EMPLOYMENT TRIBUNALS

Claimant: Mr Laidlaw

Respondent: Muller UK & Ireland Group LLP

Heard at: Bristol (by CVP) **On:** 10 and 11 April 2024

Before: Employment Judge Murdoch

Representation
Claimant: In person
Respondent: Ms Amesu, counsel

REASONS

JUDGMENT having been sent to the parties 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:

Introduction

1. The claimant, Mr Laidlaw, was employed by the respondent, Muller UK & Ireland Group LLP, from 5 April 2020 until his dismissal without notice on the 5 December 2022.

2. The claimant claims that his dismissal was unfair within Part X of the Employment Rights Act 1996. He also claims that the respondent breached his contract of employment by failing to give him the required notice of termination of his employment. He also claims he is due two days of accrued but untaken holiday pay.

3. The respondent contests the claim. It says that the claimant was fairly dismissed for gross misconduct. The respondent disputes that the claimant was entitled to notice pay given that he was dismissed for gross misconduct. The respondent disputes that the claimant is owed any holiday pay.

The hearing

4. I heard the claim on 10 and 11 April 2024.

5. The claimant was unrepresented at the hearing and gave sworn evidence.

6. The respondent was represented by counsel, and called sworn evidence from Mr Forteith (Engineering Manager for Site Services at Stonehouse site), Mr Coupe (Engineering Manager, and disciplinary officer) and Mr Murphy (Site lead, and appeals officer).

7. I considered documents from an agreed 333 page bundle which the parties introduced in evidence, plus a list of issues. I further considered four witness statements from the claimant and the people named in paragraph 6 above.

8. The claimant sent in a photograph that I received in the morning of the first day of the hearing. I admitted it on the basis that the claimant considered it relevant, the respondent did not object, and it was in the overriding interest to seek flexibility in proceedings.

9. The respondent's representative noted that the claimant's witness statement was undated and unsigned. I confirmed that I was content to proceed by taking the claimant's evidence-in-chief and asking the relevant questions, such as can you confirm that the contents of the witness statement are true to the best of your belief etc. Neither side objected to this approach, and when I did take the claimant's evidence-in-chief, he showed me via his camera that his version of his witness statement was in fact dated and signed, and we agreed that it was likely to have been an administrative error that the unsigned/undated version was uploaded.

Issues for the Tribunal to decide

10. The parties agreed that this case concerned three claims, namely unfair dismissal, wrongful dismissal / notice pay and holiday pay.

11. It was not in dispute that the claimant was dismissed for gross misconduct (misconduct being a potentially fair reason for dismissal within s98(2) Employment Rights Act 1996). The respondent contended that the dismissal was fair as it reasonably concluded that the claimant's action of resting on the floor outside of effluent plant building during his break time was a repeated or serious failure to obey instructions or any other serious act of insubordination, and a serious breach of the health and safety rules, which fell within its definition of gross misconduct. The claimant contends that the decision to dismiss was both procedurally and substantively unfair.

12. In relation to unfair dismissal, as the reason was misconduct, the key issue was whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will decide as follows:

    a. Was there a genuine belief that the claimant was guilty of misconduct?
    b. Was that belief based on reasonable grounds?
    c. Had the employer carried out a reasonable investigation into the matter?
    d. Had the employer followed a reasonably fair procedure?
    e. Was the decision to dismiss the claimant within the band of reasonable responses?

13. In relation to the unfair dismissal remedy, I stated that I wanted to be addressed on the Polkey no difference rule, the ACAS Code, and

contributory fault, which although strictly issues of remedy, were appropriate to be considered at this stage. The claimant did not wish to be reinstated and/or re-engaged, so if the dismissal was unfair, the Tribunal would need to decide whether:

a. The claimant would have been dismissed in any event (this is often referred to as a *Polkey* reduction). The respondent argued that the claimant would have been dismissed in any event, and therefore any award should be reduced accordingly.
b. The respondent failed to comply ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015). The respondent denied that it failed to follow the ACAS Code of Practice. I asked the claimant if he was able to particularise which paragraphs of the code that he alleged the respondent had breached, and he was unable to do so at the hearing (where he was unrepresented). I note though that he was legally represented by a solicitor before the hearing, and that this solicitor also prepared his written closing submissions. I note that in his written closing submissions, he contended that the alleged breaches were paragraphs 19 (usually a written warning followed by a final warning), 20 (if first is sufficiently serious may be appropriate to move directly to final written warning) and 21 (warnings need to set out nature of act, change required, timescale and consequences).
c. The claimant contributed by his inappropriate conduct to his dismissal. The respondent asserted that the compensation should be reduced in full to reflect the claimant's contributory conduct.

14. In relation to the <u>wrongful dismissal / notice pay</u> claim, the issue is whether the respondent has shown that the claimant fundamentally breached his contract of employment by committing an act of gross misconduct entitling it to dismiss him without notice. Unlike for the claimant's claim of unfair dismissal, where the focus is on the reasonableness of management's decisions, and it is immaterial what decision I would myself have made, for the breach of contract claim, I am required to decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

Agreed list of issues

15. The parties agreed the following list of issues accordingly, which I adopted (save as to remove the paragraphs concerning re-instatement and re-engagement as I confirmed with the claimant that he was seeking compensation only in relation to his unfair dismissal claim):

<u>*Unfair Dismissal*</u>

16. 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 gross misconduct.

17. Was it a potentially fair reason?

18. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

19. If the reason was gross 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:

    a. there were reasonable grounds for that belief;
    b. at the time the belief was formed the respondent had carried out a reasonable investigation;
    c. the respondent otherwise acted in a procedurally fair manner; and
    d. dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

20. If there is a compensatory award, how much should it be? The Tribunal will decide:

    a. What financial losses has the dismissal caused the claimant?
    b. Has the claimant taken reasonable steps to mitigate their loss and replace their lost earnings, for example by looking for another job?
    c. If not, for what period of loss should the claimant be compensated?
    d. 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?
    e. If so, should the claimant's compensation be reduced? By how much?
    f. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
    g. Did the respondent or the claimant unreasonably fail to comply with it?
    h. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
    i. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
    j. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
    k. Does the statutory cap of fifty-two weeks' pay apply?

21. What basic award is payable to the claimant, if any?

22. 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

23. What was the claimant's notice period?

24. Was the claimant paid for that notice period?

25. If not, was the claimant guilty of gross misconduct?

Holiday Pay (Working Time Regulations 1998) / Unauthorised Deductions

26. Did the respondent fail to pay the claimant for two days annual leave the claimant alleges he had accrued but not taken when his employment ended?

27. By doing so, did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

The law

Unfair dismissal

28. Section 94 of the Employment Rights Act 1996 gives employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to an employment tribunal under section 111. The claimant must show that he was dismissed by the respondent under section 95.

29. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

30. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

Misconduct dismissals

31. In misconduct dismissals, there is well-established guidance on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439**, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23**, and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

Gross misconduct

32. Gross misconduct may result in summary dismissal (i.e. dismissal without notice), thus relieving the employer of the obligation to pay any notice pay. Exactly what type of behaviour amounts to gross misconduct is difficult to pinpoint and will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract, and the conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence.

Law on compensation and adjustments

33. In circumstances where it is found a decision to dismiss was unfair, the Tribunal must consider how much compensation to award in accordance with sections 122 and 123 the Employment Rights 1996.

34. In respect of the basic award, section 122 (2) ERA 1996 provides:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

35. In respect of the compensatory award, section 123 ERA 1996 provides:

> "(1) Subject to the provisions of this section and sections …, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
> ...
> (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

36. There are three potential adjustments commonly at play in unfair dismissal cases:

37. *Polkey:* The first is where a deduction is made from a compensatory award in an unfair dismissal case to reflect the chance that although a dismissal was procedurally unfair it would have happened in any event. This is often referred to as a *Polkey* reduction by reference to the *Polkey v A E Dayton Services Limited* [1988] ICR 142.

38. *ACAS Code:* The second is where an award may be increased or reduced by up to 25% if the employer/employee has unreasonably failed to comply with the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015), if it is just and equitable in all the circumstances to do so. This is set out in section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992. This adjustment can only apply to the compensatory award, not the basic award, and is applied before any

reduction for contributory fault (section 124A of the Employment Rights Act 1996).

39. *Contributory fault:* The third is where the claimant by their inappropriate conduct contributed to their dismissal. This adjustment can apply to both the basic award (section 122(2)) and the compensatory award (section 123(6)). The Tribunal will consider this potential deduction by: i) identifying the relevant conduct; ii) assessing whether that conduct was culpable or blameworthy; iii) for the purposes of the compensatory award under section 123(6), decide whether the culpable conduct caused or contributed to the dismissal; and iv) if so, determine to what extent it is just and equitable to reduce the award.

Wrongful dismissal / notice pay

40. The breach of contract is the failure by the employer to give the claimant the notice of termination to which they were entitled under the contract. In this case, this is alleged because the employee has been dismissed without any notice (summary dismissal). An employee will not be entitled to notice of termination if they have fundamentally breached the contract e.g. the contract is terminated because the employee is guilty of gross misconduct.

41. The amount of notice to which the employee was entitled should be set out in the written statement of employment particulars which employers are required to give employees (s.1 Employment Rights Act 1996). In this case, the notice period was disputed, as the claimant claimed nine weeks and the respondent argued it was one week.

Holiday pay

42. Employees are entitled to be paid in lieu of accrued but untaken holiday on termination of employment, however the employment came to an end, even if the contractual provisions do not make any provision for payment in lieu or state that no payment will be made if the employee is dismissed for gross misconduct.

43. In this case, the claimant claimed that he was owed eight days. The respondent paid the claimant for six days. The claimant now claims that there are two remaining days that he is owed.

Findings of fact

44. The claimant, Mr Laidlaw, was employed as a Mechanical Engineer by the respondent, Muller UK & Ireland Group LLP, from 5 April 2020 until his dismissal without notice on the 5 December 2022. The claimant had, however, worked on the site since 2013. The site was originally run by another company, but the claimant was TUPED over to the respondent's company on 1 April 2015. The claimant was made redundant by the respondent on 30 August 2019 and was re-employed by the respondent on 5 April 2020. During this eight-month gap, the claimant worked as a contractor for the respondent on the site.

45. The claimant was a well-regarded and competent employee and had no formal warnings nor other disciplinary issues during his employment.

Relevant policies and protocols

46. I note the respondent's document entitled 'Your safety roles and responsibilities' document **[61]** specifically states:

> 'Take care of your own health and safety and that of other who may be affected by your behaviours at work'.
> 'Ensure that you are aware of the hazards and controls associated with your work'.
> 'Listen, engage, and respond to all health and safety communication. Ask if you do not understand. Feel confident and supported when challenging unsafe behaviours.'

47. I further note that the company's motto: 'Nothing we do is worth getting hurt for' **[61]** which the claimant admitted was 'plastered everywhere' on site.

48. I note the claimant's employment contract, which states in paragraph 7.1 that 'you have a legal duty to take reasonable care of your own health and safety and to take reasonable care not to put anyone else at risk of injury or harm' and paragraph 7.2 that 'you are required to follow all site safety signs, procedures and safe systems of work.'

49. I further note paragraph 18.1 to 18.8 in the employment contract which deal with termination and notice period. I will set out paragraph 18.8 in full here which states: 'We shall be entitled to dismiss you at any time without notice or payment in lieu of notice if you commit an act of gross misconduct, [or] a serious breach of your obligations as an employee… please refer to our Disciplinary Policy for a non-exhaustive list of acts which may constitute gross misconduct.'

50. The respondent's disciplinary procedures set out rules of conduct (paragraph 2), misconduct (paragraph 3) and gross misconduct (paragraph 4). Paragraph 4.1 states that: 'Gross misconduct is a serious breach of contract and includes misconduct which, in our opinion, is likely to irreparably damage the working relationship and trust between us. Gross misconduct will be dealt with under this policy. If an allegation of gross misconduct is well founded then it will normally lead to dismissal without notice or pay in lie (summary dismissal).'

51. The two example acts of gross misconduct that are relevant in this case are:

    a. Paragraph 4.2.6: 'Repeated or serious failure to obey instructions, or any other serious act of insubordination'; and
    b. Paragraph 4.2.14: 'Serious breach of health and safety rules'.

July incident

52. On 20 July 2022, Mr Forteith found the claimant taking his break behind the bioreactor on the Effluent Plant. I accept the claimant's oral evidence that he was behind the bioreactor on his break that day as it was very hot and it

was the only place he could find a breeze. I find that the claimant was told by Mr Forteith that he was not to take his break in that area. In a meeting the following day, Mr Forteith told the claimant that this area by the bioreactor was a 'hazardous area' and 'not a suitable breakout area'.

53. The claimant did not (at the time or any time thereafter) perceive this as an instruction. He has maintained throughout that this was simply 'advice'. I disagree. I find that this was indeed an instruction from management not to take breaks in this specific area by the bioreactor again.

54. I further find that the claimant did not flout this specific instruction as he did not take breaks in this area by the bioreactor again.

55. I find that the respondent had intended to follow this July incident up with an investigation, which may have led to something like a warning of some description, but that Mr Forteith's request for a follow up was lost in someone's inbox and it was not followed up, it was not mentioned again, and it was not investigated. There was no warning issued and the claimant's disciplinary record remained clean.

October incident

56. On 26th October 2022, the claimant went to see Mr Forteith about his complaint concerning lack of PPE. Mr Forteith told the claimant to visit Ms Kane to make the complaint. So the claimant went to see Ms Kane from HR intending to make a grievance about Mr Forteith and the failure to provide adequate PPE. Ms Kane told the claimant to go see someone called Ms Sutton (the respondent's health safety and environment advisor and health and safety coordinator). The claimant went to see Ms Sutton, and was about to start collecting the relevant information and evidence about his grievance and complaint, but was unable to, due to the events that then unfolded that same day.

57. In what must have been no more than a few hours later, if that, Ms Kane came across the claimant in her walk around the premises. She said hello to the claimant and then some minutes later, turned back on herself, and found the claimant resting in his normal break spot. I find that the claimant had been taking one of his breaks in this same spot outside of effluent plant building for some six years and had never encountered Ms Kane in this area before. This spot outside of effluent plant building is not the same spot as the July incident which was next to a bioreactor. I find that although Ms Kane was used to doing walks around the premises since the animal activists protests, it is more than an uncanny coincidence that within hours of the claimant informing Ms Kane that he wanted to make a grievance about Mr Forteith and to make a complaint about lack of adequate PPE, that she just so happened on that day to discover and confront him about the use of this break spot. I find that the claimant was found by Ms Kane taking his break laid back at a 45 degree angle with a piece of foam behind his head with his bump cap over his eyes. I accept the claimant's evidence that he was not asleep.

58. I find that Ms Kane then ordered the claimant to either 'wake up' or 'get up' or 'stand up' or something to that effect. The claimant did not know that Ms

Kane was part of the leadership team, as he had only met her briefly earlier that day and she had introduced herself as someone from HR. So he asked her who she was to establish whether she had any authority to order him around. I also find that he took a photo of her without her permission. I find that Ms Kane perceived his behaviour to be aggressive. I also find that the claimant perceived Ms Kane's behaviour to be aggressive, given that she had approached him with such a direct order. I note that 'aggression' did not form part of the reason for dismissal so I will not delve into this any further. I note that the claimant then moved on from this area.

59. Later that same day, Mr Forteith conducted an investigatory hearing with the claimant, which was followed by a letter on the same day (still), stating that the claimant had been suspended with immediate effect on full pay while a full investigation was carried out.

Dismissal proceedings

60. On 14 November 2022, the respondent sent a letter to the claimant inviting him to an investigation hearing. On 18 November, the claimant was interviewed by the investigatory manager Mr Osborn. On 28 November, the respondent sent a letter to the claimant inviting him to a disciplinary hearing. On 5 December, the disciplinary hearing took place and was led by Mr Coupe. On 13 December, the respondent sent a disciplinary hearing outcome letter to the claimant setting out its decision to dismiss. Dismissal was for the following reason:

> *"On 26th October 2022, you were allegedly found asleep in a production area despite having been advised against this before. When you were challenged by a member of the senior management team, you refused to co-operate. In line with our Disciplinary Policy, this is considered gross misconduct under Section 4.2.6 Repeated or serious failure to obey instruction, or any other serious act of insubordination and Section 4.2.14 Serious breach of health and safety rules."*

61. On 22 December 2022, the claimant appealed. On 23 January 2023, the appeal hearing took place and was led by Mr Murphy. The claimant was accompanied by Mr Holbrow. On 31 January 2023, the appeal manager upheld the original decision to dismiss the claimant for gross misconduct.

Conclusions on unfair dismissal

62. I now need to decide whether the respondent acted reasonably in all the circumstances in treating the misconduct as a sufficient reason to dismiss the claimant.

Genuineness of belief and reasonable grounds

63. Having heard from three respondent witnesses orally, as well as reviewing their witness statements and documents set out in the bundle, I find that the respondent's witnesses held a genuine belief that the claimant was guilty of misconduct.

64. However, I am not satisfied that the respondent held this belief on reasonable grounds. This is because I accept the claimant's account that:

    a. He had used this area outside the effluent plant building as a rest spot for six years.
    b. He wanted to limit close proximity to other people in the other designated rest spots because his father had recently died of Covid and he was living with his elderly mother in her 80s.
    c. He had conducted a dynamic risk assessment, which was a daily part of his job, and decided that his rest spot did not pose a health and safety risk.
    d. Factors that contributed to his risk assessment conclusion included the following:
        i. The claimant's rest spot was not a PPE area, whereas one of the alternative designated rest spots was the effluent Plant Control Room which was a PPE 4 risk zone which had employees placing their sandwich boxes and coffees next to dangerous substances, such as containers full of 90% sulphuric acid (see figure 9 at page 217 and figure 10 at page 218 and figure 16 at page 221); and
        ii. The claimant had been a key player in the design of this area of the site and knew that the IBC containers were specifically stored around the corner; in case of puncture / leakage, they would flow directly to drains, which would have made it impossible for any caustic to flow approximately 30 feet around the corner to the rear of the building where the claimant was positioned on the raised Effluent Membrane Building plinth.
    e. The claimant deemed other designated rest spots to be unsuitable for the following reasons:
        i. It was agreed between the parties that the engineering canteen was unavailable during the July and October 2022 incidents. I find that the claimant understood that this enlarged engineering canteen, when finished, would be available to the services department (the department he belonged to), but it only became available for use after the claimant was suspended. Mr Forteith sent an email around to the services department team three weeks after the claimant's dismissal to confirm that the engineering canteen was now open and available for use.
        ii. There was a designated room as a temporary engineering canteen whilst the work was being done on the engineering canteen. The respondent's position was that this temporary engineering canteen was available to everyone at all times and the claimant's position was that it was limited to engineering staff, not staff from the service department. I find that the claimant believed that the temporary engineering canteen was not available to him.
        iii. There was the main dairy canteen, which the claimant said he had never used in the 10 years that he had worked on that site. I accept the claimant's contention or belief that during Covid, the tables in the main dairy canteen were allotted to various departments, and the services department were not included in that allocation.
        iv. There was a boiler room that some of the services staff used to take breaks in. However, the claimant and his colleagues decided

not to use it anymore due to the noise and the corresponding hearing damage.

v. There was a smoke free outside area for breaks but I accept the claimant's contention or belief that the claimant was unaware of this area at the time.

vi. There was the Effluent Plant Control Room, which the claimant did use for his first break of the day, but that he felt uncomfortable in because it was a PPE 4 risk zone, as noted above.

vii. There was also his car which he could have rested in, but to access his car, he would have had to get changed and then walk some distance to his car and then back again and change again, which he submitted in oral evidence, and I accept, was impractical for his short breaks (which were 10-30 minutes).

65. Given the claimant had been resting in the area outside the effluent plant building for six years as he considered it to be the most suitable rest spot amongst the alternative rest spots, that he had not been instructed or warned not to rest at that particular spot before, and that he had just made a complaint a few hours before he was 'caught' resting there, I do not think there were reasonable grounds upon which an employer could believe that the claimant had committed gross misconduct.

Investigation and procedures

66. Employers are expected to have regard to the principles for handling disciplinary and grievance procedures in the workplace set out in the Acas Code of Practice on Disciplinary and Grievance Procedures ('the Acas Code'). I have taken into account the large size of the respondent and the extensive administrative resources available to it.

67. I accept the respondent's submission that the investigation and procedure were conducted fairly. I accept the position in the respondent's closing submissions that:

a. Ms Kane was kept off the emails related to the claimant's suspension and investigation immediately **[132].**
b. Mr Osborn was appointed to carry out the investigation and Mr Coupe identified to undertake the disciplinary promptly **[135].**
c. The claimant was invited to the investigation via letter, was informed of his right to be accompanied, the allegations made, and details of the investigation itself **[140].**
d. When Mr Osborn was conducting his investigation, he interviewed the claimant, interviewed an independent service engineer to comment on where breaks could and should be taken, asked Mr Forteith for further clarification via email **[85].**
e. Mr Forteith provided two different names of colleagues for Mr Osborn to interview **[162-163].**
f. The claimant was invited to the disciplinary meeting via letter. He was informed of his right to be accompanied, the allegations were set out, the potential outcomes were outlined and disciplinary pack was attached **[178-179].**

g. The outcome letter sets out in clear terms the reasons for dismissal, the consequences, the claimant's right to appeal and how to do so **[201-202].**
h. The appeal was heard, and the outcome communicated in accordance with respondent's policy **[261].**
i. The claimant was given an opportunity to put his case during all relevant meetings.
j. All matters were dealt with promptly.

68. However, I find that the respondent did not comply with the spirit of paragraphs 19 (usually a written warning followed by a final warning), 20 (if first is sufficiently serious may be appropriate to move directly to final written warning) and 21 (warnings need to set out nature of act, change required, timescale and consequences). Given the claimant had no previous warnings and had a clean disciplinary record, the spirit of the ACAS Code suggests that it would have been more appropriate for the October incident (namely the respondent not being content with the claimant's chosen rest spot) to have been processed as some form of warning.

Band of reasonable responses

69. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances.

70. It is an implied term in contracts of employment that the employer will provide employees with a safe system of work and take reasonable care for their safety. As part of this duty, employers must investigate 'promptly and sensibly' all bona fide complaints about safety drawn to their attention by employees — *British Aircraft Corporation Ltd v Austin 1978 IRLR 332, EAT*. If an employee objects to his working conditions, the employer should investigate the matter promptly and communicate its findings to the employee.

71. The July incident occurred in a separate area, did not result in any warning of any kind, and the claimant did not rest in that area again. The respondent's position was not, in any event, that the July incident was directly relevant to the reason for dismissal.

72. Instead of noting the claimant's complaint about inadequate PPE on 26 October, giving him the information he needed to formalise his grievance, and investigating the claimant's bona fide complaint 'promptly and sensibly', the respondent suspended the claimant on the very same day. The respondent says it suspended the claimant for different reasons – namely finding him resting in a place they considered to be dangerous – but it is highly relevant that he was 'caught' resting in the same place he had rested every day for six years on the very same day that he raised a complaint about PPE, and that he found himself suspended within hours of attempting to make a complaint.

73. This feels like a case of the employer jumping the gun and dismissing an employee that complained about the standards of work and health and

safety. In the case of *Heaps, Collis and Harrison Ltd t/a Air Power Centre v Burt EAT 173/99*, the employee raised concerns about the levels of radioactivity on a barge on which he was working. His grievance had not been finally disposed of at the time of his suspension and summary dismissal. The EAT upheld the tribunal's finding of unfair dismissal on the ground that the employer had been unduly precipitate.

74. I do not think that it is within the band of reasonable responses for an employer to consider the October incident on its own, namely resting in an area that the employer considers to be inappropriate, to be serious enough to dismiss the claimant summarily. This is especially so when juxtaposed against the fact the claimant had made a complaint on the very same day as he was suspended. I therefore find that the respondent did not act reasonably in all the circumstances.

Conclusions on compensation/adjustments

Polkey (no difference)

75. Broadly speaking, there has not been any procedural unfairness in this case, so it is not necessary to consider the Polkey deduction.

ACAS Code of Practice

76. In this case, which concerns a complaint of unfair dismissal arising from the claimant's dismissal for misconduct, the relevant ACAS Code of Practice is the Code of Practice 1 on discipline and grievance procedures.

77. I find that the respondent generally complied with the Code of Practice, and broadly conducted a thorough and fair procedure, with the exception of not following the spirit of the paragraphs on warnings. I have therefore decided not to adjust the award on this basis.

Contributory fault

78. I find that the claimant's conduct was culpable or blameworthy to the extent that he was somewhat dogmatically determined to prove his point that his chosen rest spot was not dangerous. He could have noted that respondent was unhappy with his chosen rest spot and worked collaboratively with the respondent during the disciplinary process to find another spot that everyone was content with. I therefore make a reduction to the award for contributory fault of 30%.

Conclusions on notice pay

79. Unfair dismissal is a statutory concept which considers the reasonableness of the employer's belief, whereas gross misconduct is a contractual concept dependent on a finding of fact about what happened.

80. The respondent's reason for dismissal was solely the October incident. Given that the claimant had worked on site for 10 years with a clean disciplinary record, I do not consider that being found resting in his break in

the area outside the effluent plant building to be sufficient to constitute gross misconduct on its own.

81. The amount of notice should be set out in the written statement of employment particulars. The express contractual term of notice will apply (provided it is not less that the statutory minimum). I find that the relevant notice period in this case is one month, as set out in the employment contract at paragraph 18. I therefore find that the claimant's claim for notice pay is well-founded, but for one month's pay instead of nine week's pay as the claimant had originally claimed.

Conclusions on holiday pay

82. The claimant accepted that he had taken 17 days out of the 25 shifts owed **[278].** In addition to that, his manager Mr Minett identified a further 5 days taken off on holiday **[272-273].** This is further supported by the respondent's contemporaneous holiday logs **[98].** That adds up to 22 out of 25 shifts, and the respondent then paid the claimant for six extra days of holiday, so the claimant is not out of pocket on holiday pay.

83. The claimant did not challenge the additional dates suggested in the bundle nor the legitimacy of the holiday logs provided by the respondent. I note that there was no reference to holiday pay in the claimant's closing submissions, nor was there reference to holiday pay in the claimant's schedule of loss.

84. I therefore accept the respondent's submissions that the claimant is not owed two days of holiday pay as claimed.

85. I am therefore content to dismiss the claim for holiday pay in full.

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Employment Judge Murdoch

6 June 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
01 July 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE