EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4102241/2020 (A)

Held in Glasgow on 1 - 3 and 21 December 2020

Deliberation: 6 and 7 January 2021

Employment Judge: D Hoey

Mr John Austin	**Claimant**
Wood Group Industrial Services Ltd	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1 The Tribunal finds that the claimant's claim of unfair dismissal is well founded. The respondent shall pay to the claimant the following by way of compensation:

a. A basic award in the sum of **£4,200** calculated as follows: the statutory basic award of £5,250, which is reduced by 20% on account of culpable conduct of the claimant that led to his dismissal, which results in the basic award being £4,200; and

b. A compensatory award in the sum of **£16,465.40**, comprising past and future losses and loss of statutory rights totalling £18,710.69 increased by 10% on account of the respondent's unreasonable failure to comply with the ACAS Code of Practice less 20% on account of the claimant's culpable conduct, giving a total of £16,465.40.

The recoupment regulations apply to the unfair dismissal award. The prescribed element is £12,223.01 reduced by 20%

on account of contributory conduct which is £9,778.41. The prescribed period is from 11 April 2020 until 21 December 2020. The total unfair dismissal award is £20,665.40. The balance is £10,886.99.

2 The Tribunal finds that the claimant's claim for notice pay/wrongful dismissal is well founded and awards damages in the net sum of **£5,175.83** calculated as follows, with damages in respect of his 10 week notice period being £4,705.30 plus an uplift of 10% in respect of the respondent's unreasonable failure to follow the ACAS Code of Practice (£470.53) which is £5,175.83.

REASONS

Introduction

1. In a claim form presented on 23 April 2020 the claimant claimed unfair dismissal and unpaid notice pay. Early conciliation had commenced on 9 March 2020 with the ACAS early conciliation certificate issued on 24 March 2020.

Issues

2. The hearing began by focussing the issues in this case. The issues to be determined were:

Unfair dismissal

a. What was the reason or principal reason for dismissal? The respondent says the reason was conduct (or some other substantial reason). The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct or the reason was some other substantial reason.

b. If the reason was misconduct or some other substantial reason, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

i. there were reasonable grounds for that belief;

ii. at the time the belief was formed the respondent had carried out a reasonable investigation;

iii. the respondent otherwise acted in a procedurally fair manner;

iv. dismissal was within the range of reasonable responses.

c. As the claimant sought compensation only by way of remedy, the Tribunal would have to decide what compensation to award the claimant, in terms of the basic and compensatory awards and consider the following:

i. What financial losses has the dismissal caused the claimant?

ii. Has the claimant taken reasonable steps to replace his lost earnings, for example by looking for another job?

iii. If not, for what period of loss should the claimant be compensated?

iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

v. If so, should the claimant's compensation be reduced? By how much?

vi. Did the respondent or the claimant unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

vii. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

viii. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

ix. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

x. Does the statutory cap of fifty-two weeks' pay apply?

xi. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Wrongful dismissal / Notice pay

d. The claimant has a notice period of 10 weeks. The issue is whether the claimant did something so serious that the respondent was entitled to dismiss without notice.

Preliminary issues

3. The parties had agreed a bundle of 162 pages together with the ACAS Code of Practice. The claimant objected to pages 163 to 167 being included. These related to notes taken during the disciplinary hearing that the dismissing officer had discovered. The respondent's agent noted that there were typed versions within the bundle but he wished to include these on grounds of completeness. The other documents were handwritten statements, one of which was from the claimant himself.

4. The claimant's agent argued that these documents had been sought for some time and had only been produced almost literally at the last minute. The respondent's agent explained that the dismissing officer had understood that the documents had been with the solicitor and only very recently discovered that they had not been provided.

5. It was clear that the documents were relevant and it was in the interests of justice that they be included in the bundle. I gave the claimant's agent time to take instructions in relation to these documents to ensure that the claimant was not disadvantaged by the lateness.

6. During the course of the hearing 2 further pages were added to the bundle by agreement.

7. We also discussed the overriding objective set out at rule 2 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and of the need to ensure all decisions that were taken were taken justly and fairly and that the matter proceeded expeditiously and proportionately. The parties worked together to ensure the overriding objective was secured.

8. The Tribunal heard evidence from the dismissing officer (Mr Fairweather, Operations Manager) and the appeal officer (Mr Lynch, Senior Operations Manager) and the claimant. Each witness sought to give evidence to the best of their knowledge and belief. I deal with conflicts in evidence in the observations section below.

Facts

9. I make the following findings of fact from the evidence the Tribunal heard together with the documents to which its attention was directed. I resolved relevant conflicts on the balance of probabilities, by assessing what is more likely than not to have happened from the evidence and contemporaneous documents.

10. For the purposes of the unfair dismissal claim I apply the legal test to the information that was before the respondent at the time. With regard to contribution, **Polkey** and the breach of contract claim, I have to determine what happened as a matter of fact, which I do from assessing the evidence before the Tribunal on the balance of probabilities. I only make findings necessary to determine the issues and not in respect of each of the points raised in evidence.

Background

11. The respondent is a very large business providing industrial services to different companies across the country. It has thousands of employees and is

split into a number of different divisions. The division in question had around 1400 staff with around 10 HR staff to assist.

12. The claimant was employed as a scaffolding chargehand (and was a fully trained part 2 scaffolder). He was also a health and safety representative and was respected by the respondent and the respondent's client. On occasion operatives would go to the claimant with any health and safety issues. He was employed from 1 November 2009 until his dismissal on 30 January 2020. He was aged 37 as at the date of dismissal and had an unblemished disciplinary record.

Disciplinary policy

13. The respondent operated a disciplinary policy which was stated to be non-contractual in nature. That policy stated that the company was "committed to helping and encouraging employees to achieve and maintain the required standards of conduct". The policy also stated that an investigation must be carried out before any disciplinary action takes place. The policy stated that the company aimed to deal with matters sensitively and with due respect for the privacy of individuals involved. All employees are required to treat in an confidential manner any information communicated to them in connection with an investigation or disciplinary matter.

14. Where there was an apparent breach of discipline, the employee would be advised of the nature of the alleged breach and asked to attend a disciplinary meeting. The alleged breach of discipline and the request to attend a meeting would be confirmed in writing and the employee will be provided with supporting documentation resulting from the investigation and a copy of the disciplinary policy. The employee would be advised of the possible consequences if the allegation is upheld.

15. Where practicable there should be at least 3 working day's notice to allow time to prepare. The meeting would normally be conducted by the employee's line manager. HR (called "P & O" – people and organisation) would be present to take notes. Where accusations of gross misconduct are made, normally a senior manager would conduct the hearing.

16. At the disciplinary hearing the nature of the alleged breach would be explained to the employee along with the evidence that has been gathered. The employee would be given an opportunity to state their case and, if necessary, call relevant witnesses and present any evidence of their own. The respondent reserved the right to decline the attendance of employee witnesses "where it regards their attendance as inappropriate in the circumstances". A written record of the meeting would be produced.

17. The manager may adjourn the disciplinary hearing if they feel further investigations are required and the employee would be given a reasonable opportunity to consider any new information obtained before the meeting is reconvened.

18. If the manager is satisfied that the alleged breach of discipline did occur, the employee would be advised verbally and in writing with a clear explanation of the decision reached and the reasons for it. The outcome letter would be sent within 10 calendar days where practicable and a copy of the notes from the meeting would be enclosed. The employee would be advised of the right to appeal.

19. As to sanction, dismissal may follow where the misconduct is of a sufficient seriousness to warrant it.

20. The policy stated that employees have the right to be accompanied at disciplinary meetings (and any appeal) by a companion who is either a work colleague or trade union official certified in writing by their union as being qualified to act as a companion at a disciplinary or grievance meeting. If the companion is not available the hearing would be adjourned and an alternative date scheduled within 7 calendar days unless otherwise agreed.

21. The employee has the right to appeal any disciplinary sanction and must inform the relevant person named within the outcome letter within 7 calendar days of receipt. The appeal letter should set out the grounds for the appeal including any specific points the employee wishes to be considered, including any new evidence not available at the time and confirm what the employee is appealing against, such as the finding or outcome.

22. The respondent would invite the employee to an appeal meeting with an appropriate manager and HR and seek to hold the meeting within 7 calendar days of being informed of the appeal. The manager involved would normally be of a higher authority than the original manager.

23. Where new evidence is brought forward on appeal, the appeal manager should review why that evidence could not have been presented at the original meeting.

24. The outcome should be confirmed within 10 calendar days.

25. Gross misconduct is defined as "misconduct of such a serious and fundamental nature that it breaches the contractual relationship (express or implied) between the employee and the respondent and includes misconduct in the respondent's opinion is likely to prejudice the company's business or reputation or irreparable damage the working relationship of trust between the company, the employee and any other third party." Examples include failure to comply with a health and safety requirement, breach of procedure or regulation.

Health and safety issues

26. Health and safety was a paramount consideration for all operators and operatives within the industry. The claimant's place of work at the material time was at a pharmaceutical site. There were pipes in the area the claimant worked with chemicals. There were also houses nearby. It was essential that relevant risks were identified and mitigated, if not extinguished.

27. Each task to be carried out has associated with it a risk assessment and method statement. The risk assessment is a document produced by the supervisor to identify what hazards are involved in carrying out the task and what control measures are needed to mitigate those risks. The method statement is similar and contains a description as to how the job is done and lists things that should be done (rather than what should not be done). Both documents are issued together in a pack (called the RAMS pack) on a 3

monthly basis, or sooner if the risks or position changes. There are 12 areas of the plant and a separate RAMS pack is issued for each area.

28. When the RAMS pack is issued the supervisors and chargehands for each area must go through each document with their squads to ensure the risks and issues arising are fully understood. Operatives then sign off to say they have been briefed and have read and understood the documents. The documents are only signed once and require to be signed again when the document is re-issued or amended.

29. There is a scaffold method statement that deals with scaffold erection, modification and dismantling. That sets out the process to be carried out in respect of scaffolding works. It states that operatives must be briefed, understand and sign the risk assessment and method statement before work can commence. They are also to complete or read, agree and sign a point of work risk assessment. The statement also states that "All materials must be passed hand to hand and under no circumstances will an operative throw or drop materials."

30. Each day work is allocated to particular squads. The respondent's client would issue a permit for the work to be done that day. The supervisor would obtain the permit which would be created digitally and a printed copy generated. The supervisor and the respondent's client would consider relevant risks for the job and incorporate the risk assessment and method statement into the permit. The permit is the client document and the risk assessment and method statement is a document generated by the respondent.

31. A point of work risk assessment is then carried out by the squad in question before commencing the task which covers the risk assessment and method statement and any additional issues arising.

The working day and the task in question

32. The claimant was based at one of the respondent's client's sites, which was a large pharmaceutical company.

33. Scaffolders often work in teams. The claimant worked with Mr Bell and had done so on a large number of occasions. On the day in question, 5 November 2019, both men were also working with 2 colleagues, Mr Reid and Mr McCluskey.

34. Their task had been to erect a mobile alloy tower. The tower had been partially dismantled, repositioned and was being re-erected.

35. A permit had been obtained from the client and a risk assessment generated. The claimant and Mr Bell had already signed the RAMS documents. The claimant had understood that the other 2 scaffolder colleagues had also done so but did not check. The claimant had failed to sign on to the risk assessment and method statement and did not check the folder that he had for the day, which contained the documents related to the task in question. There was a blank risk assessment in his folder, which had the names for each of the squad on it, but the claimant did not check it. The squad had not been asked to sign the document. It was the claimant's responsibility to ensure the RAMS had been signed by his squad prior to work commencing. That had not been done by the claimant.

36. The claimant had undertaken a point of work risk assessment with the squad prior to commencing the job. The point of work assessment went into greater detail as to the risks arising from that task than the generic RAMS document. Each of the squad completed the point of work risk assessment. That document stated that each of the squad had read and understood the RAMS document.

Facts in relation to the incident in question

37. The claimant was in the process of completing the task of anchoring the mobile tower to a fixed structure. He required one more coupler which was a fitting that connected items. The claimant shouted down for someone to pass him up a coupler.

38. Mr Bell picked up a coupler and threw it up to the claimant. The circumstances surrounding what the claimant knew about the coupler being thrown to him were in dispute and was a matter that had to be investigated to allow Mr Fairweather to reach a view upon (since that became the main reason for the claimant's dismissal). The Tribunal's findings of fact in relation to the incident in question are set out following the facts necessary to determine the unfair dismissal claim (since they differ from what Mr Fairweather found). Mr Fairweather believed that the claimant had known the coupler was to be thrown to him by Mr Bell.

39. Mr Bell had been standing below the claimant. Two other scaffolders were standing nearby within view of the incident.

The aftermath of the incident

40. Senior staff of the respondent's client (Mr Dunn, Improve Plant Manager and Mr Mitchell, Site Director) had been walking in the vicinity of the scaffold carrying out a site audit. As they were walking along they witnessed the incident, seeing Mr Bell throw the coupler which the claimant caught. Mr Mitchell told Mr Bell he had witnessed the incident and asked that it stop. Mr Bell agreed that the act was unsafe and should have used a rope and bag to transfer the item. Mr Bell had said that the work was complete and the correct procedure would be followed in future. Mr Dunn and Mr Mitchell spoke to Mr Fairweather, operations manager, to notify him of the incident. Mr Fairweather undertook to investigate matters and deal with it given the seriousness.

41. Mr Fairweather asked for the squad to attend his office. The 4 scaffolders did so and Mr Fairweather spoke with each scaffolders individually. The 2 scaffolders who were nearby denied seeing anything at the time, saying they were 10m away, facing each other talking.

Written statements at the time

42. The claimant and Mr Bell were asked, by Mr Fairweather, to provide a written statement as to what happened shortly following the incident.

43. The claimant stated: “We had just finished building an alloy tower. As I was tying it onto the steel work I realised I was a double short of finishing the job. I shouted down and asked the boys for 1 double to finish. I looked round and Mr Bell threw it up to me and I caught it not thinking. I should have said to pass it up through the lifts. As Gary threw it and I caught it Mr Weir came around the corner and challenged us.”

44. Mr Bell stated: “I was working erecting an alloy tower with my squad. Job was nearly complete when one of people in the squad asked me to give him a fitting up to finish the job which I threw up to him. At that point Mr Weir came and asked me what I was doing to which I told him I was giving up a fitting to finish the job.”.

45. Neither of these statements were provided to the claimant during the disciplinary process.

Suspension

46. On or around 5 November 2019 the Mr Fairweather wrote to the claimant (in a letter that was undated) confirming that he had been suspended pending an investigation into allegations of “serious breach of health and safety regulations – throwing/catching a scaffold fitting from your colleague who was working on ground, 6m below”, which was stated to have been witnessed by a Client Director. That letter confirmed that the claimant would be required to attend an investigation meeting.

47. Mr Fairweather asked Mr McCallum to investigate matters and report to him. Separately an internal health and safety investigation had been commenced.

Client email

48. On 6 November 2019, following a request from Mr Fairweather, Mr Dunn, Improve Plant Manager, sent an email to Mr Fairweather confirming what he had seen. The email stated: “At 10:00 on Tuesday 5 November Graeme Weir and I were carrying out a site audit. On walking along the roadway we

observed 4 Wood scaffolding staff in the process of constructing a scaffold on the access road. One scaffolder was on the scaffold platform about 20 feet above the road level, a second scaffolder was standing directly below next to the base of the platform holding a clamp. The other 2 scaffolders were standing close by watching the activity.

49. We observed the scaffolder who was standing at the base of the scaffold throwing the clamp from the ground level up to his colleague who was working at the top of the platform. Graeme asked for the activity to stop and highlighted what we had observed. The scaffolder commented that he agreed that this was unsafe and acknowledged that he should have been using a bag/rope to transfer the materials to his colleague working above. The scaffolder informed us that the work was complete and in future he would adhere to using the correct procedure for this activity.

50. On leaving the area Graeme and I met a supervisor and informed him of the situation. He commented that sufficient bags and ropes were available. The supervisor commented that he would address the issue with the team concerned."

Health and safety report

51. On 7 November 2010 an investigation report was produced by Mr Carson, HSE Advisor and Mr Gallagher, Scaffold Supervisor. The Executive Summary of the report stated that the investigation reviewed the scope of works to which the scaffold team had been authorised to carry out. It said that the throwing of the scaffold double coupler has been in direct breach of the scaffolder's CISRS train, SG6 Manual handling practices and method of works instructions. It noted that throwing scaffold fittings is classed as an unsafe practice and the group was aware of the practice but "chose collectively not to apply it (in whole or in part) – an intentional act (violation)".

52. Under "incident description" it was stated that on 5 November 2019 at around 11am 2 scaffolders were observed by the client throwing a scaffold coupler fitting from ground to approximately 4.5m in height. The client intervened with the scaffolders and a formal statement raised with the supervision team. It

noted that the claimant had asked for a double coupler to complete the job from his colleague who then threw the fitting up to him.

53. The double coupler was galvanised steel weighing 1.03kg. At a height of 4.5 metres with that weight, there would be 45.5 joules created which could have led to a recordable incident had it struck an individual. There was a live chemical pipeline nearby too.

54. The report stated that there had been several key safety processes in place to ensure proper practices were known and adopted on site. The method statement stated that "all materials must be passed from hand to hand and under no circumstances should material be thrown or dropped". The Safety Policy required all employees to take care and always follow the rules. The scaffolders had also received manual handling training in scaffolding and a toolbox talk had been delivered to Mr Bell in October 2018 stating that throwing of scaffolding objects is prohibited and would lead to disciplinary action. Both operatives were stated to have had adequate instructions to ensure they knew throwing scaffold fittings is outlawed.

55. Under the heading "timeline of events" the report noted that the operatives arrived onsite at 81m and at 830 received a work instruction to alter the mobile tower. The scaffold squad completed the point of work risk assessment for the task at 840 and began to carry out the task. It was at 10am that the client management team observed the scaffold fitting being thrown. They intervened and the operative who threw the fitting agreed it was an unsafe act. At 10.10am the client management team reported the incident to the supervisor who escalated it to management.

56. At 10.15am the report states that management initiated incident investigation by taking witness statements and suspended the 2 operatives to ensure an investigation could take place.

57. Under the heading "root cause" it is noted that the Manual Handling in Scaffolding Operations Procedure (at section 4.4.1) states that "Scaffold

materials should never be thrown. The practice of bombing or throwing materials is now considered an unsafe practice and all materials should be handled in a controlled manner, eg passed by hand or using a manual handling aid." The report stated:

58. "The 2 operatives involved were both to blame for their actions. It is recognised that where the individual throwing the fitting is ultimately responsible for the unsafe act, the operative receiving the fitting is also to blame as he prepared himself to catch the fitting and was duly aware of the actions about to be taken by the operative throwing the fitting. The operative requesting the fitting should have stopped and asked for the fitting to be passed up to him in a safe manner either by hand or by a bag and rope which is available to use. The Method Statement for the works stated (at section 11) that "All material must be passed from hand to hand and under no circumstances should materials be thrown or dropped." The scaffolders involved admitted in their own statements that the fitting was thrown and as witnessed by the client site director both operatives said at the point of challenge that what they did was an unsafe act."

59. The foregoing conclusion was reached without speaking to the claimant, who had never admitted to preparing himself to catch the fitting (and during the subsequent process never admitted such a fact). It is also incorrect to state that the claimant said at the point of challenge that what they had done was an unsafe act, since the client statement confirmed that it was only the claimant's colleague that had said this (and the client had not in fact spoken with the claimant at all).

60. While there was a heading entitled "Appendix" which said would "typically include witness statements" no statements were provided. There was no evidence of any statements having been taken in relation to the report or its conclusions. The claimant had not been spoken to by the report's authors prior to issuing the report.

Investigation meeting

61. On 19 November 2019 Mr McCallum, Scaffold Supervisor, wrote to the claimant requiring him to attend an investigation meeting at 22 November 2019. The purpose of the meeting was stated to be "to collate the facts surrounding the allegation that on 5 November the following act was witnessed by a client director; serious breach of health and safety regulations – throwing a scaffold fitting up to your colleague who was working on the scaffold 6m above."

62. The claimant had not received a copy of the suspension letter and that was attached to the letter.

63. On 22 November 2019 the claimant attended the investigation meeting conducted by Mr McCallum. The claimant was told that the purpose of the meeting was to "present his side of the story" and allow Mr McCallum to ask questions.

64. The first question the claimant was asked was given the claimant was the chargehand on the job, did he get all the men to sign on to the risk assessments before starting the task. The claimant replied that he believed that had been doe the day before and everyone was signed on to it.

65. The claimant was then asked if he had been issued with a fittings bag to allow fittings to be pulled up by rope or passed by hand, to which the claimant agreed. The claimant also agreed that the throwing of scaffold component was not acceptable. He said: "In my defence I just caught it. I didn't ask for it to be thrown to me."

66. Mr McCallum had no further questions but the HR officer asked the claimant to "run through the incident" from his perspective. He said: "We were doing a job and we were a fitting short so I asked Gary to pass me a fitting and he threw it up at me. I automatically caught it because I didn't want to not catch it and it fall on someone below. I told him he shouldn't have thrown it and then at that point the client came past."

67. The claimant was asked if he challenged Gary and told him he shouldn't have done it and he said "Yes I did. I understand I shouldn't have let it happen but I caught it to save it dropping on someone like I said."

Investigation report

68. On 3 December 2019 Mr McCallum produced an investigation report. It began by stating that 2 scaffolders had been observed by a client throwing a scaffold coupler from ground to 4.5m in height. A health and safety investigation had been conducted by Messrs Carson and Gallagher. Mr McCallum had been asked to investigate the matter in line with the disciplinary policy.

69. Under "key findings" the report stated: "During the investigation interview John admitted that he caught the fitting that was thrown up to him because he thought that was better than letting it fall to the ground. As he was the chargehand on the job he has a duty of care and responsibility to ensure that jobs are carried out safely. John did advise in his interview that he told Gary that he should not have thrown the fitting."

70. Under "Conclusion and recommendation" it stated: "An unsafe act of this nature is not acceptable and it does not fall within the company safe practices policies or the behaviours and standards we expect employees to adhere to. Whilst John was not the person that threw the fitting he still prepared himself to catch the fitting and was duly aware of the actions about to be taken by the operative throwing the fitting. This is extremely concerning and there were no mitigating factors that have come out of the investigation that would make the incident less serious. There was an extreme potential risk that someone could have been injured if the object had not been caught and there was the potential for sparks to have been generated in the area which could have explosive implications. I recommend that this progress to disciplinary action."

71. It is unclear why Mr McCallum concluded that the claimant had "prepared himself to catch the fitting and was duly aware of the actions about to be taken by the operative throwing the fitting" since this had not been asked of the

claimant (who did not admit to doing so). There was no material from which Mr McCallum could conclude that the claimant had "prepared himself to catch the fitting". Noone had said the claimant had done so.

Mr Bell's investigation meeting

72. Mr McCallum was also responsible for investigating the matter with regard to Mr Bell. In his investigation meeting (the details of which were not provided to the claimant) Mr Bell was asked why he threw the fitting. He said the claimant "had asked me to get him one so I did and then I just threw it up and it was wrong."

73. Mr Bell admitted that it was not acceptable to do so and that he had been issued with equipment to do so safely. Mr McCallum had no further questions. Mr Bell then explained that he had been working for the company for 13 years and had never done anything wrong before. He stated that it was a genuine mistake.

Invite to disciplinary meeting

74. On 10 December 2019 Mr Fairweather wrote to the claimant requiring him to attend a disciplinary meeting on 13 December 2019. He would conduct the meeting and a separate HR officer would be in attendance (via Skype).

75. The purpose of the meeting was to discuss the claimant's alleged misconduct. It was alleged that the claimant was "observed by the client catching a scaffold double coupler from ground to approx. 4.5m in height which could be considered to be an unsafe working practice" which had the potential to cause ham and damage to a live chemical pipeline.

76. The letter stated that it was also alleged that the claimant "did not sign on to the method statement or risk assessment. This is potentially a breach of the Safety Rules, ie a breach of the health and safety procedure or regulation and a failure to comply with a health or safety requirement."

77. The letter enclosed the investigation report, the investigation minute with the claimant, the health and safety report, the scaffold method statement, the risk assessment and the disciplinary policy.

78. If the allegations were established there was a risk the claimant could be dismissed. He was also told of his right to bring a companion to the meeting.

Adjournment of hearing

79. The claimant attended the meeting on 13 December 2019. Mr Fairweather had intended proceeding with the hearing. The claimant's trade union official asked that the statement that Mr Fairweather had obtained from the client be produced. It was agreed to adjourn the meeting.

New hearing fixed

80. On 14 January 2020 Mr Fairweather wrote to the claimant stating that following the adjournment of the 13 December meeting, and following the claimant's request for additional information "having reviewed your request and having spoken further to the investigation team, we would like to advise you that we would like to go ahead with this meeting and reschedule for 17 January 2020."

81. The letter stated that "You requested a further statement from the further witness (Client) which we now enclose. If there is any further evidence or other lines of enquiry that comes out of your disciplinary hearing meeting that I feel may warrant further investigation, then I can always investigate further before making any final decision. In respect of your request for information relating to Mr Bell and his case, unfortunately the company will not be able to provide you with a copy of his evidence pack for GDPR (General Data Protection Reasons). Therefore, if you wish to contact Mr Bell Direct and he is willing to share his pack with you, then the Company will have no objection to you doing so."

82. The letter repeated the 2 allegations that had been set out in the earlier letter

83. The claimant's trade union representative was unable to attend on the allocated day and the meeting was adjourned.

84. On 16 January 2020 Mr Fairweather wrote to the claimant again stating that as the claimant's representative was not available on 17 January the hearing had been rearranged for 22 January 2020.

Disciplinary hearing

85. On 22 January 2020 the claimant attended the disciplinary hearing with his trade union representative, Mr Pritchard, a full time official. The meeting lasted 23 minutes and was conducted by Mr Fairweather with an HR business partner in attendance.

86. Mr Fairweather had conducted disciplinary hearings before and in the last 10 years had dismissed employees on the ground of gross misconduct on 6 to 8 occasions. Mr Fairweather had the support of an HR team in connection with the disciplinary process.

87. Mr Fairweather asked if the claimant had sufficient time to look through the documentation and was OK to proceed with the hearing. Mr Pritchard stated that in relation to the statement from the client, he wanted to have the client present. He stated that he had not seen any witness statements from the 2 scaffolders who were present. As 11 weeks had passed since the event, it was suggested that an investigation ought to have taken place and the ACAS Code followed.

88. The HR representative stated that if the respondent felt the additional client statement is relevant or needs to be added further, the hearing manager could always go back and ask further questions and obtain further information before making any final decision and she felt that the hearing should proceed on that basis. She stated that she was not aware of any further witnesses. She stated that "Tony and I are only dealing with the disciplinary hearing so we can only go off what has been passed to us by the investigating manager. I will note your comments for the record but I feel we should proceed and if

we need to question anyone further as a result of what comes out today Tony can pick this up and investigate further before making any final decision."

89. The claimant provided the details of the 2 other witnesses. Mr Reid and Mr McCluskey which the respondent noted.

90. Mr Fairweather then stated that the claimant was observed catching a coupler from ground to approximately 4.5 metres in height. The claimant said that "I was just reacting to the situation. When it was thrown at me I'm only human and my natural instinct was to catch it. I never asked for it to be thrown in that way. I asked for the fitting to be passed up to me and then it was thrown up to me."

91. Mr Fairweather asked if the claimant asked that it be passed to him and he said "I did and when it was thrown at me what was I expected to do? I wouldn't have let it fall in case there was anyone underneath which could have resulted in a worse situation."

92. Mr Pritchard pointed out that in the client statement he said he had observed the scaffolder throwing it up to the claimant. He did not say that the claimant had actively encouraged him to throw it to him. Mr Pritchard said that the hearing should be "discounted" as the claimant merely acted on instinct and avoided injury and damage.

93. Mr Fairweather noted that in the claimant's statement he had asked for it to be passed to him not thrown. Mr Pritchard responded by stating that "Everyone knows that you don't do this and shouldn't throw things up. There are proper ways to carry this out. I think it's unreasonable to expect on a daily basis the claimant to have to specify by what method he should receive this. It would just be an expectation that it should be carried out by the correct way of doing things.".

94. The claimant said that he said pass it up to him which did not mean throw it up. He thought it would come up properly. He confirmed that it is not acceptable to throw fittings and as Mr Bell had a bag, he assumed that he would have come up the ladders and handed it up.

95. He was asked if he would have done anything differently and said no because he was not expecting it to be thrown to him and he can only assume that Mr Bell was not thinking.

96. Mr Fairweather asked if it had happened before and the claimant said it was completely out of character for Mr Bell. He was then asked if he challenged Mr Bell about it and the claimant said he had but he could not remember exactly what Mr Bell said but he knew he should not have done it.

97. Mr Fairweather then said to the claimant that he understood there was an "unofficial code amongst scaffolders" and asked the claimant if he was aware of any unofficial gestures and whether any were made. The claimant said: "No. Hand signals are made by touching our sleeve for example but purely for safety reasons."

98. Mr Fairweather then asked the claimant "what exact instructions were given". The claimant said that it had been 11 weeks since the event and so he could not recall exactly but for the fitting to be given up to him not to be thrown up to him.

99. The HR representative asked if any witnesses saw what happened and the claimant said that Mr Reid and Mr McCluskey were present as was the client.

100. With regard to the method statement and risk assessment, the claimant accepted that he did not check his folder. He did not get to sign onto them. He said there was a blank form in his folder and he should have looked at this and noticed but did not.

101. With regard to the point of work risk assessment, the claimant said that those present had not been part of the squad and they did not sign as there was no place for signatures. The claimant said that he and Mr Bell knew the area and job as they had already worked on it before but the statement was blank.

102. Mr Pritchard recapped on behalf of the claimant by noting that the client's statement did not suggest the claimant was encouraging the behaviour in any

way for the fitting to be thrown to him. The claimant acted out of instinct and had he not caught it could have been serious. He acted with the best of intentions. Mr Pritchard said that it appeared that Mr Bell acted without thought while the claimant acted honestly and cooperated fully. He had been consistent throughout.

103. Mr Prichard noted that the claimant did accept he should have checked the method statement and risk assessment and that this was an oversight. The claimant would accept an informal caution as a sanction. The claimant was a safety representative with many year's experience and had no blemish on his character or many good years of service.

104. Mr Fairweather stated that he would reserve his decision and write to the claimant.

Email from Mr Fairweather

105. In an email dated 24 January 2020 from Mr Fairweather to the HR representative who was present at the hearing, he stated: "Apologies, meant to send this on Wednesday 22 January 2020. Regarding the incident with the 2 scaffolders, I did speak to the other scaffolders who were in the vicinity (Mr Reid and Mr McCluskey) on the day of the incident. I have also spoken to them on Wednesday 22 January and they have both confirmed they did not see anything or hear anything as they were about 10m away and were facing each other talking about something else. The first thing they say they noticed was the Site Director approaching the 2 scaffolders who were working on the mobile tower."

106. This email was not disclosed to the claimant.

Mr Bell's disciplinary hearing

107. At a separate hearing on 24 January 2020 Mr Fairweather conducted Mr Bell's disciplinary hearing, along with the same HR representative. At the outset of the hearing Mr Bell set out personal reasons which he believed had led him to do what he had done on the day in question. His position was that these personal issues had led to a momentary lapse in concentration; his mind was

elsewhere and it was a one off act. It was suggested that the claimant be asked if this had happened before as it had not and that would be confirmed. In his 14 years of service this was the first time he had done such a thing.

108. Mr Fairweather asked Mr Bell to run through what happened. Mr Bell said that the claimant had asked for a fitting and he threw it up to him. That was out of character for him and he realised it was a mistake.

109. Mr Fairweather asked what the instruction was the claimant had given Mr Bell and he said that the claimant said he needed a fitting up and "gave me the nod". The HR representative asked if the claimant had said by what means to send it. Mr Bell said that the claimant had said just that he needed another one up.

110. Mr Fairweather asked Mr Bell if he was aware of an unofficial gesture code but he was not. Mr Fairweather asked if the claimant was using a gesture such as the nod. Mr Bell said that he was not aware of anything like that and that he took the nod to mean that it was "safe to send".

111. Mr Fairweather asked if the claimant had been expecting the coupler to be thrown to him and Mr Bell said that he wouldn't have thrown it if anyone was in danger. When asked if the claimant was expecting it or if it was the spur of the moment, Mr Bell said he did not know and wasn't sure but thought the claimant was expecting it.

112. He was asked if anyone else was in the vicinity at the time and Mr Bell confirmed there were 2 other scaffolders around but they were not in the immediate area.

113. Mr Fairweather asked Mr Bell if the claimant had said anything about not throwing it. Mr Bell could not recall.

114. Upon asking what happened next, Mr Bell said the client came over and asked about the correct procedure. He said he had made a mistake and would not repeat it.

115. Mr Bell was asked if he would normally have a bag with him for the type of work he was doing. He said “most times, but not for that job that I can recall.”

116. The matters discussed at this hearing were not communicated to the claimant.

Outcome letter

117. On 30 January 2020 Mr Fairweather wrote to the claimant to confirm the outcome of his disciplinary hearing. The letter stated that the meeting had been arranged to discuss 2 allegations: catching a scaffold coupler which is unsafe practice and not signing on to the method statement or risk assessment.

118. Mr Fairweather stated “Having carefully considered the evidence, our discussions and having taken your explanations into account, I have established to reasonable satisfaction that you have committed the allegations outlined above.” He decided to terminate the claimant’s contract of employment due to gross misconduct.

119. The reasons he gave were that “my reasonable belief is that you did ‘request’ the fitting to be thrown up to you and that you were ‘aware’ that it was going to be thrown up to you. There is a suggestion from the evidence that I have available to me that a nod was made which suggests that an unofficial scaffolding code to throw the item up to you was made, and despite you identifying that a rope and bag was the correct method to get a fitting from ground level to the top of the scaffold, the evidence suggests that there was no rope and bag present at the work area. There is also sufficient doubt in my mind as to whether any conversation did take place with Mr Bell immediately following this incident to ask him why the item had been thrown up to you which again suggests that this is because you had requested the coupler to be thrown up to yourself.”

120. Mr Fairweather considered the claimant’s actions to be a serious breach and failure to comply with company and client safety procedures and regulations as well as a breach of the manual handling in scaffolding operations procedure.

121. Mr Fairweather noted the consequences of the act could have been very serious and that he would have expected someone as a chargehand and safety representative "should have known better than to have partaken in such an unsafe act." He stated that it was the claimant's responsibility to ensure that his squad was working safely on the job and Mr Fairweather felt there has been a failure on the part of the claimant.

122. With regard to the signing of the method statement and risk assessment, Mr Fairweather noted the claimant admitted that this had not been carried out which was a further breach of health and safety procedure and protocol. It was the claimant's responsibility to ensure this had been signed by the squad prior to work commencing on the job. He felt the claimant had failed in his duty and responsibility.

123. He said "while we listened to your representations, the organisation was not able to find any mitigating factors for a lesser sanction. This is a dismissal without notice and will take effect as of today's date."

124. He enclosed a copy of the minutes of the hearing and confirmed that he had the right to appeal which should be submitted within 7 calendar days of receipt.

125. Mr Fairweather did not believe the claimant when he said that he had asked that the fitting be passed up. He believed that the claimant had known the fitting was going to be thrown up. He relied upon the reports that had been provided to him which stated the claimant had known that the item was being thrown to him. He also relied upon his "gut reaction" and his experience that there would be no time to catch the fitting in the way the claimant said and that it was only likely to have been caught if the claimant knew it was being thrown to him. He did not consider the claimant would have had enough time to catch the fitting instinctively.

126. He also did not believe the claimant when he alleged that immediately after catching the fitting he asked Mr Bell why it had been thrown to him. Mr Fairweather considered that this had not featured in each of the responses the claimant had been given and Mr Bell could not remember the claimant

challenging him. Mr Fairweather considered the claimant's account to be inconsistent and implausible.

127. When the claimant had said that he "should not have let it happen" at the investigation meeting, Mr Fairweather believed that showed that the claimant knew the item was being thrown to him and could have stopped it at the time.

128. Mr Fairweather was also concerned about the respondent's relationship with the client in relation to these issues given their seriousness. He stated that "the client had made their feelings known about people who do these sorts of things."

129. The principal reason for dismissal was the claimant's failure to follow health and safety rules and allow the fitting to be thrown to him. Mr Fairweather believed that was gross misconduct and justified dismissal.

130. The failure to check the position with regard to the risk assessment and method statement was also serious in Mr Fairweather's view and could potentially have led to dismissal but the combination of both resulted in Mr Fairweather's decision to summarily dismiss the claimant.

Appeal

131. On 4 February 2020 the claimant sent an email with an enclosure stating that "Find enclosed my letter of appeal on my unfair dismissal.". In the enclosure the claimant stated the following:

"Please accept this as a formal request to appeal against the unfair dismissal of myself on the basis that this outcome is misinformed as it is not based on the facts or evidence collected. There are 2 main reasons I see for this.

The disciplinary manager has misinterpreted the facts available to him in the investigation material

The correct and lawful disciplinary process as set out by ACAS has not been followed correctly and there are key facts and witness statements missing from the investigation.

Under the heading "key facts which have been misinterpreted" the claimant stated that the client that provided the statement to Mr Fairweather on 6 November (which the claimant had not received until January, after requesting it in December), there was no suggestion from the client of the claimant using any sort of body language or unofficial scaffolder code to ask the coupling be passed to him in an unsafe manner. This was a key part of the discussion in the meetings we had. In the outcome letter it is stated that "you did request the fitting to be thrown to you and you were aware it was going to be thrown to you. There is a suggestion from the evidence a nod was made which suggests an unofficial scaffolding code to throw the item up to you was made.." My request is that you read the evidence provided and advise me (a) where the reasonable evidence is that I gave a nod so knew the coupling was about to be thrown. The client statement refers to Mr Bell being observed throwing the coupling and being spoken to. At no point does it mention me giving a nod or any body language to ask him to throw it to me and (b) where is there evidence no rope and bag was present. This was not checked on site nor was I asked when providing my statement. I always have it with me as does Mr Bell."

132. He then stated that *"Tony then said: "there is sufficient doubt as to whether any conversation did take place immediately following the incident to ask him why the item had bene thrown to you which suggests that this is because you requested it be thrown to you". Tony is calling me a liar. I argue disciplinary outcomes should be based on facts not opinions or suggestions based on personal bias.*

I am a loyal committed long serving employee. I have been honest and upfront throughout this process and I am being branded a liar. I did not request the coupling be thrown to me. I responded in the safest way possible to mitigate any further risk by catching it and I immediately acted by having a conversation with him. The misinterpretation of the facts gathered and unfair outcome decision which has resulted in be being branded a liar and the unfounded accusations being made in the outcome of letter are defamation.

My second point is that the disciplinary process has not been followed correctly which is very likely the main reason why the facts have been so grossly misinterpreted.

You have not provided all statements available. To date I have been advised that Mr Bell's statements could not be provided for GDPR reasons which is reasonable when the investigation is at fact find but they should be provided at disciplinary stage per ACAS guidelines. All witness statements must be provided during disciplinary investigations. This is a significant error. His statement should have been redacted but provided.

Not all witnesses were asked to provide a statement. There were 2 other scaffolders present who witnessed the incident. Why were they not asked to provide a statement? I was asked for their details during the hearing and gave them but they were named on the point of work safety assessment and should have been known.

The most significant failure was that one of the main witnesses, the client, Mr Weir, who reported the incident alongside Mr Dunn was not asked to provide a statement at all. When this was challenged by my union rep in December 2019 at a disciplinary meeting we were advised this would be looked into. In January 2020 HR said it was not appropriate to get a statement from Mr Weir and this could be followed up by the disciplinary manager if he felt he needed to do so. How can this be considered acceptable? This is a disciplinary hearing. Mr Weir was a key witness to this event and should have provided a statement.

There has been no ownership of the process from the start. There are a number of critical facts which are being missed. A number of people have been involved in different stages but have clearly not handed it over sufficiently which has had a significant impact on the consistency and attention to detail.

From the point above it is clear to see that the investigation has not followed due process, evidence has not been collected properly, in full or within a reasonable time, therefore the outcome decision has not been based on the

true facts relating to the incident and should be re-evaluated by another independent manager.

To close the complete mismanagement of this investigation has caused me severe undue stress. At no point has management been in contact to check on my personal well being."

Appeal meeting

133. On 12 February 2020 the respondent acknowledged the claimant's appeal letter and stated that the hearing would take place on 18 February 2020 before Mr Lynch, senior operations manager. The letter stated that his letter would be considered.

134. While a minute of the hearing was taken, the respondent has no record of it and none was sent to the claimant.

135. In an email from Mr Lynch to the HR representative on 19 February 2020 Mr Lynch stated *"After the hearing Mr Austin's appeal yesterday I wish to uphold the original decision to dismiss for the following reasons:*

I believe John signalled to his colleague to throw the fitting to him. I don't believe the labourer would have thrown the fitting ignoring the fact that it would have caused injury to his colleague, damage to plant and the tower. This unsafe practice in years gone by was common.

Staff carrying out the practice of throwing equipment in an unsafe manner know they will be disciplined and could be dismissed.

The claimant was our site safety representative in which case expectations from ourselves that he show constant leadership on health and safety

He confirmed he was a part 2 scaffolder with 14 year's experience in the industry. He should be competent enough to know he should not be tying alloy scaffolds to fixed structures using galvanised tubes and steel couplings."

Appeal outcome letter

136. On 24 February 2020 Mr Lynch sent the claimant a letter with the outcome of the appeal. The letter stated that he had *"carefully considered the points raised during the appeal meeting as well as those in the letter of 4 February 2020" but he decided to uphold the original decision. He stated "I have detailed below how I have come to this decision;*

Following a review of the appeal, I have a reasonable belief that you signalled to your colleague to throw the fitting to him on the platform. I do not believe the labourer would have thrown the fitting ignoring the fact that it could have caused personal injury to his colleagues, damage to plant and tower. This is an unsafe practice.

I believe staff carrying out the practice of throwing equipment in an unsafe manner know they will be disciplined and could be dismissed. The company will conduct further briefings on this matter.

You highlighted that you are a site safety representative in which case expectations from ourselves that he show constant leadership on health and safety

You confirmed yesterday [sic] that you are a part 2 scaffolder with 14 years; experience in the industry. I have an additional concern that you should be competent enough to know you should not be tying alloy scaffolds to fixed structures using galvanised tubes and steel couplings.

I therefore conclude that I uphold the original decision to dismiss you on the ground of gross misconduct. The appeal decision is final."

Mitigation

137. While working for the respondent the claimant earned gross pay of around £590 a week for working 39 hours. His net weekly pay was £470.53. The respondent contributed £34.10 into a pension on behalf of the claimant. He had worked for the respondent for 10 complete years and was aged 37 at the date of his dismissal (30 January 2020).

138. Following the claimant's suspension from work he had visited his GP and had been prescribed medication to assist with his mental health. In January the claimant's medication was doubled. The claimant was able to stop taking medication in March 2020.

139. The claimant struggled to cope with matters following his dismissal. His mood was down and he felt bad given how he perceived he had been treated. His dismissal on account of gross misconduct severely dented his confidence. He believed that the scaffolding industry was a small industry and that he would struggle to get another job as a scaffolder given the reasons for his dismissal (which was one of the most serious things a scaffolder could do).

140. When he was working with the respondent he had hoped to progress through the ranks and was interested in promotion. He had been highly regarded with regard to health and safety and had hoped to secure more senior positions within the respondent's business.

141. Following his dismissal, he believed he would struggle to secure a job in scaffolding again. He was concerned that his dismissal would prevent him working in the sector again, being for gross misconduct and for one of the most serious acts a scaffolder could have done (even although he denied being guilty). It was a small sector and he believed he would not secure another role as a scaffolder. He was disheartened and considered that he should look for other roles. He began to look for jobs that he believed would suit his skill set, including site foreman, project management and health and safety roles. The pandemic affected the smaller construction sites in particular from March 2020.

142. The claimant applied for a number of roles following his dismissal, mostly through an online portal. In February 2020 the claimant applied for the following roles: trainee recruitment consultant, customer service adviser, foreman, construction project manager, full time warehouse operative, scaffolder and product lead. He was not successful in those applications.

143. From the period from February to June the claimant applied for other jobs via the online portal but was not successful.

144. He secured a new role with a small construction operation with effect from 4 June 2020 wherein he earned £12 gross an hour, working 39 hours a week as a ground worker. He was not eligible for a pension. That role was secured as a result of a recommendation from a family friend.

145. The claimant was in receipt of benefits, namely Job Seekers Allowance, from 5 February 2020 until the start of June 2020 when he commenced his new role.

Facts in relation to the incident in question (found by the Tribunal)

146. The facts in this section are facts I have found on the balance of probabilities from the evidence presented and are relevant for the purposes of the notice pay claim and for **Polkey** and contribution. They are not relevant for the unfair dismissal claim which is determined by the information found by the respondent, which differs from the following facts.

147. The claimant was in the process of completing the task of anchoring the mobile tower to a fixed structure. He required one more coupler which was a fitting that connected items. The claimant shouted down for someone to pass him a coupler.

148. Mr Bell picked up a coupler and threw it up to the claimant. The claimant had not been expecting the coupler to be thrown at him. He was in the process of completing the job of tying the scaffolding and was crouching down. As he turned around, he saw the coupler being thrown and managed to catch it, which was an instinctive reaction, which the claimant did to prevent the coupler falling back to the ground.

149. As the claimant caught the fitting he looked at Mr Bell, who looked shocked. He had never done that before. The claimant asked Mr Bell why he had done it. Due to personal issues, Mr Bell had not been thinking straight and acted on impulse. At that point the respondent's client arrived.

150. Mr Bell had been standing below the claimant. Two other scaffolders were standing nearby within view of the incident.

Observations on the evidence

151. The only real area of dispute in relation to the facts was in connection with what happened in relation to the incident in question and the claimant's role. Mr Fairweather's position (which was essentially adopted by Mr Lynch on appeal) was that the claimant knew the fitting was going to be thrown to him. Mr Fairweather did not believe the claimant's explanation which was that he asked it to be passed to him and (by luck) saw the fitting being thrown to him and managed to catch it, which he did instinctively. Mr Fairweather did also not believe the claimant when he said that immediately after catching the fitting the claimant essentially remonstrated with Mr Bell. Mr Fairweather believed that the claimant had known the item was going to be thrown to him. The remainder of the facts were not in dispute.

152. As I set out above, I require to decide on the balance of probabilities what actually happened since that is necessary to determine the notice pay claim together with the issues in respect of contribution and **Polkey**. The unfair dismissal claim is assessed with reference to the information before the respondent (and their conclusions).

153. The claimant was clear in his recollection of events and was honest. He accepted that he had done wrong in relation to the failure to check the position with regard to the risk assessment and method statement. He was clear in his position in relation to what had happened that led to his dismissal and his evidence was consistent with the productions and contemporaneous notes in relation to the incident in question. He was prepared for his position to be tested and asked repeatedly that those present be asked to comment on what happened. His position throughout this process was consistent and clear. I found the claimant to be credible and having spent a considerable period of time assessing the evidence I find on the balance of probabilities that the claimant's position is more likely than not to be what actually happened.

154. Mr Fairweather was an experienced manager and also gave his evidence to the best his recollection. He had placed considerable reliance upon the reports that had been provided to him (at the investigation stage) which had

reached a conclusion that the claimant knew the item was being thrown to him, despite there being no evidence to justify that conclusion (and the claimant presenting an alternative position, which had not been considered).

155. Mr Fairweather had also been involved in the matter from the outset when the respondent's client had advised him about the incident and the seriousness of it. One of the reasons why Mr Fairweather did not believe the claimant was because in his view the claimant's explanation was implausible. He considered it unlikely someone could catch a fitting without knowing it was being thrown. That resulted in Mr Fairweather concluding that the claimant had known that the item was going to be thrown rather than passed to him safely, and consequently he did not consider it necessary to examine the claimant's explanation carefully. Having carefully considered the evidence and the information before Mr Fairweather and the context,

156. There were a number of significant factors which made it more likely that what seemed totally implausible may in fact be true and as a result ought to have been examined (rather than summarily rejected). These included the explanation Mr Bell gave for throwing the item and the fact that no one, including Mr Bell, had said that the claimant had known the fitting was going to be thrown to him. In fact, the evidence before the respondent, on the face of it, supported the claimant's position, particularly the statement from the client suggesting the claimant was working on the scaffold platform at the point the item was thrown to him. Those facts suggest that the claimant's explanation was not so implausible as to be untrue.

157. Mr Fairweather stated in evidence that Mr Bell had told him at some point, on an informal basis, that the claimant had told Mr Bell to throw the item to him. He stated in evidence that this was "at the back of his mind" when he was considering matters following the disciplinary hearing but maintained that it was not a reason for upholding the allegation. I considered on the balance of probabilities that Mr Bell had not told Mr Fairweather that the claimant had asked that the item be thrown to him. Had Mr Bell told Mr Fairweather of this, I considered it more likely than not that this would have been something Mr Fairweather would have recorded at the time and raised either during the

investigation process or during the disciplinary process. At no stage did Mr Fairweather put the fact that Mr Bell had told Mr Fairweather that the claimant had asked the item be thrown to him to either Mr Bell or the claimant at their respective disciplinary hearings, nor record it anywhere. He also did not provide that information to the investigator to check the position with Mr Bell.

158. Given the significance of that admission and the seriousness of the matter, I did not consider it likely that there would be no record of such a statement having been made and concluded that on the balance of probabilities it had not been said. Mr Fairweather had said that as it was not a formal discussion he did not record it. I did not consider that to be credible given the seriousness of the matter, the emphasis by the respondent (and Mr Fairweather in particular) with regard to written records of matters pertaining to health and safety.

159. Mr Fairweather said that this was not part of his reasoning for dismissing but it was “in the back of his mind”. The claimant’s agent argued that this was an example of the respondent’s attempt to persuade the Tribunal of the claimant’s guilt in the absence of a fair investigation. This evidence underlined Mr Fairweather’s absolute belief in the guilt of the claimant, but it was a belief which had been reached without a proper basis given the evidence before him.

160. In relation to mitigation the claimant gave evidence that he had applied for jobs via an online agency. While he had been able to secure a screen print showing the jobs he had applied for in February the system was unable to provide any further information. I considered that the claimant was truthful in his evidence. He had sought alternative roles by applying via the online portal but was not successful. He produced the evidence that he had. The respondent’s agent also argued that the claimant had been unable to set out exactly what the nature of his new employment was, suggesting he was self employed and then that he was subject to a contract of employment. The claimant presented his evidence in a truthful way. He did not understand the legal basis of his appointment. He was paid a sum each week, which was paid into his bank account (evidence of which was provided) by his employer

(which was supported by evidence from the employer). I accepted the claimant's evidence in that regard.

Law

Unfair dismissal

161. The Tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within section 98(1) and (2) of the Employment Rights Act 1996 and whether it had a genuine belief in that reason. One of the potentially fair reasons is for matters relating to "conduct". Another is "some other substantial reason". The burden of proof here rests on the respondent who must persuade the Tribunal that it had a genuine belief that the employee committed the relevant misconduct (or that the reason was some other substantial reason) and that belief was the reason for dismissal.

162. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98(2), the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98(4).

163. Section 98(4) provides that 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 rescores 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.

164. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably; **Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden** 2000 ICR 1283. It should be

recognised that different employers may reasonably react in different ways and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.

165. Mr Justice Browne-Wilkinson in his judgement in **Iceland Frozen Foods Ltd v Jones** ICR 17, in the Employment Appeal Tribunal, summarised the law. The approach the Tribunal must adopt is as follows:

    a. "The starting out should always be the words of section 98(4) themselves

    b. In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair

    c. In judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt

    d. In many (though not all) cases there is a band of reasonable responses to the employee's conduct which in which the employer acting reasonably may take one view, another quite reasonably take another.

    e. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."

166. In terms of procedural fairness, the (then) House of Lords in **Polkey v AE Dayton Services Ltd** 1988 ICR 142 firmly establishes that procedural fairness is highly relevant to the reasonableness test under section 98(4). Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have

made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing: ”in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation.”

167. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the Employment Appeal Tribunal in **British Home Stores v Burchell** 1980 ICR 303 the employer must show:

    a. It believed the employee guilty of misconduct

    b. It had in mind reasonable grounds upon which to sustain that belief

    c. At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

168. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity and the substantial merits of the case.

169. In **Ilea v Gravett** 1988 IRLR 487 the Employment Appeal Tribunal considered the Burchill principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance of probabilities, that the employee was guilty of misconduct and that in all the circumstances based upon the knowledge of and after consideration of

sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety of facts that can arise. At one extreme there will be cases where the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will increase. It may be that after hearing the employee further investigation ought reasonably to be made. The question is whether a reasonable employer could have reached the conclusion on the available relevant evidence.

170. In that case the Employment Appeal Tribunal upheld the Tribunal which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.

171. The amount of investigation needed will vary from case to case. In **Gray Dunn v Edwards** EAT/324/79 Lord McDonald stated that "it is now well settled that common sense places limits upon the degree of investigation required of an employer who is seized of information which points strongly towards the commission of a disciplinary offence which merits dismissal." In that case the Court found that further evidence would not have altered the outcome as the employer had shown that they would have taken the same course even if they had heard further evidence. That was a case which relied upon the now superseded **British Labour Pump v Byrne** 1979 IRLR 94 principle but emphasises that the amount of investigation needed will vary in each case. Thus, in **RSPB v Croucher** 1984 IRLR 425 the Employment Appeal Tribunal held that where dishonest conduct is admitted there is very little by way of investigation needed since there is little doubt as to whether or not the misconduct occurred.

172. A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable employer would do, applying the statutory test, to ensure the employer had

reasonable grounds to sustain the belief in the employee's guilt after as much investigation as was reasonable was carried out. In **Ulsterbus v Henderson** 1989 IRLR 251 the Northern Irish Court of Appeal found that a Tribunal was wrong to find that in certain circumstances a reasonable employer would carry out a quasi-judicial investigation with confrontation of witnesses and cross-examination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a "most meticulous review of all the evidence" and considered whether there was any possibility that a mistake had been made. The court emphasised that the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.

173. Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The Employment Appeal Tribunal emphasised in **Fuller v Lloyds Bank** 1991 IRLR 336 that where there is a procedural defect, the question to be answered is whether the procedure amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where the result of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see **Sainsburys v Hitt** 2003 IRLR 23).

174. The Court in **Babapulle v Ealing** 2013 IRLR 854 emphasised that a finding of gross misconduct does not automatically justify dismissal as a matter of law since mitigating factors should be taken into account and the employer must act reasonably. Length of service can be taken into account (**Strouthous v London Underground** 2004 IRLR 636).

175. In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct. This includes conducting an investigation, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter and allowing an appeal.

176. Paragraph 9 of the Code is headed “Inform the employee of the problem” and states: “if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide any copies of any written evidence which may include any witness statements with the notification.”

177. Paragraph 12 is entitled “Hold a meeting with the employee to discuss the problem” and states; “Employers, employees and their companions should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.”

178. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process (**West Midland v Tipton** 1986 ICR 192). This was confirmed in **Taylor v OCS** 2006 IRLR 613 where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and that a mere review never is). The Tribunal should consider the disciplinary process as a whole and apply the statutory test and consider the fairness of the whole disciplinary process. If there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

179. Where a claimant has been unfairly dismissed compensation is awarded by way of a basic award (calculated as per section 119 of the Employment Rights act 1996) and a compensatory award, per section 123 of the Employment

Rights Act 1996 ("the 1996 Act"), being such amount as is just and equitable so far as attributable to action taken by the employer.

Basic award

180. This is calculated in a similar way to a redundancy payment. The basic award is subject to reduction where the conduct of the employee before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to do so (section 122(2) Employment Rights Act 1996).

Compensatory award

181. This must reflect the losses sustained by the claimant as a result of the dismissal. In respect of this award it may be appropriate to make a deduction under the principle derived from the case of **Polkey**, if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair. That was considered in **Silifant v Powell** 1983 IRLR 91, and in **Software 2000 Ltd v Andrews** 2007 IRLR 568, although the latter case was decided on the statutory dismissal procedures that were later repealed. The case of **Ministry of Justice v Parry** 2013 ICR 311 is relevant too. The Tribunal must consider all the circumstances in deciding whether it is able to assess the chance of a fair dismissal (see **Frew v Springboig St John's School** UKEATS/0052/10). Further, if an employer wishes to advance a **Polkey** argument, it should be supported by evidence (**Compass v Ayodele** 2011 IRLR 802).

182. At paragraph 54 of the Judgment, the Employment Appeal Tribunal in **Software 2000** summarised the legal principles and it is worthwhile quoting them in full (but it must be read bearing in mind the statutory procedures were abolished as was section 98A): "The following principles emerge from these cases:

    a. In assessing compensation, the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for

how long the employee would have been employed but for the dismissal.

b. If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

c. However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

d. Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

e. An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

f. The s.98A(2) and **Polkey** exercises run in parallel and will often involve consideration of the same evidence, but they must not be

conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

g. Having considered the evidence, the Tribunal may determine

   i. That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

   ii. That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

   iii. That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

   iv. Employment would have continued indefinitely.

h. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

183. In **Jagex v McCambridge** UKEAT/41/19 the Employment Appeal Tribunal held that on the facts of that case the dismissal had been substantively and procedurally unfair and the Tribunal's reasons showed that no reasonable employer would or could fairly have dismissed the claimant for what he did. In such cases there was no need to consider the **Software 2000** principles in detail. It was inherent in that decision that fair procedures would not have made the dismissal fair. The Tribunal had erred, however, in concluding that

gross misconduct was required to justify a reduction for contributory fault since the correct test is to consider whether the conduct was culpable, blameworthy, foolish or similar, which could include conduct that falls short of gross misconduct or even a breach of contract.

184. The amount of the compensatory award is determined under section 123 and is "such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

Mitigation

185. The leading authority in this area is **Wilding v BT** 2002 ICR 107. That case confirms that the onus is on a wrongdoer to show that the claimant failed to mitigate their loss by unreasonably refusing an offer of reemployment. It is not enough to show that it would have been reasonable for the employee to take those steps since it was necessary to show that it was unreasonable for the innocent party not to take them. It is only where the wrongdoer can show affirmatively that the innocent party has acted unreasonably in relation to the duty to mitigate that such a defence can succeed. This was considered in **Cooper v Lindsey** UKEAT/184/15 where Langstaff P noted that there is a difference between acting reasonably and not acting unreasonably. It is not for the claimant to show that what he did was reasonable. The central cause is the act of the wrongdoer.

186. Lady Wise considered this issue in **Wright v Silverline** UKEATS/8/16 where she noted that the Employment Judge had erred in adopting a starting point of considering whether the employee's conduct was unreasonable and by failing to make it clear that the onus is on the wrongdoer to show that the employee failed to mitigate their loss. The onus is not neutral and it is for the respondent to show that the claimant acted unreasonably.

Reduction of the awards

187. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant but the tests are different.

188. Guidance on the amount of compensation was given in **Norton Tool Co Ltd v Tewson** [1972] IRLR 86. In **Nelson v BBC (No. 2)** 1979 IRLR 346 it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included “perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct.” Guidance on the assessment of contribution was also given by the Court of Appeal in **Hollier v Plysu Ltd** [1983] IRLR 260, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant’s conduct played in the dismissal. The Employment Appeal Tribunal proposed contribution levels of 100% (employee wholly to blame), 75% (employee mainly to blame), 50% (employee and employer equally to blame) and 25% (employee slightly to blame). That was not, however, specifically endorsed by the Court of Appeal and there is no reason a Tribunal has to follow these guidelines as they are a matter of common sense. The more serious and obviously 'wrong' an employee's conduct, the higher the deduction is likely to be.

189. A Tribunal should also consider whether there is an overlap between the **Polkey** principle and the issue of contribution (**Lenlyn UK Ltd v Kular** UKEAT/0108/16).

190. Thus, if the Tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount as it considers just and equitable. There need be no causal connection between the dismissal and the conduct when a Tribunal considers a reduction to the basic award.

191. A deduction for contributory fault under s 123(6) can be made only in respect of conduct that persisted during the employment and which caused or contributed to the employer's decision to dismiss. It follows that the employee's conduct must be known to the employer prior to the dismissal.

192. In **Nelson v BBC (No 2)** [1979] IRLR 346 the Court of Appeal said that three factors must be satisfied for the tribunal to find there to be contributory conduct. The first of these is that the conduct must be culpable or blameworthy. The second is that it must have caused or contributed to the dismissal. The third is that it must be just and equitable to reduce the award by the proportion specified.

193. In **Steen v ASP Packaging Ltd** [2014] ICR 56 (Langstaff P presiding) the Employment Appeal Tribunal stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of section 123(6) of the Employment Rights Act 1996 if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. It will likely be an error of law if the Tribunal simply states its conclusion as to contributory fault and the appropriate deduction for it without dealing with these four matters. The court said that there is no need to address these matters at any greater length than is necessary to convey the essential reasoning and of its nature a particular percentage or fraction by which to reduce compensation is not susceptible to precise calculation but the factors which held to establish a particular percentage should be, even briefly, identified.

194. In **Steen** a finding of 100% contributory conduct was said to be an unusual finding but a permissible finding. A Tribunal should not simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is appropriate. It may be the case but the percentage might

still require to be moderated in the light of what is just and equitable: see **Lemonious v Church Commissioners** UKEAT/0253/12.

195. In terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, if an employer unreasonably fails to comply with the ACAS Code the compensatory award can be increased by up to 25%. If an employee has unreasonably failed to comply with the Code, the compensatory award can be reduced by up to 25%. The Employment Appeal Tribunal has held that the Tribunal take into account the absolute value of any uplift, rather than just the percentage value (see **Acetrip Ltd v Dogra** UKEAT/238/18).

196. If a claimant has received certain benefits, including Job Seeker's Allowance (as in this case), the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. This means that the respondent must retain a portion of the sum due until the relevant Government department has issued a notice setting out what the claimant is to be paid and what is to be refunded to the Government.

Notice pay

197. Under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 a Tribunal can award a claimant damages for breach of contract where the claim arises or is outstanding on termination of employment. The cap of the award that a Tribunal can make is currently £25,000.

198. For claims of breach of contract for notice pay, such as in this case, where an employee has been dismissed by reason of breach of contract for gross misconduct, the Tribunal requires to make findings from the evidence it has heard to determine whether or not the claimant was as a matter of fact in breach of contract such that the respondent was entitled to terminate the contract summarily. If the employer did not have grounds that entitled it to dismiss the employee summarily, notice pay can be awarded (subject to the rules as to mitigation).

199. In **British Heart Foundation v Roy** UKEAT/49/15 the Employment Appeal Tribunal (Mr Langstaff, President) noted, at paragraph 6: "Whereas the focus in unfair dismissal is on the employer's reasons for the dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or whether in fact the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal, There the question is indeed whether the misconduct actually occurred."

Submissions

200. Both agents provided detailed written submissions together with authorities, a copy of which is on the Tribunal file. Both agents supplemented their submissions orally. Although I do not refer to each of the points or authorities referred to, I have taken into account the full submissions made and carefully considered the authorities to which reference was made. What follows is a summary of the submissions.

Respondent's submissions

201. It was submitted that the case revolves around an assessment as to what happened when the claimant caught the fitting that was thrown to him. The starting point is to consider the inherent unlikeliness of the event being as the claimant stated. It was submitted that in light of the inherent unlikeliness, little by way of investigation is needed. it was submitted that the claimant's suggestion in evidence that he was crouching down when he saw the fitting coming towards him was something that had not been said by him before and was very different from that set out to date. It was highly unusual. As it was not known to the respondent, they could not investigate that.

202. Counsel also submitted that there was nothing by way of investigation that could have exculpated the claimant.

203. Counsel summarised the authorities which I have taken into account. He argued that given the inherent unlikeliness of the event, little investigation is

needed. the claimant was virtually caught in the act. It was “massively unlikely”.

204. Counsel argued that the claimant had come close to admitting his guilt when he said, at the investigation meeting that “I understand I shouldn’t have let it happen”. When assessed against the claimant’s other comments, this was akin to an admission and counsel argued the more absurd or strange the position advanced by an employee, the lesser the degree of investigation that is needed.

205. This was a very serious act of misconduct with a very improbable explanation. The claimant had been given plenty of chances to explain, which only made his position worse. It was difficult to see how any further investigation would alter the outcome. While the claimant said others witnessed the event that was not right since the 2 scaffolders told Mr Fairweather they had not seen anything.

206. Mr Dunn and Mr Weir gave a written statement. There was no basis to take further statements. Procedure is not a tick box exercise. The employer looked at what was alleged to have occurred, took account of the seriousness and the evidence from the client, an unbiased third party who saw the event, and reached a conclusion. It was unlikely someone would throw steel 20 feet in the air without knowing it would be caught.

207. Counsel argued that there are common sense limits on the investigation required of an employer which has information that points strongly to commission of a disciplinary offence that merits dismissal. Further, the authorities show that there is no automatic right to confront witnesses and cross examine them nor necessarily the right to see witness statements. It is enough for the employee to know what is being alleged. In this case the claimant’s explanation was intrinsically improbable.

208. The failure to provide statements must be considered in the round. Counsel argued that natural justice is a very narrow concept in relation to the dismissal procedure and is largely focused on knowing generally what the charges were and being able to respond.

209. The claimant was represented during the process and there was more than sufficient investigation to allow a belief to be held. There was little required by way of investigation given the massive improbability of the version presented by the claimant. The incident could only have occurred with the complicity of the claimant.

210. Ultimately the question is one of reasonableness, akin to proportionality, with regard to the investigation which, it was submitted, was reasonable.

211. With regard to the appeal process, this was not fatal to the fairness of the dismissal since it can be assumed the reasoning mirrored that of Mr Fairweather.

212. Counsel also suggested that equity and the substantial merits should be considered and the honest mistake of the respondent with regard to GDPR need not be a matter that adversely affects the respondent. Consideration should be given as to how bears the burden of that error.

213. With regard to remedy, the claimant had not proven his loss. The onus of proof is firmly on the claimant and he has not done so. The claimant failed to provide anything following the orders issued in July and the evidence produced was scant. The claimant was unclear as to his employment status and his current position is unclear. He had therefore failed to discharge the onus of proof as to loss

214. Even if the dismissal was unfair, in terms of **Polkey**, a fair dismissal would have been carried out in 2 to 3 weeks which would be what would be needed to sort out any procedural difficulties.

215. Finally, counsel argued that there should be 100% contribution given the claimant's conduct.

Claimant's submissions

216. The claimant's agent noted that the entire incident was witnessed by 2 external managers, Mr Weir and Mr Dunn. They observed Mr Bell throw the fitting and said 2 other scaffolders were close by watching the activity. They

stated the claimant was working at the top. Rather than hypothesize as to what the claimant did, the respondent should have properly investigated matters.

217. Little was done by way of investigation despite the claimant and his union representative seeking more detail. The claimant was given little information and was not given all the information on which the respondent based its decision. The respondent failed to follow its own procedures and the ACAS code.

218. The claimant's agent argued that it is a fundamental part of a fair process to know the case. Fairness requires knowledge of the case to be met with evidence relied upon being provided so it can be considered.

219. The initial statements that were taken were not disclosed. It took a while to get the client statement and no further statements were taken nor investigation made. This was not an employee who had been caught in the act. It relied upon inference and required to be investigated. Nobody had said the claimant did anything wrong but the managers relied upon their hypothecation.

220. There was potentially exculpatory evidence and the claimant asked this be considered. That could potentially have shown the claimant to be wrong but he wanted a fair investigation to take place and yet his requests were ignored.

221. The approach adopted by Mr Fairweather, it was submitted, was indicative of a closed mind. The fact he was prepared to proceed to deal with the matter without even giving the claimant the client statement demonstrated his approach. The refusal to obtain the basic facts from those who witnessed the evident underlines the unfairness.

222. The reports provided at the time were flawed. The first report was concluded without any witness statements being taken and was concluded within 48 hours. The claimant was not interviewed and yet the conclusion reached was that he was to blame. The report was flawed since it said the claimant accepted what was done was unsafe. He made no such admission. The

investigation was rushed and shoddy. The claimant's agent submitted it was a rush to judgment and a closed mind was demonstrated.

223. The investigation meeting was very limited with few questions being put to the claimant. His position was consistent and clear. His position was consistent with his original statement. The statement that he shouldn't have let it happen was his explanation that with hindsight he should have been clearer as to the instruction to pass the fitting up. The claimant was clear in saying he did not ask it be thrown to him.

224. It was argued that the decision to dismiss was based on speculation and not evidence, which was available. Those present ought to have been asked for their view on what the claimant had said. This incident had potentially catastrophic consequences and yet the investigation was minimal. A reasonable employer would speak to all relevant people to get to the bottom of the incident and understand what happened

225. The second allegation was new and had not been raised during the investigation to any great extent and the claimant admitted that he had failed to complete the risk assessment but this was a relatively minor error. It was an oversight on his part.

226. With regard to loss, it was argued that the claimant gave his evidence in a straightforward way to the Tribunal. He explained the steps he had taken to get another job and explained, as best he could, how his new role works. He is paid directly by his employer into his bank with tax and national insurance deducted at source. His losses were clear.

227. The claimant saw a career in health and safety but this process caused the claimant to suffer stress. His mental health limited his options.

228. The claimant's agent argued that Mr Fairweather had not told the truth when he said that Mr Bell had told him that the claimant asked him to throw up the fitting. This was intended to be deeply damaging to the claimant. There was no evidence to support that at all. At one level Mr Fairweather is acting as investigator, speaking to Mr Bell and the other witnesses and is then the

disciplinary manager. He has already made his mind up from the evidence which is unfair. These points are not put to the claimant. Mr Fairweather is a judge in his own cause.

229. By carrying out the investigation in the way he did, he potentially plants the seed of doubt as to what people have said such that he cannot fairly consider matters. He had already decided that the claimant was guilty.

230. The claimant's agent argued that the unfairness was demonstrated by raising the issue of there being an unofficial code or nod given by the claimant. There had been no suggestion of that and Mr Bell had not even made that point.

231. The failure to sign on to the method statement and risk assessment was not significant as can be seen from the amount of time dealt with that in the disciplinary hearing and the fact it was not dealt with at all during the appeal. Mr Fairweather would not have dismissed the claimant for that offence alone. He would have issued an informal caution or warning and no more than 10% deduction for contributory conduct should apply.

232. The appeal carried out failed to cure any defects and did not address the issues raised.

233. In short the process followed was totally flawed and unfair. The respondent is a large well resourced organisation with a sizeable HR function. There was no justification for fundamentally flawed process. In this case the employer failed to carry out a fair investigation. Nothing had been provided to the respondent which suggested the claimant was guilty. The respondent failed to investigate properly and find out what actually happened.

234. It was submitted that the respondent had failed to properly frame the allegation by raising the issue of a nod and unofficial code. This had not been raised and the allegation should have been precisely framed. The outcome letter shows that Mr Fairweather relied on information that had not been provided to the claimant.

235. Natural justice had not been observed in this case. The respondent had closed their mind and adopted a prejudiced approach.

236. The claimant's agent summarised the authorities and referred to the applicable principles. In this case, it was argued that there was no evidence to show that a fair dismissal could have followed. It was simply too speculative to say the claimant would have been fairly dismissed and there should be no **Polkey** reduction and contribution should be around 10% at best.

237. With regard to losses, the claimant was dismissed weeks before the pandemic. His dismissal was a shattering blow and his confidence was lost and he felt stigmatised in the industry. He had been charged with the most serious offence a scaffolder could be charged with. He could not work in that industry again.

238. The claimant had been honest as to steps taken to find another job and brought what he could by way of evidence. He found work but it was at a lower level of pay. He tried to secure other work.

239. With regard to mitigation the onus is on the wrongdoer to show the claimant unreasonably failed to mitigate his loss. It is not what is reasonable but the claimant needs to be shown to have acted unreasonably. There is a difference between acting unreasonably and not acting reasonably.

240. The claimant's agent argued that the ACAS Code had not been followed. Paragraph 9 set out that an employee should be given sufficient detail as to the allegation. That would include witness statements. There was no good reason not to provide the information.

241. Paragraph 12 of the Code stated that the employer should make every effort to attend and go through evidence gathered. The respondent failed to do so. The offer to call witnesses was done in a vacuum with no evidence provided for the claimant to meaningfully take part.

242. With regard to the claim for breach of contract, the Tribunal needs to make findings as to what actually happened. If the claimant did do what was alleged he is not entitled to notice pay but if he did not, the sum is payable.

Respondent's response

243. Counsel for the respondent argued that the onus of proof with regard to loss is different to that of mitigation. The claimant had been entirely unclear in his position and had not proved his loss.

Decision and reasons

244. I shall deal with each of the issues arising in this case sequentially having carefully considered the submissions from both parties and the authorities provided in detail.

Unfair dismissal

Reason for dismissal

245. The first question is what the reason or principal reason for the dismissal was. The respondent says the reason was conduct (or some other substantial reason). The respondent believed that the claimant had breached the rules with regard to health and safety by essentially allowing the fitting to be thrown to him (which was extremely serious) and by failing to complete the method statement and risk assessment on behalf of the squad. That related to conduct. The reason was therefore a potentially fair reason.

246. From the evidence before the Tribunal the respondent did genuinely believe the claimant was guilty of the conduct in question. The claimant admitted that he had failed to sign onto the risk assessment and method statement. While the claimant denied knowing the fitting was going to be thrown to him, Mr Fairweather was convinced that the claimant was guilty of that allegation and that the claimant had not been truthful in his denial.

Were there reasonable grounds for that belief

247. One of the key issues in this case is whether or not the respondent had reasonable grounds to believe that the claimant was guilty of the misconduct that led to his dismissal. While the claimant admitted the breach with regard to the method statement and risk assessment, that by itself was not the reason for his dismissal. The principal reason for the claimant's dismissal was

the respondent's belief that the claimant had breached the rules with regard to passing scaffolding materials. The issue is whether or not the respondent had reasonable grounds to believe the claimant had known that the fitting was going to be thrown to him.

248. The grounds for that belief were that Mr Fairweather did not believe the claimant when he said that he acted on instinct and did not know Mr Bell was going to throw the fitting to him. Mr Fairweather believed that the claimant had in some way participated in the act of the item having been thrown to him, whether by asking it be thrown to him or giving a nod.

249. Mr Fairweather said that the claimant had not been consistent in explaining how he had asked the fitting to be passed to him.

250. The claimant's initial statement (on 5 November) said that "I shouted down and asked the boys for 1 double up to finish. I looked round and Mr Bell threw it up to me and I caught it not thinking. I should have said to pass it up through the lifts. As Mr Bell threw it and I caught it, Mr Weir came around."

251. In his investigation meeting (on 22 November) the claimant said "in my defense I just caught it. I didn't ask for it to be thrown to me". He said that he asked Mr Bell to pass him a fitting and "he threw it up at me. I automatically caught it because I did not want not to catch it and it fall on someone."

252. In his disciplinary meeting (on 22 January) the claimant said "I was just reacting to the situation. When it was thrown to at me I'm only human and my natural instinct was to catch it. I never asked for it to be thrown in that way. I asked for the fitting to be passed up to me and then it was thrown up." He said that "I didn't say pass it up to meaning for it to be thrown up to me. I thought it would come up properly." He also said "I wasn't expecting it to be thrown to me.". He repeated that he did not ask it be thrown to him but that it be passed up.

253. From the evidence before Mr Fairweather, the claimant's position had been clear and constant. His position was that he asked the fitting be passed to

him. He did not expect it to be thrown to him and when he realised it was being thrown he caught it.

254. In the dismissal letter Mr Fairweather stated that his reasonable belief was that the claimant "requested" the fitting be thrown to him and that he was "aware" that it was going to be thrown up. He then stated that there was a suggestion from the evidence available to Mr Fairweather that the claimant gave Mr Bell a nod and that despite the claimant saying a rope and bag was the correct method to pass the item, there was evidence there was no rope and bag around. That evidence was not set out and had not been provided to the claimant.

255. The claimant had not been asked about whether or not a rope and bag had been with him at the time. The evidence on which Mr Fairweather based his conclusion was what Mr Bell had told him during his disciplinary hearing but Mr Bell could not recall if he had a rope and bag at the time. There was no evidence that there was no bad and rope available at the time. The claimant had denied giving any nod and maintained that he always had his bag and rope with him and had this matter been investigated, that would have been discovered.

256. The evidence from Mr Bell was also unclear with regard to a nod being given in the sense suggested by Mr Fairweather. Mr Bell had not clearly stated that the claimant had given him a nod which meant the fitting should be thrown to him. This issue had not been clarified with Mr Bell as he denied there was an unofficial code for scaffolders about a nod. At best he said the nod meant "safe to send" but that did not necessarily mean the claimant had instructed the fitting be thrown. There was no evidence before Mr Fairweather to suggest that the claimant had known the fitting was going to be thrown to him.

257. The real reason Mr Fairweather believed the claimant must have known the fitting was being thrown to him was because he considered that to be the only plausible explanation. Mr Fairweather's belief was that the claimant could only have caught the fitting in the way suggested if he had known that it was coming and expected it to come. For him, it would be unlikely someone would

throw a 1kg steel fitting and for it to be caught, without the person knowing it was coming to them. Mr Fairweather was convinced that the claimant must have known it was being thrown. That absolute belief, however, resulted in Mr Fairweather closing his mind to the evidence before him and resulted in him being unable to see that the evidence could in fact support the claimant's position and ought to have been considered, rather than summarily rejected. From the evidence before him, what could well be implausible in isolation, could in fact have happened.

258. The claimant had made it clear during the disciplinary process that there were others present at the time in question who should be spoken to since they could, at least potentially, confirm that the claimant's position was accurate. While the 2 other scaffolders originally told Mr Fairweather they had not seen anything, the statement from the client indicated that they had. A reasonable employer would investigate that inconsistency. Even although the scaffolders were subsequently spoken to (again) and confirmed their position, that was not communicated to the claimant and the inconsistency with what the client said was not considered, which is something that no reasonable employer would have ignored. It fell outwith the range of reasonable responses.

259. Further, the client had stated that the claimant was working on the scaffold at the time the fitting was thrown to him. That appeared to support what the claimant was saying. The statement relied upon by the respondent did not state that the claimant was ready to catch the fitting or that he knew it was being thrown to him. There were 2 people from the client who said they saw what happened. Given they appeared to suggest the claimant was working at the time the fitting was thrown, a reasonable employer would investigate that matter by checking the position.

260. The claimant had made it clear that there was evidence that could be obtained to check what had actually happened. He reiterated the position in his letter of appeal but the matter was not pursued by the respondent. The disciplinary hearing had begun by it being said that if further enquiries were needed, Mr Fairweather could instruct these be done. Mr Fairweather chose not to seek any further information and proceeded on the basis of the limited information

he had before him, which was incomplete and inaccurate (given the content of the investigation report) rather than seek to ascertain what actually happened.

261. Another reason Mr Fairweather did not believe the claimant was that the claimant had said he had challenged Mr Bell after the incident but there was little evidence to support that. However, Mr Bell could not recall if the claimant had said anything to him and did not say that the claimant had not challenged him. That was not evidence that supported Mr Fairweather's conclusion the claimant was not telling the truth. Mr Fairweather believed that if someone had thrown something of that weight without warning, the person receiving it would be angry and if angry they would remember exactly what was said, it would have stuck in their mind. While that may be the case on some occasions, it is not necessarily the position in every case and a reasonable employer given the facts of this case ought to have approached matters with an open mind.

262. Mr Fairweather placed considerable weight on the conclusion reached by the investigation manager which was that the claimant had "readied himself" to catch the item. That conclusion, however, had been reached without speaking with the claimant and no evidence had been presented to show why that conclusion had been reached. In other words, there was no evidence that could reasonably lead to the conclusion that the claimant had readied himself to catch the item. The claimant had not said he had done so and no one else had seen him do so either.

263. Mr Fairweather placed weight on the claimant's comment during the investigation meeting that he "shouldn't have let it happen". Taken in isolation that does suggest that the claimant could have altered what happened by stopping Mr Bell from throwing the fitting. Mr Fairweather did not ask the claimant to verify what he meant by that comment (which was said to the investigation manager and not Mr Fairweather). Mr Fairweather did not ask the claimant about that comment at all during the disciplinary hearing. The claimant had consistently stated that he did not know the fitting was being thrown to him. He said he caught it by instinct.

264. The claimant's comment during the investigation meeting in context did not reasonably support the suggestion that the claimant must have known the item was being thrown to him when taken in context. The claimant was saying that in retrospect he could have asked that the item be passed to him safely, ie he could have specified that the fitting be passed to him via a rope and bag or hand to hand (rather than just passed to him) and by failing to spell that out he had let it happen. That was why the claimant said he should not have let it happen since he could have asked the fitting be given to him by hand or by rope and bag. That comment and the context in which it was said does not reasonably support the conclusion the claimant knew the item was being thrown to him. Had the matter been put to the claimant during the disciplinary hearing, the position would have been clear. The conclusion reached by Mr Fairweather was not reasonable in the circumstances and was indicative of his mind having been closed to any alternative explanation and did not provide him with a reasonable basis to believe in the claimant's guilt.

265. In short Mr Fairweather concluded that the claimant was lying to him and that led to him concluding the claimant had been guilty of the allegation.

266. From the evidence before the respondent, there was no reasonable basis to conclude that the claimant was guilty of the principal allegation that led to his dismissal.

267. Had the investigation manager spoken to the claimant and taken into account his position (and indeed had the other persons who were in the vicinity been asked to provide a statement which could then be considered), Mr Fairweather may have realised that what appeared to be implausible to him may in fact be true. From the facts before Mr Fairweather there was no reasonable basis to conclude the claimant was guilty. This was not a case where it was one word against another's. Rather the claimant's position could have been verified by checking with those present at the time as to what they saw the claimant do (or not do) and that information would have given the respondent a basis upon which to form a belief, rather than proceeding upon hypothecation without a factual basis in this case. There was evidence

available which could have supported the belief that Mr Fairweather had but that evidence was not obtained.

At the time the belief was formed, had the respondent carried out a reasonable investigation

268. The respondent's agent argued that while there may be imperfections in the investigation process, ultimately the investigation was reasonable. The respondent's position was that the incident was so grave and the claimant's explanation so unlikely. That by itself, however, does not mean that no investigation is needed. I take into account the implausibility of the explanation but the respondent required to look at the evidence before it. The claimant's explanation was not said in isolation. Had there been no way to verify what the claimant said, it may well have been reasonable to rely upon the hypothecation of the respondent as to the implausibility of what the claimant was saying having happened (given Mr Fairweather's experience and the fact the claimant did catch the fitting that was thrown to him) but in this case there was evidence before the respondent which would have shed light on whether what the claimant was saying, however implausible, might in fact have been correct. The evidence before the respondent, if viewed objectively, did suggest that what appeared to be implausible was in fact true. The failure to consider that evidence was a serious failure and resulted in the respondent not being open to the possibility that the claimant's position could be true.

269. It is important not to apply a counsel of perfection and the issue is whether or not the respondent carried out a reasonable investigation in the facts of this case, in light of the size and resources of the respondent, taking account of equity and the merits of this case. As the court in **Burchell** says, the question is whether at the stage the respondent formed a belief in the claimant's guilt, had the respondent carried out as much investigation as was reasonable in the circumstances of this case. It is important to recognise that different employers, equally reasonably, can act in different ways and the issue is whether the approach taken falls within the range of responses open to a reasonable employer. The case of **Ilea** is instructive in this regard too and is in many respect similar.

270. Upon learning of the incident, Mr Fairweather almost immediately asked the claimant and Mr Bell to provide written statements as to what happened. Those statements were not, however, disclosed to the claimant during the disciplinary process despite being relied upon by Mr Fairweather. There was no reasonable basis for not providing those statements to the claimant particularly as their content was taken into account by Mr Fairweather in dismissing the claimant.

271. Mr Fairweather also spoke to the 2 scaffolders who were nearby shortly following the incident. Unlike the claimant and Mr Bell, however, these individuals were not asked to provide written witness statements. Mr Fairweather accepted what he was told by these individuals without question, despite the claimant providing a contradictory position (with no explanation as to why he concluded they should be believed and the claimant not believed) and in particular despite the email Mr Fairweather subsequently received from the client suggesting that the colleagues had in fact seen what had happened given their location. That was something Mr Dunn and Mr Mitchell had seen. They stated the claimant was working on the platform when he caught the fitting. That could be viewed as supporting what the claimant said, however implausible it appeared.

272. A reasonable investigation would have sought to understand precisely what those present had seen particularly where Mr Fairweather reaches a conclusion on what he thought had happened and how unlikely he considered the claimant's explanation to be. A reasonable investigation would consider what evidence exists, whether or not that evidence exculpates the claimant. A reasonable investigation would seek to determine whether or not the claimant had breached the rules in the manner suggested, rather than proceeding upon an assumption that the claimant had readied himself to catch the item he asked to be passed to him.

273. The fact that Mr Fairweather had himself spoken to potentially key witnesses, effectively as part of the investigation could affect the fairness of the dismissal given the weight Mr Fairweather placed upon his assessment of what he had

been told, without giving the claimant that information (and the ability to challenge and consider it).

274. A reasonable investigation would fairly examine the facts and ascertain what happened given what the claimant said had happened. To do so, the information provided to the respondent by the client should have been followed up. A reasonable investigation would not simply have assumed that the colleagues had seen nothing and what they had said was correct and therefore could not assist the investigation when that appeared to be contradicted by the client and the claimant.

275. Even if those individuals maintained their position, a reasonable investigation would seek a statement from the client to verify precisely what was seen with regard to the claimant. The email provided by the client (on behalf of both Mr Dunn and Mr Mitchell) gave a short summary of the position. The email stated that the claimant was "working on the top of the platform". The email did not suggest the claimant knew the fitting was being thrown to him and did not suggest that the claimant was ready to catch it. The email could in fact be read to support what the claimant was asserting, that he was working on the platform and instinctively caught the fitting. A reasonable investigation would have verified the position to find out exactly what the client had seen with regard to the claimant's position. That would have provided Mr Fairweather with a proper basis upon which to assess the claimant's credibility. It would also have given Mr Fairweather evidence on which to base his conclusion as to what happened and avoided his reliance upon gut reaction or conjecture.

276. While the ACAS Code suggests that statements should normally be provided, I accept that there is no hard and fast rule that witness statements should be provided in all cases. Whether or not the failure to obtain and provide statements renders a dismissal unfair is a fact sensitive question and depends on what is fair and reasonable in the particular case. This is also not a criminal trial and the obligation on the employer is to act reasonably with due regard to natural justice and fairness. In this case a reasonable employer would have ensured the evidence available was obtained and a decision made on the basis of the evidence, rather than hypothecation given the facts of this case.

277. Mr Fairweather believed that the claimant's explanation was incredible (and he was resolute in that belief) but his belief requires to be based upon reasonable grounds. As the court in **Ilea** says, situations can vary from one extreme to being caught in the act (where little by way of investigation would be needed) to where the issue is one of inference (where greater investigation is needed). This is not a case where the claimant was virtually caught in the act since there was no evidence from any of the witnesses that the claimant had in fact done anything wrong – he had not admitted to asking the fitting to be thrown, Mr Bell had not said that the claimant had done so and none of the witnesses said the claimant had done anything wrong. There was no evidence showing the claimant had admitted to asking the fitting be thrown to him. In fact the client had suggested that the claimant was working on the platform, which supported what the claimant asserted. This case was akin more to finding the claimant guilty by inference rather than fact, a point accepted by both Mr Fairweather and Mr Lynch, whose position was that they believed the claimant's explanation to be so implausible that they did not believe it. That was based on their experience rather than on the information before them, in terms of what people actually saw happen.

278. Mr Bell also provided an explanation for his decision to throw the fitting to the claimant in the course of his disciplinary hearing. That was not something provided to the claimant during his process and was not something on which Mr Fairweather appeared to place much weight (despite relying on other matters Mr Bell disclosed, which Mr Fairweather used to support his belief in the claimant's guilt). That was significant since the explanation provided by Mr Bell explained why he did what he did, which may have suggested that the claimant's explanation was not implausible after all. Mr Bell had cited personal issues which led to him acting entirely out of character. It was a one off (serious) lapse of judgment. Mr Bell had worked with the claimant for a number of years and he had asked (at his disciplinary hearing) that the respondent confirm with the claimant that he had not done anything like this before as it was out of character and there were personal reasons why Mr Bell did what he did. Given that information was in the possession of Mr Fairweather before he decided to dismiss the claimant, and was information

that was taken into account by him, even although not provided to the claimant, it would not be reasonable to ignore what had been said. A reasonable investigation would have considered what Mr Bell had said and how it impacted on the claimant's position since the information Mr Bell provided suggested the claimant's explanation was not implausible.

279. A reasonable investigation would test what the claimant said as against the evidence (rather than what was believed to be the case). In this case the evidence the respondent had before it supported what the claimant said. There was no evidence before the respondent which suggested the claimant had not acted on instinct – no one had said the claimant told his colleague to pass the fitting to him in an unsafe manner.

280. The submission by the respondent's agent that the claimant's evidence to the Tribunal (that he was crouching down completing the job when he turned and saw the fitting coming towards him and caught it instinctively) presented a new explanation was not accurate. The claimant's evidence was that he had been crouching down and upon turning around saw the fitting approaching him and he caught it instinctively. Nothing that claimant said during the investigation or disciplinary process contradicted that. He had not been asked about his precise position when he caught it. He had been asked few questions as to his position and the details as to the point he caught the fitting. Had the respondent asked the claimant what his physical position was when he caught the fitting, there was no reason to believe his answers would have been any different to those questions that were asked at the Tribunal hearing. There was no evidence that the claimant was somehow changing his position or misrepresenting the facts. This underlined the limited scope of the investigation which had focussed purely on the fact the claimant did catch the fitting rather than fully engaging with the surrounding facts which shed light on the claimant's explanation.

281. An important witness in relation to the events in question with regard to the allegations facing the claimant was Mr Bell. Clearly what Mr Bell said happened was critical in assessing whether or not what the claimant said was credible, even if implausible. No attempt was made to obtain a statement from

Mr Bell and provide this to the claimant. As indicated above, Mr Bell had personal reasons for acting out of character. Mr Fairweather placed considerable weight on what Mr Bell said during his disciplinary hearing in relation to matters that he felt showed the claimant was guilty of the allegation but Mr Fairweather did not consider the explanation Mr Bell had provided which appeared to support the claimant's position. As that information had not been provided to the claimant, he was unable to rely on it during the disciplinary process.

282. A reasonable investigation would have carefully considered what Mr Bell said the claimant instructed him to do in relation to the fitting in question and provide that evidence to the claimant to allow him to consider and respond to it.

283. The reliance on GDPR to fail to disclose the statement Mr Bell provided at the time of the incident was unreasonable. It was also contrary to the respondent's own disciplinary policy. There was no reasonable basis for not providing the claimant with a statement from Mr Bell given the importance of Mr Bell to this allegation.

284. This is not a case where the evidence points strongly to commission of a disciplinary offence such that the amount of investigation needed is less than otherwise needed. The respondent's agent submitted that the act could only have occurred with the complicity of the claimant. That is not so since Mr Bell could have chosen himself, with no instruction from the claimant, to throw the fitting to the claimant. The act itself does not suggest the claimant was complicit in it. The claimant said that he asked it be passed to him – not that it be thrown to him. The claimant consistently stated that was what happened which was not something Mr Fairweather believed and consequently did not contemplate this as a possibility.

285. As the respondent's agent also submitted, the incident in question was witnessed by a third party, the respondent's client (Mr Dunn and Mr Mitchell). That did not mean, however, as submitted by the respondent's agent, that the investigation needed was minimal. The evidence from those individuals would

be key to identifying exactly what happened given the written statement said in terms they had seen what had happened. That evidence would then allow the respondent to assess whether what the claimant said was in fact implausible or accurate. The email statement from the client was insufficient to assess the facts and a reasonable investigation would have sought to verify exactly what the client saw the claimant do, whether or not he did indeed ready himself to accept the fitting or whether he, as he submitted, was not aware it was going to be thrown to him. That was central to the investigation and was not considered.

286. It is also not correct to say that there was no evidence in fact which could have helped the claimant. While the 2 scaffolders were spoken to by Mr Fairweather after the disciplinary hearing and again denied seeing anything, a reasonable investigation would have considered why the client appeared to contradict that. A reasonable investigation would consider why the 2-scaffolder's position is accepted as truthful in contrast to the claimant (whose position is not accepted) particularly when the client appears to suggest the 2 colleagues did in fact witness the matter. It is not clear why the colleagues' position was preferred. Mr Lynch commented in his evidence that it would have been useful to know how far the 2 scaffolders were from the incident. Those witnesses may have recalled matters once the client's position was put to them or the client could have given information to assist.

287. At the very least a reasonable investigation would have checked with those present at the time of the incident to determine where (specifically) they were in relation to the incident, what they heard and what they saw and assessed that as against what the claimant said.

288. Given the lack of clarity as to what happened, and if the respondent believed the 2 scaffolders did not in fact see what happened, (and even if they did not see what happened), a reasonable investigation would have obtained more detail from either or both of Mr Dunn and Mr Mitchell who witnessed the event. These were essential witnesses to a very serious act.

289. Again this is not a counsel of perfection, and I take care to avoid substituting what I consider should have been done. The requirement is to act fairly and reasonably, such that the investigation falls within the range of responses open to a reasonable employer. A reasonable investigation may not have required to speak to both individuals, but at the very least a reasonable investigation would have gone beyond the basic email statement to check what the client saw the claimant do (and say) and whether or not his position was accurate or not. It is possible that either Mr Dunn and/or Mr Mitchell would be able to verify what the claimant said or the contrary position. As the client said they witnessed the incident in question they were clearly able to shed light on what happened, and avoid the need for Mr Fairweather to rely on hypothecation. The failure to investigate that was unreasonable given the statement in the respondent's possession stated the claimant was "working" on the platform above at the time the fixture was thrown.

290. Similarly Mr Fairweather concluded that the claimant was not telling the truth when he said he remonstrated with Mr Bell for throwing the fitting to him (which assists him in finding the claimant's explanation to be untrue). Those present in the vicinity could have been asked what they heard the claimant to say to Mr Bell (given Mr Bell could not recall what the claimant had said to him at the time). There was no evidence before the respondent that could reasonably lead to a conclusion the claimant did not say what he alleged. A reasonable investigation would have checked what people present heard, thereby avoiding the need for Mr Fairweather to assume that what the claimant said was untrue.

291. The failure to investigate that was unreasonable and led to Mr Fairweather concluding that the claimant was not accurately recalling what had happened at the time. The fact that the claimant could not recall exactly what he said to Mr Bell and on occasion did not mention that he said anything to him does not necessarily mean he was not telling the truth. His focus was in relation to the incident itself rather than what he had said to Mr Bell. Had the claimant been asked what he had told Mr Bell immediately after the incident, there is no

reason to believe his response would have been different given he had been consistent about what he said.

292. In all the circumstances the investigation that was carried out that led to the respondent believing in the claimant's guilt with regard to the fitting having been thrown to him was fundamentally unreasonable and unfair. It did not fall within the range of responses open to a reasonable employer given the size and resources of the respondent.

Did the respondent otherwise act in a procedurally fair manner

293. One of the procedural issues in this case which led, in part, to Mr Fairweather believing that the claimant was guilty of the principal allegation was because Mr Fairweather had spoken to potential witnesses at the start of the process. He concluded that their assertion that they had not seen anything was to be believed. He took no statements from them nor did he seek to put to them what the client had said in their statement. He had not explained why he believed those individuals in preference to what the claimant was asserting and what the client appeared to say. That may be a minor procedural issue given the individuals may not have seen anything. That failure by itself did not render the dismissal unfair but the involvement of Mr Fairweather at the outset had the potential to influence his view on what happened subsequently. It was possible that Mr Fairweather's involvement in the matter immediately following its aftermath could have influenced him and assisted in his becoming convinced in the guilt of the claimant, rather than basing that decision upon the evidence that was available. Mr Fairweather had been involved at the outset of the process when the claimant and Mr Bell had given written witness statements, which he did not provide to the claimant.

294. Further, Mr Fairweather took into account what Mr Bell had said during his disciplinary hearing in deciding the position in relation to the claimant, despite that hearing occurring after the claimant's disciplinary hearing. That resulted in Mr Fairweather reaching conclusions about the claimant on the basis of information that had not been presented to the claimant. That prevented the claimant from considering the evidence and making submissions in relation

to the information before the respondent which could have altered the outcome. That was a serious failure given the outcome letter and Mr Fairweather's conclusions.

295. The respondent did ensure that the nature of the allegation was known to the claimant. The claimant argued that the framing of the allegation itself was unfair because it did not specify precisely how the respondent believed the claimant had known about the fitting being thrown, whether by nod or otherwise but the claimant knew broadly speaking what the allegation was. The claimant had been told that the respondent believed the claimant had known that the fitting was going to be thrown to him and had readied himself to receive it. The framing of the allegation was not perfect, but it was reasonably clear.

296. There were a number of other failures with regard to the procedure followed.

297. The disciplinary policy required the claimant to be provided with the information upon which the respondent relied to reach its decision. That was not done and the respondent had failed to follow its own policy. The respondent had failed to provide the claimant with the written statements that had been obtained at the outset from Mr Bell and the claimant. There was no reasonable basis for failing to do so. The reliance on GDPR was misplaced. An employer with the size and resources of the respondent ought to have known that such statements would ordinarily be provided, given the terms of the disciplinary policy.

298. The respondent also relied upon what Mr Bell had said in his disciplinary hearing but failed to provide this information to the claimant. It was not surprising that the claimant asked for the evidential basis for the statements in the dismissal letter in his appeal communication. Mr Lynch did not engage with the points raised by the claimant and focused on his belief (which mirrored that of Mr Fairweather) that it was unlikely the claimant could have caught the fitting without knowing it was being thrown to him. A reasonable employer would have given the claimant all the information relied upon

reaching the conclusion that was reached which would have allowed a fair hearing to take place.

Was dismissal within the range of reasonable responses

299. A failure in investigation or procedure does not by itself render a dismissal unfair and it is important not to apply a counsel of perfection since no employer is perfect. Ultimately the question is whether the respondent acted fairly and reasonably in dismissing the claimant by reason of misconduct taking account of size, resources, equity and the substantial merits. The whole process should be considered in assessing the fairness and I have taken account of equity and the substantial merits. The question is not whether a reasonable employer would have dismissed but rather whether the decision to dismiss (and overall procedure adopted) was within the range of responses open to a reasonable employer.

300. I have taken a step back to assess whether in all the circumstances the respondent acted fairly and reasonably in dismissing the claimant by reason of his conduct. I apply the legal test with regard to the fairness of the dismissal taking account of the information before the respondent at the time.

301. I have concluded that the respondent did not act fairly and reasonably in dismissing the claimant by reason of misconduct, taking account of the size, resources equity and the merits of this case.

302. This was an act that had potentially catastrophic consequences: the throwing of a 1kg metal fitting in an area where chemicals were present and domestic dwellings were nearby. This was of the utmost serous both the respondent and their client. Health and safety was of the highest priority. Equally this was a matter of the utmost seriousness to the claimant whose job was at risk.

303. The respondent concluded that the claimant had carried out a very unsafe act but the investigation that led to that belief was unreasonable. There were a number of important steps that were not taken, which a reasonable employer would have taken. The investigation was fundamentally flawed. The failure to carry out a fair investigation rendered the decision to dismiss unfair.

304. The key failure in the investigation was the decision not to obtain information from those who had been present at the time who could shed light on whether the claimant's position was correct or not. A reasonable employer of the size of the respondent with its resources would have obtained statements from those persons present whose position could be assessed as against what the claimant said. Those statements should have been provided to the claimant and the evidence should have been properly considered.

305. Mr Fairweather relied upon his view that the claimant's explanation was implausible. That was his view but it was not based upon the evidence before him. As a result of his absolute belief in the guilt of the claimant, he failed to consider the claimant's explanation as credible. He had closed his mind to the potential for the claimant's explanation to be correct and did not view matters objectively. He did not take account of Mr Bell's explanation for doing what he did when considering the claimant's explanation (even although he took into account other things Mr Bell said, which Mr Fairweather believed supported his view of the claimant's guilt). He assumed the claimant's explanation was implausible, which in isolation it was. However, when viewed alongside Mr Bell's explanation and in light of the client statement, a reasonable employer would consider carefully what the claimant did and said and not summarily reject it. Mr Bell did not state that the claimant told or asked him to throw the fitting to him. At best he was unclear as to what the claimant did. The respondent required a reasonable basis upon which to sustain that belief. The evidence of those present was not properly considered. There were 4 other people who had witnessed what had happened but no steps were taken to put to them what the claimant had said had happened, at the very least to allow the claimant's position to be tested. The email statement from the client suggested the claimant's position was correct and a reasonable investigation would have followed that up to ascertain the position, rather than rely upon hypothecation.

306. As set out above, Mr Fairweather placed weight on the claimant's comment during the investigation meeting that he "shouldn't have let it happen". Taken in isolation that does suggest that the claimant could have altered what

happened by stopping Mr Bell from throwing the fitting but Mr Fairweather did not ask the claimant to verify what he meant by that comment (which was said to the investigation manager and not Mr Fairweather) and Mr Fairweather did not ask the claimant about that comment at all during the disciplinary hearing. The claimant had consistently stated that he did not know the fitting was being thrown to him. He said he caught it by instinct. That was not so fanciful that it could be summarily rejected given the facts.

307. It is necessary to consider the comment in context, which was not what Mr Fairweather had done. The claimant was saying that in retrospect he could have asked that the item be passed to him safely, ie he could have specified that the fitting be passed to him via a rope and bag or hand to hand (rather than just passed to him) and by failing to spell that out he had let it happen. That was why the claimant said he should not have let it happen since he could have asked the fitting be given to him by hand or by rope and bag. That comment and the context in which it was said did not reasonably support the conclusion the claimant knew the item was being thrown to him. Had the matter been put to the claimant during the disciplinary hearing and the claimant fairly given the chance to reply, the position would have been clear. The conclusion reached by Mr Fairweather was not reasonable in the circumstances and was indicative of his mind having been closed to any alternative explanation.

308. The appeal hearing did not revisit matters with any degree of substance and engage with the substantive points the claimant had raised. The claimant was not told how Mr Fairweather had reached the conclusion he had and he was not provided with the information he sought. Instead Mr Lynch concluded that the claimant must have known the fitting was being thrown to him since it was unlikely he could have caught it if he did not know it was being thrown to him. That failed to take into account the points the claimant had raised, and the information that Mr Bell had presented which explained why he had thrown it and the fact that Mr Dunn and Mr Mitchell seemed to support what the claimant had said. Had Mr Lynch considered the matter reasonably and engaged with the evidence before him, he would have seen that what

appeared to be implausible could in fact have been accurate. A reasonable investigation would have clarified what had actually happened.

309. The ACAS Code states (at paragraph 5) that it is important to carry out necessary investigations to establish the facts of the case. Investigation is obviously important since it leads to the facts upon which a decision is based. The ACAS Guide which supplements the Code states that an employee should be treated in a reasonable and fair manner when investigating matters. Importantly it emphasises that it is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against. That did not happen in this case.

310. In all the circumstances I have concluded that the respondent did not act fairly and reasonably in treating their belief in the claimant's misconduct as sufficient to dismiss him. The decision to dismiss the claimant did not fall within the range of responses open to a reasonable employer.

311. The admitted misconduct of the claimant with regard to the method statement and risk assessment did not by itself justify dismissal. The claimant had covered the specific risks arising at the point of work risk assessment. He had failed to check the method statement and risk assessment had been signed by the squad and that was a failure to comply with a health and safety requirement but it was not misconduct of itself justifying dismissal.

312. Mr Fairweather did not say that he would have dismissed for that allegation alone, albeit he considered that allegation to be serious. Taken in context no reasonable employer would have dismissed for that allegation alone.

313. It is important to bear in mind that misconduct alone does not necessarily justify dismissal and all the facts must be considered (for which see **Babapulle v Ealing** 2013 IRLR 854). It is clear that the respondent would not have dismissed for this infraction alone, given the surrounding facts. The claimant had unblemished and lengthy service and had made one error, which he admitted once it came to his attention. The error was mitigated significantly by the fact that the point of work risk assessment had been done, and the squad had been alerted to the specific risks. The claimant had been very well

regarded with regard to his health and safety duties and took these seriously. It would not have been reasonable to have dismissed the claimant for that allegation alone and any such dismissal would not have been within the range of responses open to a reasonable employer. In any event Mr Fairweather did not say that he would have dismissed for that reason alone.

314. I do not consider the reason for the dismissal was some other substantial reason, namely the claimant's lack of candour over the incident and failure to complete the risk assessment, as alleged. The reason relied upon by the respondent was matters relating to conduct.

315. The claimant's dismissal was accordingly unfair.

Remedy

Basic award

316. The basic award payable to the claimant was agreed between the parties at 10 (as he had 10 complete year's service) x £525 (the cap on a week's pay) which amounts to £5250.

Compensatory award

317. With regard to compensatory award, the respondent's agent argues that the claimant had failed to discharge the onus of establishing loss at all. The argument was that the claimant had not shown what he had earned with his new employer. It was also argued that the claimant had failed to mitigate his loss.

318. I considered the respondent's arguments that the claimant had not proven his loss (or discharged the "evidential burden of proof") and that he had not mitigated his loss carefully but I do not accept them. I was satisfied from the evidence presented to the Tribunal that the claimant had proven his losses and that he had reasonably sought to mitigate his losses. He acted reasonably in seeking to find another role following the loss of his job as a scaffolder. He applied for a number of roles online.

319. I accepted the claimant's evidence that he did not want to return to the scaffolding trade given how he felt and his belief that he would not secure another role, which was not unreasonable in the circumstances. The claimant had been dismissed for what was one of the most serious acts of misconduct a scaffolder could commit. It was also a small industry. I did not consider it credible that the claimant would have been genuinely considered for re-employment if he had applied to the respondent, given the reason for this dismissal. The fact Mr Fairweather indicated references were not properly considered did not, in my view, result in the claimant acting unreasonably given how the claimant felt about his prospects and his confidence within the sector. The claimant acted reasonably in what he did.

320. I considered the claimant had applied for jobs and taken reasonable steps to mitigate his loss. Although the claimant was not able to provide evidence as to each of the specific roles he had applied for in the period from March to June, he did take steps to seek alternative roles. Furthermore, the pandemic had clearly a negative impact upon the job market and while the respondent's business may have grown, the number of available jobs within the marketplace generally had dropped as people were getting to grips with the pandemic. The evidence of Mr Fairweather in relation to alternative jobs was limited to his specific area, namely the scaffolding sector, which was something that the claimant, in my view reasonably, had chosen to avoid, if he could. The claimant did apply for some construction related jobs but he had not been successful. The steps the claimant took were reasonable in the circumstances both in relation to his personal situation and given the pandemic and impact upon vacancies generally.

Past losses

321. To avoid damages being awarded twice, given my judgment in relation to the notice pay claim below, I consider it fair to award damages for wrongful dismissal and assess compensation for the unfair dismissal claim from the day after the damages period ended (per the approach set out by the Employment Appeal Tribunal in **Shifferaw v Hudson** UKEAT/294/15).

322. The claimant's notice period would have commenced on 31 January 2020 and ended following a 10 week period, namely on 10 April 2020. For the purposes of the compensatory award, the period commenced on 11 April 2020.

323. I am able to calculate his net weekly pay from the information before the Tribunal. The claimant earned £9,127 from 12 June 2020 until 30 November 2020 (24.5 weeks). His net weekly pay is therefore £9,127 divided by 24.5 which is £372.53. His net weekly wage with the respondent was £470.53 with £34.10 each week being paid into a pension (which is not a benefit the claimant secured with his current employer).

324. From 11 April to 21 December 2020 there are 36 weeks. He would have earned 36 x £590 which is £21,240. He had in fact earned £9,127 (to 30 November) plus 3 weeks' net pay (3 x 372.53 = £1117.59) which is £10,244.59. His net losses to date are therefore £21,240 - £10,531 which is £10,995.41.

325. His pension loss during this period is £34.10 x 36 which is £1227.60.

326. His total past losses are therefore £10,995.41 plus £1227.60 which is £12,223.01.

Future losses

327. Determining when the claimant is likely to secure another job at a comparable rate is necessarily speculative. From the information before the Tribunal, I consider that the claimant should secure another role at a similar rate within 24 weeks from 21 December 2020. The claimant is clearly capable and articulate and the job market was picking up such that the claimant's skills are likely to become in demand and he ought to be able to secure a role at a comparable rate within 24 weeks, which is a reasonable period. In his evidence the claimant believed that he would secure a role comparable to that which he lost within a few months to a year, albeit there was no certainty.

328. Had he worked 24 weeks with the respondent he would have earned 24 x £590 which is £14,160. He is scheduled to earn 24 x £372.53 which is £8,940.72. The difference is £5,219.28.

329. His pension loss is 24 x £34.10 which is £818.40.

330. His total future losses are therefore £5,219.28 plus £818.40 which is £6,037.68.

331. He is also entitled to a sum in respect of the loss of statutory rights he has suffered, in respect of which I award £450.

332. The total compensatory award is therefore £12,223.01 plus £6,037.68 plus £450 which is £18,710.69.

Polkey

333. With regard to **Polkey**, the issue is whether or not there is a chance the claimant would have been fairly dismissed by this employer had a fair procedure been followed. Any reduction in respect of this matter requires to be based on the evidence before the Tribunal and I take into account the position set out by the Employment Appeal Tribunal in **Software 2000** set out at length above. If the respondent contends that the claimant's employment would not have continued, there must be evidence led to support that submission. I require to consider therefore from the evidence presented to the Tribunal (both in terms of the evidence from the respondent and the claimant) whether, if a fair process had been followed, would the claimant have been fairly dismissed at some point and what the percentage chance is that a fair process would still have resulted in the claimant's dismissal.

334. The claimant's dismissal was procedurally and substantively unfair. The employer in this case had become convinced that the claimant was guilty of the allegation that led to dismissal without properly engaging with and considering the evidence which led to a belief that the claimant was guilty without a proper or reasonable basis for the belief.

335. There is no evidence before the Tribunal that would allow me to find that had a fair process been followed the claimant would have been dismissed in any event. There is no evidence before the Tribunal that would allow me to find that if the respondent had properly investigated the matter, it would have concluded that the claimant was guilty of the offence that led to his dismissal.

It is for the respondent to lead evidence to justify a reduction under this head. There was no evidence before the Tribunal that showed that a fair investigation would have led to a conclusion that the claimant was guilty. The belief by Mr Fairweather and Mr Lynch was predicated upon their instinct that an event like this could not happen as to the claimant said it did. Yet the evidence from Mr Dunn/Mr Mitchell at best was neutral and could well be regarded as supporting the claimant's position. Nothing Mr Bell said supported the belief of the respondent (since at best he said a nod meant "good to go" but that did not necessarily mean the claimant knew Mr Bell was going to throw the item). There is no other evidence that would allow me to find that had a fair procedure been followed the claimant would have been fairly dismissed.

336. The respondent's agent argued that a fair dismissal would have happened within a short space of time since all that was needed was to have spoken to the individuals who had witnessed the incident. The difficulty with that submission is that there is no evidence before the Tribunal that shows that if the respondent had spoken to these individuals they would have supported the respondent's position. The evidence before the respondent at the time of dismissal suggested that the claimant could have been telling the truth. The client statement suggested the claimant had not readied himself for Mr Bell to throw the fitting to him. The reports that had been written wrongly stated that the claimant had admitted to the wrongdoing despite there being no evidence for that conclusion.

337. There was no evidence before the Tribunal that would support a finding that dismissal would have happened had a fair investigation taken place.

338. The situation in this case is not dissimilar to the position that arose in **Jagex** where the dismissal was unfair both procedurally and substantively. In this case there is no evidence that would support a finding that the claimant would be fairly dismissed at some point. At paragraph 70 the Employment Appeal Tribunal stated that "the tenor of the reasons overall was that no reasonable employer would or could fairly have dismissed the claimant for what he did.

… It is inherent in its decision that fair procedures would not have made the dismissal fair." That is the position in this case.

339. There is no basis for me finding that there is a percentage chance that a fair process would have resulted in the claimant's dismissal. While these exercises are of necessity based upon speculation, as identified in **Software 2000**, there requires to be some basis upon which to determine that there was a prospect of a fair dismissal, and even if the exercise is speculative, it ought still to be undertaken unless the evidence is so scant that it can be ignored. That is the position in this case.

340. From my assessment of the claimant and the evidence before the Tribunal, I concluded that the claimant had not been guilty of the misconduct alleged with regard to the fitting in question. That is not relevant to the unfairness of the dismissal, which is judged by the information before the respondent and not the information before the Tribunal, but a fair process would have considered what the claimant said and tested that objectively against the evidence. There is no evidence before the Tribunal that suggests there was any likelihood or percentage chance the claimant would be fairly dismissed at some point.

341. The claimant had lengthy service which was unblemished. While he was guilty of misconduct, by his own admission, there is no evidence to suggest he would have been dismissed at some point following the date he was dismissed, had a fair process been followed.

342. Absent any evidence that would justify a finding that the claimant would have been fairly dismissed at some point, I have decided that it is not just and equitable to make any reduction by reason of **Polkey**.

ACAS Code

343. With regard to the ACAS Code it was argued that the respondent unreasonably failed to comply with paragraphs 9 and 12 of the ACAS Code.

344. In terms of paragraph 9 the notification to the employee should contain sufficient information about the alleged misconduct to enable the employee to prepare his response. That was done in this case. The claimant knew what

the essence of the allegation was, that he had somehow known that the fitting was going to be thrown to him. While the framing of the allegation was not perfect, it was sufficient as required by the Code. This paragraph states that it is normally appropriate for witness statements to be provided, not that they must be provided. I do not consider that the respondent unreasonably failed to comply with paragraph 9 of the Code.

345. In terms of paragraph 12, the employer should go through the evidence that was gathered. It is clear from the outcome letter that Mr Fairweather took into account evidence he had obtained from Mr Bell, which information had not been given to the claimant and had not been gone through at the hearing. The respondent unreasonably failed to comply with this paragraph of the Code to the extent that it did not go through the evidence that had been gathered.

346. In all the circumstances an increase of 10% is just as a consequence of the respondent's unreasonable failure to comply with the ACAS Code.

Contribution – reduction of compensatory award

347. With regard to the position set out in **Steen v ASP Packaging Ltd** 2014 ICR 56 I find firstly that the conduct which gives rise to contributory fault was the action of the claimant that he admitted in connection with this failure to sign into the risk assessment and method statement. On the facts I have found, the claimant did not do anything wrong with regard to catching the fitting that was thrown to him. He caught it by impulse and by so doing avoided potentially catastrophic consequences.

348. Secondly, having identified the conduct, the failure to sign onto the risk assessment and method statements before doing the work, I ask whether that conduct is blameworthy. For the purposes of section 123(6) of the Employment Rights Act 1996 this failure did in part cause the dismissal but it was a small part. The main or principal reason for the dismissal was the far more serious charge of allowing the fitting to be thrown to him. The failure with regard to the risk assessment was of a significantly lesser seriousness. Nevertheless health and safety was a paramount consideration for the respondent and it cannot be underestimated. It is about avoiding

complacency. This was not, however, a failure to give any thought to the risks or health and safety procedures at all since the claimant had carried out the point of work risk assessment and the squad were aware of the risks of the task in question. He had failed to properly complete the paperwork in relation to the generic risk assessment and method statement with regard to scaffolding for the full team.

349. Mr Lynch did not deal with this allegation at all in his appeal outcome letter, and instead focused on other matters. He considered the other allegation to be the main reason for dismissal.

350. The final question is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. Balancing all the factors and in light of the claimant's admitted misconduct, I consider it just and equitable to reduce the compensatory award by 20%. While the claimant considered a fair reduction to be 10%, I considered that the failure in this case was significant and as such 20% was fair and just.

351. It is just and equitable to reduce the compensatory award by 20% in terms of section 123(6) of the Employment Rights Act 1996.

Reduction of basic award

352. With regard to the basic award, in terms of section 122(2) the basic award can be reduced where any conduct of the claimant before the dismissal was such that it was just and equitable to reduce the basic award, the Tribunal can do so accordingly. I have concluded that it is just and equitable to reduce the basic award by the same amount and for the same reasons as that pertaining to the compensatory award. The claimant had failed to complete the health and safety processes with regard to the method statement and risk assessment. A reduction of 20% of the basic award is just and equitable in terms of section 122(2) of the Employment Rights Act 1996.

Recoupment

353. The recoupment regulations apply to this award given the claimant was in receipt of relevant benefits.

354. The recoupment regulations apply to the unfair dismissal award. The prescribed element is £12,223.01 less contributory conduct (20%) which is £9,778.41. The prescribed period is from 11 April 2020 until 21 December 2020. The total unfair dismissal award is £20,665.40. The balance is £10,886.99.

Wrongful dismissal/Notice pay

355. The claimant has a notice period of 10 weeks. The issue is whether the claimant did something so serious that the respondent was entitled to dismiss without notice. The parties agreed that the amount of damages for the failure to pay notice pay would be the net sum of £4705.30

356. From my separate findings of fact I was satisfied on the balance of probabilities that the claimant was not guilty of conduct that went to the root of the employment relationship. While he had admitted to (and was guilty of) misconduct, that did not justify his dismissal. I did not find that he was guilty of any other misconduct that justified his dismissal.

357. He is therefore entitled to notice pay. The claimant's notice period would have commenced on 31 January 2020 and ended following a 10 week period, namely on 10 April 2020. The claimant did not secure any earnings during that period and so no sums fall to be deducted.

358. The claimant is therefore awarded 10 week's net pay, namely £4,705.20 plus 10% in respect of the unreasonable failure by the respondent to comply with the ACAS Code of Practice (£470.53) yielding a total sum of £5,175.83.

Summary

359. In summary the claimant was unfairly dismissed and dismissed in breach of his contract (wrongfully dismissed). The respondent shall therefore pay to the claimant:

    a. In respect of his unfair dismissal claim, which is well founded, a basic award in the sum of £5,250 which is reduced by 20% on account of

conduct of the claimant that led to his dismissal, which results in the basic award being £4,200; and

b. In respect of his unfair dismissal claim, which is well founded, a compensatory award in the sum of £18,710.69 increased by 10% on account of the respondent's unreasonable failure to comply with the ACAS Code less 20% on account of the claimant's culpable conduct giving a total of £16,465.40.

   The recoupment regulations apply to the unfair dismissal award. The prescribed element is £12,223.01 less contributory conduct (20%) which is £9,778.41. The prescribed period is from 11 April 2020 until 21 December 2020. The total unfair dismissal award is £20,665.40. The balance is £10,886.99.

c. In respect of his claim for wrongful dismissal, notice pay in the net sum of £4705.30 plus an uplift of 10% in respect of the respondent's unreasonable failure to follow the ACAS Code of Practice (£470.53) which is £5175.83.

D Hoey

Employment Judge Hoey

8 January 2021

Date of Judgment

Date sent to parties **30 January 2021**

ANNEX TO THE JUDGMENT (MONETARY AWARDS) Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover

(recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal.

This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element.

Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant.

If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.