**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No. 4103682/2019**

**Final Hearing Held in Dundee on 31 July and 1 August 2019, deliberation day on 14 August 2019**

**Employment Judge A Kemp**

| | |
|---|---|
| **Mr M Cooney** | **Claimant**<br>**Represented by**<br>**Miss L Campbell**<br>**Solicitor** |
| **C J Lang & Sons Limited** | **Respondent**<br>**Represented by**<br>**Mr S Allison**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**The claimant was not unfairly dismissed, and his claim is dismissed.**

**REASONS**

**Introduction**

1. The claimant claimed unfair dismissal against the respondent. The respondent admitted the dismissal and contended that the reason for that was gross misconduct, and that the dismissal was not unfair. Miss Campbell confirmed that no separate claim for breach of contract was made.

## Issues

2. The Tribunal identified the following issues for determination:

(i) What was the reason for the dismissal?

(ii) If potentially fair, was it fair under section 98(4) of the Employment Rights Act 1996?

(iii) If not, what remedy was the claimant entitled to having regard to (a) his losses, (b) whether a fair dismissal may have resulted from a different procedure, and (c) whether he contributed to the dismissal.

## Evidence

3. Evidence for the respondent was given by Mr Tom Macdonald, Mr Ian Fleming and Mr Colin Main. The claimant gave evidence himself. There was a single bundle of documents spoken to, which was added to without objection during the course of the hearing. The Tribunal was also shown CCTV footage by way of projector, with selected excerpts provided by the respondent without objection by the claimant.

4. By agreement of the agents, at the conclusion of the evidence matters were deferred to allow each to prepare written submissions. They were duly tendered, and considered on a deliberation day thereafter.

## Facts

5. The Tribunal held the following facts to have been established:

6. The claimant is Mark Cooney.

7. He was employed by the respondent as a Warehouse Operative. His duties were to keep the factory floor and area around it tidy, removing empty boxes

that had been discarded by other workers. He was responsible for cleaning up any spillages.

8. His employment commenced on 5 January 2019. His net weekly pay was £282.23. He worked a standard 37.5 hour week.

9. The respondent has a Disciplinary Policy which has provision for gross misconduct. The list of examples of that included “breach of health and safety policy, procedure and/or obligations” and “causing loss, damage or injury through negligence”.

10. The respondent also has a Health and Safety Policy. Its provisions included under the heading “2.8 Employees are responsible for”…….. “2. Ensuring the health, safety and welfare of themselves and others who may be affected by their acts or omissions.”

11. The respondent was concerned to maintain health and safety at its premises. It trained its staff, including the claimant, regularly in a series of health and safety matters.

12. In June 2018 a letter had been sent to the respondent, with an indication of support from 10 employees, complaining about Mr Matthew Buchanan, another employee who was the son of Mr Dougie Buchanan, a senior manager of the respondent. Mr Matthew Buchanan had worked with the claimant, and later left the employment of the respondent.

13. The respondent operated a warehouse facility at which the claimant worked. It was divided into various areas. One was the chilled area. It was not the claimant’s normal place of work, but he was asked to work there in October 2018 as holiday cover. He did so.

14. The claimant’s duties there were in essence to tidy the area he worked in, and to clean spillages.

15. Staff working for the respondent are issued with standard uniform, which includes a dark blue fleece, and a light blue jumper.

16. At the side of the main area of the chilled area is a walkway that leads to a door. Behind that door is a corridor. The corridor leads to doors to each of the male and female toilets on the ground floor and to a set of stairs that leads to an area at the first floor level that is for staff to use, which has facilities including a microwave. That staff area was where staff tended to take their breaks.

17. The floor of the toilets and corridor is made of tiles. The toilets were cleaned twice each day by cleaners employed by the respondent.

18. On 17 October 2018 the claimant commenced work at his normal time of 9 am. The claimant went to the chilled area. Within that is a traywash machine. It is used to wash trays which had contained foodstuffs. It takes about 20 minutes to be ready for use when switched on. He left the traywash area to go to the staff facility area at 9.05.

19. At 9.08.44 (being 0908 hours and 44 seconds) that day Mr Mark Furey, an employee of the respondent went towards the walkway, clocked off to start his break, and entered through the door leading to the corridor. He was wearing a dark blue fleece and high visibility jacket. He went into the staff area on the first floor. His break was to last 20 minutes.

20. At 9.18.12 the claimant entered the traywash area wearing a light blue jumper and a high visibility jacket. He left that area at 9.19.22 and returned at 9.20.48 carrying an item (which was not identified in evidence). He entered the door to the corridor at 9.21.01. The claimant had noticed when waiting for the traywash machine to start that there was a foul smell coming from the male toilets area. He went to the male toilets. He found a white bottle which contained some form of floor cleaning liquid that he thought was Flash. He

took that, and poured some into the two urinals that were there, then poured some onto the floor of the toilet, and some onto the corridor. He obtained a wire brush, and brushed the liquid into the floor of the toilet. He opened the window of the toilet to help it to dry more quickly. It took about two minutes to do so.

21. At 9.21.38 another employee Mr Derek Duffy entered from the traywash area through the door to the corridor. He left that same door at 9.22.55.

22. At 9.23.30 the CCTV footage from a camera in the chilled area shows an arm with a light blue sleeve shaking the last drops of liquid from a white bottle. That arm was the claimant's. He had continued to pour liquid from the bottle out from the corridor into the walkway, such that his hand was outside the doorframe into the walkway whilst his feet were standing on the corridor. He continued to pour the last drops of liquid from the bottle onto the walkway adjacent to the door leading to the corridor.

23. By his actions he made the tiled floor of the toilet and corridor wet and slippery. When he carried out these actions he was wearing a light blue jumper.

24. At 9.24.00 the claimant left through the door from the corridor into the traywash area, carrying the white bottle, which he then placed in a bin near the traywash machine. The claimant made no attempt to find a "wet floor" or similar sign. There were several such signs available at the warehouse, including in the chilled area. In the period from around 9am to 9.24am that day the claimant had not seen Mr Furey.

25. At 9.28.23 Mr Furey left through the door from the corridor to the traywash area, wearing a dark blue fleece and high visibility jacket.

26. At 9.29.41 Mr Charles Stewart another employee of the respondent entered the door into the corridor. He came out of the same door at 9.33.15. In the intervening period he slipped on wet tiles in the corridor.

27. At 9.40 am Mr Stewart reported the accident he had sustained to Mr Ricky Mauchline. He had sustained a lumbar injury and later that day left work. He was off work because of the injury for two weeks.

28. Mr Mauchline went to put a wet floor sign where the accident to Mr Stewart had occurred. As he went to do so, he also slipped on the wet tiles. He did not sustain material injury.

29. Mr Mauchline was the supervisor for the areas that included the chilled area. He conducted an investigation. He took photographs of the floor tiles in the corridor and toilet that were wet. He obtained CCTV footage from the chilled area. He obtained witness statements from Mr Duffy, Mr Furey, Mr S McAvoy and Mr A Ritchie.

30. Mr Mauchline also spoke to the claimant on the day of the incident, at an investigatory meeting, and asked him about it. He took a written statement which the claimant signed. In that the claimant stated, amongst other matters "I was in the toilet and used like a flash bottle to help mask the smell in the toilets at chilled. I poured the liquid in and around the urinals in the gents and then brushed it into the floor, and then opened the window to help it dry." He denied that he had cleaned in the corridor area, or put liquid on the tiles there. When asked about the use of a wet floor sign he said, "No, because I brushed it in and opened the window to help it dries quicker." He said that the can of air freshener was empty. When asked if anyone else could have used the bottle he said, "No I emptied it, like I said there was only a small amount in it." He said that it was not a spray bottle.

31. The claimant was suspended from work the next day, on full pay. Mr Mauchline completed his investigation. He issued written findings on

18 October 2018 in which he concluded that there had been a serious breach of health and safety. He referred in detail to the timings from the CCTV footage and his belief that the claimant had deposited fluid on the tiled floor, which led to two employees slipping.

32. The claimant was informed that he was to attend a disciplinary hearing before Mr Tom Macdonald by letter dated 30 October 2018. The letter stated that the allegations against him were:

(i) On 17 October 2018 you poured flash liquid in and around the urinals, brushing it into the floor to mask a smell in the area
(ii) Knowing the floor was wet, you opened the window to help it dry, but did not put up signage to advise of any hazard
(iii) Thereafter, you were witnessed sprinkling liquid over the floor in the walkway to the toilets (by which was meant what has been described above as the corridor).
(iv) Shortly afterward, two employees slipped on the wet floor to their injury

33. The letter referred to gross misconduct as breach of health and safety obligations and work, and also stated that the outcome of the meeting may be his summary dismissal. It referred to his right to be accompanied by a fellow employee or trade union representative.

34. A disciplinary hearing took place before Mr Macdonald on 2 November 2018. Notes were taken by a member of staff. The claimant was accompanied by a work colleague Mr Ian Jamieson. A minute of that meeting is a reasonably accurate record of it. At that meeting the claimant maintained that he had not poured liquid onto the corridor. He read from a statement he stated had been prepared by his solicitor, but did not hand over despite a request to do so.

35. He said that he was not authorised to clean toilets but that a former supervisor, Mr Graeme Ward, had told him to deal with spillages. He refuted the claim by Mr Duffy in his statement that he had seen the claimant pour

liquid on the corridor. He said in relation to the CCTV footage of an arm that there was no evidence to suggest that it was his. Mr Furey had a light blue jumper under his fleece. He accepted that he took a white bottle and placed it in the bin. He alleged that Mr Dougie Buchanan was using the incident and that he was being victimised. He said that there were not a lot of yellow warning signs in the warehouse.

36. Following the meeting Mr Macdonald considered what his decision was to be over the weekend. He emailed his decision to HR on 5 November 2018. On the basis of that HR drafted a letter of dismissal, which Mr Macdonald checked. The letter was sent to the claimant on 5 November 2018 and stated that he was summarily dismissed for gross misconduct, having taken into account his evidence and mitigation.

37. The claimant appealed against that decision by letter dated 9 November 2018.

38. Arrangements for the appeal were made, with a delay to allow the claimant to arrange representation by his union. The appeal was heard by Mr Ian Fleming on 19 December 2018. The claimant attended with Mr Jim Stevenson, a GMB union representative. Margaret Cordiner of HR attended. A minute of that meeting is a reasonably accurate record of it.

39. The claimant produced a letter setting out his arguments for the appeal. It was the same letter he had read from during the disciplinary hearing. During the discussions, the appeal was summarised as having two strands:

(i) The investigation was unfair as Mr Dougie Buchanan had pressurised Mr Duffy, and there was no corroborative evidence

(ii) Even if there was such evidence, the claimant was doing his job and acting in good faith. He had a clean disciplinary record, good attendance and good service. The outcome should not have been dismissal.

40. The claimant and Mr Stephenson agreed that those were accurate.

41. Following the appeal meeting Mr Fleming spoke to Mr Dougie Buchanan, Mr Tom Macdonald and Mr Ricky Mauchline. Written notes of those meetings were taken. He then concluded that Mr Buchanan had not placed undue pressure on Mr Macdonald or Mr Mauchline such as to influence improperly the decision to dismiss. He concluded that the decision to dismiss was the proper one. He did not consider that there was any merit in the appeal. He wrote on 21 January 2019 to reject the appeal.

42. Following his appeal the claimant obtained employment with Ravensby Glass Co Ltd for the period from 20 March 2019 to 29 March 2019.

43. Thereafter he secured work as an Agency Worker with EN Recruitment Services Ltd. He was sent to work for a client of theirs in the period from 13 May 2018. The role was intended to be a permanent one. Whilst there his attitude was not good, and his performance was deemed to be unsatisfactory. EN Recruitment were asked to remove him from the site on 7 June 2018, and he was then terminated from the contract with EN that day.

44. The claimant has not been in employment since that date.

45. The Claim Form was presented to the Tribunal on 10 April 2019. In that when asked at paragraph 7.1 “Have you got another job” the claimant ticked “No”. That was under the heading “If your employment with the respondent has ended, what has happened since?.”

**Respondent’s submission**

46. The following is a basic summary of the written submission tendered. Mr Allison invited me to accept the evidence from the respondent’s witnesses, and to reject that of the claimant. He compared the manner in which evidence had been given and what he described as the claimant failing to answer direct

questions. He argued that the reason for dismissal had been proved to have been conduct, and that that was potentially fair. He referred to the test in section 98(4) of the Employment Rights Act 1996.

47. He referred to the three stage test in ***BHS v Burchell [1982] ICR 303***, and argued that each stage had been met. He argued that the CCTV footage was the most compelling evidence. Reference was also made to the admissions the claimant had made. It was suggested that there was a reasonable basis for the belief.

48. He then argued that there had been a reasonable investigation, and set out why that was. He argued that if there was any defect, it had been cured by the appeal. He argued that the decision to dismiss fell within the band of reasonable responses and referred to ***Brltish Leyland (UK) Ltd v Swift [1981] IRLR 91***, and set out the reasons for that argument.

49. He then made submissions as to contribution, and regarding remedy. He argued that any losses stopped when either of the two new roles commenced.

**Claimant's submission**

50. Again the following is a basic summary of the written submission. Miss Campbell also referred to section 98(4) of the Employment Rights Act 1996. She argued that the respondent had failed in its duty to carry out a full and fair investigation, had failed to act reasonably and provide a sufficient reason for deciding to dismiss. There had not been a genuine or reasonable belief as to the claimant's involvement. The decision was procedurally and substantively unfair.

51. She also referred to the case of ***Burchell***, and to ***HSBC v Madden [2000] ICR 1283, NHS 24 v Pillar UKEATS/0005/16, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Salford Royal NHS Foundation Trust v Roldan***

***[2010] IRLR 721, Carmeli Bakeries Ltd v Benal,*** the citation for which is ***UKEAT/0616.12,*** and to the ACAS Code of Practice.

52. It was suggested that the investigation was tainted, had been insufficient in considering whether Mr Furey may have been involved, or the role of Mr Buchanan in influencing it. What was said is that it was "not unreasonable to suspect that there could be some form of undue influence or coercion".

53. It was suggested that Mr McDonald had taken a view on guilt from an early stage. He had assumed that the arm shown in the CCTV was that of the claimant, but that it was "perfectly reasonable to expect" that Mr Furey had removed his dark blue fleece (the submission refers to jumper but must have meant the fleece which was dark blue, the jumper being light blue).

54. The argument was also made that dismissal was not within the range of reasonable penalties, and that there ought not to have been a dismissal for such conduct if established. She also argued that there had been no contributory conduct.

**The law**

*The reason*

55. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act").

56. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Conduct is a potentially fair reason for dismissal.

*Fairness*

57. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> "depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

58. That section was examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

59. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

(i) Did the respondent have in fact a belief as to conduct?
(ii) Was that belief reasonable?
(iii) Was it based on a reasonable investigation?

60. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
> In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

> the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

61. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct:

> "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

62. The band of reasonable responses has also been held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

63. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

*64.* If there is a degree of unfairness at the initial stage, that can be remedied by a properly conducted appeal – ***Taylor v OCS Group Limited [2006] ICR 1602.***

65. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. One aspect may be relevant to the present case, although its terms in this regard are very basic:

> "4.3(4) "Employers should carry out any necessary investigations to establish the facts of the case.

> 23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence…. ”

66. ACAS also issued a Guide on Discipline and Grievances at Work. It does not have the status of a Code, but has comments that provide a measure of guidance, and does so in more detail than the Code. Under the heading “investigating cases” is the following:

> “When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigation will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee’s case as well as evidence against.”

67. In the event of a finding of unfair dismissal, a basic and compensatory award may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. In respect of the latter it may be appropriate to make a deduction under the principle derived from ***Polkey,*** if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair.

68. The Tribunal may reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant. The amount of the compensatory award is determined under section 123 and is “such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer”.

**Observations on the evidence**

69. I considered that the three witnesses for the respondent gave evidence well, candidly and reliably. Whilst there were some imperfections in the way in which matters were conducted, which I comment on below, I am satisfied that both Mr Macdonald and Mr Fleming were credible and reliable, and that the allegation that Mr Buchanan had used the opportunity to have the claimant dismissed was without foundation.

70. Mr Main was not a witness employed by the respondent, and gave evidence on what he considered to be the poor attitude of the claimant. In the event however this evidence did not play a significant part in the decision, and arose solely in respect of remedy in the event that the claim had succeeded.

71. The claimant's evidence was not I considered reliable. His account of events changed materially from the investigation, disciplinary hearing, appeal and the hearing before me. Examples are that in the investigation statement he gave, and signed, he said that he had opened the windows of the toilet to help the floor dry. The clear inference from that is that the floor was wet, and a tiled wet floor is liable to be slippery, particularly when the cause of it being wet is the addition of a cleaning fluid such as Flash. When he gave evidence, it was to the effect that the floor was not slippery at all, and he had only opened the window to let the foul smell escape. That was inconsistent with his own original statement.

72. At the investigation stage, and later, he argued that he had not had time to get wet floor warning signs. The CCTV footage did not show any sign of him seeking those signs. I was satisfied that they were available, even if not in good condition. It is a matter of obvious common sense to use such a sign if the floor is wet, and if no signs can be found, to tell a supervisor or someone else. Not only did the claimant not do so, he gave in evidence a new explanation that he did not look for such a sign as the floor was not slippery and did not need to have such a sign. That is I consider inconsistent with his

initial position. It was an attempt to avoid being believed to be at fault for what occurred. I did not accept his evidence.

73. The CCTV evidence was to an extent limited, in that it showed an arm coming out from the door leading from the corridor into the walkway, shaking a white bottle, as referred to above. The arm was clothed in a light blue sleeve of a jumper. 23 seconds later the claimant is seen to leave that same door, carrying a white bottle, wearing a light blue jumper. The claimant accepted that that bottle was the one he had used earlier.

74. The claimant's position was that he had only sprinkled the liquid onto the tiled floor in the toilet area, and not the corrido outside the door leaving to the male toilet. He claimed that the arm shown on the CCTV footage was not his, but that of Mr Furey. It could only have been Mr Furey if not the claimant, as he was the only person shown on CCTV footage entering that area at that time. The claimant said that he had not seen Mr Furey within the area behind the door leading from the corridor to the walkway at any stage during the material events in and around 9.20-9.30 am that day.

75. For the claimant's version to be correct, the claimant would have required to have used the white bottle within the toilet area, as he had accepted, Mr Furey would then have attended that area to pick up the bottle, having taken off his dark blue fleece, then sprinkled the contents over the corridor and just outside the door leading into the walkway as shown on CCTV, then returned the bottle to where it had been, all unseen by the claimant. Within no more than 23 seconds of his doing so the claimant would then have required to have picked up the bottle, and be seen to go through the door with it into the walkway. Mr Furey would then have put on his dark blue fleece again, and exited the same door less than five minutes later.

76. The suggestion made by the claimant that Mr Furey's arm is shown in the CCTV footage lacks any credibility. The claimant admitted that he had used a bottle of cleaning fluid in the toilets, and had brushed it into the tiled floor

there. He admitted that he had taken the same bottle and placed it in a bin, and that he had emptied it. The possibility that Mr Furey had become involved in that is contrary to all common sense, and the timings set out above which derive from the CCTV footage.

77. There is in addition a statement from Mr Duffy that he had seen the claimant sprinkling liquid on the tiled area of the corridor. To that the claimant makes the suggestion that he was either lying, or under pressure from Mr Dougie Buchanan. That is not easy to reconcile with the fact that the statement from Mr Duffy was given and signed on the same day of the accident. In any event, I consider that the respondent was entitled to accept the statement at face value, and believe that it supported the conclusion that the claimant had poured liquid onto the floor of the corridor, as well as within the male toilet as he had accepted.

78. The CCTV footage showing an arm with light blue clothing sprinkling the same white bottle, and 23 seconds later the claimant wearing the light blue top is seen to carry the white bottle and put it in the bin, is I consider particularly compelling evidence that the claimant was the perpetrator. It would have been sufficient without Mr Duffy's statement, but the statement was further support for such a belief.

79. Shortly afterwards, Mr Stewart slipped on an unmarked wet tiled area of the corridoor, which was still slippery. Mr Mauchline also slipped. Those two falls tend to confirm the belief that the floor was wet and slippery. The very strong likelihood is that the reason for that is that the claimant placed liquid on it as set out above.

*Reason*

80. Against that background I required to assess the evidence. The first question is what the reason for dismissal was. I was entirely satisfied that it was conduct. The suggestion that it was a vendetta by Mr Buchanan I reject. Firstly, if Mr Buchanan had wished to pursue a vendetta it is surprising that it

took from June 2018 to do so. Secondly, Mr Fleming investigated that allegation, and found no evidence to support it. I was especially impressed with Mr Fleming's evidence on that. He is clearly a careful and experienced man, addressed the matter with an open mind, and had he found evidence of improper influence I am clear that he would have said so. Thirdly, Mr Macdonald denied any such influence on him when giving evidence before me, and I accepted his evidence.

*Fairness*

81. The reason being conduct is potentially a fair one. I then considered whether the decision to dismiss fell within the band of reasonable responses as explained in the case law set out above. I concluded that it did. The ***Burchell*** test was met. Firstly, it was clear that the respondent did in fact believe that the claimant was guilty of the gross misconduct alleged. Secondly, it had reasonable grounds in its mind for that belief. Thirdly, I was satisfied that a reasonable, and full and fair, investigation had been carried out. I shall consider the issue of the investigation first, then that of the basis for the belief.

*(a) Investigation*

82. Mr Mauchline as the supervisor for the area of the incident was the obvious person to conduct it. It would only be if he was involved to a material extent or was otherwise partial in some way that that would not be appropriate. Whilst he did fall, he did not suffer any material injury and was not off work – indeed he carried out the investigation that day.

83. There was no dispute that Mr Stewart had slipped, nor that he had been off work for two weeks.

84. The investigation spoke to witnesses. It recovered CCTV footage. A written record with findings was submitted. It appeared to me that that all fell within the band of reasonable responses. The criticisms made of it are not I consider well founded. There is no need for corroboration, which is a concept from the criminal law. What is required is that the investigation be conducted fully and

fairly, and as a reasonable employer could do so. I consider that that was done. The evidence from the claimant's admissions, the statement of Mr Duffy, and the CCTV footage, was compelling. I did not consider that further investigation was required, such as showing the photographs to Mr Duffy, or asking Mr Furey if he had acted as the claimant alleged.

85. I reject the claimant's evidence that the liquid may have been something else, such as juice dropped from a bottle, as very unlikely indeed. There is I consider no need to have the liquid tested to see what it was in the exercise of discretion by a reasonable employer in such circumstances. It was not a step required of a reasonable employer.

86. Mr Macdonald held the disciplinary hearing and was therefore independent of the investigation. The claimant was given an opportunity to comment on it, and to give his explanation for events. The claimant had seen the CCTV footage at the investigation meeting and disciplinary meeting. I consider that the procedure followed was one within the band of reasonable responses. There was I consider no breach of the ACAS Code.

*Belief*

87. I consider that the respondent had reasonable grounds for its belief. The CCTV evidence showing an arm with a light blue item of clothing sprinkling the last drops of the contents of the bottle outside the door leading from the corridor, then the claimant wearing light blue clothing leaving 23 seconds later, followed in under five minutes by Mr Furey with a dark blue item of clothing, leads to the inference, with the other evidence, that the claimant had sprinkled the same liquid from the same bottle on the tiled floor of the corridor outside the toilet area in which he accepts that he sprinkled liquid from the same bottle. That was supported by Mr Duffy's statement. The wet and slippery nature of the floor which led to the falls has been referred to above.

88. I considered all of the cases referred to in Ms Campbell's submission, but did not consider that they set out matters of principle beyond those I have quoted above in the section entitled "The law". They were other cases on other facts on which those principles were applied, in my judgment.

89. It did not appear to me to be credible that Mr Dougie Buchanan had learned of the incident, and influenced each of Mr Duffy, Mr Macdonald and Mr Fleming against the claimant. In any event, Mr Macdonald had a reasonable basis for his belief, and that was later supported by Mr Fleming from his own investigations. It is only if their views are those a reasonable employer could not have held that an issue arises.

*Penalty*

90. I then considered the issue of penalty. Mr Macdonald confirmed that he had had all options open to him, and took into account the claimant's clean disciplinary record, and length of service. His oral evidence was supported by the terms of the minutes of the hearing in which, near the start, it was said that he would consider, amongst other matters "is disciplinary action warranted, and, if so, at what level." Whilst dismissal was perhaps harsh given the circumstances, where the claimant was seeking to take action to reduce a foul smell, I do not consider that it can be said to be outwith the band of reasonable responses. It was clear that health and safety was an important consideration for the respondent. That was also clear from the list of offences amounting to gross misconduct in the disciplinary procedure. The claimant had breached his health and safety obligations.

91. There was some evidence with regard to whether or not the claimant's actions in trying to mask a foul smell fell within his duties. I consider that that was not in reality a material issue. Whether formally part of his duties or not, and whether or not cleaners attended the toilets twice a day, there was no dispute that there was a foul smell. Doing something about it was reasonable in principle. His former supervisor had, he said, in effect encouraged him to do what was needed.

92. But the claimant introduced to the tiled floor a cleaning liquid. Doing so made it wet and slippery. That was, or at least should have been, obvious to the claimant. At the very least, some form of signage should have been displayed by him, and the changing attempts to explain why he did not was not indicative of any appropriate care being taken by him. The CCTV footage shows him leaving the area after putting the bottle in the bin. There was no attempt to find a sign, as he later appeared to accept. I consider that the evidence from Mr Macdonald and Mr Fleming that there were many such signs available to be credible and reliable, and I reject the claimant's suggestion that they were not, or were in such poor condition as to be not capable of use.

93. It is also material to the issue of the reasonableness of penalty that an injury was sustained to another employee Mr Stewart. It was not serious but did involve two weeks' absence from work, and clearly in that a degree of pain for the employee concerned.

94. Finally, as Mr Fleming commented on in his evidence, a further factor was the claimant's reaction. He did not accept responsibility, and apologise, but said the cause of the hazard in the corridor was not his actions, and in effect blamed Mr Furey for it. His doing so was without proper foundation. Mr Furey was most likely to have simply gone to the staff area, as most do during breaks, and then returned to work. In addition, the claimant sought to weave together a conspiracy theory, that the decision was instigated by Mr Dougie Buchanan to get back at him for the issue with his son.

95. The evidence was clearly against that suggestion. The claimant's evidence I have found not reliable. Some of the changes in his evidence have been referred to above. He had also claimed that six out of eight signatories of the letter of complaint had had their employment terminated. In fact, three out of ten had left the employment of the respondent. That tendency to exaggerate contributed to my considering him not a reliable witness. I also noted that in

the Claim Form presented in April 2019 that he had made no mention of the work at Ravensby Glass Co Ltd which had been obtained in March 2019.

96. As the ACAS Code makes clear, even an employee with long and unblemished service may be fairly dismissed if the misconduct is sufficiently serious. The claimant's length of service, which was not particularly long, and record which was clear, were considered, but were not held to have outweighed the serious breach of health and safety obligations. The respondent did not directly found on the health and safety procedure.

97. I consider that a reasonable employer could have dismissed in such circumstances. The claimant had introduced a slip hazard to an area, had failed to take simple health and safety measures such as placing a wet floor sign, there had been two falls with one employee sustaining an injury from which he required to be absent from work for two weeks, and the claimant did not acknowledge his responsibility for what had occurred, but attempted to blame another. I considered that the penalty of dismissal was open to a reasonable employer.

*Appeal*

98. I considered that Mr Fleming conducted an open-minded, reasonable and fair appeal. He acted reasonably in considering the points made, and even if there had been a defect in the disciplinary hearing, which I consider did not occur, I would have held that the appeal cured that defect in accordance with the case of ***Taylor,*** had I held that there was an issue with the fairness of the disciplinary hearing and decision by Mr Macdonald.

*General*

99. I do not disregard certain issues where best practice was not followed. The letter calling the claimant to the disciplinary meeting, on one reading, indicated a degree of pre-judgment in that it referred to what the respondent believed. That was however contradicted by Mr Macdonald, both in his

evidence that he had approached the matter with an open mind, which I accepted, and in the points that he made at the start of the hearing that no decision had been taken, and that the outcome was also one that included disposals other than dismissal. The investigation did not include the accident reports that were referred to, and there was no statement from Mr Stewart. The statement from Mr Furey was rather basic, and Mr Fleming did not record in writing his conversations after the appeal hearing and before he made the decision. His letter of rejection of the appeal did not specify the reasons for his decision.

100. These however are matters of best practice. A failure to follow best practice does not render a dismissal unfair. The test is that of reasonableness as set out above, and has regard to the size of the respondent's undertaking. In all the circumstances I do not consider that the failures to follow good practice are sufficient to render the dismissal unfair.

101. Even if I had concluded that the dismissal was unfair, I would have reduced the compensation by 100% on account both of the Polkey principle and contribution. It appears to me that the strong likelihood is that the claimant did sprinkle cleaning liquid onto the corridor tiled floor such as to make it sufficiently slippery that two members of staff fell, and one sustained injury. Had there been a fuller investigation in accordance with good practice I consider that a fair dismissal would still have resulted.

102. Separately, I would have concluded that the claimant contributed to the dismissal. He created the danger. He did not take the obvious steps to warn about it, and ought to have done so. He was somewhat cavalier in his attitude to what had happened, and he made his position worse by blaming others, and failing to appreciate and accept the danger his actions had caused. I do appreciate that his motives in taking the action initially were good ones, in that he was seeking to mask a foul smell, but the manner in which he did that was to create risk for others, that led to an injury.

## Conclusion

103. I consider that the decision to dismiss was one a reasonable employer could have taken. The claimant had committed a serious breach of his health and safety obligations.

104. In the circumstances I have held that claim fails, and it is dismissed.

**Employment Judge:** **Alexander Kemp**
**Date of Judgment:** **16 August 2019**
**Date sent to parties:** **19 August 2019**