(4)(a).
>
> (4) In applying that subsection, the employment tribunal must decide on the reasonableness of an employer's decision to dismiss for the real reason. That involves a consideration, at least in misconduct cases, of three aspects of the employer's 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. If the answer to each of those questions is "Yes", then the employment tribunal must decide on the reasonableness of the response of the employer.
>
> (5) In doing the exercise set out at (4) above, the employment tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss would be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it can be shown to be perverse.
>
> (6) The employment tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt, for that of the employer. The employment tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted."

8 It was established in **Sainsbury's Supermarkets Limited v Hitt [2002] EWCA-Civ-1588** that what is now known as the "range of reasonable responses" test, applies as much to the investigation into alleged misconduct as it does to the decision to dismiss the employee. In **A v B [2003] IRLR 405** the Employment Appeal Tribunal held that it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where the employee's reputation or ability to work in his or her chosen field of employment is potentially at risk. Whilst it is unrealistic and quite inappropriate to require the safeguard of a criminal trial, it is necessary to have a careful and conscientious investigation of the facts and the investigator charged with carrying out the enquiry should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee, as he should on the evidence directed towards proving the charges against the employee.

10 It was suggested in the claimant's case that there was an element of overlap between an incident of poor performance or incapability and an act of misconduct. The possibility of such an overlap was recognised by the Employment Appeal Tribunal in **Sutton & Gates (Luton) Limited v Boxall [1979] ICR 67,** when it was said that "capability" should be treated as applying to those cases in which the incapability was due to inherent incapacity, but, "Where someone fails to come up to standard through his or her own carelessness, negligence or idleness, this is not incapability but misconduct."

11 The possibility of this overlap was put to the respondent's witnesses by the Tribunal Judge. Their response was that they accepted that the claimant had made a mistake when he put the wrong computer code into the Datastor system. They all agreed that this was not a matter which would have led to the claimant being dismissed. Their concern was that the claimant subsequently authorised the release of the product, in the knowledge that there had been some kind of error which may have impacted upon the production process. It was the claimant's failure to investigate or at least refer to a more senior manager, which they regarded as an act of gross negligence which they described as a "dereliction of duty and managerial responsibility". It was for that that the claimant was dismissed. The Tribunal found that it was reasonable for the respondent to have treated the claimant's acts or omissions as those of gross negligence amounting to gross misconduct. Categorisation by the respondent must be seen in the context of all the circumstances of the case. Those include the seniority of the claimant's position and in particular the impact of the Andrew Saddler incident in 2015, of which the claimant was fully aware. The Tribunal found that some reasonable employers may have decided that this was one of those cases in which the inadequacy of the performance was so extreme that there was n irredeemable incapability. In those circumstances, a warning and opportunity for improvement would be of no benefit to the employee and may constitute an unfair burden on the business. (**James v Waltham Holy Cross UDC [1973] ICR 398**). The gravity with which the respondent viewed the claimant's conduct was reasonable in all the circumstances.

12 The Tribunal then had to consider the respondent's response to that conduct. The claimant had eight years continuous service and had a clean disciplinary

record. The Tribunal found that Mr Vogels and Mr Sutlieff had both addressed their minds to that mitigating factor and that both addressed their minds to the alternatives to dismissal. Mr Vogels in particular concluded that, whilst the incident justified summary dismissal, he would be willing to offer the claimant an alternative role in the respondent's undertaking. The role offered to the claimant was that of a "Hygiene Operator" and was one which the claimant maintained throughout as being "wholly inappropriate". It was argued by Mr Moores and indeed by the claimant himself, that he never actually rejected that offer, although both also conceded that the claimant never actually accepted the offer. The claimant's evidence to the Tribunal was that, once his appeal had been dismissed and he realised that he was not going to be reinstated to his role as Production Manager, then he would have accepted the alternative role. The claimant accepted that he had never made this clear to the respondent. Even after he received the outcome of his appeal, he did not respond by telling Mr Sutlieff or anybody else that he was then prepared to accept the alternative role. The claimant accepted that he had been informed that he had until 31 March in which to make up his mind, although he maintained his argument that one day to do so was insufficient in all the circumstances.

13 The question for the Tribunal is whether it was reasonable for the respondent in all the circumstances of this case, to conclude that by the time of the appeal being dismissed, the claimant had not accepted the alternative role and could thereby be deemed to have rejected it. The point was further explored in the additional documents introduced by the claimant on the morning of the second hearing and which now appear at page 202-208 in the bundle. Those are a letter from Mr Sutlieff to the claimant dated 5 May, and the minutes of the meeting where the outcome of the appeal was delivered, on 28 May. It is clear from the minutes of that meeting at page 205, that Mr Sutlieff informed the claimant that Mr Vogel had decided that he "was going to summarily dismiss you – the alternative role was offered as a substitute to this however, but you did not take this." The claimant replied "OK". At page 207 Mr Sutlieff refers to the claimant's comment that the "alternative role is inappropriate". Mr Sutlieff is recorded as having said, "I also respect and accept your decision to not take up the offer of this alternative employment." That again was not challenged by Mr McCarthy. The respondent in fact continued to pay the claimant until his appeal was dismissed on 28 April.

14 The Tribunal concluded that some reasonable employers in all the circumstances of this case would have concluded that the claimant's failure to accept the alternative role could properly and fairly be regarded as his rejection of that role.

15 For those reasons the claimant's complaint of unfair dismissal is not well-founded and is dismissed.

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EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
20 October 2017

Case Number: 2500595/2017

JUDGMENT SENT TO THE PARTIES ON

24 October 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL