EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100049/2019

Held in Glasgow on 7, 8 and 9 October 2019

Employment Judge S MacLean

Mr T Maguire	**Claimant** **Represented by:** **Ms L Neil,** **Solicitor**
CS Wind UK Limited	**Respondent** **Represented by:** **Ms K Graydon,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the application is dismissed.

REASONS

Introduction

1. The claimant sent a claim form to the Tribunal's office on 7 January 2019 complaining of unfair dismissal. In the response, the respondent admitted that the claimant was dismissed but said that the reason was potentially fair: conduct and in all the circumstances, the dismissal was far.

2. After an application for further specification of the basis for stating the claimant's dismissal was unfair, on 2 April 2019 the claimant, who was by then represented, made an application to amend the claim form: (1) to provide further detail ; (2) make an additional claim that he was dismissed because he made a number of disclosures to the respondent; and (3) in any event, his dismissal was not proportionate to his actions and did not fall within the band

of reasonable responses to his actions on 25 and 26 September 2018. Also the claimant felt that the dismissal was procedurally unfair as an inadequate investigation was conducted and it was unreasonable for the respondent to dismiss him under these circumstances.

3. Following a preliminary hearing on 7 May 2019 before Employment Judge Rory McPherson, the following judgment was issued:

"The judgment of the Employment Tribunal is that:

1. The claimant's ET1 is amended by addition of the claimant's document headed "PAPER APART TO ET1" circulated under cover of the claimant's agents email of 2 April 2019; and

2. The claimant's email of 15 April 2019 is not accepted as Further and Better Particulars amending ET1 as now amended by the claimant's document headed "PAPER APART TO ET1".

4. The amended claim introduced new allegations about a discussion on 25 September 2018 and new allegations about discussion relating to an incident on 26 September 2018. A new claim of automatic unfair dismissal because of making a protected disclosure was introduced.

5. The claimant contends that the principal reason for his dismissal was due to the fact that he raised with his manager verbally and in writing concerns which were protected disclosures under section 43B(1)(d) of the Employment Rights Act 1996 (the ERA): that he disclosed information which in his reasonable belief was made in the public interest and tends to show that the health or safety of any individual has been endangered, is being endangered or is likely to be endangered.

6. Although dismissal was admitted, the parties agreed before the hearing that the claimant would give his evidence first. Derek McIlroy, HR manager, SK Yoon, PSP function leader, and YC Kim, managing director, gave evidence for the respondent. The parties prepared a joint set of productions. Additional documents were produced by the claimant on the morning on the hearing.

The Issues

7. The issues to be determined by the Tribunal are as follows:

a. Did the claimant make a protected disclosure?

i. Did the claimant disclose "information" containing facts tending to show that the health or safety of any individual has been endangered, is being endangered or is likely to be endangered.

ii. Did the claimant genuinely believe that information disclosed the failure or likely failure to endanger the health or safety of an individual.

iii. Was that belief reasonable?

iv. Was the belief made in the public interest?

b. If so, was the making of the protected disclosure the principal reason for the claimant's dismissal?

c. If not, what was the reason for the claimant's dismissal?

d. Was it a potentially fair reason?

e. Did the respondent have a genuine belief in the alleged misconduct?

f. Did the respondent have reasonable grounds for the belief in the alleged misconduct?

g. At the time the respondent formed that belief, had the respondent carried out as much investigation into the matter as was reasonable in the circumstances?

h. Was dismissal a fair sanction applying the band of reasonable responses test?

i. What remedy, if any, should be awarded to the claimant?

The Relevant Law

8. Section 103A of the ERA states that an employee will be regarded as unfairly dismissed if the reason (or if more than one) or the principal reason of the dismissal is that the employee made a protected disclosure.

9. For a disclosure to be protected under the ERA, it must be a disclosure of information; it must be a qualifying disclosure; and made in accordance with one of the six specified methods of disclosure.

10. The respondent must show that the reason for dismissal in that it was for one for the potentially fair reasons set out in section 98(2) of the ERA.

11. *British Home Stores Limited v Burchell* [1978] ICR 303 provides that in cases of alleged misconduct, employers must show: (1) he believed the employee was guilty of misconduct; (2) he had in his mind reasonable grounds to sustain that belief; and (3) at the stage he formed the belief on those grounds, he carried out as much investigation as was reasonable in the circumstances of the case."

12. Section 98(4) of the ERA provides that whether the dismissal was fair or unfair, the Tribunal should have regard to the reasons shown by the employer, and the answer to that question depends upon whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably in treating the reason as sufficient reason for dismissing the employee; and that this should be determined in accordance with the equity and substantial merits of the case.

13. The Tribunal was referred to the following cases: *British Home Limited Stores v Burchell* (above); *Polkey v AED Dayton Services Limited* [1988 ICR 142]; *Iceland Frozen Foods Limited v Jones* [1982] IRLR 439 EAT; *Fuller v Lloyds Bank* [1999] IRLR 336; *Panayiotou v The Police and Crime Commissioner for Hampshire* [2014] UKEAT/0436/13.

Findings in fact

14. The Tribunal made the following findings in fact.

15. The respondent is a manufacturing business providing “ready to install” tower solutions for the onshore and offshore wind energy market, including repair and modification services.

16. The respondent employs approximately 100 employees at its site in Campbeltown. The respondent employed the claimant from January 2002 to 2 November 2008 as a transport operative, which involved operating a mobile crane. A daily task involved moving wind towers sections off the rotators.

17. YC Kim is the managing director to whom five function leaders report including, Sung-Il Park, production function leader, Hannah Fawcett, finance and admin function leader, and SK Yoon, PSP function leader. Derek McIlroy is the HR manager and until April 2019 Stuart McTaggart was the health and safety advisor.

18. The respondent takes health and safety seriously. An external company carries out health and safety checks and the respondent is monitored. The respondent employs a full time health and safety advisor who carries out risk assessments for all procedures.

19. On several occasion since October 2016 the claimant indicated to management that he did not consider that the respondent had the correct equipment to move a wind tower section with paint wheels attached off the rotators safely. Employees were not allowed underneath the tower during this process.

20. On 25 September 2018, the claimant and his shift partner of 14 years, Campbell McBrayne, were asked to move a wind tower section with paint wheels attached off the rotators. The claimant initially refused.

21. The claimant was invited to speak to Mr Park. Mr McIlroy and Mr McTaggart were also present. Mr Park asked the claimant what was the problem. There had been no change to the process or method for around two years. The claimant said that what he was being asked to do was unsafe and suggested that the paint wheels be removed. Mr Park said that the claimant would not

be held responsible any damage to the tower section. The claimant indicated that it did not work that way. The claimant completed the task.

22. On 26 September 2018, Marc Cameron, WT Supervisor asked the claimant and Mr McBrayne to move a section of the towers off the rotators. The claimant considered that the manoeuvre could not be carried out safely as the available attachment did not fit securely behind the flange and the paint wheels were attached. He asked for the paint wheels to be removed; there was no one available to undertake this task. The claimant refused to carry out the instruction.

23. On 27 September 2018 at 09:11, Mr Park sent an email to Mr McIlroy and Mr McTaggart which was copied to others stating:

> "Tommy refused work last night again. Joey asked to unload but Tommy said "no".
>
> Please, please, please support us to resolve this issue ASAP. Production needed the turning roller. And the top section was not unloaded and it delayed WT production (it is still on the turning rollers).
>
> I do not think we can just let him do like this anymore.
>
> Please advise what we can do with this employee."

24. Around 15:00 on 27 September 2018 Darren Freeman, the claimant's supervisor asked the claimant to write a statement of what had happened on 26 September 2018. The claimant indicated that he would do that when he had finished unloading two flange lorries. The claimant felt distressed and anxious and told Mr Freeman that he was leaving.

25. Mr Freeman sent an email to Mr McIlroy at 16.14 stating that he had asked the claimant to provide a statement and the claimant said that he was on his way home as he was stressed.

26. The claimant was absent on sick leave. On 29 September 2018, he received a letter from Hannah Fawcett dated 28 September 2018 advising as follows:

"On Tuesday 25 September 2018, you initially failed to carry out a work instruction, namely lifting and moving of a section, as you believed it was not safe. Following discussion and agreement, you agreed to undertake the task.

On Wednesday 26 September 2018, you again failed to carry out a work instruction namely moving a section off rotators. This work was later carried out without incident by others. I note that you were asked to provide a statement regarding this incident by your supervisor when you came on shift on 27 September but refused to do so and subsequently left the site.

Your behaviour is contrary to CS Wind Employee Rules and the decision has been taken to issue you with a final written warning for the following reasons:

- Your failure to conduct yourself in a manner consistent with the proper and professional performance of your duties and maintenance of the working relationship;
- Refusal to comply with proper instruction namely the moving of the section on Wednesday 26 September 2018.

In addition, the decision has been taken to issue you with a written warning for the following reason:

- Refusal to comply with proper instruction namely the provision of a statement in respect of the incident on Wednesday 26 September 2018.

These warnings will remain on your file for a period of 12 months and will expire on 26 September 2019. If you commit any disciplinary offence during the period of these warnings, further disciplinary action will be taken against you. Depending on the nature of the disciplinary offence, a possible outcome could be that you receive a further written warning or be dismissed depending upon the circumstances.

If you wish to appeal this decision, you should set out your grounds of appeal in writing and send them to Derek McIlroy, HR Manager, within 5 working

days of the date of this letter who will then arrange for your appeal to take place."

27. The claimant wrote to Mr McIlroy on 4 October 2019 asking for both sanctions to be overturned. In the letter of appeal, the claimant stated:

> "On Wednesday 26th September 2018, I and my work partner, Campbell McBrayne, were asked to move a section off the rotators. After fully assessing the situation, we advised that this manoeuvre could not be carried out as safely as we did not have the necessary attachment. The attachment which was available did not fit securely behind the flange and the paint wheels are attached. As an alternative, we offered to either lift the top section straight up to allow the rotators to move back and then safely remove the paint wheels or to lift the section straight up, remove the rotator and sit at the section on wood straddles. We were then advised by one worker from the surface treatment department that Mr Boyd said to leave it until the morning. This manoeuvre was completely different from the one which was discussed on Tuesday 25 September.
>
> I did not see myself as refusing to carry out instruction but rather I was protecting CS Wind UK's reputation and good health and safety record by using my extensive 17 years' experience and knowledge of safe and alternative options which would achieve the same outcome. It is my understanding that CS Wind UK's demand that all employees follow strict health and safety rules and regulations adhering to HSE standards at all time. This is the guidelines that I follow each and every day including Wednesday 26 September 2018. I do not question that the work instruction may have been carried out later without any instant by others, but that would have definitely been breaking health and safety guidelines as there is no attachment on site which would allow this to be done safely. I have reported on several occasions that we do not have the correct equipment to carry out these manoeuvres safely. I feel under pressure to carry out potentially unsafe manoeuvres at work and that is why I do my best to provide alternative funds, which would eliminate any potentially dangerous situations.

When I approached my supervisor on Thursday 27 September 2018, I was accused of failing to carry out my duties the previous evening. The tone used was very threatening and aggressive leaving me feeling extremely anxious and stressed. I experienced palpitations and nausea so I advised my supervisor that I would have to go home. I did not just walk off site. My supervisor did ask me to provide a statement of events from the previous evening but at that point in time I was in no fit state to do so – I fully intended to provide this once I had fully recovered and could record this accurately with a clear state of mind.

I do not believe that the correct procedures were followed before issuing these written warnings. As stated by ACAS Code of Practice, I should have received a written account of these accusations with a date and time for a formal disciplinary meeting where I could have put forward my case and then a decision could have been made instead went straight to issuing warnings without any kind of formal meeting.

I appreciate you taking the time to reconsider my case."

28. On 25 October 2018, Mr McIlroy wrote to the claimant who was remained absent from work advising that he agreed the correct procedures were not followed and that the decision was being overturned in full pending addressing the points raised in the letter of 28 September2018 at a disciplinary hearing to be convened on 30 October 2018.

29. Enclosed with the letter of 25 October 2018 was a letter inviting the claimant to a disciplinary hearing to be conducted by SK Yoon, PSP Function Leader which set out the allegations against the claimant were:

"1. On Wednesday 26 September 2018, you failed to carry out a work instruction, namely the moving of a section off the rotators;

2. you did not provide a statement regarding this incident by your supervisor when requested.

The above allegations are contrary to the following CS Wind UK Employee Rules:

1. number 8, specifically: “refusal to comply with the proper instruction.”

2. number 2 “conduct themselves in a manner consistent with the proper and professional performance of their duties and the maintenance of good working relationships”

30. The letter also advised that the claimant could call any relevant witnesses to the disciplinary hearing and that he should provide their names as soon as possible, with any documents which he wished to be considered. The claimant was informed of the right to be accompanied by either a work colleague or a certified trade union representative and that he should be aware that the potential outcome of the hearing could be up to and including summary dismissal.

31. Craig Connor, a workplace colleague accompanied the claimant at the disciplinary hearing on 30 October 2018, which was conducted by Mr Yoon. Mr McIlroy took notes.

32. The claimant confirmed that he had received the letter dated 25 October 2018 setting out the allegations made against him. The clamant read from a prepared statement which referred to the “organisation for lifting operations and that the guidance states ensuring “lifting accessories used for securing the load are compatible with the load.”

33. The claimant said that he told Mr Cameron that he could lift straight up but that he did not feel it was safe as it does not lock. The claimant said that he did not refuse as he gave an alternative.

34. In relation to the statement, the claimant said that he did not refuse to give a statement. Mr Freeman was aggressive, and the claimant was stressed and was having palpitations. He left to go to his doctor. The claimant said it was not just him but his colleague Mr McBrayne who felt the same thing and felt it

was unsafe. The claimant said that the attachment did not secure behind the flange and that he would move it when the paint wheels were off.

35. Mr Connor provided a statement hand written by him relating to a near miss by him and Mr McBrayne on 19 October 2018 involving a top section with paint wheels fitted. There was also discussion about the meeting, which took place between Mr Park, Mr McTaggart and the claimant.

36. Mr Yoon spoke to Mr Park. Mr Park's position was that the claimant had refused to work. They did not discuss the instruction in detail. Mr Yoon also spoke to Mr McTaggart who also confirmed that the claimant had refused to lift the section. Mr McTaggart said had no health and safety concerns about the request.

37. Mr Yoon considered the allegations, the claimant's reasons for refusing, the claimant's work experience, and the information that he had from Mr McIlroy, Mr Park and Mr McTaggart. Mr Yoon concluded that the claimant had refused an instruction to move the section of tower off the rotators, which was part of his main duties. Mr Yoon considered that the refusal was unreasonable and therefore the claimant was in breach of the respondent's employee rules by refusing to comply with a proper instruction (number 8). He also considered the claimant was in breach of employee rule number 2 which requires employees to conduct themselves in a manner consistent with the proper and professional performance of their duties and maintenance of good working relationships. Mr Yoon said that he considered that in his opinion the working practices in place are safe and appropriate to the tasks required. He therefore decided in respect of the first allegation that the claimant was to be dismissed summarily from effect from 2 November 2018. He felt that no action was to be taken in respect of the second allegation. The claimant was advised of the decision in writing by letter dated 2 November 2018, which also advised of his right of appeal (the dismissal letter).

38. The claimant wrote to Mr McIlroy on 7 November 2018 appealing against the decision to dismiss. The grounds of appeal set out his recollection of events as narrated in the letter of 4 October 2018. He appealed on the grounds that

he was not refusing instruction but offering alternative safe options, which would achieve the same outcome. The claimant said that he understood that the procedure had changed and that employees were no longer required to carry out instructions.

39. Mr Kim heard the appeal on 19 November 2018. Ms Fawcett was also present. The claimant was informed that he had the right to be accompanied but he was unaccompanied.

40. In preparation for the appeal hearing, Mr Kim read the dismissal letter. He also viewed a report by Mr McTaggart on the "Reach Stacker Issue" prepared on or around 28 September 2018. It referred to an employee having highlighted "an unsafe issue in his eyes regarding the lift of the top of top section with the lifting hook and paint wheel. It has been suggested that the full weight has not been taken by the hook making this lift an unsafe act".

41. At the appeal hearing Ms Fawcett took the lead and asked questions while Mr Kim listened. Afterwards Mr Kim concluded that the original instruction was a proper instruction, which the claimant failed to follow. The claimant was advised of the decision not to uphold the appeal by letter dated 18 November 2018.

42. At time of dismissal, the claimant was 36 years of age. He had been continuously employed for 16 years. The claimant's gross weekly wage was £514.40. His net weekly basic pay was £ . The claimant was in receipt of Universal Credit from 21 January 2019 to 30 October 2019. He applied for four posts in the period between dismissal and 13 March 2019. Two of those posts were based abroad. The claimant found alternative employment on 20 May 2019 with Calmac. This is a temporary position in which he earns £324.23 per week. In order to attend this job, he has had to purchase a car.

Observations on witnesses and conflict of evidence

43. The Tribunal considered that the claimant gave his evidence in an honest straightforward manner. The Tribunal felt that his evidence about events on

25 and 26 September 2018 were confused and embellished on the information contained in the paper apart to the response, which was allowed by way of amendment.

44. The Tribunal considered that Mr McIlroy gave his evidence candidly. He acknowledged being aware of the decision to issue the claimant with a final written warning contrary to the procedures set out in the respondent's disciplinary procedure. The Tribunal's impression was that despite having a disciplinary procedure, which complied with the ACAS code of practice, the respondent in this case had a very cavalier attitude towards the process.

45. In relation to Mr Yoon and Mr Kim, the Tribunal was mindful that English was not the first language of either of these witnesses. That said, there had been no request for a translator and the Tribunal therefore had no reason to believe that they did not understand the questions that were being put to them. Both witnesses appeared to have a very poor recollection of the events. The Tribunal found this surprising given that the decision resulted in the termination of employment of a longstanding employee. While the Tribunal appreciated that the events happened almost a year ago, the respondent was aware of these proceedings in January 2019. The Tribunal considered that their lack of recall was in part because there was little in the way of contemporaneous notes of discussion and meetings that took place at the time.

46. The claimant produced a handwritten note dated 19 October 2018 from Craig Conner about an incident involving Mr Connor and Mr McBrayne. Mr Connor did not give evidence. The claimant was not at work when the incident referred to in the note took place. Mr Yoon said that it was a different task being carried out: Mr Connor being asked to move a tower to storage, the claimant was being asked to move the tower off rotators which is a lesser movement. The Tribunal did not place any significant weight on this evidence other than Mr Yoon was are of the handwritten note when he reached his decision.

47. The evidence generally about events on 25 and 26 September 2018 was confused. The claimant said that on 25 September 2018 Marc Cameron (who

was acting for the surface treatment supervisor who had gone home ill) asked the claimant and Mr McBrayne to move a tower section which had just been painted from outside the surface treatment building to storage. The paint wheels were still attached on either side of the tower. The claimant said that he asked for the paint wheels to be removed because he was concerned about the tower slipping and falling off. No one was available to remove the paint wheels. The claimant suggested an alternative but was then told that he did not need to complete the task as it was not desperate. The next day, his supervisor Mr Freeman said that there was a complaint. The claimant and Mr Campbell were again instructed to undertake the same task. The claimant then was asked to attend a meeting with Mr Park, Mr McIlroy and Mr McTaggart. The claimant then referred to being instructed to undertake the same task on 27 September and was asked to move the tower from the rotators and move it to the paint workshop. The claimant again refused to do so unless the paint wheels were removed. The claimant then said that he was to provide a statement, but he felt sick and stressed and phoned someone to pick him up. It was suggested to the claimant on cross-examination that his recollection of the dates were confused.

48. Mr McIlroy's evidence was that he attended a meeting with the claimant, Mr Park and Mr McTaggart where there was discussion any how an internal section be moved and whether the claimant would have any responsibility for any accident. The task was safe and had been carried out for some time. He could not recall the sequence of events; any discussion about methods or a lane being broken down. While the meeting was mentioned in the disciplinary notes, no detail is provided.

49. From the evidence and contemporaneous documents (such as they were) of events the failure to carry out the work instruction on 25 September 2018 was considered in relation to the final written warning but was not one of the allegations put to the claimant which gave rise to the claimant's disciplinary hearing ultimately leading to dismissal.

50. The Tribunal therefore considered that contrary to the claimant's evidence in chief the events, which he said on 25 September 2018 were more likely to

have happened on 26 September 2018 as stated in his letter of 4 October 2018.

51. In relation to the health and safety meeting, the Tribunal considered that it was more likely that this took place on 25 September 2019 as the letter of 28 September 2018 states in relation to the instruction on 25 September 2018 "Following discussion and agreement you agreed to undertake the task".

52. The claimant's evidence was that at the health and safety meeting, Mr Park threatened to dismiss the claimant and that the whole premises were unsafe. Mr McIlroy who was present had no recollection of that. The claimant also said that Mr Park told him that new a hook would cost £100,000.

53. The Tribunal's impression is that having raised a health and safety issue on 25 September 2018, the respondent's response was to understand from the claimant what the issue was given that the respondent did not consider the instruction was different from previous instructions. The claimant was not convinced that Mr Park had threatened to dismiss the claimant at this meeting and that initial disciplinary action was a final written warning. The Tribunal also considered that it was highly unlikely that Mr Park would say that the whole premises were unsafe as had he done so, the Tribunal felt that it was likely that Mr McTaggart would have responded to this and that Mr McIlroy would have remembered that discussion.

54. The claimant also gave evidence that on 25 September 2018 (which the Tribunal found to be the instruction on 26 September 2018), he was told that the task was not desperate. The Tribunal considered it unlikely given the demand on productivity that the claimant was informed that it was not desperate. If it was indeed the claimant's understanding, it was quite apparent from its own evidence that his supervisor had received complaints about the situation.

55. The claimant said that Mr Yoon did not know about the disciplinary meeting on 30 October 2018. Mr Yoon's evidence was that he did know in advance and had prepared a list of questions. The Tribunal considered that given Mr McIlroy informed the claimant on 25 October who would be conducting the

disciplinary hearing it was highly unlikely that he would not have checked Mr Yoon's availability.

56. The claimant referred during his evidence to the line being reduced to one lane. He did not mentioned this during the disciplinary procedure which the Tribunal considered was surprising if the claimant thought that it made a difference to the safety of the manoeuvre. Mr Yoon was unaware of this at the time but that would be the situation sometimes. The Tribunal's impression therefore that it was not a situation, which has not exited before.

57. The claimant said that he thought Mr Park made the decision to dismiss him. Mr McIlroy who was present at the disciplinary hearing assisted Mr Yoon with the dismissal letter and confirmed that Mr Yoon was the decision maker. Mr Yoon also confirmed that it was his decision. Mr Kim confirmed that he took the decision at the appeal hearing. The Tribunal was not convinced that Mr Park was involved in any of decision-making process during the disciplinary hearing. The Tribunal's impression was that the outcome of the second disciplinary process was not predetermined. Ms Fawcett took the decision to issue the final writing warning. Mr Yoon was not involved in that decision nor was she involved when he decided to dismiss the claimant. While Ms Fawcett attended the appeal hearing in Mr McIlroy's absence on leave it was not her decision that was being appealed. Given Ms Fawcett's earlier decision the Tribunal thought it was more probable than not that Mr Kim reached his own decision at the appeal hearing.

58. The claimant said that Mr McBrayne had the same concerns and refused to carry out the task. Mr McIlroy and Mr Yoon said that they were not aware that Mr McBrayne had refused. He did not attend the health and safety meeting. There was no reference in Mr Park's email of 27 September 2018 to Mr McBrayne refusing nor was he asked by Mr Freeman to provide a statement about events on 26 September 2018. While the claimant's letter of 4 October 2018 referred the claimant and Mr McBrayne having concerns it does not state that Mr McBrayne refused the instruction. The Tribunal considered that it was more likely that Mr McBrayne did not refuse the instruction.

59. The claimant said in evidence that the respondent had since purchased the appropriate attachment, which the claimant said support his position that the instruction was unsafe. The evidence from the respondent's witnesses was that the manoeuvre cause paint damage, which had to be rectified later in the process. This gave rise to customer complaints as a result of which the respondent purchased a new hook attachment to prevent this damage around May 2019 at a cost of around £10,000. The Tribunal understood that the manoeuvre had been happening since October 2016 and continued after the claimant's dismissal. The respondent knew that it caused damage to the paintwork; this was an on-going problem. The Tribunal considered that the respondent's explanation was plausible.

Submissions for the respondent

60. The respondent invited the Tribunal to place no weight on the evidence of Mr Connor and prefer the evidence of the respondent's witnesses over that of the claimant. The respondent called the decision maker, the appeal hearer and the HR manager who was present for the health and safety meeting and during the disciplinary process. Mr Park did not make any decision about the claimant's employment. It was open to the claimant to seek a witness order.

61. Section 103A of the ERA requires the Tribunal to ask: (a) was the making of disclosure the reason (or principal reason) for the dismissal; and (b) was the disclosure in question a protected disclosure within the meaning of the ERA? An employee will only have been unfairly dismissed if the answer to both questions is "yes" (see *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401). The answer to both questions is "no".

62. The alleged disclosures must therefore be the main reason for the claimant's dismissal. There is not the necessary causal link in this case. The reason for the claimant's dismissal was his refusal to comply with a proper instruction on 26 September 2018. The decision makers were clear it was not because of any disclosures made by him. The matters relied upon by the respondent are genuinely separable from any protected disclosure, the reason for dismissal is not the disclosure (see *Parsons v Airplus International* [2017] All ER D 177).

63. For the alleged disclosures to be protected, the claimant must have made: a disclosure of information; which is a qualifying disclosure; and made in one of the protected manners. The onus is on the claimant to establish that he made a protected disclosure.

64. The disclosure of information requires disclosure of facts, not simply voicing a concern or making allegations (see *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436. The claimant was disclosing concerns, not facts. He was concerned that a tower could slip and fall but there was no factual basis for this concern.

65. The Tribunal was referred to section 45B of the ERA. The claimant asserts that his disclosure tended to show that health or safety could be endangered if a tower fell. The onus is on the claimant to establish that he reasonably believed this (see *Babula v Waltham Forest College* [2007] IRLR 346). For health or safety to be likely to be endangered, the claimant must show that he reasonably believed, given the information on which he is relying, that it was more likely than not that health or safety would be endangered. It is not enough to believe there is a risk or possibility that it will occur (see *Kraus v-Penna* [2004] IRLR 260). Reasonable belief involves both a subjective test of the claimant's belief and an objective test as to whether that belief could reasonably have been held in the circumstances. On the evidence, which the Tribunal has heard that the claimant did not reasonably believe that his alleged disclosures tended to show health or safety could be endangered. See *Darnton v University of Surrey* [2003] IRLR 133. The claimant in this case knew there was no reasonable factual basis to his allegation.

66. The onus is on the claimant to establish that he held a reasonable belief that the disclosure was made in the public interest. The Tribunal must determine whether the claimant subjectively believed at the time that the disclosure was in the public interest and whether that belief was objectively reasonable. See *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed* [2017] EWCA Civ 979 and *Parsons v Airplus International Limited* 0111/17. If the claimant genuinely did believe the tower could fall, which is denied, his concern was any liability

for the damage to the tower as this is all that would happen. The respondent's position that no qualifying disclosures were made.

67. The reason for the claimant's dismissal related to his conduct, which is a potentially fair reason under section 98(2) of ERA. The claimant's misconduct was the refusal to carry out the work instruction on 26 September 2018.

68. It was the respondent's genuinely held belief that the claimant acted unreasonably in his refusal and that his behaviour amounted to gross misconduct as defined in the respondent's Disciplinary Procedure, specifically number 8. The only reason for dismissal, which the Respondent held was the refusal to carry out the work instruction.

69. The instruction was a proper one. The claimant specialised in moving tower sections and it was a main part of his role. He used machine daily. Although Mr Yoon unaware that the warehouse was down to one lane that can sometimes happen so even if it was the case the claimant would have been asked to do this previously. The instruction came from an authorised deputy and was part of the normal process. The procedures are checked using risk assessments and this was an established action by an established method. The paint rings being attached made no difference to the task being performed. There was nothing unusual or different about this instruction; the well-established practice is not reckless or negligent which task was carried out before and continues to be carried out after the request was made to the claimant. The Tribunal should accept that the respondent had a potentially fair reason to dismiss the claimant, in accordance with section 98(2)(b) of ERA.

70. If the Tribunal is satisfied that the respondent has established a potentially fair reason for dismissal, it must then determine the question of whether the dismissal was fair or unfair under section 98(4) of the ERA.

71. The three-stage test set out *British Home Stores* (above) is relevant to this case. The respondent has shown that: Mr Yoon believed the claimant was guilty of misconduct; Mr Yoon had in mind reasonable grounds upon which to sustain that belief; and at the stage which that belief was formed on those

grounds, the respondent had carried out as much investigation into the matter as was reasonable in the circumstances.

72. The respondent did not need to have conclusive direct proof of the claimant's misconduct only a genuine and reasonable belief, reasonably tested. It is not disputed that the claimant did not comply with the instructions issued to him. Once the Burchell test is satisfied, and the employer has shown a reasonable belief that the claimant was guilty of misconduct, it is irrelevant that the claimant did not consider the behaviour inappropriate himself.

73. If the Tribunal does not accept that a reasonable investigation was carried out. The Tribunal was referred to the case of *Boys and Girls Welfare Society v MacDonald* [1996] IRLR 129 where the EAT confirmed that the onus is not on an employer to establish that the Burchell Test was established rather the Tribunal should ask itself if whether the dismissal fell within the range of reasonable responses.

74. The Tribunal must not substitute its own opinion as to what is a reasonable and adequate investigation and must instead apply the objective standard of the reasonable employer (see *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23. The Tribunal must ask itself whether what occurred fell within the 'range of reasonable responses' of a reasonable employer. The 'range of reasonable responses' test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached.

75. The Tribunal must next consider whether the respondent acted reasonably in treating the conduct of the claimant as justifying summary dismissal. The Tribunal was referred to *Iceland Frozen Foods Limited v Jones* [1982] IRLR 439 EAT**;** *Post Office v Foley* [2000] IRLR.

76. The decision to dismiss the claimant fell within the band of reasonable responses. The claimant was refusing to comply with instructions to carry out his main duty. It was an essential part of his role and essential part of R manufacturing process. The respondent concluded the actions were gross misconduct consistent with its policy. The claimant accepted if the respondent

found he had committed number 8 on the list of examples of gross misconduct then the sanction would be summary dismissal under the policy

77. The claimant was one of a select group that could perform task so him refusing was problematic. His actions caused delay and disruption Mr Yoon considered the allegations, the claimant's reasons for refusing, the claimant's work experience, and the information that he had from Mr McIlroy, Mr Park and Mr McTaggart and concluded that the claimant had refused to perform his main duties, which amounted to gross misconduct and therefore summary dismal was apt.

78. There is always an area of discretion within which management may decide on a range of disciplinary sanctions all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable, but whether dismissal was reasonable. In assessing reasonableness the Tribunal sound take the following in to account.

79. The conduct amounted to gross misconduct. The disciplinary procedure defines what the respondent considers to constitute gross misconduct. It also points out that gross misconduct may result in summary dismissal. The claimant's conduct fell within the definition of gross misconduct. The respondent genuinely believed that the claimant had refused to carry out a work instruction, falling under the respondent's 8th example of gross misconduct under the policy. The instruction that the claimant refused to perform was central to his role. It was essential that he carry out his role for the respondent to be able to produce the towers and meet its deadlines.

80. Mr Yoon was aware of the claimant general record and length of service. Factors such as previous good performance and clean disciplinary record will not always save an employee against whom there are allegations of gross misconduct (see *AEI Cables Ltd v McLay* [1980] I.R.L.R. 84. The claimant's conduct falls under the examples of gross misconduct. The policy states: "*if the organisation is satisfied that gross misconduct has occurred the dismissal will always be summary"*

81. The claimant has introduced new evidence in relation to his case at the Tribunal hearing, which was not raised during the disciplinary procedure applicable to him. The Tribunal's function is not to re-hear the case and decide if the claimant should be dismissed. Its function is to decide whether the decision to dismiss the claimant was fair or unfair. At the time of making its decision the respondent could not be expected to take account of information that it was not aware of. The respondent based its decision on the information that it had at that time and having given the claimant a full opportunity to put forward his explanations and any mitigation.

82. The claimant acted in a manner that demonstrated a deliberate intention to disregard one of the most fundamental elements of his contract of employment namely complying with the reasonable instructions of his employer. The respondent's decision to dismiss was within the band of responses, which a reasonable employer might have adopted when faced with the claimant's conduct.

83. In determining the reasonableness of the decision to dismiss the claimant the Tribunal must also consider whether the respondent followed a fair procedure. The procedure the respondent adopted was fair in all the circumstances.

84. The ACAS Code of Practice at paragraph five states that "It is important to carry out necessary investigations of potential disciplinary matters without reasonable delay to establish the facts of the case." The respondent carried out such investigation as was necessary, in circumstances where the claimant had evidently refused to carry out an instruction and the work not been done by him (see *The Royal Society for the Protection of Birds v Croucher* [1984] IRLR 425 confirms that where the misconduct is admitted, there is very little scope for the kind of investigation to which the EAT referred in Burchell i.e, investigation designed to confirm suspicions or clear up doubt as to whether or not a particular act of misconduct had occurred.

85. The disciplinary meeting was held without delay and the employee had sufficient time to prepare his case. The claimant was informed of the against him and was offered an opportunity to set out his case. The claimant was

informed of the decision to terminate his employment in writing and was provided with an opportunity to appeal. An appeal hearing took place and the outcome was confirmed in writing. The respondent acted reasonably by taking all necessary procedural steps.

86. If there was any failure on the part of the respondent to follow its disciplinary procedure the dismissal may nonetheless be fair (see *Fuller v Lloyd's Bank Plc* [1991] IRLR 336. The claimant was not prevented from seeking to show that the respondent's reason for dismissing him could not be treated as sufficient. The claimant was provided with the opportunity to put forward any explanation or mitigation for his actions. There was no prejudice to the claimant, the principles of natural justice were adhered to and therefore there was no procedural unfairness. The procedure was fair and all steps were taken in accordance with the disciplinary procedure

87. Whilst the earlier disciplinary decision was overturned it is worth noting that when the claimant challenged that sanction/process, it was decided that it would be fairer to start again with a full disciplinary process, which is what happened. What is being judged in this case is the fairness of the dismissal, not the earlier process involving the written warning, which had no bearing on the decision to dismiss. It was not that the claimant was dismissed on appeal. It was an entirely new process. The claimant accepted that the respondent followed the disciplinary procedure for the second process that led to his dismissal

88. Mr Yoon did not need to know the ACAS code as was suggested. He only needed to follow a process that is compliant, ordinarily the internal procedure which, in this case was followed. The claimant thought the decision was predetermined as he thought decision would be the same as before but the decision was not the same. The claimant was signed off as unfit for work but not unfit to attend a meeting. By the appeal stage the claimant was dismissed and there not covered by a sick line.

89. At the appeal hearing Mr Kim considered the claimant's appeal, he had the appeal letter and confirmed that the claimant did not raise anything new. The absence of minutes does impact on the procedural fairness.

90. The respondent has not treated another staff member inconsistently.

91. In calculating his pay the claimant has used his P45 for a seven-month period. The claimant's earnings should be averaged over a 12-month period given the fluctuation in his earnings and the period of loss in respect of which the claimant is seeking to be compensated. The respondent therefore used figures for annual pay from 27 October 2017 – 26 October 2018 (the week prior to dismissal) in order to calculate the claimant's average earnings.

92. The claimant contributed to his dismissal rather than raising genuine concerns he chose to ignore a proper instruction when he had no reason for believing the task was unsafe. The multiplier for the purpose of the basic award is 15.

93. The claimant's net weekly pay was £374.63. The period of loss from the date of dismissal is 48 weeks. The pension loss is £521.76.

94. A claim for expenses must therefore be supported by evidence produced at the Tribunal Hearing. The claimant has not established that these expenses were incurred as result of the dismissal, or reasonably incurred or reasonable amounts in themselves.

95. The respondent says that the claimant failed to mitigate his loss. He could have secured work within three months. He contributed to his dismissal – rather than raising genuine concerns he chose to ignore a proper instruction, which was pertinent to the fulfilment of his role when he had no reason for believing the task was unsafe.

96. To the extent that the Tribunal finds there to have been any procedural unfairness, the Claimant would have been fairly dismissed had a fair procedure been followed in accordance with the decision in *Polkey v AE Dayton Services Ltd* [1988] ICR 142 The procedural unfairness alleged by the claimant about the final written warning is not relevant for the purpose of these

proceedings that are determining the decision to dismiss. In any event, those procedural issues were addressed. Mr Yoon had sufficient information to form his decision. Nothing further would have made a difference to the outcome. Therefore, compensation should be reduced by 100 percent.

97. The claimant knew the instruction was safe. It had been performed for years. He knew the tower was not at risk of slipping and he knew there would not be anyone underneath it. The alleged disclosure was not made in good faith.

98. There was no breach of the ACAS Code of Practice and therefore that there should be no increase in any award made. All claims should be dismissed.

Submissions for the claimant

99. The claimant invited the Tribunal to prefer his evidence to that of the respondent's witnesses. He was an experienced operative and his knowledge of health and safety outstripped that of the health and safety manager. There was a unique set of circumstances. He did not refuse the instruction but instead encouraged a different method to avoid doing the task in an unsafe way.

100. The Tribunal was reminded that Mr McIlroy referred to the place being busy and stressful. Mr McIlroy failed in his duties as he did not provide the claimant with minutes and did not remain engaged in the process after the disciplinary outcome letter. It took some weeks for Mr McIlroy to notify the claimant that a disciplinary hearing was going to take place while appreciating that the claimant was absent from work due to ill health. Mr Yoon had little understanding of the instruction which had been given. His investigation focused on the verbal discussion. He referred matters to Mr McTaggart but there was no risk assessment and he failed to investigate the matter. He did not speak to Mr McBrayne. He also took account of Mr Park's view and he had previously threatened dismissal.

101. Mr Kim was unable to justify his decision. He referred to the report prepared by Mr McTaggart which was riddled with holes. It did not appear to relate to the same issues.

102. In the circumstances, it is difficult to see how any appeal is meaningful particularly given Ms Fawcett's involvement. There was no breach of a proper instruction and therefore the real reason for dismissal was because the claimant raised health and safety concerns.

103. The Tribunal was referred to *Burchell* (above) and section 98(4) of the ERA.

104. There was no evidence of any investigation. The ACAS Code refers to an investigation having to take place. Mr Yoon did not understand what was instructed and he had no knowledge of ACAS guidance.

105. Mr Kim had an opportunity to cure defects on appeal and he was not able to do so. Mr Kim seemed confused when asked to justify his decision. Ms Fawcett made the decision and there was no further investigation made.

106. It was unfair because the reason was the protected disclosure which was made verbally to Mr Cameron and Mr Boyd on 25 September 2018 and verbally to Mr Freeman, Mr McIlroy, Mr Park and Mr McTaggart on 26 September 2018. It was also made in writing in the original appeal letter of 4 October 2018 and verbally to Mr Yoon and Mr Kim at the disciplinary and appeal hearings. Despite explaining that the refusal was because of health and safety concerns, the claimant was still dismissed. New equipment has now been ordered which would suggest that the respondent acknowledged that there was a genuine health and safety reason.

107. In terms of remedy, the Tribunal was invited to prefer the claimant's schedule. The claimant's position was that he had mitigated his loss. Given his location, it was difficult to apply for alternative roles. Those roles proposed by the respondent were for roles, which he was suitably qualified. In order to attend the job for which he was successful, he requires to be able to travel to his work due to the anti-social hours.

108. There was no contribution as the dismissal was unfair given the inadequate investigation at every stage.

109. Given that they issued a harsher sanction, the real reason for dismissal must be the protected disclosure.

Deliberations

110. The Tribunal considered first whether the claimant made a protected disclosure. The claimant said that he made a verbal disclosure on 25 and 26 September 2018 and a written disclosure in his letter of 4 October 2018 and at the disciplinary hearing on 31 October 2018 which tended to show that the health and safety of an individual was likely to be endangered if the tower fell while being manoeuvred.

111. The Tribunal accepted that the claimant considered since around October 2016 that the attachment was inappropriate for the manoeuver and could not be carried out safely he believed that there was a risk that the tower might fall. The information did not include facts tending to show that the health or safety of any individual was likely to be endangered.

112. The claimant and his colleagues had been moving the tower with the paint wheels attached for some time. It was a daily task. When the claimant initially refused the instruction on 25 September 2018 a health and safety meeting took place. Mr McTaggart was satisfied that there was no risk to individual although paintwork could be damaged. Risk assessments had been carried out for the procedure. Employees were not allowed underneath the tower during the manoeuvre. The Tribunal was not satisfied that he genuinely believed that information disclosed the failure or likely failure to endanger the health or safety of an individual or that it was made in the public interest.

113. Having reached the conclusion that claimant did not make a protected disclosure it could not have been the principal reason for the claimant's dismissal. The Tribunal then considered what was the reason for the claimant's dismissal.

114. The evidence of Mr Yoon was that he dismissed the claimant because the claimant refused to carry out the work instruction on 26 September 2018. Mr Yoon said that he believed that the claimant was given a proper instruction to carry out a task, which was part of his role and the claimant refused. The Tribunal was satisfied that the respondent had shown the reason for the dismissal was misconduct. The Tribunal therefore concluded that the

respondent was successful in establishing that the dismissal was for a potentially fair reason.

115. At this point the Tribunal referred to Section 98 of the ERA, which sets out how a tribunal should approach the question of whether a dismissal is fair. The Tribunal then referred to the case of *Burchell (above)* which was approved by the Court of Appeal in the case *Foley v Post Office [2000] IRLR 827.*

116. The Tribunal noted that the claimant did not dispute that he did not comply with the instructions issued to him on 26 September 2018. He did not dispute that moving towers is a main part of his job. He also did not dispute that the refusal to comply with a proper instruction is an example of conduct, which the respondent considers is gross misconduct, which may lead to dismissal. The claimant did not dispute that he did not provide a statement to Mr Freeman on 27 September 2018.

117. Against this background the Tribunal considered the investigation in this case. The Tribunal was mindful that it could not substitute its own view as to whether a reasonable investigation was carried out or embarked on an analysis of the quality of the evidence obtained, so as to lead to its own view of the evidence resulting in its conclusion as to what Mr Yoon ought to have found as opposed to applying a range of reasonable responses test to the investigation carried out by the respondent leading to Mr Yoon's decision to dismiss the claimant.

118. Before the disciplinary hearing the claimant was not at work. The claimant was not suspended but on sick leave. Mr Yoon had the claimant's letter of 4 October 2018, which set out the claimant's position that he offered an alternative option to the instruction and explained why he had not provided a statement on 27 September 2018. The claimant was informed in the letter inviting him to the disciplinary hearing that he could call any relevant witnesses and was asked to provide names as soon as possible and to provide copies of document that he wished to ne considered.

119. The claimant did not call any witnesses at the disciplinary hearing although Mr Connor accompanied him. The claimant did not ask for Mr McBrayne to

be present at the disciplinary hearing nor did the claimant ask Mr Yoon to obtain a statement from Mr McBrayne or clarify why Mr McBrayne was not being disciplined. From the handwritten note provided by Mr Connor at the disciplinary hearing the claimant was aware that Mr McBrayne was preforming the task that the claimant alleged Mr McBrayne refused to do. While another employer might have obtained a statement from Mr McBrayne the Tribunal could not say that it was in these circumstances not with in the band of reasonable responses not to do so.

120. During the disciplinary hearing reference was made to the health and safety meeting. Mr Yoon spoke to Mr Park who said that the claimant had refused to work. Mr Yoon also spoke to Mr McTaggart who also confirmed that the claimant had refused to lift the section. Mr McTaggart said had no health and safety concerns about the request.

121. The claimant did not raise the issue of the factory being down to one lane until the Tribunal hearing. Neither Mr McIlroy nor Mr Yoon was aware of this. The Tribunal considered that a reasonable employer would not investigate a matter, which was not raised during the disciplinary process.

122. The Tribunal acknowledged that while other employers may have acted differently it could not conclude that the investigation carried out by the respondent did not fall within a reasonable band of responses to the situation.

123. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been reached.

124. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been reached.

125. Under the respondent's disciplinary procedure refusal to comply with a proper instruction is normally regarded as gross misconduct liable to summary dismissal. The Tribunal did not understand the claimant to be suggesting that to be dismissed in these circumstances was unfair but rather it was unfair for

the respondent have dismissed him given that he offered an alternative option and had left work because he was ill on 27 September 2018 and still intended to provide a statement.

126. The proper test is not what the policy of the respondent as employer was but what the reaction of a reasonable employer would have been in the circumstances. Where an employer sets a policy in advance an employer may follow it provided the employer and the tribunal do not shut their minds and deliver an automatic conclusion but take into account the facts of the case against the background of that policy.

127. The respondent had a clear policy warning employees what to expect if the respondent believed any misconduct refusal to comply with a proper instruction. The Tribunal did not consider the decision to dismiss the claimant was predetermined or an automatic conclusion. The respondent had on a previously issued a sanction of a final written warning.

128. The Tribunal observed that other than the incident on 25 September 2018 there was no history of misconduct by the claimant. He was a long serving, experienced employee. The claimant did not concede that his conduct on 26 September 2018 or his failure to provide a statement on 27 September 2018 was in any way inappropriate or that in retrospect he would have acted differently.

129. The Tribunal's impression was that the claimant was frustrated about the process that he was being instructed to undertake and wanted the respondent to purchase the appropriate equipment. The Tribunal had no doubt that the claimant felt that irritated that, colleagues who he considered less experienced and knowledgeable that him were not taking his advice. However he did not seem to consider how his behaviour was impacting on other colleagues and managers who were involved process and the impact on the respondent's business.

130. The Tribunal was satisfied that the claimant's mitigating factors were considered by Mr Yoon before arriving at a decision. There was no evidence of health and safety concerns by Mr McTaggart or any indication that the

claimant would comply with the instruction in the future. The Tribunal concluded that Mr Yoon's decision to dismiss the claimant fell within the band of reasonable responses, which a reasonable employer might have adopted.

131. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage is relevant to reasonableness of the whole dismissal process.

132. As regards the investigation and the conduct of the disciplinary hearing for the reasons previously indicated the Tribunal was satisfied that there had been a reasonable investigation. The claimant was aware of the case against him and at the disciplinary hearing he was given an opportunity to explain his position or any mitigation circumstances. The claimant was given the opportunity to be accompanied.

133. There was no evidence to suggest that Mr Yoon had a direct interest in the outcome of the disciplinary hearing nor was there evidence of any appearance of bias or partiality on his part. The Tribunal had no doubt that the decision to dismiss was taken only by Mr Yoon. Mr McIlroy's role was to give advice on procedural matters. The Tribunal noted that the claimant was given an opportunity to call witnesses but did not do so. Mr Connor was not a witness and there was no suggestion that he had refused a similar instruction.

134. The Tribunal then considered the appeal process. It was satisfied that Mr Kim had no previous involvement in the case. Mr Kim was senior to Mr Yoon. He approached the appeal with an open mind. In Mr McIlroy's absence on leave Ms Fawcett attended. The Tribunal was satisfied that while she asked questions Mr Kim made the decision. If anything, given her earlier decision, the Tribunal considered that Ms Fawcett might have reached a different decision from Mr Kim.

135. The Tribunal referred to the decision set out in the letter to the claimant from Mr Keith dated 15 November 2018. Mr Kim upheld Mr Yoon's decision about the allegation that the claimant failed to comply with a proper instruction. Mr Kim also upheld the decision the allegation that the claimant did not provide

a statement when requested. Mr Kim considered the sanction of dismissal and taking into account the mitigation circumstances upheld that decision.

136. The Tribunal was satisfied that the respondent had carried out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stages.

137. The Tribunal concluded that the dismissal was fair. Having reached this conclusion the Tribunal did not consider it necessary to go onto determine the question of remedy.

138. The Tribunal therefore dismissed the claimant's claim for unfair dismissal.

Employment Judge:	S MacLean
Date of Judgement:	06 December 2019
Entered in Register, Copied to Parties:	07 December 2019