EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111405/2021 (V)

Hearing on 13 and 14 December 2021 by CVP

Employment Judge Campbell

Mr Robert Hayes	**Claimant Represented by Self**
Co-operative Group Limited	**Respondent Represented by Mr A MacPhail, Counsel**

JUDGMENT

The judgment of the employment tribunal is that the claimant was not unfairly dismissed contrary to section 94 of the Employment Rights Act 1996 and the claim is therefore dismissed.

REASONS

General

1. This claim arises out of the claimant's employment by the respondent which began on 19 November 2018 and ended with his dismissal on 2 June 2021.

2. The tribunal heard evidence from Mr Simon Harding, Warehouse Team Manager; Mr Ian Smith, Warehouse Manager; Mr Andy Baird, Distribution General Manager; Mr Alan Banner, Depot Operations Manager and Mr Nick Cole, Head of Depot Operations, all on behalf of the respondent, as well as the claimant himself.

3. Despite offering or believing alternative accounts of some of the key events in the claim, all of the witnesses were found generally to be credible and reliable.

4. An indexed joint bundle of documents was provided and pages within it are referred to below in square brackets. The claimant provided a supplementary bundle consisting of a handwritten letter and nineteen photographs. Those were also considered and where necessary are referred to individually below.

5. Both parties helpfully provided oral closing submissions which were noted and considered in reaching the decisions below.

Legal Issues

6. The legal questions before the tribunal were as follows:

6.1. Was the claimant's dismissal on 2 June 2021 by reason of his conduct, which is a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996 ('ERA')?; and

6.2. if so did the respondent meet the requirements of section 98(4) ERA so that the dismissal was fair overall?

6.3. If not, and therefore the claimant's dismissal was unfair, what compensation should be awarded?

Applicable Law

7. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.

8. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.

9. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities and case-law based principles are considered below under the heading 'Discussion and Conclusions'.

Findings of Fact

10. The following findings of fact were made as they are relevant to the issues in the claim.

Background

11. The claimant was an employee of the respondent from 19 November 2018 to 2 June 2021. He was dismissed without notice on the latter date.

12. The respondent operates as a nationwide seller of groceries. It has a distribution facility at Newhouse in North Lanarkshire. This is where the claimant worked as a Warehouse Operative. The facility stores frozen foods in bulk which are picked according to orders received and arranged ready for delivery to stores.

13. The area where the frozen food is stored, and where the key events in the claim took place, is referred to as the 'chamber'. A diagram of its layout was provided [209]. The aisles are designated by groups of letters. In each aisle there will be pallets of goods which can be stacked to well above head height. The pallets are removed and replaced by Warehouse Operatives using either

a small fork-lift vehicle or a 'LLOP', which is a slightly longer vehicle and has capacity on the back to hold pallets.

14. When moving about the chamber a one-way system had to be observed. This was in the order (following the aisle designations on page [209] of LE – ME – MF – LF – LG – MG – MH - LH).

15. A key duty of Warehouse Operatives is to 'pick' goods from the place where they are stored in pallets, break up pallet loads into smaller quantities and bring them to a different part of the warehouse where they can be sorted into deliveries for particular stores. Operatives are told what goods to pick by instructions given via a headset and they will respond verbally to confirm when that task has been completed. They will then be given their next task and so on. Each Operative will say a check number or code in this process which confirms that they have completed the task assigned and are ready for the next one.

16. The respondent uses a warehouse management system called Manhattan which assists with allocation of picking tasks and measurement of efficiency. The system records each picking task undertaken, including when it begins and ends, down to the second, and where the Operative was picking at the time. It also records time in other areas and on other tasks. In doing so it relies on the information given to Operatives about the tasks they are to perform and the responses received by the Operatives about when they have completed those tasks. It is possible using the data collected to create a report for any Operative on a given shift showing each task they performed in order, its type, duration and location within the depot.

Events of April 2021 and initial investigation

17. The claimant was working as normal in the chamber on 26 April 2021. Shortly after 3.45pm he reported to Alan Paterson, who was his Team Manager, that he had been struck by a piece of ice falling from the ceiling of the chamber. He was accompanied by a fellow Warehouse Operative named Thomas or Tam Boyd who vouched what he said. Mr Paterson said he would report the matter.

18. The claimant returned to work and finished his shift around 9.40pm. No further reference to the incident was made by Mr Paterson or anyone else from the respondent before he left.

19. On 27 April 2021 the claimant was again at work and raised the matter he had reported the day before with Mr Paterson. With his consent he was tested for drugs and alcohol within his system, which is a standard step the respondent performs in any case involving an accident at work. The tests showed that the claimant had a drug present in his system. He was therefore suspended on full basic pay by another Team Manager, Ms Iwona Erenc [102]. This is also the respondent's standard practice when a test is failed. The meeting at which this took place was noted [99-100].

20. The claimant was later able to provide an explanation for the failed test, namely a prescription medication, and the respondent accepted that he was not at fault in that regard, although he was asked to keep his manager updated on any medication he was taking.

21. The claimant completed a brief written statement as part of the respondent's accident reporting procedure [101]. He said that being hit by the lump of ice caused him dizziness, sickness and headaches the following day and he had to contact his GP.

22. Also on 27 April 2021 a statement was taken from Alan Paterson [98]. He confirmed that the claimant and Mr Boyd had entered the office area of the chamber around 3.45 to 3.50pm on 26 April. Each was carrying a piece of ice and Mr Boyd told him that it had fallen from the ceiling of the chamber and the smaller of the pieces struck the claimant. He indicated that he had reported the matter so that the ceiling and overhead pipework and other fittings could be checked and cleaned.

23. Mr Simon Harding, Warehouse Team Manager at the depot completed an accident 'Near Miss Report' to log the incident [94]. Again that was a standard step for the respondent to take.

24. The claimant attended Hairmyres hospital in East Kilbride on 28 April 2021, complaining of pain in his head and nausea. He was observed by a doctor and his presentation was described as 'unremarkable', but that his symptoms may be due to concussion. A letter to this effect was provided to the claimant's GP [103].

25. A statement was taken from Mr Boyd as part of the accident reporting process on 5 May 2021 [107-109]. He had been on holiday immediately before and so could not be interviewed until he returned to work. He gave an account consistent with the claimant's and said he had seen the ice falling and hitting the claimant on the back of his head. He said he took a photograph of the ice at 3.44pm and that it must have fallen around 3.40pm. He was unaware of any other witnesses to the event. A copy of the photograph was provided [233].

26. The claimant was interviewed by Mr Harding over a number of dates in May, and notes were taken of the discussion [113-146]. The claimant countersigned each page and is deemed to have accepted them as a faithful summary of the discussion. Initially the exchanges were about the claimant's failed drug test and the medication he had been taking. Mr Harding then asked the claimant to give a further and more detailed account of the events of the incident he had reported, which he did.

27. As the meeting went on Mr Harding produced a report taken from the Manhattan system known as a 'non-productive' report [70-76]. This was in table form and showed a breakdown of the claimant's working time around the point when the incident was said to have occurred, including each picking job and where in the chamber that was being undertaken. It was suggested that the report placed the claimant at a different part of the chamber from where the ice was reported to have fallen at the relevant time. The claimant responded that the time of the incident might have been different and closer to 3.44pm when Mr Boyd took his photograph of the fallen ice.

28. The meeting was adjourned to 11 May for further discussion, and then immediately again on that day to 24 May in order to allow the claimant to secure a trade union representative to accompany him. Mr Harding confirmed to the

claimant that he was moving the process to a disciplinary hearing as he believed that on the balance of probability there were factors suggesting the claimant's version of events was not true or accurate. These included that the Manhattan system suggested both he and Mr Boyd were in another part of the chamber when the incident allegedly took place, that the claimant's basis for understanding the time of the incident was not reliable, that the claimant could not have carried out his picking duties sufficiently ahead of the system records to place him where he said he was, that the only record of him stopping work was for an unconnected reason, that the place on his head where the claimant was injured was inconsistent with ice falling from the ceiling, and that no other colleagues in the chamber witnessed anything of the incident.

29. The claimant was told he would be invited to a disciplinary hearing with details of the time, place and hearer to be confirmed. He was also told that his suspension for failing the drugs test was being revoked, but that he was now on suspension pending further disciplinary process.

30. In between Mr Harding's meetings with the claimant he also interviewed Darren Robertson, Cameron Lindsay and Slawomir Sarcen, all Operators who had been in the chamber at the time of the alleged incident. Notes were taken of the discussions [147-152]. Each was asked whether they recalled seeing anything happen on the afternoon in question. None of them could recall anything. They were then told where the Manhattan system placed them at 3.40pm and asked again if they recalled seeing anything at that time. Again, they did not.

31. The claimant was invited by letter dated 26 May to a disciplinary hearing on 31 May [155-156]. It was to be chaired by Ian Smith, Warehouse Manager. The reason given was the claimant's

> *'alleged seriously inappropriate behaviour in the workplace and serious breach of the Health & Safety Policy in that on 26 April 2021 you colluded with a colleague to report an accident that we believe did not happen, in order to raise a claim against the company, which we regard as gross misconduct. Your actions bring into question your honesty and integrity and our ability to trust you.'*

32. A copy of the investigation materials was provided to the claimant, directly or through his nominated trade union representative.

33. The claimant attended a disciplinary hearing on 31 May with Mr Smith. Also present were a note taker and the claimant's trade union representative, Brian Knott. The handwritten notes of the meeting were produced [157-165]. They are not signed by the claimant but are accepted as a representative record of the discussion.

34. Mr Smith recapped on the evidence from the Manhattan system which suggested the claimant would have been in a different area from where he said he was hit by falling ice. The claimant responded to say his account was truthful and he had been on his way to marshal his cages. Mr Knott made a number of representations on his behalf about the adequacy of the investigation process and the evidence in favour of the claimant's account of events.

35. The hearing was adjourned to another day to allow Mr Smith to consider the evidence and the representations made by and on behalf of the claimant.

36. The disciplinary hearing was reconvened on 2 June 2021, for a shorter discussion noted to last for 20 minutes [168-173]. The claimant was again accompanied by Mr Knott. By this time Mr Smith had made his decision about the outcome of the meeting, which he delivered and explained to the claimant. He noted that the time reports from the Manhattan system showed the claimant and his only witness Mr Boyd both being in a different place from where they said he was struck by the falling ice, and that the claimant's explanation of how he had determined the time of the incident was unconvincing.

37. Mr Smith had decided that on the balance of probability the claimant had colluded with Mr Boyd to fabricate an account of an accident which did not happen. Mr Smith accepted that the claimant should have been given clearer notice by Mr Harding that he was being made subject to a disciplinary investigation, but that he did make clear he wanted to explore the claimant's account of the incident in more detail. Mr Smith ended by saying that his decision was to dismiss the claimant with immediate effect. Since the claimant

was found to have committed an act of gross misconduct, he was not entitled to notice or payment in lieu.

38. The claimant raised in evidence before the tribunal that he had been offered the opportunity immediately before the reconvened disciplinary meeting to resign. This he said had been conveyed to him by Mr Knott and not Mr Smith directly. It was not put to Mr Smith when giving evidence and so he was unable to say if he had made such an offer, and if so on what terms. Based on the evidence available it is found that the claimant was given an opportunity to resign, but that he elected not to so that he could keep open the option to contest his dismissal through the appeal process if necessary. This was his own evidence. He was not forced or advised to resign. Mr Smith had already reached a conclusion that the claimant was guilty of gross misconduct and should be dismissed by default. As such there was no unfairness in this aspect of the process.

39. Mr Smith confirmed his decision, including the rationale in more detail, in a letter to the claimant dated 3 June 2021 [174-176]. It confirmed that the claimant would be paid up to that date. His right of appeal against the decision was confirmed.

First stage appeal

40. The respondent's disciplinary policy and procedures allow for two stages of appeal against dismissal.

41. The claimant confirmed that he wished to appeal against his dismissal by letter received by the respondent on 8 June 2021 [180-182]. He addressed it to Andy Baird, Distribution General Manager who had been nominated as the appeal hearer in Mr Smith's outcome letter. The appeal letter set out the basis on which the claimant wished to appeal.

42. The appeal hearing took place on 22 July 2021. The claimant was accompanied by a different trade union representative named Nicky Frew. A note taker recorded the meeting in writing and the notes were countersigned

by the claimant [185-195]. They are accepted to be a suitably accurate account.

43. Mr Baird asked the claimant to give an account of what happened on the afternoon of 26 April. He read through the locations where the claimant was recorded to be between 3.40 and 3.44pm according to the Manhattan system. The claimant said that he had given his check digit slightly ahead of completing a picking task. Mr Baird stressed the importance of establishing when precisely the incident had occurred, as potential witnesses would have been in the area at certain times but not at others. The claimant complained that Mr Paterson did not take his account of the incident seriously on the day it occurred and delayed reporting it, which hampered further investigation. He also suggested that Mr Harding may not have been completely neutral in his investigation of the matter.

44. The claimant also said he had been made aware that Mr Boyd had been made an offer in order to keep his job. This was a reference to the fact that a separate disciplinary process had been initiated against Mr Boyd for his part in the same incident. By this point, Mr Boyd had gone to a disciplinary hearing before a manager named Alan Banner and been dismissed for gross misconduct. Mr Banner had concluded that Mr Boyd had fabricated his account of the claimant being struck and injured by the ice. The offer allegedly made to Mr Boyd required him to change his account of the events of 26 April, to say that the incident never happened.

45. Mr Banner's evidence to the tribunal, which is accepted, was that during an adjournment in Mr Boyd's disciplinary hearing, and before he reached any decision, he indicated to Mr Boyd's trade union representative that the evidence provisionally pointed towards Mr Boyd's account being inaccurate. In that context Mr Banner suggested that if Mr Boyd were to admit that the account was false, this would count in mitigation to his benefit. Mr Banner did not say to the representative what the outcome would be in terms of any sanction were Mr Boyd to take or not take that course of action.

46. The claimant provided a copy letter from Mr Boyd in his supplementary bundle. It was dated 15 November 2021 and the claimant said it had been written for the purpose of being shown to the tribunal as Mr Boyd could not attend in person because of his work commitments. The letter stated that it had been written to confirm that the respondent

> *'…tried to blackmail me by offering me my job back on the condition I withdrew my statement and I would receive a one year final written warning. This was proposed to me by Alan Banner from the Newhouse Depo. I declined the offer following that I got unfairly dismissed from work.'*

47. Mr Boyd's letter is largely consistent with Mr Banner's evidence, save that Mr Banner was clear that he did not specify any sanction which would apply in the event that Mr Boyd either changed his account of events or adhered to it. Mr Banner's evidence, being provided to the tribunal in person and under oath, is accepted. That is not to say that Mr Boyd was wrong in his recollection of the facts, but it is possible that by the relaying of Mr Banner's message to him via his union representative it has taken on a different emphasis.

48. Mr Baird said he could not comment on the matter as he had not been involved. After further discussion he brought the meeting to a close and said he would confirm his decision in writing.

49. Following the appeal hearing Mr Baird reviewed the Manhattan time reports and cross-referenced them with each other and the floor plan of the chamber to build up a timeline of the claimant's and Mr Boyd's activities and whereabouts according to those records. He focussed on the period between 3.37 and 3.44pm.

50. Mr Baird considered from reviewing the claimant's list of picking tasks that he was occupied with undertaking them in different parts of the chamber until 3.43pm. That was therefore the earliest time he could have arrived at the place where the ice was said to have fallen. In doing so Mr Baird noted that the claimant was recorded to have completed another picking task elsewhere at 3.44pm, but was prepared to assume that this was completed up to a minute earlier as the claimant maintained he would do from time to time. Mr Baird also

noted that Mr Boyd's photograph of the fallen ice was time-stamped at 3.44pm, establishing that the incident could not have occurred after that time.

51. Considering all that would have happened had the claimant's account been true and accurate, Mr Baird reached the view that it could not have taken place within the two minute window between 3.43:00 and 3.44:59pm.

52. Reviewing the additional evidence in the process, Mr Baird reached a conclusion overall that events did not take place as the claimant said, and that he had manufactured the account of being hit by falling ice.

53. Mr Baird issued his outcome letter on 2 August 2021 [197-200] in which he explained in detail his analysis of the timeline of events, the conclusions he drew from that, and his responses to the issues raised by the claimant in the appeal meeting. His overall decision was to reject the claimant's appeal and allow Mr Smith's original decision to stand.

54. The letter confirmed that the claimant had a further right of appeal to Nick Cole, Head of Depot Operations.

Second stage appeal

55. The claimant confirmed by email to Mr Cole that he wished to use his final right of appeal and a hearing was arranged for 31 August, then 2 September, and finally 27 September 2021.

56. At the hearing the claimant was represented by Mr Frew and a note taker attended along with Mr Cole. Copies of the notes were produced and were countersigned on each page by the claimant [203-206]. The meeting lasted for approximately 20 minutes. Mr Cole said that he would not do a lot of talking but he would listen to the claimant's representations and then go away to explore and consider them.

57. The claimant's main points by this stage were that it would take longer for the claimant and Mr Boyd to agree to put forward a false account than it would for the incident to occur as they had described, that it was possible within the timeline established by Mr Baird that all of the events the claimant relied on

could have taken place, that the investigation of the incident should have begun that day and not the day after, that the claimant had produced evidence of his head being injured, and that there was no CCTV and no other witness to the incident save Mr Boyd.

58. Mr Cole ended the meeting and undertook to consider the claimant's points, then issue his decision in writing.

59. Following the meeting Mr Cole asked a Health and Safety officer based at the Newhouse depot named Martin Stack to effectively reconstruct the claimant's movements as established by the Manhattan system. Mr Stack and a colleague moved around the chamber to retrace the movements the claimant would have made around the time of the alleged incident. They reported back to Mr Cole to say the timings on the system appeared to be accurate and consistent with the findings Mr Baird had made at the first appeal stage. They also said that it followed from this that the claimant's account of being in the location where he said he was hit by falling ice was unlikely to be correct. There was not enough time for him to reach that point at the time the fall of ice had allegedly occurred.

60. Mr Cole relied on this information to conclude that Mr Baird had accurately and fairly considered the claimant's appeal, which he had refused. He saw no reason to depart from that.

61. Accordingly, Mr Cole sent an outcome letter to the claimant dated 26 October 2021 [207-208] in which he explained why he believed the claimant's dismissal was the correct outcome.

62. The issuing of Mr Cole's letter exhausted the respondent's appeal process.

Post-employment matters including mitigation and loss

63. The claimant's dismissal took effect on 2 June 2021. He was paid up until the following day. Around a week later he approached a similar business based at Newhouse and asked to be considered if there were any warehouse

vacancies. He was interviewed on 21 June and offered a job on that day. He started in the role on 11 July 2021 and is still in that role.

64. He did not claim any benefits or receive any other earnings between 3 June and 11 July 2021.

65. According to his final payslip he was paid £12.21 per hour. In his claim form he stated that on average he worked 37.5 hours and received £1,750 gross and £1,345 net per month. His employer contributed 5% of his pay into an occupational pension scheme.

66. In his new role the claimant's pay is expressed as a gross annual salary of £22,815. He is entitled to join an occupational pension scheme. He confirmed at the outset of the hearing that he has sustained no ongoing financial loss since commencing that role, and his losses are confined to the period between 4 June and 10 July 2021.

Discussion and Conclusions

What was the reason for the claimant's dismissal?

67. The parties appeared to agree that the claimant had been dismissed because of his conduct, but disagree over whether the requirements of section 98(4) ERA had been satisfied. In any event it is found that conduct was the reason for the claimant's dismissal. That is evident from all the documents in the process, particularly the disciplinary hearing and appeal outcome letters. The reason for dismissal was described as follows by Mr Smith in his decision letter:

> *"I write to confirm your summary dismissal…on the grounds of gross misconduct.",* and
>
> *"I have concluded that alleged seriously inappropriate behaviour in the work place and serious breach of the Health and Safety Policy in that on the 26th April 2021 you colluded with a colleague to report an accident that we believe we did not happen in order to raise a claim against the company which we regard as gross misconduct."*

Was the claimant's dismissal for misconduct reasonable?

68. In assessing the overall reasonableness of an employer's actions in such cases ***British Home Stores Ltd v Burchell [1978] ICR 303, IRLR 379*** will apply. Mr MacPhail for the respondent provided a copy of the case report and made specific reference to certain passages, as well as the more general fundamental principles it establishes.

69. ***Burchell*** requires three things to be found before a conduct related dismissal can be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

70. There appears to be little doubt that Mr Smith, as disciplinary hearer and the person who decided to dismiss the claimant, genuinely considered he was guilty of misconduct. His outcome letter of 3 June 2021 makes this clear, as above. The fact that Mr Smith, Mr Baird and Mr Cole each believed the claimant was guilty of misconduct was not challenged and no alternative reason for dismissal was put forward.

71. It is next necessary to consider whether the respondent had reasonable grounds for holding the belief that the claimant was guilty of misconduct. Looking first at whether there was evidence of the misconduct which Mr Smith had found to have occurred:

    71.1. There was evidence of the claimant's movements at the relevant time to a sufficiently reasonable degree of accuracy, by way of the Manhattan warehouse management system;

    71.2. The same applied to the movements of his only witness, Mr Boyd;

    71.3. That evidence suggested that neither person could or should have been at the place where the ice was said to have fallen on the claimant;

71.4. In any event, it was unlikely that the claimant and Mr Boyd would have had time to act as they said they did over the incident in the window of time under consideration;

71.5. The claimant was vague and equivocal about the precise time of the alleged incident when challenged;

71.6. There were no other witnesses to the matter despite at least three operatives being in the chamber at the time; and

71.7. The placement of the claimant's injury to his head appeared inconsistent with something striking him from above.

72. The claimant argued that the Manhattan system was not designed to track the movements of staff in the warehouse – it was a management tool. Nor did it in fact track the movement of operatives in the chamber with complete precision. He is correct about that. However, given the level of detail the system was able to provide, and the requirement for the respondent to reach its conclusions on the balance of probability, it was entitled to rely on the information it was able to gain from the system, and also to conclude that such information established that more likely than not neither the claimant nor Mr Boyd were in the vicinity of the ice if it fell from the ceiling at the alleged time. In doing so each person who reviewed the evidence was prepared to make allowances with the data to allow a reasonable tolerance in the claimant's favour.

73. It must be recognised that there was evidence in favour of the claimant telling the truth. As well as his own and Mr Boyd's testimony, there was a photograph of his head being injured to some degree at least, and additionally the letter from Hairmyres hospital confirmed that the claimant had attended there and reported symptoms consistent with a blow to the head. However, the respondent was entitled to balance that evidence against the evidence suggesting the events had not occurred as the claimant alleged, and decide that none of it was decisive enough to establish the truth of his account.

74. The claimant can also justifiably point to the pieces of ice which he said fell from the ceiling, which were photographed and which he took to show Mr

Paterson. To a degree they supported his account although, like the other evidence, did not completely prove it. Mr Smith the decision maker accepted that the ice had fallen around or shortly before the time the claimant said, but simply that he had not been in its vicinity and it had not hit him.

75. Therefore, considering the question of whether Mr Smith had reasonable grounds on which to make a finding of gross misconduct, there was sufficient evidence.

76. The third limb of ***Burchell*** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to pursue every avenue without regard to time, cost or likely return, but no obviously relevant line of enquiry should be omitted.

77. Considering again the disciplinary allegations raised, the evidence gathered and the claimant's response to them, it is found that the respondent's investigation met the required legal standard. The legal test, as emphasised in ***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have dealt with any particular aspect differently. Mr Harding's investigation was sufficient to meet that requirement. He interviewed the claimant and Mr Boyd, as well as the three other employees in the chamber at the time of the alleged incident. He interrogated the respondent's warehouse management system to clarify each person's movements to an acceptable degree. He collated the evidence which the claimant provided.

78. Further and in any event, at each appeal stage the circumstances were effectively investigated afresh. Rather than accept the evidence at face value both Mr Baird and Mr Cole went back and checked it.

79. The claimant's criticism of the respondent, and in particular Mr Paterson, is noted. It was argued that due to the inaction of that manager, the benefit of a day was lost before an investigation into the incident could commence. Whilst

it was unclear whether Mr Patterson did delay, it is true that certain steps could have taken place on 26 April rather than the following day or subsequently, including the drug and alcohol testing of the claimant and interviewing of operatives who were in the chamber. However, it is difficult to see how the investigation was impaired given that each person likely to have witnessed anything of relevance had been interviewed by 17 May, particularly since had they seen anything happen as the claimant described them it is likely they would have remembered that, if not reported it themselves.

80. There was no material witness or area of enquiry which the respondent overlooked. At the time of the process the claimant did not raise issues with the sufficiency of the investigation. He did not suggest any further areas of enquiry that the respondent should pursue. The disciplinary case came down to a weighing up exercise of the available evidence, testing the material suggesting the claimant's account was untrue against the evidence in his favour.

81. The claimant argued that having the reason for his suspension effectively switched from one to another was unreasonable. However, it is found that the respondent's approach was proportionate. It was entitled not to have the claimant return to work until any questions relating to the failure of the drug test had been resolved, and by that point Mr Harding had gathered sufficient evidence to justify embarking on a disciplinary process. The claimant was paid throughout his suspension and so the disadvantage to him was no greater than was reasonably required.

82. He also suggested that the witnesses Robertson, Lindsay and Sarcen were effectively led or channelled in the evidence they gave to Mr Harding. They were told where they were according to the Manhattan system at the time the incident was alleged rather than asked. Looking at the notes of each interview, and as recorded above, each was asked an open question to begin with, namely whether they recalled anything happening in the chamber on the day in question. This was a sufficiently neutral initial question. When each witness said they had no recall, they were provided with the details of their location

according to the system. It is difficult to see how else the question could have been put, given that they were being asked about an event of short duration in the middle of a working day nearly three weeks later. They would either have remembered the event had they witnessed it, or not.

83. The claimant also put to Mr Smith that Ms Erenc was his partner, which he confirmed, and that accordingly, both being involved in the process created a conflict and the possibility of bias. However, the involvement of Ms Erenc was at the stage where the matter was being treated as a workplace accident and before it became a disciplinary matter. Ms Erenc suspended the claimant as he had failed the drug test, which is standard practice. Mr Harding then took over, decided that there was a potential disciplinary case and saw the investigation through to its conclusion. Ms Erenc is not noted to have been involved again. Even if the involvement of two employees who were partners in itself implied a lack of impartiality, Ms Erenc had no material part to play in the disciplinary process.

The band of reasonable responses

84. In addition to the ***Burchell*** test, a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.***

85. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would allow the employee to remain in their employment but impose a sanction such as demotion or a final warning.

86. It is also important that it is the assessment of the employer which must be evaluated. Whether an employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer against the above standard.

87. Mindful of the above approach which a tribunal must take in dealing with the question of reasonableness, it is found that dismissal of the claimant was within the band of reasonable responses open to the respondent in these circumstances. In particular, whilst the claimant is correct to say that the Manhattan system was not infallible or able to prove beyond doubt the claimant's movements, the respondent was entitled to rely on it as being accurate, and to prefer it to the claimant's account even despite his supporting evidence.

88. Mr Smith found that the claimant had critically undermined the trust between the claimant and his employer and therefore it is accepted that the sanction of dismissal in particular was appropriate. It is noted that Mr Boyd was dismissed for his part in the matter and so no question of consistency appears to arise.

89. Therefore, whilst dismissal of the claimant may have been towards the higher end of the band of reasonable responses, it did fall within that range on the evidence in this case.

90. It is important for the claimant to appreciate that the respondent was not required to prove that his account of events was false with absolute certainty, or beyond reasonable doubt. Similarly, it is not the role of the tribunal to decide whether the claimant was or was not injured by a falling piece of ice as he claims. As ***Burchell*** dictates, the tribunal is only required to consider whether the process followed by the respondent was a reasonable one, including the conclusion it arrived at about the most likely version of events.

Conclusions

91. As a result of the above findings it is not necessary to address further matters such as contributory conduct, ***Polkey,*** mitigation or other aspects or remedy.

92. For the record, the respondent did not seek to argue that the claimant failed to mitigate his losses, and this is the tribunal's finding also. It is to the claimant's credit that he took steps almost immediately to find other work, and secured a similar role in such a short space of time.

93. The claimant will understandably be disappointed that he has not succeeded in his claim when his position throughout both the disciplinary process and this tribunal hearing was that he was the party injured or wronged and not vice versa. However, this tribunal is not the forum to decide questions of safe working systems or personal injury, and applying the necessary legal tests to his complaint under employment law it is determined that he was not unfairly dismissed. Therefore, his claim must be rejected.

Employment Judge: **B Campbell**
Date of Judgment: **17 December 2021**
Entered in register: **14 January 2022**
and copied to parties