EMPLOYMENT TRIBUNALS

Claimant: **Mr S Sweetenham**

Respondent: **K E Kents Limited**

Heard at: **East London Hearing Centre**

On: **5th and 6th October 2017**

Before: **Employment Judge Reid**

Representation

Claimant: **Mr Bunting, Counsel**

Respondent: **Mr Hopkins, Solicitor, Birkett Long LLP**

JUDGMENT (RESERVED)

1. The Claimant was unfairly dismissed by the Respondent. He is awarded compensation of £3,427.26 as set out below.

2. The Claimant was not wrongfully dismissed by the Respondent and that claim is dismissed.

3. The Claimant's claim for an additional award under s38 Employment Act 2002 (failure to provide written particulars) is dismissed on withdrawal.

4. The Claimant's claim under s11 Employment Relations Act 1999 (failure to allow request to be accompanied) (if it was in fact raised in the Claimant's claim) is dismissed on withdrawal.

REASONS

Background

1. The Claimant brought claims for unfair dismissal and wrongful dismissal. He was employed by the Respondent as a Foreman Driver until his dismissal with

immediate effect on 9th November 2016. The dismissal arose following an incident on 8th June 2016 when a large tank was damaged when the Claimant was moving it on behalf of a client.

2. The parties had prepared an agreed list of issues. There was a one file bundle. The Respondent called four witnesses and the Claimant gave evidence, all having provided witness statements. The hearing covered issues on both liability and remedy. I heard oral submissions on both sides. I reserved my decision.

3. The representatives helpfully agreed the figures in the Claimant's schedule of loss (page 32) in terms of the totals for the maximum basic and compensatory awards before any reductions/increases, except for the figure for loss of statutory rights which the Respondent said should be £350 and not £500. It was confirmed that the Claimant no longer pursued items 5 and 6 (right to be accompanied, no contract provided) which claims were withdrawn. It was also identified that the Claimant's losses if he won his unfair dismissal claim would need to take account of his 12 week notice period even though he had found another more highly paid job within two weeks of his dismissal and thus mitigated his losses after that point, under the *Norton Tool* principle.

Findings of fact

The Claimant's employment

4. The Claimant was employed by the Respondent as a Foreman Driver, one of two Foremen, the other being the Yard Foreman. His employment commenced on 1st June 1993. At the time of his dismissal he had around 30 drivers working under him. He was paid a higher salary than the other drivers due to his additional Foreman responsibilities and had obtained the CPCS certificate (Certificate of Professional Competence Standards), an accreditation which was reviewed and monitored annually. At the time of his dismissal he had around 23 years' experience at the Respondent. I find that the Respondent had trained him appropriately and sufficiently as shown by the documents at pages 96-107. I find given his level of experience, his length of experience and his supervisory responsibilities that he did not need further training in how to risk assess a job; if it was an unusual or new type of job he was also able to recognise it as such and able seek further instructions from his managers at the office or from the client he was working for if there were special requirements or for further guidance. Although the training was some years previously in 2008, the Claimant had said he had a good understanding of the correct procedure for loading vehicles (page 102), consistent with not raising any need for extra training prior to the incident in June 2016 for which he was dismissed.

5. The Claimant was responsible (as was the Respondent) for health and safety issues (page 87,100). This included the wearing of PPE (page 97,121,102,104) with which the Claimant was issued (page 105). The incident for which he was dismissed was a 'transhipping' procedure, thus also requiring the wearing of a hard hat (page 104).

Complaint dated 14th June 2016 from the Respondent's client, CIS and subsequent disciplinary procedure

6. The Claimant attended CIS' site on 8th June 2016 in order to do a job which involved lifting two large plastic tanks onto an articulated lorry (an artic), using a crane on his lorry. I find based on Mr Kent's and Mr Waller's oral evidence that the Claimant had done a procedure like this before this, taking into account I find it unlikely that given his length of experience, training and supervisory responsibilities that he had not; the Claimant says he had not (witness statement para 4) but Mr Kent's and Mr Waller's account is consistent with that length of experience and those supervisory responsibilities.

7. The Respondent received a complaint about this job on 14th June 2016 (page 116). This stated that damage had been caused to one of the tanks by the Claimant because he had not waited for the lorry loader booked to help him complete the manouevres on the first tank (using a second crane) to arrive but had gone ahead on his own, against the instructions of the driver of the artic and of the client of CIS who was on the site. The email criticised the Claimant for not waiting for the other driver to arrive.

8. I find based on the oral evidence of Mr Kent (Chairman) that getting such a complaint was very unusual and that CIS was a long-standing and valued client of the Respondent. I find that Mr Kent was not told about this complaint until mid-end October 2016.

9. Subsequently in August 2016 (page 124-125) the Respondent received a further email from CIS attaching two photos of the Claimant on the day and an email from CIS' client giving details of the cost of replacement or the cost of repair of the tank. I find the photos had been taken by CIS' client who was there on the day because he was very concerned with what he was seeing the Claimant do and because he had asked the Claimant not to do it; had the manoeuvres been safe and the client not had any concerns then I find he would not have taken the photos. I therefore find that the Respondent reasonably concluded from being sent photos that the account in the June email of the Claimant being told to stop was accurate because consistent with the taking of photos.

10. The Claimant said that he had not been told there was any problem with the job until October 2016. However I accept Mr McEvoy's oral evidence that he discussed the incident and the damage with the Claimant because he dealt with insurance claims; whilst Mr McEvoy may not have discussed it with the Claimant in June 2016, I find he did so at the latest in August 2016 because it is likely that the provision of the figures to make an insurance claim would trigger a discussion with the Claimant, even if a discussion had not been had in June 2016 when the complaint first came in. In addition I find it unlikely that once Mr McEvoy and Mr McMichael saw the photos provided in August 2016 of the Claimant standing under a large tank, held by a single sling, with no hi-vis clothing on and not wearing a hard hat that they would not have discussed it with him. I therefore find that the Claimant was aware there was a problem with the 8th June job before October 2016, though there had still been a delay in raising it with him and it had not been raised promptly after the complaint was received in June.

11. However neither Mr McMichael nor Mr McEvoy took any further disciplinary steps as regards the Claimant's actions on 8th June 2016. In around mid-end October Mr Kent found out about the complaint because he noticed from a debtors list that CIS had not paid the invoice which was very unusual for them as they usually paid promptly within 60 days. I find based on his oral evidence that Mr Kent was extremely upset to have lost a good client and very angry that nothing had been done by his managers so far as regards action following the Claimant's behaviour on 8th June 2016, apart from to discuss it with the Claimant; he described it as an outrage that they had only talked to the Claimant about it but not done anything further, said he had been disappointed with his managers because they had not gone through any process with the Claimant despite it being a serious matter and said he was angry with his managers for not telling him sooner about the complaint.

12. Mr Kent then met with the Claimant twice to discuss the complaint. I find that although he did not give the Claimant a copy of the June and August emails and the photos he went through the contents of the emails with him and showed him the photos. The Claimant accepted in his oral evidence that he was aware at this time from this discussion that the repair cost was around £4,000. Mr Kent asked the Claimant at their first meeting to write down what was his version of what happened on 8th June. The Claimant did this (page 117-119, typed up agreed version page 120-121). I find that that the Claimant said in this statement that he had not been aware of any damage to the first tank on the day. He accepted that there was damage but said he was sorry for causing it. He accepted that he had been wrong to try and roll the tank using just one sling. The Claimant also said in his statement that he had not been aware a second lorry was coming to help him and that had he known this he would have waited. However he also said that he had made the wrong call on the job to keep the job on time (page 120). I find implicit in this is the Claimant's acceptance that he made a decision to go ahead rather than to wait which raised the question as to what the Claimant would be waiting for and what he decided he would not wait for to avoid wasting time. I find from this that the Claimant knew another lorry was coming but did not want to wait (ie he made the wrong call not to wait for it) having already waited an hour to be let onto the site (witness statement para 4). I therefore find that the Respondent acted reasonably when it accepted the account in the June email that the Claimant knew another lorry was coming and was asked to wait and did not accept his account that he did not know the second lorry was coming to help with a second crane. I find that whilst the Claimant did not expressly apologise in this statement he recognised that he had been at fault to a degree in making the wrong call. He did not say that he would not let such a thing happen again.

13. The Claimant had now had an opportunity to put his version of events to the Respondent. There was then a second meeting once Mr Kent had the Claimant's written statement (Mr Kent witness statement para 30-31). The Claimant did not explain why he had not worn his PPE and hard hat (Mr Kent witness statement para 32). Mr Kent pointed out the very serious consequences which could have happened (para 33). Given the Chairman had got involved it was clear to the Claimant that what had happened on 8th June was a serious matter and that Mr Kent had thought it important enough to get involved himself once he became aware of it.

14. Whilst Mr Kent's investigation had not been wide ranging and his meetings with the Claimant were not documented, I find that once the Claimant had given his written account there were not significant matters left to investigate. The Respondent had a

complaint from a client backed up with photos taken on the day. It had the Claimant's written account which accepted he had done the wrong thing using the single sling on the tank and which accepted that he caused the damage to the tank. It gave no explanation of why he did not wear his PPE and hard hat which was evident from the photos he was shown at his meeting with Mr Kent. Whilst one area of dispute was whether the Claimant knew that a second lorry was coming and should have waited, the Claimant had accepted he had made the wrong call to keep the job on time ie made a decision to go ahead rather than not to go ahead. This means that it was reasonable for the Respondent not to investigate further as to whether or not the Claimant knew another lorry was coming and to conclude that he did know. I therefore find that the investigation was reasonable in its ambit, falling within the reasonable range.

15. All four managers (Mr Kent, Mr Waller, Mr McMichael and Mr McEvoy) said that the Claimant was not very communicative and/or shrugged things off in their meetings with him. I therefore find that this pattern started with Mr Kent and continued.

16. I find based on his oral evidence that Mr Kent also then discussed the Claimant more generally with the other managers in the office (including Mr Waller, Mr McMichael and Mr McEvoy) and with a few of the drivers because Mr Kent felt there was a general negativity about the Claimant and he thought some resentment on the part of the Claimant towards managers who were younger than him. I find he canvassed their views on the Claimant more widely and received negative feedback. I find from this that Mr Waller who ultimately went on to take the decision to dismiss was therefore brought into a feeling that this negativity was also an issue and was relevant to what was to be addressed in the disciplinary action. These discussions muddied the waters as to what allegations needed to be put to the Claimant as part of the disciplinary process given that all the Claimant knew was that any problem was about the job on 8th June and not any wider issues about his behaviour or attitude more generally.

17. Mr Kent then handed the matter back to Mr Waller and the other two managers to deal with the process (Mr Kent witness statement para 42-43) the plan being that the two other managers would go forward with a disciplinary process. Mr Kent's view at this time (witness statement para 47) was that the Claimant's dismissal was a possibility because it was a serious matter but I find that no decision had yet been taken because Mr Kent's practice according to his oral evidence was to allow Mr Waller (his son in law) to get on with things and he tried to avoid countermanding Mr Waller's instructions or decisions. It was therefore likely that he would let Mr Waller deal with it from then on as he was the Director in day to day charge in the office. Whilst Mr Kent said at the hearing that parting company with the Claimant had been discussed I find that he was referring to matters in the past because he went on to say that he had always defended the Claimant's corner, though maybe the Claimant's mindset had changed as he got older.

18. Some nearly 8 months after the CIS incident the Claimant was sent a letter inviting him to a disciplinary meeting the next day at 7.30am (page 126). The letter was left for the Claimant to pick up at the end of his working day. This was not reasonable notice because he only had overnight to prepare for it and there was no sudden urgency which meant it had to be the next day, when the matter had been left since June when the complaint from CIS had been received. The letter referred to the

Claimant's recent actions – if referring to the CIS job in June they were not recent which was confusing as it might make the Claimant think there was also something else. Although he was ultimately said to be dismissed because of health and safety breaches in June the letter did not refer to this as an allegation. The letter correctly stated he had the right to be accompanied but in practice it was going to be very unlikely that the Claimant could get someone by 7.30am the next day. The letter did not enclose a copy of the June and August emails and the photos which, although he was aware of them and had seen them, were key documents he should have been given the opportunity to read through again before a disciplinary meeting. The letter did not point out the possible disciplinary consequences. All these factors were matters of procedural unfairness to the Claimant, even though he knew that the issue was the 8th June incident (although given the vagueness of the letter he could have reasonably read it as also referring to other unspecified things he wasn't aware of). There had in particular been a significant delay since the receipt of the complaint from CIS in June 2016 and then again after the provision of the photos in August 2016. This delay also hampered the Claimant's ability to recall the detail of what happened on 8th June (ET1 para 19).

19. The Claimant met with Mr McMichael and Mr McEvoy. He said he did not want a companion when asked (page 128/131). According to Mr Waller the intention was to have a two part meeting, with the Claimant meeting Mr McMichael and Mr McEvoy first and then Mr Waller joining them after a short break. Mr Waller described this as their normal procedure - an initial discussion with the immediate manager(s), then joined by a more senior manager. However this was not a procedure set out in the Respondent's disciplinary procedure and muddied the waters as to what the meeting was in fact for because it gave the impression that the first part was investigatory (discussion with immediate managers) and then the second part was something else though it wasn't clear what (though Mr Waller would not have heard what the Claimant said in the first part in any event as not there). Alternatively it gave the impression that the first part was possibly investigatory and the second part was disciplinary (again not clear how that would work if Mr Waller didn't know what was said in the first part if not there and no notes were yet available of the first part). This also made the process procedurally unfair because it wasn't clear to the Claimant what was going on as regards the significance of the different parts to the meeting and who was doing what and what to expect next as part of the disciplinary procedure. This muddying of the waters was compounded by Mr McMichael telling the Claimant that the meeting was finished and he could go home (page 130) even though Mr Waller had not yet arrived to do the planned part 2 of the meeting. In any event the person who was to go on and take the decision to dismiss (Mr Waller) had not been at the disciplinary meeting to hear the Claimant's explanation or to ask him questions. Whilst Mr Waller had the typed up notes by the time he took the decision to dismiss and had a further meeting with the Claimant on 9th November 2016 (see below) he had not attended an important part of the process which had been set up as a disciplinary meeting which had been ended by telling the Claimant to go home before Mr Waller got there.

20. The Claimant disputed the accuracy of the notes at pages 128 and 131 as to what was said at the meeting. I was told that both Mr McMichael and Mr McEvoy had written up these notes after the event but had taken handwritten notes at the time. Despite both saying their handwritten notes were at the office they had not been disclosed or produced at this Tribunal hearing. The Claimant said in his oral evidence that he did not say in this meeting, as recorded in the notes, that he had been wrong

(quote on page 128 and 131). However he had already admitted to making the 'wrong call' and I find therefore that admitting he had been wrong was a similar statement and that he therefore did say this at this meeting, because he had already said something similar in his own statement for Mr Kent. The Claimant's oral evidence was also that he did not say at this meeting (as recorded on pages 128 and 131) that he had been trying to get the job done as quickly as possible/as quickly as he could. However he had already said in his statement for Mr Kent that he had been trying to keep the job on time so I find he did make this similar statement at this meeting. The Claimant also said he did not say that he had cocked the job up (page 128/131) but again saying you have cocked the job up is not significantly different to saying you made the wrong call. I therefore find that on these points the Claimant did say the things recorded in the typed up notes. As regards being asked about the failure to wear PPE the Claimant accepted in his oral evidence that he was possibly asked about that at this meeting; his lack of a good explanation (page 129, 131) was consistent with his lack of a good explanation at the hearing (either that he couldn't explain it or that it might be because it was a hot day) and I accordingly find that the notes are also accurate on that issue. When taking the decision to dismiss I find that that Mr Waller reasonably relied on these notes as accurate on these key areas.

21. The Claimant's statement for Mr Kent had said that the Claimant had not been aware of any damage on the day (page 121) though he was sorry for causing it. At the meeting the Claimant was said to again have accepted that he did damage the tank (page 128,131), consistent with that earlier statement. I find that he did say this at the meeting (although by the time of the Tribunal hearing he was saying he did not and that what he had meant to say on page 121 was 'if' he had damaged the tank he was sorry for that) because by now he had also been told by Mr Kent that the repair bill was around £4,000 such that it was likely he accepted that he caused that damage given he had accepted he made a wrong call and had cocked up. It was therefore likely that the Claimant accepted in this meeting that it was he who damaged the tank, because there was damage and no other explanation, albeit he did not know on the day that he had. It was also consistent with saying that he was wrong and cocked up the job to accept that the damage was done during the lift by him. The Respondent therefore reasonably concluded he was accepting that he caused the damage because that is what he was saying at this time. Given that damage to the tank had been caused and this acceptance by the Claimant, there was no requirement for to Respondent to investigate whether the damage was caused by him (ET1 para 19) as it reasonably concluded it had been.

22. I find that the Claimant was told to go home at the end of the meeting (page 130) because they had finished and were not going to wait for Mr Waller. It was therefore not the case that the Claimant had stormed off before the meeting had ended as is the implication in para 5 of Mr Waller's witness statement. Mr Waller said in his oral evidence that the Claimant had walked out and the meeting had not been concluded but I find that it had and the Claimant had been told to go home and await a phone call. The Claimant was rude and aggressive as he left (consistent with Mr Labanauskas reporting seeing that aggression in the yard) but the meeting was over. It was not clear why Mr McEvoy concluded that the Claimant had quit his job (page 132) when he had been told by him to go home and await a further call; whilst the Claimant was angry and upset in the yard in front of Mr Labanauskas it was somewhat of a leap that those angry words about the Respondent were the Claimant telling the Respondent that he was resigning.

23. The Claimant was told he would be paid for the rest of the day (page 130, not an area of the notes in dispute) and to await a call later that day. It was strange to say that he would be paid for the rest of the day as that raised the implication as to what would happen the next day. Whilst I find that a decision to dismiss had not already been made it was a very inept thing to say. I find that Mr McMichael did not say to the Claimant that Mr Kent and Mr Waller said 'its time to go our separate ways' (Claimant's witness statement para 10) because I have found that no such decision had been made prior to this meeting. However I find that Mr Michael did say that Mr Kent and Mr Waller took a serious view of the matter, because they did.

24. As regards the issue of the Claimant's lorry, I find based on the Claimant's oral evidence that he was aware that his current lorry was due to be replaced and that the intention was to allocate him a new or different lorry. The Claimant's removal of his personal possession from his lorry that day was because he was changing lorries in any event.

25. The Claimant said that Mr Waller called him later on 3rd November 2016 to ask for the return of his company phone and tachograph equipment. Given that Mr Waller's account was that he was trying to get hold of the Claimant in the days after the meeting on 3rd I find that this conversation did take place on 3rd November taking into account the Claimant had been told to expect a call later that day. In addition Mr Waller (witness statement para 7) said that the Claimant had contacted a colleague to arrange the return of equipment and the Claimant would not have done so unless he had been asked to return it by Mr Waller.

26. Telling the Claimant that he had to return equipment when on Mr Waller's own account the disciplinary process was incomplete, gave the impression that Mr Waller had made up his mind that the Claimant was going to be leaving. I find that given Mr Waller's subsequent misinterpretation of what was going on (he was to go on to say that the Claimant had constructibly and unilaterally dismissed himself, page 138) he had formed the view that the Claimant was going to be leaving one way or another. Mr Waller was at this stage attributing that to the Claimant in effect baling out of the disciplinary process - in his view that the Claimant had left the meeting on 3rd November before it was finished and stormed out rudely and had been heard swearing about the Respondent in the yard. I therefore construe the request for return of equipment as consistent with Mr Waller's view at the time that the Claimant was not co-operating and in effect heading for a resignation or already having resigned. I therefore find that it does not show that Mr Waller had decided to dismiss but was again an inept statement showing that Mr Waller did not have a grasp on how the meeting with the Claimant had ended and what legally was going on in terms of what might be construed as a resignation and what is not a resignation.

27. After that call on 3rd November I find that there was no contact between the Claimant and Mr Waller until Mr Waller got a message to the Claimant via Steve Owers who he heard had been in touch with the Claimant. Mr Waller said he had made multiple attempts to contact the Claimant and said he had phone records to show this but these had not been disclosed or produced at the Tribunal hearing. Once the Claimant had posted his letter dated 7th November 2016 (page 134) I find it likely that he would not return calls because he had written formally wanting a formal written reply as to the outcome of the disciplinary meeting on 3rd November 2016. Given the

absence of any documentary evidence that multiple calls and texts were made I find that although there may have been calls or texts they were not numerous and that the Claimant although possibly not returning a call or a text was waiting for a reply to his letter. I therefore find that the Claimant was waiting for a reply to his letter and not avoiding Mr Waller, though both were slightly at cross purposes because Mr Waller did not know the Claimant had been in touch by letter till he received that letter.

28. Having got in touch via Mr Owers the Claimant met with Mr Waller on 9th November 2016, an important meeting of which there are no notes or minutes. Mr Waller said he had not by now received the Claimant's letter dated 7th November 2016 but he was aware that the disciplinary process had not been concluded and so whether the letter asking for an outcome had been received or not was not material as to its content, though it was material to his perception that the Claimant was not co-operating by not getting in touch. He told the Claimant that he was dismissed for his conduct on 8th June 2016, namely health and safety breaches; his oral evidence was that this was the reason but I find Mr Waller was also influenced by the discussions which Mr Kent had had with him and the other managers and drivers about the Claimant's attitude, which allegation had never been put to the Claimant (except very obliquely in referring to 'attitude' on page 126) or investigated in any way that the Claimant could properly respond to. Mr Waller did not give the letter at page 135 to the Claimant; I find from this letter (representing his thinking at the time as a draft letter) that Mr Waller was in a state of some confusion as to the process because he referred to the meeting on 3rd November as disciplinary but also that he was then sent home pending investigation and that investigations had now concluded when there hadn't been any more. After he received the letter dated 7th November 2016 from the Claimant, Mr Waller wrote to him to 'recap' (page 137) and said the Claimant had constructibly and unilaterally dismissed himself and criticised the Claimant for not resigning in writing but he had even on his own account dismissed the Claimant. This sea of confusion was procedurally unfair as the Claimant was likely to have been left not being quite sure what was going on and hampered his ability to see that he could formally appeal his dismissal. I find that Mr Waller did not however receive the Claimant's latter dated 7th November 2016 until after the meeting on 9th November 2016 because there would otherwise have been no reason for Mr Waller to write again to the Claimant on 14th November (page 137) given his view at the time that the Claimant had already dismissed himself.

29. The letter at page 137 also showed the level of confusion because it now referred to the meeting on 3rd November 2016 as a disciplinary meeting whereas Mr Waller had thought previously it may have been an investigatory meeting prior to further investigations (as shown by his thinking on page 135). Mr Waller quoted the Claimant as having said 'its best I go now' but whilst he may have been angry or upset and that had been reported to Mr Waller, neither Mr McMichael nor Mr McEvoy nor Mr Labanauskas quoted the Claimant as saying this and Mr Waller had the typed meeting notes. The letter at page 137 did not confirm that the Claimant had been dismissed by the Respondent even though Mr Waller said in his oral evidence that he had dismissed the Claimant at their meeting. An important consequence of this was that no right of appeal was referred to in the letter at page 137 and the Claimant was still left in some confusion as to whether the Respondent was saying it had in fact dismissed him or not as this letter suggested it had not, again hampering his ability to consider a formal appeal against dismissal.

30. The Claimant wrote to the Respondent (page 139). The Clamant said he had not known of the damage until October 2016. This letter did not expressly appeal the decision to dismiss but the Claimant had not been told he had such a right and had been told he had dismissed himself; this letter in any event clearly challenged the dismissal. There was therefore no appeal stage, a major failing, and in breach of the Respondent's own procedure (page 85, 86).

31. The Respondent breached the following aspects of the ACAS Code of Practice (2015) taking into account the above findings: para 5 (no unreasonable delay), para 9 (sufficient information given about the alleged misconduct in letter and appropriate in this case to include copies of the June and August 2016 emails and the photos; possible consequences specified in letter), para 11 (time to prepare), para 22 (inform of right of appeal), para 26 (opportunity to appeal). The Respondent's failure was unreasonable given that these principles are mostly set out in its own disciplinary policy (page 85-86). However this was not a case where no procedure at all was followed.

Findings of fact – the Claimant's behaviour on 8th June 2016

32. I find that in completing the manoeuvre of the first tank using a single sling without waiting for the second lorry he knew was coming to arrive, the Claimant acted recklessly or negligently and put himself and the others on site at risk. His oral evidence was that the others were not standing by or under the tank as he was so were not at risk but he nonetheless put them at risk. He also caused damage to the tank which resulted in an insurance claim and a lost client and put the Respondent at risk of enforcement action for health and safety breaches. He was trained, very experienced and in a supervisory role for more junior drivers and expected to set them an example and help in their training. Whilst he did not intend to cause damage and was not aware of it on the day, his actions were sufficiently serious to amount to gross misconduct taking into account an example of gross misconduct in the Respondent's procedure was actions endangering the health and safety of another employee (and by analogy here the safety of the others on the site that day.) Although the Claimant sought at the hearing to correct page 121 (final sentence) to say what he meant at the time ie that he was sorry *if* he cause the damage I find that the damage had been caused by him based on the client complaint, photos and the subsequent insurance claim.

33. Separately I find that his actions on 8th June 2016 were culpable or blameworthy because he disregarded safety requirements (affecting himself and others and a client's property) and also he went ahead with completing the manouevres of the first tank knowing that a second lorry and crane was coming, because he did not want to wait.

34. Separately I find that he would have been likely to have been dismissed in any event for his disregard for safety and his decision not to wait for the second lorry and for the damage caused, even had a fair procedure been followed. Had a fair procedure been followed he would have been likely to have been dismissed much sooner than he was because part of the unfairness was the significant delay in starting a disciplinary process; this is not therefore a case where his employment would have been terminated at a later date than it was.

35. It was put in submissions on behalf of the Claimant that this was a case where it was not possible to try and construct what might have happened had a fair procedure been followed by the Respondent, given the multiple failings by the Respondent. I find that whilst there were a number of serious failings in the way the Respondent dealt with the Claimant's dismissal, it is still possible to sensibly construct what might have happened because of the Claimant's acceptance in his written statement as to at least some of his failings, the written evidence of the June and August 2016 emails and the photos, his lack of a reasonable explanation (or an explanation at all) as to why he had failed to wear his PPE (especially his hard hat) whilst standing under a large tank and the fact that damage had been caused to the tank causing an insurance claim and loss of a valued client. All these point to that the Claimant would have been dismissed in any event even had a fair procedure been followed.

36. However weighed against that is Mr Kent's oral evidence that he was horrified when he found out that the Claimant had been dismissed, was surprised and disappointed and his oral evidence that he valued the Claimant as a very long term employee. The likely scenario had a fair procedure been followed was that Mr Kent might have heard an appeal against dismissal (based on his oral evidence that it was usually either him or Mr Waller). It therefore follows that Mr Kent might have heard an appeal and then allowed an appeal even if the Claimant had been dismissed because he might take the view, as he had before, that the Claimant's behavior was stupid and wearing what Mr Kent called his 'illogical head' when he let himself down from time to time. However weighed against that was his oral evidence of how seriously Mr Kent viewed the incident on 8th June 2016 and his awareness of the possible serious consequences of breaches of health and safety rules including the death or serious injury of an employee and hefty fines.

37. Taking all these factors into account I assess the chance of the Claimant having been dismissed in any event had a fair procedure been followed as 75%, allowing for the chance that Mr Kent would have heard his appeal against dismissal and then not upheld a prior decision to dismiss, taking into account his long service.

Relevant law - unfair dismissal and breaches of ACAS Code of Practice

38. The relevant law as regards the unfair dismissal claim is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal), the test in *BHS v Burchell [1978] IRLR 379* and the range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 and as that test applies to the reasonableness of the extent of an investigation, *Sainsburys v Hitt* [2003] IRLR 23.

39. The ACAS Code of Practice (2015) applied to the dismissal. s207A Trade Union & Labour Relations (Consolidation) Act 1992 provides that an unreasonable failure to comply with the Code by the employer can, if it is just and equitable to do so, result in an increase to compensation by up to 25%.

40. It was raised in submissions on behalf of the Respondent that the uplift did not apply to the basic award but only to the compensatory award because s124A Employment Rights Act 1996 (order of adjustments) refers to s118(1)(b) and s123 and that is a reference to the compensatory award. This is the correct interpretation and therefore any adjustments are limited to the compensatory award.

41. *Norton Tool Co v Tewson* [1973] 1WLR 45 applied to the Claimant's losses for the 12 weeks of his notice period such that these should form part of the compensatory award even though he found higher paid new employment after 2 weeks and thereby mitigated his losses after that point.

Relevant law - s122(2) and s122(6) Employment Rights Act 1996

42. The basic award may be reduced where the Tribunal considers that it would be just and equitable to do so because of conduct of the employee before dismissal. The compensatory award may be reduced by a proportion where the Tribunal considers that the dismissal was caused or contributed to by the employee's actions and the Tribunal considers that it is just and equitable to reduce by that proportion. The conduct in both cases must be blameworthy or culpable (*Nelson v BBC (No 2)* [1979] IRLR 346).

Relevant law – reduction under *Polkey v AE Dayton Services Ltd* [1987] IRLR 503

43. The compensatory award can be reduced if the Tribunal finds that even if a fair procedure was followed, the claimant would still have been dismissed. I considered *Software 200 Limited v Andrews* [200] ICR 82 and the need to consider whether it is not possible to reconstruct what might have happened such that no sensible prediction can be made.

Reasons – unfair dismissal and breaches of ACAS Code of Practice

44. Based on the above findings (up to para 31) I conclude that the Respondent conducted a reasonable investigation within the 'range of reasonable responses' test, taking into account what was reported in the June and August emails and shown on the photos and what the Claimant said in his written statement. Although the Claimant said that he was not provided with a risk assessment or specific instructions I have found that he was told a second lorry was on its way and he was aware (ET1 para 4) that it was a lifting job involving the lifting of two large plastic tanks onto an artic. He did not raise the lack of a risk assessment being the problem in his written statement (page 120-121) such that the Respondent might reasonably have been expected to investigate whether there should have been one done by someone else. He was trained and experienced such that if a risk assessment had really been an issue on the day he is likely to have raised it himself; his account to the Respondent was instead that he did not know the second lorry was coming which account the Respondent reasonably did not accept.

45. Based on the above findings as to the information available to the Respondent prior to dismissal I conclude that the Respondent had reasonable grounds for concluding that the Claimant had committed a significant breach of health and safety rules in completing the maneuvers on the first tank without waiting for the second lorry to arrive (including in relation to the wearing of PPE equipment) and acted dangerously on 8th June 2016 which had resulted in damage to the tank and potentially put himself and others at serious risk, based on the evidence before Mr Waller including the client's emails and photos, the Claimant's explanation given to Mr Kent in writing and what he had said broadly consistent with that written statement at the meeting on 3rd November 2016. I also conclude that the Respondent genuinely believed the Claimant had breached safety rules in a dangerous way on 8th June 2016.

46. The Respondent therefore satisfied the test in *Burchell*.

47. The Respondent had a fair reason for dismissal ie the Claimant's conduct on 8th June 2016, being his negligence or carelessness and disregard for safety practices which had resulted in damage to a client's property.

48. Turning to the procedure followed by the Respondent, I have identified the specific failures to follow the ACAS Code of Practice (2015), relevant to whether the dismissal was overall fair. In addition there were a number of other broader failures which rendered the process unfair and in breach of s98(4) Employment Rights Act 1996 being the significant delay after receipt of the June complaint, the Respondent's confusion about what stage of the process the parties were at and who was doing what and when, failure to tell the Claimant about the discussions with other managers/drivers about his 'attitude' which discussions fed into the decision to dismiss without the Claimant knowing about it, failure at any stage to provide the Claimant with a copy of the key June and August 2016 emails and photos so that he could read/see the detail himself and prepare properly, failure to allow reasonable time for the Claimant to prepare for the meeting, failure to write to the Claimant and confirm his dismissal promptly after 9th November (even though a draft was to hand), failure to tell the Claimant he could appeal his dismissal and failure to hold an appeal even in response to the Claimant's letter dated 25th November 2016 which clearly challenged the dismissal. The dismissal was therefore unfair for these reasons under s98(4) Employment Rights Act 1996. Although the Respondent is not a large employer it has a team of managers and a written disciplinary procedure of its own which if it had followed would have avoided most of these problems. The Respondent's decision to dismiss was therefore outside the range or band of reasonable responses (*Iceland)* for these reasons.

49. As regards the Claimant's losses, he found new more remunerative employment starting 2 weeks after his dismissal. Applying *Norton Tool Co v Tewson* [1973] 1WLR 45 he is therefore entitled to have those 12 weeks included as his loss of earnings for the compensatory award.

50. Given the Claimant's considerable length of service I assess the loss of statutory rights as £500 as claimed by the Claimant.

51. As regards the breaches of the ACAS Code of practice I fix the increase under s207A Trade Union & Labour Relations (Consolidation) Act 1992 at 20% on the basis that it was not a case that no procedure at all was attempted or carried out such that it would not be just and equitable to increase by the maximum of 25%.

<u>Reasons – wrongful dismissal</u>

52. Based on the findings at para 32 above the Respondent was entitled to dismiss the Claimant with immediate effect for gross misconduct.

<u>Reasons - s122(2) and s122(6) Employment Rights Act 1996</u>

53. I fix the reduction under s122(2) and 123(6) as 75% in the light of the Claimant's serious failings which put himself and potentially others at risk and which resulted in damage to a client's property and the loss of a valued client (the culpable or blameworthy conduct). It is just and equitable to reduce the basic award on this basis.

54. This conduct was the cause of his dismissal for the purposes of s 122(6) and it is also just and equitable to also reduce the compensatory award by 75% because the Claimant was largely to blame for his dismissal, it arising largely out of his own actions but not wholly so because a contributory factor was also the views of colleagues about his attitude which on the limited evidence before me on this issue was not culpable or blameworthy.

55. In assessing what is just and equitable for both reductions, I have taken into account that there was a significant delay in starting disciplinary action against the Claimant, such that he might reasonably have thought that no disciplinary action was going to be taken.

Reasons – *Polkey* deduction

56. Based on the above findings at paras 34-37 above the Claimant's compensatory award should be reduced by 75% on the basis that is the % chance he would have been dismissed in any event had a fair procedure been followed.

Compensation

(A) Basic Award

£12,250.95

Less reduction under s122(2) ERA 1996 at 75% (£9,188.21)

= £3,062.74

(B) Compensatory award

12 weeks = £4,360.20

Plus loss of statutory rights £500

= £4,860.20

Reduction under *Polkey* at 75% (£3,645.15)

= £1,215.05

Plus ACAS Code of practice uplift at 20% (£243.01)

= £1,458.06

Less reduction under s123 (6) ERA 1996 at 75% (£1,093.54)

= £364.52

Total A plus B = £3,427.26

Employment Judge Reid

16th October 2017