EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4121233/2018

Held in Glasgow on 25 and 26 February and 27 March 2019

Employment Judge: G Woolfson

Mr George Hope	**Claimant** **Represented by:** **Ms M Javed – Trainee Solicitor &** **Mr M O'Carroll Advocate**
United Biscuits UK Ltd t/a pladis	**Respondent** **Represented by:** **Mr D McCrum – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was unfairly dismissed by the respondent, and the respondent is ordered to pay to the claimant the sum of **£7,844.87** (Seven Thousand Eight Hundred and Forty Four pounds and Eighty Seven Pence).

E.T. Z4 (WR)

REASONS

Introduction

1. The claimant has brought claims for unfair dismissal and wrongful dismissal. The hearing took place over three days in Glasgow. I heard evidence from two witnesses for the respondent (Richard Payne and Jim Cuthbert) and, on the claimant's side, from the claimant himself and his trade union representative, Peter Doherty. I was referred to a joint bundle of documents. The claimant is seeking compensation only.

The issues to be determined

2. Did the respondent have a potentially fair reason for dismissal?

3. If so, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant?

4. If the claimant was unfairly dismissed:

    4.1. how much compensation should be awarded?

    4.2. should any compensation be reduced to take account of any failure on the part of the claimant to mitigate his loss, the application of **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 and/or contributory conduct?

5. Was the claimant wrongfully dismissed and, if so, how much should be awarded by way of notice pay?

Findings in fact

6. The respondent is a food manufacturer with around 500 employees based in Glasgow. The claimant commenced employment with the respondent on

12 June 2008. He was employed as Team Member 1 and worked out of the warehouse at Tollcross. His role was to collect pallets in the warehouse from the lines, and then stack and label them. He worked on nightshift, between 7:00pm and 7:00am.

The claimant's accident at work

7. Richard Payne is a Manufacturing Manager. He arrived at the warehouse at around 5:00am on 12 April 2018. When he arrived, he was informed that an accident had taken place involving the claimant. He was informed that the claimant had fallen over a pallet and broken his ankle, and that this had happened at around 10:25pm on 11 April 2018. He was informed by Catherine Girvan that the claimant had said the accident had happened at a pallet on the floor.

8. By the time Mr Payne had arrived, a Production Manager, Billy Atkinson, had taken a statement from the claimant which was in the following terms:

"Laying the pallet down, I tried to step over it and went over on my ankle."

9. The above statement was written by Mr Atkinson on a blank sheet of paper, and signed by the claimant before he was taken to hospital. When the claimant was at hospital, it was confirmed that he had sustained a double fracture to his ankle.

10. In the course of 11 and 12 April 2018, Mr Atkinson obtained statements from other employees. Unlike the statement taken from the claimant, the statements from the other employees were on pre-prepared Incident Statement Forms. The statements, insofar as relevant, were the following:

    10.1. Robert Barton: he stated that the claimant had been putting an empty pallet in position, and when he stepped on the pallet to come off his foot had slipped.

10.2. Jim Hutton: he stated that he did not witness the accident, but that he had heard screaming and when he turned round he saw Mr Barton and Mr Dorrans supporting the claimant, and that the claimant told him he had put a pallet down and had tried to step over it and hurt his ankle.

10.3. Catherine Girvan: she had been called to assist as she is a first aider, and she stated that she informed the claimant she thought his ankle was broken and would need to attend hospital. She stated that the claimant had told her he had fallen over a pallet, and that he had pointed in the general direction of an empty pallet.

10.4. Joe Dorrans: he stated that he did not witness the accident, but that the claimant told him that he had gone over on his ankle on a pallet.

Health and safety investigation

11. Mr Payne informed one of the other managers, Jackie Findlay, what had happened. Ms Findlay reviewed CCTV footage of the accident.

12. The footage showed the claimant laying a sheet on a pallet and moving a pallet with one of his feet; then walking towards a cage used to store equipment, the cage being behind a desk used for paperwork; then climbing onto a pallet which was upturned at the side of the cage; then stretching up (to reach a radio); and then falling or slipping off the pallet and sliding down against the side of the cage, with some force but remaining upright, and holding on to the cage to steady himself for a few seconds before turning around, attempting to walk away and stumbling forward.

13. Ms Finlay decided that a health and safety investigation should be carried out because the statements which had been taken gave an impression that the claimant had stepped over a pallet.

14. Scott Garner is a Team Manager who carried out the health and safety investigation. He reviewed the CCTV footage and the statements, and arranged to have a telephone conversation with the claimant, who was absent from work as a result of the accident.

Telephone call: 19 April 2018

15. The telephone call took place on 19 April 2018. The claimant was informed at the start of the call that Mr Garner wished to review how the accident had occurred, as the claimant had been unable to give a full statement at the time. The claimant was not informed that Mr Garner had reviewed CCTV footage.

16. The first question which Mr Garner asked was what the claimant had been doing prior to the accident happening. The claimant's answer was as follows, as this is noted in the handwritten note of the call:

> *"Can't remember. Think I just came back my break. Starting to pick on L14, I was getting pallets. Getting pallets. I felt a twinge in ankle, didn't think anything of it. Sometimes I step on a pallet, didn't think anything. Went over to desk, turned radio down came down off pallet, turned, then knew something wrong."*

17. The claimant was asked whether he hurt his ankle when he was adjusting the radio, to which the claimant replied:

> *"No, it was when I came down. You know when you step off a pallet, your ankle does 'go' sometimes."*

18. The claimant was asked whether he remembered reporting it to a manager. The claimant explained that a lot of people attended, *"but it was hard to describe right away. I said something about walking off the pallet and twisting my ankle"*.

19. The claimant also confirmed during this call that he was on strong painkillers (co-codamol and ibuprofen) and that he was due to be prescribed tramadol.

20. The handwritten notes of the phone call were sent to the claimant, and he signed them.

Telephone call: 26 April 2018

21. A second telephone call took place with Mr Garner on 26 April 2018, as part of the health and safety investigation. Mr Garner stated that the purpose of the call was to have a full understanding of the accident so as to allow them to make sure the correct assessment had been carried out in order to prevent a recurrence. The claimant was not informed that Mr Garner had reviewed CCTV footage.

22. Mr Garner said that he wanted to talk about the claimant saying he had felt a twinge and also the point where the claimant ultimately hurt his ankle and the pain became more serious.

23. With regards to feeling a twinge (before the accident itself), the claimant stated that he felt a twinge after coming back from putting a pallet down. He said it was a pain he could shrug off and he just went over on his ankle. When asked how long there was between the twinge and the final injury, the claimant stated that he could not remember, and that maybe it was a couple of minutes or possibly five minutes but that he was not sure. The claimant was then asked to describe what he had done when he adjusted the radio. The claimant's reply, as noted in the handwritten notes of the phone call, was as follows:

> *"I went on the pallet to turn the radio down. This was the pallet at the side of the cage. I stepped on the upturned pallet, turned radio down and stepped off of pallet."*

24. The claimant explained that the pallet was up at an angle against the cage, with the radio on top of the cage. He also explained that he did not trip off the pallet, and that his ankle *"went"* after he came back from adjusting the

radio. He was asked how long after adjusting the radio his ankle gave way, to which the claimant replied:

"In a short period of time, I walked away from the desk a few yards and my ankle just gave way."

25. The claimant stated that the area near the desk and adjusting the radio did not cause his injury, as he walked past the desk after adjusting the radio and his ankle gave way.

26. The claimant was asked whether he remembered coming into contact with a pallet and this causing the injury, to which he replied that he did not remember coming into contact with a pallet and that his ankle just gave way.

27. The claimant was then informed that information from statements taken at the time suggested that the claimant had hurt his ankle by putting a pallet down and tripping over it. The claimant then said:

"I can't remember falling over a pallet, I don't think that happened."

28. The claimant was asked whether he thought that adjusting the radio caused the final ankle injury, to which the claimant replied:

"No, I had walked away and ankle went, it must have been weak from earlier."

29. The handwritten notes of the phone call were sent to the claimant, and he signed them.

Meeting: 9 May 2018

30. On 9 May 2018, Mr Garner had a meeting with the claimant, also as part of the health and safety investigation. The claimant attended with his trade union representative, Phyllis Riddell. The claimant was informed that the

purpose of the meeting was to clarify information regarding the accident and also review CCTV footage. Mr Garner explained that as the claimant's first statement had been taken when he was in considerable pain there had been a need for further interviews, and that these had taken place on 19 and 26 April 2018. Mr Garner stated that the process was being carried out to ensure that they fully understood how the accident happened and to allow for the correct remedial actions to be identified.

31. Mr Garner stated that when he first reviewed the statements, the cause of the accident seemed to be tripping over a pallet, to which the claimant replied:

> *"I never really tripped over a pallet, I thought that at the time."*

32. The claimant was then referred to what he had said about there being two occasions on which he had felt pain over a period of about five minutes. The claimant confirmed that was the case, and also that the second occasion was when he *"came down off pallet after turning radio down"*. The claimant was asked if he could remember what he had said to his colleagues at that time, to which the claimant said he could not. Mr Garner asked if the claimant had been in a lot of pain, and the claimant said: *"Yes, that's why I shouted on the boys".*

33. When the claimant was referred to what other witnesses had said at the time, the claimant said:

> *"When I came down off the pallet after turning down radio and turning on my ankle again that's when I said to the boys I'd hurt myself, obviously because I turned on my ankle again."*

34. The claimant said he thought it was a freak accident. The claimant was asked to explain how he could have a double fracture if he had a twist but with no further contact with a pallet, to which the claimant replied:

"I probably came down and turned on it again, it's one of those things, I can't really explain it."

35. When the claimant was asked whether he felt that climbing down from the upturned pallet was the cause of the accident, the claimant replied: *"not really"*.

36. The claimant was shown the CCTV footage for the first time. Mr Garner then asked the claimant how he thought the accident had been caused, to which the claimant replied:

"Going over my ankle when I came back down there."

37. Mr Garner then said:

"In your previous statements you have said you did not injure yourself after coming down, you felt the pain when you walked away."

38. The claimant replied:

"I think I said it was when I walked away."

39. Mr Garner then referred to the telephone call which took place on 26 April 2018, during which the claimant had said that his ankle went after he had come back from adjusting the radio, and that this was a short period of time after when he had walked a few yards. The claimant then said to Mr Garner:

"I meant when I came down from adjusting the radio."

40. Mr Garner then stated that it was clear to him that the cause of the accident was the force of the claimant falling down from the pallet. The claimant said that was Mr Garner's opinion.

41. At the request of the claimant's trade union representative, the CCTV footage was played again. The trade union representative then stated:

> *"He has walked away and that's what he said."*

42. The claimant was asked to explain why none of his statements reflect on the force of the fall, to which the claimant replied that he never thought there was any force.

43. The claimant also confirmed that he had not spoken with anyone about the accident, apart from Mr Garner.

44. The claimant was asked whether he wished to change his statement, now that he had watched the CCTV footage, to which the claimant replied that there was nothing to change.

45. Mr Garner concluded the meeting by stating that he was now in a position to close the health and safety investigation.

46. The handwritten notes of the meeting were signed by the claimant.

Disciplinary investigation meeting: 17 May 2018

47. By letter dated 10 May 2018, from Scott Garner, the claimant was informed of his suspension from work. The letter stated:

> *"It is alleged that during a recent Health & Safety Accident Investigation, you knowingly provided the business with a false statement."*

48. By letter dated 15 May 2018, from Alan Armit (Team Manager), the claimant was asked to attend a disciplinary investigation meeting. The meeting took place on 17 May 2018, and the claimant was again accompanied by Phyllis Riddell. The claimant was asked to take Mr Armit through what had happened on the night of 11 April 2018, and the claimant explained the following:

> *"I came back from my break, during that night or any other night, it's possible to go over on your ankle. I had that night, but I never thought any more of it. I went up to change the radio. To be honest we keep our own radio at the gatehouse, but that night the factory was quiet so we used the one there. I went over to the radio and climbed up, when I stepped back down I felt something on my ankle give way. I wasn't sure what it was."*

49. The claimant explained it was common practice for employees to climb on top of a pallet to change the radio, and that the radio had been there for about two years. He explained that Mr Garner was aware of the practice.

50. When the claimant was asked why in his first statement he said he fell over a pallet, the claimant stated that he could not really remember and that he had been in too much pain.

51. The claimant explained that he had been putting pallets down at two locations. When he was asked whether he hurt his ankle kicking a pallet into place at the second location, the claimant stated that he had felt a twinge earlier on.

52. When the claimant was asked whether climbing on top of a pallet to change the radio was a safe way to work, the claimant explained: *"Looking back now, no"*, and he explained again it was common practice to climb up the pallet.

53. Mr Armit referred to the claimant having said on 9 May 2018 that he never really tripped over a pallet, and asked the claimant to clarify what he meant. The claimant said that he *"never tripped over it"*.

54. It was pointed out to the claimant that the statements of other employees are very alike and say that he tripped over a pallet, and he was asked whether at any point he had asked people on site to say what had happened. The claimant explained that he could not remember speaking with people,

and that all that he had done at the time was ask for help because he had hurt himself coming off the pallet.

55. The claimant was informed that one of the witnesses had said that he was told what to say in his statement and that he agreed because he felt intimidated to do so. This was a reference to Mr Barton, though Mr Armit did not disclose the identity of the witness to the claimant. The claimant replied:

> *"No, I never said anything like that. All I said was give me a hand please. I could hardly talk because of the pain."*

56. When asked whether there was anything which the claimant wished to add, the claimant said:

> *"Just that the previous statements that I have given I was heavily sedated with drugs due to my injury and I never really read them before I signed them."*

57. Following a question from Ms Riddell, the claimant confirmed that he had not been given the option of having a representative with him when he gave the previous statements. Mr Armit stated that this was because it was an accident investigation at that point.

58. The typed notes of the meeting were signed by the claimant.

Disciplinary investigation meeting: 21 May 2018

59. A second disciplinary investigation meeting took place 21 May 2018. The claimant was again accompanied by Phyllis Riddell. The meeting was held by Mr Armit.

60. Mr Armit referred to what the claimant had said about feeling a twinge earlier on in the shift, and asked the claimant to clarify when that was. The claimant said that it might have been 10 or 15 minutes previously. The claimant was

asked whether he thought that coming down off the pallet after changing the radio had an impact on his ankle injury. The claimant said:

> *"At the time no, but when I look at the video I came down quicker than I thought, so it must have had an impact on me."*

Further investigation

61. By way of further investigation, Mr Armit had a telephone call with Mr Garner on 21 May 2018. Mr Garner was asked if he was aware where the radio had been stored, to which Mr Garner replied he was not aware of the location. Mr Armit informed Mr Garner that the claimant had said that Mr Garner knew where the radio was stored and how it was accessed, to which Mr Garner replied:

> *"Not at all. I was not aware of where the radio was stored and under no circumstances aware of how people accessed the radio."*

62. Mr Armit also met with Helen Brown on 21 May 2018, a day shift worker. Ms Brown confirmed that the radio was normally stored on top of the cage. She also stated that in order to access the radio she would normally use a stick or, if the cage was open, stand on the mobile platform. Ms Brown stated that she never climbed up the side of the cage.

63. In a handwritten document dated 21 May 2018, Mr Armit recommended that the matter proceeded to a formal disciplinary for gross misconduct, his reasons for this being the following:

    63.1. The *"prime witness statement"* from another employee (Mr Barton) had been amended to state that he did not see the accident and that he had been told to say what he said in his original statement as he felt intimidated.

63.2. The claimant's initial statement and the statements from others in the area at the time were more or less word for word the same, and the claimant had stated he never spoke to anyone.

63.3. The claimant had lied during the investigation with several discrepancies in his statements.

63.4. The behaviour of the claimant was unacceptable, and on reviewing the CCTV footage Mr Armit had no doubt that the unsafe act carried out to access the radio was the main, if not only, cause of the accident.

63.5. Later statements mentioned two occasions where the claimant stated that he had gone over on his ankle, but there is no report of this and no evidence of another occasion during the review of CCTV footage.

Disciplinary hearing: 29 May 2018

64. By letter dated 22 May 2018 from Mr Payne, the claimant was asked to attend a disciplinary hearing on 29 May 2018. The letter stated:

> *"This is in relation to an allegation that during a recent Health & Safety Accident Investigation, you knowingly provided the business with a false statement. This is considered gross misconduct."*

65. The disciplinary hearing took place on 29 May 2018. The hearing was chaired by Mr Payne, and the claimant attended with his union representative, Peter Doherty.

66. When he was asked what had happened on 11 April 2018, the claimant stated (as per the typed minutes of the disciplinary hearing):

"I got back from break and turned over on my ankle. Thought it weakened my ankle. Picked up a couple of boxes, turned down the radio, came down the pallet. I saw in the CCTV that I came down fast. I was in pain, so I called on Robert Barton. Told them I thought I hurt myself going over the pallet."

67. Mr Payne stated that the purpose of the disciplinary hearing was to talk about discrepancies and inconsistencies, not the accident and the behaviour. Mr Payne stated that through six interviews there was a variety of information about how he injured himself, and he asked the claimant to explain why this was. The claimant replied:

"What I meant stepped off pallet, I meant the one leaving on radio. I didn't trip over anything. Came off it a bit too fast after seeing the CCTV."

68. When the claimant was asked why a witness would give a statement saying he tripped over a pallet, the claimant said that he did not know and that he had said at the time he had hurt himself coming off the pallet.

69. When Mr Payne stated that the claimant's original statement aligned with that of Mr Barton and Mr Dorrans and another person (unnamed), the claimant stated that when he came off the pallet he was in so much pain he could have said anything.

70. The claimant agreed with Mr Payne when he said that if they did not have the CCTV footage, then there would be another version of events.

71. The claimant said the following:

"I remember sitting with Willie and he said what happened? Pain was so high, I didn't know."

72. Mr Payne showed the claimant the statement which he had signed on the night of the accident, and the claimant said:

"I know I signed it, but I was in loads of pain."

73. The claimant was referred to the fact that Mr Barton had been dismissed. The claimant stated that he was not aware of that and that he could not be held accountable for other people's actions.

74. (Mr Barton had attended a disciplinary hearing of his own on 23 May 2018, six days before the claimant's disciplinary hearing, which was also chaired by Mr Payne. During that disciplinary hearing, Mr Barton stated that he had not in fact seen the accident and that his original statement was given because the claimant had spoken to him in a threatening manner. Mr Payne, however, did not accept the assertion that Mr Barton had been intimidated by the claimant. No details regarding this were disclosed to the claimant.)

75. Mr Payne referred to *"everyone pointing at a flat pallet at yellow stopper"* in the CCTV footage, as opposed to pointing at the pallet leaning against the cage. The claimant replied that he did not know why they were pointing at the flat pallet.

76. Mr Payne stated:

"When I read through it all, when all aligned to your initial statements it suggests lies and collusion to align to events. I'm struggling with the why?"

77. The claimant said:

"Why would I lie? I know the camera is there."

78. Mr Payne then referred to the claimant having been in pain, and made a comment about the claimant's awareness being affected, the camera being there and the statement of a witness changing, to which the claimant said:

"When you watch the video, no reaction until I turned. Didn't know until there."

79. Mr Payne asked if the claimant agreed that going over on his ankle before (i.e. what the claimant had explained was an earlier twinge) had nothing to do with it, and the claimant agreed with this. Mr Payne referred to the claimant manipulating pallets (with his foot) and suggested that he wouldn't have been doing that if he had been in pain. The claimant agreed, and explained that pain like that which he had experienced (at the earlier point) only lasts a minute.

80. The claimant stated that the radio had been there for two years, chained to the cage, and that he believed that to be common practice. Mr Payne agreed, but suggested that the way the claimant accessed the radio was not common practice, and made reference to accessing the radio via a ladder or platform. To this, the claimant replied: *"Impossible, can't see how it'd work"*.

81. Following an adjournment, Mr Payne stated that the witness Mr Barton stated that he had seen the accident, and that the witness Mr Hutton had stated that the claimant had told him about tripping. He also stated that Ms Girvan's statement did not specify the pallet on the floor, but that is what she meant. Mr Payne stated that his position was there had been recognition of an unsafe act and then a cover-up to ensure lies were as stickable as possible and that the claimant's initial statement was corroborated by Mr Barton, Mr Hutton and Ms Girvan.

82. After a further adjournment, Mr Payne said that whilst the claimant had admitted that he had carried out a foolish act, that was not the issue. He said that due to the pain the claimant might have lost focus and was complacent about the use of CCTV. He then stated the following:

"Reasonable belief of providing different account of events and colluding with Robert Barton to do the same and misinformed others at the time

to support version of events and you did this to deflect from the real root cause which was your behaviour. As a result of submitting false information during an incident investigation, to the detriment of the investigation's official conclusion, I am terminating your contract for gross misconduct with immediate effect."

83. The claimant's employment terminated on 29 May 2018. He did not receive notice or payment in lieu of notice.

84. The dismissal of the claimant was confirmed by letter dated 30 May 2018. The letter explained that the allegation was one of gross misconduct and includes the following:

"My reason for this decision is that regardless of knowing that there was a camera in the Warehouse, I believe that either the pain you were in made you lose focus or become complacent about the recording of CCTV footage. I have a reasonable basis to believe that you provided the investigation with false information and by collaborating with the other witnesses, they provided a version of events reflecting your initial statements, which in turn had a detrimental effect to the efficient and effective conclusion of the investigation. I believe that your decision to do so was motivated by a desire to hide your real actions which were as you now admit, unsafe, and colluded with an eye witness to create an alternative version of events which was only recognised as untrue when the CCTV footage was reviewed."

Appeal hearing: 20 June 2018

85. By letter dated 31 May 2018, the claimant appealed against the decision. The letter was handwritten by the claimant and stated that he felt the decision to dismiss was too severe.

86. The appeal hearing took place on 20 June 2018, and was chaired by Jim Cuthbert, Factory General Manager. Mr Cuthbert was provided with all of the documents from the procedure which had taken place up to that point. The claimant attended with Mr Doherty.

87. The claimant stated that whilst he knew he should not have been doing what he had been doing, it was common practice and losing his job was too severe.

88. The CCTV footage was shown, following which the claimant stated:

> *"So, see when I drop to the ground and stagger, I think that's when I thought I may have tripped over a pallet. It's just my recollection of events."*

89. Mr Cuthbert then stated:

> *"Okay, well it looks to me like the second you fall, your ankle was completely gone, very wobbly and unsteady, surely that's from the impact of the fall? Your statement reads like you've walked away (after jumping down) and then your ankle has given way, but from what we just watched, that's not what happened."*

90. Mr Cuthbert stated that he was struggling to understand why the claimant's initial reaction was that he had tripped over a pallet. The claimant stated that he could not remember saying that to Mr Atkinson or anyone else. Mr Cuthbert then stated:

> *"Do you understand where I'm coming from, you didn't trip up over a pallet, you fell from a pallet after climbing up on it, two very different things."*

91. The claimant questioned why he would lie, stating that he knew there were cameras, that what he did was common practice and for two years the radio had been chained to the cage.

92. Mr Cuthbert then stated:

> *"There are answers from you that create a clear pattern. The initial view was that you tripped over a pallet. I struggle to understand why, if you had an initial 'twinge', as you say, you'd even consider climbing up on a pallet and/or using your feet to push things about like you were. You then mention the radio, and then you move on to it being that you tripped over a pallet, so there's an ever-changing picture from you. There should be absolutely no uncertainty. From reading your statements, you keep changing your view on what caused the injury, why?"*
>
> *"We are continually stepping through this investigation, re-asking questions and you're giving different responses. So what Richard Payne is saying is that there are untruths in this investigation."*

93. Mr Cuthbert then stated that had they not had the CCTV footage they may never have known what really happened because up until that point the claimant told a different story about what had happened.

94. Mr Cuthbert then said:

> *"OK, let's take this back a step or two. So way back at the beginning, on the day the accident happened, you say that you were 'laying a pallet down and tripped over it'. RB, Jim CG all have very similar stories. There is no mention of you climbing/falling from a pallet nor any mention of you trying to adjust the radio. If it was common practice and you weren't doing anything wrong, why did you not just say that? I don't understand why after an injury that severe, you wouldn't just state exactly what you were doing, after all there should be nothing to hide?"*

95. The claimant stated that he did not know and that he honestly could not remember speaking to everyone, apart from Mr Atkinson.

96. Mr Cuthbert went on to say that the radio only came into the story after the claimant had been made aware that CCTV footage of the incident was available.

97. Mr Cuthbert asked the claimant whether he had an explanation for the varying versions of events, to which the claimant replied that he did not think his versions were varied.

98. The meeting was adjourned for approximately 20 minutes, following which Mr Cuthbert informed the claimant that his appeal unsuccessful. The reasons which he gave were as follows:

> *"It is apparent that climbing on the pallet was a gross breach of health and safety and your attitude that this was custom and practice isn't acceptable to me. But ultimately there has been a serious breach of trust and confidence here that I don't feel can be repaired. You have not convinced me today that you have been completely truthful during this investigation. You gave an initial statement and once we got the CCTV you changed your version of events. Your justification for this isn't convincing. There was the potential of a major accident occurring again as we may never have got to the truth on how the accident occurred and that is extremely serious. I personally feel that I cannot trust you."*

99. Mr Cuthbert's decision was confirmed by letter dated 21 June 2018. That letter included the following passage:

> *"My reason for this decision is twofold. Firstly, from reviewing the CCTV footage it is clear to me that the incident itself was a gross breach of H&S regulations. Under no circumstances should you have climbed on to the pallet that you subsequently fell from. Secondly, you have failed to convince me that you were completely truthful throughout the duration of this investigation. From our conversation and after reviewing all of the documentation available to me, I am of the opinion that had the CCTV footage not become available to us, we may never have ascertained the*

cause of the accident. This therefore may have led the investigation down a different route and may have potentially put others at risk in the future. Pladis expect you to observe a mutual trust and confidence at all times and unfortunately on this occasion, you have breached this."

100. The claimant received sickness benefit of £72.00 per week until he secured new employment starting on 1 November 2018. He has an ongoing financial loss of £98.00 per week.

Relevant law

101. In terms of section 94 of the Employment Rights Act 1996 (the "1996 Act") an employee has the right not to be unfairly dismissed.

102. In terms of section 98(1) of the 1996 Act, it is for the employer to show the reason for dismissal, and that it is either a reason falling within section 98(2) or some other substantial reason which justifies dismissal. One of the reasons which falls within section 98(2) is a reason which relates to the conduct of the employee.

103. In terms of section 98(4) of the 1996 Act, whether a dismissal is fair or unfair *"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 [the reason] as a sufficient reason for dismissing the employee"*. This is to be determined in accordance with equity and the substantial merits of the case.

104. In **Sharkey v Lloyds Bank PLC** UKEATS/0005/15, the following is explained (paragraph 9):

The focus is thus on the employer's reason for dismissal and whether the employer's actions, focusing upon those actions, were reasonable or unreasonable. The conventional approach, derived from British Home Stores Ltd v Burchell [1978] IRLR 379, is that it is for the

employer to show the reason (here, the reason was conduct; that is not controversial). Then there is a four-stage test in order to determine the question arising under section 98(4): does the employer have a genuine belief in the misconduct, are there reasonable grounds for that belief, do they follow a reasonable investigation, and is the decision to dismiss one that is within the band of reasonable responses?

105. An employer is entitled to dismiss an employee without notice or payment in lieu of notice in circumstances where the actions of the employee amount to a repudiatory breach of the contract of employment.

Submissions: Mr McCrum for the respondent

106. The claimant was dismissed because he attempted to hide the fact that he had committed an unsafe act and misled the respondent regarding the cause of his broken ankle until it became clear through CCTV footage what had really happened. This was gross misconduct. He continued to mislead the respondent throughout the investigation meetings. Alternatively, the reason for dismissal was a breakdown in trust and confidence which is some other substantial reason. There is no doubt about the honesty of the respondent's belief that the misconduct took place.

107. There were two investigations. The first was a health and safety investigation and the second a disciplinary investigation. The claimant says that the respondent focused on minutiae and that the investigation continued for longer than necessary. However, it was necessary to investigate further due to the CCTV footage being available and to investigate whether the claimant had misled the respondent. The claimant then provided further misleading information by suggesting there were two incidents and failing to describe accurately how the injury had been caused. It was reasonable to conclude that the claimant's initial statement was completely untrue and that, combined with the other statements, he had intended to cover up the truth.

108. As a result of the investigation, there were significant inconsistencies in the evidence of the claimant. He started by saying that he had laid a pallet down and tried to step over it. He then introduced a two-stage explanation, bringing in a twinge in his ankle. He needed to introduce this explanation to reconcile his initial statement with the CCTV footage. However, it is simply not credible that his initial explanation had anything to do with the breaking of his ankle. His description of events also did not accord with the CCTV footage, as he stated he went over to the desk, turned the radio down and came off a pallet, and then turned and knew something was wrong. In fact, after climbing up the pallet and turning the radio down, he fell straight down breaking his ankle immediately.

109. When the claimant was shown the CCTV footage on 9 May 2018, he said that he could not explain why four witnesses had made the reports which they had made on the day in question, when those reports clearly differed from the true sequence of events revealed by the footage. Then, during the Tribunal hearing, he suggested that Mr Atkinson had picked him up wrong and that in fact all along he had told the truth. During the Tribunal hearing, he said for the first time that the initial twinge happened when he was kicking a pallet into place. However, this is contradicted by what he said previously when he stated that he did not think he had come into contact with a pallet and just went over on his ankle.

110. The CCTV footage also does not accord with what the claimant had said the gap was between the first onset of pain and the second. He also said at the time that he had stepped off a pallet, when that is not the case as he clearly had fallen down and that this caused his ankle to break. He stated that he had walked away from the desk a few yards and his ankle gave way, whereas the footage shows that the injury happened due to the impact of falling as soon as he hit the ground. He also stated during one of the meetings that he did not think that the aftermath of adjusting the radio was the cause of injury, whereas again the CCTV footage shows this is not true. The claimant was not providing the respondent with accurate information

enabling the respondent to understand what happened. Therefore, without the CCTV footage the respondent would not have had accurate information about the incident.

111. The claimant did not accept until the disciplinary hearing that it was the impact of falling which caused the injury. With regard to information he gave to the hospital, it is clear that he was happy to tell the truth to the hospital about what caused his injury. The respondent did not see the hospital record at any stage.

112. On the one hand, during the disciplinary investigation the claimant said, through his representative, that the notes of the earlier meetings with Mr Garner should be ignored. Now, however, the claimant is heavily reliant on those earlier investigation meetings, though still is attempting to cast some doubt on their accuracy.

113. The claimant is suggesting that Mr Garner fabricated his evidence when he spoke with Mr Armit regarding the radio. However, there was no reason for management to believe there was any kind of cover-up. The claimant also at no point suggested that there had been a cover-up. This has only been suggested now, at the Tribunal hearing. There is also no wider conspiracy.

114. The claimant accepted during the disciplinary hearing that if it had not been for the CCTV, the respondent would have been looking at a different version of events, with reference to his original statement. The claimant challenges the accuracy of the minutes in this respect, though he did not challenge this at the time. The claimant was unable to do anything to viably explain the difference between the evidence given in the investigation with Mr Garner and the content of his original statement, which was corroborated by four other witnesses.

115. The claimant is saying that his original statement should be treated with caution, due to the level of pain he was in. However, this is not mentioned during the investigation meetings, even though he was asked to explain why his statement and those of the witnesses differed from the true facts. He

said he simply could not explain the differences, and at the time he said he did not wish to change his original statement.

116. During the Tribunal hearing, he said that he did not really know at the time how bad the injury was. However, this beggars belief, given that he had broken his ankle. He is continuing to change the story as he goes along, and this is inconsistent with other statements that he was in significant pain immediately after the incident.

117. The respondent was entitled to look at all the evidence with a critical eye and reach appropriate conclusions. One of those conclusions was that it seemed highly unlikely the claimant would mistakenly tell the same fictitious version of events to four different witnesses immediately after the fall. Then there were contradictory statements, in addition to him saying that he was in so much pain he cannot remember what he said and now, at the Tribunal hearing, stating that at the time he was referring to the upturned pallet, that Mr Atkinson picked him up wrong and that he suffers from a lack of eloquence.

118. By the time of the disciplinary hearing, he had started to distance himself from his statements regarding having had a twinge. There was no evidence from the CCTV footage that he had gone over on his ankle at any time before the main incident, and his references to a twinge are inconsistent with the statements of the other witnesses. It is also clear from the CCTV footage that the claimant was able to speak with the witnesses separately. There was no commotion in the immediate aftermath.

119. His inconsistencies continued even into the appeal hearing. He is still trying to reconcile the CCTV footage with his original statement. It also appears, following cross-examination, that he is now accepting he did tell people he had tripped over pallet, but is saying that he somehow articulated himself incorrectly. However, the differences between his original account and the statements which corroborated it, when compared to his subsequent evidence, is too stark to be explained through an inability to articulate eloquently.

120. He also only appealed on the basis that the sanction was too severe, i.e. he appears to accept that he had done wrong but argued that he should not be dismissed. If it was his position he had done nothing wrong, as it was common practice, then he would have appealed on the basis that he should not have been given any penalty at all.

121. It is clear that Mr Payne concluded that the actions of the claimant were unsafe, and that this was inextricably bound up in the reason for dismissal. The reason for dismissal was an unsafe act in respect of which untruths were told. You cannot strip out the unsafe act. The claimant also based his appeal on the fact that he had carried out an unsafe act. His argument regarding common practice was essentially his defence to the unsafe act, and shows that he was fully engaged with that allegation. However, given the terms of his appeal, he had effectively decided not to argue that the act was not unsafe.

122. Therefore, for the purposes of the appeal, and the claimant having accepted he had carried out an unsafe act, it was a question of how he could explain the inconsistencies between his original statement and the CCTV footage, and he simply could not provide a valid explanation. He could not explain why the four other witnesses had told Mr Atkinson that the claimant had told them he had tripped over a pallet.

123. In any event, Mr Cuthbert clearly upheld the dismissal on the basis that the claimant had not told the truth about the injury. Therefore, even if you strip out the unsafe act, Mr Cuthbert is still reasonably upholding the dismissal.

124. Therefore, the respondent had a genuine belief that the claimant had committed an unsafe act and then provided false information. They had reasonable grounds for that belief based on a reasonable investigation. Dismissal was within the range of reasonable responses. The respondent had to reach a conclusion based on the balance of probabilities. The claimant knowingly gave his original (false) statement as he knew he had carried out an unsafe act, and he wanted to cover it up. He had undergone

relevant training just three weeks before. He and Mr Barton agreed on what they would say, and the claimant then informed the other witnesses the same thing. The claimant then introduced a fictitious two-stage explanation, regarding the twinge and saying that further damage occurred as he walked away having come down from a pallet, all of which was inconsistent with the CCTV footage.

125. If there was any procedural defect, which is denied, this was remedied by the comprehensive appeal, and the overall process was fair (see **Taylor v OCS Group Ltd** [2006] EWCA Civ 702). If the procedural defect was introducing a new reason for dismissal at the point of appeal, the outcome would have been the same even if the respondent had given prior warning that the disciplinary hearing was also to be about the unsafe act.

126. With regard to a remedy, the Tribunal must consider contributory conduct. Therefore, the Tribunal must make a finding one way or the other on the balance of probability as to whether the claimant was guilty of the misconduct, i.e. the commission of an unsafe act and subsequent misleading of the respondent as to the reasons for his injury. This conduct is evidenced by the claimant's original statement and the four corroborating statements which were made at the time, in comparison to what is seen on the CCTV footage and what the claimant later said in the Mr Garner interviews and the various inconsistencies.

127. The claimant's dismissal was caused entirely by his misconduct and both any basic award and compensatory award should be reduced by 100%.

128. With regard to wrongful dismissal, the respondent was entitled to dismiss the claimant without notice or payment in lieu of notice. This was because of his conduct of endangering others by carrying out an unsafe act and then giving false information. This was a fundamental breach of contract by the claimant.

Submissions: Mr O'Carroll for the claimant

129. The respondent did not in fact have a genuine belief of wrongdoing on the part of the claimant. Alternatively, even if there was such a genuine belief, the outcome of the preliminary investigations meant that it did not have reasonable grounds to maintain that belief.

130. The respondent's position regarding the inconsistency of the claimant's statements hinges on his original statement, taken immediately after the incident by Mr Atkinson. This statement is referred to again and again and permeated the entire process which included three health and safety interviews, two disciplinary investigation meetings, the disciplinary hearing and the appeal hearing.

131. The original statement was a single short sentence drafted by Mr Atkinson which he insisted the claimant sign shortly after the accident, even though the claimant was noticeably in great pain. The claimant did not check the statement once he had signed it. The claimant was then taken to hospital, at which point he provided a brief history of the accident before a break to his ankle was confirmed and painkillers were prescribed.

132. The main purpose of the health and safety investigation which followed was to prevent a recurrence. At the start of the first telephone interview, on 19 April 2018, it was acknowledged that the claimant was unable to give a full statement at the time. By the time of the telephone interview, he was at home, at rest and with his condition stabilised. During this interview, the claimant explained that he had turned the radio down and came down off a pallet and then turned and knew something was wrong. He also clarified that he did not hurt himself adjusting the radio, but when he came down. Then, on 26 April 2018, the claimant provided a full, clear and frank explanation of the accident. He explained he went on to a pallet to turn down the radio, the pallet was side of the cage, the radio was on top of the cage and he stepped onto the upturned pallet, which was at an angle, in order to turn the radio down. He also stated at the time that he did not trip of the pallet and that his

ankle went after he came back down from adjusting the radio. He described walking a short distance before his ankle gave way.

133. That explanation of the claimant might be thought to have completely answered the question beyond any doubt as to how the accident occurred. Nevertheless, the respondent persisted in asking questions on the basis of the original statement made at the time of the accident, despite the position having now been made clear. The claimant stated that he could not remember falling over a pallet. Where is the confusion? What more could have been said? At this stage, the telephone interview could have been terminated, and indeed the health and safety investigation itself. Instead, further questions ensued which only served to confuse the facts which had already been established.

134. The claimant was shown CCTV footage for the first time on 9 May 2018. The claimant thought that he was attending a return to work meeting. However, this was not the case and there was instead a lengthy reiteration of the previous interviews, and the claimant again stated what had happened. It might be said that all of the facts had by this time been analysed to destruction. The circumstances of the incident had been made abundantly clear by the claimant during the interview on 26 April 2018. Mr Garner, however, persistently and repeatedly reverted to the original statement made on 11 April 2018, despite its admitted inadequacy. He concentrated on minor points of discrepancy and ignored the clear and unequivocal statements which mirrored what was contained within the CCTV footage.

135. Any person faced with continual questioning again and again on the same facts would be hard pushed to maintain an entirely consistent response. This should be noted with reference to the evidence of Mr Cuthbert during cross-examination. He stated different positions with regard to his role as the appeal manager. He was giving evidence on oath, and yet even he provided inconsistent statements without any particular pressure being brought to

bear. This should be compared with the three-fold interview process with the claimant as part of the health and safety investigation.

136. It should be noted that the statements of the claimant made during the first and second telephone interviews were made without the benefit of having seen the CCTV footage. And yet, the description of the incident very clearly reflects what can be seen from that footage. The claimant, therefore, was not seeking to mislead his employer. He was not seeking to cover up unsafe practices. He provided a full, frank and clear explanation of how the accident occurred. There is no evidence that the claimant attempted to change his story prior to the first telephone interview. This is supposition. The suggestion that the claimant was forced to change his story once he saw the CCTV footage is also without foundation. Both Mr Payne and Mr Cuthbert stated that had it not been for the CCTV footage, they would not have known what the cause of the accident was. That position, however, is incorrect and undermines their credibility and reliability. Mr Cuthbert himself accepted that if safety measures were to have been put in place following the interviews on 19 and 26 April 2018, they would have been exactly the same measures which transpired as necessary following the review of the CCTV footage. That admission completely undermines the evidence regarding placing other colleagues at risk and not knowing what safety precautions were necessary until the CCTV footage had become available.

137. It appears that Mr Garner had seen the CCTV footage, as early as 19 April 2018. However, he did not reveal that fact to the claimant. He effectively "held all of the cards", knew exactly how the accident occurred and yet continually questioned the claimant to see if he could catch him out in a lie. As Mr Garner had seen the footage, there was no need for the health and safety interviews, as the cause of the accident was known. Therefore, the health and safety investigation was in fact carried out for other purposes. The claimant was effectively already facing a disciplinary investigation, about which he had been given no warning. On that basis, the dismissal is unfair.

138. Mr Garner did not ask questions around the radio or the means by which it was adjusted. A plausible explanation for this lack of curiosity on his part is that he was already fully aware of such matters by reason of being the Warehouse Manager. Therefore, and ironically, the person within the respondent's organisation who was tasked with carrying out the health and safety investigation had himself misled the respondent, as he denied knowledge regarding the radio in the course of the internal process. It is inconceivable that the Warehouse Manager, being responsible for health and safety, would have been unaware of the practice with regard to the radio. This explains why Mr Garner was intent on obscuring the simple facts of the accident, as outlined by the claimant during the telephone interviews, and focusing instead on finding inconsistencies. That would mean blame was not attributed to him. The procedure was a charade.

139. The statement taken from Helen Brown as part of the internal investigation is completely without credibility. It was the only statement taken from another employee and appears to be something of a fig leaf. It is inconceivable that a radio chained to the top of the cage within a protective metal frame could be adjusted by a stick. The claimant also explained that no ladder was available and access would have been impossible using a mobile platform.

140. Therefore, the health and safety investigation was unfair. The statements of the claimant were ignored and the investigation ploughed on in an attempt to establish discrepancies which were manufactured rather than real, and which related to matters of detail rather than substance. Further, the true purpose of the investigation was to discredit the claimant and ultimately commence disciplinary proceedings against him. The conclusions of the health and safety investigation were predetermined, rather than objectively decided, as were the disciplinary conclusions which followed.

141. At the disciplinary stage, the single allegation was that the claimant knowingly provided the business with a false statement. Mr Payne accepted in evidence that if the investigatory reports leading up to his determination

regarding dismissal were flawed, then it is possible that his conclusions might also be flawed. He agreed that the disciplinary hearing served to confirm the conclusions reached by Mr Armit. There is a disagreement as to whether the claimant agreed at the disciplinary hearing that if it had not been for the CCTV footage then there would have been another version of events. In any event, Mr Cuthbert admitted that the events as explained on 26 April 2018 would have permitted the necessary preventative measures to have been put in place.

142. Mr Payne relied on the recommendations of Mr Armit. Because Mr Armit had failed to have regard to what the claimant had said in the telephone interviews, Mr Payne also failed to have regard to this and accepted the narrative that there were discrepancies which meant that the claimant had been dishonest. The reasoning in the letter of dismissal is not based on the actual facts available to the respondent. Amongst other things, it was completely without foundation to state that the claimant had created an alternative version of events which he only recognised as untrue when the CCTV footage was reviewed, as the version of events which he provided on 26 April 2018 (prior to seeing the CCTV footage) mirrored almost exactly what was in the CCTV footage. The decision of Mr Payne was based upon a flawed prior investigation, and the decision taken to dismiss was unfair.

143. With regards to the appeal, the transcript demonstrates that the appeal was in effect a rehearing of the original decision. Mr Cuthbert, however, ignored the fact that at the earliest opportunity, on 19 April 2018 and then again on 26 April 2018, the claimant had explained exactly what he had been doing. The reasons for refusing the appeal are two-fold. Aside from repeating the same conclusions of Mr Payne regarding dishonesty, for the first time a new reason is provided, namely a serious breach of health and safety regulations. However, this had not been referred to as an allegation which the claimant had to answer. There may have been a host of duties under various regulations which the claimant might have had to consider, but he was not given notice of any of them. The claimant was not in a position to

instruct his union representative regarding a possible answer to this new charge.

144. The decision letter following the appeal makes no mention of the sanction imposed, despite Mr Cuthbert's initial position in evidence being that the appeal hearing was primarily for the purpose of considering the severity of the sanction. This might be taken to indicate that his mind was in fact effectively closed to any alternative to summary dismissal. Given the additional failings in respect of the appeal, therefore, the case of **Taylor v OCS Group Ltd** is of no assistance to the respondent.

145. The claimant is seeking compensation, and sought to obtain work (and did so) as soon as he had recovered from his injury. He mitigated his loss. There should be no reduction in compensation by reason of contributory conduct. The claimant did not consider the act to be an unsafe act at the time, and this only became a focus at the appeal stage. His understanding was based upon tolerance by management. There should be no **Polkey** reduction. If the statements provided by the claimant on 19 and 26 April 2018 had been properly taken into account, the conclusion would have been that he had not been guilty of misconduct and dismissal would not have occurred.

Observations on the evidence

146. On the whole, I am satisfied the witnesses gave their evidence to the best of their recollection.

147. There was a question around one part of the minutes of the disciplinary hearing, which state the following:

> *"RP: If we didn't have the video, there would be another version of events.*
>
> *GH: Yes."*

148. During evidence, the claimant said that he did not say "yes", as noted in the minutes. Mr Doherty, the claimant's trade union representative who also attended the disciplinary hearing, said that he did not recollect the claimant saying "yes" and that his notes did not reflect that (though his notes were not produced).

149. The suggestion being made by Mr Payne at the time was that the other version of events would have been the version as noted in the initial statement signed by the claimant on the night of the accident.

150. I consider it is likely the claimant either said "yes" as noted in the minutes, or otherwise indicated his agreement to the suggestion. However, and given his evidence, I also consider it likely that he did not pay much attention to the minutes at the time, and left matters largely in the hands of the union, and that he is now reading this from his perspective of having provided an accurate version of events as part of the wider health and safety investigation.

Decision

Did the respondent have a potentially fair reason for dismissal?

151. It is for the respondent to show the reason for dismissal, and that it is either a reason falling within section 98(2) of the 1996 Act or some other substantial reason which justifies dismissal.

152. The reason for the claimant being dismissed was set out in the letter of dismissal, as follows:

> *"I have a reasonable basis to believe that you provided the investigation with false information and by collaborating with the other witnesses, they provided a version of events reflecting your initial statements, which in turn had a detrimental effect to the efficient and effective conclusion of the investigation. I believe that your decision to do so was motivated by*

a desire to hide your real actions which were as you now admit, unsafe, and colluded with an eye witness to create an alternative version of events which was only recognised as untrue when the CCTV footage was reviewed."

153. The above refers to both collaboration with witnesses and collusion with Mr Barton. At the end of the disciplinary hearing (before issuing the letter), Mr Payne stated his decision that the claimant had colluded with Mr Barton to provide a different account of events and had misinformed others so they would support his version of events.

154. Therefore, even though the letter of dismissal refers to collaborating with the other witnesses in the first sentence in the passage quoted above, this is in fact a reference to collusion (or collaboration) with Mr Barton specifically and misinforming the other witnesses.

155. During the health and safety investigation, the claimant referred to having felt a twinge in his ankle before the accident. Mr Payne did not consider this was consistent with the CCTV footage. Mr McCrum submits that the claimant's position was that what he had been trying to say in the initial statement was that he had gone over on his ankle at an earlier point, i.e. the twinge explanation. It was submitted that the claimant needed to introduce the twinge explanation in order to reconcile the initial statement with the CCTV footage. This ties in with Mr Payne explaining the following during cross-examination:

"The moving of the radio alerted people, including [the claimant], that we had CCTV coverage."

156. The respondent's position, therefore, is that the claimant, on 19 April 2018 during the first telephone interview (and before he had seen the CCTV footage), introduced false information about a twinge because he had been alerted to the fact that CCTV footage existed, by virtue of the radio having

been moved, and because he was trying to reconcile the initial statement which he had signed with the CCTV footage.

157. The claimant also said to Mr Garner that he had stepped off a pallet, that his ankle had given way after he had walked away a few yards and that it must have been weakened from the earlier twinge (and that as such he did not think that adjusting the radio caused the final injury). Mr Payne did not view this as consistent with the CCTV footage and considered this to be part of the false information provided by the claimant.

158. The appeal outcome involved a conclusion by Mr Cuthbert that there had been a gross breach of health and safety regulations by the claimant. Mr McCrum states that the reason for dismissal was an unsafe act in respect of which untruths were told.

159. Therefore, taking all of this into account, I conclude that the reason for dismissal was that the claimant: (a) carried out an unsafe act, (b) colluded with Mr Barton to create an alternative version of events, and misinformed witnesses such that they provided a version of events, reflecting his initial statement, (c) in addition to his initial statement, provided false information about having felt a twinge, stepped off a pallet and walked away a few yards with his ankle having been weakened, and (d) was motivated to do so by a desire to hide his real actions which he admitted were unsafe.

160. Mr McCrum states that the reason for dismissal was gross misconduct. He also says that, alternatively, the reason was a breakdown in trust and confidence which is some other substantial reason.

161. The position stated in the ET3 is that this was a conduct dismissal to which the **Burchell** test applies. The claimant was dismissed without notice or payment in lieu of notice and I am satisfied from the evidence, and in particular the minutes of the disciplinary hearing and the letter of dismissal (which referred to the claimant being dismissed for gross misconduct), that the reason for dismissal was the alleged conduct of the claimant.

162. Conduct as a reason for dismissal falls within section 98(2) of the 1996 Act. I will therefore consider the reasonableness of the decision to dismiss for conduct with reference to the **Burchell** test and section 98(4) of the 1996 Act.

Did the respondent have a genuine belief in the misconduct?

163. It was submitted that the respondent did not have a genuine belief of wrongdoing on the part of the claimant. However, I do not consider there to be evidence which supports that view. It is clear that Mr Payne dismissed the claimant because he believed that what he had stated in the letter of dismissal had occurred. I am satisfied that Mr Payne had a genuine belief in the alleged conduct, and that Mr Cuthbert shared that view.

Were there reasonable grounds for that belief?

164. I will consider the reasons for dismissal, set out above at paragraph 159, with reference to the information which Mr Payne had available at the time.

(a) The unsafe act

165. Given the CCTV footage, and the fact that the claimant acknowledged to Mr Armit that he had carried out an unsafe act, there were reasonable grounds to believe that the claimant had carried out an unsafe act.

(b) Collusion with Mr Barton and misinforming witnesses

166. Mr McCrum submits that whilst the claimant is saying his original statement should be treated with caution due to the level of pain he had been in, this was not mentioned on 19 April, 26 April or 9 May 2018.

167. However, during the first telephone interview on 19 April 2018 Mr Garner made no reference to the initial statement signed by the claimant. During the second telephone interview on 26 April 2018 Mr Garner made reference

to the pain the claimant had been in, which he stated had become more serious. He did not refer to the initial statement signed by the claimant, and instead made a general reference to statements which had been taken.

168. At the start of the meeting on 9 May 2018, Mr Garner said that the initial statement had been taken when the claimant had been in considerable pain and that there was a need for clarity. During that meeting Mr Garner asked the claimant if he had been in a lot of pain when he had spoken with his colleagues after the accident had happened. The claimant confirmed that he had been in a lot of pain, and explained that he could not remember what he had said to his colleagues.

169. The purpose of the health and safety investigation, as explained by Mr Garner on 26 April 2018, was to understand the accident so as to prevent a recurrence. There was no reason, therefore, for the claimant to focus on the initial statement, and Mr Garner himself did not focus on that statement. The only mention of that statement during the health and safety investigation was on 9 May 2018 in the context of the claimant having suffered considerable pain, and during that meeting the claimant explained that he had been in a lot of pain when he had spoken with his colleagues.

170. It was not until the disciplinary investigation meeting on 17 May 2018 that greater focus was placed by the respondent on the initial statement signed by the claimant. The claimant explained that he could not really remember what he had said when he gave his statement on the night of the accident as he had been in too much pain. He also said that he had hardly been able to talk because of the pain.

171. During the disciplinary hearing, the claimant stated that he remembered sitting with Mr Atkinson who asked him what had happened, but that at the time he did not know because the pain was so high and that although he had signed a statement, he had been in loads of pain. When Mr Payne stated at the disciplinary hearing that the claimant's original statement aligned with certain witnesses, the claimant stated that when he came off the pallet he was in so much pain he could have said anything.

172. It is therefore clear that the issue of the claimant having been in a great deal of pain was referred to on a number of occasions, both at investigation meetings and at the disciplinary hearing. On each occasion, the context was that the claimant had been in a great deal of pain when giving a statement to Mr Atkinson and speaking with colleagues.

173. During cross-examination, Mr Payne agreed that the claimant had been in a great deal of pain. He agreed that the statement signed by the claimant on the night of the accident was taken in circumstances which were less than ideal and should be viewed within the context of the claimant having just suffered an injury and being in pain. However, this is contrary to the approach which he took when reaching his decision after the disciplinary hearing. Mr Payne stated the following in the letter of dismissal before concluding that the claimant had collaborated with witnesses:

> *"My reason for this decision is that regardless of knowing that there was a camera in the Warehouse, I believe that either the pain you were in made you lose focus or become complacent about the recording of CCTV footage."*

174. Mr Payne also stated in evidence that the claimant had *"enough wits about him"* to make sure that Mr Barton backed up his version of events. When Mr Payne was asked how that squared with the claimant then freely explaining to Mr Garner exactly how the accident had occurred (by explaining that he had stepped onto an upturned pallet to adjust the radio), Mr Payne confirmed that it did not square. He went on to say (as noted above) that the radio being moved had alerted the claimant to the fact that they had CCTV footage.

175. Therefore, Mr Payne concluded that the claimant had colluded with Mr Barton and had misinformed witnesses on the basis that: (a) despite the level of pain being such that he was complacent about the existence of CCTV, the claimant had enough wherewithal to misinform witnesses and

ensure that Mr Barton backed up an alternative version of events, and (b) the claimant then changed his story for the purposes of the first telephone interview, as he had been alerted to the existence of CCTV footage by virtue of the fact that the radio had been moved.

176. However, there are two issues with this. Firstly, at no point had it been put to the claimant that the pain which it was accepted he had been in made him complacent about the existence of CCTV. All the discussions which had taken place in relation to the pain which the claimant had been in were around the fact that he had been in a great deal of pain when speaking with Mr Atkinson and his colleagues. Yet, rather than having regard to that information, and despite what he said in cross-examination, Mr Payne reached his own conclusion about the impact and effect of the pain from which the claimant had been suffering, but without putting that to the claimant. I consider that an employer acting reasonably would not take such an approach. Secondly, there is nothing to suggest the respondent had any evidence that the claimant, who was absent from work due to the injury, had been alerted to the radio having been moved. I agree with Mr O'Carroll that this is no more than supposition. An employer acting reasonably would not draw conclusions about the honesty of an employee without having evidence to substantiate the basis for those conclusions.

177. I therefore conclude that Mr Payne did not have reasonable grounds to believe that the claimant had colluded with Mr Barton and misinformed the other witnesses.

(c) Providing false information

The initial statement

178. It was reasonable for Mr Payne to conclude that the initial statement signed by the claimant contained false information, given the CCTV footage.

The twinge

179. As noted above, the respondent's position is that the claimant, on 19 April 2018 during the first telephone interview (and before he had seen the CCTV footage), introduced false information about a twinge because he had been alerted to the fact that CCTV footage existed, by virtue of the radio having been moved, and because he was trying to reconcile the initial statement which he had signed with the CCTV footage.

180. However, nothing to this effect was put to the claimant by Mr Payne or anyone else. Furthermore, as noted above, there is nothing to suggest the respondent had any evidence that the claimant had been alerted to the radio having been moved.

181. The claimant had said to Mr Garner (on 19 April 2018) that he hadn't thought anything of the twinge which he said he had felt and (on 26 April 2018) that it was a pain he could shrug off. On 17 May 2018 he said to Mr Armit that he had gone over on his ankle at an earlier point but that he never thought any more of it. At the disciplinary hearing, Mr Payne was concerned that the claimant was seen on the CCTV footage manipulating a pallet with his foot very shortly before the accident. This was the first time this had been mentioned. The claimant explained that pain like the twinge he had felt only lasts a minute. This was consistent with the information he had already provided before this issue had been raised.

182. In addition, during the first telephone interview on 19 April 2018 Mr Garner did not refer to the initial statement signed by the claimant. During the second telephone interview on 26 April 2018, he also did not refer specifically to the initial statement signed by the claimant. He stated that information from statements taken at the time suggested that the claimant had hurt his ankle by putting a pallet down and tripping over it, to which the claimant said: *"I can't remember falling over a pallet, I don't think that happened."* During the meeting on 9 May 2018, the only reference to the initial statement was in the context of the claimant having suffered considerable pain, and otherwise Mr Garner again made a general reference to statements which had been taken. Therefore, during the health

and safety investigation no particular focus was placed by the respondent on the initial statement signed by the claimant, and at no point did the claimant say that the initial statement which he had signed was referring to the earlier twinge which he was explaining he had felt and which he was saying was of no particular significance.

183. During the meeting on 17 May 2018, when the claimant was asked by Mr Armit why in his first statement he said he had fallen over a pallet, the claimant stated that he could not really remember and that he had been in too much pain. Again, he did not say anything to suggest that he was linking that statement to what he was saying about having felt a twinge.

184. Therefore, the respondent did not suggest to the claimant that he was trying to reconcile the initial statement with the CCTV footage, and the respondent had no evidence to substantiate the view that the claimant had decided to do so because he had been alerted to the fact that CCTV footage was available. Further, the claimant did not say anything which could reasonably be taken to suggest that he was linking the initial statement he had signed with what he was saying about having felt a twinge.

185. I do not therefore consider there were reasonable grounds for Mr Payne to believe that, by explaining he had felt a twinge, the claimant had provided false information.

Stepping off the pallet and walking away with a weakened ankle

186. With regard to the claimant saying he had stepped off a pallet and walked away a few yards and that his ankle must have been weakened from earlier, Mr Payne saw that this was inconsistent with the CCTV footage and it was therefore reasonable for him to believe that this was false information.

(d) The claimant's motivation

187. Mr Payne concluded that the claimant had been motivated to provide false information, collude with Mr Barton and misinform witnesses by a desire to hide his real actions which he admitted were unsafe. However, this

conclusion highlights that Mr Payne did not have regard to statements which the claimant made as part of the health and safety and disciplinary investigations.

188. In answer to the first question he was asked during the first telephone interview, the claimant explained that he had gone to turn down the radio, come down off a pallet, turned and knew something was wrong. This was an account which, albeit brief in its terms, to a large extent reflected the CCTV footage. He gave more details on 26 April 2018, explaining about having stepped onto an upturned pallet which was at an angle at the side of the cage. Therefore, from the point at which he was first questioned after the night of the accident, the claimant explained what he had been doing at the time of the accident occurring and did so without having seen the CCTV footage. As noted above, the respondent had no evidence to suggest the claimant had been alerted to the radio having been moved and had therefore changed his story. The claimant then acknowledged at the meeting with Mr Armit on 17 May 2018 that climbing onto the upturned pallet had been an unsafe act.

189. During cross-examination Mr Payne was asked whether, as at 26 April 2018, the respondent had the necessary information from the claimant to prevent a further accident, to which Mr Payne replied: *"At that point, yes".* In answer to further questions he placed more emphasis on the CCTV footage and the fact there were discrepancies between the footage and what the claimant had said (such as the claimant saying he had walked away). However, he also confirmed that, even if they did not have the CCTV footage, they would have moved the radio from the top of the cage. Mr Cuthbert also confirmed during cross-examination that if all the respondent had was the information provided by the claimant on 26 April 2018 then that would have been enough to take the necessary precautions as they would have been aware that the claimant had climbed onto an upturned pallet.

190. Therefore, the claimant had provided information which disclosed what he had done and that it had been unsafe, which is something he had acknowledged.

191. In addition, Mr Payne's conclusion regarding the claimant's motivation was very much focused on his belief that the claimant had colluded with Mr Barton and misinformed witnesses to ensure that an alternative version of events was provided. I have already concluded that Mr Payne did not have reasonable grounds for that belief.

192. I conclude, therefore, that Mr Payne did not have reasonable grounds to believe that the claimant was motivated by a desire to hide his actions.

Did those grounds follow a reasonable investigation?

193. I have concluded that Mr Payne had reasonable grounds to believe that the claimant had carried out an unsafe act. Given the CCTV footage and the fact that the claimant acknowledged to Mr Armit that he had carried out an unsafe act, I consider there was a reasonable investigation. I have also concluded that Mr Payne had reasonable grounds to believe that certain false information had been provided, and given the CCTV footage this also followed a reasonable investigation.

The appeal hearing

194. During the appeal hearing, Mr Cuthbert stated the following:

> *"There are answers from you that create a clear pattern. The initial view was that you tripped over a pallet. I struggle to understand why, if you had an initial 'twinge', as you say, you'd even consider climbing up on a pallet and/or using your feet to push things about like you were. You then mention the radio, and then you move on to it being that you tripped over a pallet, so there's an ever-changing picture from you. There*

should be absolutely no uncertainty. From reading your statements, you keep changing your view on what caused the injury, why?"

195. The above passage quotes Mr Cuthbert as having stated that the initial view was that the claimant had tripped over a pallet. However, during the telephone interview on 26 April 2018, when the claimant was informed that information from statements taken at the time suggested that he had hurt his ankle by putting a pallet down and tripping over it, the claimant said: *"I can't remember falling over a pallet, I don't think that happened."* During the meeting on 9 May 2018, Mr Garner stated that when he first reviewed the statements the cause of the accident seemed to be tripping over a pallet, to which the claimant replied that he never really tripped over a pallet. During the disciplinary hearing the claimant stated that he had not tripped over anything. However, there is no indication that Mr Cuthbert had regard to the fact that the claimant, as part of the respondent's health and safety and disciplinary processes, was not agreeing with statements to the effect that he had tripped over a pallet.

196. The above passage also quotes Mr Cuthbert as having stated that, after mentioning the radio, the claimant moved on to saying he had tripped over a pallet. This is not accurate. Again, during the telephone interview on 26 April 2018 and the meeting on 9 May 2018 (after having explained about the radio), and at the disciplinary hearing, the claimant explained that he did not trip over a pallet.

197. Mr Cuthbert included the claimant having referred to the radio as part of what Mr Cuthbert called the ever-changing picture. I consider this shows that he was not taking into account the fact that during the first telephone interview Mr Garner acknowledged that the claimant had been unable to give a full statement at the time of the accident and that the claimant then went on to provide a much more accurate account of events which differed significantly from the initial statement.

198. During the appeal hearing, Mr Cuthbert said the following:

> *"OK, lets take this back a step or two. So way back at the beginning, on the day the accident happened, you say that you were 'laying a pallet down and tripped over it'. RB, Jim CG all have very similar stories. There is no mention of you climbing/falling from a pallet nor any mention of you trying to adjust the radio. If it was common practice and you weren't doing anything wrong, why did you not just say that? I don't understand why after an injury that severe, you wouldn't just state exactly what you were doing, after all there should be nothing to hide?"*

199. This also highlights that Mr Cuthbert focused on the initial statement, to the exclusion of the more accurate information which the claimant provided during the health and safety investigation which followed. The above passage quotes Mr Cuthbert as having referred to the severity of the injury, yet gives no indication that he was taking into account the pain which the claimant had been in and which had been referred to in the course of the health and safety investigation and the disciplinary process.

200. Mr Cuthbert also said the following at the appeal hearing:

> *"But if we didn't have the CCTV footage we may never have known what really happened George because up until that point you told a different story about what happened. That concerns me."*

201. I have added the emphasis. Later in the appeal hearing Mr Cuthbert stated that the claimant only mentioned the radio after he had been made aware that CCTV footage was available. However, whilst the respondent had seen the CCTV footage prior to the first telephone interview, the claimant had not seen the CCTV footage and Mr Garner did not tell the claimant that CCTV footage had been reviewed. The claimant was not shown the CCTV footage until later in the meeting on 9 May 2018, and the respondent had no evidence to suggest the claimant had otherwise been made aware that CCTV footage had been reviewed.

202. Mr Cuthbert's approach was therefore not dissimilar to Mr Payne's. They both focused their attention on the statement signed by the claimant on the night of the accident, rather than the information provided as part of the wider health and safety investigation and the disciplinary investigation. They did so without having regard to the considerable pain which it had been acknowledged the claimant had been in, and they drew conclusions about the claimant's actions based on an assumption around him being aware that CCTV footage had been reviewed.

Section 98(4) of the 1996 Act

203. This falls to be determined with reference to section 98(4) of the 1996 Act, which is in the following terms:

> **"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."**

204. Rather than considering this as if I had been the decision maker, this needs to be considered from the perspective of the objective standards of the reasonable employer. I need to decide whether dismissal was within the range of reasonable responses, taking into account the information which was available to the respondent at the time and the particular concerns of the respondent.

205. Mr McCrum states that the unsafe act was inextricably bound up in the reason for dismissal. However, it was Mr Cuthbert at the appeal stage who

introduced the reference to there having been a gross breach of health and safety regulations. Mr O'Carroll submits that this had not been referred to as an allegation which the claimant had to answer and that there may have been a host of duties under various regulations which the claimant might have had to consider, but that he was not given notice of any of them.

206. In this context, reference was made to **Taylor v OCS Group Ltd**. The following is stated by the Court of Appeal at paragraph 48:

> **In saying this, it may appear that we are suggesting that ETs should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) requires the ET to approach their task broadly as an industrial jury. That means that they should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.**

207. It is clear that the unsafe act was not the main reason for dismissal. Mr Payne stated at the conclusion of the disciplinary hearing that whilst the claimant had admitted carrying out a foolish act, that was not the issue.

208. The main concern for the respondent was the information provided by the claimant and his motivation for providing that information. The claimant said that he had stepped off the pallet and walked away a few yards before going over on his ankle, and suggested his ankle must have been weakened. However, these inaccuracies were not the focus of the conclusions reached by the respondent at the disciplinary or the appeal stage. During cross-examination Mr Payne explained that, whilst there were a number of inconsistencies, the biggest discrepancy was the statement signed by the claimant on the night of the accident. It was that statement which was the focus of the disciplinary hearing and which underpinned the process carried out by the respondent and the decisions of Mr Payne and Mr Cuthbert. The

respondent's primary concern was its belief that on the night of the accident the claimant made a conscious decision to hide the fact that he had carried out an unsafe act by colluding with Mr Barton and misinforming witnesses. I have concluded, however, that the respondent did not have reasonable grounds for that belief.

209. The respondent was also concerned about the claimant providing information about having felt a twinge, and believed that the claimant was doing so in order to create an explanation for the initial statement which he had signed on the night of the accident. The respondent believed that the claimant was motivated to come up with some sort of explanation for having provided that statement, given that (according to the respondent) by the time of the first telephone interview he knew that CCTV footage had been reviewed. I have concluded, however, that the respondent did not have reasonable grounds for that belief.

210. Mr Payne also concluded that the claimant's actions had a detrimental effect to the efficient and effective conclusion of the investigation. This is undermined by my findings on reasonable belief. In addition, although the claimant had provided some information which was not consistent with the CCTV footage, the other information which he had given the respondent disclosed that he had carried out an unsafe act (something which he acknowledged) and was sufficient for remedial measures to be taken.

211. I conclude that the respondent's focus on the initial statement signed by the claimant resulted in the respondent placing little weight on much of what the claimant subsequently said. The respondent had little regard to the claimant having provided an explanation, at the first opportunity he was given after the night of the accident, which was a much more accurate account of events, and saying that he had been in a great deal of pain and could not remember what he had said (due to the pain) and that he had not in fact tripped over a pallet. The respondent ultimately had a core belief that the claimant had, on the night of the accident, colluded with and misinformed witnesses in an effort to hide the fact that he had carried out an unsafe act.

This was compounded by the respondent making an assumption about the claimant being made aware that CCTV footage had been reviewed, and concluding that as such the claimant had changed his story and provided false information about having felt a twinge. However, I have concluded that the respondent did not have reasonable grounds for those beliefs.

212. In all of the circumstances, and notwithstanding the fact that the claimant had carried out an unsafe act and provided some information which did not reflect the CCTV footage, I conclude that the respondent did not act reasonably in treating the conduct of the claimant as a sufficient reason for his dismissal. Dismissal was outwith the range of reasonable responses, and therefore the claimant was unfairly dismissed.

Basic award

213. The claimant had completed nine years of service. He was 63 years of age when he was dismissed and his gross weekly wage was £445. The basic award is therefore £6,007.50.

Compensatory award

214. The bundle of documents includes a schedule of loss. The explanatory notes in the schedule state that the claimant is seeking wage loss of £98.00 per week for a period of 30 months from 1 November 2018, which it is said is when he commenced new employment (having received sickness benefit up to that point). This is on the basis that, given his age (he is now 64), the claimant will struggle to find a job that will replace the income he had with the respondent.

215. Other than seeking a reduction for contributory conduct, the schedule of loss was not challenged. I am therefore prepared to make the award being sought, which is in the sum of £12,740. I also award £500 for loss of statutory rights, being the sum sought in the schedule of loss. Therefore, the compensatory award is £13,240.

Polkey reduction

216. Given the reasons for the dismissal being found to be unfair, primarily that the respondent did not have reasonable grounds for its belief that the claimant had tried to hide the fact that he had carried out an unsafe act by providing false information about a twinge and colluding with and misinforming witnesses, this is not a case where **Polkey** falls to be considered.

Contributory conduct

217. When considering a possible reduction for contributory conduct, the following passage from the Employment Appeal Tribunal in **Steen v ASP Packaging Ltd** UKEAT/0023/13 explains how a Tribunal should approach the matter (paragraphs 8 to 14):

> **8. In a case in which contributory fault is asserted the tribunal's award is subject to sections 122(2) and 123(6) of the Employment Rights Act 1996. Section 122(2), dealing with the basic award, provides:**
>
> > **"Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."**
>
> **9. Section 123(6) provides:**
>
> > **"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory**

award by such proportion as it considers just and equitable having regard to that finding."

10. The two sections are subtly different. The latter calls for a finding of causation. Did the action which is mentioned in section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be addressed in dealing with any reduction in respect of the basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent. Both sections involve a consideration of what it is just and equitable to do.

11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy.

12. It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is on what the employee did. It is not on the employer's assessment of how wrongful that act was; the answer depends what the employee actually did or failed to do, which is a matter of fact for the employment tribunal to establish and which, once established, it is for the employment tribunal to evaluate. The tribunal is not constrained in the least when doing so by

the employer's view of the wrongfulness of the conduct. It is the tribunal's view alone which matters.

13. (3) The tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question, (4).

14. This, question (4), is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.

Question 1: what is the conduct which gives rise to potential contributory fault?

218. The conduct in question is the claimant having climbed onto an upturned pallet, his statement given to Mr Atkinson and speaking with colleagues at the time of the accident, and the information he provided during the health and safety investigation and disciplinary process, including the reference to having felt a twinge.

Question 2: was the conduct blameworthy?

219. Further to the above passage from **Steen v ASP Packaging Ltd**, this

involves the Tribunal establishing for itself what the claimant did or did not do. The Court of Appeal, in **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220, suggests that separate and sequential findings of fact are made on discrete issues, such as contributory conduct, even if this involves some duplication.

220. I will therefore consider the conduct referred to above, and in doing so I will make factual findings and set out my conclusions.

(a) Climbing onto the pallet

221. **Facts:** Whilst at work on 11 April 2018, the claimant decided to adjust the radio which was on top of the cage. He therefore climbed onto a pallet at the side of the cage and reached up to the radio. He slipped off the pallet, and slid down against the side of the cage, with some force but he remained upright and kept a hold of the side of the cage and steadied himself for a few seconds. He then turned and attempted to walk away, at which point he stumbled forward. It was then that the claimant knew something bad had happened, though he was unaware that he had suffered a double fracture to his ankle.

222. At the point when the claimant climbed onto the upturned pallet, he did not think that what he was doing was unsafe. However, when Mr Armit reminded the claimant that he had completed safety training, the claimant acknowledged that he had carried out an unsafe act. The safety training had taken place on 6 April 2018, five days before the accident, and included training on storage at height and how to access items at height.

223. **Conclusion:** During cross-examination the claimant stated that he should have thought that what he had done was dangerous. I am of the view that by stepping onto an upturned pallet at the side of the cage and reaching up to adjust the radio, the claimant carried out an unsafe act. I conclude that the actions of the claimant were blameworthy.

(b) The initial statement and speaking with colleagues

224. **Facts:** When the accident happened, the claimant was in a considerable amount of pain. Due the level of pain he was in, the claimant found it difficult to speak, though he did say to his colleagues that he had hurt himself coming down off a pallet, that he didn't know what he had done and that he was in pain. The claimant was asked by Mr Atkinson to give a statement. The claimant was in a great deal of pain and said that he couldn't give one, but Mr Atkinson said that the claimant had to give a statement before going to hospital. Mr Atkinson wrote down a short statement of one sentence on a blank piece of paper, which said the claimant had been laying down a pallet, had tried to step over it and went over on his ankle. The claimant signed the statement, though he did so without paying attention to what had been written.

225. **Conclusion:** I do not believe the claimant made a decision to create an alternative version of events either himself or in conjunction with others. I do not believe he colluded or collaborated with witnesses. I accept the evidence of the claimant that he cannot remember what he said to Mr Atkinson. In the absence of other evidence (such as evidence from Mr Atkinson), I do not conclude that, on the balance of probabilities, the claimant did in fact say to Mr Atkinson what was written down in the initial statement. However, even if the claimant did say to Mr Atkinson what was written down in the initial statement, I consider it is likely he did so because he was in such pain that he did not really know what he was saying and was not in a position to provide a statement in the first place. I therefore do not believe that his conduct in this regard was blameworthy.

(c) Information provided during the health and safety investigation and disciplinary process

226. **Facts:** The claimant attended hospital, and the discharge letter explained that the claimant had been standing on a pallet and fell off sustaining an inversion injury. During the first telephone interview with the respondent as part of a health and safety investigation, the claimant explained that he went to turn down the radio and that after coming down from the pallet he turned and knew something was wrong. During the second telephone interview, he explained about stepping onto the upturned pallet at the side of the cage to adjust the radio. He stated that he had stepped off the pallet and walked away a few yards before he went over his ankle. He said that he didn't trip off the pallet and that his ankle went after coming back from adjusting the radio.

227. During the meeting with Mr Garner on 8 May 2018, the claimant was shown the CCTV footage. Mr Garner asked the claimant how he thought the accident had been caused, to which the claimant replied: *"Going over my ankle when I came back down there."* He also referred to turning on his ankle.

228. During the investigation meeting on 17 May 2018 the claimant stated that he had gone over to the radio and climbed up, and that when he stepped back down he felt something on his ankle give way. During the investigation meeting on 21 May 2018 the claimant explained that at the time he did not think that the moment he came down off the pallet had an impact on his ankle injury, but that having seen the CCTV footage he came down quicker than he thought and that it must have had an impact. During the disciplinary hearing he said to Mr Payne: *"When you watch the video, no reaction until I turned."*

229. **Conclusion:** During cross-examination, the claimant said the following:

> *"I didn't actually know what I'd done until I turned around and my ankle gave way, then I knew I'd done something really bad."*

230. The claimant repeated that he did not know what had happened until he had turned around. The claimant said that he didn't realise how hard he had come off the pallet until he had seen the CCTV footage. He was challenged on this on the basis that he could not walk, to which the claimant said: *"Once I turned to walk".*

231. Therefore, the claimant has made various references, both to the respondent and in evidence, to not knowing he had suffered an injury until the point at which he had turned to walk away.

232. Notwithstanding the fact that the claimant had fallen with some force, he had managed to pause and steady himself before he made an attempt to walk away. It was at that point that he went over on his ankle and realised he couldn't walk, and I believe that is the memory which has stayed with him.

233. During cross-examination it was put to the claimant that saying he had walked away a few yards was not true, to which the claimant replied: *"When you look at the CCTV, no, a couple of feet maybe"*. However, even that is not accurate, as the CCTV footage shows that he was unable to walk away even though he had tried to do so. Therefore, during the Tribunal hearing, even after the CCTV footage had been shown a number of times, the claimant stated more or less the same position as he had stated previously (albeit acknowledging that what he had said previously was not accurate). With regard to the claimant saying that he had stepped off the pallet, he also said this during the meeting with Mr Armit on 17 May 2018, by which time he had seen the CCTV footage.

234. Therefore, the claimant has provided information, to the respondent and the Tribunal, which does not reflect the CCTV footage, even after having seen the CCTV footage. I conclude it is likely the claimant has a memory which he has expressed, the most significant part of that memory being the point at which he turned to move away and realised something bad had happened and at the same experienced a considerable amount of pain. Exactly how he came down from the pallet and how far he did (or didn't) manage to walk

before going over on his ankle are not details which the claimant has recalled with any precision. What he has been able to recall very clearly is the fact that he turned, went over on his ankle and experienced a considerable amount of pain.

235. It was suggested to the claimant that he had told the truth when he was at hospital (the implication being he had not told the truth otherwise). However, I do not consider that the report from the hospital undermines my conclusion above, as in my opinion the report is of limited evidential value.

236. Taking all of this into account, I do not consider the claimant set out to mislead the respondent. I do not consider that his statements that he had stepped off the pallet and walked away a few yards amount to blameworthy conduct.

(d) The twinge

237. **Facts:** The claimant experienced a twinge in his ankle prior to the accident. This was not of any particular significance to the claimant. The claimant said during the health and safety investigation that his ankle must have been weak from earlier, though at the disciplinary hearing he acknowledged that in fact the earlier twinge did not relate to the final injury.

238. **Conclusion:** I accept the claimant's evidence that he felt a twinge in his ankle prior to the accident. I do not believe that he made this up in an effort to hide the fact that he had carried out an unsafe act and to try to explain the initial statement.

239. During cross-examination the claimant stated that he felt the twinge at a point shown in the CCTV footage very shortly before the accident, which is different to what he had said to the respondent. However, I am not concerned about this, given the claimant's recollection of the events more generally, the length of time which has passed and the fact that the twinge was of no particular significance to the claimant.

240. With regard to the claimant having said that his ankle must have been weak from earlier, I consider this is likely to be a reflection of the point outlined above, i.e. that the memory of the claimant has very much focused on the point at which he turned and went over on his ankle, rather than the moment of the fall itself. That would explain the claimant drawing a link between the earlier twinge and the eventual injury, though he did accept at the disciplinary hearing that, having seen the CCTV footage, there was in fact no such link.

241. I do not therefore conclude that the claimant referring to an earlier twinge or suggesting his ankle had been weakened was blameworthy conduct.

Question 3: did the blameworthy conduct cause or contribute to the dismissal to any extent?

242. Given my findings above, it is the claimant having carried out an unsafe act which needs to be considered. The unsafe act was not the main reason for dismissal. However, it is clear that the unsafe act contributed to the claimant's dismissal. It was the unsafe act which resulted in the accident and which led to the events which followed.

Question 4: to what extent should the award be reduced and to what extent is it just and equitable to reduce it?

243. Section 123(6) of the 1996 Act provides as follows:

> **Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.**

244. I consider that the dismissal was, to a large extent, contributed to by the unsafe act of the claimant climbing onto the upturned pallet. There would have been no accident had it not been for the claimant's actions in this

respect. The claimant also had, a matter of days previously, taken part in relevant safety training.

245. When considering the level of reduction, I need to have regard to my finding as to the extent to which the unsafe act contributed to the dismissal. Having found that the dismissal was, to a large extent, contributed to by the unsafe act, though bearing in mind the unsafe act was not the main reason for dismissal, I conclude it would be just and equitable to reduce the compensatory award by 75%. This reduces the award to £3,310.

Contributory conduct: the basic award

246. The basic award is intended to reflect the claimant's past service (nine complete years) and loss of job security. However, health and safety is something which the respondent takes seriously, and it had arranged safety training for the claimant a matter of days before the accident. There would have been no accident had it not been for the claimant's actions. In all the circumstances, I consider it would also be just and equitable to reduce the basic award by 75%. This reduces the basic award to £1,501.87.

Wrongful dismissal

247. The respondent argues that it was entitled to dismiss the claimant without notice or payment in lieu of notice because he endangered others by carrying out an unsafe act and then giving false information.

248. I make reference to my factual findings and conclusions above, in the context of whether the claimant's conduct was blameworthy, which I consider to be equally relevant for the purposes of assessing the claim for wrongful dismissal.

249. Given those factual findings and conclusions, I do not consider the claimant's actions amounted to a repudiatory breach of contract. In this

regard, it is not being suggested that the unsafe act in itself was a repudiatory breach.

250. Therefore, the claim for wrongful dismissal is upheld. The figure in the schedule of loss for notice pay is based on an incorrect net wage figure, and it was confirmed after the hearing that the claimant earned a net wage of £337. Therefore, the correct figure for the period of notice is £3,033 (£337 x 9 weeks).

Total award

251. The total monetary award is **£7,844.87**. I do not believe the recoupment provisions apply, on the basis that the claimant did not receive a relevant benefit.

Employment Judge **G Woolfson**

Date of Judgment **29 May 2019**

Date sent to parties **03 June 2019**