EMPLOYMENT TRIBUNALS

Claimant: Mr S Brown

Respondent: Svitzer Marine Limited

Heard at: Leeds (by CVP) **On:** 3 and 4 February 2022 &
7 February 2022 (deliberations in private)

Before: Employment Judge Feeny

Representation
Claimant: Ms Hogben, counsel
Respondent: Ms Souter, counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is as follows.

1. The complaint of unfair dismissal is well-founded.

2. The Claimant's basic award is reduced by 40% to reflect his conduct.

3. The Claimant's compensatory award is reduced by 40% to reflect his conduct.

4. A hearing will be listed to determine the remaining remedy issues.

REASONS

Procedure

1. This was a wholly remote hearing held by Cloud Video Platform (CVP) which the parties had consented to. There were no technical issues of any substance during the hearing and I was satisfied that both parties were able to present their cases fully and without hindrance.

2. I had an agreed bundle of documents running to 278 pages.

3. On the Claimant's part, I had witness statements from him, Jack Sakura (crew mate), and Nigel Holden (union representative). From the Respondent I had witness statements from Andrew Hill (dismissing officer) and Scott Baker (appeal officer). All witnesses confirmed the truth of their statements on oath and were cross-examined.

4. Both parties were represented by counsel: Ms Hogben for the Claimant and Ms Souter for the Respondent. At the conclusion of the evidence both counsel made oral submissions. I am grateful to both counsel for the clear way in which they presented their respective client's cases and in particular for their time management which meant that we were able to conclude evidence and submissions within the two day listing. Inevitably, this Judgment had to be reserved.

Claim and issues

5. By an ET1 presented on 3 May 2021 the Claimant brought a single complaint of unfair dismissal pursuant to sections 94 and 98 of the Employment Rights Act 1996 ("ERA"). The Respondent pleaded that the dismissal was for the reason of conduct, which is a potentially fair reason pursuant to s 98(2)(b) ERA.

6. I was not provided with a written list of issues agreed between the parties but I was satisfied that I did not need one; the issues are those set out in the well known case of **Burchell**, which I refer to in more detail below.

7. At the outset of the hearing I indicated that I would deal with liability first but that I would also hear submissions on any reductions for contributory fault and **Polkey** (if applicable).

Findings of Fact

8. The Respondent provides marine services to the shipping industry such as towing vessels in and out of ports, salvage of stricken vessels, and emergency response. It operates out of a number of ports throughout the United Kingdom. It is a subsidiary company within a large global group of companies.

9. The Claimant was employed by the Respondent from 2005 until his summary dismissal on 23 December 2020 (which was communicated by way of letter dated 21 December 2020). The Claimant had spent the first 13 years with the Respondent as a Mate. In around 2018 he had been promoted to Master and this was the role he held at the material time. The Claimant generally operated out of the Port of Humber.

10. The Claimant "passed out" as Master twice. After his initial passing out there was an incident on a vessel called the Comet and the Claimant was returned to Mate. It was unclear how long it took for the Claimant to be passed out a second time (he suggested in evidence he was only demoted for one week) but the relevant fact is that the Claimant had undergone induction training to become a Master twice. He regarded the second training course as more thorough.

11. As part of this induction process, the Claimant received specific training on the Respondent's HMS reporting system. This was largely self-taught learning but he was quizzed on his knowledge by a manager at the Respondent as part of this training.

12. This case concerns an incident which occurred on 25 August 2020. On that day the Claimant was Master on the vessel Stanford heading up a crew of five: two mates (Mr Sakura and PS), chief engineer (KH), and second engineer (JH). The Stanford was on the river Humber and at around 7pm it was travelling from Saltend up the river to Hull. It was next to a shallow area called "the Hebbles".

13. At around 7pm the Stanford stopped moving. In a relatively short period of time the Claimant and his team were able to get it moving again and it continued its journey. The issue is whether the Stanford had become – briefly – grounded, that is whether it had come into contact with the river bed.

14. If a vessel becomes grounded, irrespective of the duration of the grounding and whether any damage is caused, various regulatory reporting requirements kick in. Ultimately, under the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 it is a criminal offence to fail without reasonable cause to report a grounding (regulation 19). Understandably, the Respondent has its own strict reporting requirements for grounding incidents. The first and most important step is for the Master to submit an incident report to this effect on HMS.

15. Following this incident the Stanford continued on its journey and docked at Hull. At around 9pm the Claimant attempted to log the incident on HMS. At 20:50 he attempted to submit an Incident Report, which was the correct form to use for a grounding. For "Event Category" he selected from a drop down box the option "Asset damage". He also uploaded a photograph he had taken from his phone of a cursor on the navigational chart purporting to show the precise location that the incident occurred, having obtained these coordinates from Mr Sakura. He did not, however, enter any text for the description of the incident. The Claimant was experiencing poor connectivity and was ejected from the system before he could complete the report.

16. The Claimant then submitted a Near Miss Report at 21:22. For "Event Category" he selected "Near Asset damage". He uploaded the same image as before and was able to complete the text for the description. This text was as follows.

    "we had just left Saltend after doing a low water job .We were slowly dodging up to the river terminal hull to start another job when we slowly came to a stop. i checked the sounder and it was still reading 3 meters. we realised we had come aground although no sounder alarm (2 m) had sounded. We put the engines astern and she came off . No temperature issues nothing seemed untoward. manouvrability [sic] was still good so we carried on and did the job,"

17. I was able to ascertain from the witnesses during the hearing the basic mechanism for reporting through HMS. The system predominately operates

with drop down boxes so the majority of options are standardised. There are boxes for free text for certain questions, such as the description of the incident, and there is the option of uploading images. Once a report is started it is saved to the system and marked “In Progress”. This allows the user to log out and return to the same report on different occasions before completing it. Once complete, the report is submitted by selecting the appropriate recipient to view it. The nominated recipient is then alerted to the completed report so he can read it and take whatever action is necessary.

18. In the case of the two reports completed by the Claimant on 25 August 2020 neither was completed or submitted. Both remained on the HMS system as “In Progress”. Whilst that meant that they had not been submitted to someone specifically to review, they were accessible to anyone accessing the system.

19. The same night (25 August 2020) the Claimant also asked his crew to complete statements on what had happened. There was a single page document in the bundle (page 167) with the four short statements from the crew headed “Svitzer Stanford Grounding: 25/08/20 – Grounding off Saltend”. It was common ground that the Claimant had asked the crew to complete this document but there was a lack of evidence as to how it was actually done. The Claimant said that he had deliberately not involved himself in its completion and Mr Sakura, one of the contributors, could not, in answer to my question, recall how he had come to produce his short statement.

20. The Claimant’s evidence was that the statements had been drafted for the anticipated MAIB investigation into the grounding but he had not of course notified (or set in chain the process to notify) the MAIB about the grounding when he asked his crew to provide the statements. Whatever the exact provenance, these statements were available to the Respondent’s managers from the outset of its investigation. Of those statements it is of note that:

    a. JH said “it was at this point that we had determined that we had run aground”;

    b. KH said similar: “we found that the clutches were still engaged and that we were aground”;

    c. Mr Sakura did not mention a grounding and implied that the stop was due to an issue with the engines; and

    d. PS provided just one sentence which did not address the grounding at all.

21. On 27 August 2020 James Evans, Marine Standards Officer, (in his words) “stumbled across” the Near Miss Report whilst searching for another event on HMS. He promptly set in motion the various reports and investigation which needed to be done in response to a grounding. He also prepared a detailed and comprehensive Root Cause Analysis report.

22. As a result of Mr Evans's discovery, the Respondent decided that there should be an investigation into the Claimant's conduct under its Disciplinary Policy. Phil Bailey, Port Manager, was appointed to investigate. The letter to the Claimant dated 8 September 2020 informing him of this described the conduct in question as follows:

    "An event which took place on 25 August 2020 which resulted in one near miss and two incident reports being raised in HMS. On that day as Master of Svitzer Stanford the vessel ran aground just after departing Saltend. Following the incident, no completed report was filed in HMS and the event was not to reported to Svitzer operations, the Port Manager (or his contact in his absence), or the harbour authority."

23. Although the letter referred to the Near Miss Report and two Incident Reports no one has been able to identify the second Incident Report. Given the nature of the HMS system is such that such a report must be available to view if created I find that there was no such report and Mr Bailey's letter was incorrect in suggesting otherwise.

24. The Claimant was not suspended at this point and he carried on working.

25. The Claimant attended an investigatory meeting with Mr Bailey on 17 September 2020. The notes are at page 213 in the bundle. The notes show that at times during the hearing the Claimant suggested that there had been a grounding but at other times claimed that he was not sure/convinced that there had been a grounding.

26. Mr Bailey prepared an investigation report on 17 September 2020. Mr Hill, Port Manager at Liverpool and Belfast, was appointed to chair the disciplinary hearing. The letter dated 15 October 2020 inviting the Claimant to a hearing recited the same description of the misconduct charge and said that it potentially constituted "serious misconduct". It was stated that the outcome could be a formal disciplinary warning. At this stage, the Claimant was not at risk of being dismissed because of the misconduct.

27. The hearing took place via MS Teams on 21 October 2020 with Mr Holden accompanying the Claimant. The hearing was recorded but a transcript of the hearing was not provided to the Tribunal. What is clear is that Mr Hill believed that the Claimant was now denying that there had been a grounding and he therefore felt he had to gather more evidence on this issue.

28. Mr Hill spoke to the crew mates who had originally provided the statements. By this point he had obtained the data from the echo sounder and plotted the Stanford's route at the material time from this. This data showed three dashes for the depth reading on 18:06 (which was one hour out from the actual time, i.e. 19:06) with depth readings varying from 4.9 m to 10.8 m at all other times. Mr Hill took this to mean that the vessel was in contact with the river bed at 19:06 hence there being no reading. The latitude and longitude readings when plotted on to the navigation chart showed the Stanford to be immediately adjacent to a sandbank at 19:06 lending credence to there being a grounding at that moment.

29. At this juncture, I observe that there were no readings for depth for 38 minutes immediately prior to 18:06 (as read on the echo sounder). The depth reading jumps from 17:28 to 18:06. The word "ADJUST" also appears between the reading for 18:06 and 18:07. Mr Hill (and later Mr Baker) did not look into these issues and what they might mean. There was some attempt by the witnesses to speculate during the hearing before me about what this might mean but I explained that I could only judge the reasonableness of the Respondent's decisions by the actions and information available at the time.

30. Having obtained this technical data, Mr Hill then conducted the interviews with the witnesses. He had on his own admission formed the view that there had been a grounding and the notes show that he opened the interviews by stating that this was the case. Notwithstanding this, some of the witnesses still maintained that they could not be sure that there had been a grounding, Mr Sakura in particular. Mr Sakura went so far as to send a clarification statement to the Respondent after his interview. It is of note that he reported seeing discoloured wash on the deck at the time of the incident.

31. Mr Sakura also reported that PS had at the time asked the Claimant if they had grounded and he (PS) stated that he thought that they had grounded. In his interview with Mr Hill PS confirmed that he had asked the Claimant this and that he was sure they had grounded because he felt it from his base in the engine room. It is of note that this is a much more detailed account than he initially gave in his earlier written statement.

32. The notes of the interview with KH are more equivocal. KH said "it was almost confirmed that the vessel had grounded". He also said, unlike PS, he did not feel anything despite also being in the engine room. JH, an agency worker, was not spoken to by Mr Hill for reasons which are unclear.

33. The Claimant was invited to a reconvened disciplinary hearing by letter dated 19 November 2020. A further charge had been added: "as Master you may have knowingly falsified a document in HMS to down grade the incident" and it was stated that the conduct was now viewed as potentially gross misconduct and that the sanction could be summary dismissal. At this point the Claimant was informed that he was suspended.

34. The Claimant attended the hearing on 27 November 2020. He was accompanied again by Mr Holden. It became clear at an early stage that Mr Hill had not provided the evidence he had gathered to the Claimant and Mr Holden. He therefore agreed to adjourn the hearing whilst the Claimant could review the additional evidence. The evidence provided to the Claimant at this point included the crew statements and interview notes, the technical data, and the diver's report. The latter confirmed that there was no damage to the vessel and therefore no objective evidence of a grounding.

35. The further reconvened hearing took place on 14 December 2020. The Claimant continued to dispute that there had been a grounding. He argued that his screen shot of the cursor disproved the plotting from the echo sounder relied on by Mr Hill and criticised the witness evidence, in particular claiming that PS had lied and had done so to avoid disciplinary action being taken against himself.

36. Following the hearing Mr Hill wrote to the Claimant by way of letter dated 21 December 2020 confirming that he was dismissed without notice for gross misconduct. The letter contains a lengthy exposition of the reasoning behind his decision but predominantly focuses on the dispute over whether there had in fact been a grounding. On the third charge, knowingly falsifying the HMS report, Mr Hill's reasoning appears to be limited to two paragraphs:

    "Although you started an incident report a lesser "Near Miss" report was later part completed and submitted. You made no other mention of this incident to port management/operations or DPA until the Near Miss was found by a Marine Standards Officer while looking for other information in the Humber HMS files. His response upon finding this clearly shows the importance the Company places on reporting a grounding correctly as regardless of time span for the grounding this is classed as a severe incident.

    In reaching a decision on the sanction of disciplinary there is reasonable belief you downgraded the incident in the hope its severity would not be recognised. It is the Company's belief you did this to avoid further analysis by the Company regarding your ability as Master."

37. By way of short letter dated 28 December 2020, the Claimant appealed Mr Hill's decision on two grounds – (1) pertinent evidence was overlooked or not given due weight and (2) the penalty was unduly harsh.

38. Mr Baker, Head of Marine Standards – Europe, was appointed to hear the appeal. A hearing took place on 16 February 2021. Mr Holden again accompanied the Claimant. The hearing took place via MS Teams and was recorded.

39. Again, no transcript of this hearing was provided to the Tribunal. Whilst I was told I could watch the recording of the hearing I explained to the parties that this was not a proportionate use of the Tribunal's hearing time. I was also told that the parties had agreed that the Tribunal did not need to see a transcript. This was surprising given that key to the appeal was a dispute of evidence between Mr Baker and the Claimant as to whether the latter had said he was "convinced that the grounding did not occur".

40. For the reasons just stated it was difficult for me to form a view on this dispute. I am, however, satisfied that Mr Baker genuinely and reasonably formed the view during the hearing that the Claimant categorically denied that the grounding occurred. I consider this impression was reasonably formed given the way the Claimant's position since the incident has moved steadily away from an admission of a grounding (as was in the initial Near Miss Report) and him repeatedly highlighting features of the evidence which he says supports such a view.

41. Following the hearing Mr Baker reviewed the AIS playback of the incident, which is a GPS log of the movement of the vessel. In his letter dated 18 February 2021 Mr Baker described what the playback showed and the conclusions he had drawn from it. The Claimant had not been given the opportunity to comment on this new evidence before Mr Baker made his decision. The letter confirmed that the original decision to dismiss was upheld; the appeal was rejected.

The Law

42. The right not to be unfairly dismissed is contained in section 94 ERA and the test the Tribunal must apply is in section 98 ERA. It is for the Respondent to prove that it had a fair reason for the dismissal; conduct is a potentially fair reason (s 98(2)(a) ERA).

43. As this is a conduct dismissal the well established principles of **British Home Stores Limited v Burchell** [1978] IRLR 379 apply. They are:

    a. Did the Respondent genuinely believe that the Claimant was guilty of misconduct?

    b. Did it have reasonable grounds for this belief?

    c. At the time that it formed the belief had it carried out as much investigation as was reasonable in the circumstances?

    d. Was dismissal within the range of reasonable responses?

    e. Was the procedure carried out fair?

44. The Tribunal must not substitute its view for that of the employer: the test is whether the Respondent's conduct in dismissing the Claimant was within the range of reasonable responses open to it (**Iceland Frozen Foods v Jones** [1982] IRLR 439, **London Ambulance Services NHS Trust v Small** [2009] IRLR 563).

45. However, the range of reasonable responses test is not infinitely wide and the Tribunal's consideration of the claim should not be reduced to procedural box-ticking (**Newbound v Thames Water Utilities Limited** [2015] IRLR 734). I must assess the substance of the decision.

46. I take into account the provisions of the ACAS Code of Practice for disciplinary and grievance procedures albeit compliance or non-compliance with the Code is not necessarily determinative of the claim.

47. In assessing whether to make a **Polkey** reduction I take into account in particular the guidance in paragraph 54 of **Software 2000 Ltd v Andrews** [2007] ICR 825.

48. For contributory fault, I can make a reduction in the Claimant's basic award due to any blameworthy or culpable conduct before his dismissal pursuant to section 122(2) ERA if it is just and equitable to do so. If I find that blameworthy or culpable conduct by the Claimant caused or contributed to his dismissal I can make a reduction to the compensatory award pursuant to section 123(6) ERA providing it is just and equitable to do so. I take into account the guidance given by the EAT at paragraphs 8 to 12 in **Jinadu v Docklands Buses Ltd** UKEAT/1066/16/BA (unreported).

49. During submissions I was also referred to **W Devis & Sons Ltd v Atkins** [1977] IRLR 314, **W Weddel & Co Ltd v Tepper** [1980] IRLR 96, **Sharkey v Lloyds Bank plc** UKEAT/0005/15/SM (unreported), and **West Midlands**

Cooperative Society v Tipton [1986] IRLR 112 and I confirm I have taken into account the principles enumerated in those cases in coming to my decision.

Conclusions

50. Although it is for the Respondent to prove that conduct was the reason for the dismissal, this was not in practical terms disputed by the Claimant. It was further not realistically disputed that Mr Hill had formed a genuine belief that the Claimant was guilty of the misconduct.

51. As I indicated to counsel at the conclusion of the evidence the key question is whether there were reasonable grounds for Mr Hill's belief that the Claimant had knowingly falsified a document in reporting the incident on HMS. On the Respondent's own case, if the Claimant was not guilty of this charge then he would not have been dismissed solely for the other two. A consideration of the reasonableness of this belief inevitably also involves an assessment of the investigation which led to it and I take both of these limbs of the **Burchell** test together.

Reasonableness of belief and investigation

52. I consider first the Respondent's view that the Stanford ran aground. It is common ground that if the Respondent found that the Stanford had run aground the Claimant would be guilty of the first two allegations of misconduct, namely (1) running aground and (2) not reporting it properly via an Incident Report.

53. By the time that Mr Hill formed his view that this allegation was proven he had gathered a reasonable amount of evidence. (I pause to note that, on his own admission, he had actually formed this view before convening the final disciplinary hearing and I discuss that issue on the section below on procedural fairness.) The two main reasons for his view were:

    a. The Claimant had admitted there had been a grounding in the Near Miss Report; and

    b. The technical data, i.e. the zero depth reading on the echo sounder and the plotted position on the chart by the sandbank.

54. The witness accounts from the crew provided varied evidence on this point and were not consistent, either between two different witnesses or the accounts the same witness had given at two different times (i.e. the initial statements provided on 25 August 2020 and when subsequently interviewed by Mr Hill in October/November 2020). There was, however, sufficient evidence within these accounts to support Mr Hill's view.

55. Some witnesses agreed that there had been a grounding (JH and PS). There was also contemporary evidence in support, namely that PS had asked the Claimant whether they had grounded when the incident occurred (a question the Claimant accepted had been asked of him) and the discoloured wash on the deck which Mr Sakura noticed. I do not consider there was sufficient reason to believe PS's account was demonstrably false,

as the Claimant had asserted, particularly as he in fact agreed that PS had asked if they had grounded at the time.

56. I agree with Mr Hill that the fact that the diver's report that showed no damage was not material to this decision given that the grounding, if it occurred, was against soft mud or sand.

57. As to the technical data, Mr Hill was entitled to prefer this to the Claimant's less scientific method of hovering a cursor over the navigational chart to indicate the location. It is striking that the latitude and longitude coordinates on the echo sounder placed the vessel next to the sandbank on the chart. As mentioned above, there were some anomalies on the echo sounder log, such as the unrecorded time in the 38 minutes prior to the incident and the "ADJUST" line. Mr Hill admitted in evidence that he had not looked into those potential discrepancies (Mr Baker admitted the same). However, I am satisfied that the data was sufficiently clear on the face of it for it to be reasonably accepted by the Respondent without further enquiry.

58. The other principal factor relied on by Mr Hill was the Claimant's admission of a grounding in the Near Miss Report. I consider that Mr Hill was entitled to proceed on the basis that this was the most contemporaneous record of the Claimant's immediate impression of the incident and so would have been the most accurate.

59. Finally, there is the absence of any plausible explanation as to why the vessel would have stopped if not for a grounding. No cogent counter-point was put forward during this process by the Claimant nor indeed by any of the witnesses.

60. Of course, this only takes the Respondent so far. The key issue is whether it was reasonable for Mr Hill to believe that the Claimant had knowingly and dishonestly sought to under-report the incident by not submitting an Incident Report. On this point I am not satisfied that the Respondent's belief and its actions were within the range open to a reasonable employer.

61. I have already commented that in a lengthy letter setting out his reasons for dismissing the Claimant Mr Hill dealt with the finding of dishonesty in only two short paragraphs. His view was that the Claimant knowingly downgraded the report so that "its severity would not be recognised" and to "avoid further analysis by the Company regarding your ability as a master".

62. To support that belief Mr Hill was required to examine how the Claimant's actions could have led to the severity of the incident not being recognised. It was apparent from his evidence before the Tribunal that he had not given much thought to this question. Mr Baker gave a more detailed response, in answer to my questions, but it still seemed to me that even he had not given this particular issue the thought and attention it required, given that it was the primary factor underpinning the decision to dismiss.

63. The first point to note is that the Claimant had in fact reported the incident, albeit using the wrong form and not submitting it to a specific recipient. If he had wanted to avoid scrutiny in the way the Respondent believed the obvious thing to do would be to not report it at all.

64. Similarly, in this context, it is inexplicable that the Claimant referred to the incident as a grounding in the text of the Near Miss Report. If he wanted to downplay the incident he would have maintained his subsequent line that he was not sure whether there was a grounding (thus keeping his options open should, for instance, the diver's report find damage).

65. Mr Baker's view was that the Claimant probably thought, of the four other crewmen, someone would probably say something, hence why he felt he had to submit something on to HMS. I accept this as a proposition. However, the fact was that both the Incident Report and the Near Miss Report were available to view on HMS, even as In Progress reports, once the Claimant had started to populate the forms. In the event, it took just two days for the reports to come to the attention of Mr Evans. Even in Mr Baker's scenario it is unclear why the Claimant believed his reports may have escaped notice.

66. It was not altogether clear to me from the Claimant's evidence whether he was aware that the reports would be available on HMS to view even when still In Progress. He maintained that he believed that the reports would be looked at by the relevant person in the state in which he had left them on HMS. He denied knowledge of the fact that he had to press submit and select a recipient for the reports to be sent to the relevant person for action.

67. The state of his knowledge on the visibility of the reports he created on HMS would be crucial evidence on whether he was acting dishonestly in creating the reports in the way in which he did. This evidential issue was simply not considered by Mr Hill and Mr Baker. The focus of questions to the Claimant during the various hearings was almost solely on whether there had been a grounding.

68. This focus led to the Respondent using the Claimant's denial of there being a grounding as the sole basis for the decision that he had knowingly falsified the report. In Mr Hill's view, the Claimant had admitted there was a grounding in his initial report and had then subsequently sought to resile from this admission even in the face of the evidence which Mr Hill had obtained. However, such a view does not provide any concrete basis for the largely separate question of dishonesty.

69. I accept that both Mr Hill and Mr Baker found the Claimant's refusal to admit that the grounding occurred unreasonable and a sign of a lack of contrition on his part. In her submissions, Ms Souter for the Respondent said that this retraction (as the Respondent saw it) called into question the Claimant's honesty and integrity and whether the Respondent could trust the Claimant. Again, I accept that proposition. However, any erosion in trust is not itself a breach of the implied term of mutual trust and confidence. In his letter dismissing the Claimant Mr Hill expressly cited this implied term and said that he regarded it as breached by the Claimant. I remind myself that the test for this is that the employee shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (**Malik v BCCI** [1997] ICR 606). I do not consider that it was reasonable for the Respondent to take the view that the Claimant's refusal to accept that there had been a grounding during the disciplinary process, particularly bearing in mind there was cogent evidence (both objective and witness testimony) pointing the other way, met the **Malik** test.

70. The final point which I consider was of critical importance but which neither Mr Hill nor Mr Baker seemed to consider in any detail was the Claimant's insistence to his crew on the evening of 25 August 2020 that they complete their own statements for the purposes of any future investigation. The Claimant would have known that those statements were in existence at the time that he created the Near Miss Report. This undermines Mr Baker's view that the Claimant was concerned that at least one of the crew would report the incident: the Claimant himself appears to have encouraged that course.

71. I also note that Mr Hill did not explore this point with the crew members during their interviews. This would have been a good opportunity to have obtained evidence on the Claimant's concerns about reporting and thought process in the immediate aftermath of the incident.

72. I remind myself that I must review the substance of the Respondent's decision, I am not just applying a procedural checklist. Given the seriousness of the charge against the Claimant there needed to be at least some cogent and persuasive evidence that the Claimant had deliberately manipulated the reporting system, rather than just acted without due care and attention. Unhappiness with the way in which he withdrew his initial admission that there had been a grounding did not provide the reasonable grounds needed. At the very least the Respondent needed to interrogate the Claimant's knowledge of the HMS reporting system to form a view on whether he was savvy enough to manipulate the system. Indeed, all evidence points to the contrary. I conclude that the level of investigation on this particular question was unreasonably slight and the Respondent did not therefore have reasonable grounds to believe that the Claimant had acted dishonestly in the manner in which he reported the incident.

Sanction

73. As I do not consider the Respondent had reasonable grounds to believe that the Claimant had acted dishonestly in the way in which he reported the incident it follows that the decision to dismiss was outside the range of reasonable responses open to the Respondent. The Respondent has always been consistent – and Mr Hill accepted in evidence – that the first two misconduct charges would not justify dismissal on their own, without the third, more serious, charge being found proven.

Procedure

74. In closing submissions Ms Hogben for the Claimant advanced five headline submissions of alleged procedural unfairness:

    a. Mr Hill "cherry-picked" which evidence to rely on;

    b. There was a failure to provide the relevant evidence to the Claimant and an attempt to proceed with the disciplinary hearing on 27 November 2020 without giving him time to consider it;

    c. Mr Hill had prejudged the grounding issue;

d. The Claimant was suspended without justification; and

e. Mr Baker introduced new evidence from the AIS playback at the appeal stage without giving the Claimant the opportunity to comment on it.

75. I deal with each in turn.

76. I do not accept that "cherry picking" is a fair term to use when describing Mr Hill's review of the evidence. There were factors which pointed either way and he was entitled to prefer one account to another. He was particularly struck by the Claimant's initial admission and the technical data he had obtained. I have already determined that this was reasonable of him.

77. Mr Hill admitted that he did not provide the relevant evidence to the Claimant before the disciplinary hearing. It should not have needed Mr Holden's intervention to secure an adjournment of the hearing to give the Claimant sufficient time to consider it. However, there is no substantive unfairness that arises. The hearing was reconvened once the Claimant had had sufficient opportunity to consider the evidence. I do not consider that Mr Hill was acting in bad faith or seeking to deliberately prejudice the Claimant's ability to defend himself.

78. Again, as I have already noted in this Judgment, it is correct that Mr Hill formed the view that the grounding had occurred before reconvening the disciplinary hearing; Mr Hill admitted this in evidence. However, for the reasons already outlined, such a view was (or should not have been) central to the key question, namely whether the Claimant had acted dishonestly. I have already found that it was reasonable for Mr Hill to form the view that he did on the grounding itself based on the evidence he had. Whilst it would have been preferable if he had expressed himself in more neutral terms to the witnesses, no substantive unfairness resulted.

79. I place no significance on the belated decision to suspend. Once Mr Hill came to the view that the third allegation should be introduced and uprated the charge from serious to gross misconduct it followed naturally and logically that the Respondent should consider suspension. This is not evidence of a prejudged decision.

80. Finally, I agree that Mr Baker would have been better served showing the AIS playback to the Claimant in the appeal hearing and allowing him to comment on it. However, in the scheme of things, the AIS playback formed a minor part of the decision-making during the overall process and I do not consider it was unreasonable for Mr Baker to obtain some further evidence without returning to the Claimant for his view on it.

Polkey

81. As I have considered that the dismissal was unfair in substance, in that no employer could have reasonably formed the view that the Claimant was guilty of the allegation of dishonesty, it does not seem to me that I can say that a fair process may still have led to dismissal. Further, having heard the Claimant's evidence and explored with him his decision-making process when creating the Near Miss Report I cannot see what evidence could have

come to light which would have justified the view that he submitted the document with dishonest intentions.

82. I therefore make no reduction for **Polkey**.

Contributory Fault

83. I have, however, been troubled throughout this hearing by the Claimant's decision to refer to the incident as a grounding in the Near Miss Report. His explanation appeared to be that he was not sure, on reflection, whether it fell between two reporting categories, i.e. grounding or near miss. Even that being so, it does not explain why he stated in the text of the Near Miss Report that there was a grounding, rather than making clear that he could not be sure.

84. The root of the Respondent's decision, including that the Claimant had been dishonest, was this inexplicable act of the Claimant in the way he completed the form. If he had hedged his bets in the text of the form then doubtless Mr Hill, and later Mr Baker, would not have treated his account with such scepticism.

85. I am satisfied that the Claimant's conduct in this regard, combined with his failure to properly submit the form on HMS and his lack of contrition during the disciplinary process, both contributed to his dismissal and was blameworthy and culpable. I do not accept that his conduct was due to a lack of training. I consider he had sufficient knowledge of HMS reporting to complete the reports properly if he had been so inclined and he failed to do so due to a lack of care and attention.

86. I consider that is just and equitable to make reduction of 40% to both the basic award and compensatory award due to this blameworthy conduct. In my view this reflects the equity that the Respondent should share the majority of blame for the unfairness of the dismissal but that the Claimant's conduct was also a substantial factor.

Employment Judge Feeny

8 February 2022