EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101522/2022

Held in Glasgow on 31 January; 1 to 3 February; and 6 to 10 February 2023

Employment Judge P O'Donnell

Members D Frew and G Doherty

Mr R Dickie	**Claimant** **In person**
GE Caledonian Limited	**Respondent** **Represented by:** **Ms D Dickson – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim for detriment under s47B of the Employment Rights Act 1996 and the claims of unfair dismissal under ss94, 98, 100, and 103A of the Employment Rights Act 1996 are not well-founded and are hereby dismissed.

REASONS

Introduction

1. The Claimant has brought a number of complaints arising from his dismissal by the Respondent, all of which are resisted.

2. The case had been the subject of a number of case management hearings and directions, primarily intended to clarify the basis of the claims being pursued by the Claimant. This was finalised at a case management hearing heard by EJ Kearns on 4 August 2022 (pp50-54) as follows.

3. The Claimant brings a claim of unfair dismissal under s94 of the Employment Rights Act 1996 under a number of heads.

4. First, he brings a claim of "ordinary" unfair dismissal in terms of s98 of the 1996 Act.

5. Second, he alleges that his dismissal was "automatically" unfair contrary to s103A of the 1996 Act because the sole or principal reason for his dismissal was that he had made protected disclosures. The disclosures on which he relies are:-

    a. On 30 April 2021, he told John Conway (lead mechanic) that illegal drugs were being taken by other employees in and out of the workplace.

    b. On 11 August 2021, he told John Conway that an anchor had been improperly fitted to a four-ton engine under which he had been working (only half the bolts were said to have been fitted). It was identified that this work had been done by another mechanic who it was said had been out socialising the night before and alleged to be "*full of substances*".

    c. On an unspecified date between 12 August and end of September 2021, the Claimant told Graeme McCormack (lead mechanic) "*about the number of young ones all heaped on the one shift*" and the issue with "*the marching powder with them all*" (a reference to cocaine).

6. The Claimant also alleged that his dismissal was "automatically" unfair under s100 of the 1996 Act the sole or principal was because he took action about issues of health and safety as follows:-

    a. Made the disclosure to John Conway on 11 August 2021 set out above.

    b. Made a complaint to management via his trade union that new starts were supposed to get one-to-one training but he was being asked to train multiple people at the same time which was not safe. This was

said to have been done over an unspecified period prior to the Claimant's suspension in October 2021.

7. The Respondent denied that the Claimant had been dismissed for reasons falling within ss103A or 100 of the 1996 Act; they denied that these disclosures and complaints had been made and, in any event, had not been the reason for the Claimant's dismissal. They alleged that the Claimant was dismissed because of his conduct and that his dismissal was fair in all the circumstances of the case.

8. The Claimant also brought a complaint under s47B of the 1996 Act alleging that he had been subject to detriments because he had made the protected disclosures set out above in respect of his unfair dismissal claim. The detriments alleged were:-

   a. Being wrongfully accused of stealing wood.

   b. Being suspended.

   c. He was investigated unfairly.

9. The Respondent denied that these actions were by reason of any disclosure made by the Claimant. In any event, they denied that the Claimant made such disclosures and any disclosure made amounted to a protected disclosure as defined in the 1996 Act.

Case management

10. During the course of the hearing, an issue arose which required the Tribunal to exercise its case management powers.

11. In the course of cross-examining Russell Wood (who was the first witness heard by the Tribunal), the Claimant put questions relating to alleged disclosures he had made to his union representatives about the taking of drugs by other employees with the representatives then carrying out their own investigation into this matter which confirmed such conduct was taking place. The Claimant said that the findings of the trade union's investigation (including the fact that it was instigated by a disclosure from the Claimant) were then

communicated to the HR person supporting Mr Wood in the disciplinary investigation. The Claimant was calling this person as a witness (although he had not spoken to her about what evidence she could give and, in particular, he could not say to whom she communicated any report made to her by the trade union).

12. The Respondent's agent objected to this line of questioning on the basis that there had been no previous notice of these allegations.

13. The evidence which the Claimant now seeks to lead regarding the information provided by the trade union to HR had not been pled in the ET1 or the subsequent further particulars lodged by the Claimant. It is not, therefore, part of the Claimant's pled case.

14. The Tribunal considered that this was a matter which the Respondent was entitled to have fair notice; it is significant evidence, either of an additional disclosure relied on by the Claimant or is evidence on which the Claimant seeks to rely in showing a link between his disclosures and the knowledge of the decision-makers in the disciplinary process.

15. The Tribunal considered that this was a matter which required amendment before the Claimant was permitted to lead evidence on this, either in putting these matters in cross-examination or leading evidence-in-chief from his own witnesses.

16. Bearing in mind that the Claimant was a party litigant, the Tribunal treated what had been said in relation to this evidence as an application to amend the Claimant's pleadings. It heard both parties on whether or not it should allow the amendment.

17. The Tribunal considered the application by applying the test set out in *Selkent Bus Co Ltd v Moore* [1996] ICR 836 that the Tribunal's power to amend is a matter of judicial discretion taking into account all relevant factors (with three particular factors being identified in that case) and balancing the injustice and hardship to both parties in either allowing or refusing the amendment.

18. The Tribunal took into account the following factors:-

a. The nature of the amendment was not a new cause of action (and so the issue of time limits does not arise); the claims remain the same claims in terms of the detriments and dismissal. It is, however, a significant variation to the existing claims introducing entirely new facts which fundamentally alter the basis on which the whistleblowing claims were being advanced.

b. The timing of the application came very late in proceedings after evidence had commenced as a result of these new facts being put to a witness in cross-examination. The Tribunal bore in mind that the Claimant is a party litigant but he had been given ample opportunity to set out his case and the facts he was offering to prove. In particular, Employment Judge Gall at a preliminary hearing in June 2022 had very carefully explained to the Claimant the need for proper specification and the consequences of not pleading a matter which is later relied on. EJ Gall also made Orders for the Claimant to provide specific information about his whistleblowing case including details of all disclosures relied upon by the Claimant and why he believed that those disclosures were the reason for his dismissal.

c. There was a clear prejudice to the Respondent in having to respond to entirely new facts, fundamental to the issues for determination, of which they have had no notice. This could have been overcome, to an extent, by allowing them time to investigate these, speak to relevant witnesses, revise their pleadings and produce additional evidence. However, that, in itself, would have created a hardship for both parties because it would have inevitably delayed the case being heard; the present hearing would have needed to go off, either in whole or part, to allow the Respondent the necessary time to investigate and respond to the new allegations; even if some of the days in question could have been rescued, the hearing would almost certainly not have concluded in any remaining days and required continuation.

d. However, even then, there is still a prejudice to the Respondent as they did not have fair notice of the new facts the Claimant was offering

to prove. The case set out by the Claimant only proceeds to the point where information is given by the trade union to a person in HR but, on his own admission, the Claimant did not know what, if any, of this information was disclosed by that HR person to the decision-makers. It cannot be in the interests of justice for a party to put in a position where they are in the dark as to the whole of the case they have to answer and are trying to respond to a speculative case.

e. The prejudice to the Claimant was that he would not be allowed to lead evidence on these matters but that was not, on the face of it, fatal to his case. It only relates to the whistleblowing elements of the case and not the ordinary unfair dismissal claim or the health and safety claim. Further, if these matters were so fundamental to his claim that it could not proceed without this evidence then the Tribunal would have expected these matters to have been raised at some point in the pleadings; the Claimant submitted a lengthy response to EJ Gall's orders and did not mention these matters; he had a further opportunity to raise these at the preliminary hearing before EJ Kearns in August 2022 when the list of issues was finalised but did not do so.

19. Taking account of all of these factors, the Tribunal considered that the balance of hardship and injustice weighed in the Respondent's favour and so it refused the application to amend. The effect of this was that the Claimant would not be permitted to lead evidence about the investigation by the trade union and any disclosure of the outcome to HR.

Evidence

20. The Tribunal heard evidence from the following witnesses in the order below:-

a. Russell Wood (RW), materials & planning manager at the Respondent's Prestwick site, who conducted the disciplinary investigation.

b. Aaron Clayton (AC), senior security manager based the Respondent's Cheltenham site, who heard the disciplinary hearing and made the decision to dismiss.

c. Danny English (DE), environment and health & safety leader based at Chletenham, who heard the Claimant's appeal.

d. John Conway (JC), a lead mechanic at the Respondent's Prestwick site, to whom it was alleged the Claimant made protected disclosures.

e. Graeme McCormack (GMcC), a lead mechanic at the Respondent's Prestwick site, to whom it was alleged the Claimant made protected disclosures.

f. The Claimant.

g. Laura Nicholson (LN), HR support at the Respondent's Prestwick site.

h. Tony Maguire (TM), a trade union representative at the Respondent's Prestwick site, who accompanied the Claimant to the disciplinary hearing.

i. Jim Frew (JF), a trade union representative at the Respondent's Prestwick site, who accompanied the Claimant to his interview with RW.

21. The Claimant sought to lead evidence from two additional witnesses but the Tribunal did not permit him to call these witnesses as their evidence was wholly irrelevant. It was evidence which was intended to prove that the Claimant had not committed acts of misconduct (in particular, that he had not stolen wood from the Respondent's store because he had been permitted to take scrap wood in the past) but none of the evidence which was to be led from these witnesses had been put before AC (or even offered to him by the Claimant) during the disciplinary process.

22. There was an agreed bundle of documents prepared by the parties running to 293 pages. A reference to a page number in this judgment is a reference to a page in the joint bundle. There was also a supplementary bundle

containing additional documents which the Claimant sought to include. Where a page in this bundle is referenced then it will be proceeded by "SB".

23. This was not a case where there was any significant dispute of fact in relation to the relevant facts. The only significant dispute related to whether the Claimant had made the disclosures set out above to JC and GMcC; both those witnesses did not recall the disclosures in question being made at all. For reasons which will be clear below, the Tribunal did not consider it necessary to resolve this particular dispute in order to determine the claims before it.

24. A considerable amount of the evidence led by the Claimant was wholly irrelevant to the determination of the issues before the Tribunal or could be given little weight by the Tribunal for a number of reasons.

25. First, as has been noted above in relation to the amendment issue and the additional witnesses who the Claimant sought to call, the Claimant sought to lead evidence at the hearing which had not been raised during the internal disciplinary process. For example, during his evidence-in-chief, the Claimant, for the very first time, alleged that another employee had made one of the threats of which the Claimant had been accused. This had never been raised at any point during the disciplinary process. Similarly, there were detailed accounts of previous occasions on which the Claimant alleged he had been given permission to take scrap wood which had never been raised until his evidence-in-chief at the Tribunal hearing. He also gave a much more detailed account of how he came to take scrap wood (which gave rise to one of the allegations leading to his dismissal) in which he stated that another employee initially took the wood but then changed their mind leading the Claimant to take it instead. This was never said during any of the internal hearings and is very different from what the Claimant is recorded as saying at those hearings. There were numerous other examples where the Claimant presented entirely new explanations for his conduct (which were intended to excuse or mitigate the conduct in question) for the very first time at the Tribunal hearing.

26. As was explained to the Claimant during the hearing, the Tribunal assesses the fairness of any dismissal based on the information available to those making the various decisions in the process at the time those decisions are made.

27. Second, the Claimant sought to lead evidence about previous disciplinary or grievance processes in which he was involved, many of which occurred some years ago and, for the most part, did not involve anyone involved in the process which led to his dismissal. The Tribunal considered that this evidence was wholly irrelevant and was no more than the Claimant ventilating long held complaints which had no bearing on the events leading to his dismissal.

28. Third, there was a considerable amount of evidence led by the Claimant, either in his own evidence or from his witnesses, which had not been put to the Respondent's witnesses in cross-examination. The Tribunal appreciated that the Claimant was a party litigant but it was explained to him that he needed to put his case to the Respondent's witnesses. In the event, the Tribunal permitted the Claimant to lead the evidence in question to allow him to present his case with the caveat that little or no weight would likely be given to any evidence to which the Respondent's witnesses had not had the opportunity to respond.

Findings in fact

29. The Tribunal made the following relevant findings in fact.

30. The Respondent is an engineering company with facilities across the globe including multiple workplaces in the UK. The Claimant was employed as a mechanic at the Respondent's site at Prestwick. He had worked there for 23 years by the time of his dismissal, starting as an apprentice. The Prestwick facility maintains and repairs jet engines.

31. The Respondent has a disciplinary policy (pp94-98) which sets out a three step disciplinary process:-

a. Suspension/investigation – any investigation will be carried out by an appropriate manager and/or HR. The outcome of any investigation will be that no further action is to be taken or that there is a need for a disciplinary hearing.

b. Hearing – the employee will be informed of the allegations in writing and provided with all relevant documents.

c. Appeal – an employee can appeal the outcome of any disciplinary hearing.

32. The disciplinary policy outlines a range of possible sanctions from a written warning up to dismissal. At pp96-97, there is a non-exhaustive list of matters which are considered to be gross misconduct including theft, wilfully placing persons or property at risk of injury or damage and violent or abusive behaviour.

33. The Respondent has a number of other policies relevant to the case:-

a. Managing Threats or Act of Violence in the Workplace (pp89-93).

b. The Spirit & Letter Policy (pp99-126).

c. Workplace Harassment Policy (pp134-139).

34. In August 2021, a cell leader at the Prestwick site, Kyle Bicker, emailed the site HR (p179) regarding a dispute between the Claimant and another employee, Liam Dale (LD). The email states that there had been some animosity and disagreement between them which had led to a meeting between them and Mr Bicker to try to resolve this. Mr Bicker stated that the end result of the meeting was that there had been allegations of threatening behaviour made with LD being uncomfortable coming into work and asking for HR to become involved.

35. In response to this email, RW was asked by HR to investigate the situation. He was a manager at the site with experience of disciplinary matters. Involvement in disciplinary and grievance processes is shared among managers, taking it in turn to deal with any such processes.

36. RW was not given any more information than was contained in the email at p179 and so he decided to meet with Mr Bicker to get more information about what had happened.

37. He met with Mr Bicker on 2 September 2021 and interviewed him. A witness statement recording what has discussed was produced at p161:-

    a. Mr Bicker explained that in the week of 16 August 2021, LD had called him to discuss the Claimant having a "go" at him and that this was not the first time this had happened. Mr Bicker spoke to the Claimant to explain what had been raised. He had thought this was the end of it but the Claimant subsequently asked for a meeting about what had been discussed.

    b. This meeting was arranged for 24 August. Both the Claimant and LD attended with another employee accompanying them. At the meeting, the Claimant alleged that LD was not telling the truth about the Claimant bullying him and LD replied that he had not said he was being bullied.

    c. Mr Bicker described the meeting as continuing with LD explaining that this was about the MRB (Material Review Board) store and that he had come into an email about the store. He had asked the Claimant how to reply to this and was told to delete it. The Claimant replied that LD had spoken to him like a dog and he was not happy about that. He stated that he had told LD to forget about the email as he was dealing with it.

    d. Mr Bicker explained that LD alleged that the Claimant had said that LD should delete the email or that he would "*punch you off that screen*".

    e. The Claimant then showed Mr Bicker the wood that he had taken from the MRB store and that Andy Gilchrist had previously informed him that he could take wood from the store.

38. The MRB store is a separate building on the Prestwick site. It is a secure store which requires a key (that must be signed out) and an access card to enter. It is a bonded store subject to HMRC rules.

39. The email referred to by LD during the meeting with Mr Bicker was part of an email chain at pp177-178:-

    a. It starts on 12 August 2021 with Andy Gilchrist (materials planning, execution and logistics manager) contacting the Claimant to note that the security log shows him signing out the key for the store on "Tuesday" night and asking what he was looking for. The email explains that the store has restricted access due to HMRC scrap procedure.

    b. LD replied later the same day to say that he had signed out the key to get wrist card holders from the store for Gate 1.

    c. Another employee, George Grierson, who was copied into the email change, replies to LD on 13 August asking if he took any boxes or wood from the store.

    d. LD replied later that day to say that he did not go into the store himself and only signed out the key on behalf of another employee returning it later. He had been told that his access card would not let him in the building.

    e. On 14 August 2021, Mr Gilchrist replied asking LD who specifically went to the store. It was this email that was referenced in the meeting with the Claimant and Mr Bicker. It also features in subsequent interviews conducted by RW.

    f. LD replies on 18 August 2021 that it was the Claimant and another employee, Billy McDowall, who went to the MRB store.

40. RW went on to conduct seven further interviews on 8 and 9 September 2021 including the Claimant, LD, Mr Gilchrist, the employees who attended the meeting with Mr Bicker as companions for the Claimant and LD, another

employee (Andy Rankin) whose name came up in the other interviews and a witness who wished to remain anonymous.

41. There was then a gap until 23 September 2021 before any further interviews took place. This was because RW tested positive for Covid and was self-isolating. He did not want to conduct the interviews remotely.

42. A further five interviews were conducted on 23 September, the majority of these witnesses wished to remain anonymous. Two further anonymous witnesses were interviewed on 1 October with a final anonymous witness interviewed on 4 October 2021. In total, RW conducted 16 interviews as part of his investigation with witness statements produced for each interview.

43. The first person whom RW spoke to on 8 September 2021 was John Irvine, who accompanied LD to the meeting with Mr Bicker. A statement taken at this meeting is at p162. In it, Mr Irvine states that he recalls that the meeting was related to an email about the Claimant being accused of stealing wood. He states that employees had been doing that for years. He expresses the opinion that the problems arose from two people who did not get along and rubbed each other the wrong way. He recalled that the Claimant had been driving round looking for LD's house but gives no context to this.

44. The Claimant was the second person interviewed on 8 September. He attended the interview with a trade union representative, JF. The witness statement produced from this interview is at p163:-

    a. The Claimant stated that LD was bad for going for smoke breaks and other employees would stop working every time he went for one.

    b. In relation to the incident with the MRB store, the Claimant explained that he had asked LD to get the key for the store and then the Claimant and Billy McDowall went to the store. They did not take LD because he was always so nosey.

    c. When in the store, the Claimant saw a box of wood off-cuts; he had a wood burner at home and so he took the wood. He stated that another employee used to do the same.

d. The Claimant stated that, later in that same week, there was mention of an email about wood being stolen from the MRB store. The Claimant said that he told LD that he would deal with it. After reading the email, LD was said to have called the Claimant over several time in an agitated state, banging the computer screen. The Claimant stated that LD showed him the email and asked what he should do with it. The Claimant replied that he should leave it because the cell leader was copied in but LD banged the keyboard. The Claimant admitted that he got annoyed with LD and told him to just delete the email.

e. The Claimant alleged that LD was huffy and easily annoyed. When Mr Bicker told him about his discussions with LD, the Claimant had asked for a meeting to clear the air.

f. The Claimant made a number of allegations about being told that LD had a short fuse and that he had avoided LD for a number of months after LD went "laldy".

g. The Claimant then made reference to what was described as "the driving incident". This was an occasion in April 2021 when the Claimant was driving home after work on a Friday when he alleges that LD drove close behind him and cut him up at a junction, causing the Claimant to swerve off the road. The Tribunal will use the term "driving incident" in this judgment as shorthand to refer to this matter.

h. The Claimant stated that when he came into work the next week he had a word with LD telling him not to drive like that around him again. He stated that LD apologised. The Tribunal will use the term "throat incident" in this judgment as shorthand to refer to this matter given the subsequent allegations set out below that the Claimant had threatened to "*rip out* [LD's] *fucking throat*" when he spoke to him about the driving incident.

i. The Claimant made reference to driving around Irvine with his partner to check on his step-son. On the face of the statement, this

information is offered apropos of nothing but its significance becomes clear when later statements are taken and there is an allegation that the Claimant was driving round the Irvine area looking for LD's house after the driving incident.

j. The Claimant stated that the Respondent cannot have people working together "*who want to rip each other's throats out*".

45. The next interview undertaken by RW on 8 September was with Andy Gilchrist. A short statement from him is at p164. He explains that he was contacted about someone being in the MRB store with items moved around and wood missing. He checked the logs and identified that LD had signed out the key for the store which prompted him to initiate the email chain described above. He stated that he had not given "*carte blanche*" to the Claimant or any other employee to take wood home.

46. RW then interviewed LD, again on 8 September, and the statement taken at this interview is at p165:-

a. LD explained that he had been asked to sign out the key for the MRB store by the Claimant. He was then told that the Claimant was not taking LD to the store and took another employee. When they came back from the store, they were laughing and would not say why.

b. Later in the week, LD heard that wood was missing and he then got an email from Andy Gilchrist about signing out the key for the store. He asked the Claimant how he should reply and alleged that the Claimant said that LD should delete the email.

c. LD stated that when he said he would not delete the email, the Claimant became aggressive and said he was going to smash the screen. He stated that others nearby heard and gave the name of another employee who he said was present, Andy Rankin.

d. LD talked about the meeting with Mr Bicker and that he did not want to work with the Claimant.

e. LD made reference to the driving incident and subsequent throat incident. He alleged that the Claimant confronted him and stated that if he (LD) drove that close to the Claimant again, the Claimant would "rip his fucking throat out". He also alleged that the Claimant told him that he had been driving around looking for LD's house. It was said that others heard this.

f. LD made a number of complaints about the Claimant nit-picking and that it does not feel like banter.

g. LD made reference to an incident where the Claimant had made a threat to another employee, Andy Rankin, during pay negotiations.

47. The last interview conducted by RW on 8 September was with John Bissett who had also attended the meeting with Mr Bicker. The statement produced from this meeting is at p166. Mr Bissett stated that the Claimant was aggressive at the meeting when challenged. He recalled LD asking the Claimant at the meeting if he had threatened to rip LD's throat out and had been trying to find out where LD lived with the Claimant answering "no" to both questions.

48. On 9 September 2021, RW conducted two further interviews. The first was with a witness who asked to remain anonymous because of concerns about the Claimant. A redacted version of their statement is at p167:-

a. They stated that the Claimant had been looking for LD's house and would have smashed the windows if he had found it.

b. He also recalled the incident involving the Claimant and Andy Rankin alleging that the Claimant had threated to "*punch his* [Andy Rankin] *head off his shoulders*".

c. The witness also recalled the Claimant throwing dry ice at LD a few times.

d. There are broad allegations about employees not being happy to work with the Claimant, that people were "*scunnered*" with his behaviour and would try to appease him .

49. The second interview on 9 September 2023 was with Andy Rankin and his statement is at p168:-

a. He recalled the Monday after the driving incident and stated that the Claimant's face was "*raging*". He stated that when LD came into the workplace, the Claimant confronted him and threatened to "*rip his fucking throat out*". Mr Rankin said that LD apologised and shook hands with the Claimant.

b. He also recalled comments about the Claimant looking for LD's house. In particular, he recalled that the Claimant had told him that his partner had asked him why he was driving round that area and that the Claimant had said that he told his partner to "*shut the fuck up*". Mr Rankin said this stuck in his mind.

c. Mr Rankin stated that the Claimant had fallen out with him during the pay negotiations when they had disagreed over the question of stopping overtime. He said that the Claimant talked over him and he told the Claimant to "*shut the fuck up*".

d. In relation to the MRB store and the missing wood, he stated that the Claimant had told LD to delete the email asking about the key and that the Claimant had said he would put his fist through the screen.

e. He stated that the Claimant would constantly throw dry ice pellets.

f. Mr Rankin stated that the Claimant had been talking to other employees about the investigation by RW, telling them what to say.

50. The interview process was then paused until 23 September 2021 due to RW self-isolating. The first interview conducted on 23 September was with Aaron Graham and the statement is at p169. He also described the Claimant as "*raging*" after the driving incident and that the Claimant had said that he had

been looking for LD's house, making reference to the Claimant's partner asking why he was driving around the area in similar terms described by Mr Rankin. Mr Graham also stated that the Claimant had used Google maps on a work computer to show Mr Graham where he had been. He also alleges that after the incident with the email about the MRB store, the Claimant had called LD "*a handless wee mongo*".

51. There were then three anonymous witnesses interviewed on 23 September whose statements appear at pp170-172:-

    a. One witness describes the Claimant getting close to LD and saying "*I'm going to rip your fucking throat out*" (p170). He also describes the Claimant asking who had been spoken to by RW and what they had said.

    b. A different witness (p171) states the Claimant told him that he was looking for LD's house.

    c. The third witness repeats Mr Graham's allegation about the Claimant calling LD "*a handless wee mongo*". They also state that the Claimant has been asking other employees if they have been interviewed by RW and what they were going to say.

52. The final interview on 23 September was with Jason McColm (p173) who recalled the Claimant telling him that he had been looking for LD's address but otherwise had little to add.

53. On 1 October, RW conducted interviews with two further anonymous witnesses whose statements appear at pp174-175:-

    a. The first witness recalls the Claimant telling LD to delete the email about the MRB store.

    b. He also recalled that the Claimant had informed him that he had been driving around looking for LD's house and had said to LD that he would "*rip* [LD's] *throat out*".

c. The second witness recalled the Claimant being "*raging*" about the driving incident and wanted LD to know that he was looking for his address. He also recalled the Claimant making the threat to rip out LD's throat.

54. The final interview took place on 4 October 2022 with an anonymous witness. In the statement produced from this interview (p176), it is said that the witness recalled the Claimant swearing at LD about the email relating to the MRB store. He also alleged that the Claimant had thrown dry ice at him.

55. Once he had concluded all the interviews, RW prepared an investigation report by filling in a template provided by HR. The report appears at pp153-160 with the witness statements attached as an appendix. It is dated 25 October 2021. The report sets out who was interviewed and when, a chronology of events and a summary of what RW concluded in terms of the evidence provided to him and the facts he found from this evidence.

56. RW concluded that the matter should proceed to a disciplinary process in respect of five allegations:-

a. Breach of the policy on Managing Threats or Acts of Violence:-

i. Threatening to rip out LD's throat following the driving incident.

ii. Threatening to put his fist through a computer screen when LD refused to delete the email about the MRD store.

iii. Threatening to punch Andy Rankin.

b. Breach of the Workplace Harassment policy:-

i. Calling LD a "*handless wee mongo*".

ii. Trying to influence RW's investigation by asking other employees if they had been spoken to and what they were going to say.

c. Breach of the Spirit & Letter policy:-

i. Removing the wood from the MRB store without authorisation.

ii. Telling LD to ignore the email from Andy Gilchrist and delete it.

d. Breach of the Spirit & Letter policy:-

i. Overall behaviour towards other employees.

ii. Asking employees where LD lives.

e. Breach of health and safety by throwing dry ice at other employees.

57. AC was appointed to hear the disciplinary hearing. He is a manager based at the Respondent's site in Cheltenham and had had no previous contact with the Claimant or any of the other employees involved in the investigation.

58. AC was appointed on 25 October 2021. He carried out an initial review of RW's investigation report that same day and came to the view that, in light of the nature of the allegations against the Claimant including threats, looking for LD's house and speaking to other employees about the case during the investigation, the Claimant should be suspended.

59. The Claimant, who was on annual leave at the time, was phoned by Pawel Smardz (the HR manager at the Prestwick site) on 25 October 2021 to inform him that he was being suspended and not to return to work at the end of his leave. A note of the call is at p150.

60. The suspension was confirmed by a letter of the same date (pp151-152). The letter set out the following allegations; the throat incident, the taking of wood from the MRB store, the Claimant's behaviour relating to the email about the MRB store and a broad allegation of a breach of the Spirit & Letter policy.

61. On 26 October 2021, AC raised a number of queries with RW by email (pp182 & 183). At this stage, he had reviewed the investigation report more fully and felt there was more information that was needed. RW replied on 27 October (pp182 & 183) providing more information. One of the queries related to the alleged threats made to Andy Rankin and RW confirmed that he spoke to Mr Rankin again on 27 October. He stated that Mr Rankin had not heard the

threat alleged to be made by the Claimant as he had walked away from him but had been informed by others that the Claimant had made the threat shortly after Mr Rankin had walked away.

62. The Claimant was invited to attend a disciplinary hearing by letter dated 28 October 2021 (pp184-185). The letter set out the allegations in the same terms as RW's investigation report and enclosed a copy of that report (including the witness statements appended to it). The letter also explained that if the allegations were upheld then they could constitute gross misconduct and lead to the Claimant being dismissed.

63. The Claimant sent an email to LN on 1 November 2021 (p186) raising points about the investigation and this was passed to AC:-

a. The Claimant complained that he was being painted as the instigator when it was LD who had instigated matters. He alleged that LD had "*came at me*" on three occasions.

b. He complained that no-one from the other shift had been spoken to. He stated that they had been there but did not specify to what this related.

c. He alleged that LD had said that once he is done with the Claimant he is coming for JF.

d. He stated that there had been several instances of socialising and the Claimant being invited to "his" home (although it is not clear who was socialising, in the context, the Tribunal takes this to be the Claimant and LD).

e. The Claimant complains of the gap in the interviews caused by RW self-isolating and alleges that this allowed "them" to get their stories straight. It is not clear if this includes all or only some of the witnesses interviewed.

f. The Claimant complains that he is an outsider to this group (again, it is not said what group is being referenced) since he refused to go to

LD's house because he does not do drugs. The Tribunal notes that this is the first time that the Claimant raises the issue of drug-taking by other employees during the disciplinary process.

64. The disciplinary hearing took place on 3 November 2021. It was done remotely via Microsoft Teams. Those present were the Claimant, AC, TM (as the Claimant's union rep), Jayne Savastano (HR) and a note-taker.

65. A minute of the hearing is produced at pp187-200. The Claimant, overall, denied the allegations and the Tribunal has made the following relevant findings about what was said at the hearing:-

a. AC opened the meeting by outlining his role and that the hearing was being conducted under the Respondent disciplinary process setting out certain ground rules around issues such as confidentiality. He then outlines the allegations as framed in RW's investigation report.

b. AC starts with the first allegation and asks the Claimant what he said to LD during the throat incident. The Claimant asks if he can explain further back or if they are taking matters in order. AC replies that he would like to go through each allegation in order.

c. The Claimant explained that he had distanced himself from LD since February. He was driving home from work one day to play golf with other employees. He stated that there were well-known problems with LD's driving. He described LD driving close behind him then speeding past, forcing him off the road. When the Claimant saw the registration he knew it was LD. He stated that he was going to have a word with him and was livid.

d. AC asked if this incident was reported to the police and the Claimant says there was no point as there was no-one else around. AC asked if the Claimant reported it to HR when he was next in work and the Claimant replied that he saw LD first thing when he was next in work.

e. The Claimant disputed the account that he had threatened to rip out LD's throat. He described approaching LD and telling him that he was

livid with what happened. He said that he told LD not to drive up the back of his car again. LD walked away and then came back to ultimately apologise.

f. The Claimant denied that any of the witnesses were present during this discussion. He alleged that they were targeting him and there was a conspiracy against him from that crew. When asked why he believed there was a conspiracy, he alleged that he had not gone back to LD's house after a day out because "they" all wanted to go back for a drug party. The Claimant alleged that there were rumours that he was going to bring this up during the investigation.

g. The Claimant also denied that he had made any threats when discussing the email about the MRB store key. When asked by AC what happened, the Claimant's explanation started by commenting about LD smoking regularly before addressing the incident. He stated that LD called him over to the computer multiple times, banging the screen and asking the Claimant to read the email. The Claimant saw it had been copied to the cell leader and so told LD to just leave it. LD said that he was not going to leave it and the Claimant replied that LD should do what he wants with it, delete if he wants.

h. The Claimant was asked why two witnesses would say that he threatened to put his fist through the screen and he replied that he did not say this, just walked away.

i. The Claimant was asked about the alleged threat to Andy Rankin and he denied making such a threat. He alleged that it was Mr Rankin who was being aggressive.

j. When asked why two witnesses would say that he had made a threat, the Claimant repeated his allegations that other employees were seeking to protect themselves.

k. AC asked if the Claimant was saying that all 15 witnesses were conspiring against him and he replied that they were. He repeated

his allegations about other employees having drug habits. At this point, he makes an assertion that other employees went to a night out in Glasgow and LD offered to pay for all of their dinners. Nothing is said at this time about what he says is the significance of this nor when this night out is said to have taken place.

l. AC asks if the Claimant had any evidence of this to which he replied that he had spoken to another employee, John Russell, who, the Claimant says, had said there was "*stuff going on*" but no detail is provided. The Claimant then starts talking about the throat incident and that his crew thought he had been discreet with LD. He then started telling AC how things were different in the past but changed with the recent recruitment drive.

m. The Claimant denied calling LD "*a handless wee mongo*" and alleged that he had messages on his phone showing another employee using that sort of language.

n. When asked why witnesses would say that he had said this, the Claimant replied that he did say to LD in jest, when LD came back to work after breaking his collarbone, some things about him being unable to lift things but did not use those words.

o. The Claimant denied asking other employees what they intended to say and alleged that people were asking him about the investigation. He stated that these were younger employees who had not experienced anything like this yet and were asking him what would happen.

p. Turning to the allegation that the Claimant took wood from the MRB store, AC asked if the Claimant had permission to do so. He replied that on the day he started he was told to take anything he wanted. He alleged that when he worked in the store, Andy Gilchrist had told him to help himself to scrap wood.

q. AC asked if the Claimant had anything written showing permission and the Claimant replied, "*not anymore*" and that he had something from his old manager (he did not give a name). He alleged that it was common practice to take scrap wood.

r. AC asked if the Claimant had asked any manager if he could take the wood on the day when he went to the MRB store. He replied there were no cell leaders or facilitators on night shift for several months.

s. The Claimant denied telling LD to delete or ignore the email. He alleged that other employees took wood and built fences and huts with it but did not give any names.

t. In relation to the allegation about his general behaviour, the Claimant repeated his allegations that the gap in the investigation due to RW self-isolating allowed other employees to create a narrative and stick together. He again made an allegation about these employees using drugs and seeking to protect themselves.

u. Asked about the allegation that he had been looking for LD's house, the Claimant denied this and stated that LD had told him where he lived when they first started working together. When asked why people would say that he had, the Claimant replied that he had never used Google maps at work. He alleged that other employees had done so to try to find RW's house. He also alleged that Aaron Graham had been outside his house some weeks previously. When asked if he had raised this with the Respondent, he said that he had spoken to the cell leader (he did not give a name initially but stated it was Kyle Bicker when asked by AC) who was said to be friendly with Mr Graham. He stated that RW never gave him the chance to raise these matters and this is the first time he had had the opportunity to do so.

v. In relation to the allegation that he had thrown dry ice, the Claimant alleged that he had had this, and other things, thrown at him. He said that everyone did it and could not deny that he had done so. AC asked

if he knew that dry ice could cause blisters and require medical assistance and the Claimant replied that he did not.

66. At the end of the meeting, AC asked the Claimant if he wanted to add anything else (p199) and the Claimant made allegations about LD's behaviour in January and February 2021. He said that after the driving incident, LD invited him to cycle to work with him. He alleged that because he had "*brought the drug thing into it*" other employees had decided to circle their wagons and if RW had interviewed them all straightaway then they could not have done so. He makes references to what others have said about LD's behaviour in text and WhatsApp messages which he offers to send to AC and which AC confirms that he should send them.

67. At the very end of the meeting, the Claimant complains about RW undertaking the investigation on the basis that the Claimant alleged RW had been fighting with another employee as well as the Claimant and RW having "*a past*" (no detail is given of what this is said to mean).

68. AC raised queries with RW after the disciplinary hearing by email on the same day and RW replies within the hour (p201). AC raises further queries by a second email on 3 November 2021 to which RW replies later that afternoon (pp203-204). The queries relate to the reasons why there was a gap in the interviews, further information about the throat incident and a query about the allegation that RW had fought with another employee.

69. The Claimant sent an email to AC on 3 November 2021 with further information (pp205-207):-

    a. The email opens with the Claimant referring to various employees who had money problems. In relation to one of them, it was said to arise from funding his "habit" (which was a reference to a drug habit). This was not expressly said about the others but the Tribunal found that the Claimant was seeking to insinuate the same allegation. It is said that the Claimant could go through other names with similar stories and that this was a case of a "*drug gang*" seeking to isolate people they do not want to work with.

b. The Claimant alleges that he came into work after another lead mechanic with "*the same habits*" and attached a photo which he described as showing a flange holding a 4 ton engine which had to rotate to work next to it. After doing so, he noticed that only half the bolts had been put in. No date is given for this incident, the mechanic in question is not named and there is nothing said which connects it to the disciplinary allegations.

c. The Claimant then gives the names of other employees who he says can speak to certain matters:-

   i. Two employees who he says have had to speak to LD about his driving.

   ii. He again mentions John Russell in the context of the night out in Glasgow.

   iii. He states that Rae Howie "*was also present*". He does not say at what Mr Howie was present but AC gave evidence that he took this to mean the throat incident. He also states that Mr Howie will confirm that LD has said he is going after JF once he was finished with the Claimant.

   iv. George Grierson who works in stores would confirm that the MRB incident was more about unknown people entering the store.

   v. A further employee who would speak about LD's behaviour.

70. AC considered this further information and came to the view that none of it was relevant to the disciplinary allegations. In particular, he considered that the Claimant was seeking to deflect from his own behaviour by raising issues about others. He did not consider that he needed to speak to the people named by the Claimant because most of them could not give any evidence about the allegations. In respect of Rae Howie who was said to be present at the throat incident, AC came to the view that, even if he gave a different

version of events, the weight of evidence supported the allegation that the Claimant had threatened LD.

71. AC raised a further query with RW by email dated 4 November 2021 (p208) asking him to speak to Andy Rankin for the names of the people who told him about the threat by the Claimant. RW replied later that same day to say that Mr Rankin gave LD's name and the name of another employee who was off on long term sick leave. He also pointed out that the threat was referenced in one of the anonymous statements.

72. On 8 November 2021, AC emailed RW (p210-211) to ask him to speak to Billy McDowall again about what happened when he and the Claimant were in the MRB store. RW replied on 9 November (p210) to say that Billy McDowall saw the Claimant take the wood but had not taken any himself.

73. AC contacted the Claimant by telephone on 10 November 2021 to advise him of the decision to dismiss the Claimant. This was followed by a letter of the same date (pp213-217) setting out the detail of the findings made by AC:-

    a. The letter opened by confirming that the Claimant's employment had been terminated with immediate effect and without notice or pay in lieu of notice on the grounds of gross misconduct.

    b. The letter then addressed each of the allegations set out in RW's investigation report. AC found each of the allegations to be upheld.

    c. In respect of the first allegation of violent or threatening conduct, AC found the following:-

        i. There were five witnesses who saw the Claimant approach LD on 5 April 2021 after the driving incident. The witnesses confirmed that the Claimant raised his voice and made the threat to "*rip his fucking throat out*".

        ii. In respect of the matters relating to the MRB store, AC found that the Claimant had removed a box of wood from the store and put it in his car. AC set out the sequence of email

correspondence with LD and, based on the evidence of witnesses, found that when LD asked him how he should respond to these queries, the Claimant became aggressive and threatened to put his fist through the computer screen.

iii. AC also found that the Claimant had threatened to punch Andy Rankin after a conversation relating to the pay negotiations. Again, this was on the basis of the evidence of the witnesses in the investigation.

d. In respect of the second allegation of harassment, AC made the following findings:-

i. Two witnesses had heard the Claimant refer to LD as "*a handless wee mongo*". He noted the Claimant denied this but preferred the evidence of the witnesses.

ii. AC noted that four witnesses had stated that he had been questioning other employees about the investigation process, telling them what to say or to stay silent.

e. In relation to the third allegation of dishonesty, AC made the following findings:-

i. The Claimant had admitted taking wood from the MRB store without approval. AC noted that the Claimant had said that this was a common practice but could provide no evidence to confirm that he had been given permission to take any wood. He also noted that Andy Gilchrist stated that no-one had been given permission to take wood from the site.

ii. Based on the evidence of three witnesses, AC also found that the Claimant had forcefully told LD to delete the email from Andy Gilchrist asking who had gone to the store.

f. In respect of the fourth allegation regarding bullying and harassment, AC made the following findings:-

i. There were statements from 10 witnesses about the Claimant's general behaviour and attitude to other employees which AC considered created a hostile and intimidating work environment.

ii. He noted the Claimant's assertion that these other employees had created a narrative between them and that the Claimant had provided text/WhatsApp messages which he purported to be evidence of this. However, AC concluded that none of this supported the assertion that other employees were conspiring against the Claimant.

iii. AC noted that numerous witnesses commented on the Claimant asking where LD lived or saying that he was looking for LD's house. In particular, he noted that Andy Rankin had a clear recollection of a conversation with the Claimant about the Claimant's partner asking why the Claimant was driving around a particular area and the Claimant's response to this. He, therefore, found that the Claimant, although he denied this, had been looking for LD's house which he considered to be intimidating behaviour.

g. In respect of the fifth allegation regarding health and safety, AC noted that the Claimant admitted throwing dry ice at other employees. He did not find the Claimant's explanation that other employees did the same thing and was considered a bit of a joke to be an adequate excuse given the risk of serious injury in such behaviour.

h. AC explained that he had taken account of mitigating factors such as the Claimant's length of service and had considered whether a lesser sanction such as a final written warning would be appropriate.

i. However, he concluded that the Claimant had not been truthful during the investigation and disciplinary hearing, failing to act with integrity. AC considered that each of the allegations, on their own, were capable

of amounting to gross misconduct and so dismissal was the appropriate sanction.

j. The letter concluded by informing the Claimant of his right to appeal.

74. The Claimant submitted an appeal in writing (pp218-219). The document in the bundle does not bear a date but there was no issue between the parties that the appeal was submitted within the time limit set in the Respondent's disciplinary policy. The Claimant raised the following points of appeal:-

a. Broadly, he felt that a one-sided view had been taken of the allegations and he had not been given a fair hearing.

b. He complained that he had not been informed of the seriousness of the allegations before he was interviewed by RW.

c. The Claimant alleged that RW would not speak to anyone who would have helped the Claimant's case and that the statements contained leading questions.

d. It was said that RW had not accurately recorded in the witness statement what the Claimant had said during their interview.

e. Reference was made to RW previously having to stop two other employees from fighting but was being allowed to judge the Claimant's conduct.

f. The Claimant repeated his complaint that the two week gap in interviews was used by other employees to collude against the Claimant.

g. It was said that no-one had looked at the Claimant's side until he met with AC but, even then, AC did not look at the evidence provided or interview the witnesses named by the Claimant.

h. Reference was made to a letter provided by a "G Wilmot" speaking of the need for management presence in the factory but there was none for months.

i. The Claimant stated that he had been invited to LD's house after the alleged incidents and been invited to cycle with him.

j. It was alleged that others threw dry ice.

k. The Claimant complained that no-one was interviewed about LD's behaviour, stating that LD "*came at me on 3 separate occasions*".

l. The Claimant stated that his action (no detail was given as to what action this was) was taken because he had been told by a cell leader in the past that he could handle matters himself and that when he had gone to HR nothing happened.

75. DE was appointed to hear the appeal. He was based in Cheltenham and had no previous involvement with anyone from the Prestwick site who had participated in the investigation.

76. The appeal hearing was originally scheduled for 2 December 2021 (p220) but was re-arranged to 9 December 2021 (p221) due to the unavailability of the Claimant's union rep on the original date.

77. A minute of the appeal hearing was produced at pp222-228:-

a. DE opened the hearing by asking the Claimant if there was anything he wished to add to the appeal points. The Claimant replied that he was being targeted by unspecified individuals turning up outside his house. DE replied that the Claimant was within his rights to go to the police about this.

b. The Claimant made reference to management not being truthful over the years and states that he has a recording of what he describes as the "investigation meeting". However, based on the evidence given to the Tribunal, this is actually a reference to the meeting between the Claimant, Kyle Bicker and LD rather than the meeting with RW. There is discussion about how this can be provided to DE and it was noted that this recording had not been referenced previously.

c. Turning to the appeal points, DE started with the complaint that RW had not spoken to anyone who would support the Claimant's case and noted that the Claimant had not given any names during the investigation. DE asked if there was anyone whom the Claimant wanted him to speak to now and the Claimant made reference to the names given to AC. DE explained that he was asking about the reference to RW and, again, asked for any names. The Claimant replied that he could give names but that he feared that no-one would back him up as they would be scared for their jobs. DE, again, asked for names and the Claimant replied that the "*full crew was there, a whole other crew were there*" but did not give names nor specify which incident was being referenced.

d. DE asked for names again and the Claimant gave Rae Howie's name stating that he was going back and forward through the section and said that there were no raised voices, just that "*Robert had a wee go at him*". The Claimant then made reference to LD shouting at him in February and having a "pop" at the Claimant. The Claimant also said that Andy Rankin was sitting beside the Claimant when it happened.

e. DE asked for clarification as to what he should speak to Rae Howie about and the Claimant replied that it was the April incident regarding the driving. DE also asked what he should speak to Andy Rankin about and the Claimant stated that it was what happened in February.

f. DE then asked about the reference to RW having to separate two employees who were fighting. The Claimant explained that this occurred several years previously and asked why RW should be allowed to judge his conduct when he had been involved in this incident.

g. DE asked if the Claimant was aware of any reports (by him or others) about dry ice being thrown. The Claimant stated that everyone was involved in throwing the dry ice and it was a common practice.

h. DE asked the Claimant to elaborate on the allegations about LD coming at him and having to defend himself. The Claimant gave detail of this. DE asked if the Claimant reported this behaviour or if there were witnesses. The Claimant replied that there were no witnesses and stated that all the statements were lies to stick up for LD because of '*their drug habits*".

i. The Claimant was asked about the cell leader who he said had told him he could handle matters himself and who in HR he reported matters in the past. The Claimant replied that these people were no longer employed and gave the names requested.

j. DE asked why the Claimant had not mentioned the recording of the meeting with Kyle Bicker and LD earlier in the process. He replied that it was only for his use. He stated that AC had said he was not allowed to raise this until the end of the disciplinary hearing and at the end of the meeting AC started banging the table. The Tribunal pauses to note that nothing in these terms was put to AC in cross-examination and the Claimant said nothing in his evidence that he sought to introduce the recording at the disciplinary hearing. He also said that AC was looking away at the end of the disciplinary hearing, appearing uninterested, and not that he was banging the table.

k. DE made reference to the transcript of the disciplinary hearing that the Claimant was given an opportunity to mention the recording at the end to which the Claimant replied that he did not think he needed it at that point.

l. DE then explained the next steps in the process. The Claimant's trade union rep added some comments that the Claimant was the victim of bullying and stated that the fact that the Claimant intended to raise drug issues was the reason why the present situation arose. She was asked if the Claimant had raised any issues with HR or management and the response was "*probably not*".

m. DE asked the Claimant for his comment on whether these matters were reported to management and the Claimant replied that he had messaged the lead mechanic (JC) about Liam's behaviour and that he would go to HR if it continued (p232).

78. After the appeal meeting, DE emailed AC on 9 December (p229) to query whether he had reviewed the additional information provided by the Claimant. AC replied the same day and confirmed that he had done so but had considered none of it refuted the allegations against the Claimant. AC noted that the witnesses named by the Claimant did not directly witness events.

79. The Claimant sent an email with further comments to DE on 10 December 2021 (p231). The email repeated the Claimant's allegations about LD's behaviour and did not raise any new allegations or provide information which went to the specific allegations against the Claimant.

80. By email dated 16 December 2021 (pp234-235), DE raised a number of queries with LN about matters which the Claimant had brought up in his appeal. In particular, he asked about the alleged fight which RW had to break up, any record of issues between the Claimant and LD, any record of complaints about others throwing dry ice, any reported incidents of other employees taking wood off-site, any report of a cell leader "squaring up" to the Claimant and any complaints about the Claimant being bullied.

81. LN replied later that same day by embedding responses in DE's email (pp234-235). For the most part, she stated that there were no records of any of these matters except for the Claimant raising an issue of bullying during a previous disciplinary in 2011 which was investigated and not upheld.

82. DE issued his appeal decision by letter dated 16 December 2021 (pp236-240). He did not uphold the appeal for the following reasons and addressed the various appeal points:-

a. He found that AC had informed the Claimant of the seriousness of the allegations and that he had been given ample opportunity to answer

these. He noted that AC had asked if there were any other witnesses or evidence the Claimant wanted to put forward.

b. DE noted that he had given the Claimant the opportunity to put forward additional evidence and he had requested that DE speak to Rae Howie. DE considered that Rae Howie would make no difference given the number of other witnesses who had stated that the Claimant had engaged in threatening behaviour.

c. There was no requirement that statements be verbatim.

d. There were no records or recollections of the incident in which the Claimant alleged RW had to separate fighting employees.

e. The gap in interviews was caused by RW requiring to self-isolate and it was decided that it was not appropriate to appoint a new investigator.

f. DE had spoken to AC and confirmed that he had taken account of all of the information provided by the Claimant but that none of this refuted the allegations.

g. DE pointed out that the recording of the meeting with Kyle Bicker was, itself, a breach of one of the Respondent's policies. Having listened to it, DE had concluded that there was nothing in the recording that refuted any of the allegations.

h. DE considered that whether or not a manager is present during any shift does not excuse employees from behaving in accordance with what is expected of them under the Spirt & Letter policy and the Respondent's code of conduct.

i. He did not consider that the fact that the Claimant's comments about being invited to LD's house or to go cycling with him were relevant.

j. The fact that other employees were said to have thrown dry ice does not excuse the Claimant doing so. In any event, there was no record of any other incidents of this being reported.

k. DE confirmed that he had checked and there was no record of LD instigating any altercation or that the Claimant had raised concern about LD's behaviour.

l. DE could find no record of the Claimant raising previous complaints with his cell leader or HR.

Respondent's submissions

83. The Respondent's agent produced written submissions to which she spoke.

84. The submissions set out the claims being pursued by the Claimant and went through these in turn.

85. Starting with the claim for unfair dismissal, Ms Dickson set out the issues which the Respondent considered required to be resolved by the Tribunal and the relevant statutory provisions.

86. In terms of the reason for dismissal, it was submitted that there was a potentially fair reason for dismissal, that is, conduct. Reference was made to the evidence heard by the Tribunal regarding the reason for dismissal such as the evidence of AC as to his reasons for dismissal and what was set out in the letter of dismissal.

87. Turning to the issue of the reasonableness of dismissal, reference was made to the cases of *Jones*, *Burchell*, and *Hitt* (below).

88. Ms Dickson then set out the facts which she said had been established before the Tribunal in respect of the investigation. For the sake of brevity, the Tribunal does not intend to set out these in detail.

89. The submissions addressed the various challenges made by the Claimant in respect of the investigation; not being informed of the nature of the concerns about his conduct; that the investigation should have been carried out by HR as well as a manager; that Mr Woods should have carried out more steps such as looking at CCTV. It was submitted that the Claimant is incorrect and that the Respondent had carried out a reasonable investigation.

90. Reference was made to the ACAS Code of Practice regarding what is required of a disciplinary investigation and submissions were made that these standards had been met in this case.

91. The submissions then turned to the disciplinary process, setting out the facts which the Respondent submitted had been proved. Again, the Tribunal does not propose to set these out in detail for reasons of brevity.

92. Submissions were made in relation to the credibility of witnesses. Particular reference was made to what was said by AC about the fact that he found it difficult to get answers out of the Claimant during the disciplinary process. It was submitted that it was the same during the Tribunal hearing and that the Claimant would not provide a straight answer to questions being put to him by the Respondent's agent or the Tribunal. In particular, the Claimant presented entirely new versions of events for the first time at the present hearing. This was contrasted with the evidence of the Respondent's witnesses.

93. Again, the submissions set out the evidence heard in relation to the appeal which the Tribunal does not intend to set out in detail.

94. It was submitted that the question for the Tribunal was whether the decision to dismiss was within the band of reasonable responses and it was submitted that the answer to this must be that it was.

95. In terms of remedies, submissions were made that the Claimant had contributed to his dismissal and that any compensation which may be awarded if the Tribunal were to find that he had been unfairly dismissed should be reduced to nil. Similar submissions were made in respect of the issue of a reduction in compensation under the *Polkey* principle.

96. The submissions then turned to the claims relating to public interest disclosure; the factual basis of the claims was set out including the disclosures relied upon, the issues which the Respondent said required to be determined were listed; the relevant statutory provisions were narrated.

97. It was submitted that the disclosures relied on did not meet the test to be protected disclosures for the purposes of the legislation. Ms Dickson set out

the basis on which this was asserted but, for the sake of brevity, the Tribunal has not set these out in detail.

98. It was noted that the Claimant, in his evidence, confirmed that he was not saying that either AC or DE had been influenced in their decisions by any of the disclosures on which he relied and these had no bearing on his dismissal or appeal. It was submitted that there was no causal link between the disclosures and his dismissal. A similar submission was made in relation to the detriments relied on by the Claimant.

99. Finally, the submissions turned to the claim that the Claimant was dismissed because he took action about health and safety. Similar submissions were made about the lack of evidence showing a causal link between the actions relied on by the Claimant and his dismissal.

Claimant's submissions

100. The Claimant handed up written submissions on which he relied. He also made some additional comments orally in response to the Respondent's submissions.

101. He submitted that the disciplinary procedure failed at the first stage by only having a manager involved in the investigation instead of a manager and HR. He was not told that RW was investigating bullying of LD. The statement produced of his interview with RW was incomplete.

102. Submissions were made about the involvement of RW and the comment from JF that the Claimant should "*watch his back*".

103. The Claimant believes that he should have had the opportunity to respond to the allegations against him and that CCTV and computer histories should have been checked as well as other witnesses who were present being interviewed.

104. The Claimant makes submissions about him being subject to verbal abuse by LD and nearly being driven off the road by him.

105. Reference is made to RW's absence due to covid during the investigation and it is submitted that if this had not happened then there would be less witnesses against the Claimant. He suggests that there has been collusion between witnesses. Submissions are made about certain people not being present for certain incidents.

106. In relation to the disciplinary hearing, it was submitted that when the Claimant tried to give his version of events at the end of the hearing, AC did not look at him and appeared uninterested. Submissions are made about the fact that neither AC nor DE interviewed any of the people put forward by the Claimant as witnesses.

107. Further submissions were made about the involvement of RW and a lack of impartiality. It is said that if the Claimant had had the opportunity to respond to the allegations then he could have easily proven that witnesses were lying.

108. It is submitted that the issues between the Claimant and LD could have been sorted out on the shop floor. Reference is made to the evidence of JC and GMcC in this respect.

109. Reference is made to the company changing its drug policy.

110. The Claimant makes submissions about other potential witnesses, specifically Rae Howie and the fact that he told JF that LD was coming after him once he was finished with the Claimant.

111. Reference is made to evidence which the Claimant brought up for the first time at the Tribunal hearing and previous disciplinary or grievance issues which were irrelevant to the issues before the Tribunal.

Relevant Law

112. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

113. The first question for the Tribunal in the test for unfair dismissal is whether there is a potentially fair reason for dismissal (s98(1)). There are 5 potentially

fair reasons listed in s98(2) and, for the purposes of this claim, the relevant reason is conduct.

114. Section 103A ERA deems any dismissal to be unfair where the sole or principal reason for the dismissal is that the employee made a "protected disclosure". A disclosure is a protected disclosure if it meets the definition set out in s43A ERA read with ss43B-H.

115. Similar to s103A, s100 ERA deems a dismissal to be unfair where the sole or principal reason for the dismissal is one of those set out in s100(1)(a)-(e). These matters relate to individuals acting as health and safety representatives or taking action about health and safety matters.

116. Sections 100 and 103A ERA are sometimes described as "automatic" unfair dismissal because the dismissal is unfair solely because it is for a reason falling within the scope of these statutory provisions. This is to be contrasted with claims of "ordinary" unfair dismissal where the potentially fair reason is only the first part of the test and there are further considerations for the Tribunal in assessing the fairness of any dismissal.

117. It was held in *Maund v Penwith District Council* [1984] IRLR 24 that the burden of proof regarding the reason for dismissal lies with the employer unless the employee does not have the requisite length of service to pursue a claim of "ordinary" unfair dismissal. If that is the case then the onus is on the employee.

118. The question of how the Tribunal should approach the burden of proof in relation to the reason for dismissal in cases involving claims of both "ordinary" and "automatic" unfair dismissal (in particular, whether the Tribunal should find the automatically unfair reason proven if the employer does not discharge the burden of showing a potentially fair reason) was addressed in Kuzel v Roche Products Ltd [2008] IRLR 530 by Mummery, LJ:-

"*The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the*

ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced led by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."

119. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

120. The test for whether a dismissal on the grounds of conduct (or misconduct) is set out in the well-known case of *British Home Stores Ltd v Burchell* [1978] IRLR 379.

121. The test effectively comprises 3 elements:-

    a. A genuine belief by the employer in the fact of the misconduct

    b. Reasonable grounds for that belief

    c. A reasonable investigation

122. It is important to note that, due to changes in the burden of proof since Burchell, the employer only has the burden of proving the first element as this falls within the scope of s98(1) with the second and third elements falling within the scope of s98(4).

123. In order for there to be a reasonable belief, especially where there is a dispute as to whether or not the employee committed the misconduct in question, the employer must have some form of objective evidence on which to base their conclusion.

124. On the question of whether the investigation was reasonable, the case of *Sainsbury's Supermarket v Hitt* [2003] IRLR 30 is authority for the proposition that the band of reasonable responses test applies to conduct of the investigation.

125. If the Tribunal is satisfied that the requirements of Burchell are met then they still need to consider whether dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer (*Iceland Frozen Foods v Jones* [1983] ICR 17).

126. Section 47B ERA makes it unlawful for a worker to be subject to a detriment on the grounds that the worker made a "protected disclosure".

127. The question of whether there is a detriment requires the Tribunal to determine whether "by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL).

128. As a matter of logic, a decision-maker (whether in the context of an unfair dismissal claim under ss100 or 103A ERA or a detriment claim under s47B ERA) who is unaware of a protected disclosure or action taken in respect of health and safety cannot have made their decision to dismiss or take any other action against a claimant for such a reason.

129. However, where an "innocent" decision-maker has been manipulated or misled into their decision by someone else within a respondent's hierarchy who is motivated by a protected disclosure made by, or health and safety

action taken by, a claimant then the Tribunal has to look at matters broadly in terms of the reason for dismissal or the cause of any detriment (*Royal Mail Group Ltd v Jhuti* [2020] ICR 731, SC and *Ahmed v City of Bradford Metropolitan District Council and others* EAT 0145/14). The Tribunal does note there is a question mark over the extent to which this principle applies in detriment cases as a result of the decision in *Malik v Cenkos Securities plc* EAT 0100/17 particularly now that claims under s47B makes provision for individual workers to be liable for any detriment.

Decision – unfair dismissal

130. The Tribunal will address each of the issues that arise for consideration in the context of the unfair dismissal claim in turn.

131. One preliminary point which the Tribunal would make is that there was a considerable focus at the hearing, particularly from the Claimant, on certain of the allegations against him (for example, the driving incident) and proving that he did not carry out the conduct in question or that the incident was not properly investigated.

132. As a result, sight was lost of the fact that there were other allegations (that is, the taking of the wood and the throwing of dry ice) where the Claimant admitted the conduct in question and for which, on their own, the Claimant could be fairly dismissed. This is not a case where it was the cumulative effect of the various alleged acts of misconduct that led to the Claimant's dismissal and the letter of dismissal was clear that each allegation was considered sufficient to dismiss the Claimant.

133. This was important as it meant that, even if the Claimant could show some error in the investigation of a particular allegation or that AC's belief in that allegation was not reasonable, his dismissal was still capable of being a fair dismissal because of the other allegations, in particular those where the Claimant admitted the conduct in question.

Was there a potentially fair reason for dismissal?

134. The Tribunal will address the reason for the Claimant's dismissal, both whether there was a potentially fair reason and whether or not the sole or principal reason was one of the automatically unfair reasons relied on, in this section given that these are interlinked.

135. In considering the reason for dismissal, the Tribunal has taken the broad approach set out in *Jhuti* (above) and looked at the whole process from the investigation to the appeal rather than focussing only on the decision by AC.

136. On the face of the contemporaneous documents, the reason given for the Claimant's dismissal was his conduct. This was the consistent reason throughout the disciplinary process from the investigation report completed by RW onwards. The evidence from RW and AC supports this and they both clearly explained the reason why the process proceeded to the disciplinary stage and why the Claimant was dismissed. The Tribunal found their evidence on this to be credible and reliable.

137. If this was all that the Tribunal had to consider then it would have no hesitation in finding that conduct was the reason for the Claimant's dismissal. However, the Claimant asserts that there were other reasons for his dismissal and so the Tribunal has to consider whether there was any evidence of this.

138. It is noteworthy that the Claimant did not put any suggestion to AC or DE that there was some other reason for his dismissal. He did seek to suggest that RW had some form of personal vendetta left over from a disciplinary process that RW heard relating to the Claimant from 2012 but there was no evidence of this and, in any event, this was wholly unrelated to the matters relied on for the claims under s100 & 103A.

139. However, importantly, nothing was put to any of these witnesses that they were influenced by the various disclosures he relies on in his automatic unfair dismissal claims. Indeed, in his own evidence, the Claimant accepted that he was not suggesting that AC or DE were influenced by the disclosures in question. He did assert that he believed that RW was influenced but this was

never put to RW and was not consistent with what was put to RW in cross-examination (which was that he carried a personal vendetta against the Claimant from a disciplinary process carried out 9 years previously).

140. The fundamental problem for the Claimant in relation to the claims for automatically unfair dismissal is that, even assuming that he made the disclosures relied on and that these fell within the scope of s100 or s103A, there was no evidence whatsoever that any of the decision-makers in the disciplinary process (that is, RW, AC and DE) had any knowledge of these disclosures.

141. In considering the claims under ss100 & 103A, the Tribunal bears in mind the specific disclosures relied on by the Claimant and that the question for it to determine is whether these were the sole or principal reason for the Claimant's dismissal.

142. This is important because it was a theme of the both the internal procedure and at the Tribunal hearing that the Claimant had a tendency to throw out a range of accusations about the conduct of others in what the Tribunal considered was an attempt to deflect from his own conduct. The Tribunal had to focus on what was the Claimant's pled case and not be distracted by other issues.

143. The Tribunal bears in mind that the Claimant's case is that he made the disclosures to persons other than RW, AC or DE and so there needs to be some evidence that these disclosures came into their knowledge in some way.

144. There was certainly no express evidence that they were aware of them; at no point did the Claimant or any other witness give evidence that RW, AC or DE were explicitly informed of these disclosures by the Claimant or anyone else. Neither was there any evidence from which the Tribunal could draw an inference that they had been informed of the disclosures on which the Claimant now relies.

145. It is certainly the case that, by the time of the disciplinary hearing, the Claimant is alleging that there was drug taking by other employees but he does not rely on that to found his claims under ss100 and 103A. As noted above, the Tribunal was concerned with the matters which formed the Claimant's pled case and there was no evidence that he did expressly raised the following matter with RW, AC or DE; the disclosure he alleges he made to JC in April 2021; the disclosure made to GMcC; the issue with one-to-one training raised with the union.

146. The Claimant did raise with AC the matter he alleges he disclosed to JC in August 2021 regarding the improperly fitted anchor (including sending a photograph). This was done by email after the disciplinary hearing and did not expressly say that the matter had been disclosed to JC. However, the Tribunal has borne in mind that the Claimant is a party litigant and have taken a broad approach to this.

147. The Tribunal can see why AC did not consider this to be relevant given that, on the face of it, this was an example of the Claimant's habit of throwing out accusations about others rather than focussing on the issues with his own conduct. There was certainly no evidence that this issue influenced AC's decision and, indeed, that was not the Claimant's case.

148. The August 2021 matter was not raised with RW at all and not expressly raised with DE (although he would have had sight of the Claimant's email to AC as part of the papers for the appeal).

149. In these circumstances, the Tribunal held that the Respondent had shown that they had dismissed the Claimant for reasons which would fall within "conduct" for the purposes of s98(1) ERA and that there was, therefore, a potentially fair reason for dismissal. There was no evidence that those involved in the decision to dismiss (looking at the matter broadly) had any knowledge of the matters relied on by the Claimant for the claims of automatic unfair dismissal and so, as a matter of logic, these cannot be the reason for dismissal. In respect of the one disclosure which was known to AC, there was no evidence that it had any influence on the decision to dismiss.

150. Given the findings above regarding the knowledge of the decision-makers and the lack of evidence of any influence on their decisions, the Tribunal has not considered it necessary to determine whether the disclosures relied on for the purposes of the claim under s103A were protected disclosures as defined in the ERA. There was a dispute as to whether these were made at all and there is a question as to whether they meet the statutory test given to whom they were made but it is not necessary for this to be resolved given the lack of any causal link between the disclosures and the Claimant's dismissal.

151. In relation to the claim under s100 ERA, the Tribunal does not consider that, on the face of it, the matters relied on fall in the scope of s100(1); the Claimant was not a health and safety representative and so ss100(1)(a) & (b) do not apply; s100(1)(ba) does not apply because the Claimant was not consulting with the Respondent in terms of the Health & Safety (Consultation with Employees) Regulations 1996 or taking part in elections under those Regulations; the Claimant was not taking action or leaving the workplace in circumstances of serious and imminent danger in terms of s100(1)(d) & (e); there was no evidence that there was no health and safety representative or that it was not reasonably practicable to raise matters with any such representative so as to bring the Claimant's disclosures within scope of s100(1)(c). In these circumstances, s100 was not engaged at all and so the claim under that section would have failed in any event.

Did the respondent have a genuine belief in that the claimant had committed the misconduct in question?

152. As set out above, there was no evidence to suggest some other reason for the Claimant's dismissal and the Tribunal accepted that the evidence of the Respondent's witnesses in relation to the conclusions to which they came about the Claimant's conduct to be credible and reliable.

153. In these circumstances, there is no basis on which the Tribunal could conclude that the Respondent did not have a genuine belief in the Claimant's conduct.

Had there been a reasonable investigation?

154. In assessing this issue, the Tribunal bore in mind that, as confirmed in the case of *Hitt* referred to above, the question is not whether the Tribunal would have carried out the investigation in another way but whether what was done by the Respondent was within the band of reasonable responses.

155. The Tribunal also bore in mind that this was a case where the Claimant admitted some of the conduct in question and so there was a relatively low hurdle for the Respondent to overcome in terms of investigating whether the Claimant did what he was alleged to have done in respect of admitted misconduct. This is important as some of the criticisms of the investigation by the Claimant were that the Respondent did not take certain steps in investigating the admitted misconduct. In particular, the Claimant argued that CCTV should have been reviewed to see the wood being removed from the MRB store but there was no reason for RW (or anyone else) to do so where the Claimant admitted taking the wood. It may have been different if the Claimant denied taking the wood but he admitted this from the outset and so there was no reason for anyone to review the CCTV.

156. The Tribunal has also considered the issue of investigation by looking at the process as a whole rather than narrowing its assessment to only the actions taken by RW. The reason for this is that it was clear from the evidence that AC and DE carried out further investigations, either of their own volition or as prompted by issues raised by the Claimant.

157. There is no doubt that a large number of witnesses were interviewed during the process and, on the face of it, there had not been a narrow or restricted interview process. A large amount of information was gathered over the course of the whole disciplinary process.

158. The Claimant's primary criticism of the investigation process is focussed on the actions of RW and, specifically, that RW did not inform him of the allegations against him when RW interviewed the Claimant. This is not surprising given the sequence of events; RW was not initially charged with carrying out a disciplinary investigation into the Claimant but, rather, to look

into why another employee, LD, felt uncomfortable coming into work. It was only as RW gathered more information that it became clear that the Claimant had a disciplinary case to answer. This was not the position when RW interviewed the Claimant.

159. The Tribunal does consider that there were other ways in which RW could have conducted the process which may have been better practice. For example, the whole process could have initially been dealt with as a grievance by LD which would require him to set out his issues and the investigation focussing on those. The Tribunal does consider that, once it was clear that the Claimant had a disciplinary case to answer, it would have been good practice for RW to re-interview him in a more formal context.

160. However, for the reasons set out below, the Tribunal does not consider that this is sufficient to render the investigation unreasonable or unfair.

161. First, the Tribunal reminds itself that it is not for it to substitute its own decision as to what it would have done. Rather, the question is whether the investigation process was within the band of reasonable responses and, taking account of all of the matters set out in the rest of this section of the judgment, the Tribunal does consider that what was done by the Respondent does fall with the band of reasonable responses.

162. Second, many (although not all) of the matters which became the disciplinary allegations were discussed by the Claimant during his meeting with RW and he was able to provide his comments on these.

163. Third, and most importantly, when the process is looked at as a whole, the Claimant had ample opportunity to answer the allegations against him. He was certainly aware of the allegations against him by the time of the disciplinary hearing before AC and the appeal hearing before DE. Both of these managers indicated that they were prepared to consider any further information put forward by the Claimant and, indeed, both of them did look into matters raised by the Claimant (although not to his satisfaction, a point which the Tribunal will address below).

164. In these circumstances, the fact that RW's investigation may not have met best practice is not sufficient for the Tribunal to decide that, when the process is viewed as a whole, there had not been a reasonable investigation. Indeed, if the Tribunal were to make such a finding on this basis then it would be falling into the trap of substituting its own decision.

165. The Claimant makes a number of other criticisms of the investigation which the Tribunal will address in turn:-

a. He complains that RW carried out his investigation on his own without someone from HR. However, the Respondent's policy (p94) clearly allows for any investigation to be done by a manager on their own and it cannot be said that this would be outside the band of reasonable responses. It may be that, in other disciplinary cases, someone from HR was present at any interview but this does not mean that every case requires this.

b. The Claimant complained that the witness statements were not in a Q&A format. However, there is no legal requirement for witness statements to be in any particular format nor does the ACAS Code of Practice proscribe how witness statements should be drafted. The witness statements produced by RW were not ones which were outside the band of reasonable responses.

c. Similarly, issues were raised about the statements not being signed off by the witnesses to confirm their accuracy but there is no legal requirement for this nor is it required by the ACAS Code. It may well be a matter of best practice to avoid issues of accuracy being raised at a later date but it does not take the Respondent outside the band of reasonable responses.

d. The Claimant sought to suggest that there were matters which were missing from his statement. However, after being given the opportunity to challenge RW on the accuracy of his statement, the only matter which the Claimant put to RW in cross-examination was that RW informed him at the outset (in reply to a query from the Claimant's

trade union rep) that the meeting was part of an investigation. The Tribunal considers that this is a very minor issue.

e. The Claimant sought to suggest that there was some collusion between employees in terms of the evidence given to RW, facilitated in part by the fact that the process was delayed by two weeks whilst RW was self-isolating due to COVID. However, there was no evidence of this beyond unsubstantiated assertions by the Claimant (for example, that LD had paid for a meals during a night-out in Glasgow or that he was "going after" JF next) which the Tribunal gave no weight.

166. The other main criticism made by the Claimant of the investigation as a whole was that witnesses suggested by him were not interviewed. However, the Tribunal can see why both AC and DE did not consider these witnesses to be relevant. With one possible exception, the witnesses were all directed towards the conduct of other employees (particularly LD) rather than witnesses to the matters which formed the allegations against the Claimant. This was not a case where the Claimant was presenting the names of new witnesses who he said were present during the "throat incident" or the "email incident" who would give alternative versions of these events. The Tribunal considers that the conclusion reached by AC and DE that these witnesses were presented by the Claimant as part of his attempts to deflect from his own conduct to be a conclusion within the band of reasonable responses especially when this is viewed in the context of the whole of the email disclosing the names (p205-206).

167. The only person presented by the Claimant as a possible witness to events was Rae Howie but, even then, there is some ambiguity about this. The plain reading of the email which names him as a possible witness is that he was present at the night out in Glasgow at which the Claimant alleges collusion. In his evidence, AC said he understood this to be a reference to the "throat incident" and that this is why he asked RW if anyone else had been identified by others as being present at this interview and no-one had been identified.

168. Again, best practice may well have been to interview Mr Howie on a "belts and braces" basis to confirm that he could not give relevant evidence and avoid later criticism but this would, again, involve the Tribunal substituting its own decision.

169. In any event, this would only be relevant to one of the many allegations against the Claimant, two of which were admitted by the Claimant. As noted above, the Claimant was very focussed on particular issues and, as a result, he lost sight of the fact that he had admitted acts of misconduct which, on their own, were capable of justifying his dismissal.

170. In these circumstances, the Tribunal considers that there had been a reasonable investigation into the alleged conduct by the Claimant.

Did the respondent have a reasonable belief?

171. In considering whether the Respondent held a reasonable belief that the Claimant had committed the misconduct in question, the Tribunal bore in mind that it was not a question of whether or not the Tribunal believed that he had done so.

172. The question for the Tribunal was whether there was objective evidence from which the Respondent could come to the view which they had.

173. It is undoubtedly the case that the Respondent had more than enough objective evidence to reasonably reach the conclusion that the Claimant had committed the misconduct in question; the Claimant admitted two of the acts of misconduct; there was a significant weight of evidence supporting the other allegations; the Claimant presented very little or no evidence contradicting the allegations and, rather, sought to make allegations against others.

174. In these circumstances, the Tribunal is satisfied that the Respondent had formed a reasonable belief that the Claimant had committed the misconduct in question.

Was the dismissal procedurally fair?

175. The Tribunal has already addressed the conduct of the investigation above and, for the reasons set out previously as to why the investigation was reasonable, we have concluded that there was no procedural unfairness in that element of the process.

176. In relation to the broader process, the Tribunal notes that the Claimant was given the opportunity to put his case including any mitigation at both the disciplinary hearing and the appeal hearing. He was given the right to be accompanied on both occasions and took this opportunity, bringing trade union representatives to both hearings.

177. The Claimant did not make any particular criticism of the process beyond the matters set out above in relation to the investigation.

178. Overall, the Respondent conducted what the Tribunal found to be a fair procedure, giving the Claimant every opportunity to answer the allegations and there was nothing in what had happened which the Tribunal considered to be unfair.

Was dismissal in the band of reasonable responses?

179. The Tribunal reminded itself that it was not a question of whether the Tribunal would have reached a different decision on the sanction to be applied but, rather, whether what the Respondent decided was something which fell within the band of reasonable responses to the misconduct that was established. No matter how much sympathy the Tribunal may have with the Claimant, it was not for the Tribunal to substitute its own decision.

180. The Tribunal considers that each of the allegations which were upheld against the Claimant were ones for which dismissal was within the band of reasonable responses. They were all matters which fell within the definition of gross misconduct in the Respondent's disciplinary procedure and, in the Tribunal's industrial experience, they were each matters which commonly attract the sanction of dismissal. Taken as a whole, it is difficult to see how dismissal could not be a sanction within the band of reasonable responses.

Conclusion

181. In these circumstances, the Tribunal has determined that the Claimant's dismissal was not unfair, there being a potentially fair reason for dismissal which the Respondent was entitled to rely on having come to a genuine and reasonable belief, after a reasonable investigation, as to the claimant having committed the misconduct in question. Dismissal was clearly within the band of reasonable responses in all the circumstances of the case and there was no procedural unfairness.

182. Although the Tribunal does not have to address the question of remedy given its finding that the Claimant's dismissal was not unfair, it considers that it would assist if it makes clear that, even if it had found that there had been some form of unfairness, it would have awarded no compensation.

183. In particular, if the Tribunal had found that the elements of the investigation which it found to fall short of best practice were outside the band of reasonable responses then, applying the well-known *Polkey* principle, it would have found that there was 100% likelihood of the Claimant being dismissed in any event given the admitted conduct relating to the taking of wood and the throwing of dry ice. In addition, the Tribunal would also have found that the admitted misconduct meant that the Claimant had 100% contributed to his dismissal. Taking account of both of these matters, the Tribunal would have considered that it was not just and equitable for the Claimant to receive any compensation and would have reduced both his basic award and compensatory awards to nil.

Decision - detriment

184. The Claimant faces the same fundamental problem with his claim under s47B as he did with his claim for unfair dismissal under s103A ERA, that is, he led no evidence that the persons who made the relevant decisions had any knowledge of the disclosures on which he relies, let alone that the reason for these decisions were the disclosures.

185. The first detriment alleged is that the Claimant was "wrongfully" accused of stealing wood. It was not entirely clear from the Claimant's pleadings, his evidence or his submissions who he says "wrongfully" accused him of stealing the wood. However, from the evidence heard by the Tribunal, it was RW who first framed this as a disciplinary matter in his investigation report and so the Tribunal proceeds on the basis that RW is the person who is said to subject the Claimant to a detriment in this respect.

186. As noted above in respect of the unfair dismissal claim, there was no evidence whatsoever that RW had any knowledge of the three disclosures relied on by the Claimant at any time during his involvement in the process. In these circumstances, the disclosures cannot be a reason for his decision to allege the Claimant had stolen wood.

187. The Tribunal also considered that RW cannot be "wrongfully" making such an allegation (in the sense that he was knowingly, as opposed to mistakenly, making a false accusation) based on the facts known to him at the time that the Claimant accepted that he took the wood from a secure store for his personal use and that the manager in charge of that store stated that the Claimant did not have permission to do so.

188. Insofar as it might be said by the Claimant that he is seeking to say that others (such as LD) were making false accusations about the wood then that is not the case he presented to the Tribunal nor is it borne out by the evidence which shows that it was RW who framed this as a disciplinary matter.

189. The second detriment is that the Claimant was suspended. This was a decision made by AC when he became involved in the process and the Claimant's own case was that AC was not influenced by any disclosures. In any event, the closest he comes to having knowledge of the disclosures was after the disciplinary hearing when the Claimant emailed further information to him which makes reference to the incident in August 2021 (although not the fact that he disclosed this to JC). This was sometime after the decision to suspend was made.

190. In these circumstances, AC having no knowledge of the disclosures at the time he made the decision to suspend the Claimant then the disclosures cannot possibly be the reason for this decision.

191. The third and final detriment is that the Claimant alleges that he was unfairly investigated. To the extent that this relates to the process carried out by RW, the Claimant faces the same problem as with the first detriment, that is, there is no evidence that RW had any knowledge of the disclosures and so these cannot have influenced how he conducted his investigation.

192. As noted above, to the extent that the investigation could broadly be said to involve AC and DE, it was the Claimant's own case that neither were influenced by the disclosures on which he relied. In any event, neither of them had any specific knowledge of the disclosures relied on but, rather, were simply aware of the Claimant's assertions about drug taking by other employees.

193. In these circumstances, given the fact that those involved in making the decisions, which the Claimant asserts amounts to detriments against him, had no knowledge of the disclosures relied on at the time they made those decisions, the claim under s47B ERA is not well-founded and is hereby dismissed.

194. As a postscript, the Tribunal should make it clear that, as with the unfair dismissal claim, it has not found it necessary to make any finding about whether the disclosures relied on meet the test to be protected disclosures given the lack of any causal link between those disclosures and the detriments.

Employment Judge: **P O'Donnell**
Date of Judgment: **28 February 2023**
Entered in register: **28 February 2023**
and copied to parties