THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Shaun Burgess**

Respondent: **James Jones and Sons (Pallets and Packaging) Limited**

Heard at: **North Shields** **On:** **17 and 18 October 2019**
(and 22 November 2019 in Chambers)

Before: **Employment Judge Beever**
Mr Wykes
Mr Denholm

Representation:

Claimant: **In person**
Respondent: **Mr Tinnion, Counsel**

RESERVED JUDGMENT AND REASONS

1. The claimant's claim for unfair dismissal pursuant to s.98 ERA is well founded on procedural grounds only and succeeds

2. The claimant's claim for automatically unfair dismissal pursuant to s.103A ERA 1996 is not well founded and is dismissed

3. The claimant's claim for detriment pursuant to s.47B ERA is not well founded and is dismissed

4. The matter is to be listed for a remedy hearing on a date to be fixed, subject to the parties reaching agreement in the meantime and informing the tribunal of that agreement

REASONS

1. By an ET1 presented on 21 March 2019 the claimant brought claims for unfair dismissal and automatic unfair dismissal for making protected disclosures and being subjected to detriment for making protected disclosures.

2. At a Preliminary Hearing on 29 May 2019, EJ Johnson helpfully set out a detailed statement of the law. He also ordered the claimant to provide further information about his protected disclosure and detriment allegations [40]. The claimant complied with this Order by setting out further information [54]. At the outset of the final hearing, the tribunal was able to identify the specific Protected Disclosures and the specific Detriments relied on by the claimant and these formed part of the agreed issues.

The issues

3. The issues for the tribunal, as determined at the outset of the hearing, are:

Protected Disclosures

3.1. Did the claimant make a protected disclosure in any of the 12 respects set out in the table below, as taken from [54] and agreed with the parties at the outset of the hearing (abbreviated herein as P1, P2 etc)?

Unfair Dismissal – s.98(4)

3.2. Has the respondent established the reason for dismissal of the claimant?
3.3. If so did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant?
3.4. Was the decision to dismiss within the band of reasonable responses?
3.5. Did the respondent follow a fair and reasonable procedure before moving to dismiss?
3.6. If there is procedural unfairness has such unfairness made any difference (*Polkey* rule)?
3.7. Has the claimant engaged in blameworthy conduct contributing to his dismissal such that it is just to reduce any award of compensation?

Automatically Unfair Dismissal – s.103A ERA

3.8. Did the Respondent dismiss the Claimant contrary to s.103A for the reason or the principal reason that he made the protected disclosure?

Detriment on the ground of Protected Disclosure – s.47B ERA

3.9. Did the Respondent subject the claimant to detriment in any of the 9 respects set out in the table below, as taken from [54] and agreed with the parties at the outset of the hearing (abbreviated herein as D1, D2 etc)?

3.10. If yes, was the detriment(s) on the ground of Protected Disclosure?

Table of Alleged Disclosures and Detriments

Alleged Protected Disclosure	**Alleged Detriment**
P1: 9/1/19: the start-up sheet “exposed electrical wires on stacker terminal block left exposed rollers missing and left lying on floor”	

P2: 9/1/19: verbally "… There is bare wires on the stacker we should not be working on it"	D1: 9/1/19 : ignoring complaints about bare electrical wiring and failing to take action in the matter
P3: 10/1/19: the start-up sheet "exposed electrical wires on stacker terminal block left exposed rollers missing and left lying on floor"	
P4: 10/1/19: verbally "… Maintenance still haven't fixed the stacker it will fucking kill someone…its fucking snowing……blown through the fucking wall…."	D2 – Verbal response of RS – that C was "always fucking crying"
P5: 11/1/19 – start up sheet As above	
P6: 11/1/19: verbally "… Who the fuck has changed my entries on the safety sheet, the wire still haven't been fixed, do you know what will happen to me if that sheet says that this machine is okay in my name is on the bottom of it…. I will go to jail"	D3 – Verbal response of RS – to C, that "you are a chatterbox, you are taking the piss"
P7: 14/1/19 – start up sheet (new week's sheet) "…exposed electrical wires…"	
P8 14/1/19: verbally "… That stacker is still not fixed, it will kill someone"	D4 – Verbal response of RS to C - if you do not work on pallets bench one, you will be sacked "
P9: 15/1/19: verbally "I am not filling that sheet in any more you haven't fixed the wires and I'm not working on that bench; it could kill someone"	
P10: 17/1/19: verbally "… I'm not working on that fucking bench tomorrow, , it is going to kill someone…..	D5 – Verbal response of RS to C - "if you do not work on the bench, you will be sack (sic)"
[Intervening disciplinary/suspension]	
	D6 – 19/1 – Documentation sent by Donna

	O'Connor - "bullying policy with sections highlighted…"
	D7 – 19/1 – letter from HR stating that suspension was for "verbal abuse towards my supervisor and failing to follow a reasonable instruction by not leaving the canteen when asked…
	D8 – 19/1 – letter sent by Donna O'Connor, refusing C's request for disclosure of start-up sheets ostensibly as they are "not relevant to the events of the morning you were suspended"
P11: 22/1 – letter to HR "…. Tensions between both myself and RS have been rising, regarding the operational condition (exposed electrical wiring) of a pallet stacker on pallets bench one…"	
P12 – 1/2/19 - during disciplinary hearing As P11	
	D9 – KS, failing to take action despite evidence of verbal abuse towards C adduced by Antony Lovat during the course of the disciplinary hearing….

4. Issues of remedy were deferred to the conclusion of the hearing. In the event, judgment on liability was reserved and no evidence or submissions were received in respect of remedy.

<u>The Facts</u>

5. The tribunal heard oral evidence from the respondent's witnesses: Donna O'Connor (DC), Richardas Skrodenis (RS) and Kenny Stanness (KS). The claimant gave oral evidence. All witnesses were cross examined. For ease, each witness will be referred to herein by their initials. Both the claimant and the respondent's representative had the opportunity to make closing oral submissions. There was a bundle of documents numbered up to 201 pages, but also including additional inserts, placed before the tribunal.

6. The tribunal made its findings of fact having regard to all of the evidence and did so on a balance of probabilities.

Background

7. The respondent is an employer of approximately 900 people and has a dedicated HR function, comprising a manager (DC) and a personnel officer. It has 15 sites across England and Scotland, including premises at Gateshead. The respondent's business is predominantly as a timber manufacturer. The site at Gateshead specialises in producing and repairing wooden pallets.

8. The claimant had commenced work for the respondent as an agency worker in October 2015 and became a permanent employee in February 2016. His job title was production operative which in essence entailed making and repairing wooden pallets. He worked full time. The claimant was conscientious and hardworking and as a result the respondent was keen to offer the claimant overtime whenever it could.

9. There were two shift patterns on site, 6am – 2pm and 2pm – 10pm. The claimant worked the early shift. Workers on the early shift were expected to attend a 10-minute briefing at 5.50am led by the shift supervisor, RS. Workers would need to clock in prior to that in order to attend on time at the canteen by 5.50am where the briefing took place.

10. The shift workers were engaged on heavy machinery. Operators on the shift completed a daily sheet to identify hazards. This sheet has been described in this case as a "safety start-up sheet", an example of which is at [60]. The claimant accepted that this was a daily sheet and that there was a "habit" at the premises that the sheets were completed daily. When asked therefore whether it was a system that reported every day on health and safety matters, the claimant did not disagree.

11. The tribunal finds that the respondent operated a daily system of compiling safety start up sheets, the purpose being to identify health and safety issues. The tribunal finds that the respondent encouraged its staff to report on health and safety issues.

The disclosures

12. On 9 January 2019 (Wednesday), the claimant noticed a bare electrical wire on pallet bench one, the location of his workplace. The tribunal accepts that he identified this on the safety start up sheet by affixing an "X" on the sheet to indicate an issue. The sheet also shows that the claimant wrote down a description. On the same day, he wrote that, "exposed electrical wires on stacker (terminal block left exposed) rollers missing and left lying on floor" (P1). The claimant wrote the description because he felt that ticking a box was not a sufficient action to bring the issue to the attention of the respondent. Shortly thereafter, the claimant's supervisor, RS, was speaking to the claimant and the claimant told him of the fault and in particular that, "there is bare wires on the stacker we should not be working on it" (P2).

13. The words spoken to RS were entirely consistent with the written description on the start-up sheet. RS accepts that the claimant raised the issue of the exposed wire with him on more than one occasion although he cannot identify the precise date(s).

The tribunal finds that the claimant did disclose the existence of the bare wires to RS.

14. The tribunal has no difficulty in concluding that both the words of description written on the start-up sheet and the subsequent verbal disclosure to RS amounted to a disclosure of information that in the belief of the claimant tended to show that the health and safety of individuals was endangered.

15. On 10 January 2019 (Thursday), the claimant noticed that the issue had not been rectified and on this occasion he placed an "X" in the daily sheet and traced a line to the words that he had written on the previous day (P3). Subsequently, but on the same day, the claimant again brought the issue to the attention of his supervisor in which he informed the supervisor that, "if someone gets [450] volts through them then they will be blown through the fucking wall" (P4).

16. By 11 January 2019 (Friday), the issue had not been fixed. The claimant identified that somebody appeared to have overwritten his previous entries and he re-inserted crosses on the start-up sheet (P5). The claimant recalls speaking to his supervisor and complaining that the entries on the safety sheet had been altered and that the wires still had not been fixed. The tribunal has considered whether the claimant had brought this to the attention of the supervisor on more than one occasion.

17. The recollection of RS was that there had been several occasions in which the same issue was repeated by the claimant. The tribunal accepts that the claimant had by now each day identified on the start-up sheet the existence of the issue and repeated his concern to the supervisor. Whether or not he used the precise words alleged on 11 January 2019, the tribunal is satisfied that he informed RS that the wire had not been fixed (P6). RS in evidence recalled that the claimant had told him that the entries had been altered.

18. The tribunal finds that over the course of the week which had ended on Friday 11 January 2019, there had been several occasions when the claimant had repeated to RS that there were bare wires. The claimant's case is that RS had ignored his concerns and further had acted in a derogatory manner in response. Underlying the claimant's case is the inference that the respondent did not take seriously its health and safety responsibilities.

19. Part of RS' responsibility was to identify possible safety issues and to note them on the Daily Quality Audit System. The tribunal were referred to [167]. There is an entry on 7 January 2019 in which RS reported that the roller balls had come off pallet bench one and that one of the backstop wires was lying on floor. RS told the tribunal that this is the same issue as identified by the claimant and the tribunal has no evidence to suggest that is not so. The tribunal is satisfied that RS had in fact identified and reported the material fault prior to its discovery by the claimant. The Quality log [167] is evidence that RS repeated his report on the following day, 8 January 2019. This is compelling evidence that RS had in mind health and safety issues and operated a practice of bringing it to the respondent's attention.

20. RS stated that he spoke to the maintenance department manager on 8 January 2019 and asked him to have a look at pallet bench one. Maintenance informed RS

that the issue was not an urgent one because the exposed wire was a secondary backstop and that (i) it was not a live wire, and (ii) the equipment had two separate stop bars and it was only the second stop bar that was not working. The entry at [167] is compelling evidence that RS took health and safety issues seriously. It would indeed be remarkable if equipment was being used when it was widely known that exposed live wires were present. Given the self-evident attention that RS paid to health and safety issues, the tribunal finds that RS was reassured that the issue was low priority and did not amount to a pressing health and safety issue. Notwithstanding, RS did in fact report the issue again on 16 January 2019 [163] when it had still not been rectified.

21. Returning to 9 January 2019, when the claimant first raised the matter with RS, it was at a time when RS had already reported it to maintenance and had received the reassurance from maintenance. The claimant has complained that his concerns were ignored and that RS failed to take any action in the matter (D1) but the tribunal finds that such a complaint is not consistent with the actions of RS prior to 9 January 2019. The claimant has complained that on 10 January 2019, in response to his verbal disclosure, RS had disparaged the claimant by saying that the claimant was "always fucking crying" (D2). The tribunal finds that such a complaint is not consistent with RS' attitude towards health and safety issues in the workplace.

22. Further, in evidence, RS accepted that the claimant had raised the issue verbally with him, and he told the tribunal, "yes, and I told [the claimant] that it was reported, but you were not listening to me, and several times I was trying to tell you and you didn't listen". The tribunal finds that RS gave evidence to the tribunal that was balanced and objective: he said, "I remember [the claimant] telling me that [the claimant's] entries were being altered and that the claimant did say something along the lines of "if someone is killed, I will go to fucking jail". RS denied saying "always fucking crying". Such words are not consistent with RS' attitude both towards health and safety and also towards the workers that he supervised. The tribunal finds that by contrast RS did not swear at the claimant and did try to explain to the claimant that it was not regarded by RS as a health and safety matter but that the claimant was not listening to RS. The tribunal finds that RS told the claimant that it was the maintenance department's view that the wire was not a live wire and the equipment could be safely used.

23. The claimant alleges that on 11 January 2019, RS responded to the claimant's repeated disclosure by stating that, "you are a chatterbox, you are taking the piss" (D3). RS denied saying this. He denied swearing. In cross-examination, RS asserted that he did not swear at work. At first, the tribunal found that perplexing as it appeared that the work environment was such that swearing might regularly be part of the conversation. However, RS' explanation to the tribunal was compelling – he was adamant that he does not swear *at* anyone: it may well be that he might swear *with* someone but that would not be in any sense detrimental because it would be part of an amicable workplace interaction.

24. The tribunal finds that RS did not ignore the claimant's complaint but instead had already reported and that maintenance did not consider it unsafe. This provides reliability to RS' recollection of the conversations with the claimant. RS had taken action and had tried to explain that to the claimant. RS did not swear at the claimant

(D2) and did not disparage the claimant in the manner complained of by the claimant (D3, D4).

25. The next working week commenced on Monday 14 January 2019. It is evident that the claimant repeated his disclosure in the description that he wrote (P7) on a new safety start-up sheet [61] and on a balance of probabilities he did also verbally repeat his complaint to RS that the equipment had not been fixed (P8) because that verbal complaint is entirely consistent with his repeating the written words in the safety start-up sheet. In a similar vein, the claimant alleges that he verbally repeated his disclosure to RS on 15 January (P9) that the wires were still not fixed and on 17 January, that "I am not working on that bench, it is going to kill someone" (P10).

26. The tribunal finds that the claimant did repeat his concerns to RS in the manner alleged. In doing so, the claimant had not taken into account the repeated attempts of RS to explain that it was not unsafe and that there was in effect no health and safety issue. The tribunal finds that the claimant did repeat that the wires were still not fixed (P8 and P9). The tribunal finds that by 17 January, the claimant did not disclose facts regarding the exposed wires but was instead simply asserting that he was not going to work on the bench (P10).

27. The claimant contends that on two occasions RS threatened the claimant with the sack. On 14 January, RS is alleged to have said, "if you don't work on pallet bench one, you will be sacked" (D4) and again on 17 January, "you will be sack (sic)" (D5). RS adamantly rejected that: "I would never ever threaten anyone to dismiss, I couldn't. I didn't even mention the word, sack, and in fact from my point of view, I would get him to speak to Kenny [Stanness]". It was common ground that RS had no authority to dismiss. Further, it is consistent with RS' open attitude towards the issue that the claimant was raising that he pushed maintenance again on 16 January 2019 for a clear resolution. The tribunal finds that RS' attitude throughout was not consistent with making threats to dismiss the claimant. Instead, RS took his supervisory responsibilities seriously including his health and safety obligations which is inconsistent with the alleged threats to dismiss the claimant. The tribunal finds that RS did not threaten to dismiss the claimant on any occasion between 14 January and 17 January, whether in response to the claimant raising the issue of the bare wires or otherwise.

<u>The Claimant's suspension and disciplinary process</u>

28. The next day, on 18 January 2019, the claimant attended work for the early shift. The briefing in the canteen started at or about 5.50am. The claimant's evidence was that he had clocked in at 5.50am. It follows that the claimant probably arrived at the canteen after the briefing had started. When asked this specific question, the claimant said that the briefing could have been underway. He said in evidence that he was "2 minutes late by their machine".

29. The claimant's arrival interrupted the briefing. There was a verbal exchange between the claimant and RS. On RS' account, RS stated, "you're late" and the claimant responded, "fuck you, I clocked in at 5.50am": on the claimant's account, RS stated aggressively, "its fucking 10 to…..". On either account, a conflict situation had arisen.

The claimant accepted in evidence that he may have sworn in his speech. The argument intensified. This was an argument that was being played out in front of the shift workers, some 12-15 colleagues.

30. The tribunal finds that RS was entitled to challenge the claimant for being late for the commencement of the briefing. The tribunal finds that the claimant objected to the challenge and on a balance of probabilities swore at RS. This conclusion is supported by RS' contemporaneous note of the altercation [171] which in the tribunal's view was a reliable account of events. The claimant's own words in his witness statement (paragraph 11) that he had stated to RS that he, "was not concerned about the time on [RS'] watch…" more than hinted at the claimant's opposition to the authority of RS' role as indeed was his acceptance that he used swearing. The tribunal finds that the claimant was responsible for raising the temperature of the exchange by forcibly challenging RS including swearing in front of his shift colleagues.

31. The claimant was asked to leave the canteen: whether it was a peremptory, "just go", or a different form of words is not of great significance. The claimant questioned why he should leave. He accepted that in evidence because he said that, "I requested further information" about why he was required to leave. Specifically, when asked by Mr Tinnion why he did not comply, he said, "it was minus 5 outside, and I was entitled to ask why I was being sent away". The fact of the matter is that the claimant did not comply with the request to leave and it was an incident witnessed by everyone on shift.

32. The claimant was suspended by RS. That is evident from the email that the claimant wrote at 8.50hrs on the same day [124] in which he asks why he had been suspended. It is further evidenced by DC who first wrote at 11.03hrs [126] the following day to "confirm" the suspension. The stated reason for the suspension was the verbal abuse towards the claimant's supervisor [129]. In evidence the claimant denied that this was the genuine reason. He stated that, "it has everything to do with my raising issues about the wires" although the tribunal has no evidence that corroborates that belief. In cross examination, the claimant contended that he did think that at the time, yet he did not mention it in his complaint letter at 11.19hrs on 19 January 2019 [131] instead suggesting to the tribunal that this letter was "totally unrelated to his suspension" notwithstanding that it was written less than 30 minutes after DC's email and letter of suspension.

33. The claimant in evidence accepted that it was reasonable to conduct an investigation given the events that had taken place and given the competing version of events. Given too that the suspension was in effect authorised albeit after the event by DC, it is consistent with the events as they unfolded that DC would support the suspension for reasons related to the allegation of verbal abuse. The letter that she wrote to the claimant giving the reason for suspension (D7) reflected her genuine belief at the time.

34. In the same letter [130], DC had enclosed the respondent's Bullying and Harassment Policy. It is the claimant's complaint (D6) that the Policy document had been highlighted at certain key sections. DC accepted that it was highlighted. The claimant felt that the highlighting was with the intention of intimidating the claimant.

The tribunal has examined the highlighted sections: they do not betray any purpose for intimidation. Nor indeed could part of the highlighting reasonably be relevant to the situation, e.g., "racial harassment". Notwithstanding the claimant's perception, the tribunal accepts the evidence of DC that this was a legacy of a previous HR training session that she herself had given and in which the policy had been highlighted as part of the presentation. There was no dispute that the respondent had provided bullying and harassment awareness training to its workers and managers and this too pointed persuasively towards the respondent's positive approach towards a safe and tolerant working environment.

35. DC reflected on the claimant's complaint letter [131] and she decided (and advised KS accordingly) that the respondent should investigate the complaints that the claimant had against RS as part of the same process so as to enquire whether this was a "tit for tat" situation. DC advised that witnesses in the canteen should be asked whether they had seen RS behaving towards the claimant as the claimant had alleged.

36. On 21 January 2019, the claimant wrote to DC requesting a copy of the safety start-up sheets [134]. DC did not comply (D8). However, it is not surprising that DC did not comply with the request as it was her evidence to the tribunal that her belief was that the disciplinary process arose from the incident of verbal abuse on 18 January 2019 and there was no relevance to the safety start-up sheets.

37. On 22 January 2019, the claimant wrote a detailed statement of events [135] which was sent to DC. It provided a detailed version of events. At [137] the letter describes tensions rising over the previous two weeks because RS was getting frustrated with the claimant raising the issue of the operational condition of stacker equipment on pallet bench one (P11). DC responded on 22 January 2019 [139] to confirm that the respondent was investigating both the canteen incident as well as the bullying complaint against RS. DC stated, "I'm not sure why the safety start up procedure documentation you requested is relevant to the events of Thursday morning? Can you confirm please". The claimant did not respond. DC's letter indicates that DC's continuing belief was that the canteen incident remained the reason for the disciplinary process. The claimant did not disabuse her of that.

38. KS gave evidence to the tribunal that he had taken advice from the respondent's HR manager, DC. KS interviewed a significant number of workers who were witness to the canteen incident. Each witness was asked a similar set of questions: dealing with both the canteen incident and in response to the allegation of bullying by RS. KS asked the questions of each witness and the answers were recorded and signed for by both the witness and KS. Not all witnesses were corroborative and some were unable to provide useful evidence. That is not a surprising outcome when a number of witnesses to the same event are questioned. The tribunal accepts as a broad view that 8 witnesses were questioned, of whom 7 had a recollection. The majority of those concluded that the claimant did swear and the majority also concluded that the claimant refused to leave the canteen when told to do so. The claimant in response alleges that these are against him and that the witnesses are lying. The tribunal concludes that there is nothing on the face of the statements or in any other contextual document that highlights the risk or indeed the probability that the witnesses had lied. To that extent, it is likely that a subsequent decision maker

would fairly have been entitled to have regard to the weight of the evidence against the claimant. The claimant properly identified that one witness, AL, had during the disciplinary hearing stated that RS had verbally abused the claimant. He complained that the respondent should have taken action (D9). However, even so, one statement should be weighed in the balance with the majority. Of itself, it was not sufficient to place the burden of explanation onto the respondent to show why it did not take disciplinary action against RS.

39. The investigation was complete by or about 24 January 2019. KS had made the notes and KS had typed them up. KS had also spoken directly with RS and asked him about the claimant's allegations that RS had bullied the claimant over the previous two years. RS specifically denied it. This is recorded in a signed email at [148] on 24 January 2019. The claimant was invited to a disciplinary hearing [133] listed for 1 February 2019. The detail of the invitation letter is self-explanatory and it included a warning that if proven the claimant faced a risk of dismissal for gross misconduct.

40. The Disciplinary hearing was conducted by KS. This was so despite the fact that DC accepted in evidence (and as the tribunal so find) that it was possible to have a separate investigator and decision maker. The tribunal were informed that the respondent owned a number of sites, including one which was 10 miles away and where there were managers who could have undertaken the task. No enquiry was in fact undertaken to see if an alternative decision maker could be found.

41. On 22 January 2019, the claimant wrote to DC setting out his version of events. He included a paragraph within [138] in which he refers to a previous incident with KS in which KS was alleged to have spoken to RS and suggested that if the claimant continued not to listen to RS then, "any more of his crap Richy suspend him and he will be gone". The letter concluded that the claimant felt that his dismissal was a foregone conclusion. It was put to KS in cross examination that he ought to have regarded this as an objection to him continuing with the disciplinary hearing. In response, KS stated that he had not been aware that the letter amounted to a complaint about him and felt at all times that he had a good relationship with the claimant. He said that he, "didn't push to take the meeting" and did not in fact read the letter as an objection. KS said, "I did not understand that the claimant had a concern about me taking the meeting; it was a matter for DC and the incident was one in which I had no involvement anyway". The tribunal notes that at no time during the disciplinary hearing did the claimant object to the chairing of the meeting by KS. The notes of the hearing are at [141].

42. KS was cross examined in detail on the evidence of Mr Lovat at the disciplinary hearing. Mr Lovat agreed that he had heard RS swearing in the workplace. This was of course in contrast to the other evidence. KS noted that this was a witness that the claimant wanted and that he was happy for him to attend. KS acknowledged the evidence but said that Mr Lovat was not a witness at the canteen incident. KS stated that the purpose of the hearing was to look at the canteen incident although he did also investigate the bullying complaint.

43. In the course of the disciplinary hearing, KS made it clear that the only incident that will be discussed is the canteen incident and KS refused to take into account any

other issues raised in the claimant's letter. In cross examination, it was put to KS that the reason he did not want questions asked was because he did not want the health and safety issues surrounding pallet bench one to be mentioned. KS said that, for the purposes of the disciplinary hearing, he did not understand the relevance of the pallet bench issues as they were in his mind totally separate incidents.

44. KS was challenged as to why he decided to dismiss the claimant for what was in effect a first offence. KS replied that he had found the allegation be true and that he couldn't see a way forward to bringing the claimant back to the workplace. KS said, "you were sacked for gross misconduct". He continued to deny the relevance of the pallet bench matters. KS spoke with DC following the hearing for 10 – 15 minutes although he cannot recall the detail of conversation. In particular he does not recall whether he had considered a warning to be appropriate although his evidence was that, "we would have considered FWW or dismissal – that's where we were". When pressed, KS considered that an FWW would not be sufficient given the events that it taken place in front of 12 employees at a staff briefing where the claimant was found to have been swearing at his supervisor: as KS put it in evidence, "what sort of message does it give to your fellow colleagues, that you disrupt a meeting and verbally abuse your supervisor in front of 12 people".

45. The tribunal panel asked an extensive series of questions of KS. KS was satisfied as a result of the investigation of witnesses that gross misconduct was a potential scenario. He could not recall how it was that he came to agree to do the disciplinary hearing. When specifically asked, "so, what was going to change in the disciplinary hearing?", KS responded that he had not yet made a decision and had not discussed it with DC and at the start of the hearing he had an open mind, that he was 100% sure that he had not made up his mind that the claimant was going to be dismissed". The notion of separating the investigation from the hearing was not raised with KS at any time during the process. He acknowledged in the tribunal hearing that it was "perhaps best practice is that someone else should be doing the hearing". As regards the bullying complaint, KS said that he had clearly interviewed relevant people and could not see any bullying going on so that it was dismissed and KS concentrated on the canteen event that had alleged to have taken place.

46. When asked to identify what his reason for dismissing the claimant was, KS said that there was in no sense any intention to hide or to ignore health and safety issues. The respondent had 15 sites and had recorded 257 near misses such that it was not uncommon to be dealing with health and safety matters. The respondent was ISO accredited and KS strongly encouraged that. If one looks at the detail of the near misses, names were not mentioned and KS would not ask nor need to know. In essence, KS was unaware that the claimant had pallet bench concerns and KS stated to the tribunal that his priorities were, "health and safety first, quality second". He also regarded the pallet bench issues as irrelevant in the disciplinary process. Specifically, his evidence to the tribunal was that, "I read the letter; I can see how the bullying aspect is connected, but I cannot see how the pallet bench is relevant, where that fits in"

47. The claimant did not appeal.

The Law

48. In relation to unfair dismissal, section 98(1) and (2) of the Employment Rights Act 1996 sets out the potentially fair reasons for dismissal. Section 98(2) states that a reason falls within this subsection, inter alia, if it relates to conduct.

49. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Birchell [1980] ICR 303, the tribunal must consider a three-fold test: (i) the employer must show that he believed that the employee was guilty of misconduct, (ii) that he had in his mind reasonable grounds upon which to sustain that belief, (iii) that at the stage at which the employer formed that belief he had carried out as much investigation into the matter as was reasonable in the circumstances.

50. Section 98(4) then sets out what needs to be considered in order to determine whether or not the decision is fair. It states "termination of the question whether dismissal is fair or unfair…. (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".

51. For the purpose of section 98(1) and 98(2) the burden of proof is on the respondent. What matters is whether the respondent has established the operative reason for the dismissal: see Brady v ASLEF [2006] IRLR 576.

52. For the purpose of section 98(4) the burden of proof is neutral in applying section 98(4). The tribunal reminds itself that it does not stand in the shoes of the employer and decide what it would have done if it were the employer. Rather the tribunal has to ask whether the decision to dismiss fell within the range of reasonable responses open to the employer judged against the objective standards of a hypothetical and reasonable employer. The case of Sainsbury's Supermarket Ltd v Hitt [2002] EW CA Civ 1588 makes it clear that the range of reasonable responses applies throughout the process including to the dismissal decision. The tribunal is required to consider whether dismissal fell within the range of reasonable responses see Iceland Frozen Foods v Jones [1983] ICR. Here the question of whether an employer has acted reasonably in dismissing will depend upon the range of responses of reasonable employers. Some might dismiss others might not.

53. Turning to deductions from compensation, the Polkey principle established that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Thornett v Scope [2007] ICR 236 affirmed the obligation on an employment tribunal to consider what the future may hold regarding an employee's ongoing employment.

54. Section 122(2) ERA provides that where the tribunal finds that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce

the amount of the Basic Award, the tribunal must reduce that amount accordingly. Section 123(6) ERA provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable. Before any such deduction, a tribunal most make three findings (in accordance with Nelson v BBC (no2) [1979] IRLR 346): (i) that there was conduct which was culpable or blameworthy; (ii) that the dismissal was contributed to some extent at least by the claimant's culpable or blameworthy action, (iii) that it is just and equitable to reduce the assessment of the claimant's loss to a specified extent.

55. In relation to protected disclosures, the statutory framework is set out fully by EJ Johnson at [44-46] and does not need to be repeated here. As to the approach of the tribunal, it is for the respondent to satisfy the tribunal as to what was the principal reason for its dismissal of the claimant. In this case the respondent alleges that its reason was related to the claimant's conduct. It is for the claimant to satisfy the tribunal that the principal reason for his dismissal was not in fact that misconduct but because he had made protected disclosures.

56. The tribunal is mindful of the proper approach to dealing with a multiple PIDA detriment claim as identified in Blackbay Ventures Ltd (T/A Chemistree) v Gahir [2014] IRLR 416 requiring a tribunal to identify each disclosure relied upon together with the alleged or likely failure to comply with an obligation and to identify the nature of the obligation; to address the basis upon which the disclosure was said to be protected and qualifying; to determine whether the claimant had the necessary reasonable belief (Babula v Waltham Forest College [2007] IRLR 346) to determine, as appropriate, whether the claimant acted in good faith or whether the disclosure was made in the public interest (Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA); and where a detriment short of dismissal was alleged, identify the detriment and the date of the act or deliberate failure to act.

57. On detriment and causation, NHS Manchester v Fecitt [2012] IRLR 64, identifies that liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act. S.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower. Once detrimental action is identified, it is for the employer to establish the reason, not for the claimant to establish the reason. s.48(2). If an employer fails to prove that the act, or deliberate failure, complained of was 'in no sense whatsoever' on the prohibited grounds, a claimant will succeed. Western Union Payment Services UK Ltd v Anastasiou [2014] UKEAT/0135/13.

Discussion and Conclusions

58. Mr Tinnion made brief oral submissions reflecting the issues that the tribunal has to decide. He emphasised the need to focus on the facts and beliefs of KS who was the relevant decision maker. It was, to use his phrase, unpromising terrain that the alleged main reason for dismissal was the health and safety issue given that the

clear evidence of KS was to the effect that reporting such matters is a good thing, and as supported by the fact that there was habit or practice of completing daily check sheets which in turn helps and encourages constant vigilance.

59. The claimant had the opportunity of oral submissions but concluded that he had confidence that the tribunal had listened and understood the evidence and did not add further.

Detriment on the Ground of Protected Disclosure

60. Did the claimant make protected disclosures? The tribunal has found that the claimant did make a number of entries on the safety start up sheets both in the week commencing 7 January 2019 and the week commencing 14 January 2019 and the tribunal has also found that the claimant verbally raised the issue specifically regarding the exposed wire to his supervisor, RS, on several occasions. The safety start up sheets are consistent with the claimant's verbal concerns. In any event, RS accepted in evidence that the claimant raised his concerns with him on more than one occasion.

61. The tribunal reminded itself that a protected disclosure requires evidence of a disclosure of information. Information is more than setting out an objection or voicing a concern. The tribunal considers that the mere act of ticking a box on the safety start up sheet does not amount to a disclosure of information nor does the occasion(s) when the claimant sought to draw a line with a pen between a ticked box and words at the base of the safety start up sheet. That said, when the claimant did write down specific words, as he did on [60] and [61], beginning on each occasion with the words, "exposed electrical wires….", the claimant did make a disclosure of information for the purposes of s.43B ERA. A repetition of a disclosure does not make it any the less a disclosure for the purposes of s.43B ERA.

62. The tribunal finds that when the claimant disclosed to the respondent the existence of the exposed wires he believed that the state of affairs presented a serious risk of injury or potentially death. This is self-evident from his words graphically expressed to RS on at least one occasion that someone could get killed. The tribunal finds that the claimant held a belief which is sufficient to satisfy the criteria required by s.43B(1)(d) that the health and safety of any individual is threatened. A state of affairs which potentially results in a serious or fatal injury in the work place due to defective machinery is plainly a matter of public interest.

63. The tribunal then reminded itself that RS responded to the claimant on at least one occasion that the maintenance department had been informed and it had advised that it was not a danger and it was not a H&S issue because the wire was not a live wire (and see paragraph 20 above). The tribunal records that the issue of whether the exposed wire was or was not live is not a finding of fact that the tribunal needs to make and does not do so.

64. However, the fact that the claimant was told that the wire was safe and did not present a risk and that this was the advice of the maintenance department meant that the claimant had received an answer to his concern. Yet he continued to raise the concern. The issue which arises in that context is whether the circumstances were such that the claimant could not have a reasonable belief that the health and safety of any individual has been or is threatened. The tribunal reminded itself fully of the low threshold of belief as set out in Nurmohamed. This was a workplace where the respondent paid real care and attention to health and safety; KS was a manager who impressed the tribunal of his own genuine focus on safety even to the extent that he was "delighted" by the interactions of his operatives when they are themselves safety aware. This attitude was in all likelihood evident in the workplace as a result. Further, it is inherently unlikely that a safety conscious business operating heavy equipment would continue to operate in the face of a complaint of an exposed electrical wire unless it was satisfied as to its safety.

65. When this was explained to the claimant he simply rejected it. He had no reason to do so. He was a highly intelligent man who presented his case at tribunal with the quality and in a manner as competently as many legally qualified advocates would aspire to. His refusal to acknowledge what was being said was unreasonable and borne out of bloody-mindedness. When RS spoke to the claimant, the claimant was simply not willing to engage and instead continued to be abrasive towards RS. This was his "DNA". Having regard to all the evidence, whereas the claimant had made protected disclosures to the respondent, once the claimant was told by RS that there was no risk and no danger, the claimant did not hold a reasonable belief, as explained further in Nurmohamed.

66. The tribunal finds that the claimant had a reasonable belief, in the Nurmohamed sense, that the disclosures by him relating to the exposed electrical wires to his employer constituted a protected disclosure for the purposes of s.43B ERA and specifically, the disclosures that he made set out above as P1 and P2. However, he did not hold such a reasonable belief in all the circumstances as regards P3 – P9 after RS had informed the claimant about the fact that maintenance had already been informed and they had examined and advised that there was no danger.

67. The tribunal concludes that P1 and P2 are protected disclosures and for the reasons set out above P3-P9 are not protected disclosures. For completeness, however, the remaining discussion and conclusions proceed on an alternative basis that all of the disclosures at P1-P9 are protected disclosures.

68. Was the claimant subjected to a detriment? The respondent did not ignore the claimant's complaints. There was no detriment. The tribunal finds that RS had in fact already identified the issue and raised it himself on more than one occasion prior to the disclosure by the claimant. The use of safety start up sheets is itself further evidence consistent with the respondent's care and attention paid to health and safety concerns.

69. The tribunal finds that RS had explained to the claimant that the issue was known to the respondent and RS informed the claimant that it was not regarded as a health and safety issue because the wire was not a live wire and not needed for the safe

operation of the machinery. This again was consistent with the care and attention taken by the respondent. It is not consistent with an attitude or behaviour from RS that required the claimant to work on the equipment at risk of being sacked.

70. The tribunal considered carefully the evidence that was given by RS and by the claimant in order to look at whether on a balance of probabilities RS treated the claimant in a detrimental manner in the way he spoke to him and in particular by verbally abusing him as “always fucking crying” and “taking the piss” and with threats to sack the claimant.

71. In evidence, RS stated that the claimant had been abusive to him on a number of occasions. Despite that, it was RS’ evidence that the claimant was a good worker and RS offered the example of the claimant subsequently apologising after the “earlier coffee incident” in November 2018 that is recorded in the HR notes [171]. The tribunal found that RS was a conscientious supervisor who undertook his responsibilities in a fair and measured way: where there was more generalised bad language or behaviour then sometimes as a supervisor it was necessary for it to “pass through your ears” i.e. “try not to take it seriously”. This showed a measured and genuine approach to his job. Given too his self-evident concerns for health and safety matters, the tribunal finds that the evidence is not consistent with the claimant’s allegations that RS was abusive in his replies or that RS threatened to sack the claimant. RS stated that he had no authority to do that and would have, if the need arose, simply have referred the individual to KS for further action. That is consistent with what later happened following the canteen incident. The tribunal also accepted the evidence of RS that there would be swearing in the workplace but it would be as part of good relations with colleagues and that RS would not swear “at” colleagues and would “never make a person uncomfortable”.

72. The tribunal by contrast concluded that the claimant was a voluble employee who expressed himself forcefully in the workplace and in terms which included swearing in his language. The tribunal concludes that when RS was seeking to explain to the claimant that the issue on the equipment did not present a health and safety issue and that it was not a priority the claimant was not listening. This conclusion is fortified by the tribunal’s findings regarding what took place subsequently in the canteen incident on 18 January 2019. Nonetheless, the tribunal concludes on a balance of probability that RS did not react detrimentally let alone abusively to the claimant and did not threaten him with the sack.

73. The claimant has not established any detriment, as particularised in D1-D5.

74. The claimant also makes a claim for detriment on grounds of protected disclosure in respect of matters relating to the subsequent disciplinary process.

75. The letter that the claimant wrote to DC on 22 January 2019 [135] contains a summary by the claimant [137] of the matters set out in the preceding paragraphs relating to the claimant’s raising concerns regarding the operational condition of the pallet stacker (P11). The claimant also relies on the repetition of that letter to KS in

the course of the disciplinary hearing (P12). Although this information was a repetition of previous disclosures, that of itself does not prevent a relevant disclosure of information for the purposes of s.43B ERA. The tribunal finds for the reasons set out above that the claimant made a protected disclosure (P11, P12) for the purposes of s.43B ERA but did not hold a reasonable belief that the health and safety of any individual was or is threatened.

76. The allegations of detriment at D6, D7 and D8 relate to DC. The tribunal has found that the claimant was sent a copy of the bullying and harassment policy on 19 January 2019. That was an appropriate step to take by DC in the light of the claimant's grievance about bullying. The complaint that the claimant makes is that the policy contained highlighted sections. The highlighted sections were a legacy of the previous training that DC had provided to all employees including the claimant that bullying and harassment would not be tolerated. To include a highlighted heading relating to race discrimination would strongly indicate that there was something generic about the highlighting and not related to the claimant's case. If the claimant had a sense of grievance regarding this, it was not justified. No detriment arises from this act by DC. In any event, for completeness, the tribunal is satisfied that the reason why DC sent the policy in its highlighted format is that it was a legacy from her earlier training and she took no conscious decision one way or the other on this occasion. The claimant complains (D7) that DC informed him by letter [132] of the reason for his suspension. That was entirely to be expected given that the claimant had been suspended. The letter was not a detrimental act and even if it were to be construed as such it was entirely the result of the decision to suspend and not on the ground that the clamant made a protected disclosure.

77. DC wrote to the claimant on 22 January 2019 [139] in which she did not disclose documents relating to the start-up sheets following the claimant's request. The tribunal regards DC's letter as an entirely respectful and appropriate letter of response. There was in fact no refusal in any event. DC was not sure of the relevance of the start-up sheets and her hesitation was entirely understandable. She asked the claimant to confirm the relevance. In the event, the claimant did not respond to her. The letter written by DC (D8) was not a detriment to the claimant. Even if it were, it was written entirely because DC was seeking to manage the misconduct process and did not, absent further explanation from the claimant, consider the start-up sheets to be relevant. It had nothing whatsoever to do with the fact that the claimant made protected disclosures.

78. The claimant complains that KS failed to take action either during or after the disciplinary hearing despite the fact that Antony Lovat had given evidence in the hearing about RS and in particular that Mr Lovat had heard RS swearing and had seen the claimant and RS swearing at each other [142]. The tribunal takes into account that the claimant asked for Mr Lovat to attend and KS was willing to facilitate that. In evidence, KS said that Mr Lovat was "valued" as an employee: KS said, "I'm not saying that I didn't believe him, but he's not at the [canteen] meeting". The tribunal finds that KS took account of what Mr Lovat had said and did not ignore it. KS had said at the disciplinary hearing that he was only looking at the canteen incident.

79. The tribunal concludes that KS took account of what Mr Lovat said. KS was not required to “take action” in respect of it and any failure to do so was not a detriment. Even if it was, the reason why KS took no action was entirely because KS was investigating the canteen incident and he did not regard Mr Lovat’s evidence as relevant. It had nothing whatsoever to do with the fact that the claimant made protected disclosures.

80. Was the detriment to which the claimant was subjected done on the ground of a protected disclosure? For the reasons expressed by the tribunal in the preceding paragraphs, the tribunal is satisfied that to the extent that the claimant has been subjected to detriment following the making of a protected disclosure, the detriment was in no sense whatsoever as a result of the claimant making protected disclosures.

81. The claimant’s claim of detriment on the ground of protected disclosure fails entirely and is dismissed.

Unfair Dismissal

82. Has the respondent established the reason for dismissal? Mr Stanness was the decision maker and it is the facts (or beliefs) known to him at the time of the dismissal that will determine the issue.

83. KS described finding opportunities to offer the claimant overtime as an exception. He regarded him as a good worker. He described the claimant as abrupt and aggressive at times but that was part of the claimant’s “DNA”. His every day observation was that the claimant was vocal and would use bad language whereas other operatives might be quiet and didn’t speak. Some events might well have justified disciplinary action but instead KS always tried to get the best from his operatives and gave evidence of looking for synergy and “strategies to think around a problem and not run around” with discipline. He stated, “where I observed, I also observed negatives and I would also take into consideration that they were skilled operatives and I would continue to try to develop them”. KS was asked about the claimant’s previous line manager who had refused to work with the claimant because he had considered that the claimant was aggressive. KS knew about this and did not take disciplinary action: in evidence he said, “I looked at it – it’s a clash of personality, and instead I looked to develop” staff.

84. The tribunal regards KS’ attitude towards health and safety issues as also one of care and attention towards maintaining a safe workplace. Nor did RS inform KS about the comments that the claimant was making to RS on the shop floor. In response to a question about the details within the safety start up sheet, KS said, “its one of my workers being trained to do, to spot it and raise it”. Despite being strongly challenged by the claimant in cross examination, KS was clear that he was happy that health and safety issues are raised and not ignored. He said, “it delights me because my worker is interacting”. The tribunal concludes that KS had a genuine

interest in ensuring that health and safety matters were raised and dealt with appropriately and that he had no difficulties with his workers in that regard. The habit of compiling daily safety start up sheets is entirely consistent with that.

85. These features are wholly inconsistent with the actions of an employer which was simply determined to "get rid of" the claimant or to use the claimant's behaviour in the workplace as a hidden reason for dismissing the claimant.

86. KS interviewed a significant number of witnesses to the canteen incident and made notes and typed up statements. The disciplinary hearing notes establish that the whole focus of the investigation was the alleged canteen misconduct. KS expressly stated that no other matter was relevant to his consideration.

87. The tribunal finds that the respondent's letter of dismissal set out the facts and matters genuinely in the mind of Mr Stanness when he made his decision to dismiss. This is entirely consistent with the disciplinary hearing. He was to a significant extent ignorant of the conversations between the clamant and RS on the shop floor. The tribunal finds that KS did not hold a disciplinary hearing or decide to dismiss the claimant because he had made protected disclosures. The tribunal is satisfied that KS did not have a hidden or ulterior reason for dismissing the claimant. The tribunal is satisfied that the respondent has established that the reason for the claimant's dismissal was the potentially fair reason of conduct.

88. Did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant? The tribunal approached this question having regard to the principles set out in Birchell but always bearing in mind that it remains necessary to return to the central question which is posed by s.98(4).

89. What is the nature of the misconduct relied on by the respondent? The outcome letter [159] states that 4 out of 7 employees (including RS) confirmed that the claimant was swearing repeatedly at RS and each confirmed that they had never witnessed RS speaking in that manner to the claimant. All (save Mr Lovat) had not heard RS swearing. KS concluded that he believed that the claimant gave verbal abuse during the canteen briefing on 18 January 2019 and that furthermore the claimant refused to leave the canteen but instead became hostile towards RS. This was in front of a significant (at least 12) number of colleagues. Given the weight of the evidence that had been obtained, KS had reasonable grounds for his belief.

90. The investigation interviewed approximately 50% of the witnesses to give a statement. There is no suggestion that the 50% had been pre-selected and indeed the variances in their evidence as highlighted by the claimant is to be expected when the witnesses are a representative sample of those who were present. The claimant was able to bring additional witnesses to the disciplinary hearing and as part of the investigation KS took account of what was said at the hearing.

91. The investigation included both the canteen incident and the claimant's grievance that he had been bullied by RS over the preceding two years. That was entirely appropriate in order to investigate the possibility of this being a "tit for tat" action on the part of RS. Witnesses were asked about bullying and the words that formed the basis of the questions were taken directly from the claimant's grievance.

92. The claimant complains that KS did not investigate the safety start-up sheets and the operational concerns that the clamant had previously raised. However, that is not a matter that affects the reasonableness of this investigation given the act of misconduct relied on by KS was one which was discrete and one which was witnessed by numerous members of staff and on any view it was not suggested at any time by the claimant that his actions on the day in question were caused by or related to any shop floor incidents.

93. This is a case where the respondent has fully satisfied the limbs of the test propounded by Burchell. This was a reasonable investigation and KS reached a genuine decision based on reasonable grounds that the claimant was guilty of misconduct.

94. The decision to dismiss the claimant was because the respondent had upheld the allegation that the claimant had behaved abusively and with hostility towards his supervisor in front of a significant number of his colleagues. The tribunal reminds itself that its task is not to substitute its own decision as to the reasonableness of the action taken by the employer. The decision to dismiss the claimant for gross misconduct following the findings of KS after the disciplinary hearing was not unreasonable. It was a decision that was open to a reasonable employer to take.

95. Did the respondent operate a fair procedure? In one respect, the tribunal was surprised by the procedure adopted by the respondent. It is an organisation of sufficient resource and had the benefit of a HR function. The role of KS exceeded the role that a reasonable employer would have allowed.

96. KS was not witness to the incident in the canteen and it was evidently the case that it was reasonable for him to be involved once the matter was reported to him. It is somewhat surprising that no real if any thought was given to the need to preserve some level of impartiality in the process. Instead, KS managed the investigation process even to the extent of making the notes of the witness evidence and providing typed statements. It was inevitable that his view was forming by the conclusion of that investigation. The tribunal accepts his evidence that he had not reached a conclusion prior to the disciplinary hearing and that he went into that hearing with no decision outcome in mind.

97. However, the claimant was entitled to basic principles of procedural fairness and a reasonable employer in the respondent's position and having regard to its size and resources would have ensured that an investigator who was independent of the claimant and KS should have undertaken the investigation and that would have left KS free from prior involvement and fully able to deal with (and be seen to deal with)

the disciplinary allegation impartially. This was a significant procedural failing and it fell outside the range of actions that a reasonable employer would take.

98. The tribunal is mindful of the need not to focus unduly on individual aspects and therefore again asked itself the question posed by s.98 (4) namely: did the respondent act reasonably in treating that reason (i.e., conduct) as sufficient to dismiss the claimant? The tribunal concluded that the answer was no.

99. The tribunal went on to consider whether the respondent would or might have dismissed the claimant absent this procedural shortcoming. The question that the tribunal had to answer was this: what would have happened had the respondent ensured that an independent investigator had undertaken the investigation and reported back to KS to enable KS to conduct the disciplinary hearing.

100. The tribunal regarded the manner in which KS undertook the investigation as reasonable including putting the claimant's own words to each witness regarding the allegations of bullying by RS and also in seeking to obtain a signature from each witness to approve the evidence that they gave. The fact that witnesses differed in their recollection and indeed in some cases did not have a recollection is a further indication that the process was an open-minded approach. The number of witnesses was substantial and not pre-selected.

101. The answer to this question, which is known generally as the Polkey question, inevitably involves a degree of speculation but the tribunal reminded itself that it should not be deterred for considering this point by the fact that it involved some element of speculation. Having reviewed all the circumstances, the tribunal concludes that an alternative investigator would have obtained materially the same evidence. Thus, KS would have conducted the same disciplinary hearing and reached the same conclusion. If therefore the procedural shortcoming identified above had been rectified, the tribunal concludes that it was 100% likely that the respondent would have terminated the claimant's employment at the same time any in any event.

102. The claimant is not entitled to any compensatory award.

103. The respondent contends that any award should be reduced by reason of contributory fault. The conduct relied upon by the respondent is the conduct of the claimant in the canteen which formed the basis of the disciplinary investigation and the resulting dismissal. The tribunal concludes that the abusive behaviour of the claimant and the hostility that the claimant showed towards his supervisor on 18 January 2019 can properly be described as culpable or blameworthy as envisaged by Nelson no.2 and by s. 122(2) and s.123 (6) ERA.

104. The tribunal has given this matter careful consideration. The tribunal finds that it would be just and equitable to reduce any Compensatory award (that might otherwise have been made) by 100%. The claimant was in that sense the author of his own misfortune despite working in an organisation that through KS was both

supportive of development of its workers and evidently careful of its safety responsibilities.

105. As to s.122(2) ERA, the tribunal has come to the conclusion that the respondent's shortcoming in allowing a process in effect to be undertaken throughout by one manager with the risk and perception that it was not a fair or open minded process was a significant shortcoming and the respondent was sophisticated enough to be able to have recognised that. The shortcoming was not related to the claimant's misconduct and it unnecessarily created a risk that the claimant would be dismissed without proper exposure of the facts. The tribunal concludes that it would not be just and equitable to reduce the Basic Award.

Automatic Unfair Dismissal

106. A claim under s103A requires a finding by the tribunal that the reason or the principal reason for dismissal was that the claimant had made protected disclosures. The findings set out conclude that the reason for the claimant's dismissal was misconduct. The claimants claim for automatic unfair dismissal fails.

Conclusion

107. The matter must now be listed for a remedy hearing.

108. However, in the light of the fact that the claimant is unrepresented, the tribunal has set out some provisional observations in the light of its conclusions. One hopes it may prove possible for the parties to reach agreement and avoid the need for a further hearing. They should be encouraged to do so. These observations do not finally determine remedy and the tribunal will determine remedy at a remedy hearing once the parties are aware of the tribunal's findings and have the opportunity to make representations.

109. The tribunal observes on a provisional basis that the claimant is entitled to a basic award for unfair dismissal but no compensatory award. The basic award is a matter of statutory calculation. It is calculated by reference to the claimant's length of employment up to the date of termination which was 2 complete years, the claimant having been continuously employed since he became employed on or about 16 February 2016 following a period of working as an agency worker.

EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

22 November 2019

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