# EMPLOYMENT TRIBUNALS

| **Claimants** | **Respondents** |
|---|---|
| Mr Andrew Wood | Moran Logistics Ltd |

**Heard at:** **Leeds** **On: 4-5 September 2023**
**Before:** **Employment Judge P Morgan**

**Appearances**
**For the Claimant:** **Mr H Wiltshire (Counsel)**
**For the Respondent:** **Mr L Fakunle (Solicitor)**

# RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is well-founded and succeeds.

2. No deduction will be made to the compensatory award under the principles in *Polkey v A E Dayton Services Ltd* [1988] A.C. 344.

3. It is 'just and equitable' to award an uplift of 15% for the Respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures ("the ACAS uplift").

4. The Claimant contributed to his dismissal by blameworthy conduct and it would be just and equitable to reduce his compensatory award for unfair dismissal by 25%. It would be just and equitable to reduce his basic award for unfair dismissal by 25% because of his conduct before her dismissal.

5. The Claimant's complaint for breach of contract for failure to pay notice pay is well-founded and succeeds.

6. The remedy or amount of compensation to be awarded will be decided at a separate remedy hearing.

# REASONS

## Introduction

1. These were complaints of unfair dismissal and wrongful dismissal, brought by the Claimant, Mr Andrew Wood against his former employer Moran Logistics Ltd. The Claimant was represented by Mr Wiltshire of Counsel, and the Respondent was represented by Mr Fakunle, Solicitor. This hearing dealt with liability, contribution, *Polkey*, and the ACAS Code.

2. Mr Wood commenced employment with the Respondent on 1 August 2020, and was dismissed on 6 December 2022, following an accident on 6 November 2022. Early conciliation commenced on 5 January 2023, and ended on 16 February 2023.

3. On 17 February 2023, Mr Wood brought proceedings against the Respondent for unfair dismissal, and wrongful dismissal (notice pay).

4. The case was listed for final hearing on 21 June 2023. On application by the Respondent EJ Rogerson directed that the final hearing be converted into a preliminary hearing. At the hearing before EJ Klimov on 21 June 2023 the case was listed for a 2 day hearing. At the time of the preliminary hearing the understanding was that only Mr Wood would give evidence for the Claimant. A list of issues was also agreed between the parties.

5. At the start of the hearing of 4-5 September 2022 the parties confirmed that there was no concurrent litigation concerning the accident, nor any intended civil litigation.

6. There was an agreed file of documents. The Tribunal also admitted further documents by agreement, and everybody had a copy. In addition there was an agreed CCTV video, to which everybody had access. The Tribunal heard evidence from the Claimant and Ms L Froggatt for the Claimant, and from Mr L Smith (Transport Shift Manager), Mr B Lee (Warehouse Manager), Ms E Ward (General Manager) for the Respondents.

7. On 5 September 2022 it was necessary to adjourn to the afternoon because one of the principal witnesses became ill. Given the delay caused by the adjournment, the desire that the case not go part heard, and the Claimant's inability to instruct his counsel for an additional hearing day, to save costs for the parties it was agreed that closing submissions should be made in writing, and a reserved judgment on liability delivered. The detailed and helpful written closing submissions of both parties were received by the Tribunal on 7 September 2023, and they have been closely considered.

## Application

8. The Claimant informed the Tribunal that he was seeking reinstatement and/or re-engagement. The Respondent objected to this on the basis that this application was made late, that they were previously not aware that this was in issue, and that the evidence necessary to deal with this point was not in the bundle, and that this might require a separate remedies hearing. The Respondent's solicitor informed the Tribunal that the Respondent would need an adjournment to deal with the issue of reinstatement and/or re-engagement, in particular to obtain a letter from one of its customers.

9. Although reinstatement and/or reengagement, is a discretionary remedy, which is not frequently granted, caselaw often refers to it as the primary remedy for unfair dismissal. A proper construction of Sections 112 and 113 of the Employment Rights Act 1996, demonstrates that a Claimant has a statutory right to seek such a remedy, up to and including when a Tribunal determines the issue of liability.

10. Under Section 112 where a Tribunal finds the claim well founded the Tribunal is obliged to put the option of reinstatement or reengagement to the Claimant, and ask him whether he wishes the Tribunal to make such an order. There is a statutory duty on the Tribunal to put this option to the Claimant, at this point of the proceedings. This applies irrespective of whether a Claimant has ticked the reinstatement or reengagement boxes on the ET1. This duty would be nugatory if a Claimant was required to make an application to amend, subject to the rules concerning amendment, to request reinstatement and/or reengagement if they had not indicated a desire for such a remedy in their ET1.

11. A Claimant is therefore not bound by any failure to tick the boxes on the ET1 requesting reinstatement or reengagement. The statutory right still applies, and the Claimant has not waived it by a failure to indicate such a desire in their ET1. Reinstatement of reengagement are discretionary remedies, but under the statute a claimant is entitled to request them if the Tribunal finds in his favour. This interpretation, that the Claimant is able to make such a choice after the submission their ET1 is also supported by Rule 76(3)(a) of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

12. Further, given that the hearing was listed for 2 days, the number of witnesses in this case (5), and the scale of the disputed facts, including allegations of dishonesty, a separate remedies hearing would be required in any case, if the Tribunal holds in the Claimant's favour on liability. Other material on remedies, including mitigation was also not before the Tribunal. Choosing to assert a right to reinstatement and/or reengagement would not in and of itself require an additional remedies hearing to be listed which would otherwise not be needed. Such a hearing would also be required to deal with the issue of compensation in any event.

13. The Tribunal therefore permitted the Claimant to seek reinstatement and/or re-engagement, and this issue remains live.

## Reasonable Adjustments

14. Prior to the hearing the Tribunal was informed of Ms Froggatt's need for reasonable adjustments. Due to her illness on the morning of the second day of the hearing, the hearing was adjourned to allow her to seek medical attention, and to provide time for her medication to take effect. By way of a reasonable adjustment Ms Froggatt was permitted to give her evidence via CVP, and was provided with breaks during her evidence.

## The Claims and Issues

15. This hearing dealt solely with the issues of liability, contribution, *Polkey*, and alleged breaches of the ACAS Code. The issues for the Tribunal to determine at this hearing, were:

### Unfair Dismissal

15.1 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

15.2 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

15.2.1 there were reasonable grounds for that belief;
15.2.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
15.2.3 the Respondent otherwise acted in a procedurally fair manner;
15.2.4 dismissal was within the range of reasonable responses.

### Remedy for Unfair Dismissal

15.3 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

15.4 If so, should the Claimant's compensation be reduced? By how much?

15.5 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

15.6 Did the Respondent or the Claimant unreasonably fail to comply with it?

15.7 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

15.8 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

15.9 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

15.10 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

### Wrongful Dismissal/Notice Pay

15.11 What was the Claimant's notice period?

15.12 Was the Claimant paid for that notice period?

15.13 If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

## Agreed Issues

16. The Respondent accepts that the Claimant was an employee of the Respondent within the meaning of Section 230 of the Employment Rights Act 1996. The Respondent further accepts that the Claimant was dismissed, and it does not dispute that the Claimant was an employee with two or more years' service.

17. In this case the dispute relates to whether the Claimant was unfairly dismissal and whether notice pay is due. The Respondent alleges that the Claimant was not unfairly dismissed, and that he is not entitled to notice pay in that they were entitled to dismiss the Claimant without notice due to gross misconduct.

## The Facts

18. In determining the issue of unfair dismissal it is important that the Tribunal does not substitute its view for that of the employer. However, since the case also concerns contribution and a claim for wrongful dismissal (both of which require an examination as to what actually happened, and not simply a consideration of what the Respondent thought the facts to be) it is necessary to set out this section in chronological order, and to make findings of facts on some matters which are not relevant to the issue of whether the Claimant was unfairly dismissed.

19. Mr Wood was employed as a shunter by Moran Logistics Ltd. Moran Logistics Ltd is a logistics company that operates a 24/7 storage, loading, and delivery service, including at the Arla Foods National Distribution Centre in Leeds. It

employs 412 people. A shunter is a HGV driver holding a Class 1 HGV licence. The shunters used Terberg Tugs to connect to, and move trailers.

20. Mr Wood was dismissed without notice on the grounds of gross misconduct on 6 December 2022, following an accident on 6 November 2022 at the Arla Foods National Distribution Centre in Leeds. His contractual notice period was two weeks.

Safety System

21. The trailers employ a safety system called a Salvo. This system is found at the front of the trailer, and it prevents the accidental driving away of the trailer during loading and unloading. A Salvo key, which is contained within a box located on the wall next to the loading bay door is used to unlock the Salvo. Each Salvo has its own key. The removal of the Salvo key ensures that the warehouse doors cannot be moved.

22. A trestle is used to support the trailers. A trestle is a stand that prevents the trailer from tipping over. It support the trailer during loading and unloading. The Salvo must be unlocked, and the trestle removed, before the Tug is reversed onto and coupled with the trailer.

23. It is agreed by the witnesses that the correct order for removal of a trailer is removal of the key, unlocking the Salvo, and removing the trestle, before the Tug is reversed on to the trailer.

Training

24. After joining the Respondent Mr Wood was provided with an induction. He was provided with training by Mr Denville Hobson who was the Respondent's shunter trainer. The training was initially planned to be three days, but it was reduced to two days. As part of this process Mr Wood was given documentation to sign, including a document entitled "Yard Shunter Responsibilities", and he completed a paper training activity entitled "Use of Trailer Stands". Mr Wood concedes that he did not read all of the documentation in full.

25. The Yard Shunter Responsibilities document sets out that when removing a trailer the Salvo key should be turned to deactivate the safe loading system, before the Salvo is released using the Salvo key. The "Use of Trailer Stands" document explains how to use a trestle, but not when it is removed when removing the trailer (i.e. the order of its removal within the sequence).

26. The shunter training provided by Mr Hobson focused on the operation of the Terberg Tug. Mr Wood was issued with a Certificate of Training by the Respondent on 12 August 2021, which recorded that his shunter training included coupling and uncoupling. However, the correct procedure of coupling and uncoupling (in terms of the exact order of key, Salvo, trestle), did not form part of the training which Mr Wood received. Further, at no point during this training was Mr Wood instructed to only carry out the role of coupling and uncoupling by himself, and without the assistance of another shunter.

27. The trestle is not referred to in the manual, or safe working practices ('SWP'), and these do not specify at which point it should be removed. As part of his training Mr Wood was taken to the Arla site since Mr Hobson was required to carry out an audit on the trestles there, to assess their condition, and count how many there were. Save for the documents provided to Mr Wood this audit was the only formal trestle training that Mr Wood received.

28. Although it is agreed by the witnesses at this hearing that the correct order for removal is key, Salvo, trestle, before the Tug is reversed onto the trailer, the Tribunal finds that there was a lack of consistency in understanding amongst both the shunters and the shunter trainer as to this order prior to the incident. In the notes of the investigation meeting with Mr Kevin Holburt, the shunter who was driving the Tug at the time of the incident, it is recorded that Mr Holburt stated: "Trestle – key – salvo – how I was trained to do the process."

29. There are also notes of a meeting which are missing from the hearing bundle, and which were not disclosed to the Claimant at any point, (including prior to the disciplinary hearing), which record a meeting between Mr Denville Hobson and Mr Wood. This was a meeting conducted by Mr Hobson with the Claimant, prior to the investigation, at which Ms Froggatt took the notes. Ms Froggatt explained, and the Tribunal accepts her evidence that this meeting took place, and also to the contents of this meeting, that both Mr Wood and Mr Hobson had different views as to the processes, and that Mr Hobson's order differed from that now agreed between the Claimant and Respondent. She states that after Mr Hobson and Mr Wood discussed the process for over five minutes, and during the meeting it was agreed that Mr Wood's understanding was correct. Mr Hobson initially believed that the removal of the trestle was not the final step in the process.

<u>Doubling Up</u>

30. It is easier to use a Tug to carry out the shunting work, than to use a tractor unit. There was a shortage of Tugs on the site. However, the exact number short is disputed.

31. On the night of the accident (6 November 2022) three shunters are displayed in the CCTV video, operating two Tugs. Mr Wood was allocated a Tug. Mr James Carswell joined Mr Wood at the beginning of his shift that evening as Mr Carswell did not want to use a tractor unit (an ordinary truck) in place of a Tug. Mr Lee states that one of the shunters should have used a tractor unit (i.e. a truck) instead of doubling up on the Tugs, since they are "allowed to" use a truck. He acknowledged that shunters sometimes refuse to use a truck since it takes longer in a truck, and Tugs are easier to operate. However, he concedes that he did not look into this issue, or the practice of doubling up. However, as set out below doubling up was the custom and practice of the site.

32. Mr Smith states that he was not sure how many tugs were available that evening. Ms Ward also did not know if a Tug was down or not. However, it was put to the Claimant in cross-examination by the Respondent's solicitor that Mr Smith's evidence was that there was only one Tug down. The Claimant gave evidence that two Tugs were down. The Tribunal accepts on the balance of probabilities that the Respondent was down two Tugs. The Claimant is the only witness to have provided any evidence on the number of Tugs short. The site was regularly short of Tugs.

33. It had become an accepted practice at the site for the shunters to double up, and to work as a team. This meant that instead of one shunter being responsible for driving the Tug, removing the key, disconnecting the Salvo, and removing the trestle, before returning to the Tug, and moving the Tug onto the trailer, more than one shunter carried out this role. This practice resulted from a shortage of Tugs. They worked as a team, rather than individually. This custom and practice had evolved at the site.

34. Mr Wood states that this practice of doubling up pre-dated when he started working at the site. Mr Lee disputed that this practice started before Mr Wood commenced working at the site, but gave no evidence as to why this was the case, or how he was aware of this, save that if there were enough shunt units they would not have buddied up. However, Mr Lee was in fact unaware at the time of the incident that shunters in fact worked in pairs, and was still not aware of this at the time of determining Mr Wood's appeal, and states that he did not look into this issue of whether this had become the practice, since in his opinion it was not raised by the appeal.

35. The Respondent's Shunter Operations Document, which was signed by Mr Wood on 11 August 2022 states: "[o]nly the duty shunters are allowed to present a trailer for loading and activate the salvo valve and trestles unless this is a live load with a tractor unit on the front." It is accepted by Mr Smith that the Claimant, and the other two shunters present that evening were duty shunters. However, Mr Smith stated that duty shunter means only for the trailer they use, and not jumping between trailers. It is the Respondent's submission that this prohibits doubling up. However, this interpretation ignores the use of the plural in the document, requires a legalistic construction unsuited to health and safety instructions, and also ignores the unchallenged custom and practice at the site.

36. The Respondent's SWP did not stipulate one person one tug. It did not deal with buddying up. That this was the custom and practice of the site is supported by the Incident Report completed by Mr Graham, which confirms that the SWP did not stipulate one person, one tug, that buddying up had become an accepted practice, which had not been challenged, and that there had been a failure to communicate a safety expectation as to one person in the vehicle and completing the process at any time. Mr Graham's report further confirms that one person completing the full couple/uncouple process was a "new rule", after the incident. Further, the PowerPoint presentation prepared soon after the incident by the Respondent's Health and Safety team records: "it's become an accepted practice to double up on the job." The Summary of Major Incident

produced by the Respondent also records the cause as “Failure to communicate safety expectations around one person being in the shunt vehicle and performing the task. This is one person process. It had become an accepted practice for drivers to ‘buddy-up’”.

37. Ms Froggatt also gives evidence that Mr Wood “had not been told to work in anyway differently by management to the way he had been doing so. It was only after the incident that had occurred that both Arla and Moran Logistics reviewed the policy, I was asked to immediately have all shunters sign to state that they were no longer permitted to share Tugs.”

38. That this instruction not to double up was new instruction is further supported by a memorandum issued on 7 November 2022 by Ms Froggatt which states: “With immediate effect if there are 2 shunters working together only one shunter is permitted to carry out all movements related to coupling or uncoupling to a trailer, this includes the trestle, park brake, salvo etc.” The reference to immediate effect makes it clear that this was not a pre-existing instruction. It is further supported by the instructions given to the shunters after the event. Mr Lee also confirmed to the Tribunal that he did not see anything which states that shunters should not work in pairs.

39. The Tribunal holds that it had become the custom and practice of the site to double up. The Tribunal also holds that this practice had started prior to Mr Wood working at the site.

The Accident

40. During the evening of 6 November 2022 Mr Wood was working with Mr James Carswell, and Mr Kevin Holburt. The Tug was driven by Mr Holburt. The accident took place between at 7.31 – 7.33 pm, and was recorded on CCTV.

41. Whilst working on the milk stocks, Mr Wood assisted Mr Holburt with a trailer. Mr Holburt removed the trestle first. Mr Wood observed this, and informed Mr Holburt that he would be removing the Salvo as Mr Holburt had already removed the trestle. To do so he would need to obtain the key.

42. To help prevent accidents, it was the custom and practice of the site that the shunter who was driving the Tug would not move the Tug until the person assisting them is clear and has signalled to him that he is clear. The signal being either a thumbs out, or verbal. The driver would then give a reciprocal signal – a wave or blast of the horn to acknowledge that he had seen it.

43. Mr Wood moved to the rear of the trailer to get the key for the Salvo. On obtaining the key from the warehouse door he had to move to the front of the trailer to unlock the Salvo. On returning to the Tug Mr Holburt glanced behind him before entering the Tug. At this point Mr Wood was still down the side of the trailer, and was not clear of the Tug/Trailer. Mr Wood then moved between the Tug and the trailer to remove the Salvo, which needed to be disconnected before the Tug could be reversed onto the trailer. To do this he was required to turn his back to the Tug. This placed him between the Tug and the trailer. Mr Wood was aware that Mr Holburt was in the Tug.

44. Mr Holburt then reversed the Tug, not having noticed that Mr Wood was there, and was not clear of the Tug/trailer, whilst Mr Wood was removing the Salvo from the trailer. Mr Holburt did not wait for Mr Wood to be clear and for the signal to be given before reversing the Tug. He also did not carry out adequate visual checks before reversing the Tug.

45. Mr Wood was not aware that Mr Holburt was going to move the tug. Mr Wood was hit by the Tug, and trapped between the fifth wheel of the Tug and the Trailer. Mr Wood shouted to Mr Holburt, but he did not appear to hear him. Mr Carswell ran over to Mr Holburt to stop him. On being made aware that Mr Wood was trapped Mr Holburt moved the vehicle forward to release him. Mr Wood was able to walk away from the accident, but received an injury to his head and eye. He was sent by a Manager, Mr David Croft to the A&E at Leeds General Infirmary where he received treatment, including stitches.

46. It is submitted by the Respondent that if Mr Wood and/or Mr Holburt in combination had followed the correct order of the procedure of key, Salvo, trestle, the accident would not have occurred. However, on the balance of probabilities the Tribunal holds that if Mr Wood had removed the Salvo followed by removing the trestle, it is just as likely that he would still have been between the reversing Tug driven by Mr Holburt and the trailer. This would not have prevented the accident.

47. It is accepted by both parties that Mr Holburt should not have removed the trestle first. Mr Wood accepts that he personally could have gone back to the front of the trailer, put the trestle in position, then moved to the back of the trailer to obtain the Salvo key, and then unlocked the Salvo at the front of the trailer, however, that he did not do so as they were under a strict timetable. However, if as suggested by the Respondent Mr Wood should have seen that the trestle was removed, and recovered the trestle, and moved to the front of the trailer to replace it under the trailer first (before collecting the key to enable the order of key, Salvo, trestle to be followed), the Tribunal holds that it is again just as likely that he would again have been between the reversing tug and the trailer whilst replacing the trestle.

48. The Tribunal holds on the balance of probabilities that the cause of the accident was the procedure of buddying up itself. This is supported by the Respondent's immediate responses to the accident, including its communications to shunters, and the re-training of all shunter drivers on Arla sites. The system of work adopted on the site was itself unsafe. If a single shunter had operated the tug, and carried out all of the steps of the procedure the accident would not have occurred. It was buddying up that placed Mr Wood behind a reversing Tug. Further, if Mr Holburt had waited for the signal before reversing, or carried out proper visual checks this too would have prevented the accident. The Respondent's health and safety PowerPoint presentation, prepared soon after the accident, under the slide "Cause of Major Accident" states that the cause was two shunters working together, and that the incident could have been avoided if the process had been carried out as a one person operation.

49. Doubling up was part of the procedure which Mr Wood was introduced to at the Arla site when he started working there as a shunter. There was nothing in the Respondent's health and safety procedures, or SWP as to the position of shunters assisting other shunters in the workplace. Further, there was no risk assessment by the Respondent covering shunters assisting other shunters.

Immediate Aftermath

50. After the accident an incident report was completed and an immediate health and safety investigation took place. The Respondents issued a memorandum on 7 November 2022 introducing a new rule banning the practice of doubling up. Statements were taken from Mr Wood, a witness, and Mr Holburt. The incident report was written by Mr Lee Graham, and finalised on 11 November 2022.

51. In his witness statement Mr Smith repeats the claim made in the ET3, that in the report "[i]t was identified that there had been failings on the Claimant's part. This was the Claimant seeking assistance from another member of staff to assist him in the operation of coupling the Trailer and removing it from the Respondents dock." However, this is not an accurate summary of the report, which records the root cause as: "Shunter process failure by potential human error and poor judgment. There has been a failure to communicate safety expectations of 1 person in the vehicle and completing the process at any time. This has become an accepted practice of buddying up and helping one another out." The report also records that the SWP did not stipulate one person per tug or the need for one person to carry out the full shunting procedure. The report identified a "major need" for the SWP to be reviewed.

52. A PowerPoint presentation was also produced by the Respondent's Health and Safety Team shortly after the incident to brief as to the cause of the incident, and the next steps. A new health and safety induction plan was put into place.

Investigation

53. By letter on 29 November 2022 Human Resources, on behalf of Mr Lewis Smith (the Respondent's Transport Manager, and nephew of Ms Ward), invited Mr Wood to an investigation meeting on 30 November 2022. The meeting took place on 30 November 2022.

54. Whilst Mr Lewis did not put the question of doubling up to Mr Wood, it is clear from the discussion which was recorded that Mr Wood informed Mr Lewis that shunters frequently worked together.

55. Mr Smith conducted the investigation meeting. After conducting the meeting he decided to suspend Mr Wood, and instigate a formal disciplinary procedure, on the grounds of "gross negligence of health and safety". Mr Smith's investigation made no findings. He states in evidence that he just obtained a statement from Mr Wood, and did not carry out a full investigation. As part of the investigation he did not watch the CCTV recording. He did not watch this recording until the first

day of this hearing. This decision was confirmed to Mr Wood in writing on 2 December 2022.

Disciplinary

56. On 2 December 2022 a second letter was sent by the Respondent's Human Resources Team to Mr Wood on behalf of Ms Froggatt, inviting him to a disciplinary meeting on 5 December 2022. This letter did not inform Mr Wood of any right to be accompanied to the disciplinary meeting, but the letter did refer to him not being permitted to disclose the contents of the documents to any third party except his accompanying colleague. He was however informed of this right of accompaniment orally at the start of the disciplinary meeting, and Mr Wood confirmed that he wished to continue with the meeting.

57. The letter informed Mr Wood that the documents which would be referred to during the meeting would be: investigation meeting notes, training documents, Statement 1, and disciplinary procedure. The letter stated these were attached to the letter. However, these documents were not received by Mr Wood (which the minutes of the meeting record). The CCTV video was not referred to in the letter.

58. The meeting was conducted by Ms Froggatt. It is clear from the minutes of the meeting of Monday 5 December 2022 that Mr Wood informed Ms Froggatt that shunters assisting one another was the common practice when the team was short of Tugs. He considered that Mr Holburt was culpable for what had occurred.

59. At the end of the meeting Ms Froggatt informed Mr Wood that there was a need to adjourn since she was unable to make a decision then given the amount of evidence which she would need to review, which was required for an informed decision. At no point was Mr Wood informed of an alleged ban from Arla sites, or able to challenge this. Of note the meeting was adjourned until Wednesday 7 December 2022, and this was recorded in writing.

60. The notes of the meeting between Mr Denville Hobson and Mr Wood referred to above were not made available to the Claimant.

61. The adjourned meeting was brought forward by the Respondent to Tuesday 6 December 2022. Mr Wood was telephoned and informed to come in on the 6 December 2022 instead of the 7 December 2022. The records of the meeting of 7 December 2022 record that Ms Froggatt stated: "I haven't seen the CCTV as I was informed it wasn't nice to review." She also informed Mr Wood that she had discussed the process with the driver trainers, and reviewed the documents, including training records, and what the safe systems of work were. At this meeting Ms Froggatt dismissed Mr Wood without notice on the stated basis that he had carried out an unsafe act. Mr Wood had not been provided with the

documents for the disciplinary meeting. It is recorded that he stated "If I can have the documents so I can reply in due course."

62. A letter confirming his dismissal was sent to Mr Wood on 7 December 2022. The reason for his dismissal was recorded as a breach of health and safety rules. However, the letter did not state which rule he was said to be in breach of. After his dismissal and appeal Mr Wood requested the Respondent's health and safety documentation via a subject access request, which was then provided. He was not provided with this material prior to his disciplinary.

63. There are two significant disputes of fact in relation to the disciplinary process. These are whether Ms Froggatt watched the CCTV video of the incident, and secondly the role of Ms Ward in these proceedings and whether she put pressure on Ms Ward to dismiss Mr Wood.

The CCTV

64. There is a CCTV video of the accident. Prior to the disciplinary meeting Ms Ward visited the Arla site and obtained a copy of this video.

65. Ms Froggatt gave evidence that she did not view the CCTV prior to the decision to dismiss. This was since she was informed that it was "too horrific to view". She informed the Tribunal that she was advised by Ms Ward who had reviewed the CCTV that it was "not nice to see as quite gruesome, shocking to colleagues". Mr Slack and a couple of Arla employees also advised her that it was gruesome. Ms Froggatt gave evidence that she did not review it as she was instructed by her general manager (Ms Ward) that the video was upsetting. She informed the Tribunal that she did not view the CCTV video until a week prior to this hearing. She also rejects the claim which Ms Ward made in cross-examination that Ms Froggatt had a memory stick of the CCTV video in her drawer, and stated: "[t]o get CCTV from Arla you have to have GDPR as well," she "[n]ever saw a copy of the CCTV," "[n]ever saw CCTV until last week."

66. Ms Ward claims that Ms Froggatt did watch the CCTV. At no point in her witness statement or in her supplementary witness statement, which was written over the weekend prior to the hearing, expressly to deal with Ms Froggatt's evidence, did Ms Ward mention the alleged failure of Ms Froggatt to view the CCTV. However in cross-examination Ms Ward stated "I can confirm that she did have the CCTV it was on a memory stick, in the drawer on desk". She further stated "I can confirm that she watched it," and that "Witness saw it". She informed the Tribunal that the reason for the omission of this material from her witness statements was that she "[d]idn't pick up on that."

67. The Tribunal holds on the balance of probabilities that Ms Froggatt did not watch the CCTV video prior to the disciplinary, and that she did not watch the video until a week prior to this hearing. It also holds that although she was informed that it was gruesome, and told that it was too horrific to watch she was not

formally instructed not to watch the video, and a copy of the video was available in the Respondent's office.

68. Ms Froggatt has been consistent on this evidence throughout. Her evidence that she did not watch the CCTV video is also consistent with the contemporaneous note of the disciplinary hearing which records that she informed Mr Wood that she had not seen the CCTV as she was informed that it was not nice to review. The Tribunal holds that this statement was true. The Respondent appears to be suggesting that Ms Ward deliberately stated this in the disciplinary meeting so as to harm her employer at a future date if the matter were to result in Employment Tribunal proceedings (a claim which is rejected, see below). It is more likely that Ms Ward incorrectly recollects that Ms Froggatt watched the CCTV recording, than it is that Ms Froggatt watched it, but decided to falsify the record in December, and then maintain a deceit in this regard to harm her employer.

69. In addition prior to the disciplinary Mr Wood requested to see the CCTV, and this request was refused, Mr Denville Hobson, informed Mr Wood that he was not in the right frame of mind to see it, and that it was too horrific to watch. He was not provided with access to the CCTV until his solicitor requested it for these proceedings. The reason for the refusal to allow Mr Wood to see the CCTV again gives support to the fact that Ms Froggatt was informed that the CCTV was horrific and gruesome, and supports her account. Further, the letter sent to Mr Wood on 2 December 2022, listed the materials which Ms Froggatt would be referring to, and the CCTV video was not mentioned.

Role of Ms Ward

70. Ms Froggatt was a new employee of the Respondent on her probation period. She alleges that Ms Ward put pressure on her to dismiss Mr Wood, and that she was hurried in her decision, which prevented her from obtaining access to necessary material. She states: "[h]ad I been left to make my own decision and given access to all processes both in place and implied along with training documents, so that I could have traceability and understanding of the agreements on site between Moran Logistics and Arla, during the disciplinary process I believe I would not have dismissed Andrew. However I was not given all of these details and I was put under pressure by Moran Logistics General Manager Emma Ward to dismiss Andrew, the main reasons for which were that I was told by her that Arla would not let him back on site as he was banned because of the incident and that he had breached safety processes." Ms Ward was unable to obtain the training documents prior the decision.

71. Ms Froggatt explained that this pressure was the reason why the resumed disciplinary hearing took place a day earlier than planned: "[s]he specifically told me not to delay the inevitable on the day I called Andrew and asked him to come back into site. I was told by her that I had to get it done (meaning I had to dismiss him). I had planned at the end of the disciplinary hearing to take time to review and consider the outcome for a few days but this was not acceptable to Emma Ward, I was told not to delay the inevitable of dismissal as it had an impact on the P&L for the business."

72. Ms Froggatt informed the Tribunal that based on the evidence which was available to her gross misconduct was a correct approach, but that given the missing evidence, in particular the absence of training documents, that he had not be trained one person one tug, and that the process was changed after the incident, then this was not appropriate. She considered that she did not have enough evidence to conclude on the disciplinary, however: “I was instructed I had to get rid of. Get off P&L, hence he was brought in earlier”, “I was told he was banned from Arla. So no work. Arla being the customer. He was banned from site so we needed to follow that line.”

73. Ms Froggatt felt uncomfortable with the pressure she felt that was being exerted on her, and informed Ms Kirsty Brookes, The Transport Shift Manager.

74. Ms Ward rejects that she put Ms Froggatt under pressure. She alleges that this is not a misunderstanding, but that instead “I think she’s lying.” Ms Ward states that she informed Ms Froggatt her that it was ultimately her decision. In cross-examination she stated that she would have backed up Ms Froggatt if she had also decided not to dismiss.

75. In his evidence, Mr Lee also alleges dishonesty on the part of Ms Froggatt, and states that he does not believe Ms Froggatt was put under any pressure, and that her claim is suspicious and results from her no longer working in the company, and being upset as a result of the way in which her employment ended. However, in cross-examination Mr Lee confirmed that he does not in fact have any knowledge as to whether or not Ms Froggatt was put under pressure. “Only Louise can tell you. Nobody put me under pressure”.

76. The Tribunal holds that Ms Ward played a role in the disciplinary process. Ms Ward accepts this. Initially in cross-examination she stated that she was just there for advice, and obtaining the CCTV evidence. However, she further accepted that she assisted the investigation as a senior manager. Her role in the disciplinary process is not minuted, and no written records which have been disclosed reflect this. All of the relevant managers worked for Ms Ward, and she oversaw the site. She had between 3-4 catch up meetings with the managers, at both the disciplinary and investigation stages concerning Mr Wood.

77. In oral evidence Ms Ward states that when she collected the CCTV recording from Arla she was informed by Arla that depending on the result of the disciplinary Mr Wood might be removed and banned from working on Arla sites. However, Ms Ward’s evidence is that she instead informed Ms Froggatt that Mr Wood would likely be banned from Arla sites. She based this conclusion on her experience of previously working for Arla for 15 years. She considered it relevant to inform Ms Froggatt of the ban, since it was an Arla site (although she accepted in cross-examination that Mr Wood could have worked elsewhere, at a non-Arla site), and that she considered that the ban was a factor that Ms Froggatt needed to take into consideration.

78. Ms Ward also accepted in cross-examination that she informed Ms Froggatt that Mr Wood's actions were a serious breach of health and safety, and that she informed Ms Froggatt that dismissal "was an option". In doing so Ms Ward had prejudged the issue that there was a serious breach of health and safety. Ms Ward accepted that Ms Froggatt knew that procedure had been broken, but states if she'd taken the decision not to dismiss she would also have supported her on this.

79. However, in cross-examination Ms Ward further stated "[e]very part of the decision has to be through me."

80. Ms Froggatt was on her probationary period. Ms Ward gave information to Human Resources as to why she considered Ms Froggatt had not met the required standards. Ms Froggatt met Ms Newbury, the Respondent's Head of Human Resources on 23 February 2023, and was informed that the Respondent considered that she had not met the standard required for her role. She was immediately placed on leave. Her probationary period ended on 3 March 2023, and her employment was terminated on this date. The letter dated 23 February 2023, which confirmed Ms Froggatt's unsuccessful competition of probationary period set out allegations made by Ms Ward as to Ms Froggatt's performance. Ms Froggatt considered a number of these allegations incorrect. She took legal advice, and raised a grievance concerning her treatment.

81. On 6 March 2023 Ms Froggatt sent a grievance email to the Respondent's HR Department. This included complaints as to how she was required to conduct disciplinaries on behalf of the Respondent: "I was advised regardless of my beliefs that if a person needed to be dismissed as they were not considered agreeable with the site management they had to be this included Andrew Wood. He was not wanted by the senior management and it was needed to be found that he was not returned, I had asked for time to sleep on the adjournment of the disciplinary, I had to call him in sooner as it was a case of the site doesn't need to pay extra money for the same outcome that's needed."

82. The email of 6 March 2023 also gives further examples of such behaviour in the context of other disciplinaries. The email lists the names of two other staff members where "all of which had decisions made for them prior to the disciplinary actions being taken and under instruction as to what was expected as the outcome without hesitation." The email alleges a pattern of practice. In cross-examination Ms Ward provided further details on each individual case, which are not recorded in this judgment so as not to prejudice any other case, where she was instructed to dismiss prior to the disciplinary taking place. In one case she informed the Tribunal that she was instructed that the employee was a liability that needed to be dismissed, and that she was to find a fault with his compliance, and that he did not follow the process regardless.

83. Ms Froggatt informed the Tribunal that she was dismissed because she did not follow the status quo. She considered that she had been underpaid for her last month. After raising the grievance email she was paid in full for her final month

of work. She informed the Tribunal that at this point, on receiving her full month's salary, she was no longer concerned. As a result of her dismissal Ms Froggatt has found employment closer to where she lives, and which she prefers.

84. Mr Fakunle, the Respondent's solicitor submits that Ms Froggatt's evidence is not genuine, and that it has been fabricated in order to retaliate or to seek revenge against the Respondent for terminating her employment. He submits that this is supported by the fact it took three months for Ms Froggatt to reveal flaws in her decision, and the fact she did not use the Respondent's whistle blowing policy.

85. The Tribunal holds on the balance of probabilities that Ms Froggatt perceived that she was under pressure by Ms Ward to dismiss Mr Wood, and that she was placed under such pressure. Ms Froggatt was on probation. Ms Ward was Ms Froggatt's senior manager. That Mr Lee an employee who had a 20 year working relationship with Ms Ward did not perceive to have pressure put on him is not indicative of whether a new employee on probation would not perceive pressure. Ms Ward had informed Ms Froggatt of the Arla ban, she also accepts that she changed the language from that communicated by Arla, to make the ban seem more likely. The Tribunal holds that she informed Ms Froggatt of the ban both before the first disciplinary hearing, and between the hearing of the 5 December 2022 and the resumed hearing of the 6 December 2022. In doing so she was putting pressure on Ms Froggatt. In particular support is given to Ms Froggatt's account by the fact that the disciplinary hearing of 5 December 2022, which was initially adjourned to the 7 December 2022, was moved to the 6 December 2022 against the wishes of Ms Froggatt. This move was profit and loss motivated as it permitted Mr Wood to be dismissed earlier, and thus save money for the Respondent. Ms Ward had made a decision, and this was why Ms Froggatt was not allowed to have the additional day to obtain and review further documentation. This conclusion is further supported by the number of meetings Ms Ward took part in concerning both the investigation and disciplinary, in which the case was discussed, (which are not recorded or minuted), and her statement that "[e]very part of the decision has to be through me."

86. Although, there were significant disagreements between the circumstances of Ms Froggatt's dismissal, as the dismissal letter, and the grievance email show, on the balance of probabilities the Tribunal holds that Ms Froggatt's evidence was not fabricated for the purposes of harming the Respondent. In particular the Tribunal notes that in the minutes of the meeting of 6 December 2022, well before any dispute arose between Ms Froggatt and Ms Ward, it was recorded that Ms Froggatt had not watched the CCTV. For Ms Froggatt to be fabricating this material on 6 December 2022, by stating untruths in Mr Wood's disciplinary meeting, so as to potentially harm her employer at a future date is far-fetched. Ms Ward's own evidence demonstrated that she played a significant role in disciplinary decisions, and the detail provided by Ms Froggatt on her role in other cases demonstrated a pattern of practice. Further, Ms Ward's certainty that Ms Froggatt had watched the CCTV, which contradicts the contemporaneous records, undermines her evidence.

The Appeal

87. Mr Wood appealed by email on 8 December 2022. He raised a number of grounds. The Claimant's counsel, Mr Wiltshire helpfully summarised the grounds:

1. The Claimant's actions were in line with accepted practice.

2. The dismissing officer failed to consider whether any breach could be dealt with through education.

3. There was nothing in the documented Health and Safety procedures that prevented shunters assisting other shunters or risk assessed the same.

4. The Claimant posed no risk of danger to others.

5. The Respondent had treated the Claimant differently to others who had carried out the procedure in the same way.

6. The Claimant had failed to consider other options to dismissal.

88. In his appeal Mr Wood stated that he believed that the safety procedures carried out on the night of the incident were in line with procedures shown to him, that all of the shunters up to the incident carried out the procedures as he was shown, and that this was the custom and practice of the site. Further that there had been further training and adjustments to the procedure since the incident. He also expressly raised the issue of shunters assisting other shunters, and the lack of health and safety procedure on this, and the lack of a risk assessment. He stated that he had carried out his duties, as shown to him by his colleagues, and they also carried these procedures out. He considered that he was being made a scapegoat for the lack of training, manpower, and equipment. It is clear that the issue of shunters working together was raised in the letter. He stated that options other than dismissal were available, and that he had not broken health and safety rules.

89. By letter of 12 December 2022, Mr Wood was invited to an appeal hearing on 20 December 2022 which would be conducted by Ms Emma Ward. This time the letter expressly informed Mr Wood that he had a right to be accompanied by a colleague or trade union official.

90. The appeal hearing was instead conducted by Mr Billy Lee, the Warehouse Manager. The hearing lasted 18 minutes and primarily consisted of the points of Mr Wood's email being numbered, and being read out.

91. During the hearing Mr Wood informed Mr Lee that he had not received the minutes from his first and last meetings. This is also recorded in the minutes. In cross-examination Mr Lee accepted this, "only Andrew knows, HR said that all was sent out together, can only go by what Andrew says." In his evidence Mr

Lee, unprompted also stated that Mr Wood is a “trustworthy person”. The Tribunal holds that Mr Wood had not received the minutes of his previous disciplinary meetings at this point.

92. At the time of the appeal Mr Lee had watched the CCTV. He considered it essential material for any dismissing officer to watch. Mr Wood was not provided with access to the CCTV.

93. On 28 December 2022 a letter was sent to Mr Wood on behalf of Mr Lee, rejecting the appeal. It did not expressly address the points raised and merely stated “[a]fter reviewing the evidence found during the investigation and hearing the case you have put forward during your appeal meeting the company does believe there are grounds for disciplinary due to your misconduct and you will be issued with a dismissal on this occasion.” How the points of the appeal were dealt with have only become clear as a result of this hearing.

94. Mr Lee dismissed Ground 4 of the appeal that Mr Wood stated his dismissal was for putting others at risk, as Mr Lee considered that a health and safety breach includes responsibility for himself as well as others.

95. Regarding Ground 1 and Ground 3 after the appeal hearing Mr Lee went to observe the process followed by the shunters. He describes this as “Remove key, unlock salvo, remove trestles” in his opinion if this process had been followed the accident would have been avoided. Materially he does not mention in his evidence, how many people were carrying out the process. However, this observation took place at a time after the shunters had been retrained, prohibited from pairing up, and with new health and safety rules in place. The Tribunal holds on the balance of probabilities that What Mr Lee observed was materially different from the previous practices. Mr Lee did not consider the change in practice, or any potential change in training.

96. Mr Lee is not a driver, or shunter trained. He informed the Tribunal that he obtained the correct order of the procedure from the driver trainer, and got him to go through it. He states in his oral evidence that he also spoke to other drivers, however, there are no records or minutes of this. The Tribunal accepts that he spoke to others. He did not look at the incident report drafted by Mr Graham as part of the appeal, nor did he see the route cause analysis. He accepts that he did not deal with the issues raised in the incident report, but he considers that that they were not raised in the appeal.

97. He considered that Mr Wood’s failure was that he did not follow the procedure of key, Salvo, trestle. However, Mr Lee was not able to refer to Tribunal to a written document setting this out in writing, which Mr Wood was said to in in breach of. He accepted that the Salvo safe system, or SWP, did not deal with the trestle, or the order. He also accepted that the manual did not deal with trestle. Mr Lee stated that this failure to follow this procedure was “a breach of health and safety as he put himself at risk by not following the correct process. Andrew was trained in this process and admitted that on this occasion he had not completed

in the correct order resulting in the accident." He did not look at the documents which identified systemic problems.

98. Mr Wood stated in his appeal that "the safety procedures carried out on the night of the incident were in line with procedures that were shown to me when I was first employed over at the dairy." Mr Lee stated that Mr Wood acted in "clear disregard" for way he was trained to do the activity safely, however, Mr Lee also confirmed that he did not investigate what procedure had in fact been shown to Mr Wood.

99. In oral evidence Mr Lee stated that for the purposes of the appeal he looked at the CCTV video, minutes of the meeting, and the appeal. Notwithstanding the incident reports, and conclusions of the health and safety investigation Mr Lee stated that he did not know that it was an accepted practice to buddy up when he was conducting the appeal. He now accepts that the custom and practice in place and unchallenged was to buddy up. He accepted that he did not read the incident report which dealt with this.

100. There is a contradiction within Mr Lee's evidence concerning his consideration of the issue of buddying up within the appeal. Mr Lee accepts that the appeal raised the issue of the correct procedure of working alongside others.

101. He firstly stated "I looked at why working as a pair. Tractor unit should have been used." However, he also stated that they were "Buddied up. Who instructed [I] don't now. Don't investigate why they were buddied up. I looked at his points of appeal". He also stated: "didn't look to see if someone buddied up before as these was not in points of appeal". He did not investigate if it was a common practice, or what procedure was followed when two shunters were working together.

102. The minutes of the meetings, both the investigatory meeting with Mr Smith and the disciplinary meeting with Ms Froggatt, which Mr Lee looked at made it clear that the shunters were working in pairs. Mr Smith asked: "If you have 2 x drivers. In a tug how do you decide who does what." Mr Wood replied: "The driver normally drives and the 2nd person carries out the Salvo/Trestle/doors etc". In the disciplinary meeting with Ms Froggatt the minutes state that Mr Wood stated in response to whether Mr Holburt knew that Mr Wood was helping him: "yes he was aware I was helping him. As this is what we do when we are short of [illegible] Tugs." He also stated: "normal processes is for the persons helping". It is clear from the notes, which were available to Mr Lee, and read by Mr Lee that the drivers were working in pairs, and that this was considered by Mr Wood to be a normal process.

103. Mr Wood raised in his appeal the issue that he was following the accepted custom and practice. However, Mr Lee did not investigate what custom and practice had been adopted at the site. He confirmed that regarding procedure he "didn't investigate as a 2". He also now accepts that buddying up was an

accepted practice and that he did not see anything that said shouldn't work in pairs.

104. Mr Lee stated that Ground 5 (differential treatment) was already covered so he did not progress with it. However, there is no evidence that this point was considered by Mr Lee at the time of the appeal. Although Mr Holburt, the driver of the Tug resigned, (and Mr Lee confirmed that he did not look at his case), the other shunters who carried out the previous procedure received refresher training, and were not subject to any disciplinary processes. In cross-examination Mr Lee stated that Mr Holburt got the same treatment, he was suspended, but handed in his notice before his disciplinary, but he did not deal with the other shunters. Relatedly, Ground 2, was that a more educational approach to Mr Wood was appropriate, and that he unlike his colleagues was not asked to attend a refresher course. Mr Lee did not deal with this ground in his witness statement, save that training was being used to help prevent or reduce future risk. He did not consider if this was appropriate for Mr Wood. However, in cross-examination he claimed that Mr Wood had already been trained on the process. However, as the Tribunal has noted above Mr Lee also confirmed, and the Tribunal holds that he did not investigate what procedure had in fact been shown to Mr Wood.

105. Regarding other options to dismissal he stated in his witness statement "I investigated what other options were available and will conclude in my final statement." However, no conclusion was provided. In cross-examination Mr Lee stated that that there "[i]s no other sanction for gross misconduct." Then "Andrew deserves to be dismissed." He then stated that he did consider other options, but it was too serious: "I did have to dismiss as didn't follow the way that always did it, clear disregard for the way trained to do safely. No-one chose apart from selves to do it in the wrong order". The Tribunal also holds on the balance of probabilities that Mr Lee was aware of other options, but because Mr Lee believed the conduct to be gross misconduct he dismissed the need to consider any other option. When cross examined Mr Lee stated that he did consider Mr Wood's previous good character, the Tribunal accepts this evidence.

106. Mr Lee states that he was not put under any pressure by others in conducting the appeal to uphold the decision to dismiss. Mr Lee and Ms Ward had a good working relationship. They had worked together for many years, and as Ms Ward stated "Billy had done a lot of my investigations". In Mr Lee's view the situation was life threatening, and there was a need to ensure that employees take health and safety matters at the workplace seriously. The Tribunal holds that Ms Ward did not put Mr Lee under pressure.

107. Mr Lee was not aware of any Arla ban at the time of determining the appeal. He also informed the Tribunal that if he had been aware that he would not have taken this into consideration. He pointed out that there were other sites where Mr Wood could work. The Tribunal accepts this evidence.

## Legal Principles

108. So far as unfair dismissal is concerned, Section 98 of the Employment Rights Act 1996 provides, so far as material, as follows:

> "98 General
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> …
>
> (b) relates to the conduct of the employee,
>
> …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

109. Where a Respondent fails to show a potentially fair reason for dismissal, this leads to a finding of unfair dismissal without the need for any consideration of reasonableness. If the Respondent establishes that the Claimant's dismissal was due to conduct the Tribunal must consider the issue of the reasonableness of the Claimant's dismissal. The burden of proof in assessing the fairness of a conduct dismissal is neutral. The Tribunal assesses the fairness following Section 98(4). In this assessment it is not the place of the Tribunal to substitute its opinion for that of the employer. The question is not whether the Respondent's actions were correct. An employer is provided with considerable managerial discretion in the running of its business. The employer's decision to dismiss the Claimant, and the process followed, is thus assessed by whether it falls within the band of reasonable responses (*Iceland Frozen Foods v Jones* [1982] IRLR 439; *J Sainsbury plc v Hitt* [2003] ICR 111, CA; *Whitbread plc (t/a Whitbread Medway Inns) v Hall* [2001] ICR 699, CA).

110. Misconduct need not be deliberate. Gross negligence can amount to misconduct, (*Philander v Leonard Cheshire Disability* EAT 0275/17).

111. The Tribunal must consider the approach set out in *British Home Stores v Burchell* [1978] IRLR 379, and *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23. The Tribunal must consider whether 1) the employer believed the employee guilty of misconduct, 2) whether it had in mind reasonable grounds upon which to sustain that belief, and 3) at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances. The burden of proof for 1) is on the employer, whereas for 2) and 3) the burden is neutral (*Boys and Girls Welfare Society v Macdonald* 1997 ICR 693, EAT; *Singh v DHL Services Ltd* EAT 0462/12). An employer need not have conclusive direct proof of the employee's misconduct — only a genuine and reasonable belief, reasonably tested.

112. In determining reasonableness, the Tribunal can only take account of those facts (or beliefs) that were known to those who took the actual decision to dismiss (after reasonable investigation) (*Orr v Milton Keynes Council* [2011] ICR 704, CA).

113. In assessing the fairness of the dismissal for conduct, following the decision of the House of Lords in *Polkey v A E Dayton Services Ltd* [1988] A.C. 344, the Tribunal must also consider procedural fairness. *Polkey* establishes that a failure to follow proper procedure is likely to make the dismissal unfair, unless the employer could reasonably have concluded that to do so was "utterly useless" or "futile".

114. Procedural fairness is an integral part of the test under Section 98(4) (*Taylor v OCS Group Ltd* [2006] ICR 1602, CA). With misconduct this includes investigating fully and fairly and hearing what the employee wants to say in explanation or mitigation. In considering procedural fairness the Tribunal may have regard to the ACAS code of practice on Discipline and Grievance Procedures, but taking into account that this is merely guidance, and not binding.

115. What amounts to a fair investigation will depend on the particular facts of the case (*Stuart v London City Airport* [2013] EWCA Civ 973). When assessing whether the employer adopted a reasonable procedure the range of reasonable responses test is also applied. Not every procedural defect will render a dismissal unfair (*D'Silva v Manchester Metropolitan University and ors EAT* 0328/16).

116. The procedural flaws are examined in context, and their implications for the overall reasonableness of the employer's decision to dismiss considered. Substance and procedure are considered together, they are not two separate questions. (*Sharkey v Lloyds Bank plc EATS 0005/15*). In considering the fairness of a dismissal the Tribunal will also consider whether an employer complied with its own internal policies and procedures (*Sinclair v Wandsworth Council* EAT 0145/07; *Welsh National Opera Ltd v Johnston* [2012] EWCA Civ 1046).

117. In considering the overall fairness the appeal also needs to be considered. An appeal may cure procedural defects in a disciplinary hearing. For this purpose, it is irrelevant whether the appeal hearing takes the form of a rehearing or a review as long as the appeal is sufficiently thorough to cure the earlier procedural shortcomings (*Taylor v OCS Group Ltd* [2006] ICR 1602, CA). There is no limitation on the nature and extent of the deficiencies in a disciplinary hearing that can be cured by a thorough and effective internal appeal (*Khan v Stripestar Ltd* EATS 0022/15).

118. It is important to keep the issues of unfair dismissal and wrongful dismissal (notice pay) separate. Unlike the unfair dismissal claim the wrongful dismissal claim requires the Tribunal to make an objective finding on the facts as to whether the Claimant in fact committed gross misconduct, rather than to examine the way in which the employer determined that question for itself (*London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA; *London Sovereign Ltd v Gallon* [2016] ICR D19, EAT). A failure on the part of an employer to give the proper notice period is likely to amount to a breach of contract entitling the employee to bring a wrongful dismissal claim unless the employer is contractually entitled to dismiss without notice.

## Application of the Law to the Facts

119. Applying these principles to the findings of fact above, my conclusions on the issues are as follows.

120. Considering the steps in *Burchell* firstly, the dismissing officer, Ms Froggatt did not believe that Mr Wood had committed gross misconduct. Instead she was pressurised into this decision by her manager Ms Ward. Ms Froggatt did not have in mind grounds upon which to sustain the belief that Mr Wood should be dismissed on the grounds of gross misconduct. She considered that she did not have enough evidence to conclude on the disciplinary. Additionally, she was hurried in her decision by her manager, Ms Ward, which prevented her from obtaining access to material which she considered necessary in order to make her decision. This material included the training documents regarding the process. This material was not examined since Ms Ward considered such investigations unnecessary and a commercial decision to dismiss Mr Wood had already been made on the basis that Ms Ward considered that it was likely that he would be barred from Arla sites.

121. Ms Froggatt identified important evidence which was missing from her decision making, including the training materials. The Tribunal holds that Ms Froggatt did not carry out as much investigation into the matter as was reasonable in all the circumstances of the case. The process and procedure that was followed on site, and what training Mr Wood had received regarding that process and procedure was of significance, but Ms Froggatt failed to examine this. This also meant that the fact that Mr Wood had not been trained one person, one tug, was not considered. Further, Ms Froggatt failed to watch the CCTV video of the accident, which was easily available to her in the Respondent's office, and which represented the most objective account of what happened.

122. The Tribunal notes Paragraph 23 of the ACAS code, concerning gross misconduct "a fair disciplinary process should always be followed, before dismissing for gross misconduct." There were significant procedural flaws with the disciplinary hearing. The Tribunal also notes Paragraph 9 of the ACAS code: "…This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

123. At no point of the disciplinary procedure or appeal was Mr Wood provided with sufficient information as to what the alleged health and safety breach was. No rule or practice was identified. This meant that he was unable to meaningfully challenge the allegations. Mr Wood was also not provided with the materials prior to the disciplinary meeting. Although this is not an absolute requirement in this case this failure limited Mr Wood's ability to challenge the allegations. He was also denied to opportunity to watch the CCTV. In addition materials which supported him, such as the minutes of the meeting between Mr Hobson and Mr Wood in relation to the procedure, were not looked at, provided to him, nor were they taken into account in making the decision. Further, the ability for Mr Wood to give an account in his disciplinary meeting regarding his conduct, training, and the process followed on the site, was a charade. This was since a commercial decision had already been made to dismiss Mr Wood by Ms Ward, who was not present in the meeting, and who had not listened to his representations.

124. The Respondent is a large employer, with disciplinary policies in place, with experienced and trained managers with significant experience of investigations and disciplinary hearings, and appeals. Mr Lee informed the Tribunal that over the course of his career he had conducted hundreds of hearings.

125. An appeal may cure procedural defects in a disciplinary meeting. Mr Lee, who conducted the appeal had a genuine belief that Mr Wood had committed gross misconduct, and the Tribunal holds that he was not pressured by Ms Ward into his decision (this means that for the purposes of issue 15.1 the Respondent genuinely believed that Mr Wood had committed misconduct). Nor was he aware of, or considered the Arla ban in his decision.

126. However, the appeal did not rectify the unfairness of the disciplinary process. It was not sufficiently thorough to cure the earlier significant shortcomings. Mr Lee did not address all of the points of appeal. He seemed unaware of a key feature of this accident, the practice of buddying up.

127. That working together was a key issue was clear from the face of the documents that Mr Lee reviewed, but also from documents, such as the incident report, which he did not. He did not consider the issue of doubling up, and was not even aware of it, notwithstanding it was of critical importance to the cause of the accident, as identified in the Respondent's own documents, and that it was also

raised in the notes of the investigation and disciplinary meetings. Of particular note he failed to deal with the ground that Mr Wood's actions were in line with accepted practice, and that there was nothing in the documented Health and Safety procedures, or SWP that prevented shunters assisting other shunters or any risk assessment covering this.

128. Mr Lee did not investigate the training which was given to the Claimant, or the practice of the site prior to the ban on doubling up and retraining of the shunters. He also relied on the CCTV evidence, which he deemed to be of importance, which Mr Wood was not permitted to view, and which he was not provided with. Mr Lee further gathered witness evidence after the appeal meeting, which was not recorded in any form, nor provided to Mr Wood, and which Mr Wood could not challenge. Prior to the appeal the documentation, including the notes of the disciplinary meetings were not provided to Mr Wood. Mr Wood was also unable to challenge which health and safety provision he was said to be in breach of, since his error was not informed to him as part of the disciplinary process or appeal.

129. Considering the decision, procedure adopted, and taking into account the appeal, the decision to dismiss Mr Wood falls outside of the band of reasonable responses. The Tribunal holds that Mr Wood was unfairly dismissed (issue 15.2).

130. Turning to *Polkey*, (issues 15.3-15.4) the Tribunal must consider could the employer fairly have dismissed and if so, what were the chances it would have done so. The Tribunal takes into account *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274. The Tribunal is not deciding what it would have done, nor what a hypothetical fair employer would have done, but rather what the Respondent would have done. The Tribunal must consider both whether the Respondent could have dismissed fairly and whether it would have done so.

131. There was an inadequacy of training on the part of the Respondent, a lack of risk assessment, and a lack of health and safety policy or documentation on the correct order to be followed. However, Mr Wood was aware of the correct order of key, Salvo, trestle, and this was not followed at the time of the incident. He together with Mr Holburt worked together, but not in this order. Mr Wood recognised that he could have refused to carry out the work, or replaced the trestle, prior to collecting the Salvo key, but did not do this due to the time pressures he was placed under. He also considered that risks were regularly taken on the site. Health and safety is important in the context of the operation of Tugs. It is not completely outside the realm of possibility that following a fair procedure that it could be within the range of reasonable responses that the Respondent employer could consider Mr Wood's conduct to be gross misconduct, albeit this would be at the far range of what is reasonable.

132. But that is not the only question which the Tribunal must answer. Instead the Tribunal must also examine what this employer would have done. Ms Froggatt confirmed that had she not been put under pressure by Ms Ward, had made her own decision, and had been able to access the processes, and training

documentation then she believed she would not have dismissed Mr Wood. Of particular relevance to her was the fact that he had not been trained one person, one tug, and the process being changed after the incident. The Tribunal accepts her evidence on this point, and holds that had a fair procedure been followed by the Respondent that Mr Wood would not have been dismissed. There is therefore no *Polkey* reduction.

133. This being a dismissal for gross misconduct the ACAS Code of Practice on Disciplinary and Grievance Procedures applies (issue 15.5). The Respondent failed to comply in full with the Code. In particular, as identified above Paragraph 9, and Paragraph 23. In addition there was a failure to comply with Paragraph 10 in that the letter inviting Mr Wood to the disciplinary hearing did not advise him of his right to be accompanied.

134. Regarding issues 15.6 and 15.7 the Tribunal holds that these failures were unreasonable and that it is just and equitable to award an uplift. It awards an uplift of 15%. The Tribunal notes *Slade and anor v Biggs and ors* [2022] IRLR 216, EAT.

135. In making this determination the Tribunal considers that the ACAS procedures were applied to some extent and were not ignored altogether. Some of the failures were inadvertent, for instance the failure to advise Mr Wood of his right to be accompanied was clearly an oversight or accidental deletion, (as the letter did make a reference to an accompanying individual), as was the failure to provide Mr Wood with the minutes, or documents, and taking into account the CCTV evidence at the appeal stage when Mr Wood had previously been refused access to the video. However, other breaches were deliberate, such as the pressure applied by Ms Ward on Ms Froggatt, which resulted in the disciplinary meeting being a charade.

136. The Tribunal also takes into account the size and resources of the Respondent - it is a sophisticated employer, and the managers conducting the disciplinary and appeal, Ms Froggatt, and Mr Lee were trained and experienced in disciplinary procedures. Mr Lee had handled hundreds of such cases. Ms Ward is also a highly experienced manager. It also takes into account that there was an attempt to provide a fairer procedure at the Appeal stage, in that Mr Lee was not pressurised by Ms Ward in making his determination, and did not consider the Arla ban, (albeit that the appeal too suffered from procedural flaws). It also considers the seriousness and motivation for the breach, including Ms Ward's financial motivation regarding profit and loss. In making this decision the Tribunal expressly discounts any allegation in relation to other cases which were referred to by Ms Froggatt, which are irrelevant to this case.

137. The Tribunal now turns to the issue of the Claimant's contribution (issues 15.8-15.10). To find contributory fault (issue 15.8), the conduct must be culpable or blameworthy (*Nelson v BBC (No.2)* [1980] ICR 110, CA). In making this determination only Mr Wood's blameworthy conduct is relevant (*Parker Foundry Ltd v Slack* 1992 ICR 302, CA).

138. Of potential relevance is the procedure of doubling up, and also the failure to follow the order of key, Salvo, trestle. For the purposes of contributory fault the Claimant doubling up, (which was the cause of the accident, and ultimately of the dismissal), was not culpable or blameworthy. As set out above it was the custom and practice of the site to double up, which was in place prior to Mr Wood starting work at the site. There was no prohibition on this practice, and he had not been instructed or trained not to do it. The practice was caused by the shortage of Tugs. Management were aware of the practice and had not challenged it. It therefore does not amount to contributory fault.

139. The Claimant's failure to follow the order of key, Salvo, trestle, notwithstanding the inadequate training provided by the Respondent, and confusion amongst the shunters, was blameworthy. Mr Wood was aware of the correct procedure. He was also aware that it was not followed on this occasion. Even though Mr Holburt removed the trestle out of order, it was Mr Holburt and Mr Wood together who were carrying out the process.

140. For issue 15.8, Section 123(6) states: "[w]here the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant". The conduct must have actually caused or contributed to the dismissal. No matter how blameworthy the conduct, if it does not cause or contribute to the dismissal the Tribunal cannot make a reduction to the compensatory award on the basis of contributory fault (*Steen v ASP Packaging Ltd* [2014] ICR 56, EAT). Construing the similarly worded Section 74(6) of the Employment Protection (Consolidation) Act 1978 Browne-Wilkinson J in *Hutchinson v Enfield Rolling Mills Ltd* EAT 471/80 stated: "[i]n our view, there has to be a causal link between the actions of the employee and the dismissal. You cannot simply point to some bad behaviour of the employee and say "By reason of that matter we are going to reduce the amount of the compensation.""

141. The Tribunal must also only consider matters which the Respondent had in mind when dismissing (*Nejjary v Aramark Ltd* EAT 0054/12). Here the cause of the dismissal was the pressure placed on Ms Froggatt by Ms Ward.

142. This was in turn based on the accident itself, the potential Arla ban, commercial pressure, and profit and loss concerns. The procedural order undertaken by Mr Wood did not play a role in the decision making of Ms Froggatt.

143. As set out above, the Tribunal holds that the failure to follow the order was not the cause of the accident. The cause of the accident, and thus ultimately the dismissal was the unsafe practice of buddying up. The accident would have been just as likely if the proper order was followed, or if Mr Wood had replaced the trestle so as to permit the proper order to be followed. Thus even though the order was an issue which Mr Lee considered relevant in the appeal, this was not a cause or contribution to the dismissal itself when the decision was made by Ms Froggatt. The order of the process followed by Mr Wood was not in play when Mr Wood was dismissed by Ms Froggatt. At this stage it had not contributed to

the real reason for Mr Wood's dismissal (*Smith and anor v McPhee and anor* EAT 338/89, noted).

144. However, the dismissal was upheld on appeal, Mr Lee upholding the decision to dismiss based on his belief that Mr Wood's failure to follow the correct procedure of key, Salvo, trestle, justified dismissal on the grounds of gross misconduct. To this extent Mr Wood's failure to follow the correct procedure caused or contributed to his dismissal, since it was this failure that resulted in his appeal against his dismissal not being allowed my Mr Lee. It was a factor which therefore played a material part in his dismissal. The answer to issue 15.8 is therefore yes. The Tribunal holds that the Claimant caused or contributed to his dismissal by blameworthy conduct.

145. The Tribunal must therefore consider if Mr Wood's conduct makes it just and equitable to reduce his compensatory award (issue 15.9). The wording of Section 123(6) "shall" requires that a reduction is made. The discretion is limited to the level of the reduction. Taking into account the guidance in *Hollier v Plysu Ltd* [1983] IRLR 260, EAT, the Tribunal considers that it is just and equitable to assess Mr Wood's contribution as 25%, and to reduce his compensatory award by this amount. This is since Mr Wood is only slightly to blame. He did not breach a health and safety rule. Nor did he fail to comply with his training. However, he failed to follow the correct order of procedure of key, Salvo, trestle, of which he was aware, and this failure took place in a high risk environment where health and safety is important. Nevertheless, this failure did not contribute to the accident itself (which was caused by the unsafe practice of buddying up). In making this determination as to a just and equitable reduction the Tribunal also considers that his fault was reduced by the inadequate training that he received, the confusion amongst fellow employees (including the shunter trainer) as to the procedure, and the inadequacy of the Respondent's documentation, and in particular the SWP.

146. The Tribunal now turns to issue 15.10. Noting the difference in wording between Sections 123(6) and Section 122(2) and also *University of Sunderland v Drossou* [2017] ICR D23, EAT, the Tribunal nevertheless considers that it is also just and equitable to reduce the basic award by 25%. For the reasons stated in the paragraph above this is since Mr Wood is only slightly to blame.

147. Turning to the issue of wrongful dismissal, Mr Wood's notice period was two weeks (issue 15.11), and he was not paid for this period (issue 15.12). The Tribunal must consider if Mr Wood did something so serious that the Respondent was entitled to dismiss him without notice (issue 15.13). The Respondent alleges that he did, namely that his committed gross misconduct. Mr Wood denies this. The Tribunal must therefore consider whether Mr Wood in fact committed gross misconduct.

148. The Respondent's disciplinary rules formed part of Mr Wood's contract of employment. The policy states:

"E) Rules Covering Gross Misconduct

Occurrences of gross misconduct are very rare because the penalty is dismissal without notice and without any previous warning being issued. It is not possible to provide an exhaustive list of examples of gross misconduct. However, any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct. Examples of offences that will normally be deemed as gross misconduct include serious instances of:
…
g) breach of health and safety rules that endanger the lives of, or may cause serious injury to, employees or any other person."

149. The conduct of Mr Wood did endanger his own life. It is fortunate that his injuries were minor.

150. However, the Respondent has not identified any health and safety rule which Mr Wood is said to be in breach of. The Respondent's SWP, manuals, and written documentation fail to set out the proper order of the procedure to be followed. In particular they do not deal with when the trestle is removed. Further, it was the custom and practice of the site to work in pairs. This practice was unsafe. However, there was no rule in place prohibiting it. As a result of this accident the Respondent has instituted such rules, but prior to these new rules being introduced, no such rules were in place. Since Mr Wood did not breach any health and safety rule which was in place at the time of the accident he therefore was not grossly negligent. The Respondent was therefore not entitled to dismiss him without notice, and he was therefore wrongfully dismissed.

**Employment Judge P Morgan**
**27 October 2023**