EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
	V	
MR SEAN ROBINSON		**QUINSHIELD LIMITED**

HELD AT: **MOLD LAW COURTS** **ON:** **3,4 AND 5 APRIL 2018**

BEFORE: **EMPLOYMENT JUDGE R MCDONALD (SITTING ALONE)**

REPRESENTATION:
FOR THE CLAIMANT: **MRS ROBINSON (CLAIMANT'S WIFE)**
FOR THE RESPONDENT: **MR POLLITT (COUNSEL)**

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim that he was unfairly dismissed for a health and safety reason contrary to s.100(1)(c) of the Employment Rights Act 1996 fails.

REASONS

Introduction and preliminary matters

1. The claimant brings a claim of unfair dismissal against the respondent arising out of his dismissal on 21 July 2017.

2. At the hearing the claimant was represented by his wife and the respondent by Mr Pollitt of counsel.

3. The parties had prepared an agreed bundle of documents for the hearing consisting of 203 pages. During the hearing a further 20 pages of documents were added none of which were objected to by either party.

4. I need to record one brief preliminary point. The tribunal had listed the case before a full panel of Employment Judge and two non-legal members. However, as Mr Pollitt pointed out, unfair dismissal

claims (even automatic unfair dismissal claims) fall within the list of cases in s.4(3) of the Employment Tribunals Act 1996 which according to s.4(2) of that Act, "shall be heard" by an Employment Judge sitting alone. S.4(5) provides discretion to sit with a full panel in s.4(3) cases in certain circumstances. In particular s.4(5)(1)(a) provides that an Employment Judge can decide to sit with a full panel where it is desirable to do because of the likelihood of a dispute arising on the facts. The non-legal members nominated to sit on the panel for the case confirmed that neither had particular experience or expertise in the industry to which the case related. I asked the parties and neither party objected to my sitting alone which is what I did.

Issues

5. There was no dispute that the respondent dismissed the claimant on 21 July 2017. The claimant had been employed for fewer than two years when dismissed so could not claim "ordinary" unfair dismissal under s.94/98 of the Employment Rights Act 1996 ("ERA").

6. However, he claimed that his dismissal was for an automatically unfair reason, namely health and safety issues. Specifically he claimed that the reason (or if more than one the principal reason) for his dismissal was that he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful to health and safety (s.100(1)(c) ERA.

7. In answer to my question during submissions, Mrs Robinson confirmed that the basis of the claimant's case was that he had complained about inadequate protective clothing (which I shall refer to for convenience as a paper overall) which was provided to him after an accident at work on 21 July 2017.

8. A claim under s.100(1)(c) can be brought regardless of length of service. It can be brought where the claimant is an employee in a place which either has no elected health and safety representative or committee or has such a rep or committee but it was not reasonably practicable for the claimant to raise the matter by those means.

9. Mr Pollitt helpfully confirmed that the respondent was not seeking to argue that there was in this case an elected health and safety rep or committee with whom it was reasonably practicable for the claimant to have raised a relevant health and safety matter.

10. That meant that the principal issue for me to decide was why the claimant had been dismissed. In essence, the claimant's case was that he was dismissed for raising health safety issues after an accident at work on 21 July 2017. The respondent's case was that it had already decided to dismiss the claimant by the 19th July 2017 because of poor performance and conduct issues at work.

11. The respondent also argued that even if I accepted the claimant's case about why he was dismissed, his claim should fail because the health and safety matter he raised did not fall within s.100(1)(c). Specifically, Mr Pollitt for the respondent submitted that the claimant did not "reasonably believe that there were circumstances harmful to health and safety".

12. If I did find that the claimant was unfairly dismissed, the respondent argued that a **Polkey** reduction should be made, with any compensatory award being reduced to £0 to reflect the fact that the respondent would inevitably have been fairly dismissed on the 21 July 2017 or shortly thereafter because of performance and conduct issues.

13. The Respondent also submitted that the claimant had contributed to his own dismissal and failed to mitigate his losses and that any compensation awarded should be reduced to reflect that.

Relevant Law

14. I've already quoted s.100(1)(c) of ERA which is the basis of the claimant's claim.

15. The burden of proof is on the claimant to show that he was dismissed for an automatically unfair reason for which no qualifying period of employment is required (**Smith v Hayle Town Council [1978] IRLR 413**).

16. If a tribunal finds that a dismissal was unfair the compensation it should award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal" (s.123(1) ERA).

17. A just and equitable reduction can be made where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called Polkey reduction named after the House of Lords decision in Polkey v AE Dayton Services Ltd 1988 ICR 142).

18. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

19. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

20. By s.207A(2) of the Trade Union Labour Relations (Consolidation) Act 1992 (TULR(C)A) the employment tribunal may, if it considers just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25% where the ACAS Code of Practice on Disciplinary and Grievance Procedures applies and an employer has unreasonably failed to comply with that Code or reduce any award by no more than 25% if the employee has unreasonably failed to comply with the Code.

21. Under s.38 Employment Act 2002, a tribunal must make an award of 2 weeks pay and may, if it considers it just and equitable, make an award of four weeks' pay where there is failure to comply with the requirement to provide the written statement of employment particulars required by s.1 ERA.

22. By s.124A ERA, any award under s.207A TULRCA and s.38 Employment Act 2002 shall be applied immediately before any reduction under s.123(6).

Evidence and Findings of Fact

23. I heard evidence from six witnesses. The claimant and his wife, Mrs Angharad Robinson, gave evidence in support of the claim. For the respondent I heard evidence from Rafal Gajewski (a geller employed by the respondent); Clive Thomas (Production Manager); Wayne Pocock (Laminating Manager); and David Wyn Jenkins (Managing Director). Mr Gajewski gave evidence in Polish through an interpreter.

24. There were written statements from three further witnesses for the respondents: Tomasz Drozd, David Long and Anthony Roberts. Mr Pollitt acknowledged that since they had not attended to be cross examined their evidence could be given little weight in disputed matters. In the event, however, the evidence given in their statements were not disputed.

25. I read those documents in the bundle of documents to which I was referred by the parties. I refer to pages in that bundle by page number.

26. I set out below my findings of fact relevant to the issues I need to decide. I have not referred to all the evidence I heard. I mean no disrespect to any of the witnesses if parts of their evidence are not referred to.

27. It is important to remember what I am <u>not</u> deciding in this case.

28. Firstly, as I will cover in more detail later, there were two incidents at work which ended up with the claimant attending hospital. They took place on the 11 and 21 July 2017.

29. I will refer to these incidents as “accidents” because that would be the day to day way of referring to them. I am not by using that word making any finding about whose fault they were or what significance they had for the purposes of health and safety legislation. This is not a personal injury claim so I am not deciding whether the respondent was in any way at fault for the accidents. I am also not deciding whether the respondent breached health and safety legislation.

30. Secondly, Mrs Robinson in cross examination established (and Mr Pollitt in submissions acknowledged) that the respondent was not what might be called diligent in keeping records of matters relating to the claimant’s employment. Mr Pollitt’s apt description was that the respondent was “not an HR driven organisation”. There was, for example, no formal letter giving notice to terminate the claimant’s employment or confirming the reasons for dismissal. Nor, for example, on the respondent’s own case, was the claimant given written confirmation that his probation period had been extended on the 15 May 2017.

31. I accept that the claimant was an employee on his probationary period and the respondent might well say it would have been more diligent in following procedures and keeping records were he an established employee with more than two years’ service. However, as the ACAS Code of Practice on Discipline and Grievance makes clear it is at least good practice to keep good written records. The Code applies to poor performance as well as conduct matters and in its foreword states that “employers would be well advised to keep a written record of any disciplinary…..cases they deal with”.

32. I am not deciding whether the claimant followed a fair procedure in dismissing the claimant. He did not have two years’ service and so could not claim “ordinary” unfair dismissal. The absence of adequate record keeping or procedural steps (like holding a formal meeting to discuss performance issues and the improvement required) doesn’t render the dismissal unfair in this case. It could be said, however, that the absence of adequate written records provides a gap which allows the claimant to suggest the real reason for his dismissal was not the performance and conduct issues suggested by the respondent.

33. With all that in mind, I turn now to the issues I am deciding, central to which is why the claimant was dismissed.

Background

34. The respondent manufactures GRP (glass reinforced polyester). It employs around 100 employees and has no HR department. The claimant was employed as a “geller”. As I understand it, this involved applying viscous liquid gel to a mould using either a paint brush or a roller to create panels. This could involve large structures like a roof. On those large items the gellers will work in pairs. For

most of his time working for the respondent, the claimant worked with Mr Gajewski, who was an experienced geller.

35. One issue in dispute was how corrosive or irritating the gel is if it gets on a person's skin. There were safety data sheets relating to the gel at p.128-144. The information from the supplier (at p.131) gives the "Human Health Hazards" as "Harmful by inhalation, harmful: danger of serious damage to health through prolonged exposure through inhalation. Irritating to eyes and skin." In terms of "Response" on the same page of that document it says "IF ON SKIN (or hair): Take off immediately all contaminated clothing. Rinse with water or shower." That advice is also reflected in the health and safety assessment record carried out by Clive Thomas which was at p.128 of the bundle. It says (on p.129) that for skin the appropriate first aid is "immediately remove contaminated clothing. Wash off promptly and flush contaminated skin in water".

36. Mr Pollitt referred me on more than one occasion to the photograph on p.169 which showed Mr Gajewski and a colleague wearing the clothing they wore when gelling. Both are wearing boots and a "bib and braces" overall over T shirts. Their arms are exposed from above the elbow and they are not wearing gloves. The claimant's evidence was that when gelling he would be dressed in the same way, i.e. wearing a T shirt and shorts under a bib and brace which left his arms exposed.

37. Having heard the evidence and considered the documents referred to above I find that the gel was not corrosive but could be a skin irritant. It was not corrosive and immediately harmful to skin in the way that some other industrial chemicals like acids can be.

38. Unless the gel is applied in the right thickness the product created when the gel hardens will be substandard. If that happens the product may have to be scrapped which obviously costs the respondent money. Perhaps as a result of that the undisputed evidence given by the respondent's witnesses was that gellers were hard to find. The suggestion was that some didn't like the level of responsibility involved.

39. Claimant's employment and induction

40. The claimant was employed after he approached the respondent for a job. He was interviewed by Clive Thomas and Wayne Pocock. Their evidence (which was not disputed) was that claimant presented himself as an experienced geller. Neither Mr Pocock nor Mr Thomas asked for a CV nor took up any references. Instead, they both said they took the claimant's word about his skills and experience. The difficulty in finding experienced gellers meant they were eager to employ one when they thought they had found one.

41. Mrs Robinson spent some time in cross examination asking the respondent's witnesses what induction process and what training the claimant underwent when he joined the respondent.

42. As to the training, I accept the evidence from Mr Pocock in particular that any training was "hands on" training. There was no certificated training for gelling. Rather it was a case of acquiring the skill of applying the gel to the right thickness through guidance from more experienced gellers. I also accept the point which a number of the respondent's witnesses made, which was that the claimant was taken on as an experienced geller so they didn't expect him to require any training in the gelling process.

43. The evidence from Clive Thomas was that the induction was carried out by the same employee who carries out all inductions. He conceded that he was not present so could give no evidence as to what induction (particularly as to health and safety) the claimant had had. The respondent did not dispute the claimant's evidence that he had not received his contract of employment until it was handed to him on the shop floor some two weeks after he was appointed.

44. Poor performance and conduct issues

45. The claimant did not dispute that concerns had been raised with him throughout his time with the respondent about the quality of his gelling. He also accepted he had been spoken to by Mr Pocock about his use of a mobile phone on the shop floor. There was some dispute about how many times the issues had been raised. Pp.104-105 of the bundle were summary notes of incidents headed "Summary of dialogue between Wayne Pocock, [the claimant]; and in addition work diary entries recorded by Clive Thomas". In oral evidence, David Wyn Jenkins confirmed he had compiled this after speaking to Mr Pocock and Mr Thomas. It has 7 entries between 28 March 2017 and 19 July 2017. The first four entries relate to thin gelling (some referring to "instances" so the actual incidents would be more than 4). The next two relate to repeated use of mobile phone and warning being given. The entry on 19 July 2017 relates to a meeting at which the respondent says it decided to dismiss the claimant following "continuing stream of poor gelling and phone use".

46. For the claimant, Mrs Robinson suggested that I should not give any weight to that document. It is accepted it was compiled after the claimant's dismissal rather than being a contemporaneous record of incidents. I do take that point but it seems to me that the document does no more than elaborate on the diary entries made by Mr Thomas (pp.106-108). These were entries which Mr Thomas said he made in the Outlook calendar on the office computer by way of a record at the time of conversations he had with Mr Pocock.

47. I did ask Mr Pocock why there not more entries in Mr Thomas's Outlook calendar given the number of incidents which his evidence suggested had happened involving the claimant. His evidence was that he would not raise everything with Mr Thomas, especially if it did not involve a disciplinary issue.

48. One incident which was not included in Mr Thomas's diary was one which the respondent alleged happened on the 24 May 2017. I will call it the "shorts incident". The evidence given by Mr Gajewski was that because it was hot, he had taken his bib and brace overall home and his wife had made them into shorts for him by cutting them down and hemming the bottom.

49. Mr Gajewski's evidence was that when the claimant saw what he had done, the claimant then cut off the bottom of his own overalls to shorten them using either a knife or scissors. The claimant denies doing so.

50. At p.167 and p.168 there were signing out forms which showed that the claimant and Mr Gajewski had signed out new bib and brace overalls on that date. Mrs Robinson suggested that the form for Mr Gajewski was suspicious. His evidence was that he had worked for the respondent for 8 years so it was curious, she suggested, that the entry for 24 May 2017 was the first on his sheet.

51. Mr Pollitt submitted that this was a coincidence and that the validity of the sheet had not been challenged until the hearing. Had it been challenged earlier then the previous sign out sheets for Mr Gajewski could have been produced. I accept that point. There is no evidence to suggest the form for Mr Gajewski at p.168 was fabricated or doctored.

52. Mr Pocock's evidence was that when he saw what they had done he told both the claimant and Mr Gajewski to get new bib and brace overalls because wearing shorts was not consistent with health and safety requirements. Mr Gajewski's evidence was not consistent with Mr Pocock at this point. Mr Gajewski said he had shortened his overalls "numerous times" and that after Mr Pocock had given them a warning, he had done the same again. He said that the first time Mr Pocock had given him replacement overalls there had been no signing out because the storeperson wasn't about. The second time they had signed them out.

53. Mr Pocock made no reference to his having to warn Mr Gajewski or the claimant for a second time. I prefer Mr Pocock's evidence on this point to that of the claimant and Mr Gajewski. First, I found Mr Pocock's evidence of incidents in general to be vivid and betraying no sign of having been fabricated. He was honest enough to accept when he could not remember specific dates but it was clear from his evidence that the incidents leading to the claimant's dismissal were very much alive to him. I found him a credible witness and prefer his evidence where it contradicts other witnesses (including the respondent's).

54. Second it does seem to me that the signing out of the overalls by both the claimant and Mr Gajewski on the same day evidenced by pp.167-168 support Mr Pocock's version of events. I accept the claimant's evidence that overalls and boots would have to be changed on something like a two-monthly basis because they would get bits of hardened gel on them. However, it seems to me too much of a coincidence that both changed overalls on the same day. I therefore find that the claimant did shorten his overalls on 24 May 2017 and was told by Mr Pocock to replace them.

55. Although I have spent some time on this incident it is not directly relevant to the dismissal. It did not, as Mr Pollitt confirmed in submissions, form part of the reason for dismissal.

56. However, it is relevant to the issues I have to decide. First, my decision on which witness was more credible in relation to this incident will inevitably influence to some extent my findings on credibility in relation to other incidents. Second, Mrs Robinson suggested it cast doubt on the accuracy of the record at pp.106-108 because the shorts incident is not mentioned in Mr Thomas's diary entries.

57. She pointed out that at para 21 of the claimant's contract of employment (p.120) it says that "failure to…[make use of protective clothing and apparatus provided for you]..may result in disciplinary action". Given the seriousness with which this suggested breaches of health and safety over PPE would be viewed, she asked, why was no disciplinary warning given? Mr Pocock's answer was that he honestly didn't think that there was a need for a warning-so long as they listened to him and didn't do it again. That seems to me consistent with the policy which implies a degree of discretion by saying breaches "may" rather than "will" lead to disciplinary action.

58. That seems to me also to explain why this matter was not raised with Mr Thomas. Mr Pocock thought it was a minor, one-off problem which he had dealt with. There was no reason to log it in the same way as ongoing and repeated problems with the claimant's gelling.

59. Extension of probationary period

60. Mr Pocock's evidence was that on 15 May 2017 it was decided to extend the claimant's probationary period. There is a note to that effect in Mr Thomas's Outlook calendar. It is accepted that this was not confirmed in writing to the claimant. Instead, Mr Pocock's evidence is that he took an opportunity when the claimant was by himself decanting gel from the barrel to let him know. Mr Pocock's explanation was that he wanted to do this when the claimant was by himself because he recognised that it was a personal matter. The claimant denies that conversation took place.

61. Mr Pocock's evidence is that the claimant was then off sick for the rest of that week. The claimant's computerised TMS record shows

his absences and holidays. It was at p.197. It shows the claimant as being absent for the rest of that week (although it is marked as "unpaid bank holiday" which is clearly wrong). However, the claimant's pay slip for that week (p.59) shows that he was only paid for one day so he clearly was absent. The claimant could not remember why he was absent.

62. Those documents do corroborate Mr Pocock's version of events and, as previously noted, I found him to be a credible and sincere witness. Mrs Robinson did suggest that the order of order of events suggested in his witness statement (para 3-5) meant that if it happened at all, the extension of the probationary period happened after the shorts incident-which by the respondent's own case meant it happened after the 24 May. However, I don't think the flaws in structure of the witness statement are enough to undermine Mr Pocock's evidence on this point - especially as it is corroborated by the entry in Mr Thomas's contemporaneous outlook calendar entry for 15 May 2017. I find that Mr Pocock did tell the claimant on 15 May 2017 that his probationary period had been extended for a further 10 weeks.

63. Accident on 11 July

64. It's not disputed that on the 11 July 2017 the claimant got something in his eye which meant he left work to go to the hospital. There was some dispute about whether the respondent had failed to provide eye protectors or the claimant had failed to wear those provided. I do not have to decide that point to decide the issues in this case.

65. However, there are two points arising from that incident which are relevant to my decision in this case. First, it is not disputed that Mr Pocock said to the claimant that he should go to hospital but should not clock off. In other words, the respondent would pay him for the rest of the day regardless of whether he returned from hospital that day. I accept Mr Pollitt's submission that that behaviour seems inconsistent with the claimant's version of events on the 21 July 2017 which suggests that Mr Pocock behaved "like an ogre" (to sue Mr Pollitt's phrase) when the claimant had his second accident at work.

66. Second, it is clear that the claimant knew who the relevant first aiders were and how to report an accident. At p.126 is the accident report form which the claimant completed with Tomasz Drozd the relevant first aider. That seems to me to address any suggestion by the claimant that he did not know who to contact in case of an accident at work.

13 July onwards

67. The respondent's case, based on Mr Pocock's evidence, is that the end of the claimant's employment came about because of his

continued inability to apply gel to the appropriate thickness and heed warnings about not using mobile phones at work.

68. Briefly, according to Mr Pocock, matters came to a head on Thursday 13th July because a large roof panel had to be scrapped because the claimant had applied gel too thinly. Mr Pocock say that he told the claimant that this was his final warning. He had to improve his work and stop using his mobile phone at work.

69. On Friday 14th, Mr Pocock's evidence was that he saw the claimant on his mobile phone again. Mr Pocock did not speak to him –he said he did not have to as he caught his eye and the claimant fumbled to put his phone away. Mr Pocock's evidence was that at that point he decided that the claimant was not going to improve and that he would not listen to what he was being told (such as not to use his mobile phone). It was in effect the straw which broke the camel's back. Mr Pocock decided he couldn't work with the claimant anymore. Having thought about it over weekend Mr Pocock decided to take action.

70. He did not have authority to dismiss the claimant but would have to get authority from Mr Thomas or Mr Jenkins to do so. He didn't act on Monday when he was back at work because wanted to have his plan B in place first, i.e. a replacement geller for the claimant. He therefore asked Mr Gajewski to work with Mr Davidovic from the start of that week. Mr Gajewski confirmed this in his evidence. By Wednesday 19th July, Mr Pocock had checked with Mr Gajewski who confirmed the new geller looked to be up to scratch so Mr Pocock knew he could cover the claimant's absence. He then spoke to Clive Thomas about dismissing the claimant. Mrs Robinson pointed to an apparent inconsistency in the notes at p.104 which suggested that Darrell Jenkins was involved in the decision as well Clive Thomas. She also pointed out that the notes make no mention of Mr David Wyn Jenkins being involved in the discussion, contrary to his own and the respondent's witnesses' evidence.

71. I accept the note on p.104 is at best unclear. Having heard the witnesses it seems to me the sequence of events was this. Mr Pocock wanted to dismiss the claimant on that day (Wednesday 19th) because he felt he could no longer work with him. In some sense, it seems to me, he felt the claimant had let him down by failing to heed his warnings about poor performance and use of mobile phone. Mr Thomas, however, persuaded him to let the claimant finish the week. That discussion took place in the office where Darrel Jenkins also worked, which is why he is mentioned in the note on p.104. I accept Mr Pollitt's submission that the reality is that the conversation was between Mr Pocock and Mr Thomas but Mr Darrell Jenkins would have chipped in as he was also in the office. Mr Pocock was not happy with the decision to let the claimant work until Friday. He went back on the shop floor and raised the matter with David Wyn Jenkins to try and persuade him to let the claimant go sooner. David Wyn Jenkins agreed with Mr

Thomas so the claimant was allowed to carry on working until Friday.

72. That version of events is corroborated by the note made by Mr Thomas by way of a post-it in the office diary (p.109) for Cath, the office manager. She had left for the day when the decision was made so the note says "just to let you know we are terminating Sean Robinson's employment as of Friday 21/07/17". Mr Thomas explained that that was so she could sort out the claimant's final pay.

73. Taking into account that corroborating evidence I accept that meeting took place and that it had been decided on 19th July to dismiss the claimant because of performance and conduct issues. Mr Pocock was to carry out the dismissal on Friday.

Half day holiday on 21st

74. The respondent says that on Thursday 20th July the claimant asked for a half day holiday on Friday 21st July and that it was authorised by Mr Pocock and Mr Thomas on Thursday 20 July. The claimant says he asked for holiday on morning of 21st after the accident when he spilled gel on himself because he wanted to go home and have a shower

75. It was not disputed that Mr Thomas was on leave on the 21st so could not have signed the holiday form on that day. It was not put to any of the respondent's witnesses that the form had been fabricated or counter signed after the claimant's dismissal.

76. Mrs Robinson asked (very sensibly it seemed to me) why the respondent would give the claimant leave when it knew it was going to sack him? Mr Pocock's answer was that it made no difference-he might as well have it. Mrs Robinson pointed out that by the 20th July the claimant had taken more holiday than he had accrued. Mr Pocock's answer was that he didn't know that at time he approved the half day holiday to be taken on the 21st. That seems to me entirely consistent with the respondent's approach to HR matters. It also seems to me that there is something in Mrs Robinson's point that it suited Mr Pocock for the claimant not to be in work given how he felt about working with him. However, that seems to me to support the respondent's version of events if anything.

77. I therefore find that the respondent had on 20 July 2017 authorised the claimant to take a half day holiday on 21 July. One significance of that is that Mr Pocock would have known the claimant would be finishing work at 11 so he would have to dismiss him around that time.

Accident on Friday 21 July

78. It's not disputed that on the 21 July the claimant got gel on his t-shirt because the handle of the bucket in which he was carrying the

gel broke and it splashed up. The photos (p.222) show the gel on the t-shirt. The claimant took it off and was left standing in shorts because he did not take a spare set of clothes with him to work.

79. It is not disputed that the claimant did not talk to a first aider although it is obvious from what happened after the accident on 11 July that he knew who they were. In evidence he accepted that the gel was not burning his skin and he was not in any pain. The claimant's evidence is that he asked Mr Pocock for a replacement overall but instead Mr Pocock gave him a paper overall which is used for spraying. I use "paper overall" as a shorthand-I appreciate it is a more substantial garment than that. The claimant says he asked Mr Pocock for new boots and instead was told to clean the ones he had.

80. In his statement the claimant says the paper suit then began to rip under the arms (that is shown in the photos at p.222). In para.6 of his statement he says that he then decided that as he "still had gel on his skin" and had no adequate protection he would need to go home and shower and that it was then when he asked for a half day holiday. I have already found that that was not the case and the respondent had already granted the half day holiday on 20 July 2017.

81. The claimant then says he saw Mr Pocock who was going on his break and asked him if he could leave and Mr Pocock refused to let him do so. The claimant then went to the office and asked Anthony Roberts whether he could speak to someone higher in authority about health and safety. Mr Roberts' statement confirms this conversation took place and that he told the claimant to speak to Mr Pocock.

82. That conversation took place after the clamant had a WhatsApp exchange with his wife (p.223) in which she raises the issue of health and safety.

83. To conclude the claimant's version of events, he says that at around 11.10 a.m. Mr Pocock came to him and asked him what he was doing. The claimant said he was gelling and Mr Pocock replied "no you are not you are on a half day". He says Mr Pocock then "snatched" the bucket of gel from him and told him he had "had enough" and that he should go home and there was no need for him to return the following week.

84. Mr Pocock's version is that he was going to dismiss the claimant by the end of his half day (as he had been authorised to do on the 19th). He says that he was going on his break on 21 July at around 10 a.m. when he met the claimant who was only wearing shorts. He asked him if he had a spare t shirt and when told not, he got him the paper overall from the store. Mr Pocock says he then went to try and find the store person, Kerry, so that he could issue the claimant with a bib and brace. After five minutes of looking, he couldn't find

Kerry so he handed the claimant the bib and brace himself which the claimant put on.

85. Mr Pocock says he then went to speak to the claimant at around 10.50 knowing his day was ending at 11. The claimant was already packing up (the gellers start doing so 15 minutes before the end of their day so they can clean everything up). Because he was cleaning up, the claimant was by himself away from the main gelling area. Mr Pocock said that because the claimant was cleaning up he didn't have a bucket-he had already stopped work so Mr Pocock could not have snatched it off him.

86. In the bundle at p.203 there was a record of the claimant's clocking off time for 21 July 2017 which showed it as 11.00. This was a print off from a computer system. Mrs Robinson suggested that this could have been doctored. The claimant's evidence was that manual entries could be made on the system, because that had had to be done when he first started with the respondent before he had a clocking in card. The respondent on the second day produced p.205 and p.206 which were screenshots from the TMS system. Mr Pollitt also showed the colour version of the screenshots from which it could be seen that the first two entries during the claimant's first week at work were in green. The evidence from Mr Thomas was that any manual entries show up in green. The entry showing the claimant's clocking off time on 21st July as 11.00 was not in green but in black.

87. Although it was suggested by Mrs Robinson that the respondent could have contacted the software company to ask them to alter the record for the 21 July I find that far-fetched and there was no evidence to suggest that had happened.

88. I find therefore that the claimant did finish work at 11 a.m. on 21 July 2017 which is consistent with Mr Pocock's version of events.

89. I also find that it would be inconsistent with the evidence if Mr Pocock had taken it into his head to unilaterally dismiss the claimant on the 21st. His evidence was very clear that he could not dismiss without higher authority.

90. Mrs Robinson did also suggest that it was inconsistent for Mr Pocock to issue a bib and brace to the claimant an hour or so before he was going to be sacked anyway and then allow him to go home in it. Mr Pocock's evidence was that the bib and brace was worthless once someone had worn it. He acknowledged that the contract of employment at para 26 on p.123 requires an employee to return equipment on termination of employment. However, he explained this related much more to other parts of the business where employees will have expensive tools which they need to return. It would not apply to inexpensive bib and braces which would be replaced at least every couple of months in any event.

91. Ultimately I prefer Mr Pocock's versions of events. I find that on the 21st July all he did was to carry out the dismissal which had been agreed to on the 19th July. That dismissal was because of the claimant's poor performance and unwillingness to listen to instructions about not using his mobile phone.

Discussion and Conclusion

92. I heard oral submissions from both representatives who both handed up written submissions. I have referred to those where relevant in this judgment. In light of my findings of fact I find that the claimant has failed to discharge the burden of showing that a reason within s.100(1)(c) was the reason or principal reason for his dismissal. His claim of unfair dismissal must therefore fail.

93. In those circumstances I do not need to deal with Mr Pollitt's secondary submission, which was that the claimant had no reasonable belief that there were circumstances connected with his work which he reasonably believed were harmful to health and safety.

Application for costs

94. I delivered the above judgment with reasons at the end of the third day of the hearing. By that point everyone bar the claimant, Mrs Robinson and Mr Pollitt had left. I confirmed a copy of the judgment and reasons would be sent to the parties.

95. Mr Pollitt then said that he was instructed by the respondent to apply for costs. He was applying for costs to be assessed but did not have a schedule of costs. He handed up a letter dated 25 March 2018 from the respondent's solicitors, Carreg Law, to Mrs Robinson as the claimant's representative. That letter was marked "Without prejudice save as to costs" inviting the claimant to withdraw the claim by 28 March 2018. If he did so the respondent would not make an application for costs.

96. Mr Pollitt's submission was that given my findings the claimant had acted unreasonably in bringing the case and/or must have known his case had no reasonable prospect of success. That, he submitted, satisfied the test in Employment Tribunal Rule 76(1)(a) and/or (b) for when a tribunal may make a costs order.

97. He submitted that the claimant must have known that he was not telling the truth when it came to certain matters such as whether Mr Pocock had told him that his probationary period had been extended. By 25 March when the costs letter was sent the claimant also had the respondent's witness statements and documents and so would have seen the evidence of the meeting on the 19 July 2017 when it was agreed he should be dismissed. I had also found, he pointed out, that the claimant had been dismissed at 11.00 and not 11.10 which he must have known. I pointed out (and Mrs Robinson had confirmed) that the documentary evidence on which

my finding on that point was based (p.203) had not been disclosed until the Saturday of the bank holiday weekend.

98. I asked Mr Pollitt whether his submission meant that whenever a tribunal preferred the evidence of one party, the other party was acting unreasonably and therefore at risk of costs. He submitted that in this case on certain points like whether the claimant was told his probation had been extended it had been a stark choice between two versions which meant one party must not be telling the truth. That was not the same as many cases where the issue may be more about interpretation, e.g. whether a dismissal was within the band of reasonable responses.

99. I asked Mrs Robinson whether she was in a position to deal with the application for costs there and then, explaining the application being made. Even taking into account the costs letter of 25 March 2018 it did not seem to me to be fair to expect her to deal with the application late on the final day of the hearing. That was particularly so given that there is relevant case law about when it may be appropriate to award costs where a tribunal finds a witness has given false evidence. Mrs Robinson was very unlikely to be familiar with that case-law.

100. Mr Pollitt suggested that it might be appropriate instead to make directions that the respondent set out their case on costs in writing giving the claimant a set period to respond. That would enable the claimant to take legal advice if they wanted to do so. That seemed to me both the fair and pragmatic approach. In those circumstances I made the order for directions set out below.

ORDER

1. Within 14 days of this judgment being sent to the parties the respondent will, if so advised, formulate in writing the basis for its application for costs and send the same to the claimant with a copy to the tribunal.

2. Within 21 days of receiving the above, the claimant's representative shall send his response in writing to the respondent with a copy to the tribunal.

3. Within 14 days of receiving the claimant's response the parties will write to the tribunal setting out any proposed directions for further conduct of the application, to be agreed if possible. The tribunal will then make such directions as it considers appropriate.

Employment Judge McDonald
Dated: 5 April 2017

JUDGMENT SENT TO THE PARTIES ON

3 May 2018

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS