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EMPLOYMENT TRIBUNALS

Claimant: **Mr P Barry**

Respondent: **T & L Sugars Ltd**

Heard at: **East London Hearing Centre**

On: **5-6 & 9 July 2018**

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

Representation
Claimant: **Mr M Stevens (Counsel)**
Respondent: **Mrs S Fraser-Butlin (Counsel)**

JUDGMENT

The judgment of the Employment Tribunal is that:

1. **The claim of breach of contract in respect of notice succeeds.**

2. **The claim of unfair dismissal succeeds.**

3. **The Claimant contributed to his dismissal by reason of foolish conduct in respect of the audit on 24 April 2017 and in his stance during the internal disciplinary process.**

4. **There is a chance that the Claimant would have been fairly dismissed in any event.**

5. **The Respondent unreasonably breached the requirements of paragraph 5 of the ACAS Code of Practice on Disciplinary and Grievance Procedures.**

6. **A further hearing will be listed to determine remedy, including the amount of any adjustments required by paragraphs 3, 4 and 5.**

REASONS

1 By a claim form presented to the Tribunal on 20 October 2017, the Claimant brings claims of unfair and wrongful dismissal. The Respondent resists the claims.

2 The issues to be determined have been agreed between the parties. I had regard to the agreed list and the issues may be summarised as follows:-

2.1 What was the reason for dismissal? The Respondent relies upon conduct.

2.2 Did the Respondent have a reasonable belief based upon reasonable investigation?

2.3 Was dismissal fair in all the circumstances of the case?

2.4 Should there be any reduction for *Polkey* and/or contributory fault?

2.5 Should there be any ACAS uplift?

2.6 On the wrongful dismissal claim, did the Claimant act in repudiatory breach of contract such that the Respondent was entitled to summarily to dismiss him?

3 I heard evidence from the Claimant on his own behalf and from Ms K Carter (former Quality Manager). For the Respondent I heard evidence from Mr Karl Ottomar (Plant Manager); Mr Jason Moore (Senior Director Global Supply Chain Operations) and Ms Gaynor Powley (Senior Director HR). I was provided with an agreed bundle of documents and I read those pages to which I was taken during the course of evidence.

Findings of fact

4 The Claimant was employed by the Respondent from 16 September 1991, latterly as Warehouse Manager. As such, the Claimant managed all of the Respondent's Thames warehousing activities, with overall responsibility for 45 warehouse staff working within 170,000 square feet of warehouse space spread across five different warehouses with a maximum capacity of 16,000 pallets. The West Ham depot alone held a maximum of 2,000 to 3,000 pallets, including an FIBC area for export and soiled stock.

5 Shortly before a period of sickness absence starting on 21 September 2016, the Claimant had been issued with a letter from Mr Ian St John (SVP Operations Europe) identifying recent incidents of under-performance and lack of control in the warehousing area for which he held the Claimant directly accountable. This included the dispatch of non-conforming stock due to inadequate labelling and sub-standard segregation and hygiene standards. Mr St John expressed confidence that the Claimant could address the shortcomings and improve quality with the assistance of the Interim Refinery Manager. He reminded the Claimant that it was critical that he held his teams accountable and ensured without doubt the quality of the stocks and

associated supply to customers. The most recent incident of concern involved a batch of contaminated sugar which had been wrongly relabelled and sent to a customer. As a result, it was made clear that it was necessary clearly to identify contaminated stock by use of a physical 'scrap' label on each side of the pallet as well as 'stopping' it on the computer system.

6 In his grievance submitted on 21 October 2016, the Claimant acknowledged the error and the need to change processes to reduce the risk of it happening again. The Claimant was unhappy that the error of a warehouse operative, when he had not been present, was being used as a means to try and force him out of his role. The Claimant was particularly unhappy that he had been shouted at, blamed and humiliated in front of other managers at a meeting on 14 September 2016. At a further meeting on 16 September 2016, the Claimant stated that Mr St John had told him that he had let the company down and that he was ultimately responsible as department manager for putting in processes to stop the problem happening. The Claimant maintained that he was being singled out; the labelling of the contaminated stock was not a requirement known to him nor was it part of his direct responsibility, rather he relied upon his staff to carry out their roles and responsibilities unless there was reason to question their ability or conduct. At that meeting, he was left in no doubt that that his employment was at risk should there be future problems.

7 Whilst the Claimant was off sick, he attended an informal meeting with Mr St John on 15 November 2016 during which his grievance was discussed. A note of the discussion prepared by Mr St John records an acceptance that the Claimant had been badly shaken by the approach adopted by Mr Peters, that Mr Peters was expected to make his managers and direct reports more accountable (to "shake the tree") and an acknowledgement that both managers could have adapted their style. Mr St John assured the Claimant that they were not colluding to build a case to dismiss him, stating that they had nothing to gain from making him unwell or removing him from the business. This is consistent with the Claimant's evidence that Mr St John had agreed that Mr Peters had been wrong to shout at him and had regretted the events. Following the meeting, a letter recording the outcome of the discussion was prepared. It was not sent to the Claimant.

8 The Claimant returned to work on a phased basis from mid-December 2016, returning to full hours in January 2017. Mr St John met the Claimant for a review on 1 February 2017. A contemporaneous email to HR records that the Claimant still felt unsettled and victimised in respect of the quality incidents. Mr St John sought to set the Claimant's mind at rest, assuring him that he was not being victimised about quality issues and noting quality improvements made by the Claimant. The tone of this email is consistent with other supportive emails between the Claimant and Mr St John at this time in the context of the Claimant's wife ill-health. Whilst the Claimant continued to feel vulnerable to criticism, I find on balance that Mr St John was genuinely seeking to improve the Claimant's confidence and to allay his fears and not, as the Claimant believes, targeting him for criticism or seeking the termination of his employment.

9 Despite the Claimant's efforts to improve quality management at the warehouse, problems persisted. Particularly serious were problems with deliveries to Aimia Foods, sent via an intermediary Kent Foods. This was a large and financially important contract for the Respondent. In January 2017, Mr Karl Ottomar replaced Mr Peters as

Plant Manager. He introduced a project to improve quality and his key focus was to improve awareness of quality risk and to remain vigilant, stressing the importance of not shipping stock if there was any doubt as to its quality. He enjoyed a good working relationship with the Claimant.

10 On 21 April 2017, Aimia complained about being supplied with stock whose outer packaging was covered in oil splatters, dirty or sooty on the top and some with bits of broken pallets splinters on and under the shrouds. The complaint required an investigation and attached photographic evidence in support. Although the soiling appeared to have been caused by the company responsible for transporting the stock, it raised a critical issue for the Respondent as they were informed that Aimia was considering de-listing them as a supplier. It was agreed that a representative of Kent Foods would attend the warehouse on 24 April 2017, inspecting the processes and storage facilities and standards, including the West Ham depot.

11 It was commercially imperative that the inspection visit went well. Mr St John asked Mr Ottomar to arrange inter alia for the West Ham depot to be inspected over the weekend. He emphasised that they could not afford any embarrassment in the impending visit. Mr Ottomar assured him that matters were in hand and that there would be a walkaround first thing on Monday morning, before the Kent Foods visit. Mr Ottomar's email was copied to Mr James McEvoy whom he referred to as "being all over it". Mr McEvoy, who was the weekend shift manager and junior to the Claimant replied setting out the steps which he was taking, including removal of damaged pallets in the depot to the rework area, tidying the bays, removing debris and sweeping the floor. He gave an assurance that the depot would be audit ready before he finished his shift.

12 The Claimant gave oral evidence that he was not aware before the visit that the commercial relationship with Kent Foods and Aimia had reached a critical point. I did not find that evidence credible or reliable. Based upon other emails between Mr Ottomar and the Claimant in the days up to and including 20 April 2017, I find that the Claimant was aware that the Respondent provided stock to Aimia, that the customer had previously made complaints about stock quality, that it was critically important that care was taken to demonstrate that pallets were in good condition at the point of dispatch and that the site visit was to audit standards at the depot in this context. This is consistent with the requirement that loads would not be allowed to leave until they had been inspected and photographed by Mr Ottomar, the Claimant and Ms Carter as part of a quality control process. This was clear from an email chain headed "Aimia" between Mr Ottomar, the Claimant and other colleagues which referred to previous problems. Mr Ottomar's email on 21 April 2017 identified the serious quality issue with Kent Foods, stated that it was imperative that they were ready and showed themselves in a good light and asked all recipients to inspect the route from FIBCs/20kg line to storage. Indeed, the Claimant's witness statement refers to his instructions to his team to prepare for the inspection and his understanding of its importance.

13 On 24 April 2017, the warehouse was not filled virtually to capacity as the Claimant suggested and the FIBC area was particularly lightly stocked. Early that morning, a broken roller door had permitted pigeon ingress to the depot which required urgent instruction of the company's pest control contractors and steps to ensure that any areas soiled by the birds were cleaned in advance of the site visit. Ms Carter had

asked two members of her quality team, Ms Jepson and Ms Perreira, to walk the audit route that morning to highlight any major issues. The Claimant also walked the audit route that morning; he did not closely inspect the pallets on the audit route but had walked past them. The Claimant, Ms Jepson and Ms Perreira did not observe any problems in the FIBC area. Nor had Mr McEvoy identified the soiled stock in his weekend preparations for the site visit. I accept Mr Ottomar's evidence that he had not inspected the depot on the morning in advance of the site visit.

14 There had also been an internal GMP audit on the morning of 24 April 2017 which had not identified soiled stock. However, I accept Ms Carter's evidence that whilst there was some overlap, the GMP audit was looking at different things and therefore I find it of little relevance.

15 At around 12.30pm, the Claimant joined the tour of the depot being undertaken by Mr Scott Liddle (Commercial Director at Kent Foods), two representatives from Aimia, Mr Ottomar, Ms Carter and another member of the quality team (Magda). Ms Carter had taken the client towards stock in the FIBC area where there were about 18 to 20 pallets, one of the Aimia representatives noticed some un-quarantined stock with an oil type substance, wood chippings and syrup on the outer packaging. It was not pigeon soiling as the Claimant suggests in his witness statement.

16 There is a dispute of evidence as to whether the soiling was clearly visible and whether it should have been noticed before the visit. The Claimant's evidence is that the soiling was not visible as it was located at the back of the pallets, had not been visible when the stock had been delivered nor to the others who had walked the audit route earlier in the day. This is consistent with Ms Carter's evidence that one would have to be within a metre of the pallets to see the soiling. However, she also stated that the soiling was to the side of the stock, not the back, and the client had not been hunting for damage or "rummaging around" when they saw the soiled pallets. Photographs of the pallets are consistent with Ms Carter's evidence that the soling area was about the size of an A3 sheet of paper. On balance, I accept Ms Carter's evidence as confirmed by the photographs and find that the soiling was visible without requiring undue effort but not readily apparent from a distance.

17 The discovery of soiled stock which had not been quarantined was a major source of concern and disappointment to the representatives of Aimia and Kent Foods. They as well as Mr Ottomar were very unhappy that soiled stock had been found on a pre-planned audit visit intended to demonstrate the Respondent's commitment to quality assurance. Mr Liddle asked for details of the soiled stock. The Claimant was unable to provide an immediate account of the provenance of the stock and said that he would find out. The Claimant telephoned Mr Goyal, the warehouse coordinator immediately, and was able to tell the clients that the stock had been received on 20 April 2017 from another warehouse. As it was not a customer return, it had not been automatically quarantined upon receipt.

18 In his witness statement, the Claimant says that he gave Mr Goyal an instruction to quarantine the stock shortly before he left the warehouse at 2:45pm. The Claimant's oral evidence at Tribunal was confused on this point. At times, he suggested that the instruction had been given at the same time as the initial telephone conversation when he asked that the stock be "stopped" on the computer system to prevent it from being

loaded. The Claimant's case, as put to Mr Ottomar in cross-examination, was that the instruction to quarantine was given within 15 minutes of the soiled stock being discovered. At other times, however, he accepted that he had told Mr Goyal only that there was dirty stock whose provenance he needed to know and that the request to quarantine was made at 2.45pm. On balance, I find that the instruction to quarantine the stock physically was only made by the Claimant at 2.45pm and not in the earlier conversation.

19 Mr Ottomar and the client representatives continued with the visit, much of which was concerned with limiting the damage caused by the discovery of soiled stock. The audit team left the warehouse at about 1.15pm by which time the stock had not been quarantined. After the client representatives left the depot, at about 3pm, Mr Ottomar was very unhappy to find that the soiled stock had still not been physically quarantined and labelled some 2 hours after it had first been discovered and so applied the appropriate red and white tape and labels himself. The Claimant accepted that he left the warehouse before the stock had been quarantined. His case was that whilst it was his responsibility to check that an issue had been resolved, he had given an appropriate instruction to a member of his team and, as with thousands of pallets before, had no reason to believe that the instruction would not be carried out. Moreover, there was no need for it to be physically quarantined sooner as the block on the system ensured that the soiled stock could not leave the warehouse. Whilst this may ordinarily have been sufficient, I preferred Mr Ottomar's evidence that the need to visually quarantine the stock immediately was urgent because of the unhappiness of the customer. Whilst it was acceptable for the Claimant to have delegated the task to a member of his team, it was critical that he followed up to ensure that the physical quarantining had been done. It was not sufficient for it to be blocked on the system.

20 In due course, the affected pallets were repackaged; in other words the stock itself was fit for market and only the outer packaging had been soiled.

21 The discovery of soiled stock was a cause of great concern and embarrassment to Mr Ottomar. He believed that the failure to find the stock and deal with it appropriately was the fault of the Claimant and a matter of potential misconduct. Due to the sensitivity of the issue, Mr Ottomar contacted Mr St John and Ms Powley (Senior HR Director) and a decision was made to suspend the Claimant pending an investigation. An email from Ms Powley to a more senior HR director, Mr Peter Andrich, sent that same afternoon confirmed the suspension and identified the areas of concern as the discovery of damaged and un-quarantined stock in a visit to reassure Kent Foods about quality standards and the Claimant's lack of knowledge when questioned. Ms Powley suggested that this was a repeat of the quality concerns which had arisen in September 2016.

22 The Claimant's suspension was confirmed in a letter of 24 April 2017. The reason given was that the Claimant's inability to explain the origin of the soiled stock when asked, there was no reference to the failure to quarantine the affected pallets.

23 Aimia produced a report on 25 April 2017 setting out its findings from the visit. The Aimia report was sent to a number of very senior members of the Respondent's management as well as to Mr Ottomar. It recorded the background concern about deliveries received in poor hygienic condition, including dirt to the exterior of the

pallets, and then stated that two sets of big bags had been observed in the dispatch area with one set being shown to have signs of black oil marks and syrup spillage. Photographs were taken and provided. The Aimia report refers to the failure to quarantine the soiled stock. It mistakenly refers to the pallets as a customer return rather than an internal stock transfer; the distinction being that automatic quarantine rules did not apply to the latter. Overall, Aimia was seriously concerned about the lack of lack of quarantine procedures for the returned pallets.

24 Emails between senior managers in the UK and globally on 24 and 25 April 2017 evidence the concern caused by the failed site visit. They refer to customers including Aimia refusing to take stock until they can be assured of an acceptable standard of warehouse and distribution management. The general view was that the UK warehousing and distribution systems were not working to an acceptable level. Consistent with the content of the emails, I accepted Ms Powley's evidence that information was passed to senior managers for information in connection with the commercial impact of the failed audit visit, not because they were involved in the disciplinary decision making process.

25 In an email to his senior managers, Mr Scott Liddle of Kent Foods set out his particular concerns that "filthy" stock had been found during the site audit, the Claimant's inability to explain where the pallets had come from and why they were in that condition, the failure to have quarantined them upon receipt from an external warehouse and their presence next to other stock which was ready for dispatch. Mr Liddle stated that this seemed to indicate a deep malaise not least as the Respondent knew that the client was coming. In his email, Mr Liddle referred to a call from Mr Herlem after the site visit suggesting that there may be a disciplinary process against the Claimant and that he may be asked to provide or check some facts. Mr Liddle was not entirely comfortable with that. He believe that it was their issue to resolve and that the main problem was a lack of adherence to their own processes. Mr Ottomar denied that anybody had told Aimia Foods that a senior head would roll.

26 The Respondent was suspended from supplying Aimia from April 2017 and lost the contract about five months later.

27 The letter dated 4 May 2017 inviting the Claimant to a disciplinary hearing set out two allegations of potential misconduct. First, the discovery during the site visit of damaged stock in the warehouse that had not been quarantined. Second, the Claimant's inability to provide any explanation about the stock or why it had not been quarantined. The failure physically to quarantine the stock after discovery was not explicitly alleged as potential misconduct. The conduct was said to amount to potential gross misconduct, being serious acts breaking mutual trust and confidence or which could bring the company into disrepute, alternatively a repeated refusal to obey a lawful and/or reasonable instruction and a dereliction of duty or serious error causing the potential loss of business with the customer. The letter relied upon what was said to be a similar error in September 2016.

28 Mr John Cochrane, Director Supply Chain, was appointed to chair the disciplinary hearing. In advance, he and Ms Natasha Kovacs-Hegedus (HR) were briefed by Ms Powley. I accept Ms Powley's evidence that her input was related to process and not the substance of any decision to be reached, this is consistent with

contemporaneous emails from Ms Kovacs-Hegedus asking for her guidance on whether the hearing could be recorded, the outcome of the earlier grievance and Ms Powley's advice that Ms Kovacs-Hegedus be present when Mr Cochrane spoke to Mr Ottomar directly.

29 Between 24 April 2017 and the disciplinary hearing, Mr Ottomar provided Ms Powley with copies of emails with the Claimant and others in preparation for the audit, a copy of the Aimia report and a statement summarising his account of the events of the visit. Mr St John also provided Ms Powley with a statement setting out his recollection of the issue in September 2016. Ms Powley accepted in evidence that it was an error of judgment for her to have been so involved in the early investigation and that she should have directed Mr Ottomar to Ms Bowhill. I regarded Ms Powley as a credible witness, prepared candidly to accept the shortcomings in the disciplinary process and I accept her explanation that the reason for her greater involvement was that HR resource was limited at the time.

30 Mr Cochrane and Ms Kovacs-Hegedus were also provided with an investigation report including a fact finding investigation conducted by Wendy Bowhill on 2 May 2017. That report relied upon the failure to quarantine damaged stock and, that when asked about it, the Claimant said that he did not know its origin or details. Whilst the report accepted that there was no wilful or deliberate refusal to obey instructions, it stated that this was a repeated failure to be addressed during disciplinary action. The Claimant was not interviewed by Ms Bowhill as part of the investigation. The only witness statement referred to was that of Mr Ottomar (provided via Ms Powley). The report included the Aimia report but did not refer to the standard procedures in place at the time.

31 The disciplinary hearing took place on 11 May 2017, lasted an hour and the Claimant was accompanied by a work colleague. The Claimant read out a pre-prepared statement setting out his account of the site visit. Upon discovery of the soiled stock, he had telephoned Mr Goyal to discover the provenance of the pallets and then shared the information with the customer representatives. The Claimant explained that the standard operating procedure was that there was no need automatically to quarantine the stock as it was not a customer return. The soiling had not been identified by the GMP audit earlier that day, the warehouse operative who had unloaded the stock nor six other people who had walked around the warehouse in advance of the audit. His case was that the soiling was only discovered because the Aimia representatives had walked around the back of the pallet. This was different to the incident in September 2016 as the stock itself was not contaminated sugar. The Claimant said he had to rely upon the people working for him and trust his staff to carry out their roles and responsibilities properly.

32 When asked for the names of the other people who walked the warehouse on the morning of the audit, the Claimant named Mr Ottomar, Ms Carter, Ms Jepson, Ms Pereira, Mr Stanton and two weekend operatives. He confirmed that his first call to Mr Goyal at 12:54pm was to establish the history of the stock and that the instruction to quarantine it physically was given at about 2:45pm. The Claimant said that the customer was mistaken when they referred to the stock being a customer return. The Claimant was unhappy that he, Mr Goyal and Ms Carter had not been interviewed as part of the investigation. In the disciplinary hearing, the Claimant noted that the failure

to quarantine the stock after discovery had not been relied upon when he was suspended. The Claimant said that there was no conflict between himself and Mr Ottomar whom he regarded as a decent bloke.

33 Mr Cochrane explored the Claimant's understanding of the process in the warehouse for stock and quality issues. The Claimant's position was that warehouse was so busy he had to rely upon the operative unloading the lorry to inspect the stock and decide whether or not it is dirty, whether it should be quarantined or whether it should be returned. In this case, the warehouse operative had not done what he ought to have done and turned away stock that was not fit for market.

34 Following the disciplinary hearing, Mr Ottomar provided Ms Powley and Mr St John with comments on points raised by the Claimant in the hearing. Some of his comments were factually incorrect, for example maintaining that there had not been a GMP audit earlier that day, that the Claimant had given a "don't know" answer to the Claimant and that the Claimant had not provided details of the provenance of the goods until 2.20pm, after Kent Foods and Aimia had left the site.

35 The Non-Conforming Product Handling Procedure was amended on 15 May 2017 to include a new section on stock transfer orders. This provided that dirty or damaged stock received in the warehouse should be put on blocked stock by the warehouse co-ordinator (Mr Goyal) and physically quarantined by a warehouse operative. Mr Ottomar accepted in evidence that the Claimant had not breached the handling procedure in place at the time, nor would have he been in breach of the new procedure and neither the warehouse operative nor supervisor had been disciplined. Nevertheless, Mr Ottomar maintained that the Claimant had ultimate responsibility as warehouse manager and, whilst it might have been acceptable in ordinary circumstances for the Claimant to give an instruction to his staff, in the context of the failed audit he should have given the instruction more promptly and followed up to ensure that the instruction had been implemented.

36 The disciplinary hearing reconvened on 16 May 2017. Mr Cochrane told the Claimant that since the first meeting, he had consulted Mr Ottomar, Mr Herlem and Mr St John. The Claimant was not provided with this additional evidence in advance of the reconvened meeting and was not given an opportunity to respond. The additional evidence did not address the Claimant's assertion that the standard operating procedure did not require automatic quarantine of stock received on an internal transfer. In her evidence, Ms Powley accepted that this was an important new fact which should have been considered.

37 Mr Cochrane told the Claimant that he was summarily dismissed for gross misconduct. Mr Cochrane gave three broad reasons: (i) lack of confidence in the Claimant doing the job, following instructions from Mr Ottomar and counselling from Mr St John the previous year; (ii) his attitude towards the stock that should have been quarantined on 24 April 2017; and (iii) a lack of professionalism towards the customer. As a result, Mr Cochrane believed that the Claimant had lost the trust and confidence of the senior operations team to implement instructions and effectively control the quality of inbound supplies, storage in the warehouse and outbound supplies. Furthermore, that the Claimant had behaved unprofessionally in front of a customer when he left the site without quarantining the soiled stock; stock which should have

been quarantined before the visit in any event. He accepted Mr Herlem's evidence that when asked by the customer why the stock had not been quarantined, the Claimant's response was: "I don't know mate". Finally, Mr Cochrane concluded that the Claimant had refused to accept any accountability for the problems on 24 April 2017 despite him being warehouse manager and so responsible for the running of the warehouse.

38 The decision to dismiss was confirmed in writing by a letter dated 17 May 2017. I accept as truthful Ms Powley's evidence that she had advised Mr Cochrane and Kovacs-Hegedus (HR) only about the correct process, not about the decision which he should reach. This is consistent with her request that Ms Kovacs-Hegedus identify the trigger in Mr Cochrane's decision to decide that summary dismissal was the appropriate sanction. The decision to dismiss was Mr Cochrane's and whilst HR helped to draft the letter, its contents reflected his decision and his reasons as expressed orally and in writing therein.

39 The written reasons for dismissal were: (i) failure to quarantine the damaged stock, (ii) failure to implement the specific instruction to prepare the warehouse, (iii) lack of professionalism towards the customer representative and (iv) leaving the warehouse without ensuring that the stock had been correctly quarantined. This was regarded cumulatively as gross misconduct as it broke mutual trust and confidence, brought the company into disrepute, showed a repeated refusal to obey a lawful instruction and a dereliction of duty. Mr Cochrane believed that the soiled stock was clearly visible in the warehouse, that it was the Claimant's responsibility as warehouse manager to ensure corrective actions were taken to quarantine it, the Claimant had not taken the necessary action to ensure that a visit he knew to be important was a success, despite knowing the importance of segregating damaged stock, taking corrective actions and putting in effective controls, the Claimant had failed to take responsibility for the issue and ensure that corrective action was taken before leaving site on the day of the visit.

40 In the dismissal letter, Mr Cochrane stated that his biggest concern and the primary factor in his decision to dismiss was that throughout the disciplinary hearing the Claimant had provided him with no indication that he believed that he had any responsibility or accountability for the control of damaged stock in the warehouse. He had therefore no reassurance from the Claimant that he would take the necessary steps to prevent the issue from reoccurring, this was particularly relevant given the similar incident in September 2016, a fact that was raised with him at the time. A second influential factor in the decision was the financial impact of the incident and the significant damage to the company's performance and reputation.

41 By a letter dated 23 May 2017, the Claimant appealed against his dismissal. The grounds of appeal were that the investigation was inadequate and key witnesses had not been spoken to, Mr Cochrane had not read the investigation paperwork prior to the hearing and was not independent, his points refuting the allegations had been ignored, he had new evidence from witnesses and, finally, that the penalty was too severe given his 25 years' service, clean disciplinary record and absence of disciplinary action against employees directly involved. The new evidence relied upon by the Claimant was contained in emails from Ms Jepson and Ms Carter.

42 Ms Jepson confirmed that she had visited the depot on the morning of 24 April

2017 and that she had no major concerns other than the problems with the door, pigeons and some pooling water on the floor. She stated she had no other major concerns at that point and had to leave as she was interviewing for the rest of the day.

43 Ms Carter confirmed that she had been on the site tour with the Claimant, Mr Herlem and Mr Ottomar. The visitors had expressed an interest in seeing the FIBC storage area which contained very little at the time. When they got closer to the stock in a corner, the visitors spotted that it had some staining on the outside similar to the subject of earlier complaints which had led to the audit. The visitors asked about the history of the stock, the Claimant said that he did not know but would find out and then called the office. On the morning of the audit at least two members of her team and, she believed, Mr Ottomar had inspected the warehouse and had not seen the marks on the stock which were very difficult to see without close inspection.

44 The appeal hearing took place on 5 June 2017, chaired by Mr Jason Moore. The Claimant was accompanied by a colleague. Mr Moore had a template of questions produced by HR to explore the Claimant's grounds of appeal. Ms Powley advised the Claimant that the appeal was not necessarily to rehear the original details but to understand whether or not the hearing was fair, whether the process that was followed was the right one and whether the decision was overly harsh. Mr Moore agreed that the Claimant could start by reading a statement addressing each of his grounds of appeal.

45 The Claimant set out his belief that the investigator had little or no actual input into the investigation. The six other people present on the morning and who had not found an issue with cleanliness were not interviewed, despite him naming them at the disciplinary hearing. The investigation was so inadequate that it had been effectively fabricated to present a picture to support a pre-judged outcome of dismissal. It gave an inaccurate impression of the September 2016 incident and incorrectly stated that he had been the subject of counselling as a result. No further investigation had taken place between the disciplinary hearing and the decision, for example into whether the stock was subject to automatic quarantine. The Claimant regarded this as a clear indication that Mr Cochrane did not wish to ascertain the true version of events and investigate his side of the story. Mr Cochrane had arrived only 20 minutes before the hearing was due to start, saying he just got off a plane from Italy, was running late and hoped to have 10 minutes to read the documents. Subsequent questions showed that Mr Cochrane had not read the information. Mr Cochrane made assumptions for which there was no evidence, for example in finding that the soiled stock was clearly visible when nothing in the investigation supported this. The Claimant was staggered by the suggestion that he lacked accountability, he had not said that he could not be held accountable and at no point had he been asked what he would do to prevent a reoccurrence. He was being used as a scapegoat as had happened in September 2016. The decision to dismiss was riddled with so many assumptions, false information and inaccuracies and he objected to the reliance upon the additional evidence of Mr Herlam taken in the gap between the two hearings. Mr Cochrane's reference to consulting with Mr St John was evidence of pre-determination. His dismissal was influenced by a desire to save cost, not the objective facts of the case.

46 Ms Powley gave an explanation of HR's role in the original decision. She had advised Mr Cochrane not to make any immediate decision but to adjourn and seek

advice if further information was required. Mr Cochrane approached her after the first disciplinary hearing as he did not feel he had all the information he needed. Ms Powley advised that he could obtain more information to fill any gaps. Mr Cochrane then approached Mr Herlam, Mr St John and Mr Ottomar. In the appeal hearing, as in this Tribunal hearing, Ms Powley denied offering any opinion on the decision to dismiss. The Claimant objected to Ms Powley's presence at the appeal hearing but as he wished the process to be concluded, he did not ask for an adjournment.

47 Dealing with the quarantining of the soiled stock, the Claimant said he gave Mr Goyal the instruction when he went back to the office at about 2.45pm. He did not accept that there was any risk in failing to act sooner as there were no deliveries planned against that stock. In the final part of his appeal presentation, the Claimant set out his long service and clean disciplinary record and belief that it was wrong that he alone be disciplined when many others had been involved, for example Mr Ottomar who was also a senior manager.

48 When asked whether he thought he had done anything incorrectly, the Claimant's initial response was to say "no", although on reflection he suggested that he could have given somebody the labels to go and quarantine the affected stock. The Claimant stated his belief that the whole incident had been blown out of proportion and fabricated in order to get rid of him. When asked whether he should have physically quarantined the stock before he left for the day, the Claimant said that it was normal to pass instructions to his staff to do this and he had no reason to assume that they would not do it straightaway as they always did. When asked if he should have treated it more urgently, the Claimant said that he supposed he could have but the urgency was to block the stock on the system and he had no reason to assume that Mr Goyal would not act straightaway once the instruction to quarantine was given. Perhaps he should have stood and watched him, but he could not stand and watch everyone do everything. The Claimant accepted that he knew how important the visit had been (contrary to his evidence to this Tribunal) and that it was serious when the customer found the soiled stock. He maintained that it was the warehouse operative who had unloaded the stock from the haulage delivery who should have spotted the soiling but accepted that it was his responsibility to ensure that corrective actions were taken towards quarantining. When asked what he would have done differently with hindsight, the Claimant said that he probably would have watched someone physically with the labels in their hand putting them on the pallets. Other than that, he could not see anything that he would change.

49 There was then a 50 minute break in the hearing. Upon resuming the meeting, Ms Powley assured the Claimant that she had not conferred at all with Mr Moore during the break. Mr Moore informed the Claimant that his decision was that the dismissal would stand. The new evidence and errors in the customer statements did not change the finding of gross misconduct as they were not relevant to the core issue, namely the urgency of the actions taken once the soiled stock was found and the Claimant leaving the warehouse before making sure that it had been physically quarantined.

50 I accepted as truthful the evidence of Mr Moore and Ms Powley that the latter assisted Mr Moore in drafting the letter confirming the decision, including making some editing suggestions but did not play any part in the decision reached.

51 In the letter dated 9 June 2017, Mr Moore accepted that they should have considered interviewing Ms Carter whose evidence was consistent with the Claimant's account of the conversation with the customer. Again, he did not think that his was a major factor in the decision to dismiss. Similarly, Mr Moore considered it mattered little whether the Claimant had been given informal counselling or a formal warning in September 2016. He considered the incidents were similar performance issues: both related to quarantining damaged stock and the need for the Claimant to own tight controls and recognise risk.

52 Mr Moore accepted some of the criticisms of the disciplinary process, such as the failure to interview the Claimant and obtain his account of the conversation with the customer, but believed that the evidence of Ms Carter and Ms Jepson would not have affected the decision to dismiss. Mr Cochrane had consulted Ms Powley about process but she had not been involved in either decision to dismiss. Mr Moore accepted that the Claimant had not specifically said that he was not accountable for control of damaged stock within the warehouse, he concluded that this was an opinion formed by Mr Cochrane borne out of the disciplinary hearing. Whilst the Claimant should have been given the opportunity to respond to the additional statements obtained during the adjournment, it would not have affected the decision to dismiss. Finally, whilst there had been no formal disciplinary action previously, the informal counselling was relevant. Mr Moore said that he had considered reducing the penalty to a final written warning based upon length of service and also the absence of a wilful refusal, but:

> "**I do believe that the lack of accountability you have demonstrated has led to the breakdown in trust and confidence in you. The gravity of the incident and the potential impact to the business (the loss of a multi-million pound contract) was known to you at the time and the fact that you still made the decision to leave the site at 2.45pm without having quarantined the damaged stock in question once it had been discovered. In my opinion, is not the appropriate action I would expect a manager of your seniority level to take. Regardless of the fact that no orders had been placed against the stock, the urgency to ensure quarantine controls are in place continues to remain critical. Your decision to delegate this and leave site demonstrates a complete lack of understanding of this and also demonstrates no recognition on your part of the urgency or need to take accountability for the corrective actions which could cause serious harm against the company**."

53 Mr Moore expanded in his oral evidence about his reasons for deciding against a final written warning. I found Mr Moore to be an honest witness and accept that he was concerned about the Claimant's failure to identify things he would do differently in the future (such as taking control of the situation by telling the customer immediately that he would label the pallets and then do so before leaving the site), lack of understanding of his overall responsibility for stock control in the warehouse and failure to demonstrate any sense of urgency once the problem was identified. If he had had any level of confidence that the Claimant would act in a way which was urgent and accountable in future, he would have changed the sanction to a final written warning.

54 Following the Claimant's dismissal, Mr Stanton provided interim cover until a permanent replacement warehouse manager was recruited in November 2017.

Law

Unfair Dismissal

55 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. Care must be taken as a potentially fair reason may nevertheless be a pretext, **ASLEF v Brady** [2006] IRLR 576.

56 The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

> (1) did the employer genuinely believe that the employee had committed the act of misconduct?
> (2) was such a belief held on reasonable grounds? And
> (3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

57 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

58 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

59 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. As confirmed in **A v B** [2003] IRLR 405, EAT and **Salford NHS Trust v Roldan** [2010] ICR 1457, CA, in determining whether an employer carried out such investigation as was reasonable in all the circumstances, relevant circumstances include the gravity of the charges and their potential effects upon the employee. There is a spectrum of gravity of misconduct which needs to be taken into account in deciding what fairness requires in any particular case.

60 The gravity of the misconduct is not determinative in assessing the extent of investigation reasonably required. This will also depend, amongst other things, upon the extent to which the employee disputes the factual basis of the allegations concerned and the nature of the defence advanced by the employee, **Stuart v London City Airport** [2013] EWCA 973. The reasonableness of the investigation should be looked at as a whole and it is not necessary for the employer to investigate every point

made by the employee in his defence, **Shrestha v Genesis Housing Association Ltd** [2015] IRLR 399.

61 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the range of reasonable responses test is not a test of irrationality; nor is it infinitely wide. It is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

62 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall:

62.1 the conduct of an employee in the course of a disciplinary process, including whether they admit wrongdoing and are contrite or whether they deny everything and go on the offensive. This includes whether an employer acting reasonably and fairly in the circumstances of the evidence during the disciplinary hearing could properly have reached a particular assessment of a witness' credibility, **Linfood Cash & Carry Ltd v Thomson** [1989] ICR 518.

62.2 disparity which may arise (i) where an employer has led an employee to believe that certain categories of conduct will either be overlooked or at least not be dealt with by the sanction of dismissal; (ii) where evidence about decisions made in relation to other cases supports an inference that the purported reason for dismissal is not the real or genuine reason; and/or (iii) decisions made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable to adopt the penalty of dismissal that some lesser penalty would have been appropriate in the circumstances, **Hadjioannou v Coral Casinos Ltd** [1981] IRLR 352.

62.3 A finding of gross misconduct does not automatically justify a finding that dismissal was within the range of reasonable responses, **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854.

62.4 Mitigating factors, including length of service and disciplinary record.

63 The fairness of dismissal must be judged by what the decision-maker knew or ought reasonably to have known at the time of dismissal. The knowledge of others within the employment organisation is not imputed to him merely because he is employed by the same employer, **Orr v Milton Keynes Council** [2011] ICR 704. It may however be relevant to whether or not the employer has carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

64 It will be unfair if the integrity of the decision to dismiss has been influenced by persons outside of the procedure, see **Chhabra v West London Mental Health NHS Trust** [2014] ICR 194 and **Ramphal v Department for Transport** [2015] IRLR 985 EAT. An investigating officer is entitled to call for advice from HR, but HR must be very careful to limit advice essentially to questions of law and procedure. They should avoid straying into areas of culpability or advising upon the appropriate sanction, beyond addressing issues of consistency. The employee being disciplined is entitled to assume that the decision will be taken by the appropriate officer without having been lobbied by other parties as to the findings he should make as to culpability. The employee should be given notice of any changes in the case he has to meet so that he can deal with them and also given notice of representations made by others to the dismissing officer that go beyond legal advice and advice on matters of process and procedure. The question for the Tribunal is whether the influence of an external source was improper and if so whether it had a material effect on the ultimate decision of each relevant decision-maker.

65 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47. The failure to apply the appeal process fairly and fully may render a dismissal unfair, **Tarbuck v Sainsbury's Supermarkets Limited** [2006] IRLR 405.

66 The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

67 If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event.

68 The relevant questions are whether the employer could fairly have dismissed and, if so, what were the chances that it would have done so, **Hill v Governing Body of Great Tey Primary School** [2013] IRLR 274. In answering these questions, the Tribunal is not limited to considering only procedural matters, **Lambe v 186K Limited** [2004] EWCA Civ 1045.

69 A basic and/or compensatory award may be reduced pursuant to s.122(2) and s.123(6) ERA respectively. In **Steen v ASP Packaging Ltd** [2014] ICR 65, the EAT advised Tribunals to address (i) the relevant conduct; (ii) whether it was blameworthy; (iii) whether it caused or contributed to the dismissal (for the compensatory award) and (iv) to what extent should any award be reduced.

Breach of Contract

70 The Claimant's claim for notice pay is brought under the Employment Tribunals

Extension of Jurisdiction (England and Wales) Order 1994, article 3. It is, in general, for the Respondent to show on the balance of probabilities that the Claimant was in fact guilty of the misconduct alleged to amount to a repudiatory breach of contract entitling it to dismissal without notice or pay in lieu. To be sufficient, the conduct must so undermine the trust and confidence inherent in that particular contract of employment that the employer should no longer be required to retain the employee, **Neary v Dean of Westminster** [1999] IRLR 288. Relevant to this determination will be the nature of the employer, the role of the employee and the degree of trust required.

Conclusions

71 The Respondent bears the burden of proving a potentially fair reason for dismissal, here it relies on misconduct. The Claimant disputes that either Mr Cochrane or Mr Moore genuinely believed that he had committed an act of misconduct. In the issues, he asserts that the real reason for dismissal was either his grievance raised after the 2016 incident or his health. In the course of submissions, Mr Stephens also asserted that the Claimant was dismissed "for show", in other words to satisfy the customer in the aftermath of the failed April 2017 audit. At other times, the Claimant has suggested that the real reason for dismissal was a desire to save money.

72 Unusually, the Respondent did not call direct evidence from Mr Cochrane who has now left the business. It relied instead upon the reasons given orally to the Claimant at the reconvened hearing on 16 May 2017, the contents of the dismissal letter and the evidence of Ms Powley. I reminded myself that a Tribunal is entitled to rely upon hearsay evidence but that care must be taken to scrutinise the reason, particularly where the decision maker is not present to give direct evidence. In his notes for closing, Mr Stephens relies upon a number of matters from which, he submits, inferences should be drawn to reject the misconduct reason advanced by the Respondent. In summary, these are that the evidence showed that the Claimant had done nothing wrong, nobody else was disciplined, the involvement of senior managers in the UK and US and a lack of bona fides in the disciplinary process as shown by inconsistencies and errors.

73 As a starting point, I have accepted Ms Powley's evidence that the decision to dismiss was taken by Mr Cochrane and upheld by Mr Moore; she helped only with the drafting of the letters. Ms Powley did not lobby Mr Cochrane or Mr Moore, nor did she improperly influence their decisions. It is therefore the knowledge and beliefs of Mr Cochrane and Mr Moore which are relevant to determining the reason for dismissal.

74 It is not disputed that the customer audit on 24 April 2017 took place against a background of concern about the soiled state of stock being supplied by the Respondent. The contemporaneous emails evidence the importance to the Respondent of ensuring that the audit was a success. The importance of the audit was shared with the Claimant and other relevant individuals, including Mr McEvoy. The audit was arranged on the Friday to take place on the Monday, the necessary preparations were therefore required over the weekend when the Claimant was not working and hence the focus upon Mr McEvoy. The Claimant had been in the warehouse since early on 24 April 2017. Mr Ottomar gave an assurance to Mr St John that there would be a walk around before the visit and sent an email on 21 April 2017 requiring the route to be inspected. The Claimant bore overall responsibility for the

operation of the warehouse. The audit did not go well as soiled stock was found, the customer was very unhappy so much so that valuable business was lost. The instruction to quarantine physically the soiled stock was not given by the Claimant until 2.45pm, almost three hours after its discovery and he left before it was implemented.

75 The contemporaneous emails from Mr Ottomar and between senior managers support the Respondent's case that the events of 24 April 2017 were the reason for disciplinary action, not the Claimant's grievance in 2016 or his ill health. The link between the senior managers in these emails and the disciplinary process is Ms Powley. Again, I have accepted her to be a truthful witness and that those managers were not involved in the disciplinary process. Given the value of the Aimia contract to the Respondent and the commercial sensitivity of the failed audit, I do not find it surprising or suspicious that they were discussing the problems and potential consequences of the failed audit. The Claimant was not dismissed at the behest of senior managers.

76 Moreover, Mr Liddle's reference in his email on 24 April 2017 to the fact that there *may* be a disciplinary process and that he *may* receive a telephone call to *check the facts* is inconsistent with the Claimant's case that the Respondent had told the customers (Kent Foods or Aimia) that he would be sacked or that dismissal was a pre-determined outcome. The Claimant was not dismissed at the behest of, or as an attempt to placate, the customer.

77 It was evident from the Claimant's evidence that he sincerely believes that he had done nothing wrong on 24 April 2017 and, by consequence, that his dismissal was part of a conspiracy dating back to 2016 to remove him from office. Given that he was summarily dismissed after 25 years' service it is not surprising that the Claimant demonstrated a bitterness towards his former employer, however, it negatively affected the reliability of his evidence. Mr St John was supportive of the Claimant and both had moved on from the 2016 as a result of the informal meeting. The Claimant had a good working relationship with Mr Ottomar. The Claimant was Warehouse Manager, with overall responsibility for the warehouse on the day that the soiled stock was found. Mr Moore was an impressive witness who clearly articulated his reasons for dismissal. Consistent with Mr Cochrane's expressed reasons, the most important issues which led to their belief in misconduct related to the Claimant's conduct after the soiled stock had been found, in particular his failure to quarantine physically the stock before with urgency and before he left the warehouse and his position at the disciplinary and appeal hearings which they believed showed an inability to accept that he had any personal responsibility.

78 Overall, I accept Ms Fraser Butlin's submission that the entire process was concerned with the failed customer audit and its commercial impact, not for any other reason or ulterior motive. The Respondent has proved that the reason for dismissal was a genuine belief that the Claimant had committed an act of misconduct on 24 April 2017.

79 It is not enough that there was a genuine belief in misconduct, it must also have been reasonable based upon a reasonable investigation. There were fundamental flaws in the quality of the investigation carried out by the Respondent. The Claimant was not interviewed, nor were others present during the audit or who had walked the

route earlier in the day. Their evidence was directly relevant not only to whether or not the soiled stock was visible and should have been identified before the audit but also to the Claimant's reaction when it was found. If Ms Carter had been interviewed, it is likely that she would have told the investigator what she told this Tribunal. Namely, that whilst the Claimant bore some responsibility he did not bear sole responsibility for the discovery of soiled product. That the soiled product was visible without undue effort but not readily apparent from a distance. It had been missed by the warehouse operative on unloading and by herself and her team in their earlier tour of the warehouse. Moreover, that the Claimant had responded promptly to the customer's request for details of the movements of the soiled stock.

80 The investigation was also deficient in its failures properly to identify the nature of the soiled stock and, accordingly, whether it was subject to a requirement for automatic quarantine. Had this been investigated, it is likely that the relevant decision makers would have concluded that the Claimant had not committed any act of gross misconduct prior to discovery of the soiled stock. Similarly, a reasonable investigation would have considered whether there were any procedures in place for stock transfer orders and established that there were none at the time of the incident. The Claimant's conduct in giving an instruction to a member of his staff physically to quarantine the stock would normally have been acceptable. Such further evidence as was obtained in the time between the two disciplinary hearings was not shared with the Claimant. Mr Cochrane relied upon evidence of Mr Herlem about the Claimant's reaction to finding the stock upon which the Claimant had no opportunity to comment. Finally, there was no investigation of the state of the stock at delivery and/or the role of the warehouse operative who had unloaded it.

81 As made clear in **Taylor**, the fairness of the whole procedure must be considered and that includes whether any initial failures in the investigation were cured by the conclusion of the appeal. The Claimant had obtained and provided the evidence of Ms Carter and Ms Jepson. There was no apparent investigation of whether the Claimant had breached any procedural requirements about the quarantine requirements for stock transfer orders and/or soiled stock which was not a customer return. Whilst the Respondent relied upon the earlier 2016 incident and the importance of quarantining, this was materially different as it had involved contaminated product (rather than soiled wrapping) that was clearly required to be quarantined. The Claimant was still not given the statements provided by Mr Harlem or Mr St John.

82 Overall, the impression of the investigation is that it was not even handed in seeking evidence which could exculpate the Claimant but proceeded on an assumption of guilt largely because of the Claimant's overall responsibility for the operation of the warehouse. Whilst an investigation is not required to be perfect, it must fall within the range of investigations which a reasonable employer would undertake in the circumstances. The failures in this investigation were so fundamental as to take it outwith the range of reasonable investigations and were not cured upon appeal.

83 As the Respondent has failed to satisfy the **Burchell** requirements, the dismissal is unfair. However, the Tribunal must also consider what if any difference a fair and reasonable investigation might have made and whether the Claimant contributed to his dismissal in any event.

84 As expressed by Mr Cochrane and Mr Moore respectively, both were particularly concerned with the Claimant's failure physically to quarantine the soiled stock upon its discovery, leaving the depot without having ensured that it was done and a general failure to be accountable for the failed audit visit. In part, these conclusions are closely linked to the failure to investigate the procedures in place at the time and also the respective responsibilities of warehouse operatives and supervisors. A reasonable investigation would have led to a proper understanding of the Claimant's role and the rules about quarantining. It may well have led to a conclusion that although he had should have been more proactive once the problem was identified, there was no failure to implement an instruction to prepare the warehouse or lack of professionalism towards a customer representative or indeed breach of any specific instruction or procedure about quarantining this particular stock.

85 Equally, however, the warehouse was not full, with very little in the FIBC area, the soiling was visible without undue effort and the Claimant had walked the route without identifying the problem despite being required to check the stock. His responsibility as Warehouse Manager was different from that of the quality team and of Mr McEvoy as weekend manager (whose preparatory work he could reasonably be expected to inspect on the morning of such an important audit visit, particularly given the instruction from Mr Ottomar that the route should be walked on the morning of the visit). The pigeons and the broken door required some attention but largely to instruct others to deal with the problem and the product had been present in the warehouse for four days before it was discovered. The Claimant did not dispute that the instruction physically to quarantine the soiled stock was given only at 2.45pm and that he left without verifying that his instruction had been actioned. Even if regarded as a dereliction of duty rather than wilful, there is a real chance that the Respondent could have reasonably believed that the Claimant had committed an act of misconduct in the circumstances.

86 In deciding whether or not dismissal would have been fair in such circumstances, the Tribunal would also have to consider the Claimant's long service and previous disciplinary record. There were no formal disciplinary warnings and the September 2016 incident was qualitatively different as it involved contaminated product and not soiled wrappings. No other employee was investigated far less disciplined, including Mr McEvoy who was responsible for preparation work over the weekend, the two quality representatives who also walked the audit route without finding the soiled product and/or the warehouse operative who unloaded it without identifying the problem.

87 However, the Claimant was the Warehouse Manager with overall responsibility for standards and stock control in the warehouse. This was a planned audit which he knew to be critically important and whose failure had very significant financial consequences. His stance in the disciplinary process did demonstrate a lack of understanding of the importance of his role and the impact of the failed audit in the warehouse for which he was ultimately responsible. He was given ample opportunity to address areas which could be improved for the future and which would enable the Respondent to retain confidence in his abilities. The Claimant's position was consistent with his case at this Tribunal that he had done nothing wrong, that the incident had been blown out of proportion and fabricated. Overall, this could reasonably permit the employer to conclude that he demonstrated a lack of

accountability which could have led to a dismissal which was within the range of reasonable responses open to the employer in the circumstances of this case.

88 Moreover, the Claimant's failure physically to quarantine the soiled stock before the audit team left the warehouse and, indeed, before his departure from work that day was foolish conduct. So was his stance in the disciplinary and appeal process where he demonstrated a real lack of appreciation of the importance of the situation. The Claimant was entitled to defend himself against the allegations of gross misconduct but the way in which he did so was foolish. Reading the notes of the hearings overall, I conclude that it was reasonable for Mr Cochrane and Mr Moore to find that he had not accepted any responsibility and showed a lack of accountability. His position that the issue had been blown out of proportion or fabricated was foolish given the significant financial and reputational impact to the Respondent of the failed audit and loss of the Aimia contract. This was particularly so where the September 2016 letter from Mr St John made clear that it was critical that he ensure quality standards in the warehouse. Both elements of the Claimant's conduct contributed significantly to the decision to dismiss him, particularly on appeal where I have accepted Mr Moore's evidence that if he had had any level of confidence that the Claimant would act in a way which was urgent and accountable in future, he would have changed the sanction to a final written warning. It is appropriate that any award is reduced to reflect the Claimant's contributory conduct.

89 Paragraph 5 of the ACAS Code of Practice provides that: "**It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing."** Although it is not always necessary to have a separate investigation meeting, it is important to carry out the necessary investigations. For the reasons set out above, that did not happen. I am satisfied that the failings in the investigation process did amount to an unreasonable breach of the Code given the high level of senior HR support and active involvement from the early stages of the process. The possible range of uplift is up to 25%. In deciding the appropriate level, regard must be had to the extent to which the Respondent did comply with the Code. The Claimant was informed of the problem and was invited to a disciplinary hearing where he was allowed to set out his case and answer the allegations. He was informed of his right of appeal and exercised that right. He was accompanied at all meetings. Whilst the investigation failures were significant and an uplift is required, 25% would be excessive in the circumstances.

Wrongful dismissal

90 The burden is upon the Respondent to show that the Claimant's conduct amounted to a repudiatory breach of contract. For the reasons set out above in consideration of **Polkey** and contributory fault, I do not consider that the Claimant committed an act of gross misconduct in relation to the preparations for the audit even if he could have been more diligent. I have also found that the Claimant did not breach any specific instruction in relation to quarantining the soiled product once it was discovered. The Claimant's responses to the problem once discovered and during the disciplinary process were certainly not impressive and did not inspire confidence but,

overall, I conclude that even if misconduct they did not amount to gross misconduct in the circumstances. On balance, I do not accept the Respondent's case that there was a repudiatory breach of contract even if there were certainly at the very least some serious performance concerns raised by this sorry incident. The Claimant was entitled to be given notice of dismissal and his breach of contract claim succeeds.

Next Steps

91 The claims having succeeded, a one-day remedy hearing will now be listed to consider the appropriate reductions to reflect the findings relevant to **Polkey**, contributory fault and the ACAS uplift. The following directions will apply:

87.1 The Claimant must provide an up to date schedule of loss within 2 weeks of the date on which this Judgment is sent to the parties.

87.2 The parties will disclose all documents relevant to the issue of remedy within 4 weeks of the date on which this Judgment is sent to the parties.

87.3 The Respondent will produce a bundle including those documents to which the Tribunal will be referred on remedy within 6 weeks of the date on which this Judgment is sent to the parties.

87.4 The parties will simultaneously exchange witness statements setting out all of the evidence upon which they intend to rely at the remedy hearing within 8 weeks of the date on which this Judgment is sent to the parties.

87.5 The remedy hearing will be listed for the first available date after 12 weeks. If there are any dates to avoid, the parties must notify the Tribunal as soon as possible.

Employment Judge Russell

30 October 2018