EMPLOYMENT TRIBUNALS

Claimant: Mr A. McEwen

Respondent: Amazon UK Services Ltd

Heard at: Liverpool **On:** 30 and 31 January 2023

Before: Employment Judge Porter

Representation

Claimant: Mr H Clarke, the claimant's uncle and lay representative

Respondent: Mr P Sangha, counsel

JUDGMENT having been sent to the parties on 8 February 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues to be determined

1. Counsel for the respondent had prepared a draft List of Issues but this had not been agreed with the claimant before the commencement of the hearing. At the outset it was confirmed that this was a claim of unfair dismissal only. The respondent asserted that the reason for dismissal was conduct. The issues were identified as:

1.1. Whether the respondent could prove that the reason for dismissal was a potentially fair reason under s98 Employment Rights Act 1996 (ERA 1996);

1.2. Whether the respondent held the honest and genuine belief that the claimant was guilty of the conduct complained of;

1.3. Whether the respondent had reasonable grounds to support that belief, following a reasonable investigation;

1.4. Whether the decision to dismiss was, taking into account all the relevant circumstances, fair, and in particular:

1.4.1. Whether dismissal fell within the band of reasonable responses;
1.4.2. Whether a fair procedure was followed;

1.5. If the claimant was unfairly dismissed, whether there should be any reduction in compensation, pursuant to **Polkey v AE Dayton Services Ltd [1988] ICR 142,** on the basis that following a fair procedure would have made no difference to the outcome;

1.6. If the claimant was unfairly dismissed, whether the dismissal was to any extent caused or contributed to by any culpable or blameworthy conduct of the claimant, and, if so, whether the tribunal should reduce the amount of award of compensation and, if so, by what proportion.

2. After the lunch break on the first day, the representative for the claimant indicated that he had had the opportunity to consider counsel for the respondent's draft List of Issues, and this was agreed.

Orders

3. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

4. Both parties invited the tribunal to view the CCTV footage, upon which the respondent relied in deciding that the claimant was guilty of misconduct. The tribunal agreed to watch the footage.

5. The hearing was held by CVP. There were no objections to this format of hearing. At the outset both the claimant and his representative, Mr Clarke, were sharing the same computer screen. They were informed that there was no objection to this provided that both could be seen on the screen throughout the proceedings. However, they made arrangements for each of them to have separate access to the hearing via independent screens.

6. During the course of the giving of evidence and cross-examination the tribunal asked the respondent's solicitor, who was observing the proceedings, to share with all persons in attendance her computer screen, upon which the CCTV was shown. In this way the representatives and witnesses could see the CCTV footage at the same time, and the CCTV footage could be stopped and reviewed as necessary. Both parties agreed to this and each witness confirmed that they could see the CCTV footage as and when questions were raised in relation to its contents.

Submissions

7. Representative for the claimant made a number of detailed oral submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

   7.1. the decision to dismiss was based on opinion, not evidence. It was based solely on the CCTV recording. Nobody present at the time thought that there was any danger;

   7.2. the investigation was flawed because the investigating officer permitted a witness to act as interpreter;

   7.3. The dismissing officer acted in breach of protocol by suggesting that there was an allegation relating to the touching of one of the women on the walkway and suggested to the investigating officer that this should be the subject of a further allegation. This was rejected by the investigating officer. However, the dismissing officer relied on this second allegation in making her decision to dismiss;

   7.4. the dismissing officer tried but failed to get the claimant to agree that he had breached rules but the allegation that he had driven right up to the walkway was a false allegation;

   7.5. the dismissing officer's witness statement refers to the expired warning but then says she decided to dismiss for gross misconduct;

   7.6. At the appeal two further witnesses were interviewed but no mention of that was made in the first appeal hearing;

   7.7. the appeal outcome made errors, recounting incorrectly from the evidence given by Mr Ellis and Mr Somers. The appeal officer distorted their evidence to support her decision;

   7.8. Nowhere does the protocol say that approaching the walkway while pedestrians are on it is a breach of the rules. This is a manoeuvre that is followed all the time and is not considered wrong or dangerous. The claimant took care: he stopped at the right hand junction to make sure that no vehicles were joining from the right, and then proceeded forward. He stopped one metre from the crossing and 1.3 metres from

the pedestrians on that crossing, as shown on the calculations and technical detail provided today. In evidence the appeal officer denies that there was any gap between the PIT truck and the crossing but it is clear that there was;

7.9. this offence would mean that every driver on the road would be guilty of dangerous driving by approaching a pedestrian crossing with pedestrians on it. That cannot be correct.

8. Counsel for the respondent relied upon written skeleton arguments and made a number of detailed oral submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was orally asserted that: -

8.1. Allegation 2, the touching of a woman on the walkway, played no part in the decision to dismiss. The dismissing officer played no role in the investigation of this potential allegation 2. She just referred it back to the investigating officer for further investigation;

8.2. the allegation of misconduct was clear - that the claimant made a conscious act to drive forward towards associates within reaching distance. In cross examination it was clear that the claimant understood what was being said and how the dismissing officer reached her conclusion. Whereas there is no express rule that you cannot move forward when pedestrians are on the walkway, PIT drivers are given a framework within which to work, and the claimant did understand that he had to keep a safe distance, and that that was breached because he was within touching distance The appeal officer did not distort the evidence given to her as part of the appeal. She set out in her own words what she took from the witnesses' words, that is, that pedestrians have a right of way;

8.3. the respondents relied on CCTV evidence and that was entirely in keeping with a reasonable investigation. The key allegation was the movement of the PIT truck while pedestrians were on the walkway. The claimant accepts that it can be observed from the CCTV footage that there was movement towards the walkway when there were pedestrians on it;

8.4. Mr Clarke's evidence and analysis produced today is not directly relevant to the allegation. The claimant did move the PIT truck when he saw pedestrians on the crossing. The respondent reasonably believed that the CCTV footage showed that the claimant had moved his PIT truck; it was reasonable to believe that the claimant had proceeded unsafely;

8.5. throughout the proceedings the claimant said he did not break any rules, that he did nothing wrong. The respondent was reasonable in taking that into account when deciding the appropriate remedy;

8.6. in the alternative, if there was an unfair dismissal, the tribunal is invited to find that there was contributory fault of 100% because of the claimant's intransigent stance and he did move his vehicle when unsafe to do so.

Evidence

9. The claimant gave evidence. In addition, he relied upon the evidence of his lay representative, Mr Harold John Clarke.

10. The respondent relied upon the evidence of:-

10.1. Ms Abigail Mary Fearns, Employee Relations Manager;
10.2. Ms Sharon Louise Wilkinson, Employee Relations Manager

11. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

12. An agreed bundle of documents was presented. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

13. Having considered all the evidence, the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

14. The Respondent is a UK subsidiary of a global online commerce business that sells a range of goods and services to consumers, enterprise and content creators. Given the nature of its operations, health and safety is of paramount importance to the Respondent.

15. The claimant commenced his employment with the Respondent on 10 October 2017. The claimant was employed at the Respondent's MAN 2 Manchester site as a Loading Dock Operative and Pit Driver on a full-time permanent contract.

16. The claimant's Contract of Employment included the following:

16.1. Under Clause 2.2 a requirement *"to comply with the Company's rules, regulations and policies from time to time in force including without limitation those policies set out in the Company's Policies and Procedures and in the Code of Conduct"*

16.2. Under Clause 10.1 of the Employment Contract "*the Disciplinary policy does not form part of your terms and conditions of employment".* The Claimant is referred to the Respondent's Disciplinary Policy, which contains a non-exhaustive list of examples of gross misconduct.

16.3. Under Clause 18.3 the Respondent reserved the right to terminate the Claimant's employment without notice or payment in lieu of notice if: *"it has reasonable grounds to believe you are guilty of gross misconduct..."*

17. The Respondent's Disciplinary Policy states that the following are examples of gross misconduct for which employees may be dismissed without notice and with the loss of benefits: *serious breach of health and safety rules, working unsafely or behaving in a way that puts your own or another person's health and safety at serious risk.*

18. The Respondent operates a Workplace Health & Safety Code of Conduct Procedure (the "Code") as part of its commitment to provide a safe and healthy work environment. Training on the Code is provided during induction. Section 4.1 of the Code identifies 'Category 1 behaviours which create a risk of serious injury or loss of life. The Code provides that such behaviours are '*regarded as extremely serious, and termination of employment may result following one offense*'.

19. The respondent has PIT Operator Safety Rules [52-54] under which the respondent requires that a PIT truck be operated in a safe manner at all times. The Rules include:

20. The claimant was issued with a first written warning on 31 July 2019 (for 9 months) linked to a health and safety breach for not engaging a dock leveller.

21. The claimant was issued with a final written warning on 19 March 2021 (for 12 months) for breach of the two-metre social distancing policy, namely a health and safety issue/breach.

22. In March 2022, in the course of a review of the site CCTV for an unrelated incident, the Claimant was observed advancing his PIT vehicle towards pedestrians on a walkway. The CCTV provides a visual recording of the incident. It does not provide an audio recording.

23. The Respondent commenced an investigation into the claimant's conduct, as shown on the CCTV footage. The investigation was conducted by Mr Dale Jackson, Employee Relations Case Manager. On 14 March 2022 [73-74] the claimant was asked to attend an investigation meeting regarding an allegation that “On 11th March 2022 at approximately 9.50am, you had continued to advance your PIT vehicle whilst associates were walking across a pedestrian walkway”.

24. The investigation meeting took place on 16 March 2022 [75-80]. The claimant was shown the CCTV footage. The claimant was given the opportunity to provide an explanation for his actions as shown on the CCTV footage. The claimant accepted that it was him driving the PIT, as shown on the CCTV footage, but did not accept that his actions were in breach of health and safety or any of the PIT operator safety rules. He stated that his manager had taken him off driving on the 11 March 2022 and he had not been driving since. The notes of the investigation show the following exchange between Mr Jackson (DJ) and the claimant (AM):

> DJ: So, the first one, from your PIT training can you tell me what distance you are required to stop at when there are pedestrians walking across?
>
> AM: Either two, or one if stopped and if your forks aren't raised, but I don't know whether a pedestrian is going to walk or not.
>
> DJ: So, the issue is here is, you have stopped within a safe distance okay, and the pedestrians have continued on to the crossing. And rather than staying at the distance, you have decided to drive forward. Could you tell me why you have done that? Why you have started to move forward again while they were on the crossing?
>
> AM: Because I don't know, like, I didn't see it as any harm. No-one was hurt, no-one was damaged, like as soon as I got to that crossing, I have still stopped to allow that pedestrian to walk past.

25. Mr Jackson interviewed both of the work colleagues (MS and AM) who were seen on the CCTV footage to be crossing the pedestrian walkway. AM stated that she did not recall the claimant advancing his PIT and remembered feeling completely safe during the incident. Upon watching the CCTV footage, AM did acknowledge that the claimant appeared to proceed the PIT vehicle forward whilst she was on the pedestrian crossing.

26. MS confirmed that the claimant moved forwards in the PIT whilst she was walking across the pedestrian walkway, but that the claimant did not come onto the crossing. MS acknowledged that she pushed the claimant in a joking manner, whilst he was stopped, probably due to something that the claimant had said. During the course of that investigation meeting another work colleague, EG, the companion and translator for MS at the meeting, said that she was also present on the pedestrian walkway. Neither MS nor EG said that they were in danger at the time of the incident. Mr Jackson was unaware that the companion EG was also a witness to the incident when the meeting with MS was arranged.

27. Mr Jackson decided that there was a case to answer in relation to the allegation, namely that the claimant had continued to advance the PIT vehicle whilst associates were walking across a pedestrian walkway. Mr Jackson prepared an initial investigation report, which was provided to Ms Fearns, Employee Relations Manager, who had been appointed as disciplinary officer. That initial report recorded that there was a live warning

on file. On reading the initial investigation report and viewing the CCTV footage, Ms Fearns referred the incident back to Mr Jackson, to investigate another potential disciplinary charge, namely, inappropriate touching of a colleague - relating to the Claimant allegedly touching one of the Associates on the walkway. This was investigated by Mr Jackson, who decided that no further action would be taken against the claimant in relation to an allegation of inappropriate touching of a work colleague. Mr Jackson therefore presented a further Investigation Report dated 25 March 2022 [95-99]. By the date of this Report, the final written warning issued on 19 March 2021 had expired. The Investigation report dated 25 March 2022 therefore, under 'Warnings and Coaching on file' records no live warnings on file.

28. The investigation report included the following:

28.1. Amazon's Policies and Procedures, including the above policies, are accessible via Amazon's Intranet called InsideAmazon and are also held in the employee's 'MyDocs'. It is a contractual term of their contract of employment that they are expected to familiarise themselves with Amazon's Policies and Procedures and to comply with them. It is also provided that any breach of Amazon's Policies and Procedures may result in disciplinary action being taken, up to and including summary termination of employment.

28.2. During an investigation meeting with AM on 16'" March 2022, prior to showing AM the CCTV footage he was asked in his experience of driving PIT vehicles, what are the correct steps to take when associates are crossing a pedestrian walkaway. AM stated that eye contact should be made then the PIT vehicle should be stopped to allow the pedestrians to cross. Upon viewing the CCTV footage, AM denied any wrongdoing and stated that as he was not physically on the pedestrian walkway he did not perceive this to be a breach of health and safety.

28.3. It is outlined point 15 of the PIT policy "Pedestrians are to remain a minimum of 1 meter from moving or stationary PIT". It is identified in the CCTV footage that AM stops his PIT vehicle less than 1 metre from the pedestrian crossing as MS is able to make physical contact with AM whilst remaining on the crossing.

28.4. AM completed PIT refresher training on 29'h September 2021, therefore it is reasonable to believe he has knowledge of the expected policies and procedures in relation to PIT driving.

29. By letter dated 25 March 2022, the claimant was invited to attend a disciplinary hearing. The letter set out details of the allegation, enclosed a copy of the investigation report dated 25 March 2022 [95-99] and the annexes listed on [96] and a copy of the disciplinary policy. The letter explained that the allegation was "continuing to advance a PIT whilst associates were walking across a pedestrian walkway" and that if the allegation was proven, it was potentially a matter of gross misconduct. The claimant was advised of his right to be accompanied by a trade union representative or work colleague.

30. A disciplinary hearing was held on 29 March 2022 via Amazon Chime, a remote video conferencing facility. Ms Fearns, Employment Relations Case Manager (ER Case Manager) conducted the hearing. Within her capacity as ER case manager Ms Fearns was part of a central team with responsibility for investigations, disciplinary hearings and grievances. She had worked in an HR capacity for 3.5 years. She received training on Amazon processes in her capacity as an HR partner and further training on investigation and disciplinary processes when joining the central team as an ER case manager. She had not met, nor had any involvement with the claimant prior to the disciplinary hearing. Her knowledge of him was restricted to the information provided in the investigation reports.

31. Michael Gillender, HR intake advisor, attended the disciplinary hearing as a note taker. He took no part in in the decision-making.

    [The assertion that Mr Gillender participated in the decision making is not supported by any satisfactory evidence.]

32. The claimant declined to be accompanied at the disciplinary hearing.

33. During the disciplinary hearing the allegation was explained to the claimant, who was given the opportunity to explain his actions. During the hearing the claimant repeatedly maintained that he did not see anything wrong with his driving behaviour. Ms Fearns reviewed the CCTV footage with the claimant a number of times and asked him why he seemed to approach the walkway, stop appropriately, but then advance the vehicle whilst the pedestrians were crossing. The claimant was adamant that he had done nothing wrong, insisting that he had stopped and that he had not placed anyone at risk. He showed no remorse or reflection on his actions. He made repeated references to a lack of 1 metre markings in relation to the walkway and disputed the distance at which he had stopped the PIT vehicle before the walkway. Ms Fearns explained to the claimant that the allegation under consideration was that he had continued to advance his PIT vehicle towards the pedestrians, not that he had not stopped within a particular distance. Ms Fearns pointed out in the discussion the fact that the claimant was close enough that he could physically touch and be touched by the pedestrians on the walkway. The claimant stated that other drivers had done the same as him. When asked to provide specific details so that this could be investigated the claimant failed to do so. The hearing was adjourned to enable Ms Fearns to consider her decision.

34. The claimant was given full opportunity to state his case at the disciplinary hearing. There is no satisfactory evidence to support the assertion that the hearing was conduct in an intimidating manner.

35. The disciplinary hearing was reconvened on 31 March 2022 [115 -118], when the claimant was informed of the decision to dismiss. The dismissing officer explained her reasons. She stated:

> "You had stopped your PIT and then made a conscious act to drive forward towards these Associates to a point where you were within reaching distance, and were therefore breaching the safety rule that you need to remain at a safe distance."
> "I believe a summary dismissal to be an appropriate sanction due to the severity of the allegation and the fact that you have not shown any remorse or reflection on the incident. You also have stated multiple times that you don't see how it was an unsafe act, as you believed that you were in control and had stopped before reaching the Associates. I considered issuing you with a warning however, I did not find this to be appropriate due to the fact that you have not been able to reflect on your actions and show that you have understanding of the safety issues."

36. The claimant was advised of his right of appeal.

37. The dismissal, the reasons for the dismissal, and notification of the right of appeal, were confirmed by letter dated 31 March 2022 [119-121], which states:

I write to confirm the outcome of the disciplinary hearing held on 31 March 2022….. At the hearing you declined your right to be accompanied.

The hearing was held to consider the allegations set out below.
1. On 11 March 2022 at approximately 09:50am, you continued to advance your PIT vehicle whilst Associates were walking across a pedestrian walkway

You explained that you had stopped and allowed the pedestrians to cross the walkway, and that no one had told you where you should have stopped. You stated that there are no markings near the crossing to indicate where PIT drivers should stop, and that other drivers would be unaware of where to stop as well. I asked whether you had ever been told the correct distance to stop from Associates when in a PIT vehicle, and you clarified that in the policy it states that you need to keep '*a metre'* away. You pointed out that there is a picture by the crossing with a '*red mark around it'* which indicates that you '*can't go in to that crossing because of the tape around it'* but that you '*can stop by it'*.

It is clear from the CCTV footage that you stopped by this sign to allow the first pedestrian to cross, but then made eye contact with the remaining two pedestrians and continued to advance towards the walkway whilst looking at them. You stated that you had '*still stopped'* and that you had not '*caused harm'* or '*any damage'*, or '*hurt anyone'*.

You asked me to indicate 1-metre stopping distance to you on the CCTV footage. I clarified with you that the allegation was not around the correct stopping distance, it was around the fact that you had made a conscious decision to advance your PIT from a stationary position whilst the walkway in front of you was not clear. I clarified the specific allegation with you and showed your Investigation Report, completed by Dale Jackson (ER Case Manager). I pointed out that there were 2 allegations that were investigated; one was regarding the movement of your PIT and one regarding touching an Associate. The allegation regarding alleged inappropriate touching was not substantiated and was therefore not progressed to a disciplinary hearing, so we did not discuss that further. When I clarified this with you, you understood the allegation.

You mentioned that there was a '*pillar'* in the way on your right, so you had to stop and allow the pedestrians to cross. I clarified with you that you were correct to stop to begin with, but that the incorrect behaviour was that you made a conscious decision to move forward whilst your path was not clear. You came to a stop by the walkway that appears to be less than 1-metre, as you are able to make physical contact with the Associates, and they are able to make physical contact with you.

You stated that other drivers have done the same as you, and I asked you to provide specific details so these could be addressed under the relevant policies. However, you were unable to provide me with specific details so I could not look into this further.

You stated that the witnesses had not reported that they felt at risk of harm, and that you were in control of the PIT. Regardless of whether the other Associates involved felt at risk, you have still caused an unsafe situation by advancing towards pedestrians whilst they are on the crossing. The consequences could have been catastrophic had you lost control of the PIT.

You are aware of the correct distance that needs to be kept when a PIT is stationary (1-metre) as you were able to recall this information during the meeting. You also pointed out the sign by the crossing with red and white tape around it, which indicates that you can stop by that sign to allow pedestrians to cross. You have also received all of the necessary training to be able to drive a PIT.

I find that you had made a conscious decision to advance your PIT towards two pedestrians that were attempting to cross the walkway. This was supported by CCTV footage and statements from witnesses. Having considered the evidence carefully, I have decided to uphold the allegation against you.

Having concluded that the allegation should be upheld against you, I considered the appropriate action and sanction.

I took into account the following:

- Your length of service
- Your disciplinary record to date
- Your lack of understanding of the safety implications of your actions
- Your explanation that the incident would not have occurred had there been 1-meter

  markings on the floor

- The fact that you have a duty of care to keep yourself and all other Associates in your immediate area safe when in control of a PIT, and the fact that you did not uphold this duty of care

  Having considered the matter carefully, I have decided to summarily dismiss you. Your last day of service is 31 March 2022. Your pay will be stopped with effect from this date.

38. The claimant exercised his right of appeal on 18 March 2022. [123-124] His grounds of appeal were:

38.1. I was accused of driving a PIT truck in a manner dangerous to the health and safety of two fellow employees, in contravention of the company Health & Safety rules. I disputed that I had in any way acted dangerously and had not put any employees' safety at risk.

38.2. The alleged incident was apparently only discovered accidently whilst CCTV footage of another, undisclosed event was being investigated.

38.3. When interviewed, the two employees, who the investigator claimed were put at risk, both stated initially that they had not been concerned for their safety in any way and one of these employees, who required an English interpreter, changed this slightly after being shown the CCTV footage. She still failed to make any kind of complaint regarding my actions or her safety.

38.4. The investigative procedures looked at various aspects of my alleged dangerous behaviour, including that I broke distancing rules and finally settled on the fact that my truck was at one point moving slowly towards a pedestrian crossing point, even though it was admitted that I stopped a safe distance before reaching the crossing.

38.5. I got the distinct impression that the person holding the Disciplinary Hearing failed to take account of various but obvious points:

- The ONLY evidence of any alleged breach of rules was the CCTV footage, which is considered very unreliable at showing minor details such as distance, speed, angles etc.
- The only allegedly corroborating evidence to the CCTV footage was from the two employees using the crossing, both of whom stated, when initially interviewed, that they had not been in any danger nor felt threatened in any way. They also did not make any accusation that rules had been broken by me - until the non-English speaking lady was shown the CCTV footage and told that I had behaved wrongly. I have been told that she still did not consider this to be the case.

38.6. I feel that I was not able to relate to these facts during the Hearing as I found it intimidating and outside my comfort zone. Despite this I repeatedly tried to explain that I had not acted in the way I was being accused and the only response I received were platitudes that 'I see where you are coming from' - as detailed in the Hearing minutes.

38.7. I was given the distinct impression that the decision to dismiss me related more to my not admitting to the false accusations than the evidence and facts of the matter clearly shown in the Investigative and Disciplinary hearing minutes.

39. The claimant was invited to an Appeal Hearing to take place on 12 April 2022.

40. The appeal was conducted by Ms S Wilkinson ER Case Manager by way of review. She has worked within HR for the past 15 years. She is part of a central team with responsibility for investigations, disciplinary hearings and grievances. She regularly receives training on Amazon policies and processes and HR/employment law as part of the Amazon HR Training Academy. She is fully familiar with the Amazon disciplinary process. She had not been involved in this claim at the disciplinary stage and had no prior knowledge of the matter. She was the appropriate level of seniority, being at a higher grade than the dismissing officer, Ms Fearns. Whilst she worked within the same Fulfilment Centre as the claimant at one time, she did not have any working relationship or contact with him prior to the appeal hearing.

41. In preparation for considering the appeal Ms Wilkinson considered:

    41.1. the CCTV footage of the Incident;
    41.2. the investigation report (pages 95-99);
    41.3. witness statements provided during the investigation (pages 75- 85);
    41.4. disciplinary decision letter (pages 119- 122);
    41.5. the notes of the disciplinary hearing (pages 102-112, 115-118).

42. Ms Wilkinson interviewed the PIT driver who was seen on the CCTV footage to be approaching the crossing in the opposite direction to Mr McEwen around the time of the incident , The interview took place on 8 April 2022. A copy of his statement is at pages 127-132 of the bundle. This is an accurate record of the meeting. During the interview, before the CCTV footage was reviewed, Mr Somers said about the incident with the claimant:

    "To me, I was facing towards the crossing. There was 3 girls crossing, there was a bit of tomfoolery from the girls. He comes to a stop, and there is bit tomfoolery, he might have edged forward. But he had control of the vehicle. Didn't see them smiling because of the masks, but like smiling with the eyes."

    The CCTV was then reviewed and Mr Somers' comments afterwards included the following:

    "That looks far worse than what I saw. There is no markings to say there is 1m distance. You know when you're driving a car and there is uncertainty, do you go or they go. There are no marking there.

    .. there are no markings there. There are different distance rules for when you have forks up and down. They might have told him to go, verbally. It looks far worse from the camera, than what I saw.

    I don't know Alex that well, but he is a hard worker. He seemed a really good guy and a hard worker. Would be a shame to lose him. For me again, he was in full control of vehicle. He is a good driver."

[On this the tribunal accepts the evidence of the respondent. The failure of the respondent to call Mr Somers to give evidence does not cast doubt on the veracity of that evidence. The claimant has taken no steps to adduce evidence from Mr Somers.]

43. Ms Wilkinson also interviewed Mr Ellis (PIT Trainer) on 11 April 2022 to clarify the PIT Policy and the training that Mr McEwen had received, the expectations when approaching a crossing and how training was audited. A copy of Mr Ellis' statement is at pages 133-135 of the bundle. That is an accurate record of the meeting. During the meeting, Mr Ellis confirmed that the claimant had received refresher training on the PIT policy . When Mrs Wilkinson asked what were the rules when approaching a pedestrian crossing, Mr Ellis stated “They must slow down and aware of hazard and look out for pedestrians and stop. It is not only Amazon policy, it is the rules everywhere outside Amazon as well. “ Mrs Wilkinson then asked “What does it mean that driver makes eye contact?” Mr Ellis replied: “Pedestrian has the right away and driver should have eye contact all the time.”

44. The Claimant attended the Appeal Meeting on 12 April 2022 on Chime. Michael Gillender (ER Intake Advisor) took notes of the meeting. (136-148). The claimant declined to be accompanied at the meeting.

45. Having confirmed the grounds of appeal, the claimant asked if he could turn off his camera. Mrs Wilkinson agreed to this, as the claimant stated that this would be more comfortable for him.

46. Ms Wilkinson reviewed each of the appeal points with the claimant. During the meeting, she offered the claimant the opportunity to review the CCTV footage on a number of occasions, but he declined to do so. Mrs Wilkinson asked the claimant why he had stopped the PIT truck, and then advanced it again whilst the pedestrians were still crossing the crossing. The claimant failed to provide any real explanation for the advancement of the PIT, instead he maintained that he had still stopped and that he had not hurt anyone.

47. Before adjourning, Mrs Wilkinson asked the claimant if he felt like he had been listened to and whether he believed he had covered everything in enough detail, both times he responded 'yes' (page 148). She explained that she was about to go on annual leave and that there may be a short delay to the proceedings.

48. The claimant sent a letter to the respondent on 18 April 2022 (page 149) raising concerns about the appeal process. This was not brought to Ms Wilkinson’s attention prior to her making the decision on appeal.

49. On 14 April 2022 the respondent sent copies of the appeal meeting notes to Mr McEwen (page 150). By email dated 22 April 2022 the claimant was invited to a reconvened meeting (page 150 and by letter at pages 152-153). By email dated 25 April 2022 (page 154) the claimant was provided with

copies of the statements from Mr Ellis and Mr Somers and his PIT Safety Test from September 2021 for his consideration. They had not been provided before or discussed at the first appeal hearing because the notes of the meetings had not been approved with the witnesses.

50. The reconvened appeal meeting took place on 27 April 2022 (pages 158-171). Holly Cooper (ER Intake Advisor) was in attendance as a notetaker . The notes taken are an accurate record of the meeting. Mr McEwen declined the option to bring a companion.

51. At the outset of the reconvened appeal meeting Mrs Wilkinson asked the claimant whether there was anything he wished to raise in relation to the additional documents/statements which he had received since the last hearing. He confirmed that there was not. Mr McEwen did not refer to his letter dated 18 April 2022 (see paragraph 48 above), did not ask Mrs Wilkinson to consider it before reaching her decision.

52. The claimant was informed of the decision to reject the appeal and reasons were provided. This was confirmed by letter dated 29 April 2022 (pages 174-185).

53. The appeal hearings were not conducted in an intimidating manner. Technical issues arose during the online meeting which led to breaks in transmission and Mrs Wilkinson left the video meeting on occasion. These breaks in the appeal hearings were not conveniently timed in order for Mrs Wilkinson to consult others.

[On this the tribunal accepts the evidence of the respondent. The claimant's assertions are not supported by any satisfactory evidence.]

54. In reaching the decision Mrs Wilkinson considered each of the claimant's grounds of appeal and the statements he made during the disciplinary process including the appeal hearings. She noted, in particular, the following:

54.1. the claimant's training record and PIT safety test demonstrated that he was provided with the training to operate the PIT correctly. He showed a good understanding of the PIT policy and the fact he should stop 1 metre away, but instead, his PIT did advance forwards (from a stopped position) prior to two associates clearing the pedestrian crossing;

54.2. The claimant did not accept responsibility for his behaviour at any point in the entire process;

54.3. The CCTV clearly showed the PIT advancing whilst the pedestrians were on the crossing;

54.4. The claimant had failed to acknowledge the unsafe behaviour he demonstrated;

54.5. the safety of those in the warehouse was paramount.

55. Mrs Wilkinson did consider whether it would be appropriate to substitute a lesser sanction, such as a final written warning. Had the claimant shown any remorse or understanding of the reasons why he was being disciplined, it may have led to a different outcome. However, Mrs Wilkinson decided that it was not reasonable to allow an individual to re-enter the business having acted in an unsafe manner when he refused to acknowledge the risk or accept any responsibility.

Additional findings of Fact in relation to the finding of contributory conduct

56. The claimant accepts that he received appropriate training in relation to the use of a PIT truck and that an aim of the relevant PIT Rules is to minimise risk of injury to people or damage to property and that as a driver of a PIT, like a driver of a car, he owed a duty of care to others (and to himself).

57. The CCTV footage clearly shows that the claimant was, in driving the PIT truck towards the work colleagues on the pedestrian walkway, engaged in some sort of joke or "tomfoolery" with his work colleagues on that walkway. He and his PIT truck were clearly within touching distance of those work colleagues, when he finally brought it to a stop. The technical evidence of Mr Clarke does not and cannot change that.

58. The tribunal accepts the evidence of Mr Clarke that a PIT truck will stop automatically if a hand slips off the handle.

59. The claimant was aware of the disciplinary policies and the possible consequences of a breach of those policies.

The Law

60. The employer must show the reason, or if more than one, the principal reason, for dismissal and that the reason fell within one of the categories of the potentially fair reason set out in Section 98(1) and (2) Employment Rights Act 1996 ("ERA").

61. Misconduct is a potentially fair reason for dismissal. **British Home Stores Ltd v Burchell [1980] ICR 303** provides useful guidelines in determining this question. It sets out a three-fold test stating that the employer must show that: 1. he genuinely believed that the conduct complained of had taken place; 2. he had in mind reasonable grounds upon which to sustain that belief; and 3. At the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

62. The Tribunal notes and takes regard of the fact that the guidelines set out in Burchell are guidelines only and that the burden of proof on the question of reasonableness does not fall upon the employer under this head, and is a question for the Tribunal to decide, when appropriate, in determining the question of reasonableness under Section 98(4) ERA 1996, under which the burden of proof is neutral. **Boys and Girls Welfare Society v McDonald [1997] ICR 69** as confirmed in **West London Mental Health Trust v Sarkar [2009] IRLR 512,** which was not disturbed on this point by the Court of Appeal . As HHJ Peter Clark and the Employment Appeal Tribunal in **Sheffield Health & Social Care NHS Foundation Trust v Crabtree UKEAT/0331/09** observed in paragraph 13**, British Home Stores Ltd v Burchell** was decided before the alteration of the burden of proof effected by section 6 of the Employment Act 1980. At paragraph 14 the Employment Appeal Tribunal held: "The first question raised by Arnold J: did the employer have a genuine belief in the misconduct alleged" goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer." At paragraph 15 the EAT held: "However, the second and third questions, reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under section 98(4) Employment Rights Act 1996 and there the burden is neutral."

63. The reasonable investigation stage has been subjected to refinement in two judgments, which are relevant here. First, **A v B [2003] IRLR 405**, a judgment of Elias J (President) and members, indicates that there is to be a standard of investigation which befits the gravity of the matter charged. If what is sought to be sanctioned is a warning, the standard of investigation will be lower than where dismissal is concerned. Elias LJ reinforced that position in **Salford v Roldan [2010] EWCA Civ 522,** indicating that where the circumstances of a dismissal would create serious consequences for the future of an employee, such as deportation, particular care must be given to the investigation.

64. The tribunal notes that it is not for the Tribunal to substitute its own view as to whether the employee committed the act complained of.

65. Once the employer has shown a potentially fair reason for dismissing, the Tribunal must decide whether that employer acted reasonably or unreasonably in dismissing for that reason. The burden of proof is neutral. It is for the Tribunal to decide. Section 98(4) ERA 1996 states:- "The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case". . The test of whether or not the employer acted reasonably is an objective one, that is, Tribunals must as industrial juries determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. There is a band of reasonable responses. The Tribunal must determine whether the

employer's action fell within a band of reasonable responses. **Iceland Frozen Foods Limited v Jones [1983] ICR 17. (**Approved by the Court of Appeal in **Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827**. The range of reasonable responses test (the need for the tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.** The tribunal bears that in mind and apply that test in considering all questions concerning the fairness of the dismissal. In determining the reasonableness of an employer's decision to dismiss, the tribunal may only take account of those facts (or beliefs) which were known to the employer at the time of the dismissal.

66. Whether or not the employer acts fairly depends on whether in all the circumstances a fair procedure, falling within the range of reasonable responses, was adopted. The form and adequacy of a disciplinary enquiry depends on the circumstances of the case. What is important is that, in the interests of natural justice, the employee can be given a chance to state his or her case in detail with sufficient knowledge of what is being said against him or her to be able to do so properly. **Bentley Engineering Co Limited v Mistry [1979] ICR 2000.** The tribunal has considered the current ACAS code of practice.

67. Defects in the original disciplinary procedures may be remedied on appeal whether the appeal is a re-hearing or a review of the original decision, depending on the circumstances of each case **Taylor v OCS Group Ltd [2006] IRLR 613 CA.**

68. In deciding whether the dismissal is fair the Tribunal must consider whether summary dismissal falls within the band of reasonable responses, taking into account all the surrounding circumstances, the employer's practice, the contract of employment and any definitions of gross misconduct contained therein, the knowledge of the employee, the seriousness of the offence. What conduct amounts to gross misconduct will depend on the facts of the individual case.

69. The tribunal has considered and applied Sections 118-124 Employment Rights Act 1996. It notes in particular:-

a. Section 122(2) under which a tribunal may reduce a basic award where the employee's conduct before dismissal makes a reduction just and equitable;
b. Section 123(1) whereby the tribunal is directed to make a compensatory award in such an amount as it considers just and equitable in all the circumstances;
c. Section 123(6) whereby a tribunal should reduce the compensatory award by such proportion as it considers just and equitable where the dismissal was to any extent caused or contributed to by any action of the claimant.

70. In **Nelson v BBC (No2) [1979] IRLR 346** the Court of Appeal said that three factors must be satisfied if the tribunal are to find contributory conduct:-
    - the relevant action must be culpable and blameworthy
    - it must have actually caused or contributed to the dismissal
    - it must be just and equitable to reduce the award by the proportion specified.

71. In **Gibson v British Transport Docks Board [1982] IRLR 228** Browne-Wilkinson stated that what has to be shown is that the conduct of the claimant contributed to the dismissal. If the claimant has been guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy, then it is open to the tribunal to find that the conduct contributed to the dismissal.
72. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

73. This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.

74. The claimant was dismissed and the effective date of termination was 31 March 2022.

75. The reason for the dismissal was conduct in that the respondent held the honest and genuine belief that the claimant had, on 11 March 2022 at approximately 09:50am, continued to advance his PIT vehicle whilst Associates were walking across a pedestrian walkway. There is no satisfactory evidence to support any assertion that the respondent had sought out or fabricated evidence to support disciplinary action against the claimant, whose Final Written Warning was about to elapse. The tribunal accepts the evidence of the respondent and finds that the respondent had genuine concerns about the way in which the claimant had driven the PIT truck on that day after a review of the CCTV footage on an unrelated matter.

76. Conduct is a potentially fair reason for dismissal within s98 (1) and (2) Employment Rights Act 1996.

77. The tribunal has considered all the circumstances of this case, including those matters referred to in s98(4) Employment Rights 1996, to determine whether, in all those circumstances, the dismissal of the claimant for the reason stated was fair or unfair. In deciding whether the decision to dismiss was fair or unfair the tribunal reminds itself that it is not for the tribunal to substitute its view for that of the employer. The question is whether the respondent acted fairly within the band of reasonable responses of a reasonable employer in concluding that this employee was guilty of gross misconduct and dismissing him.

78. Having examined all the circumstances the tribunal notes in particular the following:

78.1. The tribunal notes that the dismissing officer relied principally upon CCTV evidence. She did not visit the site to look at the place the alleged incident took place, she did not seek expert advice on the veracity of the CCTV recording, did not take any steps to, for example, measure the distances between the PIT truck and the walkway, between the PIT Truck and the pedestrians on the walkway, did not seek to accurately measure the speed at which the PIT truck approached the crossing.

78.2. The claimant has before the tribunal presented a calculation of the distances prepared by Mr Clarke, who has considerable experience in the operations of fork lift trucks (or PIT trucks as they are called by the respondent) and health and safety. Those calculations challenge the respondent's evidence that the claimant drove the PIT truck up to the walkway. Mr Clarke's calculations show that the PIT truck was approximately 1 metre away from the walkway and 1.3 metres away the pedestrians when the claimant brought the PIT truck to its second stop. However, these calculations were presented before the tribunal, not during the course of the disciplinary hearings. The question is whether the failure of the dismissing officer to visit the site, to obtain expert evidence from a PIT driver as to the operation of the vehicle, the failure to obtain a calculation of the relevant distances, rendered the investigation unreasonable. On balance the tribunal finds that it did not. The precise distance from the walkway, the precise distance from the pedestrians on that walkway, was not relevant to the allegation of misconduct. Both the dismissing and appeal officers have been very clear that the issue was the fact that the claimant had stopped before the walkway, and then made the positive decision to move towards the walkway when pedestrians were still on it. The tribunal agrees with Mr Clarke that there is some confusion as to whether the distance between the walkway and/or pedestrians and the PIT truck was a relevant consideration. Reference is made during the investigation and disciplinary hearings to the rule that the PIT truck must not stop within 1 meter of any pedestrians. However, it is clear that the claimant was not charged with any allegation of misconduct relating to the precise distance between the claimant's PIT truck and the pedestrians and/or walkway. He was charged with a serious breach of health and safety arising from his decision to move towards the walkway when he could clearly see that pedestrians were on it. The respondent was reasonable in relying on the CCTV evidence which showed the PIT truck moving towards the pedestrians and stopping close enough to those pedestrians that one of them was able to reach out to the claimant and touch him. The respondent interviewed the relevant witnesses, namely the pedestrians on the walkway, prior to the decision to dismiss. The fact that it transpired, during the interview with MS, that her companion and translator, EG, also witnessed the event, this did not make the

investigation unreasonable. The claimant did not identify any other relevant witnesses. Although he asserted that other drivers acted in the same way without penalty he did not provide the names of the drivers or the dates/places when this had occurred. The investigation was reasonable;

78.3. Following that investigation there were reasonable grounds to support the belief that the claimant had continued to advance his PIT vehicle whilst Associates were walking across a pedestrian walkway. The claimant did not deny that he had done this, as clearly demonstrated by the CCTV evidence.

79. In deciding whether a fair procedure was followed the tribunal has considered all the circumstances and notes in particular as follows:

79.1. The specific allegation of misconduct was put to the claimant who was given full opportunity to state his case both during the investigation and at the disciplinary hearing;

79.2. The claimant was advised of his right to be accompanied at the disciplinary hearings, he was given full opportunity to state his case and the matters put forward on behalf of the claimant were considered by the dismissing officer and by the Appeal Officer before reaching their decisions:

79.3. There is no satisfactory evidence to support the assertion that any of the investigation, disciplinary or appeal hearings were conducted in a hostile or intimidatory manner. Both the dismissing and appeal officer asked the claimant relevant questions about the incident and took note of what the claimant said;

79.4. There is no satisfactory evidence to support the assertion that the dismissing officer had taken an active part in the investigation, or was biased in any way;

79.5. The respondents explained the procedure to the claimant at each stage. Notes were provided of the meetings. The claimant was given the opportunity to challenge the accuracy of those notes. He did not.

79.6. At the appeal stage further witnesses were interviewed, Mr Somers the other PIT truck driver seen on the CCTV, and Mr Ellis, PIT truck instructor. This was not discussed at the first appeal hearing with Mrs Wilkinson. However, copies of the notes of the hearings were provided to the claimant before the reconvened appeal hearing. He was asked if he had any comment on them: he did not. Mrs Wilkinson, in reaching her decision, did not wrongly interpret the evidence of Mr Somers. The tribunal finds that Mrs Wilkinson considered each of the points of appeal and made her decision on the basis of the evidence before her. There is no satisfactory evidence to support the assertion

that she was deliberately falsifying or misinterpreting evidence to suit her desired outcome. Mrs Wilkinson was not biased in her approach.

80. In all the circumstances the tribunal finds that the respondent followed a fair disciplinary procedure.

81. The key question is whether the decision to dismiss fell within the band of reasonable responses of a reasonable employer faced with similar circumstances. The tribunal has considered all the circumstances and notes in particular the following:

81.1. the first question is whether the conduct, that the claimant continued to advance his PIT vehicle whilst Associates were walking across a pedestrian walkway, did amount to gross misconduct justifying summary dismissal. The tribunal would agree with Mr Clarke that this conduct, by itself, would not amount to misconduct: during the normal course of the working day any PIT truck driver would find themselves driving towards a walkway with pedestrians on it. The question is what is their reaction to that, what steps do they take to avoid any risk to the safety of the pedestrians and themselves. The respondent asserts that the actions of the claimant amounted to an example of gross misconduct set out in its disciplinary procedure, namely "serious breach of health and safety rules, working unsafely or behaving in a way that puts your own or another person's health and safety at serious risk". The dismissing officer states that the reason for dismissal was that she had found that the claimant "had stopped [his] PIT and then made a conscious decision to drive forward towards the Associates to a point where he was within reaching distance, and was therefore breaching the safety rule that he needed to remain at a safe distance." The claimant denies that there was a breach of health and safety rules, denies that he was working unsafely, denies that he behaved in a way that put his or another person's health and safety at risk. The claimant relies on the fact that the associates on the walkway did not think that they were put at risk, that no-one else thought his actions were dangerous, including the other PIT driver, Mr Somers. The claimant points out that he was not at the time warned that his conduct was a danger or a threat to safety, he was only called in to account for his actions after the CCTV had been reviewed on an unrelated matter. The claimant is adamant that the measurements made by Mr Clarke clearly show that no health and safety rule had been breached because the pedestrians on the walkway were more than 1 meter away from the PIT truck when the claimant stopped for the second time in advance of the walkway. However, the evidence provided by Mr Clarke was not available during the course of the investigation, disciplinary and appeal hearings. The claimant asserts that it beggars belief that the respondent cannot accept the clear photographic evidence that there was a gap shown on the floor between the front of the PIT vehicle and the walkway. However, the precise distance between the PIT Truck and the walkway/pedestrians was not in issue. The dismissing and appeal officers based their decision on the basis that the CCTV showed the

claimant first stopping, and then moving towards the walkway and the pedestrians on it to within touching distance. The claimant did not dispute that one of the pedestrians had reached out to touch him. It was reasonable for the dismissing and appeal officers to conclude that the actions of the claimant amounted to a serious breach of health and safety policies and procedures, amounted to gross misconduct;

81.2. the tribunal accepts the evidence of the dismissing officer and finds that the dismissing officer did not, in reaching her decision, take into account the allegation of appropriate touching of a work colleague. It is clear that the fact that the PIT truck had been brought to a stop within touching distance of a work colleague was a relevant factor. However, that was a factor relevant to the allegation which progressed to a disciplinary charge. The investigation hearing on 16 March 2022, in relation to this first allegation, clearly shows that the distance between the claimant and the pedestrians on the walkway was in issue and there was a discussion about the work colleague touching the claimant;

81.3. The dismissing officer believed that summary dismissal was an appropriate sanction due to the severity of the allegation and the fact that the claimant had not shown any remorse or reflection on the incident. She did consider an alternative penalty, issuing a warning, but decided that this was inappropriate because the claimant had not shown any remorse, would not accept that he had put himself and/or others at risk, which questioned whether the claimant had any understanding of the safety issues. It was reasonable for the respondent to take into account the claimant's failure to acknowledge the health and safety issue in deciding on the appropriate penalty;

81.4. the claimant was aware of the company's strict rules relating to the use of the PIT truck and had received refresher training on this topic;

81.5. It is correct that the claimant did stop before the walkway, did not hit the pedestrians on the walkway, that the pedestrians and the observing PIT truck driver, Mr Somers, did not regard the actions of the claimant as a threat to health and safety. There were clearly no previous issues with the standard of the claimant's driving. Evidence was given during the investigation that the claimant was a good driver. Many employers may have decided that a Final written warning was the appropriate penalty and that dismissal would be too harsh. However, it is not for the tribunal to substitute its own view or find that dismissal was unfair because the penalty was harsh. The tribunal finds that dismissal in these circumstances did fall within the band of reasonable responses. The fact that the employees involved in the incident did not feel that their actions posed a risk does not mean that the employer cannot take the opposite view and take appropriate action. It was reasonable to conclude that there was a risk to health and safety in contravention of the policies and that dismissal was the appropriate penalty.

82. Taking into account all the circumstances the tribunal finds that the dismissal was fair.

83. The claimant was fairly dismissed.

Contributory conduct

84. Further and in the alternative, if the tribunal is wrong on that, the tribunal has considered whether the claimant was guilty of conduct which contributed to his dismissal and, if so, whether the basic and compensatory awards should be reduced, and if so, by how much. On this question the tribunal must substitute its view and decide for itself whether the claimant was guilty of culpable behaviour which caused or contributed to his dismissal. The CCTV evidence is clear. The tribunal considers that Mr Somers identified the problem succinctly- this was the case of the employees involved in some tomfoolery. The notes clearly show that he thought all of them were involved in this, including the claimant. It is clear to the tribunal that the claimant deliberately set off towards the walkway, albeit edging forward very slowly and in complete control, as some sort of jokey behaviour with his friends on the walkway, making out that he was going to carry on across, not give them the right of way. On this occasion he stopped in time, on this occasion the tomfoolery did not extend to the mates jumping up or remonstrating with the claimant and getting caught in the PIT truck. However, this sort of behaviour with a PIT truck is dangerous, is a risk to health and safety. In these circumstances the tribunal finds that the claimant was guilty of culpable behaviour which led to his dismissal and any basic or compensatory award should be reduced by 100%.

Employment Judge Porter
Dated: 8 March 2023

WRITTEN REASONS SENT TO THE PARTIES ON

22 March 2023

FOR THE TRIBUNAL OFFICE