EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Krzysztof Wasala	**v**	**Fusion Lifestyle Ltd**

Heard at: Watford by Cloud Video Platform **On:** 25 February 2020
18 December 2020

Before: Employment Judge Bedeau

Appearances:

For the Claimant: Mr H Giani, Counsel
For the Respondent: Ms L Ford, Human Resources Manager

JUDGMENT having been delivered orally by the Judge and sent to the parties on 8 January 2021, and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented to the tribunal on 21 February 2019, the claimant made claims of unfair dismissal contrary to s.98(4) Employment Rights Act 1996, and automatic unfair dismissal because of union activities, contrary to s.152 Trade Union Labour Relations (Consolidation) Act 1992. The response was presented on 2 April 2019 in which the respondent asserts that the claimant was dismissed for gross misconduct for a serious health and safety breach, as well as for breach of trust and confidence.

The issues

2. The issues I have to hear and determine are as follows:-

   Unfair dismissal, section 98(4) ERA 1998

   2.1 What was the reason for the claimant's dismissal? The respondent contends that it was his conduct, whereas the claimant argues that the respondent intended to dismiss him all along and was motivated by his trade union activities.

   2.2 Did the respondent hold a genuine belief based on reasonable grounds, in the claimant's conduct?

2.3 Had the respondent conducted a reasonable investigation into the claimant's conduct?

2.4 Was dismissal within the range of reasonable responses?

Unfair dismissal, section 152 TULR(C)A 1992

2.5 In relation to the s.152 automatic unfair dismissal claim, what was the principal reason for the claimant's dismissal? Was it for his trade union activities?

The evidence

3. I heard evidence from the claimant who did not call any witnesses. On behalf of the respondent evidence was given by Mr Mohammed Farah, General Manager, Southgate Leisure Centre; Mr Philip Wallis, Contract Manager; Mr Gary Munday, Business Development Manager, and Ms Tegan Russell, General Manager.

4. In addition to the oral evidence the parties adduced a bundle of documents comprising of 507 pages. Where possible page references will be given.

Findings of fact

5. The claimant worked at the Park Road Pools and Fitness Centre on Park Road, North London, and at the time of his dismissal, was employed as a Team Leader. He commenced his employment on 31 March 2014 and at all material times, he was a member of Unison, the recognised trade union in the workplace.

6. This case is about the health and safety procedure when filling a tank with chlorine to be used in the respondent's swimming pools. The claimant was dismissed for failing to follow the correct procedure. Below is the chronology leading to his dismissal.

Customer complaint 1 December 2017

7. On 1 December 2017, the Centre where the claimant worked received a complaint from a customer who advised that the water in the swimming pool, the previous evening, 30 November, had caused their group to cough and suffer throat problems. The claimant was the Team Leader on duty during the evening in question. A detailed investigation followed conducted by his line manager, Ms Tegan Russell, General Manager. The outcome revealed that the readings taken showed unsafe chlorine levels and that the claimant had failed to take any remedial action to address the serious health and safety breach. It was alleged that he had breached health and safety; brought the respondent's name into disrepute; failed to follow a reasonable management request; and had falsified pool test results. He was suspended and invited to a disciplinary hearing.

8. The disciplinary hearing was conducted by Mr Mohammed Farah, General Manager, on 8 January 2018, who upheld the allegations except for the falsification of records. The claimant, together with his work colleague, Mr Adrian Williams, who also was on duty that evening, received a final written

warning to last one year from 8 January 2018, with conditions including that they complete a water training module and to have a meeting with their General Manager to identify further training needs. (119 – 218)

9. I find that at the time of the claimant's dismissal there was a live final written warning.

Ms Yamila Rodrigues

10. On Saturday 2 June 2018, Ms Yamila Rodrigues, Dry Operations Manager, had left the valve on the day tank in the poolroom open as she had been called away to attend to an emergency. It overflowed. There was a build-up of fumes causing an explosion and the premises had to be evacuated. Those who attended to clear the spillage could only stay in the room for about ten minutes. The incident was investigated and following a disciplinary hearing on 8 June 2018, Mr Will Holmes, Contract Manager. In interview she admitted her mistake and was remorseful. It was her first transgression. She was given a final written warning for breach of the respondent's health and safety; breach of its policy or procedure; and lack of care and attention in exposing it to unnecessary risk. Mitigating circumstances were taken into account. (499 – 507)

11. I refer to that incident at this stage because what then happened was a decision was taken that all relevant staff should be trained on the filling of chlorine in the tanks in the plant room. The procedure is in writing. (pages 92 – 95, 93 of the bundle)

12. I am satisfied that the valve of the bulk tank, which is the feeder tank, had to be opened in order for the chlorine to flow into the main tank, called the day tank, and the valve on the day tank had to be in the open position to allow the chlorine to flow into it. What the procedure states, quite clearly, is that the person who performs that task should never leave the valves unattended during the filling process. I am further satisfied, having been taken to the respondent's handbook issued to its employees, that breaches of health and safety may be dealt with under the company's disciplinary procedure and could result in the termination of that employee's employment. There are also provisions in the respondent's disciplinary procedure in respect of gross misconduct. Examples of gross misconduct include deliberate disregard for health and safety matters.

13. The bulk tank in the plant room is a large bulk tank of chlorine which is used to top up the day tank as and when required. It should be topped up when it is half full. The levels are meant to be checked during the team leader's daily checks which should happen at least three times on their shift.

14. To top up the tank the Team Leader must put on the appropriate personal protective equipment which is a suit, gloves and mask. He or she would then turn on the two valves and wait by the day tank until it is full and at that point the valves should be turned off.

The spillage of chlorine 31 August 2018

15. At approximately 5.20am on 31 August 2018, Ms Dorothy Bruce, Team Leader, started her shift and went into the plant room. There she saw chlorine spilled on the floor with the tank valves open. Using her mobile phone she took a photograph of the condition in the room. She then contacted Ms Russell who turned up on site three hours later at or around 8.30 that morning, and made a video recording of the room.

16. The matter was investigated by Mr Farah who viewed the CCTV footage which showed that the claimant had entered the pool room at or around 8.58 the previous evening and left at or around 21.03 that evening. He was in the plant room for five minutes and three seconds. He was interviewed by Mr Farah on 3 September 2018. There is a written account of the questions asked and the answers given. He confirmed that he had carried out his checks and had filled the day tank. He could not, however, explain why there was an overflow. Mr Farah concluded that there was a case to answer for gross misconduct, and that disciplinary proceedings should be invoked for alleged breach of health and safety as well as breach of trust and confidence. (136, 147, 328 – 345)

17. The claimant was suspended on 11 September 2018 on pay which was confirmed by Mr Farah, in writing, on 12 September, who invited the claimant to a disciplinary hearing on 30 August 2018, to discuss the gross misconduct allegations. (347 – 348)

Disciplinary hearing

18. The claimant went on sick leave and thereafter had difficulty securing the attendance of his union representative. The disciplinary hearing was eventually held on 11 October 2018, chaired by Mr Finn Wallis, Contracts Manager, assisted by Ms Louise Ford, Human Resources Consultant, who took notes. The claimant was represented by Mr Gerard McGrath, Branch Secretary, Unison. The allegations were breach of health and safety and breach of trust and confidence.

19. I am satisfied that during that hearing and during the subsequent appeal hearing, neither the claimant nor Mr McGrath, took notes. The notes taken are those of the respondent. The claimant was given the opportunity to correct them and did do so. I, therefore, accept the content of the notes as produced by the respondent.

20. The claimant gave two explanations of how he believed the leak or the overflow could have occurred. It was either it had been sabotaged or caused by Ms Bruce at or around 5.20 in the morning, when she arrived for her shift, or that there was a technical fault.

21. After listening to him and Mr McGrath, When the claimant went through the procedure he followed that evening, Mr Wallis felt that it was unlikely that he would forget to turn off the valve had he stayed by the tank as the policy or the procedure required him to do. Mr Wallis did not decide on an outcome but engaged in an investigation himself into the explanations given by the claimant.

22. From his investigation he was satisfied, having spoken to Ms Russell, that there were no technical faults reported and that the valves were in perfect working order before and after the incident. It, therefore, left Ms Bruce and she was re-interviewed. She had taken the photograph at 5.20am showing the spillage and when that time was compared with the timing on the CCTV recording, it showed that she had entered the room at or around that time and had not been present earlier. The footage also showed that the claimant had left the room at 3 minutes past 9 the previous evening. Between that time and 5.20am the following morning, no-one had entered the room save for Mrs Bruce at 5.20am. Mr Wallis formed the view that it was the claimant who had left the valves open.

23. In addition, Mr Wallis wanted to know whether or not the claimant could have carried out all necessary checks and could fill the day tank within five minutes and three seconds. If he had stayed by the tank he was in a position to turn off the valves. He carried out the procedure as given by the claimant, with Ms Russell acting as the claimant and with Ms Ford who timed her. From beginning to Ms Russell removing her protective equipment, it took 7 minutes and 50 seconds, a lot longer than 5 minutes and 3 seconds the claimant was actually in the room. It was Mr Wallis' genuinely held belief that the most likely scenario was that the claimant had entered the plant room, turn on the valves, left the area, and carried out the rest of his checks, in breach of procedure. It was also observed that he did not have on any personal protective equipment at the time.

24. Having excluded Ms Bruce and put the claimant in the frame as the person who was responsible for the overflow of the chlorine, Mr Wallis came to the conclusion that the claimant's employment should be terminated by reason of gross misconduct.

25. I am satisfied that Mr Wallis had taken into account the claimant's length of service and that he did not have a clean disciplinary record as he had at the time an extant final written warning. He considered alternatives to dismissal, such as demotion. I am satisfied that his approach was not a 'tick boxes' exercise, as the claimant alleged, but a genuinely held view as to whether or not demotion would assist the claimant in some way, but he dismissed it as a reasonable alternative as the claimant had been under a final written warning in relation to his management of chlorine in the pool in November 2017, and had been the beneficiary of the retraining exercise in the first week of June 2018 following the incident caused by Ms Rodrigues. Taking those matters into account, the decision was taken that he should be dismissed. (353 – 372)

26. The decision was sent to the claimant in a letter dated 18 October 2018, by Mr Wallis. (373 – 376)

<u>The appeal</u>

27. He appealed on 2 November 2018 asserting that:

> "1. The chair of the disciplinary hearing was insufficiently qualified or technically inexperienced to come to the conclusions he came to in his decision-making process. 2. That the timing exercise carried out by management after the hearing

> had concluded, is a deliberate, subjective, meaningless and distracting ploy by management in a [vain] and naïve attempt to add legitimacy to prop up the decision to dismiss. Why were we not invited to observe this exercise? 3. That in his letter confirming dismissal, the chair made reference to some technical formula which has no bearing on this matter in, yet again, deliberately creating some poorly constructed smokescreen to detract from his flawed decision. 4. That management failed to provide video footage to Krzysztof and me as his representative in advance with other evidence in the timely manner. There are questionable differences between the footage and the still photo." (378 – 379)

28. The appeal was heard by Mr Mark Munday, Divisional Business Manager, on 22 November 2018. The claimant attended and was represented by Mr McGrath. Notes were taken by Ms Ford. In addition to the five grounds of appeal the claimant raised a sixth ground, namely that Ms Russell had victimised him because of his trade union activities.

29. He asserted, firstly, that Mr Wallis was not an operational manager but worked in the office. He was advised by Mr Munday that that was not the case but he would investigate Mr Wallis' duties.

30. Secondly, he disputed Mr Wallis' view that he could not have carried out all of the tasks in the plant room within five minutes and three seconds. He was told by Mr Munday that it was his intention to conduct a re-enactment of what the claimant did in the room and that it would be done after the hearing. After much discussion about how much chlorine was required to fill the tank, it was agreed that 200 litres would be used.

31. Thirdly, the claimant referred to Mr Wallis' reference to Bernoulli's equation in his dismissal letter. Mr Wallace wrote:

> "You raised the concern with why the bulk tank did not fully empty. My investigation indicates that this is due to a stabilisation point with the chlorine levels. This can be explained through the Bernoulli's equation which states that the total energy of a moving fluid is conserved. In other words, the sum of energy due to pressure and kinetic energy remains constant even when the flow volume changes. By applying the Bernoulli's equation, it can be demonstrated that pressure actually decreases when fluid is travelling through a constriction (from bulk tank, through to a small pipe to the day tank). The total energy before the constriction and during the constriction must be the same. In accordance with the conservation of mass, the velocity of the fluid must increase in the constricted volume and thus the kinetic energy also increases."

32. Mr Munday was less concerned about the Bernoulli equation and was more concerned about whether or not the valves were left open.

33. Fourthly, the claimant raised the concern that he had not been provided with the video footage, but this had been rectified prior to the appeal hearing. In relation to the photographic evidence taken by Ms Bruce, the claimant submitted that it could have been "doctored." The valves were in the open position but in the video taken by Ms Russell, they were closed.

34. Fifthly, Ms Rodrigues had been treated differently in similar circumstances, in that, she had received their final written warning.

35. The sixth point was that he alleged that Ms Russell had targeted him over the previous 12 months by use of disciplinary hearings. Mr McGrath asserted that it was to do with the claimant's trade union activities.

36. The hearing was adjourned to enable the claimant to re-enact the filling of the day tank. The exercise took five minutes and 21 seconds taking into account the matters raised by the claimant that he did not have two unlock the doors and that he had tried to stop the tank from filling up with the 200 litres. Mr Munday's view was that the claimant had rushed all of the checks required to be taken and the speed at which he conducted the re-enactment meant that he could not have feasibly read and recorded the readings on the pressure gauges and monitors. It was, therefore, not a demonstration which he placed considerable weight on in the claimant's favour.

37. All parties returned to the hearing room after the re-enactment, and after a short discussion about an alleged theft on 16 July 2018, by another employee, which Mr Munday considered to be not relevant to the issues he had to consider, the hearing was closed.

38. Before sending his outcome decision, Mr Munday carried out his own investigation. He contacted Ms Russell regarding victimising the claimant; spoke to Mr Will Holmes, Contracts Manager, who conducted Ms Rodrigues' disciplinary hearing and issued her with a final written warning; he looked into the possibility of altering the times on an iPhone and concluded that it was extremely difficult to do; he spoke to Mr Wallis about his role and was satisfied that he was an experienced operational manager who explained his reasons for dismissing the claimant; he also spoke to Mr Jon Richardson, Contracts Manager, about his decision to take no action in relation to an earlier disciplinary matter in June 2018. Mr Richardson said that the claimant was, at the time, trying to make the right decision in relation to changes to the pool matrix and in failing to conduct a lifeguard visibility test, notwithstanding he had breached procedure; and Mr Munday was provided with copies of the paperwork from the claimant's previous disciplinaries and those concerning Ms Rodrigues.

39. After considering all of the evidence, he concluded that, in relation to the first ground, namely that Mr Wallis did not have any operational experience, after speaking to him, was satisfied that he was competent and knowledgeable in dealing with the disciplinary hearing. This ground was rejected.

40. As regards the second ground, the timing exercise, Mr Munday felt it was useful but having taken into account all the allowances raised by the claimant, it still took him 18 seconds longer than the time on the 30 August. In any event, Mr Munday did not believe that the claimant could have accurately assessed all of the readings and concurred with Mr Wallis' view that he had left the chlorine tank filling while he completed his checks and forgot to turn off the valves. This ground was also rejected.

41. In relation to the use of the Bernoulli equation, the third ground, Mr Munday was satisfied that it was referred to in direct response to a question put by the claimant in relation to the filling up of the day tank from the bulk tank and how could there be chlorine left in the bulk tank. The equation was not

relevant to the issue and this ground of appeal was rejected.

42. Mr Munday concluded that the photograph taken by Ms Bruce and the video by Ms Russell, clearly depicted different scenarios. The valves were closed after Ms Bruce had taken the photograph. The video was taken three hours later. Further, Mr Munday did not believe that Ms Bruce's photograph had been doctored. This ground was rejected.

43. The fifth ground was the alleged inconsistent treatment of Ms Rodrigues, in similar circumstances. She had received a final written warning whereas the claimant was dismissed. Mr Munday took into account that there were several differences between the two cases. In Ms Rodrigues's case, she had a previous clean disciplinary record. She accepted that she had made a mistake and apologised. She also rectified her mistake. She only breached procedure when she was called away to deal with an emergency. In the claimant's case, however, he did not admit to his mistake; was not remorseful; and was not willing to learn from it. He breached procedure as it appeared that he was rushing and not for an emergency reason. He had a live written warning at the time and had comparatively recently attended training. Management had reissued new work instructions on the correct procedure for filling the tanks in the plant room. Of note, it was made clear that the person who is engaged in that task, should not leave while the tank when filling. For those reasons Mr Munday concluded that there was no inconsistent treatment. The circumstances were not parallel. They were not similar.

44. As regards the sixth ground, the claimant asserted that he felt that Ms Russell had targeted and victimised him because of his trade union activities. Mr Munday took into account that Ms Russell was also a member of the same union, Unison, and was not involved in the disciplinary investigation or in the decision to dismiss the claimant. It appeared to him that all the disciplinary actions taken were justified. Some of the claimant's colleagues were also disciplined around the same time as he had been disciplined. Many were union members. He, therefore, had not been singled out. In relation to the final written warning, that was issued by Mr Farah. The decision to dismiss this made by Mr Wallis.

45. All of the claimant's grounds of appeal were not upheld. He was written to by Mr Wallis on 7 December 2018, who, in a very detailed outcome letter, set out his findings and conclusions. (400 - 405)

Submissions

46. I took into account the submissions of Mr Giani, counsel on behalf of the claimant, and those of Ms Ford, on behalf of the respondent. I do not propose to repeat their submissions having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. I also have taken into account the relevant authorities.

The law

47. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employees 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."

48. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following has to be established:

a. First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,

b. Second whether that genuine belief was based on reasonable grounds,

c. Third, whether a reasonable investigation had been carried out,

49. Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case. Was the decision to dismiss within the band of reasonable responses?

50. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.

51. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

52. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.

53. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree

UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark, held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer. Reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.

54. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's supermarket Ltd v Hitt [2003] ICR 111 CA.

55. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.

56. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.

57. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer or of adopting a substitution mindset. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was suffering from an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, "It's been a few months since I have been in this position with a man underneath me" was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, for the comment made. The employment tribunal found, by a majority, that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, in which the Court of Appeal held that the tribunal is required to consider section 98(4) ERA 1996, when considering the fairness of the dismissal.

58. The level of inquiry the employer is required to conduct into the employee's alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. "At the one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.", Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

59. In Hadjioannou-v-Coral Casinos Ltd [1981] IRLR 352, the EAT held, Waterhouse J,

> "We should add, however, as counsel has urged upon us, that industrial tribunal would be wise to scrutinise arguments based on disparity with particular care. It is

> only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from the proper consideration of the issues raised by section 53(3) of the Act of 1978. The emphasis in that section is upon the particular circumstances of individual employee's case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or tribunal is to think that a tariff approach to industrial misconduct is appropriate. …"

60. In that case the EAT adopted counsel's argument that the disparity argument becomes more relevant "in truly parallel circumstances" where the claimant is dismissed and the other is given a lesser penalty.

Conclusion

Unfair dismissal, section 98(4) ERA 1996

61. I am satisfied that the respondent has shown that the reason for the claimant's dismissal was that he was responsible for the overflow of chlorine in the plant room and that there was a breach of trust and confidence. The reason was, therefore, conduct as set out in section 98(2)(b), and is a potentially fair reason for dismissal.

62. In relation to the fairness of the dismissal, the burden is neutral, section 98(4).

63. Applying Burchell, had the respondent conducted a reasonable investigation? Mr Farah initially investigated the incident and spoke to the claimant. The claimant was invited and attended the disciplinary hearing and was represented, by Mr McGrath, union representative. At the appeal, he had in his possession the documents, picture and video evidence Mr Wallis would be referring to. He was able to put his case to Mr Wallis and to Mr Munday, who conducted their own investigation. The CCTV was viewed, as was the picture and video recording of the room. Ms Bruce was interviewed and the claimant was given the opportunity to re-enact what he did during the evening in question. Mr Holmes and Ms Russell were also spoken to as part of the appeal. The respondent had conducted a reasonable investigation into the allegations, Sainsbury's supermarket Ltd v Hitt. Overall the disciplinary procedure was fair, Taylor v OCS Group Ltd.

64. Did the respondent have a genuine belief in the claimant's guilt based on reasonable grounds?, Burchell. The fact that Ms Bruce was in the room for a very short while; that she had taken a photograph of the scene which showed the spillage; that the CCTV evidence showed that the claimant had left the room at 9.03 having entered it at 8.58, having been there for 5 minutes and 3 seconds; that the re-enactment did not lead the respondent to conclude that he would have carried out all of the necessary checks within the limited timeframe; and that he was seeking to avoid blame, were all facts relied upon. They were reasonable grounds for believing that the

claimant was responsible for the overflow and of a breach of trust and confidence.

65. Did the respondent held a genuine belief in the claimant's guilt?, Burchell. It had not been demonstrated that Mr Wallis and Mr Munday were motivated by his union membership or activities, or by some ulterior reason. They came across as credible witnesses focusing on the evidence before them.

66. Did the dismissal fall within the range of reasonable responses? Having taken into account the previous final written warning and the fact that an alternative to dismissal, such as demotion, was considered and rejected, the decision was taken to dismiss. Mitigating factors were taken into account, such as the claimant's length of service. It is for the employer to determine the seriousness of the conduct, Tayeh v Barchester Healthcare Ltd. It was taken seriously in view of the fact that the claimant had recently been trained on the correct procedure for filling the day tank; was not remorseful; sought to deflect blame from himself onto others; and was the subject of a live written warning.

67. It is not for me to adopt the role of the reasonable employer, but to consider section 98(4), Bowater and Newbound.

68. The employer must consider what is a reasonable sanction, Brito-Babapulle v Ealing Hospital NHS Trust.

69. The respondent did consider the allegation of inconsistent treatment or disparate treatment, when compared with Ms Rodrigues' case, and concluded that she was called away to attend an emergency; admitted her guilt; was remorseful; and had hitherto a clean disciplinary record. Unlike to claimant. The circumstances in both cases must be "parallel", Hadjioannou.

70. I, therefore, come to the conclusion that the claim of unfair dismissal contrary to s.98(4) is not well-founded as the respondent had followed the correct procedure and came to a conclusion that fell within the range of reasonable responses are reasonable employer is entitled to come to. Its decision was not outside that range. Accordingly, this claim is dismissed.

71. The effective date of dismissal was when the claimant received the letter. As that letter was sent on 18 October 2018, he would have received it by not later than 20 October 2018. I, therefore, find the effective date of dismissal was on 20 October 2018.

Automatic unfair dismissal, section 152 TULR(C)A 1992

72. The respondent was entitled to find that there was no evidence that the claimant had been victimised for his trade union membership or activities. Ms Russell was a member of Unison as was the claimant. She was not involved in and had not influenced his decision to issue the claimant with a final written warning; the initial investigation into the chlorine overflow, was conducted by Mr Farah, who, independently of Ms Russell, recommended that the disciplinary procedure be invoked. She also was not involved in the decision to dismiss him, or to dismiss his appeal. Many of the respondent's employees are member of a union, some were disciplined around the time

the claimant had been disciplined. This claim of automatic unfair dismissal contrary to s.152 of the 1992 Act, is also not well-founded and is dismissed.

73. I do make this observation, having listened to the claimant's evidence, it was difficult to conclude that he had evidence other than a mere assertion that Ms Russell had treated him in a way that suggest it was because of his trade union activities. I was not satisfied that she had demonstrated an animus towards him. I was even less satisfied that Ms Russell had significantly influenced the outcome of his case by securing his dismissal and the dismissal of his appeal.

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Employment Judge Bedeau

Dated: 3 April 2021
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Judgment sent to the parties on
19 April 2021
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For the Tribunal office