Case Number: 2302180/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Markham	**v**	**Aesica Queenborough Ltd**

HELD AT **Ashford** **ON 24 May 2019**

BEFORE Employment Judge G Phillips

Appearances
For Claimant: In person
For Respondent: Mr M Huggett, Legal Executive

FULL MERITS HEARING
RESERVED JUDGMENT

It is the decision of the Tribunal that the Claimant's claim of unfair dismissal was well founded and should succeed. Further, the Claimant was wrongfully dismissed by the Respondent in breach of his contract.

REASONS

1. I shall for ease refer to the parties as the Claimant and the Respondent. The Claimant, by his ET1 dated 11.06.2018, brings a claim of unfair dismissal against the Respondent. The Claimant says that the dismissal was substantively and procedurally unfair for a variety of reasons, which are set out in more detail below. The Respondent, through its ET3 dated 01.08.2018, disputes this. It says the Claimant was fairly dismissed because of gross misconduct. The Respondent says that gross misconduct was a reasonable belief to hold and that this belief was reached after the Respondent had carried out as much investigation as was reasonable in the circumstances. The Respondent says that termination of employment was a reasonable response in all the circumstances. The Respondent accordingly denied that it had unfairly dismissed the Claimant.

2. The case was listed before me as a full merits hearing.

Issues

3. Unfair dismissal. Dismissal was not in issue. The Respondent says that the reason for dismissal was misconduct, which is a potentially fair reason under 98(2) ERA. If that is the case, a Tribunal then has to determine if the dismissal was fair or unfair in accordance with section 98(4) Employment Rights Act1996, taking account of the test propounded in *British Home Stores Ltd v Burchell* [1978] IRLR 379 and confirmed in *Iceland Frozen Foods Ltd v Jones* [1993] ICR 17. Therefore, the following issues have to be determined:

a. Did the Respondent genuinely believe that the Claimant had committed misconduct?
b. Was that belief reasonably held?
c. Was there a reasonable investigation?
d. Was dismissal a fair sanction?
e. Was a fair procedure followed?
f. If the dismissal is found to be unfair, what remedy should be awarded? If remedy arises for consideration, the Respondent submits that issues of "Polkey" and contributory conduct arise.

4. Wrongful dismissal / breach of contract. The Claimant was summarily dismissed for gross misconduct, i.e. without notice. Whatever the position on fairness, consideration will need to be given as to whether summary dismissal was appropriate in the circumstances. Even if the dismissal is found to be fair, an issue may still arise as to whether the Claimant's conduct amounted to a repudiatory breach of contract such as to entitle the Respondent to dismiss him without notice.

Evidence

5. Both parties, including the Claimant in person, submitted witness statements, which had been exchanged in advance of the hearing. The Respondent submitted a witness statement from Mr Gareth Bristow (at the relevant time, an Active Pharmaceutical Ingredients ("API") shift manager, who carried out the initial disciplinary investigation) and two statements from Mr Gary Reid (UK General Manager, who heard the appeal). Their witness statements were taken as read as their evidence in chief. Each individual who had provided a witness statement gave oral evidence on oath, and was cross-examined. Mr Bristow made an alternation to paragraph 9 of his witness statement to correct a factual error around the timing of knowledge of the incident. I also had the opportunity to ask questions of my own of each witness. The Respondent did not submit a witness statement or any evidence from the dismissing officer, Ms Aude Cazenave, who it said was no longer employed by it.

6. The Tribunal had before it a paginated bundle of some 350 pages of documents (the Bundle), prepared by the Respondent, based on both parties' disclosure. Where relevant, references to documents in the Bundle in this Judgment will be referred to by their page number as [xx]. I raised a question during the hearing as to why a section of these documents [pages 315 to 335] had been heavily redacted (removing details of the sender and recipient, date of sending and some contents). It transpired that these were internal emails from the Respondent

relating to the Claimant, which had been provided to him as a result of a subject access request, and the redactions had been made due to data protection concerns [313-4]. The Claimant had provided these to the Respondent for inserting into the Bundle. A number of these emails appeared to be directly material and relevant to the issues in this case and it was not clear why fuller unredacted versions of some of these had not been provided by the Respondent via the disclosure process. No-one on the Respondent's side was able to explain this. I will refer to these emails, where they appear relevant below, as the SAR emails. It was not in my view satisfactory that those SAR emails directly related to this case, had not been fully disclosed by the Respondent. This meant the potential for examination of the Respondent's witnesses about their significance was curtailed.

7. At the outset of the hearing, although the initial burden of proof is on an employer in an unfair dismissal case, to establish the reason and that it is a potentially fair reason, as the Claimant was unrepresented, I suggested that he give his evidence first, so that the background narrative and issues could be set out. After discussion, this approach was agreed to.

8. I considered all the evidence before me, both written and oral, in reaching my decision. This document formally records my judgment and gives my reasons for it.

Factual findings pertaining to the claim

9. The Respondent is a pharmaceutical contract development and manufacturing company providing both Active Pharmaceutical Ingredients (APIs) and finished dose forms, operating at all material times from premises in Queenborough, Kent. The Claimant had been employed by the Respondent, latterly as an API Charge hand, from 29 January 2002 [35]. On 26 February 2018, the Claimant was summarily dismissed for gross misconduct, after a valve, which should have been shut, had been found to have been left open, which had allowed Freon gas (an active pharmaceutical ingredient) to escape into the environment. This was a matter which required the Respondent to file a report to the Environment Agency and to carry out an internal technical investigation and report. Up until this time, the Claimant had an unblemished 16 years of service and was well respected by his managers. This is reflected in the number of character references he produced [231-238], including ones from two API Shift Managers, his own, Gareth Bristow, [232] and Steve Wood [234].

10. For obvious reasons, the pharmaceutical industry, including the Respondent's business, is heavily regulated including by the Medicines, Health and Regulatory Authority (MHRA) and the Environmental Agency (EA). The industry is governed by what are known as Good Manufacturing Practice (GMP) rules [78A onwards]. GMP sets the general principles and minimum standards that a manufacturer must meet in their production processes so as to ensure quality of the production of products and ultimately to prevent harm to the end user. GMPs are interpreted and implemented by the individual businesses own quality management systems, in the Respondent's case through the use of Operational Procedure Documents [111 onwards]. These individual procedures are audited by the MHRA. Although there

was no training specifically for an API Chargehand, (and one of the points raised by the Claimant during his disciplinary was that he had not been trained in supervising others), the Respondent's employees, including the Claimant [83-111], received regular training and assessments on GMPs and OPDs.

11. The Respondent's plant was a big plant, carrying out 10 different product processes at any given time. The Respondent has separate OPDs for each individual manufacturing process. The relevant OPD for this purpose was API process - Carbene Reaction and Distillation - TA3/100 and TA2100 [118-146; 112-117]. These manufacturing processes would often take place over several days, so would often involve several shifts and operatives. The relevant OPD would set out the various steps that needed to be taken, some of which steps specifically required a signature that they had been completed. The steps of the Carbene Reaction and Distillation process in this case that were in issue were 1.5 to 1.6 [124]. These related to the TFE Transfer to TA3/100 and required, inter alia, that (1.6) the TFE charge valves be closed.

Relevant Policies and Procedures

12. The Respondent's Disciplinary Procedure, so far as relevant and material, is dated December 2009 [43-45]. It makes clear that, in the case of gross misconduct or a serious breach of the employment obligations, summary dismissal may result without previous warnings. As far as authority to take disciplinary action is concerned, the policy states that each stage of the procedure will normally be carried out by the employee's supervisor or immediate line manager. Authority to dismiss is restricted to "Senior management, Site leadership or others so designated." The policy notes: "no disciplinary penalty should be imposed until the employee has been informed of the complaints against them, a full investigation into the allegation or circumstances has been carried out and a disciplinary hearing convened. The investigation should take place promptly and will involve obtaining all the facts relevant to the case". The policy states that where a companion is unable to attend at all formal stages of the procedure, the employee may request a postponement of a formal hearing of up to 7 calendar days to facilitate attendance. The policy also states [44]: "the employee must have sufficient advance warning of a disciplinary hearing to enable them to prepare and be given the opportunity of having a companion present".

13. The policy also states that where gross misconduct or a serious breach of any employment obligation is concerned, [44A] an employee may be summarily dismissed. "Summary dismissal will only be actioned following a full investigation into the allegations and the employee being given the opportunity to provide an explanation at a disciplinary hearing. Where an employee is summarily dismissed there is no entitlement to a notice period or payment in lieu of notice". The policy sets out a non-exhaustive list of examples of gross misconduct "which will normally result in summary dismissal", which includes "actions which are in breach of a statutory responsibility including the company's Health and Safety at work policy or regulations relating to the Company's activities as a manufacturer and supplier of pharmaceutical and health care products (eg Good Manufacturing Practice); "a serious neglect of duty or failure to observe Company rules, regulations, policies/procedures, including GMP; "dishonesty or fraud – including the fraudulent

completion of Company form and claims"; and "matters which have or may have a serious adverse effect on the Company, its reputation or relationship with its customer".

14. So far as suspension is concerned, the policy states that an employee may be suspended on full pay at any stage of the procedure where time is required to carry out enquiries/investigations or where it is considered appropriate that they should not attend work.

15. Finally, on appeals, the policy states that appeals must be submitted within 7 calendar days of the issue of the notification of formal disciplinary action. It adds that the manager hearing the appeal will have the authority to take whatever action is considered appropriate in all the circumstances, including upholding or overturning the decision, and reducing or increasing the penalty.

Employment history and the incident leading to dismissal

16. In or about 2008, the Claimant began working as a Production Operative on the API processes. He received training to ensure compliance with the rules and regulations as well as to understand the processes operated by the Respondent [106-111, 148-204]. In or about November 2016, he became an API Chargehand [337]. He was responsible for Shift 2 [the Respondent operated 5 shifts] – during which he had his own responsibilities as well as overseeing 2 operatives. In addition to being required to sign off the various identified steps of the relevant process, the Claimant was required at the end of a shift to complete a log book and detail any irregularity. A walk around the plant, which could take 15 to 30 minutes, would usually accompany a handover.

17. On 14 February 2018, one of the three processes the Claimant was overseeing on his Shift included the Carbene Reaction and Distillation - TA3/100 and TA2100, which takes place under a GMP. At 02.55 he signed off step 1.4, at 02.57, he signed off step 1.5 and at 03.30 he signed off step 1.6, indicating that the TFE charge valves had been closed. At 6am, he completed a standard handover to another charge hand (CH1). At approximately 9.30am, abnormally low pressure [0.8 bar as opposed to 8/9 bar) in the TA3/100 carbene reaction was observed by CH1 and a colleague. They investigated this and reported to their Shift Manager, Mr Wood, that as a result of their investigation they had identified that the TFE charge valve was open, when it should have been shut. It was assumed that this would have resulted in the escape of Freon gas into the environment. Mr Wood reported the matter to his superior, and identified that the Claimant was the person who had signed that the valve had been shut. Mr Wood telephoned the Claimant, speaking to him at approximately 1.20, (he said not long after he had woken up). During this conversation with Mr Wood, the Claimant accepted he was on Shift and had signed off closing the valve. In his incident report [98], Mr Wood wrote of this conversation: "He cannot say for definite but as he was on the addition preps he agrees that he must have left the valve open". The Claimant next came in to work an (overtime) shift on 14 February at 6pm; his next regular shift was due to start on 21 February. His evidence was he completed at least 3 further shifts prior to his suspension, including 1 after the investigatory interview.

The investigation

18. Mr Gareth Bristow, the Claimant's API Shift Manager, with substantial experience in API, who had recently started with the Respondent, was asked to investigate the incident from a disciplinary perspective. Separately, a Mr Doug McAndrew was appointed to carry out an investigation for the purpose of reporting to the Environment Agency what had happened, why and whether new operating processes were needed: ER 1811926 [214-222].

19. The unredacted part of an SAR email dated Monday 19th February 2018 headed "RE: TA3 /100 – loss of Freon incident [3/6], which appeared to be part of a longer 3 page email trail, most of which was not disclosed, stated "Thanks [blank] can you push hard with the investigating manager to get him in asap. If you meet any resistance can you let me seek Ians support [blank] is expecting this to be dealt with as expeditiously as possible so if you encounter any difficulties or lack of response please let me know". It was not clear who sent this email to who, or in what context. The email immediately below this, most of which is redacted, states (with the same subject matter but no date or addressee or sender details): "I will speak to Ian today regarding whether we can contact Dan to come in tomorrow if not will arrange the investigation meeting for first thing Wednesday."

20. On Monday 19th February, Mr Bristow sent a letter to the Claimant inviting him to attend an investigatory meeting with himself and a Ms Follington from HR, on the following Wednesday, 21 February. This letter informed the Claimant that the meeting was to discuss an allegation that he had allegedly "not followed the correct GMP operating procedures resulting in loss of Freon to the atmosphere" [89].

21. On 21 February, Mr Bristow and Ms Follington met with the Claimant and conducted an investigatory interview [93-6]. During this interview, the Claimant stated that as he was the only one on that job, while "he didn't remember leaving it open" "it must have been me. I must have just forgotten. We had 4 actualised valves. Once I had the job handed back, I would normally just for my own piece of mind, go and check the job over and that's what I did and my mind was more on checking that they were tight and not the valve. I am sorry". Mr Bristow clarified that the reference to actualised valves, involved a fitter and checking his work. Additionally, the Claimant said he was running two other processes, which he accepted was part of normal operations. He stated, "Yes there is not a lot. I have just forgotten to close the valve. I must have been thinking about checking the actuates. In my defence, in 16 years, this is the first error I have had. I surprised and disappointed in myself". Mr Bristow asked the Claimant about other internal or external pressures that may have been impacting on him. Ms Follington checked that the Claimant understood that this was a serious allegation, to which he replied "Yes". Ms Follington summarized that "to be clear you understand the processes but on the day you might have been distracted by other activities", to which the Claimant replied "Yes, I can't say any more than I forgot." The Claimant asked if the severity of his punishment was going to be dependent on the external Environment Agency investigation, but was told by Mr Bristow that he could not answer that at the moment. The Claimant again said he was sorry that he had put himself and everyone else in this position.

22. Mr Bristow endeavored, via Mr Woods, to speak to the operative and CH1 who had been on the Shift following the Claimant's. They declined to speak to him without a union representative. They were never interviewed.

23. Mr Bristow compiled a report [90 onwards], with a number of Appendices, which he submitted on 23 February. By this time he had walked around the plant and the site where the valve was located, and had reviewed (1) his interview with the Claimant; (2) Mr Wood's report; (3) the relevant operating Procedures; (4) the Claimant's sign off sheet for the shift in question [100]; (5) the Claimant's training records and assessments; and (6) the latest version of Mr McAndrew's investigation report consisting at this point of some 8 pages [214-222]. Mr McAndrew's report looked at equipment, personnel and processes. It concluded that a "contributory cause was human error", but "equipment design is consider to be the root cause" [217]. He elaborated that the process was not actuated, valve position feedback is not provided to the control system and there were no alarms. …. As a single failure can result in a significant release of Freon the plant design does not provide sufficient safeguards and is considered to be the root cause of the incident". This conclusion was further confirmed at item 8 [220]: "the root cause is equipment design which failed to provide sufficient barriers to safeguard against a single operator error."

24. Mr Bristow concluded in his report, "The potential root cause of ER 1811926 is down to equipment design which failed to provide sufficient barriers to safeguard against a single operator error. In this case the operator failed to close the TFE Valve at Step 1.6 and unwittingly opened a route for Freon to vent to the atmosphere. Omission [sic] by Dan Markham that he must of left the valve open as he was in charge of the operation of the TA3/100 carbene reaction concludes that he left the valve open and signed to say it was closed".

Suspension

25. An SAR email, [317] headed "Investigation" and dated Friday 23rd February states "The investigation needs to be completed today so we get an invite to Dan to bring him to a hearing on Monday".

26. On Friday 23 February, the Claimant received a phone call at home asking him to come into work to attend a meeting. The Claimant was told by Aude Cazenave (the Operations Director, who was to hear the disciplinary hearing) that a disciplinary hearing would be scheduled for the following Monday 26th February and that in the meantime he was suspended. He was escorted off the site. Ms Cazenave then wrote to the Claimant to confirm the investigation had been concluded and he had been suspended [223]. (Mr Bristow explained in his oral evidence at the tribunal hearing that there were two investigations – the one he had conducted vis a vis the disciplinary process and the ER 1811926 one Mr McAndrews was undertaking. While Mr McAndrews' investigation was ongoing for quite a while, it was Mr Bristow's that had concluded.)

The disciplinary hearing and decision to dismiss

27. This letter also stated that a disciplinary hearing would take place on Monday 26th February at 15.00. It stated that the allegation against him was that he had allegedly "not followed the correct GMP operating procedure resulting in the loss of Freon to the atmosphere." The letter also stated that this allegation constituted gross misconduct which, if found proven, may lead to dismissal. Mr Markham tried to arrange for the hearing to be postponed until 2 March 2018, as his chosen union representative was not available. He also pointed out that the letter gave him "short notice to formulate a response" [229]. This was rejected on the basis that 48 hours' notice had been given.

28. The Claimant prepared some notes of his own for the hearing [251-254]. These included that, (1) by reference to the ACAS code, it was not appropriate for Gareth Bristow, as the Claimant's shift manager to conduct the investigation; (2) that Mr McAndrew's investigation had concluded that the root cause was equipment design; (3) that there was inadequate documentation of individual process stages; (4) that it was not 100% definite that the valve had been left open by the Claimant – "although its more than likely"; (5) why no else with access to the processing at the relevant time had been interviewed; (6) that the Claimant had not been given training with regard to supervising others; (7) that there were various "stressors" in play, including that the Claimant had done a lot of overtime (12 extra shifts) in the 6 weeks before the incident, that his wife had to travel longer to get to work and there was continual pressure from management to complete monthly targets. The Claimant also submitted a closing statement, which referred to the error he "potentially" made being an unintended human error and an isolated incident that was not reflective of his good character and competency.

29. The Claimant's disciplinary hearing went ahead on 26th February, conducted by Ms Cazenave, assisted by Kim Stace from HR, who acted as noted taker [257-262]. Sometime later a typed up version of the contemporaneous handwritten note was prepared, but the Claimant did not see this until after the Tribunal proceedings were started. The Claimant challenged the veracity of the typed up version, which he said were not contemporaneous; he said he had asked for a typed up version for the appeal, as the handwritten one was illegible, but this was not provided at that time [263 – 265, 302]. (During this hearing, where an issue arose as to accuracy of the typed up version, the reference was checked against the handwritten notes. No significant discrepancies were noted). The disciplinary meeting started at 15.04. The Claimant was accompanied by his chosen trade union representative. Points made were as per the notes referred to above. A specific point was made by the Claimant's representative about the pressure and the timing of the gas release. The meeting was adjourned at 15.37 and reconvened at 16.45. At this point, the typed up notes indicate that Ms Casenave said she had reviewed the pack and "additional information". A document at [266] in the bundle is titled "Data collated from Mark Sandy (Snr Process Engineer) by Aude during disciplinary hearing adjournment – Data confirmed the valve was opened when Dan was responsible for plant". The documents attached to this included [267] a graph which had come to form part of Mr McAndrew's investigation, ["page 8 of 10"], but which had not been disclosed to the Claimant beforehand (and indeed was not disclosed to him at all until the tribunal disclosure process occurred). This graph showed a normal batch trend for temperature and pressure for the TFE Transfer and compared it to what had actually been recorded as having occurred during the

Claimant's shift. This showed a difference in the pressure; while there was, in both cases, an increase in pressure at about 3.00 am [as the reaction occurred] peaking about 5.00am, on the Claimant's shift this then steadily decreased (instead of continuing to rise and then plateau). This graph appears to be the "additional information" referenced by Ms Cazenave. The notes record that she noted the failure to close the valve was a GMP failure, the "mitigation" on equipment design and documentation, and the Claimant's length of service and performance but said she believed that this was gross misconduct and therefore summary dismissal. The Claimant was told he had 5 days in which to appeal. The meeting concluded at 16.49.

30. An SAR email dated Monday 26 February at 18.44, [318] states "Just to confirm that we met with Dan Markham this afternoon and after a period of adjournment fed back that we had upheld the allegation of gross misconduct and therefore summarily dismissed him with effect from today's date. He has the right to appeal within 5 working days." It is not clear who sent this, or to who.

31. On 28th February, a letter was sent by hand to the Claimant, [269-70] signed by Ms Cazenave, confirming her decision. This stated, amongst other things that "I listened to the mitigation presented during the meeting and whilst I am sympathetic to the points outlined – I cannot ignore the fact that you signed for the completion of an activity that you could not recall doing when the consequences of doing so were known and potentially severe. The Company will not tolerate anything which puts the health and safety of its employees or the environment in jeopardy. I concluded that your actions and failure to follow the company procedures amounted to a breach of your statutory Health and Safety responsibilities in that you failed to take reasonable care. I explained that your actions amounted to gross misconduct and therefore I decided that due to the seriousness of the incident I had no alternative but to summarily dismiss you with immediate effect. I did give careful consideration as to whether I could apply a lesser penalty but came to the conclusion that I could not".

32. At 14.38 on 28th February, Mr Gary Reid, the Respondent's UK General Manager, sent round an email to Queenborough employees, titled "Important Information mandatory read". This stated that

> *"As a business, our number one priority is and must always continue to be, 100% compliance in both health, safety and quality.*
> *You may or may not be aware that we recently had an incident (14th Feb) whereby failure of an individual to follow the correct GMP procedure by signing for a task that was not completed resulted in a reportable incident to the Environment Agency which could have had very serious repercussions. Not only to our reputation as a business but more importantly to our people and environment. This erodes further our reputation with the regulators and is not the behavior I expect from any individual on site. As a result of this action, the employment contract of the individual has been terminated.*
> *Each and every one of us is responsible for ensuring that we work in line with our status as a GMP compliant manufacturer, our GMP rules are in place in order to deliver safe medicines to our customers and ultimately our patients who rely upon them for their health and wellbeing. Signing for work that has*

*not been done or checked to the right standard is **not acceptable in any circumstance**.*
We are a service provider making medicines for people under stringent GMP conditions. If a person does not follow GMP procedures this person ultimately chooses not to work for Aesica as we will not tolerate any non compliance or fraudulent actions that ultimately put our patients and colleagues at risk.
The business has, and will continue to enforce a zero tolerance approach and I would ask you all to remain diligent and vigilant in this regard."

The appeal

33. The Claimant appealed against the decision to dismiss him. He questioned the fact that he had been given 5 days in which to appeal. He said his appeal was based on consistency and the fact that previous similar cases had been treated differently to his. He also said that the outcome of summary dismissal was too severe when he believed alternatives could have been reached [273]. An appeal meeting was initially set up for Monday 19th March, chaired by Gary Reid [274]. An issue arose as to the availability of the Claimant's preferred trade union representative, but the Respondent was not amenable to changing the date to accommodate this. In the event, the Claimant was accompanied by another trade union representative, who was not so familiar with his case [275-8]. The appeal hearing took place on Thursday 22nd March [281-286]. It was conducted by Mr Reid, assisted by Amy Mort from HR. The Claimant's representative raised a number of issues including Mr McAndrew's finding that "equipment design failed". Ms Blanks raised a point about the consistency of the Claimant's treatment and provided a list of other cases which were said to be comparable, where lesser sanctions had been applied. These were gone through briefly at the hearing. An issue concerning health and safety was also raised. The meeting concluded. The Claimant was told that Mr Reid was due to be away on leave for just over 2 weeks and this needed to be taken into account in terms of getting a response back to him [288].

34. On 19th April, a letter was sent to the Claimant by Mr Reid confirming that he was upholding the original decision to terminate the Claimant's employment by reason of gross misconduct and that his dismissal remained effective from 26 February. Mr Reid said that he had reviewed in full all the material supplied to the Claimant prior to the disciplinary hearing. He had also reviewed the overtime data. He emphasized that because the plant was aging and not automated, manual operation in line with GMP was very important. He concluded that "You have signed to confirm you carried out an action that you did not carry out; this resulted in a release of Freon to the atmosphere and investigation by the Environment Agency. The failure to close the valve in accordance with the GMP work order together with the positive act of confirming this step had been completed when it had not is a serious breach of company procedures as well as a serious breach of your statutory Health and Safety responsibilities." With regard to the Claimant's argument on consistency of treatment, Mr Reid wrote that he had investigated the detail surrounding one case that the Claimant believed was most comparable to his. He had concluded that whilst on the face the two appeared similar (because both concerned a failure to close a valve) in the other case the closing of the valve was not a documented GMP step and therefore the employee had not breached GMP by signing for the action." Mr Reid indicated that upon review of the other cases

listed by the Claimant, he did not believe they were of a similar nature. He also responded to the health and safety issue that had been raised. Taking everything into consideration, Mr Reid said that he had decided to uphold the decision to terminate the Claimant's Contract of Employment, "given that you did not follow GMP operating procedures resulting in a loss of Freon to the atmosphere. Your actions amounted to a breach of your statutory health and safety responsibilities in that you failed to take reasonable care".

35. An amended work order resulted from Mr McAndrew's investigation, which included adding a lock and chain to the valve [298], which would prevent any unauthorised person from opening the valve. Further, a second person also now checks and signs that the valve has been closed.

Submissions

36. Mr Markham made short oral submissions at the end of his case. Mr Huggett had prepared some written submissions in advance, which he supplemented with short oral submissions of his own. With apologies if this does not do justice to the full detail or cogency of these submissions, I have endeavoured to summarise both parties' submissions briefly below.

37. Claimant. The Claimant read out a personal statement by way of closing. He said that he had loved his job and had been considered a "real asset" by both colleagues and managers. He made a number of challenges to the disciplinary procedure carried out by the Respondent, which he said rendered it unfair, including that:

i. Mr Bristow should not have been the investigation manager because he was the Claimant's line manager;
ii. Mr Bristow should have conducted a fuller investigation, including speaking to (i) the fitter who had been on site during the Claimant's shift, (ii) the two operatives on the shift that followed him, and (iii) anyone else who might have had access to the valve;
iii. he was not shown, either at the disciplinary hearing or at the appeal, a crucial graph [267] that was relied upon by Ms Casenave at the disciplinary hearing;
iv. he should not have been suspended and this was in effect the application of a disciplinary sanction; no notes had been taken of that meeting which had been conducted by the same person who had heard the disciplinary hearing;
v. insufficient time was given for the disciplinary hearing after he had been told it was to happen and his postponement request was rejected;
vi. he had not been provided with typed up notes of the disciplinary hearing and only had hard to read handwritten notes;
vii. the outcome of the disciplinary hearing was hasty and not properly considered (there was "only" a 50 minute adjournment before the outcome was made known) and was a foregone conclusion as the Respondent had an agenda and did not believe in his guilt;
viii. there were issues around the consistency of his treatment;

ix. the appeal process was also unsatisfactory and rushed: Mr Reid had sent an email out before the Claimant had received the letter confirming his dismissal which reflected a zero tolerance approach; he was hostile and rushing at the hearing but then took over a month to let the Claimant know his decision;

38. On a substantive level, the Claimant said he should not have been dismissed because dismissal was not consistent with previous cases and dismissal was too severe an outcome given his exemplary service and that Mr McAndew's report had identified that the "root cause of the problem" was equipment failure: it was not fair in all the circumstances to have dismissed him for a "contributory cause" and if a correct procedure had been followed he would have been exonerated. He also criticised the fact that Ms Cazenave had not given evidence at the Tribunal hearing.

39. The Claimant referred to three specific cases: (1) *Brito-Babapulle v Ealing Hospital Trust* (UKEAT/0358/12) (#28,31): this was a case where an employment tribunal had gone straight from a conclusion that there was gross misconduct to a decision that dismissal for that reason was inevitably within the range of reasonable responses and had failed to consider whether the decision was unfair in the light of all the personal mitigation available to the claimant, including length of exemplary service; (2*) Dr M Thomson v Imperial College HealthCare NHS Trust* (UKEAT/0218/14) (#28,29, 32, 40) where the court looked at the reasonableness of appointing an individual with insufficient relevant experience to conduct a disciplinary hearing: "fairness does not depend on a 'box-ticking' approach to procedures; (3) *Gurnett v ASOS.com Limited* (ET no 3304149/2009) (page 5 #8.7/8; page 8 #11.8; page 10 #11.16; page 12 #13) which looked at the application of the ACAS Code, the fairness of the investigation process, and the lack of warning of the prospect of dismissal.

40. Respondent. The Respondent's case is that the Claimant was fairly dismissed for leaving a valve open; further the Claimant had signed a formal record stating that he closed the valve. The Respondent's business is heavily regulated and there are rules and procedures for good reason. The Claimant does not challenge that he knew, understood and was aware of these rules and their importance. These rules ensure the safety of patients, employees and the environment. As a Chargehand, the Claimant was trained, skilled and experienced. There was evidence that the leaving open of the valve had caused the incident to be reported to the Environment Agency and had resulted in caustic Freon gas being released into the environment.

41. Mr Huggett said the Respondent had carried out a reasonable and sufficient investigation in accordance with its policy. This had not been rushed. Mr Bristow was sufficiently trained and experienced to undertake this. It was right for him to have referenced Mr McAndrew's separate investigation. He had tried to speak to others but they had declined. At the investigatory interview, the Claimant accepted in effect that, while he said he could not remember not closing the valve, it must have been left open by him. He had apologised. His suspension was reasonable and in accordance with policy. It was not a knee-jerk reaction, it was a neutral act, only done after Mr Bristow's investigation had been concluded.

42. The serious potential consequences of the disciplinary charge were made clear to the Claimant. The disciplinary hearing might not have been postponed but matters were organised so that his chosen trade union representative could attend it with him. It was unfortunate that he was not provided with the graph but he was provided with Mr Bristow's investigation report and accompanying documents [90-222]. Further, the timings on the graph show that it was very likely that the valve had been left open by the Claimant. It made no difference to the outcome. There is no evidence that the Respondent was out to get the Claimant. Mr Reid's email [271] was just him wanting to make things clear to staff going forward.

43. At the appeal, the Claimant had argued that dismissal was not consistent with previous cases and gave 8 separate examples. Mr Reid had gone through each of these and had decided that they were, on their own facts, not comparable. In particular, with the last example, which did involve a GMP process, the error had been discovered when the form came to be signed [82B to 82D] so it was not signed. Mr Reid had also made a number of other checks of matters raised by the Claimant, including his overtime and length of service. Mr Reid also dealt specifically with Mr McAndrew's report [300]. A detailed outcomes letter was sent to the Claimant by Mr Reid.

44. The Respondent says therefore that the decision to dismiss was within the range of reasonable responses and was not too severe. If the dismissal was found not to be within the range of reasonable responses, the Respondent submitted that the Claimant had contributed 100% to his own dismissal, and / or that it would be just and equitable to reduce the amount of the basic and compensatory awards, and / or that there should be a *Polkey* deduction applied.

45. Mr Huggett referred the Tribunal to the following cases: (1) the three part test in *BHS Ltd v Burchell*, (2) the guidance in *Iceland Frozen Foods v Jones*, as subsequently confirmed in *Post Office v Foley*.and *HSBC (formerly Midland Bank) v Madden* [2000] IRLR 827, that the appropriate test for a Tribunal to apply, is to ask whether the employer's actions, including the decision to dismiss, fell within the band of reasonable responses that a reasonable employer could adopt in the same circumstances, not substituting the Tribunal's own view for that of the employer, but rather judging whether the Respondent had taken the correct approach and acted in a reasonable manner; (3) *Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23, that the range of reasonable responses test applies to any investigation; (4) that Tribunals should take particular care when scrutinising consistency arguments: *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352, *Paul v East Surrey District Health Authority* [1995] IRLR 305 and *MBNA Ltd v Jones* (UKEAT/0120/15); (5) failures at a disciplinary hearing can be rectified at appeal: *Taylor v OCS Group Ltd* [2006] IRLR 613.

Law

Unfair dismissal claim

46. As far as the unfair dismissal aspects of the case are concerned, the material statutory provisions are set out in section 98 Employment Rights Act. According to s 98(1) ERA in determining whether the dismissal of an employee is fair or unfair,

it is for the employer to show (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Subsection 98(2) ERA deals with the "potentially fair reasons" for dismissal and includes at (b) the conduct of the employee. It was said by Cairns LJ in *Abernethy V Mott Hay & Anderson* [1974] lRLR 213, at 215 that: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be a set of beliefs held by him, which cause him to dismiss the employee." That formulation by Cairns LJ was approved by the House of Lords in *Devis v Atkins* [1977] ICR 662. It is not for the employment tribunal to consider the substance of the employer's reasons at the s 98(1)(b) stage (provided they are more than "whimsical or capricious" [*Harper v National Coal Board* [1998] IRLR 260]). It is important not to conflate the questions of whether there was a potentially fair reason with the question as to whether it was a fair dismissal in the circumstances. They are two separate stages of the process. As Griffiths LJ observed in *Kent County Council v Gilham* [1985] ICR 233, if on the face of it the employer's reason could justify the dismissal, then it passes as a reason and the enquiry moves on to s 98(4) and the question of reasonableness. In *Sheffield Health and Social Care NHS Foundation Trust* v *Crabtree* EAT/0331/09, the EAT reminded Tribunals that the first part of the *Burchell* test goes to the reason for the dismissal, where the burden is on the employer.

47. S 98(4) ERA provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case. The burden of proof in establishing the reasonableness of the dismissal is neutral and the test is an objective one - *Boys and Girls Welfare Society v Macdonald* [1996] IRLR 129.

48. In the case of *BHS v Burchell,* the EAT laid down a three part test when considering whether a dismissal for misconduct was fair in all the circumstances. A tribunal must be satisfied that

i. the Respondent had a genuine belief in the alleged misconduct - as stated above this is relevant to reason not reasonableness;
ii. there must be reasonable grounds for having come to that conclusion; and
iii. the Respondent had carried out a reasonable investigation.

49. This means that the employer need not have conclusive direct proof of the employee's misconduct - only a genuine and reasonable belief, reasonably tested. The *Burchell* test was approved by the Court of Appeal in *Weddell and Co Limited-v-Tepper* [1980] ICR 286 and also in *Panama-v-London Borough of Hackney* [2003] IRLR 278. In *Boys and Girls Welfare Society* [1996] IRLR 129, the EAT said *Burchell* was inappropriate if there was no conflict on the facts, for example the employee admitted or did not dispute his guilt. Nevertheless, in *Whitbread plc (t/a*

Whitbread Medway Inns) v Hall [2001] IRLR 275, the Court of Appeal made it clear that even where misconduct is admitted (so that an employer does not, for example, have to prove that it had reasonable grounds for its belief) an employer is still under a duty to follow a fair procedure, such as hearing explanations and considering other penalties besides dismissal (unless the offence is so heinous that a reasonable employer following good industrial practice could conclude that no explanation or mitigation would make any difference to the decision to dismiss). In *John Lewis plc v Coyne* [2001] IRLR 139, an employment tribunal held that a dismissal for making personal phone calls (which was not denied and was in breach of company rules) was unfair because the employer had failed to investigate the seriousness of the offence, including the purpose of the calls, whether there was any element of personal crisis and whether or not the conduct was persistent.

50. Case law also makes clear that "a decision to dismiss must be within the band of reasonable responses which a reasonable employer might have adopted" - *Iceland Frozen Foods v Jones*. Tribunals should not, when considering these matters, look at what they would have done in the circumstances but should judge, on the basis of the range of reasonable responses test, what the employer actually did. The appropriate test is whether the dismissal of the Claimant lay within "the range of conduct that a reasonable employer could have adopted".

51. The EAT in *Haddon* v *Van den Berg Foods Limited* [1999] IRLR 672 said that the range of reasonable responses was wrong and was an *'*unhelpful mantra*'* because the test made it too difficult for an employee to succeed and it became in effect a test of perversity. The problem was that 'the moment that one talks of a 'range' or 'band' of reasonable responses one is conjuring up the possibility of extreme views at either end of the band or range'. However, the Court of Appeal dismissed these concerns in the joined cases of *HSBC (formerly Midland Bank) v Madden* and *Foley* v *The Post Office* [2000] IRLR 827, (and also subsequently in *Whitbread v Hall* and *Post Office v Burkett)* a year after *Haddon* was decided. The Court of Appeal reiterated that in applying the law of unfair dismissal in s 98 ERA, the correct approach for a tribunal to adopt was the approach set out by the EAT in *Iceland Frozen Foods v Jones,* namely that it was not for a tribunal to substitute its own view as to an employer's conduct and that tribunals should determine in each case whether the decision to dismiss falls within the 'band of reasonable responses' which a reasonable employer might have adopted towards the employee's conduct. The test therefore to be applied in a case of suspected misconduct, is not whether further investigation should have been carried out or more could have been done but whether the investigation that had been carried out could be regarded by a reasonable employer as adequate. In *ILEA-v-Gravett* [1988] IRLR 497, the EAT offered the following advice: "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of enquiry and investigation which may be required, including questioning of the employee, is likely to increase". The Court of Appeal *in Taylor v OCS Group Ltd* [2006] EWCA Civ 702 said that the essential question, when deciding whether a dismissal is fair under s 98(4), is whether the employer acted reasonably.

52. In *Haddon*, it was suggested that the "band of reasonable responses" is conceptually indistinguishable from a perversity test, although it was suggested in *Foley* that the test to be applied in tribunals in this context is not one of perversity. In *Tayeh v Barchester Healthcare Limited* [2013] EWCA 29, the Court of Appeal was expressly asked to clarify the difference. Rimer LJ (giving the leading judgment, with which Pill and Hughes LLJs agreed) acknowledged the problem (paragraph 50):-

> *Whilst the guidance in Foley excludes any need for a tribunal to find that an employer's decision to dismiss was perverse before it can conclude that dismissal was unreasonable, I admit to some difficulty in understanding the nature of that guidance. If the tribunal's application of the band of reasonable responses approach informs it that dismissal in the particular case fell outside the band of reasonable responses that might be adopted by the hypothetical reasonable employer, that would appear to be equivalent to a conclusion that dismissal was a decision that, on the facts, no reasonable employer could have made. That would be akin to a finding of perversity. That said, I accept that the guidance in Foley, binding upon this court, is to the effect that appeals to concepts of perversity are out of place in the consideration of the reasonableness or otherwise of the dismissal: the approach that has to be applied is simply that of the 'band of reasonable responses.'*

53. In their comments on what constitutes a fair dismissal in the case of *Reilly* v *Sandwell Metropolitan Borough Council* [2018] UKSC 16, the Supreme Court voiced some criticisms of the principles set out in *Burchell*. A female head teacher of a primary school had a close (non-sexual) relationship with a man who was convicted of making indecent images of children. Having taken advice she did not disclose the relationship or conviction to the school. The governors, however, later became aware of the relationship, suspended the head teacher and then dismissed her for the non-disclosure. A claim for unfair dismissal failed as did appeals to the Employment Appeal Tribunal, the Court of Appeal and the Supreme Court, all holding that a dismissal was within the band of reasonable responses an employer could reach. Lady Hale cited the views of Sedley LJ in *Orr* v *Milton Keynes Council* [2011] ICR 704 where he described the meaning of s 98(4) as 'both problematical and contentious' and said he thought Morrison P's views in *Haddon* were 'cogently reasoned'. However, the position remains that the *Burchell* test is still good, and that the approach taken and guidance given in *Foley* remains good law.

54. The Acas Code of Practice on Disciplinary and Grievance Procedures is intended to provide basic practical requirements for fairness that will be applicable in most conduct cases as the key procedural principles that underpin the handling of disciplinary and grievance situations at work. It sets down minimum standards only. A failure to follow the Code will not in itself make a dismissal automatically unfair, but its provisions will be taken into account by employment tribunals where appropriate when deciding whether a dismissal is fair or unfair and tribunals can adjust awards by up to 25% for any unreasonable failure to comply with any of its provisions (EA 2008, s 3). In *Lock v Cardiff Railway Co Ltd* [1998] IRLR 358, the EAT emphasised the importance of tribunals examining and taking into account the Acas Code. Not to do so would amount to a misdirection of law.

55. The section of the Code on handling disciplinary issues (para 5 to 28) sets out the steps employers must normally follow, which include, so far as appear to be relevant on the facts of this case:

> 5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case.
> 7. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.
> 8. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.
> Inform the employee of the problem
> 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the
> notification.
> .....
> Hold a meeting with the employee to discuss the problem
> 11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.
> 16. If a worker's chosen companion will not be available at the time proposed for the hearing by the employer, the employer must postpone the hearing to a time proposed by the worker provided that the alternative time is both reasonable and not more than five working days after the date originally proposed.
> 27. The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.

56. In order to expand and explain these basic principles, a non-statutory and non-binding ACAS Guide "discipline and grievance at work" accompanies the ACAS Code. It provides detailed practical advice on the formulation and operation of disciplinary procedures. Page 13 of the Guide sets out a number of procedures that can be followed. S 98(4) ERA and the Code accepts that allowances may be made for the particular circumstances of each case and the size and administrative resources of the employer's undertaking.

Investigations

57. In *A-v-B* [2003] IRLR 405, the EAT said that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation. In its view an investigation leading to a warning need not be as rigorous as one likely to lead to dismissal. The EAT accepted that the standard of reasonableness will always be high where dismissal is a likely consequence. The EAT pointed out that while, even in the most serious of cases, it is unrealistic and inappropriate to require the standards and safeguards of a criminal trial, a "careful and conscientious investigation of the facts is necessary" and the person carrying out the investigation "should focus no less on any potential evidence that may exculpate or at least point towards the innocence

of the employee, as he should on the evidence directed towards proving the charges against him."

58. The Court of Appeal in *Sainsbury's Supermarkets Limited v Hitt* stated that the range of reasonable responses test "applies as much to the question of whether the investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. … The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. ... The purpose of the investigation was not to establish whether or not the applicant was guilty of the alleged theft but whether there were reasonable grounds for the employer's belief that there had been misconduct on his part to which a reasonable response was to dismiss him."

59. In *Gratton v Hutton* (2003) unreported, 1 July, the EAT emphasised that the test is not whether further investigation might reasonably have been carried out but whether the investigation which had been carried out could be regarded by a reasonable employer as adequate.

60. In *Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09,* the EAT held that there was a neutral burden of proof under s 98(4) ERA and said that a reasonable investigation did not require an employer to gather all available evidence. They reminded Tribunals that the first part of the *Burchell* test goes to the reason for the dismissal, where the burden is on the employer. The second and third questions go to the reasonableness of the dismissal. In that respect, the EAT's judgment in *HSBC Bank plc v Madden* is wrong.

61. In *Salford Royal NHS Foundation Trust v Roldan* [2010] IRLR 721, the Court of Appeal confirmed that when carrying out an investigation into allegations of gross misconduct, employers should take into account the gravity of the potential consequences for an employee. If a dismissal could "blight an employee's career in some significant way, then Tribunals ".....will be required to scrutinise the employee's procedure all the more carefully." This may mean a more thorough investigation is required in cases where there are potentially significant consequences for the employee if he loses his job. In *Roldan*, the employee, who was a nurse, lost her work permit and consequently her right to stay in the UK, and also became the subject of a criminal investigation by the police.

62. The Court of Appeal also considered the scope of a reasonable investigation in a conduct dismissal in *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ 94. The claimant contended, when challenged over allegations of inflating his expenses, that there was an obligation on his employer to investigate in full all the defences he advanced. The Court of Appeal said such an approach would add an ‘unwarranted gloss’ to the range of reasonable responses test. Any investigation should be looked at as a whole. Employers must consider those defences that are advanced, but whether and to what extent it is necessary to carry out a specific inquiry into each of them will depend on the circumstances.

63. The ACAS guidance emphasises that the more serious the allegations against the employee, the more thorough the investigation conducted by the employer ought to be. The Guide stresses that employer should keep an open mind when carrying out an investigation; their task is to look for evidence that weakens as well as supports the employee's case.

Suspension

64. In *Gogay v Hertfordshire County Council* [2000] IRLR 703, the Court of Appeal upheld the High Court's finding that suspension of an employee was in breach of the implied duty of trust and confidence. The employee had been suspended (on full pay under a contractual clause) pending the outcome of an investigation. The Court of Appeal held that it does not inevitably follow that an employee should be suspended merely because there are reasonable grounds for an investigation. There must be reasonable and proper cause for a suspension. In the case of *Agoreyo v London Borough of Lambeth* [2017] EWHC 2019 (QB), the High Court was critical of a 'knee-jerk' suspension. The Court stressed that suspension is not a neutral act but 'inevitably casts a shadow over the employee's competence'. The High Court found that prior to suspending Ms Agoreyo the school made no attempt to ascertain Ms Agoreyo's version of events, failed to consider any alternatives to suspension, and the suspension letter did not explain why the investigation could not be conducted fairly without the need for suspension.

65. The Acas guidance makes it clear that suspension with pay may be considered for certain cases such as gross misconduct or where relationships have broken down, or where it is considered that there is a risk to an employer's property or responsibilities to others. However, the guidance emphasises that such suspension should be imposed only after careful consideration and should be reviewed to ensure that it is not unnecessarily protracted. If suspension is not reasonable it may be a repudiatory breach by the employer of the implied term of trust and confidence.

The appeal

66. The Court of Appeal in *Taylor v OCS Group Ltd* held that where a first hearing is defective, the appeal can cure the defect if the appeal is comprehensive, According to Smith LJ, 'what matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair'. In *McMillan v Airedale NHS Foundation Trus*t [2014] EWCA Civ 1031, the Court of Appeal held that as a right to appeal against a disciplinary sanction is for the employee's benefit, an increase in sanction would be permitted only if there was an express term in the employment contract allowing this.

Equitable considerations

67. Equitable considerations can include length of service. A long-serving employee will generally deserve more consideration before dismissal. Equity can also include consistency. An employer should consider how previous similar situations have been dealt with in the past. Nevertheless, it will be rare that the circumstances of one employee are truly comparable with those of another. In

Hadjioannou v Coral Casinos Ltd [1981] IRLR 352, the EAT said that inconsistency of treatment would be relevant only in limited circumstances. In *Hadjioannou* the Appeal Tribunal accepted the following analysis of the circumstances in which disparity might be relevant to an ET's consideration of an unfair dismissal claim

> " *… Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least will be not dealt with by the sanction of dismissal. Secondly, there may be cases in which evidence about decisions made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for a dismissal. … Thirdly … evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances."*

68. The EAT accepted, in *Hadjioannou*, that evidence as to decisions made by an employer in truly parallel circumstances may support such an argument. However, the EAT sounded a note of caution. At paragraph 25 Waterhouse J said:

> *". … Tribunals would be wise to scrutinize arguments based upon disparity with particular care. … there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a Tribunal may be led away from a proper consideration of the issues raised by s.57(3) of the Act of 1978. The emphasis in that section is upon the particular circumstances of the individual employee's case. …"*

69. The approach set out in *Hadjioannou* was endorsed by the Court of Appeal in *Paul v East Surrey District Health Authority* [1995] IRLR 305, where the Court of Appeal held that the employee's dismissal was fair on the ground that there was a clear and rational basis for distinguishing between the cases of the two employees.

The right to be accompanied

70. Under s 10 ERA 1999, workers have a statutory right to be accompanied at a disciplinary hearing. This right applies only where the worker 'reasonably requests' the presence of a companion. Where the worker's request is reasonable, the employer must permit the companion to attend (see eg *Roberts v The Regard Partnership* (ET/2104545/09)). The worker may choose whom he wishes to accompany him providing it comes within s 10 (ie trade union officials or fellow workers). By virtue of ss 37 and 38 ERA 2004 (amending s 10 ERA 1999), employers must allow a companion who accompanies an employee to a disciplinary hearing to address the hearing, to put an employee's case, to sum up that case and to respond on the employee's behalf. If an employer does not allow a companion to attend, this can be taken into account when considering fairness. In *Toal v GB Oils Ltd* (UKEAT/0569/12), the EAT held that the claimant had an absolute right to choose his companion: the use of the word 'reasonably' in s

10(1)(b) applied to the right to request to be accompanied but not to the choice of companion. In *Stevens v University of Birmingham* [2015] EWHC 2300, the High Court held it was unfair for the University to refuse the claimant a companion of his choosing, and that amounted to a breach of the implied term of trust and confidence.

Wrongful dismissal / breach of contract

71. There are different tests for unfair and wrongful dismissal. While unfair dismissal is a creation of statute and is about fairness, wrongful dismissal is about complying with the terms of the contract. In most cases, contracts of employment will contain agreed paid notice periods (or may provide for a payment to be made in lieu). Even in cases of misconduct, notice should still be given in accordance with the contract. The exception to this, which allows an employer to terminate a contract without notice occurs where an employee has committed an act of gross misconduct such as it can be said he has himself broken the contract, allowing the employer to accept the breach and dismiss without notice. A dismissal with the appropriate notice will be a contractually lawful dismissal (though it may be unfair). The common law approach to "gross misconduct" is that it is in effect a descriptive label that is applied to an act of misconduct which is sufficiently serious as to undermine the trust and confidence which is inherent in the particular contract of employment, and which, in effect, amounts to a repudiation of the contract by the employee such as to entitle an employer to summarily dismiss an employee - i.e. without any requirement for notice. Whether misconduct is sufficiently serious as to justify summary dismissal is a question of fact. Where a tribunal finds that the conduct justifying a dismissal was not gross misconduct, so as not to justify summary dismissal (ie without notice), this will not (necessarily) mean that the dismissal is unfair, although it may mean that the dismissal is wrongful if no notice was given. If there is no such serious act or omission by the employee, then summary dismissal would be a breach of contract by the employer. It is therefore necessary to examine what the employer's (express) terms and conditions and own internal procedures require, so as to determine whether these have been breached, as well as looking at any implied terms, such as that of trust and confidence, to consider whether there were sufficient grounds for the employer to terminate the contract of employment without giving notice.

Discussion and conclusions

Unfair dismissal

<u>Did the Respondent have a genuine belief in the alleged misconduct?</u>

72. As far unfair dismissal is concerned, s 98(1) ERA provides the starting point, which is for the employer to show the reason for the dismissal, and that it is a reason falling within subsection (2). In *BHS v Burchell,* the EAT laid down the three part test when considering whether a dismissal for misconduct was fair in all the circumstances. Case law has established that it is important not to conflate the question of whether there was a potentially fair reason with the question as to whether it was a fair dismissal in the circumstances. These are two separate stages

of the process (*Gilham*, *Crabtree)*. The first part of the *Burchell* test is relevant to the reason not reasonableness.

73. In this case the Respondent says that the Claimant was dismissed for the potentially fair reason of conduct. There was in my assessment ample evidence of this: (i) the valve had been left open; (ii) this had resulted in the leak of a gas to the environment; (iii) this (the leaving open of the valve) was not disputed; (iv) it was more likely than not that this occurred during the Claimant's shift; and (v) the Claimant was unable to come up with any alternative explanation, such that while he could not remember, he accepted it must have been him. On this this basis, in my judgment, the Respondent satisfies the first part of the test: it had a genuine belief in the alleged misconduct: it cannot be said that this was a "whimsical or capricious" reason (*Harper v National Coal Board*).

Fairness

74. The second and third parts of the *Burchell* test relate to the fairness of the dismissal, which is governed by s 98(4) ERA. This provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case. The size and administrative resources aspect of this can mean that, always depending on the circumstances, a larger organisation may be expected to adhere more strictly and more fully to processes and procedures – there may be a little more latitude for small, less well-resourced organisations.

75. It is clear from case law that an employer need not have conclusive direct proof of an employee's misconduct - only a genuine and reasonable belief, reasonably tested. In *Boys and Girls Welfare Society*, the EAT said *Burchell* was inappropriate if there was no conflict on the facts, for example the employee admitted or did not dispute his guilt. Nevertheless, in *Whitbread v Hall*, the Court of Appeal made it clear that even where misconduct is admitted an employer is still under a duty to follow a fair procedure, such as hearing explanations and considering other penalties besides dismissal.

76. When looking at the fairness of a dismissal, a tribunal must be careful to apply the test of the "band of reasonable responses which a reasonable employer might have adopted" (*Iceland Frozen Foods).* This applies as much to the procedural aspects of the process that was followed as to the substance of the decision (*Hitt*). It is not a question of perfection or necessarily of what else might have been done, although that can be a relevant consideration, but whether what was done could fall within the range of reasonable responses of the reasonable employer. Tribunals must be careful in this regard not to fall into the trap of substituting their own views for that of the employer (*Madden* and *Foley).* Bearing these warnings in mind, I went on to look at the procedural and substantive aspects of this case.

Procedural issues

77. As set out above, the Claimant raised a number of challenges and concerns to the procedure, which the Respondent refutes. Separately, having heard all the evidence, I identified a number of other matters, which I felt were potentially of concern. These are also considered below.

78. The investigation. The Claimant raised a number of concerns about this, including that Mr Bristow should not have been the investigation manager because he was the Claimant's line manager and that a fuller investigation should have been conducted. He also said he was asked leading questions. It is clear that where the consequences for an employee are grave, they are entitled to expect a thorough investigation (*A v. B)*. The Respondent's policy states that any investigation should take place promptly and will involve obtaining all the facts relevant to the case. The Acas code acknowledges that there is no right to be accompanied to an investigatory interview.

79. In the circumstances of this case, the additional steps suggested by the Claimant were ones that could reasonably have been undertaken by an employer of the size, and with the resources, of the Respondent and would not have taken very long to complete. However, on balance, I agree here with Mr Huggett that the Respondent had carried out a reasonable and sufficient investigation in accordance with its policy. Given that the Claimant had, during both the conversation with Mr Woods and subsequently with Mr Bristow, [93-6] accepted that while "he didn't remember leaving it open" "it must have been me. I must have just forgotten" and had apologised, it could not in my assessment be said to be unreasonable for Mr Bristow to conclude as he did. He had Mr Woods account, he also had access to Mr MacAndrew's initial findings. So far as leading questions are concerned, an investigation interview is not subject to the same sort of safeguards that are in place for a disciplinary hearing. I do not believe that if leading questions were asked, it would render the investigation process unfair. Having heard Mr Bristow's oral evidence, in my judgment he was sufficiently trained and experienced to undertake this process. The Respondent's Disciplinary Procedure, so far as relevant and material [43-45], makes clear that as far as authority to take disciplinary action is concerned, each stage of the procedure will normally be carried out by the employee's supervisor or immediate line manager.

80. The suspension. The Claimant said he should not have been suspended and this was in effect the application of a disciplinary sanction; no notes were taken of this meeting, which was conducted by the same person who would hear the disciplinary hearing. So far as suspension is concerned, the Respondent's policy states that an employee may be suspended on full pay at any stage of the procedure "where time is required to carry out enquiries/investigations or where it is considered appropriate that they should not attend work". The policy also notes: "no disciplinary penalty should be imposed until the employee has been informed of the complaints against them, a full investigation into the allegation or circumstances has been carried out and a disciplinary hearing convened". The Acas Code states that in cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action. The Acas guidance suggests that suspension with pay may be considered for certain cases such as gross misconduct or where relationships have broken

down, or where it is considered that there is a risk to an employer's property or responsibilities to others. However, the guidance emphasises that such suspension should be imposed only after careful consideration and should be reviewed to ensure that it is not unnecessarily protracted. In the *Gogay case*, the Court of Appeal said it does not inevitably follow that an employee should be suspended merely because there are reasonable grounds for an investigation. There must be reasonable and proper cause for a suspension. In *Agoreyo*, the High Court was critical of a 'knee-jerk' suspension and stressed that suspension is not a neutral act but 'inevitably casts a shadow over the employee's competence'.

81. The suspension here was short – it lasted over a weekend; the offence was serious. It followed on from a concluded investigation. Ms Cazenave appeared to be a sufficiently senior manager to be dealing with suspension and that she would also deal with the disciplinary hearing did not in my judgment give rise to any concerns. However, there was no evidence presented as to why the Claimant was suspended and there was nothing in the documents evidencing the decision making process. The Respondent's policy allows for suspension at any stage of the procedure "where time is required to carry out enquiries/investigations or where it is considered appropriate that they should not attend work". There was no issue on the face of it relating to the need for more time, but there was no other evidence to suggest what was the reason for the suspension, which did appeared to have been applied routinely. Given that suspension is not normally a neutral act, and there was nothing to counter this in the letter informing the Claimant of his suspension or to explain why he was being suspended, [223] in my judgment, it appears that the Respondent did not adopt a reasonable procedure when it suspended the Claimant.

82. <u>The disciplinary process</u>. The Claimant raised a number of concerns about this.

83. The Acas Code provides that [9] "if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification. It also says that a meeting should be held with the employee to discuss the problem [10] and at [11] says "The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case. It also provides that [16]. "If a worker's chosen companion will not be available at the time proposed for the hearing by the employer, the employer must postpone the hearing to a time proposed by the worker provided that the alternative time is both reasonable and not more than five working days after the date originally proposed". The Respondent's policy notes, "no disciplinary penalty should be imposed until the employee has been informed of the complaints against them, a full investigation into the allegation or circumstances has been carried out and a disciplinary hearing convened". The policy also states that where a companion is unable to attend at all formal stages of the procedure, the employee may request

a postponement of a formal hearing of up to 7 calendar days to facilitate attendance.

84. In my assessment, the Respondent complied with the Acas Code and with its own policy in regard to most of the disciplinary process. The letter inviting the Claimant to the disciplinary hearing made clear the seriousness of it and the potential consequences [223]. It also appears that while the Respondent did not accede to the Claimant's request for a postponement, it did made arrangements so as to ensure that the Claimant's chosen representative was able to attend at the allocated time and place, so no issue arises out of this.

85. The Claimant also complained that he was not shown the graph [267] that was relied upon by Ms Cazenave at the disciplinary hearing (and which was also apparently available to Mr Reid at the appeal: the Claimant didn't see this until the discovery process for the tribunal hearing). It is not satisfactory, in my view, that a crucial document relied upon by the Respondent was not made available to the Claimant. However, he was provided with all the other relevant documents relied upon by Mr Bristow and Ms Cazenave; it did not seem to me that it had deliberately been withheld, not least because it was a document that was helpful to the Respondent. Nonetheless, it should have been made available to the Claimant as it deprived him of the opportunity to question and challenge its findings; also it helped explain why the Respondent was confident that the valve had been left open during the Claimant's shift.

86. Mr Markham also complained about the timing of the disciplinary hearing and said giving him 48 hours over a weekend was insufficient. The Respondent's policy, which reflects clause 11 of the Acas Code, states [44] that "the employee must have sufficient advance warning of a disciplinary hearing to enable them to prepare …" It is also clear that disciplinary hearings should not be subject to unreasonable delay.

87. An SAR email, [317] headed "Investigation" and dated Friday 23rd February states "The investigation needs to be complete today so we get an invite to Dan to bring him to a hearing on Monday". It is clear that someone within the Respondent was keen to move things along. I was concerned about the amount of notice given for the disciplinary hearing, particularly when the Claimant had been suspended and was not permitted on site. There is also evidence via the SAR email that someone up the management chain was dictating the timing. On the other hand, disciplinary hearings often take place at relatively short notice. This was a matter of potentially serious misconduct. Moreover, the Claimant did have 48 hours' notice, was provided with all the relevant documents (bar the graph), was able to have available to him the trade union representative of his choice, and was able to prepare a number of responses to the documents provided [[251-254]. It did not appear to me that he had in reality been prejudiced by the short notice. On balance, while this was not an ideal situation, it could not be said in my judgment, to fall outside the range of reasonable actions taken by employers in such a situation.

88. <u>The decision to dismiss</u>. The Claimant complained that the outcome of the disciplinary hearing was hasty and not properly considered (there was "only" a 50 minute adjournment before the outcome was made known) and argued it was a

foregone conclusion. He relied in part upon the email sent by Mr. Reid on 28th February. He said this showed that the Respondent had an agenda and did not believe in his guilt.

89. On balance, I did not consider that that the fact that it took 50 minutes to consider an outcome to a decision was unusual or could be said to be outside the range of reasonable actions taken by employers in such a situation. Mr Reid's email was sent after the decision had been taken. That email does appear to suggest that the Respondent was convinced of the Claimant's guilt. Further, the SAR email dated Monday 26 February and timed at 18.44, [318] had already reported the outcome. Mr Reid, when asked in evidence, said he had not hads any contact with Ms Cazenave prior to the disciplinary hearing. Although there was some similarity in language and tone between Ms Cazenave's letter and the email, there was no other evidence to suggest that her decision was pre-determined or the result of pressure from elsewhere.

90. I was concerned about one matter relating to the disciplinary hearing and the outcome. The letter of 23 February to the Claimant informing him of the disciplinary hearing, [223], stated that the allegation against him was that he had allegedly "not followed the correct GMP operating procedure resulting in the loss of Freon to the atmosphere." The Respondent's disciplinary policy sets out various non-exhaustive examples of gross misconduct, including "actions which are in breach of a statutory responsibility including the company's Health and Safety at work policy or regulations relating to the Company's activities as a manufacturer and supplier of pharmaceutical and health care products (eg Good Manufacturing Practice)" as well as "a serious neglect of duty or failure to observe Company rules, regulations, policies/procedures, including GMP*".* This policy also lists as other examples, "dishonesty or fraud – including the fraudulent completion of Company form and claims" as well as theft, violence, serious insubordination, unacceptable conduct or behaviour etc. These are of course only examples, and are non-exhaustive and are not supposed to cover off every eventuality. However, there is in my view, an apparent overlap and some conflict between the two examples relating to breaches of rules and regulations, which is material in my judgment on the facts here, and which creates a lack of certainty around sanctions and outcomes: one example talks about "a *serious* neglect of duty or failure to observe Company rules, regulations, policies/procedures, including GMP*"* while the other, which appears to be the one relied upon Ms Cazenave talks of "*actions which are in breach* of a statutory responsibility including the company's Health and Safety at work policy or regulations relating to the Company's activities as a manufacturer and supplier of pharmaceutical and health care products (eg Good Manufacturing Practice)": one refers to a "serious" breach and the other does not. In my view, judged against the other examples that are given, and to ensure a consistent level of seriousness, to amount to gross misconduct, it must have been the intention that to justify summary dismissal for gross misconduct a "serious" breach of the rules or regulations is needed.

91. This has a direct bearing in this case – the original referral by Mr Bristow and the letter inviting the Claimant to the disciplinary hearing, refer to the charge against him as being "an allegation that he had "not followed the correct GMP operating procedures resulting in the loss of Freon to the atmosphere", (which is stated to

amount to gross misconduct") but Ms Cazenave's letter of 28th February to the Claimant, [269-70] confirming her decision to dismiss, stated, "I concluded that your actions and failure to follow the company procedures amounted to a breach of your statutory Health and Safety responsibilities in that you failed to take reasonable care." This terminology appears to rely on the example that does not set out a level of seriousness, relying only on the fact of a breach and it appears to be based on a different allegation than the one identified by Mr Bristow. Further, and in any event, it never appears to have been specifically put to the Claimant that he breached a statutory duty. I was not shown and no reference was made during the tribunal hearing, or as far as I could judge, at either the disciplinary or the appeal hearings, to the Respondent's health and safety policy. No reference had been made to a failure to take reasonable care. While much has been made of GMP, no reference has been made to any specific health and safety rule that was said to have been breached or as to what the Claimant's statutory Health and Safety responsibilities were said to be. As a consequence he had no opportunity to deny these charges, let alone seek to respond to them in full. Mr Reid in his letter rejecting the Claimnat's appeal, [301] refers to the Claimant's failure to follow GMP operating procedures and finds "your actions amounted to a breach of your statutory health and safety responsibilities in that you failed to take reasonable care". In my judgment, this is a further instance of procedural unfairness.

92. The appeal. The Claimant complained that he had not been provided with typed up notes of the disciplinary hearing and only had the handwritten notes; he also sought to argue that he had not been dealt with consistently; he said the appeal process was unsatisfactory and rushed: Mr Reid had sent out the email of 28 February which reflected a zero tolerance approach; Mr Reid was hostile and rushed the hearing but then took over a month to let the Claimant know his decision.

93. The Acas Code [27] states that an appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case. The Respondent's policy states that appeals must be submitted within 7 calendar days of the issue of the notification of formal disciplinary action. It adds that the manager hearing the appeal will have the authority to take whatever action is considered appropriate in all the circumstances, including upholding or overturning the decision, and reducing or increasing the penalty.

94. I was not convinced that it was reasonable in the circumstances here for Mr Reid to deal with the Claimant's appeal. I did not consider that it could be said that Mr Reid was either impartial or uninvolved. This is because in particular of the tone and content of the email that he had sent round at 14.38 on 28th February to all Queensborough employees. Although this does not specifically identify the Claimant by name, it is quite clearly referring to his case. This email made specific reference to a number of matters, which suggested to me that Mr Reid had already made his mind up about the Claimant's case: including for example (emphasis added), (i) "Each and every one of us is responsible for ensuring that we work in line with our status as a GMP compliant manufacturer, our GMP rules are in place in order to deliver safe medicines to our customers and ultimately our patients who rely upon them for their health and wellbeing. *Signing for work that has not been done or checked to the right standard is not acceptable in any circumstance*"; (ii) "If a person *does not follow GMP procedures this person ultimately chooses not to*

*work for Aesica as we will not tolerate any non compliance or fraudulent action*s that ultimately put our patients and colleagues at risk"; and "(iii) "The business *has, and will continue to enforce a zero tolerance approach* .." On balance, in my judgment, it was contrary to good practice and unreasonable for Mr Reid to have conducted the appeal, given the tone and content of this email**.**

95. I have found, as set out above, a number of what I regard as procedural irregularities relating to (i) the suspension, (ii) the graph, (iii) the basis relied upon for dismissal and (4) the appeal. While these would not individually, in isolation, in my judgment, necessarily have made the dismissal procedurally unfair, when taken together, they do to my mind render the overall dismissal process as unreasonable and so I find this was a procedurally unfair dismissal.

96. Substantive matters: the decision to dismiss. In additional to any procedural flaws that may be identified, the fairness of a dismissal also involves considering whether the decision to dismiss falls within the "band of reasonable responses which a reasonable employer might have adopted" (*Iceland Frozen Foods).* S 98(4) ERA provides that the determination of the question whether the employer acted reasonably or unreasonably includes whether the reason relied upon was a sufficient reason for dismissing the employee, as well as taking account of the size and administrative resources of the employer's undertaking, as well as "equity and the substantial merits of the case". Tribunals must be careful in this regard not to substitute their own view as to what they would have done.

97. In my assessment, the Claimant was reasonably made the subject of disciplinary action. That was fair and reasonable given the error that was found and the fact that gas had leaked into the atmosphere and that this was a reportable event to the Environment Agency, it could not be ignored or dismissed. Moreover, there was a significant body of evidence on which to base an assumption that this had occurred due to the Claimant's error. He, in effect, had accepted that. It was a serious and significant matter and was rightly and reasonably in my judgment ascribed to a category of potential gross misconduct. However that does not mean that dismissal, nor summary dismissal, should automatically follow in every case: the Respondent's own policy acknowledges that it will "normally" follow. Equitable factors such as length of service, performance, disciplinary record and consistency of approach have to be considered, along with the size and administrative resources of the employer.

98. I also reminded myself in this context of the observations of Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220:

> *"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."*

99. The fairness of a dismissal falls to be judged on the basis of the facts known to the employer *at the time of the decision to dismiss* (*Devis v Atkins*): in the present case however, there was no material evidence placed before me which had not been available to the Respondent's management at the time of the decision to dismiss. Further, a tribunal should not take lightly the opinion of experienced managers who decided that what had happened amounted to gross misconduct and that summary dismissal was appropriate. However, ultimately it is for the tribunal to decide whether those managers' views represented a reasonable response to the Claimant's conduct, and the "band of reasonable responses" is not "infinitely wide". S 98(4)(b) ERA expressly directs tribunals to decide this question "in accordance with equity and the substantial merits of the case". This means that deciding fairness is not simply "a matter of procedural box-ticking": it does allow an employment tribunal to find that dismissal was outside the band of reasonable responses "without being accused of placing itself in the position of the employer".

100. The Claimant challenged the consistency of his treatment, and Mr Reid's finding that he did not believe that there was a lack of consistency in the treatment; the Claimant also raised a concern as to why Mr Reid had felt in necessary to put in a supplemental statement dealing with this. I did not find anything unusual in the submission of a supplementary statement. Bearing in mind the cautionary words of Waterhouse J in *Hadjioannou*, that "industrial tribunals would be wise to scrutinise arguments based on disparity with particular care", in my assessment, Mr Reid appears to have considered the cases on consistency that were presented to him carefully and distinguished them from the facts in the Claimant's case. He was, on the available evidence, entitled in my judgment, to come to the opinion that those previous cases could be distinguished from the present. A range of different disciplinary sanctions had been applied to a variety of different allegations of misconduct. I saw no basis on which this could be said to fall outside the range of reasonable responses.

101. Nonetheless, having asked myself the question on the facts and circumstances here "whether a reasonable employer facing the circumstances as found by the Respondent have dismissed the Claimant", I have come to the conclusion they would not. I considered that both summary and indeed any sort of dismissal fell outside the realms of reasonableness in the circumstances of this case. I make my finding that dismissal as a sanction was outside the band of reasonable responses in this case, based in particular on the following matters:

i. In terms of equitable factors, the Respondent did take some note of the Claimant's length of service, performance and considered whether a lesser penalty could be applied: Ms Cazenave noted that she had listened to the mitigation presented and had given consideration as to whether a lesser penalty could be applied, but had come to the decision they could not; and in his appeal outcome letter, [300], Mr Reid noted the Claimant's length of service and said he had reviewed all the available documentation. Nonetheless, these references appeared to me to be perfunctory. Further, no account appears to have been taken of the fact that implementing some of Mr McAndrew's recommendations would obviate the risk of such an incident occurring again: subsequently two of

his recommendations (adding a lock to the valve and introducing a double check that it had been turned off) were implemented. I did not believe that against this background, the Claimant's length of service, of 16 years, his exemplary disciplinary record, and the numerous character references that had been supplied, had been given sufficient weight by the Respondent;

ii. although this was a serious incident, there was nothing to suggest the Respondent had taken any or any sufficient account of the fact that there was no actual injury to any employee or patients or the atmosphere: as Mr Reid said in his 28th February email, it "could have had" very serious repercussions (but, in the event, did not);

iii. while the Respondent did take note of the "mitigation" on "equipment design and documentation", I did not believe that the Respondent took sufficient account of the findings of either Mr Bristow or Mr McAndrew, both of whom concluded that while there was a "contributory" human error by the Claimant, the "root cause" was equipment design which [Bristow] "failed to provide sufficient barriers to safeguard against a single operator error" and [McAndrew] "equipment design is considered to be the root cause" [217]. The Claimant pointed out in his very first interview with Mr Bristow [95] that "there is nothing to stop what I have done happening, no interlocks on that system". Mr McAndrew also found that the process was not actuated, valve position feedback is not provided to the control system and there were no alarms. …. "As a single failure can result in a significant release of Freon the plant design does not provide sufficient safeguards and is considered to be the root cause of the incident". This conclusion was further confirmed at item 8 [220]: "the root cause is equipment design which failed to provide sufficient barriers to safeguard against a single operator error." These matters were specifically raised by the Claimant at the disciplinary interview [251/2; 264] – where Ms Cazenave referred to it after the adjournment as "mitigation on equipment design and documentation", language also used in her letter confirming the decision to dismiss [269]. When Ms Blanks raised this at the appeal hearing, [294/5], Mr Reid s*aid he was not sure how that was linked to "why we are here and the appeal".* Mr Reid said, *"This meeting its for you to provide information and a forum to question the processes that were followed if that's what you want to do, I assume you have the employee handbook that details the process?"* In his letter upholding the dismissal [300] Mr Reid referred to Mr McAndrews' investigation report but appeared to dismiss its findings on the basis that the plant was aging and processes were not automated and relied on manual operation. Yet as part of the outcome of Mr McAndrew's report further process safeguards were implemented [298];

iv. a breach of statutory health and safety responsibilities was relied upon by the Respondent in dismissing the Claimant, which was not based on Mr Bristow's investigation findings and which was never put to the Claimant [270/301] – at no point had any specific health and safety responsibility been raised or put to the Claimant during the disciplinary hearing, but this

was the conclusion that was reached by Ms Cazenave; Mr Reid during the appeal hearing [282] stated that the situation and the allegation "fits into three sections in the handbook: (1) actions which are in breach of a statutory responsibility including the company's health and safety at wok policy; (2) a serious neglect of duty or failure to observe company rules, regulations, policies / procedures, including GMP; (3) fraud". Ms Blanks asked what the Claimant's letter said and Mr Markham asked if he was being accused of having done it on purpose. Mr Reid replied "It could be that way couldn't it. You signed for an activity that you did not complete. That can amount to fraud". Ms Blanks replied "Fraud is financial". None of this was raised at the disciplinary hearing. But in Mr Reid's email of 28th February, he specifically refers to "we will not tolerate any noncompliance or fraudulent actions" which he then raises at the appeal hearing**;**

v. no account appeared to have been taken by the Respondent that its own disciplinary policy in setting out a non-exhaustive list of examples of gross misconduct, said that these "will *normally* result in summary dismissal", - my emphasis added – which gave them a discretion as to how to proceed in any case: rather Ms Cazenave's dismissal letter stated that "The Company *will not tolerate* anything which puts the health and safety of its employees or the environment in jeopardy"; Mr Reid's email of 28 February stated that "Signing for work that has not been done or checked to the right standard is *not acceptable in any circumstance" and* "If a person does not follow GMP procedures this person ultimately chooses not to work for Aesica as *we will not tolerate any non compliance or fraudulent actions* that ultimately put our patients and colleagues at risk; it appears that the Respondent ignored its own room for the exercise of discretion;

vi. as reflected in his email of 28 February, Mr Reid appeared to have already made up his mind about the Claimant, before he heard his appeal.

102. Overall, I do not believe therefore that a reasonable employer would have dismissed the Claimant in these circumstances, whether with or without notice. Therefore I find that the decision to terminate his employment was substantially unfair as dismissal fell outside the band of responses of a reasonable employer. Additionally, I have also found, as set out above, that this was a procedurally unfair dismissal.

Wrongful dismissal

103. A different test applies when looking at wrongful dismissal from unfair dismissal. If the Claimant had been dismissed with notice, in accordance with his contract, no potential claim for wrongful dismissal would arise. An employer is only permitted to terminate a contract without notice when an employee has committed a repudiatory breach of the terms of his contract such as it can be said he has himself broken the contract, allowing the employer to accept the breach and dismiss without notice. I must ask myself here whether I think that in this instance, the Claimant committed a repudiatory breach of contract. In my assessment, there were reasonable grounds to believe that Claimant had left open a valve but signed

that he had switched it off: it was more likely than not that the Claimant had made the error and erroneously signed for it. There was nothing to suggest he had done so deliberately or had tried to cover it up. As to whether that amounts to a repudiatory breach the obvious place to start is to look at what the Respondent's disciplinary policy views as acts likely to justify dismissal summarily. In this case, there is, as already identified above, an apparent inconsistency in terms of whether a breach or a serious breach of rules and regulations amounts to potential gross misconduct. In my view, judged against the other examples, (theft, violence, serious insubordination, unacceptable conduct or behaviour etc) the intention must have been that there must be a serious breach of the rules or regulations (including the GMP) to amount to a repudiatory breach. While there was a breach here, in my judgment, on the facts, this was not a serious breach. It was not intentional, it had not happened before, there was no evidence to suggest it would happen again and while the consequences were potentially serious, in the event, they were not. On that basis, I do not believe that the Claimant committed a repudiatory breach of contract. Therefore, I find that the Respondent was not entitled to summarily dismiss the Claimant without notice.

Remedy

104. Given my findings above, it will be necessary to have a further hearing to determine the appropriate remedy in this case.

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Employment Judge Phillips
7 June 2019