THE EMPLOYMENT TRIBUNALS

Claimant: **Mr A Quinn**

Respondent: **Mabey Hire Limited**

Heard at: **North Shields** **On: 26 & 27 February 2020**
and Teesside Justice Hearing Centre **On: 13 & 14 August 2020**

Before: **Employment Judge Morris (sitting alone)**

Representation:

Claimant: **Mr D Bayne of Counsel**
Respondent: **Mr J Heard of Counsel**

RESERVED JUDGMENT ON LIABILITY ONLY

The judgment of the Employment Tribunal is as follows:

1. The claimant's complaint that his dismissal by the respondent was unfair, being contrary to Section 94 of the Employment Rights Act 1996 by reference to Section 98 of that Act is not well-founded and is dismissed.

2. The claimant's complaint that the respondent was in breach of his contract of employment in that it failed to give him notice of the termination of that contract to which he was entitled is not well-founded and is dismissed.

REASONS

Representation and evidence

1. The claimant was represented by Mr D Bayne, of Counsel, who called the claimant to give evidence. The respondent was represented by Mr J Heard, of Counsel, who called four present and former employees of the respondent to give evidence on its behalf: namely, Mr S Knight, Training Officer; Mr S Williams,

General Manager for Glasgow; Mr A Kemp, formerly Operations Director (West); Mr P Spencer, Charge hand.

2. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. I also had before me a bundle of agreed documents comprising some 225 pages to which were added a further 34 pages during the course of the Hearing. The numbers shown in parenthesis below refer to page numbers or the first page number of a large document in that bundle.

The claimant's complaints

3. The claimant's complaints were as follows:

   3.1 His dismissal by the respondent was unfair being contrary to Sections 94 and 98 of the Employment Rights Act 1996 ("the 1996 Act"); primarily (at the risk of over-simplification) that he had not been guilty of misconduct as alleged and the respondent had not acted reasonably in relation to his dismissal including as to the investigative, disciplinary and appeal processes and the sanction of dismissal.

   3.2 The respondent had acted in breach of his contract of employment by dismissing him without giving him the notice of termination of that contract to which he was entitled.

4. The indication in the claimant's claim form (ET1) that the claimant was also claiming a redundancy payment was withdrawn at the commencement of the Hearing and, to the extent that there was such a claim, it is dismissed.

The issues

5. The parties had produced an agreed list of issues. Drawing upon that list in respect of liability only, the issues in this case can be summarised as follows:

   5.1 Was the claimant dismissed? The respondent accepted that he had been.

   5.2 Has the respondent shown what was the reason for the claimant's dismissal? The respondent asserted conduct namely, consistently failing to adhere to its Health and Safety Policies.

   5.3 Was that reason a potentially fair reason for dismissal within Section 98(1) of the 1996 Act? Conduct is such a potentially fair reason.

   5.4 If the reason was a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for the dismissal of the claimant in accordance with section 98(4) of the 1996 Act? This would include whether (taking account of the Acas Code of Practice: Disciplinary and Grievance Procedures (2009) and the guidance in British Home Stores Limited -v- Burchell [1978] IRLR 379 (as qualified in Boys and Girls Welfare Society v McDonald [1996] IRLR129) a

reasonable procedure had been followed by the respondent in connection with the dismissal and whether (in accordance with the guidance in Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Post Office v Foley [2000] IRLR 827) and Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903) the decision to dismiss the claimant fell within the band of reasonable responses of a reasonable employer in such circumstances.

5.5 In this respect, the Tribunal would, however, apply the guidance set out in Burchell having regard to the fact that the statutory 'test' of fairness, which is now found in section 98(4) of the 1996 Act, was amended in 1980 such that neither party now has a burden of proof in that regard.

5.6 With regard to the above questions, in accordance with the guidance in Burchell and Graham, I would consider whether at the stage at which the decision was made on behalf of the respondent to dismiss the claimant its managers who, respectively, made that decision and upheld that decision on appeal had in mind reasonable grounds, after as much investigation into the matter as was reasonable in all the circumstances of the case, upon which to found a genuine belief that the claimant was guilty of misconduct.

5.7 Did the parties comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015)?

Wrongful dismissal

5.8 Was the claimant in fact guilty of gross misconduct so as to entitle the respondent contractually to terminate his contract of employment without notice?

Consideration and findings of fact

6. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

Context

6.1 The respondent is a large employer in the business of providing what it refers to as "temporary works", which includes the provision by hire of equipment and, on occasions, its own employees to utilise that equipment primarily in relation to groundworks being undertaken within the construction industry. It employs some 400 employees and operates from 17 depots throughout the UK including one at Durham where some 20 employees (roughly divided equally between operatives and administrative support) are employed.

6.2 The claimant was employed at the Durham depot. His employment commenced on 2 February 1988 and terminated on 23 May 2019 when he was summarily dismissed for gross misconduct. He was initially employed as a labourer and worked his way up to become a chargehand, a role he performed for approximately seven years prior to his dismissal.

The early employment of the claimant

6.3 Nothing untoward occurred during the early part of the claimant's employment, which is apparent from his promotion ultimately to charge hand. From May 2016, however, his employment was not without incident. I set out the matters below by way of background to the circumstances that led to the claimant's dismissal, which commenced in April 2019. Mr Kemp and Mr Williams both stated that they based their respective decisions to dismiss the claimant and not allow his appeal upon those circumstances and not the following historical matters.

6.3.1 In May 2016 the claimant was suspended by his depot manager (AD) for suspected breaches of health and safety but after an investigatory meeting he was informed that no disciplinary action would be taken and his suspension was lifted; albeit he was warned that if there were any further instances of a similar nature it may result in formal disciplinary action being taken against him (39).

6.3.2 In December 2016 the claimant was again suspended by AD for suspected serious breaches of health and safety (40). Following a disciplinary hearing and despite the claimant's assertions to the contrary, it was concluded that he had deliberately breached health and safety by moving "SSP-14" rails contrary to company guidance and training that he had received. As a consequence he was dismissed for gross misconduct. On appeal, however, the claimant was reinstated subject to a twelve-month final written warning and his being placed on a Performance Improvement Plan (PIP) for three months, which would cover supervisory and safety regulations (47).

6.3.3 In his letter of appeal the claimant raised allegations against AD, whom he felt had a personal vendetta against him, which were investigated as a grievance. His grievance was not upheld, it not being believed that AD's behaviours were due to any malice; rather it was due to poor communication, historical behaviours and cultural and depot practices. In the circumstances a mentoring session between the claimant and AD was to be arranged (49).

6.3.4 In April 2017 the claimant was suspended following a number of complaints against him; being bullying and harassment, forging Mr Spencer's initials on green tags, paper remains not being removed from shaft brace rams, calling another employee

"useless", using offensive language against another employee and not following process and procedure. A disciplinary hearing was held on 4 May 2017 following which the decision was taken to extend the claimant's final written warning by a further three months.

6.3.5 In May 2017 the claimant was placed on a new PIP.

6.3.6 In November 2017 the claimant was suspended for a fourth time; this in relation to allegations of serious breach of health and safety rules and disregard of employee health and safety (56). These matters arose not from the claimant's direct involvement in a situation but from his supervising, as charge hand, another employee who was, in fact, his brother. The claimant's brother was ultimately dismissed but, following investigation, the claimant was allowed to return to work.

6.3.7 The claimant was away from work with work-related stress from 29 November 2017 until February 2018. He attributes his stress to the conduct of AD towards him. The claimant returned to work when he heard that a new manager, PK, was due to commence employment in place of AD.

6.3.8 In February 2019 PK invited the claimant to attend an informal meeting regarding, first, a particular incident that had been incorrectly reported and, secondly, concerns relating to the claimant's personal well-being that had been expressed by his colleagues and observed by PK (63). Matters discussed included the incident and the incorrect recording; the claimant's health (including his hearing and a strained back for which he was taking medication); personal issues at home; whether there was a need to release the claimant from some or all of his charge hand responsibilities for a short/temporary period. As to the last mentioned, the claimant did not consider that this was necessary. PK accepted this but advised the claimant that he would be monitored closely and if there was no improvement in his decision-making and/or supervisory skills, or if PK felt that the pressures of the role were affecting him physically or mentally he would stand the claimant down for a necessary time to enable him to recover. They discussed the expectations of a charge hand role especially with coaching and development, which the claimant agreed take on board.

The health and safety context

6.4 Understandably, health and safety are matters of great importance to the respondent, which is reflected in its various policy documents: for example, its Hazard Observation Raising and Reporting procedure (21), its core Health and Safety Beliefs (32) and its Check, Challenge, Correct approach (34). Health and safety is said to be its whole business model.

6.5 The Hazard Observation procedure is based upon employees being encouraged to submit Hazard Observation cards ("HOC") if they see anything unsafe at a depot in order that it can be attended to; this can be done anonymously. At Durham the cards could be submitted to the claimant, PK, or the office manager, JM.

6.6 Mr Knight had known and worked with the claimant for many years. In his opinion as Training Officer, the claimant knew how to do the job correctly and could do it well but chose to cut corners. During one of the first conversations Mr Knight had had with the claimant after he became Training Officer the claimant had said to him, "We only do it properly whenever you're here". Concerns over the claimant's performance had led to Mr Knight's predecessor taking him through a full training programme a few years ago.

Issues giving rise to the claimant's dismissal

6.7 On 29 April 2019 Mr Knight visited the Durham depot. As he drove into the car park he saw the claimant on a forklift truck loading a lorry, the driver of which was on the back. The driver was not wearing a protective hat or safety glasses and did not have a safe means of getting on and off the back of the lorry. These were serious health and safety breaches for which the claimant, as supervisor, was responsible. When the claimant saw Mr Knight he told the driver to get off the lorry and put on his protective equipment. Another employee, AM, also witnessed this incident and reported it to a manager.

6.8 On 30 April 2019 Mr Knight was again at the Durham depot to train an employee, SH, on the use of multi-brace hydraulic rams. He asked SH to pick a ram at random from those that were marked as 'available' indicating that it had been fully serviced and was ready to be sent out to a client. When a ram is 'available' it must be tagged with a green label marked with the initials of the person who has cleaned and tested it. Mr Knight noted that the ram should not have been marked as being available as it was full of mud and stones showing that it had not been cleaned to the correct standard. He particularly noticed, from the fact that the R/clips on the cover plate were damaged, that it could not have been removed to inspect the inside of the ram and that the end plate bolts had not been checked and were loose. Additionally, the test rig used to test the pressure of the ram had a leak from one of the fittings meaning that the ram could not hold the necessary level of pressure, which is required as part of the testing process. Mr Knight took photographs that are at pages 72 to 81 and on 1 May submitted a statement recording these matters (71).

6.9 Mr Knight saw that the green tag had been completed with the claimant's initials (77) and SH told him that the claimant had serviced the ram the previous week. It seemed to Mr Knight that the ram had come in from a client site and had been tagged as available by the claimant without going through the proper process. This angered him as, if a ram fails, it can mean death on site. He had trained the claimant on rams (57 - 62) and he

therefore knew the risks. Mr Knight checked the other 'available' rams and found a further two that the claimant had signed off that had not been tested in accordance with the respondent's procedures. Mr Knight explained in evidence that tags cannot come off incorrectly and be restored onto the wrong ram, and that they would normally be pulled or cut off with pliers.

6.10 Mr Knight asked to speak to the claimant but was told that he was off work. He therefore called over the other employees to show them the state of the ram. They remarked that it was the claimant who had tested the ram and that he always cuts corners. Mr Knight asked why they had not reported this and they replied that they had tried to do so using HOCs but they were usually just put in the bin or ignored.

6.11 Mr Knight therefore submitted a HOC (68). He then escalated this incident to PK, making use of an "Incident Fast Facts Report" (29). PK then investigated matters, which he recorded in a "Non-Conformance Record – Quality" dated 3 May 2019 (88). He reviewed Mr Knight's statement and photographs as well as previous HOCs, which he described as being "of the same nature". Mr Knight also noted the findings of GB, the respondent's Product Specialist, who had contacted the office to report that some rams on site did not have any green tags on them to prove that they had been tested; the claimant was also accountable for this. PK considered that all the evidence gave rise to concern that the claimant's actions had resulted in unsafe acts relating to health safety and a failure to adhere to procedures. The claimant's inability to deal fully with the accountabilities of the charge hand role led to PK concluding that it was necessary to suspend him pending a disciplinary investigation.

6.12 On 1 May 2019 Mr Knight was again at the Durham depot. He noticed that a number of JCBP panels (John Collins Box Panels) had been stacked incorrectly. First, a number had been stacked in a dangerous fashion as they had not been dismantled and could have collapsed (83 and 84). Other employees had told him that they had been stacked by the claimant that morning. Secondly, a number that had been dismantled had been piled up without the required sheet of plywood between each of them and, therefore being metal on metal, they could have slipped (85 – 87). Stacking of the panels in these ways was contrary to both the training that had been provided to the claimant and to the respondent's user guide of which the claimant would have been aware. As charge hand the claimant was responsible for supervising all employees and training/correcting them. Instead, Mr Knight found that it was he who was always having to correct the claimant when he came to the depot. As the claimant was not present to speak to directly Mr Knight submitted a separate HOC in respect of each of these two matters (82).

6.13 PK then met with the claimant on 2 May at which several issues were discussed as follows (90):

The ram identified by Mr Knight – NCR 3470

6.13.1 The claimant maintained that he had done what he was supposed to do and that he would not put his name to something that was not right. He did not directly answer how Mr Knight had managed to clean the ram other than to say that he would have taken the other side off and that the ram had been in the sea and was up to the eyes. He accepted that the bolt was a bit loose but suggested that that would not affect it. He had never had rams fail before.

Using a road plate to clean the yard – HOC DUR893

6.13.2 On 6 March 2019 Mr Spencer submitted a HOC regarding the claimant's use of a steel road crossing plate, which Mr Williams explained weighed about half a ton, (rather than a specified attachment) that he attached to the front of a forklift truck to clean the depot yard, which Mr Spencer suggested was dangerous and could cause damage (66). The corrective action taken at the time was that this would never be done again.

6.13.3 When PK raised this at their meeting, the claimant maintained that the yard was too dirty and that they always used to use old plates. In his witness statement the claimant asserts that PK initially told him that he "could use a plate to clean the floor". I do not accept this evidence. First, there is no record of such a discussion in the note of this meeting (90), which one would have expected; the most natural thing when taken to task by a manager for some form of wrongdoing is to immediately counter that the manager had given his approval for what had occurred. Secondly, PK having given prior permission is inconsistent with the answer the claimant gave to Mr Williams (see below) when he asked if PK said it was okay to use the plate and the claimant replied, "He said he wasn't very happy". Thirdly, upon investigation by Mr Williams, PK denied giving the claimant permission to use the plate.

SSP ram not cleaned – HOC DUR910

6.13.4 On 16 April 2019 other employees called Mr Spencer over to look at a ram. When he removed the cover he could see that it was blocked with mud and clay yet it had a green tag on it indicating that it was available to be sent to a client. The tag had the claimant's initials on it. Mr Spencer put in a HOC but later realised that it had not been processed. The office manager asked him to write it out again but he refused because he had lost confidence in the system of filling out HOCs; although he was subsequently persuaded to do so (66). When this matter was raised with claimant at the time he said that he had tested the rams. The corrective action taken was that he was instructed to make sure that they would be re-tested.

6.13.5 At the meeting with PK the claimant suggested that he could not see inside the ram as the muck dropped down when it is rolled over. He accepted that Mr Knight had told him to take the caps off and to take more time on cleaning the rams.

Using a hammer head to close a roller door– HOC DUR907

6.13.6 When the Durham depot was about to close on 25 April 2019 the claimant could not set the security alarm, which he found was because a shutter door would not fully close. He therefore placed the head of a heavy mel hammer on the door. The following morning DG was first into the depot. He raised the door and, when it started going up, the hammer head fell off just missing his head (67). When this was raised with the claimant at the time he said that he had to do this for the alarm. He was instructed to tell all the staff about this to make them aware.

6.13.7 At the meeting with PK the claimant explained that it was late at night and it was out of order so he did it so that the alarm did not go off. He said that he did, however, realise how severe it was.

Using a metal grinding disc to cut rubber – HOC DUR901

6.13.8 On 27 April 2019 Mr Spencer saw the claimant using a metal grinding disc to cut a rubber insert for a pipe lifter whereas a grinding disc should only be used to grind and not to cut, and certainly not to cut rubber which had melted over the grinder and the hire truck. Mr Spencer submitted a HOC to this effect (67). This incident was witnessed by AM.

6.13.9 At the meeting with PK the claimant maintained that it was an old disc and when he was asked if he was not aware that a hacksaw should be used to cut rubber he answered that it had never been damaged and it had been okay in the past but he understood. In his witness statement the claimant once more asserted that PK told him that he "could use the metal grinder to cut the rubber". For reasons similar to those in respect of the use of the road plate, I again do not accept this evidence: there is no record of such a discussion in the note of this meeting (91) (which for the above reasons one would have expected) and upon investigation by Mr Williams, PK denied giving the claimant such permission.

The informal hearing of 6 February 2019

6.13.10 PK revisited the meeting that he had had with claimant on 6 February 2019. The claimant maintained that Mr Spencer was refusing to help him. PK reminded him that he was trying to coach and develop the claimant in his role and asked whether he had used the phrase he had given him when speaking to other employees who were not doing as required, "Are you refusing to

carry out the task you are trained, competent and able to do?" The claimant said that he had not done so but had just asked Mr Spencer to test the rams. As to his health, the claimant explained that his hearing was okay now. PK pointed to there having been four instances in the last month, which was about his performance and quality, and painted a picture about it all. The claimant answered that he went by the book and does it right. He suggested that Mr Knight had never shown him and, specifically, had never gone through MBrace for a few years. He confirmed that he was asserting that Mr Knight had signed him off but had not shown him or got him to re-test although he had done "Powershore and that".

6.14 PK adjourned the meeting, which reconvened after 44 minutes. After having reviewed the above matters he informed the claimant that he would be suspended on grounds of health and safety. He gave the claimant a letter of suspension (93), which he read through to the claimant. The reason for the suspension given in that letter was, "Not following company procedures regarding health and safety requirements to not only yourself, fellow colleagues and our customers."

6.15 Mr Williams accepted that the above investigation fell short of the guidance contained in the respondent's Managers Guide to Disciplinary Procedures (226) in a number of respects: not giving the claimant notice of the interview and of its purpose; not advising him that he could be accompanied; the investigator had only interviewed the claimant and not more widely; an investigatory report had not been prepared. I accept that those procedural points had not been attended to but I also accept the submission by Mr Heard that the principal question for me is not the technical detail but whether the totality of the investigation was within the range of reasonable responses. Mr Kemp did not agree with Mr Williams' assessment; in his opinion as the claimant had admitted the various acts of wrongdoing it was not necessary for PK to have gone further. I agree with that assessment also.

6.16 During the claimant's suspension, an employee in the respondent's HR Department, TR, looked into matters further, including the allegations made by the claimant about Mr Knight during the course of the meeting with PK. She spoke over the telephone with Mr Knight on 14 May 2019 a record of which, headed "Investigation", is at page 94. He informed her that contrary to what the claimant had said he had trained him on MBrace as part of a hydraulic refresher on 9 August 2018. He explained in detail what he had done including testing a powershore, a single acting ram and then a double acting ram that could be modified double acting, multi-brace or super sharp plus, "they are all the same procedure". He continued that he would then walk round the yard with the trainees and ask questions on all hydraulic equipment within the depot. In the claimant's case he had "shown him everything". During the course of this conversation with TR Mr Knight also raised the following issues: him seeing, on 29 April, the lorry driver on the back of his lorry referred to above, which had been

witnessed by AM; the dangerously stacked panels (which he got the trainee that he was with, DG, to stack correctly); and the panels that were stacked without the timber slats in between. He reported to TR that other employees had told him that it was the claimant who had stacked the panels dangerously that morning and had blamed him for not using the timber slats. He told TR that they stated that there was no point in putting in HOCs about the claimant as nothing happened and he is the one who actions the cards anyway. As to the claimant having stated that he does everything by the book, Mr Knight questioned the inconsistency of why he was testing the MBrace ram if he had never had any training for it and why the rams looked the way they did. He also questioned why it was he who had to change some fittings on the hydraulic test rig due to it leaking and not holding the correct pressure, which was essential to ensure that the rams are fit for use. Attachments to this Investigation record include the claimant's Training Certificates from 2013 onwards, his signature of training in Mr Knight's Training Book, the photographs taken by Mr Knight, the Hydraulic Fitters Syllabus and the HOCs. In this regard the claimant accepted in cross examination that he had had all the necessary training in respect of how to clean and test all the hydraulic rams used by the respondent.

6.17 Mr Williams, who did not know the claimant, was appointed to conduct a disciplinary hearing. The respondent's HR Business Partner, SA, wrote to Mr Williams on 14 May attaching relevant documents (99). She provided a summary and the reasons for the investigation, which she summarised overall as being health and safety and not following procedures.

6.18 Mr Williams wrote to the claimant on 14 May 2019 to invite him to attend a disciplinary hearing on 23 May (97). In that letter he set out the seven allegations that had been provided to him by SA as follows:

6.18.1 Not following company procedures regarding health and safety requirements to not only yourself, fellow colleagues and our customers.

6.18.2 Failing to use the correct machinery or tools to carry out your role.

6.18.3 Disregard for the safety of others within the workplace by putting 'potential risks' in place, which could or could have result(ed) in an accident incident.

6.18.4 Multi brace hydraulic rams not being tested in line with company testing and safety procedures, potential risk to employees and our customers.

6.18.5 Competency in final checking as a 'supervisor' of others work within your role, potentially putting direct reports at risk.

6.18.6 The number of incidents recorded over a substantial period and the severity of these risks to the company reputation and brand, potential of harm to fellow employees and customers.

6.18.7 Potential risk of legal action or financial compensation claim due to quality of work carried out by you.

6.19 Prior to the meeting the claimant submitted to Mr Williams what he termed a "letter of consideration" dated 21 May 2019 in which he commented upon the allegations against him including as follows (101):

6.19.1 He considered Mr Knight's comments to be personal and not professional. If he had concerns about the claimant's methods why did he not assess at that point in time and test one with him?

6.19.2 Several days had gone by since the claimant had tested the rams and anything could have happened during that time.

6.19.3 The rams are given a 20-second sense/quality check prior to sending out. If the power pack [*which I assume to be the same as the testing rig*] had been leaking it would have been picked up at that point and re-tested. When the claimant had done his testing, the pressure was holding. He would never put his name to the leg unless he was 100% sure that they were safe.

6.19.4 It was not his intention to say that Mr Knight did not train them properly. He was just trying to put across the point that they had not done Mbrace training in a long time.

6.19.5 The lorry driver who was said not to be wearing correct PPE on 29 April 2019 did not get out of the wagon until the claimant had put the 14m rail on, when the driver then went to the toilet. The claimant had continued to load smaller rails. When the driver came back the claimant asked him to put his hard hat on. At no stage did Mr Knight approach him regarding this and if it was reported by AM, it was never mentioned to the claimant and there was no HOC to his knowledge.

6.19.6 The panels are stacked by four employees (whom he named) in addition to the claimant. It was easy to point the finger at the person who was not there to defend themselves. The old manager had been quite happy for the panels to be stacked without wood as long as there was a square block at the back.

6.19.7 It was utter rubbish for other employees to say that there was no point in putting HOCs in against him because he is the one who looks at them and deals with them. This is reflected in the fact that only one of the cards had been dealt with by him.

6.19.8 There had been no mention of the rams going to site with no green labels on and he was at a loss as to how that could happen as it is up to everyone to flag any equipment without labels prior to loading. For this job SH and JB had painted all the legs and flagged that three of them did not have labels and needed to be re-tested, which was done prior to them being sent out.

6.19.9 He had worked for the respondent for over 31 years, 28 of which were happy and fulfilling until AD became manager at the depot. While she was there he was the victim of bullying and harassment but nobody would listen. She managed to create a rift between him and the rest of the team that is still prevalent today. He had been off with stress for three months from November 2017 to February 2018 caused by the constant harassment and only returned as AD was leaving. He does his best to be professional but when you are not supported by your work colleagues the stress does get to you.

6.20 Mr Williams conducted the disciplinary hearing on 23 May 2019 at which the claimant chose not to be accompanied (103). JM attended as note taker. Amongst other things the following matters were discussed:

6.20.1 The claimant first confirmed that he knew that he was at the meeting for allegations of not following health and safety procedures as per the invitation letter. He then explained his job title and role as charge hand including looking after the equipment generally, making sure the yard is clean and tidy and man management. The meeting then moved on to consider specific matters.

Using a road plate to clean the yard – HOC DUR893

6.20.2 The claimant explained that he used the road crossing plate on a forklift truck to clean the yard because the respondent's chief executive was visiting and the yard was to look spotless but it was thick deep of mud. They used to have a sweeper but not now. When he had told PK that he would use the road crossing plate he asked about the snowplough but it was broken. Mr Williams pressed the claimant as to whether PK had said it was okay to use the plate to which he responded (as recorded above), "He said he wasn't very happy". Asked again whether PK had said it was fine, the claimant replied, "He said don't do it again". Mr Williams asked whether the claimant thought what he had done was a safe act. He initially responded that it was not dangerous but when asked again whether it was a safe act he said that it was not and expanded upon what could go wrong in terms of damaging the yard and the forklift truck. The claimant confirmed that he was responsible for the team, that the respondent did not advise this use of a road plate and that he

had been trained. He suggested that he did not have any approved attachments. Finally, he confirmed that, as he had said when PK spoke to him about it, he would never repeat what he had done and would just use a brush. In short, I am satisfied that it was reasonable for Mr Williams to conclude that the claimant did not have permission to use the road plate and knew that what he did was unsafe.

SSP ram not cleaned – HOC DUR910

6.20.3 Mr Williams raised the issue of this ram having a green tag on despite being full of mud and clay. The claimant explained that it had been full of sand and he had washed the inside as best he could, including taking the caps off, but it was wet and when dry it becomes flaky. He explained that when it is sent out there is always a double check so any like that would not be sent to site. Mr Williams made the point that a green tag should not be put on if equipment is not ready. The claimant responded that he had been doing this for 25 years and had had no failures, and this was why they do quality checks. He accepted, however, that if something does go wrong it could be massive with the potential for collapse that would put lives at risk. He had never cut corners in his life.

Using a hammer head to close a roller door– HOC DUR907

6.20.4 The claimant explained that the roller door comes down and has a sensor on it. He was locking up at 4.55, the alarm went off and he is a keyholder. He noticed that there was a gap of about an inch. He put a brush on but that did not work so he put the hammer head on the door – on the lip so it would touch. He was worried that the alarm would go off and either he or PK would be called out during the evening. He confirmed that it was a massive mistake and that he should have put a tag on to warn others. He is normally first in. He suggested that DG could have done a 20-second scan but he accepted that it was his mistake. He was upset at what could have happened and accepted that he needed to think more before acting. He accepted that the hammer could have hit DG on the head and understood that it was serious, and agreed that falling from above could kill somebody but he was more worried about alarms and the safety of the company. He accepted Mr Williams suggestion and that he was relying on luck saving them and commented that they would have to spend money on someone coming out every time it does it. In oral evidence Mr Williams explained that the claimant should have escalated the problem with the roller door to his managers (his immediate line manager, the Regional Operations Manager, any General Manager in the region or, ultimately to head office who could have put the claimant in touch with someone who would make the decision) all of whom are

contactable 24 hours a day or, alternatively, called out the roller door company or the alarm company. When asked why he preferred the hyperbole from DG over the claimant's explanation Mr Williams clarified that he had not rejected the claimant's explanation but accepted that he did not investigate as fully as he should have. I record that the claimant sought to minimise this incident during cross-examination when he explained in some detail how he had simply lent the hammer head onto the lip of the door with the greater part actually resting on the ground, the inference being that as the door was raised the hammer head would have remained on the ground. I find that explanation to be inconsistent with the claimant's position during this interview that his was a massive mistake, he needed to think more before acting, it could have hit DG on the head and, falling from above, it could have killed somebody.

Using a metal grinding disc to cut rubber – HOC DUR901

6.20.5 The claimant explained that he had previously been told to cut the rubber with a hacksaw as drills were not strong enough. He had an old disc and it would have been a five second job. Mr Williams explained in oral evidence that the fact that an old grinder had been used was problematic as it would be prone to shatter, which would be worse if it was a stone disc as the claimant had suggested. Mr William also stated that using a grinder could result in the rubber getting into the machine, it could jam causing the blade to snap or the body of the machine to come out of the user's hands, it could cause a fire and if cutting through the rubber metal was reached the wheel could break. At the interview with Mr Williams the claimant maintained that he had said to PK that he had no proper tools to do the job and he replied that he would look into it but do not do it again. In oral evidence Mr Williams rejected the suggestion that if the correct tools were not available the claimant was right to use his initiative. The claimant confirmed to Mr Williams that he had had abrasive rails training after the incident but stated that he was not trained at the time. He then clarified that he was trained and was just re-doing it. He had used a grinder because it was a massive job and the old hacksaw was not working. It was just 10 seconds with the grinder to cut a little bit: just a fast blade doing a little nick. He was not aware that he should not have done it and it was not on the training that he knew of. He then confirmed that he knew that he should not be cutting but it was just a little groove. He confirmed that he should not do it and would not do it again. In oral evidence Mr Williams explained that the issue was not whether he had just accepted Mr Spencer's account; rather, the claimant should not have been doing what he was doing in using the grinder improperly.

Driver on lorry without PPE – 29 April

6.20.6 The claimant explained, as above, that the driver had gone to the toilet and when he came back he went to move the ladder whereupon the claimant told him to get down and put his hard hat on, and that was when Mr Knight came over. He did not know why Mr Knight had said that the driver had no hard hat on, he did not speak to the claimant, "it's lies". The driver had lent over onto the wagon and the claimant told him to get down – he had no hat on. In this regard I prefer the evidence of Mr Knight not least because it was corroborated by AM, first, at the time when he witnessed what occurred and reported it to a manager and, secondly, when he was interviewed by Mr Williams during the course of the disciplinary hearing.

The ram identified by Mr Knight – NCR 3470

6.20.7 The claimant told Mr Williams that he did not know where this was coming from. He always checked everything, measured it and got the top, sides, lifting eyes for dirt turning on its side and blasting it out. It flakes when dry. They were really bad and he had cleaned them the best that he could. He suggested that it could not be proved that it was the same ram that he had checked. On being shown the photographs the claimant maintained that he had not done it and would not send it like that. As to the pin being bent and the bolt loose, he confirmed that he would tighten them up. He had a machine and did not know why it was like that. This explanation contrasts with the claimant accepting in the investigation meeting with PK that the bolt was a bit loose but that would not affect it. Asked by Mr Williams whether he was saying someone else had done it, he answered that he could not prove that. Mr Williams noted that the green ticket had been done by the claimant but he responded that this was weeks after and someone could have changed it. He did the best he could and if he had missed it (although he did not think so) he would hold his hand up. He would not send it out and, if he missed it, it would be picked up at the quality check. He said he did not know where the stones had come from and mentioned wind. The ram was a straight pass and held its pressure. He did not know what had happened it was not right. I do not find a number of the features of the claimant's explanation as to the condition of this ram to be credible: that wind could have lifted stones inside the ram and, given that the ram was selected by SH at random from what the claimant describes as a "large pile of 'available' Rams" that other employees could have taken a tag from a ram checked by the claimant and affixed it to the ram in question. I also note that here and at other times during the investigation the claimant fell back on the position of having cleaned the ram as well or as best as he could and accept the evidence of Messrs Knight, Williams and Kemp that that is simply

not an acceptable standard. Likewise, I accept their evidence that it is inappropriate for the claimant to rely upon the fairly superficial 20-second check that is undertaken before rams are dispatched from the depot to correct any deficiencies in the initial cleaning and testing; rather a ram should not have a tag attached to it identifying that it is available for dispatch unless and until it has been thoroughly serviced in accordance with the respondent's procedures. On these bases together with, first, SH and then the other employees having told Mr Knight that it was the claimant who had serviced the ram in question and, secondly, the point made above that the claimant did not raise at the meeting with PK points that he raised later in the process (the tag might have been switched, the ram could somehow have become dirty in the intervening six-day period or that it was not him who had cleaned this ram) I am satisfied that this ram was a ram that the claimant had cleaned and tested and that he had failed to carry out that service in accordance with the respondent's procedures and practices in respect of which he had received appropriate training.

The findings of GB

6.20.8 Mr Williams raised GB having telephoned the depot to report rams on site without green tags and asked why that had occurred. The claimant answered that PK had asked them to paint the rams, which other employees (SH and JB) did and said that labels had come off three rams. They were therefore tested again and had labels on when they went on the wagon. He, SH and JB made sure so they were delivered with tags tied on with a plastic bag tie but it can easily snap off.

MBrace training

6.20.9 The claimant suggested that training should be on all rams and he did not think a day and a half was long enough. He confirmed, however, that he had been trained on MBrace but not for a few years. This contrasts with what the claimant told PK about training from Mr Knight and he accepted in cross examination that he had had all necessary training on hydraulic rams.

JCBP panels incorrectly stacked

6.20.10 Mr Williams showed the claimant the pictures Mr Knight had taken of the panels. The claimant maintained that AD had been happy with stacking the panels like that, no one had criticised it and the safety officer had not complained. The claimant considered that there was nothing wrong with this and did not know why they were looking at him because they all do this. While the claimant had previously mentioned that other employees stacked the panels it was only in cross-examination

that he raised for the first time that it was SS who had stacked the panels and not him. This contrasts with the information provided to Mr Knight by the other employees that it was the claimant who had stacked the panels. In discussion with Mr Williams the claimant maintained that it was okay as long as the panels were stacked nice and straight. When challenged by Mr Williams that steel on steel was not good the claimant maintained that it was not hurting anything but he would not put the panels on the wagon like that. Mr Williams asked what would happen if, steel on steel, the stack was knocked by a fork truck. The claimant responded that all it would take was for someone to say don't do it and they would drop them down. He was being blamed for everything. Everyone has different ways – they were all responsible. It was put to the claimant that he should make sure as charge hand to which he responded that he could not be there all the time. He added that PK went out every night to check if there was any danger and no one had mentioned anything until Mr Knight said last week, so they put timber in. This notwithstanding, Mr Williams explained in oral evidence that, as charge hand, the claimant knew that he should not stack steel on steel.

6.21 Towards the end of the meeting Mr Williams asked if the claimant had anything to add. He answered that his health was not good and concentration was low. He hoped that Mr Williams would look at this and re-testing if needed. Hopefully he would consider him to stay. He confirmed that at the meeting with PK at the end of February they had discussed releasing him from his charge hand duties but he had said that was not required. He was trying to prove himself but should have gone to occupational health. He has a lot on his plate with stuff at home but at the time he did not but wished now that he had. He confirmed that PK had done a full review of his charge hand duties in February but he wanted to keep at it. He loved the place and did not know what he would do without it. He had had lots of problems with AD. When he was off he had no support. No one from HR got in touch.

6.22 Mr Williams reconvened the meeting after about an hour but only to tell the claimant that he had a couple of things to check. They reconvened again an hour and a quarter later. Mr Williams told the claimant that he had spoken to PK about the claimant using the road crossing plate and the grinder and he said that he was not aware of either until afterwards (134). He also denied the claimant had asked him for the correct tools at the time but only after the HOC had been raised. Mr Williams had also spoken to SH who had said that the kit had had no tags on before they were painted. Not being qualified himself, he had asked the claimant to test them (135). JB had said that the rams had tags on but they were "minging" inside and he told the claimant to retest them as he was not qualified to do so (136). Mr Knight had confirmed that the driver was on the back of the wagon and AM had seen that. AM said that the driver had no ladder or PPE, was standing on the kit and snapped a 6m ladder. The

claimant responded that he did not know where this had come from, JB and SH got them out and painted them; it was just not right.

6.23 Mr Williams explained that he could only go with the information he had. Having given careful consideration to the points brought up he was satisfied that the claimant's actions amounted to serious and repeated breaches of health and safety procedures and demonstrated a blatant disregard for the health and safety of himself and others, which could have resulted in serious harm or even death. The claimant had not denied anything that he was alleged to have done. As a charge hand the claimant was expected to lead by example and to supervise the work of others. Mr Williams was satisfied that he was fully trained and was well aware of the correct procedures but chose not to follow them. Despite admitting that his actions could have had serious consequences, the claimant had tried to blame others. On these bases he found that the claimant's actions amounted to gross misconduct. He then considered what sanction should be imposed taking into account the mitigating circumstances the claimant had raised. Given the seriousness of the offences, however, he believed that there needed to be a very strong reason not to dismiss, which did not exist in this case given the gravity of the claimant's conduct and his senior position. The most concerning thing was that the claimant did not feel that he had done anything wrong and therefore a warning would not have had any impact. He had already been given the opportunity to step back to the role of yard operative, which he had not accepted. Overall, Mr Williams felt that it would be dangerous for the claimant to continue in employment and that dismissal was the correct sanction. He therefore informed the claimant that he was dismissed with immediate effect due to the reasons discussed. The decision would be confirmed in writing in three working days and the claimant could appeal in five working days. In cross-examination focusing on the separate allegations Mr Williams expressed his opinion that the matters of the hammer head and the misuse of the grinder and the road plate would justify a disciplinary hearing as would the stacking of the panels if continual but not the issues related to personal protection equipment, which would be dealt with by way of a conversation, or those raised by GB, which would be investigated and that might have led to something else. The rams could have been disciplinary matters but probably would have been dealt with by extra training in respect of sand residue but not in respect of mud and rocks.

6.24 In a letter to the claimant dated 23 May 2019 (139) Mr Williams confirmed his decision to dismiss the claimant for gross misconduct for the following reasons:

6.24.1 Failure to adhere to Health & Safety Policies.

6.24.2 Failure to adhere to Health & Safety beliefs.

6.24.3 Putting yourself, your colleagues and our customers at harm.

6.24.4 Decision upheld for the allegations noted against you as per your invite to Disciplinary Hearing letter dated 14 March 2019.

6.24.5 Long-term Performance Issues relating to your role and lack of delivery of responsibilities as a manager. Not following instructions from your line manager and inability to carry out duties as required.

6.25 The claimant was offered a right of appeal, which he exercised by letter of 28 May 2019 (140). That letter is a matter of record and its content need not be rehearsed here at any length as each of the reasons given by the claimant for his appeal were considered at the appeal hearing, which are addressed below. Suffice it to say that the claimant advanced four reasons for his appeal as follows:

The ram identified by Mr Knight on 30 April 2019.

6.25.1 The claimant said that he had checked the ram on 24 April, six days before the incident. He was confident that he had done so correctly but they could have been tampered with in the six days. There would have been another quality check before it was released, which would have highlighted any concerns and therefore not resulted in a customer complaint or injury. The leak in the power pack would have been spotted by Mr Knight prior to testing if he had performed the 20-second scan and checked the hose.

The HOCs

6.25.2 The point of these cards is to prevent accidents and to increase safety awareness and the claimant did not believe that they should be used as a dismissal reason when they come from employees.

The claimant's letter of consideration

6.25.3 The claimant did not think that his letter of 21 May 2019 had been taken into consideration at all.

The claimant's circumstances

6.25.4 At their meeting on 7 February 2019 PK expressed concerns for the claimant's health and his ability to meet the expectations of his role. He did not want to step down but looking back he felt that PK had failed as a manager in not insisting. An occupational health assessment had been agreed but never materialised. The claimant had not felt himself for several months. He felt that PK recognised this but did not act on it. Additionally, he had been ignored, harassed and bullied by PS and AM who only spoke words of abuse and swore at him when he asked them to do

anything. He reported this to PK but he failed to act and actually laughed, which also added to the workplace stress and had an effect on his mental health. He felt that he should have been offered support rather than dismissal and the company had failed him.

6.26 Mr Kemp was appointed to consider the claimant's appeal. He had never met or heard of the claimant. In preparation for the appeal Mr Kemp was provided with a comprehensive pack of documents. He noted that a point in the appeal related to the testing of hydraulic rams and therefore also obtained the Hydraulic Ram Product Manual. He also noted that the claimant had alleged bullying and harassment by two other employees, PS and AM, and therefore visited the Durham depot with SA to conduct interviews with them. They both strongly denied the allegations.

6.27 The appeal hearing took place on 18 June 2019. SA was present as note taker; again the claimant elected not to be accompanied (147). Matters discussed included those set out below. I record that the discussion at the appeal hearing tended to range from one matter to another and then back again but, in the interests of clarity, I have sought to draw common points together under the following headings, which are those I have used above.

The ram identified by Mr Knight – NCR 3470

6.27.1 The claimant said that he had never had any failures in 30 years. Rams are originally tested and then tested again a week later. If anything goes out it gets a once over and if anything goes wrong it gets checked again. I note, however, that that does not answer the principal point that a tag indicating the availability of the ram should not be fixed to it unless and until it has been fully serviced. He could not believe that the ram identified by Mr Knight was the same one that he had done even though it had his name on it; he would not have done that. He suggested that others could have taken the tags off and replaced them; there was something going on at the depot. He blasted it out as best as he could, pumped them out and had taken the caps off. The claimant talked Mr Kemp through the testing process in detail. He noted from the photographs, however, that the ram was full of mud, the pins had clearly not been checked, the cover plate had not been removed to check for debris internally and the test unit was leaking meaning that enough pressure could not be built up to test the ram. The claimant had tried to explain that sometimes mud can re-form while a ram is drying and little stones can stick but Mr Kemp countered that a ram should contain no mud whatsoever and if it does re-form it would not be of a satisfactory quality for tagging and would have to be re-washed.

The findings of GB

6.27.2 The claimant said that the items had tags on when they left and went to site. He had personally checked them off the night before. When they arrived on site they were found to be missing but they could have easily have snapped off or maybe they had been tampered with.

6.27.3 Mr Kemp did not find this explanation plausible as the claimant's charge hand role involved checking and counter-signing a load before it left the site and the rams would be secured using strong cable ties, but the tags were not present when GB checked the vehicle on its arrival on site. That said, in oral evidence, Mr Kemp confirmed that this particular issue was not something to hold against the claimant.

Using a road plate to clean the yard – HOC DUR893

6.27.4 The claimant explained that he needed to clean the yard in readiness for a visit by the respondent's chief executive. He went to PK to say what could he use and he had said to use the snowplough. He had used the road plate a small distance. In Mr Kemp's opinion this was dangerous as a road plate can spring with missile effect if it was to catch onto something in the yard or it could have flipped the truck over injuring the claimant. The claimant had contested both these points and said that he only used the plate because he had not been provided with the proper equipment.

Using a hammer head to close a roller door– HOC DUR907

6.27.5 The claimant explained that it was the end of the day and he was rushing. He went to put the shutter down but the alarm kept going off. All he did was to lean the hammer there. The next day DG went into work, it wasn't as if he couldn't see it. The claimant had told PK that he was in the wrong.

Using a metal grinding disc to cut rubber – HOC DUR901

6.27.6 The claimant explained that he had used the grinder for 10 seconds to cut the rubber; that was all. No one had ever told him not to do it. He confirmed that his abrasive testing was in date and he was certified. He had used a stone disc as they did not have the right equipment. PK had said he would look into it but he was under pressure. In oral evidence Mr Kemp observed that at the appeal hearing the claimant had not said that the use of the grinding disc had been approved by PK.

The claimant's letter of consideration and the claimant's circumstances

6.27.7 Finally, the appeal hearing considered the claimant's letter of consideration and the claimant's circumstances during the course of which the appellant highlighted the problems he had faced with his previous manager, AD, being placed on PIPs and the unpleasantness that he had faced from Mr Spencer and AM. When Mr Williams had interviewed the two employees, however, they had denied the allegations and he believed their version of events to be credible not least because the claimant had mentioned to him that he was going out with them, which Mr Kemp found surprising if they were harassing him. The claimant confirmed, however, that he and PK got on really well and he was supportive. As to his health, over the years he had had problems with his ears, tinnitus, sinuses and blood pressure in 2016/2017. He had gone to the doctors in February 2019 because of his stress level due to problems with AD but his home life was also terrible at the time. More recently he had had a bad time for months and been to the doctors. He was mentally and physically drained. He had been given the opportunity to step down but did not want to be a failure. PK had mentioned occupational health but that never came and the claimant had not approached HR about it.

6.28 During an adjournment Mr Kemp considered the evidence before him, which he was satisfied showed that a number of very serious health and safety incidents had been caused by the claimant's systematic failure to follow the correct procedures. The biggest issue was that he did not seem to understand that what he had done wrong and did not take responsibility for his actions. As charge hand he was responsible for overseeing the yard and supervising the work of other employees. Given his behaviour Mr Kemp felt it was categorically unsafe for him to continue in his role.

6.29 After the appeal hearing the claimant wrote to Mr Kemp on 18 June 2019 setting out advice that he had received from a solicitor. He stated that all the incidents had an underlying theme and were all down to training for which the respondent was responsible and no incident would be deemed as gross misconduct; at worst they would be misconduct and the respondent was therefore not entitled to sack him on the spot.

6.30 Mr Kemp's decision was conveyed to the claimant in an appeal outcome letter dated 21 June 2019, which he and SA had written together (165). In addressing the five principal points put forward by the claimant in his letter as the reasons for his appeal, the outcome letter confirmed, amongst other things, as follows:

6.30.1 There had been no evidence to suggest that the rams had been tampered with and no cause for concern why any other employees would have done so, which was highly improbable given that the ram had been randomly tested by Mr Knight.

6.30.2 The four HOC's over a short period of time showed a consistent and systematic failure in the claimant's ability to understand how cutting corners could and would put others and himself at risk, including fatalities, of which he had not taken ownership and there had been no evidence that the cards were a gripe at him by other employees.

6.30.3 The claimant's letter of consideration was taken into account, as it was by Mr Williams, and at the appeal hearing the claimant had failed to explain why he believed it was not.

6.30.4 The claimant had confirmed that PK was a supportive manager who he found to be approachable and had given him advice on how best to manage his team. The possibility of OH referral had been considered at their meeting in February 2019 but after consideration it was felt that the referral was for the same reasons as the claimant had been referred, reviewed and assessed only a year before. Whether an OH referral was required would be reviewed again in May. The claimant had been offered the option to step down from his role as charge hand either permanently or temporarily but he had declined. The claimant had not asked for help at any time and did not use the 24 employee assistance helpline but it was acknowledged that the respondent could have explored the claimant's state of health and well-being further.

6.30.5 After investigation, including interviewing both Mr Spencer and AM who had denied any untoward behaviour towards the claimant including swearing at him, no evidence had been found to verify the claimant's claim of bullying and harassment by them and, at the appeal hearing, the claimant had struggled to give any instances or examples relating to these allegations only stating that when he returned back to work after a week off AM had said, "it's been fantastic without you be here, being told what to do".

6.31 In conclusion, the appeal decision was to uphold the original decision of dismissal due to the combination of incidents of health and safety and disregard for the claimant's own safety and that of others as a high-risk. It was believed that the claimant's continued employment could result in a serious incident that could seriously impair or maim either him or another. It was believed that his lack of care, attention and inability to understand the importance of delivering a high level standard for the respondent's customer could seriously impact the brand and reputation of the respondent's business. In oral evidence Mr Kemp explained that the particular matters that had led him to his decision were the claimant's improper use of the road plate, the grinder and the hammer head to close the roller door, and the ram identified by Mr Knight.

Submissions

7. After the evidence had been concluded the parties' representatives made submissions, both oral and written, which painstakingly addressed in detail the matters that had been identified as the issues in this case in the context of relevant statutory and case law. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to my decision.

8. That said, the key points made by Mr Bayne on behalf of the claimant included as follows:

Unfair dismissal

8.1 As to the reason for dismissal, Mr Williams had said it was the totality of the eight health and safety breaches against the claimant and no one incident amounted to a serious breach of health and safety rules so as to justify the dismissal on its own; further that the ram allegations justified a PIP or extra training rather than disciplinary action. Mr Kemp's evidence had been that the reason for refusing the appeal were the allegations relating to the road plate, the grinder and the roller door; the ram allegations were relevant but the stacking allegations were not part of it. Mr Williams had fallen into the trap of looking at the allegations together in the round. Additionally, he and Mr Kemp had looked at the eight specific allegations which was less than half the picture because for a long period of time there had been no criticism of the claimant who had an exemplary health and safety record.

8.2 The history of the claimant's suspensions should not play into the Tribunal's decision and, in respect of the conflict of evidence between the claimant and Mr Spencer, it should not draw conclusions from the manner in which the claimant gave evidence, which was impassioned, compared with the calm and measured way in which Mr Spencer gave evidence. The claimant genuinely believed what he was saying and he had admitted various acts of wrongdoing, which was indicative of truth.

8.3 As to fairness:

8.3.1 On any view the respondent, which is a large company with a HR Department and a relevant policy document, did not carry out a fair investigation (reference being made to the ACAS Code of Practice and the respondent's Guide for Managers) with the result that Mr Williams and Mr Kemp had to carry out their own investigations, which they had done only briefly.

8.3.2 In the invitation to the disciplinary hearing the claimant had not been clearly notified of the allegations he had to answer.

8.3.3 The sanction of dismissal had been unfair in that the allegations regarding the road plate, the grinder and the roller door had already been dealt with informally, the claimant had never been warned about his behaviour and the respondent had simply aggregated a number of separate incidents over an eight-week period none of which amounted to gross misconduct on its own.

Wrongful dismissal

8.4 The Tribunal should accept the claimant's evidence. While he might have done wrong none of the individual incidents involved a fundamental breach of contract amounting to gross misconduct. Where an employee is dismissed on a 'totting up' basis in the absence of a final written warning he has a contractual right to be dismissed on notice

9. The key points made by Mr Heard on behalf of the respondent included as follows:

Unfair dismissal

9.1 In terms of the charges upheld at the time there had been a reasonable investigation. It was right that an investigation report had not been produced but section 98(4) does not require everything that is contained in an internal procedure. What is required is a reasonable investigation within a range of reasonable investigations and the respondent's investigation was in that range.

9.2 The respondent had reasonable grounds following a reasonable investigation to find the claimant guilty of misconduct including that the ram identified by Mr Spencer was not as clean as it should have been and the claimant had used the grinder and the road plate when he knew it was wrong and contrary to the training that he had received. The decision to dismiss was comfortably within the range of reasonable responses. The claimant's health and safety failures could not have been more serious.

9.3 The respondent applied a fair process within a range of fair processes. At no point did the claimant state that he needed more time or that he did not understand what he was charged with or the criticisms of what he had done wrong. He knew what he was charged with and what the complaints were and had the opportunity to provide answers. If there were any problems with the disciplinary stage they were remedied on appeal: Taylor v OCS Group Ltd [1996] IRLR 631.

Wrongful dismissal

9.4 The previous disciplinary processes and sanctions are relevant to the wrongful dismissal claim because the Tribunal can take account of everything in deciding whether there was a fundamental breach. The historic evidence is that the claimant did commit health and safety breaches and did not change his ways demonstrating a slow crescendo

arriving at the dismissal. If the Tribunal finds that the claimant committed an act of gross misconduct in respect of any one of the charges, that is sufficient for the Tribunal to conclude gross misconduct. The two instances of the rams identified by Mr Spencer and Mr Knight could have led to fatalities and the use of the grinder and the road plate could have led to serious injury or worse to the claimant or others. All were extremely serious, were obviously gross misconduct and constituted repudiatory breaches such that it was not necessary to go through the claimant's history.

The Law

10. The principal statutory provisions that are relevant to the issues in this case are to be found in the 1996 Act and are as follows:

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

.....

(b) relates to the conduct of the employee,

.....

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Application of the facts and the law to determine the issues

11. The above are the salient facts relevant to and upon which I based my judgment. I considered those facts and submissions in the light of the relevant law and the case precedents in this area of law upon which I was addressed by the representatives in submissions.

12. As indicated above, the claimant has brought claims of both unfair and wrongful dismissal, which I shall address in turn.

Unfair dismissal

13. The issues arising from the statutory and case law referred to above that are relevant to the determination of the complaint of unfair dismissal and are summarised at paragraph 5 of these reasons fall into two principal parts, which are addressed below.

What was the reason for the dismissal and was it a potentially fair reason?

14. The first questions for me to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within sections 98(1) and (2) of the 1996 Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

15. In ASLEF v Brady [2006] IRLR 576 it was said,

"*Dismissal may be for an unfair reason even when misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that ….*

It does not follow, therefore, that whenever there is misconduct which could justify dismissal a tribunal is bound to find that that was indeed the operative reason, even a potentially fair reason. For example if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – would not be the misconduct at all, since that is not what brought about dismissal, even if the misconduct merited dismissal.

Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so."

16. In this case, the claimant has variously suggested that there were significant differences between him and Mr Spencer, a rift between him and other employees at the depot that had been caused by AD and some form of conspiracy between other employees at the Durham depot to remove him from his employment, including a suggestion that that was to enable Mr Spencer to have his job as charge hand. Such suggestions could obviously be relevant both to the decisions taken by Mr Williams and Mr Kemp and to my judgement in this case not least because they and I have relied, to an extent, on what other employees said to the relevant managers regarding such matters as the claimant having serviced the ram identified by Mr Knight, having stacked the JCBP panels and having allowed the lorry driver to work without appropriate PPE. I am alert to and have considered the possibility that those suggestions of the claimant might be accurate but that is not how I see the evidence. I am not satisfied that, referring to the above decision, the claimant has "put in issue with proper evidence a basis" for that contention. On the contrary, I am satisfied that the facts and beliefs of the respondent, as personified by Mr Williams and Mr Kemp who took the decisions to dismiss the claimant and reject his appeal (i.e. the reason for the dismissal) are as clearly set out in their respective contemporaneous decision letters from which I have summarised as above.

17. In essence, the claimant had been guilty of the serious health safety breaches as alleged (the inappropriate use of the road plate, the grinding disc and the hammer head to close the roller door; not properly cleaning and tagging the hydraulic rams; incorrectly stacking the JCBP panels), which was compounded by the claimant's senior position as charge hand.

18. On the evidence before me I am satisfied that the respondent has discharged the burden of proof to show that the reason for the claimant's dismissal was related to his conduct, that being a potentially fair reason in accordance with section 98(1) of the 1996 Act.

Did the respondent act reasonably or unreasonably?

19. Having thus been satisfied as to the reason for the dismissal, I moved on to consider whether the dismissal of the claimant was fair or unfair under section 98(4) of the 1996 Act, which requires consideration of three overlapping elements, each of which I must bring into account:

    19.1 first, whether, in the circumstances, the respondent acted reasonably or unreasonably;

    19.2 secondly, the size and administrative resources of the respondent;

    19.3 thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

20. In this regard I remind myself of the following important considerations:

    20.1 Neither party now has a burden of proof in this respect.

20.2 My focus is to assess the reasonableness of the respondent and not the unfairness or injustice to the claimant, although not completely ignoring the latter.

20.3 I must not substitute my own view for that of the respondent. This principle has been maintained over the years in decisions including Iceland Frozen Foods (re-confirmed in Midland Bank v Madden [2000] IRLR 288) and J Sainsbury plc v Hitt [2003] ICR 111. In UCATT v Brain [1981] IRLR 224 it was put thus:

> "*Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not*."

20.4 The decision in Polkey v AE Dayton Services Ltd [1988] ICR 142 firmly establishes procedural fairness as an integral part of the issue of reasonableness.

20.5 My consideration of whether the claimant's dismissal was fair or unfair is a single issue involving the substantive and procedural elements of the dismissal decision.

20.6 The 'range of reasonable responses test' (referred to in the guidance in Iceland Frozen Foods and Foley), which will apply to my decision as to whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses of a reasonable employer acting reasonably, applies equally to the procedure that was followed in reaching that decision: see Hitt.

21. The issues in this case are fairly standard in a case of this nature and arise from law that is relatively settled. In that regard while bringing into my consideration the decision of the EAT in Burchell (which has obviously stood the test of time for over forty years) I also took into account more recent decisions of the Court of Appeal, which reviewed and indorsed those authorities: ie. Fuller v The London Borough of Brent [2011] EWCA Civ 267, Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29 and Graham, particularly at paragraphs 35 and 36 where Aikens L.J. stated as follows:

> *"In Orr v Milton Keynes Council [2011] ICR 704, all three members of this court concluded that, on the construction given to section 98(4) and its statutory predecessors in many cases in the Court of Appeal, section 98(4)(b) did not permit any second consideration by an ET in addition to the exercise that it had to perform under section 98(4)(a). In that case I attempted to summarise the present state of the law applicable in a case where an employer alleges that an employee had engaged in misconduct*

and has dismissed the employee as a result. I said that once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.

If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see section 21(1) of the Employment Tribunals 1996 Act 1996."

22. I have brought the principles arising from the above case law into account in making my decision. From the above excerpt taken from Graham it will be apparent that the Court of Appeal takes as the first consideration the question of whether the respondent carried out an investigation into the allegations that was reasonable in the circumstances of the case. That reverses the order of these considerations as set out in Burchell and, with respect, has always appeared to me to be the more appropriate order to adopt as without a reasonable investigation, any grounds might be baseless and any belief might not be well-founded.

23. Thus the first element or question that I considered is whether at the stage that Mr Williams came to his decision to dismiss the claimant and Mr Kemp decided to reject his appeal the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

24. Mr Bayne was extremely critical of the investigation, commenting that he had seldom come across an investigation as slight as this especially for a large employer with such resources. It is right that the initial investigation meeting conducted by PK was brief but he identified the essence of the claimant's

position with regard to the four HOCs that they discussed: he explained that in relation to the ram identified by Mr Knight he had done what he was supposed to do and that when Mr Knight had managed to clean it he would have taken the other side off, and that the bolt had been a bit loose but that would not affect it; he accepted that he had used the road plate to clean the yard explaining that they always used to do that using old plates; as to the ram identified by Mr Spencer he explained that he could not see inside and that the muck dropped down when it is rolled over; he accepted that he had used the hammer head on the roller door and that he realised how severe it was; he explained that the grinding disc had been an old disc although he understood. Importantly, at this meeting the claimant did not deny any of the allegations that had been made against him. Further, in relation to the ram identified by Mr Knight the claimant did not raise at this meeting points that he raised later in the process that the tag might have been switched, the ram could somehow have become dirty in the intervening six-day period or that it was not him who had cleaned this ram; indeed his acceptance that the bolt on the ram had been loose indicates that it was the claimant who had cleaned it. As explained fully above, on these bases together with the fact that the ram in question was selected by SH randomly, I am satisfied that this ram was a ram that the claimant had serviced and that he had failed to carry out that service in accordance with the respondent's procedures and practices in respect of which he had received appropriate training.

25. The initial investigation then continued with the telephone conversation between TR and Mr Knight when he contradicted the claimant's assertion at the meeting with PK that he had not undertaken MBrace training for a few years. Additionally, Mr Knight raised the issues of the lorry driver on the back of the lorry and the panels that had been dangerously stacked by the claimant.

26. A disciplinary hearing is also part of an investigation. It was submitted on behalf of the claimant that he was not made sufficiently aware of the allegations that he had to answer. I agree that the invitation letter was far from precise and raised generalised issues such as failing to use the correct machinery or tools to carry out his role when particular reference could and probably should have been made to, for example, the incorrect use of the road plate and the grinding disc. That said, by this stage the claimant was aware from his meeting with PK that these matters were in issue. This is borne out by the claimant's letter of consideration in which he raised Mr Knight's comments, the amount of time that had passed since he had tested the rams, the leak in the power pack, the MBrace training, the lorry driver not wearing correct PPE, the incorrectly stacked panels and the rams without green labels going to the site at which GB was working. In this connection I also accept the evidence of Mr Williams that the claimant never mentioned at the disciplinary hearing that he was unaware of the allegations or in any way suggested that he could not provide his answers to them or was in any way disadvantaged. On the contrary, I am satisfied that Mr Williams carefully discussed each of the individual allegations with the claimant and afforded him the opportunity to provide explanations and otherwise comment.

27. I consider it important that at the commencement of the disciplinary hearing the claimant explained what his role as charge hand involved before the meeting addressed the specifics including as follows:

27.1 The claimant initially suggested that he had raised the use of the road plate with PK (which is his evidence in his witness statement) but I note that he did not put that to PK during their meeting on 2 May, which would have been the natural thing to do; furthermore, when pressed by Mr Williams the claimant stated that PK had not been very happy and that he was not to do it again (which indicates a conversation after and not before the plate had been used) and, importantly, the claimant agreed that for him to have done so was not a safe act and that he had been appropriately trained in this regard.

27.2 He explained that he had cleaned the ram identified by Mr Spencer as best he could, it becomes flaky when dry but there is always a double check. He did not directly respond to the point that a green tag should not have been put on the ram if it was not available to leave the depot. He did, however, accept that a ram failure could have massive implications that would put lives at risk.

27.3 He accepted that he had put the hammer head on the roller door, that it was a massive mistake to have done so, it could have hit DG on the head, it was serious and could kill somebody. In this connection I note that in cross-examination Mr Williams accepted that he did not investigate this issue as fully as he should have but given these clear admissions by the claimant I struggle to see what further investigation should reasonably have been undertaken.

27.4 Similarly, the claimant accepted that he had used a grinding disc to cut rubber appearing to suggest that the shortness of the task justified his improper use of equipment. The claimant explained that he had told PK that he had no proper tools to do the job but, once more, in the record of the investigation meeting with PK there is no reference to the claimant, on being challenged about this, immediately responding to PK to this effect. He also ultimately clarified that he had received relevant training in this respect and that he knew that he should not be cutting the rubber with the grinding disc, and confirmed that he should not do it and would not do it again.

27.5 The claimant provided his explanation as to the lorry driver being on the back of his vehicle without appropriate PPE and suggested that Mr Knight's alternative account was "lies"; but that account had been corroborated by AM.

27.6 As to the ram identified by Mr Knight, the claimant provided his explanation including that he had cleaned the rams as best he could, that it could not be proved that the ram was the same one that he had checked, someone could have changed the green tag in the intervening period since he had checked the ram, any issues would be picked up at

the quality check and, as to the stones remaining in the ram, he mentioned the wind.

27.7 He explained that the rams that had been identified by GB as having been delivered without tags on them did have tags when they were put on the wagon to leave the depot but that the ties could easily snap off.

27.8 He explained his position regarding the MBrace training.

27.9 As to the panels that Mr Knight considered to have been dangerously stacked the claimant did not deny that he had stacked them but explained that AD had been happy with that method, no one had criticised it and the previous safety officer had not complained. As far as he was concerned there was nothing wrong with this method, everyone did it. He countered Mr Williams' suggestion that as charge hand it was for him to make sure that the panels were safely stacked as being that he could not be there all the time and PK checked every night.

28. Thus, I repeat, that Mr Williams gave the claimant the opportunity to address each of the allegations against him, and he took that opportunity. At the conclusion of the meeting Mr Williams correctly asked the claimant if he had anything to add and while he spoke generally about his health, charge hand responsibilities and an Occupational Health referral he did not revisit any of the above specific allegations.

29. In cross-examination Mr Williams was challenged about various matters relating to the fairness of the disciplinary hearing process. I am satisfied that he gave honest and candid answers including making a number of concessions, which added to the credibility of his evidence. By way of example, he accepted the suggestion that it might not have been fair to dig up the matters referred to in two HOCs as they had been dealt with informally but I accept his explanation that it was appropriate to do so in this case because of the deterioration in the claimant's behaviour at this time. In this respect he accepted that he had not spoken to Mr Spencer (or the office manager) about the distinction between him having apparently observed mud and clay in the ram while the claimant had referred to sand but he explained that, in any event, the ram should not have had a green tag on it. He also accepted that, with hindsight, his approach to the issues of the ram and the tag was to accept the allegations unless the claimant could demonstrate otherwise, that he did not investigate matters regarding the missing tags identified by GB, that there had been some confusion in his witness statement regarding what the claimant had said about SH and JB and in this regard there was a mismatch between this evidence and the contemporaneous documents at 135 and 136. Generally, Mr Williams accepted that, with hindsight, he would do some things differently and would investigate a bit more albeit adding that the decision would still be the same. I bring these matters into account in reaching my decision. The question for me, however, is not whether, with the value of hindsight and in the context of skilful questioning from an experienced advocate in cross examination, Mr Williams might have investigated a bit more but whether what he did on behalf of the respondent in conducting his

part of this process was within the range of reasonable responses of a reasonable employer.

30. All in all, I am satisfied Mr Williams' investigation and his conduct of the disciplinary hearing was within that range. I reiterate that the claimant had every opportunity to explain his position in respect of the several allegation and took that opportunity as set out above, and I am not satisfied that he was in any way disadvantaged by what was suggested on his behalf was inadequate information provided to him in advance of the hearing. Indeed, Mr Williams could not recall the claimant ever saying anything to the effect that he did not expect a particular issue to be raised, he was not prepared or he was taken off guard.

31. Ultimately Mr Williams adopted the correct two-stage approach of considering, first, whether the above matters constituted gross misconduct and then, secondly, what sanction should be imposed. I accept his evidence that given the seriousness of the offences in the context of the claimant's role as charge hand the sanction of dismissal was one that fell within the range of reasonable responses of a reasonable employer; in this regard I also note Mr Williams' opinion that as the claimant did not feel that he had done anything wrong a warning would not have had any impact.

32. The final stage of the process was the appeal and the appeal hearing. This is important for a number of reasons including that at an early stage in the development of the law of unfair dismissal it was said that a procedural flaw at the dismissal stage could be corrected at the appeal stage. That has developed, however, to the current approach of considering the totality of the process followed by the employer: Taylor v OCS Group Limited [2006] IRLR 613 and in Graham, "An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) …".

33. The appeal hearing took place on 18 June 2019. The principal focus of the appeal hearing was upon the matters that had been identified by the claimant in his appeal letter (140) albeit Mr Kemp also explored other matters that had been considered by Mr Williams. Nothing new was introduced at this meeting and, therefore, there can be no suggestion that in respect of this meeting the claimant was inadequately prepared for what was discussed. Once more he took the opportunity afforded to him to explain his position further including as follows:

    33.1 He explained the ram testing process and that he had blasted it out as best he could and, noting the photographs that the ram was full of mud, explained that it could reform while a ram is drying and stones could stick. He again suggested that others could have taken the tags off and replaced them.

    33.2 He explained that he had checked the rams dispatched to GB and they had had tags, but they could easily have been snapped off or tampered with.

33.3 He had used the road plate to clean the yard for only a short distance prior to a visit from the respondent's chief executive.

33.4 He accepted that he had told PK that he had been wrong to use the hammer head to close the roller door.

33.5 He also accepted that he used the grinder to cut rubber explaining that it had only been 10 seconds and no one had ever told him not to; albeit confirming that his abrasive testing was up-to-date.

33.6 He raised with Mr Kemp issues around his health and the problems he had had with his previous manager and the two employees, Mr Spencer and AM, albeit confirming that PK was supportive and they got on well.

34. For the above reasons, I am satisfied as to this first element in Graham (the third element in Burchell) that at the stage that Mr Williams made the decision to dismiss the claimant and Mr Kemp maintained that decision, the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

35. I therefore turn to consider the second and third questions in Graham of the belief that the claimant was guilty of misconduct and the reasonable grounds for that belief.

36. In my findings of fact and consideration above I have set out my assessment of the grounds upon which the two decision-makers made their decisions on behalf of the respondent. It is not necessary for me to revisit those grounds here. Suffice it to say that it will be apparent that in light of the incidents of misconduct (many of which the claimant admitted) and the explanations given by the claimant (at times contradictory) I am satisfied that at the time Mr Williams and Mr Kemp came to make their decisions they each held a genuine belief that the claimant was guilty of the misconduct complained of and they each had in mind reasonable grounds upon which to base their respective beliefs, which, to complete the circle, I repeat followed a reasonable investigation in the circumstances.

37. Thus, stepping back and considering all the evidence before me in the round, I am satisfied that the respondent did act reasonably in the process that culminated in the decision to dismiss the claimant.

38. In summary, and now by reference to the more traditional approach to the order of the elements in Burchell, on the evidence available to me and on the basis of the findings of fact set out above, I accept that:

38.1 the respondent, in the shape of Mr Williams and Mr Kemp "did believe" that the claimant was guilty of misconduct;

38.2 they each had in their minds reasonable grounds upon which to sustain their belief that the claimant was guilty of misconduct; and

38.3 at the stage at which they formed that belief on those grounds the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

39. The final issue is the reasonableness or otherwise of the sanction of dismissal. Referring to established case law such as Iceland Frozen Foods (again as indorsed in Graham) there is, in many cases, a range or band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. My function is to determine in the circumstances of this case whether the decision of this respondent fell within the band of reasonable responses that a reasonable employer might have adopted.

40. In this case I am quite satisfied that in the circumstances known to Mr Williams and then Mr Kemp as a result of the respondent's investigation (including the claimant's input at the disciplinary and appeal stages), the dismissal of the claimant was a decision that fell within the band of reasonable responses of a reasonable employer in these circumstances.

41. In summary, therefore, I am satisfied that, as is required of me by section 98(4), the respondent acted reasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing him.

42. I make a concluding, perhaps obvious, point in respect of the complaint of unfair dismissal. The decisions of Mr Williams and Mr Kemp were taken on the basis of what was said by the claimant at the disciplinary and appeal hearings respectively (against the background of the investigation meeting conducted by PK and the further investigations undertaken by TR, Mr Williams and Mr Kemp). Largely, I have to examine the issues in the unfair dismissal complaint (the reason for the dismissal and the question of reasonableness) on that same basis rather than upon what the claimant (and his representative) said at the Tribunal Hearing. As Mr Williams said at the disciplinary hearing, he could only go on the information he had.

Wrongful dismissal

43. The single issue in respect of the claimant's contract claim is again set out at paragraph 5 above. The issue of reasonableness, which is so important in the context of a complaint of unfair dismissal, does not apply. It is simply a matter for the Tribunal to determine whether it considers that the claimant was, in fact, guilty of a repudiatory breach of his contract of employment entitling the respondent to terminate that contract on grounds of gross misconduct without giving him the notice to which he would otherwise have been contractually entitled.

44. In cross examination Mr Williams and Mr Kemp explained which of the incidents they considered amounted to gross misconduct. Mr Williams expressed his opinion as set out fully above. In short, he identified the stacking of the panels if continual, the hammer head and the misuse of the grinder and the road plate; also the rams in respect of mud and rocks but not in respect of sand residue. For

his part, Mr Kemp identified the improper use of the road plate, the grinder and the hammer head and the ram identified by Mr Knight.

45. Each of those witnesses has the necessary expertise in this connection, which, not having that expertise, I obviously bring into account. I repeat, however, that it is a matter for me to determine whether the claimant was guilty of gross misconduct. On the basis of the evidence before me, including the claimant's acceptance of wrongdoing in relation to certain incidents as set out above, I am satisfied that his actions in respect of the hammer head, the grinder and the road plate, even considered separately, were sufficient to constitute a repudiatory breach of his contract of employment. Mr Kemp's description, in particular, of the possibility of the road plate (which Mr Williams said weighed approximately half a ton) springing with missile effect if it were to catch onto something in the yard or flipping over the forklift truck injuring the claimant was as convincing as it was chilling. Similarly troubling is the prospect of a ram (such as that identified by Mr Knight that I have found had not been properly serviced by the claimant in accordance with the respondent's policies and practices) failing with the potential for the collapse of earthworks in or alongside which workmen could be working: the claimant himself accepted that the consequences could be massive and could put lives at risk.

46. In summary, I am satisfied that each of these matters (the hammer head, the grinder, the road plate and the ram identified by Mr Knight) considered separately, constituted a repudiatory breach by the claimant of his contract of employment entitling the respondent to terminate it without giving him contractual notice.

Conclusion

47. In conclusion, my judgment in respect of the claimant's complaints is as follows:

47.1 The reason for dismissal of the claimant was conduct and the respondent did act reasonably in accordance with section 98(4) of the 1996 Act. In that latter respect I have to be satisfied that there was a sufficient investigation, reasonable grounds and a reasonable belief allowing the managers, on the evidence available to them, to form a decision which fell within the range of reasonable responses. I am so satisfied.

47.2 For the above reasons the claimant's complaint under section 111 of the 1996 Act that his dismissal by the respondent was unfair, contrary to section 94 of that Act, is not well-founded and is dismissed.

47.3 The claimant's complaint that the respondent was in breach of his contract of employment in that it failed to give him notice of the termination of that contract to which he was entitled is not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENTJUDGE ON 9 October 2020

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