EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102302/2017

Held in Glasgow on 19, 20, 21, 22 and 23 February 2018

Employment Judge:	**Ms M Robison**
Members	**Mr A Ross**
	Mr H Boyd

Mr R Sciortino	**Claimant** **In person**
Lemac Engineering UK Ltd	**Respondent** **Represented by** **Mrs M Peckham** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal finds that the claimant was unfairly dismissed in terms of section 94(1) of the Employment Rights Act 1996. All other claims are dismissed.

REASONS

Introduction

1. The claimant lodged an ET1 claiming unfair dismissal; dismissal and detriment as a result of having made a protected disclosure; failure to pay redundancy pay; notice pay; holiday pay and arrears of pay in respect of unpaid overtime and unpaid expenses (fuel). The respondent resisted all of the claims, arguing that the claimant had been dismissed for reasons of misconduct.

2. At a hearing which took place over five days on 19, 20, 21, 22 and 23 February 2018, the claimant appeared in person, and the respondent was represented by Mrs P Peckham, solicitor.

3. In this case, case management preliminary hearings had taken place on 6 October and 10 November 2017, and various orders had been issued. The respondent's application to amend to include an alternative claim that the claimant had been dismissed for "some other substantial reason", that is a break-down of trust and confidence, was considered in chambers and allowed.

4. Notwithstanding previous case management orders, at the outset, there was an initial discussion whether the list of issues which had been prepared properly reflected the outstanding issues between the parties. With regard to monetary claims, the claimant stated that he was in addition claiming mileage in respect of one journey on 19 June and also holiday pay. These were in fact included in his schedule of loss. He confirmed that he was not claiming failure to furnish written particulars, although that too was included in the schedule of loss.

5. By the end of the hearing, the claimant confirmed that he was no longer claiming holiday pay (having accepted the respondent's evidence in that regard) and nor was he claiming unpaid overtime. The only outstanding monetary claim therefore was the claim for the mileage (apart from redundancy pay and notice pay, which were dealt with as aspects of the unfair dismissal claim).

6. With regard to the question of reinstatement, the claimant initially advised that he was unsure and asked for more time to consider that. After the second day, he confirmed that his desire was to return to work for the respondent, although not in the same role. In his final written submissions, he advised that he was withdrawing that request.

7. During the course of the hearing, the claimant sought to lodge additional documents, which were allowed on the basis that the respondent did not object, except to the extent that the supplementary bundle contained duplicates, and in relation to one document, to which the respondent did object, discussed below.

8. The claimant alleged that the respondent had failed to include in the bundle all of the documents which he had forwarded to them and upon which he said that he was relying. It transpired that the claimant had forwarded to the respondent a "zip" file which contained a number of large files, including

photographs. We accepted Mrs Peckham's explanation that a great deal of time had been spent by her colleagues seeking to ensure that all of the files in the zip file were included in the bundle. Mrs Peckham explained that was why she had not objected to some of the documents which had made their way into the bundle, the relevancy of which she questioned, and which we were of the view were irrelevant to the issues for determination. It transpired that there was one photograph in particular, which had not been lodged which the claimant sought to have included in the bundle. This was a racist image which the claimant claimed that Mr Coleman had sent to him at some stage. Mrs Peckham objected on the grounds that the photograph was not relevant to the issues to be determined, and in any event its provenance was not clear, because it was not accompanied by a covering e-mail or any other document linking it with Mr Coleman, who denied sending it. After recessing to consider our position, we refused to allow that document for the reason that it was not relevant to the issues to be determined by the Tribunal.

9. There was a very large number of documents lodged in this case. In addition to the "tribunal bundle" (referred to here as main bundle or MB (which contained 615 pages)) and the supplementary bundle (referred to above), there was a "mitigation bundle", containing a schedule and counter-schedule of loss and documents to support the claimant's mitigation argument; as well as an ancillary bundle which contained the list of issues, joint statement of agreed facts and chronology, claimant's amendment, essential reading for PIDA claim and respondent's skeleton argument. We found the main bundle in particular to be unwieldy and the documents not easy to find our way around, especially the e-mail chains which were copied out of order.

10. In addition, there was a bundle containing witness statements, which had been ordered during the case management preliminary hearings.

11. We should say that we recognised that the claimant was required to represent himself, and that he was clearly out of his depth. We therefore allowed him additional opportunities to consider his position, as appropriate. For example, we adjourned after he had read out his witness statement to allow him to consider overnight whether he had anything further to add. Where appropriate we asked relevant questions of the witnesses to ensure equality of arms, and we allowed other additional adjournments as requested.

Findings in fact

12. The Tribunal finds the following relevant facts admitted or proved.

Background

13. The claimant was employed by the respondent from 26 May 2013 until 11 July 2017 when his employment was terminated for gross misconduct.

14. The respondent manufactures excavator attachments from a depot at Tillicoultry, as well as in Virginia, USA. The respondent saw a downturn in business in the UK following the events post 2008, when a number of senior managers were made redundant. The number of staff had reduced from around 25 in 2008, when there were 5 full-time administrative staff employed in the office, to 3 in 2017, with the claimant being the only full-time member of operational staff.

15. Initially, the claimant was employed in a sales role but following the departure of a previous director, James Travers after around a month in the role, he found himself with a very wide range of roles to cover, under the title of operations manager, working very long hours. Following Mr Travers departure, Mr Frank Coleman was the sole director of the UK company, but he operated in the US, visiting the UK only around twice each year.

16. The claimant worked from the “front office”, along with two other employees, namely Ms Andrea McCue and Mrs Alison Paterson. At the relevant time, the respondent employed six employees who worked in manufacturing in the workshop.

Health and Safety Concerns

17. One of the roles which the claimant required to oversee as the operations manager was health and safety, in respect of which he had no formal training or prior experience. During his employment, he raised a number of issues relating to health and safety with Mr Coleman. For example, on 23 July 2015, the claimant advised Mr Coleman of some concerns regarding maintenance and repair of machinery (MB 123). The claimant had the authority to shut down proceedings, for example on 2 November 2015, he shut down manufacturing due to problems with the fire alarm system (MB 125), which required an overhaul in order to meet health and safety requirements (MB 125-129). The claimant raised further issues with Mr Coleman in an e-mail of 4 November 2015, including issues relating to machinery breaking down (MB132). The depot also required an electrical re-wire (see e-mail 28 January 2016 MB 130-131). The claimant also raised issues about the temperature in the office and workshop on a number of occasions, for example in November 2016 (MB351). Mr Coleman was aware

of these concerns. The claimant did however have authority to shut down the depot and send staff home, which he did for example in November 2016 (SB4-8).

18. The respondent engaged RBS in respect of business loans and invoice processing. At one time they used their services in respect of health and safety issues. Due to concerns with the service, the respondent terminated their agreements with RBS, first in respect of health and safety, then in respect of the finance service, and then in respect of human resources.

19. At the instigation of the claimant, and with the approval of Mr Coleman, the claimant engaged a company called Citation in respect of health and safety and personnel matters towards the end of 2015.

20. Tracey Calderwood, health and safety consultant with Citation, undertook a health and safety inspection on 20 January 2016. That same day, the claimant e-mailed Mr Coleman (MB 163) to advise of the visit, stating "it's on the whole not very good news, however the representative does state it still is not the worst business she has visited of late but still we have to treat this as very serious. As previously presented to you, a number of issues are in danger of causing employees a severe risk to life. We have until March to remedy or at least display that we are looking proactively to ensure highlighted issues are repaired or booked for maintenance along with quotes and estimates". He then set out a list of issues to be addressed urgently and what needed to be done.

21. Mr Coleman responded (MB 163) "figured that would be coming after the incident with the other Bucket Manufacturer. All you can do is get quotes as below – we will just have to evaluate the viability of same. If it is like here if you show good faith in addressing these issues they may extend the timeframe for fixing the issues. Is there any fine from the Government associated with this visit? Obviously we don't wish to have anybody working in an unsafe environment. The highlighted issues below are matters that should have been addressed on an ongoing basis regardless of inspections or visits. Let me know when you start to get quotes together".

22. In a letter addressed to Mrs Paterson dated 9 February, Ms Calderwood subsequently stated that "a number of points were observed relating to compliance to health and safety law during the inspection and are detailed within the report. It is imperative for these to be addressed at the earliest possible time. Failure to comply with these recommendations could be detrimental to the business should the premises be inspected by an Enforcement Officer". A full report was enclosed with that letter (MB 136-

162), making 45 recommendations for action, with a number of high and medium priorities identified.

23. With assistance from the claimant and Ms McCue, Citation also prepared an employee handbook dated 7 June 2016 (MB 172 – 201). A health and safety policy was also prepared by Citation, dated 28 November 2016 (MB 240 - 328).

24. Along with Ms McCue, the claimant set about getting quotes to address the issues which had been raised in the Citation health and safety report. For example, on 23 February 2016, the respondent received a quote for electrical services for around £87,500 (MB 169). Around that time the respondent received a quote for roof work of around £100,000 (MB 171).

25. On 16 June 2016, Mr Garry Miller of the HSE visited the depot. This was an unannounced spot check visit. Initially, the claimant said that he was too busy and asked Mr Miller to return later (MB 519).

26. It was understood that this visit was precipitated by a complaint to the HSE by a former employee whom the claimant had dismissed in or around May 2016 (MB 518). However, both the claimant and Mr Coleman were aware of fatalities following an accident at a competitor down south, and understood that may also have been a catalyst for the visit.

27. Following the visit, the claimant e-mailed Mr Coleman (MB 202) to advise of "HSE spot check today – everything checked out fine in the housekeeping division, however the machinery, roof and cranes that are condemned/previous highlighted issues are probably about to be forced out of commission...if no action is taken...by the HSE themselves and they will bill us for the pleasure of doing so or instructing us about how to set it right." He set out the machinery to which this applied and said "for the record is historic (from other HSE meetings) and has been finding faults before my tenure. They have stated they will be holding me personally responsible.....you are responsible as the company director first and foremost...has to be highly respected as health and safety should be of the utmost paramount. This has previously been presented to you several times over the last few number of years. Simply put I have been advised to cover myself – as UK branch do not have the monetary budget for the presented costings as per Andrea's pricing for summary of works which is now needing examined to be able to proceed. I have advised HSE that items will need to be repaired/introduced depending upon monetary budget to try and rectify these issues as a list of priority. Please give this some serious thought".

28. Following that visit, the claimant forwarded e-mails to Mr Miller which he had exchanged with Mr Coleman regarding health and safety issues, stating that he was "covering my own behind" (MB 123, 125, 127, 130, 132, 163, 166).

29. Following a subsequent visit on or around 24 June 2016, HSE served prohibition notices, notices of contravention and improvement notices dated 24 – 27 June 2016 (MB 204-219), which the claimant forwarded to Mr Coleman by e-mail dated 29 June 2016 (MB 220). In that e-mail he reiterated health and safety concerns, stating that these were issues which he had raised before and highlighting priorities for actions (MB226). He also stated that he was "extremely worried for the employees and myself here on site....even more so that we have no immediate access (funds) to pay for critical and serious items needing attention".

30. On 11 July 2016, Mr Coleman transferred £20,000 into the respondent's UK account (MB383A). Between July 2016 and June 2017, Mr Coleman transferred £74,000 to the UK account (MB383B) to cover health and safety remedial work and day to day expenses.

Claimant's e-mails on more general management issues

31. On 14 December 2016, the claimant wrote an e-mail to Ms McCue which included extremely degrading and vulgar language directed at her.

32. In the first half of 2017, the claimant sent a number of e-mails which indicated that he was getting increasingly stressed. For example, by e-mail dated 20 January 2017 (MB368), he asked Ms McCue to "arrange a meeting with all staff for Tuesday morning at 09.15 and ensure that everyone is present. The issues I want to discuss are as follows – I am taking no prisoners and putting a few of the ass-hats in their place", and the list included "fucking bitching; fucking moaning". The e-mail continued, "in general the topics above, I am using to target and single out Dob and Mario. If they cannot adapt to how a modern business should be working – effectively I will phase them out". Then on 2 March 2017, he wrote an e-mail to Ms McCue and Mrs Paterson which commenced, "look at this absolute pile of shit from Clacks bid below."...and ended "fucking useless as a used tampon" (MB370). On 24 April 2017 he wrote an e-mail advising he had to go home to deal with someone who was removing solar panels from his house (MB372) and on 25 April 2017 he referred to "Asian shite" (MB374A). On 26 April 2017 (MB376), he wrote a very odd e-mail regarding production faults using sarcastic language and inappropriately large font and excessive questions marks and exclamation marks.

33. On 2 May 2017 (MB377), he sent an e-mail to Mr Coleman in which he stated, “I’m pretty tired and do not want to present any more hassles to you financially – it’s simply not fair on any of us. This stress is making us all ill with worry and such like. My nerves and Alison’s nerves are shattered”. In an e-mail dated 3 May 2017 (MB378) he raised a number of further concerns, and stated “Only good news that the health and safety visit passed 27 issues that had previously failed and only two remain that we are working towards”. On 12 May 2017, the head foreman, Mario, resigned his position after 12 years of service and three years in that role.

34. In June 2017, the claimant prepared a powerpoint presentation (MB 353 – 367) related to concerns about the financial viability of the business given a down turn in sales. This included proposals for “moving forward”. He set out positives and negatives which included under positives, “Health and Safety is now correct within remit 27 of 29 items”; and under negatives “machinery requires weekly attention or replacing”; “struggles to pay bills and wages” and “building still needs extensive works which currently place workers lives at risk”. This presentation also included a slide headed “Redundancy figures (included as an option)” (MB 364). The claimant forwarded this powerpoint to Mr Coleman by e-mail dated 9 June 2017, in which he stated “I have really thought hard about this; things are really extremely tough! We are experiencing mass issues with staffing, machinery and such like, I cannot find an apt replacement for Mario....”

Incident leading to dismissal

35. On Monday 19 June 2017, while Mr Coleman was driving back from his beach house having spent the week-end there with his family, he was called on his personal mobile by a Jon Hewitt, a customer of the UK business. Mr Coleman realised it was important because his staff at the office would not give out his mobile number unless they were pressed to do so. Mr Hewitt told him about a site visit to a customer in Rotherham with the claimant. He said that in 30 years in the industry he had never been spoken to the way that the claimant had spoken to him that day. Mr Coleman asked Mr Hewitt to follow up his concerns in writing.

36. On Tuesday 20 June Mr Hewitt e-mailed Mr Coleman in the following terms (MB 394): “Please read the attached email and report I have just received from Rai. I am not getting into this any further with Rai, I do not appreciate his written comments about yesterday’s events, all of which Rai has projected me in a very bad light. I can 100% assure that events did not unfold as Rai has stated in his e-mail. Rai’s stance and level of support, I find absolutely disgusting and disrespectful. From this point on, is it possible

that I can deal direct with yourself. I do not want any involvement with Rai moving forward.....Rai is now not willing to help me or provide me with any information or drawings or any spare parts to help me fix my customers issues of which I find to be totally unsatisfactory, Rai has gone back on his agreement that he made with myself and my customer yesterday, Rai is blaming everyone else apart from himself, he needs to take some responsibility here!"

37. Later that day, Mr Coleman spoke to Ms McCue and Mrs Paterson to ask for their thoughts on what he had heard from Mr Hewitt. They raised concerns about the claimant's behaviour and mentioned two other recent incidents when they were concerned about the claimant's behaviour with customers. He asked them to type up a statement.

38. Ms McCue stated that (MB 455) she had a number of general concerns regarding the claimant's management style, which included concerns about damage to the company reputation because of his lack of understanding of the company's products; mannerism on the telephone to customers and suppliers; his unreliability regarding time keeping; failure to return calls and changeable moods. She also advised that she had overheard a call between the claimant and a Gordon Campbell on 25 May regarding an ongoing complaint when she had witnessed him raising his voice to the customer and telling the customer that he had done all he could and wasn't willing to do anymore. She said that the call ended with the claimant saying "you know what, take your face for a shit" and then slammed the phone down.

39. She also stated that on 13 June 2017 she took a call from a supplier Nicky regarding outstanding payment due, and she transferred the call to the claimant. She then overheard him swearing in an aggressive manner, and in particular saying "if you would get off the fucking phone I could maybe chase sales and money due in to us"; he stated that he had "no fucking say over the finances", and he hung up the call and said "go and fuck yourself". After the call he said that he had "fucking had it with this place and the fucking stress of it" and left saying "fuck you too" to her and Mrs Paterson.

40. This was over heard by Mrs Paterson, as confirmed in her statement (MB455A) (dated 22 June 2017). Mrs Paterson also stated that she felt that over the previous 4-5 months the claimant had been extremely stressed, although she was not sure whether this was work related or related to his personal life. She thought he had difficulty dealing with customers because of his lack of technical ability and then would become irate and pass customers on to herself or Ms McCue. She said that if he came into the

office and was unhappy with either of them then "he would send demeaning emails and go on power trips".

41. On Wednesday 21 June, in an e-mail to Mr Coleman, Mr Hewitt set out his recollection of the claimant's visit on Monday 19 June. He advised that after they had visited the customer, they returned to his office to inspect a bucket which was causing concern, during which discussion the claimant had informed him that he was in the wrong, did not like his attitude and was being a "dick" about this issue. He continued "at this point I was so mad I told Rai I was going to drop him off at a taxi rank and for him to find his own way back to the airport. Of course I did not carry out his threat, I was so mad and appalled that a supplier of mine could be so rude and arrogant and nasty to blame me (the customer) for everything that had gone wrong with a bucket that he was responsible for. I took Rai back to the airport, very little was said on the way back to the airport....I have found Rai pushing every issue back onto myself even when it is blatantly obvious that Lemac owned those issues and had caused these issues. I then received Rai's e-mail which I forwarded onto yourself, stating that he would not support us in any way unless we paid".

42. On Wednesday 21 June 2017, at 12.57 am US time, that is 05.57 UK time, Mr Coleman sent the claimant an e-mail (MB405) which stated as follows:

"With this letter we wish to inform you that effective immediately, your employment with LEMAC Engineering (UK) Ltd is terminated. Our company gives serious attention to all policies governing its operations. By disregarding them and creating an unpleasant environment, you have jeopardized the well-being of our business and your colleagues. We have an obligation to amend that. Upon termination, all benefits associated with your position will cease. You are requested to return all property belonging to LEMAC this morning and to leave the premises in a peaceful fashion. Failure to do this will result in further action against you. As you are aware I am in a different time zone, if you wish to discuss this further over the phone, I can do so at 08.00 EDT (1.00pm GMT) if you provide me with an alternate phone number to contact you".

Claimant's "grievances"

43. The claimant responded by e-mail of the same date at 06.59 (UK time) (MB405) asking, "under what premises (sic) am I losing my position? What have I done to terminate my position? I have a contract and employee rights as outlined in my contract provided by Citation. I have no inclination as to what I have done wrongly or incorrectly, as no such issues/case has been

presented to me...you can rest assure that I will fight and challenged this decision every step of the way as I have not been presented with an investigation meeting/interview, disciplinary hearing and the company has not followed the proper three stroke process relevant to any crime I have been adjudged to have committed. And as of yet I have no idea what crime I have committed.....I have had to adopt many roles over the years that constantly place me in situations where I am putting out fires or being distracted from my own role. I have endeavoured to do the best – the utmost best by your business and employees in very tight and pressurised conditions indeed under the duress of severe stress. If you can provide an example of what I am supposed to have done I would be grateful for this..."

44. The claimant set out further concerns in a lengthy e-mail later the same day at 12.36 (MB 407-411). He described this as a "formal grievance". This largely related to advice about the correct way to terminate an employee's employment.

45. There was then an e-mail exchange regarding the claimant's claims that he had attempted to call Mr Coleman, and Mr Coleman denying that he blocked his number or had missed calls, and subsequent e-mails from the claimant in which he expressed concerns about the failure of Mr Coleman to provide any written explanation setting out the reasons why he was dismissed (MB 412 – 420). Although Mr Coleman said that he had initially attempted to speak to the claimant, he was subsequently advised that he should not do so.

Appeal

46. By letter dated 27 June 2017 (MB 420- 421), Mr Coleman responded to the claimant advising that he was treating the e-mail of 21 June as an appeal, and that would be heard by an independent solicitor and HR advisor, Ben Thornber, of Thornber HR Law, who he had engaged for the purpose. He advised that "given the circumstances we have decided to hold this as a complete re-hearing of the issues. As a result, I enclose further documents, statements and evidence relating to your recent conduct and conduct with clients, which has led to the decision to dismiss you. You will have an opportunity to respond to the issues identified". Enclosed with that letter were an extract of the disciplinary policy, e-mail chain from Gordon Campbell, claimant's report to Jon Hewitt, and statements of Ms McCue and Mrs Paterson.

47. That letter set out the principal allegations as follows:

"1.On Thursday 25 May 2017, you spoke with the client Gordon Campbell ....on the telephone about the ongoing issues with his bucket. You were witnessed to raise your voice with the customer, saying that you had done all you could and were not willing to do anymore, and the call ended with you saying, "you know what, take your face for a shit", and then slammed the phone down on him.

2. On Tuesday 13 June 2017, you were witnessed speaking to our supplier Nicky.....regarding an outstanding payment due to him. You were witnessed cursing and swearing in an aggressive manner saying, "If you could get off the fucking phone I could maybe chase sales and money due in to us", and also stated you had "no fucking say over finances". The call ended with you saying to the client "go fuck yourself" and then hung up. Immediately after this you also said "fuck you too" to two of our employees...."

3. On 19 June 2017, you spoke in a derogatory manner to Jon Hewitt.....telling him he was in the wrong, that you did not like his attitude, that he was being a "dick" about the issue, and that he was the one at fault about the issues".

48. The letter continued, "these allegations potentially amount to gross misconduct, under "using threatening or offensive language towards customers, clients or other employees", and "behaviour likely to bring the company into disrepute". It will be for Ben Thornber to make a recommendation about the appropriate disciplinary sanction, if any. He will listen to what you have to say and will make recommendations about the appropriate course of action. In effect, it will be a new decision, which could be that you should be reinstated with full back pay (with or without a disciplinary warning), or else dismissed for gross misconduct. I undertake to follow his recommendations. If you have any further documents you wish for Ben Thornber to consider at the appeal, or if you have further questions about the process, please send these to me before Friday. With regards to your subject access request under the Data Protection Act we will deal with this in due course".

49. That letter was sent by post and by e-mail, both ordinary post and recorded delivery. The claimant did not receive the e-mail, he assumed because of the size of the attachments (MB452). When the claimant complained that he had not received either hard copy, a third copy was hand delivered to his house.

50. The claimant sent an e-mail on 29 June which he called "a second grievance", in which he complained that the letters had a different amount of

pages (MB 426-427). Mr Coleman responded to advise that the letters delivered were the same, and contained the same allegations (MB453).

51. The appeal hearing took place on 3 July 2017. At the outset of the appeal hearing, the claimant asked if he could record the meeting. Mr Thornber took some hand-written notes (MB461-463). The claimant asked if he could read out a document which he called an "opening statement" setting out his position in considerable detail over 18 pages (MB 434-451). Thereafter, Mr Thornber asked the claimant a number of further questions.

52. After the appeal hearing, Mr Thornber contacted Mrs Paterson and Ms McCue to "confirm or re-confirm by e-mail their position about some of the evidence you presented concerning the allegations which they had direct knowledge of". Mrs Paterson set out her recollection of the phone calls on 13 and 19 June (MB464).

53. Ms McCue provided a statement (MB 466) and forwarded handwritten notes (MB467) which she had made at the request of the claimant, who had contacted her from the airport after the customer visit on 19 June, which she subsequently typed up, including the following that "a disagreement took place over bump stops on Lemac clamp loader; Jon threatened Rai that he was going to drop him in Leeds with all the pakis as his name sounded like he was one; he dropped him in the middle of nowhere and he had to get taxi to the airport" (MB 454).

54. By letter dated 10 July 2017, Mr Thornber set out his decision (MB469 – 474). He addressed each of the allegations in turn. In respect of the first allegation, although the claimant claimed that he had said "take your face for a shit" after he hung up the phone, Mr Campbell confirmed in a follow up call that those were the words that he used. Given that the words were unusual, and what he said was corroborated by Ms McCue, he said that the only reasonable conclusion he could come to was that the allegation was correct.

55. With regard to the second allegation, although the claimant denied that he had sworn at the supplier, Mr Thornber contacted the supplier after the appeal hearing, and he confirmed that he had spoken to him inappropriately and sworn at him. Given that this was corroborated by Ms Mc Cue and Mrs Paterson, he thought it was reasonable to conclude that he had sworn at the supplier, which was further supported by his conclusions relating to the first allegation.

56. With regard to the third allegation, he concluded that it was not credible that the claimant would dictate a note to Ms McCue that Mr Hewitt would drop

him in Leeds "with all the Pakis" when he did not mention other aggressive and abusive comments which he claimed during the appeal he had said to him; while the claimant in the appeal claimed that he had said "stop dirking me", the overlap between those highly unusual words and word dick appeared too convenient, and therefore it was probable that he had used the word dick; the picture he painted of Mr Hewitt's behaviour was so extreme as to be somewhat unbelievable; Mr Hewitt's version that he was so incensed that he threatened to drop him off at a taxi rank was more credible; telling Mrs Paterson and Ms McCue about getting a taxi and the Paki comment was an attempt to cover his tracks and put the blame on Mr Hewitt, as supported by the different version of events about the airport ride given at the appeal; and it takes a lot for a client to contact the owner of a supplier's business to complain about the behaviour of the supplier's senior employee and particularly in the strong terms expressed in the email of 21 June, the contents of which appeared genuine and credible. Given his conclusions above, he considered it was reasonable to prefer Mr Hewitt's version over the claimants.

57. He concluded that these were examples of gross misconduct as set out in the disciplinary policy, and therefore he concluded that each allegation and/or taken together, amounted to gross misconduct.

58. The letter continued, "I accept that you felt you were under significant stress and pressure for a prolonged period, without adequate support from Frank Coleman who is the sole director". Mr Thornber said that in coming to the decision that the claimant was guilty of gross misconduct, he had "taken into consideration your account of lack of support and the stress you were under. I have no doubt you were under a considerable amount of stress at work even if it is difficult for me to ascertain how much of that was the fault of others. However even if what you say is all true (which is probably unlikely, given my conclusions above), this does not mean the company should be expected to condone your behaviour for these specific acts. As a result I consider it would be reasonable for the company to uphold its prior decision to dismiss you immediately for gross misconduct".

59. The letter continued, "If the company were to follow my recommendation, then you would have no further right of appeal (notwithstanding that this hearing was in the form of a re-hearing). I have shown this letter to Frank Coleman and as you can see from his e-mail enclosed dated today, he has agreed with my conclusions and has decided to follow my recommendation to uphold his prior decision to dismiss you immediately for gross misconduct".

60. The email response from Mr Coleman to the claimant dated 10 July 2017 (MB 468) stated that that he had read and digested the contents of the letter; and that he agreed with the conclusions and therefore that the decision to terminate his employment stands, but that he would be paid to the date of the appeal, ie 11 July 2017.

61. Mr Thornber's letter of 10 July 2017 concluded, "Finally, it is clear both from Frank Coleman's view of your actions, and from the comments you make about Frank in your document, that there is a complete breakdown in mutual trust and confidence between you and the company. Even if I am wrong, therefore, on the finding of gross misconduct (which I do not believe I am), then it would be reasonable and fair that your employment should come to an end".

62. Following the claimant's dismissal, HSE subsequently visited the premises, and served a notice of contravention and improvement notices dated 27 July 2017 (MB 329 – 343).

Relevant law

Public interest disclosure

63. The law relating to public interest disclosures is contained in Part IVA of the Employment Rights Act 1996 (ERA). Section 43B states that a "qualifying disclosure" means any disclosure of information which, "in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show", inter alia, "that the health or safety of any individual has been, is being or is likely to be, endangered", or "is likely to be deliberately concealed".

64. A qualifying disclosure will be a protected disclosure if it is made to an appropriate person. Section 43C(1) ERA states that "a qualifying disclosure is made….if the worker makes the disclosure a) to his employer…..". Section 43F is headed up "disclosure to prescribed person" and would include a disclosure to the Health and Safety Executive in terms of the Public Interest Disclosure (Prescribed Persons) Orders 2014 and 2015.

65. Section 47B ERA states that "a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground the worker has made a protected disclosure".

66. Where the worker is an employee and the detriment amounts to dismissal, section 47B does not apply. In that case, section 103A states that an

employee who is dismissed shall be regarded….as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

Unfair dismissal

67. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) states that an employee has the right not to be unfairly dismissed by his employer. Section 98(1) provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

67. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

68. In a dismissal for misconduct, in **British Homes Stores Ltd v Burchell [1980]** ICR 303 the EAT held that the employer must show that:

- He believed the employee was guilty of misconduct;
- He had in his mind reasonable grounds upon which to sustain that belief, and
- At the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

69. Subsequent decisions of the EAT, following the amendment to the burden of proof in the Employment Act 1980, make it clear that the burden of proof is on the employer in respect of the first limb only and that the burden is neutral in respect of the remaining two limbs, these going to "reasonableness" under section 98(4) (**Boys and Girls –v- McDonald [1996] IRLR 129, Crabtree –v- Sheffield Health and Social Care NHS Trust EAT 0331/09).**

70. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed as well as the penalty

of dismissal were within the band of reasonable responses (**Iceland Frozen Foods Ltd –v- Jones [1982] IRLR 439**). The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached (**Sainsbury v Hitt 2003 IRLR 23**). The relevant question is whether the investigation falls within the range of reasonable responses that a reasonable employer might have adopted.

71. The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

72. Under Section 113 of the 1996 Act, if the Tribunal finds that the claimant has been unfairly dismissed, it can order reinstatement or reengagement, or where no award for reinstatement or reengagement is made, it can award compensation under Section 112(4) of the 1996 Act. Section 118 of the 1996 Act states that compensation is made up of a basic award and a compensatory award.

73. A basic award is based on age, length of service and gross weekly wage (Section 119). The amount is one and a half week's pay for every year that the employee was over the age of 41, subject to a maximum. Section 122(2) states that the basic award can be reduced if the Tribunal considers that the claimant's conduct before the dismissal was such that a reduction would be just and equitable.

74. Section 123(1) of the 1996 Act states that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer.

75. If the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, under Section 123(6) it can reduce the amount by such proportion as it considers just and equitable. Under section 124A, any section 207A reduction must be applied immediately before any reduction under this section.

76. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA) provides that if the ACAS Code of Practice entitled "Disciplinary and Grievance Procedures" applies and it appears to the

Tribunal that the claim concerns a matter to which the code applies and that the employer has failed to comply with the code in relation to that matter, and the failure was unreasonable, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than 25%. There is a similar provision for a reduction if the employee has failed to comply with the code and the failure was unreasonable.

77. If the dismissal is found to be unfair on procedural grounds, it may be just and equitable to reduce compensation if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred. This is known as a "**Polkey"** reduction.

Respondent's submissions

78. Mrs Peckham had lodged a skeleton argument, which she supplemented in oral submissions. She submitted that the issues raised in relation to the ordinary unfair dismissal and the public interest disclosure claim intertwine, but matters crystalised on 21 June 2017 when the claimant was dismissed, although the effective date of termination was 11 July 2017.

79. All of the respondent's witnesses were very upset about the allegations which the claimant made in his appeal. The claimant's appeal letter shows the claimant lashing out in a disturbing manner; and there is no evidence to support the allegations which he makes there. She submitted that although there had been minor incidents in the past, this pattern of conduct had started some 6 to 12 months prior to the termination of his employment, as is evidenced by e-mails which have been lodged. This is not a situation where the claimant can argue that he was simply using industrial language, because he goes far beyond that, the language he has used is vulgar, offensive and repugnant, including abusive, sexist and racists comments in e-mails, and is not appropriate for the office or for client facing roles. Mr Coleman only became aware of this during this process, and it is for that reason that he now says that if Mr Thornber had recommended a final written warning, that he would have regarded this behaviour as gross misconduct and would have dismissed him in any event.

80. Mr Coleman accepted in evidence that he was in the wrong; but on reviewing the disciplinary procedure he had interpreted "immediate termination" as permitting him to terminate the claimant's employment immediately as he had no detailed knowledge of UK employment law. While he failed to take advice, and it might be said that the procedure was unfair, the question is whether overall it was substantively unfair. Taking account that the appeal hearing was an extensive rehearing, which included listening to the client, and follow

up enquiries with the first two clients who reaffirmed what had been said by Ms McCue and Mrs Paterson, this process corrected the procedural flaws. Overall the process arrived at exactly the same conclusion that the claimant was guilty of gross misconduct. The claimant now accepts this in relation to the first and second allegations, whereas he has until today denied the allegations and argued that the respondent's witnesses had colluded.

81. With regard to the third allegation, Mrs Peckham invited the Tribunal to consider that Mr Hewitt's complaint was substantiated. She submitted that Mr Hewitt had no possible motive to contact Mr Coleman in the US, so shortly after the event, if the version of events was as suggested by the claimant. She submitted therefore that the conclusion reached by Mr Thornber that this was gross misconduct meant that dismissal in the circumstances was fair. The claimant has not sought to argue that any aspect of the appeal process was unfair.

82. Even if the Tribunal does not accept that, Mrs Peckham argued that the claimant's conduct prior to dismissal supported the alternative view that dismissal was for some other substantial reason. There was an irretrievable breakdown of trust, as evidenced by unacceptable racist, sexist and offensive comments, which was behaviour which was likely to bring the respondent into disrepute and affect relations with customers.

83. With regard to the claimant's claims that there was collusion and falsification of documents, the claimant had presented no evidence to support that, and this goes to the claimant's credibility and the credibility of the rest of his claims.

84. With regard to the redundancy claim, there is no evidence to suggest that the claimant was dismissed to avoid a redundancy payment. This is contradicted by the significant amount of money which Mr Coleman was putting into the business, in comparison with the small sum that would be due to him as a redundancy payment.

85. With regard to the public interest disclosure claims, at no point does the claimant raise this in the post-dismissal e-mails, one of which is extensive; if he thought that was the reason, as is clear from the evidence the claimant would not have been shy about asserting that. Rather, it was an afterthought to bolster his claim and a further example of him lashing out.

86. While the respondent accepts that there were health and safety issues, she submitted that these had been raised and dealt with proactively, if not as quickly as preferred, given that the electrics and roofing required specialist involvement. She submitted that the issues raised by the claimant are merely observations and cannot be categorised as protected disclosures. It would

only be issues raised with Mr Coleman or the HSE which would qualify. In any event, the claimant has failed to show any link between them and the dismissal. If that had been the case, the respondent would have dismissed the claimant much earlier in the process. In any event, on the claimant's own admission, most of the issues raised had been dealt with by the time of the dismissal. With regard to what he says are detriments, he is inappropriately conflating dismissal and detriment.

87. Should the Tribunal find that the claimant has been unfairly dismissed, Mrs Peckham argues that there is contributory fault, and relying on **Hollier v Plysy [1983] IRLR 260**, she argued that this is a case where the claimant is wholly, rather than largely responsible, and therefore both the basic and the compensatory awards should be reduced by 100%. She also relies on **Polkey**, that the claimant would have been dismissed in any event had a fair procedure been followed. She submitted that it would be wholly impracticable for the claimant to be reinstated.

88. Further and in any event, Mr Coleman was very upset when he saw some of the e-mails which have been lodged in the process of this claim, such as MB352, and had he know of these, he would in any event have dismissed the claimant, not least because of the risk of sexual harassment claims, given their duty of care to other employees. Mrs Peckham accepted that were the Tribunal to conclude that the claimant had been dismissed for some other substantial reason, then he would be entitled to four weeks' notice pay.

89. With regard to mitigation, while the claimant has applied for a number of jobs, she submitted that the comments that he had made on a crowd-funding website would have hampered his success of job-seeking activities, given employers now search on the internet to determine the suitability of prospective employees. Further, the claimant has lodged no evidence to support his claim that he has been looking for jobs since November.

90. She invited the Tribunal to find that dismissal in the circumstances was fair and to dismiss all the claims.

Claimant's submissions

91. The claimant had prepared written submissions, the majority of which he read out, but which he passed up to the Tribunal when he felt unable to continue. In his written submissions he set out the claims which he was pursuing, and those which he was withdrawing. He said that he had found the process extremely tough, stressful and traumatic but had tried to co-operate and stay focused on the facts.

92. He said that for four years he carried out his roles and responsibilities well over and above what was originally asked of him in very tough and challenging conditions which the director admitted. He had very little training or guidance for the roles yet displayed an aptitude for them, having been thrown in at the deep end when the former director, James Travers, left the business in June 2013 after 19 years in the role. Having been taken on in sales, which was his background, he set out (in a non-exhaustive list) 19 other roles which he required to undertake in addition, including transport, buying, IT, labouring, pricing and estimating, HR, H&S, tendering and procurement, design and forecasting, and depot management of 1.5 acre site. He was very proud of his achievements, especially in selling to various countries for the first time.

93. He submitted that there was bullying in the workplace and that he had been physically and verbally abused, but he remained loyal and took very little sickness absence.

94. In 2016/2017, events contributed to chronic stress which affected his ability to perform his roles to the usual high standard, and other staff, including Mr Coleman, were incapable of supporting him. He referred to various documents in the main bundle to support his submission. By this time he was the only full-time employee in the office. On occasions, he had to advise staff that they would not be getting paid, or that their pay would be delayed.

95. He set out in written submissions how his health had been affected during 2017 and 2018. He submitted that false accusations were made during the Tribunal by the respondent's witnesses. He said that claims made against him had not previously been raised, and in any event this was not the reason he was fired. He did not accept that staff were too embarrassed to report his behaviour, but that they were all as bad as each other, including Mr Coleman. He was too nervous to cross examine on issues that he should because he was not sure what was relevant, although he considered his questions were relevant because they created a larger picture of events and surroundings. He said that Mr Coleman needed to be reminded that UK law is different from that in the US, as are trading conditions. As a UK business the correct procedures should have been adhered to, and to understand that his business needs to develop, given that smaller business are leapfrogging them. The business needs a dedicated response from Mr Coleman, who should be made aware of his legal obligations, in light of more recent HSE findings, and act before a fatality occurs.

96. In respect of his unfair dismissal claim, he submitted that the respondent failed to follow a fair procedure; failed to follow the ACAS code of conduct; failed to follow the staff handbook despite having a copy; and failed to review

training needs. Mr Coleman could not recall when and in what medium he had spoken to Andrea and Alison, but gave differing versions; Mr Coleman failed to ask them for guidance on HR issues; no reference is made to gross misconduct in the e-mail terminating his employment; Ms McCue claims she did not know who produced the letter of 27 June; and in her witness statement denied visiting his home, then admitted she had; Ben Thornber confirmed that a proper disciplinary procedure had not been carried out. There are various references to an appeal and a re-hearing, and it is still not clear what he attended. He submitted that he was a dedicated, loyal employee and that he is utterly horrified that he was treated in this way.

97. With regard to the whistleblowing claim, in terminating his employment, Mr Coleman had failed to take account of the fact that the claimant had not been provided with adequate training in health and safety issues, and yet he said that he was responsible for health and safety, despite that not being stated in his job description. In fact it was the claimant and not Mr Coleman who had signed up Citation for HR and H&S services, which he had to be corrected on, and nor had the company used RBS for H&S services. Mr Coleman admitted that he raised health and safety issues with him, but could not be specific. He could not recall getting the e-mail about the cold snap or the faulty kerosene heaters. The claimant then set out the documents upon which he relied to support this claim. He submitted that he had never seen the Health and Safety Handbook before, and it was not signed by him.

98. With regard to his claim for redundancy, Mr Coleman admitted that he had asked him to produce redundancy figures.

99. The claimant concluded by expressing how difficult he had found preparing submissions, especially having had limited sleep during the course of the hearing, and by apologising for any offence.

Tribunal observations and decision

100. In this case, we found the respondent's witnesses to be generally credible. That said, we found that Ms McCue was not forthcoming or candid in the way that she gave her evidence, which she gave in a stilted and unnatural manner. We came to the view that it related to the fact that she had once enjoyed a "laddish" relationship with the claimant but that had turned sour. This might explain why she had not previously complained about the claimant's behaviour towards her and use of inappropriate language in e-mails. Mrs Paterson was generally credible and forthcoming in giving her evidence, which we found to be helpful in trying to understand the rationale for some of the claimant's actions.

101. We found Mr Coleman to be a credible witness. He was candid both in respect of how he had dealt with this issue and in respect of the running of the business. He made no attempt to adjust his answers to present himself in a better light. He was generally prepared to accept his failings, and gave a plausible rationale for them. We considered his reaction to the content of some of the e-mails to be genuine. Although we accepted the claimant's submission that Mr Coleman could not remember whether he had spoken to Ms McCue and Mrs Paterson before or after he had discussed Jon Hewitt's call, we considered his answer, that these events happened so close together that he could not properly recall, to be a truthful one.

102. With regard to the claimant, we realised that he found the role of representing himself in Tribunal to be very stressful. We recognised that he was out of his depth and found it very difficult to be sure about what issues were relevant to the claims before us, and what was not. This was clear from his witness statement, but even from his final written submissions most of which is an explanation of his actions, rather than arguments in support of his claims. Nevertheless, we attempted, as appropriate, to assist him to ensure that we had heard all evidence relevant to allow us to determine the issues before us.

103. However, it was clear to us that he was seeking to "blacken the character" of the other witnesses involved and trying to present himself in a better light. Eventually, he seems to have realised that it would be better for him to come clean, only admitting, for the first time in cross examination, two of the three allegations, and accepting that they amounted to gross misconduct. This was significant, not least given what he said in the appeal hearing. Although he had previously explained that he had been under stress, he eventually put forward in mitigation that his actions were stress related. Yet even in his written submissions, he made allegations about the behaviour of colleagues which he had not raised before. Given these issues, we did not consider him to be a credible witness. This was the reason that we found, where there was any conflict, that we preferred the evidence of the respondent's witnesses to that of the claimant.

Public interest disclosure claim

104. In this case, the claimant argues that the reason that he was dismissed was because he had made various protected disclosures which, as we understood it, tended to show that "the health and safety of an individual has been or is likely to be endangered". He said that he had raised these concerns over the years of his employment not only to Mr Coleman but also to Ms McCue and Mrs Paterson. We were of course however only interested in the allegations that he had made disclosures to Mr Coleman, since Ms

McCue and Mrs Paterson were his subordinates. He also said that he had raised these various concerns with the Health and Safety Executive, and specifically Mr Garry Miller.

105. In compliance with a case management direction, the claimant had set out the incidences which he considered to be public interest disclosures, the dates upon which he said that he had made the disclosures, and to whom the disclosures were made. He set out 17 items which he said amounted to protected disclosures (MB 74-85).

106. While we appreciated that the claimant was not familiar with the term "protected disclosure", nor the law relating to public interest disclosure, clearly there must be a disclosure, and it must be of information (not a general allegation or opinion), which in the claimant's reasonable belief would be a danger to the health and safety of any person, or attempts to conceal such dangers, and which is disclosed in the "public interest".

107. We were of the view that none of these 17 items could be classified as protected disclosures in the legal sense, and indeed it was questionable whether they disclosed anything that Mr Coleman was not already aware of. We accepted that the claimant did raise strongly worded concerns about health and safety issues, but in general we did not accept that these could be classified as protected disclosures for the purposes of the relevant legislation. We tended to the view that the so-called "disclosures" listed were in fact a narrative about the issues which had been initially raised by others, whether that was the health and safety consultant from Citation, or subsequently HSE.

108. The claimant lodged e-mails which show that he did raise issues in 2015, but he also referred to the fact that many of these issues had previously been raised, even before his tenure. Indeed, in the Scott Schedule, he refers in several places to there being an awareness for 10+ years about some of the issues that he refers to, and to Mr Coleman being aware of them. To that extent, even in the ordinary meaning of the word, that does not make them "disclosures".

109. With regard to item 1 (and item 11), we were aware that the claimant had raised concerns about the cold to Mr Coleman, which he acknowledged. The claimant did acknowledge that temperature minimums were a guideline and not a legal requirement. It was not clear how employees' health and safety could be endangered especially when the evidence was that it was the claimant himself who shut down the depot and sent people home when he was concerned about it being too cold. He later makes reference to a "warm room" and "paid rest breaks" being introduced.

110. With regard to the second item, which relates to the failure to comply with fire regulations, it appears that this was an issue which was brought to the claimant's attention by the "fire brigade master". He states that he advised Mr Coleman in the summer of 2014. The claimant did lodge an e-mail which he had sent to Mr Coleman dated 2 November 2015 in which he had raised concerns about the alarm, and advised that the depot was shut down due to faults with it. However, of this visit, in evidence, he said that, "I didn't go out of my way to contact them" and that he understood this to be an ad hoc, random visit. We did not therefore understand this to be as a result of him "reporting" this issue to a regulatory authority.

111. With regard to the visit by Mr Miller of the HSE, the claimant makes reference to that relating to "a previous employee", and it emerged in evidence that the employee had been dismissed by the claimant and it was believed that he had reported the respondent to the HSE. Although in the Scott Schedule the claimant had stated that a disclosure had been made to Garry Miller of HSE, certainly the claimant was not asserting that he had himself contacted HSE. Indeed when Mr Miller arrived, the claimant asked him to return later (MB519).

112. The claimant subsequently obtained information from the HSE which confirmed that a complaint had been made to the HSE on 9 June 2016 by an individual described as "anon" (MB 518), which the claimant understood was the dismissed employee.

113. The claimant did lodge a number of e-mails, where he had raised health and safety concerns with Mr Coleman, which he said that he had forwarded to Mr Miller on 16 June 2016, but even then he said that this was to cover himself, since he understood that he may be personally liable for health and safety breaches.

114. In the Scott Schedule, the claimant states that he e-mailed Garry Miller to advise that Mr Coleman was not taking the inspection and report seriously. He said that he complained that he was not acting quickly enough, and that he was not supplying them with sufficient funds to address the issues. The claimant has however not lodged any e-mails in support of that, beyond the e-mails he forwarded on 16 June. He complains that this had an impact on trade because without the right equipment, goods could not be manufactured. He complains (at item 10) about the electrical wiring but explains that companies were on site for two weeks to remedy issues. He makes reference to staff refusing to use machinery.

115. In the Scott Schedule the claimant claims that Ms McCue and Mrs Paterson have falsified records during HSE visits to imply that machinery which should be out of use is being used. No documentary evidence was lodged to support that claim, and in any event it would appear that this allegation was only made after the claimant was dismissed.

116. In general, the Scott Schedule is a narrative of what happened after the HSE visit, and the claimant's concerns about how the issues were being addressed. We did not accept that these could properly be classified as "protected disclosures".

117. Even if these were to be properly classified as protected disclosures, as Mrs Peckham pointed out, the last disclosure listed on page 83 was February 2017, and the claimant appeared to acknowledge that in cross examination. Indeed, documents were referred to in which the claimant stated that, by around May 2017, 27 of 29 issues raised by HSE had been dealt with.

118. Even if we are wrong in our view that none of these issues amounts to a protected disclosure, we considered whether it could be said that there was a causative link between the disclosure made and the claimant's dismissal. There were a number of factors which led us to conclude that there was in fact no link between the disclosures made and the claimant's dismissal.

119. First, the claimant made no reference in any of his many e-mails in the immediate aftermath of receiving the "termination e-mail" to health and safety issues. In his e-mail MB405, and indeed in subsequent e-mails, he states that he does not know why he has been dismissed and indeed makes much of the respondent's failure to advise him (until he received the letter of 27 June 9 days later) of the reasons for his dismissal. At no point does he suggest that his dismissal is related to him having raised health and safety issues.

120. He makes no direct reference in the 18 page "opening statement" which he prepared for the appeal to him having been dismissed for health and safety reasons, beyond listing (MB 437) concerns that he had with the equipment. He made no reference, during the course of the appeal hearing itself, to any suspicions that he might have been dismissed for raising health and safety issues.

121. Further, the claimant confirmed in evidence that he did not himself have health and safety issues in mind when he was dismissed, or indeed until after the appeal. It was only after he consulted a solicitor, when he claimed that he became of the view, in retrospect, that this was the reason for his dismissal.

122. Further, as discussed in detail below, we were conscious of the relative proximity of the dismissal to a strongly worded complaint about the claimant made by a customer, and we thought that the (inappropriate) speed at which the decision was made to dismiss the claimant was not indicative of the respondent having reflected and concluded that this was an opportunity to rid themselves of the claimant for having raised health and safety concerns. As Mrs Peckham submitted, had they wanted to get rid of the claimant because he was raising health and safety concerns, it is likely they would have done so far sooner.

123. In all the circumstances, we did not consider that there was any link in this case between dismissal and the claimant having raised concerns about health and safety issues, far less having made a public interest disclosure. The claimant's claim in respect of automatically unfair dismissal in this regard is dismissed.

Detriment following public interest disclosures

124. The claimant also argued that he had separately suffered detriment as a result of making protected disclosures. He set these out in the Scott Schedule at page 87. In particular, he said that the detriment he had suffered related to "the way in which grievances and disciplinary issues were handled, so the employer is not taking them seriously (concerns about health and safety) or dealing them with a proper manner (disciplinary process and health and safety)". He then listed the following relevant items: "withholding certain employee terms such as a reference; withholding payslips, monetary amounts due and my P45 for 5 working weeks after finishing date" as well as making complaints about being underpaid in respect of travel time allowances, fuel monies, holiday and in-lieu time".

125. By the time it came to the hearing, the claimant was no longer making any complaint about the reference, holiday pay or travel time, having accepted the evidence of the respondent's witnesses. We heard no evidence to suggest that any delay in producing pay slips or P45s was in any way linked to him having raised health and safety issues. We have found that the claimant was not underpaid for fuel allowance.

126. Reference was made during the course of proceedings to a further visit from the HSE following the claimant's dismissal. The claimant was not however prepared to answer a question whether he had made a further report to the HSE following his own dismissal. We considered this to be odd, as we understood that he was relying on post-dismissal detriment.

127. In any event, we conclude that we heard no evidence to suggest that the claimant suffered any detriment as a result of raising concerns about health and safety issues, and therefore that claim is dismissed.

Redundancy payment claim

128. The claimant also argued that at least part of the reason for his dismissal was the fact that the respondent wanted to avoid making him redundant.

129. We heard evidence from the claimant that he had been asked by Mr Coleman to provide redundancy figures. Although it was not clear to us why the claimant had produced the powerpoint (it did not appear to us that Mr Coleman had requested it), we noted that it included at MB364 redundancy figures. It did not escape our notice that other members of staff would be "cheaper" to make redundant than the claimant.

130. We noted that the claimant had claimed in his "opening statement" for the appeal (MB434) that "I have been made a scapegoat for the company and the directors key failings. This is a colluded witch hunt without real data and evidence that much I am sure, to enable the business to cut its losses and avoid paying redundancy monies"; and at MB 438 "It's my belief they want the place shut down and the redundancy monies paid".

131. Mr Coleman confirmed in evidence that he had asked for redundancy figures to be obtained, around the winter of 2016/2017, because at that time he was looking at the overall viability of the company. He said that this information was relevant if the company had to close, or if they could go forward with less people.

132. This matter was brought up in the appeal hearing itself (MB463). Mr Thornber said that he focussed on the chain of events presented to him, and that while he could not second guess Mr Coleman's motivations, the evidence supported his conclusion that incidents alleged was the principal motivation. He was aware of clients who may well be seeking to reduce head count, but where there is gross misconduct, then that is a means of reducing head count, and still a fair dismissal.

133. We accepted Mr Coleman and Mr Thornber's evidence that the factual matrix in this case pointed to the claimant having been dismissed for gross misconduct (discussed below). We accepted that issues relating to redundancy costs were not in any way linked to the claimant's dismissal and could not be said to be the reason for it. The claimant's claim in respect of redundancy pay is therefore dismissed.

Claim in respect of unlawful deduction of wages

134. While the claimant was initially making a number of claims relating to unlawful deduction of wages and failure to pay holiday pay, having heard the respondent's witnesses, he did not pursue his claim for unpaid overtime or unpaid holiday pay.

135. He did however maintain his claim for unlawful deduction of wages in respect of an underpayment of a fuel allowance.

136. We have found however, that employees were paid 50 pence per mile. Mrs Paterson's evidence was that the company followed HMRC guidelines, but when the rate went down to 45p per mile, Mr Travers decided that it should be maintained at 50 pence to cover "wear and tear". There was no evidence that employees were paid mileage allowance at £1.00 or £1.50 per mile.

137. The claimant accepts that he was paid 50 pence per mile for 37 miles relating to the 19 June meeting and therefore we make no award in respect of that claim, which is dismissed.

Unfair dismissal

138. The claimant is also claiming "ordinary" unfair dismissal. This case differs from many other unfair dismissal claims in that it is apparent that the respondent accepts procedural errors in relation to the termination of the claimant's employment, but seeks to argue that overall the process was ultimately fair, because any procedural errors were corrected on appeal.

139. The respondent in this case alleges that the claimant was dismissed for misconduct. That is disputed by the claimant, who as set out above, argues that the reason that he was dismissed was primarily because of health and safety issues, but also to avoid making a redundancy payment.

140. We have come to the view, discussed above, that the claimant did not make any valid protected disclosures and that in any event he could not be said to have been dismissed for reasons relating to the raising of health and safety concerns, or any desire to avoid making a redundancy payment.

141. We were influenced in that conclusion by the fact that the claimant had been dismissed immediately after Mr Coleman had received a complaint from a customer regarding the claimant's behaviour. We heard evidence that the claimant was dismissed for three incidents of misconduct which related to allegations of the use of inappropriate language with

customers/suppliers/colleagues. Indeed, the claimant eventually accepted that he was guilty of the first and second allegations, and that these amounted to gross misconduct.

142. The Tribunal therefore concluded that the first limb of the **Burchell** test had been met and that the respondent believed the claimant to be guilty of misconduct. Accordingly the respondent has shown that the reason for the dismissal of the claimant was conduct, which is a potentially fair reason for dismissal.

Reasonableness of decision to dismiss

143. The Tribunal then turned to consider whether the respondent acted reasonably in dismissing the claimant for misconduct. The question is whether it was reasonable in all the circumstances for the respondent to dismiss the claimant for misconduct. As discussed above, the issue is not whether this Tribunal would have dismissed the claimant in these circumstances but whether the dismissal was within the band of reasonable responses available to the respondent in all the circumstances.

144. In determining whether or not dismissal was reasonable in all the circumstances, the Tribunal first considered whether or not the respondent had in mind reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct.

145. Mr Coleman formed the view that the claimant was guilty of misconduct based on the fact that a UK client had gone to the trouble of contacting him in the US on his personal mobile phone when he was on leave. The client had said that he had never been spoken to in the way that he had been spoken to by the claimant in thirty years of working in the industry. Mr Coleman had spoken to Ms McCue and Mrs Paterson and ascertained that this was not an isolated incident.

146. Given that information from those sources, the Tribunal considered that Mr Coleman had in mind reasonable grounds on which to sustain his belief that the claimant was guilty of misconduct. The Tribunal therefore finds that the second limb of the **Burchell** test is made out.

147. The Tribunal then turned to the third limb of the **Burchell** test. The question is whether at the stage at which the respondent formed the belief that the claimant was guilty of gross misconduct, he had carried out as much investigation into the matter as was reasonable in the circumstances. The range of reasonable responses test applies to the question of the investigation as well as other procedural aspects leading up to dismissal.

148. Certainly, if consideration is given to the termination of the claimant's employment by Mr Coleman, there is no question that the respondent fails at this hurdle. We did not understand the respondent to suggest otherwise.

149. Mr Coleman was contacted on his personal mobile by Mr Hewitt. Mr Coleman knew that it was a serious complaint because his staff would not give out his personal mobile readily. He therefore only had the client's version of events, although he was clearly inclined to believe him because of the circumstances of the call. He subsequently spoke to Mrs Paterson and to Ms McCue on a whatsapp call to ascertain what they knew of the issue and ascertained from them that there were two other recent incidents of inappropriate behaviour with customers/suppliers. Although the exact timing of these calls was not clear, we concluded that discussions had taken place before Mr Coleman sent the termination e-mail (and these were followed up by the written statements, dated after the e-mail).

150. Although he took no advice, not even from Mrs Paterson, regarding the disciplinary process, Mr Coleman's evidence was that he had consulted the employee handbook. He understood that gross misconduct would result in "summary dismissal". He understood this to mean immediate termination of employment. He did not appreciate that it had a different meaning in UK employment law. He said that he achieved his immediate objective which was to make sure that the claimant did not go into the office the next morning. When asked why he had not considered suspension, which would have achieved the same result, he said that he did not think that was required by the handbook, but that in hindsight that is what he should have done.

151. The e-mail would have been sent around 6 am UK time, which the claimant would have received shortly thereafter. This e-mail came completely out of the blue for him. The e-mail makes no reference to the reason for the termination beyond stating that the claimant had disregarded policies and created an unpleasant environment, jeopardising the well-being of the business and colleagues. Although Mr Coleman suggests in the e-mail that the claimant can contact him to discuss it, that is clearly after the event. There was no effort made to contact the claimant to ascertain his version of events, even to allow him to put forward any explanation in mitigation.

152. While the claimant made much of the way that the respondent subsequently informed him of the allegations, especially at the time, we are not of the view that anything, beyond the delay in notifying him of the allegations, turns on that. We do however accept that there was a complete failure to advise the claimant of the reasons for the dismissal, a complete failure to give him the opportunity to refute those reasons, and an unacceptable delay in informing him of the allegations which were relied on to justify immediate termination of

his employment. We readily accept that this is in breach of the respondent's disciplinary procedure and in breach of the ACAS code of practice.

153. We conclude that when Mr Coleman made the initial decision to dismiss, the extent of the investigation which he conducted was entirely unreasonable, and fell well outwith the range of reasonable responses open to an employer in the circumstances.

Procedural fairness

154. As discussed, Mr Coleman was made aware very quickly of these failings in respect of the timing of his decision to dismiss the claimant. The respondent sought to correct these failings by setting up an appeal, and by conducting the appeal as a complete re-hearing of the claim.

155. We heard then that the allegations were set out in the letter to the claimant dated 27 June 2017, which we accepted the claimant had received by 29 June at the latest. That letter advised that the appeal hearing would take place on 3 July 2017, that the claimant could be accompanied (although he chose not to be), and that the appeal would be conducted as a complete rehearing. Documents upon which the respondent was relying in respect of the allegations were enclosed.

156. The claimant arrived at the appeal hearing with a pre-prepared 18 page document which he called an "opening statement". His request that the hearing should be recorded was granted by Mr Thornber (although he said that was not the usual way that conducted appeals). Mr Thornber also permitted the claimant to read out the 18 page document at the appeal, and there was further discussion with the claimant regarding his response to the allegations.

157. Mr Thornber subsequently contacted the customer who confirmed that the claimant had sworn at him, and the supplier who also confirmed that the claimant had used inappropriate language. He asked Ms McCue and Mrs Paterson to confirm or reconfirm their recollection of the discussions, and was furnished with the hand written and type written notes which Ms McCue had taken at the claimant's request on 19 June.

158. Mr Thornber considered the claimant's denials, but for reasons which he records in the appeal letter, the only reasonable conclusion that he could come to was that all three allegations were correct. Given the information upon which this conclusion was based, we accepted that this conclusion was a reasonable one for him to reach.

159. The requirement is to conduct as much investigation as is reasonable. We considered that, looking at the approach taken to the appeal hearing, sufficient investigation was conducted by that stage to allow the respondent to conclude that the claimant was guilty of gross misconduct.

Reasonableness of the sanction of dismissal

160. The Tribunal considered whether the sanction of dismissal was reasonable in all the circumstances. Mr Thornber considered that the sanction of dismissal was reasonable because the behaviour described was of the kind set out in the disciplinary policy which justified summary dismissal. On the face of things, not least given that the claimant has now accepted that he was guilty of gross misconduct, summary dismissal does fall within the range of reasonable responses.

161. However, as we understand it, the claimant now argues that the sanction of dismissal in the circumstances was unfair because of the mitigation upon which he relies. In particular, he says now that he realises that he was not himself, that he was under a great deal of stress, such that he should not have been at work. He says that stemmed not only from the stress he was under at work, but also pressures in his personal life.

162. We noted that Mr Thornber considered this question of the stress which the claimant was under when he re-heard the case. He stated that he had taken that into account (MB470) accepting that the claimant felt "under significant stress and pressure for a prolonged period, without adequate support from Frank Coleman who is the sole director". He said that in coming to the decision that the claimant was guilty of gross misconduct, he had taken account of the lack of support and the stress he was under.

163. As a Tribunal, it was apparent to us that the claimant was felt under pressure and indeed that may well have been suffering from stress. We accepted that he had inherited a wide range of roles, and found himself with a much bigger job than he had expected, aspects of which he was not trained to do. The claimant found himself as operations manager and in charge of the day to day running of the business by default. We noted that he apparently got limited support from Mr Coleman, who came over from the US on approximately two occasions each year. We accept that the claimant did take his role seriously and that he wanted to ensure that the company continued to perform well. Mrs Paterson expressed misgivings about the claimant's technical ability, and indeed suggested that he should not go on the site visit on 19 June. No doubt all that would have put the claimant under some pressure. Mrs Paterson had noticed that for up to six months prior to the termination of his employment he had been stressed and worked up all the

time, which she put down to his personal life, and indeed the claimant did make reference to a house move, his wedding and the removal of solar panels.

164. However, we came to the view that the position of authority which he essentially inherited after Mr Travers left went to his head. The references in the papers to "I'm the boss" and "I am your superior" was an indication of that. Mrs Paterson said in her statement to Mr Coleman on 22 June 2017, "I found that if Rai came into the office and was unhappy with myself or Andrea he would send demeaning emails and go on power trips", and it seems that he was something of a Jekyll and Hyde character. While Mrs Paterson said that the claimant was usually good with customers, she had noted a change in the claimant's behaviour some 4-5 months prior to the termination of his employment. We noted too that there was evidence of erratic and extremely inappropriate behavior even prior to the six months leading up to his dismissal.

165. That said, we accepted Mr Thornber's evidence that even although the claimant was under considerable stress, that was not sufficient excuse for the way that he behaved with customers. We were of the view that this was not sufficient mitigation for the kind of conduct described. We were also of the view that if the claimant was as stressed as he now says that he was, that is the first thing that he would have said when his employment was terminated. Although, as discussed, he did mention stress in his email responding to the termination e-mail and expanded on these concerns by the time of the appeal hearing about being stressed, he did not, as he has now done, say "mea culpa" and put his behaviour down to stress, at work and in his personal life.

166. In the circumstances therefore, we do not consider that Mr Thornber failed to take account of any mitigation, but rather even taking account of that, considered that the conduct amounted to gross misconduct justifying dismissal. We accept that Mr Thornber's conclusion, as endorsed by Mr Coleman, fell within the range of reasonable responses.

Overall fairness

167. While we are of the view that dismissal in the circumstances is substantively fair, and within the range of reasonable responses, we have come to the conclusion that dismissal in this case is unfair because of the procedure adopted by the respondent.

168. We accepted Mrs Peckham's submission that the requirement is to consider the question of fairness overall, looking at all the circumstances of the case. She said that any unfairness caused to the claimant by the way that his employment was initially terminated was "cured" by the conduct of the

appeal, and therefore that summary dismissal (as at 11 July 2017) was in all the circumstances fair.

169. We were not prepared to accept that in this case. While it may be said that the appeal goes a long way to curing the defects given the way that it was conducted, it cannot detract from the fact that the claimant was dismissed by e-mail at 6 am, without warning, out of the blue without being advised with any precision of the reason, without being asked for his version of events, without being given any opportunity to put forward circumstances in mitigation.

170. We conclude therefore in all the circumstances that dismissal for gross misconduct was unfair.

Remedies

171. In this case, the claimant maintained his position during the hearing that he was seeking to return to work for the respondent, despite some misgivings. He said that he was looking to work in another role. It is now apparent from his written submission that he has resiled from that position. In any event, given the conduct alleged and conceded, given what we heard of the claimant's behaviour while he was working with the respondent, given that relations between the claimant and Ms McCue and Mrs Paterson have clearly broken down, not to mention relations with Mr Coleman, given the size of the undertaking, given concerns by the respondent that they could face a sexual harassment claim in future, we had no hesitation in concluding that any kind of re-employment was not practicable in this case.

172. We have however found that the claimant was unfairly dismissed, and therefore absent re-employment, he would normally be entitled to a basic award (which would have encompassed a "redundancy payment") and a compensatory award (which would have included "notice pay"). We noted that he has not yet obtained alternative employment, despite his efforts, all as set out in the mitigation bundle.

173. However, after careful reflection, we have come to the view that this is one of the relatively rare cases where we find that the claimant contributed 100% to his dismissal.

174. Looking at the time line of events, had the claimant not got into the altercation with the client, then that issue may never have come to the attention of Mr Coleman. Although it was not entirely clear whether Ms McCue and Mrs Paterson were intending to bring this particular issue to Mr Coleman's attention in any event, had it not been for his behaviour with that client, and the two previous incidents with the other customer and the

supplier (which the claimant now admits), then the claimant would not have been dismissed. The dismissal is entirely due to his own conduct. The claimant himself admits two out of the three allegations, which in evidence now he accepts amounted to gross misconduct. Not least for that reason, we consider his conduct to be culpable and blameworthy. It is for these reasons that we conclude that there was contributory fault, and that the claimant was entirely the author of his own misfortune and sufficiently egregious to conclude that he was 100% at fault. In such circumstances, we consider that it is just and equitable that any compensation that we would have awarded is reduced to nil.

175. Further and in any event we consider that had a fair procedure been followed, then dismissal would have been fair. It is clear to us from the conduct of the appeal, that the use of a fair procedure would have resulted in dismissal anyway. Consequently a **Polkey** reduction, of 100%, would be made in this case in any event.

Alternative claim – some other substantial reason

176. Following the appeal, Mr Thornber reached the following conclusion that: "it is clear both from Frank Coleman's view of your actions, and from the comments you make about Frank in your document, that there is a complete breakdown in mutual trust and confidence between you and the company. Even if I am wrong, therefore, on the finding of gross misconduct (which I do not believe I am) then it would be reasonable and fair that your employment should come to an end".

177. Indeed, it was evidence of that behaviour that led the respondent to seek to amend their claim to include, in the alternative, a claim that the claimant was dismissed for "some other substantial reason", that is the way that he had conducted himself at work which has led to a breakdown of mutual trust and confidence.

178. We were of the view that the claimant's behaviour would have come to the attention of Mr Coleman sooner or later. It is clear from the documentary evidence lodged, and from the evidence particularly of Mrs Paterson, that the claimant's behaviour was becoming increasingly erratic, and that if not brought to Mr Coleman's attention by a customer, it may well have been brought to his attention by Mrs Paterson or Ms McCue.

179. In any event, we accepted that had an appropriate investigation taken place at the point of summary dismissal, then much of what we heard about the claimant's conduct would have come to the attention of Mr Coleman, and that he would have concluded that the claimant's behaviour was such that he had could have no trust or confidence in him. That conclusion could be reached

not least by the evidence of a number of e-mails which were entirely inappropriate and unprofessional and with some among the worst we as a specialist tribunal have had brought to our attention.

180. In this case, we have concluded that the claimant was unfairly dismissed, given the failures of the respondent to follow a proper procedure. It was not therefore necessary for us to decide this alternative claim since the claimant was paid until 11 July 2016, and while Mrs Peckham submitted that he would have been dismissed within two weeks of that, we have found that he is not in any event entitled to any compensation.

Conclusion

181. The claimant's claims of automatic unfair dismissal and detriment for making a protected disclosure, as well as the monetary claims, are dismissed. We have found that dismissal in this case was procedurally unfair and therefore not within the range of reasonable responses. However, we have concluded that the claimant is 100% at fault and therefore no compensation is payable.

Employment Judge: M Robison
Date of Judgment: 05 March 2018
Entered in register: 10 March 2018
and copied to parties