EMPLOYMENT TRIBUNALS

Claimant: **Mr J Atkinson**

Respondent: **Caterpillar UK Limited**

HELD at Newcastle by CVP **ON: 21 and 22 November 2024 and 5 December 2024**

BEFORE: Employment Judge Aspden

REPRESENTATION:

Claimant: **In person**
Respondent: **Ms Vittorio, legal adviser**

JUDGMENT having been sent to the parties on 10 January 2025 and written reasons having been requested in accordance with the Employment Tribunals Rules of Procedure 2013 (now the Employment Tribunal Procedure Rules 2024), the following reasons are provided:

REASONS

The claim and issues

1. Mr Atkinson's complaint is one of unfair dismissal under the Employment Rights Act 1996. His case is that the respondent constructively dismissed him by doing one or more of the following things:

   1.1. Mr Rayner complaining (on 21 February 2024) that Mr Atkinson parked at fork-lift truck in an area Mr Rayner perceived he should not be parked;

   1.2. Mr Rayner creating several safety reports about Mr Atkinson's operation of the fork-lift truck over the rest of the day (after Mr Atkinson confronted Mr Rayner when he complained about the fork-lift);

   1.3. the respondent failing to deal with a grievance submitted by Mr Atkinson within a reasonable time; and

1.4. the respondent not upholding Mr Atkinson's grievance.

2. The claimant applied for permission to amend his claim to add complaints under the Equality Act 2010. I considered that application on the first day of this hearing and refused permission. The claimant has asked for written reasons for that decision. Those reasons will be provided separately.

3. The respondent does not dispute that the matters referred to at 1.1, 1.2 and 1.4 had occurred. As for 1.3, the respondent accepts the claimant submitted a grievance; it denies it failed to deal with the grievance within a reasonable time.

4. Therefore, the issues I needed to decide to determine whether the unfair dismissal complaint succeeds are as follows.

4.1. Was the claimant dismissed? Ie

4.1.1. Did the respondent fail to deal with the claimant's grievance within a reasonable time?
4.1.2. By doing that and/or by Mr Rayner doing the things referred to at paragraphs 1.1 and 1.2 and the respondent not upholding the claimant's grievance, did the respondent breach the implied term of trust and confidence? The Tribunal will need to decide:
4.1.2.1. Whether, by doing those things, the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
4.1.2.2. whether it had reasonable and proper cause for doing so.
4.1.3. Or did that breach another term of contract?
4.1.4. Was the breach a fundamental one? I would need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.
4.1.5. If this was a fundamental breach of contract, did the claimant resign in response to it? I would need to decide whether the breach of contract was a reason for the claimant's resignation.
4.1.6. Did the claimant affirm the contract before resigning? I would need to decide whether the claimant's words or actions showed that he chose to keep the contract alive even after the breach.

4.2. If the claimant was dismissed, was the dismissal unfair? Ie

4.2.1. What was the reason or principal reason for the breach of contract?
4.2.2. Was it a potentially fair reason?
4.2.3. Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the claimant?

Evidence and facts

5. I heard evidence from the claimant. On behalf of the respondent I heard evidence from Ms Dewdney and Mr Ruddell. I took into account documents I was referred to.

6. The claimant was employed by the respondent for over 30 years. As a storeman, the claimant's job involved driving a fork-lift truck.

The respondent's policies and practices

7. The respondent has a written policy referred to as the ECP UK Health and Safety policy. The policy describes health, safety and the environment as the company's 'number one priority.' The policy sets out the responsibilities of employees. It sets out certain rules which it says employees must adhere to at all times. Those rules include the following:

   7.1. working within the safe systems of work and standard working practices as laid down for the area, and reporting any deviations from those systems;

   7.2. reporting all accidents, near miss incidents and hazards to the relevant people in a timely and constructive manner;

   7.3. highlighting training needs;

   7.4. participating constructively in any accident investigations of incidents in which they are involved or a witness; and

   7.5. identifying any health safety environment improvements to their team leader.

8. In that policy team leaders have additional responsibilities which include making sure that all 'pro-active actions are taken so that no injuries or accidents can happen.' The policy says that team leaders are a 'role model' and should communicate that nothing is more important than safety. The policy says team leaders must ensure that their team adheres to all safe working practices and to assist in accident and near miss investigations.

9. I accept from the evidence I heard from the respondent's witnesses, and Mr Ruddell in particular, and the documents I was referred to that the respondent takes its health and safety responsibility extremely seriously. It actively encourages employees to speak up about health and safety concerns. Mr Ruddell described this as a 'speak up - listen up' culture whereby anyone at any level can challenge and reinforce a safe work culture without fear of reprisal or retaliation. That I accept, is the culture the respondent seeks to inculcate in its workforce.

10. To that end, as well as having its health and safety policy, the respondent has in place processes for reporting near misses and a policy referred to as the 'Recording Reporting Incidents Policy'. The purpose of that policy is described in the documents as follows: '… to ensure that all incidents and significant near misses are reported promptly and correct protocols are adhered to. This will ensure the correct people are contacted and measures are put in place to prevent further harm.' The policy defines a 'near miss' as an event not causing harm but that has the potential to cause injury or ill health; it defines a 'significant near miss' as an event not causing harm but that has the potential to cause serious injury or long term ill health. The health and safety policy requires all staff to report near misses, ie potential hazards and not just those that might be classed as a significant near miss.

11. The respondent has an electronic system, referred to as the CI Incident Report App, which is used to log various matters, including serious health and safety issues, near misses, observations and first aid. Such matters are logged on to the system by a team leader or manager. For staff below team leader level the expectation is that staff wishing to report something will fill out a paper form and

give it to a team leader or manager who will then put the information on to the computerised system. Once the matter is logged on the system it is sent to the departmental manager and the health and safety manager; the departmental manager will then investigate the matter and report the findings and any action points on the app. Ms Dewdney is one of those managers. On average she receives three to four matters to investigate every week. They vary in severity from serious matters to minor issues.

The events of 21 February 2024

12. On Wednesday 21 February 2024 the claimant was working in an area known as the supermarket area. He needed to use a different piece of equipment there so he parked up the fork-lift truck in that area. There was no designated space to park a fork-lift truck. In these proceedings Mr Ruddell acknowledged that it had been a mistake for the company not to have set aside a designated parking area when that area was designed.

13. Subsequently somebody told the claimant that a team leader, Mr Rayner, wanted to speak to him. The claimant needed to transport some booms. He decided to go to speak to Mr Rayner en route to where the booms needed to be. He drove the fork-lift truck to where Mr Rayner was and went to speak to him.

14. Before this day, the claimant and Mr Rayner had had no prior dealings of any note. Mr Rayner was a team leader in a different department to the one in which the claimant worked. They knew each other to say hello. There had been no fallings out between them and Mr Rayner had never demonstrated any animosity towards the claimant. There is no evidence Mr Rayner had any axe to grind with the claimant before 21 February 2024.

15. When the claimant went to see Mr Rayner, Mr Rayner told the claimant he should not have parked the fork-lift truck where he had in the supermarket area. The claimant asked why. Mr Rayner said it was not a designated parking area. The claimant told Mr Rayner to stop interfering.

16. Subsequently, on the same day, Mr Rayner recorded a near miss incident on the system. Referring to the matter he had raised with the claimant earlier that day about parking in the supermarket area, the entry he made read ‘left the fork-lift truck in an area with no designated fork-lift parking.’ This was allocated incident number 76703.

17. The same day Mr Rayner reported two other near miss incidents involving the claimant. In one, given incident number 76704, Mr Rayner said that the claimant had not used three points of contact when dismounting from the fork-lift truck. In another, incident number 76706, Mr Rayner said the claimant was seen travelling from south to north in Bay 1 on his fork-lift truck carrying three booms and that he had ‘squeezed past the new supermarket and over the walkway instead of driving out of the door at the south side around the building.’ The reference in 76706 was to the journey the claimant had taken in the fork-lift truck when he went to see Mr Rayner.

18. I infer from the numbers allocated that Mr Rayner reported these incidents at the same time or very soon after he reported the first incident about parking in the supermarket area.

19. Later that day the claimant was in the fork-lift truck in front of an area with a zebra crossing. At the same time as somebody was crossing the zebra crossing the claimant began to reverse the fork-lift truck. Mr Rayner was in the vicinity and saw this happening as did another team leader. Mr Rayner shouted to the claimant to stop. When this incident was discussed with the claimant later, and in his evidence to this Tribunal, the claimant said he had no intention of reversing as far as the zebra crossing and so the person crossing at the time was in no danger. Neither Mr Rayner, nor the other team leader, nor the pedestrian could have known that at the time. Mr Rayner then made a report on the near miss system about this incident. He categorised it as a near miss. It was given Incident number 76777.

20. One of the issues of fact that I have to decide in this case, is whether Mr Rayner was motivated to make reports as a way of bullying the claimant or retaliating against the claimant for telling Mr Rayner to stop interfering.

21. The claimant tendered in evidence message exchanges with people the claimant said work or used to work at the respondent. The claimant contends the messages show that Mr Rayner picked on people or bullied people. They included messages said to have been sent to the claimant by a work colleague in March 2024 in which the colleague said about someone 'Everybody at work is fuming about that fat C¥%T he's been putting them in about [a named individual] on our line.' Invited by the claimant to elaborate, the claimant's colleague then sent a further message in which he referred to another individual and a 'near miss', as well as claiming someone had been 'pulled' by Mr Ruddell for 'not checking off the combi'. Subsequent messages dating from August 2024 appear to show the same individual agreeing with a statement by the claimant that he was 'treated disgracefully' and generally insulting unspecified people and calling them names. Another series of messages is said to have been sent to the claimant by a former employee of the respondent, in October 2024. The messages appear to have been sent to the claimant in response to him seeking evidence for the purpose of these proceedings. The former employee said 'Everyone in that factory told me to keep well away from [Mr Rayner] as he's nothing but trouble and not one person I have ever spoken to down there had said anything nice about him…'. He also said he and two others were 'getting spoken to worse than shit' and that he was 'spoken down to', 'treat like shit'.

22. I do not consider this evidence to have any probative value. To the extent that these two individuals make any comments about Mr Rayner personally and the way that they claim they or others have been treated by him, the claims are vague and unspecific. There is nothing in the messages that would enable me to assess what Mr Rayner is alleged to have done or said to anyone on any particular occasion, still less whether he did in fact do/say such things, the context in which it was said or done, whether Mr Rayner's conduct was objectively reasonable, and (if not) whether that demonstrates a pattern of behaviour that might shed light on Mr Rayner's motivations in respect of his actions on 21 February 2024.

23. However, there are some other factors that could be said to support the claimant's case. They include the following.

    23.1. The claimant made some powerful points during the hearing about the number of near miss reports that had been made on the system for the year to date, the average number of daily reports and the fact that these four reports, all made on one day, represented a significant proportion of those reports and

exceeded the average. I accept that it was unusual for four entries to be made on the same day about the same individual.

23.2. One of the reports concerned parking in the supermarket area. There was, however, no designated space for the claimant to park in the area in question and Mr Rayner must have known that.

23.3. The respondent did not call Mr Rayner to give evidence. When asked why that was, there was no suggestion from the respondent that he could not have given evidence.

24. However, those are just some of the factors in this case. It is necessary to consider the evidence as a whole. Of great significance in this case I find is the importance the respondent places on health and safety. I accept that this is of the highest importance to the respondent. The respondent actively and strongly encourages reports to be made where a health and safety concern exist. Indeed the policy indicates that if a report is not made that is a breach of an employee's duty. As team leader, Mr Rayner would know that was the case and he would know he had a particular responsibility for ensuring that good health and safety practices are adhered to and that near miss incidents are properly looked at. The purpose of a near miss report is to enable matters to be investigated, not necessarily to attribute blame but to make improvements. Those matters are an important part of the context in which these reports were made. It is against that background that I consider the actions of Mr Rayner.

25. The first matter of which the claimant complains involved Mr Rayner verbally raising with the claimant an issue concerning his parking the fork-lift truck in the supermarket area. The fact that there was no designated parking area meant that that left room for disagreements as to whether a fork-lift truck, wherever it was parked, was causing an obstruction or not; if there was no obvious place to park a fork-lift truck then it appears to me that different people could validly have different views on the matter. I find it more likely than not that that is what happened in this case: ie that Mr Rayner simply had a different opinion from the claimant as to whether the fork-lift truck was parked in an appropriate space. Given that there was no history of animosity at all between Mr Rayner and the claimant when Mr Rayner first spoke to the claimant about this, I infer from the fact that Mr Rayner raised this with the claimant verbally that he had a genuine concern about where the claimant had parked, believing the claimant had created an unnecessary safety hazard. Raising that with the claimant as Mr Rayner did was entirely in line with the respondent's policy of encouraging staff, especially team leaders, to flag potential safety risks when they saw them. I find that Mr Rayner was not acting in bad faith nor bullying the claimant when he spoke with the claimant about this issue.

26. The second matter of which the claimant complains concerns the fact that Mr Rayner made four near miss reports on the system that same day. I make the following observations and findings.

26.1. The first report concerned the parking incident. I have found as a fact that Mr Rayner had genuine concerns when he raised this face to face with the claimant. The claimant's response, telling Mr Rayner to stope interfering, was hardly likely to allay those concerns. If anything, it seems to me that the way the claimant responded is likely to have increased Mr Rayner's concerns about the claimant's attitude towards matters of health and safety. Given that the

claimant did not engage constructively with Mr Rayner when Mr Rayner tried to raise the matter informally with him, it is unsurprising that Mr Rayner then raised the matter on the near miss system: that is what the system is there for and logging the matter was in line with the respondent's policy.

26.2. In the second incident report Mr Rayner alleged the claimant had not used three points of contact when dismounting from the fork-lift truck. In his witness statement for this hearing the claimant said:

> 'The three points of contact rule is a standard safety practice that I have always followed. At no point on 21st February 2024 did I deviate from this practice, and the claim that I did is both unfounded and exaggerated.'

However, that evidence is at odds with what the claimant said on cross examination: the claimant said he could not rule out the possibility that he had not used three points of contact. Furthermore, in a meeting with Mr Ruddell the claimant's union rep said it was 'standard practice' for drivers to dismount without using three points of contact. In addition, in his grievance the claimant said he was not seeking to contest the content of the near miss reports. Looking at the evidence in the round I find that it is more likely than not that Mr Rayner did see the claimant dismount from the fork-lift truck without using three points of contact. I also find that using three points of contact was the appropriate and safest way to dismount and dismounting in a different way risked injury; Mr Rayner will have been aware that was the case. I find it more likely than not that he had a genuine belief that the claimant had taken an unnecessary risk when dismounting in the way he did.

26.3. With regard to incident number 76706 (the route taken by the claimant in the fork-lift truck and the allegation that the journey was unnecessary) I accept Mr Ruddell's evidence that the more and longer journeys there are in a fork-lift truck the greater the hazard and that it is the respondent's policy to seek to reduce the number of journeys in a fork-lift truck. I find that Mr Rayner is likely to have viewed this as an unnecessary journey undertaken by the claimant and therefore one which increased hazards unnecessarily.

26.4. It is the respondent's practice to encourage employees generally, and team leaders in particular, to report incidents like those that formed the basis of incidents 76704 and 76706. As a team leader, Mr Rayner had a particular responsibility to comply with the respondent's policies in this regard. It is possible that Mr Rayner could have opted to discuss these issues with the claimant informally, as he had attempted to do with regard to the parking incident. However, the claimant's response to Mr Rayner's attempt to discuss the parking issue had demonstrated that he was not amenable to such conversations. In the circumstances, it is unsurprising Mr Rayner then raised incidents 76704 and 76706 through the near miss reporting App rather than simply speaking to the claimant about them.

26.5. As for the reversing incident (Incident number 76777) Mr Rayner had seen the claimant reverse in the direction of a pedestrian crossing at the same time as somebody was crossing it. When this incident was discussed with the claimant later, and in his evidence to this Tribunal, the claimant said he had no intention of reversing as far as the zebra crossing and so the person crossing at the time was in no danger. However, neither Mr Rayner nor the other team

leader, nor the pedestrian could have known the claimant's intentions at the time. During a subsequent investigation another team leader told Mr Ruddell he would have reported it himself if the claimant had not done so. I find it more likely than not that Mr Rayner also believed the claimant's actions when reversing created a safety hazard.

27. Looking at all the evidence in the round, whilst I accept there was an unusually high number of reports made by Mr Rayner against the claimant on 21 February 2024, I am not persuaded that Mr Rayner acted in bad faith in logging those matters as near miss incidents nor that he did so in order to bully the claimant. I find that Mr Rayner made the reports because he had genuine concerns about the actions taken by the claimant.

28. The claimant contends that Mr Rayner made the near miss reports as retaliation for the claimant telling him to stop interfering earlier in the day. I cannot rule out the possibility that, if the claimant had engaged constructively with Mr Rayner when he raised the parking issue with the claimant in person, Mr Rayner might have been less concerned about the parking incident, the way the claimant dismounted from the fork-lift truck, and the claimant taking an unnecessary journey in the fork-lift truck to speak with him. As noted above, the claimant's reaction to Mr Rayner's attempt to discuss the parking issue is unlikely to have allayed any concerns Mr Rayner had and if anything is likely to have caused Mr Rayner to have further misgivings about the claimant's attitude to safety concerns. It is conceivable, therefore, that if the claimant had not told Mr Rayner to stop interfering, Mr Rayner might have been content to discuss the second and third incidents with the claimant in the same way as he did with the parking issue, and refrain from making near miss reports in respect of those incidents; (I think that is unlikely to have been the case in respect of the reversing incident, which on the face of it was more serious). In that sense, I do not rule out the possibility that Mr Rayner making near miss reports in respect of the first three incidents was a consequence of the claimant telling him to stop interfering. That does not mean, however, that it is appropriate to characterise those near miss reports as acts of retaliation. Mr Rayner had a responsibility to raise health and safety concerns in an appropriate manner. By telling Mr Rayner to stop interfering when he raised the parking issue directly with the claimant, the claimant himself had effectively closed off one avenue that may have been open to Mr Rayner. In the circumstances, I find that by making near miss reports as he did, Mr Rayner was not 'retaliating' against the claimant but was simply logging genuine safety concerns in an appropriate manner and in accordance with his duties.

Events following the near miss reports

29. The CI incident report app alerted Ms Dewdney to the near miss reports. She is employed as a BCP material distribution manager. She had become aware of the first three reports first of all and went to speak to the claimant about them.

30. When Ms Dewdney and the claimant spoke, they discussed the fact that there was no parking for the fork-lift in the supermarket area. Ms Dewdney said she would raise the issue of the lack of a designated parking area at the forthcoming management meeting. With regards to the requirement to have three points of contact when dismounting the fork-lift truck, the claimant told Ms Dewdney that he may have just jumped off it; so Ms Dewdney coached the claimant on what was required when dismounting in the future. Ms Dewdney also said to the claimant that if he is called over to speak to somebody and is moving a boom that he should

dismount his fork-lift and walk over to them and not make an unnecessary journey in the fork-lift with a load.

31. Later on, Ms Dewdney became aware of the fourth near miss report. She considered that a more serious incident and that it would need further investigation. She went to speak to the claimant again. I find it more likely than not that that conversation took place on Thursday 22 February, the day after the incidents, because in a later email Ms Dewdney implied they had spoken on that date. During that meeting the claimant said he thought Mr Rayner's actions in logging these near miss reports was bullying. The claimant said in his claim form that because he felt bullied by all the incident reports he completed an incident report about Mr Rayner which he gave to his team leader Mr Howes, and that when he spoke to Ms Dewdney she said she would take his report upstairs to discuss it with management. Ms Dewdney told me in evidence that she does not recall whether Mr Howes or the claimant spoke to her about this. I accept she does not recall it but I think it's more likely than not that the claimant did complete such a paper report and did mention it to Ms Dewdney in the meeting. I say that because, when a few days later Mr Atkinson put in a formal grievance, Ms Dewdney sent him an email acknowledging it and apologising for not getting back to him on the previous Thursday afternoon, explaining she had had to leave the site urgently at lunchtime that day because someone she looks after had been admitted to hospital.

32. Friday 23 February was a non-working day for the claimant. His next working day would have been Monday 26 February. On that day, however, the claimant began a period of sick leave that continued until he resigned his employment.

The claimant's grievance

33. On that same day, 26 February, the claimant sent an email to Ms Dewdney raising a formal grievance. He said that he had a problem with the 'multiple near misses/safety observations submitted against me on Wednesday 21 February.' He went on to say 'I am not at this time attempting to contest the content of the near misses/safety observations, but I am concerned that the person or persons who compiled them was intending to target me as a revenge for something I may have said to upset them earlier that day.' The claimant went on to say 'I consider this to be a form of bullying which I refuse to accept at work, and I expect the company to take measures to ensure I feel safe to carry out my duties without being exposed to such actions going forward.' The claimant went on in his grievance to refer to his 30 years of service and also said he suffers from anxiety. He said 'I find it difficult to come to work under the current circumstances, as I have suffered over the weekend and continued with anxiety as a result of the events last Wednesday.' He asked when he could meet Ms Dewdney to talk about his grievance and said he would like to be accompanied by a union representative at the meeting.

34. Ms Dewdney acknowledged the claimant's email promptly that same day. She said she would look into the grievance procedure that evening and let him know the next steps. She also said 'I understand you were off today. I hope you are OK.'

35. Ms Dewdney passed the claimant's grievance to HR who arranged for it to be dealt with by Mr Ruddell. The following day, Tuesday 27 February Ms Ball from HR

emailed the claimant confirming that they had received his grievance and saying that Mr Ruddell would be in touch over the course of the next week to discuss it.

36. The following Monday, 4 March the claimant sent an email to Ms Dewdney self-certifying his continued absence from work on grounds of stress. Ms Dewdney telephoned the claimant inviting him to come into work to discuss his grievance and a meeting was arranged for Thursday 7 March.

37. Two days before that meeting the claimant sent an email asking to be sent copies of all the near misses and safety observation reports that his grievance concerned. That same day Ms Dewdney replied by email to Mr Atkinson explaining that it would be Mr Ruddell conducting the meeting. I infer that Ms Dewdney had spoken to Mr Ruddell before replying before replying and had been asked to relay a message because, in her email, she that Mr Ruddell had told her 'This is just a fact finding discussion for Jeff to explain why he feels he needs to raise a Grievance. The first step in a Grievance is to discuss if it can be resolved at a local level before we initiate any further actions.'

38. On 7 March that meeting took place between the claimant and Mr Ruddell. The claimant had a union rep present. The next day Mr Ruddell emailed Ms Dewdney saying that they had to 'pause progress' regarding the grievance meeting because the near misses had not been investigated yet and follow up actions taken. He asked Ms Dewdney to speak to the claimant to get his feedback on those incidents. In fact Ms Dewdney had already spoken to the claimant at the time the incidents were reported. Mr Ruddell also said in his email that witnesses needed to be spoken to about what Mr Ruddell described as 'the more serious allegations around dismounting without three points of contact as well as the NM where he reversed towards a pedestrian'. Mr Ruddell asked Ms Dewdney to let him know when that was done and let him know the outcomes.

39. Ms Dewdney replied that day saying she had misunderstood the CI reporting app and would update it. She said that should be done for Monday.

40. On that Monday, which was 11 March, Mr Ruddle asked Ms Dewdney whether they were conducting a next stage story board for the reversing incident. That same day Ms Dewdney replied saying that a colleague was going to arrange to do that and she had chased him up a couple of times. She also mentioned she had been off sick a couple of days the previous week. She said she would chase her colleague again the next day when she was back in the office.

41. I accept Ms Dewdney's evidence that:

    41.1. at this point she believed one of her colleagues was doing the next day story board investigation into the reversing incident;

    41.2. however she subsequently spoke to her colleague later that week and learned that he was not doing the investigation and there had been a misunderstanding.

    I also accept that she had had a couple of days off sick the previous week.

42. At this point Mr Ruddell was waiting for the next day story board to be completed before looking further into the claimant's grievance. Ms Dewdney knew that to be the case.

43. Some five weeks later, on Wednesday 17 April, the claimant emailed Ms Dewdney saying 'It's been some time since we last spoke and I came into work to discuss

my grievance. Could you please ask HR if there is anything which I haven't done yet which I need to do to move things forward.'

44. Two weeks later, on 30 April, the claimant emailed HR copying in Mr Ruddell and Ms Dewdney enquiring about the current status of his grievance. Mr Ruddell replied to all that day saying 'I cannot proceed with the grievance as I have not received the feedback from the near miss investigations and/or the next day story board. I can appreciate Jeff's frustration but we need to follow all the steps in the process to ensure a fair and honest outcome.' The claimant sent a further email that day saying 'as you know I have done everything requested to assist in this process.' He asked for any information that could be provided to him in relation to the near misses and safety observations and any witness statements.

45. The same day there were further exchanges of emails between Mr Ruddell, Ms Dewdney and Ms Ball of HR. In one of those emails Mr Ruddell asked Ms Ball to push Ms Dewdney for a response. Ms Ball said, 'Not a lot I can do - It needs to come from her manager.' There is no evidence before me that Ms Ball spoke to Ms Dewdney's manager or that, if she did, Ms Dewdney's manager spoke to Ms Dewdney about the next day story board investigation, whether before or after these email exchanges. I infer that no such discussions took place.

46. It is apparent from Mr Ruddell's email that by this date he had spoken to Mr Rayner, the pedestrian involved in the reversing incident and Mr Shanks, a team lead who had witnessed that incident.

47. Mr Ruddell spoke to the claimant on 1 May. He explained again to the claimant that he was waiting for Ms Dewdney to complete the next day story board investigation into the reversing incident.

48. Ms Dewdney gave evidence that at this time she was experiencing a number of personal difficulties in her home life which meant that she was having to spend a lot of time at home dealing with those. I accept that was the case. I also accept this affected her ability to carry out the next day story board investigation in a timely manner. I find that the delay in Ms Dewdney's investigation was in significant part due to her personal problems at home. They meant she was not able to devote the time she ordinarily would to this matter and no doubt to her other work responsibilities. I find that, notwithstanding that there was a delay in completing the next day story board, Ms Dewdney was not deliberately delaying dealing with the matter. I say that not only because I accept her evidence about the personal matters she was dealing with but also because the evidence shows that, before those matters arose, Ms Dewdney generally responded very promptly to the claimant's communications. For example, she acknowledged the claimant's grievance on the day it was raised and passed it on the HR straight away; she also volunteered an apology for not getting back to the claimant the previous Thursday and explained why that was. That do not appear to me to be the actions of someone deliberately dragging their feet in respect of a grievance.

49. She did not however make Ms Ball in HR aware of the difficulties she was experiencing.

50. On Tuesday 7 May, Ms Dewdney completed the next day story board. As part of her investigation she had spoken to Mr Shanks who had witnessed the reversing incident as well as Mr Rayner. She categorised the reversing incident as a 'significant near miss'.

51. The next day Mr Ruddell emailed Ms Ball saying 'I've now got all the documentation for Jeff's grievance. I feel that I am in a position to make a decision'. He implied that he was expecting a complaint from the claimant or his union rep about the length of time it had taken to deal with the grievance.

52. The following day Mr Ruddell emailed the claimant inviting him to a meeting to discuss the outcome of his grievance. That meeting was arranged for 13 May. Mr Ruddell said he would provide the documentation and the investigation outcomes at the meeting.

53. The claimant attended that meeting on 13 May accompanied by a trade union rep, Mr Wilson. Ms Ball from HR was also present. Mr Ruddell took the claimant through the near miss reports and the claimant was given an opportunity to comment. The claimant acknowledged did not deny he had jumped down from his cab and either he or the union rep said it was 'standard practice' to dismount from a fork-lift truck by jumping down without three points of contact. The claimant said he believed Mr Rayner had, in the claimant's words, 'weaponised the system' against him.

54. I accept Mr Ruddell's evidence that when he looked into the claimant's grievance he spoke to Mr Rayner and Mr Shanks and that Mr Shanks had told Mr Ruddell that he had not made a near miss report himself because he knew Mr Rayner had, but that he would have made a near miss report had Mr Rayner not done so. Mr Ruddell also spoke to the pedestrian who told him he had not expected the claimant to reverse at the moment he was crossing. Mr Ruddell's evidence to me was that pedestrians have priority and I accept that was the respondent's policy.

55. I accept that Mr Ruddell did take seriously and investigate conscientiously the claimant's allegation that Mr Rayner had effectively used the near miss reporting system to get back at him due to their altercation on 21 February. That Mr Ruddell took the complaints seriously is evidenced by the fact that he waited for the next day story board before responding to the grievance and spoke to witnesses individually.

56. Mr Ruddell formed the view that Mr Rayner had not been using the near miss reporting system to retaliate against the claimant. It was Mr Ruddell's belief, having investigated the matter, that Mr Rayner had raised the matters in good faith. In reaching that conclusion Mr Ruddell was of the view that there were grounds for Mr Rayner to report the incidents. In this regard:

    56.1. Mr Ruddell formed the view that the claimant had probably jumped down from the cab because the claimant had not suggested otherwise and in essence, Mr Ruddell felt, had acknowledged that he probably had. Mr Ruddell considered that to go against good health and safety practice and that the incident was, therefore, an appropriate matter for Mr Rayner to have reported.

    56.2. Mr Ruddell formed the view that it was appropriate for Mr Rayner to report the reversing incident because it had appeared, not just to Mr Rayner but to others, that the claimant was reversing towards a pedestrian. Whatever the claimant's intentions may have been it was appropriate, in Mr Ruddell's view, for Mr Rayner to have reported the matter.

    56.3. Mr Ruddell formed the view the claimant had taken an unnecessary journey with his fork-lift truck and that that went against appropriate safe

practice. Mr Ruddell considered it had been appropriate for Mr Rayner to report that fact.

56.4. Mr Ruddell accepted that there was no designated space to park the fork-lift truck in the supermarket area and that this was problematic. However he did not consider the fact that Mr Rayner had reported that matter was evidence of animosity on his part or bullying towards the claimant.

57. Mr Ruddell wrote to the claimant on 20 May with a letter setting out the outcome of the grievance. He said he had decided not to uphold the claimant's grievance and he set out his reasons, referring to the speak up and listen up culture.

The claimant's resignation

58. The next day the claimant resigned. His letter began 'I'm writing to inform you that I am resigning from my position as store man with Caterpillar UK Ltd with immediate effect.'

59. As a matter of law the claimant's employment ended as soon as that email was received by the respondent.

60. Mr Ruddell sent an email to the claimant upon receipt of that email. He said 'Before formally acknowledging your intention to resign your position with Caterpillar UK, I would like to invite you to an in person meeting to discuss the issues outlined in the letter in more depth.' He went on to say he had booked a meeting room and invited Ms Ball from HR to attend as well. The claimant then sought to retract his resignation, which had been without notice, and instead substitute a resignation on notice but the respondent declined to allow him to do so.

Legal framework

61. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed.

Dismissal

62. A claim of unfair dismissal cannot succeed unless there has been a dismissal as defined by section 95 of the Employment Rights Act 1996. It is for the claimant to prove, on the balance of probabilities (ie that it is more likely than not), that he has been dismissed.

63. In this case, the claimant claims he was dismissed within the meaning of section 95(1)(c), which provides that termination of a contract of employment by the employee constitutes a dismissal if he was entitled to so terminate because of the employer's conduct. In colloquial terms, the claimant says he was constructively dismissed.

64. For a claimant to establish that there has been a constructive dismissal, he must prove that:

64.1. there was a breach of contract by the employer;

64.2. the breach was repudiatory ie sufficiently serious to justify the employee resigning;

64.3. he resigned in response to the breach and not for some other unconnected reason; and

64.4. he had not already affirmed the contract before electing to leave.

Repudiatory breach of contract

Implied term of trust and confidence

65. Its established law that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666, EAT; Lewis v Motorworld Garages Ltd [1986] ICR 157, CA; Mahmud v Bank of Credit and Commerce International SA (often cited as Malik v BCCI) [1997] ICR 606, HL.

66. The test is not whether the employer's actions were unreasonable. Nor whether they fell outside the range of reasonable actions open to a reasonable employer: Buckland v Bournemouth University [2010] IRLR 445, CA.

67. Case-law shows that the conduct needs to be repudiatory in nature in order for there to be a breach of the implied term of trust and confidence (see Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT). This was emphasised by the Court of Appeal in the case of Tullett Prebon Plc & ors v BGC Brokers & ors [2011] EWCA Civ 131; [2011] IRLR 420. There, the Court of Appeal cited the case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 and stressed that the question is whether, looking at all the circumstances objectively, from the perspective of the reasonable person in the position of the innocent party, the conduct amounts to the employer abandoning and altogether refusing to perform the contract.' The High Court in the Tullett case held (in a judgment subsequently upheld by the Court of Appeal) that 'conduct which is mildly or moderately objectionable will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough'; Tullett Prebon v BGC [2010] IRLR 648, QB.

68. When assessing whether conduct was likely to destroy or seriously damage the trust and confidence, it is immaterial that the employer did not in fact intend its conduct to have that effect: Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT.

69. Similarly, there will be no breach of the implied term simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held (Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA).

70. The question is whether, viewed objectively, the conduct is calculated or likely to destroy or seriously damage the trust and confidence. The employee's subjective response may, however, be of some evidential value in assessing the gravity of the employer's conduct (see the Tullett Prebon case above in the High Court).

71. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually would not constitute a breach of the

term (United Bank Ltd v Akhtar [1989] IRLR 507). In Lewis v Motorworld Garages Ltd [1986] ICR 157, CA, Glidewell LJ said: '… the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?'

72. In Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35, CA the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series, the cumulative effect of which was to amount to the breach. Those acts need not all be of the same character but the 'last straw' must contribute something to that breach. Viewed in isolation, it need not be unreasonable or blameworthy conduct but the Court of Appeal noted in Omilaju that will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfies the final straw test.

Implied duty in relation to grievances

73. In addition to the implied term of trust and confidence, employers have an implied contractual duty 'reasonably and promptly [to] afford a reasonable opportunity to their employees to obtain redress of any grievance they may have': W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516.

74. If that implied term is breached, it does not automatically follow that the breach will justify the employee resigning and claiming that he has been dismissed. An employee will only be able to establish they have been constructively dismissed if the breach is so serious or fundamental that it amounts to a repudiation of the contract.

Termination in response to the breach

75. In light of my conclusions below it is unnecessary to say more about the law in this respect.

Conclusions

76. Mr Atkinson's case is that the respondent constructively dismissed him by doing one or more of the following things:

    76.1. Mr Rayner complaining (on 21 February 2024) that Mr Atkinson parked a fork-lift truck in an area Mr Rayner perceived he should not be parked;

    76.2. Mr Rayner creating several safety reports about Mr Atkinson's operation of the fork-lift truck over the rest of the day (after Mr Atkinson confronted Mr Rayner when he complained about the fork-lift);

    76.3. the respondent failing to deal with a grievance submitted by Mr Atkinson within a reasonable time; and

    76.4. the respondent not upholding Mr Atkinson's grievance.

77. The first two of those matters concern Mr Rayner's actions.

Mr Rayner's complaint about parking fork-lift truck

78. It is not disputed that (on 21 February 2024) Mr Rayner complained to Mr Atkinson about where he had parked a fork-lift truck in the supermarket area. The facts as I have found them to be are as follows:

    78.1. Mr Rayner had a genuine concern about where the claimant had parked.

    78.2. Raising that with the claimant as Mr Rayner did was entirely in line with the respondent's policy of encouraging staff to flag potential safety risks when they saw them and in line with Mr Rayner's responsibilities as a team lead.

    78.3. Mr Rayner was not acting in bad faith nor bullying the claimant when he spoke with the claimant about this issue.

79. I conclude that Mr Rayner had reasonable and proper cause to raise this issue with the claimant in the way he did. Mr Rayner doing so did not amount to, nor was it capable of contributing to, a breach of the implied term of trust and confidence.

80. In any event, Mr Rayner raising this as he did was not something that was either calculated or likely to destroy or seriously damage the relationship of confidence and trust between the respondent and the claimant.

Mr Rayner creating safety reports

81. It is not disputed that Mr Rayner created four safety reports about Mr Atkinson's operation of the fork-lift truck on 21 February 2024. The relevant facts as I have found them to be are as follows:

    81.1. It is the respondent's practice to encourage employees generally, and team leaders in particular, to report safety concerns. As a team leader, Mr Rayner had a particular responsibility to comply with the respondent's policies in this regard.

    81.2. Mr Rayner had genuine concerns about the parking incident. He believed that the claimant had created a safety hazard by parking the fork-lift truck where he had.

    81.3. Mr Rayner saw the claimant dismount from the fork-lift truck without using three points of contact. Using three points of contact was the appropriate and safest way to dismount and dismounting in a different way risked injury. Mr Rayner knew that to be the case and believed that the claimant had taken an unnecessary risk when dismounting in the way he did.

    81.4. With regard to incident number 76706 (the route taken by the claimant in the fork-lift truck and the allegation that the journey was unnecessary), the more and longer journeys there are in a fork-lift truck the greater the hazard. It is the respondent's policy to seek to reduce the number of journeys in a fork-lift truck. Mr Rayner is likely to have viewed this as an unnecessary journey undertaken by the claimant and therefore one which increased hazards unnecessarily.

    81.5. The claimant did not engage constructively with Mr Rayner when Mr Rayner tried to raise the parking matter informally with him. That being the

case, it is unsurprising that Mr Rayner then raised the above matters on the near miss system: that is what the system is there for and logging the matter was in line with the respondent's policy.

81.6. As to the reversing incident (Incident number 76777) Mr Rayner had seen the claimant reverse in the direction of a pedestrian crossing at the same time as somebody was crossing it.

81.7. Mr Rayner made the reports because he had genuine concerns about the actions taken by the claimant. By making near miss reports as he did, Mr Rayner was not 'retaliating' against the claimant but was simply logging genuine safety concerns in an appropriate manner and in accordance with his duties. Mr Rayner did not act in bad faith in logging those matters as near miss incidents. Nor did he do so in order to bully the claimant.

82. I conclude that Mr Rayner had reasonable and proper cause to make the near miss reports as he did. Mr Rayner doing so did not amount to, nor was it capable of contributing to, a breach of the implied term of trust and confidence.

83. In any event, Mr Rayner making these near miss reports was not something that was either calculated or likely to destroy or seriously damage the relationship of confidence and trust between the respondent and the claimant.

Failing to uphold grievance

84. The claimant contends that the respondent breached the implied term of trust and confidence by failing to uphold Mr Atkinson's grievance.

85. The decision not to uphold the grievance was taken by Mr Ruddell. I have made the following findings of fact:

85.1. Mr Ruddell took seriously and investigated conscientiously the claimant's allegation that Mr Rayner had effectively used the near miss reporting system to get back at the claimant due to their altercation.

85.2. Before reaching his decision not to uphold the grievance Mr Ruddell spoke to those involved including Mr Raynor and others and considered what the claimant had said.

85.3. Mr Ruddell did not uphold the grievance because he formed the view that Mr Rayner had not been using the near miss reporting system to retaliate against the claimant. It was Mr Ruddell's belief, having investigated the matter, that Mr Rayner had raised the matters in good faith. In reaching that conclusion Mr Ruddell considered whether Mr Rayner had valid grounds was to report the incidents and concluded that he did.

86. Mr Ruddell formed a view that was clearly open to him on the evidence available to him. He had reasonable and proper cause not to uphold Mr Atkinson's grievance. Therefore, his doing so cannot have been, or contributed to, a breach of the implied term of trust and confidence.

Delay in dealing with grievance

87. The claimant's remaining allegation is that the respondent failed to deal with the grievance submitted within a reasonable time.

88. The claimant originally complained about Mr Rayner in an incident report which he gave to his team leader Mr Howes. The respondent cannot reasonably be criticised for not treating this incident report as a grievance. The claimant had been with the respondent long enough to know that if he wished to raise a grievance, the appropriate way to do that was through the grievance procedure.

89. The claimant submitted a grievance on 26 February. At the outset, the respondent responded promptly to the grievance. It was acknowledged straightaway. Mr Ruddell was appointed promptly and met with the claimant on 7 March.

90. It was appropriate for the respondent to investigate the near miss incidents themselves through its usual investigation procedure before conducting an investigation into the motivation of Mr Rayner in making those reports. It was appropriate to expect Ms Dewdney to do that as she was the manager at the time responsible for conducting that investigation and she had already spoken to the claimant about it.

91. However, there was a delay in doing the next day story board. This element of the investigation was not completed until 7 May. That is two months after Mr Ruddell met with the claimant. Once the next day story board was completed on 7 May, Mr Ruddell promptly arranged to meet the claimant, completed his investigation and told the claimant of the outcome on 20 May. I consider that there was no undue delay in dealing with the grievance between 7 May and 20 May.

92. Going back to the period between 7 March and 7 May, initially, there was a short period of delay dealing with the next day story board due to some confusion as to who was doing it. However, that confusion was resolved during week commencing 11 March. It still then took another seven or eight weeks to do the next day story board. Over this period Ms Dewdney knew Mr Ruddell was waiting for it to be completed before he was able to complete looking at the claimant's grievance.

93. I have found that Ms Dewdney did not deliberately delay the investigation. Rather, Ms Dewdney's failure to carry out the next day story board investigation in a timely manner was in significant part due to the fact that Ms Dewdney was experiencing a number of personal difficulties in her home life which meant that she was having to spend a lot of time at home dealing with those matters. Nevertheless there was delay and the effect of that delay was compounded by the fact that the respondent did not keep the claimant up to date in any active sense as to what was happening. What has not been explained is why, given she was struggling to complete the investigation, Ms Dewdney did not speak to anyone in HR or management to explain, or, why, if her managers knew that she was struggling, they did not speak to her about this. Nor is it clear why HR did not investigate the reasons for the delay further. Neither Ms Ball nor Mr Ruddell discussed with Ms Dewdney's line manager the need for the investigation to be completed and the effect this was having on the resolution of the grievance. Nor did Ms Dewdney's line manager discuss the matter with Ms Dewdney or take steps to ensure she or someone else could complete the investigation in a timely manner. The respondent could undoubtedly have been more proactive in finding out what the problem was and keeping the claimant abreast of difficulties. There was, I have found, a collective

organisational failure between 7 March and 7 May to ensure the claimant's grievance was dealt with promptly.

94. The ACAS Code of Practice on grievance and discipline provides that employers should deal with grievances promptly and should not unreasonably delay meetings and decisions. There was a breach of the ACAS Code in this case in that the grievance was not dealt with promptly in the period between 7 March and 7 May 2024. There was no deliberate delay. However, it took an unreasonable amount of time to progress the claimant's grievance over this period. It seems to me that the grievance was not given the priority it should have been given, especially given the claimant was off work with stress.

95. I have concluded that the delay between 7 March and 7 May 2024 amounted to a breach of the respondent's implied contractual duty, recognised in the case of W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516, to '… promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'.

96. However, I have concluded that, assessed objectively, the respondent's breach of contract was not a significant breach that went to the root of the contract of employment or which showed that the respondent no longer intended to be bound by the implied term. In other words, I have concluded that this breach of contract was not so serious or fundamental that it amounted to a repudiation of the contract of employment. I say that for the following reasons:

    96.1. This was not a case in which the employer failed to provide any mechanism whereby its employees' grievances could be ventilated and addressed. Nor was it a case in which lip service was paid to the grievance policy and the claimant fobbed off when he sought to raise the matter. On the contrary, the respondent did have a grievance procedure and in the early stages the respondent responded very promptly to the claimant's grievance. Ms Dewdney acknowledged the grievance straight away and passed it on to HR. A meeting then took place within a very few days and the claimant was told of the need to complete the next day story board investigation. The next day Mr Ruddell emailed Ms Dewdney asking her to progress her investigation and let him know when that was done and the outcomes. Two working days later Mr Ruddell contacted Ms Dewdney again to ask about the next day story board and later that week Ms Dewdney spoke to a colleague about that matter. Those were not the actions of an employer set on ignoring a grievance or dragging its feet in dealing with it.

    96.2. The delay stemmed from the decision that the next day story board should be completed before the grievance investigation was made. That decision in itself cannot be criticised; it was made for good reason. That process was intended to enhance rather than thwart the process of investigating the grievance.

    96.3. I have found that Ms Dewdney's delayed conclusion of the next day story board was not deliberately designed to hold up the grievance investigation. It was at least in part explained by the difficulties she was experiencing in her personal life.

96.4. At the end of April when the claimant contacted Mr Ruddell enquiring about the status of the investigation, Mr Ruddell responded the same day and then spoke to the claimant a couple of days later. Again, those were not the actions of an employer trying to avoid its responsibility to address the claimant's grievances.

96.5. The claimant should not have had to chase the respondent up and the respondent could undoubtedly have been more proactive in finding out what the problem was and keeping the claimant abreast of difficulties. Nevertheless, viewed objectively, the facts in the round do not give the impression of an employer that was intent on dragging its feet or thwarting the claimant's attempts to ventilate his grievance.

97. For the same reasons I have also concluded that the respondent's delay in dealing with the grievance was not conduct that, assessed objectively, was calculated or likely to destroy or seriously damage the relationship of trust and confidence. Although I accept that the respondent's action (or inaction) was moderately objectionable and caused some damage to the relationship of trust and confidence, it was not repudiatory in nature and not serious enough to amount to a breach of the implied term of trust and confidence.

98. My conclusion then is that:

98.1. the respondent did not breach the implied term of trust and confidence; and

98.2. although the respondent breached its implied contractual duty to promptly afford the claimant a reasonable opportunity to obtain redress of his grievance, the breach was not repudiatory in nature.

99. That means the claimant was not entitled to resign without notice. When the claimant terminated his employment, that did not amount to a dismissal by the respondent.

100. For that reason the claimant's claim of unfair dismissal fails because he has not established he was dismissed.

Employment Judge Aspden

27 February 2025