



# EMPLOYMENT TRIBUNALS

**Claimant:** PAUL BAINBRIDGE

**Respondent:** NAVIGATOR TERMINALS SEAL SANDS LIMITED

**Heard at:** via CVP

**On:** 10<sup>th</sup> & 11<sup>th</sup> February 2022  
Deliberations 25<sup>th</sup> February 2022

**Before:** Employment Judge AE Pitt

## Representation

Claimant: Mr D Robinson-Young, Counsel

Respondent: Ms A Rokad, Counsel

# RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal is not made out and is dismissed.

# REASONS

1. This is a claim by Mr Paul Bainbridge, date of birth 24 June 1977, who was employed by the respondent as a terminal operator from 8 August 2008 until his dismissal for misconduct on 18 January 2021. He makes a claim for Unfair Dismissal. The respondent is a bulk liquid storage provider for numerous liquids such as petroleum and liquefied gas.
2. The claimant was represented by Mr Robinson Young of Counsel and the respondents by Miss Rokad of Counsel. I had before me a bundle of documents which included the pleadings, Health and Safety reports and the disciplinary procedure notes. I also had a video of the Appeal Hearing. I was additionally provided with the staff handbook and an operational procedure in relation to RTWs.

3. I read witness statements and heard evidence from Mr Michael Chaney, Operations Manager on-site, at the time of these events; Mr Craig Garbett, the North-east Terminals Manager; Mr Ian McCulloch, Head of Safety Health, Environment, Quality and Security for the respondents; Mrs Helen Dalton, Head of Human Resources. I also read the statement and heard from the claimant.
4. An issue arose on the second day in relation to a document that does not appear in the bundle. The document is called the 'James Reason Incident Decision Tree'. It is referred to by the claimant in his witness statement in paragraph 37. His claim is the decision to dismiss him was inconsistent with the decision tree. It is not referred to in his ET1 nor was it mentioned in the issues at the commencement of the hearing.
5. It was raised at the commencement of the hearing that the claimant's witness statement had page numbers that were inconsistent with the bundle before me. I asked counsel to try and resolve this without the tribunal having to go through each document when the claimant gave his evidence to ascertain which ones he referred to.
6. The document and the comments of the claimant in paragraph 37 of his witness statement were not put to the respondents' witnesses, Chaney and Garbett when they gave their evidence. I am told by Mr Robinson-Young that this was an oversight on his behalf because he had been unable to obtain instructions from his client.
7. It is unclear to me why the bundle and the page numbers are not consistent. Although Mr Robinson-Young tells me that there has been a change in the bundle. Miss Rokad tells me there has not been a change in the bundle composition.
8. My concern is that this is a clear comment by the claimant as to how the decision-maker, Mr Garbett, reached his decision. This was not put to him explicitly. He was asked questions by counsel about the serious nature of the incident, and the procedure that was adopted in relation to the obtaining or commissioning of the investigation report. Mr Garbutt said he had looked at the whole incident which could be interpreted in a number of different ways and he said 'I had a looked at the whole picture the number of errors and via violations and concluded it was complacency and overconfidence.' He accepted it was not a deliberate act.
9. In relation to that, I am told by Mr Robinson-Young that he understood it was in the staff handbook which was sent to me on the morning of the hearing. it appears that not all pages of the handbook were included in the bundle.

10. Miss Rokad's concern is that she is now unsure of the case she has to meet, and whether or not she has the correct witnesses to challenge this. Although quite rightly she says it was not put and she was not aware it was an issue.
11. Further to that, her instructions are that the document was a draft that was never disseminated amongst the workers at the site and therefore was not in force. Conversely, the claimant says this is the document he was sent by HR when he was suspended, which implies that he was expecting this to be relied upon.
12. There is no specific reference to the document in the ET1, the first the respondents were aware of it was when the claimant's witness statement arrived. It has not been put to the witnesses that they failed to take account of the document. I have therefore not taken it into account when making my decision.

### The Facts

13. The respondent is a bulk liquid storage provider for numerous liquids such as petroleum and liquefied gas. As the name suggests it provides storage for liquids on behalf of customers. When the product is required a RTW, will attend the site and load up. The claimant was employed by the respondent as a terminal operator. His role was to escort Road Tank Wagons, RTW, onto the site and empty and fill as required.
  - 13.1. The respondent has a number of policies and procedures in place for the work to be carried out. In particular I was referred to NTS – OPS – Road – 0009 discharging RTWs; this document sets out the exact procedure the operator must follow when discharging, (emptying), an RTW. It also sets out the duties of the driver on the site. One of the requirements at 4.6 of the documents is that the operator must ensure the driver stays with the vehicle throughout discharge. This appears to imply that the operator must also be with the vehicle in order to carry out this instruction. I was also referred to NTS–OPS–Road–001. This is the procedure for loading of RTWs. It sets out the responsibilities for drivers and operators. The operator is responsible for the completion of the task, i.e. the loading of the RTW. Under the health and safety section, there is a requirement that personnel must wear the correct PPE appropriate to the product. The health and safety section reads “operator will remain in the road bay throughout the loading procedure. Procedures, operator training, spill control and effluent systems are in place to ensure that there are no environmental issues when loading raw RTWs. If an RTW is overloaded stop closing immediately and report it to the supervisor”. There is then a section that sets out the duties of the driver and the operator. There is a note next to each section indicating whether this is simply best practice or process safety-critical. Paragraph 4.4 reads “open the road loading valve allowing the product to run into the RTW by gravity, check the Weighbridge readout is increasing; this method cannot be used

on road pumps fitted with an auto valve.” At 4.6 there is a requirement that the driver stays with the vehicle during loading.

13.2. The staff handbook contains a written disciplinary procedure that gives examples of gross misconduct which includes, acts of gross negligence or misconduct; breach of safety rules and any action which seriously endangered the health or safety of another person whilst at work. The handbook also contains a section on Health and Safety, which commences with a general statement of policy that health and safety have equal importance to all the business objectives. It sets out particular steps it takes to meet its responsibility. It goes on “this policy can only be successful with the active cooperation of all employees. Management, therefore, believes that it is the responsibility of all employees to perform their assigned duties safely by following safe working procedures, using proper safety equipment and by reporting or correcting unsafe acts or conditions.”

14. By way of background, there are two significant events in the claimant’s employment history which are relevant. The first relates to personal and sensitive matters which occurred in 2010. As a result, the claimant had had an absence from work, there is a dispute as to how many weeks but that is not relevant for these proceedings. He was also offered counselling by the respondent. Since that time, it appears nothing has been raised in relation to his mental health by the claimant. In relation to the health of an employee, the respondent requires every employee to undergo a health assessment annually. This is carried out by an occupational health provider on behalf of the respondent. The results are confidential and are only revealed to the respondent if there is an issue in relation to the employees’ ability to work safely on the respondent site.

14.1. The claimant argues that he did raise the issue of anxiety every year at his medical, and assumes that this was passed on but he has not adduced the reports to substantiate this. He tells me everyone was aware of his issues with anxiety, but I can find no evidence of that.

14.2. The second matter is a health and safety event involving the claimant which occurred in 2018. On this occasion, there was a spillage from a truck when it was being loaded. An investigation was carried out which concluded that human error was in part to blame for this. Disciplinary proceedings were instituted. The conclusion was that the claimant did not close a valve when stopping a pump. There was a loss of 3500 litres of gas oil. As a result of this misconduct, the claimant was given a final written warning which was to remain on his file for 12 months and his role was changed from CRO to that of a terminal operator with a consequent deduction reduction in wages.

14.3. There is one other event that was raised in relation to the different treatment of the claimant. In 2014 a colleague of the claimant's, SW, had allowed an RTW to overspill; following the incident, SW was taken off the job. He was not disciplined

15. On Friday, 23 October 2020 two events occurred which involved the claimant when he was on duty dealing with an RTW at the 9 Pit Rd loading.

15.1. Event one was in relation to the loading of the RTW. An error was made when the claimant started to load the RTW with DEA, this was the incorrect product. He realised his error very quickly and stopped the loading. He notified his superiors. The procedure which the respondent must carry out at this stage is as follows; it must empty the load and must then inform the customer. One of the matters which must be dealt with is whether the RTW can then be loaded with the correct product without the RTW having to be cleaned. Clearly, if the RTW has to be cleaned there will be a delay in the RTW leaving site and a consequent knock-on effect to the driver and the customer. The respondent, therefore, has to seek permission from the customer in order to confirm its instructions. On this occasion, the customer was content for the RTW to be loaded with the correct product without cleaning first.

15.2. The first incident occurred at approximately 3:30pm. It was not until 5:51pm that the customer agreed that the original load could be discharged back into its tank and that the correct product could be loaded without the need for cleaning. At around 6pm the removal of the incorrect product to the tank was commenced. Following that the loading of the correct product of TEA was then commenced. By this time the claimant was close to the end of his shift. It is a requirement that employees conduct a handover to the next person to come on to shift. This can be conducted either in the site office or at an RTW if one is being loaded.

15.3. The timeline shows that at 1804 the claimant handed a hose to the driver to connect to the RTW. At 1805 loading commenced; at 1813 the claimant is in a site vehicle and parked behind the RTW, I understand this is so he can keep an eye on the volume/weight of product going into the RTW. At 1816 the driver left the RTW without informing the claimant of his intention to do that. The claimant was notified that the operator coming onto duty was ready to do the handover. As a result, the claimant left Pit 9 at 1818 and went to the site office, the driver returned the vehicle at 1819. The operator coming onto shift returned to Pit nine at 1822 and 1832 the loading was achieved. The RTW was unattended by any person for a period of one minute. It was unattended by an operator for 4 minutes.

15.4. During the period between the first and second incident, it appears from the log that the claimant was continuing with duties to do with the first error, but he remained on-site throughout. Following the initial incident, he

spoke to his shift supervisor Mr Richardson and a note was created of that conversation. Mr Richardson wrote “Paul acted in an honest and professional manner when he realised his error, he immediately stopped product movement and reported it to his supervisor. I just want to reiterate to Paul the importance of double-checking paperwork before opening systems, as this may lead to customer complaints.” The document was signed by Mr Richardson and the claimant to be placed on the claimant’s personnel file.

15.5. One of the issues raised by the claimant in relation to the subsequent events was that he was not permitted to take time out following this initial incident. That is to say, he was not allowed time to gather his thoughts or even to go home. He relies on the events in relation to SW, where that employee actually went home. From the evidence I have heard, it was clear to all involved on that occasion that the employee was extremely distressed by what had occurred, as there had been an actual spillage of product from the RTW. This could have caused environmental damage as well as loss to the customer. SW had not left the RTW during loading.

15.6. I am satisfied in relation to the claimant at no time did he show any signs of distress in relation to the error he had made. In particular, he did not make any reference to it when speaking to his supervisor. I am further satisfied that when it occurred, he did not show any signs of distress.

15.7. It is a little unclear how the investigation was commenced. The procedure is incidents are logged onto a computer system; they should then be picked up by the management team who would then instigate an investigation. I do not have however the benefit of the email exchanges between the management team appointing investigators. However, it is clear that an investigation did take place resulting in the investigation report contained within the bundle to which I have already referred.

15.8. I am satisfied that the claimant, who was an experienced employee would be aware that this would occur, especially in light of the previous incident in 2018. I reject his suggestion that he thought the matter was concluded when he spoke to his supervisor following the first error on 23rd October.

16. On 7th November 2020, the claimant received a phone call from a friend advising him that he had tested positive for Covid 19. The two had played golf a couple of days earlier. The claimant informed his supervisor in case there was a requirement for him to isolate and cover would be required for his role. Mr Chaney was made aware of this and requested a statement from the claimant asking him to set out the times and details of his activities. The purpose for him doing this he said he was concerned that the claimant had broken guidelines in relation to his activities. The claimant raised this with HR.

HR was quite clear that they considered Mr Chaney was not entitled to ask such a statement and that the claimant had done nothing wrong.

17. On 9 November the claimant attended his GP and was signed off from work until 23<sup>rd</sup> November 2020 because of work-related stress. The claimant states this is because of the respondent's behaviour. The claimant did not return to duty until 4 December which was his next day on shift.

18. During his period of absence, the investigation had been continuing and statements were obtained from a number of employees. On 30<sup>th</sup> November the claimant received an invitation to an investigatory meeting regarding the incident on 23<sup>rd</sup> October 2020. It had not been possible to speak to the claimant about this until his return from sick leave.

18.1. On 4<sup>th</sup> December 2020, the claimant was spoken to by the investigation team and subsequently suspended pending the outcome of the investigation. During the course of the meeting, the claimant had an opportunity to view the CCTV. At the meeting, the claimant stated that following his viewing of the CCTV footage this was the first time he realised he had left the RTW unattended. He maintained his mental state must have been affected by the day's events and he wasn't thinking clearly. The claimant maintained that stance during his evidence. However, during cross-examination, he stated, 'I wanted to get home, it had been a busy day. I left to do the handover.' It seems clear to me that the claimant simply wanted to get home that day.

18.2. The report when it was finished should have gone to Mr Chaney, for him to consider whether there should be disciplinary proceedings, however, it appears from the witness statement of Mr Garbutt that he commissioned the report on 30<sup>th</sup> November 2020. This clearly cannot be correct as other employees had been spoken to prior to this date and the CCTV footage had been obtained and viewed. Mr Chaney in his witness statement says he made the decision to go to disciplinary but not when he decided that.

19. A disciplinary hearing was held on 18<sup>th</sup> January 2021 present were Mr Chaney and Mr Garbutt. There was an unavoidable delay in holding the hearing because the claimant had tested positive for Covid-19. The evidence of Mr Garbutt was that Mr Chaney was present to assist him with any technical issues. However, upon reading the minutes it is clear that Mr Chaney conducted the hearing asking the questions. When asked about this Mr Garbutt stated this was so he could concentrate on the answers.

19.1. The claimant did not raise an issue about Mr Chaney's presence at the time, but it is a matter I have to consider. The claimant's case is he was dismissed because he complained to HR about Mr Chaney.

19.2. During the course of the disciplinary hearing, the claimant stated, 'Until I saw the CCTV footage at the investigation meeting I didn't even know

I had done that. [Leave the RTW unattended]. It had been a particularly stressful shift, with the mistake I made earlier that I immediately rectified, and I just wanted to get off-site. My mind was not in the right place. I have been with the company for 13 years and I have never done anything like it before, I was mortified, there was no intent or malice at all. My frame of mind was not great.'

19.3. Following a short break, Mr Garbutt informed the claimant he was to be dismissed. The claimant was dismissed for gross misconduct namely:

- i. Leaving the road truck unattended is a serious breach of procedure which could have resulted in a number of major incidents
- ii. Given the Top Tier COMAH status of your workplace, you have a responsibility and duty of care to make our supervisor or colleagues aware that you were not feeling able to continue your shift and you had ample opportunity to do so
- iii. Your actions put yourself and your work colleagues in serious danger and put the business at significant risk

20. The claimant appealed the decision on the following grounds: first that there is no absolute requirement that the operator stays with an RTW, the procedures use the word 'will' rather than 'must'; the company were aware of his mental health conditions and he was in a state of shock on the day in question. The company should have recognised this and not placed him in the position where he made a further error; he had immediately informed his supervisor of the first incident and acted in the best interests of the company.

20.1. The appeal was heard on 10<sup>th</sup> February 2021 by Mr McCullough, Mrs Dalton was present to support him and take notes. The claimant was asked about his state of mind. He told Mr McCullough that he was treated inconsistently in that of another employee, SW, who had made a mistake had been removed from the job completely. The claimant should not have been put in that position because his superiors knew he was distressed. He accepted that he had not told his supervisor that he was distressed. Mr McCullough also went on to question the claimant in relation to the other appeal points.

20.2. Mr McCullough investigated the matters raised by the claimant. He concluded that the incident involving another employee was different. The employee had an actual spillage and was showing signs of distress following it so he was removed from the job, he could find no evidence of the shift being undermanned.

20.3. At no time did the claimant raise the issue of Mr Chaney's involvement although he expressed the opinion that the company had



closed rank. The claimant complains today that the hearing was unprofessional, and Mr McCullough was hostile. I have viewed the footage of the meeting and I do not agree. I am satisfied that the claimant had sufficient opportunity to set out his case and it was carried out in a professional manner.

20.4. The outcome was sent to the claimant by letter dated 11<sup>th</sup> February 2021. Mr McCullough upheld the decision to dismiss. In his letter, he addressed each of the claimant's appeal points in turn explaining why he had reached his decision. In relation to the issue of the claimant's state of mind, his conclusion was that the claimant was under a duty to raise his health with his supervisor. If the claimant was using coping mechanisms to cope it would be difficult for his colleagues or supervisor to be aware he needed assistance.

### The Issues

21. What was the reason (or the principal reason if more than one) for the dismissal?

20.5. The Respondent relies on conduct, specifically gross misconduct, within the meaning of S98(2)(c) and S139(1)(b) Employment Rights Act 1996 ("ERA 1996")?

20.6. Or in the alternative, breaches of health and safety procedures which were serious enough to warrant dismissal in all the circumstances, and amounting to some other substantial reason ("SOSR") within the meaning of S98(1)(b) ERA 1996?

22. Did the Respondent:

20.7. Have a genuine belief in respect of the alleged misconduct?

20.8. Did the respondent have reasonable grounds to sustain that belief?

20.9. Had the respondent carried out such investigation as was reasonable in all the circumstances?

23. Was the decision to dismiss the Claimant within the range of reasonable responses?

Remedy

24. If the Tribunal finds that the Claimant was unfairly dismissed, is it just and equitable to award any compensation in the circumstances, and if so, in what amount?

25. Should any compensation awarded be reduced on the following grounds:

25.1 Did the Claimant cause or contribute to his own dismissal and is it just and equitable to reduce any award? If so, how much?

25.2 If the dismissal was procedurally unfair, should there be a Polkey reduction? If so, when would that have been?

25.3 To what extent has the Claimant mitigated his loss?

### The Law

26. The law of unfair dismissal is governed by section 98, Employment Rights Act 1996, the act. Under the section, it is for an employer to establish the reason for the dismissal and that that reason is either falling within subsection two or some other substantial reason which would justify the dismissal of the employee. The conduct of the employee, as in this case, may found a fair dismissal.

27. The approach to misconduct cases was formulated by Arnold J in **British Home Stores Ltd v Burchell [1980] ICR 303**. If the reason for the dismissal was misconduct of an employee and potentially fair, the Tribunal must ask itself the following questions.

- i. Did the respondent act reasonably in treating the employee's conduct as sufficient reason for dismissal in accordance with equity and the substantial merits of the case?
- ii. Did the respondent have an honest belief in the misconduct of the claimant?
- iii. Did the respondent have reasonable grounds to sustain that belief?
- iv. Did the respondent undertake as much of an investigation into the misconduct as was reasonable in all the circumstances?
- v. Did the respondent follow a fair disciplinary procedure?

28. **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**. In determining the fairness of a dismissal, the Tribunal must consider if dismissal fell within the range of reasonable responses. The Tribunal must not impose its view on the dismissal but consider whether a reasonable employer could have dismissed on the facts of the case.

29. **Post Office v Fennell (1981) IRLR221** determined that the words "having regard to equity in substantial merits of the case" means employees who misbehave in much the same way should have meted out to them much the same punishments. Where one is penalised more heavily than those who

committed a similar offence, the employer does not act reasonably in treating that as a sufficient reason.

30. **In Hadjiioannou V Coral Casinos Limited (1981)IRLR 352**, the Employment Appeal Tribunal stated that a complaint of reasonableness based on consistency of treatment would be relevant in limited circumstances:-

- i. where employees have been led by an employer to believe that certain conduct will not lead to dismissal.
- ii where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason.
- iii where decisions made by an employer in parallel circumstances indicate it was not reasonable for an employer to dismiss.

31. **Taylor v OSC group Limited 2006 ICR 1602 CA** gives authority to the principle that where a disciplinary hearing is flawed, the flaws may be cured by an effective appeal. An appeal may be either by review or by re-hearing as long as it cures any remedies it does not matter which.

### **Submissions**

32. Both Counsel submitted comprehensive submissions and responses which I have read. On behalf of the claimant, it is submitted that the comment at the disciplinary 'Until I saw the CCTV at the investigation meeting I didn't know even know I had done that' was such that the respondent should have been aware that the claimant was seriously unwell on the day of the incidents. It should have obtained medical evidence regarding this. Further that if this is correct the claimant cannot be guilty of gross misconduct for an unconscious act.

32.1 In addition, counsel raised the issue of procedural fairness. There are three aspects to this; first the involvement of Mr Chaney in the disciplinary hearing; secondly a failure to give any thought to the claimant's mental health problems; finally, Mr Garbutt did not properly investigate the issues raised at the appeal.

33. On behalf of the respondent, Miss Rokad submitted that the claimant never raised any issues with the attendance of Mr Chaney during the disciplinary process; there were no other criticisms of the process. As to the mental health issue, the claimant has never stated the exact nature of the mental health problem nor adduced any medical to support the fact he has such a

problem. He has worked for the respondent for a number of years without incident; this issue has only been raised at the hearing.

- 33.1 Miss Rokad submits that the respondent followed the Burchell guidance, and the dismissal was procedurally fair. It was clearly gross misconduct and fell within the band of reasonable responses.

### Discussion and Conclusions

34. Despite the claimant's assertion that the respondent was well aware of his anxiety, there is no documentary evidence to sustain this. Mrs Dalton told me that the occupational health reports are considered confidential unless there is something within it that affects the ability of the worker to carry out his role. I accept that this must be correct. There is no evidence that the claimant ever told his supervisor or other management that he had ongoing issues with anxiety. If it had been an issue for him, he should have raised this. Specifically in his evidence, in relation to the first incident, the claimant alleges this had a substantial impact upon him, which led to him in effect having some sort of blackout or breakdown which resulted in him leaving the RTW shortly after 6 pm that evening. There is absolutely no evidence to support this contention. The claimant could have adduced medical evidence of his ongoing anxiety state, he could have adduced medical evidence that the impact of the first incident resulted in the second incident. The claimant did not approach his GP for help following the incident which is in contrast to the events of November and December when he did see his GP and was given a sick note on both occasions.

34.1 I concluded that the claimant now advances this argument to bolster his argument in relation to different treatment between himself and his colleague, SW. On the occasion when SW was in error it was a more serious incident in that there was an actual overflowing of an RTW of noxious product. It was clear to the supervisors that SW had reacted badly to his error and needed time to collect his thoughts. I accept the respondent's assertion that SW was moved or allowed time away from work because of his clear distress. The claimant showed no signs of distress and even in the note compiled with his supervisor is there any mention of this. There was no evidence before me to suggest that the respondent should have been aware that there could have been a problem with the claimant following that first incident. At no time following the first incident did the claimant raise an issue with his supervision that he did not feel fit and well to continue with his duties.

34.2 Although the claimant says in his witness statement that it was a stressful day, which clearly it was, because of the earlier error. There was a period of three hours before the next error occurred. I do not accept therefore that the claimant should have been given time away

from his role as a matter of course if he had asked for it would have been granted.

34.3 I note that the claimant has two periods of absence between 23rd October and his dismissal on 10th January 2021. The first absence was from 9th November 2020 following the series of emails regarding his conduct away from work which led to a fear that he might have to self isolate as a result of contact with a person who contracted the Covid-9 virus. The claimant was given a two-week sick note and was able to return to work when his next shifts commenced on 4th December. On that day having been suspended he then went to see his GP and was again put on the sick for stress at work.

34.4 I have not been shown any evidence that the claimant spoke to his GP regarding stress or anxiety at the time of the incident on 23 October. Although other less serious incidents required an attendance for medical advice.

#### The Investigation

35. Although the sequence of events is not documented I am satisfied that the investigation conducted following the incidents had commenced prior to the issue of the claimant's contact with the person who tested positive, and the subsequent emails between Mr Chaney the claimant and Mrs Dalton.

35.1 I have seen the previous investigation report from 2018 which commenced on 11th February and was finalised on 22nd March 2018. The report into the claimant's conduct on 23rd October follows the same structure and timings.

35.2 I note that in his witness statement Mr Garbutt uses the phrase I commissioned the report. Having heard his evidence I am satisfied that this was a genuine error on his part probably because of a lack of documents in relation to how the investigation progressed.

35.3 What is clear is that it was a thorough investigation that involved the investigators viewing some four hours of CCTV footage during which time they noted a number of breaches of health and safety guidance including failure to wear protective personal equipment up to and including the claimant leaving the RTW unattended.

35.4 The investigators spoke to all the relevant parties which included the claimant on his return on 4th December. It would be perhaps clear from watching the CCTV footage that the claimant had made a number of errors some minor some not so minor during the course of that afternoon. It is unsurprising therefore that following being spoken to he was then suspended. During the course of that meeting, the claimant was able to view the video footage.

35.5 I concluded that the investigation was such a one as a reasonable employer would conduct.

### Mr Chaney's Involvement

36. I do not accept that the claimant was dismissed because of the events in November surrounding the emails and the claimant speaking to Mrs Dalton in HR. There was no official complaint made by the claimant concerning Mr Chaney's behaviour. Having raised the matter with HR nothing else appears to have been said, although at this time the claimant does take a period of sickness absence.

### The Involvement Of Mr Chaney At The Disciplinary Hearing.

37. From the evidence I heard it appears that once the Incident Report was concluded it would be for Mr Chaney to decide if there should be disciplinary action taken against the claimant. Clearly, this is what happened.

37.1 The claimant was informed by a letter dated the 8<sup>th</sup> December 2020 that he was required to attend a disciplinary hearing. The letter contained various documents and indicated that Mr Garbutt, the North-East Terminal Manager would chair the meeting and be supported by Mr Michael Chaney. The claimant did not raise an issue with the attendance of Mr Chaney at the time nor did he raise an issue during the course of the disciplinary hearing itself. Mr Garbutt told me that he required Mr Chaney present to deal with any technical or operational matters that arose.

37.2 I have seen the notes of the disciplinary hearing they reveal that Mr Chaney had substantial input into the disciplinary hearing. It was Mr Chaney who asked all the questions whilst Mr Garbutt simply listened. Following the hearing Mr Garbutt and Mr Chaney retired together and upon their return Mr Garbutt announced his decision. I am however satisfied that the decision was that of Mr Garbutt. Although I have concerns about Mr Chaney actually being present at the hearing and the extent to which he was involved.

### The Mental Health Issue

38. This argument hangs upon the claimant's comment at the disciplinary hearing that he was unaware that he had walked away from the RTW until he was shown the CCTV footage at the disciplinary interview. It is argued by counsel that this should have alerted the respondent to a possible issue with the Claimant's mental health, especially against the background of ongoing anxiety issues.

38.1 Whilst I note the claimant was not represented at the hearing, he did not raise with Mr Garbutt or indeed Mr Chaney that he felt anything other than the normal stresses of the day because of what had occurred earlier. In particular, he did not raise with either of them that his mental health had taken such a toll upon him that he had some sort of blackout or breakdown. It is argued that the respondent should have considered this comment and adjourned for occupational health input.

38.2 I do not agree with that assertion, there was nothing in the behaviour of the claimant prior to that date or on the date of the incident itself which would lead the respondent to conclude that there had been a crisis for this employee. The respondent in its dismissing letter does not make a particular comment on this point. Mr Garbutt considered the claimant was being complacent. Without something further, I concluded that this comment of itself would not necessarily put an employer on notice that its employee was undergoing a crisis and further investigation was required.

38.3 The claimant had occasions in the recent past taken sick leave for "stress at work" on the first occasion because he was challenged in relation to his out of work behaviour, and on the second because of his suspension. It might be said that these were minor incidents that led the claimant to seek assistance from his GP, whereas there is a distinct lack of input from his GP following what Counsel asserts is a breakdown.

38.4 Against that background, I concluded that a reasonable employer would not necessarily be on notice of any issues affecting the claimant's mental health.

#### The Belief Of Mr Garbutt

39.I concluded that Mr Garbutt had a genuine belief in the misconduct of the claimant. This was in part based upon the claimant's admission but also upon the CCTV footage which showed the claimant leaving the RTW unattended and other health and safety breaches.

39.1 Even if Mr Chaney was involved in the decision, and I do not accept that he was, there was clear evidence upon which Mr Garbutt could conclude the claimant was guilty of misconduct.

39.2 I concluded that the decision by Mr Garbutt was based upon a reasonable investigation which included admissions from the claimant and CCTV footage of the incident itself.

#### The Decision To Dismiss

40. The claimant argues that the incident was not so serious that it required dismissal as a sanction. From the evidence, I heard from the respondent health and safety is paramount on the site upon which the claimant works.

40.1 I concluded that the claimant, is not arguing that he was treated differently to SW in relation to his dismissal. His clear evidence was that he should have been allowed a break in the same way as SW was. I do not accept that there is such a similarity that there is any disparity of treatment. SW was showing clear signs of distress immediately after his actions, whereas the claimant appeared calm. Without his input, I concluded a reasonable employer was entitled to act in the manner the respondent did.

40.2 The impact of the claimant leaving the RTW whilst it was being filled was a serious breach of health and safety. The claimant relies upon the wording of the standard instructions which state an operator "will". The Claimant's case is that it is not a requirement or mandatory. The respondent's argument is that for safety purposes and employees should be with the RTW to ensure it doesn't overflow.

40.3 The assessment of the seriousness of the breach is a matter for the respondent and upon the evidence which it had before it, I cannot fault that conclusion although I note that the product was not necessarily a dangerous or toxic substance, the consequences of an RTW being overloaded would be serious to the respondents in terms of the loss of the customs product. The conclusion in relation to the seriousness of the breach is a conclusion a reasonable employer was entitled to reach.

40.4 I concluded therefore that dismissal was within the range of reasonable responses

41. My only concern with regard to the initial disciplinary hearing was the involvement of Mr Chaney

### The Appeal

42. I was asked to consider the video footage of the appeal meeting which I did both with the parties and by myself. The issue of the manner in which it was conducted. not pursued to any great degree. Having had an opportunity to view the footage I can see no evidence of hostility or other unacceptable behaviour.

42.1 Having heard the evidence of Mr McCullough I am satisfied that having listened to the claimant's appeal Mr McCulloch then carried out such further investigations as were required in order for him to come to a fair reasoned and reasonable conclusion.



42.2 As far as the mental health aspect was raised in these proceedings, I note that the claimant did not raise it at the hearing, in particular, he did not adduce any evidence of it.

42.3 I concluded therefore that if there were any issues with the involvement of Mr Chaney at the disciplinary hearing, the claimant was given a fair opportunity to appeal and this remedied any issues

### Burchell guidance

43. I am satisfied that Mr Garbutt had an honest belief in the misconduct of the claimant.

43.1 Mr Garbutt had reasonable grounds upon which to sustain that belief, it is based primarily upon the CCTV footage and upon the claimant's admissions when he viewed the footage.

43.2 Turning to the investigation, there was a thorough investigation into what had occurred which included CCTV footage.

43.3 In looking at the procedure I concluded that it was inappropriate for Mr Chaney to be involved in the hearing to the extent he was. He clearly was not acting in a support role but rather conducting the hearing itself. However, I accept Mr Garbutt's evidence that the decision to dismiss was his alone.

43.4 However, the claimant was allowed to appeal and this appeal rectified any issues with Mr Chaney's involvement at the earlier hearing. Including any input into the decision to dismiss.

43.5 Having heard the evidence of Mr Garbutt I concluded that dismissal was within the range of reasonable responses.

44. I concluded therefore that insofar as the disciplinary procedure did have a flaw this was remedied by the appeal hearing

45. The claim for unfair dismissal is therefore not made out.

Employment Judge AE Pitt

10<sup>th</sup> March 2022