EMPLOYMENT TRIBUNALS

Claimant: **Mr R Hepworth**

Respondent: **NRG LTD**

Heard at: **Leeds** **On: 10 December 2025**

Before: **Employment Judge Themistocleous**

Representation
Claimant: **Ms Duane, Counsel**
Respondent: **Mr Robinson, Solicitor**

RESERVED JUDGMENT

1. The claim for unfair dismissal is well founded and succeeds.

2. In respect of the calculation of remedy:

    a. There will be no reduction to the award to reflect the chance that the Claimant would have been fairly dismissed if the Respondent had followed a fair procedure in dismissing him;
    b. The Claimant contributed by his conduct to his dismissal to the extent of 50%. The basic and compensatory awards will be reduced accordingly; and
    c. An uplift of 15% will be made under section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 to the compensatory award for unfair dismissal for the Respondent's failure to follow the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures in respect of the Claimant's dismissal.

3. The Tribunal will decide remedy for unfair dismissal, if not agreed, at a further hearing to be listed. Notice of Hearing to follow separately.

REASONS

Background

1. The Claimant brought a claim for unfair dismissal following the termination of his contract of employment by the Respondent on 7 November 2024 by reason of misconduct.

2. The Respondent is a gas and oil distributor to both residential and commercial clients.

Evidence

3. The Tribunal had before it an agreed bundle of documents of 285 pages and three additional documents sent separately.

4. All witnesses submitted written witness statements in advance of the hearing and attended for cross examination. The Tribunal heard first from Mr Garrett, Operations Director (the disciplinary officer) and then Mr Royle, Managing Director (the appeal officer) on behalf of the Respondent. It then heard from the Claimant.

5. There was insufficient time to hear oral submissions and therefore both parties provided written submissions by 24 December 2025.

6. Having considered all relevant evidence, the Tribunal makes the factual findings set out below.

Issues

7. The issues were agreed at the outset of the hearing:

    7.1. What was the reason for the dismissal and was it a potentially fair reason for the purposes of section 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent relied upon misconduct as the reason for dismissing the Claimant.

    7.2. Did the Respondent reasonably believe that the Claimant had committed the act of misconduct, namely causing the oil spill?

    7.3. Did the respondent carry out a reasonable investigation?

    7.4. Was the dismissal procedurally unfair?

    7.5. Was dismissal a sanction within the range of reasonable responses? In particular, was it within the band of reasonable responses to dismiss the Claimant for gross misconduct for causing an oil spill?

    7.6. If the dismissal was procedurally unfair, what difference, if any would a fair procedure have made?

7.7. Did the Claimant contribute to his dismissal?

7.8. Was the ACAS code of conduct breached?

Facts

8. On 3 February 2014, the Claimant commenced employment with the Respondent as an Account Manager.

9. On or around 10 April 2017, the Claimant moved into the role of HGV Tanker Driver and took on the responsibility for delivering fuel directly to customers. His working day was approximately 5am until 1pm.

10. Between 2017 and 2022, the Claimant undertook role-specific training on ADR (dangerous goods), PDP (Petroleum Driver Passport) and Driver CPC qualifications. He also received on the job training from another driver when starting his role on undertaking deliveries. There was much dispute between the parties as to whether or not a Standard Operating Procedure (SOP) was in existence and whether the Claimant and other drivers were aware of it. One SOP dated November 2024 was included in the bundle, referenced in the ET3 response form and Respondent's witness statements, albeit the Respondent accepted that it came into existence one week after the Claimant's termination. The Respondent then subsequently asserted two things:

    10.1. That the SOP produced in November 2024 simply confirmed the practice drivers were already carrying out and were fully aware of; and

    10.2. It was a later version of the SOP referred to in the Driver Handbook that was in force at the time of the Claimant's termination. However, that was not produced in the hearing or relied upon. Mr Royle gave evidence to the effect that the suggested earlier version of the SOP was broadly the same as the 2024 version, but was unable to comment on what any of the changes or additions were to the 2024 version, which the Tribunal found to be most unsatisfactory.

11. The Claimant maintained that all drivers were doing slightly different things, that he never had sight of the driver handbook or either SOP. The November 2024 SOP gave precise detail on what drivers should do when delivering fuel. The Respondent noted it had been produced at the request of Mr Royle on the appointment of a new Health and Safety Manager, rather than in response to the incident involving the Claimant.

12. The Tribunal preferred the evidence of the Claimant that no SOP was shared with drivers as being in force at the time of the incident which led to his dismissal and that all drivers were doing things slightly differently. This conclusion was made on the basis that the Respondent repeatedly referred to November 2024 SOP that was not in existence at the time of the incident and did not even produce the version allegedly in force at the time, either during the disciplinary, appeal or the proceedings, which was fundamental to the reason the Claimant

was dismissed. The Tribunal therefore found the prescriptive process for delivering fuel outlined in the November 2024 SOP did not apply in this case.

13. From 2021, the Respondent operated a discretionary bonus system of £1000 per year per driver. Bonuses were reduced for various reasons one of which was when oil spillages occurred. A minor spill would result in a deduction of £30 and a major spill a deduction of £100. The Respondent strongly asserted this bonus deduction system was not in place instead of or in substitution ofa disciplinary system. The Claimant asserted that this lead to confusion as to the seriousness of spillages and how matters would be managed. The Respondent alleged that following the appointment of a new Operations Director, Mr Garnett, the discretionary bonus scheme was withdrawn in June 2024, on the basis that it was not a sufficient deterrent for safeguarding against oil spills. The Respondent was unable to point to any evidence alerting employees of this change. The Claimant accepted that he had heard that remuneration was being changed (he thought from 1 November 2024) but he was unclear why.

14. The Tribunal accepted both the Claimant's submission that this caused confusion as to the seriousness and how matters would be managed but also the Respondents submission that was not in place instead of a disciplinary system - both a deduction to bonuses and disciplinary action could be taken. Indeed there was evidence of other terminations for causing spills. The Tribunal found there was no marked change in how the Respondent dealt with oil spills on Mr Garnett's appointment to employees' knowledge tantamount to a "clamp down", on the basis that the Respondent's witness could not point to any documentation supporting a change nor give any substantial oral evidence on the point.

15. The Respondent had a disciplinary policy. The policy gave examples of gross misconduct and noted that a potential sanction for gross misconduct could be dismissal without notice. The policy also noted:

    15.1. Disciplinary allegations will be outlined to employees in writing with confirmation of the range of possible sanctions;
    15.2. A summary of information gathered at the investigation as well as any document to be relied upon at the hearing will be provided to the employee;
    15.3. Employees would be given 5 working days' notice of a disciplinary hearing; and
    15.4. Employees will be informed in writing of the decision and the reason for it.

16. On 9 August 2024, there was a spillage incident involving another driver (Mr C Newbould). Mr Newbould essentially left the tank loading and went to sit down because he felt unwell and was suffering from a suspected hernia which later transpired to be a UTI. Prior to starting work, Mr Newbould had alerted the Respondent of this. Mr Newbould was initially dismissed but was later reinstated on appeal by Mr Garnett the Respondent's Operations Director, in

light of the mitigating health-related factors. The Claimant supervised Mr Newbould for a day on his return to work.

17. Documents were included in the bundle relating to several other colleagues involved in oil spills however the Respondent did not assert a positive case that their circumstances were the same as the Claimant's and indeed some were in their probationary period. The Tribunal did not find that any of the other cases were substantively similar to the Claimant's.

18. In the summer of 2024, the Claimant's brother became seriously unwell, and in later months died. The Claimant alerted his Line Manager, Duncan regarding this. The Claimant gave testimony this severely affected his and his father's mental health.

19. On 11 October 2024, the Respondent had an order to deliver approximately 5,000 litres of oil to a customer at Scoreby Grange, Helmsley. The Claimant was allocated this delivery, as part of a schedule of deliveries that day. This delivery was different to those he had already done that day as it required the Claimant to hold the gun when unloading the fuel. The Claimant had not delivered to this site for around 2 years.

20. On 11 October 2024, following attempting to call the farmer and the Respondent, on arrival the Claimant relied on confirmation of a person on site (who he assumed to be the farmer) as to which of the two tanks there should be filled with fuel – it transpired the tank directed to be filled by the person there was the wrong tank and it was indeed not empty nor did it have sufficient capacity to take the delivery. There was some dispute between the parties as to whether the person the Claimant spoke to was competent to give instructions, albeit the only reference to that being a requirement in the delivery before the Tribunal was in the November 2024 SOP that was not yet in force at the time of the incident. The Claimant accepted that he tapped the tank and checked a gauge before fueling but it transpired it was the wrong gauge, due to another gauge being located near this tank. The Claimant accepted not remaining with the tank whilst fueling as he should have and rather returned to his vehicle cab to complete his paperwork. The Claimant noted in oral testimony that he was trying to finish his work as quickly as possible to return home to his family due to the position with his brother and father which was worsening by the day and that it was impacting on his own mental health, all of which was accepted by the Tribunal in light of the Claimant's compelling testimony. During the delivery, spillage occurred. The exact amount of the spillage was unclear albeit both parties agreed it was serious and caused an environmental impact. The Claimant immediately took action to remedy the issue and reported the incident. The Respondent estimated the incident led to remediation costs of around £13,000 albeit noted it was not possible to confirm the cost exactly due to the ongoing long term nature of remediation works, which the Tribunal accepted. The Claimant disputed the extent of the damage and the cost to remedy it, albeit in light of his concession that the spill was "serious and caused environmental impact" the Tribunal was not concerned as to the exact extent of the damage and remedial costs.

21. On 23 October 2024, the Claimant attended an investigatory meeting with the Respondent's Transport Director, Chris Welch. The Claimant confirmed his account, acknowledging that he had not remained with the tank during delivery, had not checked that the gauge used related to the correct tank and accepted that this reflected complacency.

22. No other witnesses or the customer were contacted or interviewed.

23. On 29 October 2024, the Respondent invited the Claimant to a disciplinary hearing for "causing a fuel spill". The letter enclosed the investigation report but no other documents (namely the remediation costs, the delivery note or the driver handbook/SOP). The letter made no reference to the disciplinary policy nor did it append it or confirm where it could be found. The Claimant accepted looking at it online at some point around the disciplinary hearing. Notably the letter did not confirm the allegation could amount to gross misconduct or that dismissal without notice was a potential sanction if the gross misconduct was confirmed. The letter did inform the Claimant of the right to be accompanied to the hearing.

24. On 4 November 2024, a disciplinary hearing was held before the Respondent's Operations Director, Mr Garnett. At the start of the Hearing Mr Garnett informed the Claimant the allegation might amount to gross misconduct and he could be dismissed if the allegation was upheld. The Claimant subsequently noted that had he had had prior warning of this, he would have organised a representative. The Claimant was asked if he was okay to proceed without a representative which he agreed, he said on the basis he didn't believe he would be dismissed. During the hearing, the Claimant explained the process he should have followed and acknowledged failures to identify the correct tank, establish ullage via the gauge and supervise the offload throughout. The Claimant made no mention of his brother's or father's ill health, or the impact it was having on his own health. The Claimant said in cross examination this was because he did not think he was really at risk of dismissal and did not want to attribute blame to his brother.

25. On 7 November 2024, the Respondent decided to dismiss the Claimant for gross misconduct without notice and confirmed the same by letter. The letter did not give any detailed findings or reasons for the decision. The Claimant was notified of the right of appeal.

26. On 12 November 2024, the Claimant lodged a written appeal against dismissal, contending that the sanction was too harsh given his length of service (10 years) and clean record.

27. On 18 November 2024, the Respondent invited the Claimant to an appeal hearing to be held by video link on 20 November 2024. In preparation, Respondent sent the Claimant the disciplinary hearing minutes and a contract of employment. The Claimant asserted he had never seen the contract before. The invitation confirmed the process and that the appeal would review both the

decision and the evidence available at the time, albeit the appeal officer and Managing Director, Mr Royle noted no further investigation was undertaken.

28. In conducting the appeal, the appeal officer considered evidence not put before the Claimant including remediation costs and the delivery note.

29. On 20 November 2024, the appeal hearing took place. Shortly before the hearing, the Claimant emailed a four-page submission expanding his appeal grounds and the appeal manager confirmed he would review this document before reaching a decision. During the hearing, the Claimant relied on his length of service and previously clean record, accepted he had made a mistake rather than acted deliberately and argued that dismissal was disproportionate. He compared his case to Mr Newbould who had been reinstated on appeal following a similar incident and he raised his personal circumstances regarding his brother and father's health and the impact that was having on him. He noted in cross examination he had not mentioned this before as he was a very proud person and did not want to be seen to be placing blame on his brother for what had happened.

30. On 29 November 2024, the Respondent issued the written appeal outcome (attaching a short report with very limited conclusions), confirming that the dismissal for gross misconduct would be upheld but gave very little in terms of reasons as to why each ground of appeal had been dismissed. In oral evidence, Mr Royle contended the Claimant's actions had been deliberate which had never been put to the Claimant. In cross examination, the Claimant did not accept he "chose" to leave the tank, and that Mr Newbould had "no choice" but to leave it due to pain. Rather the Claimant contended both he and Mr Newbould left the tank due to their different health issues, the Claimant's being mental health related. The Tribunal found that in cross examination, Mr Royle seemed to have no appreciation that a mental health condition could impact upon an employee's ability to carry out their role and make decisions, in the same way a physical health condition could and that impaired his judgment in assessing this ground of appeal.

31. The Claimant started ACAS Early Conciliation on 29 January 2025 and it ended on 4 March 2025.

32. The Claimant issued proceedings in the Tribunal for unfair dismissal on 26 March 2025.

Applicable law

33. Section 98 (1) Employment Rights Act 1996 provides that in determining for the purposes of this part, whether the dismissal of an employee is fair or unfair, it is for the employer to show:

> *(a) The reason (or if more than one the principle reason for the dismissal).*
> *(b) That it is either a reason falling within subsection (2) or some*

other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

A reason falls within the subsection if it –

(b) relates to the conduct of the employee,

34. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –

(a) *depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and*

(b) *shall be determined in accordance with equity and the substantial merits of the case.*

35. The guidelines set out in the case of ***British Home Stores Limited -v- Burchell [1978] IRLR 379*** applies to this case in that the test to be satisfied is that:
    35.1. The Respondent honestly believed that the claimant was guilty of the misconduct alleged;
    35.2. The Respondent had reasonable grounds on which to sustain that belief; and
    35.3. The Respondent had carried out an investigation that was reasonable in the circumstances.

36. The Tribunal must finally consider whether dismissal was a reasonable sanction for the alleged misconduct. In determining whether the Respondent's decision to dismiss for conduct is reasonable pursuant to Section 98(4) of the ERA, the Tribunal is assisted by the band of reasonable responses approach which is proved in the case of ***British Leyland (UK) Limited -v- Smith [1981] IRLR 91***. It was stated that:-

"the correct test is:

was it reasonable for the Employer to dismiss [the Employee?]. If no reasonable Employer might reasonably have dismissed him, then the dismissal was unfair. But if a reasonable Employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all cases, there is a band of reasonable responses within which one Employer might reasonably take one view whereas another might reasonably take a different view".

37. The Tribunal cannot substitute its own decision for that of the Respondent (affirmed by the Court of Appeal in ***Sainsbury's Supermarkets Limited -v- Hit [2003] IRLR 23*** even if it believed that the decision to dismiss was harsh in the circumstances. The dismissal will be fair unless the Respondent's decision to dismiss was one which no reasonable employer could have reached.

38. The case of **Polkey –v- A E Dayton Services Limited 1987 IRLR 503 HL** indicates that generally an employer will not have acted reasonably in treating a potentially fair reason as a sufficient reason for dismissal unless or until it has carried out certain procedural steps which are necessary, in the circumstances of that case, to justify the course of action taken. In applying the test of reasonableness in Section 98 (4) the Tribunal is not permitted to ask whether it would have made any difference to the outcome if the appropriate procedural steps had been taken, unless doing so would have been "futile". Nevertheless, the **Polkey** issue will be relevant at the stage of assessing compensation. **Polkey** explains that any award of compensation may be nil if the Tribunal is satisfied that the Claimant would have been dismissed in any event. However, this process does not involve an "all or nothing" decision. If the Tribunal finds that there is any doubt as to whether or not the employee would have been dismissed, the **Polkey** element can be reflected by reducing the normal amount of compensation accordingly.

39. Section 122(2) provides as follows:

40. *"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."*

41. Section 123(6) then provides that:

42. *"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."*

43. Three factors must be satisfied in this regard:

43.1. the relevant conduct must be culpable or blameworthy;

43.2. it must have actually caused or contributed to the dismissal; and

43.3. it must be just and equitable to reduce the award of compensation by any percentage specified.

44. The burden of proof is on the Respondent in this respect.

45. Tribunals are also obliged to take the provisions of the ACAS Code of Practice on Discipline and Grievance Procedures 2015 into account in that it sets out the basic requirements of fairness which are applicable in most cases of misconduct.

46. Applying the legal principles to the facts as found, the Tribunal reaches the conclusions set out below.

Conclusions

What was the reason for the dismissal and was it a potentially fair reason for the purposes of section 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent relying upon misconduct as the reason for dismissing the Claimant.

47. Mr Garrett, the Disciplinary Officer asserted the reason for dismissal was creating an oil spill through failing to identify the correct tank to be filled, failing to establish ullage via the correct gauge and failing to supervise the offload, which he asserted amounted to gross misconduct but did not reference the applicable part of the disciplinary procedure.

48. Mr Royle the Appeal Officer asserted in oral evidence that the dismissal was due to a deliberate act by the Claimant, choosing to leaving the offload, which led to the spill. Causing deliberate damage to property was referenced by Mr Royle as the act of gross misconduct under the Respondent's disciplinary policy that he had in mind.

49. Whilst the reason for dismissal was not well articulated by the Respondent and it did not highlight to the Claimant that it could amount to gross misconduct or refer to the relevant section of the disciplinary policy relied upon, the Tribunal found the Claimant was dismissed for causing an oil spill, essentially by his negligence in not properly supervising the offload, a matter both the Respondent's witnesses relied upon, albeit articulated differently. Whilst causing an oil spill is not listed as an example of misconduct or gross misconduct in the Respondent's disciplinary policy, nor is the policy required to list all examples exhaustively, "causing loss, damage or injury through serious negligence" is listed as an example of gross misconduct and the Tribunal found causing an oil spill that was by the Claimant own admission "serious and caused environmental impact" would fall into this category.

50. The Tribunal was not persuaded by the Claimant's submission that a matter of negligence was never put to the Claimant and that therefore it could not be the reason relied upon. Whilst the word "negligence" was not used, it is evident from the allegation "causing a spill" and "not supervising the offload" negligence was indeed the crux of the allegation.

51. The Tribunal was also not persuaded by the Claimant's submission that the bonus scheme essentially prevented the Respondent from treating oil spills as disciplinary matters at all, albeit agreed it created a degree of confusion, but there was indeed evidence other employees had been dismissed for causing spills.

52. The Tribunal is therefore satisfied the reason for dismissal was misconduct and not any other reason. Misconduct is a potentially fair reason pursuant to section 98 (4) of the ERA 1996.

Did the Respondent reasonably believe that the Claimant had committed the act of misconduct, namely causing the oil spill?

53. The Tribunal has found the Respondent had a genuine belief that the Claimant was guilty of misconduct on the basis that the Respondent carried out an investigation meeting with him and the Claimant accepted failing to identify the correct tank to be filled, failing to establish ullage via the correct gauge and failing to supervise the offload throughout, which ultimately led to the oil spillage.

Did the respondent carry out a reasonable investigation?

54. Reasonable investigation is not all investigation possible and it is not necessary to be to a to criminal standard.

55. In light of the Claimant's admissions noted above the level of investigation carried out was reasonable. The Claimant at least was spoken to. There is little else the Respondent could have done to ascertain what happened.

56. The Respondent did not dispute that a person on site may have directed the Claimant to fill the tank in question or that the gauge for the tank was in an obscure place, indeed with a gauge for a different tank close by.

57. The Tribunal was not persuaded by the Claimant's submission that the Respondent undertaking any further investigation at the site or with the person present at the site was reasonably necessary, nor that it would have impacted the investigation or process beyond that point.

Was the dismissal procedurally unfair?

58. The Tribunal has found the Respondent did not follow a fair procedure in terminating the Claimant's employment. It is noted that the Respondent took the following steps:

    58.1. Carried out a reasonable investigation as noted above;
    58.2. Permitted the Claimant to be accompanied to the disciplinary hearing;
    58.3. Held a disciplinary hearing – put allegations to the Claimant and considered his responses;
    58.4. Communicated the decision to dismiss to the Claimant;
    58.5. Offered an appeal; and
    58.6. Issued an appeal outcome letter.

59. However, fundamentally the Respondent did not:

    59.1. Provide a notice of disciplinary hearing setting out the allegations in breach of Respondent's own policy;
    59.2. Provide 5 working days' notice of the disciplinary hearing in breach of Respondent's own policy;
    59.3. Provide all the relevant evidence to be considered by the disciplinary officer in advance of hearing, in breach of Respondent's own policy, not enabling the Claimant to consider and respond to the allegations appropriately;
    59.4. Provide a copy of the disciplinary procedure or details as to where it could be found;

59.5. Warn the Claimant that the allegation may amount to gross misconduct or that a potential outcome could be dismissal without notice in advance of the disciplinary hearing in breach of Respondent's own policy – which the Claimant said would have changed their position on not having a companion had he have known in advance;
59.6. The disciplinary decision did not give detailed reasons for the decision in breach of Respondent's own policy;
59.7. The Appeal Officer did not give adequate consideration to the appeal grounds as detailed in the factual findings above and that resulted in inconsistent treatment with Mr Newbould;
59.8. The appeal did not remedy any breaches in the disciplinary; and
59.9. The appeal outcome did not adequately address the points of appeal and give detailed reasons for the decision.

60. On this basis, the Tribunal concludes that the procedure followed by the Respondent was unfair. The Claimant's complaint of unfair dismissal therefore succeeds on procedural grounds alone. There is no need to go any further, but for the sake of completeness, I have considered the position if I am wrong in relation to the question of procedural fairness.

<u>Was dismissal a sanction within the range of reasonable responses? In particular, was it within the band of reasonable responses to dismiss the Claimant for gross misconduct for causing an oil spill?</u>

61. Taking care not to substitute Employment Tribunal's own decision, the Tribunal went on to consider if dismissal was in the range of reasonable responses a reasonable employer might take. That is not to say there are no other decisions another employer may have taken - to be unfair no reasonable employer would have dismissed.

62. The Tribunal found that the decision was not within the range of reasonable responses a reasonable employer might take. In light of the following:

62.1. The Respondent caused confusion by having a policy to deduct sums from employees bonuses for causing minor and major oil spills. It was unclear how such policy interacted with the disciplinary policy and it was even more unclear if and when the policy was withdraw. This lead to confusion amongst employees as to how serious the Respondent treated the conduct of causing an oil spill and the expectation on employees to prevent them. As such these were not actions a reasonable employer would take;
62.2. The Respondent not sharing the SOP allegedly in force at the time of the incident with the Claimant during the disciplinary or appeal despite that being fundamental to his dismissal if there indeed was one or asserting there was an SOP in force when there was not, is not and issuing one subsequently are not actions a reasonable employer would take;
62.3. The Respondent's disciplinary officer did not give appropriate consideration to the Claimant's remorse, early admission, his long 10 year service and his unblemished employment record, which are also not actions a reasonable employer would take;
62.4. The Respondent's appeal officer did not giving appropriate consideration to the Claimant's grounds of appeal, his remorse and early admission, his long 10 year service, his unblemished employment record and most notably his personal circumstances at the time of the incident (in relation to his brothers

ill health and the impact that was having on both the claimant and his father) are also not actions a reasonable employer would take; and

62.5. The Respondent's appeal officer not adequately assessing the similarities between the Claimant and Mr Newbould's situations, seemingly creating a disparity in treatment between employees who were physically and mentally unwell. Both the Claimant and Mr Newbould left the offload unsupervised leading to a spill. Mr Newbould left due to physical pain and the Claimant mental strain. The Tribunal did not accept the Respondent's submission that Mr Newbould's circumstances were different because he alerted the Respondent in advance of his ill health, as the Claimant too informed his Line Manager of the situation with his brother, albeit slightly further in advance and not on the day in question. The Tribunal has found that the Respondent's unwillingness to consider the parallels in the two situations, rendering different outcomes, were also not actions a reasonable employer would take.

63. In making this assessment the Tribunal considered the size and administrative resources of the Respondent. The Tribunal noted that the Respondent accepted under cross examination it is an organisation that employed approximately 175 employees, with an approximate turnover of £25m at the material time. It had access to HR administration services and legal advice. Within the range of reasonable responses, the respondent's size and resources does not excuse the unfairness in management's actions in this case.

64. The Tribunal has therefore found dismissal was not within the range of reasonable responses a reasonable employer might have taken and the claim succeeds.

<u>If the dismissal was procedurally unfair, what difference, if any would a fair procedure have made?</u>

65. As recorded earlier, the Tribunal agreed with the parties at the start of the hearing that if it concluded that the Claimant had been unfairly dismissed, it would consider whether any adjustment should be made to compensation on the ground that if a fair process had been followed by the Respondent in dealing with the claimant's case, the Claimant might have been fairly dismissed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8**, **Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40;** and **Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**.

66. The Respondent invited the Tribunal to find that had a fair process been followed then the outcome would still have been dismissal.

67. The Claimant invited the Tribunal to find that the Claimant would have been retained if proper procedures had been adopted, in which case no reduction ought to be made.

68. The Tribunal noted that it might also find either that the dismissal would have occurred in any event, with a possible delay to allow for a fair procedure. This may result in a limited compensatory award only to take account of any additional period for which the employee would have been employed had the proper procedure been adopted or it may be impossible to say what would have

happened and the Tribunal should make a percentage assessment of the likelihood that the employee would have been retained.

69. In undertaking this exercise, the Tribunal is not assessing what it would have done; rather what this employer would or might have done. The Tribunal must assess the actions of the employer before it, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274** at para 24.

70. The Tribunal finds that if the Respondent's management had: alerted the Claimant of the severity of the disciplinary situation and potential outcomes in advance of the meeting, the Claimant would have considered he may be dismissed and disclosed his reliance on his personal circumstances in defence of the allegations at disciplinary stage and if they Respondent had properly considered the Claimant's explanation for his actions namely his personal circumstances and mental health concerns, at either the disciplinary or appeal hearing, coupled with his 10 yearlong service and unblemished record, it would not have dismissed him. Fundamentally, however, a fair procedure would not on the tribunal's conclusions have resulted in a dismissal within the band of reasonable responses.

Did the Claimant contribute to his dismissal?

71. The Tribunal also agreed with the parties that if the Claimant had been unfairly dismissed, it would address the issue of contributory fault, which inevitably arises on the facts of this case.

72. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

73. In making the decision the Tribunal considered the circumstances in which the oil spill occurred. Namely that the Claimant accepted failing to identify the correct tank to be filled, failing to establish ullage via the correct gauge and failing to supervise the offload but that he was directed to fill the tank in question by a person present on site and that he had failed to supervise the offload due to his personal circumstances at the time as detailed above. Ultimately, the Claimant not supervising the offload led to the oil spill, which the Claimant accepted was "serious and caused environmental impact".

74. Based upon the findings above, the Tribunal found not supervising the offload was blameworthy and that it at the very least contributed to the dismissal and that it would be just and equitable to reduce any compensation by 50% to take into account this conduct. The claimant was equally to blame for his dismissal. This reduction should apply both under Section 123(6) and Section 122(2) of ERA.

Was the ACAS code of conduct breached?

75. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides where it appears to the employment tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of

Practice applies, the employer had failed to comply with the Code in relation to that matter, and the failure was unreasonable, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the award it makes by no more than 25%.

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. The Tribunal found that there were breaches of paragraph 4 of the Code of Practice as the Respondent did not assess Mr Newbold's and the Claimant's mitigation consistently, paragraph 9 of the Code because the Respondent did not provide the Claimant with sufficient notification of the possible consequences of the disciplinary action or provide all evidence considered by the disciplinary officer in advance of the disciplinary hearing and paragraph 12 of the code as the Respondent failed to go through all evidence it considered with the Claimant to enable him to put his case on the evidence in response.

78. The Tribunal found that the failure to follow the ACAS Code of Practice was unreasonable and could have quite easily been rectified by the Respondent as it was a medium sized employer with HR and legal support. The Tribunal found that it is just and equitable to increase the compensatory award by 15%. The procedure followed by the Respondent was unfair in the ways outlined above, but this is not a case where no process at all was followed and therefore this is not a case where the maximum possible uplift should be imposed.

Employment Judge Themistocleous

Date 26 January 2026

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/