EMPLOYMENT TRIBUNALS

Claimant: Mr A Sanderson

Respondents: (1) Wm Morrison Supermarkets PLC
(2) Neerock Limited t/a Woodhead Bros

Heard at: Manchester **On:** 8 & 9 January 2020

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: Ms S Johnson, Counsel
Respondent: Ms C Scarborough, Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The correct respondent is the second respondent , and the claims against the first respondent are dismissed.

2. The claimant was unfairly dismissed by the second respondent.

3. The claimant's dismissal was not for an automatically unfair reason of either having raised health and safety issues, or having carried out trade union activity, and these claims are dismissed.

4. The Tribunal makes no reduction to the compensatory award on the basis that a fair procedure would have made no , or some , difference to the decision to dismiss the claimant, on the grounds of ***Polkey.***

5. The claimant did not contribute to his dismissal, nor was he guilty of conduct which would entitle the Tribunal to reduce his basic award, and the Tribunal makes no reduction in either the basic or the compensatory award.

6. The claimant is entitled to a remedy. The parties are encouraged to seek to agree remedy. If they are unable to do so by **17 February 2020** they , or either of them, are to notify the Tribunal that a remedy hearing is required. That notification

shall specify the estimated length of hearing, dates to avoid, and the issues that the Tribunal will be required to determine on remedy.

REASONS

1. By a claim form presented to the Tribunal on 28 August 2019 the claimant complains of unfair dismissal, arising out of the termination of his employment on 3 April 2019. That is the sole claim he makes, any claim that may have been intimated for holiday pay having been withdrawn.

2. Whilst the only claim made is one of unfair dismissal, it is put in three ways. The first is "ordinary" unfair dismissal, for which the claimant has the requisite qualifying service. Secondly, it is put that his dismissal was for an automatically unfair reason of his having raised health and safety concerns (or having taken steps to protect himself or others from imminent danger), under s.100 of the Employment Rights Act 1996. Thirdly, it is put that his dismissal was because he had taken part in trade union activities , so as to render his dismissal automatically unfair pursuant to s.152 of the Trade Union & Labour Relations (Consolidation) Act 1992.

3. The second respondent entered a response, in which it admitted that it was the employer of the claimant, and contended that his dismissal was not for either of the two automatically unfair reasons, and was fair. In the alternative, it pleaded that any award for unfair dismissal should be reduced on the grounds of ***Polkey ,*** and/or for contribution.

4. The first respondent did not enter a response. The claimant sought a rule 21 judgment against it, but the Tribunal declined to make this, on the basis that the second respondent had admitted being the employer of the claimant, and that unless the Tribunal was satisfied that this concession was incorrect, and the first respondent was in fact the employer of the claimant, and liable for any dismissal, the Tribunal should not make a judgment against the first respondent simply "in default" of a response. Hence the issue of which of the two respondents employed the claimant was a live one, and has had to be determined by this Tribunal.

5. The claim was heard on 8 & 9 January 2020. Judgment was reserved, and is now given.

6. The claimant was represented by counsel, Ms Johnson, instructed through the claimant's trade union. The claimant gave evidence, and also called Nick Gerrard, a full – time union official, who had represented him through the disciplinary and appeal process. The respondent was represented by Ms Scarborough of counsel, and called James Hutchinson , the dismissing officer, and Anthony Bell, the appeal officer. There was an agreed bundle, and references to page numbers are accordingly to pages in the bundle, unless otherwise stated.

7. Having heard the evidence, read the documents referred to the course of the evidence in the bundle, and having considered the submissions of the parties, the Tribunal finds the following relevant facts.

7.1 The claimant was employed from 24 October 2005 , as a cold store scanning operative. He was provided on 18 April 2007 , with a written statement of

principal terms of his employment which is at pages 55 to 56 of the bundle. The employer is shown as “Woodhead Bros Meat Company”.

7.2 Companies House records show that Neerock Limited was incorporated on 10 January 1991. Its filed accounts up until year ending 2012 show it as “trading as Woodhead Bros Meat Company”. It is a wholly owned subsidiary of the first respondent. From 2012 references to Woodhead Bros Meat Company cease to appear in the accounts.

7.3 No other statement of particulars of employment, or contract of employment, has been issued to the claimant.

7.4 The claimant’s payslips (pages 239 and 240 of the bundle) have the logo of the first respondent on them, the disciplinary and appeals policies applied (pages 90 to 103) similarly are Morrisons documents, and James Hutchinson, the Abattoir Manager who carried out the dismissal , was an employee of the first respondent, as is Anthony Bell, who carried out the appeal.

7.5 A pay advice (some form of internal print out , which the claimant was unlikely to receive or see) at pages 240 to 241 of the bundle does make reference to “Woodhead Bros (Neerock) Ltd”, although there is no such limited company.

7.6 The claimant was employed at the respondents’ abattoir at Whitewalls Industrial Estate , Colne, Lancashire. He worked in despatch, and part of his duties involved operating pallet trucks, which are self – propelled, and “driven” by means of operating a handle at the front of the truck, which has controls upon it to regulate the speed of the truck as it moves. When the operating handle is upright, the truck is braked, not under power, and cannot move. The claimant was fully trained upon the operation of this equipment, and had passed the requisite training requirements.

7.7 The claimant was a member of USDAW, which is recognised by the respondents at the site, and the claimant was elected as a union representative in January 2016. He was an enthusiastic representative, and since his appointment membership of the union has increased. He was involved in inductions of new members of staff, and would inform them of the terms and benefits of union membership to encourage them to join. He also , in that role, raised a number of health and safety related concerns.

7.8 In March 2018 the claimant participated in an induction at the Colne site. Hayley Noblet , a People Manager , was also involved in this induction, and she was dissatisfied with the way in which the claimant behaved during it. This caused her to send an email to Nick Gerrard, the USDAW area organiser on 23 March 2018 (pages 191 to 192 of the bundle), in which she expressed her concerns about the claimant’s behaviour in the induction, and requested that he be stepped down as a union representative with immediate effect. In particular she was concerned that the claimant had referred to a claim brought successfully by a union member, which she considered breached his privacy, and she considered that the claimant had been “gloating” about this success.

7.9 Nick Gerrard replied to her in a lengthy email (pages 193 to 196 of the bundle), in which he declined the request that the claimant be removed as a

representative, and suggested that this was part of an agenda by the HR Department to smear him , and have him removed due to his effectiveness as a union representative.

7.10 Hayley Noblet then went on maternity leave, and no further action was taken in relation to the concerns that she had raised.

7.11 In relation to health and safety matters, those which the claimant had raised , or been involved with, can be summarised as follows:

a) November 2017 - a collective grievance raised by members of the union on the pork evening shift, in relation particularly to the line speed which was required of operatives on the shift;

b) July 2018 - a petition was raised in relation to a similar issue on the pork morning shift;

c) July 2018 to November 2018 - the claimant raised an issue in relation to the storage on 10 wooden pallets in the dispatch area of industrial cooling fans that were left there for over three months;

d) December 2018 - concerns raised in relation to the state of the male toilets;

e) December 2018 - concerns raised in relation to the external petfood area;

f) February 2019 - concerns raised in relation to damage to a roller shutter fire door;

7.12 The claimant around this time , in early 2019, generally found the approach of Will Smith , the health and safety manager to such issues , more helpful, and Will Smith invited the claimant to raise any concerns that he had with him directly. Will Smith held site monthly drop-in clinics, at which the claimant or anyone else could raise health and safety issues.

7.13 The claimant also found Mike Rotherham , who had recently become the team manager in dispatch approachable, and more receptive to health and safety concerns. In a meeting on 18 February 2019, to discuss health and safety issues, Tom Jones, the dispatch department manager , expressed some frustration on the part of managers in getting health and safety matters dealt with. Mike Rotherham who was also in this meeting similarly expressed concerns that his hands were sometimes tied in getting things fixed. In this meeting the claimant did ask if he was productive, and if he was “a pain in the arse” . Mike Rotherham did not agree with this specifically, but mentioned the need to communicate more, for more working together, and asked the claimant to come to him if he had any issues (see pages 121 to 122 of the bundle for the relevant parts of the notes of this meeting).

7.14 Further, in February 2019 there was an incident in which a union member was injured when a metal hook upon which a carcass was hanging snapped so that the carcass fell upon the operative. This gave rise to concerns about the state of the hooks at the premises, which were some 30

years old, and which had now broken on some five occasions. This was a major concern , and the claimant raised this with the health and safety officer, Will Smith.

7.15 This issue was potentially a major concern for the respondents , as the cost of replacing all the hooks was significant, in the region of £125,000. Instead of replacing hooks the problem was ultimately to be dealt with by a system of checks upon the integrity and condition of the hooks, which would then be colour-coded to show that this had been carried out. Nick Gerrard complained about this issue in an email to James Jenkins, then the site manager, of 1 March 2019 (pages 218 to 129 of the bundle). James Jenkins is alleged also to have been dismissive of a previous health and safety grievance raised a year earlier, claiming that such matters were a waste of his time.

7.16 On the morning of 6 March 2019 claimant was working as normal in the dispatch area. He was operating a pallet truck, which was fully loaded. The area was very busy that day, with a number of operatives moving stock on trucks in this area. At around 8.30 a.m. that morning the claimant became aware that an engineer, Adam Ashworth , was carrying out some work to a truck on the shop floor in the dispatch area. He was doing so by lying underneath the truck, with his legs protruding out into the area in which the claimant and his colleagues were operating trucks. There was no cordon or barrier in place, and the truck was on blocks.

7.17 The claimant was concerned upon observing this situation, which he considered was dangerous. He first approached Gary MacMahon, a line leader, about this, but he took no action. The claimant therefore approached Vicky Pickles, another line leader , about the situation, and she told the claimant that engineers generally worked under trucks in this manner. The claimant wanted to take a photograph of the engineer lying in this position, and so took out his mobile telephone in order to do so. His intention was to send a photograph to Will Smith, or to text him, as he had invited the claimant to raise any concerns with him directly. The claimant found however that his battery was low, and he did not in fact take a photograph, or use is phone to send any message to Will Smith.

7.18 He did, he accepts, have his mobile phone out in his hand whilst operating his pallet truck, and did so as he passed the engineer lying on the floor. The period of time over which the claimant had his phone in his hand in this manner was approximately 20 seconds. The claimant did not collide with the engineer, or anyone, or anything , else whilst operating his pallet truck in this fashion. He then put his mobile phone away.

7.19 He then raised the matter with Mike Rotherham, who then took steps to move the engineer into the loading bay. Mike Rotherham then asked the claimant to complete a “near miss” form, which he did, and handed the same back to Mike Rotherham. A copy of this form has not been produced by the respondents.

7.20 Vicky Pickles reported to Mike Rotherham that she had been told that the claimant had had his mobile phone out. This had been reported to her by

Rob Wilson, a warehouse operative who was also working in dispatch that morning.

7.21 Mike Rotherham therefore commenced an investigation into what the claimant had done that morning. He interviewed Vicky Pickles at 11. 20 , Rob Wilson at 11. 40 and the claimant at 12.30 that day. The notes of these interviews are at pages 124 to 133 of the bundle. In her interview Vicky Pickles told Mike Rotherham that Rob Wilson had told her about the claimant using his mobile phone on the shop floor, and that when she looked round she saw the claimant with one hand on his truck , and the other moving into his pocket. She had not seen the phone , but she had asked Mike Rotherham if the claimant was allowed to use his phone on the shop floor. In his interview Rob Wilson told Mike Rotherham that he had seen the claimant take his mobile phone out whilst using his truck and flipping the phone cover over. The claimant had spoken to him about the engineer, and Rob Wilson had said to him that whilst he (i.e the claimant) was on about health and safety, he was himself using a phone whilst in control of his MHE (manual handling equipment i.e his pallet truck). Asked if the claimant had carried on using his phone, Rob Wilson said that he just walked past with the phone in his hand towards bay 5.

7.22 In the interview with the claimant that morning, Mike Rotherham explained how he had become aware of the incident, and how he had spoken with Vicky Pickles, and had indeed told her that she should have acted sooner on the claimant's information. She had then gone on to question whether the claimant should have a mobile phone whilst on the floor and using his MHE, and whether he should be taking pictures of someone working.

7.23 The claimant explained how he approached Vicky Pickles about seeing Adam working underneath the truck, and how he had approached Gary about this. He explained that Gary did nothing, and so he spoke to Vicky to ask her what she thought about this. She had said that the engineers always did that, and so the claimant had then approached Mike Rotherham himself about the issue. As a shop steward and health and safety representative, if he saw any unsafe practice he would take appropriate pictures for investigations. His phone was flat, however, and there was then no need to carry the matter forward as Mike Rotherham had acted on it , and had given him a near miss form to complete.

7.24 Mike Rotherham asked him if he was using the phone whilst operating his MHE, and the claimant said that he was unsure where his truck was, but he thought it was at the Bay at the time. Mike Rotherham asked if he had permission for his phone, and the claimant said that he could use the phone when investigating. This was not official at the time but he wanted to take a photograph in case nothing was done about the incident. This would be normal practice as a health and safety and union representative.

7.25 The claimant was told that the matter would be investigated further, and asked if there was anything to add. The claimant told him that he had spoken to Dan , who had updated him on the repairing of trucks and that this would not happen again, as the trucks would be moved to a different area and barriered off.

7.26 The following day Mike Rotherham interviewed Adam Ashworth (pages 134 to 136 of the bundle). He had little to add , had not seen the claimant with his mobile phone in his hand, and was not aware that he was intending to take any photograph.

7.27 The claimant was not suspended at this point, and Mike Rotherham made further investigations by viewing the CCTV footage of the dispatch area covering the relevant time period.

7.28 On 11 March 2019 Mike Rotherham held a further meeting with the claimant, and a notetaker was present (see pages 137 to 141 of the bundle). In this meeting Mike Rotherham asked the claimant if he was authorised to have his mobile phone with him in the warehouse. The claimant said that he was not, but that everybody did it. He was asked if he was using his mobile whilst also using his truck. He said he could not recall. Mike Rotherham said he would review the CCTV footage and would show it to the claimant later. The claimant said that he had used his phone because there were serious health and safety issue that he had informed the line leaders about, and he was then going to take photographs of the issues. One of the line leaders had said that the engineers always did that (i.e. worked underneath MHE equipment on the shop floor), and the other said that they knew about it. Neither had done anything about it , however, and so , after these conversations, he went to take pictures, but did not actually take one. Mike Rotherham had then solved the situation temporarily after he had been informed. A full-time solution had been put in place, and he had then filled in a near miss report to highlight the safety issue.

7.29 Mike Rotherham said in this interview that the claimant was “100% correct” to raise the issue, and asked if he had spoken directly to the engineer. The claimant had not, and they went on to discuss his intention to take a photograph, but confirmed that he had not done so. He said this had been a very serious issue, and he should not need to have reported it to a manager . The line leaders should have reacted more quickly to this health and safety situation.

7.30 Mike Rotherham went on to say that over the past couple of weeks up until this issue he felt that they had been building relationships in the meetings that they had had each week, and that they had a health and safety board. He expressed disappointment with how the claimant had chosen to handle this issue when they had really opened up communication channels. The claimant said that he understood, but he just wanted to get the area safe. Mike Rotherham expressed his concern at the claimant using his mobile phone, and he stated that he could definitely say the majority of colleagues had their mobiles on the shop floor. He had not, however, he agreed, ever seen any colleagues using their phone whilst using MHE.

7.31 Mike Rotherham then viewed the CCTV footage and on 25 March 2019, held a further meeting with the claimant at which the claimant was shown the relevant footage. A note of this meeting is at pages 143 to 145 of the bundle.

7.32 In the meeting Mike Rotherham put to the claimant that the CCTV footage showed that at 08.31 the claimant spoke with Gary, which the claimant agreed. It was then put to him that he took his phone out of his pocket whilst using his pallet truck at 08.32 , which the claimant also agreed. It was then put to him that he was seen talking to Rob Wilson with the phone in his hand, and he agreed this as well. He said that he was just checking why the phone was not working. The claimant was asked if he agreed with everything that was shown on the CCTV footage, and he said that he did. He went on to say that the only reason why his phone came out was because the issue had not been acted on straightaway by the line leaders, one of whom said they knew about it and the other (Vicky Pickles) had said that was the way in which the engineers always did it, and she accepted it as normal practice. The claimant went on to say how he had then seen Mike Rotherham about the incident. He was told that the investigation would be reviewed and he would be contacted with an outcome. He was not suspended at that juncture. Whilst the claimant was (see page 171 of the bundle) on holiday for some of the ensuing period, he was also in work, operating pallet trucks for some of it as well.

7.33 The CCTV footage has not been retained, and was not available to be shown to the Tribunal. Three stills from it , however, were taken and are included in the bundle at pages 147, 148 and 150. The claimant accepted in evidence that he was the person shown in the middle of the first of these images at page 147, where he accepted he can be seen operating his pallet truck with one hand and with his mobile phone in the other. Whilst it is contended by the respondents that the claimant can be seen in the second image on page 148, the claimant did not accept that this was him, although the person in the footage is also wearing a white hardhat, as he indeed is in the first image. In the third image on page 150, this is a view from behind, and it is not possible to tell if the person in question has a mobile phone in their hand.

7.34 These images are timed between 08.32.00 and 08.32.21 (from different cameras), and hence cover just over 20 seconds. The position of the engineer working on the truck is not visible in any of them.

7.35 By letter dated 1 April 2019 the claimant was invited to a disciplinary meeting to be held by James Hutchinson, the Abattoir Manager, who had been appointed the disciplinary manager, on 3 April 2019 at 1:30 p.m.. Enclosed with this letter (pages 152 to 153 of the bundle) were copies of the investigation statements taken by Mike Rotherham from the claimant in the three meetings that he had with him, and the statements that he took from Vicky Pickles, Rob Wilson and Adam Ashworth. Additionally were enclosed a Certificate of Training dated 24 February 2017, a further Certificate of Training dated 23 October 2012, page 31 of a General Safety document, the claimant's site training card, the three CCTV still images (all described as showing the claimant) , and a statement from the security officer who observed the CCTV footage. Additionally the Disciplinary Policy was attached. The Tribunal takes this to be a copy of pages 90 to 96 of the bundle. The Tribunal does not find that any of the documents at pages 71 to 79 of the bundle were included in this material.

7.36 The claimant was informed of his right to be represented at the meeting and warned that the allegations were serious, and that dismissal for gross misconduct was a potential outcome of the disciplinary hearing.

7.37 The disciplinary hearing was duly held on 3 April 2019 by James Hutchinson , supported by Sophie Smith as notetaker. The notes are at pages 154 to 165 of the bundle. The claimant was represented in this meeting by Nick Gerrard. James Hutchinson viewed the CCTV footage before the meeting.

7.38 James Hutchinson opened the meeting after introductions by referring to the fact that a near miss report been raised , which had brought the incident to light, and he invited the claimant to go through the events of that day. The claimant did so, and referred to the CCTV footage, which he was unsure if James Hutchinson had seen . He described the department being in chaos that morning, and how he had seen the engineer underneath the electric truck with his legs out. He explained how he had raised this with Gary MacMahon, who had not been questioned in the investigation. He explained what he expected him to do, and how he had then gone on to speak to Vicky Pickles, who had told him that that was the way that this work was always done. He said he then thought of emailing Will Smith. After there had been no response he saw Mike Rotherham, he had his mobile phone , and he was going to text or email. The statement that he was taking pictures was not right because his phone was flat. His intention was to email or text Will Smith, whom he had spoken to several times in the health and safety clinic. James Hutchinson put to him that the CCTV pictures showed his phone lit up. The claimant queried whether that might not be his phone case, but James Hutchinson said that it was lit up.

7.39 The claimant at this point made reference to two of the still pictures, saying that one looked like a different silhouette. He said that there was another colleague with a mobile phone. James Hutchinson replied that the picture was clearly him with a lit phone, and that there was another camera angle on the CCTV which showed the claimant with a lit phone. The claimant replied “alright” to this. The claimant went on to describe how he went to see Mike Rotherham about this, and that he had admitted this was an issue. His phone was pretty much dead.

7.40 It was put to him that in his first statement had said that he took photos, but the claimant had asked that this be changed , as he did not take photos. There was then further discussion about whether the claimant’s phone was dead, because James Hutchinson pointed out that it was lit up, and the claimant went on to say that his phone was not out for more than a few seconds. Then James Hutchinson put to him that the CCTV footage showed the claimant driving past Adam Ashworth with his phone in his hand, that he was seen then to go past the bay , and put his phone away. The claimant said that he did not take pictures.

7.41 James Hutchinson then asked why it did not occur to the claimant to speak to Adam Ashworth. The claimant explained that he was busy loading and that if he stopped to talk to Adam a line leader would have asked why he stopped. Mike Rotherham had asked him why he did not approach him first,

and the claimant said that he had gone to the line leaders first. When James Hutchinson put to him that he would surely speak to Adam first, the claimant said that he filled in the near miss report , and had reported it to the line leaders.

7.42 James Hutchinson pressed this issue, but the claimant said that it was the line leaders who should have responded, and that he was not Adam Ashworth's boss.

7.43 Neck Gerrard became involved at this stage, and asked why the line leaders did not speak to the engineer. James Hutchinson replied that the issue was that the claimant had his phone out, and continued to use his truck with the phone in his hand. Neck Gerrard asked if the truck was moving, James Hutchinson replied that it was , and the phone was in the claimant's hand whilst he was driving the truck.

7.44 After further discussion as to the practice of the engineers, which had now been changed, James Hutchison went on to say that the claimant was operating MHE whilst using a mobile phone , and was not in full control. He had put Adam in more risk because he was not paying attention. The claimant was involved in health and safety inductions, and in training on the use of trucks. He reiterated how the CCTV showed the claimant was walking with the CME and the phone in his hand, which could be seen from to camera angles which showed that the phone was lit. This was a disregard of health and safety. The claimant reiterated that it was chaos in the department, and James Hutchinson said that this was a serious issue with the claimant moving MHE with his phone in his hand. He went on to refer to the claimant being involved with the union, and that there had been lots of health and safety progress. The claimant agreed that he was positive about health and safety and James Hutchinson agreed that there had been lots of positive things. He went on to say that the issue was operating MHE with a mobile phone in his hand when the claimant should be a "shining star". People came to him for advice, but he had done something people should not be doing. There was a policy where mobile phones were not allowed, and there was none of having a phone for union activities. The claimant went on to say how many people have mobile phones including Vicky Rob and Gary and some of the night shift people. James Hutchison went on to say that it was moving the truck with the mobile phone in his hand that was a serious breach of health and safety. Nick Gerrard said that had a line leader done something about the issue they may not be there. James Hutchinson said that he understood, but the claimant had a phone with him while operating his truck. He had walked past Andrew Ashworth and could have hit him. He had his phone in his hand he was not paying attention. The claimant himself had highlighted what could have happened to him.

7.45 The claimant said he had done a lot more good things than one total error. James Hutchinson agreed, and said this was the disappointing thing. The claimant had done something that he told other people not to do. The claimant reiterated that he was disappointed that his line leaders did not sort it out properly, and they just worried about getting meat out.

7.46 James Hutchinson went on to make reference to the claimant highlighting that other people were working with mobile phones, but said the difference was that they were not operating a truck with a mobile. Again Nick Gerrard went on to point out the good work that the claimant had done and how he had felt that he had been banging his head (presumably against a brick wall). If he had reported a hazard and he would expect the respondent to fix it. He was hopeful this was consistent with health and safety but it seemed like the employer was selective about these issues.

7.47 James Hutchinson then adjourned the meeting for some 30 minutes or so, and upon return pointed out that Nick Gerrard had not seen the CCTV footage. He asked him if he wished to view it. He asked if he was happy to go along with what the claimant had viewed , showing him moving the truck with a mobile but Nick Gerrard said this was fine, and it was okay not to view the CCTV footage.

7.48 James Hutchinson went on to say that he was aware of all the good work that the claimant had done , and that he had highlighted the issue that morning. The issue he had , however, was that he had highlighted what could have happened to Adam , and he could have hit Adam with the truck and injured him. Using the truck with a mobile hand was the same as driving a car and texting. If something went wrong , that will be remembered and the claimant was not fully concentrating. This was gross misconduct and a breach of health and safety , in that the claimant was moving with a full pallet truck and using his mobile phone. He said that there had been another similar situation where the result in the same . The decision was dismissal for gross misconduct . The company could not go on risking health and safety issues. The claimant had 10 days in which to appeal.

7.49 At this point Nick Gerrard raised the issue about the defective hooks. James Hutchinson said that this had nothing to do with the issue, but Nick Gerrard replied that the claimant had been sacked for being a union representative. Nick Gerrard then rather took over the remainder of the meeting, contending that the claimant been sacked because he was a union representative, and had been making a stir. He queried why the claimant had not been suspended, and James Hutchinson replied that the claimant been given the benefit of doubt, as he could not recall if he was using his truck at the time when first asked .

7.50 Nick Gerrard again claimed that James Hutchinson had dismissed the claimant because he was causing issues for the site. James Hutchinson denied that , and agreed that the claimant had done many things. Nick Gerrard asked why a lesser sanction had not been imposed, and James Hutchinson replied that it was gross misconduct, and he had been consistent. He added that the claimant could appeal, to which Nick Gerrard replied that there was no point, the company applied health and safety only when it suited. The claimant then said that he had made “one mistake”, to which James Hutchison replied that it was a breach of health and safety, and it was consistent. Nick Gerrard ended by saying he believed the dismissal was due to the claimant being a trade union representative.

7.51 The claimant's dismissal was confirmed in a letter dated 10 April 2019 (pages 166 to 169 of the bundle) . In that letter James Hutchinson set out his findings that the claimant had been operating MHE equipment whilst using his mobile phone on 6 March 2019. He referred to the CCTV footage, and the claimant walking his truck past the engineer fixing an electric truck on the floor whilst using his mobile phone. He went on to deal with what the claimant had said about his intention to contact Will Smith, and how he had created a major health and safety issue by putting the engineer at risk.

7.52 He dealt with the point raised in the disciplinary hearing that the claimant had not been suspended, which was explained on the basis that the claimant that could not recall where his truck was , and that his mobile phone was flat. Reference is also made to the fact that the union was not informed of the disciplinary meeting, which James Hutchinson said had made no difference as his union representative was present at the meeting.

7.53 Reference was made to the claimant's training about the use of a mobile phone whilst using truck. James Hutchison went on to say that whilst the claimant was not officially authorised to have a mobile phone on the shop floor , he accepted his reasons for doing so in order to report any hazards.

7.54 He went on to say that the correct process would have been to stop using the MHE equipment, use the mobile phone while stationary, and then to travel the truck once the mobile phone been placed back into the claimant's pocket.

7.55 He went on to say how in mitigation he had considered the claimant's service and his heavy involvement in health and safety. The incident on 6 March 2019, however, should not have happened . Someone with his length of service and understanding of health and safety knew the serious consequences of behaving in such a regardless and unsafe manner.

7.56 James Hutchinson goes on in this letter to say that he had considered a lesser sanction, but it had been highlighted that statements taken from the claimant throughout the investigation were not consistent, in that he had initially said that he was unsure where his truck was and that he wanted to take pictures in case nothing was done about the hazard. He said that due to the inconsistency of the statements he believed that the claimant was not showing due care and attention as he could not recall the events of the incident.

7.57 He ended by saying that the claimant's decision to walk with his mobile phone his hand as he was travelling past a hazard with his truck could have resulted in serious injury or fatality. The action would be a complete contradiction by creating a health and safety risk which he said he was trying to highlight. He was dismissed without notice , and this was explained to him. He was advised of his right of appeal

7.58 The claimant did appeal by letter of 11 April 2019 (page 170 of the bundle). In his grounds he said that he wished to appeal with immediate effect. He felt that mitigation was not taken into account where two line leaders failed in a duty of care to himself , to alleviate a potential fatality. Also

he felt the decision was disproportionate to what was really happening in the bigger picture of an engineer being potentially crushed. He added that he believed the decision was based on him being a shop steward and not on what he had reported.

7.59 The appeal was acknowledged , and originally was to have been considered by Tom Jones , the warehouse manage. There was then some discussion between the claimant's union representative and respondent as to who should hear the appeal, and in due course Anthony Bell, site engineering manager at the Bradford site was appointed to hear the appeal. He is a manager a grade above James Hutchinson. He had started his employment with Morrisons in January 2019.

7.60 He received the documentation, which was likely to have been those documents sent to the claimant with the invitation to the original disciplinary meeting, the notes of the disciplinary hearing with James Hutchinson, and his outcome letter to the claimant. Whilst Anthony Bell's statement at paragraph 5 suggests that he received as part of the appeal pack all the documents to be found at pages 41 to 103 of the bundle, the Tribunal does not accept this in respect of pages 71 to 79. These documents are entitled "Vehicle Safety Management Enforcement Policy Woodheads Colne". Pages 71 to 73 are one version of this document, but the last page is not signed. Pages 74 to 79 however are another version, the last page of which is signed by the claimant and dated 24 February 2017.

7.61 In both versions of these documents a range of penalties for accidents and dangerous occurrences whilst operating MHE are set out. On page 72 guidelines are given for management to ensure a constant and fair application of the policy. The suggested penalties are of verbal, first written, or final written warnings. The examples of the accidents or dangerous occurrences referred to range from minor damage only collisions to collisions with a person resulting in major injury. For this latter occurrence the suggested penalty is a final written warning, a three months ban, training and retesting.

7.62 This document contains the following:

"Offences which may have resulted in summary dismissal the Senior Management may result in dismissal, promotion or longer or permanent ban." (*sic)*

7.63 Similarly at page 78 of the bundle , under the heading "Disciplinary Procedure" , there are set out examples as guidelines for management to ensure a constant and fair application of the policy. The suggested sanctions in this part of this document are very similar to those set out above, save that they begin with counselling for minor collisions, but collisions with a person which result in a major injury are still suggested to warrant a final written warning with a three-month ban , retraining and retesting.

7.64 The Tribunal does not accept these documents formed part of the material provided to the claimant in anticipation of the original disciplinary hearing, nor were they in any pack provided to Anthony Bell for the purposes of the appeal. Further, even if they did, neither James Hutchinson not Anthony

Bell made any reference to them in the course of their respective meetings with the claimant and his representative, or in the outcome of the original disciplinary hearing , or of the appeal. No mention of them is made in either of their witness statements. Even if these witnesses had seen, or were familiar with, these documents, the Tribunal is quite satisfied that the claimant and his representative were not provided with them at the time, and accepts entirely that the first time that the claimant or his union representative were aware (or , more accurately, reminded) that these documents existed was upon disclosure in the course of these proceedings.

7.65 The appeal meeting was held on 24 May 2019, when Tammy Johnson was also present as a note taker, and Nick Gerrard again represented the claimant.

7.66 The notes of the appeal meeting are at pages 172 to 187 of the bundle. The nature of the appeal was to review the decision taken by James Hutchinson, and Anthony Bell was not considering the matter afresh.

7.67 In the appeal meeting the claimant initially stated that he felt the dismissal was an attack upon himself and the union , and was disproportionate to the incident. He explained the circumstances of the incident on 6 March 2019 and the failure of the line leaders deal with it. Anthony Bell indicated that he was struggling to find this was mitigation. There was further discussion as to whether the claimant was going to take photographs or send a text that morning , and he explained the pressure that he was under to get goods out. Nick Gerrard also made the observation that there were breaches of health and safety on the part of the line leaders and indeed the engineer, but that management did not appear concerned about their deficiencies. There was a discussion about the claimant's passion for health and safety, and about other issues that he had previously raised. He agreed that he was a "leading light", and led by example. The claimant described himself as a "pain in the ass" on-site, but he did this in the best interests of health and safety. Anthony Bell accepted that he had such a passion.

7.68 Anthony Bell clarified whether the claimant intended to text or email Will Smith, and he said that he was going to text in order to meet him. Anthony Bell questioned why the claimant did not simply stop his truck, and he explained how he was under pressure to get trailers out, and how he had spoken to his line leaders , but they were oblivious.

7.69 Nick Gerrard made reference to the claimant being a nuisance for raising issues, and the attitude of the previous site manager James Jenkins, who had been dismissive of a previous health and safety grievance. He referred to Jim Hutchinson's analogy of using a mobile phone whilst driving a car, and pointed out that would result in points and not a ban . He referred to the corrective purpose of disciplinary procedures, and to the claimant having a "moment of madness" resulting from lots of frustrations from getting ignored . He had got his phone out when he should not have done, but there was no accident and no one was injured . The punishment did not fit the crime.

7.70 There was further discussion about other health safety issues that had been raised in relation to the male toilets, and how Hayley Noblett in March 2018 had an agenda to de-recognise the claimant. Again it was put to the claimant that he could have stopped his truck, and he again made reference to the chaotic conditions at the time. He clarified that he had not taken any photograph or indeed sent any text. Nick Gerrard asked Anthony Bell if he had seen the CCTV footage he replied that he had seen the stills. In further discussion as to how long the claimant's phone was out in his hand, the claimant said it was seconds , some 5 to 10 seconds.

7.71 In further discussions the claimant and Nick Gerrard repeated that the site was not consistent in its approach to health and safety, and cited other examples health and safety matters such as the cooling fans and other bigger issues.

7.72 Anthony Bell questioned the claimant as to whether he had taken his eyes off the direction of travel and that could have been life-threatening, to which the claimant replied that he did not take his eye off the ball , he was not 10 seconds with his eye off the ball. Nick Gerrard recognised that there was a risk, but no more than that, and the line leaders were not acting at all. He felt that the decision had come from the top. Subsequently , Nick Gerrard did say that it was misconduct , but that it was not proportionate to dismiss (page 186 of the bundle). The dismissal was clearly based on the claimant being a union rep, who was not liked because he made life harder for some. He provided at that point , the Tribunal accepts, Anthony Bell with a copy of Hayley Noblet's email, referred to above , in which she sought to have the claimant stepped down from his role as a union representative.

7.73 Anthony Bell adjourned the meeting at that point for some 54 minutes. Upon his return he announced his decision, which was that he had considered the mitigation , had read the appeal pack, and understood the claimant's passion for health and safety. He could not however overlook the seriousness of what the claimant had done, and he upheld the decision to dismiss. He said that recommendations would be made as result of investigations, and that a copy of the risk assessment conducted in relation to how engineers repaired trucks be sent with the outcome letter.

7.74 The outcome of the appeal was sent to the claimant by letter dated 29 May 2019 (pages 188 to 189 of the bundle), but no copy of any risk assessment accompanied this document. In it Anthony Bell referred to the claimant's two grounds of appeal, the first based on the fact he was the site shop steward, and had been challenging of health and safety issues, and the second that his dismissal was a disproportionate outcome from the incident.

7.75 In his reasoning Anthony Bell stated that he understood that the claimant was disappointed and frustrated with the perceived lack of urgency around making the dispatch area safe for an engineer to repair an electric truck, and how his decision to contact Will Smith and/or to take photographs of the area meant that he used his mobile phone. He went on to refer to this usage of a phone was discretionary, but that health and safety was the priority and the claimant did not consider this. He went on to say that the claimant's use of his mobile phone whilst operating MHE equipment even for a minimal

amount of time was a breach of health and safety. The claimant created a 'huge risk" to the safety of his colleagues in the area. He went on to say that he did not find any evidence that supported that his role as a union representative in any way influenced the decision, and he simply could not say how the information the claimant provided about his service and his challenging of health and safety procedures had any influence upon the decision either. He accordingly dismissed the appeal upheld the decision to dismiss.

7.76 During adjournments in the appeal Anthony Bell made some brief enquiries as to whether any other persons had or had not been dismissed in similar circumstances , and was informed by HR that there were no similar cases.

7.77 Neither James Hutchinson nor Anthony Bell conducted any further enquiries of their own, and no action in relation to the incident on 6 March 2019 was taken in relation to any line leader, or Adam Ashworth, although action was taken to ensure that repairs to trucks in future were not carried out in the dispatch area in the manner that occurred on 6 March 2019.

8. Those, then are the relevant facts. Ultimately not much turns in this case upon the credibility of the witnesses, in that the Tribunal is not being invited to find that any particular witness is not telling the truth in his evidence to the Tribunal. That said, whilst credibility may not be in issue, the Tribunal has to consider the reliability of the evidence has been given. On balance the Tribunal finds that the evidence of the claimant and Nick Gerrard is more reliable than that given by James Hutchinson, and in particular, Anthony Bell. The documents in the bundle provide far greater support for the claimant's evidence than they do for the respondent's.

The submissions.

9. Both counsel made oral submissions. For the claimant Ms Johnson highlighted the deficiencies in the process , as she had put them to James Hutchinson , in the investigation carried out by Mike Rotherham, which he as the dismissing officer had not felt the need to investigate further. In particular she highlighted the absence of any investigation into the failings of Vicky Pickles, and Gary MacMahon, or the possible use by Rob Wilson of a mobile phone. She also highlighted the lack of any investigation into the potential serious breach of health and safety on the part of Andrew Ashworth, whose actions had created the dangerous situation in the first place.

10. She pointed out the claimant's trade union activities, his success in this role and the attempt in March 2018 by Hayley Noblet, to have the claimant stepped down as a trade union representative. This she suggested was clear evidence of hostility to the claimant in this role which was likely to have informed the decision to dismiss him in the circumstances.

11. Additionally she pointed out the claimant's extensive health and safety concerns raised with his employers, some of which were very serious and potentially very costly to them. There was evidence of how the site manager James Jenkins had reacted when health and safety issues were raised as grievances in 2018. She invited the tribunal to consider the timing of the claimant's dismissal, which occurred

very shortly after he had instigated a grievance about very serious issue of the defective hooks, which was potentially very costly for the employers. James Hutchinson was aware of these issues, even if not all them directly impacted upon his departments. She highlighted the failings of the line leaders, and the serious risk that Andrew Ashworth himself created on the day in question. There had been no investigation into these aspects, nor into Rob Wilson. James Hutchinson had not adequately taken into account all the mitigating factors that had been accepted by Mike Rotherham, and the lack of suspension of the claimant.

12. Her primary submission therefore was the dismissal was for one, or possibly both, of the automatically unfair reasons.

13. Alternatively, she submitted that as an "ordinary" unfair dismissal, the dismissal was unfair. She made reference to the principles in ***Burchell*** , and contended firstly that there had not been a reasonable investigation, given the concessions made by James Hutchinson, in hindsight, that he could have made more enquiries of the witnesses spoken to by Mike Rotherham, and some who were not. Additionally, regardless of any deficiencies in the investigation, she submitted that the decision to dismiss for what , on the evidence, could clearly not have been more than 20 seconds of the claimant having his mobile phone out operating a pallet truck, fell outside the band reasonable responses. She relied in particular upon the documents pages 71 to 79 of the bundle which she submitted clearly showed that under the respondent's own procedures a final written warning would be the most serious sanction to be imposed even if the claimant had actually collided with a person and caused major injury, which of course had not happened.

14. She submitted too that the appeal did not remedy the position. Anthony Bell did not investigate any of the matters that James Hutchinson had failed to investigate, and did not investigate adequately or at all the main ground of appeal that the claimant's dismissal had been because of his trade union and health and safety activities.

15. Further if the Tribunal did find that the claimant's dismissal was unfair, she submitted that no reduction on the grounds of ***Polkey*** or for contributory fault should be made.

16. The respondent, through Ms Scarborough, contended firstly that the correct employer was the second respondent. The claimant was employed before James Hutchinson was employed by the first respondent , by the second respondent, and this remained the contractual position.

17. The claimant's dismissal was in no way influenced by his trade union activities, or his championing of health and safety issues, but was because of a serious violation of health and safety by the claimant in operating a pallet truck whilst using his mobile phone in close proximity to Andrew Ashworth.

18. In relation to the email from Hayley Noblet of March 2018, this had not been acted upon, and no attempt was made by anyone else in HR or in the management of the respondents to follow this up and to seek the removal of the claimant as a trade union representative. There was no other evidence of any anti-union hostility towards him, and no basis for saying that his trade union activities played any part in the decision to dismiss him.

19. Similarly, in relation to health and safety matters, the evidence was that the situation was improving, with the claimant establishing a better relationship with Mike Rotherham, and Will Smith opening up and encouraging communication about health and safety issues.

20. In relation to "ordinary" unfair dismissal, she submitted that the claimant had committed a serious breach of health and safety, in using his mobile telephone, even briefly, whilst operating his pallet truck. He was aware of the dangerous situation created by Andrew Ashworth, yet instead of stopping, and speaking to him, using his phone at that stage, the claimant had continued to operate his pallet truck with his mobile in his hand as he passed the very hazard that he had observed. He was not looking where he was going.

21. The other matters that the claimant had raised in his disciplinary and his appeal were not relevant, as there was no other employee in the circumstances was guilty of the same form of misconduct. The decision to dismiss in the circumstances is one that was open to respondent. A fair procedure was followed, at both the disciplinary and appeal stages, and the dismissal was fair. The claimant's representative was invited to view the CCTV footage, but declined to do so. The persons present at the time were interviewed, and that was sufficient. An employer is not expected to conduct a forensic analysis of the evidence, especially where there is CCTV footage, and the claimant's admissions. All other issues were peripheral, and fell away.

22. There was no unfairness in line leaders and Andrew Ashworth not being disciplined. The issue of how trucks were to be repaired in future was dealt with. Similarly, Rob Wilson had not done the same thing as the claimant, he had not operated MHE whilst using his phone.

23. The claimant was given an appeal, and the reasons for his dismissal, and the upholding of it on appeal, were provided to him. Those reasons were not confined to what was in the outcome letters, but were all the matters discussed in the meetings.

24. Whilst Anthony Bell was criticised for being fairly new to the respondent, that cut both ways, as that would make it less likely that he was aware of, or had any involvement in, the claimant's activities as a trade union representative or in relation to health and safety, and he was more likely to be independent, with a fresh pair of eyes. The seriousness of what the claimant had done could not be overlooked. Mitigation was considered, and taken into account, but it was insufficient. The dismissal was within the band of reasonable responses.

25. Ms Scarborough pragmatically recognised that the vehicle safety management enforcement policy documents at pages 71 to 79 of the bundle did present a potential difficulty for the respondent. She pointed out, however, that these documents clearly state that they are guidelines only, and that in each individual case the respondents would be entitled to take all the circumstances into account. Even if the respondents were "bound" as she put it by these documents, they would be entitled nonetheless to dismiss as the Policy only suggested a band of outcomes, and did not prescribe what sanction had to be imposed in every case.

26. The claimant was fully trained, and had a heightened awareness of health and safety issues. He could not say he did not know that what he did was a serious breach.

27. Finally, and in the alternative, she invited the Tribunal if the claim succeeded to make a reduction either on the basis of ***Polkey*** or , in respect of both the basic and the compensatory awards, contribution on the part of the claimant in his admitted breach of health and safety on this occasion. She contended for a reduction in the order of 100%, or at least 75 to 90 % on this basis. Any different procedure would have been unlikely to make any difference, or to have delayed the dismissal, so any such reduction should also be of 100%.

Discussion and findings.

28. The first task of the Tribunal is to determine which is the correct respondent. This in essence is a matter of contract, with which respondent did the claimant have a contract of employment? It is the Tribunal's conclusion on the balance of probabilities that the claimant's contract of employment was at all material times with the second respondent. Whilst there was discussion about the possibility of disclosure of any contract between the first and the second respondent, none was produced. On reflection, given that the second respondent is a wholly owned subsidiary of the first, the absence of such a contract is perhaps not surprising. The only written statement of particulars of employment supports a finding that the claimant was originally employed by the second respondent. Whilst much of the documentation bears the logo of the first respondent, its policies and procedures have been utilised, and indeed the claimant's line management was by employees of the first respondent, all that is in the view the Tribunal insufficient to effect a variation of the claimant's original contract of employment which was made with, and remained with, the second respondent.

29. The next task is to identify the reason for the claimant's dismissal. In approaching this task the Tribunal is not merely considering whether the respondent has established a potentially fair reason for dismissal under section 98 of the Employment Rights Act 1996, but is looking to see whether either of the two automatically unfair reasons dismissal for which the claimant contends have been made out.

30. Whilst neither counsel made reference to it, the Tribunal has reminded itself of the burden of proof in automatically unfair dismissal claims. It is clear from ***Maund v Penwith District Council [1984] IRLR 24*** that , except in cases where a claimant lacks qualifying service, the burden of establishing the reason for dismissal will rest upon the respondent.

31. In this case there is no doubt that the claimant was an effective trade union representative, and something of a campaigner on health and safety issues. Whilst the claimant refers to the attempts made in March 2018 by Hayley Noblet to have him removed as a trade union representative, that is the only evidence upon which the claimant can begin to rely in support of his contention that his dismissal was by reason of any trade union activity. That was, of course a year before his dismissal, and was an attempt made by a member of the HR team who then went on maternity leave and which was not followed up by the respondent.

32. Further it is clear from the terms of the email in question that the concerns raised were in respect of the manner in which the claimant was carrying out his role, rather than the fact that he was doing so. Hayley Noblet may have had a valid point that it would be inappropriate for a trade union representative to make reference to individual cases, thereby potentially breaching the data protection rights of an individual concerned. She may on the other hand, have had less of a point, in relation to his alleged "gloating" about a successful claim against the employer. The claimant may have been somewhat over-enthusiastic in his recruitment campaign, and this email may reflect genuine, and possibly reasonable, concerns.

33. It is , however , the Tribunal considers, a somewhat slender basis upon which to base a contention that the claimant's dismissal a year later was because of his participation in trade union activities.

34. In relation to health and safety related reasons, again there is little doubt but that the claimant was involved in various campaigns to improve health and safety. Some were in relation to very serious issues, such as the defective hooks, others, such as the condition of the male toilets, rather less so. Whilst the claimant described himself in a meeting in February 2019 as a "pain in the arse", that was his own terminology, and was not adopted or acknowledged by management of the respondent.

35. Further all the evidence is to the effect that by early 2019 health and safety matters were being addressed more readily and effectively than they had been previously. The claimant considered that Mike Rotherham was approachable, and that Will Smith had made attempts at better communication, indeed encouraging the claimant to bring his health and safety concerns directly to him.

36. There is thus no evidence that the respondent was seeking to deny or minimise the importance of health and safety matters that the claimant was raising, and no evidence that it considered that he was raising baseless , or mischievous, issues of health and safety. Clearly, a serious issue in relation to the hooks arose in February 2019. This was potentially costly for the respondent, and was serious in that there had already been one incident where an employee was injured, and another where it was only a matter of good fortune that no injury occurred. The claimant suggests that his dismissal shortly after these matters were raised is more than coincidental.

37. The respondent's evidence from both James Hutchinson, and to a lesser extent Anthony Bell, was that these issues played no part in the claimant's dismissal. James Hutchinson in particular , whilst aware of issues that the claimant had raised , was not directly involved in all of them, and the Tribunal accepts his evidence that they played no part in the decision that he took. Whilst the claimant, and particularly Nick Gerrard may have their suspicions that there was more senior management influence at work, there is no evidence of this. Considering in particular this most recent and serious safety issue was that of the hooks, it is to be noted that this is not something that the claimant alone uncovered, and brought to the attention of his employer. This was an issue which was, for want of a better word, notorious, and would have generated , by reason of the incidents that had already occurred, reports, entries in accident books, near miss reports and doubtless other paperwork which would have brought them to the attention of the respondent. In other words the

claimant was not the sole cause of the respondent having to face this serious health and safety issue, he merely was one of the messengers about it.

38. For all those reasons the Tribunal does not find that either his trade union activities, or his raising of health and safety concerns (or any other action on his part falling under section 100 of the Employment Rights Act 1996) was the reason, or a principal reason , for the dismissal of the claimant, and these claims are accordingly dismissed.

39. Turning to "ordinary" unfair dismissal, the first issue for the Tribunal to determine for these purposes again is the reason for the dismissal. It is for the respondent to establish a potentially fair reason, and the reason relied upon in this case is that of conduct. The Tribunal finds that the respondent did indeed dismiss the claimant on the grounds of his conduct, and so the Tribunal must now consider whether the dismissal was fair in all of the circumstances. In doing so the Tribunal reminds itself that is not to substitute its view for that of the employer, but must consider whether the decision to dismiss , both procedurally and substantively, fell within the band of reasonable responses.

40. Having determined that the reason for the dismissal was the claimant's conduct, the Tribunal has to consider what the respondent reasonably believed that conduct to have been. It is clear on all the evidence the respondent believed the claimant had on 6 March 2019 operated his pallet truck whilst having in his hand his mobile phone. The respondent also found , and could only reasonably have found, that the claimant did so for approximately some 20 seconds.

41. It was clarified in the course of the disciplinary process that mere possession of a mobile phone in the circumstances on the shop floor would not necessarily amount to misconduct particularly given the claimant's role as a trade union representative with responsibility for health and safety. He was not, however dismissed, for having a mobile phone , he was dismissed for using it whilst operating a pallet truck with a full load in a very busy dispatch area.

42. That , the Tribunal concludes, the respondent reasonably believed, after a reasonable investigation (because it was admitted, and was clear from the CCTV footage) , was misconduct on the part of the claimant. It was in fact conceded to be by the claimant himself, referred to making an "error", or "one mistake", and by Nick Gerrard his trade union representative. That however does not determine whether the respondent acted fairly in treating that conduct as sufficient reason for dismissal, particularly summary dismissal.

43. In order to consider that issue, all the circumstances must be taken into account. The circumstances were, as the respondent knew from its investigations, and which were not doubted in the findings of James Hutchinson, and on appeal of Anthony Bell, that the claimant had raised with two line leaders the dangerous practice being adopted by the engineer Andrew Ashworth of repairing a pallet truck on the dispatch shop floor, with the truck on blocks, the area not cordoned off, and the engineer's legs protruding into an area where heavy pallet trucks were in constant use.

44. That was situation the claimant sought to bring to the attention of the appropriate managers, but which was not acted upon. He therefore, as encouraged

to do by Will Smith, sought either to contact him using his mobile phone, or to take photographs which he could then show him. In order to do so he took out his mobile telephone, but seeing that he had low battery, he neither took any photograph nor did he text or telephone Will Smith. During this period which lasted no more than 20 seconds, the claimant did operate his pallet truck with his free hand. He passed Andrew Ashworth, but was aware of his presence. He did not collide with Andrew Ashworth or anything or anybody else.

45. The question therefore is whether to dismiss in the circumstances fell within the band of reasonable responses. The matters advanced by the claimant, and not disputed by the respondent, as mitigation were not found to be sufficient by either James Hutchinson , nor, particularly on appeal , by Anthony Bell. They both took the view that the claimant's own breach of health and safety was so serious on this occasion that dismissal was the only sanction.

46. That at first blush may appear to be a decision open to the respondent in the circumstances, albeit a slightly harsh one. There are however two very important factors which in the Tribunal's view take this decision outside the range of reasonable responses. The first is the point made by the claimant and Nick Gerrard in both the disciplinary hearing and on appeal, that whilst the respondent has acted in the circumstances swiftly and decisively in relation to a breach of health and safety on the part of the claimant, it has shown no interest in pursuing any other persons involved in this incident whose own breaches of health and safety may be as serious, or even more so, as that committed by the claimant. That is not a comparability point, and the Tribunal does not approach the fairness of the dismissal from the point of view of comparing claimant's treatment with that of , say, Rob Wilson, who was alleged by the claimant to be in possession of a mobile phone when he should not have been. The claimant did suggest in the hearing that Rob Wilson had actually been using telephone, but he had not said this in the course of any investigation disciplinary meeting. Similarly the Tribunal is not overly concerned with whether any other persons have or have not been dismissed in similar circumstances in the past. Neither the claimant nor his union representative was able to identify any person whose treatment in the same circumstances was more lenient than the claimant's.

47. Rather, the relevance of this issue is to the extent to which the respondent can be said to be acting reasonably in applying very strict standards to the claimant in relation to breaches of health and safety, when the same standards do not appear to have been applied to others, possibly in roles senior to the claimant, involved in the same incident.

48. That is one factor, but the other and rather more weighty factor is the respondent's Vehicle Safety Management Enforcement Policy. This (which is to be found at pages 71 to 79 of the bundle) is a set of documents which the Tribunal accepts was not before James Hutchinson or Anthony Bell. The evidence of the former was that he was familiar with it, and that he considered the range of sanctions referred to in it. The Tribunal does not accept that evidence, not least of all because there is no reference whatsoever to this process in any of the documentation in the case. Further, this documentation was clearly not provided to the claimant and his representative, because if it had been, as Nick Gerrard said in evidence, much would have been made of it in the disciplinary meeting, and the appeal.

49. Whilst Ms Scarborough has sought to argue that the status of these procedures as "guidelines" means that the respondent was entitled to consider this case on its own merits, and to reach a decision to dismiss, the problem the respondent is that it has, as recently as 2017 when the claimant signed for the second version of this policy, laid out express levels of sanction for precisely the same sort of misconduct for which the claimant was dismissed. Clearly, rather like using a mobile phone when driving, as observed by James Hutchinson, use of a mobile phone whilst operating a self-propelled pallet truck is potentially dangerous. It is potentially dangerous because of the risk of inattention, which could then lead to an accident. It is thus conduct which potentially could lead to an accident and/or injury.

50. The sanctions provided for under the Policy in question , however, deal with situations where there is not a potential risk of collision and/or injury, but where there the risk actually materialises. Even in these circumstances, were the claimant to have collided with a person and caused major injury, the guidelines under this policy provide for no more than a final written warning, a ban, and retraining and re-testing. That may be, on reflection, unduly lenient, but it was the applicable policy in force at the time. The respondent's witnesses have been unable to explain (because they did not have these policies in mind when making their decisions) why they deviated from the sanctions in this Policy. No reasonable employer in these circumstances ,the Tribunal considers, could impose a more serious sanction for conduct which only gave rise to a potential risk of collision and injury than it would impose for conduct which actually caused either of those eventualities. On that basis, reinforced also by the lack of any apparent concern to take action about anyone else's breaches of health and safety in the circumstances, which the claimant himself brought the attention of his employers, the Tribunal finds the decision to dismiss was outwith the range of reasonable responses and was unfair.

51. Whilst the Tribunal has not found that the claimant's dismissal was by reason of his having raised health and safety concerns, the Tribunal does consider that there may be some element of the claimant being "hoist by his own petard"", and treated rather more harshly than his conduct deserved because of his health and safety awareness. The claimant clearly made, as he accepted, an error and a mistake, but it was a very short lived one which had no actual consequences. He should have known better, but his error was very short lived, and had no consequences.

52. The Tribunal now turns finally to whether any reduction in compensation should be made on the basis either of ***Polkey*** , or by reason of contribution on the part of the claimant. In relation to the former, the Tribunal has found the claimant's dismissal was unfair not merely on procedural grounds, but was substantively unfair. Procedurally , there was little wrong with the dismissal, and the respondent's failure to investigate or take any action in relation to health and safety breaches on the part of any of the persons involved in this incident goes further than a mere procedural failing.

53. In terms of contribution, the respondent invites the Tribunal to make reductions in both the basic award and the compensatory award and there is authority to the effect that a Tribunal will rarely make different reductions to those two awards. The difference between a reduction in respect of the basic award under section 122(2) of the Employment Rights Act 1996, and a reduction in the

compensatory award under section 123(6) of the Act , is that for the latter the contributory fault on the part of the dismissed employee has to contribute to the dismissal, but for the purposes of reduction in the basic award, there need not be any such causal connection.

54. The starting point has to be a finding of fact as to any conduct which may justify any such a reduction. The Tribunal has found as a fact, as conceded by the claimant , that he did operate a pallet truck with a mobile phone in his other hand for a period of approximately 20 seconds on 6 March 2019. That may amount to conduct of such a nature as to entitle the Tribunal to consider making the reductions contended for, but in considering whether to do so the Tribunal does take into account the respondent's own Management Enforcement Policy under which this would not have amounted to conduct for which the claimant would have been dismissed . At most , he would have received a final written warning , had he actually collided with any person and caused them injury, but that did not, of course, occur.

55. In these circumstances, the Tribunal does not consider that the conduct it has found , which was fleeting, and came about for the mitigating reasons that are well rehearsed above, was of such a nature as to entitle the Tribunal to consider making any such reductions, and it proposes to make none. In the alternative, even if it was of such a nature the Tribunal would not , considering all the circumstances consider it just and equitable to make any such reduction to either the basic or the compensatory awards.

Remedy.

56. The claimant is entitled to a remedy. A schedule of loss has been served and the claimant was able to mitigate his losses within what appears to have been a reasonable period of time. There was a question during the evidence about the claim made for loss of a discount card, which the claimant has not quantified. In the circumstances , given that both parties are represented , the Tribunal is hopeful they will be able to resolve the issue of remedy without a further hearing. The Tribunal will afford them time in which to do so, and in the event that they cannot resolve remedy they are to seek a hearing to determine remedy in accordance with the Tribunal's order set out above.

Employment Judge Holmes

Dated : 17 January 2020

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

21 January 2020

FOR THE TRIBUNAL OFFICE

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