EMPLOYMENT TRIBUNALS

Claimant: Mr M Benson

Respondent: Samworth Brothers Limited Trading as Samworth Brothers Supply Chain

Heard at: Leicester Employment Tribunal

On: 8 and 9 August 2022

Before: Employment Judge Rachel Broughton sitting alone

Representatives

Claimant: Mr Bidnell- Edwards - counsel
Respondent: Mr Finley – solicitor

RESERVED JUDGMENT WITH REASONS

The judgment of the Tribunal is that:

1. The claim of unfair dismissal pursuant to section 94 and 98 ERA is well founded and succeeds subject to a reduction in the basic and compensatory award of **70%** for contributory fault. There is no Polkey reduction.

2. The claim for wrongful dismissal is **not** well founded and is dismissed.

THE REASONS

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Background

1. The Claimant was employed by the Respondent from 3 September 2017 until 20 December 2021 as a Warehouse Operative at its Oak Meadow, Leicester Distribution Park ('Site'). It is not in dispute that he was dismissed by the Respondent.

2. The Claimant's role involved 'picking', which essentially involves locating products stored in the warehouse and loading them ready for delivery to the customer. The Claimant loaded goods with the use of various vehicles including powered pallet trucks (PPT's) to move palletised stock around the Site.

3. The Claimant started the ACAS early conciliation process on the 27 January 2022 The ACAS certificate was issued on 17 February 2022. The claim was presented

to the Employment Tribunal on the 30 March 2022. There is no issue with time limits.

Issues

4. The issues to be determined in this case are as follows:

1. ***Unfair dismissal***

1.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was conduct.

1.2 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses?

Remedy for unfair dismissal

1.3 If the Claimant was unfairly dismissed and the remedy is compensation:

1.3.1 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed: Polkey v AE Dayton Services Ltd [1987] UKHL 8;

1.3.2 would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

1.3.3 did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)

2. ***Wrongful dismissal / Notice pay***

2.1 The Claimant's notice period was 4 weeks.

2.2 The Claimant was not paid for the notice period; was the Claimant responsible for a repudiatory breach of his contract of employment?

Summary of the claim

5. On 14 December 2021, the Claimant was moving stock using a PPT and when reversing the PPT, it collided with his supervisor, Mr Glyn Slater who was walking across the warehouse on foot.The skid plate of the PPT went over Mr Slater's feet causing him to fall. Mr Slater suffered some fairly minor injuries including bruising and swelling to his feet and some grazing to his elbow and minor damage to his thigh from the fall.

6. The Claimant was charged with an allegation of gross misconduct, namely serious negligence. Following a disciplinary hearing, he was dismissed summarily. The Claimant complains that dismissal was unfair essentially because he disputes that

he was solely responsible for the accident, considers the penalty to be outside the band of reasonable responses and compares his treatment with the lesser sanction other colleagues received for similar offences.

Evidence

7. The Tribunal was assisted by an agreed bundle of 280 documents. The Tribunal also viewed video footage of the incident of the 14 December 2021, with the agreement of both parties. The same video footage was also played to the witnesses at various times during cross examination.

8. The Claimant produced a witness statement, gave evidence under oath and was cross examined.

9. The Respondent produced witness statements for Mr Kurt Henney, Warehouse Shift Manager and disciplining officer and Mr Maude, General Manager of the distribution business and appeal officer. Both witnesses gave evidence under oath and were cross examined.

10. There was a preliminary discussion about a document the Respondent had produced (p.163 – 172) listing dates and names of those who had a saliva and breath test carried out by the Respondent between 25 January 2019 and 23 February 2022. During an adjournment the Claimant was shown an unredacted copy with the names of each employee included and on reviewing that confirmed that the Claimant did not consider it necessary for the unredacted copy of the document to be added within the bundle. The accuracy of the document was not contested.

Findings of fact

11. All findings of fact are based on a balance of probabilities. All the evidence has been considered however, this judgment sets out the evidence the Tribunal considers relevant to the determination of the issues. References to numbers are to pages within the agreed bundle.

Contract of employment

12. The Claimant's contract of employment (p.41 -52) provides at paragraph 19 as follows.

> *"You are reminded of your duty under the Health & Safety at Work Act etc. 1974 to comply with our policy and any departmental procedures or rules which may be brought to your attention; to take reasonable care to avoid injury to yourself and others; to report officially all accidents and hazards; to use safety equipment provided for your protection and to co-operate with management in meeting statutory requirements."*

13. Paragraph 23 refers to the disciplinary policy and provides at paragraph 23.2 that it does not form part of the contract of employment.

14. Paragraph 28 provides that the Claimant's notice period is 1 week for each completed year of continuous employment subject to a maximum of 12 weeks' notice. The Claimant had accrued 4 full years' service as at the termination date and thus was entitled to 4 weeks' notice under his contract of employment. Paragraph 28.2 however provides that if dismissed summarily the Claimant will not receive notice of termination.

Disciplinary policy

15. The disciplinary policy provides at paragraph 7.1.4 as follows (p.55 – 62) .

"A colleague does not normally have the right to be accompanied at an investigative interview. However, the Company may allow a companion if it helps to overcome a disability or any difficulty in understanding English."

16. Paragraph 7.1.15 sets out examples of gross misconduct and includes:
    - *"Serious negligence which causes or might cause unacceptable loss, damage or injury…*
    - *Serious infringement of health and safety rules…*
    - *Serious breach of any other company policies and procedures*."

17. The Respondent has policies on Safe Systems of Work (SSOW) in the warehouse. The SSOW set out the responsibilities of those involved in the operation of PPTs . For warehouse operatives, the SSOW specifically provides as follows (p.63):

"Warehouse operatives are responsible for:

- *Complying with this safe system at all times*
- *Applying the rules specified in General Operating Instructions below…"".*

18. The General Operating Instructions which apply to the warehouse and use of PPTs (p. 63 – 65) and which the Claimant does not dispute he was aware of and understood he had to comply with, includes as follows:

"The following rules are to be applied at all times during the use of PPTs.

PPT operators should ***always:***

- ***Give pedestrians right of way***
- ***Maintain vigilant observation of the working areas and others in it.***
- ***Check the direction of travel is clear before moving off****.*
- *Watch out for obstructions.*
- *…*
- *Use the horn to warn others where necessary…*

Tribunal stress

19. It is common between the parties that the Claimant had been fully trained and understood the relevant SSOW and General Operating Instructions.

Past Incident involving the Claimant in January 2019

20. The Claimant complains that the sanction of dismissal was applied to him because the Respondent viewed him unfavourably following an incident in January 2019. The Claimant, it is alleged, became what counsel for the Claimant describes as a 'Jonah' figure, a person deemed to cause or have bad luck and that this perception of him explains the inconsistent treatment and disproportionate penalty that was applied.

21. In January 2019, a supervisor, Mr Gibbens had asked the Claimant and a colleague, Mr Palmer to load bread onto a trailer. The Claimant had to shrink wrap over 20 dolly's together to 'rush out the trailers'. His undisputed evidence is that this system has since been deemed to be unsafe and has been changed. While

carrying this out, the Claimant fell through a gap between the trailer and the bay because the trailer had been placed in the bay incorrectly . The Claimant's undisputed evidence is that the accident was not his fault. Mr Maude under cross examination confirmed that the Respondent had accepted responsibility for the accident and the injuries the Claimant sustained.

Shift change : September 2021

22. Mr Henney is a Warehouse Shift Manager responsible for the day to day running of the warehouse along with fellow Warehouse Shift Manager, Ian Hemsley. The two Shift Managers cover the warehouse on a rota, working a 'four on four off' shift pattern . Mt Henney's line manager is Mr Glyn Maude. Four team leaders report into three supervisors who in turn report into the Warehouse Shift Managers.

23. It is not in dispute that on the 22 September 2021, the Claimant made a request to change his shift pattern from 4 October 2021. This was a change to the days that he worked although he continued to work the same hours and the same number of days per week (4 days) . This request was granted. The evidence of Mr Henney which was not disputed, is that the Claimant was also allowed to leave work early to attend medical appointments. Mr Henney puts forward these examples of how the Claimant's requests were accommodated, to illustrate that there was no unfavourable perception or treatment of the Claimant following the incident in January 2019.

24. Mr Henney was the Shift Manager on shift when the 14 December 2021 incident took place.

The warehouse

25. The Tribunal now turn to the events of the 14 December 2021.

26. The bundle contained a number of maps of the warehouse. The relevant area we are concerned with houses loading bays starting at number 20 which are located along the back wall of the warehouse. Mr Slater's desk was located to the left hand side of bay 20. Directly in front of the loading bays is an area running horizontal, which is the loading area, and in front of the loading area are the marshalling lanes (areas where the pallets are placed for loading). In front of the marshalling lanes is a pedestrian walkway marked in blue to indicate that it is not protected by Armco safety barriers and is a shared area. The blue footpath changes on the map to an orange/yellow walkway at around bay 35/36. The orange/yellow line on the map indicates that this part of the walkway is protected by safety barriers.

27. Bay 41 /43 onwards can be accessed from Mr Slater's desk either by walking across the loading area in front of the marshalling lanes (where vehicles including PPTs are loading the pallets) or by walking around the perimeter of the marshalling lanes using the blue and orange walkways.

28. The walkways do not allow direct access to each loading bay. To reach the loading bays from the walkways, a person would need to still walk across the loading areas. However, the distance from the walkway to the loading bays reduces from about bay 41/43 onwards.(There are references in the documents and statements to Mr Slater on the 14 December 2021, having to get to bay 41 or 43 to close it. The Claimant in his first interview mentions bay 41 while Mr Slater mentions in his interview, having to get to bay 43. It is common between the

parties that it does not make any difference to the issues to be determined, whether it was bay 41 or 43).

29. As can be clearly seen on the CCTV footage, Mr Slater on the 14 December, did not use the walkways, he walked across the loading area in front of the marshalling lanes from bay 20 to get to bay 41/43. The Claimant was loading into bay 20 at the time.

30. Mr Henney gave evidence that in his role, he would visit this area where the Claimant had been working on the 14 December 2021, multiple times a day and that the walkways are designed for none operational staff such as visitors to walk safely around the warehouse. A considerable amount of time was taken up by counsel for the Claimant in cross examination about the relative safety of the walkways, and whether it was a breach of the SSOW for Mr Slater to have walked across the loading bays rather than use the walkways.

31. Mr Henney's evidence is that it would not be reasonably practicable for Mr Slater as a supervisor of an operational area to use the designated walkways because the managers and team leaders have to manage a team of 5 people who are operating in that area . Mr Henney accepted in response to a question put to him by the Tribunal, that it would have been safer for Mr Slater to use the walkways but his position is that it would not have been practicable for him to have done so while carrying out his operational duties.

32. That the usual practice is for the managers and team leaders to access the various areas in the warehouse by walking across the loading areas rather than around the perimeter walkways, the Tribunal find is supported by the Claimant's own evidence. The Claimant under cross examination accepted that he had expected Mr Slater to get up from his desk at any point and go to the bay which needed closing and to do so quickly. When asked what the Claimant's expectations were about the route Mr Slater would take on 14 December, to bay 41/43, and whether this was across the loading bay area, his evidence was.

" *yes, he probably would have gone that way"*

33. Mr Henney gave evidence that for Mr Slater to have accessed bay 41/43 on the 14 December 2021, he would have had to use a walkway that had gates at the end, the implication being that it would take even longer to use the walkway as an alternative route, The Claimant gave evidence that the gates had not been in place at that time and Mr Maude was unsure whether they were or not. The Tribunal is not satisfied on the evidence, that the Respondent has established that there were gates in place at the time of the incident. The Tribunal is satisfied on the evidence, that the walkways were not without some risk, parts of them could still be accessed by drivers. The relevant walkway would have ended, according to the plan presented to the Tribunal, close to the bay where Mr Slater was walking to.

34. It is the Tribunal find, common sense that using designated pedestrian walkways is likely to be safer than walking across marshalling lanes when in use; hence why visitors are required to use the walkways. However, the Tribunal also find that it was normal practice for the supervisors who were responsible for the day to day running of the warehouse, to be present and walking around the loading bay areas. There is no specific SSOW which expressly prohibits this and that this was the most practicable way to supervise what was happening in the warehouse, was the evidence of Mr Henney and Mr Maude in his evidence and is on balance accepted by the Tribunal.

Investigation

35. Following the incident on the 14 December 2021 (at about 8:50am), an Accident Record was prepared (p.68) by the transport shift manager, Samantha Ingram. This recorded that the accident happened outside bay 21 – 22. There is no dispute that the record accurately reports the injuries sustained by Mr Slater. Photographs of the injuries were taken (p.68a – 68L) which were sent to Ian Hemsley.

Interview with Claimant

36. Michelle Lowe, a supervisor then met with the Claimant on 14 December 2021 at 10:45, a couple of hours after the accident (p.98). The Claimant did not have a representative, however counsel for the Claimant accepted during the hearing that the Respondent's policies do not provide for the right to a companion at this stage and nor does the ACAS guide.

37. During this first interview, the Claimant referred to seeing Mr Slater in his 'peripheral vision'. That a colleague (Mick) was calling for Mr Slater to go and close down the door on bay 41 and that one minute Mr Slater was at this desk and the next he was behind the Claimant; " *I believe he was dashing to bay 41 to close it down".*

38. The Claimant does not dispute the accuracy of the notes of this interview.

39. The Claimant described how that morning he had also had to avoid the cleaner working in that area and goes on to complain that; " *This is becoming a bigger issue as so much of the time more and more people on foot in the areas between the marshalled pallets and bays…".* The Claimant was clearly therefore the Tribunal find, aware that others were working in that area on foot, reinforcing the risk of driving in that area and the need to remain vigilant.

40. The Claimant explained how he had gone to get a first aider and tried to contact someone on his radio to attend to Mr Slater.

41. The Claimant had not by the time of this first interview, viewed the CCTV footage. The notes record him making statements that (P.98):

    41.1 He did all round checks before moving the pallets on the PPT
    41.2 That he had looked in the direction of travel when driving the PPT
    41.3 That he had followed the correct procedures; " *Been looking around me all the time. Last thing I expected was a supervisor to dash out of nowhere behind the truck."*

42. The Claimant in cross examination accepted that the SSOW provides that pedestrians have the right of way and that Mr Slater was a pedestrian. His evidence is that when marshalling lanes are full, the loading area is where he has to turn the PPT, which is where he was heading for when he hit Mr Slater. He is seen to be driving backwards in an arc shape to turn the PPT around so that he would be facing forward when entering the loading bay.

43. Under cross examination however the Claimant maintained that even if he had looked around, because he is right handed, he would have had to drive with his head to the left to have seen Mr Slater, which would have been difficult to do. He maintains that had he looked over his right shoulder, which he would have done

because he is right handed, he would not have seen him in any event. He conceded however under cross examination that vigilant observation (as required by the General Operating Instructions) would have meant moving his eyes around (not just looking over his shoulder to the right) . His evidence is also that he was looking at the pallets in the marshalling lane at the side of him, to make sure he did not hit them because a collision would result in a disciplinary sanction. That however was not the only possible hazard the Tribunal accept, that he was required to look for.

44. The Claimant accepted under cross examination that he did not look in his direction of travel as required by the SSOW before moving off . He accepted that pedestrians have the right of way and he did not maintain vigilant observation when he pulled off; "*not at that moment in time*". This is obvious the Tribunal find, from the CCTV footage.

Michelle Lowe- Interview with Mr Slater

45. Ms Lowe then met with Mr Slater on 14 December 2021 (p.100 – 101).

46. Mr Slater explained that he was walking towards bay 43 to shut it when he was hit by the Claimant's PPT. He states he did not hear a horn sound, that he was walking in an open space where he believed the vision of him would be clear. Mr Slater confirmed that he was on the floor and the Claimant stopped and went to find a first aider.

47. Mr Slater was not asked about how observant he had personally been in terms of checking where people were who were working in the area, whether he had known the Claimant was operating the PPT in that area at the time and whether and to what extent he had checked where the Claimant was at the time he was crossing the loading bay. The interview with him is brief (10 minutes)

Incident log

48. The Respondent has a computerised incident log, which is updated during the process of an investigation. In the comments section it records Michelle Lowe on 14 December 2021 noting the following:

"Although Glyn carried on working both on the day of the accident and all relevant days required up to Christmas, this was a very severe incident which has triggered our internal disciplinary investigation. Furthermore Glyn had to walk to the warehouse office to ask for first aid assessment and treatment which was totally unacceptable and showed a true lack of empathy from Martin at the time of the accident."

49. Neither Mr Henney nor Mr Maude could explain why Ms Lowe made the comment about the Claimant's actions showing no empathy, given that Mr Slater had accepted that the Claimant had left to find a first aider and the Claimant's evidence was consistent with that. Mr Maude agreed that the comment Mr Lowe made about the Claimant was negative but in isolation did not accept that it ' looked suspicious.

Investigation interviews – David Gibbens

50. Further interviews took place with another supervisor, David Gibbens, on 15 December 2021.Mr Gibbens met with the Claimant on 15 December 2021 (p.102 -

104). Mr Gibbens had viewed the CCTV footage and the Claimant viewed it himself during the course of that meeting.

51. When asked whether the Claimant had sounded the horn, the Claimant was not definitive but stated that he thought he had. The footage does not include audio and therefore was of no assistance in clarifying whether he had or not. Mr Slater's evidence was that he had not heard a horn.

52. It was put to the Claimant that it looked from the CCTV footage as if he had not looked around. The Claimant confirmed that he knew that Mr Slater was being called to bay 41 but stated that Mr Slater should have followed the walkways (the pedestrian walkways) and had he done so, the accident would not have happened.

53. Mr Gibbens is recorded in the notes as ending the meeting by informing the Claimant that it will be forwarded to a disciplinary; "*because is classed as a gross misconduct" [sic].*

54. The Claimant alleged in cross examination that the decision was made to dismiss him on 15 December 2021 (p.104) when Mr Gibbens had decided that it was a gross misconduct offence . However, under cross examination the Claimant accepted that not to comply with the SSOW was a serious infringement of Health and Safety rules, amounts to serious negligence and may cause serious injury or a fatality. It is nonetheless alleged by the Claimant that identifying the offence as gross misconduct at this stage suggests that the outcome was predetermined.

55. No other individuals were interviewed. The only interviews were therefore those two with the Claimant and the one interview from Mr Slater.

Incident Report

56. The incident report which was prepared and which Mr Henney included the following comments (p. 70 – 72);

"Martin completely ignored his training and the safety of his fellow colleagues by driving his PPT without doing any visual checks which was confirmed on CCTV. Due to this we will be sending this to a disciplinary under gross misconduct.

CCTV has been reviewed. Martin Benson picked pallets up on PPT and reversed backwards. At no point did he do all round checks and was not looking in direction of travel. Glyn was in clear view from when Martin started to reverse had he have conducted all round checks before moving. There was 7 seconds from when Martin started driving to when he struck Glyn Slater with the PPT."

57. The investigation report referred to the *"root cause"* of the incident being "*Reckless behaviour"* and "*Driver Error*". Again it is alleged that this description of the cause of the incident suggests that the outcome was predetermined and there was no consideration of the extent to which Mr Slater may have been at fault.

Accident Coding by the Health and Safety team

58. There is a separate incident log where all the incidents are recorded, there is a brief description of them and they are given a coding to denote how serious they are, from red to green.

59. The unchallenged evidence of Mr Maude which the Tribunal accepts, is that the incident log from the internal incident reporting system would have been viewed by the Health and Safety team when they coded the incident . Mr Maude was not sure when the coding would have been done, he believed it would have been after the initial investigation. Mr Henney's undisputed evidence which the Tribunal accept, is that when the supervisors and managers complete the incident report, they report all incidents as green and it the incident is then categorised by the Health and Safety team without any discussion with the supervisors or managers . The Health and Safety team therefore decide whether to re-categorise it.

Invitation to disciplinary letter

60. The Claimant was invited to a disciplinary hearing by letter of 15 December 2021 (p.105) sent from Mfon Etim, People Partner.

61. It was put to Mr Henney that the wording of the letter indicated predetermination because it refers to an "*allegation"* of gross misconduct. Mr Henney denied this.

62. The letter does not include the details of what it is alleged the Claimant had done or failed to do (i.e. whether he had failed to maintain vigilant observation, sound his horn etc), which amounted to gross misconduct. It refers to the 'relevant investigation' and that his action in general terms, is considered to be ; "*serious negligence which caused or had the potential to cause unacceptable loss, damage or injury".*

63. It is not disputed by the Claimant however that he was well aware that the disciplinary hearing related to the incident on the 14 November 2021 and his operation of the PPT. The Tribunal consider it relevant however to the issue of fairness, that he was an experienced, trained driver and by this stage had seen the CCTV footage recording his driving and the resulting incident.

Disciplinary : 20 December 2021

64. The hearing was conducted by Mr Henney, with Ms Mantine, People Advisor present as notetaker.

65. Mr Henney's undisputed evidence is that he had seen the notes of the interviews undertaken with Mr Slater and the Claimant and the CCTV footage prior to the hearing.

66. Mr Henney gave evidence under cross examination that the incident report (p.70 - 77) was part of the pack of documents that he was given and reviewed before the hearing but then later on reviewing the documents, gave evidence under cross examination that he had been mistaken and had not seen those prior to the disciplinary hearing. The documents sent to the Claimant by Mfon Etim, prior to the disciplinary hearing do not include the incident report (p.106). There is no reference to the Incident Log by Mr Henney in the hearing or in his outcome letter and the Tribunal accept on balance, the evidence of Mr Henney that he did not have or review a copy of the incident report prior to the disciplinary hearing.

67. Mr Henney also gave undisputed evidence which the Tribunal accept, that he did not speak to Mr Helmsley about the incident before the disciplinary hearing.

68. The evidence of Mr Henney is that whatever coding the Health and Safety team gave the incident, that would have no bearing on his decision during the

disciplinary process. The disciplinary notes and outcome letter, do not the Tribunal note, make any reference to the identification of the incident as 'red' in support of Mr Henney's observations about the seriousness of the incident . The Tribunal is satisfied on the balance of probabilities, that the coding of itself was not a factor operating on his mind during the disciplinary process however the fact it involved a PPT, a pedestrian and resulted in personal injury, were factor he took into account.

69. The notes of the hearing are not in dispute (p.107 – 110).The Claimant confirmed at the hearing that he had viewed the CCTV. The Claimant was accompanied by Mr Brent, another warehouse operative.

70. The Tribunal on viewing the same CCTV footage find that it can be seen clearly that the Claimant is driving the PPT out of bay 20, he is reversing the PPT out of the loading bay and into the marshalling lane in front of bay 21.While reversing he is looking over his left shoulder all the way, he then swings the PPT around so that it is facing the pallets in bay 20 . He then faces the pallets, with his back to bay 20 and lifts the pallets on to the PPT forks. He then reverses, he does not look over his shoulder to check what is behind him before he starts to reverse backwards (up the marshalling lanes backwards towards bay 20). He then starts to swing the PPT in an arc so that he is reversing toward bay 21 and moving into the loading area, he turns the PPT around in this manner so that he can turn the PPT to be facing into the loading bay 20. At no point does the Claimant look over his shoulder, left or right. Mr Slater is seen crossing behind him and he is looking only forward (not to the side) and is then hit from behind by the PPT and falls over. All this is clearly visible.

71. Mr Henney accepted that when the Claimant was reversing out of bay 20 and looking over his shoulder he would still have had a blind spot because he cannot turn his head fully. However, Mr Henney gave evidence that he considered being vigilant would mean looking to the right and left as he was reversing.

72. It can be seen on the CCTV that when the Claimant reversed the PPT backwards (just before hitting Mr Slater), there is a stack of pallets to his right as he reverses in the next marshalling lane. Mr Henney did not accept initially under cross examination that the pallets would have obstructed the Claimant's view had he turned his head to the right before he set off or at anytime during the reversing action, because the stack of pallets are all built to 1.7 metres and he believed the Claimant was 6 foot tall. On being shown the video Mr Henney conceded that it was hard to tell from the CCTV footage whether the Claimant's eyeline was lower than the pallets and thus whether the pallets would have obstructed his view. Mr Henney accept that he did not know the Claimant's height but maintained that the Claimant would have had full vision when reversing and that although not recorded anywhere, his evidence is that he had considered at the time of the disciplinary, what the Claimant could have seen.

73. Mr Brent did mention during the hearing (p.109) that it is hard to see people, especially the 'short ones; " *They are piling pallets higher than them*". That is not explored further with the Claimant. However, the Claimant did not say in this hearing that he could not see Mr Slater because of the height of the pallets and he accepts that he did not look around before he started reversing;

"*Because I know where GS was, and no one else was around. If anyone else was around I was going to be more aware*."

74. Mr Henney gave evidence that that he had considered whether the view from the camera, being located circa 40 foot in the air, may have given a distorted view of

what the Claimant would have seen but considered that the view would have been '*pretty much'* same as the Claimant's.

75. The Tribunal is not satisfied that Mr Henney had in fact given any thought to whether the CCTV footage being at height, gave a less reliable view of the incident. This was not mentioned during the disciplinary hearing, in his outcome letter or in his evidence in chief, he alleged this only when this was put to him in cross examination. The Tribunal do not find Mr Henney's evidence on this point to be credible.

76. On viewing the CCTV, it is not obvious to the Tribunal from the video footage that had the Claimant turned to check his area of travel, Mr Slater would have been masked by the pallets. The video was played a number of times to try and catch the precise moment before the Claimant reversed and had failed to look over his shoulder, however, trying to do so fails to also take into account that there would have been a delay in the Claimant starting to put the PPT into reverse, had he first taken the time to turn and look before setting off.

77. The fact remains however, that the Claimant did not at any point when reversing check if anything was behind him. If his line of vision was impaired by the pallets that would have required more vigilance; common sense dictates that either he also considered his line of vision was not impaired because he considered that he could see adequately over the pallets, or it was but nonetheless he did not reverse more carefully and continue to check as he reversed.

78. Mr Henney accepted that the SSOW document requires the PPT driver to check the direction of travel before moving and check for obstructions but does not provide that the PPT diver has to look in the direction of travel all the time that they are moving . However, he referred to the General Operating Instructions which require the person to *'maintain vigilant observations'.*

79. The Claimant stated that he thought he had sounded his horn. The video footage could not ascertain either way whether he had or not. Mr Henney's evidence is that he did not form a view on this either way because it was not clear. The Claimant's own evidence the Tribunal find, was not definitive, he thought he had but then again his initial evidence was that he also thought he had looked behind him before setting off. Mr Henney gave evidence that he did not take into account either way whether or not the Claimant had sounded his horn and that Mr Slater would have still been some 10 metres distance away in any event at the time, if the horn had been sounded.

80. The Claimant described in the disciplinary hearing how he had seen Mr Slater at his desk and he had heard the radio calls asking for Mr Slater to shut down a bay and if he heard Mr Slater say something then he would have known that he was moving, he would have been more aware. The Tribunal find that the clear inference to be drawn from this, is that the Claimant accepts that he could have been more vigilant and would have been if he was aware that Mr Slater was moving from his desk.

81. The Clamant referred in the hearing, to having to dodge barriers and people when working and " *Sooner or later you are going to knock someone. Cleaners are there, the less people around the bays, the less chance for someone to knock something".*

82. The Claimant accepted he was supposed to have looked around and Mr Brent comments that; *"everyone can have a lapse of concentration…"*

83. The Claimant was fully aware of the need to be vigilant and when asked " *Do you believe you were driving safety"* is recorded as replying; *" No. I think I did sound the horn*." However, he foes on to state that; " *It's only beep beep, its not long beeps*". The implication being that it would not have sounded for long

84. The Claimant made a number of admissions in this hearing:

    84.1 That he did not look before he reversed.
    84.2 That he accepted that SSOW required him to look around.
    84.3 That he had not seen Mr Slater behind him

Mr Slater's conduct

85. Mr Henney under cross examination did not accept that Mr Slater had ample opportunity to see the Claimant reversing into him and to move out of the way if he had glanced to the right and noticed him reversing in an arc toward him. Mr Henney repeated a number of times that when coming to his decision, he had assumed Mr Slater had seen the Claimant and believing that the PPT was a safe distance away Mr Slater would not have expected the Claimant to have driven in an arc and reversed toward him, which explained Mr Slater's failure to react, rather than a lack of vigilance on his part.

86. Mr Henney also accepted that Mr Slater had himself been under an obligation to ensure that he maintained an adequate distance between himself and the PPT and that he had an obligation to look around him and keep himself safe in the warehouse .He considered that the General Operating Instructions applied to Mr Slater and he had considered as part of his decision making process whether Mr Slater had been vigilant because.

    "*a guy making his way to another area, expect operational pedestrian to check the area of travel and he did look at the area where he was walking".*

87. Mr Henney confirmed under cross examination that he did not accept during the disciplinary process, and still does not accept, that Mr Slater was responsible for the accident and that it was the PPT operator who must give the pedestrian the right of way and check his direction of travel. Mr Henney denied under cross examination that Mr Slater had been negligent, or that he was not taking adequate care.

88. Mr Henney did not interview Mr Slater. His evidence is that he considered whether Mr Slater had himself broken any rules around safe systems of work when he viewed the CCTV footage and during the disciplinary hearing . He accepts however that he did not document his consideration of and findings about Mr Slater's conduct.

89. Mr Henney confirmed in response to a question from the Tribunal, that he had seen the notes from the interview conducted with Michelle Lowe and Mr Slater (p.100) before the disciplinary hearing. The notes of the interview conducted with Mr Slater consist of only 1 1/2 sides of handwritten A4 notes, written in large hand writing. There are only 7 comments made by Mr Slater as recorded in those notes, including the following.

    " *ML; Did you see any PPT drivers in the area before you got hit.*

    GS: No, I ***was looking forward to bay 43*** *to see if anybody else was going towards it to close the bay". Tribunal stress*

90. Mr Henney gave evidence when taken to this comment by Mr Slater in the interview notes, that:

" I must have missed it at the disciplinary – it was an oversight."

91. The Claimant's companion at the disciplinary hearing commented that (p.108) *"pedestrians still need to be alert"* . There is no real engagement with that issue during the hearing. Mr Henney does not inform the Claimant that he believes that Mr Slater was looking around him and that he is of the view that he was therefore being vigilant. Had Mr Henny informed the Claimant that this was his belief, the Claimant could have requested that Mr Henney either look again at the CCTV and/or speak with Mr Slater and it may have resulted in Mr Henney reading Mr Slater's interview notes more carefully and rectifying his oversight.

92. Mr Henney accepted that looking again at the CCTV footage during this hearing, it can be clearly seen that Mr Slater did not look to his right as he crossed the loading bay.

93. The Tribunal find that it is evident from the CCTV footage alone that had Mr Slater looked to his right, he would have seen the PPT reversing but he did not do so. He was not a vigilant operational pedestrian, which he was required to be.

94. The Claimant when asked if the incident could have been avoided in the disciplinary hearing, comments that if it had been anyone else that was sat in the corner, not a supervisor, it would not have happened and comments that: "*I know where I have gone wrong, but if GS had just said something on the radio."*

95. The Tribunal are not satisfied that Mr Henney gave any meaningful consideration to the extent to which Mr Slater may have contributed to the incident. He focuses solely on the Claimant's conduct. The notes of the disciplinary hearing evidence that Mr Henney did not express his view about Mr Slater's conduct in that hearing and he did not address it either in the outcome letter. In his evidence in chief he deals with this briefly (w/s para 16) commenting only that in his view; " *Glyn had done nothing wrong*". He does not address in his evidence in chief however how he had arrived at that view.

Walkways

96. Mr Henney's evidence under cross examination is that he did not consider that Mr Slater could gain access to bay 41 by using the designated pathways, without at some point having to cross into the marshalling lanes and loading area. While that is clear from the map, it is also clear that by the time the walkways reach bay 41, the distance to walk across the marshalling lanes is short, much shorter than the distance Mr Slater would have walked from his desk across the loading area.

97. Mr Henney's evidence is that he did not consider at the time or since, that Mr Slater not using the path was amounted to a failure by him to employ safe systems of working

98. Mr Brent asked what the walkways are for and Mr Henney stated; "*No one really should be walking down there".* He does not elaborate on what he means. The evidence of Mr Henney which he would later provide on appeal to Mr Maude, is that he had meant that no one other than those working in the area are meant to be there and visitors are an example of the type of people who should use the

walkways. The Tribunal accept on balance Mr Henney's evidence that this is what he had meant. His explanation is consistent with his view that Mr Slater had done nothing wrong by walking across the loading bays because he was part of the operational management team.

Sanction

99. The disciplinary hearing was adjourned at 11:28am. It reconvened at 12pm and on reconvening Mr Henney asked some further questions. Following a further adjournment from 12:11 to 1:50pm, Mr Henney then gave his decision: "*You were negligent by not being observant and looking, which caused injury to a colleague. Which had the potential to cause unacceptable loss of injury. During the first part of the disciplinary, you said you didn't follow SSOW and didn't look before moving and did not drive safely. Which [sic] lead to a colleague being knocked over. It is my decision to dismiss you."*

100. Under cross examination, Mr Henney gave evidence that the Respondent does not operate a policy that driving a PPT without checking the direction of travel first, is an automatic dismissal. The incident as a whole would be considered and it is Mr Henney's evidence that he took into account the Claimant's length of service and clean disciplinary record but this was outweighed by the severity of his conduct and in addition, the Claimant was not at all apologetic or remorseful:

"*he did not accept responsibility for the accident blaming others rather than recognising his own actions … he was maintaining that Glyn Slater was also to blame for the accident but in my view,Glyn had done nothing wrong".*

101. Mr Henney's evidence is that the Claimant's involvement in two previous incidents, the accident in January 2019 and another in September 2021, played no part in his decision. Mr Henney has the Tribunal accept some awareness of both the incidents in January 2019 and September 2021 however no reference is made to either incidents by Mr Henney during the hearing or in his outcome letter.

Outcome letter

102. The decision to dismiss was confirmed in a letter dated 23 December 202 (p.111).

103. There is no reference in the outcome letter to any consideration of mitigation. There is also no reference to any consideration about a lesser sanction and the contrition or lack of contrition shown by the Claimant and the impact this had on the sanction. The Tribunal accept on balance however, the evidence of Mr Henney that a factor he took into account when deciding on the sanction was the remorse shown by the Claimant and that Mr Henney considered that the Claimant was attempting to blame Mr Slater for the accident. That this was a relevant consideration is consistent with the question Mr Henney asked the Claimant about how he felt the incident could have been avoided (p.108).

104. Mr Henney gave evidence that if he had found that Mr Slater was also to blame for the incident, it would have made no difference to the decision to dismiss because the Claimant was still negligent however he accepts that there would also have been an investigation and a disciplinary process involving Mr Slater.

Appeal hearing

105. The appeal hearing took place on 4 February 2022. It was heard by Mr Maude with a note taker present.

106. The Claimant set out his initial grounds of appeal in a letter and these were essentially as follows (p.113):
- *His good work record and his commitment shown over the years*
- *That he had made what he described as "one mistake".*
- *There are people who have hit doors, barriers, backing and dropped pallets and are still working.*
- *That he thought he had a good reason – that if Mr Slater had used the pedestrian walkways he would not have been passing*
- *The disciplinary was more like an interrogation*
- *That he had been refused to be allowed to only pick and not work on the trucks on days when he was stress because he has a disabled son and is expecting an emergency call.*
- *That he was observant but referred to Mr Slater running past him and not using the walkways.*

107. The Claimant then presented an appeal statement (p.125 – 126). The document raises in summary the following issues

- *That he had no right to representation at the investigation meetings*
- *Mr Gibbons [Gibbens]did not investigate what the Claimant had said before deciding that there would be a disciplinary on the grounds of gross misconduct*
- *Raises the issue of a decision being premeditated*
- *That Mr Slater was not asked about using the walkways and if he had clear vision why did he not see the Claimant*
- *Mr Henney had comments in the disciplinary that the walkways are only for visitors but this comment was not documented and that he had also said nobody should be walking down the bays*
- *There is no risk assessments or SSOW for non MHE employees*
- *If Mr Slater had been more vigilant it would not have happened*
- *The Claimant's clear disciplinary record and high performance.*

108. The appeal statement does not seek to assert that the Claimant is not responsible but asserts that he is not the "*only person fully responsible for this incident*".

109. Mr Maude confirmed under cross examination that he had seen a copy of the full accident report documentation including the incident log (p.70- 97). He had discussed before the appeal, the incident involving the Claimant with his line manager, the Health and Safety team and Ian Hemsley, because Mr Hemsley had been responsible for the accident investigation. He had also seen the CCTV footage. Mr Maude had also sight of the disciplinary notes before the appeal hearing. Mr Maude's undisputed evidence is that he did not have any conversation with Mr Henney beyond a meeting with him on 10 February 2022, the notes from which appear in the bundle (p.139) .

110. The notes of the appeal hearing in the bundle contain handwritten amendments made by the Claimant (p. 127 – 135) and each page is signed by him, confirming that he agrees that the notes are a true reflection of what had been discussed.

111. Mr Maude explains at the outset, that he is not conducting a rehearing.

Mr Slater's conduct

112. On being taken to the disciplinary outcome letter (p.112) Mr Maude accepted in cross examination, that the Claimant was never informed what finding Mr Henney had made about the conduct of Mr Slater.

113. The Claimant complained as part of the appeal process that Mr Slater was not asked about using the walkways. When asked by Mr Maude if it was usual for Mr Slater to walk in the loading area, the Claimant replied that: "*several people do it*" and he explained that while there was no rule against people walking up and down the bays, he considered there should be and had raised this with his supervisor.

114. When asked what the Claimant believed may have prevented the accident, he referred to Mr Slater not using the walkways and that: *"It's down to two people, both need to be vigilant, can't blame one person. If you are walking by that area, you know there are trucks, you should be vigilant." (p.131)*

115. Mr Maude refers to the Claimant in the hearing, saying that the fault is 50/50 between himself and Mr Slater (p.130).There is therefore an understanding by Mr Maude, that the Claimant is at least accepting that he is as much to blame as Mr Slater for the incident.

Comparators

116. The Claimant raised at the appeal that there were instances of other operatives who had accidents "*before Christmas*" who had not been punished and other incidents since he has left but does not provide any details of which employees were involved.

Incident – Victor Dimbu

117. The Claimant mentioned that he had felt under pressure at work the week before the accident when he was given a second load by Victor Dimbu, a Team Leader and told that Mr Maude was asking why it had been loaded late. The Claimant felt that this made him rush. He was thus determined to get the load out on time on the 14 December 2021.

Stress – disabled son

118. The Claimant was asked about feeling under stress because of his disabled son but informed Mr Maude that on the day in question, he was not stressed.

Closing remarks

119. At the end of the appeal hearing, when asked if there was anything else which he felt Mr Maude should ask, re replied that: *"No fair play to you, you have been fair"" and " No I think you have held a fair hearing. .."*

Further Investigation

120. Mr Maude than arranged for Michael Martin to interview Mr Dimbu (p.136) on 9 February 2022. Mr Dimbu recalled that he had checked with the Claimant the week before about a certain load because Mr Maude or Mr Henney had asked

whether why it was late. Mr Dimbu could not recall the Claimant appearing stressed and recalled that the Claimant had confirmed it was loaded .

121. Mr Maude then interviewed Mr Gibbens on 10 February 2022 (p.137 – 138) who denied that the Claimant had raised any issue with the loading bays being dangerous for pedestrians prior to the 14 December 2021 but had done so on that day. Mr Gibbens confirmed that he had not adjourned the investigation meeting with the Claimant before deciding to recommend that the matter go forward to a disciplinary hearing because looking at the CCTV footage and the circumstances, it appeared clear to him that disciplinary action needed to be considered.

122. Mr Maude then interviewed Mr Henney on the 10 February 2022 (p.139). Mr Henney clarified his comment that "*no one should be walking*" there, as a comment about people generally however Mr Slater needed to have access because his desk is there and he has to liaise with the loader's . When talking about who uses the walkways, he was using visitors as only an example and that walkways are there for people to get around the warehouse who do not need to be in the operating areas.

123. There is no discussion about the extent to which, if any, Mr Henney had considered Mr Slater to have contributed to the incident and nor is there any discussion about why Mr Henney decided to dismiss rather than apply a lesser penalty.

Consistency/ comparators

124. Mr Maude's undisputed evidence is that he considered other incidents involving manual handling employees (p.140-143) and accidents involving injuries (p.144 to 147) . It is not in dispute that the only incident coded during that period as 'red' by the Health and Safety team is the incident involving the Claimant. His evidence is that Mr Maude did not consider that any of the incidents were comparable to that involving the Claimant. The closest in terms of comparison are as follows;

Incident 14 January 2021

125. There was an incident on 14 January 2021 involving an operative who pulled a pump truck (a non-motorised piece of equipment, similar to a sack barrow) with excessive force and injured his own right foot. It was considered a minor incident both because of the injury and the type of equipment involved and coded as green by the health and safety team. The injury details are recorded as a *"swollen right foot".*

Incident 18 July 2021

126. The Claimant compares his treatment to an incident recorded on 18 July 2021 (p.145). This is recorded as an accident which was caused by contact with equipment or machinery and the brief facts as recorded are that: " *A warehouse operative was placing an empty pallet on top of a stack of pallets, but didn't line the pallets up correctly . Thus caused the top pallet to slip off the pile and hit the operative 's right ankle as it fell*"

127. The evidence of Mr Henney is that that incident was coded green because there was no machinery involved, it involved moving pallets by hand and that the

"*contact with equipment or machinery"* as a category was selected because the pallet is classed as 'equipment.

21 December 2021: comparator incident

128. There is also further incident recoded on 21 December 2021 (p.141) in the warehouse,. There is no injury recorded. The incident is categorised as caused by; *" Behaviour/Not following procedure" .*The accompanying description is :;"*Warehouse operative was moving picked pallets into the blast freezer when they forgot that the chilled FLT that they were using doesn't fit into the blast freezer racking, causing the FLT mirror to hit the racking arms and fall off."*

129. Mr Henney's undisputed evidence is that the area where this incident occurred is a non-pedestrian area. The driver of the FLT was not able to get the FLT into the racking. There was no injury to any person, the only damage was to the mirror on the FLT. Mr Maude likened it to catching a car wing mirror.

April 2021

130. The incident log also records an incident 25 April 2021 which involved a pedestrian. The details recorded are; " *A warehouse operative was booking in a pallet received from Kettleby when the pallet behind them was pushed into their left foot. This happened as FLT driver had arrived to pick up a pallet behind the IP and pushed their forks into the pallet too quickly and too low, pushing the pallet across the floor into the IP*".

131. The undisputed evidence of Mr Maude was that the pedestrian could not be seen by the driver in the area where he was working, and that the finding was that the Respondent had not defined the safe working area and needed to make changes to its practices, therefore no disciplinary action was taken against the driver. This incident had been given a green coding.

132. Mr Maude's evidence is that he reviewed the incident log and concluded that there were no incidents sufficiently similar to the Claimant's such as to give him any cause for concern about inconsistent treatment.

133. The Tribunal accept on balance his evidence about what he had considered and why he had reached the decision that the incidents were not sufficiently similar. The Tribunal find that the reasons for reaching this decision were not perverse, they were clear and rational based on the information he had.

134. Mr Maude did not discuss the record of other incidents with the Claimant to clarify whether any of these were the ones he was alluding to or to explain why those other incidents were not comparable in his opinion, he merely addressed it in his outcome letter.

Safety record

135. Mr Maude had been invited by the Claimant to take into consideration his clean disciplinary record and performance record and his undisputed evidence is that he therefore reviewed his file. The Claimant however complains that Mr Maude took into account incidents which it was unreasonable for him to take into account. Further, it was Mr Maude's reference to those incidents which lead the Claimant to

suspect that a 'negative' view had been formed of him because of them and that this influenced unfairly, the decision to dismiss him.

136. In the letter of the 11 February 2022, setting out the outcome of the appeal (p,148), Mr Maude commented on the Claimant having been involved in:

"*…3 major incidents: Falling off a loading bay, MHE Battery short and this incident".*

137. The ' falling off a loading bay' Mr Maude confirmed under cross examination, was a reference to the incident in January 2019. The MHE Battery short incident, was a reference to an incident on 6 September 2021.

6 September 2021 Incident

138. On the 6 September 2021 the Claimant was unloading a trailer when the PPT stopped because of a problem with the battery plug . Mr Maude gave undisputed evidence that the investigation revealed that the battery plug looked like it had been crushed during a battery change causing it to short circuit however it was not possible to say which operator had been responsible for carrying out that particular battery change, it could have been the Claimant but it was not possible to be clear. No disciplinary action was taken against anyone. The Respondent then changed the practice so that there was only one person given the task of changing the battery. Mr Maude under cross examination gave evidence that this incident was mentioned on the Claimant's personnel record because he had been in control of the truck at the time the incident happened. The investigation report relating to this incident (p.183) concludes that:

"This incident occurred because the Operator either did not notice the damage or damaged the battery himself and did not report it."

139. Mr Maude's evidence which was not disputed, was that the Claimant was not subjected to any disciplinary action however he was given some retraining.

140. Mr Henney and Mr Maude, both denied that this incident had (along with the January 2019 incident) led to a negative opinion about the Claimant. Mr Maude gave evidence that in his role, he got to know those who had a reputation however, the Claimant was not one of those people.

141. Mr Maude explained that he had noted these incidents because he had been asked by the Claimant to review his record, he conducted a fact find and simply set out what he had found had been recorded. However, it is not in dispute that the Claimant was not as part of the appeal process, asked about these incidents and given a chance to make representations about the extent to which it would be reasonable to take them into account.

142. The appeal outcome letter includes the following statement (p.151):

" Other than your safety record, you have been a good employee…"

143. Under cross examination Mr Maude referred to these incidents as the only " *blemish"* on the Claimant's record. He went on to explain that what he had meant by this was that it was : " *in the context of a good employee, it was the only thing that could demonstrate he did not have a perfect record".*

144. Mr Maude accepted that he did not investigate the extent to which the Claimant had been to blame for these incidents, he recorded only what he had found on the Claimant's record. Mr Maude asserted that these two incidents had no bearing on his decision and was a *" neutral fact find"* . He denied specifically that this influenced his view of the likelihood of a safety incident happening again when deciding whether to uphold the decision to dismiss.

145. The Tribunal find however that it is incongruous to refer to these two incidents as demonstrating a less than perfect safety record while accepting that there was no blame attributed to the Claimant at the time. The Tribunal consider it reasonable to draw an inference from the way he described these incidents, that what was operating on Mr Maude's mind at the time of the appeal, was that the Claimant's safety record indicated some deficiency.

146. The Claimant did not raise during the appeal, but now complains as part of these proceedings, that he was subject to less favourable treatment prior to the 14 December 2021 and that on reflection, he believes that this treatment was because of the incident in January 2019 and in part, the incident in September 2021. He cites a number of examples of what he alleges to be the unfair treatment he was subjected to, to evidence the unfavourable opinion that was formed about him and the Tribunal now turn to those;

Overtime

147. The Claimant alleges that if any overtime was reduced, it was always his overtime that was stopped. He also complains that he would work overtime but would not be paid for it. Mr Henney's undisputed evidence is that the record of overtime payments made to the Claimant (p.173- 175) shows that in fact the Claimant worked overtime almost every week over the period 2018 to 2021. Under cross examination the Claimant was not able to provide any specific dates when this overtime was stopped or any clear indication of the period over which this happened and how frequently. He also complains that swapping days was commonplace between colleagues but never for him if he asked, however he was not able to provide any specific examples of when this had happened.

148. The Claimant also complains that he would work overtime but the record of his overtime worked would be removed and he would not be paid. He was not able to identify the dates this was alleged to have occurred, he described it as "random" . The Claimant further explained that he would go to his line managers including Mr Henney, who would then reinstate the overtime on the system (albeit this resulted in a delay in payment). The Claimant was not able to say whether this only affected him. The Claimant moved away from this position that he had complained about this, stating: ;

" *There is complaining and saying ' that has not been paid' and he says' blimey' and looks at it"*

149. The Claimant does not complain that there was ever an occasion when this was not rectified.

150. The Claimant did not raise an issue about this alleged unfavourable treatment before the decision to dismiss him or at the appeal, because it "*never occurred to me at all"* and he did not "*realise it was an issue until the letter from Mr Maude*". He confirmed in response to a question from the Tribunal that at the time these issues with his overtime were happening, he did not consider that Mr Henney was 'singling' him out.

151. The Claimant's evidence on these issues around overtime is vague and it is relevant that at the time this was alleged to be happening, he did not consider that he was being treated differently.

152. The Tribunal is not satisfied on the evidence before it, that the Claimant has proven on a balance of probabilities, that his overtime was reduced more than anyone else's or that colleagues did not swap overtime with him or that any issue with the overtime recorded was deliberate and only affected him.

Drug and alcohol test (saliva and breath tests)

153. The Claimant complains that the less favourable treatment, also included being asked to take part in an excessive number of drug and acholic tests, 4 or 5 after the incident in January 2019 until his dismissal, whereas most employees had never had one test. The Respondent's position is that the people were selected at random.

154. The Respondent disclosed a record of tests taken from 25 January 2019 to 23 February 2022 (p.163 -172). The accuracy of the record is not in dispute. The record shows that the Claimant had only 2 tests in the period from January 2019 until his dismissal. The first test was on 6 October 2020, almost 2 years after the January 2019 incident . It is recorded as "*random*". The second test was carried out on the 14 December 2021, immediately after the accident in question which is recorded as carried out; *"For cause- Post incident*".

155. The Claimant accepted under cross examination that he had taken the same number of tests as Mr Maude during that period and conceded that he may have been "*mistaken*" about the dates when the tests were carried out.

156. During the appeal hearing, the Claimant did not raise any of the alleged concerns about his treatment and in fact made the comment that (p.128); "*The Company has been very good to me".* That is not consistent with a view that he considered he was being targeted and penalised through overtime and excessive alcohol and drug testing.

157. The Tribunal is not satisfied on the evidence, that the Claimant has proven on a balance of probabilities, that he was treated any differently from any other employee with respect to these tests.

The outcome – appeal

158. By letter of the 11 February 2022 (p.148), the Claimant was informed that his appeal was not successful.

159. Mr Maude addressed each ground of appeal but did not hold a further meeting to discuss the additional investigation he had carried out. The Claimant was not therefore given an opportunity to comment on the further interviews. He does not allege that had he been given that opportunity he would have further evidence to put forward however, he does complain about the view that was taken about his safety record in light of the reference to the incidents in January 2019 and September 2021.

160. Mr Maude informed the Claimant in the appeal outcome letter that he had looked at accidents and near misses involving MHE from 2 December 2021 to 7 February 2021 and none of them resulted in injury. He had also considered the record of incidents involving injuries in 2021 and that only one did not involve a self-inflicted injury, namely the incident on 25 April 2021. Mr Maude refers to this incident being similar in that it involved a pedestrian but goes on to explain that the decision in that case was that practices needed to be changed and thus no disciplinary action was taken. He concludes that there are no incidents sufficiently similar to the Claimant's.

161. The incident log was not supplied to the Claimant and he did not have a chance to comment further however, he does not now allege that there were other incidents beyond those referred to and recorded which should have been considered by Mr Maude.

162. With regards to the incident with Mr Dimbu, Mr Maude accepted that the Claimant may have been concerned about Mr Maude asking about the loads being late however, is of the view that he cannot not understand why this would have contributed to an incident over a week later.

163. An issue raised about not having representation at the investigation stage was dismissed on the ground that there is no requirement to offer the right to a companion at that stage of the process. This is not a procedural point still pursued by the Claimant in these proceedings.

164. The complaint that Mr Gibbens had decided that the case should proceed to a disciplinary hearing was premeditated because there was no adjournment, was dismissed by Mr Maude on the basis that it was clear to Mr Gibbens from the CCTV and circumstances of the incident, that disciplinary action should be considered.

Mr Henney – walkways

165. Based on the evidence Mr Henney had given during the further interview, Mr Maude dismisses the complaint raised about what Mr Henney had said about the walkways, in that Mr Maude accepted Mr Henney's account that he had referred to 'visitors' only as an example of those who should be using walkways.

Mr Slater's conduct

166. Mr Maude did not re- interview Mr Slater during the appeal process and thus did not ask him about his route through the warehouse on the date of the accident. Mr Maude did not consider that he should speak to Mr Slater about his conduct on the day of the accident and to explore further whether he was to blame. He gave evidence in response to question from the Tribunal, that it had been his understanding that Mr Henney had carried out an investigation into Mr Slater's conduct and that he did not consider that Mr Slater was culpable, because there was no reference in the evidence of any issue with Mr Slater's conduct. He accepted under cross examination however, that given Mr Henney had not dealt with this in his disciplinary outcome letter, he had been *"deprived*" of the findings Mr Henney had made regarding Mr Slater's conduct. He gave evidence however that he had been in agreement with the view, having viewed the CCTV footage that Mr Slater was not culpable, because the Claimant should have driven in a straight line to move the load on his PPT and turn around in the marshalling lane,

he should have looked as much as he could in the direction of travel and that the only way Mr Slater could have seen him would have been to look behind him.

167. However, in cross examination Mr Maude accepted on being taken to the CCTV footage that Mr Slater did not see the Claimant or look for him either and he agreed that Mr Slater was not being observant; "*he didn't look for him - but it does go both ways".*

168. Mr Maude accepted in response to a question from the Tribunal, that pedestrians can be criticised if they do not ensure that there is enough distance maintained between them and a PPT and that Mr Slater thus contributed to the accident.

169. Mr Maude's evidence was that even if Mr Slater had been found to be negligent it would not have changed the decision to uphold the dismissal however, he accepted that even where there is an injury, it would not necessarily be the operator of the truck or machinery that would be held capable.

170. Mr Maude's evidence is that although the SSOW does not specify that the PPT driver must constantly look in the direction travel, there is an overarching duty under the Health and Safety at Work Act to work safely and his unchallenged evidence was that part of the training for a PPT driver is to check for 'blind spots' when driving the PPT.

171. It is repeated by the Claimant on a number of occasions during the appeal hearing that he considers that Mr Slater had also failed to be vigilant and thus contributed to the accident. Mr Maude does not in his findings engage with that point of appeal. Mr Maude concludes (p.150) that the route Mr Slater took through the warehouse made the most sense but he does not address in his findings whether Mr Slater had used reasonable vigilance. His evidence in chief indicates that he considered that Mr Slater had no responsibility (w/s para 13).

*"**Most importantly**, Martin still did not seem to accept his responsibility for the accident and was still blaming others- Glyn Slater and the company generally…"*

Tribunal Stress

172. Mr Maude gave evidence in response to a question from the Tribunal, that the issue about the remorse shown by the Claimant was a "*very important"* factor and that but for that, Mr Maude's evidence is that his decision would have been different.

173. The Claimant complains that Mr Maude prevented his representative asking a question in the hearing, however that is not recorded in the notes. The Claimant had checked the notes and made amendments to them but had not included this in his comments. This allegation was also not put to Mr Maude in cross examination . The Tribunal is not satisfied that the Claimant has established this on a balance of probabilities.

CCTV footage - reliability

174. Under cross examination Mr Maude accepted that it would be difficult from the CCTV footage to decide what the Claimant on the 'ground' could and could not have seen and conceded that he had not 'consciously considered' whether the CCTV footage gave a distorted view. He did not consider carrying out a reconstruction to ascertain what the Claimant could have seen. His role was not to hear the case again. His view however was that everyone in the CCTV footage had a reasonable opportunity to see everyone else.

175. The Claimant does not dispute the accuracy of the wording in the notes (p.135) where he comments in response to Mr Maude asking if there if anything the Claimant feels he should have asked, that ; " *No fair play to you, you have been fair".* The reliability of the CCTV footage or the need for a reconstruction of what happened, was not raised by the Claimant during the disciplinary or appeal process.

Submissions

176. Both parties made submissions. What is set out below is a summary only of those submissions, which were considered in full.

The Claimant's submissions

Reason for dismissal

177. The Claimant refers the Tribunal to the following case authorities which have been considered; **Hadjioannou v Coral Casinos Ltd: EAT 1981 (paras 24 and 25)** and **Post Office v Fennell [1981] IRLR 221; *A v B 2003 IRLR 405, EAT***

178. The Claimant asserts that the inconsistency of treatment supports an inference that the purported reason for dismissal is not genuine and that consistency in any event, is a matter to be considered when applying the requirements of section 98 (4) ERA and the seriousness of the consequences of dismissal for the Claimant (**A v B 2003 IRLR**).

179. It is submitted that there were comparable cases, the incident on **25 April 2021** ((p.144) it is submitted is the ' most comparable' in terms of the level of injury however unlike in the Claimant's case, there was no exploration of the conduct of the other individual involved.

180. It is submitted that the incident on **21 December 2021** (202835) (p.141) is not on *'all fours'* as no one was injured but it is 'suggestive' of a harsher approach in the claimant's case

181. It is accepted that Mr Slater was not subject to the same process as the Claimant.

182. It is submitted that the quality of Mr Henney's evidence is of concern because he gave contradictory answers and he changes his answers when asked questions by the Tribunal or under cross examination. It is submitted that he had suddenly said he had considered that Mr Slater had been vigilant when the CCTV shows he was not, and that there was no attempt to determine what Mr Slater had seen. Mr Henney's evidence was that 4 seconds was not enough time for Mr Slater to have realised the PPT was going to hit him (had he looked to see where it was when it was arching toward him), that this was not a credible belief and that the Tribunal should find his evidence unreliable.

183. Paragraph 4 of the Claimant's witness statement could be interpreted as the Claimant alleging that he had looked behind him before moving off however, that it is submitted , is a *'pedantic interpretation'* and is clearly not the Claimant's case. He accepted as soon as he had seen the CCTV footage that he did not look over this shoulder when he set off reversing the PPT and thus this should not been taken as evidence that the Claimant is not a reliable or credible witness.

184. It is submitted that there was a failure to consider that the CCTV was located at height and what the Claimant could actually have seen and thus to what extent his failure to look over his shoulder, had actually caused or contributed to the accident. It is submitted that he could not have moved his head 180% when driving and thus there would always have been a 'blind spot' and there would have been an accident with any driver in those circumstances because Mr Slater was not being vigilant.

185. It is submitted that the dismissal was predetermined, in that it was described before the disciplinary hearing as gross misconduct and not that it 'could' amount to gross misconduct.

186. The evidence that the Claimant did blow the horn was disregarded also it is submitted, an indication of predetermination.

187. It is submitted that there is evidence (p.70 onwards) of a negative perception of the Claimant from Mr Henney. Ms Lowe refers to a lack of empathy and while the incident is put down to recklessness, similar incidents are not recorded as 'red'.

188. It is submitted that in terms of the wrongful dismissal claim, the Claimant was not actually negligent.

189. It is submitted that the Claimant was seen as a '*Jonah*' figure and people took against him.

Band of reasonable responses

190. It is submitted that had a fair investigation been carried out, Mr Slater would have been found to have caused the incident by 'dashing' through the area, he would have been subject to a disciplinary and the Claimant remained in employment. Mr Henney's approach was not that of reasonable disciplinary officer in that; he failed to set out in his reasons about what he thought Mr Slater had done, would have known that Mr Slater had not looked, would have interviewed Mr Slater and he had not explored that Mr Slater should have used the walkways.

191. The appeal cannot it is submitted cure the defects in that; Mr Maude did not interview Mr Slater, did not identify what the Claimant could have in fact seen, would not have known that Mr Hennery did not determine and take into account, whether the Claimant had used his horn.

192. It was not, it is submitted, known to the Claimant until the appeal outcome letter, that there was a negative view held about the Claimant's safety record and it is submitted Mr Henney was aware and this influenced his decision.

193. It is submitted that the Claimant accepted he was at fault and that it was outside of the band of reasonable responses to dismiss, the disciplinary letter does not contain sufficient information about the findings, the outcome was predetermined and the appeal did not cure those failings.

194. The primary case for the Claimant is that he did not cause the accident but in the alternative, his culpability was minimal. With respect to Polkey it is submitted that the Claimant would not have been dismissed had a proper process been followed and there should therefore be no deduction.

195. Acas code; the Claimant relies upon a breach of paragraph 4 of the Code in that there was inconsistent treatment and a failure to carry out necessary investigation

196. It is also submitted that there was a failure to inform the Claimant of the case he was facing and that it was predetermined.

197. Paragraph 9 of the Code is also relied upon, that notification should contain sufficient information but he was not informed exactly what he had done wrong.

198. With reference to the Burchell test, it is submitted there was no genuine belief and in any case it was not based on a reasonable grounds after a reasonable investigation.

199. The Claimant seeks a full Acas uplift of 25%.

Respondent's submissions

200. The Respondent referred the Tribunal to the EAT case of ***MBNA Ltd v Jones EAT 0120/15***/.

201. It is submitted that Mr Maude gave his evidence in a straight forward and honest manner. It is accepted that at times Mr Henney became confused in cross examination but it is submitted that some of the questions put to him by counsel for the Claimant were not clear. He readily admitted that he had not noticed in Mr Slater's statement during the investigation, that he had been looking in the direction he had been walking.

202. By comparison it is submitted that the Claimant was not an honest witness and specific reference is made to paragraph 4 of his witness statement where he states; " *I believe that I was reversing in my PPT and recall looking behind me, but once I had started moving , I then saw Glyn Slater was there behind me*…". It is therefore submitted that his evidence in chief is not consistent with his admission during the investigation and disciplinary process, that he had not looked behind him.

Reason for dismissal

203. It is submitted that the argument that he was dismissed because of the accident in January 2019 does not 'stack up' because ; his claim that this resulted in loss of overtime is not substantiated, he has provided no details of the overtime and the evidence is that he worked a lot of overtime. He alleges that he was prevented from swapping shifts but again could not provide any details of when this took place. He complains he was not paid on time but accepted when he raised it, his pay was corrected and the Claimant went as far as to say that Mr Henney was not involved in "*any of this singling out*".

204. The allegation about drug and alcohol tests is not substantiated either, he accepts now that he had the same number of tests as Mr Maude during the relevant period. The Claimant did not complain about his treatment until after his dismissal and did not even raise at the appeal with Mr Maude who he expressed as having judgment he trusted.

205. There is no reason to believe that the negative comments of the more junior managers had an impact on the decision Mr Henney made.

Reasonable grounds

206. The Claimant accepted he failed to comply with the obligation to look in the direction of travel before moving and admitted that someone who did this is guilty of gross misconduct under the Respondent's policies.

207. Had the CCTV not been available, the Respondent would have had to carry out more investigation but the CCTV was clear.

208. The fact Mr Slater did not look round is 'unfortunate' but does not exculpate the Claimant's actions. The Claimant ; Knew he was working in a busy area for pedestrians, He knew Mr Slater was in the area, he knew Mr Slater had been asked to close bay 41, the Claimant had not been asked to close bay 41 and the Claimant knew Mr Slater would be likely to be moving at speed and he expected him to take the route across the loading bay which he did

209. Whether or not the Claimant sounded his horn does not excuse what he did not do which it is submitted, is why Mr Henney did not consider it to be of significance.

210. It is submitted the CCTV and the statements amounted to an adequate investigation.

Sanction

211. Mr Hennery explained that he decided on dismissal because the Claimant had not shown remorse and it is submitted that even now his case is that he was not responsible. In the disciplinary hearing the notes (p.108) record the Claimant stating in terms of whether it could have been avoided; "*Yes, if that had been anyone else in that corner that was not a supervisor..."* hence it is submitted the Claimant is effectively saying it was Mr Slater's fault.

212. It is submitted that no one is denying that had Mr Slater acted differently the accident would not have happened, he could have got out of the way had he seen the PPT reversing but that it was incumbent on the Claimant to be looking out for pedestrians and 'this sort of thing'.

Consistency of treatment

213. The respondent referred to the cases of ***Post Office v Fennell 1981 IRLR 221, CA. Hadjioannou v Coral Casinos Ltd 1981 IRLR 352, EAT*** .

214. It is submitted that it cannot possibly be alleged that the incident reported on 25 April 2021 is sufficiently similar to the Claimant's situation.

215. Further, it is submitted that the evidence does not support a finding of predetermination and what Mr Gibbens had said was correct, it was an accusation of gross misconduct but that is not the same as stating that he claimant should be dismissed.

Acas code

216. It is submitted that there is no breach of the Acas code. There was no predetermination and there was adequate investigation with The CCTV and the claimant's admission that he did not look before moving his PPT.

217. The dismissal letter was a reasonable letter, the Claimant did not suggest that he did not know why he had been dismissed.

Contributory fault

218. It is submitted that the claimant had not contributed but caused the incident and if there is a finding of unfair dismissal, the Tribunal is invited to make a 100% deduction for contributory fault.

Polkey

219. Mr Henney's evidence is that even had he been aware that Mr Slater had not himself been looking around and been vigilant when crossing the lading bay, it would have made no different to the outcome and thus there should be a 100% Polkey deduction.

Wrongful dismissal

220. It is submitted that the claimant committed a fundamental breach of contract in not following the SSOW and clause 19.1 of his contract of employment provides that such a failure is a breach of the contract. It is submitted that it is also a fundamental breach of mutual trust and confidence.

Legal Principles – substantive claims

Unfair dismissal – section 94 and 98 ERA

221. The starting point is the statute and section 98 of the Employment Rights Act 1996 (ERA) provides that;:

(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason *(or, if more than one, the principal reason) for the dismissal, and*

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason *falls within this subsection if it-*

(b)relates to *the conduct of the employee*

(4)[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 on 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.*

The reason for dismissal

222. Tribunals must also take account of the genuinely held beliefs of the employer at the time of the dismissal. However, what a Tribunal must not do is put itself in the position of the employer and consider how it would have responded to the established reason for dismissal: ***Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA*****,**.

223. It is up to the employer to show the reason for dismissal and that it was a potentially fair one . A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to

dismiss the employee' :***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*.**

224. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness.

225. As Lord Justice Griffiths put it in ***Gilham and ors v Kent County Council (No.2) 1985 ICR 233, CA***: '…if on the face of it the reason **could** justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to S.98(4)] and the question of reasonableness.'

Conduct

226. In relation to conduct dismissals the leading authority on fairness is the case of **BHS v Burchell [1978] IRLR 379**, which sets out a three part test namely –

(1) Did the employer have a genuine belief in the employee's guilt?

(2) Was that belief based on reasonable grounds?

(3) Were those grounds formed from a reasonable investigation?

227. The case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** makes it clear that the test which the tribunal must apply is whether dismissal was within the band of reasonable responses that a reasonable employer in the circumstances might have adopted

Inconsistent Treatment

228. In ***A v B 2003 IRLR 405, EAT*** the EAT accepted that the standard of reasonableness will always be high where dismissal is a likely consequence, so the serious effect on future employment and the fact that criminal charges are involved may not in practice alter that standard. Such factors merely reinforce the need for a careful and conscientious inquiry.

229. 'Equity' is not a separate part of the reasonableness test: Lord Simon of Glaisdale in ***W Devis and Sons Ltd v Atkins 1977 ICR 662, HL***, 'the reference to "equity and the substantial merits of the case" merely shows that the word "reasonably" is to be widely construed'.

230. Inconsistency of punishment for misconduct may give rise to a finding of unfair dismissal: ***Post Office v Fennell 1981 IRLR 221, CA*.**

231. ***Hadjioannou v Coral Casinos Ltd 1981 IRLR 352, EAT*** The EAT accepted the argument that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances:

- *where employees have been led by an employer to believe that certain conduct will not lead to dismissal*
- *where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason*
- *where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.*

232. The EAT in *Hadjioannou* went on to state that cases for comparison would have to be 'truly similar or sufficiently similar', rather than 'truly parallel' and stressed the danger inherent in attaching too much weight to consistency of treatment when the proper emphasis under S.98(4) is on the 'particular circumstances of the individual employee's case'.

233. *Hadjioannou v Coral Casinos Ltd* was subsequently endorsed by the Court of Appeal in ***Securicor Ltd v Smith 1989 IRLR 356, CA*** . The panel had found that S was more culpable than C and therefore the employer's decision was held by the Court of Appeal to be not perverse since it was based on clear and rational reasons.

234. In considering disparity of treatment, employment tribunals must be careful not to substitute their own view for that of the employer. In ***Kier Islington Ltd v Pelzman EAT 0266/10*****.**

235. ***MBNA Ltd v Jones EAT 0120/15***:*"22…If it was reasonable for the employer to dismiss the employee whose case the ET is considering, the mere fact that the employer was unduly lenient to another employee is neither here nor there".*

Disciplinary hearing

236. Where misconduct is admitted or the facts are not in dispute, it may not be necessary to carry out a full investigation: **Boys and Girls Welfare Society v McDonald [1996] IRLR 129.**

237. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: **Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23.**

Appeal

238. House of Lords in ***West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL***:the employer's actions at the appeal stage are relevant to the reasonableness of the whole dismissal process.

Acas Code

239. Section 207A(2) TULR(C)A provides that: 'If*, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim* to *which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'*

240. ***Kuehne and Nagel Ltd v Cosgrove EAT 0165/13*****,** a tribunal may only consider *adjusting* the compensatory award once it has made an express finding that a failure to follow the Code was unreasonable.

241. ***Brown v Veolia ES (UK) Ltd EAT 0041/20***, the EAT has confirmed that breaches of the Code in *respect* of the disciplinary process can properly be taken into account when considering whether to award an uplift to an award of damages for wrongful dismissal, even where, notwithstanding those breaches, the dismissal is found to be fair under S.98(4) ERA.

242. In In ***Lawless v Print Plus EAT 0333/09*** Underhill P acknowledged that the relevant *circumstances* to be taken into account by tribunals when considering uplifts would vary from case to case but should always include the following:

- *whether the procedures were applied to some extent or were ignored altogether*
- *whether the failure to comply with the procedures was deliberate or inadvertent, and*
- *whether there were circumstances that mitigated the blameworthiness of the failure to comply.*

243. The specific provisions identified by the Claimant are paragraphs 3, 4 and 9 of the Code:

3. Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.

4. That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- *Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
- *Employers and employees should act consistently.*
- *Employers should carry out any necessary investigations, to establish the facts of the case.*
- *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*
- *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*
- *Employers should allow an employee to appeal against any formal decision made.*

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

244. It may not be necessary for a claimant who seeks an uplift of compensation on account of the employer's failure to comply with the Acas Code however,to direct the tribunal to particular provisions of the Code that he or she alleges have been breached: ***Gavli and anor v LHR Airports Ltd EAT 0012/21*** .

Polkey deduction

245. The House of Lords' decision in ***Polkey vAE Dayton Services Ltd 1988 ICR 142, HL*** establishes procedural fairness as an integral part of the reasonableness test under S.98(4).

246. Not every procedural defect will render a dismissal unfair. For example, in ***D'Silva v Manchester Metropolitan University and ors EAT 0328/16*** the EAT upheld an employment tribunal's conclusion that a flaw in the disciplinary process that rendered it 'not ideal' did not render the dismissal unfair.

Contributory fault

247. Section 123(6) of the Employment Rights Act 1996 (ERA) states that: '*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*.'

248. There is an equivalent provision for reduction of the basic award contained in S.122(2) ERA which provides merely that; "*where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal* ***shall*** *reduce or further reduce that amount accordingly"*

249. EAT in ***Optikinetics Ltd v Whooley 1999 ICR 984, EAT***, held that S.122(2) gives tribunals a wide discretion however, under S.123(6) where, to justify any reduction, the conduct in question must be shown to have *caused or contributed to the employee's dismissal*.

250. In ***Nelson v BBC (No.2) 1980 ICR 110, CA*****,** the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

- *the conduct must be culpable or blameworthy*
- *the conduct must have actually caused or contributed to the dismissal, and*
- *it must be just and equitable to reduce the award by the proportion specified.*

Wrongful Dismissal

251. A claim of wrongful dismissal, is a dismissal said to be in breach of a statutory or contractual right to notice. The Tribunal has jurisdiction to consider such claims under the Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994.

252. The Tribunal is required to undertake an evaluation of the evidence before it and to reach its own conclusions as to what took place.

253. The Tribunal must then go on to consider, having reached conclusions as to what ***in fact*** took place, whether that was sufficiently serious as to amount to gross misconduct and to permit the employer to terminate the contract of employment without notice: ***Phiri v Surrey & Borders Partnership NHS Foundation Trust UKEAT/0025/15*** *and* ***Cameron v East Coast Mainline Company Ltd UKEAT/0301/17).***

Conclusions and Analysis

Credibility of witnesses

254. The Tribunal found the Claimant to be generally credible and reliable. Although his evidence in chief appeared to indicate that he was denying not having looked over

his shoulder before reversing, he had admitted to this during the disciplinary process and when questioned about this during the hearing. The Tribunal accept that this was a poorly worded paragraph in his statement rather than an intention to mislead the Tribunal.

255. The Tribunal also found Mr Maude and Mr Henney to be generally credible and reliable. While Mr Henney's evidence under cross examination was at times defensive and lacking credibility on certain specific issues, in particular his view about whether Mr Slater could have got out of the way had he seen the PPT and whether he had considered whether the CCTV was reliable being positioned at a height , the Tribunal do not consider that the credibility of his evidence more generally was tainted. When taken for example to the investigation notes with Mr Slater, he readily admitted to a mistake in not having seen the relevant entry and his evidence in other material respects was supported by the evidence. The Tribunal also accept that at times although he appeared not to be answering questions in a forthright fashion, there were occasions when the way questions were put to him in cross examination, was convoluted and confusing.

Ordinary Unfair Dismissal

(**a) Could the Respondent prove a potentially fair reason for dismissal on the balance of probabilities?**

256. The Claimant asserts that the inconsistency of treatment supports an inference that the purported reason for dismissal, namely conduct is not genuine. The Claimant alleges that he was treated differently in terms of the sanction applied because of the incident in January 2019 and September 2021.

257. As set out in the above findings, the Claimant has not established that he was subject to unfavourable treatment after the January 2019 incident as alleged, in terms of how he was treated with respect to overtime or the drug and alcohol tests.

258. Mr Maude had taken into account his disciplinary record and had viewed the January 2019 incident and September 2021 incidents has giving rise to a blemish on his safety record when deciding whether the sanction of dismissal was appropriate however, that the Tribunal conclude does not detract from the *reason* for dismissal. The Claimant accepts that failing to drive a PPT safely is a serious health and safety issue and he accepted that he had not driven safely and the CCTV evidence shows that he failed to check his direction of travel before he set off. He himself at the disciplinary hearing accepted he did not look before reversing and his representative referred to it as a lapse in concentration. A lapse which resulted in injury to a work colleague.

259. The Tribunal conclude that the Respondent has satisfied the burden of establishing that what caused it to dismiss was the belief held by it that the Claimant had failed to drive a PPT safely on 14 December 2021, causing injury to a work colleague. This was work which the Claimant was capable of doing but on this occasion he had been careless when carrying out. The Tribunal is satisfied that it is properly categorised as conduct. :***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*.**

Pretermination

Invitation to disciplinary letter

260. The Tribunal conclude that the letter of invitation to the disciplinary hearing dated 15 December 2021 (p.105) does not indicate predetermination of the outcome of the disciplinary hearing. The wording is fairly standard wording and does nothing other than make it clear that the employer considers that the offence falls within the category of gross misconduct. The letter refers to an "*allegation"* of gross misconduct and in the circumstances, given not least the evidence of the CCTV, the belief that this offence falls within the category of gross misconduct is within the band of reasonable responses that a reasonable employer in the circumstances might have adopted

261. Paragraph 9 of the Acas code provides that the disciplinary letter contain information about the *possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting.".* To warn an employee that the allegation amounts to gross misconduct and may therefore result in dismissal, is serving the Tribunal find, only to put the employee on clear notice of what the consequences of a finding that the allegation is made out.

262. The Tribunal does not conclude that the categorisation of the offence as set out in the letter is evidence that the outcome was predetermined.

Red Coding

263. The ' red; coding of the accident was something which the Health and Safety team were responsible for . The Tribunal accept that it would have been coded red because it involved heavy machinery and physical injury in circumstances where the Claimant had not been complying with SSOW.

Ms Lowe's comments

264. The Tribunal conclude that Ms Lowe's comments about the Claimant lacking empathy, were unjustified and it remains unclear why she would have made that comment. The Tribunal finds that Mr Henney did not view the incident log before arriving at his decision and thus would not have seen this comment but in any event, the evidence does not support a conclusion that Ms Lowe's view influenced Mr Henney's decision, his decision the Tribunal accept on the evidence, was based on the Claimant's conduct in causing the accident on 14 December and not what efforts he made to get first aid assistance for Mr Slater.

Inconsistency of treatment

265. Counsel for the Claimant submits that the inconsistency of treatment supports an inference that the purported reason for dismissal is not genuine.

266. Mr Maude considered the issue of consistency of treatment at the appeal stage .

267. The Tribunal is satisfied that Mr Maude made findings that the cases were not truly similar or sufficiently similar on rational and clear reasons: ***Hadjioannou v Coral Casinos Ltd 1981 IRLR 352, EAT*** and it is not for this Tribunal to substitute its own view for that of the Respondent: ***Kier Islington Ltd v Pelzman EAT 0266/10*****.**

268. Although the Claimant does not seek to argue that he had been referring to incidents not included in the incident log considered by Mr Maude, and while it would have been preferable to put this information before the Claimant at a further meeting to give him a chance to identify which of the incidents he considered showed inconsistency of treatment, the Tribunal conclude that to fail to do this in the circumstances was not if itself, outside the band of reasonable responses. Mr Maude looked at all the incidents during the period identified by the Claimant and the incident log had sufficient information to enable Mr Maude to make a reasonable assessment of the facts and their similarity to the incident on 14 December 2021. The Claimant had not been able to provide any details of any other incidents when asked by Mr Maude at the hearing.

269. The Tribunal therefore conclude that there no inconsistency of treatment and the other incidents identified do not support an inference that the purported reason for dismissal is not genuine.

270. The Tribunal conclude that the reason for dismissal was the Claimant's conduct.

(b) Was the decision to dismiss fair, applying s.98(4) ERA 1996? .

At the time the respondent formed the belief had it carried out a reasonable investigation ? Was the decision to dismiss with the range of reasonable responses ?

271. The Tribunal have considered **not** what it would have been reasonable and fair for an employer to have thought on the facts and evidence before it at the disciplinary, but what it finds Mr Henney actually thought and whether, having regard to the totality of his reasons, whether he believed those reasons to be true on reasonable grounds.

Investigation

272. While the letter inviting the Claimant to the disciplinary hearing does not provide details of what it is alleged the Claimant had done which amounted to gross misconduct, in the sense that it does not detail in the letter whether it is the failure to look behind before reversing and/or the failure to maintain vigilant observation etc, it is not disputed by the Claimant that he was well aware that the allegation related to the incident on the 14 November 2021 and his driving of the PPT.

273. The Claimant does not allege that he was not able to properly prepare for the disciplinary hearing. He was aware that the allegation was that he had driven his PPT in a manner which was "negligent". While he may not have been told whether that was because he had not looked before moving off and/or not maintained adequate vigilance, the Tribunal is satisfied that from the interviews with him and having viewed the CCTV, he had sufficient information to prepare to answer the case at the hearing.

Failure to interview Mr Slater/ consider in full his statement

274. Mr Henney does not refer during the disciplinary hearing or in his outcome letter, to having taken into account the behaviour of Mr Slater and he does not set out what his findings are in that regard; whether or not he had found that Mr Slater should also have been more vigilant and whether he shares any culpability for what happened or if not, why not. He also does not comment on any view he has

formed about the Claimant's contrition or acceptance of the level of his responsibility for the accident and he does not refer to having considered mitigation or the appropriateness of any lesser sanction.

275. The Tribunal conclude on the evidence, that Mr Henney did not consider whether Mr Slater was culpable, if he had, he did not give it sufficient consideration, certainly not to the extent that a reasonable employer acting reasonably would have done. The Tribunal conclude that Mr Henney focussed only on the Claimant's conduct. He did not attach any significance to the behaviour of Mr Slater. It simply implausible, looking at the CCTV footage that Mr Henney formed a view as he asserts he did, that Mr Slater was being vigilant. It is apparent as he now accepts, that Mr Slater can clearly be seen, not looking anywhere other than in front of him and that is further confirmed by what Mr Slater said during the investigation interview with him.

276. To conclude that Mr Slater had been vigilant and had no responsibility for the incident was not within the band of reasonable responses in the circumstances.

277. Mr Henney gave evidence that it would have made no difference to the action which would have been taken against the Claimant, whether Mr Slater was also culpable. However, this was a matter which on Mr Henney's own evidence, he considered was relevant. His evidence is that he considered it and formed a finding about it and the Tribunal conclude that it informed his view of the reasonableness of the Claimant's stance that he was not solely responsible which in turn informed Mr Henney's perception about the lack of contrition shown by the Claimant and the risk therefore of a repeat of this type of incident. It is the Tribunal consider, fundamental to the fairness of the process.

278. The finding Mr Henney made, that Mr Slater had been vigilant when crossing the loading bays and looked around him, was perverse. It was contradicted by the CCTV footage he viewed at the time and even Mr Slater's own interview notes.

279. Not only did Mr Henney the Tribunal find, not engage with the question of whether Mr Slater was culpable and whether this should make a difference in the sanction to be applied, Mr Henney's own evidence is that he considered dismissal was the correct sanction because the Claimant was not accepting responsibility and was not contrite. However, the Tribunal consider that it was outside the band of reasonable responses, to form that view without first considering whether the frustration and view the Claimant was expressing about not being the only person who should be held accountable, was a legitimate and reasonable view to hold.

280. With respect to the issue about not reaching a finding about whether the Claimant sounded his horn or not, the Tribunal accept that Mr Henney did not take that into account . However the Tribunal consider that his approach to this issue was not outside the band of reasonable responses. It did not detract from the Claimant's obligation and failure to look behind him before reversing and remaining vigilant. Mr Slater did not know if the horn had been sounded, the CCTV could not confirm and the Claimant's evidence is that it would not have sounded for long, the implication being that it may not have been heard. The Claimant had not alleged that sounding his horn negated the need for other important safety measures which he had not taken.

Failure to consider the height of the CCTV camera

281. While neither Mr Henney or Mr Maude gave any consideration to whether the CCTV footage gave a distorted view of the incident because it was at height, this was not raised by the Claimant during the disciplinary or appeal process. Further, the Claimant had admitted to not looking behind before he started reversing and that "*…If anyone else was around I was going to be more aware*." This indicates clearly that he was being less vigilant than he could have been and knew he should have been. He also admits that he was aware that Mr Slater was at his desk close by and had been called a number of times to close a bay and that he would have probably expected him to take the route he did. He admitted he did not look, that he did not believe he was driving safely and Mr Brent referred to a '*lapse of concentration'* . There is no dispute, that Mr Slater was injured.

282. The Tribunal do not consider that it was outside the band of reasonable responses to have relied on the CCTV footage and the admissions the Claimant made. It was not outside the band of reasonable responses not to carry out a reconstruction of the incident on the warehouse floor to ascertain what precisely the Claimant could have seen on the ground rather than rely on the CCTV and the evidence from the two key witnesses, even taking into account the seriousness of the consequences for the Claimant of a finding of gross misconduct.

283. It was within the band of reasonable responses the Tribunal conclude, looking at the CCTV footage, to form a belief that the Claimant would have seen Mr Slater had he been more vigilant .

Sanction

284. The seriousness of the offence the Tribunal conclude could justify dismissal. The Claimant himself accepted that it was a serious issue to breach Health and Safety rules around safe working practices.

285. The Tribunal conclude that dismissal for this offence would have been within the band of reasonable responses. However, Mr Henney considered other sanctions but the lack of remorse the Claimant showed was an important factor he took into account . The Tribunal conclude that the view he reached that a lesser penalty was not appropriate, because the Claimant was unreasonably accusing Mr Slater of also being to blame, was outside the band of reasonable responses that a reasonable employer in the circumstances might have adopted. The Claimant accepted that he had made a mistake, but he also reasonably considered that Mr Slater also contributed, a view which the Tribunal find was the only reasonable conclusion to form on the evidence.

286. That finding by Mr Henney was fundamental to the fairness of the decision to apply the sanction of dismissal . The belief that Mr Slater did not contribute to the incident, the belief in the Claimant's lack of remorse in no small part because of the perception that his accusation that Mr Slater's contributed to the accident, was unreasonable.

287. Further, it was outside the band of reasonable responses to not address in either the disciplinary hearing or the disciplinary outcome letter or at appeal, what the finding had been regarding the culpability of Mr Slater and respond to the Claimant's complaint that he was also responsible and why no action was being taken against Mr Slater. The difference in treatment, is also a consideration which the Tribunal may take into account in terms of the equity of the situation. Mr Slater's position can reasonably be distinguished on grounds which are rational

because he was a pedestrian, he was not operating machinery however, in terms of equity in a more general sense, he had had failed to comply with his own Health and Safety responsibilities and was in a position of authority and yet was not even subject to a warning or retraining.

Appeal

288. Mr Maude dealt with the Claimant's grounds of appeal and the approach to the issue of consistency of treatment is addressed above. The Tribunal do not conclude that the way other incidents, which were not sufficiently similar were treated, renders the decision to dismiss in this case unfair on equity grounds. The Tribunal is satisfied that Mr Maude was acting within the band of reasonable responses in finding that there were material differences between the Claimant's case and the others recorded on the incident log, and the decision for deeming them not to be sufficiently similar were clear and rational.

289. I was not clear why the Claimant had felt that the situation with Mr Dimbu had contributed to the incident, other than adding to a feeling of working under stress to complete his work. However, given this incident had happened a week before the 14 December incident, it was within the band of reasonable responses to find that this did not render the decision to dismiss unfair and had no material bearing on the case. The Claimant had merely been asked about a load, he does not allege that he was rebuked or disciplined unfairly.

290. The dismissal by Mr Maude of the complaint by the Claimant that the decision by Mr Gibbens to proceed to a disciplinary hearing showed that the outcome was premeditated because there was no adjournment, was also the Tribunal conclude within the band of reasonable responses. The CCTV footage clearly implicated the Claimant. The Claimant had been given a chance to explain himself and did so, accepting that he had not looked in the direction of travel before moving off in breach of the SSOW. It was within the band of reasonable responses for Mr Maude to dismiss this ground of appeal and find that the action of Mr Gibbens was a reasonable course to take and did not support an allegation of predetermination.

291. The Tribunal find that it was within the band of reasonable responses for Mr Maude to dismiss the complaint about Mr Slater not using walkways, given the explanation Mr Henney had given about this comment in the interview held with him and Mr Maude's own experience and knowledge about the practicability of supervisors walking across the loading bays rather than using walkways.

292. Mr Maude had been invited by the Claimant by way of mitigation to consider his good working record. Mr Maude did view it as '*less than perfect'* and his reasons for doing so were the Tribunal conclude, outside the band of reasonable responses. The Claimant's record was tainted in Mr Maude's view the Tribunal conclude, because of his involvement in an accident which did not arise as a result of any fault on the part of the Claimant and another where no blame was actually placed directly on the Claimant.

293. Although the Claimant invited Mr Maude to take into account his personnel record, he was not given an opportunity to comment on the 2 previous incidents and the extent to which they indicated a less then exemplary safety record. Mr Maude had little knowledge of the incidents but considered them to be a 'blemish' on his safety record. The only reasonable inference to be drawn from the language Mr Maude used in cross examination to describe these incidents along with what he

stated in the appeal letter, is that those incidents were not supportive of the Claimant's position.

294. Given Mr Maude's limited knowledge of the previous incidents, it was outside the band of reasonable responses to have taken them into account without first giving the Claimant an opportunity to comment, not least given the seriousness of the consequences for the Claimant of dismissal and the lack of any previous disciplinary action connected with those incidents.

295. While Mr Maude denied that these incidents influenced his decision, The Tribunal is satisfied that they did play some part in the evaluation process Mr Maude undertook when assessing the fairness of the sanction and the opinion he formed that the Claimant did not seem to accept responsibility for the accident and that he did " *did not believe there was any guarantee that he would not do something similar in the future…".* Had the two earlier incidents been of no consequence, then Mr Maude would have simply no doubt confirmed that the Claimant had a perfect safety record to date or mentioned that he had not taken them into account, but he clearly considered that these incidents in some way tarnished or tainted his record.

296. Further, Mr Maude had not interviewed Mr Slater and proceeded on the basis that Mr Slater had not contributed to the accident because he had assumed that this had been Mr Henney's finding. The Tribunal conclude that Mr Maude had failed to give sufficient consideration to the extent to which Mr Slater's actions had contributed to the incident. He did not engage with this issue in any meaningful way in the appeal process as evidenced in the appeal letter and his evidence chief. The appeal did not therefore remedy this defect in the disciplinary process.

297. The failure to address this at the appeal, was outside the band of reasonable responses. This was a fundamental failing because it affected the view of the reasonableness of the Claimant's protestations about the conduct of Mr Slater, which while it may reasonably have been held not to have exculpated the Claimant from blame, it gave rise to a perception that he was not contrite. It give rise to a perception that the Claimant was refusing to take responsibility for his actions. Had there been a meaningful consideration of whether Mr Slater's conduct had also fallen short, then this may have given rise to a different view of the reasonableness and legitimacy of the Claimant's position and the fairness of the decision to dismiss.

298. It must the Tribunal conclude, have been frustrating and felt unfair to the Claimant, that while he was losing his job, Mr Slater a supervisor, who had failed to be vigilant and contributed to the situation (accepted under cross examination by Mr Maude), was not being held accountable to any degree for his failure to comply with the SSOW, while he was facing possible dismissal.

299. There was indeed a 'blind' spot and that was the failure to look in any meaningful way, during this whole process, at the conduct of Mr Slater. That was outside the band of reasonable response because what it did was impact on the perception Mr Henney and Mr Maude had of the Claimant's sense of contrition, the risk of a repetition of such an incident and whether a lesser sanction should be applied.

Summary

300. In conclusion, there were serious flaws in the disciplinary and appeal process and the Tribunal conclude that these flaws were so serious that in the circumstances the dismissal was unfair contrary to section 98 ERA, for the following reasons:

- *The failure by Mr Henney to read or read with adequate care, the witness statement of Mr Slater and/or to view with reasonable care the CCTV footage and as a consequence form a belief which was perverse on the evidence, namely that Mr Slater had been vigilant when walking across the loading bay and had looked and been aware of the Claimant driving the PPT in the marshalling lanes.*

- *The failure to engage with the issue of the conduct of Mr Salter both during the disciplinary and appeal stage, and whether it contributed to the accident and the reasonableness of the Claimant's view about the disparity in treatment between him and Mr Slater.*

- *The failure to set out in the disciplinary outcome letter and for Mr Maude to clarify with Mr Henney and with the Claimant, the findings which had been made about the extent to which Mr Slater had contributed to the accident and on what grounds.*

- *The failure to give the Claimant an opportunity during the appeal process, to make representations on the extent to with the incidents in January 2019 and September 2021 should be taken into account and amounted to a 'blemish' on his safety record.*

The Claimant's claim that he was unfairly dismissed succeeds.

Polkey

301. The Tribunal do consider that it is possible to determine whether or not the Claimant would have still been dismissed or whether a lesser sanction would have been applied had the process being carried out fairly. The evidence of the Respondent suggests that the Claimant would not have been dismissed and a lesser sanction would have been applied had their view of the reasonableness of his opinion that Mr Slater shared some responsibility, been different.

302. Both Mr Maude and Mr Henney gave evidence that they would have dismissed regardless of whether action should have also been taken against Mr Slater however, both also stressed the importance they attached to the perceived contrition shown by the Claimant. A perception formed, the Tribunal conclude, to a significant extent by the Claimant maintaining his position about the unfairness of only taking action against him and not taking into account the conduct of Mr Slater. The Tribunal conclude that the Claimant's position on this issue was a perfectly legitimate one to raise but he was seen in raising as, as refusing to take responsibility or show remorse.

303. Mr Maude's evidence is that his decision on appeal would have been different had he felt that the Claimant was accepting responsibility and not seeking to blame others. The Tribunal understood from his evidence, that the Claimant would not have been dismissed.

304. It is hardly surprising that the Claimant felt increasingly that he was not being listened to and that this complaint that Mr Slater shared some responsibility was falling on deaf ears. Mr Henney did not engage with it and address whether and to what extent he considered Mr Salter to be at fault and nor did Mr Maude and yet they viewed the Claimant's protestations as a lack of remorse and this was outside the band of reasonable responses.

305. The Tribunal do not therefore consider that a Polkey reduction should be applied in these circumstances given the Respondent's evidence about the impact the Claimant's attitude had on the sanction applied.

Contributory fault

306. Mr Maude in the appeal hearing refers to the Claimant believing that his contribution was 50%. The Claimant under cross examination gave evidence that he had apologised to Mr Slater and referred to it as being his " *fault"* when he did so.

307. The Claimant's actions were blameworthy, they may have been a mistake and due to a loss of concentration and a desire to get the job done on time however, he had been trained, he was experienced and the accident caused injury and could have led to even more serious injury.

308. Although Mr Slater should have taken steps to protect his own welfare, the Tribunal have watched the CCTV footage and accept that it is obvious that the Claimant was blatantly failing to make any effort to look behind him before he started reversing and was concentrating on avoiding the pallets in the marshalling lanes rather than looking all around him for pedestrians.

309. It was the Claimant who was operating dangerous machinery, and his failing was blameworthy and was the reason for his dismissal. He had breached the SSOW and his evidence is that he understood to do so was a serious matter.

310. In those circumstances it must be just and equitable to reflect his blameworthy conduct in the compensation to be awarded. It lead directly to his dismissal.

311. The Tribunal take on board that the Claimant was the one operating the moving machinery, he was under specific obligations not only to be vigilant (as Mr Slater was) but to take further measures to safeguard other people working in that area, which included looking before setting off in the direction of travel. The Tribunal consider that the Claimant was more blameworthy than Mr Slater, because he was the one in charge of dangerous equipment and under more specific obligations in terms of what steps he had to take to protect others in the vicinity including to give pedestrians, which would have included Mr Slater, right of way.

312. The Claimant's conduct was blameworthy, it caused or contributed to the dismissal, and it is just and equitable to reduce the basic and compensatory award by **70%.**

Wrongful dismissal

313. The difference between the unfair dismissal test in misconduct cases is that whether dismissal is unfair is based on Burchell and is subjective, however the wrongful dismissal test, is objective. It is necessary for the Tribunal to decide whether the Claimant was responsible for a repudiatory breach of his contract of employment.

314. The Claimant admitted to breaching SSOW. He admitted that he had made a mistake, he even apologised to Mr Slater, saying that it was his fault. Whatever the wrongdoing by Mr Slater giving rise to issues of equity (and the impact the Claimant's perceived remorse had on the decision making process of the disciplining officer when deciding whether to apply a lesser sanction), the Claimant had breached the SSOW and he had driven in a manner which was the Tribunal find, negligent.

315. By his own admission he would have driven with more awareness had he known other people were around him but he should have driven with that same care in any event because he knew other people work in that area,. He had complained about the increasing number of people present in the loading already and further, he expected Mr Salter would at some point be leaving to close bay 41/43.

316. The Tribunal have gone on to consider whether the conduct justified the summary termination of the Claimant's employment. Was it so serious it amounted to a repudiatory breach?

317. The Claimant had an express contractual obligation to comply with the Respondent's health and safety practices but in any event he understood that any infringement was a serious matter.

318. Viewed objectively, the Claimant's conduct constituted gross misconduct and so the dismissal was **not** wrongful.

319. The Respondent was entitled to terminate the contract of employment without notice.

ACAS

320. In terms of any ACAS uplift, the parties will have the opportunity to address the Tribunal further on the percentage uplift to be applied, in light of the findings set out on this judgment at the remedy hearing.

Remedy

321. The case will be listed for a remedy hearing to include further submissions on an ACAS uplift in light of the findings set out in this judgment. Separate case management orders have been issued

Employment Judge Broughton

Date: 27 October 2022

JUDGMENT SENT TO THE PARTIES ON

3 November 2022

FOR THE TRIBUNAL OFFICE