



EMPLOYMENT TRIBUNALS

Claimant: D Stevens

Respondent: Asda Stores Limited

Record of an Attended Hearing at the Employment Tribunal Audio Recorded by CVP

Heard at: Leicester Employment Tribunal

Heard on: 3 February 2026 and 9 March 2026

**Written
Submissions**

Received: 30 March 2026

**Further
Comments**

Received: 8 April 2026

Before: Employment Judge Broughton (sitting alone)

Appearances:

Claimant: Mrs Stevens, Lay Representative

Respondent: Mr Montgomery, Counsel

JUDGMENT

The claim of unfair dismissal is well founded and succeeds subject to a significant reduction for contributory fault.

The Respondent is ordered to pay to the Claimant the following sums:

1. Basic Award: £4,830
2. Compensatory Award: £3,186.38

A total sum of £8,016.38

The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

REASONS

Background

1. The Claimant was employed by the Respondent from 29 November 2004 until his summary dismissal on 3 March 2025.
2. ACAS early conciliation commenced on 29 May 2025 and completed on 9 July 2025. The Claimant submitted his claim form to the Tribunal on 3 August 2025. The claim set out a claim of unfair dismissal. The particulars of claim attached with it referred to the making of disclosures however he had not indicated on the form (box 8.1) that he was making a claim for 'whistleblowing'.
3. The Claimant confirmed at the start of the hearing that it is a claim of ordinary unfair dismissal only, it is not a complaint of whistleblowing.

Evidence

4. There was an agreed bundle of documents running to two hundred sixty-six (266) pages.
5. The Claimant gave evidence and produced a witness statement and was cross examined. He called a witness Mr Thomas Jones, who was employed by the Respondent at the material time and held the position of Department Manager. He provided a witness statement, gave evidence and was cross examined.
6. The Respondent called three (3) witnesses; Mr Horst Werner Gavin Dacey (Mr Dacey), Transport Operations Manager at the Lutterworth LDC (Distribution Centre) who dealt with the disciplinary proceedings, Mr Steven Michael Gamble, General Manager for the Respondent at the Lutterworth Distribution Centre who dealt with the first appeal and Mr Thomas Spooner, employed by the Respondent as Operations Manager at the Lutterworth Distribution Centre who dealt with the second appeal. These 3 witnesses were cross examined by Mrs Stevens on behalf of the Claimant.
7. The claim had initially been listed for one (1) day however, we were unable to complete the evidence in that day and it was relisted to 9 March 2026. The full day was required to complete the evidence and therefore, with the agreement of the parties, they sent in written submissions on 30 March 2026 and further replies to the other parties' submissions by way of supplemental submissions on 8 April 2026. Unfortunately, those submissions did not find their way to Judge Broughton until 17 May 2026.
8. All references to page numbers in this Judgment are to page numbers in the evidence bundle.

Findings of Fact

9. All findings are based on a balance of probabilities. Although reference may not be made to all the evidence in this judgment, it has been considered in full.

10. The Claimant was employed by the Respondent as an HGV Driver at Lutterworth Distribution Centre (LDC). He confirmed under cross examination, not disputed by the Respondent, that he had been employed since November 2004 but not initially as an HGV Driver. He had been employed as a “colleague” (employee) and promoted to Department Manager. He then funded himself to obtain qualifications to be an HGV Driver and transferred to the LDC on Magna Park as an HGV Driver in 2015.
11. The Claimant had around ten (10) years’ experience as an HGV driver as at the date of the incident and had managerial experience.

Disciplinary Policy

12. The Respondent’s disciplinary policy provides examples of acts of potential gross misconduct (page 46):
- “A serious *breach of trust or confidence resulting in a breakdown in working relationship.*
 - *Deliberate or serious breaches of H&S regulations that could endanger self or others or bring the company name into disrepute.”*
13. The Disciplinary Guidance Booklet (page 73-112) is intended to “*support Investigating and Disciplinary Managers when dealing with a breach of our disciplinary rules to understand the seriousness of an issue(e.g. misconduct/gross misconduct) and the potential range of sanctions available...*”. It sets out examples of mitigating and aggravating factors:

“Example Mitigating Factor:

- *The subject was unaware of proper policy or procedure and would not have reasonably been aware....*

Example Aggravating Factor:

- *The actions of the subject were deliberate*
- *The subject acted in a way that was seriously negligent/ demonstrated serious failure of judgment...”*

14. In a section on Health and Safety Compliance (page 88) it states that the following will be treated as potentially gross misconduct:

“Reckless unsafe behaviour that could result in injury to self, a colleague, or customer.

Refusing to wear or failure to provide PPE or correct protective clothing where there is significant risk of harm.

Intentional disregard of Health and Safety policies or precautions where there is a significant risk of harm”

LNG

15. In or around the end of 2023 to the beginning of 2024, the Respondent introduced new LNG refuelling sites where their commercial vehicles were refuelled with bio-liquified natural gas (LNG). The purpose of using LNG fuel was to reduce the Respondent’s carbon emissions and they worked alongside Gasrec, a fuel provider for commercial vehicles in the UK.
16. The evidence of Mr Dacey (his witness statement paragraph 10) is that LNG is primarily

composed of methane and is produced by cooling natural gas to minus one hundred sixty-one degrees Celsius (-161°C), which transforms it into a liquid state. His further evidence is that LNG is highly flammable, can cause respiratory issues if inhaled and due to its extremely low temperature, can result in severe cryogenic burns if it comes into contact with skin or other body parts. As a result, the Respondent implements strict safety protocols for colleagues who handle and refuel with LNG which includes the LNG refuelling sites, which include Lutterworth, (the site in question), being monitored 24/7 via CCTV surveillance which is outsourced to Gasrec.

17. Under cross examination, the Claimant agreed that he understood that LNG is stored at very low temperatures and he agreed that contact with it can cause cryogenic burns. The Claimant also accepted that exposure could cause limb loss or worse. The Claimant alleges that he was not told about the potentially for limb loss during his training but gave evidence that he found out about the severity of the harm it can cause through research he conducted online when the Respondent first introduced the use of LNG (i.e. before the incident in question):

Claimant: *"I goggled it to find information on it when it came in*

Judge: *"When did you google it?"*

Claimant: *"Before the system came into place."*

18. In terms of whether it is highly flammable or not, the Claimant's evidence is that from his own research, he had read that liquified natural gas is not flammable.
19. The Claimant also gave evidence that he is not aware that inhaling it can cause respiratory problems and questioned how that could be possible if it is in liquid form.
20. The Claimant did not confirm where he had carried out his research, nor did he produce any research material to evidence what he alleges he read about LNG not being flammable or not giving rise to respiratory issues if it is inhaled.
21. The Respondent's own training documents produced by its Technical Centre of Excellence (page 135) sets out the risks of LNG and identifies the hazards as "extremely flammable, risk of cryogenic burns (cold burns to skin)". It also states under "precautionary statements" that "keep away from heat/sparks/open flames/hot surfaces." In terms of health risks of over exposure, it states:
 - (i) *"Eyes: direct contact with liquified gas can result in eye burns";*
 - (ii) *"Skin: contact with product may cause frostbite";*
 - (iii) *"Inhalation: vapour may cause drowsiness and dizziness. Symptoms of over exposure are dizziness, headache, tiredness, nausea, unconsciousness, and cessation of breathing".*
 - (iv) *"Injection: Not an expected route of exposure".*
22. The training document goes on to state that (page 136) in terms of first aid measures :*"in case of exposure to intense concentrations of vapour, fumes, or spray, transport the person away from the contaminated zone, keep warm and allow to rest. If symptoms persist, call a doctor. Artificial respiration and/or oxygen may be necessary."*
23. There is a sign which is normally displayed at LDC. A copy of the signage is in the bundle (page 239). It states in large capital letters:

- (i) *"Protective eyewear must be worn";*

- (ii) *"EN511 gloves must be worn";*
- (iii) *"Long sleeves and no shorts";*
- (iv) *"Extremely flammable non-odorous gas....";*
- (v) *"Cold surfaces present risk of cold burns";*
- (vi) *"CCTV recording for safety monitoring";*
- (vii) *"No unauthorised persons";*
- (viii) *"No smoking or naked flames"; and*
- (ix) *"No electronic devices".*

24. On balance the Tribunal accept the evidence of Mr Dacey about the potential health and safety risks which LNG presents, including that it is highly flammable. His evidence is supported by the company's health and safety warnings and training documents and risk assessments (page 239). The Claimant did not produce any documents to contradict this evidence.

Incident

25. On 17 February 2025, the Claimant was driving an HGV and refuelling using LNG at the Lutterworth refuelling site at approximately 5:00pm.

26. It is not in dispute that the Claimant was seen by Susan Sly, Transport Shift Manager, at the fuelling station using his mobile phone and not wearing the correct PPE which he had been issued with, namely:

- (i) He was not wearing goggles; and
- (ii) He was not wearing a visor.

27. Ms Sly spoke to the Claimant and reminded him of the training procedures. He was not suspended at that point.

28. He was then issued with a letter dated 17 February 2025 (page 168) which states as follows:

"Further to an incident whereby you were witness [sic] using your mobile phone and not wearing the correct PPE at IDC gas fuelling station, you are now requested to attend an investigatory hearing".

29. The Claimant was invited to a hearing on Wednesday 19 February 2025 at 5:00pm conducted by Ms. Sly with a note taker.

30. The Claimant does not seek to contest the accuracy of any of the notes of the meetings the Respondent held with him.

31. Prior to this meeting, at 7:15am Brett Jones, Driver Skills Trainer had confirmed to Ms Sly by email that the Claimant had to answer 5 questions before he was signed off as trained to refuel with LNG (page 171 and 153), including:

- *What are the PPE requirements whilst at an LNG fuelling site?*
- *What safe working practices must be met before refuelling?*

32. The invitation letter to the hearing on 19 February 2025 referred the Claimant to the disciplinary procedure located in the Colleague Policy Handbook and “if you do not have a personal copy to hand, or would like one, please contact me.” He was reminded of his right to be represented by a GMB representative or a fellow colleague.

The investigation hearing: 19 February 2025 (page 172 to 176).

33. The Claimant was informed that this was a fact-finding meeting.
34. At this meeting with Ms Sly, the Claimant was asked to explain the process when refuelling and he went on to explain that he switches off the engine and the lights on the vehicle, takes his keys out of the ignition and accurately explained the rest of the process.
35. He was asked whether he recalled looking at a training document, which was then produced to him at this meeting (page 126 to 136) to which he stated in the meeting: *“I do remember going through it with Pete on one occasion when being trained, however most of the training was verbal, show and tell.”*
36. Ms Sly refers him to the pages in the training document which shows what PPE should be worn. It is also put to the Claimant that Ms Sly had herself been at the refuelling station that afternoon and that there was a rather large sign that states what the drivers should not do at the refuelling station. The Claimant is asked if he is aware of that signage.
37. It is not in dispute between the parties that the sign was not where it should have been that day. Nonetheless, the Claimant does not deny at the investigatory meeting being aware of the sign. What he states at this meeting is: *“at this moment in time I cannot recall it, but I’m not denying that it is there.”* The Tribunal find as a fact however that the Claimant was not being candid with Ms Sly. The Claimant was familiar with the sign and also knew that it was not in its usual place on 17 February 2025 because during these proceedings he gave evidence that he had noticed that it was not there during his shift on 17 February 2025 and had later informed his wife. He nonetheless would not raise this until after he had been dismissed.
38. When questioned about this sign under cross examination he ultimately accepted that it was possibly the case that the health and safety warning sign had been on display at the LDC site, where he refuelled, for the last year. It was clear that the Claimant was very use to seeing that sign:

Judge: *“To notice at the time of the incident on 17 February the sign was not there you must have been cognisant that it was normally there?”*

Claimant: *“ Yes, I knew the sign was there normally.”*

39. The Claimant would however later at the appeal stage, seize on the fact that the sign had been damaged and moved to somewhere on site where it was less visible on the day in question, to claim a lack of awareness around the danger of not wearing his PPE or using his phone. This behaviour was, the Tribunal find, disingenuous and this conduct, along with his responses to certain questions during these proceedings, cast serious doubt on his credibility as a witness.
40. The Claimant had informed his wife on 17 February 2025 that the sign was missing from the site and she in turn informed Mr Thomas Jones, the then Department Manager. Mr Thomas Jones gave evidence on behalf of the Claimant during these tribunal proceedings that he was informed on 18 February 2025 by the Claimant’s wife regarding the potential absence of this mandatory hazard warning sign at the refuelling station following which he personally

inspected the site and confirms (not disputed by the Respondent) that there was no visible hazard sign within the perimeter of the LNG station. His evidence is that the sign was on site but had been moved because it was damaged but in cross examination he agreed that the sign, a copy of which is in the bundle (page 195), was normally at the site.

41. The Tribunal find on balance as fact, that the signage had been damaged and left by a barrier near the tank. It was therefore not in its usual place. Mr Singh Department Manager had reported that it had been moved to GasRec on 27 January 2025 (page 159) : *"During my inspection of the LNG site, I noticed that the signage for the tank was missing and had been left by the barrier near the tank. I've raised the issue with GasREC and they've confirmed that the engineer will be on site tomorrow to fix the problem."*

42. The undisputed evidence of Mr Thomas was that the usual place for the sign is attached to a long metal post where it is visible when drivers drive into the fuelling station. He could not remember whether the sign was left by the barrier near the tank as it states in the email from Mr Singh or not, he just recalled that it was not where it was usually placed and that it may or may not have still been visible to drivers when refuelling. Whether the sign was still visible or not depends it seems on which side of the tank the sign had been left. However, the Tribunal find that despite the Claimant making much of the absence of this sign later in the internal proceedings, this was a distraction, he was familiar with the sign and his evidence in cross examination implying that he needed the sign to be there to instruct him what not to do is nonsense. The Claimant is an intelligent man who does not need to keep reading the same sign to understand the warning.

43. Despite being so familiar was the sign, after he was dismissed and at the first appeal stage, the Claimant would prepare a written statement which he read out and in which he falsely claimed that the signage was (page 208):

"...completely brand new and was not present when my incident occurred."

44. In cross examination he ultimately conceded that he knew what the instructions were on the sign.

45. At the meeting with Ms Sly he was also asked about his training and whether he could recall the part about wearing correct PPE and what that PPE was. He tells her in this meeting:

*"...before the training took place I was provided with a visor or faceguard, goggles and a set of gloves. Upon taking the training, I was **told these needed to be worn.**" Tribunal stress*

46. Under cross examination the Claimant attempted to persuade the Tribunal that he had been given goggles and a visor but had not been told that he had to wear them. That also proved to be misleading evidence:

Claimant: *"They were provided [goggle and visor] but I was not told compulsory to wear them."...*

Judge: *"Are you saying someone provided you with goggles and a visor and said you don't need to wear them?"*

Claimant: *"No, I'm not saying that."*

47. After being taken to the notes of the investigation meeting where he had admitted that he had been told to wear the PPE, he then gave evidence that:

Claimant: *"Yes, I was told I needed to wear it [PPE] ... I did have a medical condition at the time."*

Respondent: "That contradicts what you have just told the Tribunal?"

Claimant: "Yes. But I was not given the reasons why."

48. The Claimant was also asked by Ms Sly at the fact finding/investigation meeting, whether he could recall the mention of mobile telephones and what to do with them during his training and he tells her:

*"At the time I cannot remember however **after reviewing the training signoff, I can now see that I made a mistake in using my mobile device whilst within the area.** I would like to make it known that I did not use the device whilst using the fuelling equipment and there was a lot of distance approximately 8m [eight (8) metres] between myself and the unit whilst it was being fuelled. I would like to reiterate that I did not intentionally try to flout the rules, I apologise and I am just really sorry." Tribunal stress*

49. The health and safety sign states in large capital letter: "NO ELECTRONIC DEVICES" and has a picture of a mobile telephone with a line through it. The Tribunal consider that the Claimant was yet again failing to be candid with Ms Sly and find that he knew perfectly well that he should not be using his phone.

50. The Tribunal consider that it is appropriate to take judicial notice that using a mobile telephone is discouraged at normal petrol stations and that common sense alone would dictate that using a mobile phone when using LNG fuel presents a safety risk of sparking or generally causing a distraction.

51. Ms Sly puts it to the Claimant during this meeting that he would not use a mobile phone when refuelling a car at a normal petrol station and he does not deny it but attempts to say that he was stood 8 metres back from the fuel, however once again this is shown to be untrue:

"From where I stood holding the dead man to where the unit is actually being fuelled is quite a long distance away however, that doesn't excuse the policy and my lack of understanding, going forward this will never happen again."

52. The Claimant is shown photographs from the CCTV footage. This shows that he was not standing 8 metres away. The photographs (page 160-167), show the Claimant using his mobile telephone close to the HGV during refuelling. When shown the photographs the Claimant states:

*"I would like to reiterate that **I've made a huge mistake and judgment** in my behaviour whilst using the refuelling system. I am really, really sorry and can guarantee going forward that that will never happen again. I would like to add that in regard to PPE, I did have a medical issue that I did not make anyone aware of as I only thought it would be a short-term thing, I did not inform anybody. This was a bone/tooth infection which caused pain around my face which resulted in having two (2) teeth removed. Having items around my face and my cinuses [sic: sinuses] resulted in pain. This problem has now nearly been rectified however this does not excuse my mobile phone usage. I would not intentionally try to endanger myself or others deliberately and I do realise **I made a very poor judgment** on this occasion. **I am fully aware of the policy and understand the policy** should be followed and again, would not intentionally put myself or anyone else at risk." Tribunal stress.*

53. Ms Sly then asked the Claimant to confirm that he had completed his LMS signoff for gas refuelling. LMS is an online management platform which records training. The Claimant confirms : "*most likely, yes.*"

54. In terms of training, he also confirms that he was taken through the training document:

"I do remember going though it with Pete on one occasion, when being trained, however most of the

training was verbal, show and tell.” (page 175).

55. The Claimant was then sent a document from Ms Sly setting out her findings (page 177-178):

- You did go to the fuel station at IDC on 17 February 2025 before your first run, you fully understand the refuelling procedure;
- You are fully trained and validated on gas training and have all of the correct PPE equipment that ASDA provided to you prior to you starting your training;
- Having been to IDC myself and seen the large obvious warning signage, I cannot understand why you have not seen it. As a professional driver you must always be aware of your surroundings.
- As you stated that you didn't know you could not use the mobile phone at the gas station, I find it hard to believe that you thought it was acceptable. Not only is there signage, but there is also on the 1st page of your training document, that you confirmed you had read and signed off on your LMS signoffs.
- As you stated, you were 8 metres away when fuelling up but from the photographic evidence is [sic] shows you standing next to the unit on your mobile phone.
- Failure to inform the Manager that you had an issues with wearing the goggles and visor is not an excuse for not wearing the correct PPE, by doing this you put yourself at risk of injury and did not follow the correct training you'd been given. If we were aware, we could have supported you in the interim.

56. The Claimant is told that the matter will now be referred to a disciplinary hearing and as it is classed as gross misconduct, this may lead to his dismissal.

57. The Claimant was sent a letter on 21 February 2025 (page 179) inviting him to attend a disciplinary hearing on 26 February 2025 to discuss the allegation that he was using his mobile phone and not wearing the correct PPE at the IDC gas refuelling station on 17 February 2025 and is informed that it was a serious breach of health and safety and is classed as a gross misconduct offence.

58. The Disciplinary Policy (page 45) provides that a disciplinary hearing will be held as soon as reasonably practicable after an investigation meeting and usually within 5 days.

59. Certain documentation is enclosed with this letter; the notes from the investigation meeting with Ms Sly, the photographs of the incident which he had been provided with, microlise playback from the time in question, his training records, and copy of the training documentation.

Disciplinary Hearing 26 February 2025

60. The Claimant declined representation at the disciplinary hearing which he attended on 26 February 2025. He did not request an adjournment or complain that he had insufficient time to prepare for it.

61. Mr Croft, a People Coordinator attended to provide support and to take notes. The Claimant does not dispute the accuracy of the notes from that meeting (pages 188-189).

62. The Claimant had preprepared a statement (pages 185-187) which he read out at the start. Relevant extracts from that 3-page document include the following where he does not say

he has not received the required training, but argues that the training was not adequate:

"Firstly, I would like to state that I admit that I have indeed failed to adhere to two health and safety requirements and I am very remorseful. But I would also like to state that I was never made aware of the reasons why these requirements had been put in place and what consequences might follow if those requirements are not adhered to. As a father of two, I would never deliberately put myself in the position where I can seriously injure myself, lose my life or cause harm to others."

...The working conditions at the incident are classed as hazardous, and therefore require special consideration in terms of training, as outlined in HASAWA [Health and Safety at Work Act] 1974 and COSHH [Control of Substances Hazardous to Health] regulations – it should have a clear explanation of what and how harm can be caused. I find that the main reason for my lack of understanding of the expected level of conduct is absolutely inadequate training provided to me by ASDA and inconsistency of how health and safety procedures are being followed.

Throughout the training, there is not a single mention of how electronic devices can overheat and cause an explosion by raising sparks. On multiple occasions, unclear instructions are given on whether mobile phones should be left in the cab or switched off.....

Training is missing crucial points of information which leads to operators not being aware of the dangers and committing misconduct as a result. I am being punished on a gross level for failure to disclose an embarrassing temporary health condition, yet you have failed to change the transport uniform policy allowing short sleeves and shorts which is clearly unacceptable and put many drivers at risk during the summer..." Tribunal stress

Adjournment

63. Mr Dacey decided he needed clarification on some points and adjourned the hearing.
64. Mr Dacey then reviewed the notes from the disciplinary process and checked the training records to confirm that the Claimant attended the relevant training (pages 124, 125 and 140).
65. Page 124 is a document setting out the Claimant's training history and includes an entry on 27 January 2024 that relates to LNG vehicle refuelling process validation with a **validation date of 27 January 2024** and an expiration date of 27 January 2025.
66. Document 125 is a screenshot from LMS which includes an entry that the Claimant was **'enrolled'** on this training on **27 January 2024**. It states completion of the training to be 27 January 2024 **08:00** and in terms of attendance status it states: "Attended."
67. Document 140 refers to the Claimant having been **'enrolled'** in training on 11 November 2024 (recorded as 00:00 i.e. midnight).
68. The Tribunal heard a significant amount of evidence about the change to the Workday training platform from the LMS system, and how training on the system is recorded. There was a considerable amount of evidence about the system, when it migrated, what is meant by enrolment and validation. This evidence appeared initially to be very relevant and took up a lot of time because the Respondent's case is that the Claimant received training on refuelling with LNG in January 2024 and then had refresher training in November 2024 which was recorded on LMS and/or Workday post migration of the data but the Claimant at the appeal denied having any training in January 2024. However, as the evidence proceeded during these tribunal proceedings what became apparent was that while the Claimant initially argued that as he was not working on site from the date he was enrolled for the training on 27 January 2024 to the date the training was said to be completed/validated on the system at 8am on 27 January, therefore he could not have had the training, it became clear in cross examination (and as he had first stated at the meeting with Ms Sly), that he accepted that he had the training with a trainer called Pete who showed him how to refuel and took him through

the training document. What he was actually alleging was that while Pete showed him how to refuel, Pete should have observed him doing it 3 times before signing him off but he had not carried out those observations. The Claimant had not complained about this before the incident however, and the Tribunal consider that this was because the Claimant, as he said himself in cross examination, felt comfortable refuelling and at the investigation hearing with Ms Sly he talked through the process of how to do it.

69. On his own evidence, he had been trained at some point in January 2024 whatever the system recorded the date as. He complains however that it was not made clear during this training what the risks were, despite the training documents he saw, the obvious warnings on the signage and being told he needed to wear PPE.
70. The Claimant also pursued an argument about the dates on the LMS/Workday incorrectly showing dates for refresher training in November 2024 on the basis that he was not on site on that date either between enrolment and validation date. However, the Tribunal consider that this was also a red herring because he also alleges (which he would not raise until the second appeal) that Brett Jones took his phone in November 2024, got the Claimant to access his training account on Workday and completed the refresher training for him. According to his own evidence therefore the training was completed (albeit not by him) and therefore what the enrolment and validation date on the system shows is largely irrelevant, they may be inaccurate, it may be as the Respondent witnesses assert that the enrolment date does not mean that the Claimant did not carry out the training prior to that or as counsel suggests there may be automatic sets times on the system which records enrolment and validation times (i.e. set to 8am and midnight).
71. The Claimant's case as it became clearer eventually is that January 2024 training should have involved observations by a trainer of him refuelling and the November 2024 refresher training was done and recorded as completed by him on the Workday system but it was in fact done by the trainer. The Claimant however, previously a manager, did not complain or object at the time.
72. Mr Dacey at the disciplinary hearing, was also provided with a copy of the signage that was said by Ms Sly to be on display at the refuelling station (page 195). In his evidence in chief, he stated it was sent by a driver, in oral evidence he could not recall asking for it and believed it may have been Brett Jones who sent it to him. Whoever sent it, he understood it to be at the site at the relevant time and the Claimant did not disabuse him of that belief.

Reconvened

73. The disciplinary hearing was then reconvened on 3 March 2025 (page 190-191). The first part of the hearing lasted for only 5 minutes. The Claimant was invited to put forward anything else he wanted to say and he asked for his length of service to be taken into account and apologised for his mistake. There was no discussion about the outcome of Mr Dacey's further investigation.
74. After an adjournment (it is not clear of how long however the Claimant would complain that it was only 30 minutes which is not inconsistent with the times recorded on the meeting notes) the meeting was reconvened and Mr Dacey read out an 'adjournment note'. The hearing then finished at 4: 40pm. The note Mr Dacey read from, which sets out the reasons for his decision, is almost 2 pages of close type (page 192 – 193).
75. Mr Dacey's evidence is that the Claimant could have put forward further information for him to consider as part of mitigation but he did not make any further submissions. The Claimant did as a matter of fact make submissions on mitigation namely that he wanted his length of service to be taken into consideration and his work ethic and offered his deepest apologies

for the mistake and promised it would never happen again.

76. The note which Mr Dacey had produced refers to the Claimant confirming that he had gone through the training documentation with Pete Bake, that most of the training was show and tell and recorded that the Claimant did not recall seeing the signage at the station, that he had claimed to have been 8 metres away from the unit when using his phone and that he did not know that he could not use his mobile phone whilst refuelling and that he did not wear the visor or goggles due to a medical issue.

77. The note recalled Mr Dacey finding that the Claimant had confirmed that he understood the refuelling procedure and had been issued the correct PP, that he had questioned the training provided by the Respondent and claims that at no stage had he been made aware of the potential risks his actions could have caused and that once his actions had been highlighted, he should have been stopped from using the refuelling facility and been retrained.

78. The conclusion he reached was as follows:

"I'm satisfied that the training you received was in line with that received by the drivers at other depots such as IDC. Whilst the training documentation itself does not state what the risk of not using the correct PPE is, it clearly states that the PPE must be worn and that mobile phones must be switched off. This PPE would not have been issued to you had it not been decided that it was required and was company policy.

Once the incident was brought to our attention you were given an invite letter to the investigatory interview on the same day, clearly stating that the investigation was for you not wearing the correct PPE and using your mobile phone at the gas fuelling station. This was not a retraining issue."

79. Mr Dacey concluded that he found it hard to believe that the Claimant was unaware that he could not use his mobile phone during refuelling as it is included in the training and there is signage at the station clearly stating this and that it is common knowledge that using a mobile phone whilst refuelling is not permitted at any fuelling station. He also referred to the training records showing that the claimant had his original training (January 2024) and had been signed off on 27 January 2024 as confirmed by an email from Kevin Partridge, Transport Trainer and he had refresher training on 11 November 2024 (page 194). The Tribunal note that the email does not state that Kevin Partridge had been the person who gave the training in January 2024, it merely confirms the validation date.

80. The Claimant was not given in advance or at this meeting, a copy of the training documents Mr Dacey had obtained during his investigation.

81. Mr Dacey reached the decision that on the day in question the Claimant had put himself and others at risk. In cross examination Mr Dacey confirmed that his understanding of the training at the time was that the recorded time of 8am on 27 January 2024 was when the training had been completed and validated and had not looked into whether the Claimant was on site at the time it was validated because this was not raised with him. He had decided that the Claimant did not follow his training or use the correct PPE which is a serious breach of health and safety and while the Claimant had apologised, he appeared to lay the majority of the blame with the Respondent and a lack of training.

82. Mr Dacey confirmed his decision to dismiss the claimant for gross misconduct in a letter dated 6 March 2025 (page 196-198).

83. The Claimant was informed of his right to appeal to Steve Gamble.

84. The Tribunal accept Mr Dacey's evidence under oath that he applied the relevant Disciplinary Policy (page 43) and not, as his witness statement states, a different policy which applies to

hourly staff (page 51).

85. It is not in dispute that the Claimant did not allege during this stage of the process that he had been treated inconsistently with any other employees.
86. In terms of the medical issue with his jaw/sinuses, Mr Dacey formed the view that had the Claimant raised it, the Respondent could have arranged for him to refuel his HGV with diesel and he would not have needed to wear the visor, but while he should have raised it he did not do so, instead he decided not to wear his full PPE.

Appeal

87. The Claimant then appealed the decision on **14 March 2025** (page 199). A letter was sent dated **28 March** informing him of an appeal hearing on **4 April 2025**. The Disciplinary Policy does not provide for any particular notice to be given of the hearing but states that the appeal hearing will usually be within **5 days** after receipt of written notice (page 46).
88. He set out five (5) grounds of appeal which were as follows:
- (1) Multiple procedures were disregarded during my investigation disciplinary (he does not say which);
 - (2) The disciplinary manager failed to address significant points raised but used information that was not discussed in his decision (he does not clarify which points);
 - (3) he believed that the outcome of the disciplinary was influenced by the disclosures he had made during the process, rather than the seriousness of his actions (he does not identify the disclosures);
 - (4) He believed that he had not been treated fairly and there is a significant breach of duty of care; and
 - (5) The decision was preconceived (he does not say why).
89. The Claimant was then called to a first disciplinary appeal hearing on 4 April 2025 to be conducted by Steve Gamble, General Manager with Sam Croft, PCA present as note taker.
90. The Claimant was again directed to where he could find the disciplinary process and was reminded of his right to have a representative (page 200).

First Appeal 14 April 2025

91. The notes of the appeal hearing (page 205-206) are not disputed by the Claimant.
92. The Claimant had again prepared a statement which he read out (pages 207-209).
93. There had been some delay in the Claimant receiving the invitation letter which had been sent by post and he had only had 24 hours' notice of the hearing however he confirmed at the start that he was content to proceed with the hearing, he did not ask for an adjournment or complain that he had insufficient time to prepare. Mr Gamble apologised for the delay in arranging the hearing and explained that he had been on annual leave until 24 March. The Claimant complains in his claim now about this delay.
94. The ACAS Code does not set out a specific time scale for notice of the hearing however provides in the context of disciplinary hearings that the employee should have a reasonable

time to prepare (not in the context of appeals). The Claimant does not complain that he had insufficient time or identify what he would have done or said differently with more notice. Paragraph 26 of the ACAS Code however provides that: *Appeals should be heard without unreasonable delay.*

95. The Claimant raised that he had not been suspended by Ms Sly at the time of the incident on 17 February 2025 and that the suspension assessment should have been completed to eliminate risks associated with a colleague carrying on their duties while the investigation is completed. In his submissions during these tribunal proceedings, the Claimant argues that the fact he was not suspended demonstrates that the incident was not considered sufficiently serious at the time to justify suspension and undermines the classification of it as gross misconduct. The Claimant also at the appeal hearing alleges that there should have been a near/miss report and that near/miss reports need to be made where there is a situation that could cause harm or damage
96. The Claimant complained that while this matter is being dealt with, he could have been allowed to continue working but fuelled up his vehicle at another distribution centre where there are assistants to carry out the refuelling, eliminating the requirement for him to do it. He also refers to his medical problem stating: *"I fully take responsibility for not bringing it up promptly."*
97. The Claimant also raised that under the disciplinary policy, health and safety offences are categorised as gross misconduct if *"deliberate or serious"* and asks what regulations he is in breach of.
98. In terms of disclosures, he refers to his disclosure about the inaccuracy and insufficiency of the training materials.
99. The Claimant now alleges in this hearing says that the photograph that had been produced in the disciplinary hearing of signage, was: *"completely brand new and was not present when my incident occurred."*
100. The Claimant referred to Ms Sly only presenting evidence of the training session in November 2024 and goes on to state (page 209) that when he questioned this, Mr Dacey stated this was a refresher and provided evidence of training in January 2024. The Claimant comments that as this incident had happened on 17 February 2025, this was eleven (11) months after the refresher training in November 2024 and thus there had been no refresher training for this process in 11 months. In terms of whether he had the original training in January 2024 he now alleges:

"Secondly, the training in question was supposedly completed by me on 27 January 2024 at 8:00am. I was not present on site at that time, furthermore, it would put me in breach of the working time regulations, so you've used falsified information in your disciplinary."
101. He goes on to say:

"Taking into account all of the above, by no means am I saying I am innocent in this and putting all the blame on ASDA. But I believe my case is an example of shared blame, where significant errors were made on both sides....."
102. He also complains that he believes that *"the facts mentioned above"* which relate to the training are the reason why his case resulted in dismissal and that it was decided long before the final hearing complaining that Mr Dacey had typed up his lengthy notes setting out his reasons in only thirty (30) minutes at that reconvened hearing.

103. The Claimant also complains that his dismissal letter outcome was not sent within five (5) working days and was not on letterheaded paper.

Further Investigation

104. Mr Gamble then carried out some further investigation following this hearing.
105. Mr Gamble contacted Naomi Weaver (Ms Weaver), Transport Technical Manager on 8 April 2025 and asked her to clarify the dates of training. She responded on 9 April 2025 (page 210) and referred to the LMS record which she said shows that the Claimant's training was completed with a validation on 27 January 2024. There is no paperwork as this had been completed electronically. Ms Weaver provided copies of the document used for training (pages 126 to 139) which is the training document version dated 2 August 2023 and (page 141 to 154) version dated January 2025.
106. The actual email Mr Gamble had sent (page 212) asked a number of questions of Ms Weaver:

*"...there was a refresher completed November 2024 and initial training was completed according to Workday in January 2024. **The colleague is suggesting he was no [sic: not] on site on 8 January 2024 at 08:00 and therefore could not have completed the training on this day at this time.** Can you shed any light on the above, **if this training was completed**, was it on a different day and time, and how often after the training is delivered if [sic] a refresher should be completed. Can you also send me the training literature for the training that result in the Workday time stamp of January 2024 and the refresher training, specifically in both cases the health and safety requirements of the colleague." Tribunal stress.*

107. The response from Ms Weaver on 9 April 2025 (page 210) is short, it simply states that the training was completed with a validation on 27 January 2024, it does not address the point about the Claimant saying he was not on site when the records show he received the training or when refresher training should be provided, she does not engage with the Claimant's assertion that he was not onsite at 8am on 8 January (which should read 27 January) and Mr Gamble does not follow up with any further questions:

"Please see attached the LMS record. This shows that his training was completed with the validation on the 27 January. There isn't paperwork as this has been completed electronically only. I've also stated the material version that he would have been training on at that time. His training record is also attached. If you have any other questions, please let me know."

108. Mr Gamble sets out his understanding of training being validated (paragraph 26 of his witness statement):

"In order for the training to be validated, David would have to log into Workday (the training software), select the required learning and answer the validation questions. These are then submitted, and the task is moved from David to the trainer, who logs into their account and verifies that the training is complete and that they are satisfied the training is understood. The trainer then submits his confirmation, and that is when the completion date and time stamp are recorded."

109. Mr Gamble's evidence is that he was satisfied that the Claimant had completed the training.
110. As part of his further investigations, Mr Gamble had contacted Mr Dacey by email on 14 April 2025 (page 213) to ask him about the allegation that he only adjourned for thirty (30) minutes. In response to this, Mr Dacey replied by email stating that after his first meeting he went away to investigate all of the points that the Claimant had raised in his written statement, when they reconvened, and the claimant had no further points to raise, he then completed his 'adjournment note'.

111. Mr Gamble asked no further questions in terms of the allegation that he had made up his mind to dismiss the Claimant before reconvening the disciplinary hearing, he did not ask for example, what he had actually added to the “*adjournment note*” (the document setting out his decision) during the adjournment to finalise it and to what extent this had been prepared.
112. In terms of the time Mr Dacey took to deliver his decision at the adjourned meeting, Mr Gamble’s conclusion was that while he accepted that this was a short period for a decision to be reached, after the initial meeting was adjourned, Mr Dacey took the time to consider all of the evidence, wrote up the adjournment note before the reconvened the meeting on 3 March 2025 and no additional evidence was needed in the event to be considered
113. Mr Gamble also on 14 April 2025 (page 214) contacted Ms Sly stating:
- “I can see no evidence of mitigating the risk of the colleague performing the function safely from the point of view of investigation which clearly a suspension would have mitigated that risk. Can you confirm why a risk assessment was not carried out and any actions taken to keep the colleague and other colleagues safe.”*
114. Ms Sly replied by email on 14 April 2025 stating:
- “I explained the reasons for his invitation to the investigation. I informed him that he has been seen using his phone and not wearing his goggles or visor, as required by his training. I emphasised that he must wear the full PPE provided and refrain from using his phone, similar to the precautions he would take at a fuel station. David apologised, took his letter and left the room.”*
115. Mr Gamble also made inquiries about the damaged signage (page 216) and referred to the issue of the signage being reported on 27 January 2025 and wanted to know when the signage was made good. The response he received (page 215) was that the signage work was completed on 14 March 2025 (i.e. after the incident with the Claimant).
116. Mr Gamble did not reconvene the hearing after carrying out the further investigation to explain to the Claimant the outcome of his investigation and seek further comments from him.
117. After his investigation, rather than reconvening, Mr Gamble set out his decision in a letter dated 17 April 2025 (page 217-220) and upheld the dismissal and dismissed the appeal.

Training : January 2024

118. In his findings, Mr Gamble concludes:
- “The date stamp that is displayed as the date that the trainer confirms training is not the date the training took place. To trigger this confirmation the colleague who has been trained electronically accepts that the training has been given. **As you have not specifically suggested that the training was not carried out**, I believe it reasonable that you were trained in line with the training documents and this was confirmed on the date in question.” Tribunal stress*
119. In response to supplemental questions, Mr Gamble explained that the Claimant had wanted the Respondent to consider that he was not available at the time of the date stamp, when it was validated on 27 January 2024 but that it was not a point of appeal that no induction training in January 2024 had taken place, the challenge was only around the date of validation: “*so I focused on only the date stamp when he was not in the building.*”
120. Mr Gamble gave evidence that he did not consider that it would be possible for the trainer to press the submit button to validate training without the colleague having first confirmed on

their own Workday account that the training had been given and that they had understood it. His evidence was:

"Each week the General Operations Manager look at a dashboard to see the training, which is outstanding, to see if it needs refreshing.....if individual has not pressed to confirm that they have received the training and the trainer presses the submit button, it would show up as training not complete on the dashboard. We have had it where the colleague [employee being trained] has refused to sign off the training."

121. The understanding of Mr Gamble was that in January 2024 training had been completed on the previous LMS system before it moved over to the new system called Workday. This is supported by the email from Ms Weaver on 9 April 2025 (page 210) who attaches the "LMS record". Mr Gamble's evidence is that the Claimant's training record migrated from LMS to Workday at some point after 27 January 2024 but he was unsure when.

122. In terms of how the process worked for LMS, Mr Gamble gave evidence in cross examination when pressed further on this around the relevance of the enrolment date, that he did not know how the LMS system worked for the transport department because he worked in the warehouse however, he was satisfied with the response from Ms Weaver and he confirmed in cross examination that he had took it that the training could have been delivered before 27 January 2024 because: *"he never said he'd never had the training."*

123. Mr Gamble repeated in answer to questions from the Judge that he understood the Claimant at this appeal was challenging only whether the correct validation date was recorded but he was not disputing that the January 2024 that training had not been delivered at all and did not investigate further into when the training had been given rather than when it was validated:

"I did not look at how or when training was delivered, I did not consider it to be an appeal point."

124. Mr Gamble did not clarify with the Claimant at the appeal hearing what precisely his complaint was about the training, he relied on what he the Claimant had said in his preprepared statement:: *"The [appeal hearing] was short but his letter was so good we could use it for the basis of the appeal."*

125. When the Judge asked Mr Gamble where in the letter the claimant agreed he had received the original training in January 2024, Mr Gamble confirmed: *"He does not specifically say he's been trained in January 2024. I took it from paragraph six (6). He apologised and I would expect it to be a specific point if he had not been trained."*

126. However, paragraph 24 of Mr Gamble's witness statement states:

"Upon starting my investigation, the main mitigation raised by the David was that he had not completed the required training. As it raises his mitigation, I investigated this prior to making my decision."

127. When Mr Gamble was asked by the Judge to clarify what his evidence was because his witness statement contradicted his evidence in cross examination, Mr Gamble gave evidence that: *"In hindsight it would read better that the Claimant had challenged the data on the system."* He gave oral evidence that what was in his witness statement in paragraph 24 was incorrect, the appeal point was about the falsification of the date of the training only.

128. The Tribunal however have regard to the fact that Mr Spooner, who dealt with the second appeal, in his witness statement at paragraph 30, states: *"During the first appeal, David further questioned the training dates and claimed he had not actually undertaken his original*

training....”.

129. Mr Gamble also in cross examination, accepted that he did not get a witness statement from the trainer about how LMS worked because he did not feel the issue on appeal was around not having training but around the time stamp but he accepted the Claimant could not have been not on site when the verification itself was done.
130. In his letter setting out his decision (page 220), Mr Gamble states that it is reasonable to find that the Claimant was trained in line with the training documents because he had not specifically suggested that training was not carried out.
131. The Tribunal find that Mr Gamble had not carried out any further investigation into whether he had training in January 2024 had actually taken place, who carried out, when it was carried out and whether it was the full training.
132. The Tribunal find that the investigation during this first stage appeal was deficient in this regard. It was clear that the Claimant was now challenging that he had received training in January.
133. In terms of the signage, it is clear from the information Mr Gamble received that the damaged sign was not replaced until after the incident, on 14 March 2025. Mr Gamble had however, been copied into the email of 27 January 2025 (page 159) which stated that the sign had been left by the barrier near the tank. In his letter setting out his findings (page 219) in terms of the photograph that Mr Dacey relied upon to make his decision, he states:

“I can confirm that the works of the signage were complete on 14 March 2025 however, I can also confirm that the signage was in the area on 27 January 2025 as this was flagged by an IDC Manager as part of their safety walk.

*The incident occurred on 17 February 2025 and therefore, I can confirm that e [sic] sign would not have been located in the place that the photograph was taken. **It’s clear however, that the signage was in the area on that date** in question and would have been located in the appropriate place prior to 27 January 2025.” Tribunal stress*

134. While Mr Gamble did not determine how visible the sign was on the date of 17 February 2025 and where exactly it was nonetheless he had regard to the fact that it would have been visible to the Claimant before 27 January 2025.
135. In terms of carrying out some risk assessment on 17 February 2025 when Ms Sly spoke with the Claimant, Mr Gamble gave evidence under cross examination that he believed a risk assessment should have been carried out and that he had given that feedback to Ms Sly but he did not believe that it changed the investigation and the process that had been followed. In his outcome letter (page 218) he states that he believes if a risk assessment had been carried out, then this should have led to a suspension but was satisfied that there was action taken by Ms Sly to mitigate risk by correcting the behaviour of the Claimant, pending the investigation.
136. The Judge asked Mr Gamble if the Claimant had not had the training and the sign was not present, whether that would have made a difference at the appeal to which he gave evidence that:

“The signage would be less of a concern to me as mitigation...if I believed the Claimant had not been trained, it would have changed considerably, absolutely... I believed he had training and what he was challenging was just about the time stamps”

137. The Tribunal find that it was clear from the appeal document that the claimant was

challenging that he had any training in January 2024. Any other reading of it was outside the band of reasonable responses.

138. In summary, the Mr Gamble concluded that there were two procedural errors that the site team had made; the suspension risk assessment had not been completed and an incorrect letterhead had been used on the disciplinary outcome letter, however this did not mitigate the Claimant's actions and he upheld the decision.
139. The Claimant names in his witness statement 4 individuals who he alleges were involved in committing health and safety breaches who were removed from their task and retrained and one (Ginny) reinstated after dismissal. Mr Gamble gave undisputed supplemental evidence that the first 3 employees used mechanical handling equipment while using a telephone, but that none of them were drivers, they all worked in the warehouse. He had no knowledge of the employee called Ginny. The Claimant in his statement provided no detail about their offences, how serious they were or what mitigating factors were involved. He appeared to assert that he should also have had retraining and in the meantime allowed to refuel at another site where GasRec employees carry out the refuelling. The Tribunal do not consider that a failure to allow the Claimant to refuel elsewhere pending an investigation impacts on the reasonableness of the decision to dismiss.
140. In terms of consistency of treatment around sanction, if indeed that is the point, the Claimant did not provide evidence about the nature of the offences those individuals were found to have committed, how comparable the safety risks were or what they specific circumstances were. The Claimant had admitted at the first hearing that he had training, that he knew he had to wear his PPE and not use his mobile phone but had done so.

Second Appeal

141. The Claimant then submitted a second appeal on 22 April 2025 (page 221). He set out three grounds of appeal:
- (1) Multiple points remain to be answered, particularly regarding the legal framework;
 - (2) A number of statements were used as facts and not checked, assumptions were made to fit the cause; and
 - (3) A decision was made to suit the corporate loyalty.
142. A second disciplinary appeal was conducted by Mr Tom Spooner, General Manager with Sam Croft, PCA attending as note taker on 6 May 2025.
143. The Claimant does not dispute the handwritten notes of that hearing (page 223-229).
144. The Claimant again had prepared a statement which he read out and it was a lengthy document (page 230-234).
145. The Claimant raised a concern about the delay with the post in terms of the first appeal but confirmed his agreement to continuing with a hearing and did not allege that this had caused any issue but asked only that post be sent first class in future.
146. He complained that he should have been taken off the task of fuelling while the investigation was ongoing and retrained and suggests that this did not happen because his safety was not as important as other colleagues or that the misconduct was not in fact considered gross misconduct.

147. He also raises that there was no near/miss report and again implies that the failure to do so indicates that this is not seen as a gross misconduct matter.
148. He also complains again about the sign not being replaced for a minimum of six (6) weeks and Mr Gamble relying on the Claimant having seen it at some point in the months before the incident, he insists that the sign was not present in the facility.
149. In terms of the training, in his document which he read out, he repeats his assertion that he was not on site at the time and that Mr Gamble had assumed the training took place instead of clarifying that with the Claimant:

*"I understand that the process is for the trainer to allocate the training, the colleague completes it and then the trainer validates the training. Times recorded will be entries by the trainer. **In my case trainer validated the training at 8am on 27th January, but I was also enrolled on the same date. This means that training was allocated by the trainer, completed by me and signed off all between midnight of 27th January and 8am of the substantial adverse effect day, when I was not present on the site.** I left the site on 26th January around 4:15 and was on shift on 27th of January at 5 pm. Furthermore, Steve did not answer how this training record appeared after the incident, as in my investigation so had no record of it. So, the training record is fraudulent, and I was not fully trained, even after the refresher in November 2024 that was completed within 5 minutes into the shift." Tribunal stress*

150. In terms of PPE and training he states in the meeting (page 226):

Claimant "As I have stated previously I admit to not wearing the full PPE and using my mobile phone obviously that has been caught on CCTV this was not the first time and again I would have not done this if I was aware of the full consequences of what could happen."

Mr Spooner: "What did you think the goggles and visor issued to you for?"

Claimant: "This was not explained so this is just my thinking for it. The fuelling station pipes get very cold and generate frost if windy so logical thinking would suggest they are to protect my eyes from this. To add on none of this was ever explained during any training as to why and any potential injuries it can cause."

Mr Spooner: "When was the last time you can recall either training or refresher on LNG refuelling?"

*Claimant : "During this whole disciplinary process this has been one of the questions I asked myself to which I couldn't remember an actual date ... **I can remember the day of the so-called refresher. I just started work at 5 pm and I was pulled aside by Brett with my phone, here I need to do your training he proceeded to complete the training record on my phone without any physical training taking place.** So, if you deem this adequate as my statement states I do not I did ask the question to Brett do we need to do something physically to which she replied something like, no it's all right. Going back quite a few months so can't remember full conversation ."*

Mr Spooner: " What you are alleging is then that Brett did the refresher training for you."

Claimant: "Well I didn't do any physical training and Brett answered all relevant questions himself and passed phone back to me." Tribunal stress

151. The claimant goes on later in the meeting to state as follows (page 229):

"As I have said previously I admit not using the correct PPE and using my phone inappropriately. I was at fault and do deserve some type of disciplinary action and believe that this should be deemed at serious misconduct and not gross and therefore a warning of any kind is warranted and I hope that by mitigation, statements and reasoning is enough for you to hopefully reinstate my position..."

152. The allegation that Brett Jones did the training for him is a matter which the Claimant had not

raised previously. He does not say the refresher training did not take place in November 2024, he now says it took place but Brett Jones did it for him. What is therefore relevant the Tribunal find is not the date of enrolment or validation, but whether Brett Jones did it for him as he alleged he had. The argument about whether training has to take place after the enrolment date on the system, that took up so much Tribunal time with the Respondent witnesses, transpired to be largely irrelevant and a distraction after the Claimant's position was eventually made clear.

Further investigation

153. Mr Spooner considered it necessary to undertake further investigation due to the serious allegation the claimant had raised and spoke to Brett Jones regarding the allegation that he had completed the health and safety training for him. It warranted investigation and therefore the Tribunal presume that Mr Spooner considered it material to his decision.
154. The evidence in chief of Mr Spooner (paragraph 21) is that Brett Jones denied that this had occurred and talked him through the refuelling process as well as the specifics of the training including and how a colleague is validated as part of the refresher programme. He also gives evidence that Brett Jones had confirmed that he had been told by the trainer that the claimant had carried out the training.
155. Under cross examination Mr Spooner gave evidence that he understood that the 'show and tell training' would take place before the enrolment date and the validation stamp and therefore the claimant would have been trained before 27 January but under cross examination when he was asked when the claimant had actually completed the training he was unable to answer that, stating that he had asked Brett questions about the refresher training in November. In terms of the January training Mr Spooner gave evidence that he did not know how the training platform worked in the transport department, stating that he made his decision based on the email Mr Gamble had received from Ms Naomi Weaver, the email from Kevin Partridge and his own conversation with Brett Jones concluding that the training was show and tell and that this training had been given however; *"I did not get to the point of ascertaining the date the claimant had been shown how to refuel or the date he was observed"* and *"I did not ask Brett to ascertain the date, the date was from Naomi and Kevin Partridge."* However, the Tribunal note that the date they had provided was the date of validation and not the date of the actual training.
156. Mr Spooner came to the decision to dismiss the appeal.
157. As he sets out his evidence in chief, in terms of the complaint that a suspension risk assessment should have been carried or that the claimant should have been removed from refuelling duties whilst under investigation, his view was that Mr Gamble addressed this point and that a suspension risk assessment should have been conducted but considered that Ms Sly had mitigated the risk by his discussion with the claimant around wearing his PPE and not using his phone.
158. Mr Spooner gave evidence that he had taken into consideration that the claimant's account of his training changed from the investigation meeting when he described his training as predominately show and tell, by the disciplinary meeting when he had claimed the training was inadequate, in the first appeal the claimant questioned the training dates and claimed that he did not undertake the January 2024 training and was now alleging that he had not completed the refresher training himself.
159. Mr Spooner sets out how in his evidence in chief (para 32) how he formed the view that the claimant's statement that he had not completed the training himself, was not credible;

"Having spoken to Brett and knowing that the training materials are managed by the technical centre of excellence in compliance team, I could not conclude that the training materials were insufficient, nor did I believe that Brett completed it on his behalf."

160. In response to questions from the Judge, Mr Spooner clarified that he had not met with Brett but has spoken to him only by telephone and further confirmed that he took no minutes of his conversation with Mr Jones, he accepted that it was a serious allegation to which Mr Spooner gave evidence that:

"In hindsight, I was validating the process and somewhat naïvely did not minute it."

161. Mr Spooner confirmed that he understood that the person who actually trained the claimant in January 2024 was Kevin Partridge but that he did not speak to Mr Partridge. The Tribunal note that he appears to have made that assumption based on the email of 3 March 2025 from Kevin Partridge (page 194) but Mr Spooner accepted that the email does not actually confirm that the training was carried out by him:

"In conversation with Brett - the trainer told him the training complete, I made an assumption and maintain it because the email was from Kevin Partridge which gave the validation date, that he did the training but I don't know whether it was Kevin who specifically completed the training."

162. Mr Spooner did not check his understanding with Mr Partridge or the Claimant who at the investigation meeting had referred to training with 'Pete'. In terms of informing the Claimant of the evidence from Brett Jones, Mr Spooner gave evidence as follows:

Judge: *"Did you tell the claimant what Brett told you?"*

Mr Spooner: *"No, after the second appeal hearing the only communication was the outcome letter."*

Judge: *"Is there any reason why you did not inform the claimant what Brett had said or pick up the phone to speak to Kevin Partridge?"*

Mr Spooner: *"No, no hindsight is great but at the time I had email from the training team and our conversation with Brett..."*

163. Mr Spooner concluded that he understood that there was no longer a requirement for near misses to be logged. In terms of the signage at the fuel station he formed the view that it was reasonable to believe that the claimant would have been aware of the signage in the months leading up to the incident, the claimant had confirmed that he had regularly attended the refuelling site and did not consider that the signage photograph detrimentally influenced the decision to dismiss nor considered it had been submitted fraudulently. Further, he also considered that the claimant understood that the goggles and visor had been provided to protect his eyes and therefore if even if he did not know the full extent of the risk, he was aware that there was a risk.

164. Mr Spooner's in his evidence in chief at paragraph 43 states:

"Regarding the severity of the actions, I had no doubt that this constituted gross misconduct. LNG is stored at extremely low temperatures and contact with the body can cause severe cryogenic burns, potentially resulting in a loss of limbs or worse. David had identified that the refuelling pipes were "very cold" and that goggles and a visor were worn to "protect his eyes" (page 227), which confirmed to me he was aware that there was a risk associated with using LNG to refuel."

165. In his evidence in chief he refers to there being specific UK government guidance discouraging the use of mobile phones at everyday petrol stations and therefore even if the claimant was allegedly not aware of the specific risks that they LNG station, as a driver it would have been aware that the rules apply generally and you could not see how we would

not have concluded that the same rules apply in an environment where the risks are more severe (para 39). While this guidance was not produced, the Tribunal consider that it can take judicial notice that mobile phone use is discouraged in everyday petrol station forecourts because of the risk of incendive sparking, regardless of how low this risk may be and in any event when refuelling a heavy good vehicle with a very harmful substance (which requires the use of various items of PPE) common sense dictates that concentrating on safe refuelling is essential.

166. The claimant also raised a number of concerns regarding Mr Spooner's involvement. The meeting notes record the claimant asking Mr Spooner whether he is still on secondment as a General Manager or has been permanently appointed into the position. The claimant expressed concern that Mr Spooner was dealing with this appeal because at the end of his secondment he may be returning to the role as Operations Manager, a role in which he would be reporting again to Mr Gamble.
167. Mr Spooner confirmed in cross-examination that he had reported into Mr Gamble from March 2022 to January 2024, he then took up the secondment as General Manager and carried out this role between January to 1 July 2025, at the end of the secondment he did return to work for Mr Gamble as one of his direct reports. Mr Spooner did not engage with this point during the course of the hearing but in the outcome letter states that the future of his position in no way affects or influences his decision-making (page 236). In cross-examination he gave evidence that he was told that he was returning to his substantive position as Operations Manager in about mid-May 2025. If that is correct his conduct of the appeal hearing completed before he was aware of moving back to work for Mr Gamble however the Tribunal consider that it is likely that he would have considered it possible or likely that he would be returning after his secondment
168. The hearing the claimant took place on 6 May 2025. Mr Spooner did not refer back to the claimant with the outcome of his further investigation before writing on 3 June 2025 to confirm that his appeal was not upheld (page 235). The Disciplinary Policy states that the outcome will be communicated as soon as possible and usually within 5 days of the appeal hearing (page 46). The ACAS Code also provides at paragraph 29 that *Employees should be informed in writing of the results of the appeal hearing as soon as possible.*
169. The Tribunal accept that the letter was posted on 3 June but there appears to have been some delay because the Claimant had not received it by 6 June 2025 (page 238).
170. In terms of the allegation that the revalidation/refresher training was completed by Mr Jones for him he sets out his decision on this:

*"...you did not escalate this at the time of the revalidation or indeed in your first stage appeal, despite now seeking to rely on this allegation, which is now been described by you is unacceptable, **however that is not how the trainer recalls the re-validation.** The training material is assessed by a technical centre of excellence and compliance teams and I find no insufficiency in the training materials and I reasonably believe that you have received your training and you knew that you should have been wearing your PPE and that you shouldn't have been using a mobile phone when refuelling." Tribunal stress*
171. Mr Spooner does not set out the evidence that is relied upon to reach the conclusion that the trainer recalls the revalidation differently or indeed clarifies exactly what the trainer's recollection had been.
172. Mr Spooner in response to the Judge, gave evidence that if the Claimant had been using the LNG refuelling station without having had any training, this would of itself have been a gross misconduct issue, if he was using equipment he had not been trained to use .

Submissions

173. The parties provided written submissions on 30 March 2026 and then provided further comments on the other party's submissions on 8 April 2026. The submissions have been taken into account in full but are not repeated in full in this judgment.

Respondent Submissions

174. The Respondent's primary position is that the Claimant's dismissal for misconduct satisfied the *Burchell* test and fell within the range of reasonable responses, and the claim should therefore fail. In summary, the Claimant acted in a way that completely disregarded his training and the Respondent's clear policies on wearing PPE and not using a mobile phone while refuelling LNG. The Respondent considered the mitigating circumstances, but were of the view, given the dangers involved, that the breach was so serious that dismissal was the appropriate sanction. This was consistent with the Respondent's disciplinary policy. A fair procedure was followed throughout. As such, the dismissal fell within the range of reasonable responses.

Claimant's Submissions

175. The Claimant in essence complains that; the Respondent failed to carry out a reasonable investigation, relied on unreliable and inaccurate evidence, disciplinary and appeal processes breached the ACAS Code of Practice, the Respondent failed in its statutory duty of care under the Health and Safety at Work etc. Act 1974 and the sanction of summary dismissal fell outside the band of reasonable responses available to a reasonable employer

Legal Principles

176. The starting point is the statute: 98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

.....

(b) relates to the conduct of the employee,

.....

(3) In subsection (2)(a)—

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

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

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

The reason for dismissal

177. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee': ***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA.***

178. What a Tribunal must not do is put itself in the position of the employer and consider how it would have responded to the established reason for dismissal : **Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA**,.
179. **CRO Ports London Ltd v Wiltshire EAT 0344/14**: what is relevant is the evidence available to the employer at the time of dismissal.

Conduct

180. In relation to conduct dismissals the leading authority on fairness is the case of **BHS v Burchell [1978] IRLR 379**, which sets out a three-part test: the employer genuinely believed the employee was guilty of misconduct, the employer had reasonable grounds for that belief; and the employer had carried out as much investigation as was reasonable in the circumstances.
181. **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** : the test which the tribunal must apply is whether dismissal was within the band of reasonable responses that a reasonable employer in the circumstances might have adopted.

Process

182. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: **Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23**.
183. The House of Lords' decision in **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL** establishes procedural fairness as an integral part of the reasonableness test under S.98(4)..
184. When determining the question of reasonableness, the tribunal should have regard to the procedures set out in the ACAS Code, which is discussed under 'ACAS Code of Practice' below.
185. **Taylor v OCS Group Ltd 2006 ICR 1602, CA** and **D'Silva v Manchester Metropolitan University and ors EAT 0328/16** where the EAT upheld an employment tribunal's conclusion that a flaw in the disciplinary process that rendered it 'not ideal' did not render the dismissal unfair.

Appeal

186. **West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL**: the employer's actions at the appeal stage are relevant to the reasonableness of the whole dismissal process.

Contributory fault

187. Section 123(6) of the Employment Rights Act 1996 (ERA) states that: '*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.*'
188. There is an equivalent provision for reduction of the basic award contained in S.122(2) ERA which provides merely that; "*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”

189. **Nelson v BBC (No.2) 1980 ICR 110, CA**: provided guidance on the three factors to be satisfied if the tribunal is to find contributory conduct.

Conclusions

Reason for dismissal

190. The Tribunal accept that the reason for dismissal was the claimant’s alleged conduct on the 17 February 2025. The Claimant accepted, to an extent, his culpability and apologised for his behaviour. He does not in these proceedings, allege that he was dismissed for any other reason. In any event, it is clear that he was dismissed for not wearing his PPE and for using his mobile phone when refuelling.

Did the employer genuinely believe the employee was guilty of misconduct

191. Counsel for the Respondent refers to the definition of gross misconduct as defined, in **Neary v Dean of Westminster [1999] IRLR 288**, namely conduct that: *"so undermines the relationship of trust and confidence ... that [the employer] should no longer be required to retain [the employee] in his employment"*. The Tribunal is mindful of the evidence of Spooner (w/s paragraph 43) and the Respondent’s disciplinary policy.
192. The Tribunal conclude that the Respondent formed a genuine belief that the Claimant was guilty of misconduct, he himself admitted what he had done and this had been witnessed and captured on CCTV.
193. The Claimant does not dispute that he did what is alleged. A fundamental plank of his claim that the dismissal was unfair relates to his claim that he was not appropriately trained and that the Respondent should share some blame for that and this should mitigate the sanction. As he summarises it in his written submissions dated 30 March 2026 paragraph 13:

“For over twenty years, Mr Stevens carried out his duties responsibly and without incident. Yet he was ultimately dismissed for actions he was never properly trained to perform and which took place in an area where safety controls had not been maintained.

The Respondent dismissed Mr Stevens for breaching a safety system that it failed to properly train him on, failed to maintain, and then failed to properly investigate.

*This case concerns organisational failures in safety management and investigation, for which the Respondent has sought to hold one long-serving employee **solely responsible**.*

*Mr Stevens lost his employment, his professional reputation, and his financial security after twenty years of loyal service—**not because he acted recklessly, but because the Respondent failed to ensure the safeguards it now claims he breached.**” Tribunal stress*

Did the Respondent carry out as much investigation as was reasonable in the circumstances : Analysis

194. **Sainsbury’s Supermarkets Ltd v Hitt [2002] EWCA Civ 1588**: It is not for the Tribunal to determine whether it would have investigated the matter differently; the question for the Tribunal is whether the investigation which was carried out was within the range of investigations that a reasonable employer would have carried out: para 30:

“The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) apply as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.”

195. The Respondent submits that the Respondent carried out a comprehensive investigation, specifically the investigation by Sue Sly, the disciplinary process conducted by Mr Dacey, and two appeals, conducted by Mr Gamble and Mr Spooner. It is submitted that throughout the disciplinary process, Mr Dacey reviewed the investigation notes, conducted a disciplinary hearing, and adjourned the hearing for further investigations to be carried out, specifically checking with the training team that the Claimant had completed his LNG refuelling training.

Training

196. The Claimant accepted in his investigation meeting with Ms Sly that he remembered going through the training documentation with a trainer, Peter, *“however most of the training was verbal, show and tell”* (page 172).
197. The Respondent submits that the training did indeed take the form of being shown how to refuel, then observed doing it, so it was reasonable to conclude from the Claimant’s comments that he had completed the required training.
198. At (page 175), when the Claimant was asked if you had completed his LMS sign off for gas refuelling, he responded, *“most likely yes”*.
199. In the Claimant’s disciplinary meeting, with Mr Dacey, he did not complain that he had not completed the training, he complained that the training was inadequate (page 185- 187).
200. Counsel for the Respondent submits that at the First appeal with Mr Gamble, the Claimant queried the accuracy of the training records. He did not, however, claim he had not been trained and that Mr Gamble was clear he interpreted that appeal point as the Claimant saying he could not have had the training on the date and time shown in the training records, making it effectively a point about alleged falsification of training records. Nevertheless, Mr Gamble confirmed with Naomi Weaver, a member of the Technical Centre of Excellence and Compliance team, that the Claimant had completed his LNG training (page 210).
201. The Tribunal do not accept that submission and conclude that it was outside the band of reasonable responses for Mr Gamble to treat the content of the Claimant’s appeal document as querying only the date of validation. It is manifestly obvious that the Claimant was asserting that he had not had the training. Mr Gamble in his own evidence in chief (which he swore to and was given the chance to correct) stated that; *“Upon starting my investigation, the main mitigation raised by David was that he had not completed the required training.”*
202. In Mr Gamble’s email to Ms Weaver (page 212) he specifically makes enquires in the context of the training not having been received; ***“if this training was completed...”***.
203. The Tribunal conclude that at the time Mr Gamble understood that the Claimant was alleging that he had not had the training however, he failed to follow thus up. He failed to get the answers to the questions he had asked and decided to process with the limited information he had been given.
204. The Tribunal also consider that his investigation into the extent to which Mr Dacy had already reached his decision prior to the hearing on 3 March 2025 was cursory and superficial. An obvious enquiry would have been to check the adjournment note itself and the extent to which it had been completed/modified before the hearing. The Tribunal conclude that it was

outside the band of reasonable responses not to establish the extent to which Mr Dacey discussed the outcome of his investigation with the Claimant and remained open minded about any response and further mitigation prior to the reconvened disciplinary hearing.

205. Mr Gamble then failed to provide the outcome of his further investigation to the Claimant before reaching his conclusion on the appeal, therefore the Claimant had no opportunity to comment.

206. The Respondent's own Disciplinary Procedure (page 46) provides :

"Appeal

Further investigations may be required if any new matters are raised in an appeal. The hearing will be adjourned .If any new information comes to light, a summary including where appropriate copies of additional relevant documents and witness statements will be provided .The colleague will have a reasonable opportunity to consider this information before the reconvened appeal hearing..." Tribunal stress

207. It is not the Tribunal's own view which it is substituting, it is the Respondent's own procedure which it has failed to comply with and further, it offends natural justice for the Claimant not to have the opportunity to comment on further evidence before the decision is finalised specifically on something as fundamental as whether he received the required training.

208. The Tribunal conclude that Mr Gamble did not carry out an investigation which was within the band of reasonable responses. He did not follow up the response from Ms Weaver to ask about the Claimant's assertion that he was not on site to receive training and wat had been involved in the validation process or how soon thereafter refresher training should be provided. There is no satisfactory explanation for that omission other than Mr Gamble did not take the time to make further enquiries, his explanation now that this was not a point of appeal is not plausible.

209. The Tribunal have considered whether this was remedied at the next appeal and conclude that it was not.

Second Appeal

210. The Claimant on appealed to the second stage on 22 April 2025. The hearing took place on 6 May 2025 before Mr Spooner and the outcome was communicated in a letter posted om 5 June 2025.

211. The Claimant raised again that he had not been trained on 27 January and although previously he had not raised an issue about the refresher training on 11 November 2024 he did at this stage and claimed for the first time that the refresher training had in fact been completed for him on his phone by Brett Jones.

212. Mr Spooner was clear in evidence that this was a serious allegation. His evidence is that he checked this out with Mr Jones in a telephone call. It may have been reasonable for him to accept Mr Jones' rebuttal of this over the Claimant's in light of the Claimant's shifting narrative however, the Tribunal conclude that it was outside the band of reasonable responses for Mr Spooner in the face of a serious allegation to not conduct a formal meeting with Brett Jones and record what he had to say. It was also outside the band of reasonable responses and offends natural justice to not disclose what Mr Jones had said to the Claimant and allow the Claimant an opportunity to comment or provide further evidence, before accepting Brett's account.

213. Mr Spooner gave evidence that he had received training on conducting appeals and because of this he considered he was able to conduct this process without being compromised in circumstances where he was having to review a decision which had been taken by his Substantive Line Manager however, despite that training Mr Spooner considered that he had been “naïve” in not recording his discussion with Brett Jones.
214. Mr Spooner’s naivety in the way he conducted the investigation with Mr Jones, (in light of his evidence that his training ensured that he would act impartially) suggests the very real possibility that he was biased in his handling of this appeal and that his failure to minute his discussion and disclose this to the Claimant was not because of a lack of training but a conscious or subconscious bias. In an organisation the size of the Respondent, the Tribunal consider that it could not have been difficult to arrange for someone clearly impartial and unconnected with the decision makers to have conducted the appeal.
215. Mr Spooner did not hold a formal meeting despite accepting how serious the allegation of Mr Jones completing his refresher training for the Claimant was, he did not minute it or keep any written record of it, and he did not have anyone from HR or a notetaker with him. He did not give the impression of having treated this allegation seriously or with an open mind.
216. Given the Claimant denied having the original training, he also did not take the simple step of checking with the trainer, who he believed, but not had confirmed, had been Mr Partridge and check what training had been given.
217. The Tribunal take into account that the Claimant had given evidence at the investigation hearing that he had received training, which was verbal, show and tell. He confirmed that he was given PPE and told he had to wear it for refuelling, and even if unaware of the full extent of the risks, he was aware of the need for PPE and at the second appeal revealed an appreciation as to the risk of not wearing eye protection however, he was challenging the adequacy of the training and that was not adequately looked into even if it would not ultimately have been considered justification for reducing the sanction.
218. Counsel for the Respondent refers to the Claimant’s changing account over the November refresher training and submits that against that backdrop, and the doubt it cast on the Claimant’s belated allegations he had not completed the training himself, the extent of the investigation fell well within the range of reasonable responses. Regardless of the training the Claimant had actually completed, he did not dispute that he was aware of the requirement to wear PPE and not use his mobile phone while refuelling. Further investigation (beyond what was done) into whether he had been trained to know that was not therefore required.
219. The Respondent also refers to the Claimant’s position changing further through these proceedings because in his Particulars of Claim, he claimed:
- “Training was not given due to the system being down, but a quick show and tell of equipment used was given instead. Picked up again in 10 months and completed in 15 minutes. Training was logged as assigned and fully completed on the day I was not present on site; the record appeared post disciplinary. No full training and signoff ever took place.”*** (page 20) Tribunal stress
220. This contrasts the Respondent asserts, with his witness statement, wherein he claims Brett Jones completed the training on his phone and “no training of any kind was done” (paragraph 16).
221. The Claimant claimed he had been shown how to refuel for around 30 minutes and observed once but not observed the required second and third times. In any event, even on the Claimant’s final account, he had carried out the substantive part of the training and was shown how to refuel safely.

PPE

222. The Claimant confirmed at the meeting with Ms Sly, at [page 174], *“Before the training took place I was provided with a visor or face guard, goggle and a set of gloves. Upon taking the training, I was told these needed to be worn”*.
223. The Respondent submits that the investigation complied with the ACAS code of procedure in misconduct cases, specifically: the issues were investigated, the Claimant was informed of the issues in writing, a disciplinary hearing was conducted where the complaint was explained, the evidence was assessed and the Claimant was given a reasonable opportunity to ask questions; the Claimant was informed of the decision in writing and given an opportunity to appeal, which he twice exercised, and a thorough appeal process was followed.
224. The Respondent in submissions concedes that the Respondent witnesses were inconsistent in their understanding of the platform on which training was delivered. The witnesses were not trainers and the Tribunal is invited to accept Mr Spooner’s evidence, that it was completed on Workday, is to be preferred. He clarified in evidence that the process was demonstrated, with three observations, then the employee was enrolled on Workday and the training was validated on Workday.
225. It is submitted by the Respondent that the training records are clearly indicative of the system recording set times on the dates input for enrolment and validation, rather than recording the precise time. It is implausible that on three of the four dates listed, the training was validated at 08:00:00 to the very second, with the fourth being at 00:00:00. The Claimant’s position, that he was not in work until 5pm on both 27 January 2024 and 11 November 2024, does not therefore cast any significant doubt on whether he completed the training by those dates. The Claimant accepts he was signed off to refuel on 11 November 2024. Therefore, on his own case, the fact he did not attend work that day until 5pm does not mean he did not complete the training, so the training records are not undermined.
226. The Tribunal conclude that it was within the band of reasonable responses for the Respondent to conclude that the Claimant had, as a minimum, received training in a ‘show and tell fashion’, and that was he aware of the requirement to wear his PPE and not use his mobile telephone while refuelling. He confirmed this to Ms Sly at the meeting on 19 February 2025. The claimant had from the outset at the investigatory meeting, accepted that he had now worn his PPE, accepted that he had been given PPE and accepted he had been told to wear it. The Claimant had apologised for what he had called his ‘poor judgment’.
227. The Tribunal do not accept that Ms Sly’s decision not to suspend immediately is evidence that the Respondent did not consider this offence to be sufficiently serious to amount to gross misconduct. She called him promptly to a fact find and warned him of the seriousness of his actions and referred him immediately to a disciplinary hearing.
228. However, the way the first and second appeal was dealt with fell outside the band of reasonable responses. There was a failure to carry out an investigation into the allegation of the Claimant not having received training or adequate training in January 2024 and then of the trainer completing his November 2024 refresher training for him and to failed to inform the Claimant of the outcome of that investigation before dismissing his appeals.

Was dismissal within the range of reasonable responses

229. It is submitted by the Respondent that regardless of the nature and date of the Claimant’s training, he accepted that, by 17 January 2025, he knew the requirements to wear PPE and not use his phone while refuelling, and yet he breached both. It is no excuse to rely on his

training. It is submitted that if the Claimant had indeed not been observed the required three times, or worse still if the training was completed for him on his phone by Brett Jones, the Claimant would still have been committing a separate misconduct offence (page 112).

230. In terms of training, the training records (page 125) show that he had completed the training by 27 January 2024 and the refresher training by 11 November 2024.
231. The Tribunal consider on the evidence, including the changing nature of the claimant's evidence about his training from investigation through to the second stage appeal, (and the Claimant's credibility more widely in terms of his evidence about the sign and what he had been told about PPE) that as a matter of fact the Claimant had received training sufficient for him to understand how to refuel safely and understand the risks LNG refuelling presented. The Claimant is an intelligent and curious individual who had carried out his own research into LNG. He was candid at the investigation in accepting he had been told to wear the PPE and had training and been through the training document. He had blamed a medical issue for not wearing his correct PPE but had accepted at the investigation that he had not told anyone about this. The Tribunal accept there was also a large sign at the station which it finds he would have seen even though it was not present on the date in question. As the internal process progressed the Tribunal find he latched onto issues such as signage being moved and dates of validation not coinciding with this shifts to challenge his dismissal. However, what is relevant to the issue of fairness is the information the employer had at the time and the decision they made based on that information and the process followed, not what is known now with the benefit of evidence given and clarified during these tribunal proceedings.
232. Counsel also in submissions states that the training documentation suggests the requirement to wear PPE was also repeated by the refuelling machine, meaning the Claimant had to confirm he was doing so on the machine before starting the refuelling process. However, this was not put to the Claimant in cross examination and it is not clear what part of the documentation makes this clear. In any event, it is also submitted that the Claimant accepted in oral evidence that his actions on that day were not materially impacted by the lack of signage. He confirmed the reason he did not wear PPE and used his phone was because of his medical issue, not the missing signage.
233. The Claimant relied on an undisclosed medical issue as justification for his actions and as the Respondent submits and the Tribunal accept, this medical issue was not the reason why he used his mobile phone (in cross examination he alleged for the first time that it was because of a family matter but did not expand) and it is submitted that the alleged medical issue confirms the Claimant made a conscious decision to disobey his training. The Tribunal accept that this explanation does indeed support a belief that the Claimant knew what he had to do but did not do so because of this alleged issue, that this was the reason, not because he did not appreciate the risks and need to wear PPE.
234. The Respondent submits that its witnesses were clear that they considered the mitigating factors, including the Claimant's length of service and previous disciplinary record. However, the seriousness of the Claimant's misconduct and the nature of his response to undergoing disciplinary proceedings, which was effectively to go on the offensive rather than show contrition, meant that dismissal was a sanction well within the range of reasonable responses. Further, alternatives to dismissal were considered, including refueling at Crick where assistance could be provided, but the Respondent's decision makers were clear they were not viable given the seriousness of the Claimant's actions and the resulting loss of trust.
235. The Claimant refers, at paragraph 19 of his statement, to four individuals who he claims were given compulsory training and removed from tasks following health and safety breaches. The Tribunal accept the Respondent's submission on this point, namely that this does not move

the dismissal outside the range of reasonable responses as the individuals the Claimant listed were not HGV drivers, as confirmed by Mr Gamble. Their cases related to using mobile phones while handling mechanical equipment. None of those cases concerned refuelling an HGV. The evidence does not support a finding of that those individuals' circumstances were comparable. The Claimant also did not raise the different treatment of these individuals as an issue during his disciplinary process.

236. In terms of the issue in Particulars of Claim (page 19) that there was no duty of care was shown to him by not suspending him or making a near miss report. As the Respondent submits and the Tribunal accepts, Mr Dacey during the disciplinary process accepted that Ms Sly did not suspend the Claimant, but the Tribunal accept that this does not impact the fairness of the dismissal. The Tribunal do not consider that it proves that the Respondent did not consider his actions to serious enough to amount to gross misconduct, although the Tribunal accept that there is a tension between this initial response and the decision, Ms Sly (after discussing with the Claimant his training etc) does herself consider this to amount to gross misconduct (page 1178).
237. In terms of completing a near miss report, Mr Gamble dealt with this in the appeal, explaining that near miss reports are only completed where medical intervention is required. The Tribunal accept, this does not impact on whether the dismissal of the Claimant was fair or not.
238. The Claimant also challenges not being removed from the task of refuelling. The Respondent submits that Mr Dacey, Mr Gamble and Mr Spooner were all clear they considered alternatives to refuelling, including moving the Claimant to an alternative site, where assistants do the refuelling, but the Claimant's actions in refuelling in such a dangerous manner without disclosing the medical issue he claimed made this necessary was such a serious breach that they had lost trust in him, therefore making dismissal the most appropriate sanction. The Tribunal accept that this was addressed during the disciplinary and appeal process and also accept that this is not a performance issues, it was a case of the Claimant accepting he had not worn PPE in circumstances where he knew he needed to wear it and where what he described as his 'poor judgment' had put him and others at risk. The Tribunal do not consider that in those circumstances; it was outside the band of reasonable responses not to offer him a role which did not include refuelling.
239. The Claimant challenges the fairness of the same HR adviser taking notes in each meeting. The Tribunal conclude that is a of no consequence, it has not been shown that the note taker took any part in the decision making.
240. In terms of the complaint about not using company headed paper, The Tribunal do not consider this to have any impact on the fairness of the dismissal.
241. The Claimant challenges the second appeal being managed by Mr Spooner, who later returned to his substantive role reporting into Mr Gamble. The Respondent makes the point that the Claimant did not ask for an adjournment and did not make specific allegations about Mr Spooner's conduct of the appeal beyond the time it took. It is asserted that Mr Spooner managed the appeal fairly and impartially and the dismissal was not unfair because of his involvement.
242. It is submitted that the internal disciplinary process was done in a reasonably timely manner and certainly there was no issue about this impacting on the fairness of the process. The Tribunal accept that there was some delay particularly around the outcome of the second appeal, however the Claimant does not point to any specific unfairness this of itself created.

Reasonableness of the Investigation– conclusion

243. The Tribunal accept that dismissal for a failure to wear PPE and using a mobile phone when refuelling with LNG is serious enough to warrant dismissal for gross misconduct and this is clear from the Respondent's Disciplinary Policy and Guidance Booklet.
244. The Claimant at the outset in the investigation meeting confirmed that he had received trained, he understood the requirements to wear PPE and not use his phone while refuelling. The Claimant accepted that he had seen the training documentation, he had looked through with the trainer, although most of the training was verbal, show and tell (page 173). The Claimant is not an inexperienced driver he had 10 years' experience. The Claimant had not only had some training, but he had also seen the sign which very clearly identified what he could land could not do. The training document explains that that the gas is extremely flammable and there is a risk of cold burns to the skin, that contact may cause frostbite, vapour may cause drowsiness and dizziness and over exposure symptoms include cessation of breathing and unconsciousness (page 150). Further, the Claimant's evidence is that he carried out his own research.
245. The way however the issues raised on appeal in particular were dealt with rendered the process unfair. The Claimant was raising issues which Mr Gamble and Mr Spooner considered sufficiently serious to warrant further investigation but failed to carry that out within the band of reasonable responses.
246. If it had transpired that the January training was not the training which was recommended and Mr Jones had completed the refresher training for him, would this have mitigated the sanction? It was clearly serious enough for this to warrant further investigation.
247. The Tribunal conclude that the following matters mean that the Respondent's conduct of this process fell outside the band of reasonable responses which is relevant to the issue in particular of mitigation and whether a lesser sanction may have been considered had these issues been properly dealt with :
- The complaint that Mr Dacey had approached the reconvened hearing with a closed mind was raised at the first appeal, but the investigation into this concern was not conducted within the band of reasonable responses. Mr Gamble did not enquire about the extent to which Mr Dacey had already completed the adjournment note prior to the reconvened hearing.
 - The Tribunal consider that what is of greater significant however is the failure by Mr Gamble to have investigated the complaint by the Claimant that he had not received training in January 2024. The Tribunal conclude that Mr Gamble was in fact aware that this was the complaint (for reasons set out in the findings of fact) but chose not even to follow up the questions he had raised with Ms Weaver. Further, as set out in the findings of fact he did not give the Claimant the opportunity to comment on the further investigation he had carried out before coming to his decision to dismiss his appeal.
 - The defects in the first appeal were not remedied by the second appeal. The Tribunal conclude that is it more likely than not, that Mr Spooner was consciously or otherwise, influenced by the fact that the decision at the first appeal was taken by Mr Gamble. This presented a real risk of a conflict and the Tribunal consider more likely than not explains the obvious failings at this stage of the proceedings (as set out in the facts).
248. Taking the above into consideration, the Tribunal find that those actions mean that the investigation into those issues the Claimant raised fell outside the band of reasonable responses and are so serious that they undermined the fairness of the process and of the decision making.

Closure of LNG Station

249. The Claimant in submissions refers to the closure of the LNG station in March 2026. This was not evidence put before the Tribunal and there has been no application to admit further evidence. The Tribunal do not consider it relevant in any event to the determination of the decisions which were taken about the Claimant's conduct in March 2025.

250. The Tribunal conclude that the claim of unfair dismissal is well founded and succeeds.

Remedy

Evidence

251. The Claimant's employment ended on 3 March 2025. The Claimant started his new job on 24 August 2025 and he seeks losses in relation to his lost salary during that period only. He accepted in cross-examination that on 'paper' he is an experienced HGV driver. He did not deny that in the last few years there's been a high demand for HGV drivers albeit it was equivocal; *"I guess so, I don't know."*

252. It was also put to the claimant in cross-examination that there are lots of jobs in his industry and again the claimant's answer was noncommittal; *"Maybe, but were they relevant to what I required? Yes jobs, but every job is suitable for every person."*

253. The claimant accepted that in terms of the evidence he has presented, there is only evidence of one application he made which was on 15 May 2025 to the Royal mail (page 260). In response to which the claimant gave evidence;

"I did not keep anything. A lot of it was done by text messages. I apply for numerous jobs once I was not selected I deleted them."

254. The claimant however did not provide oral evidence identifying any other jobs that he applied for, he did not name even one other company he had applied to.

255. In between 3 March 2025 and starting his new job he did not apply for any benefits e.g. income support. The claimant did not dispute in cross-examination that he had an entitlement to claim jobseekers allowance nor does he dispute the respondent's calculation of that in submissions at £92.05 per week. His evidence in cross-examination is that he did not apply for any benefits because he was using his savings and intended if successful in this claim, to apply for reinstatement. He is not however seeking reinstatement now.

Legal Principles

256. Section 123 (4) of the Employment Rights Act 1996 provides that ; "in ascertaining the loss Tribunal shall apply the same rule concerning the duty of the person to mitigate his loss supplies to damages recoverable under the common law of England and Wales all (as a case may be) Scotland ."

257. The test is simply whether the employee's conduct in pursuing or refusing a particular source of income is reasonable on the facts of each case.

258. The burden of proof of establishing a failure to mitigate is on the employer.

259. In ***Penny and anor v Swansea City Association Football Club and anor ET Case No.1600764/16*** the employment tribunal was of the view that, as a general principle, a claimant who has been unfairly dismissed is entitled initially to seek work at a reasonably

comparable salary and status, and within a reasonable geographical range of where he or she previously worked. If the job hunt is unsuccessful, there must come a point when the claimant can reasonably be required to seek work at a lower salary or status, or in a wider geographical area.

260. As set out by Sir John Donaldson in **Archbold Freightage Ltd v Wilson 1974 IRLR A10 NIRC** the dismissed employees duty to mitigate his loss will be fulfilled if he can be said to have acted as a reasonable person would do if he had no hope of seeking comment compensation from his previous employer.
261. Tribunal has had regard to the guidance in **Cooper Contracting Ltd v Lindsey 2016 ICR D3 EAT**.
262. In **Secretary of State for Employment v Stewart 1996 IRLR 334, EAT** the EAT held that that if an employee unreasonably fails to claim unemployment benefit during the period covered be a payment in lieu then he or she may be found to have failed to mitigate his or her loss.
263. When calculating the compensatory award, the calculation should initially be based on the assumption that the employee has taken all reasonable steps to reduce his loss and if the employee has in fact failed to take such steps the compensatory award should be reduced to cover only those losses that would have been incurred if the employer taken the appropriate steps.

Submissions

264. The Claimant sets out in submissions that following dismissal on 3 March 2025 he remained unemployed until he secured new employment on 25 August 2025. He claims a period of approximately 25 weeks loss. He asserts that during this time he actively sought full-time employment and while he considered taking up agency work he complains that this typically offers variable daily hours with no guaranteed income or stability and therefore he submits that he reasonably prioritised securing permanent employment (although he gave no evidence of what that involved beyond making 1 application). He seeks the following sums as set out in his written submissions:
 - loss of earnings £18,341
 - pension loss £525 (3%)
 - loss of holiday entitlement £2,111
 - Total compensatory lost £20,977
265. The sums above are however different to those in his Schedule of Loss in the joint bundle which the Respondent addressed in cross examination and in its original submissions (see below).
266. The Respondent calculates 24 weeks loss of wages to be £17,607.36 (£733.64 per week) and loss of benefits at £1,680.
267. The loss of benefit figure the Respondent puts forward is the same figure set out in the Claimant's Schedule of Loss in the joint bundle. The amount for loss of holiday entitlement set out in the Claimant's written submissions was not included in the Schedule of Loss and there is no explanation of how that has been calculated in the submissions or reference to any supporting documents.

268. In cross examination the Claimant gave evidence that he was unable to explain how he had arrived at the figure of £1680 for loss of benefits (including pension contributions) because his wife (who did not give evidence) had prepared the Schedule of Loss but he stated that he would explain how it was calculated in written submissions. It was explained to him that he could deal with it in submissions if there was evidence to support it within the bundle. Although he has still not explained this figure in his submissions, the Respondent does not take issue with the sum of £1,680 but argues quite rightly, that the Schedule of Loss makes no reference to a claim for holiday pay and the Tribunal have not been taken to any documents in support of this claim.
269. There is no separate claim for holiday pay either as a claim for accrued holiday under the Working Time Regulations 1998 or as a breach of contract claim and there was no application to amend the claim.
270. The claim for holiday pay is not accepted as a claim which has been pleaded or losses which have been established on the evidence as part of the unfair dismissal claim.
271. The Claimant did not include in the sums claimed a sum for loss of statutory rights although this was included within the template used, he did not insert any figure against this heading or go on to include it within the sums sought within this written submissions at paragraphs 10 and 11 which breakdown the compensatory loss and basic award.
272. The Respondent argues that the claimant is not entitled to the full amount of loss of wages sought because he failed to mitigate his loss. The Respondent argues that he failed to claim jobseekers allowance of £92.05 per week and provided no justification for not doing so and that the total should be reduced by £92.05 per week (£2,209.20 if 24 weeks).
273. Further it is argued that the Claimant failed to mitigate by applying for more jobs and that he accepted in evidence that HGV drivers are in high demand and the only evidence of him having applied for one job on 15 May 2025 (page 259). It is submitted that if the claimant applied for more roles he could have obtained one much more quickly than the nearly 6 months it took given the nature of the industry and his experience.
274. The Respondent argues these loss of earnings should be capped at three months (13 weeks).

Conclusion

Job Seekers Allowance

275. The Claimant was out of work for 24 weeks, from 3 March 2025 to 24 August 2025.
276. Was the Claimant's decision not to claim benefits unreasonable? (**Secretary of State for Employment v Stewart**).
277. The Claimant does not allege that he was confused over whether he had a legal entitlement to claim benefits, he simply chose to use his savings instead but in doing so the Tribunal accept that he increased his losses during the period he remained out of work.
278. The Respondent calculates the legal entitlement he had to job seekers allowance to be £92.05 per week. That calculation was set out in their first written submissions and was not challenged by the Claimant in his response and the Tribunal note that £92.05 appears to be the correct sum as set out on the government website
279. The claimant does not dispute that he would have received this benefit had he applied for it.

280. The Tribunal are persuaded by the Respondent's submission that it was not reasonable of the claimant to use his savings rather than apply for the benefit to which he was entitled while he remained out of work, at least after a period of a couple of months after which it would have been clear that if he was not prepared to accept agency work he may be out of work for quite a while longer.

Agency Work

281. The Claimant's evidence is that while agency style work was considered this work typically offer variable daily hours with no guaranteed income or stability and is unsuitable for his 'circumstances'. He does not elaborate on what those circumstances are. Accordingly, the Claimant argues that the period of unemployment of 6 months reflects the limited availability of suitable work and not any failure to mitigate loss."
282. The Claimant's own evidence is that there was agency work available and while the Tribunal can appreciate his preference for more permanent employment it considers that it would have been reasonable after a period of three months,(at which point he still had no indication of when he would secure alternative permanent employment), to have taken up an agency role as a short term measure, he could still have continued looking for permanent employment while taking reasonable steps to mitigate his losses.
283. The Tribunal do not consider that his actions in taking no steps to mitigate his loss by accepting some interim agency driving work after a period of 3 months of being out of work was reasonable.
284. The Tribunal do not consider it reasonable for the Claimant to consider that in the event of reinstatement his employer would make good a period of six months during which he elected not to claim benefits but use savings and not to take up any agency work in circumstances where there is no convincing evidence that he was being active in looking for other permanent roles.
285. The Tribunal consider taking into account the Claimant's own evidence in responses to questions about the availability of HGV work generally, that he could and should have secured agency work after a period of three months.
286. The Tribunal conclude that a deduction should be made for a failure to claim job seekers allowance after 8 weeks of being out of work and a failure to take agency work after a period of 12 weeks.
287. The Tribunal conclude that taking agency work would have mitigated his loss of salary (the Claimant does not allege that he could not have obtained sufficient agency work to cover his lost salary during that period) however, the Tribunal conclude that he would not have received the benefits he would have enjoyed had he continued with the Respondent and that those losses continued during the full 24 weeks.
288. It is not in dispute that the Claimant's net weekly earnings were £733.64 per week
289. The Tribunal calculate the claimant's losses accordingly to be as follows:

Basic award : £16,100 (based on 20 years' service and age 47 at the termination date which equates to 23 weeks with a statutory cap of £700 per week)

Compensatory Loss:

- (i) 8 weeks loss of earnings @ £733.64 net weekly earnings: £5,869.12 [no reduction for

failure to mitigate]

(ii) 4 weeks loss earnings @ £733.64 less job seekers allowance: £2,934.56 - £368.20
=£2,566.36 [*reduction for failure to claim job seekers allowance*]

(iii) Further 12 weeks: Nil [*reduction for failure to mitigate by electing not to accept interim agency work after 12 weeks out of work*]

(iv) loss of benefits: £1,680.

Sub Total compensatory loss: £10,115.48

290. Total of basic award plus compensatory loss : £26,215.48

ACAS breach

291. The question now arises whether there should be any adjustment to the compensatory award pursuant to the statutory provision for making adjustments of up to 25 per cent in respect of breaches of the ACAS Code of Practice on Disciplinary and Grievance Procedures: S.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A).

292. Any percentage adjustment for breach of the ACAS Code should be made after a reduction has been made for failure to mitigate losses: *Digital Equipment Co Ltd v Clements* (No.2) 1998 ICR 258,CA.

293. Th Claimant submits briefly that there were the following breaches:

Failure to Conduct a Reasonable Investigation:

- *Training validity not properly assessed*
- *Missing signage was not properly investigated*
- *Validation loophole ignored*
- *Site conditions not verified*

Appeal Failures:

- *Late receipt of appeal notice*
- *No meaningful investigation at appeal stage*
- *Lack of independence*
- *Excessive delay in outcome*

294. The Tribunal do not agree that there missing signage was not properly investigated. It was established that there was a sign usually in place. The Tribunal find it of no real consequence that on the day in question it was damaged, even if it could not be seen where it was placed awaiting replacement. The Claimant himself never raised this at the investigation of disciplinary hearing although he discussed with his wife that it was missing.

295. In terms of the issue of late receipt of notice and excessive delay; the Claimant was content to proceed with the first appeal and the ACAS Code does not set out a specific period for notice. The Claimant did not assert that he had not had a reasonable period in which to prepare for the hearing and given the statement had prepared and read out, clearly he was prepared.

296. The Tribunal accepts the Claimant's position in respect of the following areas:

Delay in Stage 2 appeal outcome

297. The Tribunal consider that there was some delay in providing the outcome of the second appeal, it took a month to send the outcome letter after the hearing and there has been no satisfactory explanation for the time it took, given the investigation consisted of really nothing more than a telephone call with Brett Jones.

Investigation at appeal stage

298. The ACAS Code of Practice on Disciplinary and Grievance Procedures (Code) at paragraph 4 provides: *Employers should carry out any necessary investigations, to establish the facts of the case.*
299. For the reasons set out in the findings of fact, the Tribunal find that during the appeal stages there was a failure to carry out an investigation into his complaints around training which fell outside the band of reasonable responses and what was 'necessary'.

Lack of independence

300. At paragraph 27 of the Code provides: *"The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case."*
301. For the reasons set out in the findings of fact, the Tribunal do not accept that Mr Spooner was impartial, he was put in the invidious position of marking his substantive boss's 'homework', (in terms of his substantive role) in circumstances where he may well have been returning to Mr Gamble's department and reporting directly to him again.
302. Despite the above, there was an initial fact find/investigation which was within the band of reasonable responses and the Claimant given a chance to state his case at each stage, (he was made aware that his conduct had been witnessed and there was CCTV footage), a disciplinary hearing and two appeals at which he was reminded to his right to have a companion. The Claimant had meetings and was able to state his case and submit documents in support. There was significant compliance.
303. The Tribunal consider a 5 % uplift to be appropriate taking into account the extent of the compliance over a process which started on 17 February 2025 and concluded in June 2025.
304. A 5% uplift to the compensatory award equates to £10,115.48 x 5% = **£505.774 = £10,621.25**

Polkey

305. A 'just and equitable' reductions under S.123(1) of the Employment Rights Act 1996 (ERA) may be made where the unfairly dismissed employee could have been dismissed fairly at a later date or if a proper procedure had been followed: ***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL.***
306. In ***W Devis and Sons Ltd v Atkins 1977 ICR 662, HL*** Viscount Dilhorne asserted that 'it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed'. In Polkey their Lordships ruled that the question of whether the employee ultimately suffered any injustice was to be taken into account when assessing compensation.
307. When applying the *Polkey* principle, a tribunal should consider not only how long a fair procedure might have taken but also whether there was a real chance that the claimant might have remained in employment if a fair procedure had been followed. In *Venkatesan v Surabi*

Ltd and anor EAT 0193/14

308. In **King and ors v Eaton Ltd (No.2) 1998 IRLR 686, Ct Sess (Inner House)**, the Court of Session held that, in considering the question of what would have happened had the unfairness not occurred, making a distinction between the 'merely' procedural and the more genuinely substantive will often be of some practical use. If there has been a merely procedural lapse or omission, it may be relatively straightforward to envisage what the course of events might have been if procedures had stayed on track. If, on the other hand, what went wrong was more fundamental, and seems to have gone 'to the heart of the matter', it may well be difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred. In that case, the tribunal cannot be expected to 'embark on a sea of speculation':

...

(3) that Polkey was not authority for a general proposition that an employer would always be entitled, however fundamental his error and however speculative the question of what might otherwise have occurred, to insist on a tribunal hearing evidence designed to support a finding as to the likelihood of an employee having been dismissed in that speculative situation (pp 662L-663A);

309. The Respondent submits that applying Polkey the compensatory award may be reduced to reflect the chance that the Claimant would be dismissed in any event and that the Respondent's procedural errors accordingly made no difference to the outcome. It submits that if the Tribunal finds that the dismissal was procedurally unfair, the counterfactual should be considered. It is submitted that the claimant's misconduct was such that if a fair procedure was followed, it is highly likely would have been dismissed. It is submitted that 75% reduction would be reasonable in the circumstances. In light of the contributory fault reduction also proposed, the respondent proposes that stepping back and assessing matters in the round an overall reduction of 90% should apply to the compensatory award
310. In the circumstances, the Tribunal consider that the unfairness of the dismissal, in particular the failure at both appeal stages to allow the Claimant the chance to comment on the further investigation, means that the Tribunal do not consider it appropriate to speculate on what the outcome of a fair process carried out within the band of reasonable responses would have been and whether in particular defects in the training process may have led to a decision that it mitigated the Claimant's culpability.
311. There was even at the date of this tribunal hearing, no evidence presented from the trainer who carried out the January 2024 training about what training actually took place with the Claimant. There was no evidence heard from Brett Jones to explain how the refresher was conducted and by whom and when and a rebuttal of the allegation. The outcome of a reasonable investigation may have made no difference to the outcome or it may have persuaded the Respondent that if there was found to be a lax approach to training, it mitigated to some extent the Claimant's attitude to safety. It was not discounted as irrelevant. The disciplinary process was not continued with this despite these allegations and investigated separately as possible disciplinary action against the training staff. The decision was not taken that the allegation would make no difference to the Claimant's case, it was investigated but not within the band of reasonable responses
312. The Tribunal conclude that it is too speculative to make a finding on the likelihood that the Claimant would have been dismissed anyway rather than some lesser sanction such as a final written warning being given, had a lax approach to training and safely been established. The Respondent does not even now produce evidence about what a fair process would have established in terms of what any further enquiries have since elicited.

313. This is a claim however where contributory fault is very significant.

Contributory Fault

314. The Claimant admitted he had exercised poor judgment. At the reconvened disciplinary hearing he referred to the mistake he had made (page 190) and at the first appeal on 4 April 2025 hearing accepted some sanction including a final written warning would be appropriate:

"I admit I made a mistake. I do hold my hands up to this mistake nonetheless I know I made a mistake but don't agree should be dismissed but more than happy if you so desire to give me a FWW [final written warning]" (page 206)

315. In determining whether particular conduct is culpable or blameworthy, the tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was: **Steen v ASP Packaging Ltd 2014 ICR 56, EAT**. The conduct is for the employment tribunal to establish and subsequently evaluate. The tribunal is not constrained when evaluating culpability by the employer's view of the wrongfulness of the conduct.

316. When a reduction on account of culpable or blameworthy conduct is made to the basic award, the question under S.122(2) is simply whether it is 'just and equitable' to make such a reduction. A reduction of the compensatory award by reason of contributory conduct under S.123(6), requires an additional consideration namely, whether the conduct in question caused or contributed to the dismissal to any extent. If it did not do so, then there can be no reduction no matter how blameworthy in other respects the tribunal might think the conduct to have been.

317. It is manifestly the case, as the Claimant repeatedly accepted during the internal proceedings, that he was at fault. His conduct was culpable and blameworthy. He is an intelligent person and an experienced driver with 10 years' experience of driving. He took a risk using his phone, then was untruthful about how far from the tank he had been standing. He did not wear PPE although he knew he was required to do so and if that was for health reasons, failed without any good reason to make anyone aware of it so that a simple adjustment of refuelling at another site could have been arranged. Whether there was an issue over the reinforcement of the seriousness of the procedures because of a cavalier attitude to the refresher training by the Training team, he knew the risks. His behaviour during the internal process also contributed to the dismissal, falsely asserting for example that the health and safety warning sign was a new sign which had not been present on site, that was manifestly untrue and undermined his credibility with the Respondent (as it did with this Tribunal) along with his changing version of events over training.

318. The Claimant repeatedly accepted he exercised poor judgment and made a mistake, but it was poor judgment which could have resulted in very serious injury to himself or/and to other people. The health and Safety at work etc Act 1974 provides at section 7 that It shall be the duty of every employee while at work—(a)to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work. A responsibility reflected in the Respondent's Disciplinary Policy and Guidance (page 46 and 75).

319. The Tribunal consider that this is a case where it is appropriate to apply a significant reduction under section 123 and 122 ERA to both the basic award and compensatory award, it would be manifestly unjust and inequitable not to do so.

320. The Claimant submits that in the circumstances, no deduction should be made for contributory conduct. If the Tribunal finds otherwise, any reduction should be minimal and

not exceed 10–15%, reflecting the Respondent's primary responsibility.

321. The Respondent submits that it would just and equitable to reduce both the basic and compensatory award by 75 to 80% given the nature and seriousness of the claimant's actions.
322. The Tribunal has had regard to awards in other Tribunal cases albeit not binding decisions and all cases are fact sensitive. In ***Westray v Sterling Press Ltd ET Case No.3400959/15***: the claimant in this case was employed as a warehouse operative by SP Ltd. He operated a forklift truck, lifting pallets up to a mezzanine level. To save time, rather than use stairs to access the mezzanine himself, he raised the truck cabin up to the height of that level, jumped across the gap, opened some doors and pulled the pallet through with a pump truck. On one occasion he was witnessed doing this manoeuvre and was reported to the employer, The employer sought advice about the health and safety implications from an external training adviser, who confirmed that under no circumstances should the truck cabin ever be exited at height as this was 'extremely dangerous and stupid'. The claimant acknowledged the failing and was summarily dismissed for gross misconduct. The employment tribunal held the dismissal to be unfair as there was no evidence of any detailed investigation. However, it ordered that the compensatory award should be reduced by 70 per cent by reason of the employee's culpable and blameworthy conduct in view of the fact that the mezzanine manoeuvre had placed him and others in danger.
323. The Tribunal considers that a deduction to the compensatory and basic award of 70% is appropriate in the circumstances of this case.
324. Any reduction on account of contributory fault must be made immediately after the adjustment for breach of the ACAS Code pursuant to section 124A ERA .

Total Sums Awarded

325. The compensation to be awarded is:

- (i) Losses: £26,215.48 after reduction for failure to take reasonable steps to mitigate (as above).
- (ii) Increased to £26,721.25 with ACAS uplift.
- (ii) Reduction for contributory fault of 70% which equates to a reduction of:
 - Basic award reduction of £11,270
 - Compensatory reduction of £7434.87

326. The sums the Respondent is ordered to pay are therefore

- Basic Award: £16,100 subject to 70% reduction: **£4,830.**
- Compensatory Award : £10,621.25 subject to 70% reduction = **£3,186.38**

Approved by:

Employment Judge Broughton

Dated: 16 July 2026

Sent to the parties on

...17 July 2026.....

For the Employment Tribunal

.....

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