



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Clarke

**Respondent:** Monster Pet Supplies (UK) Ltd

**Heard at:** Leeds (by CVP)

**On:** 8 October 2020 and  
29 October 2020

**Before:** Employment Judge Parkin

## Representation

Claimant: In person

Respondent: Miss N Twine, Counsel

# RESERVED JUDGMENT

**The Judgment of the Tribunal is that** the claimant was not wrongfully dismissed in breach of contract by the respondent and his claims for notice pay and holiday pay during a notice period are dismissed.

# REASONS

## 1. The claim

The claimant claimed wrongful dismissal and breach of contract in his ET1 claim form presented on 9 June 2020. He was employed as Head of Logistics from 7 January 2019 until his employment was summarily terminated on 21 April 2020. He set out the details of his claim succinctly:

“The company has at no point during my employment raised any concerns regarding my performance and have in fact praised and thanked me for my performance and efforts both in one to ones and in front of witnesses.

They have alleged to have completed a full investigation without my knowledge or input and presented the document listing 24 non-exhaustive concerns which are either untrue or unfair and not given me a right of reply

or appeal. In my opinion I believe the company have looked to terminate my contract without upholding the contractual 3-month notice period”.

He sought his 3-month notice payment with a payment compensating for the three months’ holiday lost for the notice period.

2. The response

The respondent admitted summary dismissal in its response and grounds of resistance, contending that it had dismissed the claimant for gross negligence in circumstances where an investigation beginning in March 2020, when the business became extremely busy during the Covid-19 pandemic and the directors needed to spend more time and focus on its operations revealed extensive health and safety, staff management and stock control issues entitling it to dismiss him without notice.

3. The Issues

3.1 Wrongful Dismissal: In respect of the breach of contract/wrongful dismissal claim, the parties agreed that the claim would succeed unless the respondent proved it was entitled to dismiss him summarily because he was guilty of gross misconduct or some other repudiatory breach of his contract of employment. Accordingly, for this claim, the Tribunal had to decide whether he was indeed guilty of gross misconduct or some other repudiatory breach. The respondent relied upon gross negligence; thus, could the respondent prove on the balance of probabilities that the claimant was negligent in some or all of the charges against him and, if so, that this negligent performance of his duties was so grave and weighty as to justify summary dismissal having regard to the nature of the business and the position of the claimant. It was necessary to explain to the claimant at times through the hearing that the Tribunal was dealing solely with these contractual issues and not with the fairness or unfairness of the dismissal.

3.2 Holiday Pay: This was a claim for outstanding holiday pay (or strictly compensation for paid annual leave) accrued but not taken as at the date of termination of employment. Again, since the claimant was paid for holiday up to the date of dismissal, the claim turned upon whether the claimant should have been given notice or not.

4. Case management and evidence at the hearing

4.1 The hearing was listed for one day as a virtual hearing by CVP (as signified by Code V above). In the event, it was not concluded within the day but was adjourned part-heard and resumed.

4.2 A Bundle of Documents of 412 pages was prepared, provided by the respondent, which included the result of continued investigation and reports after the claimant’s dismissal. The claimant had provided what he described as a list of issues which was more a prompt for him to use when questioning the respondent’s

witnesses. This needed to be shared with the respondent's representative on the first morning and the respondent that day also provided a complete copy of its returns report, originally contained at pages 241 to 244 of the bundle but which was incomplete.

4.3 It was agreed that the respondent would call its witnesses first but that the claimant would have the final closing submission since he was acting for himself. The respondent called its director Mr Jonny Gould, an external consultant Mr Andy Smith and the other director Mr Adam Gould; the claimant gave evidence on his own behalf.

## 5. Credibility of the witnesses

5.1 As with many cases, credibility of the witnesses was an important feature in the Tribunal's determination. It concluded that the claimant and the respondent's directors relied rather heavily on hindsight in reporting upon and seeking to justify their actions; it sought to identify contemporaneous documentation wherever possible which supported the version of each of those witnesses who were so highly involved.

5.2 The main content of the claimant's claim form is set out above; his own witness statement was similarly lacking in detail in dealing with challenging the reasons for dismissal the respondent gave in its letter of dismissal. Since he had never faced a disciplinary hearing with the opportunity to understand fully and, where appropriate, refute allegations and put his own case, he took the opportunity to make strong denials for the first time under cross-examination at the hearing, but not always convincingly. Indeed, the Tribunal concluded that the claimant was not prepared to acknowledge that there were many areas of real weakness in his running of the warehouse and distribution operation, as highlighted by Clipper and Mr Smith. Whilst he denied that he had been silent when questioned by Jonny Gould about the list of concerns raised by Clipper or even that any questions had been asked of him, the Tribunal found it inconceivable that, if he knew the concerns raised to be largely wrong or completely over-blown, he would not have said so clearly to his director and tried to demonstrate their inaccuracy during the next week or so before he needed to take leave of absence. Regrettably, he was not always an accurate historian, perhaps because of the sad circumstances of his absence from work and his perception of the unfairness of his dismissal.

5.3 The Tribunal concluded that the Gould brothers were themselves prepared at times to show themselves in a better light or over-state the position – for instance when both initially in their witness statements named the claimant as having condoned employees climbing on the racking (specifically KD as disclosed in the formal health and safety investigation - 66-73) when this was actually a reference to the warehouse team leader IH. However, it had no doubt whatsoever of how genuine their total loss of trust and confidence in him was by late April 2020. On top of the Clipper complaints, their own investigations and the input of Andy Smith had revealed major deficiencies in health and safety in the distribution operation all pointing to the claimant's lack of effective management.

5.4 The Tribunal was impressed with the evidence given by Mr Smith, who had been brought into the business from outside, initially to support the claimant and the business when the great influx of orders resulting from the Covid-19 pandemic arose. Shadowing the claimant closely, he became increasingly critical of the claimant's performance as he became more acquainted with it and with the business operation.

## 6. The Facts

From the oral and documentary evidence, the Tribunal made the following findings of fact on the balance of probabilities.

6.1 The brothers Adam and Jonny Gould, the two directors, set up the respondent as a new business in 2011 to provide pet supplies online to the public in particular pet food, toys and accessories. The business was successful and grew year on year and in mid-2018 the directors decided they needed to appoint a senior executive to manage the warehouse and logistics as they grew the business still further. In effect, they needed a warehouse management and distribution expert to bring their operation into professional shape and allow them to grow the business (with planned expansion to quadrupling in size over the next 5 years).

6.2 The Leeds warehouse, with offices above, operated as a distribution centre with goods in, storage, picking and packing orders and goods out, all items being barcoded and managed through a bespoke warehouse management system.

6.3 The Goulds took advice from an external consultant who advised consistently through from 2018 until early 2020, Steven Williams. He introduced the claimant as a prospective candidate for the new role and prepared the first draft of a job description for what was originally to be entitled Operations Manager (30-31). The main purpose of the role would be to "manage the warehouse, customer service and transport operations to deliver exceptional service in line with customer expectation, whilst maintaining costs within set budgets". Part 6 of the core role accountabilities in the job description headed Health & Safety stated that the manager was to:

- Ensure Health & Safety compliance at all times to minimise the risk of accidents/incidents
- Provide and Update Risk assessments for all Warehousing and fulfilment operations
- Ensure safe storage and handling of goods including those that require specialist handling by trained operatives
- Promote Health & Safety awareness throughout the operational environment
- Ensure that there are adequate Security arrangements to protect the Company's property and its employees
- Ensure that the premises, plant and machinery are maintained effectively to reduce the likelihood of down-time and operational interruptions

6.4 The claimant had huge experience of managing a warehousing and distribution operation. The directors interviewed the claimant formally and discussed the job description with him, stressing the primary requirements of health and safety operations and quality management. He satisfied them that he had ample experience for it and was offered and accepted the role in October 2018. The title Head of Logistics was given to mark his position and seniority (although other less senior managers were also called “Head of...”) and he was often described as Head of Logistics and Operations.

6.5 The claimant commenced employment as Head of Logistics at a salary of £55,000.00 per annum under a contract of employment dated 7 January 2019, his starting date (32-43). Clause 2 of the contract simply set out his job title without describing his duties, which were broadly to manage the warehouse, customer service and transport operations delivering exceptional service to customers and maintaining costs within set budgets; operational management, financial control, people management and communication and health and safety management. Although customer service was in the original job description, the claimant did not have sole responsibility for that since the respondent did have a separate Head of Customer Service, Nicky Wademan.

6.6 Clause 3 of the contract provided for a 6-month probationary period, with the possibility of that being extended before confirmation of permanent employment. Clause 12, headed “Ending your employment” provided for notice of termination of 3 months by the respondent after the end of the probationary period and 3 months’ notice at any time by the claimant. At 12.2 it stated:

“Nothing in this contract will prevent us from ending your employment, without notice or payment in lieu of notice, in the case of gross misconduct justifying summary dismissal without notice...”.

6.7 Clause 9: “Disciplinary and Grievance Matters” referred to the respondent’s disciplinary and grievance rules and procedures but stated that they did not form part of the contract. There was a right of suspension during investigation of an allegation which could constitute serious misconduct and a right of appeal, such that any appeal had to be made in writing giving detailed reasons.

6.8 The claimant was the most senior employee of the respondent and by far the most highly paid manager. He reported directly to Jonny Gould, but effectively to both directors. Although he had a set of detailed objectives, comprising functional objectives, strategic objectives and personal objectives provided by Steven Williams in February 2019 (46-49) there was no evidence whatsoever of systematic monitoring of those objectives by Steven Williams or the directors nor any documentary evidence in relation to the decision to confirm his appointment at the end of the probationary period. The functional objectives included implementing safe systems of work and risk assessments in line with the management of the Health & Safety at Work Act, continuing to drive efficiency and performance in the distribution centre (demonstrated by a portfolio of key performance indicators), identifying and delivering cost saving opportunities in the operation and by negotiating with suppliers, identifying and developing a robust succession plan within the distribution centre, creating a development and training plan, maintaining focus on customer service and leading the team towards “a

culture of perfect service". The personal objectives included developing a safety plan for the site incorporating risk assessments, SSoW and site instructions and guidelines.

6.9 Notwithstanding occasional concerns raised by email with the claimant by the directors early in his employment, the claimant's probationary period ended in July and the appointment was confirmed, without any extension of the probationary period. Thereafter, there is no evidence of careful performance appraisal, for instance at the end of 2019 or one year from the claimant's employment in January 2020.

6.10 From then on, few concerns were raised with the claimant on a formal basis through email. Whilst there had been minor criticism of the claimant's performance from February to May 2019, there was scarcely any documentary evidence of such criticism in late 2019 and early 2020. The directors were concentrating on growing the business and other projects (such as building up the associated subscription business, Itch); they liked the claimant and put great trust in his ability to manage the warehouse and logistics operation. When they occasionally raised issues informally about warehouse tidiness, staff behaviour (such as shouting and rowdiness), stock management and health and safety measures with him directly or through Steven Williams, they were always reassured by him that he was on top of and in control of the operation or OK with the situation raised and he would "sort it out". The absence of formal emails from the directors, especially Jonny Gould, raising concerns or queries with the claimant in late 2019 and early 2020 (other than one on 26 February 2020 about an employee who was shouting – 65) reveals the level of trust imposed in him by the directors.

6.11 The respondent's business had grown steadily at the rate of 10-15% each year for some time. However, in early 2020, shortly after the outset of the COVID-19 pandemic and especially after the lockdown announcement, the respondent experienced exceptional growth of some three to four times its normal online orders. It set in place immediate modifications to ease the impact on the business and especially the operation of the warehouse, such as reducing customers' expectation of delivery of orders within days to delivery within weeks, limiting its range to petfoods only and limiting customers to only two items in their shopping basket. Nonetheless, there was a very significant impact of upon the warehouse operation with existing systemic problems greatly exacerbated by the sheer volume of orders to be met.

6.12 The claimant introduced night shift operations and recruited more staff but there was a lack of oversight and training for those staff. Before that, he had been responsible for about 12 members of staff over 2 shifts.

6.12 With effect from 24 March 2020, the respondent introduced Andy Smith, an external consultant in logistics, to work alongside the claimant for a month in order to assist and support the claimant in improving the warehouse and distribution operation. Like the claimant, Mr Smith had a very long experience in retail distribution and logistics management. Mr Smith immediately became aware of health and safety concerns and a poor staff culture within the warehouse. He found stock all over the floor, wrongly located and not stored correctly, pallets blocking exits, much litter from empty packages and boxes, staff climbing the racking, taking

frequent smoking breaks and playing football on the night shift and customer returns blocked in behind other stock. He was very critical of the disorganised management of the warehouse, such that product was illogically scattered all over the racking making packaging orders very difficult to complete. This inefficiency meant that at this exceptionally busy time there were about 10,000 orders in the system when the respondent only had capacity to deal with 1000-1500 orders a day. Mr Smith shadowed the claimant for a few days and reported his findings both to the claimant, who did not challenge them, and to Jonny Gould.

6.13 Mr Smith recommended a short term measure of bringing in some extra resource with special expertise both warehouse employees and team leaders to help the respondent get back on track. As a result, from about 1 April 2020 the respondent brought in Clipper, an external professional logistics company, to provide team leaders and operatives to assist in servicing the influx of orders. The introduction of Clipper was arranged by Rob Millington of Itch, the sister company.

6.14 From the outset the Clipper team leader who had much health and safety experience, Rob Stephenson, was also highly critical of the warehouse operation and health and safety practices. Early on the morning of 1 April 2020, he sent a detailed email to his manager, Carl Moore, and immediately sought out Andy Smith upon his arrival at the business to tackle him about his concerns: "Have you seen it in there? It is a nightmare." Whilst Mr Smith, like the claimant, was perturbed that the Clipper team leader had immediately gone to his own manager rather than first raising the concerns with the respondent (that is, they were concerned at the manner in which the concerns were first raised), the Tribunal found that the concerns raised by Mr Stephenson were taken seriously by both Mr Smith and then by Jonny Gould when raised with him (and that the respondent was not only concerned about the manner in which Mr Stephenson had acted, as was the claimant's version). Mr Smith did not like the way the Clipper team leader went about it but did agree with the majority of the concerns he was raising when he looked into them more fully from 1 April onwards.

6.15 The subsequent email from Mr Moore to the respondent on 1 April 2020 effectively threatened that Clipper would not continue to work at the warehouse without an improvement in working practices especially on health and safety (235-236). It raised 17 concerns and was deeply critical of the respondent's approach to social distancing:

1. Colleagues climbing racking.
2. No fire register.
3. Supervisor is not sure how many agency colleagues are on site.
4. No formal training. Even for colleagues using cardboard bailer (very dangerous).
5. Stock all over the place, down aisles outside, everywhere.
6. No space for everything.
7. Absolutely no hygiene measures. Rubbish piles all over.
8. Pallet trucks abandoned.

9. Stock on pallets stacked unsafe.
10. Pallets in high racking without being wrapped.
11. Pick and pack processes not being followed. No signatures, ticking of boxes etc.
12. Pallets of cardboard double stacked on top racks.
13. No rotation of perishable stock therefore generating waste.
14. No accurate inventory.
15. Gas bottles stored inside.
16. Animal feed left all over floor inside and out. Attracting vermin.
17. Absolutely no social distancing.

6.16 When addressed by Jonny Gould about the concerns raised, the claimant was rather silent. Although he felt that most of the criticisms were wrong or exaggerated, he acknowledged the truth of a few of them and did take some actions in response, such as having the floor cleared of stock (even if it meant more being stored outside) and employing a second cleaner on each shift. However, despite the fact that they could each be viewed as direct criticisms of his own management, he did not methodically dispute the concerns raised on 1 April or over the next week or so when he was still at work. At the hearing, the claimant expressly disputed that there were any gas bottles stored inside; the Tribunal found he was mistaken on this since it could not accept that the Clipper Team Leader would have stated this if it were not so or that the claimant would not immediately have challenged and refuted it if it were not so.

6.17 Although this is not fully supported by documentary evidence, from the introduction of Mr Smith and then Clipper i.e. from the end of March 2020 onwards, the directors began to lose faith in the claimant and commenced their own fuller investigation into the warehouse operation. The Tribunal inferred that they started to pay very much more attention to matters of health and safety within the workplace and working relationships amongst the workforce than they had done for many months. For instance, like the Clipper team leader, Mr Smith and the directors were aware of several employees using the cardboard baler, not merely 4 employees the claimant had ensured were properly trained by the supplier to use that piece of equipment when it was initially installed on his recommendation. The claimant's evidence was most contradictory in relation to this machine: at times he stressed the care taken to train these 4 employees and that there was restricted use to trained staff but at other times disputed that there was any possible danger of accidents with the machine at all. Likewise, although the claimant disputed this, the Tribunal accepted that when they viewed the CCTV the directors saw employees not wearing their PPE (high-vis jackets) when working in the warehouse as they should have been doing.

6.18 There were multiple deficiencies in the warehouse operation which were brought into the open by the influx in orders. The sheer volume of stock, much of which could not actually be housed inside the warehouse, meant items were stored on the floor and customer returns items were stored behind new items of stock



(and effectively hidden from view and not dealt with). Fire exits were being used as ordinary exits and some exits were blocked by stock. Some items stored at height on the racking were unwrapped, such that they could fall. Mr Smith found the warehouse chaotic with excessive stock on the floor as well as outside, blocking walkways and exits; although he recognised that the volume of incoming stock (“goods in”) necessary to fulfil orders contributed greatly to this, he felt that poor organisation rather than inadequate capacity of “slot locations” was the main problem. The deficiencies covered not only health and safety practices but stock control systems and dealing with customer returns and errors in stock placement which resulted in high levels of manual overriding or need to change the stock records. Whilst a manual stock adjustment removing the item of stock resolved the immediate problem, it failed to explain what had gone wrong; not only was time wasted on the manual input but loss or theft of stock may be hidden as a result. Although the claimant maintained that it was sufficient and appropriate to do a stock take on a proportion of the entire stock of 3500-4000 items, of 500 items at a time, no complete stock take was made on a quarterly or annual basis during his employment.

6.19 By 10 April 2020, the claimant’s mother was very poorly and he was rightly concerned to care for her.

6.20 On that date, 10 April, there was a significant accident at work when a warehouse operative KD fell off the racking as a bag of animal food hit him when he was climbing up it to pull another heavy bag out. He fell awkwardly and injured himself on an empty pallet on the floor. No ladder or fork lift truck had been used. The directors were only fully aware of the circumstances and seriousness of this accident afterwards when an accident report form was completed in May 2020 by their Head of Customer Service, Nikki Wademan (66-73). KD blamed pressure to get the work done for why he had climbed the racking without assistance and advised that he had always been told by the warehouse manager that if he could climb the racking he should and although he had been advised by numerous people not to climb the racking, the manager (IH) did so. He did not name the claimant as having permitted or required him to climb the racking. No contemporaneous accident report was made since there was no accident book in operation; this was a most significant health and safety breach which Mr Smith needed to put right since, even though other less specific means of accident recording were available, there was no set practice of immediate entry of accidents or near-misses into a single record.

6.21 On 13 April 2020, the claimant requested and was immediately granted time off for personal reasons because his mother was very ill.

6.22 On 16 April 2020, both Adam and Johnny Gould witnessed an incident involving a warehouse operative AW acting violently towards another employee whilst the claimant was absent from work. AW ran aggressively at and pushed another employee to the ground and then swung a piece of wooden pallet around in the direction of other staff members. Jonny Gould viewed CCTV footage and discovered that AW was seen not wearing his hi-vis jacket in the warehouse and arriving late (after falsely being logged in on time). AW was dismissed summarily for gross misconduct by Adam Gould by letter dated 21 April 2020 (74-75). The

violent incident and time keeping abuse reflected the poor employee culture and lack of accountability which had been noted both by the Clipper team leader and by Mr Smith.

6.23 At about that time, several days before actually notifying the claimant, the directors decided to dismiss him. There was absolutely no warning to the claimant that his job was at risk and no disciplinary hearing. The two directors merely discussed between themselves whether the claimant's employment could continue and took legal advice on the matter. They determined that they should dismiss him summarily because they believed him guilty of multiple acts of gross misconduct in fulfilling his role as Head of Logistics; they had lost all faith in him and no longer had trust and confidence in his ability to carry out the role, with the determining feature being his lack of organisation and control over health and safety matters, which they saw as putting employees and the business at risk.

6.24 On 19 April 2020, after the claimant had been trying to call Adam Gould to notify him that his mother had died, Adam rang him back. Adam Gould had been intending to tell the claimant that he was dismissed but drew back from doing so upon learning of the claimant's mother's death.

6.25 Then on 21 April 2020 Jonny Gould rang the claimant and, having extended his condolences, notified him that he was being dismissed with immediate effect for gross misconduct on grounds of health and safety and that the full details would be set out in a letter to follow. He did tell the claimant that he had completed an investigation. The claimant may have requested a right of appeal during the telephone conversation but the Tribunal did not find that Mr Gould told him he could not do so. The claimant was understandably very upset during that short conversation and his recollection of the course of it, although it was brief, may be faulty. Afterwards he never made any written request to appeal his dismissal and no appeal against dismissal took place.

6.26 Although dated 21 April 2020, the claimant only received the written confirmation of dismissal on 29 April 2020. The letter (76-78) was signed by Adam Gould and headed: "Dismissal – Gross Negligence"; it set out "a number of extremely serious concerns have been raised resulting in your dismissal". It listed 24 concerns but without any supporting evidence:

**"A) Health & Safety**

Below is a list of non-exhaustive Health and Safety concerns under your management which have raised:

1. Staff members have been witnessed climbing warehouse racking, this has resulted in the last month with two members of the warehouse team being injured at work.
2. No record of these incidents was made in the Company's accident book nor has there been any process or follow up regarding these accidents.
3. No fire register for your team members is maintained and managed by you and no record kept of how many team members are on site.

4. There is no proper method of logging the arrival and departure of staff on site.
5. No formal training is provided to members of staff in particular on the cardboard bailer.
6. PPE requirements are not enforced, in particular the wearing of hi-vis jackets at all time.
7. The warehouse has on numerous occasions been left in an extremely messy and dis-organised state presenting hazards to your team members.
8. Stock is placed on pallets at height without being properly wrapped, presenting a very serious concern.
9. Gas bottles for the forklift truck have been stored inside.
10. No proper cleaning process is in place for the warehouse with broken product left unattended too, presenting a vermin issue.
11. Continual use of fire exits as main doors.
12. The general state of the warehouse and a complete lack of process has presented a potentially dangerous working environment.

#### **B) Staff Management**

Below is a non-exhaustive list of issues regarding your management of staff:

1. No process is in place for staff who may have accidents at work.
2. No process and record keeping is done for staff sickness, which upon investigation is an extremely serious and costly issue within your team.
3. No process is in place for staff discipline and performance review, an issue that requires urgent redress.
4. No process is in place for staff time sheet verification.
5. No key register is kept for those members of staff as key holders and it has been revealed that at times the building was not properly alarmed by your team members and that keys have been lost by staff members. No report of this has been made to the Directors of the Company.

#### **C) Stock Management**

Below is a non-exhaustive list of issues regarding your management of stock:

1. Since being in post no full stock take of the warehouse has been undertaken. In itself this is very serious as there is no stock integrity and accuracy.
2. The failure to implement any proper stock management has resulted in an extremely high number of 'problem orders' resulting in excessive customer refunds.
3. No proper verification of in-bound stock is done.

4. No investigation or process is in place for orders which are dispatched incorrectly.
5. Returned orders are not dealt with promptly and are often left unattended to for weeks.
6. No process is in place for 'missing' stock which could have been stolen, lost or damaged.
7. Damaged product isn't adequately dealt with."

The letter concluded:

"Please note the issues listed above are a sample of the issues that have been identified during our investigation. Each in themselves are extremely serious and taken as a whole have resulted in the decision that has been made regarding your dismissal. In addition a number of these concerns have been verified independently by external agencies and contractors.

The Company has not taken this decision lightly and has sought the advice of solicitors regarding the dismissal without notice. We are satisfied that the decision is appropriate given your senior position in the Company. We are extremely disappointed that your performance has resulted in these actions."

No right of appeal was referred to. Although the letter referred to "concerns raised", the directors did believe the claimant had committed the breaches or omissions and considered the label of gross negligence to be the same as gross misconduct (the term used by Jonny Gould in the telephone conversation on 21 April 2020).

6.27 Many of the respondent's concerns echoed the Clipper list but there were also new matters resulting from the directors' investigation, such as the majority of the stock and staff management items including lack of management of staff sickness and loose management of attendance and overtime. The directors' investigations had begun before the dismissal but the statistical reports in the Bundle for staff sickness and overtime continue to the end of May 2020 (nearly 6 weeks after the dismissal), showing marked increases under the claimant's tenure. Staff sickness in 2018 was 166.5 hours for the year (before the claimant's employment), 424.3 in the year 2019 and 1873.54 for the 5 months in 2020 to the end of May (including those weeks after dismissal)(223). Overtime hours were 515.75 for the year 2018, 2073.55 in the year 2019 and 1749.86 for the 5 months in 2020 to the end of May (228) leading to premium rate payments. The respondent considered there was insufficient management control over staff taking sickness and no investigation whether the overtime, based on staff self-declaring their entry and exit times was legitimate.

6.28 On the stock management side, the directors found no adequate system for dealing with customer returns, with the returned stock often stored (and "lost") behind other stock. Whilst Andy Smith upon his arrival agreed with the claimant that the respondent should concentrate on getting new orders out for a couple of weeks, with approval from Jonny Gould, there was already a major backlog of returns not dealt with in February and early March; when intense effort was put in to finding and dealing with about 550 customer returns after the claimant's

dismissal, some were found to date back to orders in December 2019 and January 2020. The directors were also surprised to find that there had been no complete stock take in the warehouse since September 2018 before the claimant's appointment but only the partial stock-takes of groups of 500 items at a time.

6.29 After the dismissal, the respondent carried out a fire risk assessment on 4 May 2020 (which described itself as the first fire safety risk assessment since the respondent had occupied its premises in 2015, made many recommendations and set out that fire marshals were still to be identified, 104-145) and further health and safety checks which found many parts of damaged racking which were beyond repair and unsafe. Mr Smith continued his engagement and was involved with Nicky Wademan in arranging the risk assessments, in particular the suite of health and safety risk assessments for various different activities in the warehouse from 13 to 26 May 2020, many of which were prepared by the Clipper team leader Rob Stephenson, who was still on site (147-222). The Tribunal accepted the claimant's evidence that some risk assessments had been carried out during his tenure but, based upon Mr Smith's evidence, found that much fuller fire and activity assessments commensurate with the respondent's workforce and scale of business were carried out soon after his dismissal. The respondent also introduced a digital time recording system to provide accurate details of staff arrival and departure for both fire safety register and reduction of clocking abuse purposes, thereby significantly improving staff attendance and reducing overtime claims.

6.30 The report on the 10 April 2020 accident was completed by Nicky Wademan in May 2020 after the dismissal. The directors who had required the investigation and report to be made were shocked at what it revealed about KD's actions and what he said about the system in operation and condonation of employees climbing the racking, although the reference to warehouse manager was not a reference to the claimant. However, other concerns about the claimant's performance continued to come to light such as finding the damaged racking in the warehouse which could have caused injury to employees or stock damage.

6.31 Mr Smith had initially come to assist the respondent and to support the claimant for a month but remained much longer. He stayed until the end of July 2020, assisting with staff training as well as the fuller risk assessments.

## 7. Submissions

7.1 The respondent contended it was a question of fact for the Tribunal whether the claimant's conduct justified summary dismissal. There was no fixed rule about the degree of misconduct necessary but it must so undermine the employment that the master was longer required to retain the servant. Gross misconduct was not limited to dishonesty or intentional wrongdoing but the respondent needed to establish that the claimant was negligent in a way so grave and weighty as to justify summary dismissal. He was the most senior employee and given a high level of trust to discharge his duties, with considerable support from Steve Williams. When the Covid increase in orders came other areas of the business coped but the warehouse was unable to, so the directors tried to correct this including introducing Andy Smith who identified the need for more resource. There was little factual dispute: whether on 1 April the only discussion with Jonny Gould was how to deal with Rob Stephenson and the claimant was never asked about the criticisms and

as to the content of the 21 April 2020 telephone call. The respondent's case was that Jonny Gould was shocked Rob Stephenson raised the issues in the way he did but his real concern was the seriousness of them; he asked the claimant how it got to that but the claimant remained silent. This version was more persuasive and probable; the claimant did not act on the email or respond to the issues, although he was working for at least a further week before his compassionate leave. The second issue was whether the claimant tried to appeal when notified of his dismissal by telephone on 21 April but was told he could not. Again the claimant's version was not reliable, he said he could not recall being told an investigation was carried out but then firmed up to say he wasn't told one had been carried out. Mr Gould's clear recollection was that he told him there had been an investigation and the claimant had not asked to appeal; the lack of appeal was consistent with the claimant not having asked. The Tribunal should find on the balance of probabilities that the respondent's findings did justify summary dismissal; many of them in isolation could do so but cumulatively they did so as the claimant had accepted in evidence (if they were proven). The potential consequences from the health and safety concerns were grave for individual employees and the business. There were 17 items from Clipper and Andy Smith's account of matters beyond those; the dismissal letter referred to the 24 points as a sample. Particularly serious were employees climbing the racking as recorded by Clipper and Andy Smith, the lack of an accident book (which the claimant accepted), the lack of a fire register which the claimant accepted (although he claimed there was some register of staff on site) Logging of staff arrivals and departures was inadequate; although the claimant said there was a system, it was abused - it was too much of a coincidence that an employee who had been there 6 months had to be dismissed within days of the claimant not being present for matters including logging in abuse. There was no record of training employees on the cardboard baler and the claimant's evidence at the hearing that it was not even a dangerous machine contradicted Clipper and could not be accepted. The directors trusted him to do his high level job as Head of Logistics and he told regularly he was on top of things; they were not aware of the huge failings which came to light earlier than they might have done because of Covid. They saw CCTV evidence of people not wearing PPE (high-vis vests). Staff management issues and most of the stock management issues arose from their own investigation, not from Clipper. The respondent could also rely on after-discovered misconduct: no fire risk assessments and other risk assessment deficiencies were grave dereliction of duty by the claimant putting the whole company in jeopardy. The failure to put the charges to him formally at a disciplinary hearing did not matter for the purposes of a wrongful dismissal claim; there was emphatic evidence from the respondent's witnesses establishing the seriousness of the allegations and justifying the summary dismissal.

7.2 Referring to his 35 years in warehousing and transport and 25 years in management, the claimant contended that an investigation and disciplinary hearing needed to have been held to discover the truth. There were no actual facts which backed up the decision made effectively by Adam Gould and no actual evidence had been put on the table. The Tribunal had rightly alluded to the fact that between passing his probation in June 2019 and the decision to dismiss there were just two documents in the bundle: on 26 February 2020, Jonny Gould's email

about a shouting employee and the Accident Investigation report relating to the 10 April accident, which caused the Gould brothers wrongly to allege that they were horrified to see he had allowed a member of staff to climb the ranking (which they then retracted). These were the only contemporaneous documents, there was no photographic evidence about the racking or climbing up on it and no evidence from Steve Williams, a key player in the initial appointment. The claimant challenged the fact that each of the respondent's three witnesses had sight of the other witnesses' statements, so rather than being individual statements, they were a collaboration to make a narrative that fitted the outcome. Despite counsel saying it was a question of fact, there were no real facts presented but merely a lot of opinion. The respondent had failed to identify documents that showed 2019 and 2020 updates on the risk assessments based upon the clean bill of health from Leeds City Council given before he started and it was entirely wrong to say there were no risk assessments in place until May 2020. The decision to dismiss him was a convenient and cheap way to dismiss without paying notice when there was no actual or visible evidence to back up the claims that were made and he felt the scale of the Bundle was to scare him. He could not see and did not understand the decision that had been made; the respondent should have done the decent thing and given notice or pay in lieu of notice although his preferred choice would have been to sit down and discuss matters with the directors. The case concerned 3 things: skill, capability and will but none had been investigated and none was put on the table for resolution; there was no discussion with him.

## 8. The Law

8.1 Wrongful dismissal/breach of contract: The applicable law is at Section 3(2) of the Employment Tribunals Act 1996 and Articles 3 and 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order, 1994. The claimant's case is that he was wrongfully dismissed in breach of his contractual notice provision by being summarily dismissed. In order to justify a summary dismissal, the employer has to show on the balance of probabilities that the employee concerned was guilty of gross misconduct or some other repudiatory breach of contract entitling it to dismiss without notice. The Tribunal therefore had to determine itself upon the claimant's actions: was he guilty of gross misconduct or some other repudiatory breach of contract which entitled the respondent to dismiss him summarily? Putting it another way, in circumstances where the respondent relies upon gross negligence by the claimant: has the respondent proved that the claimant was negligent in respect of some or all of the charges against him and if so, was the negligent performance of his duties so grave and weighty as to justify summary dismissal in determined in context having regard to the nature of the business and position of the employee?

Holiday pay: strictly this is a claim for compensation in lieu of leave under Regulation 14(2) of the Working Time Regulations 1998, having regard to the paid annual leave entitlements under regulations 13 and 13A. The parties agreed that the claimant's leave year started on the date his employment commenced namely 7 January 2019, with his second leave year beginning on 7 January 2020; his dismissal was 97 days into the new leave year.

## 9. Conclusion

Unlike the decision to be made in an unfair dismissal claim, the claimant's wrongful dismissal/breach of contract claim turned on the Tribunal's own findings. The Tribunal noted that the term gross negligence was not set out in the contract of employment as something entitling the respondent to dismiss summarily, whereas gross misconduct was. Whilst not detracting from an employer's contractual entitlement to dismiss summarily when its employee is in repudiatory breach of the contract of employment, the Tribunal considered that it must not conclude too readily that this claimant, with a high level of responsibility within the respondent's organisation but who had been worthy of appointment just over 15 months earlier and had successfully completed his probationary period 9 months earlier, was guilty of so serious a breach as to justify summary dismissal through sheer poor performance of his duties. Within the employment field it is not unusual for employees to be wrongly appointed or over-promoted but, where there are significant performance issues, the Tribunal must scrutinise closely the degree or seriousness of the breach on the part of the employee. Absent any question of unfairness of dismissal, the norm is that employers will give notice of termination to unsatisfactory employees or at least provide pay in lieu of notice.

10. However, having considered the evidence and made its finding of facts above, the Tribunal did not accept the claimant's analysis (largely provided in his own "re-examination" following the respondent's cross-examination) that everything was very much a work in progress by March 2020, developing satisfactorily until Covid-19 interrupted that progress and which would have resumed once the high volumes of orders resulting from the pandemic had passed through. Two separate external agencies were highly critical of the claimant's performance in his role: the Clipper team in the email dated 1 April 2020 and Andy Smith verbally to Jonny Gould, as was confirmed in his evidence to the Tribunal which the Tribunal accepted. The Tribunal found as a fact that the great majority of the criticisms made by Clipper and Mr Smith were completely objective and legitimate; it did not accept the claimant's analysis. The respondent company sought to recruit a highly competent warehousing and distribution professional at the end of 2018 because the directors felt this was needed as they carried on growing their business. They appointed the claimant as their Head of Logistics, which was a senior, wide-ranging and demanding role. The absence of formal correspondence once his probationary period was over, from mid-2019 onwards, confirms their reliance on the claimant's expertise and their trust in him. Whilst there was some distanced input and support from Steven Williams and his line director was Jonny Gould (although he dealt with both directors), there was very little oversight over his area of responsibility. When the directors did raise informally matters of performance which concerned them, he always reassured them that he was on top of it or had it in hand and would see to it and they took him at his word. Unfortunately the Tribunal concluded that he was not performing well in his job even before the influx of orders from about March 2020 resulting from the pandemic although this had not been obvious to the directors. The problems resulting from the huge growth in orders with the need for extra stock to fulfil those orders quickly demonstrated his deficiencies to the directors, especially in the area of health and safety at work.



11. The Tribunal found that the respondent's directors lost all trust in him and considered the claimant to be performing his contract of employment wholly unsatisfactorily by early April 2020, a conclusion which was reinforced during his unfortunate period of absence from work in mid-April 2020. Moreover it concluded on the balance of probabilities that the respondent did prove that his unsatisfactory performance amounted to negligent performance of his duties which was so grave and weighty as to justify summary dismissal, in other words gross negligence or a repudiatory breach of contract akin to gross misconduct.

12. Had the deficiencies solely related to stock management or to staff management, the Tribunal would have been unlikely to have found the claimant had committed a repudiatory breach of the contract of employment entitling the respondent to dismiss him summarily. The Tribunal concluded that the overriding factor was the major failure to uphold good health and safety practices in the warehouse operation, which was a core element of the claimant's role: the lack of a basic accident book, the fact that employees were witnessed climbing on racking (with an inevitable accident following) showing that the signage and instructions to and training of employees was inadequate, staff observed working in the warehouse without their PPE, untrained staff using the cardboard baler, the weak system of registering warehouse staff attendance (highly relevant to effective fire evacuation procedures), storage of gas bottles inside the warehouse, blockage of walkways and exits and misuse of fire exits, the need for much fuller risk assessments to be put into effect very swiftly after the claimant's dismissal; these all demonstrated serious disregard for good practice. These failures taken together fully established the claimant's repudiatory breach of his contract of employment.

13. The Tribunal concluded that even at the hearing the claimant was still in denial about the extent of the problems succinctly summarised by Mr Smith in his witness statement, which had gone largely unchallenged in cross-examination by the claimant. Whilst it understands the claimant's sense of grievance that the respondent's issues were never formally put to him so he could explain or give his version and that he was not given the opportunity to put things right and improve his performance, this was not a claim of unfair dismissal. Applying the contractual test, the Tribunal was satisfied on the balance of probabilities that the claimant was guilty of such a serious failure to perform the key elements of his contract of employment that summary dismissal was justified. He was not wrongfully dismissed and his breach of contract and holiday pay claims are dismissed.

Employment Judge Parkin

Date: 13 November 2020