# THE EMPLOYMENT TRIBUNALS

**Claimant** Mr S Weston

**Respondent** RPC Containers Ltd

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

HELD AT NORTH SHIELDS ON 25th-27th April 2018
EMPLOYMENT JUDGE GARNON ( sitting alone)

*Appearances*
For Claimant Mr K Ross of Counsel
For Respondent Mr M Dulovic of Counsel

## JUDGMENT

The Judgment of the Tribunal is:
The claim of breach of contract is dismissed on withdrawal by the claimant
The claim of unfair dismissal is not well founded and is dismissed.

## REASONS

### 1. Introduction and Issues

1.1. The claimant, born 6th December 1947 , was employed as an electrician from 26 August 2005 . His employment was terminated without notice on 15 June 2017 but he was, later, paid in lieu . He withdrew his claim for wrongful dismissal.

1.2. The issues are:
1.2.1. What were the facts known to, or beliefs held by the employer which constituted the reason, or if more than one the principal reason, for the dismissal?
1.2.2. Were they, as the respondent alleges, related to the employee's conduct?
1.2.3. Having regard to that reason, did the employer act reasonably in all the circumstances of the case:
(a) in having reasonable grounds after a reasonable investigation for its beliefs
(b) in following a fair procedure
(c) in treating that reason as sufficient to warrant dismissal?
1.2.4. If the employer acted fairly substantively but not procedurally, what are the chances it would still have dismissed if a fair procedure had been followed?
1.2.5. If dismissal was unfair, did the employee cause or contribute to the dismissal by culpable and blameworthy conduct.

## 2. The Relevant Law

2.1. Section 98 of the Employment Rights Act 1996 ("the Act") provides:
"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or if more than one the principal reason) for dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it relates to .. the conduct of the employee."

**The Reason**
2.2. In Abernethy v Mott Hay & Anderson, Cairns L.J. said the reason for dismissal is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. The reason must be established as at the time of the initial decision and at the conclusion of any appeal. Although it is an error of law to over minutely dissect the reason for dismissal, it is essential to determine the constituent parts of the reason. I will mention in my conclusions another case on this point the relevance of which will be more apparent when the facts have been set out.

2.3. Thomson-v-Alloa Motor Company held a reason relates to conduct if, whether the conduct is inside or outwith the course of employment, it impacts in some way on the employer/employee relationship. Misconduct and incapability are sometimes hard to differentiate. Sutton and Gates (Luton) Ltd -v- Boxall held a reason relates to capability if the claimant is trying his best and nevertheless failing, but relates to his conduct if he is failing to exercise to the full such talents as he possesses.

**Fairness**
2.4. Section 98(4) of the Act says:
"Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
(a) depends on whether in all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

**Reasonable belief and investigation**
2.5. An employer does not have to prove, even on a balance of probabilities, that the misconduct he believes took place actually did take place. The employer simply has to show genuine belief. The Tribunal must determine, with a neutral burden of proof, whether it had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable, see British Home Stores v Burchell as qualified in Boys & Girls Welfare Society v McDonald.

2.6. Serious allegations, if disputed, must always be the subject of careful and conscientious investigation and the investigator carrying out the enquiry should focus

no less on evidence which may exculpate or point towards the innocence of the employer as on evidence directed to prove the charges see A v B [2003] IRLR 405.

**Fair procedure**

2.7. In Polkey v AE Dayton Lord Bridge of Harwich said :

*…an employer having prima facia grounds to dismiss .. will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus; …in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation; …*

**Fair Sanction**

2.8. Ladbroke Racing v Arnott held rule which specifically states that certain breaches will result in dismissal cannot meet the requirements of section 98(4) in itself. The statutory test of fairness is superimposed upon the employer's disciplinary rules which carry the penalty of dismissal. The standard of acting reasonably requires an employee to consider all the facts relevant to the nature and cause of the breach, including the degree of its gravity. But rules are not irrelevant. Employees are entitled to place weight on matters important to them. In Meyer Dunmore International v Rodgers, Phillips P put it thus:

*"Employers may wish to have a rule that employees engaged in, what could properly and sensibly be called fighting are going to be summarily dismissed. As far as we can see there is no reason why they should not have a rule, provided – and this is important – that it is plainly adopted, that it is plainly and clearly set out, and that great publicity is given to it so that every employee knows beyond any doubt whatever that if he gets involved in fighting in that sense, he will be dismissed.*

2.9. Even an admission of some misconduct will not automatically make dismissal fair as explained in Whitbread Plc v Hall [2001] IRLR 275:

*"Although there are some cases of misconduct so heinous that even a large employer well versed in the best employment practices would be justified in taking the view that no explanation or mitigation would make any difference, in the present case the misconduct in question was not so heinous as to admit of only one answer. Dismissal had been decided by the applicant's immediate superior who had a bad relationship with him and had gone into the process with her mind made up. In the circumstances, that method of responding was not among those open to an employer of the size and resources of these employers."*

2.10. It may be unfair to dismiss an employee for doing what others do without being dismissed see Post Office-v-Fennell and Hadjioannou-v-Coral Casinos . The latter contained guidance approved by the Court of Appeal in Paul-v-East Surrey District Health Authority. An argument that one employee received a greater sanction than others is relevant where

(a) there is evidence employees have been led to believe certain conduct will be overlooked or dealt with by a sanction less than dismissal

(b) where other evidence shows the purported reason for dismissal is not the genuine principal reason

(c) where, in truly parallel circumstances it was not reasonable to visit the particular employee's conduct with as severe a sanction as dismissal.
in Newbound-v- Thames Water Utilities the facts were on the face of it similar to the present case .A manager was given a lesser penalty than a subordinate who had a longer service and more experience. it was also about a breach of health and safety requirements. The tribunal had found the respondent's justification for the difference in treatment was insufficient. The Court of Appeal agreed this had been a permissible finding and Lord Justice Bean observed he had rarely seen such an obvious case of unjustified disparity . If there is a good explanation for the disparity a different result will occur. Again, I will mention another case later because its relevance will be more apparent.

**Appeals**
2.11 Taylor-v-OCS Group 2006 IRLR 613 held that whether an internal appeal is a re-hearing of a review, the question is whether the procedure as a whole was fair. If an early stage was unfair, the Tribunal must examine the later stages " *with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker , the overall process was fair notwithstanding deficiencies at the early stage* " ( per Smith L.J.)

**Band of Reasonableness**
2.12. In all aspects substantive and procedural we must follow the clear rule in Iceland Frozen Foods v Jones (approved in HSBC v Madden) and Sainsburys v Hitt, that we must not substitute our own view for that of the employer unless the view of the employer falls outside the band of reasonable responses. When considering the sanction, previous good character and employment record is always a relevant mitigating factor. In UCATT v Brain, Sir John Donaldson said thus:
*"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not. …the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances."*

## 3. Findings of Fact

3.1. The respondent manufactures plastic bottles and containers at Plenmeller Works, Haltwhistle , Northumberland. It is part of the wider RPC Group which has a number of sites nationally and internationally.

3.2. I heard for the respondent Mr Graeme Stephenson the Operations Manager at the Plenmeller site for 3 years 6 months who had previously worked in a similar role elsewhere . He took the decision to dismiss. I also heard its Group HR Manager, Gillian Doughty who is based at head office and Mr Darren Jones the General Manager for the last 3 years, who heard the appeal. I heard the claimant and his witness and Mr Marco Andreotti. I read the statement of Mr Stephen Thompson who

was to be called but became unavailable. I do not believe any witness I have heard has said anything they do not honestly believe to be true. There is little factual dispute on the face of the witness statements. However certain points in oral evidence proved to be very significant.

3.3. The claimant was employed by the respondent for 11 years as an electrician and had a clean disciplinary record. His role was to keep the machines on the production line in good working order and where possible ensure the production line could continue to operate to ensure orders could be met within deadlines.

**The Company Policy on Safety and the Event which caused the dismissal**

3.4. The respondent regards safety as its priority. It takes steps to train and educate its employees eg a Safety Awareness Week held across all sites . Signage about safety is displayed prominently. Section 5 of the Plenmeller Site Handbook covers safety generally and section 5.2 refers to the Group Health & Safety Policy which is explicit that working safely is a condition of employment. Four bullet points In the safety principles are most relevant

*Our work is never so urgent or important that we cannot take the time to do it safely*

*Each of us is responsible for our own safety & the safety of others*

*We do not take short cuts*
*We never compromise safety*
A document at the site says at page 53B any engineer in doubt should consult a person with knowledge of that field eg the engineering supervisor of manager.

3.5. Each site has an external audit every year which checks its adherence to safety procedures. They have monthly tool box talks which everyone attends during which particular safety issues are raised to remind all employees of safe working practice. They issue "quality point" lessons. One was delivered by Jason Spotswood to the claimant and others on 11th June 2015 entitled "*Safety guards and devices are meant to be used!*". Page 53 H is signed by the claimant showing he was there. It includes " ***Never remove or disable a machine guard or safety device*** ! "

3.6. The Disciplinary and Grievance Procedure says disregard for safety rules is one example of gross misconduct warranting potential summary dismissal The site handbook reinforces this at rule 1.14 where it refers to '*Wilful disregard or negligence towards the Employer's health and safety rules and procedures"* .

3.7. The claimant was well aware of the safety rules and policy. Ms Doughty says she was asked to make a statement on the Group's position on safety matters "*as I understand that the Claimant has alleged in this case that there was* ***a common practice of ignoring health and safety risks*** *if production was risked by a machine being out of commission and under repair*". He has never said that. He believes he abides by the principles and, even steps taken which contravene the rules, do not **ignore** safety risks. The more appropriate word in my judgment for what the claimant has always maintained is that he "calculated" a risk before taking it

3.8. On 5 April 2017, he was on night shift when his manager, Mr Stephen Thompson asked him to look at machine U1, which would not start up. The machine

is used for making salt bottles and the printer on the shift was waiting to print the bottles so there was a reason to have the machine back in operation within a reasonable time. The machine was shut down while he tried to solve the problem.

3.9. On this machine there are two safety switches. Each is triggered if the guard door moves. He was unable to align the “striker” to one switch due to the movement of the lower door hinge although the other switch was aligning. He spent about 90 minutes attempting to fix the fault during which time that machine could not operate. Mr Thompson visited him a number of times to check how long it would take to repair the fault. He appeared keen to have the machine up and running again

3.10. The claimant went to the stores and there were no replacement switches available. He told Mr Thompson the machine needed a new switch. He suggested he could bypass the switch by removing the “male” fitting and placing it in the female one and then fixing it in position with tape. The presence of the second safety switch the claimant said meant the machine could still operate safely with the bypass to the broken switch, pending a permanent fix, but, in the event the second switch failed electrically, opening the guard door may not shut-down the machine. The claimant thought the risk of the second switch failing was so small, it could be taken.

3.11. At first, Mr Thompson was not happy with a suggestion of bypassing a safety feature. However, the claimant reassured him the machine would still operate safely. As a result, Mr Thompson asked him to undertake the bypass. Once he had, they started up the machine, the claimant moved the guard door and the machine shut down. Mr Thompson was satisfied it could operate safely so decided to run it. He instructed the claimant to make a note of what he had done in the shift log and the electrical log and to ensure a notice was placed on the door of the machine to highlight what had been done. Mr Thompson gathered the operatives from D Block where U1 is positioned and explained the machine was still working but with only one trip switch in place. They demonstrated the machine would still cut out and made them aware that in the unlikely event the second one failed, the machine would not automatically shut down if the guard door was opened. Normally the door would only be opened to clean the moulds, when the machine would be turned off.

3.12. Mr Andreotti was working that night shift. He was not asked to provide any assistance. He is electrically trained but his job was as a shift fitter. Where there is a problem the shift manager will generally identify if it is electrical or mechanical and call the appropriate person. However, Mr Thompson may not know. There is no reason the claimant could not have asked Mr Andreotti to help. If it was a mechanical problem, Mr Andreotti could have helped to fix it. Mr Stephenson cannot understand why the claimant did not call for help from him. Neither can I. Mr Andreotti only became aware of the problem when he saw a notice attached to the machine.

3.13. The Engineering Manager is a Mr S Dixon . He was not on shift but was on call. The claimant and Mr Andreotti believe the matter should have been picked up next morning by Mr Dixon checking the shift log where he would see the entry that the switch had been bypassed. There is a production meeting every morning to discuss issues from the day before. Given the length of time U1 was down on 5th April, this should have been highlighted at the morning meeting. Mr Andreotti believes it will have been discussed then and says he “assumes” the lack of action is because

they did not consider it to be urgent. It may simply have been overlooked. This is where Mr Andreotti's oral evidence was so significant. He said Mr Dixon had a reputation for not following things up. Moreover, on the night shift and weekends in his experience matters happen very differently from week day shifts. He used to work a lot of overtime so saw all types of shift. He accepted Mr Stephenson probably would not know everything that went on all night and weekend shifts.

3.14. The claimant went off shift and due to rotas and some leave did not return to work until 14th April. He **assumed** the repair would have been done on 6th April. The switch was not in a readily visible place and no-one knows what happened to the notice placed on the machine. Mr Thompson's next shift was 8th April. He failed to "follow it up " so the machine ran with the switch bypassed until spotted by Mr Birkett the Safety Manager on 19th April. The machine was shut down. The problem was the hinge not the switch. On 21st April a Mr Tom Nicholson fixed it in about 20 mins.

3.15. As part of the investigation the respondent did ask Mr Thompson why the repair had not been followed up as soon as possible and , he accepted he should have emailed Mr Dixon. He took responsibility for not doing this and does not believe the claimant should have been expected to do it. Mr Stephenson disagrees to an extent. As the electrician on duty, the claimant should have contacted Mr Dixon himself, but Mr Stephenson accepts Mr Thompson should have also.

**The Investigation and Grievance /Disciplinary Process**

3.16. Mr Birkett came into the factory when the claimant was on a night-shift on 1 May and asked what had happened with the U1 switches. The claimant told him. He saw the claimant t again on 11 May 2017 and asked further questions. Mr Birkett did not tell him he was conducting a disciplinary investigation. The claimant said he felt he had taken reasonable steps to highlight what he had been done by making a note in the electrician's log book. He said the decision to bypass was a joint decision with Mr Thompson. When asked whether he had any other comments, he said there had been other problems with switches and he had, in the past expressed the view that switches should be replaced by stronger metal switches. Mr Birkett recommended a disciplinary hearing take place.

3.17. A letter to the claimant on 11th May from Mr Stephenson called him to such a hearing on a charge of , "*on 5 April 2017 you contravened the Health and Safety at Work Act with your actions by disabling a machine safety device on machine U2, and recommended that the machine should carry on working. You then failed to follow up this course of action'.* No particulars of the charge were given

3.18. Mr Stephenson accepts there were **two parts** to the charge, doing the bypass in the first place and then not following it up**.** Mr Birkett had obtained a copy of the claimant's repair log for the night in question, spoken to Mr Andreotti, obtained astatement from Mr Thompson and from the claimant , looked at the manufacturer's declaration of conformity under EU directives and re-interviewed the claimant on 11th May. Mr Stephenson felt this was a thorough enough investigation. I agree.

3.19. On 16th May the claimant asked for more information and a postponement. Mr Stephenson's letter of 17 May suggested he should source the paperwork from the Administration department. Though documentary evidence had not been provided

with the original disciplinary invite, this was rectified by letter dated 23 May and the disciplinary hearing put back to 14th June at the claimant's request.

3.20. Ms Doughty received a grievance from the claimant dated 19th May 2017. She could see it consisted largely of the factual issues which had led to a disciplinary hearing. She thought the matters raised in the grievance should be dealt with as part of the disciplinary process. I agree, as this is in accordance with the ACAS code of practice. Mr Ross helpfully said he would not argue otherwise.

3.21. On 11th June the claimant wrote to Mr Stephenson saying what had been done was in his view safe. In oral evidence the claimant accepted that had a health and safety inspector visited the factory on 6 April and found one of two safety switches, which are manufacturer had deemed to be necessary to make its machine safe, bypassed by plugging the male and female plugs that should go into the switch, into one another and binding it with tape, such inspector would have taken a dim view of it. The fact health and safety inspections can take place at random was evidenced later, because one did.

3.22. On the morning of the disciplinary, 14th June the claimant had put into Mr Stephenson's post box statements from Mr Andreotti and Jason Spotswood who had been for several years a shift manager Mr Stephenson at the start of the disciplinary hearing had not looked at his post yet but he read them early on during the hearing. Mr Andreotti in the 2 years he had been working for the respondent, said he had witnessed temporary fixes and notices fixed to machines. A statement from Mr Spotswood confirmed and it was common practice for switches to be "*linked out"* and signs to be displayed, in order to keep machines running. The phrase "linked out" means to bypass some safety feature. The only examples the claimant gave were one he had done in 2016 on machine U1 when the shift manager was Mr Thompson and one which, according to the documents appears to have been in 2011. However, Mr Andreotti claims to remember it and he only started in 2015. Probably these are different incidents on the same machine called A8. Any incident in 2011 was at a time when the culture of the company was considerably different. If it happened after Mr Andreotti started the worst that can be said is that a temporary fix done on a night shift was allowed to continue until 2:30 pm on the following day when the order was completed and the machine shut down. It was not in my judgment a "common" practice but even if only occasional, it is not acceptable. When Mr Andreotti was being questioned about the absence of details in the shift log , he used the phrase "*if it makes it into the shift log*". He was clearly saying some managers omit to write down all that has happened if it involves some safety breach.

3.23. The notes are a reasonably accurate summary of what was said. The claimant said he **felt** under pressure to get the machine back into operation, but not that he had been **put** under pressure by any manager to do so. He said the decision was Mr Thompson's not his. Mr Stephenson accepts that but says if a manager is told by the specialist experienced, qualified electrician that disabling one safety switch is a safe step to take, the real fault lies with the person who gave the advice. The claimant did not make his best point to Mr Stephenson that he expected the temporary fix to be replaced by a permanent fix the next day. Rather he alleged it was "common practice" to disable safety devices. Mr Andreotti and Mr Spotswood also referred to a common practice without giving examples of incidents. In oral

evidence Mr Andreotti said Mr Spotswood was one of the managers who encouraged temporary fixes if production was under threat as did Mr Thompson. Mr Stephenson would have considered this if they had told him. Mr Andreotti's oral evidence was telling. He had much criticism of Mr Dixon, Mr Thompson and Mr Spotswood but accepted Mr Stephenson, at the hearing, may not have known of any laxity by them which he said was mainly on night shifts and at weekends .

3.24. As for the second part of the charge, Mr Stephenson said the claimant was not going to be on duty again for over a week but did not take any further steps to check whether the potential danger had been rectified. He agreed in oral evidence he would not have dismissed for this reason. He felt there was no justification for bypassing the switch in the first place His statement then says
"*In view of his demeanour, refusal to acknowledge in any way that he had been wrong, lack of remorse and insistence that he had done this previously without any problem, I did not feel I could trust him not to bypass safety switches again on the next occasion when he felt under pressure to get a machine back up and running. I therefore dismissed him at the end of the disciplinary hearing*".
*I accept that Stewart had no prior disciplinary warning and a reasonably long period of prior service. However given what he had said in the disciplinary hearing he had done the same thing previously on at least once before. On this occasion at least he had wilfully disregarded the respondent's health and safety rules and I felt therefore that I had no other alternative but to dismiss*."
A table of Plenmeller safety discipline cases shows dismissal is rarely the sanction for breaches of safety rules Mr Stephenson always looks at the circumstances and the seriousness of the contravention before deciding what penalty is necessary.

3.25. The claimant formed the impression Mr Stephenson was not particularly interested in anything he had to say.The actual meeting only lasted 25 minutes. Following a 30 minute adjournment, Mr Stephenson said his decision was the claimant had contravened the Health and Safety at Work Act by disabling a safety device and failed to follow up this action.He did not use the phrase gross misconduct

3.26 After the dismissal he sent an email to the management team on 15th June saying an allegation had been made it was common practice to bypass safety switches to keep machines running. He said it was not substantiated but he felt it important to reiterate the respondent's core position that ***'to disable any safety device is illegal and our work is never so urgent or important that we cannot take the time to do it safely. We do not take short cuts.'***

**The Appeal**

3.27. The claimant appealed by letter dated 18th June on 7 grounds
i) his grievance had not been addressed.
ii) evidence from Mr Andreotti and Mr Spotswood, had not been considered.
iii) he disputed Mr Stephenson had carefully considered the case and believed he had already made up his mind.
iv) he had not received an answer to a question made in writing on 11th June asking when the 'alleged contravention' had been discovered.
v) he disputed the fix to machine 'U1' rendered it unsafe and argued such a conclusion required expert evidence to confirm it actually did.

vi) He believed the investigation was undertaken by persons who were not electrically trained and therefore management reached a decision without a proper understanding from an impartial professional.

vii) He relied on his previous good service over 12 years without any disciplinary warnings and excellent attendance record and stated he was being dismissed to make way for an apprentice to take over his role

Points (v) and (vi) are simply answered because both Mr Stephenson and Mr Jones are qualified engineers. The answer to point (iv) was 19th April but whatever it was would not help the claimant. Point (vii) was not made out on the evidence and was rightly not pursued by Mr Ross before me.

3.28. On 20th June, Mr Andreotti submitted written statements from himself, Edmund Ridley(a former shift manager) and Mr Spotswood, to Mr Jones who considered these as part of the appeal. Mr Ridley spoke highly of the claimant's commitment and his ability to fix machines. This was not in doubt. However Mr Ridley had been shift manager for many years when the culture of the company was very different. He too referred to machines being "linked out".

3.29. The appeal hearing was held on 28th June. The notes are at pages 96-100 and documents the claimant produced to support his case at 101-109. The claimant raised some further instances of what he alleged to be common practice of bypassing safety devices. Mr Jones adjourned to consider what had been said and to review the new evidence including extracts from the handwritten engineering log and a list of 'points of interest". He asked Mr Stephenson to investigate these and report back. He did so in his two paged email dated 30th June and included copies of the material he relied upon. Mr Jones reviewed his conclusions against the evidence available and using his own considerable engineering knowledge reached the same conclusion which was that the evidence did not support the existence of a common practice, which would have been in direct contravention of the respondents well-publicised policies as they existed in 2017. A trawl of records over the last two years did however reveal 50 instances of safety switches having to be replaced thus showing electrical components can and do fail.

3.30. Mr Andreotti, who no longer works for the respondent, alleged in a statement dated 19th July that on 5th May Mr Thompson called him to Mr Dixon's office . When he walked in, Mr Dixon was at his desk and asked what he wanted. Mr Thompson then came in and said '*sorry I need to borrow your office'*, at which point Mr Dixon left. Mr Thompson shut the door and said the phone would ring in a minute because someone wanted to ask him about something but he could not tell him what. The phone did ring and it was Mr Birkett. Mr Thompson left the room. Mr Birkett asked whether on 5 April Mr Andreotti had been called to the machine and he told him he had not. Straight after this call Mr Andreotti went to see Mr Dixon who was just leaving the canteen to ask him what was going on. Mr Dixon took him to the machine, showed him how the two safety switches worked and said Tom Nicholson had checked out the machine and confirmed it could operate safely with only one switch. Mr Dixon commented he did not "*know what the big drama was about*" and showed Mr Andreotti there was a bolt missing which had caused the door to drop and move away from one of the switches but not the other. Mr Dixon later denied discussing the matter with Mr Andreotti prior to the disciplinary hearing. Mr Andreotti was shocked when he read this in the claimant's outcome letter but in

light of the claimant's dismissal can understand why Mr Dixon does not want to admit he said "*didn't know what the big drama was about*" . I believe Mr Andreotti's detailed account, but it does not help the claimant to show Mr Dixon holds a wrong view. Two wrongs do not make a right.

3.31. Mr Jones reached a decision and on 5th July sent the claimant a letter setting it out giving detailed reasons under each of the seven grounds. There was no evidence which showed a common practice of bypassing safety devices This was supported by the findings of the HSE following an unannounced visit when they specifically asked members of operational staff about this Mr Jones could not ignore the fact that the claimant had **knowingly reduced** the level of safety for his colleagues operating the machine or what he called his "unapologetic stance" which made it difficult to have any confidence that faced with a similar problem in the future he would not behave in the same way. The appeal was dismissed. I can understand the claimant thinking Mr Stephenson had pre-judged the issues because of the speed with which he acted, though I do not share his view. However the claimant and Mr Andreotti accept Mr Jones gave careful consideration to everything said.

3.32. The outcome letter used the words "*gross misconduct (wilful disregard or negligence towards the Employer's Health and Safety rules and procedures*)". "Gross misconduct" was not used at the disciplinary hearing or in the letter of dismissal. The respondent paid notice pay .The term has recently been considered in the Court of Appeal in Adesokan-v-Sainsbury's but I do not have to decide today whether what the claimant did satisfies the definition. Mr Jones used the phrase because it is contained in the list of examples of gross misconduct. An employer who decides to dismiss with notice even where there has been what is arguably gross misconduct is doing no injustice to the employee.

3.33. Mr Thompson was disciplined at a hearing on 14th July by being given a written warning by Mr Stephenson who says he was also at fault for his part in bypassing the safety switch but he was contrite, remorseful and said he had learned a valuable lesson . Mr Stephenson felt he could trust him not to do the same again. In contrast, the claimant had made it clear he did not consider he had done anything wrong, and had done the same on previous occasions. Mr Stephenson had no confidence that given another such problem he would not do so again. For both him and Mr Jones that was the big difference which justified a higher penalty.

3.34. The claimant has suggested by his age may have been part of the reason why he was dismissed. This is refuted and was not pursued by Mr Ross. The claimant has produced additional documents in disclosure not produced during the disciplinary or appeal hearing attempting to show evidence of a common practice of bypassing safety devices. I do not see they show that was a practice in 2017.

3.35 On the issue of comparative sanctions in other cases, Ms Doughty has been with the Group for 18 years so is aware of a number of cases where employees have been dismissed for health and safety breaches. These include

- At the RPC Oakham site an employee with 27 years' service dismissed in July 2017 for climbing into a machine – inside the guarding.

- At the RPC Llantrisant site, the dismissal of an employee in May 2017 for bypassing safety procedures and entering into a machine.

- At the RPC Rushden site, the dismissal of an employee in September 2014 for starting up a machine with a safety door open.

She asked produced a table at of cases at other sites at page 146 and Mr Stephenson compiled one of cases at Plenmeller. The circumstances of the cases vary greatly but I cannot find evidence of people who have been found out to have knowingly taken a safety risk and maintained that doing so was not unsafe being allowed to keep their jobs. Mr Andreotti says others have done worse . It reminds me conversation I overheard between two men whose friend named Joe had been disqualified from driving for being slightly over the drink drive limit. One said " *There is no justice, Fred does it all the time and he still has his licence.*" There was no "injustice" in Joe being banned, rather in Fred not having been caught. The principles in Paul cannot involve a comparison between people who have been detected and dealt with through a disciplinary process and those who have escaped detection

## 4 Conclusions

4.1. In Orr-v- Milton Keynes Council, the issue was whether an employer, when considering dismissal of an employee for misconduct, is to be taken to know exculpatory facts which are known to the employee's manager but are withheld from the decision-maker. Moore Bick LJ with whom Aikens LJ agreed said
*Sedley L.J. suggests that the person deputed to carry out the investigation on behalf of the employer must be taken to know any relevant facts which the employer actually knows, which include not only matters known to the chief executive but also any relevant facts known to any person within the organisation who in some way represents the employer in its relations with the employee. However, in my view it would be contrary to the language of the statute to hold that the employer had acted unreasonably and unfairly if in fact he had done all that could reasonably be expected of him and had made a decision that was reasonable in all the circumstances. That is why it is important to identify whose state of mind is intended to count as that of the employer for this purpose. To impute to that person knowledge held by others is to reverse the principles of attribution formulated in the Meridian case and to place the whole exercise on an artificial footing. The obligation to carry out a reasonable investigation as the basis of providing satisfactory grounds for thinking that there has been conduct justifying dismissal necessarily directs attention to the quality of the investigation and the resulting state of mind of the person who represents the employer for that purpose. If the investigation was as thorough as could reasonably have been expected, it will support a reasonable belief in the findings, whether or not some piece of information has fallen through the net. There is no justification for imputing to that person knowledge that he did not have and which (ex hypothesi) he could not reasonably have obtained."*

In this case, I accept Mr Dixon and maybe Mr Thompson are probably more aware of unsafe practices that they were prepared to admit but neither Mr Stephenson nor Mr Jones , having conducted a thorough investigation had any evidence of that

4.2. Mr Ross cited MacKie v AWE plc ET/2701393/2014 in which he says it was held lack of contrition by an employee would not justify treating him harshly for sticking to his guns in the course of a disciplinary enquiry .I agree that is sensible in many cases however it is not really lack of contrition that was the issue here .Retarded Children's Aid Society -v-Day held an employer in deciding sanction can take into account the employee's refusal to recognise what he had done was wrong . If he is " *determined to go his own way*" it can be a factor in deciding to dismiss him rather than give a warning I would not choose the words Mr Stevenson and Mr Jones used when saying that the claimant showed no "remorse" or took an "unapologetic stance". The more appropriate word would be he showed no **"recognition"** that even though his temporary fix actually caused no safety risk provided the machine was being operated by people who knew about the bypass, it had the **potential** to do so especially if it lasted for longer than the claimant himself anticipated.

4.3. Whilst I do not think the claimant was to blame for the fact it was not picked up on the day shift on 6 April, especially in the light of the evidence I have heard about the laxity of Mr Dixon in the following matters up himself, the claimant should have anticipated his temporary fix may well not be corrected promptly .

4.4. In these circumstances the answers to the issues are that the principal reason for dismissal was the claimant took the shorter course of bypassing a safety device rather than , having spotted it was a mechanical problem , taking the time to correct that problem. I accept the respondent genuinely believed it did relate to conduct because the claimant was knowingly succumbing to pressure, partly self-imposed and partly due to the culture on night shifts, to put production speed before safety.

4.5. The belief of the respondent was reasonable and reached after a thorough investigation. Any deficiencies in the hearing undertaken by Mr Stevenson was certainly cured by what I regard as a very comprehensive appeal.

4.6. The decision to dismiss was well within the band of reasonable responses notwithstanding the claimant's long and impeccable record. It is never fair to make a scapegoat of somebody, but can often be fair to make an example of them particularly where senior management are committed to changing a culture with regard to safety. Whilst it is sad to see a long career coming to such an end the dismissal of the claimant was plainly fair .

4.7. I have to say that what I have heard causes me some concern that the high standards adopted by the respondent's senior management may not be universally applied particularly on night shifts. There is always a tension between the need to maintain high safety standards and the desirability of maintaining production. I also noted the claimant and Mr Andreotti at times appeared reluctant to name people they said participated in linking out machines. Any employee who feels a line is being crossed should not, as Mr Andreotti suggested they were, be in fear of victimisation or reprisals either from colleagues or managers.. The respondent would be sensible to ensure there are effective means of ensuring they can put safety first and, where necessary, " whistleblow" on managers who appear to more concerned with production than safety .

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**T M GARNON EMPLOYMENT JUDGE**

**JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 30th APRIL 2018**