EMPLOYMENT TRIBUNALS

Claimant: **Mr S Calvert**

Respondent: **Princes Limited**

Heard at: **Leeds by CVP**
On: **17-19 January, 10 May and (deliberations only) 22 July 2022**

Before: **Employment Judge Maidment**
Members **Ms GM Fleming**
Ms H Brown

Representation
Claimant: **Ms I Egan, Counsel**
Respondent: **Ms L Gould, Counsel**

RESERVED JUDGMENT

1. The claimant's complaint of health and safety detriment in respect of an alleged deduction of pay/annual leave is dismissed upon his withdrawal of it.

2. The claimant's remaining complaints of health and safety detriments fail and are dismissed.

3. The claimant's claim of ordinary and automatic unfair dismissal fails and is dismissed.

4. The claimant's claim for damages for breach of contract fails and is dismissed.

REASONS

Issues

1. This case concerns the claimant's actions as a Shift Operations Manager ("SOM") on a night shift commencing on 1 June 2020. This was not an ordinary or anticipated shift. Due to a positive Covid test of one of the factory

employees on the day shift, the nightshift activities were limited to a deep clean of the area in which that individual had worked. The staff then left site earlier than the ordinary night shift finish time in circumstances in which the respondent was critical of the claimant.

2. The parties had agreed a detailed list of issues, which can be found at pages 63 – 66 of the agreed bundle.

3. The claimant brings a complaint of health and safety detriments reliant on him having left his place of work and/or taken appropriate steps to protect himself or others from circumstances of danger which he reasonably believed were serious and imminent and which he could not reasonably be expected to avert.

4. The first detriment complaint is his being suspended, then subjected to an investigation and/or disciplinary hearing on the ground that he left work/took appropriate steps in those circumstances of danger. The second detriment is him being issued with a final written warning. The claimant, during the hearing, withdrew a complaint of detriment regarding the deduction of a day's pay for 1 June 2020 and/or requiring him and his colleagues to use up a day of annual leave.

5. The claimant then brings a complaint of automatic unfair dismissal for the same health and safety reasons. In the alleged circumstances of serious and imminent risk of danger, the reason or principal reason for his dismissal, he says, was because he left his workplace and/or took (or proposed take) appropriate steps to protect himself or other persons from the danger.

6. In any event, as an employee with more than two years' continuous service, the claimant brings a complaint of ordinary unfair dismissal, where the respondent relies upon reasons relating to the claimant's conduct as a potentially fair reason for dismissal. In particular, the respondent relies on an allegation, firstly, of the claimant not checking all buildings before leaving the site, resulting in a new and inexperienced member of staff being left alone in an area of the factory known as Zeus with no knowledge that the rest of the team had been sent home. The second aspect of the claimant's conduct said to justify dismissal is his failing to confirm that all lines were de-energised and safe prior to leaving the site on 2 June 2020.

7. The claimant criticises the respondent's process of investigation as well as the disciplinary and appeal making process and decision-making. It is noted that the tribunal may be required to engage with arguments as to whether, had any defect been remedied, the claimant might have been fairly dismissed in any event or with what percentage likelihood and/or the question of the claimant's conduct contributing to his dismissal.

8. The claimant's final complaint is one seeking damages for breach of contract as regards the termination of his employment without (3 months) notice.

Evidence

9. The tribunal had before it an agreed bundle of documents numbering some 375 pages to which were added, without objection, further documentation, taking the bundle up to 499 pages.

10. Having confirmed the issues with the parties' representatives, the tribunal then took some time to privately read the witness statements exchanged between the parties and relevant documentation. This meant that, when each witness came to give evidence, they could simply confirm their written statement and, subject to brief supplementary questions, then be cross-examined. On behalf of the respondent, the tribunal heard firstly from Mr Andrew Wood, Manufacturing Manager, Annie Knell, Continuous Improvement Manager and Mr Henry Butters, Factory General Manager.

11. Unfortunately, time did not allow the tribunal to hear evidence on the claimant's side necessitating an adjournment and resumption of the hearing on 10 May 2022. On that day, the tribunal heard from the claimant, during whose evidence, a witness on his behalf, Mr Martin Rushforth, former SOM and Site Manufacturing Manager, was interposed. Before completing the claimant's evidence, the tribunal also heard from the claimant's wife, Mrs Karen Calvert. Ms Gould, whilst stating that the respondent did not agree with the background information and opinions proffered, did not wish to cross examine her.

12. In circumstances where it was not possible for an early convenient date to be found for the attendance of both counsel to make their closing submissions, directions were given for the exchange of written submissions and each party then responding to those submissions before the tribunal met to commence its deliberations.

13. Having considered all relevant evidence, the tribunal makes the factual finding set out below.

Facts

14. The claimant was employed by the respondent from 14 October 2010 and, following a promotion in 2013, held the position of Shift Operations Manager. The respondent is a multinational company which manufactures canned goods and soft drinks, including for large supermarket chains. The claimant's role at the respondent's site in Bradford required him to lead and drive the shift manufacturing team to achieve the production of quality products safely and efficiently. The claimant worked on the night shift. He had a clean disciplinary record.

15. The respondent operates 24/7 with generally one 12 hour shift handing over to the next without any significant break in production. The only exception was when a planned shutdown took place over the Christmas period, at which point a site services team assisted in the decommissioning of machinery which was de-energised and engineers followed a checklist of tasks to complete.

16. The tribunal has heard evidence from the claimant and Mr Rushforth, a former Site Manufacturing Manager up until 31 March 2020, that the claimant would challenge decisions to ensure that what the respondent did was correct. As a result, he was said to be disliked by management. Mr Rushforth said that Mr Wood, who became Manufacturing Manager, had been vocal about his dislike of the claimant to Mr Butters, the Factory General Manager and had belittled the claimant in front of others. This was not accepted by Mr Wood. He did however refer to himself having had a difficult relationship with the claimant initially (there had been a "clash") but he said he perceived that the claimant had come round to the way the respondent wished to work going forward and that the claimant was an asset to the business. He said that he did not see the claimant as a troublemaker. The claimant said that he remained guarded and did not yet trust that Mr Wood had changed his attitude towards him. His evidence suggests nevertheless that he did perceive an improvement.

17. The claimant's responsibilities in his job description included ensuring compliance with hygiene and health and safety requirements. On nightshifts he deputised for the Manufacturing Manager and General Manager and was the most senior employee on site.

18. On 23 March 2020, the country went into a national lockdown due to the coronavirus pandemic with the public ordered to stay at home. The respondent was classed as an essential business which was allowed to remain open for the duration of the lockdown.

19. The respondent implemented a number of measures to promote a safe working environment and weekly briefings were given to staff as measures were introduced or government guidance changed. Risk assessments took place and were updated. The measures taken included the introduction of social distancing throughout the factory, staggered start and end times to shifts and breaks, advising employees not to travel to work in groups, hygiene processes to clean and sanitise an area should someone be sent home with symptoms of the coronavirus, where possible for doors to be kept open to reduce touch points, otherwise routine cleaning of touch points every 2 hours, restrictions on the number of people on site, the provision of hand sanitisers and wipes, restrictions on the numbers allowed in common spaces, reducing the number of meetings, the introduction of disposable containers and cutlery in the canteen, permitting key staff to use personal mobile phones rather than communal radios and permitting vulnerable staff or those who lived vulnerable people to wear a different colour hi-vis vest

so that they could be identified as people not to be approached without first seeking their permission. The claimant had not seen the risk assessments, but was aware of the measures the respondent said were being taken including from periodic site updates. He did not necessarily accept that the respondent's expectations were achieved, but could give little specific by way of example.

20. During the day shift on 1 June 2020, one of the employees in the Ingredients Processing Centre ("IPC") area was notified that he had tested positive for coronavirus. He had left the site to be tested and had received news of a positive test result after he returned to the site. The claimant accepted that the respondent had not been aware that the individual was getting a test. All the employees working in that area were told to go home and arrange to be tested. Hygiene operatives then went into that area to conduct a standard touch point clean. At this point in time the respondent had no policy requiring employees to remain away from work until they had a negative test result. That became the policy after this incident.

21. News of the positive test spread around the day shift causing increased concern and some employees to leave the workplace prior to the end of the shift at 7pm. Those waiting to come on shift became aware of the positive test and a number were worried about whether the workplace was safe for them to work. Mr Andrew Wood, Manufacturing Manager to whom the claimant reported, tried to reassure employees who had arrived on site that the affected area had been cleaned but a number refused to work and a heated and confrontational situation involving up to 100 members of staff developed outside the factory entrance. The claimant and Mr Andrew Vie, Health and Safety Manager, also tried to calm the situation and reassure people.

22. Mr Wood then contacted Mr Henry Butters, Factory Manager and, whilst their view was that the site was safe, they decided that, in order to defuse the situation, no production would be undertaken on that night shift. Instead, those workers who did not wish to work were told that they could go home, without pay for that shift, or could stay to undertake further cleaning duties to prepare the site for the day shift on 2 June. That decision was taken at around 8.15pm. Subsequently, employees who had chosen not to work the shift were allowed to take it as paid holiday if they wished.

23. The claimant did not raise any concerns at that time and indicated that he would stay on shift. He agreed before the tribunal that he had an option whether to stay or leave the site. He agreed that he and those who remained were told to conduct a deep clean of the IPC area and that he was told that up to that point there had only been a touch point clean of the areas where the employee who had tested positive was known to have been. Rather than in his normal office, he based himself in a room in the respondent's learning centre a short distance outside the building which housed the IPC plant (and the production area). Employees who had

remained on site gathered in the learning centre and were issued with full PPE and tasked with undertaking a deep clean of the IPC area, including of floors, ceilings and all surface areas.

24. Mr Wood asked the claimant to take photographs of the cleaning which had been done to demonstrate to those on the incoming day shift the steps taken to make the site safe. Before the tribunal, Mr Wood's position was that the site was already safe, but that a further deep clean it was hoped would put people's minds further at rest. Having been on site since 7am, Mr Wood left at 10pm. Mr Wood told the tribunal that he expected it to take all shift to deep clean the IPC area given that it contained a lot of pipework and machinery. It did not cross his mind that people might finish early. He said that he had stayed until 10pm (the claimant thought that it was closer to 9pm) to ensure people were happy being at work and not wanting to leave the claimant on his own until things had settled down.

25. At 2:54am the claimant emailed Mr Wood with the photographs requested and a record of the areas cleaned. The photographs included a group picture of those who had worked in the IPC as well as individual pictures with the employee's name added. He stated: "A proud moment for me tonight working with these great people. I hope we can resolve the issues quickly today and I hope this goes a long way in supporting getting started back up." The claimant said in cross- examination that he was seeking to convince the business as a whole, and its employees in particular who had refused to work, that an adequate clean had taken place so as to get the site back open again. The claimant said that at the time he sent the email, he would have been prepared to walk through the IPC area, albeit he subsequently was more equivocal in evidence, saying that he hadn't considered if it was safe to work and was not in a position to say. Given the claimant's email that equivocation is difficult to accept. The claimant later said that the plant had started up on the next morning shift due to his team's work and that if such a clean had occurred the previous afternoon, the nightshift production may have continued. The claimant said that they had done an extensive clean, albeit he did not know whether a Covid deep clean differed from any other deep clean undertaken from time to time. Before Mr Wood set off for work in the morning, he replied telling the claimant that he had done a great job.

26. When Mr Wood arrived on site later that morning he spoke to the Shift Operations Manager for the day shift, Alan Holmes, in the car park and asked where the claimant was. He was told he was not there. The claimant had indeed decided to send everyone home early on completion of the IPC clean and left site shortly after 3am. He told the tribunal that he had done so as a reward and in recognition of his team's work that night. In cross examination, the claimant accepted that he had taken all the steps he could to reduce the Covid risk in the IPC. When asked if he thought that other areas ought to have been cleaned, he said that he hadn't thought about that at the time or that other areas might not be safe. He said that he had been

instructed to clean the IPC and that had been done. Mr Wood subsequently learned that Robert McCulley, Logistics Coordinator, had arrived on site at around 5am. The claimant and other staff had already left but Mr McCulley found an agency worker, Linda, alone on site in the Zeus production area, apparently unaware of why the rest of the team had gone home. He also had found that one of the production lines, C6, had been left running and that a fast action (entry) door had been left open.

27. Mr Wood thought that, given the circumstances in which the day shift had left, the site ought to have been checked prior to the claimant leaving – he said to the tribunal that he would have expected a cursory look.

28. An investigation by Mr Vie then commenced and he contacted Mr Wood with his initial findings: that the claimant was suspected of having breached health and safety by leaving the site in an unsafe manner, leaving it unsecure and leaving an inexperienced worker on site alone by failing to carry out proper checks. Having been told that further investigation was required, Mr Wood decided that the claimant should be suspended. He telephoned him on 3 June to inform him of that decision. Mr Wood's evidence was that the claimant said very little in response including when told that Linda had been left on site alone. Mr Wood said that he told the claimant of the allegation of leaving site without permission. The claimant disputes that he was told this. The letter of suspension dated 4 June from Ms Hallas of HR referred to a breach of health and safety and security, but without specific reference to the claimant leaving his shift without permission.

29. Mr Wood agreed that potentially he would not have suspended the claimant if no one had been left on site, if he had shut off the machines and had simply failed to let Mr Wood know that he had left early. He said that if everything had been sorted and the claimant had let him know that he was going home early then certainly everything would have been fine. There would simply have been a need for the customary dialogue regarding a handover for the day shift.

30. Mr Wood was interviewed by Mr Vie as part of what was now a disciplinary investigation on 5 June. When asked if he had a conversation with the claimant about leaving the site early if all the work was done, he replied: "to the best of my knowledge, no." He explained that he had a lot of conversations that evening with people who wished to leave site, but he would not have had a conversation with the claimant about him leaving early. There was never a discussion. When asked what the rules were for leaving site for the SOMs he replied: "I'm not too sure, think would be same." He told the tribunal that by this he meant that the rules would be the same for everyone i.e. they would each have to ask their line manager. He confirmed that when the site shut down for Christmas the machines wouldn't be left energised and nothing would be running. When asked about locking up, he said that he was not too sure of the process.

31. Mr Wood said that after he had been interviewed as part of the investigation, he had no involvement in the claimant's disciplinary case and did not, for instance, discuss it with Ms Knell, who chaired the disciplinary hearing. There is no evidence that he did.

32. Before the tribunal, Mr Wood confirmed that there was no explicit rule saying that people in the claimant's position needed permission to leave site early, but said that all employees needed such permission otherwise it would be an act of gross misconduct. If he himself had been intending to leave early, he would have sought permission he said from the General Manager. The claimant had telephoned Mr Holmes around 9-10pm to say he had been left with a skeleton crew to clean the IPC and that he might have an "early dart". Mr Holmes confirmed to the claimant that he was fine with that. Mr Wood told the tribunal that he would have expected a call or text to himself even at around 3am from the claimant. Mr Vie's investigation report in fact recorded that this was an unprecedented occurrence with no formalised process and at the time of leaving the site in the early hours of the morning it would not have been practical for the claimant to speak to a senior manager (there is a dispute as to whether this was a recording of Mr Vie's opinion or referencing the claimant's case in mitigation). Mr Wood accepted in cross examination that he had not himself said otherwise in the investigation. Mr Wood said that rather than cascade instructions to others about leaving the site early, he would have expected the claimant, as the senior person, to communicate that himself to every person present.

33. In the circumstances, on the evening of 1 June there had been no customary handover between the day and night shift managers.

34. When the claimant left, Mr Wood confirmed that as well as leaving Linda behind there were security employees for the whole of the industrial site and employees of Ceva, a third-party logistics company operating the warehousing of goods in another building on the site. He agreed that Linda would otherwise have been on her own from around 3:30am to 5am.

35. The IPC plant was in its own separate building. Generally, people would not move from the production area to the IPC building and employees from those separate areas would typically come into contact in common areas such as the canteen and cloakroom. The IPC building was between 150 – 200 m from the Zeus building, where Linda was found. The separate warehouse operated by Ceva was a similar distance away from Zeus. The production area was completely walled off from the Ceva warehouse and there was no need for any Ceva staff to have access to the production area.

36. On 2 June Mr McCulley provided an email of his discoveries when he arrived on site. He described the fast response doors as being open, him trying to close them but discovering that the power had tripped out. He

asked for the electrics to be switched back on. He then went over to the Zeus production area where he came across Linda. She told him that she had been on her own since 10pm and as she was new to the respondent did not know what to do. Therefore, she said that she had cleaned as much as she could and stayed at her post. He said that he had then carried on with his walkaround and audit of the site.

37. Mr Wood accepted that Mr McCulley had not told him about a machine being left on. He said that the morning was fraught and he could have been told by Mr McConnell, a hygene operative. He also agreed that at this point it was not clear how long the fast response doors had been open for.

38. In cross-examination, Mr Wood accepted that the claimant's concern to protect his and the safety of others was a contributing factor to him leaving site. That was part of the reason why the remaining members of the shift had been directed to leave early, although they left because they had finished their task in IPC.

39. C6 was a production line for carbonated and ready to drink products. On the morning of 2 June Mr Wood was told that the conveyor belt on the line belt had been left running underneath cases of bottles which were resting on the line. The cases were static, but the belt was running underneath them causing wear to the conveyor and, as was evidenced on inspection, the bottles to show wear. He said that meant that there was a risk of leakage and potential damage to machinery. He said that, at an ordinary shift handover, the line would not be left in that state and would be stopped. He believed that it had been left on from the day shift before the night shift came on. The decision as to when to stop the conveyor depended upon the point it was in its cycle. If it was towards the end of its cycle, it might be allowed to continue until the next shift commenced. This was the decision of the outgoing Manufacturing Team Leader in discussion with his nightshift counterpart. However, on this evening there had been no handover. His evidence was that if the other lines around it were static, the fact that the C6 conveyor was still moving would be evident from quite a loud noise.

40. He agreed in cross examination that there was "slim to no reason" that the claimant would have gone into the production area.

41. Linda was working in Zeus which was her normal area. Nothing was going on there that night. Mr Wood didn't expect anyone to have been there that night. When interviewed by Mr Vie she said that she had been told to clean D6 in Zeus. Ms Knell agreed in cross examination that Mr Chisholm, a Manufacturing Team Leader, had told people to clean their own areas and Linda would reasonably consider her area to be D6. She agreed that there was no investigation as to whether Linda had been given a message to leave the site.

42. The fast-action doors which had been left open were roller doors in the main production hall, not in Zeus. The doors were between the main production hall and the pallet area, which Mr Wood agreed could be accessed by Ceva staff taking product to the warehouse. He said that at the end of the day shift he would expect these to be shut and indeed the door should be shut at all times including to ensure that there was no risk of contamination of the food products including due to birds or other animals potentially entering the production hall.

43. If the claimant needed to get something from his usual office, he would walk past those doors, but no production was running that night. The claimant's normal office was a significant distance away from the IPC area, around 500 m. Ordinarily around 60% of the claimant's time was spent on the factory floor. On this nightshift, the claimant based himself in the respondent's learning academy – in a room behind the reception area of the building and just across a car park from the IPC area. Mr Wood agreed that the claimant, on this particular nightshift, would be there as his interest lay in overseeing what was going on in the IPC area.

44. Mr Vie interviewed a forklift truck driver, Mr Lodhi, on 5 June. He said that he had seen all the staff go early, but that one of the manufacturing team, Mr Exley had said that he could stay so they could share a lift home. Linda was interviewed on the same day. She said that she had been directed to clean her usual line, D6. Adam Henderson, an operative, had gone over to Zeus with her. She had seen Robert McCulley when she was waiting to clock out at 6:25am. She said she'd found out that everyone had gone home at 3am and she was on her own. She described it as "a bit weird". Mr Wood was interviewed that day as already referred to. Mr Exley spoke to Mr Vie on 5 June. He recounted that the claimant had said that they could go home as the task that had been set had been completed and that people would feel happy to come into work in the morning now. The industrial site's security guard, Chris McNally was also interviewed on that day. He subsequently made some amendments to the statement which had been taken. He recorded that the staff had left sporadically between 2am and 3.30am. Originally, he said that he had done a check at 2:30am and the fast action doors weren't open. On clarification he said that a colleague Waqqas had done the 2:30am patrol but he did the one at 4:30am. Waqqas was not interviewed by Mr Vie. Mr McNally was asked if he had seen any of the fast action doors open and said that the exterior door was open, as it often was, and the one directly behind was closed. He said that as far as he was aware the interior door could only be opened by a fob. He said that the claimant had spoken to him at around 3:30am telling him that he was leaving so that there would only be people from Ceva and Banisters, a separate business, on the industrial site. When asked if the claimant had asked him to patrol the inside of the respondent's site, he said that he had not.

45. Another Manufacturing Team Leader, Mr Steve Chisholm (who was Linda's line manager), told Mr Vie that he had told those who were staying on, at

around 8:15pm to go to the canteen. He then decided to go to the MTL office to get some PPE out as he thought they would be doing a general clean of their areas. He noted that the claimant said that they needed to sterilise/deep clean the IPC. He recalled seeing Adam Henderson in the canteen at around 1:15am and been surprised that he had not gone home. He said that he had gone home himself at around 3:15am. He said that the claimant said they would be paid until 7am, the claimant had taken all their names and thanked them for staying on and stepping up to the plate. Mr Exley, also a Manufacturing Team Leader, was interviewed and said that he had waited for Ali Lodhi to finish as he was getting a lift home with him.

46. Robert McCulley, Logistics Coordinator, said to Mr Vie that he arrived around 5:20am. He'd seen the (early morning) cleaners on site, who asked what was happening and he had said that he wasn't sure. He said he had rung the claimant's phone at around 5:30am but it had cut off and thought that might be due to the bad signal in the SOM office. He described walking around the site to get to the SOM office when he noticed that the fast response door was open and that it had tripped. He said he spoke later to an engineer to rectify this. He carried on walking around in the dark saying that the only sound he could hear was the compressed air. He recounted being startled by coming across Linda in Zeus, who said that she had been there all shift. He thought this was around 6 to 6.15am. She told him that she had been cleaning with a male member of staff but that he had disappeared at 10pm. She said that she was new and had been waiting to hear what to do.

47. Alan Holmes, SOM, was interviewed on 11 June. He recounted that the claimant had called him around 9 – 10pm to say that he had been left with a skeleton crew to clean the IPC. He said the claimant referred to the possibility of him having "an early dart". He said that he was fine with that and had enough information.

48. Merrix McConnell, hygiene operative, spoke to Mr Vie on 11 June. He said that he thought that before 7am he had gone into the building and seen that the C6 belt was still running but not going anywhere. There were 10 cases of drink on it - he commented that "it wears away the plastic and then the bottles". He said that the line should have been switched off and he reported this as it was a health and safety matter. He took one of the bottles off the line and the plastic had worn away. He said that he reported that C6 was still running to Mr Wood. Whilst recognising that his timings were not specific, Ms Knell subsequently noted that his team started usually at 6am and considered that his observation was likely to have been before the new shift arrived between 7:00 – 7:15am.

49. Pat Smith, hygiene supervisor was interviewed on 11 June. He described not knowing what was going on when he arrived at work at around 5:40am. He described finding Linda who had said that she had not seen anyone since 10pm the previous night.

50. Dave Skinner, production operative, was interviewed on 16 June. He said that he had not seen Linda that night but that Adam Henderson knew she was there.

51. The claimant himself was interviewed on 11 June. He agreed that before the tribunal that he was able to recall events and respond to questions. He was accompanied by a colleague. The claimant raised that he believed the issue of security had now been added to an alleged breach of health and safety. He described the atmosphere on the night of 1 June. He referred to having given Mr Vie his opinion at the time that everyone should be Covid tested. He referred to people having left by 8.15pm and Mr Wood announcing that there would be no production and that the task was to deep clean the IPC. He said that Mr Wood said that he was going to have to leave as he had no lights on his bike. He described going over himself to the IPC at 2am to inspect the area. He asked for some photos to be produced so that he could report back to Mr Wood. He also provided some screenshots to show who was on site. He said that he had mentioned to Ben Exley and Steve Chisholm (MTLs) that if the task was completed early, he would authorise everyone to finish early and be paid until 7am. He said that when he went to IPC around 2am he spoke to everyone to say that they had done a fantastic job and from around 2:40am people had started leaving. He said he had gone through the names of people on site with Mr Exley and Mr Chisholm. He had called Mr Swatman and Mr Sheikh, Laboratory Team Leader, to tell them to tell their teams to go and had spoken to 3 forklift truck drivers to tell them they could leave. He confirmed that he had not told any more senior management of his plan and that he himself had left between 3:15am to 3:30am.

52. He had already that night spoken to Alan Holmes who was taking over the day shift to explain what was going on and that he was putting a report into Mr Wood to reassure everybody that it was safe to go back in. He thought that Mr Holmes had said that if he didn't see him in the morning he would presume he had got the work done before. He said that Mr Holmes had said that he didn't know if he himself would have stayed at work in the circumstances. The claimant said that he felt nervous and phoned his wife as normal on a break at around 10pm. She was concerned and asked why he was still there as she worked with highly vulnerable children and was concerned if she took anything into her workplace that would infect a child. He said that his only answer was that he felt like he didn't have a choice about staying as he was the most senior member of staff on site. He said that no senior manager had even asked about his welfare. He said that he eased his wife's concerns by telling her that he was thinking of letting everyone go early. He didn't know at that stage if he was going to finish early. He said that he would not have called any senior manager at 3am. When asked if he thought he could have done things differently he said that in a clearer mind he may have stayed and handed over to Mr Holmes and that he was not sure he would have done the same. However, it wouldn't have been a shock for Mr Holmes to find the factory empty. As regards

security, he said that he had spoken to Mr Exley and Mr Chisholm around security in the IPC. He called security on the way out and spoke to advise them that everyone from the respondent had left and to ask if they would do a couple of extra walkarounds. He said that his understanding on pre-planned shutdowns was that the engineers shut the line down in a certain way and that site services checked all exterior doors. It was put to him that the last walkaround by security was 2:30am. The claimant said that he had not been told this and would have reacted differently and come back in and checked if he had known. He was unaware that any conveyor belt was still running as he had had no handover on commencing the night shift. He said that he didn't go into the factory, but that he hadn't had a handover. He would have thought that the lines would have been stopped. At the end of the interview he said that he was "open to learning, the human mind is complex and it wasn't a normal night so please consider that."

53. The tribunal is aware that Adam Henderson was interviewed and a statement for him was produced. However, by mistake, this was not provided to the claimant in advance of the disciplinary hearing. The claimant raised this when it was presented and it was determined that this statement would not be relied upon. It is not been disclosed to the tribunal. Ms Knell considered that the claimant was aware that Mr Henderson had been working in Zeus. She agreed that she had no evidence as to who had told him to go home.

54. Mr Vie wrote up an investigation summary report of the incident. His key findings were that the claimant did not seek permission to leave the site on 2 June. The site was left unattended and unsecure, with no additional checks completed to ensure that the site was secure and all relevant personnel had left. An employee who was new to the business was left alone on site with no support or communication around what was happening that night. He recorded that the claimant had admitted not completing a site walkaround to confirm the safety and security of the premises prior to leaving. This was despite having been made aware, he recorded by Steve Chisholm, that Adam Henderson was working in Zeus with no knowledge that the rest of the team had been sent home. In the event of an accident involving Linda it is likely that she would not been discovered for several hours. As already referred to, under the heading of "mitigation factors", he recorded that this was an unprecedented occurrence with no formalised process to follow and that at the time of the claimant's leaving in the early hours of the morning it would not have been practical to speak to a senior manager. It is unclear whether these were recorded as the factors which Mr Vie thought should be considered in mitigation or whether he was simply recording the mitigating factors put forward by the claimant. The claimant in questions from the tribunal considered that the information may have come from answers he gave in his investigatory interview with Mr Vie – i.e. they were a reference to the claimant's own view.

55. Ms Annie Knell, Continuous Improvement Manager, was asked to determine the disciplinary case against the claimant by HR. She had no line management responsibility for the claimant and reported directly to the General Manager. She was provided with the investigation report, investigation interviews and the claimant's job description.

56. The claimant was invited to a disciplinary hearing by Laura Hallas, HR Officer, on 19 June. The claimant was however absent due to ill-health, an absence which was managed by HR without Ms Knell's involvement. An OH report of 15 July 2020 recorded that the claimant was ill due to the work issues and that an undue delay in dealing with his stressors could result in an exacerbation of his symptoms. The advice was to conclude matters with normal care, concern and sensitivity and in a timely manner. Nevertheless, the claimant was not currently fit to attend a meeting. A further OH report was produced on 19 August, but was not provided to Ms Knell. This said that the claimant was unfit for work but could attend a meeting. OH said that their intervention was unlikely to be helpful without progress being made on the claimant's employment situation. The claimant's own note of his consultation was not that he was fit to attend a meeting, but indeed that he required counselling. The claimant raised this at his subsequent disciplinary hearing, but couldn't recall disclosing his note. The claimant had in fact covertly recorded his OH appointment. His view was that the recording should not be disclosed without obtaining the consent of the OH professional. He did not seek that consent. He told the tribunal that the respondent might have sought that consent. Before the tribunal, he agreed that it was said that his condition might improve with counselling, rather than that counselling was essential. He agreed that OH did not say that he could not attend a meeting without receiving prior counselling. In an email of 15 October, the claimant said that he was unable to attend a disciplinary hearing due to his condition in respect of which he needed time for both medication and counselling to be effective. He had by then had 2 counselling sessions. By October or November, Ms Knell understood that occupational health advice had been obtained saying that the source of the claimant's stress was the ongoing internal procedure. On that basis it was considered that it would assist the claimant's recovery to bring the disciplinary case to a conclusion. Ultimately a hearing was then scheduled for 13 November 2020 by an invitation of 11 November, which referred to the possible adverse consequences to the claimant's health of a delay. By then the claimant had attended 4 counselling sessions. The claimant was told that if he failed to attend, the meeting could be held in his absence. The claimant attended accompanied by a colleague.

57. Ms Knell said that she was aware that the claimant had been unwell and that breaks would be given to allow him to gather his thoughts. The issue of the statement of Adam Henderson was resolved as already referred to. The claimant then said that he was still suffering from anxiety and depression and had attended the hearing because of the pressure put on him by the respondent. Ms Knell explained that the respondent's position was that the last occupational health report had stated that removing the

stressors would be of assistance. The claimant said that he wanted an adjournment because he had 2 grievances he wished to submit. These were handed to Ms Knell who reviewed them in an adjournment.

58. The complaints raised in grievances related to the disciplinary investigation and a lack of support given to him by the respondent on the night of 1 June. Ms Knell considered that these were matters that would be considered as part of the disciplinary process. She reconvened the meeting to explain that to the claimant and said that he would be contacted separately regarding the grievances in due course. The claimant disagreed with this course of action and after further discussion and a break for the claimant to try to take some advice on the matter, as suggested by the HR manager present, the hearing was adjourned for the day.

59. The claimant had been able, with support, to put together his detailed written grievances. Nevertheless, he maintained to the tribunal that he was not sufficiently mentally stable to respond properly to questions. He prepared a further written statement prior to the reconvened hearing. The notes of the hearings are not suggestive of the claimant being unable to put his case across and debate the issues with Ms Knell.

60. The hearing was reconvened on 18 November. Ms Knell explained that it was her intention to consider the points raised in the grievance during the disciplinary hearing. They then proceeded to discuss the allegations, but the claimant indicated he did not feel well and could not continue. The hearing was therefore again adjourned.

61. The hearing was further reconvened on 24 November. The claimant had in the interim prepared a further note for himself of the points he wished to raise. When asked in cross-examination, if he had been able to raise all the points he had wished, he said that he was not asked any specific questions about his grievance. The claimant referred to an email he had from Sean Baker, a former employee in site services. Mr Baker was said to have stated that he did not do a personnel sweep on a shutdown but just made sure that his direct reports had left. Ms Knell did not ask for a copy of the email, but rather whether or not Mr Baker was still employed by the respondent. The claimant read out an email from Chris Forsyth dated 4 August referring to the behaviour and emotional state of the employee, Linda. It was put to Ms Knell in cross examination that these might demonstrate a number of reasons why Linda might not have gone home, even if told to do so. Ms Knell agreed that she did not further investigate this, but said that Linda had been left behind on site and without the claimant ensuring that everyone had left. She did not consider that the issues raised by Mr Forsyth made Linda an unreliable witness. The claimant also referred to an email in his possession about doors into the backyard being left open. It was put to Ms

Knell that this was a hygiene issue with which she agreed. The hearing was then adjourned for Ms Knell to consider her decision.

62. Her conclusion was that the claimant was guilty of allegations made against him.

63. She recognised that on 1 June the situation on the night was chaotic. Employees were concerned about whether it would be safe to work, despite the IPC having already been cleaned. Ms Knell told the tribunal that she understood the claimant's concerns about his and his wife's health and its possible impact on others. However, she noted that there had been a clean of the IPC area in the afternoon (she had not appreciated that it had been a light clean only) and there was going to be a deep clean on the evening. Any clean she considered mitigated the risk. Mr Wood had agreed that employees could go home if they wished, but there was no dispute that the claimant had decided that he would stay on site and work. The claimant had confirmed that prior to leaving, Mr Wood had given him instructions to complete a deep clean of the IPC and to report back to him. The aim was to enable production, which had been suspended for the night shift, to resume the following morning. The claimant was the most senior person on site after Mr Wood's departure.

64. The claimant had told her that he had not relied on the respondent's time and attendance system to determine who was on site as he considered that some of the previous shift had not clocked out and many of those who had chosen to stay for the night shift had not clocked in. The claimant, she concluded, did not have a definitive list of who was on site.

65. When the deep clean of the IPC had been completed, the claimant had authorised all remaining employees to leave. He confirmed to Ms Knell that he had done this verbally with Mr Chisholm and Mr Exley and via email to the remaining teams at around 3am. The claimant said that he had left the site himself and asked the security team to carry out additional walkarounds until the day shift arrived several hours later. She considered that the claimant did not follow up on his instructions to ensure that the message to leave had been received by all staff. Nor did he carry out a walkaround to check that everyone had left and that the site was secure and safe. At around 5am, Mr McCulley had found the employee, Linda, in Zeus on her own. The C6 production line was found to still be running and the fast action door was found to be open and not secure.

66. Ms Knell dealt firstly with the allegation of a serious breach of health and safety. The claimant had not checked all buildings prior to leaving, checked that no one was left on site or that the lines were made safe. The claimant had raised that it had never been the responsibility of the SOM to check site buildings. When asked who was responsible, if not him as the most senior manager on site, he said that he felt that his stopping to speak to security

was sufficient. The claimant said that a former site services manager had informed him that it had never been one of their actions to check the whole site in circumstances of a shutdown and no procedure for doing so existed. During Christmas shutdowns there was a practice of cascading information and the claimant said that he had done this by instructing the level of managers beneath him that he had authorised all employees to leave site. He believed this fulfilled his responsibilities and that the manufacturing team leaders ought to have cascaded instructions to the employees who were their direct reports.

67. Ms Knell accepted that there was no written procedure for the situation the claimant had been faced with, which was an unusual one. However, she said that there had been no agreement that the site would be left unattended, only that there would be a deep clean of the IPC. The claimant had had no prior discussion about closing the site – he had made the decision to do so. There was therefore a need to seek advice, but he had not done so and made all the decisions himself. She accepted that on the Christmas shutdown, the engineers turned the lines off and site services were present to check that all the doors were closed – this was a planned procedure. There had not been an unplanned ad hoc shutdown, certainly during the 2 years Ms Knell had been employed by the respondent at the time. However, she remained concerned that the claimant admitted that he did not know who was in the building but took no action to determine exactly who was on site and instead relied on cascading instructions via team leaders. With a planned shutdown everyone would have known when they were to leave (Ms Knell accepted that this would have occurred through a cascading of information, however) and therefore the need to contact everyone to tell them to go was unnecessary. That was not the situation here. She felt that, as the most senior manager on site, he had responsibility for that. She accepted in cross-examination that it was the responsibility of the claimant's direct reports to understand which of their reports were on site, but said that ultimate responsibility rested with the claimant as he had decided to close the site. Not having a reliable attendance sheet was not a good reason for not ensuring people had left site before he did. She considered that cascading information works where there was a level of validation to confirm that all persons within the cascade had been contacted. However, she did not consider that a one-way cascade was sufficient. Even if it had been the right approach, the claimant was responsible for ensuring that the managers who reported to him had left site, but he left site without knowing whether they had done so or not.

68. Indeed, she considered that the claimant had left site aware that others were still there. He had said that he had told security at the gate house that employees would be coming out after him and that Mr Lodhi was still working because Mr Exley was waiting to travel home with him. At this point Ms Knell considered that the claimant had no idea whether everyone else had left. As a result, she believed, of his failings one individual was left on site. She considered the evidence that had been produced by the claimant to suggest that Linda may have been hiding and might not have been found

even if the area where she had been was checked. She did not consider this to be relevant. She agreed however that Mr Steve Chisholm as an MTL knew that Linda and Adam had been working in Zeus. She would have expected Mr Chisholm to have told them that the site was closing, but the claimant had done nothing to check that everyone got the message The claimant had admitted that he had not undertaken a check or waited for line managers to report back from the cascade. It would have been enough for him to have done a properly validated cascade, Ms Knell considered. He had not, however, done one. Had he done one, it was her belief that it was more likely than not that Linda would not have been left alone on site.

69. As regards machinery being shut down, the claimant said that he presumed that the site had been shut down before he started work at 7pm, because Mr Wood had told everyone that there would be no production. No hand over to him had taken place. Ms Knell did not agree that there was no need for him to enter the factory and did not consider that it was reasonable for a person in his seniority to have left the site without satisfying himself that all areas, including the production lines in the factory, were safe. She believed from the claimant's own evidence that there had been a lack of clarity as to the state in which the factory was left due to the way in which the day shift had departed and the fact that the majority of the night shift had decided not to work their shift. C6 had been left running and she did not believe the claimant had taken adequate steps to ensure that the lines were safe. She disagreed in cross-examination that there was no serious health and safety risk. That was incorrect she said given the nature of the automated machinery on site – there had been, she thought, a risk of serious injury or death. She agreed that in fact no harm did result. She agreed that nothing was running in Zeus where Linda was cleaning rather than operating machines. She agreed that whilst Mr McConnell had found C6 to be running sometime before 7:00am, it was possible someone working a day shift could have switched it on prior to Mr McConnell's observation. However, she considered the statement given to Mr Vie of Pat Smith, hygiene supervisor, which in terms of timeline backed up Mr McConnell's statement about finding C6 running well before 7am. She felt there was no reason for him to lie about the wear he found on the bottles placed on the conveyor. She could not come to any conclusion that the claimant had walked past C6 on the evening shift. It was put to her that Mr Wood had accepted that the claimant would have had no reason to walk past C6. She agreed, but only in the context of the requirement to do a deep clean in IPC. He should still have checked the wider site. Ms Knell did not accept that on the basis of any route Mr McCulley might have taken, when going to the shift managers' office, that Mr McCulley would have heard C6 running. The tribunal has seen that this was a very lengthy belt running through a number of areas of the production hall, albeit at times at an elevated level. She did not expect that he would have heard it. She also was disappointed that, rather than admit that he had not checked the lines, the claimant had sought to challenge the exact wording of the allegation and debate the difference between the lines being energised and running. In any event, in the context of the site being left empty, all machines, she considered, ought to have

been unplugged. Nevertheless, she said she might have forgiven the claimant if at least none of the machines had been left working. Ms Knell did not believe that Mr Wood was to blame for all production not being shutdown – he had directed that production cease, not that the site be left and shut down. Mr Wood was not there at the time of the claimant's decision to leave the site and was not made aware of the claimant's decision. It was up to Shift Managers to manage the production lines. She understood why, in the circumstances, the day shift manager had not shut down all of the production machinery. Ms Knell did not consider that the MTLs, Ben Exley and Steve Chisholm were responsible for C6 that night as they were managing people in the IPC. She believed that the claimant had not done enough.

70. Ms Knell was clear that there had been a serious breach of health and safety which amounted to an act of gross misconduct as defined in the respondent's disciplinary policy. She considered whether the mitigation put forward justified a lesser sanction than a summary dismissal which would ordinarily apply in such a case. She told the tribunal that she took account of the claimant's length of service and clean disciplinary record as well as the lack of any written procedure covering this type of eventuality. However, she also had regard to the claimant's responsibilities in respect of health and safety, the fact that he was knowledgeable and the most senior person on site. She did not accept that his concerns about coronavirus infection explained why he had left the site without taking the time to check it first. She considered that the claimant had not expressed any remorse for his actions and not offered alternatives but rather had sought to deflect the blame onto others. She thought that showed a lack of understanding of the seriousness of what had taken place or that he was wilfully trying to excuse his poor judgement and was unable to take responsibility for his own decisions. She could find no reason to impose a lesser sanction and therefore took the decision to summarily dismiss the claimant in respect of this allegation.

71. The second allegation was of a serious breach of security in the claimant not having completed a site walk around in circumstances where the fast action door had been left open. She agreed that it was possible that Mr Lodhi had left the door open, but said that this was after the claimant had left site knowing Mr Lodhi was still there -having left before him, the claimant was unable to check that the site was secure. She agreed that there was a history of these doors failing, but again the claimant had failed to conduct any checks. Asking security to check the exterior of the building was inadequate. They would have noticed it if it was wide open, but not necessarily otherwise. Ms Knell agreed in cross-examination, that there had been prior occasions of doors being left open. On consideration, she agreed with the claimant that it was not possible to know when the door had been left open. However, it had not been sufficient to ask the gatehouse to undertake additional patrols. This request was unspecific and she was satisfied that a serious breach of security had taken place. She considered that this allegation also amounted to gross misconduct but that it was

appropriate for this specific allegation to issue a final written warning. She did this recognising that some of the issues the claimant had raised around the respondent's culture and site security had demonstrated past failings in this regard.

72. The third allegation related to leaving site without express permission. The claimant had told her that his only regret about leaving the site was that he had not done so at 8pm with the majority of the other employees. His position was that he had permission to leave because Mr Wood had given him his consent to leave at 8pm and this also applied if he chose to leave early several hours later after he had decided to stay on shift for a period and when he was the most senior employee on site. She did not accept this explanation. The evidence was that Mr Wood had decided to let people go whilst everyone was in the car park. The claimant had described then his own decision to authorise the team to leave early once the IPC clean had been completed. That meant it was not a continuation of the permission given to the claimant earlier in the shift. Once he had decided to remain on site, the authority for the team who remain on site lay with him directly. She did not believe that the timing of 3am was a valid reason for not contacting a senior manager in what was an unusual set of circumstances. He had had between 9.30pm – 3.30am to speak to someone. If there was any doubt about whether he could leave and he had not wished to contact anyone, he should have remained on site until the start of the following shift. She considered that the claimant had left site without express permission and this again amounted to an act of gross misconduct. There was no reason why consent could not have been obtained or why the claimant could not have delegated tasks to another member of the site. He had made no attempt to mitigate any of the consequences of leaving the site unmanned and she considered that he should have remained on site until the next shift was due to commence. However, she accepted that there was a lack of direction and support and the events of the evening were very unusual, such that a final written warning was the appropriate sanction for this aspect of the claimant's misconduct.

73. Ms Knell was referred to Mr Vie's report where it mentioned a mitigating factor being that it was not practicable for the claimant to speak to a member of the senior leadership team. She told the tribunal that she understood this to be a recording of the claimant's assertion, rather than Mr Vie expressing his own opinion. She accepted that she had not sought Mr Vie's clarification.

74. By letter of 3 December the claimant was invited to a disciplinary outcome meeting to take place the following day. The claimant's wife however contacted the respondent to say that the claimant would not be attending due to ill health, but that his colleague, Mr Patchett, who had been present during the earlier disciplinary hearings would attend on his behalf. When they met, Ms Knell, went through the outcome letter which had been typed up by Ms Gommersall from some handwritten notes following a discussion

between her and Ms Knell. Ms Knell confirmed that it was her decision and Ms Knell checked the letter before it was sent to ensure that it reflected their discussions. It was then sent to the claimant on 10 December with the right to appeal given.

75. Ms Knell rejected the suggestion in cross-examination that she had dismissed the claimant because the respondent wanted to get rid of him as he was not seen as someone who fitted in with the new leadership team.

76. Ms Knell spoke to Henry Butters, who was to hear any appeal to inform him of the dismissal outcome. From text messages of 4 December, it is clear that Ms Knell had met with him that day. She recalled telling him then that the outcome had been delivered, but said that on that day there was no discussion about any potential appeal.

77. The claimant submitted an appeal on 16 December and a hearing was arranged for 6 January which was attended by the claimant together again with Mr Patchett. Mr Butters chaired the hearing accompanied by Sarah Vie of HR. The claimant was asked to outline his grounds of appeal and said he had prepared a 13 page document which Mr Butters could go through or take away, consider and then reconvene the meeting. Mr Butters agreed to take the document away and consider it but asked the claimant to summarise his grounds. He confirmed he was unhappy with the outcome of the 2 allegations which had led to a final written warning, as well as that which led to his dismissal.

78. After the meeting, Mr Butters considered the points the claimant was making in mitigation. He noted that many of these had been raised with Ms Knell at the disciplinary stage. On 15 January 2021, the claimant was invited to attend a reconvened appeal hearing on 26 January. However, on that morning the claimant emailed Ms Vie to say he would not be attending because of heightened levels of anxiety. He asked instead that the appeal outcome be forwarded to him as soon as possible.

79. Mr Butters concluded that the disciplinary sanctions imposed by Ms Knell ought to be upheld. He set out his rationale in an outcome letter of 3 February. In coming to his conclusions, he was mindful that the claimant had not given him any reason to conclude that he would not do the same thing again in the same circumstances. There was no evidence that the claimant accepted responsibility. Instead, he had sought to argue that the respondent or other individuals were at fault. He considered the claimant's length of service and clean disciplinary record but had no confidence that the claimant would do things differently if presented with the same situation in the future.

80. The tribunal notes that it is accepted that the claimant's position was advertised before the appeal outcome was delivered. Mr Butters explained

that, had he made the decision to overturn the dismissal, all recruitment activity would have ceased immediately.

81. Mr Butters had only joined the respondent in January 2020. He denied in cross examination that the claimant had been a convenient scapegoat. Whilst accepting that there was pressure on the respondent to maintain output in the pandemic, he disagreed that this was his focus to the detriment of safety considerations.

82. Before the tribunal, the claimant accepted that once Mr Wood left site on 1 June, he was the most senior employee remaining and was responsible for the staff who stayed behind to work. It was put to him that if it was thought at the start of the shift that it was unclear who had been on site, this was something he needed to establish. He did not accept that this was his responsibility. He said that he knew that his 4 direct reports were at work i.e. Mr Exley and Mr Chisholm as Manufacturing Team Leaders, Mr Swatman, Engineering Team Leader and Mr Sheikh, Laboratory Team Leader. He expected them to know who of their own direct reports were on site. He agreed that other than having sight of screenshots of employees recorded as clocked in/out, he did not know who was present that night. He agreed that he had not directed his reports to establish who was on site saying that that was not an activity which would normally take place. When suggested that there was nothing standard about this shift, that he knew at the start that it was unclear who had remained and he did nothing to find out, he said that he did not feel he needed to because he had a team reporting to him responsible for that activity. He simply expected his direct reports to know who of their staff was there as he did with his own team. Given the presence discovered of Linda on site, he was asked if on reflection he felt he should have done more. He said that she had interacted with Mr Chisholm before being sent to the area where she was ultimately found. He agreed that he had not known that Adam Henderson had been on site until he had been told by Mr Chisholm. He confirmed that he believed that all of those on site were those photographed cleaning the IPC area as well as the separate laboratory and engineering workshop teams with their own team leaders.

83. The staff who reported to Mr Exley and Mr Chisholm had been those involved in the cleaning of the IPC area. As far as he believed, all of their reports on site had been asked to clean the IPC. When asked if he thought that any of their staff were doing any other work, he said there was a possibility and Mr Exley had mentioned earlier about sending people to clean various areas. He had then briefed the staff that they were to clean the IPC and he agreed he subsequently discovered that Mr Henderson had been found on site. He could not say whether it had been known by anyone that Mr Henderson had been on site. He didn't recall having ever seen him in the canteen. When asked if he could have taken register of who had been in the canteen, he said he was not sure if he had needed to. Again, he had

known who from his own direct reports were at work and expected that they would know their own staff. Describing hindsight is a wonderful thing, the claimant agreed that he could have taken a register.

84. When asked if the discovery of Mr Henderson elsewhere during the shift had rung any alarm bells, he responded “none whatsoever”. He did not accept that this ought to have rung any alarm bells. He repeated that he was responsible for his own 4 direct reports. It never been raised with him that anyone had been sent to a different area. He did not think that he had asked Mr Chisholm or anyone else to check if anyone else was elsewhere on site after the discovery of Mr Henderson.

85. The claimant said that he had subsequently come to understand that Adam and Linda had been told by team leaders to clean the usual area where they worked. Mr Henderson was, he said, the responsibly of Mr Chisholm and he himself did not need to establish where Adam Henderson had been and why. That was a responsibility he delegated to Mr Chisholm.

86. He confirmed that he had told Mr Chisholm and Mr Exley verbally to send staff home. He had telephoned Mr Swatman and Mr Sheikh with that instruction. The engineering workshop and laboratory were some distance away in a separate building to the IPC area. The claimant’s position was that he certainly had authority to make that decision. When put to him that, purely from a health and safety point of view, he ought at least to have sent a text to the senior management team, who would arrive on the day shift, to tell them what had happened, the claimant said that he had never claimed to be a master of health and safety. The claimant said that he had told the incoming Shift Operations Manager, Mr Andrew Holmes, that he was considering sending the shift home early.

87. As regards the way in which employees had been told to leave, he said that the responsibility for cascading information rested with each level of leadership. He cascaded the message to his own team and expected, as he felt was the standard way in any shutdown, that they would cascade the information to their own reports. When put to him that the system he adopted did not involve him checking if people had actually left, he said that that was the responsibility of each team leader - no one ever checked if he had left on a shutdown, so, if he had failed, then so had his own senior managers in the past. He agreed that he had not ensured that his own direct reports had left the site. Indeed, he knew, as he had told Ms Knell, that some people were still on site after he had left. He told the tribunal that he had told Mr Exley and Mr Chisholm that he was going to the security office on the way out. He was comfortable with Mr Exley remaining on site waiting for Mr Lodhi to complete his work. He agreed that he hadn’t told Mr Exley to ensure that everyone had left before he did. He said that he had done everything in the way he had acted in any other shutdown. If he had

done anything wrong, then he had been doing each shutdown previously incorrectly. He accepted then that this situation was different from a Christmas shutdown or an instance of a power cut. There had been no prior occasions during a night shift where he had decided to send everyone home.

88. It was put to him that it was more important to ensure that all doors were closed if there were no employees left on site from a safety and security perspective. The claimant said that his assessment was that he ought to ask security to do some extra tours around the site. He agreed that he had not given security any more specific instruction.

89. The claimant did not accept that leaving the conveyor belt C6 running could lead to any health and safety consequences. Mr Rushforth's view was that there was next to no chance of any safety risk caused by liquid potentially spilling out onto any electrics as the electrics were insulated, there were trays to catch spillages and the conveyor was periodically jet washed. On the other hand, Mr Rushforth said that ideally the belt should not have been left running – it would be consuming energy. The claimant agreed that he had not done anything to ensure that no machinery was left running. When put to him that before sending everyone home he should have himself or through his reports checked that nothing had been left running, he said that the assumption was that the only operations were around the IPC and that there was no need to go into the factories. All the IPC area had been shut down correctly. It was put that given the chaotic way in which the day shift ended, there was scope for machinery to have been left running. The claimant said that he did not know when everyone had left the factory during the day shift and did not know if the machines had been shut down. When put to him that he should have found out what the situation was, he said that the objective he had been given was to clean the IPC and once this was completed he made his decisions. He had no reason to go to the factory. On further discussion regarding potential safety risks of machinery being left running he said that, for instance, it was the responsibly of the security team to locate the position of any fire if the alarms went off. When put that he was in a position, if present, to more quickly identify where any hazard had occurred, he repeated that this was the responsibility of security. When raised that if the employee, Linda, had been hurt, it was far better for another employee to have been there for her, he agreed.

Applicable law

90. In a claim of unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct under Section 98(2)(b) of the Employment Rights Act 1996 ("ERA"). This is the reason relied upon by the respondent.

91. If the respondent shows a potentially fair reason for dismissal, the tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

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

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

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

92. Classically in cases of misconduct a tribunal will determine whether the employer genuinely believed in the employee's guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard.

93. The tribunal must not substitute its own view as to what sanction it would have imposed in particular circumstances. The tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

94. A dismissal, however, may be unfair if there has been a breach of procedure which the tribunal considers as sufficient to render the decision to dismiss unreasonable. The tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

95. If there is such a defect sufficient to render dismissal unfair, the tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142**, determine whether and, if so, to want degree of likelihood the employee would still have been dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

96. In addition, the tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the claimant and its contribution to his dismissal – ERA Section 123(6).

97. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any kind conduct on the employee's part that occurred prior to the dismissal. The assessment of conduct for these purposes is that of the tribunal on a balance of probabilities.

98. That applies also to the claim for damages for breach of contract. The tribunal must determine on the balance of probabilities whether the claimant committed conduct which was sufficiently serious so as to treat the contract as repudiated – was he in fundamental breach of contract?

99. Section 100(1) of the Employment Rights Act provides that:

> *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –*
>
> *….*
>
> *(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work*
>
> *(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."*

100. The test for "belief" is whether the claimant subjectively believed that the circumstances of danger existed and whether such belief was objectively reasonable, taking into account safety measures which had been implemented by the respondent. The tribunal has been referred by Ms Egan to **Rogers v Leeds Laser Cutting Ltd [2022] EAT 69** which confirmed that the coronavirus pandemic could give rise to circumstances of danger that the employee could reasonably believe to be serious and imminent. Each case, however, must be determined on its facts.

101. A test of causation must be satisfied. This section only renders the employer's action unlawful where that action was done because of the health and safety reason. In establishing the reason for dismissal, this requires the tribunal to determine the decision making process in the mind of the dismissing officer which in turn requires the tribunal to consider the employer's conscious and unconscious reason for acting as it did.

102. The issue of the burden of proof in (analogous) whistleblowing cases was considered in the case of **Maund v Penwith District Council 1984 ICR 143**. There it was said that the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that he or she is advancing. However, once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal. The Tribunal is not, however, obliged to draw such inferences as it would be in any complaint of unlawful discrimination. The same principles apply when the raising of a health and safety concern is put forward as the reason for dismissal.

103. This case also involves allegations that the Claimant has been subjected to detriments for health and safety reasons.

104. Section 44 of the 1996 Act provides that:-

"(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that –

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."

105. Again, the issue of causation is crucial. The Tribunal refers to the case of **NHS Manchester v Fecitt and others [2001] EWCA Civ 1190** and in particular the judgment of Elias LJ. His view was that section 47B will be infringed if (in that case) the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. He said:

*"Once an employer satisfies the Tribunal that he has acted for a particular reason – here, to remedy a dysfunctional situation – that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the Tribunal considers that the reason given is false (whether consciously or unconsciously) or that the Tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the **Igen** principles".*

106. Applying the legal principles to the facts as found, the tribunal reaches the conclusions set out below.

Conclusions

107. The tribunal considers firstly whether the claimant can rely on the protection afforded to employees where they hold a reasonable belief that there are circumstances of serious and imminent danger. Whilst the wording of the statutory provisions suggests that there have to be circumstances of danger, the authorities suggest the crucial question is the reasonableness of the individual employee's belief.

108. That, however, presupposes that the claimant actually had the necessary belief, in this case, when he took the decision to send staff home and leave site.

109. The tribunal has found that the respondent had put in place Covid safety measures of which the claimant was well aware, despite him not having viewed specific risk assessments. The claimant had remained on site for the express purpose of ensuring that the IPC underwent a deep clean so as to make the area, in which the employee who had tested positive, was Covid safe.

110. The claimant left site and released all those who had remained with him, because he believed that the task he had been asked to manage had been completed and that all reasonable steps had been taken to avert any future risk of danger from the prior presence of the employee who had tested positive for Covid. The claimant was clear when he sent the email attaching the photos of the staff who completed the task, shortly before leaving, that it was his hope that the factory could get started up on the return to work of the day shift. The claimant's view was that there had been an adequate clean to allow production to restart and that he had taken all steps he could to reduce the Covid risk. Mr Exley confirmed that the claimant had said that the day shift should be happy to come into work. Whilst Mr Wood considered in cross-examination that a factor, in his view, in the claimant deciding to leave early was safety, this was not, on the evidence, one of the claimant's considerations at the time. The claimant was clear that he was allowing everyone to leave as a reward and recognition for work done on that shift i.e. rendering it safe and ready for a return to normal working. On the facts, it cannot be said that the claimant proposed to avert the danger by ensuring a deep clean was undertaken first and then leaving the site. There was no such continuum. He considered he was averting the danger by ensuring the deep clean, but left because he considered his task to be completed rather than to minimise the risk to safety to himself or others.

111. It has been suggested that the respondent could have had policies in place which were more robust and which would have enhanced safety, including routinely carrying out more than a touch point clean (the type of clean conducted was not in the claimant's mind when commencing the nightshift) and requiring employees to leave site if they had symptoms or believed that they might have Covid, prior to testing positive. Regardless of any additional measures the respondent might have taken however, the claimant was not concerned that there was a risk to health and safety and certainly not circumstances of danger. It is not enough for there to be a general state of affairs of Covid being recognised as a serious and imminent threat to health or that the claimant took the risk of possible Covid infection seriously, not least given his wife's occupation. The tribunal accepts that he had those concerns.

112. Even at the commencement of the night shift, the claimant had been involved in seeking to reassure employees outside the factory that it was safe. The claimant did not have to stay at work to oversee the cleaning of the IPC once it had been determined that there would be no production on the night shift. He raised no concerns. At around 10pm the claimant spoke to both his wife and Mr Holmes and said that he was considering leaving early. Had there been a belief of serious and imminent danger, the claimant might have been expected to have said something in rather more forceful terms rather than just contemplating an early finish. He did not tell Mr Holmes why he was considering taking "an early dart". This was clearly a reference to knocking off early after doing a required task, not to an urgent need to remove himself and others from an unsafe workplace. He carried on at work for a number of hours thereafter and, again, made a decision to leave only at the point where he considered that the workplace was safe.

113. Clearly, had he not been suspended from work, the claimant would have returned to manage his next nightshift.

114. Had the claimant believed there to have been a serious and imminent risk of danger, that belief would not on the facts and conclusions have been objectively reasonable. A deep clean had been conducted of the IPC. The context was on the respondent already having in place significant measures to ensure a Covid safe environment, whilst recognising that the risk could never be eliminated and there would always be more which could have been done.

115. On the basis of these conclusions, the claimant's complaint of detrimental treatment for health and safety reasons and automatic unfair dismissal cannot succeed. In any event, had the tribunal reached the contrary conclusion as to the claimant's belief, the tribunal cannot, on the evidence, conclude that the claimant was suspended, investigated and subjected to a disciplinary process which led to final written

warnings for some allegations and his dismissal arising out of others on the grounds of his leaving site. It is insufficient that the claimant's leaving site formed the factual background to the allegations. Mr Wood was clear that he would not have suspended the claimant if he had just left the site early without letting him know in advance. His decision (and the scope of investigation) was precipitated by the additional information provided in Mr McCulley's email. Ms Knell and Mr Butters were both of the genuine view that the claimant ought to be disciplined/dismissed, not for leaving the site, whether or not he might have been regarded as leaving to protect himself or others, but for the way in which he left the site. They considered this to have been itself a serious breach of health and safety. The claimant could have left site early (and would have certainly remained in the respondent's employment) if he had taken what the respondent believed to be appropriate steps to check that staff were not left behind on site and that machinery was not running. He was not suspended, investigated or disciplined because of any steps he had taken which might have been protected under Sections 44(1)(d) and (e) of the 1996 Act. He was dismissed because of the health and safety risk he was considered as having created himself by failing to take appropriate steps before leaving. He was not dismissed simply because of leaving site early.

116. The tribunal turns now to the claim of ordinary unfair dismissal. The tribunal is satisfied that the claimant was dismissed for a reason relating to conduct. Ms Knell genuinely believed that the claimant had failed to take steps to ensure the safety and security of the site when he left and concluded that she no longer could have trust and confidence in him (not a new allegation, but an essential part of her assessment of the severity of the conduct), including in circumstances where she believed that he was failing to show insight and responsibility as regards his own actions.

117. The tribunal has no evidential basis for concluding that the claimant's dismissal was a pretext in circumstances where the respondent or certain of its managers did not get on with or rate the claimant. Mr Wood was open in accepting that there had been an initial clash with the claimant, but the tribunal accepts that their relationship had moved on more positively. The claimant created the circumstances which led to his dismissal and certainly Ms Knell did not treat them more seriously than she would ordinarily have done arising out of any antipathy towards the claimant.

118. There was in, all the circumstances, a reasonable investigation. Indeed, a significant number of relevant and potentially relevant witnesses were interviewed. The respondent was not elective. The tribunal does not consider the witnesses to have been questioned inappropriately or deliberately led by Mr Vie towards a conclusion he was actively seeking. Mr Vie has not given evidence to the tribunal, but

the way in which his investigation was conducted is clear from his report and the information upon which it was based. The claimant points to inconsistencies in the statements of witnesses, but the tribunal considers any discrepancies to be of the type which are inevitable when a number of witnesses are asked to give precise recollections, including exact timings, of past events. It is noted that Mr McNally of security did change his statement to reflect that he had not carried out an inspection at 2:30am. The individual security officer who had conducted that inspection, Waqqas, was not interviewed, but the tribunal does not consider that failing to be sufficient to render dismissal unfair. Certainly, any evidence about that final inspection he undertook preceded the claimant's decision to leave site. Mr McCulley could not be exact regarding the time at which he discovered the C6 conveyor to still be running. There was a lack of exactitude regarding the time at which Linda was discovered. There was no enquiry as to whether Linda had been told to leave the site, but no evidence pointed to that being the case. The respondent did not act unreasonably in not investigating or reopening the investigation to look at Linda's domestic circumstances and whether she might have had a motivation to stay "hidden" on site on the night in question. The claimant had provided no first hand and/or reliable evidence as to what Linda had done that evening and why. It was not a matter within his knowledge. Ms Knell's decision-making was not flawed by her lack of appreciation that there had been a light clean only of the IPC before the commencement of the nightshift. The claimant was tasked with overseeing a deep clean from the commencement of that shift in any event.

119. There were then reasonable grounds for Ms Knell's conclusions. For the reasons she explained in the dismissal outcome letter and in her evidence before the tribunal, there was a reasonable basis for her concluding that the claimant had failed in the duties he owed to the respondent as the holder of a senior position and the most senior position on the nightshift in question.

120. There was no dispute that the claimant had not checked all of the buildings prior to leaving site. He had not checked if there was anyone left on site and indeed had left knowing that some staff remained on site and working. He had not checked that there were no machines in operation.

121. She was reasonable in considering that the claimant was unwilling to recognise and accept his personal responsibility and that he instead sought to highlight blame which he believed ought to have been attached to his subordinate managers. Whilst the events of 1 June were exceptional, with no procedures in place to deal with such a situation and with, certainly at the commencement of the shift, an atmosphere of some chaos, she reasonably concluded that the claimant had failed to understand that it was essential to ensure that the site was safe prior to

leaving and to take steps to guarantee that so far as possible. She reasonably concluded that the claimant could not have been sure either as to who was on site or the state in which the factory had been left in terms of operational machinery by the hastily departing day shift, certainly in the absence of the type of handover which would normally have occurred. The claimant did not show an interest in ascertaining either and she reasonably concluded that he had put no system in place to validate any checks having been carried out. There was no follow-up to ensure that information had been relayed to all operatives, including in circumstances where it was known that people had appeared on site unexpectedly during the course of the nightshift – Adam Henderson in the canteen, for instance. The claimant was reasonably concluded to be unconcerned that he knew he was leaving with, at the very least, Mr Lohdi still concluding his forklift truck driving duties before travelling home with Mr Exley. She reasonably concluded that he did not have any appreciation of him bearing the ultimate responsibility.

122. Whilst Mr Wood in cross-examination suggested that the claimant would not have entered the production areas, Ms Knell was not unreasonable in expecting the claimant to have taken responsibility to satisfy himself that the lines were left in a safe state, not least again in the aforementioned circumstances in which the day shift had left. The evidence reasonably pointed to the belt having been left running all night with it unlikely, given the likely timing of its discovery and the signs of wear on the plastic bottles, for it to have been switched on by the incoming day shift. Whilst recognising that there had not been an incident as a result of C6 being left running, she reasonably concluded that not checking the site meant that the claimant left without knowing whether any lines were running, which could have exposed the respondent to risk of more serious harm. The tribunal notes that the plastic bottles left on the conveyor line running beneath showed wear and that the liquid contents might therefore have spilled out. Ms Knell was mindful of that. Whilst Mr Rushforth dismisses that as being no risk at all, the tribunal considers such assertion to be surprising (it cannot have been a desirable state of affairs) and certainly that Ms Knell's conclusion as to potential risk was not unreasonable.

123. In the event of planned shutdowns, it had not been the role of an SOM to personally check all buildings, but this was an exceptional situation. Ms Knell reasonably concluded that the claimant ought to have understood what was reasonably required of a person with his responsibility. It was clear that the type of audit process which would have been conducted in the case of a planned shutdown would not be in place on this night. The claimant could not reasonably make assumptions that a cascading process would be effective (not least given the lack of certainty as to who was on site) and took no steps to ensure that it had been conducted. Mr Wood was, during the investigation process, unclear as to the rules for leaving site or locking up, but again the circumstances the claimant found himself in were

unique and Ms Knell reasonably expected him to exercise appropriate decision-making.

124. The claimant overstates the role and responsibility of the security firm which was in place with the primary responsibility of ensuring the security of the perimeter area, not what was happening inside the buildings.

125. There may have been failings of others in connection with Linda and indeed Adam Henderson's whereabouts on the shift in question, but that did not reasonably cause Ms Knell to dismiss the charges against the claimant. Nor indeed is it accurate to suggest that representatives of the logistics company, Ceva, and Banisters were on site or were assuming any responsibility. The fact that someone working on the day shift might have taken responsibility for shutting down the C6 conveyor, again did not reasonably absolve the claimant of responsibility. The claimant might not have typically have gone into that area during the nightshift, but again this was not a typical situation and he knew that the site had been left in a state of chaos and without a handover. He knew he was now intending to leave the site unattended

126. Just because Linda had not been the only person on site until sometime around 3:30am did not mean that she had not been effectively alone in what was a very large site and in any event the evidence was that she had been on her own from around that time.

127. Linda was a new and inexperienced member of staff with limited capabilities and experience. It is inaccurate to suggest otherwise.

128. The claimant's dismissal is then said to be unfair for procedural failings. The claimant maintains that the disciplinary process was flawed in that he was unfit to fully participate in it. The tribunal has noted the various postponements of the disciplinary hearing due to the claimant's ill-health. Certainly, but understandably, the respondent wanted to progress the matter, but it did not proceed without regard to the claimant's state of health. Indeed, the respondent had been advised by occupational health that any undue delay would exacerbate the claimant's health issues and had been notified that, whilst the claimant was unfit to attend work, he could attend a meeting. There was clearly believed by occupational health to be a need to resolve the claimant's employment situation before he would be able to regain full fitness. It was recognised that the claimant's health might improve with counselling. By the point of the claimant's disciplinary hearing on 13 November, he had attended 4 counselling sessions. Whilst there is no evidence the respondent delayed matters to allow the counselling, the claimant had as a matter-of-fact received treatment which it was hoped might assist him prior to answering the allegations against him. The

disciplinary hearing commenced on 13 November but was adjourned and continued firstly on 18 and then concluded, save for the decision making, on 24 November. The claimant was offered the opportunity to take breaks and there were discussions regarding the claimant's health. Whilst it is appreciated that answering live questions might be a more stressful experience, the claimant had been able to rationalise his thoughts in written submissions, including grievances he raised. He fully participated in the disciplinary process and was able to put forward his case. He was accompanied by a colleague.

129. The grievances raised by the claimant did relate to the disciplinary process and it was not unreasonable for Ms Knell not to commence a separate grievance process to be determined prior to (and thus pausing) the conclusion of the claimant's disciplinary case. The grievances were related to the disciplinary issues and how they had been pursued against the claimant. Any lack of detail in the dismissal outcome letter behind the conclusions reached on the claimant's grievances, does not render the decision to terminate his employment unreasonable.

130. The respondent agreed not to rely on the statement of Mr Henderson which had been omitted from the disclosure of information to the claimant prior to the disciplinary hearing.

131. There is no evidence but that Ms knell was open to reach whatever conclusion she believed to be appropriate. There was nothing improper in the involvement of the HR representative who attended the disciplinary hearing drafting the decision letter. It did represent Ms Knell's decision. The claimant was able to put forward a detailed appeal document which was properly considered by Mr Butters and in circumstances where again the tribunal has no evidence upon which it could conclude that Mr Butters had been involved in the process at an earlier stage. There is no evidence that he discussed Ms Knell's decision to dismiss the claimant either before it was taken or indeed shortly thereafter in any detail. It was properly reported to him that the claimant was no longer in the respondent's employment – something he needed to be aware of at the earliest point in time so that the respondent's operations could be appropriately managed.

132. The tribunal does not consider any pre-judgement to be evidenced by the claimant's role being advertised prior to the conclusion of the appeal process. The tribunal accepts that there was an imperative to seek to obtain a replacement for the claimant in circumstances where he had been suddenly dismissed. Had the claimant been reinstated on appeal, then no steps had been taken which would have prevented the cessation of the recruitment process,

133. The tribunal has not been able to identify any unreasonable failure to comply with the ACAS Code of Practice on Disciplinary Procedures. This was not a procedurally unfair dismissal.

134. The question is then whether Ms Knell acted within a band of reasonable responses in terminating the claimant's employment for the failure to take responsibly and carry out his duties as she found they reasonably ought to have been. The tribunal has found that she took into account the claimant's length of service and clean disciplinary record as well as the state of chaos at the commencement of the shift, the lack of a written procedures covering emergency shutdowns and, indeed, the pressure that the claimant may have felt he was under to leave arising out of his telephone conversation with his wife. On the other hand, she considered the expectations of the claimant in his senior role, a role in which he was experienced and where he would habitually be the most senior employee on site during his shift. She considered that his decision to leave without ensuring site safety was a serious failing to exercise appropriate judgement. The claimant did demonstrate a lack of regret and had in the disciplinary process sought to deflect responsibility on to his subordinate managers which caused Ms Knell to have doubt that the claimant had learnt anything from the events of 1 June 2020.

135. Her treatment of the other allegations for which the claimant was given a final written warning is demonstrative of her taking care to differentiate between the actions of the claimant and that she took care to assess the blameworthiness of the claimant's individual failings.

136. In submissions it is suggested that there was a disparity of treatment between the claimant's and the individual who had attended work whilst sufficiently concerned that he might have had Covid to have taken a test. However, his and the claimant's situations are not at all comparable.

137. In all the circumstances, dismissal must fall within the band of reasonable responses. The claimant's complaint of unfair dismissal fails.

138. The tribunal then turns to the separate breach of contract claim where it has to determine for itself whether the claimant was in fundamental breach of his contract of employment. Ultimately, the tribunal agrees with the conclusions which Ms Knell reached at that time. The claimant did act in a wilful manner in the sense that his decisions were deliberate. Whilst they may be categorised as errors of judgement, they were nevertheless of a most potentially serious nature. The claimant left a huge industrial complex without taking steps to satisfy himself that it was safe in terms of the people there and the activities

continuing. He was the most senior employee on site and with the ability to assess the situation and make the best decisions. Before the tribunal, his failure to appreciate the seniority of his position and the responsibility that entailed was quite stark. He left the site on 2 June without the care and concern which any employer in the respondent's position would reasonably expect him to show. The risk to health and safety by leaving the site in this manner was significant and his failing of a fundamental nature entitling the respondent to dismiss him without notice. The claimant was not wrongfully dismissed.

Employment Judge Maidment

Date 26 July 2022