EMPLOYMENT TRIBUNALS

Claimant: Mr R Hornby

Respondent: Iceland Foods Limited

HELD AT: Manchester **ON:** 22 – 26 October 2018

BEFORE: Employment Judge Porter (sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Ms N Owen of counsel

JUDGMENT having been sent to the parties on 2 November 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Written reasons are provided pursuant to the request of the claimant made by email dated 7 November 2018.

Issues to be determined

2. During the course of the first morning, having heard both parties' submissions on the relevant issues, EJ Porter confirmed that the issues were as identified in the respondent's List of Issues as follows:

Whistleblowing

2.1. Did the claimant make qualifying disclosures as particularised in his email of 11 March 2017 at page 40 of the hearing bundle, in particular:

2.1.1. did he disclose information relating to a relevant failure?

2.1.2. Did the claimant have a reasonable belief that the information disclosed showed a relevant failure?

2.1.3. Did the claimant reasonably believe that the information was in the public interest?

2.2. If so, was the disclosure a protected disclosure?

2.3. If the claimant made a protected disclosure, was it the sole or principal reason for the claimant's dismissal?

Unfair dismissal

2.4. If the claimant was not dismissed because of protected disclosures, if made, was the claimant dismissed by reason of misconduct, in particular:

2.4.1. did the respondent genuinely believe the claimant had staged an accident at work?

2.4.2. Were there reasonable grounds to sustain that belief?

2.4.3. Did the respondent carry out a reasonable investigation in the circumstances?

2.5. If so, was the dismissal reasonable in all of the circumstances of the case?

2.6. If not, should compensation be reduced by reason of Polkey and/or the claimant's contributory conduct?

Orders

3. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

4. The respondent made application that the claimant be debarred from giving evidence in the claim on the grounds that:

4.1. the claimant had not prepared a witness statement in advance of the hearing;

4.2. the claimant did not intend to call any other witnesses;

4.3. the claimant had failed to comply with the order of the tribunal;

4.4. the respondent had sent to the claimant several emails explaining how to set out his witness statement and the potential consequences of non-compliance;

4.5. there is considerable prejudice to the respondent who cannot guess what the claimant's case is;

4.6. that prejudice to the respondent outweighs any prejudice to the claimant. Evidence will still be heard from respondent's witnesses. The burden is on the respondent to prove the reason for dismissal. The claimant can cross-examine respondent's witnesses.

5. The claimant opposed the application on the grounds that that he had been unable to prepare a witness statement because:

5.1. The respondent had failed to disclose certain documents, including the full CCTV footage relating to the incident and stills from the footage which had been used in the disciplinary process;

5.2. The respondent had disclosed some requested documents only the week before the hearing;

5.3. The respondent had sent to the claimant a revised bundle the week before the hearing

6. EJ Porter considered all the circumstances and noted in particular that:

6.1. there had been a delay in providing the claimant with certain requested documents and the paginated bundle;

6.2. the respondent had not served its witness statements on the claimant until 17 October 2018;

6.3. The order of the tribunal was that witness statements be served by 21 September 2018;

6.4. the claimant asserted that the respondent's bundle was not agreed as it omitted a large number of relevant documents which had been disclosed by him to the respondent in May 2018. The claimant had therefore prepared his own bundle of documents, which he handed to the tribunal and respondent's representative

7. In all the circumstances EJ Porter refused the respondent's application that the claimant be debarred from giving evidence in the claim. EJ Porter announced her preliminary view that in light of the late compliance with orders by both parties a more appropriate order would be to postpone the hearing to allow both parties adequate time to prepare.

8. Both parties were keen to retain the existing hearing. After discussion as to the best way forward for a fair hearing it was agreed and ordered that:

   8.1. The claimant would prepare a witness statement and forward a copy to counsel for the respondent by email later this evening;

   8.2. The respondent would forward to the claimant:

      8.2.1. copies of all CCTV footage and still photographs which had been available during the disciplinary process;

      8.2.2. A copy of the witness statement of Mitch Thompson, as requested by the claimant;

      8.2.3. Copies of any risk assessments undertaken at the three sites Fallowfield, Prestwich and Cheetham Hill

   8.3. Counsel for the respondent would prepare a supplemental paginated bundle of any of the claimant's documents which did not appear in the respondent's bundle;

   8.4. the tribunal would commence hearing evidence at 1.30pm the following day.

9. On the second day the parties confirmed that the Orders had been followed. Counsel for the respondent confirmed that there were no risk assessments for the three sites but all documents relating to health and safety at these sites had been disclosed and appeared in the bundle.

10. Both parties confirmed that they were ready to proceed. The claimant expressed concern about using the respondent's bundle of documents and the supplemental paginated bundle of his documents prepared by counsel for the respondent. The tribunal confirmed that the claimant could use his own bundle of documents to conduct the case and that both the tribunal and counsel for the respondent would assist the claimant in identifying the relevant document in the respondent's bundle and supplementary paginated bundle. On this basis the claimant confirmed that he was ready to proceed. Neither party made any application for postponement.

11. The claimant made application, during the cross-examination of the respondent's witnesses, that the remaining witnesses be excluded from the hearing.

12. The application was unsuccessful. The claimant failed to provide any satisfactory evidence to support his request that the tribunal depart from the normal practice of holding the hearing in public, during which any witness can remain. The claimant has made an assertion, without any supporting evidence, that the witnesses will collude, will change their evidence, if they hear the questions being put by him to the other witnesses. The claimant says, quite reasonably, that the number of witnesses for the respondent makes him feel uncomfortable. However, EJ Porter agrees with the submissions of the respondent that a litigant in person can find the process of litigation stressful. However, the claimant does not suggest that his right to a fair hearing is prejudiced by the presence of the respondent's witnesses. EJ Porter is satisfied that the claimant's right to a fair hearing is not so prejudiced.

13. During the hearing the tribunal viewed, in open tribunal, the CCTV evidence which was considered during the disciplinary process. This comprised two pieces of footage, one showing the claimant remove some plastic from a bin , and another, some 20 minutes later, of the claimant falling on the floor. The claimant made application for disclosure of the entire CCTV footage. There was some confusion as to which part of the CCTV footage the claimant required. The respondent asserted that:

    13.1. there was CCTV footage of 20 minutes in duration prior to the claimant taking the plastic from the bin;

    13.2. this was irrelevant as the claimant could not be seen on any of that footage;

    13.3. the claimant did not request this footage during the disciplinary process

14. The tribunal ordered the respondent to send to the claimant a copy of that piece of CCTV footage. On the second day of the hearing the claimant confirmed that this CCTV footage had been sent.

15. During the second day of the hearing the claimant made a request for disclosure of the CCTV footage of the 20 minute period between the claimant taking the piece of plastic and his fall.

16. The respondent asserted that:

    16.1. No such footage had been considered or asked for during the disciplinary process and was irrelevant;

16.2. The claimant had not made it clear before today that he was seeking that particular footage

17. The claimant denies that. He asserts that he has requested sight of the entire footage throughout, that is, the time between the claimant taking a piece of plastic from the bin and his fall.

18. EJ Porter ordered that the entire footage be disclosed by the next day, if possible.

19. At the commencement of the third day counsel for the respondent stated that enquiries had been made and the CCTV footage for the period of time between the claimant taking a piece of plastic from the bin and his fall, could not be disclosed as it had been destroyed. Mr Birkett would deal with this when giving his evidence.

20. The claimant did not accept that the CCTV footage had been destroyed.

21. The tribunal explained that the tribunal would hear evidence on the point and the claimant could challenge the respondent's evidence in cross-examination.

Submissions

22. The claimant made a number of submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

22.1. He was a whistleblower and refused to ignore life-threatening health and safety issues which would have cost the company hundreds of thousands of pounds to remedy;

22.2. the respondent has failed to provide any risk assessment for the stores where the claimant has reported serious safety issues. They have provided no health and safety reports from the health and safety officer. They have provided nothing to show that the necessary work has been finished;

22.3. there was a conspiracy to get rid of the claimant and the respondent used the first opportunity to dismiss him;

22.4. he was not evasive or inconsistent in giving evidence. He had a genuine accident at work. He had tried to explain why he had used a piece of plastic, how it was commonplace for him to do so;

22.5. it was simply not credible that a man of his age would deliberately fall;

22.6. the respondent has failed to provide the complete CCTV footage of the fall. Mr Birkett said the system was too old but this was a new piece of equipment;

22.7. The respondents have failed to explain why they accepted at first that he had been involved a genuine accident and then later changed their mind and made false accusations against him.

23. Counsel for the respondent relied upon written submissions which the tribunal has considered with care but does not rehearse in full here. In addition it was asserted that:-

23.1. the claimant has been inconsistent in giving his evidence. For example, he said he felt bullied by Andrew Birkett but then said he felt he could trust Andrew Birkett to come to the correct decision;

23.2. the claimant has been evasive in giving his evidence. He is not prepared to answer any question in cross-examination when the correct answer is to agree with a question;

23.3. the claimant raises conspiracy theories when backed into a corner. He is now saying that the two witnesses to the accident were lying and that Daryl lied because his manager was a friend of Andrew Birkett;

23.4. The claimant has clearly demonstrated before this tribunal why it was reasonable for the respondent's dismissing and appeal officers to find that the claimant was lying and had staged the accident.

Evidence

24. The claimant gave evidence.

25. The respondent relied upon the evidence of:-

25.1. Mr Richard Cooper, former Head of Commercial Operations;

25.2. Mr Andrew Birkett, Head of Refrigeration;

25.3. Mrs Wendy Swash, Head of Delivered Sales

26. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

27. Bundles of documents were presented, as set out in the above Orders. References to page numbers in these Reasons are references to the page numbers in those Bundles.

28. The tribunal viewed the two pieces of CCTV footage which had been viewed during the disciplinary process.

Facts

29. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

30. The respondent is a well-known and leading retailer of frozen and fresh food products to the public, both via online and high street outlets. The respondent currently employs approximately 22,500 employees across the UK.

31. The claimant was employed as a Senior Refrigeration Engineer from November 2000. His employment was transferred to the respondent on 25 November 2013 under the Transfer of Undertakings (Protection of Employment) Regulations 2006. He had a clean disciplinary record.

32. Mr Andrew Birkett became the Head of Refrigeration in 2013. His role was to oversee all of the engineers, and he had responsibility for refrigeration equipment design for new stores and store refits. Three field service managers reported into Mr Birkett, including Mr David Hackett, who the claimant ultimately reported in to.

33. As a Senior Refrigeration Engineer the claimant conducted annual Planned Preventative Maintenance (PPM) audits at each of the stores within his region. This involves cleaning all refrigeration units within any unit, with the assistance of a contractor. As part of that audit the claimant was required to complete, and send to a Central Data base, a written report, confirming that the equipment has been cleaned and, if not, to record any outstanding issues. The claimant is also required to complete a Health and Safety section to confirm whether there are any issues, to provide comments and a suggested solution. The written report is then signed by the claimant and a member of the store staff, who signs to confirm that the clean has been completed.

34. At the relevant time it was the duty of a technical supervisor to review the PPMs submitted by the claimant and other engineers, and to action any work needed to resolve any health and safety issues.

35. On 4 February 2014 the claimant conducted a PPM at the Fallowfield site and included in his written report (p286 of respondent's bundle RB) a problem of

Health and safety, namely, “Back safety cover over steel ladders for roof access stops level with roof dangerous”.

36. On 7 October 2015 the claimant conducted a PPM at the Cheetham Hill site and included in his written report (p344 of RB) a problem of health and safety namely “to get to condensers on the roof there is no walk way and access is gained by walking across angled roof which can be dangerous when wet.”

37. On 28 January 2014 the claimant conducted a PPM at the Prestwich site and included in his written report (p364of RB) a problem of health and safety namely “have to go through building from outside very dangerous also no roof edge protection… No lighting on roof for condensers also no socket.”

38. The claimant reported his concerns to retail assistants at the relevant store at the time he conducted each of the audits. He also forwarded his written reports for each of the PPMs to the Central Data base. The claimant did not at the time raise these concerns directly with his line manager or any other manager in his department. The claimant simply recorded the health and safety concerns on the PPM written reports and, at that stage, took no further action. The claimant did not know, at the time he sent those PPM written reports, that they were not being reviewed or actioned.

39. In or around July 2016 Mr Birkett was asked to investigate a problem at the Fallowfield store. He logged on to the computer system, which shows the temperatures of the cold rooms, which should be below - 21 degrees centigrade at all times. Mr Birkett noted that the temperatures at this store had been very high for a long period of time. Mr Birkett was concerned because the claimant was the lead engineer at this store and had completed most of the jobs at the Fallowfield store, where the equipment was clearly not working correctly. Mr Birkett instructed Paul Radford, a Field Service Manager, to investigate.

40. Mr Radford conducted the investigation and prepared a report. In August 2016 Mr Birkett received a copy of that report and became aware that:

    40.1. the claimant had documented the health and safety issues on his PPM reports, as set out at paragraphs 35 – 37 above; and

    40.2. these had not been actioned; and

    40.3. the technical supervisor had failed to review the PPM reports as required.

41. Mr Radford made several recommendations including:

    41.1. raising with Head Office the health and safety issues that the claimant had documented on his PPMs, to ensure that these were rectified;

41.2. the review and improvement of the reporting of health and safety issues to ensure that this problem did not recur

As a consequence the reporting of these health and safety issues has changed.

42. After Mr Radford had commenced his investigation, in or around August 2016, the claimant notified issues around health and safety in the Cheetham Hill store to his supervisor Mark Collins. Mark Collins submitted a health and risk report detailing the issues and sent this on to Mr Haggart to action the remedial works. There was considerable delay in completing the remedial work, as indicated by the exchange of emails between Mark Collins, David Hackett and others, which indicates that the works did not commence on site until January/February 2018 (p357of RB).

43. In or around February/March 2017 the claimant raised with Mark Collins issues with trip hazards at the Prestwich store. Mark Collins assessed the risks himself and produced a risk assessment report on 20 February 2017 (p387of RB). Mark Collins took action to resolve the issues.

44. On 9 May 2016 the claimant raised a formal grievance (p41 of the supplemental bundle of the claimant's additional documents (CB)) asserting that :

44.1. David Haggart, a senior manager in his department, had been bullying the claimant, who was being targeted because of his age;

44.2. David Haggart was trying to force the claimant out of the business;

44.3. unwarranted disciplinary action was being taken against the claimant by David Haggart, who was encouraging people to make complaints against the claimant to help David Haggart get the claimant out of the business;

45. in his grievance the claimant did not assert that he was being targeted by David Haggart because the claimant raised health and safety concerns or because he had made a protected disclosure.

46. Charlotte Ashdown, HR officer, investigated the claimant's grievance but found no evidence to uphold the claimant's complaint. The claimant was notified of the grievance outcome, was given the right to appeal but chose not to appeal.

47. Mark Collins became the claimant's line manager in May 2016. Subsequently Mark Collins expressed concerns about the claimant's performance and in March 2017 the claimant was placed on a formal improvement plan.

48. In or around April 2017 it was reported to Mr Andrew Birkett, Regional Services manager for Iceland refrigeration, that the claimant had had an accident at work on 11 April 2017 and had gone off sick as a result.

49. On the claimant's return to work on 25 April 2017 Mr Mark Collins carried out a Return to Work interview. Mr Collins asked the claimant about the accident on 11 April 2017. The respondent had a duty to investigate the accident under the RIDDOR procedure. No allegations of dishonesty were made by Mark Collins against the claimant during that interview.

50. David Haggart later informed Mr Birkett that he had been contacted by Andrea Roberts from the respondent's insurance department because she had found some CCTV footage which may be relevant to the claimant's accident.

51. Part of Andrea Robert's duties included the investigation of accidents. As part of an investigation into another incident at the store where the claimant had suffered his fall, she came across some CCTV footage of the claimant, which was passed on to Mr Birkett. There is no satisfactory evidence before this tribunal that either Andrea Roberts knew the claimant, or was aware of his disclosures of information or knew of any health and safety concerns raised by him.

52. Mr Birkett reviewed the CCTV footage provided by Andrea Roberts, which showed the claimant taking a piece of plastic from a bin, some 20 minutes before his fall. Mr Birkett decided that there should be a formal investigation of the claimant's accident. He asked David Haggart to complete an investigation. However, Mr Haggart indicated that he was not the best person to conduct the investigation because the claimant had previously raised a grievance against him for alleged bullying and harassment. Mr Birkett therefore decided to carry out the investigation himself.

53. Mr Birkett interviewed the claimant on 2 May 2017 in the presence of Charlotte Ashdown, the HR manager. Mr Birkett showed the claimant two separate pieces of CCTV footage from the date of the accident, 11 April 2017. The earlier piece of CCTV footage showed the claimant hunting around in, and retrieving a piece of plastic from, a bin in a store area at the back of a store. The next piece of CCTV footage showed the claimant falling to the ground. The claimant was given an opportunity to explain why he had taken the piece of plastic from the bin. Mr Birkett was not satisfied with the claimant's explanation and made the decision to suspend the claimant pending an investigation into an allegation that the claimant had staged the fall and subsequently taken two weeks off sick.

54. There is no satisfactory evidence to support the claimant's assertion that he was bullied during the course of this investigatory meeting on 2 May 2017. The tribunal accepts the evidence of Mr Birkett that he did not bully the claimant but asked a series of questions as summarised in the notes of the meeting (p89 of

RB). The claimant was given full opportunity to provide his explanation. For example, at the claimant's request, Mr Birkett agreed to go out to the claimant's van so that the claimant could show him how he commonly used pieces of plastic to wrap screws. During that visit Mr Birkett noted that there were no screws wrapped in the sort of plastic identified in the CCTV. He noted that there were screws and other sharp objects placed in plastic pouches or bags;

55. As part of his investigation Mr Birkett interviewed two colleagues, Darryl Wright and Janette Swindles, who had come to the claimant immediately after the fall. Both witnesses said that they initially thought the claimant was playing a prank and that the fall did not look real, that the claimant had pointed to the shrink wrap on the floor and he said that he had fallen over it. Both witnesses told Mr Birkett that they were fairly certain that the piece of plastic the claimant retrieved from the bin was the same piece of plastic which the claimant said he fell on shortly afterwards. Mr Birkett asked both witnesses about the pathway taken by the claimant before the fall. Both said that the only thing there was the piece of plastic. Neither reported that the floor was wet or slippery. Notes of those interviews were made and signed by Darryl Wright (p98 of RB) and Janette Swindles (p102 of RB) to confirm the notes as a true and accurate record of the meeting.

56. During the course of his investigation Mr Birkett asked for the full CCTV footage of the time that the claimant was in store but was told that it was not available.

[On this the tribunal accepts the evidence of Mr Birkett. This evidence did come late in the day, at the hearing itself. However, the claimant did not, during the investigation and disciplinary process, ask for the CCTV footage of the area for the period of time between the time he took the piece of plastic and the time of his fall. He did not at any time assert that his actions immediately prior to the fall were relevant in deciding whether the fall was a genuine accident or whether it had been staged. This question of the "missing piece of CCTV footage" has only been clarified at this hearing]

57. Mr Birkett carried out a further investigation meeting with the claimant on 9 May 2017, when the claimant was accompanied by his trade union representative. Notes were made of that meeting and signed to confirm them as a true and accurate record of the meeting. At the meeting:

57.1. the claimant said that since he had raised a grievance in 2016 against David Haggart, he had been subjected to several disciplinary investigations by Mark Collins, his supervisor. Mr Birkett advised the claimant that he could make complaint about but that this was entirely separate and did not affect Mr Birkett's investigation of these events;

57.2. The claimant commented that this had been the third investigation meeting as the first meeting had been conducted by Mark Collins. Mr

Birkett explained that Mark Collins had conducted the first meeting about the accident at work following normal procedure but since then CCTV evidence had come to light which led him to consider that a more senior manager should continue the investigation;

57.3. There was a detailed discussion about the CCTV evidence, which was played and paused repeatedly. The claimant was asked a number of questions about how the fall had taken place. In particular, the claimant was asked:

57.3.1. Why he had taken the piece of plastic out of the bin;

57.3.2. Why he had taken a strip of plastic to wrap up screws, rather than take out a plastic bag and place any screws in that;

57.3.3. Whether the piece of plastic he took out of the bin was the same piece of plastic on which it was said he had fallen;

57.3.4. Why he had fallen, whether he has running, whether he had slipped on anything;

57.3.5. Whether his path was clear prior to his fall;

57.3.6. Whether he had told Darryl Wright and Janette Swindles that he had fallen on the piece of plastic, which was seen to be lying on the floor in the claimant's path;

57.4. The evidence of Darryl Wright and Janette Swindles was put to the claimant for comment;

57.5. Neither the claimant nor his representative:

57.5.1. asked for any additional CCTV footage from the day of the accident;

57.5.2. Identified any other witnesses who may be able to assist the investigation

58. Neither Mr Collins nor Mr Haggett provided any evidence to the investigation or disciplinary procedure.

59. Having carried out the investigation Mr Birkett prepared an investigation report (p129 of RB). The investigation report set out Mr Birkett's findings including the following:

> Bob confirmed that he removed a piece of plastic from the waste bin cage in the back area. He appears to do this discreetly and did not mention it to Darryl. Bob states that his reason for taking this plastic from the cage was to wrap up a bag

> of screws that he had in his pocket that have been digging into his leg on his journey from Middleton to Shaw. …
>
> Despite the screws sticking in Bob's leg whilst he was driving, Bob did not remove them from his pocket when he got to Shaw. He stated that he probably used the screws when he fitted the L Guard in the store. Bob could not recall when he wrapped the bag of screws with the plastic wrapping that he had collected and stated that he 'put the wrap in his pocket to do later'
>
> Bob suggested during his interview on 2/5/17 that he could show examples of this method being used to secure similar items in his van. When we visited his van during an adjournment Bob could not show me any examples of plastic wrap being used to secure items in his van.

60. Mr Birkett decided that there was a disciplinary case to answer and outlined the reasons for that recommendation in his report. Mr Birkett took no part in the decision to dismiss.

61. The claimant was advised by letter dated 15 May 2017 (p128 of the RB) that a disciplinary hearing had been arranged. The claimant was provided with a copy of the Investigation report.

62. The claimant did submit a grievance on 15 May 2017 (p136 of RB) raising concerns about the behaviour of Mr Haggart and Mr Collins, the number of investigations of disciplinary charges against him by Mark Collins, being put on a Performance Improvement Plan. The claimant:

    62.1. stated " I have also reported on numerous occasions Health and Safety issues at Iceland Fallowfield, Cheetham Hill and Prestwich but feel that the onus is being put on me and I don't feel that I am getting any support."

    62.2. expressed his feeling that the company was constantly searching for any way to discipline/dismiss him;

    62.3. complained about being called to the investigation meeting on 2 May by Mr Birkett and being suspended.

63. The grievance was considered by Stuart Ware, HR Manager, separately from the disciplinary procedure which led to the claimant's dismissal. A grievance investigation meeting was held on 25 May 2017, when the claimant was represented by his trade union representative. The claimant signed the notes of that meeting as a true reflection of the meeting. During that meeting:

    63.1. The claimant's representative asserted that the claimant felt that he had been subjected to a number of investigations since he had raised his grievance the previous year;

63.2. The claimant confirmed that there had been a mediation following his grievance, that he and David Haggett shook hands and agreed that everything would be ok and they would move on. However, the claimant felt that David Haggett still had a grudge and was getting the claimant's supervisor to do his dirty work;

64. The claimant did not, during the course of that grievance, assert that he was being targeted, single out for detrimental treatment, because he had raised health and safety issues. He made no reference at all to the three written reports referred to at paragraphs 35-37 above.

65. Mr Richard John Cooper, Head of Commercial Operations at the time, dealt with the disciplinary hearing. Mr Cooper had never met the claimant before, had never met him. Mr Cooper was unaware of the health and safety matters raised by the claimant. Mr Cooper did not discuss the issue with Andy Birkett or David Haggett. He relied on the information given to him by HR, in essence the investigation report with attached documents and the CCTV footage, the same information which was available to the claimant. Mr Cooper was unaware of where the CCTV footage had come from. He was unaware of any other accidents which had taken place at the same store.

[On this the tribunal accepts the evidence of Mr Cooper.]

66. The claimant was invited to a disciplinary hearing on 22 May 2017 (p142 of RB). He was advised of the allegation that he had staged an accidental fall at work on 11 April 2017. The claimant was advised of his right to be accompanied by a work colleague or a trade union representative and that summary dismissal was a potential outcome of the hearing.

67. Prior to the disciplinary hearing Mr Cooper viewed the available CCTV footage and photograph stills created from that footage, read the statements, notes of the investigatory interviews with the claimant, the accident report and the investigation report.

68. Before the disciplinary hearing the claimant was provided with copies of the notes of the meetings with the witnesses Darryl Wright and Janette Swindles. His trade union representative asked that:

68.1. The disciplinary hearing be postponed pending determination of the claimant's outstanding grievance;

68.2. The claimant be allowed to cross-examine the witnesses.

69. Both requests were denied. By email dated 19 May 2017 (p144 of the RB) Charlotte Ashdown advised that:

69.1. The claimant had been provided with the opportunity to submit questions which the disciplining manager could submit to the witnesses for their response;

69.2. The grievance was not intrinsically linked to the disciplinary and the issues raised in the grievance did not impact on a fair disciplinary hearing being completed.

70. The disciplinary hearing took place on 22 May 2017, when the claimant was accompanied by his trade union representative, Ross Quinn. Mr Cooper was assisted by Clare Watts, HR Manager. The notes of the disciplinary hearing (pages 68 to 84 of the RB) are wrongly dated 22 April 2017 and were not signed by the claimant as an accurate record of the hearing.

71. During the disciplinary hearing:

71.1. The CCTV footage and photograph stills were reviewed;

71.2. the claimant was asked to provide an explanation for his fall and comment on the statements made by the two witnesses;

71.3. the claimant and his representative were given full opportunity to state their case;

71.4. the claimant did not challenge the CCTV evidence, did not assert that Darryl Wright and Janette Swindles were lying or had any reason to lie;

71.5. Neither the claimant nor his representative raised written questions to be put to the two witnesses;

71.6. the claimant did not assert that there had been another accident in the same place.

72. The hearing was adjourned to allow Mr Cooper to reach a decision. Mr Cooper carried out no further investigation. He reviewed the CCTV footage noting that the CCTV footage did not show what the claimant had tripped on, but showed the claimant stumbling in to the shot of the camera before falling to the ground.

73. In reaching his decision to dismiss Mr Cooper decided whether the claimant had staged the fall. In reaching this decision Mr Cooper considered all the information considered during the disciplinary hearing including the CCTV footage, the stills, the statements, notes of the investigatory interviews with the claimant, the accident report and the investigation report. In reaching his decision Mr Cooper decided that it was highly unlikely that the claimant would tumble forward because he had slipped, stepped on or tripped on such a thin piece of plastic. The HR officer Charlotte Ashdown did not play any part in that

decision making process. Mr Cooper made the decision to dismiss and reconvened the hearing to inform the claimant of the decision to summarily dismiss. The claimant was advised of his right of appeal.

74. In reaching his decision to dismiss Mr Cooper took into account the claimant's long service and clean disciplinary record but decided that the staging of the accident was gross misconduct and far too serious to justify a lesser sanction.

75. Mr Cooper confirmed his decision by letter dated 30 May 2017 (p 163), extracts from which read as follows:

> In reviewing the primary allegation, I needed to be satisfied that you had indeed staged a fall at work rather than simply falling as you would suggest. I have considered all of the evidence available to me to establish a robust picture of the circumstances surrounding the incident that was witnessed by Daryl Wright and Janette Swindles, store colleagues at Shaw store.
>
> You are seen rolling at speed into view of the CCTV cameras at 16.59 on 11 April 2017. While still on the floor, you can clearly be seen pointing behind you and Janette retrieving a piece of plastic wrap. During the investigation, both Daryl and Janette stated that you had confirmed that you had tripped on the piece of plastic wrap. The accident report you completed with Mark Collins also states that you 'tripped on a small piece of shrink wrap'.
>
> I note that your account of the incident changed as the investigation progressed. Although you maintained that you tripped, you were unsure about the likely cause of the incident; shrink-wrap, cardboard, water or a flat-bed. I have referred to the witness statements to determine clarity on this and would observe that both Daryl and Janette confirmed that the floor was clear of any obstacles.
>
> I then considered the significance of the shrink-wrap in helping me to determine whether it is reasonable to conclude that your fall was staged. At 16.37 on 11 April 2017, you can clearly be seen on CCTV looking around the back area of the store and taking a piece of plastic wrap from the bin. During the investigation, you stated that you had taken this plastic to wrap up some screws that were loose in your pocket and digging into your leg. You confirmed with me that the screws were still loose in your pocket after the accident. I note that the suitability of the piece of plastic wrap you took from the bin the purpose of securing the screws was queried during the investigation. You confirmed with me that you had not been able to show Andy Birkett any examples of screws secured in a similar way in your van during the investigation. I therefore find your explanation for taking the plastic wrap from the bin for the purpose of securing screws in your pocket improbable.
>
> In summary, in reaching my decision I gave diligent consideration to the following facts:
>
> - Both colleagues who witnessed the incident questioned the authenticity of your fall. Janette stated that you fell 'like a stuntman' and that the fall 'looked fake'. Daryl questioned whether you were playing a prank.

- You were unable to share a reasonable account of the incident with me that would in any way validate the speed of your fall as seen on CCTV, the probable cause of your fall or finally why your explanation of the fall changed during the investigation.

- You were seen taking a piece of plastic from the bin some 20 minutes before the incident that you did not subsequently use for the purpose you said you selected.

For the reasons noted above, I determine that it is reasonable to believe that you staged a fall at work and after carefully considering all the facts available to me have determined to summarily dismiss you……

76. The letter confirmed the claimant's right of appeal.

77. The claimant exercised that right by email of 2 June 2017 (p165 of the RB).

78. Mrs Wendy Swash, Head of Delivered Sales was asked to consider the claimant's appeal. She had no prior involvement or knowledge of the incidents. She did not know the claimant, did not know of him. She did not know anyone in that area of the business. She was unaware of the disclosures of information set out at paragraphs 35 – 37 above, was unaware of any health and safety issues raised by the claimant prior to the disciplinary process.

79. An appeal hearing took place on 14 June 2017, when the claimant was accompanied by his trade union representative, Ross Quinn. Notes of the appeal hearing were prepared and signed by the claimant as an accurate record (p186 of the bundle).

80. Mrs Swash adjourned the appeal hearing as she wished to conduct a further investigation.

81. Mrs Swash investigated what had prompted the investigation into the claimant's accident and how the respondent had become aware of the CCTV footage. As part of her investigation Mrs Swash spoke to Andrea Roberts, Andy Birkett Charlotte Ashdown and David Haggett. Notes were made of those interviews and were signed as an accurate record (p195 – 209 of the RB).

82. Having conducted that investigation Mrs Swash found that Andrea Roberts at Head Office was reviewing footage from another accident at the same store and she accidentally came across the footage of the claimant taking the plastic approximately 20 minutes before the fall. Mrs Swash for this reason concluded that the investigation began because of that involvement of Andrea Roberts and it was not caused by any other agenda.

83. Mrs Swash considered the points raised by the claimant during the course of the appeal but after her investigation upheld the decision to dismiss for the reasons set out in her letter dated 12 July 2017 (p230-233 of the RB).

84. The respondent has not disclosed to the claimant or provided this tribunal with copies of risk assessments relating to the stores about which the claimant raised his health and safety concerns. It has produced other health and safety documents relating to those stores.

85. The respondent operates its own published disciplinary policy. That policy does not allow for representation at an investigation meeting as of right. The respondent would consider any requests for representation.

The Law

86. Under s43A Employment Rights Act 1996 (ERA 1996) a protected disclosure means a qualifying disclosure (as defined by s43B) which is made by a worker in accordance with any of sections 43C to 43B.

87. Any disclosure which, in the reasonable belief of the worker, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered is a qualifying disclosure - S.43B(1)(d).

88. The fact that a worker must have a 'reasonable belief' does not mean that the worker's belief must necessarily be true and accurate. The statutory provisions require only that the information disclosed 'tends to show' that the relevant failure has occurred, is occurring or is likely to occur. It follows that there can be a qualifying disclosure of information even if the worker is wrong, but reasonably mistaken, in his or her belief. In **Darnton v University of Surrey 2003 ICR 615, EAT,** the EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as understood by the worker at the time the disclosure was made, and not on the facts as subsequently found by the tribunal.

89. For a disclosure to qualify under that section, the worker need only have a reasonable belief that his or her disclosure is made in the public interest.

90. Although the word 'disclosure' is not itself defined in the ERA, it is clear that the phrase 'disclosure of information' in S.43B is intended to have a wide reach and that an employee simply has to communicate the information by some effective means in order for the communication to constitute a disclosure of that information.

91. S.43L(3) ERA 1996 provides that 'any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention'. Accordingly, protection is not denied simply because the information being communicated was already known to the recipient.

92. Under s43C ERA 1996 a qualifying disclosure is made in accordance with this section if the worker makes the disclosure to his employer. The statutory provisions are silent on the identity of the person within the employing company or organisation to whom a disclosure should be made in order for it to be regarded as having been made to the worker's 'employer. The IDS Handbook on Whistleblowing suggests that a sensible construction would be that a disclosure made to any person senior to the worker with express or implied authority over the worker should be regarded as having been made to the employer. A disclosure made to a junior colleague or even one of equal status, on the other hand, would not be covered.

93. S.103A ERA 1996 renders the dismissal of an employee automatically unfair where the reason (or, if more than one reason, the principal reason) for his or her dismissal is that he or she made a protected disclosure.

94. When faced with a case in which the claimant alleges that he or she has made multiple protected disclosures, a tribunal should ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal. This was confirmed in **El-Megrisi v Azad University (IR) in Oxford EAT 0448/08,** where the EAT overturned a tribunal's decision on the basis that it had isolated the last of a series of disclosures, concluded that it was not the reason for dismissal, and gone on to find that the dismissal was because E was an 'obstructive nuisance' who objected to 'questionable' tasks. On the facts of the case, it was clear that the employer's negative view of E was formed because she had made protected disclosures, and that these disclosures, taken cumulatively, were the reason for dismissal.

95. In **Trustees of Mama East African Women's Group v Dobson EAT 0220/05** the EAT stated that establishing the reason for dismissal in a S.103A claim requires the tribunal to determine the decision-making process in the mind of the dismissing officer. This requires the tribunal to consider the employer's conscious and unconscious reason for acting as it did.

96. In **Royal Mail Ltd v Jhuti 2018 ICR 982, CA** Underhill LJ referred to **Orr v Milton Keynes Council 2011 ICR 704, CA** in which the Court of Appeal had held that the focus must be on the knowledge, or state of mind, of the person who actually took the decision to dismiss. The statutory right not to be unfairly dismissed depends on there being unfairness on the part of the employer: unfair or even unlawful conduct on the part of individual colleagues or

managers is immaterial unless it can properly be attributed to the employer. Where a dismissal comes about because of false evidence given by a colleague in a disciplinary hearing, or manipulation by a line manager with no responsibility for dismissal, there are no grounds for attributing the manipulator's motivation to the employer. There may be grounds for doing so when the line manager, although not actually taking the decision to dismiss, has played a formal role in the decision-making process

97. An employer must show the reason for dismissal, or if more than one, the principal reason, and that the reason fell within one of the categories of a potentially fair reason set out in Section 98(1) and (2) Employment Rights Act 1996 ("ERA 1996"). It is for the employer to show the reason for dismissal and that it was a potentially fair one, that is, that it was capable of justifying the dismissal. The employer does not have to prove that it did justify the dismissal because that is a matter for the tribunal to assess when considering the question of reasonableness.

98. Misconduct is a potentially fair reason for dismissal. **British Home Stores Ltd v Burchell [1980] ICR 303** provides useful guidelines in determining this question. It sets out a three-fold test stating that the employer must show that:

- he genuinely believed that the conduct complained of had taken place;
- he had in mind reasonable grounds upon which to sustain that belief; and
- At the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

The Tribunal notes and takes regard of the fact that the guidelines set out in **Burchell** are guidelines only and that the burden of proof on the question of reasonableness does not fall upon the employer under this head, and is a question for the Tribunal to decide, when appropriate, in determining the question of reasonableness under Section 98(4) ERA 1996, under which the burden of proof is neutral. **Boys and Girls Welfare Society v McDonald [1997] ICR 693**. as confirmed in **West London Mental Health Trust v Sarkar [2009] IRLR 512,** which was not disturbed on this point by the Court of Appeal. As HHJ Peter Clark and the Employment Appeal Tribunal in **Sheffield Health & Social Care NHS Foundation Trust v Crabtree** UKEAT/0331/09 observed in paragraph 13, **British Home Stores Ltd v Burchell** was decided before the alteration of the burden of proof effected by section 6 of the **Employment Act 1980**. At paragraph 14 the Employment Appeal Tribunal held:

"The first question raised by Arnold J: did the employer have a genuine belief in the misconduct alleged" goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer."

At paragraph 15 the EAT held:

"However, the second and third questions, reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under section 98(4) Employment Rights Act 1996 and there the burden is neutral."

99. Once the employer has shown a potentially fair reason for dismissing, the Tribunal must decide whether that employer acted reasonably or unreasonably in dismissing for that reason. The burden of proof is neutral. It is for the Tribunal to decide. Section 98(4) ERA 1996 states:-

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

The test of whether or not the employer acted reasonably is an objective one, that is, Tribunals must as industrial juries determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. There is a band of reasonable responses. The Tribunal must determine whether the employer's action fell within a band of reasonable responses. **Iceland Frozen Foods Limited v Jones [1983] ICR 17**. (Approved by the Court of Appeal in **Post Office v Foley**, **HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827**. The range of reasonable responses test (the need for the tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed**. Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.** The tribunal bears that in mind and applies that test in considering all questions concerning the fairness of the dismissal. In determining the reasonableness of an employer's decision to dismiss, the tribunal may only take account of those facts (or beliefs) which were known to the employer at the time of the dismissal.

100. The reasonable investigation stage has been subjected to refinement in two judgments, which are relevant here. First, **A v B** [2003] IRLR 405, a judgment of Elias J (President) and members, indicates that there is to be a standard of investigation which befits the gravity of the matter charged. If what is sought

to be sanctioned is a warning, the standard of investigation will be lower than where dismissal is concerned. Elias LJ, now in the Court of Appeal, reinforced that position in **Salford v Roldan** [2010] EWCA Civ 522, indicating that where the circumstances of a dismissal would create serious consequences for the future of an employee, such as deportation, particular care must be given to the investigation.

101. Whether or not the employer acts fairly depends on whether in all the circumstances a fair procedure, falling within the range of reasonable responses, was adopted. The form and adequacy of a disciplinary enquiry depends on the circumstances of the case. What is important is that, in the interests of natural justice, the employee can be given a chance to state his or her case in detail with sufficient knowledge of what is being said against him or her to be able to do so properly. **Bentley Engineering Co Limited Mistry [1979] ICR 2000**.

102. In deciding whether the dismissal is fair the Tribunal must consider whether summary dismissal falls within the band of reasonable responses, taking into account all the surrounding circumstances, the employer's practice, the contract of employment and any definitions of gross misconduct contained therein, the knowledge of the employee, the seriousness of the offence. What conduct amounts to gross misconduct will depend on the facts of the individual case. Generally gross misconduct is conduct which fundamentally undermines the employment contract, is a deliberate and wilful contradiction of the contractual terms or amounts to gross negligence. The current ACAS code gives examples of gross misconduct which includes theft or fraud/physical violence or bullying/deliberate and serious damage to property/serious insubordination/serious misuse of an organisation's property or name/deliberately accessing internet sites containing pornographic, offensive or obscene material/unlawful discrimination or harassment/bringing the organisation into serious disrepute/serious incapability at work brought upon by alcohol or illegal drugs/causing loss, damage or injury through serious negligence/a serious breach of health and safety rules/a serious breach of confidence.

103. The tribunal has considered the current ACAS Code of Practice and the six steps which an employer should normally follow when handling disciplinary issues, namely:

- Establish the facts of each case;
- Inform the employee of the problem;
- Hold a meeting with the employee to discuss the problem;
- Allow the employee to be accompanied at the meeting
- Decide on appropriate action

- Provide employees with an opportunity to appeal.

The tribunal notes that the Code states that it is important to deal with issues fairly including dealing with issues promptly and without unreasonable delay, acting consistently carrying out any necessary investigations, and giving the employee the opportunity to state their case before any decisions are made.

104. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues
(including, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

105. The first question is whether the claimant made a protected disclosure within the meaning of s47B ERA 1996. The claimant relies on the disclosures of information set out at page 40 of the bundle. However, the claimant has in evidence before the tribunal corrected the dates upon which the information was given. Therefore, the three disclosures of information relied upon are those set out at paragraphs 35-37 above. The respondent accepts and the tribunal agrees that these statements are disclosures qualifying for protection under s43B(1)(d). The respondent does not accept that these specific disclosures of information were made to the claimant's employer for the purposes of s43C. Whereas the tribunal would agree with the respondent that disclosure of information to a shop floor employee with no responsibility for health and safety may not amount to a disclosure to the employer, the tribunal finds that when the claimant sent each of the written reports arising from the PPM audit to the central database, he was making a qualifying disclosure to his employer for the purpose of s43C ERA 1996. This was a written report, the purpose of which included the raising of health and safety issues; the company procedure was that the reports would be reviewed by the technical supervisor to ensure that appropriate action would be taken. The claimant did not know at the time that the technical supervisor was failing in his duty and was not reviewing the reports: nobody knew. The fact that the claimant did not at the same time disclose the same information to his supervisor by different means does not invalidate the sending of the written report to the database.

106. The claimant did, in sending the written reports detailed at paragraphs 35-37 above, make protected disclosures within the meaning of s43A ERA 1996.

107. The next question is whether the claimant was dismissed for the reason or principal reason that he had made those protected disclosures.

108. The claimant was dismissed and the effective date of termination was 22 May 2017.

109. The tribunal has considered the reason for dismissal. The tribunal has considered all the circumstances and, in particular, the following:

109.1. the claimant made the three protected disclosures;

109.2. the claimant did not, at the same time as making those disclosures, disclose the information to either his supervisor at the time, or Mark Collins or Mr David Haggart;

109.3. Mr Birkett was not aware of the disclosures until August 2016;

109.4. The claimant raised other health and safety issues with his supervisor, Mark Collins, in relation to Cheetham Hill in August 2016;

109.5. In or around February/ March 2017 the claimant raised with Mark Collins further health and safety issues in relation to trip hazards at the Prestwich store;

109.6. The respondent has been slow in remedying some of these health and safety issues;

109.7. The respondent has not disclosed to the claimant or produced to this tribunal risk assessments for the stores in relation to which the claimant has raised his health and safety concerns;

109.8. The respondent had a system for reviewing any health and safety concerns raised by the engineers. It is clear that the system failed. The technical supervisor had failed in the duty to review the reports and it took some years before the respondent noticed that fundamental failure and took steps to remedy it. It is of great concern that a large company in this line of business could fail to notice that one of its procedures to safeguard the health and safety of its staff and members of the public could be ignored in this way;

109.9. On 9 May 2016 the claimant raised a formal grievance against David Haggart (see paragraph 44 above). In his grievance the claimant did not assert that he was being targeted by David Haggart because the claimant raised health and safety concerns or because he had made protected disclosures;

109.10. Charlotte Ashdown, HR officer, investigated the claimant's grievance but found no evidence to uphold the claimant's complaint. The claimant chose not to appeal that decision;

109.11. Mark Collins became the claimant's line manager in May 2016. Subsequently Mark Collins expressed concerns about the claimant's performance and in March 2017 the claimant was placed on a formal improvement plan;

109.12. Mr Andrew Birkett was informed that the claimant had had an accident at work on 11 April 2017 and had gone off sick as a result;

109.13. On the claimant's return to work on 25 April 2017 Mr Mark Collins carried out a Return to Work interview. Mr Collins asked the claimant about the accident on 11 April 2017. The respondent had a duty to investigate the accident under the RIDDOR procedure. No allegations of dishonesty were made by Mark Collins against the claimant during that interview;

109.14. David Haggart later informed Mr Birkett that he had been contacted by Andrea Roberts from the respondent's insurance department because she had found some CCTV footage which may be relevant to the claimant's accident;

109.15. Having reviewed the CCTV footage provided by Andrea Roberts, Mr Birkett decided that there should be a formal investigation of the claimant's accident. He asked David Haggart to complete an investigation. However, Mr Haggart indicated that he was not the best person to conduct the investigation because the claimant had previously raised a grievance against him for alleged bullying and harassment. Mr Birkett therefore decided to carry out the investigation himself;

109.16. Mr Birkett interviewed the claimant on 2 May 2017 in the presence of Charlotte Ashdown, the HR manager (see paragraphs 53 and 54 above). The claimant was shown all the available CCTV footage of the incident and was asked for an explanation of his actions. Mr Birkett was not satisfied with the claimant's explanation and made the decision to suspend the claimant pending an investigation into an allegation that the claimant had staged the fall and subsequently taken two weeks off sick;

109.17. There is no satisfactory evidence to support the claimant's assertion that he was bullied during the course of this investigatory meeting on 2 May 2017 (see paragraphs 53 and 54 above);

109.18. As part of his investigation Mr Birkett interviewed two colleagues, Darryl Wright and Janette Swindles (see paragraph 55 above). Both witnesses said that they initially thought the claimant was playing a prank

and that the fall did not look real, that the claimant had pointed to the shrink wrap on the floor and he said that he had fallen over it. Both witnesses told Mr Birkett that they were fairly certain that the piece of plastic the claimant retrieved from the bin was the same piece of plastic which the claimant said he fell on shortly afterwards. Mr Birkett asked both witnesses about the pathway taken by the claimant before the fall. Both said that the only thing there was the piece of plastic. Neither reported that the floor was wet or slippery;

109.19. Mr Birkett carried out a further investigation meeting with the claimant on 9 May 2017, when the claimant was accompanied by his trade union representative (see paragraph 57 above). At the meeting the claimant said that since he had raised a grievance in 2016 against David Haggart, he had been subjected to several disciplinary investigations by Mark Collins, his supervisor. Mr Birkett advised the claimant that he could make complaint about but that this was entirely separate and did not affect Mr Birkett's investigation of these events. There was a detailed discussion about the CCTV evidence, which was played and paused repeatedly. The claimant was given full opportunity to provide an explanation and comment on the evidence of the witnesses;

109.20. Having carried out the investigation Mr Birkett prepared an investigation report (p129 of RB). Mr Birkett decided that there was a disciplinary case to answer. Mr Birkett took no part in the decision to dismiss. There is no satisfactory evidence to support any assertion that Mr Birkett in some way manipulated the investigation, or falsified the evidence relied upon, because of his knowledge of the protected disclosures and/or the raising of other health and safety issues by the claimant. The evidence relied upon was principally the CCTV footage and the evidence of the claimant and the two witnesses. There is no satisfactory evidence to support an assertion that the CCTV footage was false or that the witnesses were lying. The claimant did not make that assertion at the time;

109.21. the investigation undertaken by Mr Birkett was conducted because of the discovery of the CCTV coverage by Andrea Roberts of the claimant taking a piece of plastic out of the bin. There is no evidence that Andrea Roberts either knew the claimant or knew of his disclosures of information or knew of any health and safety concerns raised by him. Neither Mr Collins nor Mr Haggett prompted the investigation, neither of them provided any evidence to the investigation or disciplinary procedure. Even if Mr Haggett and Mr Collins did hold a grudge against the claimant, did dislike him, did want him out of the business, they played no part at all in the disciplinary process or the decision to dismiss;

109.22. Mr Richard John Cooper, Head of Commercial Operations at the time, dealt with the disciplinary hearing. Mr Cooper had never met the claimant before, had never met him;

109.23. In reaching his decision to dismiss Mr Cooper viewed the CCTV footage, viewed the stills, read the statements, notes of the investigatory interviews with the claimant's, reviewed the accident report and read the investigation report;

109.24. the claimant did not during the disciplinary hearing, challenge the CCTV evidence, did not assert that Darryl Wright and Janette Swindles were lying or had any reason to lie;

109.25. There is no satisfactory evidence that Mr Cooper took into account any other evidence in reaching the decision to dismiss. Mr Cooper was unaware of the health and safety matters raised by the claimant. Mr Cooper did not discuss the issue with Andy Birkett or David Haggett before reaching his decision;

109.26. The assertion that the HR officer Charlotte Ashdown was biased in some way against the claimant because of her earlier involvement in the claimant's grievance is without merit. In this investigation/ disciplinary action Charlotte Ashdown provided a support role. There is no satisfactory evidence to support an assertion that she in some way manipulated to procedure to ensure the claimant's dismissal. She refused to the request for an adjournment of the disciplinary hearing pending determination of the claimant's grievance, she refused the request for cross-examination of witnesses, but this was not a manipulation of the evidence. She did not play any part in the decision-making process. The suggestion that the dismissing officer and appeal officers acted under the instruction or influence of Charlotte Ashdown, and/or Mr Collins and/or Mr Haggett, and/or because of some companywide determination to remove the claimant from office is completely without merit, unsupported by any satisfactory evidence.

Having considered all the evidence, the tribunal has considered the conscious and unconscious reasons in the mind of the dismissing officer at the time. The tribunal has considered whether there are any facts from which the tribunal could draw the inference that the real reason for dismissal was the protected disclosures, or indeed, the later health and safety issues raised by the claimant. There are facts to indicate that the respondent has failed to follow its own procedures for the review and correction of any health and safety issues raised by its engineers, including the claimant. However, there is no satisfactory evidence to support an assertion that the claimant has been treated unfairly because of his reporting of health and safety concerns, either before or at the time of his dismissal. The claimant did not, in either of his grievances, assert that the reason for the unfair treatment of him by

Mr Haggett and Mr Collins was related to the protected disclosures. Having considered all the circumstances the tribunal accepts the evidence of Mr Cooper that he was unaware of the protected disclosures, unaware of the health and safety issues raised by the claimant. Mr Cooper had no involvement in the management of the claimant. This is not a case where a dismissing officer acts on reasons outside the disciplinary process, outside the actual allegation of misconduct made against the claimant. Mr Cooper was independent and brought an independent judgment to bear on the basis of the relevant evidence presented to him. That evidence had not been manipulated in any way by Mr Birkett, the only manager involved in the disciplinary process who was aware of the protected disclosures and the other health and safety issues raised by the claimant. That evidence had not been manipulated by Charlotte Ashdown, Mr Collins or Mr Haggett. In all the circumstances, the tribunal finds that the reason uppermost in the dismissing officer's mind for his decision to dismiss was his honest and genuine belief that the claimant had staged an accident at work. The letter confirming dismissal (p163 of the RB) accurately reflects the real reason for dismissal. The disclosures of information made by the claimant in 2014 and 2015, his raising of health and safety concerns in the performance of his duties, did not form any part of the reason for dismissal.

110. The claim under s103a Employment Rights Act is not well-founded.

111. The question is whether the dismissal was unfair under s98 ERA 1996.

112. The reason for the dismissal was the claimant's conduct. Conduct is a potentially fair reason for dismissal within s98 (1) and (2) Employment Rights Act 1996.

113. The tribunal has considered all the circumstances of this case, including those matters referred to in s98(4) Employment Rights Act 1996, to determine whether, in all those circumstances, the dismissal of the claimant for the reason stated was fair or unfair. In deciding whether the decision to dismiss was fair or unfair the tribunal reminds itself that it is not for the tribunal to substitute its view for that of the employer. The question is whether the respondent acted fairly within the band of reasonable responses of a reasonable employer in concluding that this employee was guilty of gross misconduct and dismissing him.

114. Having considered whether the respondent carried out a reasonable investigation of the alleged misconduct, the tribunal notes in particular as follows:

114.1. On the claimant's return to work on 25 April 2017 Mr Mark Collins carried out a Return to Work interview. Mr Collins asked the claimant about the accident. That was not part of any disciplinary action. The respondent

had a duty to investigate the accident under the RIDDOR procedure. No allegations of dishonesty were made by Mark Collins against the claimant;

114.2. The investigation undertaken by Mr Birkett was conducted because of the discovery of the CCTV coverage by Andrea Roberts of the claimant taking a piece of plastic out of the bin. Mr Birkett interviewed the only witnesses to the incident. The claimant was interviewed. Mr Birkett asked for the full CCTV footage of the time that the claimant was in store but was told that it was not available;

114.3. In any event, the non-availability of the entire CCTV footage did not undermine the fairness of the investigation. The claimant was interviewed twice. He did not assert that anything of relevance had occurred in the back room, the scene of the incident, prior to his fall;

114.4. The failure of the respondent to investigate the circumstances of the second accident, which Andrea Roberts had been investigating when she found the additional CCTV footage of the claimant, does not render the investigation unfair. The claimant did not during the investigation or disciplinary process assert that the area where he fell was an accident hot spot, that there had been numerous other accidents there. Mr Birkett asked both witnesses about the pathway taken by the claimant before the fall. Both said that the only thing there was the piece of plastic. Neither reported that the floor was wet or slippery. The assertion that the second accident had some link to, or could assist in the investigation of the claimant's fall is without merit;

114.5. The involvement of Mr Birkett as investigating officer did not render the investigation unfair. Mr Birkett was mentioned in the formal grievance letter but only in relation to the calling of the first investigation meeting without notice and the claimant's suspension. The claimant did not complain that Mr Birkett was in some way biased and should not be the investigating officer. Mr Birkett took no part in the decision to dismiss. There is no satisfactory evidence to support any assertion that Mr Birkett in any way engineered the investigation to secure the claimant's dismissal. Notes were taken of the investigatory interviews with the claimant. Darryl Wright and Janette Swindles were interviewed, notes were taken, each witness signed the notes as a true and accurate record. The claimant did not assert that those witnesses were lying. The CCTV footage was not challenged.

Having considered all the circumstances the tribunal finds that there was a reasonable investigation. Applying the principles confirmed in **A v B [2003] IRLR 405**, the tribunal is satisfied and finds that the standard of investigation did befit the gravity of the matter charged. There were no other witnesses. The claimant did not suggest any further investigation was necessary to get to the truth of the allegation.

115. The tribunal has considered whether, having conducted that investigation, the respondent had reasonable grounds to support its belief. The tribunal notes in particular that the investigation showed that:

115.1. The witnesses said that they initially thought that the fall was faked;

115.2. The witnesses were confident that the piece of plastic which the claimant said he had fallen on was the same piece of plastic which the claimant had taken from the bin;

115.3. The claimant did not deny taking the plastic from the bin, did not assert that the witnesses were lying;

115.4. The investigation showed that the claimant clearly said at the outset, both to the witnesses and Mark Collins, that he had fallen on the piece of plastic. After being shown the CCTV of him taking the plastic from the bin the claimant did change his story, did seek to provide another explanation for the fall;

115.5. The witnesses were clear that the pathway was clear: the only item in the claimant's path was the piece of plastic;

115.6. the respondent was reasonable in concluding that the claimant's explanation for taking the piece of plastic from the bin was unsatisfactory. Mr Birkett went to the claimant's van to investigate the claimant's assertion that he normally wrapped sharp screws in bubble wrap/plastic. The claimant's assertion that plastic is plastic is not correct. The respondent was reasonable in rejecting the claimant's explanation on the basis that there was no evidence that it was the practice of the claimant to place loose screws and other fittings in long thin pieces of fabric. The respondent was reasonable in concluding that placing sharp objects in plastic bags/pouches, is different from wrapping such objects in long pieces of plastic;

115.7. The CCTV footage did not show the beginning of the fall, the reason why the claimant had tripped or slipped. It was not possible to determine the actual cause of the fall from the CCTV footage. It does seem highly unlikely that the claimant would deliberately fall and run the risk of serious injury. The claimant could have genuinely slipped and not known what had caused the slip. However, there were reasonable grounds to support the respondent's belief that the claimant had staged the accident bearing in mind in particular that the claimant had taken a piece of plastic from the bin, had on the evidence of the witnesses identified that piece of plastic as the cause of the fall, and then gave unsatisfactory and inconsistent evidence in the disciplinary hearing. The respondent was reasonable in its

belief that it was highly unlikely that the claimant would tumble forward because he had slipped, stepped on or tripped on such a thin piece of plastic. There were more solid objects in the vicinity of the fall, but the respondent was reasonable in accepting the evidence of the witnesses that at the time of the fall the claimant's pathway was clear.

116. Having considered all the circumstances the tribunal finds that the respondent did have reasonable grounds to support its belief.

117. Having considered the procedure adopted by the respondent the tribunal notes and finds that:

117.1. the specific allegation of misconduct was put to the claimant who was given full opportunity to state his case both during the investigation and at the disciplinary and appeal hearings;

117.2. The failure to give notice of the investigatory meeting on 2 May and to allow for representation does not render the procedure unfair. There was no provision in the disciplinary policy which allowed for representation. The claimant did not ask for a companion at that meeting;

117.3. the respondent followed a fair disciplinary procedure in that the claimant was advised of the right to be represented at the disciplinary and appeal hearings, the claimant and his representative were given full opportunity to state their case and the matters put forward on behalf of the claimant were considered by the dismissing officer and appeal officers before reaching their decisions;

117.4. The failure to allow the claimant the opportunity to cross examine witnesses does not render the decision unfair. It was reasonable to ask the claimant and his representative to prepare written questions for the witnesses. They chose not to exercise that right;

117.5. the claimant was advised of his right of appeal and exercised that right.Ms Swash conducted a reasonable investigation to determine the reason for the investigation of the claimant's accident, to establish whether there was an underlying motive for the disciplinary action and was satisfied that the action of Andrea Roberts was the reason for the investigation, not any other agenda;

117.6. It was reasonable for the respondent to treat the claimant's grievance completely separate and to proceed with the disciplinary action before the outcome of that grievance had been determined. Ms Swash's investigation clearly showed that neither Mr Collins nor Mr Haggett had any involvement in the disciplinary process. The respondent acted reasonably by appointing two managers who did not know the claimant, did not know this particular part of the business, to conduct the disciplinary and appeal processes.

In all the circumstances the tribunal finds that the, viewed overall, the procedure adopted was fair and complied with the ACAS guidelines.

118. The tribunal has considered all the circumstances to decide whether, in reaching the decision to dismiss, the respondent acted within the band of reasonable responses of a reasonable employer faced with similar circumstances. The tribunal notes in particular that:

118.1. The claimant had a clean disciplinary record and long service;

118.2. The respondent held the honest and genuine belief that the claimant was guilty of an act of dishonesty. This was a very serious matter and clearly the staging of an accident at work amounts to gross misconduct. The claimant held a very responsible position, engaged in matters of health and safety.

In all the circumstances the tribunal finds that dismissal did fall within the band of reasonable responses. The tribunal has considerable sympathy for the claimant who has in the course of the disciplinary procedure expressed the wish to continue to work for the respondent until his retirement. However, it is not for the tribunal to substitute its view. Where an employee, even of long service and with a clean disciplinary record, is honestly and genuinely found to have committed an act of gross misconduct, then dismissal falls within the band of reasonable responses.

119. Taking into account all the circumstances the tribunal finds that the dismissal was fair.

Employment Judge Porter

Date: 20 December 2018

REASONS SENT TO THE PARTIES ON
20 December 2018

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FOR THE TRIBUNAL OFFICE