Case Number: 3200250/2016

JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Nolan**

Respondent: **XPO Bulk UK Limited**

Heard at: **East London Hearing Centre**

On: **7, 8 & 9 February 2018 & 29 March 2018 (in chambers)**

Before: **Employment Judge G Tobin**

Members: **Mrs B Saud**
Miss S Campbell

Representation

Claimant: Ms A Chute (counsel)

Respondent: Mr A Alemoru (lay representative)

JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. **The claimant was unfairly dismissed.**

2. **The Tribunal makes no *Polkey* deduction but does make a deduction of 15% in respect of contributory conduct and provides an uplift of 5% in respect of the respondent's failures to follow the ACAS Code of Practice.**

3. **The claimant's complaint of automatic unfair dismissal is dismissed upon withdrawal by the claimant.**

4. **The claimant's complaint in respect of unauthorised deduction of wages is dismissed upon withdrawal.**

5. The claimant's complaint of breach of contract in respect of pension contributions was conceded by the respondent and the respondent is ordered to pay £840.00 to the claimant.

6. The claimant's claim in respect of the shortfall of his holiday pay has been conceded by the respondent and the respondent is ordered to pay £800.00.

7. This case will be listed for a remedy hearing, case management orders will be issued in due course.

REASONS

Preliminary matter

1. The claimant's solicitors wrote to the Tribunal prior to our chambers day to inform us that the respondent's representative was in default of our order made in respect of the provision of written submissions and that we should disregard the respondent's submissions. We did not have a response to this application from the respondent. Whilst we note this apparent breach, we declined to grant the claimant's application. It was not in the interest of justice nor did it meet the overriding objective to disregard the respondent's submissions. Accordingly, we have taken the respondent's written submissions into account in our determination which follows.

The case

2. The claimant issued proceedings on 10 March 2016 which the respondent replied to on 30 June 2016. The case is summarised by Employment Judge Russell in her case management summary for the preliminary hearing of 5 July 2016.

3. The claims that were brought at the commencement of this hearing were claims in respect of unfair dismissal, automatic unfair dismissal, unauthorised deduction from wages and breach of contract. During the course of the hearing the claimant withdrew his claims in respect of a whistle-blowing disclosure and also his claim that he was entitled to be paid for a work-break. The respondent accepted the claimant's complaint in respect of holiday pay and in respect of an underpayment of the claimant's pension contributions. This left the salient issue as one of (ordinary) unfair dismissal only. So far as ordinary unfair dismissal only is concerned, the issues for the Employment Tribunal to resolve were as follows:-

3.1 Has the respondent "shown" the reason for dismissal?

3.2 If so, was the reason for dismissal a potentially fair one?

3.3 Was the dismissal "procedurally" fair?

3.4 Was the dismissal within the range of reasonable responses?

3.5 If the dismissal was "procedurally" unfair, then what was the percentage of chance of the claimant being dismissed fairly, i.e. was there a *Polkey* reduction to be applied?

3.6 Did the claimant's conduct contribute to his dismissal?

3.7 Should there be any increase or decrease in any award in respect of any parties' failure to follow the relevant ACAS Code of Practice.

The law

4. The claimant claimed that he was unfairly dismissed, in contravention of section 94 Employment Rights Act 1996 ("ERA").

5. Section 98 ERA sets out how the Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

6. The s98(4) test can be broken down to two key questions:

6.1 Did the employer utilise a fair procedure?

6.2 Did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

7. The respondent said that it dismissed the claimant for a conduct-related reason pursuant to s98(2)(b) ERA. Although the claimant denies the misconduct in question, there is no dispute that this was a conduct-related matter. For misconduct dismissals, the employer needs to show:-

7.1 an honest belief that the employee was guilty of the offence;

7.2 that there were reasonable grounds for holding that belief; and

7.3 that these came from a reasonable investigation of the incident(s).

These principles were laid down in *British Home Stores v Burchell [1980] ICR 303.* The principles were initially developed to deal with dismissals involving alleged dishonesty. However, the *Burchell principles* are so relevant that they have been extended to provide for all conduct-related dismissals. Conclusive proof of guilt is not necessary, what is necessary is an honest belief based upon a reasonable investigatory process.

8. Accordingly, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the respondent was justified in dismissing the claimant for the reasons given, i.e. in relation to his purported misconduct.

9. ACAS has issued a code of practice under s199 Trade Union and Labour Relations (Consolidation) Act 1992. Although the Code of Practice is not legally binding, in itself, Employment Tribunals will adhere closely to the relevant Code when determining whether any disciplinary or dismissal procedure was fair. The ACAS Code of Practice represents a common-sense approach to dealing with disciplinary matters and incorporates principles of natural justice. In operating any disciplinary procedure or process, the employer will be required to:

- Deal with the issues promptly and consistently;
- Established the facts before taking action;
- Make sure the employee was informed clearly of the allegation;
- Allow the employee to be accompanied to any disciplinary interview or hearing and to state their case;
- Make sure that the disciplinary action is appropriate to the misconduct alleged;
- Provide the employee with an opportunity to appeal the decision.

10. In *West Midlands Cooperative Society Limited v Tipton [1986] ICR 192* the House of Lords determined that the appeals procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can properly reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.

11. In judging the reasonableness of the employer's decision to dismiss an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did, in fact, chose. Consequently, the question for the Tribunal to determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden 2000 ICR 1283*. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

12. In this case, the respondent asserted that, if the claimant succeeded in his complaint of unfair dismissal, then he should be subject to a possible reduction of any compensation payable (to nil) under the principles set out in the leading case of *Polkey v A E Dayton Services [1988] ICR 142*. Where a Tribunal finds that the dismissal was unfair it still may reduce the award payable by any amount if it is convinced that, had the employer followed the correct procedures then, it was likely that the employee's dismissal would have been fair. So if a Tribunal thinks it was only a matter of time before the employee would have been dismissed (usually for a different and fair reason) or, alternatively, where there was only a minor defect in the procedures applied and had this been corrected the employee would have been dismissed fairly then the Tribunal could

make a finding of unfair dismissal but only award compensation to reflect this "lost time" or minor defect.

13. Section 123(6) ERA states that:

> "[W]here the Tribunal finds that the dismissal was to an extent caused or contributed to by the action of the complainant, it shall reduce the… compensatory award by such proportion as it considers just and equitable having regard to that finding".

14. This ground for making a reduction is commonly referred to as "contributory conduct" or "contributory fault". There is a wide discretion under s122(2) ERA to possibly reduce the basic award on the grounds of *any* kind of conduct on the employee's part that occurred prior to his dismissal. Therefore, the capacity to make reductions to the compensatory award is more restrictive than in respect to the basic award. Three factors must be satisfied if the Tribunal is to find contributory conduct: (a) the relevant action must be culpable or blameworthy; (b) it must have actually caused or contributed to the dismissal; and (c) it must be just and equitable to reduce the award by the proportion specified.

15. Finally, s3(2) Employment Act 2008 inserted the provision of S207A Trade Union & Labour Relations (Consolidation) Act 1992 which provided that an Employment Tribunal may increase an award by up to 25% where the employer fails to comply with the relevant ACAS Code of Practice – which in this instance the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2009) – and that failure was unreasonable. Under s124A ERA such an adjustment will only apply to the compensatory award. Following *Lawless v Print Plus EAT 0333/2009* the relevant circumstances to be taken into account when considering an uplift will vary from case to case but the Employment Tribunal should always take into account: (a) whether the procedures were applied to some extent or were ignored altogether; (b) whether the failure to comply with the procedures was deliberate or inadvertent; and (c) whether there were circumstances that mitigated the blameworthiness of the failure to comply. The size and resources of the employer may be a relevant factor although this has limited application if the Tribunal assesses that the employer's motives for disregarding the ACAS guidance were deliberate or blameworthy.

The facts

16. We (i.e. the Employment Tribunal) made the following findings of fact. We did not resolve all of the disputes between the claimant and the respondent, we merely concentrated on those disputes that would assist us in determining the issues as identified above. We have set out how we have arrived at such findings of fact where this is not obvious or where, we determine, this requires further explanation. The Hearing Bundle was large and in excess of 210 pages. At the outset of the hearing, the Employment Judge emphasised to the parties that, as a matter of course, we do not read all of the documents contained in a Hearing Bundle. He stated we will read documents referred to us and we may read additional documents that have not been cross-referenced in any statement; however, if a party thinks a document is relevant and important, then it must bring that document to our attention.

17. The claimant was employed as an LGV Category C & E driver. His employment commenced on 11 August 2010.

18. The claimant's job entailed delivering fuel to petrol or filling stations. The claimant also trained fuel delivery drivers; although, following a dispute with Mr Jay Smith (the Depot Manager), the claimant had not undertaken any training duties for 19 months prior to his dismissal.

19. On 8 December 2015 an incident occurred which led to the claimant's dismissal. The sequence of the incident is as follows:-

19.1 The claimant arrived at the Tesco Chichester store to delivery fuel at around 6.30pm. It was dark and windy.

19.2 Upon arrival he went through his usual checks, which included reviewing the ullage reports on the delivery sheet. He then began to delivery fuel into two pots. Shortly after commencing to fill the second pot an alarm sounded.

19.3 The claimant went to investigate the alarm but did not find any warning lights on the DCD (Driver Controlled Delivery) box. He did not stop the delivery.

19.4 He checked and discovered an airlock in the delivery hose. The claimant fixed this blockage and the flow started again. The delivery vehicle did not pump fuel into the receiving tank it merely relied upon gravity for the flow – the receiving tank being underground and filled from a tanker tank 4ft or so (at its lowest point) above the ground.

19.5 Having fixed the blockage/airlock, the flow started again. The alarm sounded once more a few minutes later. The claimant returned to the DCD box and again there was no warning indicator to suggest anything was wrong.

19.6 The claimant shut off the alarm and went to check his paperwork. At that point he noticed that he had misread the ullage. He then went to press the emergency stop button. This coincided with a member of the garage staff approaching the claimant and informing him that there was fuel on the forecourt. If the claimant had not pressed the emergency stop button, then he did so immediately.

19.7 The claimant instructed the Tesco employee to call the Fire Brigade to arrange for their attendance. This was standard procedure where there was a spillage of fuel. He also reported this matter to the respondent. The Fire Brigade then arrived but did not do anything other than inspect the scene, spread a little more sand and ensured that the clean-up had been satisfactorily dealt with.

20. The claimant was delivering fuel to a tank that was faulty – without being told so. There was no sign on the tank; presumably Tesco staff were relying on the respondent acting upon a report by Tesco's Primary Account Manager - Fuel. The respondent had previously been warned by Tesco staff that there was possible water contamination of the tank in question and a possible sensor fault. The claimant had not been informed of this prior to the delivery. This did not affect the above sequence of events, but it puts into context the respondent's inattentive approach to dealing with this customer and also the respondent's lack of consistency in dealing with employees' shortcomings.

21. The claimant did not breach of any standard operational procedures applicable to him and, indeed, no operational procedures were referred to the claimant throughout any investigation or disciplinary process.

22. Following the incident, the respondent and Tesco were more preoccupied with the breakdown of communication between the two over a faulty tank rather than the spillage occasioned by the claimant. Indeed, there was no complaint or remark by Tesco staff or management in respect of this incident and from the correspondence between Tesco's Primary Account Manager – Fuel and the Group Operations Director of Eurotank Services (on behalf of the respondent) the spillage was fully cleaned without complaint.

23. The claimant was suspended on 9 December 2015. The suspension was said to be in respect of "the overfill and spillage at Tesco's Chichester". Suspension was said to be a "precautionary measure whilst we conduct a full investigation into this matter". The Claimant was suspended by Mr Jay Smith, the Depot Manager.

24. An investigatory meeting took place on 10 December 2015 by Mr Darren Kavanagh (the shift manager). The claimant said in evidence that he was told by Mr Kavanagh that he would merely get a "slap on the wrists". This is not recorded in the handwritten and typed summary of the investigation meeting. Nevertheless, we accept that this was said by the investigatory officer because, firstly, we believe the claimant's evidence in this regard. Furthermore, although the claimant's assertion goes significantly further than Mr Kavanagh's account in his unsigned and undated statement, it is clear that Mr Kavanagh lifted the claimant's suspension (and this is demonstrated by requiring him to attend a load and tip assessment). This was despite Mr Kavanagh wrongly believing that the claimant was on a more serious warning, Mr Kavanagh's viewed the claimant's "human error" as not so serious as the respondent has subsequently maintained. In the recommendations to his disciplinary report, Mr Kavanagh gives credit to the appellant for freely admitting to a mistake and misreading the ullage for tank 6 at the start of his delivery.

25. The claimant returned to work on Friday 11 December 2015, as instructed by Mr Kavanagh, and completed a load and tip assessment with a trainer, Mr Stuart Williams.

26. The claimant's account of his assurances from Mr Kavanagh that the matter was not too serious is further corroborated in his email to Mr Smith of 15 December 2015 where he states as follows "I would like you to confirm to me in writing that you have decided to overrule one of your manager's decision to allow me to return to work. Darren agreed in the investigation that there was no reason to keep me away from work as there was no sign of any gross misconduct and that I should be returned to work to be retrained with a load and tip as soon as possible".

27. Mr Smith found out that the claimant's suspension was lifted on Monday 14 December 2015 and immediately re-suspended him. This over-rode Mr Kavanagh's decision; we conclude that the suspension was lifted because the claimant attended his training on the Friday and said that Mr Kavanagh told him to return to his normal duties for Tuesday 15 December 2015. Matters had only come to ahead on 14 December 2015 when the claimant telephoned the respondent's office to discuss his time off to attend a trade union meeting on the day after his due return to work. The claimant eventually spoke to Mr Smith who said that he was overriding the decision of the investigation officer.

28. On 14 December 2015 Mr Smith invited the claimant to a disciplinary hearing set for 17 December 2015. The allegations against the claimant were as follows:

1. You failed to ensure that there was sufficient ullage, attempting to deliver 4,400 litres of diesel into ullage of 1,132 at Tesco Chichester on 8 December 2015.

2. At the above delivery you failed to identify the above error after two high level alarms sounded.

3. Your actions resulted in the spillage of diesel on our customers premises.

4. Your actions have brought the company into disrepute.

29. The claimant complained about Mr Smith's actions, which he labelled "victimisation". This complaint was made by email to HR and, we are satisfied that this amounted to a grievance. The essence of the claimant's complaint was that:-

29.1 Mr Kavanagh had investigated the incident on 8 December 2015 and had informed him that this matter would not constitute gross misconduct and that there was no reason to continue with his suspension. Mr Kavanagh told the claimant that there was still going to be a disciplinary process in the near future, but that, at least, he would still have his job. (We believe the claimant's account in respect of this assertion as this was consistent with his subsequence oral complaints and his contemporaneous or near-contemporaneous correspondence. Furthermore, if this key assertion was not consistent with the investigatory officer's determination, then the respondent should have called Mr Kavanagh to give evidence, which he was not.)

29.2 When the claimant telephoned the office to arrange for time off for a trade union meeting he was contacted a short while later by Mr Smith, who re-suspended him and told the claimant that he was overriding Mr Kavanagh's suspension decision.

29.3 The claimant said that his earlier disciplinary warning was harsh, but that he had accepted it on the recommendation of his shop steward. He requested that this was looked into because he felt that Mr Kavanagh had his decision overturned on that occasion as well and that no other driver had been disciplined for such minor irregularities on tachograph entries.

30. The disciplinary hearing proceeded on 17 December 2015 before Mr Ian Champion (Operations Manager – Harvest Energy). The claimant was represented by his trade union representative, Mr John Hastings. Notwithstanding that Mr Champion was supported by Ms Jeni Clunie, a HR Business Partner, the decision to dismiss was that of Mr Champion.

31. The whole focus of the hearing was in relation to the incident of 8 December 2015 and the sequence of actions that we describe above. It is quite clear from the respondent's minutes of the disciplinary hearing that Mr Champion dismissed the Claimant in respect of the disciplinary transgression. Mr Champion did not assess any mitigation. There was no evidence taken at the disciplinary hearing about how the claimant's actions could have brought the company into disrepute.

32. The disciplinary hearing commenced on 17 December 2015 at 2:30pm and lasted 1 hour 55 minutes, allowing for the adjournment. The disciplinary hearing resumed the next day at 2:30pm and finished at 5:05pm (although from the respondent's minutes we could not see how the discussions could have possibly taken over 2½ hours). The meeting resumed at 5:40pm for 10 minutes for Mr Champion to give his decision.

33. Mr Champion dismissed the claimant at the end of the disciplinary hearing. Mr Champion thanked the claimant for his honesty and acknowledged shortfalls in the handling of the disciplinary process. He then proceeded to dismiss the claimant with notice to be paid. The reasons given by Mr Champion was recorded by the respondent as follows:

> … the fact remains on the 8Th Dec, at Tesco Chichester there was an environmental incident and an overfill of a tank, due to your failure to follow the correct delivery procedure. Whilst I believe a genuine mistake was made in miss-reading the ullage on tank 6, and miss-interpreting it, to indicate your pot would fit, led to the overfill. This breach of procedure, by failing to confirm the receiving tank can take the quantity to be delivered, is serious enough to warrant a disciplinary sanction. However, to miss a warning on the ullage printout pre-delivery, indicate high product, and to discount a warning alarm not once, but twice, that led to the spill is far more serious. I take into account human error and the unfortunate circumstances surrounding your brother that led to the initial miss-reading mistake. I cannot excuse the failure to take the warning alarm into account and over-ride it the first time, and to then continue to deliver and result in a second alarm and the kiosk staff having to inform you product was leaking onto the forecourt. In relation to this I am issuing you a 12 month final written warning. As you already have a live warning on file, this will unfortunately result in the termination of your employment with notice to be paid.

34. Mr Champion confirmed the claimant's dismissal by letter of 23 December 2015. In this letter, Mr Champion repeated the allegations (as set out in paragraph 34 above). The confirmation of dismissal summarised the claimant's response to the incident as follows:

> … you stated that he was a genuine mistake on your behalf and you misread the pre-delivery ullage reading of 1,132ltrs as 11,000ltrs. You believed the pot you were delivering of 4,400ltrs should have fitted comfortably. You had not seen the initial warning on the pre-delivery ullage printout and were unsure what the warning alarms sounded for, although you believed that an air-lock had caused the tank to stop receiving product rather than the overspill prevention.

35. The dismissal letter proceeded to confirm that Mr Champion considered the allegations against the claimant had been proven and confirmed that he had issued the claimant with a Final Written Warning for one year. As the claimant already had a current 6-month written warning on his file, Mr Champion dismissed him with notice; although Mr Champion's letter did not state what notice period the claimant had accrued and when the dismiss would take effect. The claimant contended that he was dismissed on 18 December 2015, which was accepted by the respondent in the Response. We find the claimant's effective date of termination was 18 December 2015. So the claimant was not dismissed on notice as purported, he was dismissed with immediate effect with a payment in lieu of notice.

36. The claimant appealed against his dismissal on 27 December 2015. He also submitted an appeal on 30 December 2015, the latter being a "formal notice of appeal". In respect of the formal notice of appeal, the claimant's reasons and grounds for his appeal were as follows:

1. I think that it is unfair that my grievance is submitted prior to the DP has not been concluded as they have a direct effect as to why I am in this position.

2. Ian Champion stated that this offence warranted a 12-month punitive measure, but given my live 6 month warning he had no option but to dismiss me. Given the nature of these unconnected incidences it was within his remit to use discretion and use an alternative that did not require dismissal.

3. I believe the sanction imposed on me to be too harsh, I have been with the company for 5 years, this in itself demonstrates my commitment to XPO.

37. The claimant was informed of the outcome of his grievance on 18 January 2015 by Mr Ian Marguet (General Manager). This dismissed the claimant's grievance.

38. The claimant's appeal hearing went ahead on 18 May 2016. This was almost 5 months after the claimant's dismissal. The disciplinary dismissal appeal hearing was heard by Mr Vince Jacques, Depot Manager. The appeal hearing lasted 1 hour 20 minutes and at the end of this appeal, Mr Jacques indicated that he would contact the claimant to reconvene the hearing once he had finished with the enquiries arising from that meeting.

39. In fact, over one month later, and 6-months after the original dismissal, Mr Jacques wrote to the claimant with the outcome of his appeal. Mr Jacques did not reconvene the hearing as promised, and we are convinced that he did not instigate any of the further enquiries that he promised the claimant he would undertake. Mr Jacques found the allegations against the claimant proven and said that it was appropriate to dismiss him in the circumstances. Indeed, Mr Jacques determination went further than reviewing the original decision to dismiss. He said: "Rather than being treated harshly in any way for any perceived reason, my view is that you were in fact treated leniently with regard to the sanction and payment in lieu".

Our determination

40. The claimant alleged that his dismissal was orchestrated by Mr Smith, with the connivance of Mr Chris Smith (Mr Jay Smith's father and a senior manager with the respondent). The claimant said that he experienced a history of antagonism with both Mr Smiths because of his trade union duties, particularly in respect of disputes over work changes, break allowances and contractual and collective agreements.

41. The claimant raised a collective grievance in respect of working time and breaks on 12 May 2015 and 3 days later he was invited to a disciplinary hearing which gave rise to the warning in respect of the tachograph incident. The claimant said that he was warned over a trivial matter. We have not heard from the disciplining officer, so we will not make any direct findings of fact in this regard however, by way of background, we are concerned as to the conduct of both Mr Smiths in this regard.

42. The claimant said that his activities in challenging the Smiths' style of management brought him in to conflict with both father and son. Accordingly, we were keen to examine the circumstances of the claimant's suspension. We were informed by Mr Alemoru that both Mr Smiths have left the respondent's employment, and neither were able to provide any evidence, either orally or by statement or letter. However, we were informed by Mr Champion that suspension was rigidly applied by the respondent to all possible misdemeanours irrespective of the magnitude. We were told that is how the Smiths dealt with infringements (actual or perceived) and, presumably, how they kept staff on edge.

43. Ordinarily we would expect a suspension to occur where there were concerns that: the claimant might repeat the offence that he was accused of; where he might impede any investigation; or where a matter was so serious that it required his removal from the workplace. This approach ensures suspension remains a neutral act. A precautionary

suspension for every case may not be discriminatory (because on the face of it, it applies to any possible transgressor) but it suggests an arbitrary approach that may not be fair. Whilst we register some concern about the appropriateness of suspension we can see no reason to re-suspend the claimant following his attendance on the prescribed course and the respondent witnesses that attended the hearing could not explain why either suspension or re-suspension was necessary in the circumstances of this case.

44. For the reasons we state above, we find that Mr Kavanagh lifted the claimant's suspension following his investigation of the incident. Mr Kavanagh's investigation report said he believed the claimant had broken procedure by:-

44.1 failing to verify the planned delivery amount would safely fit into the receiving tank, and

44.2 failing to stop the delivery after the overfill alarm sounded.

45. Mr Kavanagh therefore recommended that the matter proceed to the next stage of the disciplinary process. Significantly, Mr Kavanagh did not identify this matter as either gross misconduct or particularly serious misconduct.

46. The claimant was an experienced tanker driver and deliverer. He trained other staff. At the disciplinary hearing Mr Champion disregarded the claimant's explanation that he thought the alarm sounded in the DCD box because of the airlock. Mr Champion said he disregarded the claimant's explanation in this regard as it was "irrelevant". However, there is no explanation why he refused to believe this explanation as this appeared to us to be a credible response from an experienced trainer and driver. The claimant had made an initial error in respect of calculating the ullage. This had resulted in certain consequences and the claimant provided a credible explanation of his responses to the events that followed. However, in refusing to accept, or to engage with, the claimant's account of his subsequent actions, we determine, that the dismissing officer displayed a surprisingly closed mind. An error had occurred, and Mr Champion was determined that the claimant needed to pay for this.

47. At the time the first alarm went, the claimant said that the DCD box gave no indication of any problem. So, from that point, the sequence of events was as follows:

47.1 The first alarm sounded. The claimant went to the DCD box to investigate the audible alarm. From the evidence that we heard, we accept that the claimant did not ignore the alarm and adhered to the correct process. The evidence was not disputed that because of the type of DCD box, there was no indication what the problem was which gave rise to the alarm.

47.2 The claimant thought that there was an air-lock (which there was as the hose was limp). We accept the claimant's evidence in this regard. We also accept the claimant's evidence that he did not stop the flow because such alarms were occasional. We reject the evidence of the respondent's witnesses that the claimant should have stopped the delivery because the claimant described his practice as commonplace, it was logical, the claimant was a trainer for this type of work and at no stage during the investigation, disciplinary or appeal process was any alternative protocol put to the claimant.

47.3 The claimant cleared the air-lock and the flow started. This appeared to have addressed the problem and reinforce the claimant's belief that he had followed the correct process.

47.4 The diesel began to flow again and ultimately the product began to come out through the breather pipes at the bottom of a pump and caused a noticeable spill on the garage forecourt.

47.5 Approximately 3 minutes after to flow recommenced the alarm went off again; so, the claimant must have been correct in assessing that there was an air-lock for there to be two alarms.

47.6 The claimant then returned to the DCD box. He pressed for an ullage printout and the reading said there was a sensor problem. If it was the respondent's case, which was not clear from the cross examination of the claimant, that the claimant should have undertaken this test for the first alarm, then we do not accept this hindsight criticism. The claimant could only have known that he got the ullage wrong when he checked his figures as up to that point he was labouring under a misapprehension that he was doing his job correctly. The first alarm sounded, and he responded to the most frequent problem associated with such an alarm – which was an air-lock – which happened to be correct. He cleared air-lock and only at the second alarm did he think that the ullage might be incorrect.

47.7 The claimant thereupon rechecked his ullage figures and discovered that he had made an error. He had read the figures wrong and was attempting to deliver too much fuel into pot 6.

47.8 At this time, a member of the kiosk staff approached the claimant to say that there was a fuel leak. The claimant's first reaction was to stop the delivery.

47.9 The claimant said he needed to shut the garage and told the Tesco employee to call the Fire Brigade. This was the standard procedure in reacting to a fuel spillage. This spillage was less than 20 litres. Notwithstanding that it was a small spillage, it still had potential to be a hazard.

48. It is ludicrous to say, as Mr Champion did, that the claimant regarded the alarms as a nuisance. The claimant was pressed on why he did not stop the flow immediately the alarm went off and the claimant's evidence was that he investigated the alarm and that such alarms in the old-style DCD boxes were occasional. He described how he investigated such alarms. So the claimant's account at the hearing, his contemporaneous account and all documentary evidence pointed to the contrary of Mr Champion's assertion. The claimant responded to the alarms on both occasions. He took action that he felt was appropriate in the circumstances. The DCD box did not assist in identifying the problem because the DCD box was one of the older versions. This is not a criticism of the respondent's equipment, but it should have been taken into account by the dismissing officer that the DCD box only provided rudimentary information in respect of a reason for the alarm. The DCD box did not show a live ullage reading. It merely showed "filling" during the delivery.

49. That said, the sequence set out in detail above resulted from the claimant's initial mistake in respect of the ullage. We find that the claimant made no error in respect of the sequence we set out at paragraph 53; however, this sequence was a consequence of his error in assessing the ullage for delivery into pot 6. So far as we could determine, having made the initial error in the ullage reading, the claimant did not do anything wrong thereafter. His steps were prompt and logical and, we determine, in accordance with his training and correct protocol.

50. The claimant's initial error, however, was twofold. First, he misread the ullage available for delivery into one pot/tank from the DCD print out. His second error was that he took no note of the "warning; HIGH PRODUCT". The claimant's explanation was that it was windy and raining and dark and that he used a ruler to work down the ullage available on the printout before he ticked the appropriate figures and that the ruler obscured the warning underneath tank 6. We accept this explanation as far as it accounts for the claimant's error, but it was a flaw in the process for which the claimant has significant responsibility. We found that the claimant was credible and, importantly, consistent in his evidence both at the hearing and in his account to the respondent's officials. He admitted his initial error. He explained his error and he did not seek to deflect responsibility. This *insight* was taken into account by Mr Kavanagh, but, having heard Mr Champion and Mr Jacques, we do not believe that it was taken into account by either.

51. In contrast, the dismissing officer, and thereafter the appeal officer, displayed a remarkable rigidity in their approach. Both displayed an unwillingness to engage with the claimant's explanation. A spillage had occurred, someone had to pay and no further thought was apparently needed.

52. Mr Champion's evidence to the Tribunal was also inaccurate in two major respects. Mr Champion significantly overstated the amount of spillage. The Employment Judge pressed Mr Champion on a number of occasions to appropriately quantify how much fuel had spilled onto the forecourt of the filling station. Following his assertion that there was a large fuel spillage, Mr Champion would not and could not state how much diesel had spilled onto the filling station forecourt. We did not ascertain a satisfactory response other than to say that this was surprisingly small. Mr Champion also insisted that the leaking fuel came out of the fuel nozzle which the public used. The fuel did not come out of pump nozzle because there was a failsafe device to prevent such an eventuality. Furthermore, the Fire Brigade was called as a standard precaution and, despite Mr Champion's contentions to the contrary, this gave no indication as to the magnitude of the claimant's error.

53. The claimant reported the incident to the respondent as normal. We accept the claimant's submission that, prior to Mr Smith's involvement, the respondent did not initially appear to be overly concerned about the matter and that the spillage did not take any great effort to clear up.

54. In evidence, Ms Chute put to Mr Champion that for a proper investigation to be undertaken, the respondent should have got the incident report from Tesco which would have indicated the size the spillage and how serious this was. In response, Mr Champion said the disciplinary was about a breach of procedure and therefore the quantity was irrelevant. So according to the dismissing officer, the magnitude of the incident had no bearing, this was wholly about a breach of procedure. The fact that the claimant had

caused a spillage was everything. As soon as Mr Champion was challenged about the quantity, his responses changed, and the magnitude of the claimant's error no longer featured.

55. However, most of the communication with Tesco following the incident was focussed on a sensor problem and the respondent's failures in this respect. Surprisingly little was said about the diesel spillage. Tesco was an extremely valuable customer to the respondent. Mr Champion said in evidence that anything that went wrong could be detrimental to that contract. However, that is not the same as bringing the company into disrepute and there was no evidence either at the disciplinary hearing or subsequently submitted to suggest that the claimant's failures had brought the company into disrepute. The claimant had made a mistake. This was human error. The spillage was not of great magnitude. We accept a spillage of diesel always has the potential to cause a major incident, yet this was a relatively small spillage and it was quickly and appropriately dealt with. Other than the original human error we cannot see the cause of any significant concern for the respondent.

56. We accept the claimant's evidence that at the time of the incident he had been very worried about his brother who had been ill and in hospital, because this seems to coincide with the employer's warning the claimant on the same date about an unrelated paperwork matter. We also accept that at the time of the incident it was dark and windy, and the claimant had done some 12 hours work of his shift. It is notable that this mitigation was not taken into account by Mr Champion.

57. The respondent's own disciplinary procedures provide for dismissal at stage 3, if conduct or performance was still unsatisfactory and the employee still failed to reach the prescribed standards. The claimants previous "live" disciplinary warning related to a single incident where he failed to record a driving circle on 1 July 2015. We are satisfied that such was the environment that the claimant worked in, any possible transgression would be recorded as a disciplinary matter. We regarded that warning as having arisen out of a trivial transgression. Prior to leaving the yard, the claimant did not drive around in a circle for long enough to register on his tachograph for the prescribed 10 minutes. We accepted the claimant's evidence of the acrimonious management of Mr Jay Smith and his father, Mr Chris Smith. We accept that the claimant had fallen foul of the Smiths because of his trade union activity and his agitation in respect of a pay increase and the working hours dispute. The claimant's case was that "his card had been marked". Indeed, that is what his grievance was about. The trade union representative advised the claimant not to appeal against the first warning for fear of aggravating the dispute with Mr Smith and thereby making matters worse.

58. It is clear to us that Mr Champion wanted to come to a conclusion that involved the claimant's dismissal. We determined that Mr Champion felt that this was safest by labelling this a misconduct dismissal and totting up the previous unrelated offence. Mr Champion was inconsistent with his decision to dismiss. In his statement he said that he regarded the claimant's misdemeanour as properly gross misconduct. He said that the claimant disregarded health and safety. However, because the disciplinary hearing was immediately before Christmas, Mr Champion said that he had some sympathy with the claimant's predicament and he wanted to ensure that the claimant received some notice pay over the Christmas period. Therefore, he said, he imposed a lesser sanction of final written warning and totted this up with the original warning to take the matter over the dismissal threshold, not because he believed this was a misconduct offence but so as to

allow the claimant to receive some notice money. Irrespective of the inconsistencies, there is no evidence that the claimant disregarded any health and safety provisions; he made a mistake in calculating the original ullage. We find in our sequence of facts that other than this initial error, the claimant did nothing wrong. The consequence of the fuel spillage was hardly mentioned by Tesco, or the respondent in its dealings with Tesco. The initial error has somehow been conflated into a health and safety issue which it was not. There is no evidence that the claimant disregarded his health and safety responsibilities and indeed, the evidence is to the contrary because he acted in a wholly appropriate manner following the initial spillage.

59. In the dismissal letter the allegations were very specific. Mr Champion did not put to the claimant the company's procedures that he could but did not follow, so therefore we do not see how he could have come to the conclusion that "I am, therefore, satisfied that your actions were in breach of the company procedures". The company did not have any procedure in this regard. At the Tribunal hearing, the company referred to the standard operational procedures of a predecessor company (NDT) but there was no evidence that these procedures were ever brought to the claimant's attention and indeed the claimant denied that he had seen these procedures before, which we believe. Significantly there is no reference to such procedures in the disciplinary hearing so, we find that these procedures did not relate to the incident in question. By producing these documents for the first time at the Tribunal hearing, we determine, that this is a case of the respondent attempting to paper over cracks in their disciplinary process after the event and this reflects a dishonest approach.

60. It is unusual for unfair dismissal only is to be heard by a full Tribunal. This came about because the claimant originally pursued a whistleblowing claim. As an industrial jury we are well placed to assess whether Mr Champion's decision to dismiss was within the range of reasonable responses available to a respondent of this nature, with its size and administrative resources. We unanimously determine that dismissal (either by "gross misconduct" or by totting up "misconduct" offenses) was outside the range of reasonable responses in the circumstances of this case. It was clear to us that Mr Champion did not undertake the consideration of the sequence of events that we undertook. Had the disciplining officer undertaken a reasonable investigation, or merely reasonably engaged with Mr Kavanagh's investigation, then he would not have come to an honest belief that the claimant was guilty of a gross misconduct offence. In any event, a reasonable employer would have considered mitigation before deciding upon dismissal and that was absent from Mr Champion's consideration.

61. Mr Jacques displayed a similar closed mind. In evidence he said that it mattered little whether the spillage amounted a flood or a teaspoon. This portrayed a remarkably inflexible attitude that was not reflected in any standard operation procedures that applied to the claimant. According to Mr Jacques "the golden rule" was that there should be no spillage. So, any transgression would be viewed inflexibly. Mr Jacques said in evidence that the spillage caused damage to Tesco premises, notwithstanding that this was remedied by the Fire Brigade and the clean-up service that Tesco subsequently engaged. This was not an accurate portrayal of the case before him. There was no damage to Tesco premises. The Fire Brigade was called as a standard response which the claimant orchestrated. The claimant asked the filling station attendant to throw some sand over the spillage and that is what happened and that amounted to the clean-up. To suggest subsequently that this was a major spillage after not addressing this point in the original investigation and disciplinary hearing is misleading and insincere. Mr Jacques was

equally unable to identify the extent of the fuel spillage and to subsequently portray this as a major incident (as Mr Champion did) amounted to similar disingenuity.

62. The appeal hearing was delayed by the claimant's grievance. We have gone through the relevant documents surrounding the claimant's grievance. We did not hear evidence from Mr Marguet so we make no formal findings of fact in respect of the claimant's grievance. However, from the information presented to us clear questions arise in respect of the investigation of this grievance and the conduct of Mr Smith. We accept the claimant's submission that his grievance was not investigated or responded to in any meaningful way. From reviewing the documents available to us it does seem that Mr Marguet failed to engage with the issues raised in the claimant's grievance adequately or at all. The claimant's disciplinary appeal was delayed for his grievance to be investigated and, we are satisfied, that this was merely a "nodding exercise" to clear the decks so as to uphold the claimant's dismissal.

63. By his own omission, Mr Jacques did not read any documents prior to the date of the appeal hearing. He said he attended the respondent's premises some 3 hours before the appeal hearing was due to start and went through the appropriate documents with the HR adviser.

64. Upon questioning, Mr Jacques was clear that he was only interested in considering the incident around the spillage. So notwithstanding that he said he had read the formal grounds for appeal, he declined to fully address the claimant's grounds of appeal.

65. Point 1 of the claimant's appeal provided some context which Mr Jacques said he would not deal with because the grievance had been concluded (i.e. dismissed). Point 2 and Point 3 were concerned with the severity of the sanction imposed. So, we were perplexed as to the way that Mr Jacques undertook his task. This was not a re-hearing. Mr Jacques said he turned up expecting to talk about a spill and health & safety and instead he was met with the claimant's concerns about his grievance, and other matters. That the matter was not as simple as Mr Jacques had anticipated was no excuse for not engaging with the grounds of appeal. Even if Mr Jacques was right about disregarding point 1, then this left two issues. First, the matter about adding to an unrelated warning so as to take a misconduct finding over the threshold to warrant dismissal and, second, whether such a decision to dismiss was too harsh, in all the circumstances.

66. In the appeal outcome letter of 22 June 2016, Mr Jacques said that he had investigated the claimant's assertion that his grievance was not completed, and he went on to say that he understood that the grievance procedure had been through due process and concluded prior to his appeal. In fact Mr Jacques made no such investigation. He did not investigate or consider the issues raised by the claimant, and, in particular: the animosity arising from the Smiths; their style of management; and the claimant's contention that he was in this position because of his trade union activities and by raising issues in respect of pay and working hours and pension contributions. Mr Jacques said he was "led to believe" that these matters were concluded and that is just not good enough in the context of this claim. It is a particularly deficient response in view of Mr Marguet's inadequate treatment of the claimant's grievance. The fact that Mr Jacques disregarded these appeal grounds confirms our belief that whatever the claimant appealed on, he was not going to succeed with any arguments put to Mr Jacques.

67. Mr Jacques could not identify what documents he had gone through and was contained within the "appeal pack" prepared by the respondent's HR. We are sure that he did not have a copy of the disciplinary procedure and he could not even say whether the dismissal letter was included. Mr Jacques sought to re-try the disciplinary procedure. We accept the claimant's submission that Mr Jacques was labouring under what he described as the old work practice that "it was instant dismissal for a spill". Nothing the claimant had said or could say would change Mr Jacques mind. This was an open and closed matter in Mr Jacques mind. This was evidenced by the Tribunal Judges' questioning of Mr Jacques. Mr Jacques said that the claimant had done nothing when the alarm went off and Mr Jacques repeated the contention. The Employment Judge put to Mr Jacques that the claimant had reacted to the alarm and had done something; he had not merely ignored the alarm. Mr Jacques refused to accept this proposition but when the evidence was put to him in a detailed manor, only then did Mr Jacques, begrudgingly, accept that the claimant had taken some action. Mr Jacques condemned the claimant for not responding to standard procedures but was unable to identify to the Tribunal the claimant's shortfalls in the respondent's NDT procedure (notwithstanding that the claimant denied having ever seen the historic NDT standard procedure).

68. The claimant was an experienced tanker driver and refueller. Indeed, he had been a trainer in this area. The claimant presented as a responsible and committed employee. The claimant admitted his initial mistake and sought to explain his circumstances. He never sought to deflect any blame for his initial error. He could and should have calculated the ullage correctly even in the context that the respondent had erred in directing deliveries to a tank that was faulty. Once the delivery was underway, the claimant gave a credible explanation as to his actions. There was never any disregard of health and safety processes. A spillage could have given rise to serious health and safety consequences which fortunately did not happen. However, that was the consequence of an initial error, it was not caused by any disregard to proper processes. The claimant had made a mistake, and this was human error. There was no wilfulness about the claimant's error. His admissions identify a high degree of insight into his shortcomings on that occasion. Mr Kavanagh identified the claimant's error and put it in – what we regard – as the appropriate context. The claimant had done something wrong but thereafter, he followed the correct protocol. We determine that Mr Kavanagh thought a slap on the wrists was in order. This was not a gross misconduct offence. Mr Kavanagh appeared to us to be a dispassionate adjudicator within the respondent's company and he did not see this as a dismissible offence. Even if this employer regarded any spillage as a dismissible offence – as Mr Jacques did – we contend that that would be outside the range of a reasonable response by an employer of this particular kind. Mr Kavanagh was a useful barometer for the response of a reason employer. Nevertheless, the assessment of the range of reasonable responses is for this Tribunal. Having considered the dismissal and the appeal, we find that the claimant's dismissal was outside the range of reasonable responses.

69. In respect of *Polkey*, although we have expressed some concerns about Mr Smith's behaviour, in looking at the claimant's conduct, we do not determine that the claimant's conduct or adherence to any rules meant that the claimant was *living on borrowed time* to any extent. When assessing a possible *Polkey* reduction we have taken into account the claimant's length of service and his commitment to provide a good service.

70. There was no minor defect in the respondent's application of its dismissal procedures, its defects were fundamental and profound. Some processes adopted by the employer are so unfair and so fundamentally flawed that it is impossible to formulate the hypothetical question of what would be the percentage chance the employee had of still been dismissed even if the correct procedure had been followed: see *Davidson v Industrial & Marine Engineering Services Ltd EATS/0071/2003*. If the claimant's dismissal had been within the range of reasonable responses, then we may have accepted the applicable of a *Polkey* deduction. However, the circumstance of this case was that the respondent wanted rid of this employee and took advantage of an error to elevate this into a dismissal offence (either by totting up originally or reassessing this on appeal). No reasonable employer would have adopted this inconsistent approach. Consequently, we make no *Polkey* deduction.

71. That said, we do feel it appropriate to make a deduction in respect of contributory conduct. This to a large extent, is an arbitrary assessment. We need to arrive at a decision which we think is fair in the circumstances. The claimant was culpable or blameworthy in not reading the college correctly and not noting the clear warning on the ullage printout. This caused a spillage which, although was relatively small and not adequately assessed by the dismissing officer or the appeal officer, it still had the potential to cause a serious incident. The claimant's initial failure was the root cause of his dismissal. We determine that having balanced all of the relevant factors, which we have set out in this determination, it is just and equitable to deduct any compensation payable (under S123(6) ERA only) by 15%.

72. Mr Jacques made significant errors in providing the claimant with a fair appeal. First, a six-month delay is wholly unacceptable to decide an appeal against dismissal. Second, Mr Jacques largely ignored the claimant's grounds of appeal and proceeded on his own agenda to justify the dismissal. He did not bother to reconvene an appeal hearing as he was so committed to discard anything that got in the way of his blinkered outlook. Although, the respondent errors in respect of the appeal were profound, the appeal was only part of the process and accordingly we limit our uplift to 5%. As such, this reduces the overall deduction from any compensation payable to the claimant to 10%, which we regard as fair and appropriate in the circumstances.

73. This case will now be listed for a remedy hearing to consider the claimant's financial loss in respect of his unfair dismissal. The Employment Judge will write to the parties separately to set out case management orders. As these preparatory steps or orders arises from the exercise of our case management functions, such orders should be made privately.

Employment Judge Tobin

2 May 2018