



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

**Judgment of the Employment Tribunal in Case No: 4101249/2019 Heard at
Edinburgh on the 22nd, 23rd and 24th October 2019**

Employment Judge J G d'Inverno (sitting alone)

Mr Alistair McCallum

**Claimant
Represented by
Ms D Reynolds,
Solicitor, per
Blackadders LLP**

Forth Ports Ltd

**Respondent
Represented by
Mr A Munro, Solicitor,
per Scottish Engineering**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

(First) That the respondent dismissed the claimant for reason of conduct, which is a potentially fair reason; and,

(Second) That the respondent's admitted dismissal of the claimant falls, in all the circumstances of the case, to be regarded as fair in terms of section 98(4) of the Employment Rights Act 1996.

(Third) The claimant's claim is dismissed.

REASONS

1. This case, in which the claimant presents a complaint of unfair dismissal in terms of section 98(4) of the Employment Rights Act 1996, called for Final Hearing at Edinburgh on 22nd, 23rd and 24th October 2019 at 10 am. Both parties enjoyed the benefit of legal representation; for the claimant Ms D Reynolds Solicitor and for the respondent company Mr A Munro Solicitor.

The Issues

2. In the course of Case Management Discussion conducted at the outset of the Hearing parties confirmed and the Tribunal recorded the following as the issues requiring investigation and determination by the Tribunal at Final Hearing:-

2.1 Reason for Dismissal

(First) What was the reason, or if more than one the principal reason, for the respondent's admitted dismissal of the claimant (effective as at 20th September 2018 by payment of eight weeks pay in lieu of notice); and in particular, as is asserted by the claimant, was the claimant dismissed for reason of his having refused a request that he work overtime made to him, some time in the period 31st August to 7th September 2019, in which case it is accepted by the respondent that the dismissal would fall to be regarded as unfair;

Which failing, and as asserted by the claimant in the alternative, was the claimant dismissed for reason of capability which is a potentially fair reason;

Which failing, and as further in the alternative asserted by the claimant and as was also proponed by the respondent, was the claimant dismissed for reason of conduct which is a potentially fair reason, in which last case does the dismissal fall to be regarded, in terms of section 98(4) of the Employment Rights Act, as substantively and or procedurally fair, as is asserted by the respondent or, substantively and or procedurally unfair as is asserted by the claimant, the same by reason of:-

- the respondent not having in fact a belief in the claimant's guilt in having committed the conduct in question, and
- separately and in any event any such belief held not being reasonable in the circumstances; and,
- by reason of the respondent having failed to carry out a reasonable investigation

2.2 Remedy

(Second) Let it be assumed that the respondent's dismissal of the claimant was substantively and or procedurally unfair, to what basic award and or compensatory award (if any), is the claimant entitled in the name of compensation for unfair dismissal.

2.3 Contributory Fault

Let it be assumed that the claimant was unfairly dismissed, did the claimant contribute to his dismissal by reason of his own conduct and, if so, by what amount, if any, should any award made be reduced to reflect the same.

2.4 Polkey Deduction

Let it be assumed that the claimant's dismissal was procedurally unfair would the claimant have been dismissed in any event had a fair procedure been followed and, if so, to what extent should any award be limited by the application of the rule in *Polkey v Dayton Services* [1987 ICR 142].

3. The case was one in which allowance had been granted for and direction made that the evidence in chief of witnesses be received by way of witness statement supported by a Certificate of Veracity.
4. In relation to the second asserted principal reason for dismissal namely capability, the respondent's representative expressed surprise that the same was being advanced in circumstances in which he observed that no reference to such a matter was contained within the claimant's witness statement. The claimant's representative acknowledged that no reference to capability as being the principal reason for dismissal was contained within the claimant's witness statement. Which observation and acknowledgment both made at the outset of the Hearing before the commencement of the evidential inquiry, the Tribunal has recorded.

Oral and Documentary Evidence

5. The Tribunal had before it the following witness statements which were received and which stood as the witnesses' evidence in chief:-

For the respondent

Mr K Williamson, Deputy Port Manager, Port of Leith who witnessed the claimant's conduct

Mr S Moraitis, Assistant Operations Manager, Port of Leith and Investigating Officer

Mr A Lamb, Deputy Port Manager, Rosyth, Burntisland, Kirkcaldy and Disciplinary and Dismissing Officer

Mr D Knox, Port Manager, Grangemouth, Rosyth, Burntisland, Kirkcaldy, Internal Appeal Officer; and on behalf of the claimant:-

Mr A McCallum, claimant

Robert Reape, an experienced Shovel Driver and colleague of the claimant

6. All witnesses attended and answered questions in cross examination and questions from the Tribunal on either oath or affirmation.

Parties lodged a Joint Bundle of Documents extending to 184 pages to some of which reference was made in the course of evidence and submission.

Findings in Fact

7. On the oral and documentary evidence presented the Tribunal made the following essential Findings in Fact restricted to those relevant and necessary to the determination of the issues before it.
8. The respondent is Forth Ports Ltd, a port business owning and operating seven commercial ports in Scotland, including the port of Rosyth, and one in England.
9. The claimant was employed by the respondent as a Port Operator from 25th June 2010 to 20th September 2018 which latter date was the Effective Date of Termination of his employment. The claimant's role involved his performance of various duties including; operating plant to enable the loading and discharging of cargoes, and working in sheds to load hauliers with miscellaneous products. The plant, operated by the claimant included a mechanical shovel. The claimant, who was based at the port of Rosyth was contracted to work 39 hours per week.
10. On 11th September 2018 the claimant was operating a mechanical shovel. The shovel is a large piece of plant used for loading heavy volumes of product, in the instant case soya, with a bucket attachment which has a capacity of 8.9 cubic metres. The claimant was operating in shed 973 situated in the port of Rosyth. He was using the mechanical shovel to load a lorry with the soya.
11. There is direct line of sight between the port offices (including from the kitchen window) and the interior of shed 937 when the doors of the shed are open. The doors of the shed were open on 11th September at approximately 12.30 hours.
12. At approximately 12.30 hours on 11th September, Kenny Williamson Operations Manager Leith, Rosyth and Burntisland and Mike Brennand Operations Manager

Cefetra (a third party customer of the port) were in the kitchen of the port office suite with a direct view into shed 973.

13. At 12.30 hours on 11th September 18 the claimant was engaged in loading, with a mechanical shovel, soya deposited against the side wall of the shed into a truck which had been driven into the shed.
14. Mike Brennand on looking into the shed observed that the shovel driver was loading the trailer and was driving towards it with its shovel elevated whilst the truck driver was walking up and down the side of the trailer. He further observed that as the loader was approaching the trailer the driver was moving his centre rope some two or three metres from the trailer as it was moving forward and then moved to the front of the trailer to check the on board weigh gauge and that during the whole time that the driver was walking up and down, the mechanical shovel was being driven forward.
15. Mike Brennand was concerned as to the safety of what he was viewing and he brought the matter to the attention of Kenny Williamson who, having also observed the activity, telephoned the Foreman directing him to bring the operation to a stop.
16. The window from which they observed the activity was approximately 100 metres from shed 973.
17. Kenny Williamson immediately asked Gary Nicholson the Port Duty Supervisor to come and observe what was happening. Both went into the Conference Room in the port office suite from which there is direct line of sight into shed 973. Both Gary Nicholson and Kenny Williamson again witnessed, this time from the Conference Room window, the lorry driver out of his cab and more specifically directly in front of the mechanical shovel while it was being driven forward. They observed that the lorry driver was guiding the shovel driver while it was moving forwards and towards him.
18. Gary Nicholson went directly to the shed and stopped the operation.

19. When arriving at shed 973 bay number 2, Gary Nicholson spoke with the driver of the truck which was being loaded. He was by that time making his way back to the cab of his vehicle. Gary Nicholson asked him what he thought he had been doing positioning himself directly in front of and potentially under the bucket of the loading shovel while watching his digital weight display. The driver replied by stating "*I'm sorry but this is my first time in the port*". At that time, most proximate to the incident itself, the driver did not deny or dispute what had been said to him by Gary Nicholson about his positioning in relation to the bucket nor did he state that he was positioned in a different way. He simply apologised for his behaviour.
20. Kenny Williamson asked to see the claimant and asked him if he understood the severity and potential consequences of his actions. The claimant by way of response stated that the lorry driver wasn't in front of him but at the side of the mechanical shovel and lorry.
21. An unsafe observation report was created on the day of the incident 11th September 2018 in which the incident was erroneously described as having taken place in bay 3 whereas in fact it took place in bay 2. Under "Description of Observation" the following was recorded – "Operator observed driving a mechanical shovel directly towards the driver who was in a position where he could be crushed between the loading shovel and the vehicle being loaded."
22. By letter dated 12th the claimant was invited to attend an investigatory meeting on 13th September 2018. The claimant was informed that the investigation was being carried out because he had allegedly breached health and safety rules whilst operating a mechanical shovel in circumstances which could have resulted in serious injury to a person. The claimant was advised that he could be accompanied by a trade union representative or colleague to the meeting.
23. On 6th September in consequence of an earlier incident Gary Nicholson had asked David Angel, Operations Supervisor to brief plant operators regarding the requirement that lorry drivers stay inside their cabs during the loading operation

and that shovel windows should remain shut during the operation for cleanliness purposes. The claimant was amongst those who received the briefing. A written sheet reiterating 5 points of which point number 3 was “lorry drivers to remain in their cabs during loading operations” and which was distributed at the meeting, was not received by the claimant.

24. The claimant had received full training on the operation of the shovel plant. He was aware of the safety requirement that operations should be discontinued in the event that a pedestrian came within the operational area.
25. As at the date of the incident the majority of trucks being loaded at the port had weight gauges which could be read from inside the cab. Some trucks, including the one that was being loaded by the claimant on the 11th September had externally located weight gauges. The truck being loaded on 11th September had a weight gauge which was externally located about half way down the length of the truck chassis. The hydraulic control levers were located externally at the rear of the truck.
26. In the course of the loading of such trucks it becomes necessary, towards the end of the process, for the truck driver to leave his cab and manually check the weight gauge.
27. There is and always had been a safe procedure for dealing with that situation, being the procedure described in evidence by the witness Robert Reape an experienced plant operator at the port of Rosyth who assisted in the instruction of the claimant in the use of the mechanical shovel. That safe process was as follows:-
 - (a) The shovel driver would meet the driver of the truck to be loaded at the shed and instruct him on the operation and then to go into the shed and prepare his truck by opening the top curtain. The truck driver would then signal to the shovel driver, with “thumbs up”,

communicating that he was ready and would then get back into his cab.

- (b) Only after the driver had returned to his cab did the shovel driver switch on and commence the operation of loading the truck continuing to what he estimated was close to the correct weight at which point he would reverse back from the truck and cease operations by switching off, taking the shovel out of drive and applying the handbrake. The shovels are automatic and therefore if left in drive will move in the event that the foot brake is released.
- (c) The shovel driver would then signal, by use of his horn, instructing the driver to get out of his cab and check the weight on his trailer. The driver having communicated to the shovel driver how much more he required would then walk back to the side of the trailer up to the lorry door and watch his weigher or go to the shed doors or other designated safe area outwith the area of operation and remain stationary.
- (d) Only once the truck driver was stationary in such a position would the shovel driver switch on and continue the operation, delivering the balance of the load required.
- (e) Once satisfied that the correct load had been delivered, the lorry driver, remaining stationary would then signal to the bucket driver who would reverse back, lower the bucket and switch off ceasing operations.
- (f) The lorry driver would then prepare his lorry to go out onto the road by closing the curtain on top of the lorry during which process the shovel driver would remain stationary, switched off and non operating, remaining so until the truck driver got back into his cab and drove out of the shed.

28. Fundamental to the safe conduct of such operations in which the driver required to leave his cab to check the external weight gauge, was that prior to his doing so and throughout his moving in what would otherwise be the area of operation, the shovel driver must have ceased operating and, having reversed away from the truck, having switched off the shovel driver also taking it out of drive and applying the handbrake; and that the operation must not be recommenced until the driver has ceased moving within the area of operation and is either back in his cab or stationary at the door of the shed or in a designated safe place.
29. Further, essential to the safe conduct of the procedure is a requirement that in the event that the truck driver ceases to be stationary and begins to move within the area of operation the operation must be ceased immediately by the shovel driver reversing away from the truck and switching off, remaining stationary and non operational until the truck driver has ceased moving and is again in either his cab or other designated safe place.
30. By letter dated 12th the claimant was invited to attend an investigatory meeting on 13th September 2018. The claimant was informed that the investigation was being carried out as he had allegedly “breached health and safety rules whilst operating the mechanical shovel in circumstances which could have resulted in serious injury to a person.” The claimant was advised that he could be accompanied by a Trade Union representative or colleague at the meeting.
31. The investigation meeting proceeded on 13th September 2018 chaired by Stelios Moraitis Assistant Operations Manager at the port of Rosyth. There was in attendance Fiona MacLennan HR Officer in the capacity of note taker. The claimant was advised that the purpose of the meeting was to allow him to respond to the allegations.
32. As part of the investigation the Investigating Officer obtained witness statements from Mr Williamson, Mr Nicholson and Mr David Angel the last, in relation to the pre-shift briefings given by him to port operators including Mr McCallum about the

operating of shovels in the shed and the content of which were put to the claimant in the course of the investigation meeting.

33. The position intimated by the claimant at the investigatory meeting was that the lorry driver had been inside his cab at all times when he, the claimant, was operating the mechanical shovel and he therefore disputed that there had been a breach of any health and safety rule. The claimant stated that the version of events given by other witnesses including Gary Nicholson and Kenny Williamson which were put to the claimant and which described him as continuing with the operation while the lorry driver was out of his cab and walking up and down the length of the lorry were incorrect. The claimant acknowledged during the course of the investigatory meeting that he had been fully briefed in relation to the correct procedures for operating the mechanical shovel.
34. The conclusion of the investigation was that the Investigating Officer considered that there was a disciplinary case to answer.
35. By letter dated 24th December 2017 a final warning, of two years duration from that date, was issued to the claimant by the respondent. The warning related to a road traffic accident in the port caused by the claimant's lack of attention and aggravated by the speed at which he was travelling. The letter warning the claimant is produced at pages 90 and 91 of the Bundle. The claimant was accorded the right to appeal against the decision to award the written warning. The claimant did not appeal the warning.

The Disciplinary Hearing

36. By letter dated 17th the claimant was invited to attend a disciplinary hearing on 19th September. The claimant was provided with copies of the documentation that the respondent sought to rely upon at the disciplinary hearing. The claimant was advised of his right to be accompanied at the hearing. The claimant was also

advised that he was entitled to call witnesses to hearing. The letter of invite, produced at page 136 of the Bundle gave notice that if the allegations of misconduct were upheld then dismissal with notice was a potential outcome of the hearing given that the claimant was subject to a live final written warning for a previous breach of health and safety.

37. On receiving his initial training on the plant, the claimant had been issued with a personal copy of the Mechanical Shovel Training and Safe Operations booklet dated 11th March 2013. Additional booklets were readily available on request and a number were left out in the canteen area. The claimant was familiar with the content of the booklet.
38. The letter convening the claimant to the disciplinary hearing, which is copied and produced at page 136 of the Bundle identified the conduct of which it was alleged the claimant was guilty as being that of committing “a serious infringement of safety rules and your serious negligence while operating a mechanical shovel which could have resulted in serious injury to a person”. The letter reminded the claimant that he had currently live on his file a final written warning due to expire on 13th December 2019. The letter advised the claimant that if the allegation of serious misconduct was upheld the penalty could include dismissal with payment in lieu of notice. The letter advised the claimant of his right to be accompanied by a colleague or Trade Union representative at the hearing and of his right to call witnesses to the hearing. A copy of the company’s disciplinary procedure, a copy of the investigation summary form and the disciplinary investigation notes including the statements obtained from Gary Nicholson and Kenny Williamson and David Angel, were enclosed with the letter.
39. The disciplinary hearing proceeded on 19th September 2018. The hearing was chaired by Andy Lamb Planning and Resource Pool Manager. Ms Marshall HR Manager attended to provide HR support to the process and Beverley Buchanan HR Administrator acted as the note taker at the meeting.

40. The claimant was accompanied by Robin Foulis his Trade Union representative. The claimant and his representative were afforded an opportunity to put forward his case and comment on the documentation and allegations that had been presented against him by the respondent.
41. At the outset of the disciplinary hearing the claimant confirmed that he had received the relevant documentation and further that he understood the allegation made against him and the fact that it was being treated as serious misconduct. The claimant and his Trade Union representative further confirmed that they had been issued with an amended copy of the investigation summary notes as the claimant's name had been incorrectly spelled throughout the original. It was confirmed that no other changes had been made. In answer to a request from Mr Lamb, the Chair, the claimant and his Trade Union representative confirmed that there were no inaccuracies in the summary notes.
42. As part of the case advanced by the claimant, he asserted that whereas he had attended and had signed a record of briefing on the 6th of September, that briefing had not included a requirement that lorry drivers remain in their cabs during loading operations. The claimant's Trade Union representative produced and tabled a document signed by 3 other port operators claiming that they also had not been briefed on that particular issue.
43. The claimant stated that he was engaged in the operation of loading a lorry and had already loaded three or four buckets. He was collecting another load when the lorry driver exited his cab in order to lift the hydraulics to view the weigher which was in the middle of the trailer. When the claimant returned to the lorry with a further load the driver was positioned at the side of the trailer near the back. He gestured to the claimant, using three fingers, that a further three tons were required. The claimant continued and loaded the truck with a further three tons and then the lorry driver indicated, using a hand gesture, that he could stop. He had started reversing away from the lorry when a call came through his mobile phone from Gary Nicholson. Gary Nicholson then came into the shed and instructed the claimant to come off the shovel loader and spoke to the lorry driver.

44. The claimant advised that the driver was located nearer to the back of his trailer during the operation which was away from the shovel loader. The claimant stated that he believed that other operators would load in the same way that is to say by allowing the driver to stand at the side of the shovel loader while the operation was proceeding. He stated that since the incident involving himself however other operators were being more vigilant and ensuring that the drivers stay in their cabs or, if it is necessary for them to be out of their cab, the operator ceases loading until the driver has returned to his cab. The claimant stated that he thought ceasing the operation until the lorry driver was back in his cab was "over the top". He stated that the driver was fully visible to him at all times when he was out of his cab. The claimant asserted that his method of operation was common practice. He stated that the lorry driver had returned to the port on the 17th of September and had stated to other operators that he had not stood under the bucket on the 11th. The claimant's Trade Union representative provided statements from three operators confirming that this was what the driver had told them. The claimant stated that due to the angle from which they were observing events it might have looked to Gary Nicholson and Kenny Williamson that the driver was standing under the bucket. When asked to confirm how far the driver was from the shovel loader the claimant stated that he was around 5 or 6 feet from the shovel loader during the loading operation. He stated that he believed that that was a safe place for the driver to stand and that he did not believe that the driver was moving around.
45. The claimant stated in evidence that he had commenced depositing the load at the front end of the truck and thus the last loads which were being deposited by him were deposited at the rear end of the truck that is the position closest to where the driver was standing. The witness Robert Reape confirmed in evidence that a safe distance was 4 to 6 metres.
46. The experienced plant operator Robert Reape stated in his evidence in chief (his witness statement paragraph 8 "*I would never allow anyone to stand underneath my bucket, at the side or down the rear of the lorry. If a person is stood close enough to the trailer they will be covered in dust from the loading operations and*

they would not be able to breathe. The best way to describe the dust is that it is like a waterfall that falls from the shovel and then down the side of the trailer” and at paragraph 7 of his witness statement in the first sentence “I understand that Alistair allowed the driver to stand at the back of the lorry and that the lorry driver was about 5 or 6 paces away from the trailer”.

47. And at paragraph 9 of his witness statement when stating what was a safe distance from the trailer such as to allow the driver of the truck and trailer to get out of his cab to check his weight:-

“I load 2 or 3 loads in the trailer, lower my shovel, reverse back from the trailer and beep my horn, at this stage the driver would leave his cab to check the weight monitor and could give an indication of how much more was required. He would then get back into his cab (a variation to his working method introduced following the claimant’s incident) and I would estimate how much more was required, load the trailer and reverse back to a safe distance. A safe distance is 4 metres or more. He would then get back out of his cab to check his weight.”

48. At paragraph 10 of his witness statement, in the last sentence thereof, the witness Robert Reape states *“There is no physical safe zone when carrying out loading and unloading operations with produce like soya”* and at paragraph 11 *“The danger zones when driving a mechanical shovel are immediately under the bucket, in between a bucket and a fixed object at a safe distance of 4 metres or less and anywhere where the driver cannot be seen”.*

49. At the disciplinary hearing the claimant disputed the accounts of the witnesses Gary Nicholson and Kenny Williamson to the extent that they spoke to the driver moving around stating that the driver was stationary. The claimant suggested that the driver should be interviewed and was advised that a statement of what the driver has said to Gary Nicholson at the time of the incident had been provided to the Disciplinary Officer. That statement did not support the claimant’s position.

50. At the conclusion of the disciplinary hearing the Disciplining Officer Andy Lamb summed up and identified that there were three issues focused now for consideration:-

- “ 1 Was the driver under the bucket as the witnesses claim?

- 2 Was the briefing made in full by DA on 6th September (i.e. did it include a specific direction that drivers should return to the cabs after checking their weigh gauge as opposed to remaining in some other place outside of their cab before the shovel driver recommenced operations?

- 3 If (a) and (b) where as the claimant claimed, that is to say the driver of the lorry was not under the bucket and that specific element of the briefing had not been received by the claimant, was the claimant’s position of claiming that the driver was near the rear of his trailer any safer?”

The Disciplinary Outcome

51. Following the disciplinary hearing Mr Lamb, its Chair, gave consideration to:-

- The investigation report

- Statements from Kenny Williamson Operations Manager and Gary Nicholson Operations Supervisor and the safety briefing provided by David Angel Operations Supervisor

- The claimant’s account of events and the statement made on his behalf by his Trade Union representative Mr Robin Foulis at the disciplinary hearing

52. By letter dated 27th September 2018 the Disciplining Officer wrote to the claimant advising him of the decision which he had reached and his reasons for it. That

letter is produced at page 148 to 152 of the Bundle. The letter of 27th September 2018 sets out, amongst other matters:-

- (a) That the disciplinary hearing had concerned the allegation that the claimant seriously infringed safety rules whilst operating a mechanical shovel on the 11th of September 2018, it being alleged that he had continued to operate the mechanical shovel whilst the lorry driver was outside his cab and in the shed and that he had continued to load the lorry with the lorry driver facing him as he drove towards him with his bucket raised.
- (b) That at approximately 12.30 hours Kenny Williamson, Operations Manager noted from the kitchen window of the port office that the driver of the lorry was standing outside his lorry, facing the mechanical shovel as it drove towards him. At this point the bucket of the mechanical shovel was raised and that those events were also witnessed by a customer with whom Kenny Wilkinson was in conversation at the time.
- (c) That the claimant's position to which he had given consideration, was one of categorically denying that he had driven his mechanical shovel towards the driver and or stating that the driver was at the end of his lorry away from the mechanical shovel stationary and not in a crush zone.
- (d) That in trying to establish why the claimant's account of events differed from that of the witnesses Williamson and Nicholson he had personally checked the view from the Conference Room window and believed that the eye witnesses would have been able to get a clear view of the incident; that both witnesses confirmed that the view was clear and at the time of the incident at approximately 12.30 hours visibility had been fine.

- (e) That following the hearing he had put the claimant's version of events to Kenny Williamson requiring him to clarify the points within his statement and that Williamson had confirmed that he saw the lorry driver move from the back of the lorry to the middle whilst the mechanical shovel was moving whereas the claimant had stated that the lorry driver was only ever at the back of the lorry and was never in a hazardous position.
- (f) That he noted the claimant's belief that the witnesses Nicholson and Williamson must have had a distorted view from the port office because he, the claimant, would not have permitted the driver to stand under the bucket and that the claimant had also advised that the lorry driver had refuted to colleagues of the claimant that he had been standing under the bucket.
- (g) In his letter of 27th September Mr Lamb went on to indicate that he had on balance preferred the evidence of the witnesses Nicholson and Williamson over that of the claimant as to what had occurred during the incident.
- (h) He noted and accepted that the briefing document signed by the claimant did not record any specific instruction that drivers were to remain in their cabs but also noted that it was a very well established practice that lorry drivers are never permitted to move around in an area of ongoing operations.
- (i) The only way of operating safely, if there is someone else in the vicinity of the operation is to remove any risk by halting the operation until the driver is back in their cab or outwith the vicinity.
- (j) That the claimant was an experienced plant driver having been operating mechanical shovels since 2012.

- (k) That the claimant was subject to a live final written warning.
- (l) That the claimant having confirmed at the disciplinary hearing that he had had “a few disciplinary warnings” and having checked the position with Mr Derek McLashan the Group Health and Safety Manager he had been advised that from a group perspective the claimant’s record was significantly worse in this regard than most other port operators.
- (m) He had concluded that the claimant had indeed infringed safety rules whilst operating the mechanical shovel during the incident and in the circumstances pertaining he considered that it was likely to be the case that the claimant would have a further such accident posing what he considered to be an unacceptable risk to the business and to himself.
- (n) In relation to the decision reached, Mr Lamb stated that he had considered the request for clemency which had been made on the claimant’s behalf by his Trade Union representative on the grounds that the claimant was “a good employee” and that his partner was shortly to give birth and had further considered the claimant’s eight years’ service record with the company. While in that context he had given consideration to alternatives to dismissal he had determined, on balance and including the claimant’s previous safety record, that there was not another suitable role where the claimant could be safely deployed. He had therefore determined that the claimant would be dismissed from his job in line with stage 3 of the company’s disciplinary procedures and that the claimant would receive eight weeks pay in lieu of notice together with any accrued paid annual leave entitlement. In the letter, Mr Lamb went on to confirm the claimant’s right of appeal against the decision and the mechanism and timescale within which an appeal letter stating the grounds of appeal should be submitted.

53. By letter dated 4th of October 2018 the claimant exercised his right of appeal. The grounds of appeal were set out as follows:-

“I am appealing my dismissal due to the fact of new evidence and new policy”.

54. By letter dated 24th October 2018 the claimant was invited to attend an appeal hearing on 2nd November. The claimant was advised that he had the right to be accompanied at the hearing with the letter of invitation there was provided to the claimant the:-

- company disciplinary policy
- disciplinary investigation summary form (dated 17th September 2018)
- disciplinary investigation meeting notes (dated 13th September 2018)
- record of the disciplinary hearing of 19th September 2018
- disciplinary outcome letter of 27th September 2018
- disciplinary investigation pack so supplied to the claimant included the witness statements referred to by the Disciplining Officer in reaching his decision and the claimant’s training record

55. The appeal hearing was chaired by Derek Knox Port Manager with Jackie Anderson Group HR Manager in attendance in support of the process. The claimant was accompanied at the meeting by his Trade Union representative David Mercer. During the appeal hearing the claimant was given the opportunity to present his grounds of appeal. The claimant had been provided with a text from the driver of the lorry which was being loaded, the terms of which were read out at the commencement of the hearing. The claimant identified that this text

constituted the new evidence which, in terms of his grounds of appeal he wished taken into account. The text was in the following terms:-

“On arriving onto the weigh bridge I supplied numbers to the weigh bridge operator and was given paperwork and told to go to the shed.

Once in the shed I removed sheet. The shovel driver came in and I explained I would have to leave my vehicle to start up trailer engine to put tipper up and check weigher.

After 3 or 4 buckets I came out and put tipper up to get last bucket on whilst checking weigher. Once loaded, someone approached me to say I shouldn't be out of my cab. I explained to him that this was necessary as it is the only way I can check weigher as it is located on the chassis, half way along the trailer.

I was unaware that drivers were prohibited from being in their cab as I had not been advised of that on arrival and there was no visible signage to that effect.”

56. The claimant stated, regarding policy that the now enforced policy that drivers should remain in their cabs was a new policy which, at the time of the incident had not been briefed to him.
57. At the conclusion of the appeal hearing the Appeal Officer indicated that there were some questions (matters) which he required to have clarified by further investigation. He stated that that process and the reaching of a decision was likely to take at least a week as it was important in relation to points of contention to look at these thoroughly.
58. After the appeal hearing the Appeal Officer himself went to the company offices to view the scene from the same viewing point as the witnesses Nicholson and Williamson. He also caused a statement to be obtained from the third party customer witness Mr Mick Brennand. In that witness statement, provided to the Appeal Officer Mr Brennand stated:-

“... whilst standing in the kitchen I saw a truck pull into the shed to get loaded with soya.

The shovel driver was loading the trailer when I noticed the truck driver walking up and down the side of the trailer whilst the loader driver was driving towards the trailer (this is a big no no in my operation as it could lead to a fatal accident). As the loader was approaching the trailer the driver was moving his centre rope some 2 or 3 metres from the loader as it was moving forward and then moved to the front of the trailer to check the onboard weigher all the time the driver was walking up and down the trailer the loader was driving forward.”

59. The Appeal Officer stated that he would also check the then current position regarding drivers leaving the cabs. The claimant confirmed that he had said as much as he could.
60. By letter dated 6th December 2018, produced at page 163 of the Bundle, the Appeal Officer Mr Knox wrote to the claimant advising him of the outcome of the appeal.
61. In his letter he narrated that in addition to considering the documentary evidence before the Dismissing Officer he had interviewed:-
 - Andy Lamb Planning and Resource Pool Manager
 - Kenny Williamson Operations Manager
 - David Angel Operations Supervisor
 - Robert Reape Port Operator; and further,
 - That he had visited Rosyth to check the view from the kitchen window to the shed and that he had instructed that a statement be obtained

62. Mr Lamb further narrated that he had taken into account:-

- The new evidence submitted by the claimant being the driver's text message
- The statement from Mick Brennand Operations Manager Cefetra (the customer)
- The information available to the Dismissing Manager Andy Lamb
- The interviews conducted by himself
- The claimant 's challenges regarding the contents of the briefing which he had received
- The claimant's training record
- The claimant's current disciplinary record and final warning
- The claimant's representative's assertion that he had learned from the experience
- The new change procedure and haulier instruction documentation and the fact that the claimant did not provide evidence to support his assertion that part of the grounds of appeal was due to a new policy

63. In his letter of outcome of 6th November 2018 Mr Lamb went on to conclude that he accepted the claimant's position that there was no clear evidence that the shovel drivers briefing received by the claimant shortly before the incident included an express instruction that drivers should remain in their cabs.

64. That having considered the customer witness's statement, which he noted had not been requested or obtained during the disciplinary investigation, he considered

that to be material and objective evidence as the customer did not know the claimant or any of his colleagues but had simply been very concerned by what he had witnessed. The customer statement, which he accepted confirmed that the driver was walking the length of the vehicle and potentially under “the shovel” while the loading operation was being continued with by the claimant; and that while there was conflicting evidence as between the witnesses’ accounts and the claimant’s as to the location of the driver when checking the weigher there was no dispute as to the driver walking the length of the vehicle while the operation was ongoing.

65. He further accepted that the view from the window could be “distorted” in relation to whether the driver was actually under the shovel as opposed to appearing to be under the shovel, but that there was consistency from all interviewed including the claimant that the driver did exit his cab and did walk the length of the vehicle (while the claimant continued with the loading operation). He stated that he found the customer’s version of events accurate and credible including, as it did, some very specific detail such as the driver moving his centre rope and that the loader being driven by the claimant was moving forward throughout.
66. He stated that he had considered the claimant’s final written warning dated 24th December 2017 for damage to two vehicles caused by a lack of concentration and speed, his disciplinary history from 2012 which comprised three final written warnings and one hearing (which extended his probationary period) all specifically relating to safety breaches. He stated that the incident in isolation would not have resulted in his dismissal however the letter of 24th December 2017 (the currently live written warning) had made it very clear that any further incident could result in his dismissal and that he could have been in no doubt as to the seriousness of the warning on safety in the working environment was a number one priority of the respondent.
67. The Appeal went on to note that at both the disciplinary investigation and hearing, the claimant had failed to accept any responsibility for the driver not being in a “safe zone” continuing to assert that the driver had never been at risk despite being

outside of his cab and moving around within the area of operation while the operation was ongoing. The Appeal Officer concluded that having taken account of all of the above he did not find established grounds to support the appeal and therefore he confirmed the decision that the appeal was not upheld and the decision to dismiss the claimant remained undisturbed.

68. The respondent's Disciplining and Appeal Officers each concluded that it was a serious infringement of safety rules and that the claimant had acted with serious negligence in continuing his loading operation in circumstances where the driver was out of his cab, and even let it be assumed was clearly visible to the claimant at all times, was nevertheless standing some 5 or 6 feet from the loading shovel as opposed to at the minimum safe distance of 4 metres or more operated by experienced shovel drivers such as Robert Reape (see his witness statement paragraph 9 line 12). The operating reach of the mechanical shovel is greater than the 5 or 6 foot distance with which, on the claimant's account given to the disciplinary hearing, the driver was standing.
69. The Effective Date of Termination of the claimant's dismissal was 20th September 2018. The claimant received eight weeks pay in lieu of notice. On the 1st of December 2018 the claimant commenced alternative employment with S Ewing and Sons Limited which employment he left on the 23rd of August 2019 to take up a college career change college course retraining as a Gas/Electricity Engineer.
70. When in employment with the respondent the claimant had received a £224.85 per month (8.6% pension contribution) which percentage rate was matched in his new employment.
71. The claimant's gross weekly pay, as at the Effective Date of Termination was £688 and his net weekly pay £550.69. The two week period 15th November being a period commencing with the expiry of the claimant's eight weeks pay in lieu of notice, the claimant enjoyed no earned income and suffered two weeks net loss of wages.

72. In the period 1st December 2018 to 23rd August 2019, the period of his employment with S Ewing and Sons Limited, the claimant earned on average a gross weekly wage of £481.28, or across the 38 weeks of that employment total gross earnings of £18,288.62. Had the claimant remained in his employment with the respondent he would in the equivalent period have received an average gross weekly wage of £688.18 or gross wages in the 38 week period of £26,150.84.
73. In the period 1st December 18 to 23rd August 19 the claimant continued to sustain a gross wage loss of £7,862.22. In the period 15th November to 1st December 18 the claimant suffered a £1,376.36 gross loss.
74. In the same period the claimant received a proportionately less employer's pension contribution which, across the 38 week period amounted to £2,490.72 gross less pension contribution [when revising adjust the loss for the period 15th November to 1st December above to also express as £1,376.36 gross loss].
75. The claimant resigned on the 24th of August 2018 to take up a college course some four weeks later on 20th September 2018 during which four week period he earned no income or pension contribution.
76. By reason of his dismissal the claimant lost and required to accrue of new, his statutory rights.

Summary of Submissions

Submissions for the Respondent

77. For the respondent Mr Munro invited the Tribunal to hold on the evidence presented:-

- (a) that the claimant had been dismissed on the ground of conduct which was a potentially fair reason in terms of section 98(2)(b) of the Employment Rights Act 1996.
- (b) That in so dismissing the claimant and in so confirming that decision on Appeal, the respondent had held a genuine belief that the claimant was guilty of the misconduct in question namely, a serious infringement of safety rules and negligence whilst operating a mechanical shovel which could have resulted in serious injury to a person.
- (c) That in the circumstances presented to them, the respondent had had reasonable grounds upon which to hold that belief.
- (d) That the respondent had conducted what was a sufficient and reasonable investigation in the circumstances and had acted reasonably in treating the misconduct which it found established as a reason for dismissing the claimant in light of the written warning which was extant and live on the claimant's file as at the date of the incident 11th September 2018.
- (e) In short, he submitted that the requirements of the Burchell test had been met and that the decision to dismiss was one which fell within the band of reasonable responses available to a reasonable employer in the circumstances.

78. In the alternative, let it be assumed that the dismissal was substantively unfair, which was denied, he submitted that any compensation awarded should reflect the claimant's contributory conduct given the claimant clearly committed a breach of health and safety rules which could have resulted in injury to his colleague.

79. Mr Munro further submitted that the respondent had followed a fair procedure in dismissing the claimant but, in the alternative, *esto* the dismissal was in some way procedurally unfair, which was denied, under reference to **Polkey v A E Dayton**

Services Limited [1987] ICR 142, he submitted that the claimant would have been dismissed in any event had a fair procedure been followed and that any award for compensation should be reduced accordingly.

Submissions for the Claimant

80. At the outset of her submission Ms Reynolds, for the claimant, confirmed that whereas at the outset of the hearing the claimant's primary contention had been that he had been dismissed by reason of victimisation on the part of Mr Lamb for refusing to work additional voluntary hours, that position was one which, on the evidence adduced, the claimant no longer offered to prove. As to the reason for dismissal she confirmed that the claimant primarily asserted he was dismissed for reason of capability which resulted from inadequate training which failing for reason of conduct; and separately;

- that the respondent had failed to follow a fair procedure
- that insufficient consideration or weight had been given by the Disciplining and or Appeal Officer to the claimant's position, supported by statements from three other shovel drivers, that the briefing which they had received on 6th September 2018 had not included an express direction that drivers were to remain in their cabs while the lorry was being loaded; and
- that the respondent in deciding to dismiss the claimant had unfairly weighed in the balance his previous safety record.

81. In the course of submission Ms Reynolds referred the Tribunal to the established cases of:-

1. **Iceland Frozen Foods Limited v Jones (EAT) 1982**
2. **Salford Royal Naval NHS Foundation Trust v Roldan [2010] EWCA Civ 522**

3. **A v B (unfair dismissal) 2002 WL 32067939 (2002)**
4. **Abernethy v Mott [1974] ICR 323 (1970)**
5. **Henderson v Granvie Tours Limited EAT 1982 WL221982**
6. **Martin v Yorkshire Imperial Metals Limited [1978] IRLR 440**
7. **Riley v Sandwell Metropolitan Borough Council [2018] – Supreme Court – ICR 705 (2018)**
8. **Andrew James Taylor v OCS Group Limited [2006] EWCA Civ 702, 2006 WL 1457335**
9. **British Home Stores Limited v Burchell [1978] IRLR 379**
10. **Iceland Frozen Foods Limited v Jones (EAT) 1982 ICR 17**
11. **Polkey v A E Dayton Services Limited (H.L.(E.)) 1988 344**
12. **Abernethy v Mott, Hay and Anderson [1974] IRLR 213 CA**
13. **Martin v Yorkshire Imperial Metals [1978] IRLR 440**
14. **Taylor v OCS Group Limited [2006] ICR 1602**

all of which the Tribunal found instructive.

82. Ms Reynolds also referred the Tribunal to the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures and the ACAS Guide on Discipline and Grievance at Work and to sections 119, 122(2), 123(6) of the Employment Rights Act 1996.
83. Ms Reynolds submitted, let it be assumed that the claimant had been dismissed for the potentially fair reason of conduct, that the process followed by the respondents and thus the dismissal was one which failed each of the three legs of the test set down in **British Home Stores Limited v Burchell**, viz;
 - (a) The respondents had not entertained a genuine belief in the claimant's guilt
 - (b) *Esto* the respondents had entertained such a genuine belief they did not have reasonable grounds upon which to sustain that belief

- (c) The claimant had failed to carry out a reasonable or sufficient investigation in the circumstances. Although Kenny Wilkinson had spoken to the lorry driver, Mr Stewart, about the incident on 11th September and had recorded his brief response, the driver could and should have been formally interviewed in the course of the investigatory meeting specifically in relation to the alleged witnessing of him walking or standing under the elevated bucket of the shovel
- (d) Additionally she submitted, that the respondent had referred to and, in deciding on the sanction of dismissal, had taken account of the claimant's prior disciplinary record notwithstanding the fact that the prior warnings had expired and that to do so was unfair and tainted the dismissal with unfairness.

84. In relation to procedure, Ms Reynolds submitted:-

- (a) that the claimant was not sufficiently informed of the case which he had to answer such as to allow him to fully participate in the disciplinary hearing and to state his case. (The claimant had formed the view that the main or only issue underlying the allegation that he had been guilty of a serious breach of safety rules and had acted negligently in the conduct of the operation, was that he had allowed the driver to stand under the elevated bucket of his shovel),
- (b) that the witness statements relied upon at the disciplinary hearing were not provided to the claimant a sufficient time in advance of the hearing to afford him or his representative a proper opportunity to prepare to state his case,
- (c) that the appeal did not correct those procedural failings and that further evidence (the statement of the third party witness) was considered by the Appeal Officer and was not provided to the claimant.

- (d) That in all the circumstances the respondent's decision to dismiss the claimant and separately the investigation conducted by them, fell outwith the range of reasonable responses available to a reasonable employer and that the dismissal was substantively unfair on that basis and that the claimant should be compensated therefore.
- (e) Separately, that the dismissal was procedurally unfair and that in dismissing the claimant the respondents had failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures and that accordingly an uplift, of up to 25% should be applied to the award made.

The Applicable Law Discussion and Disposal

85. In a succinctly and accurately drawn written summary, Ms Reynolds set out the applicable law by reference to the leading cases and relevant statutory provisions. Mr Munro, for his part, took no issue with Ms Reynolds' statement of the law, a position with which the Tribunal concurred and, the Tribunal respectfully adopts and incorporates it herein by reference, for the purposes of brevity.
86. The claimant's concerns regarding the outcome of the disciplinary hearing and process, as was focused by his grounds of appeal in the internal process and expanded on in evidence before the Tribunal were:-
- (a) His perception that he was being condemned for having allowed the driver of the truck that was being loaded to stand under the elevated bucket of his shovel, a matter which he knew not to be true and which, in his view, had not been investigated sufficiently as to entitle the respondent to hold a reasonable belief that he had done so.
 - (b) That he had not received the express direction, in the preceding week, that drivers should henceforth always return to their cabs

during operations and that, for his part, he had been following a procedure which he and other drivers had previously followed which involved the driver remaining out of his cab but remaining stationary in a “safe place” which he defined as any place where he could see the driver.

- (c) He also considered it unfair that the respondent had taken into account his previous safety record despite the fact that written warnings other than the most recent were no longer current.

87. The alleged conduct of which the claimant was put on notice that the disciplinary investigation related to, was that of “*serious infringement of safety rules and your serious negligence while operating a mechanical shovel which could have resulted in serious injury to a person*” (page 119 of the Bundle).

88. The alleged conduct which was the subject matter of the disciplinary hearing and of which the claimant was put on notice as requiring to respond to at the disciplinary hearing was:-

“The reason for this disciplinary hearing is due to ‘the allegation of a serious infringement of safety rules and your serious negligence whilst operating a mechanical shovel which could have resulted in serious injury to a person’”

89. As appeared on the face of the documentation and witness statements provided to the claimant across the internal investigatory process, the disciplinary process and appeal process, the above allegations were potentially and variously evidenced by a number of elements of the matters spoken to. Those included, certainly at the investigatory stage, the allegation:-

- (a) That the claimant had allowed the truck driver to stand under the bucket

- (b) That the claimant having received an express direction in the preceding week that cab drivers of all trucks should remain in/return to their cabs during the conduct of operations and
- (c) That while he was engaged in the loading operation the truck driver was, not only out of his cab but walking up and down the side of the trailer whilst the loader driver was driving towards the trailer and that as the loader was approaching the trailer the driver was moving his centre rope some 2 or 3 metres from the loader before moving along the trailer to check the onboard weigher and that during the time when the driver was walking up and down the trailer, the loader was driving forward
- (d) The lorry driver being out of his cab and in front of the mechanical shovel while it was being driven forward
- (e) The lorry driver was guiding the shovel driver when it was moving forward and towards him
- (f) The lorry driver being out of his cab and in front of the shovel, while it was operating, guiding the shovel operator.

90. The claimant put in issue the reason for dismissal asserting, ultimately, that he had been dismissed for the principal reason of capability which failing, conduct.

91. On the evidence presented, I had no hesitation in determining that the reason for dismissal was "conduct" which is a potentially fair reason. The preponderance of the evidence pointed to that being the reason.

92. In the disciplinary hearing outcome letter (pages 148-152) the Disciplining Officer narrates that upon the evidence presented and considered by him including the claimant's evidence and his account together with submissions made by his Trade Union representative, that he found established, amongst other matters:-

- (a) That Kenny Williamson the Operations Manager had observed that the driver of the lorry was outside his lorry facing the mechanical shovel as it drove towards him at a point when the bucket of the mechanical shovel was raised. And that the incident had in addition been witnessed by a third party customer.

93. At page 149 of the Bundle the Disciplining Officer states:-

“I have tried to establish why your account of events differs from that of Kenny Williamson and Gary Nicholson. I have checked the view from the Conference Room window and I believe that the eye witnesses would have been able to get a clear view of the incident.

After the hearing I clarified several points with Kenny regarding his statement and he advised that he saw the lorry driver move from the back of the lorry to the middle whilst the mechanical shovel was moving. You stated that the lorry driver was only at the back of the lorry and was never in a hazardous position.

On balance I prefer Kenny and Gary’s evidence for the following reasons ...”

And at page 150:-

“The only way of operating safely if there is someone else in the vicinity of the operation is to remove any risk by halting the operation until the driver is back in their cab or outwith the vicinity”

94. At page 151 the Disciplining Officer concludes:-

“Having considered all of the above, in my opinion, on 11th September you approached your job in an unsafe manner by not considering the health and safety implications of permitting the lorry driver to be in the shed whilst you continued to drive.”

95. In considering the application of the Burchell test to those conclusions I am satisfied that the Disciplining Officer and the Appeal Officer, (the respondent) both entertained, as a matter of fact a reasonable suspicion amounting to a belief of that misconduct namely “*a serious infringement of safety rules and serious negligence while operating a mechanical shovel which could have resulted in serious injury to a person*” and further, that the Disciplining Officer and the Appeal Officer had in their minds reasonable grounds upon which to sustain that belief.
96. Any one of the aspects of the conduct identified by the witnesses if held established would evidence the alleged misconduct. The Disciplining Officer chose to believe the account of events given by the observing witnesses and preferred that account over the claimant’s. He was, in the circumstances, reasonably entitled to do so.
97. The claimant’s internal grounds of appeal focused upon two assertions, firstly, that he had not allowed the driver to stand under the bucket and, secondly, that he had not received an explicit direction in the preceding week that drivers were to remain in/return to their cabs during the currency of operations. In the absence of that direction, he had followed his hitherto practice which he asserted was a common practice of allowing the driver to remain in the vicinity i.e. within the area of operations while he was operating, on the basis that he could see the driver at all times and thus the driver could be regarded as being in a safe place. He challenged the sufficiency of the investigation/evidence available to the Disciplining Officer such as would have allowed him to reasonably conclude that the driver had been under the bucket and or that the claimant had received the specific instruction in the preceding week and therefore the reasonableness and soundness of the decision to dismiss him.
98. The Internal Appeal Officer addressed all of those points himself directing and conducting further investigation. He considered, the “new evidence” submitted by the claimant being a text message from the driver of the lorry and gave consideration to the documents available to the Dismissing Officer Andy Lamb in

his letter and the evidence of R Reape an experienced shovel driver which he accepted. He himself checked the view from the window. He directed that a statement be obtained from the driver in addition to the *de recenti* statement made by the driver to Gary Nicholson at the time of the incident. He directed that a statement be obtained from the third party customer witness Mick Brennand and gave consideration to both.

99. In his letter of outcome at pages 163 and 164 of the Bundle, the Internal Appeal Officer makes clear that he accepted, on balance, that there was no clear evidence that the claimant had received the express direction in the preceding week regarding drivers requiring to remain in/return to their vehicle cabs during the conduct of operations.
100. He further makes clear that he accepted that the view from the window could be “distorted” such that it might appear that the driver was under the shovel to those observing from the window when in fact he was not but rather, was merely in direct line with the shovel. The Appeal Officer went on however to identify that all of the evidence, including the claimant’s concurred in establishing that the driver had exited his cab and did walk the length of the vehicle while the operation was ongoing, a position which he considered was further corroborated by the third party witness’s statement which specified that the driver was at the side of the truck moving his centre rope while the loader, driven by the claimant was moving forward. That is to say at a time when the driver had got out of his cab and was walking/moving in the vicinity and up and down the length of the lorry so close to that he was able to adjust the centre rope, the claimant had not ceased the operation but rather was continuing the operation of loading including driving towards the vehicle.
101. That was a finding of fact which, on the evidence presented and the investigation and enquiries made across the investigation phase, the disciplinary hearing and the appeal process, the Appeal Officer was reasonably entitled to make.

102. In relation to the Burchell test, I conclude that in upholding the decision to dismiss the Appeal Officer did in fact believe that, by reason of continuing his operation and not stopping his operation when a dismounted pedestrian was moving within the area of operation, the claimant had committed a serious infringement of safety rules and had acted with serious negligence while operating a mechanical shovel which could have resulted in serious injury to a person. I am further satisfied on the evidence presented that the Internal Appeal Officer had in his mind reasonable grounds upon which to sustain that belief.
103. Regarding the third leg of the Burchell test, whether the respondent had carried out such investigation as was reasonable in the circumstances, there was some merit in the submissions made by Ms Reynolds on the claimant's behalf in relation to inquiry made at the initial investigation stage in relation to the issues of fact which the claimant put in dispute namely whether he had permitted the driver of the lorry to stand under his elevated bucket and or whether he had acted in contravention of an express direction received by him in the course of the preceding week. Those appear to be matters which the Investigating Officer had viewed as sufficiently vouched to result in there being a case to answer based on the evidence of the observing witnesses but without specifically interviewing the driver of the lorry or bottoming out whether, although in receipt of a briefing in the preceding week, the briefing had included the particular direction that drivers should remain in/return to their cabs during ongoing operations. As pointed out in **A v B** by the EAT "the touchstone is always reasonableness and as established in **Sainsbury's plc v Hitt** the reasonable responses test applies to all aspects of the disciplinary process in the employer's decision making, including the investigation. The term investigation is not to be regarded as relating only to a sequential process which occurs prior to the disciplinary hearing or internal appeal but rather, extends to cover the whole of the internal process, some matters of potential importance emerging as matters requiring investigation, or more investigation, at various stages in the process and, a degree of unfairness at the initial stage can be remedied during an appeal process (**Taylor v OCS Group Limited**).

104. Looking across the three stages of the process I am satisfied that the respondent carried out such investigation as was reasonable in the circumstances and that all three legs of the Burchell test have been met.
105. This was a case in which the claimant had received full training on operational mechanical shovel and in the safe methods of operating it. He had in addition received a personal copy of the operator's handbook and had been mentored in his operation by the witness Mr Reape who was interviewed by the Internal Appeal Officer and who, when giving evidence before the Tribunal described in detail what was a safe method of conducting operations in circumstances where it was necessary for the driver to leave his cab at points in the process in order to check his weigh gauge. Mr Reape described a process which involved himself, the shovel driver, reversing the shovel away from the lorry to a safe distance which he defined as 4 to 5 metres, taking the shovel out of drive, applying the handbrake and switching the engine off, before permitting the driver of the lorry to exit his cab or to move in the operational area. Further, that the operation should not and would not be recommenced by him until such time as the driver had either returned to his cab or was stationary in a safe area. Mr Roake defined a safe distance for these purposes as 4 or 5 metres.
106. The claimant's position, both in the internal disciplinary and appeal processes and before the Tribunal, was not to assert that he was unaware of the requirement that operations should not be conducted when a dismounted pedestrian was moving in the operational area but rather, to deny that he continued the operation, by driving his shovel towards the truck to be loaded, at a time when the driver was moving around in a pedestrian capacity within the vicinity of the vehicle which was being loaded. The claimant's position was to assert that at all times when he was conducting operations and the driver was not in his cab, the driver was stationary at the rear of the vehicle at a distance of about 5 or 6 feet from the operating shovel with which he was actively loading soya into the trailer; and at other times, inconsistently with that position, to assert that it was sufficient for the driver to always be visible to him in order for the driver to be regarded as being in a safe place.

107. In relation to the important matter of whether the claimant continued with the operation of lifting soya from the pile and loading it into the trailer of the truck at a time when the driver was out of his cab and moving within the operational area close to and variously at a distance of not more than 5 or 6 feet from the truck and from the operating shovel, there was a direct contradiction as between the accounts presented by the claimant and that presented by other witnesses.
108. At the end of the day, the Dismissing Officer and the Appeal Officer chose to believe the evidence of all three of the observing witnesses, including the third party customer witness, on that point and, on the preponderance of the evidence, and on balance held that the claimant had continued with the conduct of the operation whilst the dismounted driver was moving within the operational area. The decision to accept the evidence of those witnesses and so hold that the claimant had conducted a serious breach of safety rules and had acted negligently in the operation of the shovel in circumstances in which there could have been risk to persons, was a decision falling within the band of reasonable responses available to the respondents.
109. The conduct which the respondents found established was conduct which, particularly in the circumstances of a live written warning, could result in the claimant's dismissal. At the heart of the decision to dismiss was the respondent's ability to trust the claimant to operate plant safely in the future and the likelihood that a further safety breach or safety related accident might occur were they to continue to employ the claimant as a plant operator. The Dismissing Officer concluded in this regard that the claimant continued employment of the claimant in such capacity would result in an unacceptable risk and to himself to the safety of others within the business. In so concluding, the Dismissing Officer took account of the claimant's health and safety record including incidents in respect of which warnings had been issued but which warnings had expired. His decision to give consideration to and take account of the claimant's record in assessing whether he could continue to repose sufficient trust in the claimant to continue to employ him as a plant operator, was a decision which fell within the band of reasonable

responses available to the Dismissing Officer in the circumstances. Having further considered whether another suitable role existed to which the claimant could be deployed safely and having concluded that it did not, the Dismissing Officer determined to dismiss the claimant. That decision was the decision which fell within the band of reasonable responses available to the Dismissing Officer and to a reasonable employer acting reasonably in the circumstances. Having considered the claimant's personal circumstances including his employment record, the Dismissing Officer determined not to dismiss the claimant summarily but rather to dismiss him with eight weeks payment in lieu of notice.

110. While some employers might, in the circumstances, have elected not to dismiss the claimant, I am satisfied that it cannot be said that no reasonable employer acting reasonably, in the circumstances, would have determined to dismiss the claimant.

111. In the circumstances presented to the respondents, including the size and administrative resources of their undertaking, the respondent acted reasonably in treating the established reason for the claimant's dismissal, namely his conduct in serious breach of safety rules, as a sufficient reason for dismissing him, when determined in accordance with equity and the substantial merits of the case.

112. The respondent's admitted dismissal of the claimant, for the potentially fair reason of conduct falls, in terms of section 98(4) of the Employment Rights Act 1996 and in the circumstances, to be regarded as fair.

Date of Judgement: 27th November 2019
Employment Judge: JG d'Inverno
Date Entered in Register: 28th November 2019
And Copied to Parties

