EMPLOYMENT TRIBUNALS

Claimant: **Mr P Morley**

Respondent: **Lordan UK Limited**

Heard at: **Cardiff** **On: 25, 26 and 27 April 2022**

Before: **Employment Judge R Harfield**

Representation:
Claimant: Ms Watts (the Claimant's partner)
Respondent: Mr Probert (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that:

- the claimant's complaints of unfair dismissal, "automatic" unfair dismissal (sections 100 and 103A Employment Rights Act 1996), wrongful dismissal are not well founded and are dismissed;
- there was an unauthorised deduction from wages when the claimant went unpaid on 18, 22, 23, 24, 25 February 2021, and 1, 2, 3, 4, 8, 9,10, 11, 15, 16, 17, and 18 March 2021, but not on the other days prior to the claimant's dismissal when he went unpaid;
- No financial award is made for 18, 22 and 23 February 2021 as the wages for those days have already been repaid to the claimant. He is awarded the gross sum of **£816.62** for the other days.
- Tax and employee national insurance contributions will be due from this sum.

REASONS

INTRODUCTION

1. The claimant presented his claim form on 20 April 2021, complaining of unfair dismissal, failure to pay a redundancy payment, notice pay, holiday pay and arrears of pay. The respondent filed an ET3 response form denying the claims. The case came before EJ Sharp for case management on 21 September 2021. The redundancy payment claim was dismissed by EJ Sharp on withdrawal by the claimant. EJ Sharp made case management orders to get the case ready for this hearing. EJ Sharp also clarified the issues in the case with the parties and produced a list of issues to be decided at the final hearing. There is in fact also no holiday pay claim brought.

2. I had before me a bundle of documents extending to 346 pages, and written witness statements from the claimant, and from Mr Lancaster and Ms Jones for the respondent. I heard oral evidence from those witnesses. I also had access to two videos of the old T drill machine. I had a written skeleton argument from Mr Probert and heard oral closing comments from both parties. I have not recited the parties' closing submissions within this Judgment, but they are incorporated by reference in the discussion and conclusions below. The parties' comments were taken fully into account. References in brackets [ ] are references to the page numbers in the bundle.

ISSUES TO BE DECIDED

3. The issues to be decided were set out by EJ Sharp on liability issues (i.e. whether any of the claimant's claims are successful or not) as follows:

Unfair dismissal

1.1 Was the Claimant dismissed? Yes

1.2 Was the reason or principal reason for dismissal that the Claimant made a protected disclosure or raised health and safety concerns? If so the Claimant will be regarded as unfairly dismissed.

1.3 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct or some other substantial reason. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

1.4 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

1.4.1 There were reasonable grounds for that belief;

1.4.2 At the time the belief was formed the Respondent had carried out a reasonable investigation;

1.4.3 The Respondent otherwise acted in a procedurally unfair manner;

1.4.4 Dismissal was within the range of reasonable responses.

1.5 If the reason was Some Other Substantial Reason, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Respondent says the Claimant was unreasonably refusing to work and refusing to accept that the Respondent had made reasonable efforts to reassure him. …

Wrongful dismissal/ Notice Pay

3.1 What was the Claimant's notice period?

3.2 Was the Claimant paid for that notice period?

3.3 If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

Protected disclosure

4.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

4.1.1 What did the Claimant say or write? When? To whom? The Claimant says he made disclosures on these occasions:

4.1.1.1 18 February 2021 – the Claimant verbally raised a health and safety concern about the location and the operation of the Old T Drill on a mezzanine floor with the Production Manager Stuart Gagen, saying that it was unsafe. The Respondent accepts that this is a qualifying disclosure;

4.1.1.2 25 February 2021 – Ms Watts emailed the general email address of the Health & Safety Executive and Sharon Holmes and said the operation of the Old T Drill on the mezzanine floor was not safe – this disclosure is disputed as the Claimant did not send the email;

4.1.1.3 2 March 2021 – the Claimant verbally raised a concern to Stuart Gagen and Stuart Lancaster that the Old T Drill was juddery and should be operated on concrete. The Respondent accepts that this is a qualifying disclosure;

4.1.1.4 On or around 3 March 2021, the Claimant spoke to Sharon Holmes of HSE on the telephone and told her that the operation of the Old T Drill on the mezzanine floor was not safe and he was being asked to work it (which he was refusing to do) – not conceded;

4.1.1.5 11 March 2021 (grievance meeting) – the Claimant said that the operation of the Old T Drill on the mezzanine floor was not safe to Stuart Lancaster & Stuart Gagen – not conceded;

4.1.2 Did he disclose information?

4.1.3 Did he believe the disclosure of information was made in the public interest?

4.1.4 Was that belief reasonable?

4.1.5 Did he believe it tended to show that:

4.1.5.1 the health and safety of any individual has been, was being or was likely to be endangered.

4.1.6 Was that belief reasonable?

4.2 If the Claimant made a qualifying disclosure, was it made:

4.2.1 to the Claimant's employer?

4.2.2 To the Health and Safety Executive as a prescribed person under s43F and the Claimant reasonably believed that the relevant failure fell within matters for which the HSE is a prescribed person and the information disclosed (and any allegation within it) are substantially true.

If so, it was a protected disclosure.

Health & Safety

5.1 Did the Claimant bring to his employer's attention by reasonable means circumstances connected to his work? The Tribunal will decide:

5.1.1 The Claimant says he raised his concerns on these occasions:

5.1.1.1 18 February 2021 - the Claimant verbally raised a health and safety concern about the location and the operation of the Old T Drill on a mezzanine floor with the Production Manager Stuart Gagen, saying that it was unsafe;

5.1.1.2 2 March 2021 - the Claimant verbally raised a concern to Stuart Gagen and Stuart Lancaster that the Old T Drill was juddery and should be operated on concrete;

5.1.1.3 11 March 2021 (grievance meeting) – the Claimant said that the operation of the Old T Drill on the mezzanine floor was not safe to Stuart Lancaster & Stuart Gagen.

5.2 Did the Claimant reasonably believe these circumstances were harmful or potentially harmful to health & Safety?

Unauthorised deductions

6.1 Were the wages paid to the Claimant on [to be confirmed] less than the wages he should have been paid?

6.2 Was any deduction required or authorised by statute?

6.3 Was any deduction required or authorised by a written term of the contract?

6.4 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

6.5 Did the Claimant agree in writing to the deduction before it was made?

6.6 How much is the Claimant owed?

THE LEGAL PRINCIPLES

Protected Disclosure Dismissal ("whistleblowing")

4. Under section 43A Employment Rights Act 1996 ("ERA"), a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. A qualifying disclosure must fall within section 43B ERA and also must be made in accordance with any of sections 43C to 43H. Section 43B says:

"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

...(d) that the health or safety of any individual has been, is being or is likely to be endangered,

5. Section 43C provides:

"Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

6. Section 43F provides that a disclosure can be a qualifying disclosure if made to a prescribed person and the worker reasonably believes that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and that the information disclosed, and any allegation contained within it, are substantially true. The HSE is a prescribed person.

7. There are therefore a number of requirements to be met before a disclosure becomes a qualifying disclosure. First, the disclosure must be of information capable of tending to show one or more of the types of wrongdoing set out at Section 43B. In order to be such a disclosure "*It has to have sufficient factual content and specificity such that it is capable of tending to show one of the matters in subsection (1)"* (Kilraine v London Borough of Wandsworth [2018] ICR 185). Determining that is a matter for evaluative judgment by the Tribunal in light of all of the facts of the case. The question is whether, taking into account the evidence as to context, the information communicated is "capable" of satisfying the other requirements of the section i.e., could a worker reasonably believe that it tended to show one of the specified matters (Twist v DX Limited UKEAT0030/20).

8. Second, the worker must believe the disclosure tends to show one of more of the listed wrongdoings. Third, if the worker does hold such a belief it must be reasonably held. Here, the worker does not have to show that the information did in fact disclose wrongdoing of the particular kind relied upon. It is enough if the worker reasonably believes that the information tends to show this to be the case. A belief may be reasonable even if it is ultimately wrong. It was said in Kilraine that this assessment is closely aligned with the first condition and that: "*if the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable to tending to show that listed matter, it is likely that his belief will be a reasonable belief."*

9. Fourth the worker must believe that the disclosure is made in the public interest. Fifth, if the worker does hold such a belief, it must be reasonably held. The focus is on whether the worker believes the disclosure is in the public interest (not the reasons why the worker believes that to be so). The worker must have a genuine and reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant motive for making disclosures: Chesterton Global Ltd v Nuromhammed [2018 ICR 731. In particular it was said "*I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."* The Tribunal

should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. The Tribunal must recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest. Sixth, the disclosure has to be made to an appropriate person (such as the employer or a prescribed person).

10. Section 103A ERA provides:

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

11. In a protected disclosure unfair dismissal claim, the employer bears the burden of proof of showing the reason for the dismissal. Where an employee disputes the reason given by the employer, an evidential burden arises to cast some doubt on the employer's reason. The employee has to demonstrate some evidential basis for questioning the employer's reason. The stages as explained by the Court of Appeal in Kuzel v Roche Products Ltd are: (a) has the claimant shown that there is a real issue as to whether the reason put forward by the respondent was not the true reason? (b) if so, has the employer proved the reason for dismissal? (c) If not, has the employer disproved the section 103A reason advanced by the claimant? (d) if not, dismissal is for the section 103A reason. However, if the employer does not show to the satisfaction of the Tribunal their asserted reason, it does not follow that the Tribunal is obliged to find the reason is as put forward by the claimant. That said, the Employment Appeal Tribunal also endorsed the proposition that in practice in many cases the Tribunal can make findings of fact about what was operating in the mind of the decision makers and therefore, in practice, only a small number of cases will ultimately turn upon a burden of proof analysis.

Health and Safety Dismissal

12. The List of Issues identifies that the claimant's health and safety dismissal complaint is brought under Section 100(1)(c) of the Employment Rights Act 1996, which provides:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that – …

(c) being an employee at a place where –

(i) there was no such [health and safety] representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by

those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety;

13. In **Balfour Kirkpatrick Ltd v Acheson [2003] IRLR 683** the Employment Appeal Tribunal said there were three elements to a section 100(1)(c) complaint. First it is necessary to show it was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee. That point is not in dispute in this case. Secondly, the employee must have brought to the employer's attention by reasonable means the circumstances that he reasonably believes are harmful or potentially harmful to health or safety. Thirdly, the reason for dismissal, or at least the principal reason if there is more than one, must be the fact the employee was exercising his rights.

14. In **Oudahar v Esporta Group Ltd [2011] IRLR 730** it was confirmed when assessing whether the claimant brought to attention circumstances he reasonably believed were harmful or potentially harmful to health or safety, the focus is on the reasonableness of the employee's belief. It was said "*the statutory provision directs the tribunal to consider the employee's state of mind when he engaged in the activity in question"* i.e. the employee's state of mind when bringing the matters to the attention of the employer. The test does not require the Tribunal to consider whether the employer agreed with the employee. It was said:

"*Sections 100(1)(c)-(e) do not protect an employee unless he behaves honestly and reasonably in respect of matters concerned with health and safety. It serves the interests of health and safety that his employment should be protected so long as he acts honestly and reasonably in the specific circumstances covered by the statutory provisions. If an employee was liable to dismissal merely because an employer disagreed with his account of the facts or his opinion as to the action required, the statutory provisions would give the employee little protection."*

15. The Employment Appeal Tribunal again emphasised the importance of breaking the analysis down into its constituent elements, looking first at the actions and beliefs of the claimant within its statutory footing, before going on to consider whether the sole or principal reason for dismissal was that the employee had engaged in the protected activity in question.

"Ordinary Unfair Dismissal"

16. Section 94 Employment Rights Act 1996 ("ERA") gives an employee the right not to be unfairly dismissed by their employer. Section 98 ERA provides, in so far as it is applicable:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--
…
(b) relates to the conduct of the employee…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

17. Under section 98(1)(a) of ERA it is for the employer to show the reason (or the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee.

18. The reason or principal reason for a dismissal is to be derived by considering the factors that operate on the employer's mind so as to cause the employer to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, it was said:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

19. In considering whether or not the employer has made out a reason related to conduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303. In particular, the employer must show that the employer believed that the employee was guilty of the conduct. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances.

20. The tribunal must have regard to the guidance set out in the case of Iceland Frozen Foods v Jones [1982] IRLR 439. The starting point should be the wording of section 98(4) of ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct; not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

21. The band of reasonable responses test also applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).

22. The band of reasonable responses analysis also applies to the assessment of any other procedural or substantive aspects of the decision to dismiss an employee for a conduct reason. Any defect in disciplinary procedure has to be analysed in the context of what occurred. Where there is a procedural defect, the question that always remains to be answered is did the employer's procedure constitute a fair process? A dismissal may be rendered unfair where there is a defect of such seriousness that the procedure itself was unfair or where the results of defects taken overall were unfair (Fuller v Lloyds Bank plc [1991] IRLR 336.) Procedural defects in the initial stages of a disciplinary process may also be remedied on appeal provided that in all the circumstances the later stages of the process (including potentially at appeal stage) are sufficient to cure any

deficiencies at the earlier stage; Taylor v OCS Group Ltd [2006] EWCA Civ 702. That case also importantly serves as a reminder that ultimately the task for the tribunal as an industrial jury is a broad one. The tribunal has to ultimately consider together any procedural issues together with the reason for dismissal. It was said:

"*The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. So for example, where the misconduct which founds the reason for the dismissal is serious, an ET might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the ET might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee."*

23. A finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Generally to be gross misconduct the misconduct should so undermine trust and confidence that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) it is for the tribunal to consider:

    (a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct; and

    (b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, matters such as the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

Wrongful dismissal

24. Wrongful dismissal claims are breach of contract claims. The claimant was summarily dismissed without notice. A dismissal in breach of the contractual term as to notice will be wrongful unless it was in itself a response to the claimant's own repudiation of the contract. The burden therefore falls on to the respondent to show that there was a repudiatory breach of contract by the claimant prior to the date of dismissal in order to avoid liability for what would otherwise be a breach of contract in not giving notice. The classic statement of what constitutes a repudiatory breach is in Neary v Dean of Westminster [1999] IRLR 288 where it was said that the conduct:

"*must so undermine the trust and confidence that is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment*."

25. Unlike an unfair dismissal claim, which focuses on whether the employer's decision to dismiss was within the range of reasonable responses, in a wrongful dismissal claim, I have to assess for myself on the evidence before me whether the claimant was in repudiatory breach of contract i.e., whether the claimant was in sufficiently serious breach of contract so as to warrant immediate termination.

Unauthorised deduction from wages

26. Section 13 of the Employment Rights Act 1996 states: -

"(1) An employer shall not make a deduction from wages of a worker employed by him unless –

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) The worker has previously signified in writing his agreement or consent to the make of the deduction.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion"

27. Case law has established that for a sum to be "properly payable" to the claimant, the claimant has to have a legal entitlement to the sum. The legal entitlement is not necessarily contractual – although that is often the basis of the entitlement.

FINDINGS OF FACT

28. It is not necessary for me to decide every factual dispute between the parties to decide the issues in the case. Where I do need to make findings of fact, I do so applying the balance of probabilities.

29. The respondent is a company that makes radiator components for the car and construction industry. It employs around 40 people. Mr Lancaster is the managing director. The claimant was employed as a machine operator from 2 January 2014 until 6 April 2021. He had also previously worked for the respondent prior to that.

30. A mezzanine floor was installed in the respondent's premises in or around December 2018. It was signed off by PWC Building Control Services Limited on 19 June 2019 [75]. There is a dispute between the parties as to the purpose of the mezzanine floor when originally planned and constructed. The claimant says (relying on his own experience of what he initially saw the floor used for, documents that were later disclosed to him, and subsequent comments by the HSE) that it was for light storage use. Mr Lancaster says it was always designed and built to house manifold machines, but that originally it was temporarily used for storage, until machines started to be moved up there.

31. I have noted the subsequent conclusions by the HSE that the structure was designed and erected for light storage use only, and not designed for employees to use as a regular workstation or workspace [291]. It is obviously important I give due regard to that, but the HSE's findings are not binding upon me, and I ultimately do not know the totality of the evidence they had before them. I have not heard witness evidence from the HSE.

32. On all the evidence before me, I accept the evidence of Mr Lancaster and find on the balance of probabilities, the mezzanine had been planned from the outset to be used to house machines and therefore to be used as a workspace. Certainly, I accept that was Mr Lancaster's genuine understanding throughout. I consider it likely that Mr Lancaster would always have known what his intention for the space was and he has been consistent throughout in stating that it was built to hold machinery. The mezzanine was designed and built as a space with access as opposed to a storage only space with simple ladder access (compared with the respondent's other mezzanine used only for storage which only has ladder access). It was also planned and built with fire retardant materials to accommodate brazing activities. I accept that the designer, Amapola's, use of the term "light storage use" refers to their weight/load classification as opposed to demarking the purpose of the structure [319]. In particular, it could bear ½ tonne per meter squared. Mr Saveker from Amapola also confirmed in a subsequent email of 9 August 2021 [296] that "*the floor was designed for a work area. This is why there are 2 means of escape and it is part checker plated and also fire rated.*" I also do not find that when, in the telephone conversation between the claimant and Mr Lancaster on 23 February 2021, Mr Lancaster is recorded as saying "*Yeah yeah yeah*" in response to the claimant saying "*they've designed it but not for machinery. You know that yourself"* he was agreeing with that proposition by the claimant. I find it was a turn of phrase/ a filler in conversation that people often use. Mr Lancaster then went on to say "*but that's what it was designed for, for machines to be up there"* which is consistent with his assertion that he believed it had been designed to hold machines.

33. At some point after the structure was built, machinery started to be moved to the mezzanine floor. This included the new T drill, which the claimant operated on the mezzanine floor without issue. The old T drill was later also moved up, most probably around the middle of 2020. Due to the weight limits as to what could be

placed on the mezzanine floor the old T drill had to be spaced at least 1 metre from the new T drill. This meant the old T drill was positioned between two main structural steels. It led to flex in the flooring of the mezzanine. When the old T drill was operating it caused both a swaying movement in the floor and jerkiness in the old T drill machine itself. I think it likely, and find, the claimant witnessed the jerking of the machine and the movement of the floor at the time and it troubled him.

34. Mr Lancaster decided to strengthen the floor. In the summer of 2000 he discussed this with the designers and installers of the mezzanine, Amapola. Due to Covid restrictions the site survey did not take place until 18 January 2021 [131], and Mr Lancaster commissioned the work in February 2021 following a quote to insert steels under the machine [132]. Mr Saveker from Amapola said at the time "*The machine is in the weight parameters but the feet and movement take it slightly over and cause the vibration.*" In October 2021 he later corrected that to say [134] that the original wording he used was poor and "*The machine weight is & was within the loading capacity of the floor as proved by the calculations provided. Due to the vibrations from the machine, this was causing a swaying movement to the floor. The remedial work to the floor was purely to help eradicate this movement. At no point was the mezzanine unsafe which has been agreed with HSE.*"

35. Mr Lancaster's evidence was also that he was in regular contact with Amapola at the time of the events in question. The point I take from this, is that I do not consider that as at February or March 2021 Mr Lancaster thought or believed that the old T drill was over the weight parameters of the loading of the mezzanine. Support for this also comes from the email Mr Saveker sent Mr Lancaster on 8 March 2021 [135 – 136] where he stated "*Your machine is approximately 2m x 1m weighing circa 1600kg, bearing plates have been added underneath to spread the load across the decking area. When spread evenly (i.e. 4 feet to the machine, each in its own 1m sq, the floor loading is close but should not be exceeding this 500kg loading per sq. m. Movement will always occur on a mezzanine, this is a similar effect to high buildings which are designed to move slightly with high winds."*

36. The old T drill was initially not in use on the mezzanine floor. One reason was that the old T drill had suffered damage in the move to the mezzanine floor and needed two new cards. There was not, however, initially a problem as the new T drill was in use. However, on a date in February 2021 the new T drill then broke down. The claimant initially did brazing work whilst efforts were made to fix the new T drill. Having a working T drill in operation was important as much of the factory work was dependent on work being produced by the T drill.

37. On 18 February 2021 Mr Gagen, the production manager, asked the claimant to stop brazing work and instead use the old T drill on the mezzanine floor. The claimant refused stating that it was unsafe and the machine was bouncing all

over the place. They went to Mr Gagen's office. It is not in dispute that he told the claimant that the mezzanine floor was safe. Mr Gagen was not a witness before me but his note is at [72] of the bundle where he records saying that the floor was safe as it had been designed by experts and there was no issue with the floor collapsing or any danger to personnel working on or under the mezzanine floor. On the balance of probabilities I consider it likely therefore the claimant had expressed concerns to Mr Gagen that the floor could collapse and there was a risk of injury. The claimant said he would not operate the old T drill as it was unsafe. Mr Gagen therefore told the claimant to clock out and go home. The clamant said he would book a holiday. Mr Gagen refused this, saying the day would be unpaid. The claimant then went home.

38. The claimant was next due in on Monday 22 February 2021. He was asked again to operate the old T drill. The claimant asked if the situation with the T drill and the mezzanine floor was still the same and he was told that it was and the mezzanine floor was safe. Mr Gagen's note [73] records him saying again the floor had been designed by experts and there was no issue with the floor collapsing. The claimant denies that was said. On the balance of probabilities, I find it likely it was said. There is nothing before me to say this was not a contemporaneous note by Mr Gagen and it is the only written record available of what was allegedly said. The explanation apparently given by Mr Gagen also mirrors that given previously on 18 February. Again, the claimant refused to operate the old T-drill saying it was unsafe. Mr Gagen told him it was his role to operate it and if he was unwilling to do so the claimant should clock out and go home. The claimant said he would, but that the respondent should expect a telephone call as he was intending to take it further.

39. On 23 February 2021 the claimant and Mr Lancaster had a telephone conversation. There is a partial transcript at [77 - 79] as the claimant recorded the call without Mr Lancaster's knowledge. Mr Lancaster's own handwritten notes are at [80]. Mr Lancaster asked the claimant to come in for an informal meeting to talk about the situation, he said he could show the claimant what they had in terms of the design of the floor. The claimant said, "*well the thing is I'm not running that machine up on that floor so whatever you show me I wont be running the machine because its not safe."* Mr Lancaster said it had been designed by professional engineers. The claimant said they had designed it, but it had not been designed for machinery. He mentioned water coming through the ceiling, and potential issues with an acid bath and said "*all the floor is bouncy and then you've got machines up there."* Mr Lancaster said again that it had been designed for machines to be up there, which the claimant did not agree with. Mr Lancaster said the machine was 1.6 tonnes and the area could take 6 tonnes so it was way under its weight limit. The claimant said he did not think it was, because he did not think it was safe up there. He said he would come into work but he would not be going up there.

40. Mr Lancaster told the claimant that was the role for him and if the claimant was refusing to do it then there was no other work for him to do. The claimant said if it came to that then Mr Lancaster had to do what he had to do but he would not work up there. Mr Lancaster said he considered it a reasonable request for the claimant to do the work. The claimant said again he would not put himself and others at risk, and if he lost his job it was up to Mr Lancaster.

41. Mr Lancaster said it was safe up there, professional people had signed it off and had done the calculations. He said he had checked with them since and they had confirmed it was within the limits of the design. I note that this is contemporaneous evidence to confirm that Mr Lancaster was in contact with Amapola at the time and I accept that he had done so, confirming the way to calculate the spacing and loading on the mezzanine floor which he noted in his handwritten annotations on [74]. Returning to the discussion with the claimant, Mr Lancaster said in his mind it was safe for the claimant to operate the machine. The claimant said again he had run the machines for years and they had never been like that, there were people underneath and if it did come through then it would be very nasty, so that he just could not do it. He said if the new T drill was fixed then fair enough, but he would not go on the mezzanine floor "*unless you have the floor reinforced like you said you was gonna do."* Mr Lancaster said the floor reinforcement was not from a safety issue or the floor falling down or the machine falling through, but was to limit the amount of movement that was going on. He said the movement was not a safety issue but to make people on the floor more comfortable. The claimant said that when it was first set up Mr Gagen had said to turn it off, as it was not safe and that Mr Lancaster said they needed to reinforce the floor, but now they were saying something totally different. Mr Lancaster said the old T drill had not been running because it had a broken card. The claimant agreed there had been a broken card, but said that when the machine was run it was shaking so much that Mr Lancaster had said the floor had to be reinforced. Mr Lancaster said the claimant had misunderstood him and that it was not from a safety point of view, and that he did not remember saying it was not safe. It was the claimant's understanding, however, that one of the reasons the old T drill had not been in use was because of the movement that had been experienced.

42. It was agreed that Mr Lancaster would scan and text to the claimant the diagram showing the loadings and a certificate signing off the structure [74, 75, 76]. Mr Lancaster did so, also sending copies in the post when requested to do so. The claimant said he was not coming in for the rest of the week. It is recorded by Mr Lancaster in his contemporaneous note from that day [80], and I accept that was said by the claimant. I do not find Mr Lancaster decided to live with the claimant's announcement in that regard, so that the claimant had time to look at the paperwork and consider his position.

43. On 25 February 2021, the claimant phoned Caerphilly Council to express concerns about the safety of the mezzanine floor. They referred the contact on to

the HSE. It remains unclear to me exactly what contact took place between the claimant, Ms Watts, and the HSE. The claimant's witness statement says that the HSE initiated the contact by sending an email to Ms Watts' email address, as the claimant does not have one. He says in his witness statement that he then spoke with Ms Holmes of the HSE but he does not set out a description of what he said. The list of issues (which was prepared by EJ Sharp on the basis of what Ms Watts said at the case management hearing), records that Ms Watts emailed the general email address of the HSE and Ms Holmes, saying that the operation of the old T drill on the mezzanine was not safe. The claimant in his oral evidence accepted that such an email was sent, saying he had dictated it and Ms Watts had typed it. He said he could give no reason as to why that email to the HSE had not been disclosed by him in these proceedings. Given that evidence and what Ms Watts said previously to EJ Sharp, it therefore seems likely to me that such an email was sent.

44. On 26 February the HSE wrote to Mr Lancaster saying "*I am writing to you regarding an alleged dangerous structure at the above site, that has been brought to our attention.*" Mr Lancaster was asked for details of the mezzanine floor structure including design drawings and specifications requested for the floor design, details of the machines on the mezzanine, and what the manufacturers installation instructions were on where the machines should be sited and their vibration levels when in use. He was given until 8 March to reply [267]. It therefore seems likely to me, and I find, that the email that was sent to the HSE alleged that the mezzanine floor was dangerous or unsafe, that there were machines sited on it that should not be there as it was not designed for that purpose, that they were too heavy, and that they were creating vibrations.

45. On 1 March 2021 Mr Lancaster was expecting the claimant in work but the claimant did not attend. Mr Lancaster wrote to the claimant saying "*I am writing to you regarding the fact you are currently absent without leave."* Mr Lancaster set out the history from his perspective, and confirmed he had sent the claimant documents received when the mezzanine floor was signed off to satisfy the claimant that it was safe and suitable for the purposes it was being put to. Mr Lancaster referred to the fact he had wanted to discuss this with the claimant in a meeting but the claimant had refused to meet. Mr Lancaster said that the weight the report stated that the mezzanine could support in terms of machine load was 6 tonnes and the old drill machine was 1.6 tonnes so they were satisfied they were operating well within safe margins. He said this had been verified by a competent third party. Mr Lancaster said he remained happy to meet with the claimant to discuss the issue and to understand if there were any other genuine health and safety concerns. He said the claimant was currently absent without leave which was likely to become a disciplinary matter and that a failure to follow reasonable instructions may amount to insubordination which if serious enough could result in summary termination of employment. He told the claimant the claimant was required to report for duty on the next shift following receipt of the

letter, saying again he was willing to discuss any further concerns the claimant had. He said as the claimant was a long serving and valued member of the team it was not be his preference to have to take disciplinary action [83-84].

46. The claimant received the letter and duly attended work on 2 March 2021. The claimant again refused to operate the old T drill and refused to work on the mezzanine floor whilst the old T drill was running up there, saying he considered it to be unsafe. Mr Lancaster explained again the design information he had provided about the mezzanine floor and the weight of the machine, and that it showed the strength of the floor was above the T drill's weight. The claimant did not change his position and so he was again sent home. Mr Lancaster wrote to him again on 2 March [85-86] summarising what had happened and saying he and Mr Gagen had discussed whether there was alternative work available but there was not. He said they looked at moving someone else on to the T drill but that the claimant was not trained to cover that person's role. Mr Lancaster said that hopefully the floor strengthening would take place on 11 and 12 March. He said they were also slowing the acceleration and deceleration parameters so the machine would be less jerky and he hoped that would be completed the next day. He said "*I hope that you can change your mind in the meantime and bring yourself to operate the machine bearing in mind these measures. I am also investigating the possibility of getting a report from a Health and Safety expert for your reassurance. This will take time. In the meantime I reiterate that we have every confidence in the safety of the mezzanine floor which has been constructed to structural engineers' calculations and signed off as safe."* Mr Lancaster also confirmed that the claimant was expected in work the next day and that not doing so was likely to become a disciplinary matter.

47. The claimant attended work again on 3 March but was again sent home without pay when he refused to operate the old T drill. The same happened again on 4 and 5 March 2021.

48. On 8 March 2021 Mr Saverker from Amapola emailed Mr Lancaster [135-136] to say that calculations would follow shortly. He said "*The existing mezzanine floor was designed, manufactured and installed to create a loading of 4.7kn which equates to 500kg per sq metre… Your machine is approximately 2m x 1m weighing circa 1600kg bearing plates have been added underneath to spread the load across the decking area. When spread evenly (i.e. 4 feet to the machine, each in its own 1m sq, the floor loading is close but should not be exceeding this 500kg loading per sq. m. Movement will always occur on a mezzanine, this is a similar effect to high buildings which are designed to move slightly with high winds."* Mr Lancaster replied to Mr Saveker to say "*All is good as it is within limits but a bit closer than when you told me to take the surrounding 1m^2 areas and add them giving 6 tonnes. But never mind all is OK. What will the weight limit be after the floor is strengthened?"* Again this shows that the initial reassurance that Mr Lancaster tried to give to the claimant was based on Mr Lancaster's exchanges with Amapola.

49. On 8 March Mr Lancaster replied to the HSE [243] with design drawings and details of the mezzanine floor. He also forwarded on photographs and a video of the old T drill and other documents requested. He explained the loading of the old T drill was 6 tonnes and that the whole floor could support 83 tonnes when evenly distributed.

50. On 8 March the claimant was again sent home and again on 9 March. On 9 March the acceleration was reduced on the old T drill to reduce the jerkiness and the claimant was sent a text message inviting him to come and see it for himself.

51. On 10 March 2021 the claimant lodged a written grievance [93-94]. It said "I have *concerns regarding the operation of the Old T Drill machine whilst situated on the mezzanine flooring.*" The claimant said whilst in operation the machine was jerky and moved around which has raised concerns about its stability. He said when the machine had previously been on the concrete flooring it was secure and stable and did not jerk around. The claimant referred to the figures given of the drill weighing 1.6 tonnes against flooring to support 6 tonnes but questioned whether the weight of other machinery had been taken into account, and whether with the combined weights Mr Lancaster was confident they were operating within safety margins. He asked for documents stating the flooring was safe and suitable for the purpose it is being put to. The claimant said he had previously worked on the mezzanine floor and had felt safe doing so, but he had not operated the old T drill and it was not in operation. He said he did not have concerns about the safety of other machines and his sole concern was the operation of the T drill whilst other machines were being operated on the mezzanine flooring. The claimant denied that he was failing to follow a reasonable management instruction. He said whilst the old T drill was in operation he had genuine concerns about his and his colleague's safety. He said there had been no measures applied about his safety concerns. He said "*You have stated in your letter dated 2 March the floor is due to be reinforced and the machine will be operating at less capacity to reduce instability. Until these measures are applied, I am unprepared to put myself and my colleagues in what I consider to be an unsafe environment."*

52. Also on 10 March 2021 the claimant attended work and went to see Mr Gagen. Mr Gagen's note is at [92]. Mr Gagen told the claimant the ramp up and ramp down speed of the old T drill had been slowed down so there was now no jerkiness of the machine. He told the claimant to view the machine with a colleague. The claimant did so, and returned to speak to Mr Gagen. The claimant agreed that the machine was not bouncing any more. The claimant, however, said he still would not run the old T drill as he did not feel the mezzanine floor was safe. He said that once the floor had been strengthened, once a risk assessment was done, and once it had been signed off by health and safety then he would run the machine. Mr Gagen told the claimant that the design and build company had a video of the drill at its most jerky part of the cycle, and they had

provided a letter stating the floor was ok. The claimant was again told to clock out and go home.

53. Again, on 10 March 2021 Mr Lancaster wrote to the claimant acknowledging the grievance letter [90-91]. He said they had considered alternative work for the claimant but there was not work available that did not involve working on the mezzanine floor or using the old T drill. Mr Lancaster's letter said that before the grievance letter arrived, they had already discussed measures undertaken to reassure the claimant, including slowing the drill down, obtaining further comfort from those who installed the floor that it was within safety limits for the load of the machines on it, and booked work to further improve the floor. He said the paperwork had been shared with the claimant and risk assessments would be revised once the floor was adjusted. Mr Lancaster noted the claimant was not happy with the explanations, as he was still refusing to operate the drill. Mr Lancaster referred to more work being planned on the floor that week, and suggested the claimant work with them and wait and see the following week. He said the claimant's grievance would be discussed in more detail at the grievance meeting on 11 March.

54. On the evening of 10 March Mr Saveker from Amapola Limited emailed Mr Lancaster [88] with an email that was largely the same as his email of 8 March. I do not know why that content was re-sent. The claimant was given a copy of this email before the grievance meeting on 11 March.

55. The grievance meeting took place on 11 March. There are handwritten notes starting at [95] and the meeting content is also summarised in the grievance outcome letter [103-107] of 11 March.

56. The notes record the claimant saying that his main grievance was the T drill on the mezzanine was not safe and referred to the wood being placed underneath. Mr Lancaster referred to the old T drill having been slowed down so it was in essence the same as the new T drill, and that there had been a letter from the mezzanine floor company saying it was capable of supporting the weight and operation of the old T drill. Mr Lancaster told the claimant the designer had seen a video of the drill operating at its most jerky point in the cycle. Mr Lancaster said the wood was not being used to support the machine but to try and reduce the jerkiness. The claimant referred to the floor having been built for storage and not for machines. Mr Lancaster disagreed saying it had been designed and built for manifold manufacturing machines, some of which had not yet been moved up there. He said it had been initially used just as storage just for convenience. He said the floor was capable of taking approximately 80 tonnes distributed evenly across it. Mr Lancaster explained the floor was having additional structural beams added beneath the T drill because the drill was between two main support beams, meaning there was more flex in the floor. He said the beams were being added to make the floor more rigid and reduce the jerkiness and not because the

floor was unsafe without them. He said this was shown by the designer's email which had been given to the claimant.

57. On or around the day of the grievance meeting work was being done to insert the additional structural beams beneath the old T drill. A fork lift truck was used to raise the floor to insert the beams. This troubled the claimant about the extent of the bowing in the floor whereas Mr Lancaster's position and understanding was that was a standard way to get the beams inserted. The notes and grievance outcome letter say that the claimant said he was not concerned with the weight, just that the T drill might fall over and his main concern was the jerkiness of the machine. In oral evidence the claimant denied saying this. He denied saying the T drill might fall over and accepted he may have referred to it falling through the floor. He also denied saying that he was no longer concerned about weight on the floor, saying it was the main reason he made his complaint. The notes and grievance outcome letter are the most contemporaneous notes available of the grievance meeting so on the balance of probabilities I find it is likely the claimant did make a comment along the lines of not being concerned about weight, in itself, on the entire mezzanine floor.

58. Mr Lancaster said that the improvements had been planned before the claimant raised his concerns and that the arrangement was safe prior to anything changing. He noted the claimant's position remained he did not consider it had been proved safe whereas Mr Lancaster was saying the opposite. The notes record the claimant saying that if he was asked to run the old T drill now for the first time, he would run it without a problem. Mr Lancaster says in his witness statement that the witness accompanying the claimant added "*but when you saw it moving you are over cautious."* The claimant in oral evidence denied agreeing that it would operate the old T drill if he saw it now as it was for the first time. He said if he had said it, he would have returned to operating the drill. On the balance of probabilities I find it likely he did make that statement. It is recorded in the handwritten notes and also within Mr Lancaster's follow up letter.

59. The grievance outcome letter recorded that the claimant had said he was still not prepared to run the drill on 15 March despite everything shown to him and done to the machine and the floor having been improved. It records the claimant saying he wanted the machine to be bolted to the floor and a health and safety person to sign off the machine as being safe in its current position. Mr Lancaster said that whilst he considered they had provided the claimant with documentation showing it to be safe he agreed, as a matter of goodwill, to look into this and whether the health and safety consultant could provide further comfort. He explained it would take some time. The claimant said he would not operate the old T drill until he had this, and so he was told he would remain on unpaid leave unless alternative employment could be found. The claimant was also told he was welcome to attend work and resume his duties and he was invited to reflect and reconsider his position.

60. Mr Lancaster said to the claimant "*My concern is that you are perhaps looking for something nobody is going to be able to give? Any health and safety person is only going to be able to look at the same information I have and to assess the risks and measures put in place to minimise hazards – they are not going to be able to "sign something off as safe" as that is how health and safety works, they merely sign off that the risks have been assessed and measures taken*." The claimant was told the health and safety consultant would be able to inspect in the week starting 15 March. The claimant was warned if these steps did not satisfy him, the respondent may reach a position where they would regard the claimant as acting wholly unreasonably and where disciplinary steps need to follow. The claimant was offered the right of appeal in relation to his grievance outcome. The claimant did not appeal. He said this was because he was not given an extension of time for submitting an appeal. Mr Lancaster had given him to Monday 22 March to submit an appeal [108].

61. On 18 March, whilst corresponding about the appeal deadline, Mr Lancaster also sent the claimant an update to say the consultant had all the information including photos and videos and was writing up his findings [108]. He said the consultant had said verbally that the consultant was content with the arrangements and regards the old T drill as safe, with no reason to cease using the machine or to alter it further. He said the risk assessment would be forwarded on when available. He said he regarded it as a reasonable instruction for the claimant to return to work and resume his duties and a failure to do so was likely to be regarded as insubordination.

62. On 18 March 2021, Ms Holmes from the HSE emailed [242-243] Mr Lancaster to say "I *have seen no evidence that the mezzanine floor has been designed for actual static point loads or live loads, that are currently being applied to the floor. You need to provide calculations from an appropriately qualified engineer to demonstrate that this has been considered."* On 19 March 2021 Amapola provided structural calculations [138].

63. Also on 19 March Mr Lancaster sent the claimant a letter with a copy of the risk assessment [109, 111]. The claimant was told he was required to attend work as normal on 22 March 2021 to operate the old T drill. Mr Lancaster said he considered he had proved it was safe on a number of different occasions and in different ways and that if the claimant continued to refuse to attend work it was likely to be unreasonable in the circumstances. The risk assessment by Mr Greenfield gives the lowest possible chance of the risk of fatigue and structural failure of the mezzanine floor due to overloading, stating the structure was designed to support loading include the T drill and the design engineers had confirmed the design was satisfactory for support of the T drill.

64. The claimant then exchanged a series of text messages with Mr Lancaster [113-114]. On 19 March 2021 he asked for confirmation that Mr Greenfield was a qualified structural engineer, saying that was the advice he had from the HSE

that day. He asked for the attachments to the risk assessment. The claimant said if all the information he had requested that day has been approved within the HSE procedure then he would be happy to return to his job and run the machinery. Mr Lancaster replied to say that Mr Greenfield was a specialist health and safety consultant because the claimant said he wanted a risk assessment and they do those. He said Mr Greenfield was using information provided by the structural engineers. He said the additional information referred to in the risk assessment were documents the claimant already had, the drawing with the loadings and the email specifying the old T drill to be safe on the mezzanine floor.

65. The claimant then said: "*when I sent the information to HSE they said it would not be a certify certificate without the proper qualifications and stated that is what I needed to prove that its deemed safe from the structural engineer from when the machinery was put on to the mezzanine flooring to be used."* Mr Lancaster again referred the claimant to the printout of the email he gave the claimant before the grievance meeting stating that the company (i.e. Amapola) employs structural engineers. The claimant said the report had to show everything they checked over, like the risk assessment one, with dates and full evaluations. He said he would forward what he had to the HSE along with the name and company. The claimant asked Mr Lancaster to send the date they attended to check the machine over. He said if everything was ok he hoped to see Mr Lancaster on the Monday.

66. Mr Lancaster confirmed, in a response to a further question from the claimant, that the email from the engineers was written before the floor was further strengthened by them and the machine slowed down. The claimant said again he would let Mr Lancaster know what the HSE's advice was and he thanked Mr Lancaster for his cooperation. Mr Lancaster urged the claimant to return to work Monday to work as normal. By the end of their exchanges it was gone 9pm at night on Friday 19 March.

67. On the Monday morning at 7:17am the claimant then messaged Mr Lancaster [114] saying "*Please can you send the structural engineers report please so I can return to work ASAP."* He did not return to work. The claimant said in evidence that he did not feel he had been sent the "right stuff" and that he was getting the HSE to check everything that Mr Lancaster sent to him. The claimant later telephoned in and said he was taking his child for a covid 19 test, albeit he does not dispute that he would not have attended work at that time in any event, given his request for a structural engineer's report.

68. On 22 March Mr Lancaster wrote to the claimant [115-116] saying Mr Greenfield was not a structural engineer but had all the reports and information from the structural engineers to satisfy himself when he risk assessed the drill and mezzanine floor and had confirmed that the safety measures were appropriate. Mr Lancaster said that Amapola had designed the floor and had advised on the

loads for the floor's design and the detailed calculations had been shared with the claimant. He said they had also been involved in the modifications and had confirmed its safety. Mr Lancaster said he understood the claimant was self-isolating until his child's covid test results came back. He referred to the fact the claimant had been warned a number of times that a continued refusal to do his job would become a serious disciplinary matter. He said he believed the claimant may be mistaken as to the role of the HSE as their role was not to approve anything but to advise. He said if the claimant was waiting for some kind of sign off from the HSE he was worried the claimant may be waiting a long time for something that was not going to be forthcoming. Mr Lancaster said the claimant had changed his mind about what he was concerned about, saying it was originally the jerkiness, not the weight on the mezzanine floor but now the texts suggested the claimant was moving the goalposts again. He said if the claimant had more questions he could ask those questions face to face when in work. He said if the claimant did not return at the earliest opportunity once the covid situation was addressed he would trigger the disciplinary process.

69. On 23 March the claimant did not return to work or make contact, and the same on 24 March or 25 March. On 23 March Mr Lancaster sent Ms Holmes at the HSE a document called "mezzanine floor email 1" asking her if the attached was what she was looking for by way of calculations [242]. On 25 March Ms Holmes said that Mr Jones, HM Inspector and Mr Lawrence, HM Specialist Inspector would be calling the following morning [242].

70. On 25 March Mr Saveker sent Mr Lancaster a document called "Mezz calcs" saying "try them with these" which were some further structural calculations with a breakdown at the end showing the loading and capacities of all steels [248].

71. On 26 March the HSE attended the respondent's site. Mr Lawrence from the HSE was a specialist structural engineer. Mr Lancaster says, and I accept, that Mr Lawrence looked at the old T drill in operation on the mezzanine floor and looked at the paperwork that Mr Lancaster had. Mr Lawrence asked Mr Lancaster to forward on by email further copies of the paperwork, which Mr Lawrence did [272]. Mr Lawrence noticed that when the mezzanine floor was initially installed the installers had failed to fit a strut. He discussed with Mr Lancaster that Amapola should come back and retrofit it. Mr Lawrence said, however, that he was content that the floor was safe without it and that the respondent could continue operating the old T drill on the mezzanine floor (and indeed the other machines on the mezzanine). Mr Lawrence agreed that the floor was not at risk of immediate collapse.

72. The HSE inspected other things that would appear to have come from the claimant/Ms Watt's notification to the HSE such as there being a gas oven and flammable substances on the mezzanine floor (which there was not). The HSE also looked round the site in general including covid 19 compliance measures.

The respondent was given some guidance about other covid 19 measures they could take.

73. The HSE did express some concerns about whether the appropriate fire safety rules and risk assessment compliance was in place for the mezzanine floor and the respondents had to take further action in that regard, but the respondent was not barred from using the mezzanine floor in the meantime.

74. The HSE visit was on a Friday where not so many employees were in work. They said they would return on 19 April to look at the rest of the factory in operation. It is not clear to me whether that was said at the time, or was later notified to the respondent, but certainly Mr Lancaster knew of the second visit by the time of the subsequent disciplinary hearing.

75. The claimant was not present at the time of the HSE visit. He did, however, have his own contact with the HSE. The claimant says in his particulars of claim that the HSE told him that no immediate action had been taken as they had no immediate concerns, but that the investigation was still ongoing as they were waiting for further documents regarding the floor's safety and the uses it was being put to [14]. In his witness statement the claimant said the HSE said they were waiting for further documents from the respondent and Amapola. In his oral evidence he said that they did not tell him anything initially, just that an investigation was ongoing and that they could not tell him anything else. At some point the claimant was also told the HSE were visiting again on 19 April. I think it likely that the claimant had been told very little by the HSE at this point in time. He knew this by the time of the subsequent disciplinary hearing as Mr Lancaster later recorded in the notes of that meeting: "*PM has been in contact with HSE again this week because he knew recent info of 19th second visit".*

76. On 29 March the claimant's partner rang in, and spoke to Ms Lloyd at the respondent. She said the family had 3 more days left in isolation. She said the child's test was inconclusive and so the family had been isolating. Ms Lloyd asked if the claimant had sent in evidence of the test and Ms Watts said no. Ms Watts sent through a copy of the test appointment. Ms Lloyd spoke with Mr Lancaster who said it was not enough and they needed the test result or instruction to isolate. Ms Lloyd requested this from Ms Watts. No response was received at the time.

77. On 29 March Mr Lancaster sent the claimant an invite to a disciplinary hearing [119 – 120]. He said there had been no update about the covid test, or evidence of a positive test of requirement to self-isolate. Mr Lancaster said the HSE inspectors had been in and were satisfied with the mezzanine floor and T Drill, having reviewed all the same information provided to the claimant. He said the HSE had a list of other issues that had been reported to them all of which they were satisfied with. Mr Lancaster gave the example of the claimant having told the HSE that there was a gas oven on the mezzanine floor which was not true.

He said that given the nature of the list of issues raised he was concerned that the claimant's motive for raising the issues with the HSE was not a genuine concern but a vexatious attempt to get the company into trouble.

78. Mr Lancaster said the disciplinary allegations were:

(1) Being absent from work without permission;

(2) Having ignored Mr Lancaster's repeated reassurances regarding health and safety, the safety of the mezzanine floor and the T drill, and acting unreasonably in continuing to pursue the issue dispute the reassurances provided;

(3) Having ignored repeated instruction to resume work;

(4) Being absent again without any proper cause or reasonable excuse on 24 March, 25 March, and 29 March;

(5) Failing to follow company procedures around covid 19 and absence in not informing them of the outcome of the child's test and not providing any evidence;

(6) Not ringing in on each day of absence within one hour of normal start time;

(7) Reporting numerous issues to the HSE without having raised those issues with the company despite having attended a number of meetings including the grievance meeting and having had plenty of opportunity to mention concerns about other things; and

(8) Acting in a manner which meant the company could no longer have trust in him as an employee.

79. The claimant was invited to a disciplinary meeting on 1 April. He was notified of his right to be accompanied. He was forewarned that if found guilty of gross misconduct his employment may be terminated without notice.

80. The disciplinary hearing took place on 1 April 2021. There are handwritten notes at [121 -123]. The decision letter is at [124 – 130], sent out on 6 April 2021. The claimant has not ever set out his own version of events as to what was said at the disciplinary hearing, and I therefore accept that the notes and the decision letter are a fair summary of what was talked about at the hearing.

81. The claimant said his position had not changed and that he would not operate the old T drill because it had not been signed off by a structural engineer. Mr Lancaster explained that two structural engineers had "ok-ed" it from Amapola and from the HSE. They ran through the 8 allegations. The claimant said he had not informed the respondent about his absence related to covid because he would not have been in work anyway until the T drill was signed off by a structural engineer. He said he still felt unsafe. He said there had not been a

letter from track and trace instructing them to isolate and that the covid result was inconclusive so they were isolating as a family rather than forcing his child, who has additional needs, to retest.

82. The claimant denied raising any other concerns about safety with the HSE other than the T drill on the mezzanine floor. He said he had simply answered their question about what else was on the mezzanine floor. He said he had to talk to the HSE because he was not happy with the answers and the documents given by Mr Lancaster.

83. The claimant said the work on the mezzanine floor should have been done from day one and he was not prepared to run the T drill at that moment. Mr Lancaster told the claimant he did not have plans to do anything else to the mezzanine floor. He said the claimant was now asking for a structural engineer's report when he had previously repeatedly asked for a risk assessment. He said the risk assessment had been generated from a structural engineer's report and that the HSE specialist inspector was also a structural engineer who was happy. Mr Lancaster said that if the HSE considered that the floor or the old T drill were not safe they would have issued a prohibition notice or an improvement notice but these things had not happened.

84. In the decision letter, in short form, Mr Lancaster concluded that:

(1) Whilst the claimant may have had reasonable concerns at the beginning, the claimant was no longer acting reasonably in refusing to return to work on the old T drill and in insisting that it was signed off by a structural engineer. This was in circumstances in which the claimant had been given assurances it had been "ok'ed" by a structural engineer from Amapola and the HSE structural engineer who had visited and confirmed he was happy; having been given copies of all the paperwork; having seen the machine was no longer making the movement; and having been given the health and safety consultant's paperwork;

(2) He was concerned that the claimant did not trust the assurances given, and in circumstances in which the claimant had moved the goal posts a number of times previously, Mr Lancaster considered the claimant was likely to continue to do so, making it impossible to satisfy the claimant's demands;

(3) He considered the claimant's failure to return to work was gross insubordination by 22 March and the claimant's text message at 7:17 that morning showed the claimant had no intention of returning to work, in circumstances in which, as stated, it was no longer reasonable to be asking for further reports and given the claimant had said if he saw the old T drill for the first time he would be happy to operate it;

(4) The claimant had not provided any evidence of a covid 19 test result or shown any advice from track and trace, and did not have any reasonable cause for being absent from work on 24, 25 or 29 March;

(5) The insubordination in not returning to work was so serious it justified summary dismissal without notice;

(6) For acting unreasonably the claimant would be given a final written warning lasting 12 months;

(7) For the claimant not contacting the respondent from 23 March 2021 onwards, having been sent a return to work instruction, he would have given the claimant a final written warning for 12 months

(8) Being absent without proper cause or reasonable excuse on 24, 25 and 29 March 2021 would also be gross misconduct for not being in work on those days and failing to make contact on those days;

(9) He would have given a 6 month written warning for not following company procedures around covid 19 and absence or ringing in on each day of absence within 1 hour;

(10) He expressed concern about the potential embellishment of things to the HSE such as am allegation there were flammable substances on the mezzanine floor and a gas oven, but as he could not tell if that was down to the HSE or not, he was prepared to give the claimant the benefit of the doubt;

(11) Despite trying to work with the claimant and reassure him he considered the claimant's stance had become unreasonable and it had damaged the trust he could have on the claimant, and he would have given the claimant notice to bring his contract to an end in any event as it was no longer viable if the claimant was not prepared to listen to his reassurances, accept the paperwork, as they would never be able to give the claimant the reassurances he was looking for.

85. On 7 April [151] the HSE emailed the claimant responding to a request for an update, stating that no immediate action had been taken with regards to the floor stability. The email said "*However, we are still looking at whether the flooring was built to the original design and whether there have been any changes made. Moving forward, we are awaiting further clarification from the company who designed and installed the floor, on the suitability of the floor for its current use*."

86. The claimant exercised his right of appeal on 11 April 2021 [142 -148]. He said that he had been given verbal reassurance that the operation of the old T drill on the mezzanine floor was safe whilst at the same time steps were being taken to

reinforce the floor and reduce the machine's motion. He said he began to doubt the company's intentions and felt alternative reassurance was required. He said the certificate and email from Amapola received on 15 March only provided information about the floor's weight capacity and distribution and did not address the operation of machinery. He said the risk assessment had an attachment missing and said that a visual inspection was required annually but that the inspection had only been done by photographs and video. He said he shared the report with the HSE who said it was not a structural engineer's report that was required to confirm the safety of the flooring and the use it was put to. The claimant said on 22 March he had again requested a structural engineer's report but had been sent a structural calculations report. He said that when Mr Lancaster told him that HSE were satisfied with the floor's safety he contacted the HSE who confirmed they had attended the factory and no immediate action was taken as there were no immediate concerns but that investigations were still ongoing due to them awaiting further documentation regarding the floor's safety and the use it was put to. He said he therefore had insufficient evidence that the flooring and its use were safe.

87. The claimant said if the HSE had told him that the investigation was complete, and they were satisfied with the floor's safety, he would have returned to work. He said he was only acting on advice received from the HSE. He said his sole concern had always been the operation of the drill on the mezzanine floor and he feared whilst the machine was in operation there was a risk of the floor collapsing due to the motion of the machine and its weight capacity. The claimant said he could not recall a conversation in which he had agreed to operate the old T drill because it had been adjusted. He said the motion of the machine had reduced but the stability of the floor and the safety of the machine being operated on the floor had not been confirmed.

88. The claimant said he did not know what the company procedures were regarding absences from work, but that he did not think he was expected to be in work anyway because of the instruction in the letter of 15 March 2021. He said that if the respondent's steps had been implemented on day one of his concerns being raised he would have happily returned to his position but verbal reassurance, contradictory information and incomplete documentation had reinforced his concerns and he had felt the need to contact the HSE.

89. On 19 April the HSE re-visited the respondent. Mr Lancaster says, which I accept, that they were primarily looking at guarding on various machines, which included the old T drill.

90. The claimant's appeal was handled by an external HR consultant, Ms Jones. Ms Jones was given full authority to consider the claimant's appeal on its merits before her. The claimant was invited to an appeal meeting on 26 April 2021. At the appeal meeting the claimant said he thought he had been sacked for whistleblowing/ putting safety concerns forward. He said he thought Mr Lancaster

had lost trust in him because he called in the HSE and when they came on to site. The claimant remained of the view he had not been given sufficient evidence that the operation of the old T drill on the mezzanine floor was safe and that a structural engineer's report was required. He said the certificate that Mr Lancaster sent him at the outset did not reassure him as it said the use was for light storage. The claimant did not really clearly answer why he had not come back to work after the reinforcement of the floor on 11 March. He said he did not think it was safe and the work should have been done before anything went up there. He accepted in the appeal he had told Mr Lancaster he was not coming in the week of the 23 February. The claimant said that when he went to look at the machine being slowed down he could see there were pieces of wood under it and he refused to use it as there was wood under it. He said as he had not had final confirmation from the HSE, from his perspective it was still being investigated and until it was dealt with he would refuse to work on the drill on the mezzanine.

91. On 21 April the claimant was sent an invite to an appeal meeting [177 – 179] on 26 April 2021. The minutes are at [181 – 202]. One question the claimant was asked was about the HSE enforcement policy [199] and whether the HSE had advised the claimant that use of the old T drill on the mezzanine floor was a serious risk. The claimant said "I *haven't spoken to them, no, I haven't had no confirmation from them so I don't know if it's a serious risk."* He said the HSE had not told him not to work on the old T drill until he had a structural engineers report and that they had said it was up to him if he wanted to run it [200].

92. On 4 May the claimant was sent the appeal meeting outcome [219 – 229]. Ms Jones' opinion was that the claimant had been absent from work from 22 March 2021 onwards without permission. Her opinion was that the respondent had provided suitable documentary evidence to confirm the safety of the use of the drill on the mezzanine floor, supported the fact the HSE did not place any improvement or prohibition notice. Her opinion was the claimant had acted unreasonably in refusing to meet with Mr Lancaster on 23 February but instead saying he would not be attending work for the remainder of the week, and telling Mr Lancaster that it did not matter whatever he said as the claimant would not run the machine. Her view was the claimant had moved the goalposts and did not have an intention to use the machine regardless of what evidence was provided. She considered the claimant had been closed minded from 22 February onwards about not returning to work. She considered that the claimant had acted unreasonably in pursuing his issues despite the reassurances provided. She found that the claimant's refusal to operate the machine on 18 and 22 February was lawful and reasonable as the claimant had genuine safety concerns for which he had only been given verbal reassurance. However, her view was that once the company provided documentary evidence from 23 February 2021 and put in place measures, that the refusal to use the machine was no longer reasonable.

93. Ms Jones removed the allegation that the claimant had not followed company procedures around covid 19 and absence on the basis that it was not relevant as the claimant would not have attended work at this point anyway absent a structural engineer's report. She concluded the claimant had failed to ring in about absence on 1 March, 23 March, 24 March, 25 March, and 29th March to 31st March. Ms Jones also upheld the alternative conclusion that the claimant had acted in a manner that broke down the trust in the relationship such that the claimant would be dismissed for some other substantial reason.

94. After the appeal meeting the claimant raised concerns about a lack of social distancing and face masks. The claimant was sent in the April payroll additional pay for the first 3 days after he raised his concerns, on the basis that Ms Jones had decided for those 3 days he should have been paid as he was ready, willing and able to work and he was not unreasonable in the assurances he had sought at that time.

95. On 10 May the HSE served improvement notices [273] relating to guards on some machinery (including the Old T drill), ventilation, guard rails, the siting of the smoking area and supervision.

96. On 13 May the Watch Manager at South Wales Fire and Rescue wrote to acknowledge a fire risk assessment dated 15 April 2021 and said it was not suitable and sufficient when providing a rationale for not providing a protected route or secondary means of escape from the mezzanine floor [285].

97. On 19 May Mr Lancaster wrote to the HSE Inspector with various photographs of action taken, including that the tie bar for the mezzanine floor had now been fitted. He said the letters were up on the safety notice board [273].

98. On 25 May Mr Lancaster sent the watch manager an updated fire risk assessment. On 26 May the updated risk assessment was accepted [285].

99. On 6 August the respondent was sent a letter by the HSE saying contraventions of health and safety law had been identified which were material breaches and that action needed to be taken by 6 September 2021 [290 – 292]. A material breach was said to be that after reviewing the documentation provided, the mezzanine flooring area was designed for light storage use only, and not designed to be used as a regular workstation or workspace. It was said that on the initial visit the strut brace had been found to not be installed as required and as it was part of the structure to be in accordance with the design, the structure could not be considered fit for purpose. The HSE recorded they had also contacted the Fire Service who said the floor was unacceptable due to a lack of sufficient fire escapes.

100. The inspector said the mezzanine floor may not have been at immediate risk of collapse, but it could not be considered suitable to use as a regular workspace for employees as the structure had not been designed for that purpose and the

considerations for such use had not been taken into account. It was said, in any event, the structure had not been installed in line with the original design for light storage let alone as a regular workplace, and should not have been used for work purposes until the respondent had ensured it was modified appropriately. It was said it breached the duty to ensure, so far as is reasonably practicable the health safety and welfare at work of all employees.

101. Mr Lancaster was asked to confirm that the strut brace was now installed, and to confirm the intentions for the use of the floor going forward. If it was to be a workstation there must be the necessary means of escape in case of a fire and sufficient evidence that the structure was suitable for such a purpose. It was said such evidence may include certification from the designer or evidence of change of use from building control.

102. On 9 August Mr Lancaster emailed the HSE inspector [293- 294] saying he was surprised to receive the notification because all of the items had been forwarded to HSE or signed off by the fire brigade. He re-sent the confirmation from May that the strut brace had been fitted. He also sent confirmation from Amapola that the floor was highly unlikely to fail without the strut and said that Mr Lawrence had also said the same on site. He confirmed that the fire authority had agreed the means of escape was ok on 26 May 2021. He confirmed that he had sent mezzanine calculations on 26 March 2021 and machine support beam calculations on 23 March 2021. He said the mezzanine floor had always intended to be used as a workplace and attached some proof by way of observing, for example, that there was steel sheeting on the designs from the outset for brazing work, and an email confirming that Amapola's wording of "light storage use" was a reference to weights not purpose. Mr Lancaster asked if the contravention letter would be withdrawn and said he would not put the letter on the employee notice board until he heard that the letter was still live. One of the attachments was an email from Mr Saveker of 9 August 2021 [296] saying that the brace is fitted for added stability and to avoid any lateral movements. Mr Saveker said the floor is highly unlikely to fail without this. He said the mezzanine was classed as light storage holding ½ tonne per sq meter and the floor was designed for a work area, and that was why there were two means of escape and is part checker plated and fire rated.

103. Mr Lancaster chased this up on 11 August [298]. Mr Jones from the HSE responded on 12 August to say that on visiting the feeling was the floor was not at immediate risk of collapse as if so they would have prohibited its use. But that to fully assess if it was fit for the purpose it was being used for they would need further documents such as the design drawings etc and to make further enquiries with relevant parties. He said it was following those further enquiries that they had formed the conclusions in the notice of contravention letter [297]. Mr Lancaster asked again whether there was anything else required as he thought he had supplied everything asked for.

104. On 7 September Mr Jones emailed to say he had not had a response about the mezzanine floor and asked if the notice of contravention letter had been brought to the attention of employees [302]. The claimant says he had a few conversations with Mr Jones from the HSE and at the beginning of September they said to him the floor was not fit for purpose and there were material breaches of the Health and Safety Act 1974 and the fire service also intended to serve an enforcement notice to remedy the breach.

105. On 28 September Mr Jones was emailing to arrange a visit about several matters and said he would like to close off the notice of contravention letter too. He said Mr Lancaster had already provided evidence for many of the issues but could update him on any outstanding actions prior to the visit or they could be discussed on the day [301]. Mr Lancaster opted for the latter. There was then a further visit on 7 October 2021.

106. On 21 October Mr Lancaster then sent Mr Jones an email from Amapola [300] with a further email from PWC Building Control Services Ltd who provided the original mezzanine floor sign off certificate. PWC Building Control Services said that the current use was fine as long as it was fine with the fire authority (which had already been confirmed). This was something Mr Jones asked for at his visit on 7 October 2021. On 21 October Mr Jones therefore said that was satisfactory to draw the issue to a close as the fire authority were happy following a revised fire risk assessment and building control had no ongoing concerns. He said it was for the respondent to manage on an ongoing basis as the fire risk assessment sets a maximum on the number of person that could work on the mezzanine at any one time. The email from PWC [307] said that using the mezzanine floor described on the drawing as a storage floor, if used for other purposes, does not contravene building regulations as it was not a material change of use.

DISCUSSIONS AND CONCLUSIONS

Protected Disclosures

The respondent's position

107. The respondent accepts that the claimant made a protected disclosure on 18 February in raising with Mr Gagen a health and safety concern about the location and operation of the old T drill on the mezzanine floor, saying it was unsafe.

108. The respondent denies that the claimant made a protected disclosure on 25 February 2021 when it is said Ms Watts emailed the HSE general email address and Ms Holmes saying the operation of the old T Drill on the mezzanine floor was not safe. It is disputed on the basis that the claimant's partner contacted the HSE and not the claimant, and that the claimant had not provided any content to substantiate the disclosure. It is said that the respondent had no information

other than to say an alleged dangerous structure had been brought to the HSE's attention [267].

109. The respondent accepts that the claimant made a protected disclosure on 2 March in raising a verbal concern with Mr Gagen and Mr Lancaster that the old T drill was juddery and should be operated on concrete.

110. The respondent denies that the claimant made a protected disclosure on or around 3 March 2021. The list of issues says that the claimant spoke to Ms Holmes of the HSE on the telephone and told her that the operation of the old T drill on the mezzanine floor was not safe and he was being asked to work it (which he was refusing to do). This is disputed on the same grounds as the dispute about the 25 February.

111. The respondent denies that the claimant made a protected disclosure on 11 March 2021 in the grievance meeting. The list of issues asserts that the Claimant said the operation of the old T drill on the mezzanine floor was not safe to Mr Lancaster and Mr Gagen. The respondent asserts that by this stage the claimant had no reasonable belief in health and safety concerns from 11 March 2021 onwards.

25 February

112. Whilst I wholesale disapprove of the claimant's failure to disclose the emails with the HSE, I find on the evidence before me that he did make a qualifying disclosure on 25 February 2021. I accept that in drafting the email to the HSE Ms Watts was doing so on the dictation of the claimant when it came to the subject matter of what was being said. It was therefore the claimant's disclosure of information, not Ms Watts'. It was the claimant who had knowledge of the workplace and the machine in question, and not Ms Watts. I do not consider that the language of sections 43A to H are a bar to another individual facilitating the making of a protected disclosure by a worker, provided the disclosure is the worker's disclosure and not that of the messenger passing it on. For example, in the oft cited case of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, the fact that the claimant's alleged protected disclosure was contained in a solicitor's letter was not a bar to it potentially being a protected disclosure (albeit it failed on other grounds). Here I am satisfied that the disclosure was fundamentally the claimant's. I am also satisfied that it was made by the claimant to a prescribed person, within the meaning of section 43F, even though Ms Watt's undertook the physical act of typing it and sending it.

113. I have made a finding of fact that the email sent to the HSE alleged that the mezzanine floor was unsafe or dangerous, that there were machines sited on there that should not be as it was not designed for that purpose, that they were too heavy and were creating hazardous vibrations. It had sufficient specificity and factual content to be capable of amounting to a protected disclosure. I also consider that this was a disclosure by the claimant which in his genuine belief

was information tending to show that the health or safety of employees was being endangered if the old T drill was in operation, or was likely to be endangered if the old T drill was to be operated.

114. I consider that belief was reasonably held from the claimant's perspective. The claimant had previously seen the jerkiness of the machine and the movement of the floor. I consider and find that experienced scared him and it was reasonable for it to do so. It was a heavy machine jerking, with the mezzanine floor then moving, both in a way the claimant was not used to. That happened and would happen again if the machine were used, when the claimant was working and there were others on site working too, including below the mezzanine floor. The claimant was also aware that Mr Lancaster had previously talked about getting the floor strengthened. He was also worried that the mezzanine may have been built for storage, which had some grounding in the fact that early on, after it was built, he had seen it used for storage. He said his colleagues joked about it being an "*expensive shelf."* These things would have fed into his worries about the weight of the machine and the movement in the machine and the floor. The claimant's personal experience and knowledge informed his beliefs. From his perspective they were was reasonably held.

115. I have factored in that Mr Lancaster had told the claimant that the floor was designed for machinery, that it had been signed off by professionals, was within its weight limits and that the reinforcement work was not being done for safety but for comfort. Mr Lancaster had then sent on the documents regarding the loadings and the original sign off. But I do not consider that made the claimant's beliefs unreasonable from his personal perspective. The claimant had physically seen and experienced what he did. From his perspective reinforcement of the floor was outstanding. The paperwork he was sent also included the terminology of light storage. The claimant considered there was a disjunct between on the one hand Mr Lancaster telling him it was safe, and it had been signed off for use by machinery, as against his own experience of the movement of the machine and the floor, that the machine had been previously turned off, that he understood the floor was to be reinforced, and its previous use as storage. From his perspective his concerns were reasonably held.

116. I also consider the claimant subjectively believed the disclosure was made in the public interest, out of concern for the safety and wellbeing of those present on site, and that was a reasonably held belief. The claimant therefore made a qualifying disclosure under section 43B. It was made to a prescribed person. Under section 43F the claimant believed that the alleged failure in question fell within a description of matters in respect of which the HSE was prescribed. That was a reasonably held belief; the claimant was referred to the HSE by his local council. The claimant also believed that the information in question disclosed, and any allegation contained within it, was substantially true. Again, that was a reasonably held belief from the claimant's perspective and knowledge at that time. It was a protected disclosure.

3 March

117. Turning to 3rd March, the only information I have about this is the claimant's statement in his witness statement "*I spoke with Sharon Homes who had asked myself the situation which I explained",* if indeed that is even the discussion in question as the claimant's witness statement seems to link this to an earlier period of time around 25 February 2021. All I am a left with is the bald statement, as recorded by EJ Sharp in the list of issues that the claimant told Ms Holmes that the operation of the old T drill was not safe and he was being asked to work it. But that is unsupported by any evidence actually put before me. I therefore am unable to find, simply because it is not sufficiently evidenced, that the claimant on that occasion did make a disclosure of information tending to show that the health of any individual had been, was being, or was likely to be endangered.

11 March – grievance meeting

118. In relation to 11 March, the respondent asserts that by this stage the claimant could not longer have reasonably held a health and safety concern. The respondent emphasises that by this time the respondent had taken steps to address the movement in and caused by the old T drill by the insertion of additional steel support beams and slowing down the machine. The respondent says the claimant had been informed of these changes and agreed that the concerning movement had stopped. The claimant had agreed in the grievance meeting that if he had been asked at that time (without the back story) to operate the old T drill in its current state he would have done so. He had also been given emails and calculations showing that the weight parameters of the floor was safe and he had at the grievance meeting said he was withdrawing his concerns about the weight capacity of the floor.

119. By the time of the grievance meeting on 11 March the claimant had seen that the movement in the machine and the floor had been addressed by the slowing down of the machine, and that the structural work inserting the beams was being undertaken. He had the information about weight calculations. He said if he had seen the old T drill now for the first time he would operate it.

120. But the claimant was also saying he still did not consider the floor had been proved safe. I find the claimant had residual fears. His residual fears related to whether the floor was meant to hold operating machinery and whether it was safe to do so. The movement in the floor he had seen was still troubling him, together with the notion there were heavy machines on it. I consider and find that the claimant could not move on from his earlier concerns relating to the movement he had seen in the floor previously with the old T drill was in use, and whether the floor was meant to be used in such a way, given the need, as he saw it, for the respondent to take steps to reinforce the floor, reduce the motion in the machine and put wood under the old T drill. He was wondering why any of that might be necessary, if the respondent was correct to say the floor was designed

for such a purpose from the outset. He expressed a worry about the old T drill potentially falling over and whether it should be bolted to the floor, which shows his ongoing worry about the safety of the set up. He wanted someone to sign the set up and use off as safe.

121. The claimant in his grievance letter and at the grievance meeting was questioning whether the floor was safe and suitable for the purpose for which it was being put to i.e. the use of heavy machinery. He spoke about his worries about why wood had been placed under the machine, that it was built for storage not machines, and his concerns of a risk of the machine toppling over. The information he was communicating had sufficient specificity and factual content to be capable of amounting to a protected disclosure. Whilst I accept the claimant did not set out as clearly as he could have done so what his ongoing concerns were, it was not a bare allegation that he was feeling unsafe. It was a disclosure by the claimant which in his genuine belief was information tending to show that the health or safety of employees was being endangered if the old T drill was in operation, or was likely to be endangered if the old T drill was to be operated, if the floor was not safe and suitable for such a purpose.

122. I consider that belief remained reasonably held from the claimant's perspective at that point in time. His personal experience and knowledge, set out above, including at paragraph 119, gave him a reasonable basis for his ongoing concerns about the safety of having machinery operating on the floor, and the stability of the floor. Given the claimant's experiences and concern about the movement in the floor he had seen, I do not accept it was a purely speculative risk on his part.

123. I also consider the claimant subjectively believed the disclosure was made in the public interest, out of concern for the safety and wellbeing of those present on site, and that was a reasonably held belief for the reasons already given. The disclosure was made to the claimant's employer. It was a protected disclosure.

Health and safety concerns

124. The respondent accepts that the claimant raised qualifying health and safety concerns on 18 February and 2 March 2021, but disputes the 11 March 2021.

125. I find that on 11 March 2021, the claimant brought to his employer's attention circumstances connected to his work, when he raised his safety concerns about whether the mezzanine floor was safe and suitable for use by operating machinery, particularly the old T drill. He did so by reasonable means, utilising the grievance procedure. The claimant believed these circumstances were harmful or potentially harmful to health and safety if the old T drill was in operation, if the floor was not meant for such a purpose. That belief was reasonably held for the reasons given above in relation to the protected disclosure claim.

What was the reason or principal reason for dismissal? Was the reason or principal reason for dismissal that the claimant made a protected disclosure or raised health and safety concerns? Or was the reason conduct or some other substantial reason?

126. When assessing the reason for dismissal it is important to bear in mind that I am not here looking at what was in the mind of the claimant, but instead I am looking at what was in the mind of Mr Lancaster when deciding to dismiss. That differentiation is important, as is the fact that just because I have found the claimant made protected disclosures/raised health and safety concerns, it does not necessarily follow that Mr Lancaster understood everything that I have found was going on in the claimant's mind or that he dismissed the claimant because of making protected disclosures/raising health and safety concerns.

127. Mr Lancaster's decision letter was multifactorial and some of the factors overlapped. In my judgement, looking at the heart of it, and the wider evidence I heard, the principal reason why Mr Lancaster dismissed the claimant was because Mr Lancaster thought that the claimant was behaving unreasonably in not returning to work on the old T drill and in insisting he would only return if it was signed off by a structural engineer. They had reached an impasse. He did not see how he could reasonably get the claimant back to work, and considered that the claimant had reached the point of refusing to obey a reasonable management instruction to return to work and operate the machine.

128. From Mr Lancaster's perspective he thought he had taken reasonable steps to address the claimant's concerns by explaining that the floor had been designed to house machinery, by explaining that the machinery was in the floor's weight allowance, by discussing the claimant's concerns with Amapola, by sending the claimant the Amapola calculations and emails and the original mezzanine sign off, by getting the old T drill slowed down to reduce its jerkiness and showing that to the claimant, by getting the structural reinforcement done underneath the old T drill, by getting the respondent's health and safety consultant to do a bespoke risk assessment and by having regular meeting and exchanges with the claimant to understand his concerns, share information and respond.

129. Mr Lancaster thought that he had at times been dealing with a moving picture of concerns from the claimant and I find that belief was genuine. The claimant was not always very good at clearly stating what his specific concern was and why, and he demonstrated that again when giving evidence at the final hearing before me when he had a tendency to either answer questions by simply saying he considered it unsafe, or by reference to information that he only learned after the time of the events in question. Mr Lancaster thought that he had dealt with what the claimant was asking about or asking for, culminating in the obtaining of the risk assessment. Mr Lancaster then thought the claimant requesting an additional risk assessment or report completed by a qualified structural engineer was an unreasonable request and was the claimant moving the goalposts again. He

thought it was unreasonable because he considered he had dealt with all the claimant's earlier requests and concerns, and because Mr Lancaster had been clear with the claimant he was getting the report from the health and safety consultant, as a goodwill gesture to reassure the claimant. He also thought the request for a structural engineer's report was unreasonable because the claimant had requested a risk assessment, and that was what Mr Lancaster used the health and safety consultant to do. Mr Lancaster considered getting a structural engineer's report was not what he had agreed with the claimant he would do, and was disproportionate because the structural engineer had undertaken the calculations which were before the health and safety consultant when conducting the risk assessment, and bearing in mind the HSE specialist inspector (who at that point in time Mr Lancaster thought was content with the use of the floor), was also a structural engineer.

130. Mr Lancaster was left not understanding why the claimant would not return to work without a structural engineer's report. He did not understand why the claimant was refusing to return to work having said that if he saw the old T drill for the first time now he would be happy to operate it, and it having been agreed, in Mr Lancaster's mind, that getting the risks assessment would give the claimant sufficient comfort to return to work the old T drill. I do not find that Mr Lancaster understood the severity of disjunct in the claimant's mind between being told on the one hand it was safe / always had been safe and, on the other hand, the claimant's own experiences of the machine and floor moving and the steps undertaken to reinforce the floor and reduce the movement. In the claimant's mind, why would that happen if the floor had always been safe? That disjunct led the claimant to not trust what he was being told, and to want reassurance from a third party that it was safe, and he ultimately looked to the HSE who had, I accept, by the end mentioned a structural engineer's report. But the claimant did not articulate all of this very well to Mr Lancaster. Indeed, the claimant struggled to do so at the hearing before me, and I have only reached the findings I have by taking a step back and considering the totality of everything before me, which is not the same as the picture that was before Mr Lancaster. Mr Lancaster therefore considered that the claimant's refusal to return to work the old T drill had become unreasonable and there was nothing, in his mind, that he could reasonably do that would actually get the claimant back to work to operate the machine.

131. Given those findings, I do not find that the principal reason for dismissal was because the claimant made a protected disclosure or disclosures or because the claimant raised health and safety concerns. The protected disclosures/health and safety concerns, are part of the backdrop, but they are not the reason why Mr Lancaster dismissed the claimant. In particular, I do not consider that Mr Lancaster resented the claimant raising his disclosures/concerns leading him to dismiss the claimant. Mr Lancaster went to significant steps on multiple occasions, showing considerable patience, to discuss the concerns with the claimant and to try to explain or resolve them. He repeatedly encouraged the

claimant to return to work, and forewarned the claimant multiple times that if the situation could not be resolved it could culminate in dismissal, but that disciplinary proceedings or dismissal were not steps Mr Lancaster wanted to take and were the last resort. I do not consider such actions are the hallmark of an employer seeking to dismiss an employee for making a protected disclosure(s) or for raising health and safety concerns. Instead, they demonstrate an employer doing their best to try to respond and resolve them and get the employee back to work.

132. The claimant's case, as I understand it from the questions asked in cross examination and his closing comments, was principally that the reason why Mr Lancaster dismissed him was because he raised his concerns with the HSE. In effect he was saying that Mr Lancaster did not like the fact the claimant had caused trouble for the respondent with the HSE. But even if I do focus on that element, I do not find that this was the principal reason for the claimant's dismissal. Mr Lancaster was concerned about other matters that he thought the claimant had raised with the HSE such as an allegation of a gas oven on the mezzanine floor and he questioned the claimant's motives in doing so, but when the claimant explained that such matters had not come from him Mr Lancaster gave the claimant the benefit of the doubt and accepted the claimant's assertion. Mr Lancaster did not, on the evidence before me, display any ill will in what he said or how he reacted to the claimant, about the claimant raising his concerns about the mezzanine floor with the HSE which he treated differently to the ancillary matters he was initially concerned that the claimant had raised. I appreciate that this does not necessarily mean Mr Lancaster felt something different in his own mind but it is evidence capable of being indicative of a lack of ill will to the claimant about raising the mezzanine floor with the HSE.

133. Moreover, there is no difference of substance in how Mr Lancaster was dealing with the claimant about the mezzanine floor in the period before he knew the claimant had contacted the HSE and afterwards. Early on, on 23 February 2021, there had been a discussion between the claimant and Mr Lancaster about how ultimately the claimant's job could be at risk if he did not follow a reasonable request to operate the machine. That was before the claimant contacted the HSE. After the contact with the HSE, Mr Lancaster wrote to the claimant explaining the position from his perspective, saying he was happy to meet with the claimant to understand and discuss the issue, and again he forewarned the claimant that ultimately a failure to follow reasonable instructions could, if serious enough, result in termination of employment. That was not a new message, but Mr Lancaster went on to tell the claimant that he wanted the claimant to return to work and that, as a long serving and valued member of staff, he did not want to have to take disciplinary action. Mr Lancaster then went on to speak to the claimant on 2 March, to write to him on 2 March again encouraging the claimant to return to work and setting out steps he hoped would reassure the claimant. The claimant was attending work and being sent home but that did not trigger

disciplinary action. The machine was slowed and the claimant was invited to see it. The claimant then lodged a grievance and Mr Lancaster wrote to him on 10 March again encouraging the claimant to think about things again once the structural work had been done. Mr Lancaster then gave more information from Amapola to the claimant and met with him on 11 March and wrote to the claimant again thereafter when the claimant was invited and encouraged to reconsider his position and return to work. The same happened again when the claimant was sent the risk assessment and in the text messages exchanged thereafter which culminated in the claimant being urged to return to work. None of this is the hallmark of an employer showing ill will to an employee who has made a disclosure to the HSE and wanting to dismiss the employee because of it. Instead, it is the hallmark of an employer who is trying to avoid the claimant being dismissed, and doing what they consider they reasonably can do to get the claimant to return to work and avoid there being disciplinary proceedings, let alone a dismissal, until the situation culminated in stalemate.

134. The claimant's complaint of "automatic" unfair dismissal is therefore not well founded and is dismissed. My conclusion in this regard would have been the same even if I had found that all of the claimant's claimed protected disclosures were in fact protected disclosures.

"Ordinary" unfair dismissal

Potentially fair reason?

135. I turn therefore to the claimant's "ordinary" unfair dismissal claim. The reason or principal reason for dismissal remains the factors that were operating on Mr Lancaster's mind so as to cause him to dismiss the claimant, and my findings in that regard are set out above. The respondent relies on the potentially fair reasons for dismissal of "conduct" or "some other substantial reason."

136. To amount to "conduct" there does not need to be reprehensible or culpable conduct on the part of the employee. It was said in JP Morgan Securities PLC v Ktorza UKEAT/0311/16/JOJ that to qualify "*an employer will generally believe there is something to be criticised by the employee's conduct*." Centrally here it was the claimant's conduct in refusing to operating the old T drill despite the steps taken to reassure him, and in saying he would not return to work to operate it without a report from a structural engineer, that were in Mr Lancaster's mind when dismissing the claimant. I find in those circumstances that amounted to "conduct" on the part of the claimant and was a potentially fair reason for the claimant's dismissal.

Genuine belief in misconduct? Belief held on reasonable grounds?

137. The next question is whether Mr Lancaster had a genuine belief in the claimant's misconduct. I find that he did. Thereafter I must consider whether Mr Lancaster formed that belief on reasonable grounds. I find that he did. Mr Lancaster formed

the view that the claimant was being unreasonable in insisting upon a structural engineer's report based on his own direct exchanges over the period with the claimant. Mr Lancaster reached the view that it was unreasonable for the claimant to insist on the engineer's report because of his personal knowledge of the efforts he had gone to, as set out above, to understand and address the claimant's concerns which had culminated in Mr Lancaster understanding that the risk assessment from the health and safety consultant would give the claimant sufficient comfort to return to work. It was a belief held on reasonable grounds. Mr Lancaster thought the claimant, in insisting on a structural engineer's report was moving the goalposts. Again given Mr Lancaster's understanding of the exchanges he had with the claimant as to what would give sufficient comfort to the claimant to allow him to return to work on the old T drill, it was a belief held on reasonable grounds. Mr Lancaster also believed that a structural engineer's report was a disproportionate request, because Amapola employed structural engineers who undertook the calculations the health and safety consultant and the claimant had sight of, and because at the time he believed the HSE's own specialist inspector was satisfied that the use of the floor was safe. Again, there was a reasonable basis for that belief.

138. Mr Lancaster therefore believed there was nothing more he could reasonably do that would give the claimant sufficient trust that the claimant would return to work by returning to operate the old T drill. There was a reasonable basis for that belief. Mr Lancaster considered he had given the claimant multiple opportunities to return to work the old T drill, and that the claimant, in not having a good enough reason to remain off work, was refusing to follow a reasonable management instruction. Again given the direction and encouragement to return to work there was a reasonable basis for that belief.

Reasonable investigation?

139. I then have to consider whether the respondent reached the decision that there was misconduct on the part of the claimant, and that the claimant should be dismissed, having conducted a reasonable investigation in the sense of it being in the range of reasonable responses. That overlaps with any issues as to procedural fairness.

140. I find that the respondent's investigation was within the reasonable range. The claimant was given opportunities during the informal process and the grievance process prior to the disciplinary process to state his concerns and have a dialogue about them with Mr Lancaster. He had the same opportunity again during the disciplinary process with Mr Lancaster and again in his right of appeal. Any lack of understanding on Mr Lancaster (or Ms Jones') part as to what was causing such a level of distrust in the claimant's mind was not through a lack of effort on the part of Mr Lancaster or Ms Jones. In any event, I do not consider that any greater understanding on Mr Lancaster's part would have led him to agree to get a structural engineer's report or that it would have been outside the

reasonable range for him not to do so, or that absent such a step the claimant would have returned to work on the old T drill.

141. The claimant was notified in advance of the disciplinary hearing what the allegations against him were. He was told of his right to be accompanied. He was told that a potential consequence could be dismissal. He was given the opportunity to say what he wanted to say. Given Mr Lancaster's status in the business, the claimant was given the right of appeal to an external individual who was given autonomy to consider the matter afresh for herself. The claimant had multiple opportunities to return to work which would have avoided his dismissal.

142. The most that I could understand the claimant to be saying to criticise the process followed, was to criticise the conduct of the appeal. He said that Ms Jones was biased against him and that he was asked questions at length over 4 hours, and far more questions that Mr Lancaster. Ms Jones said, which I accept, that they were matters that she wanted to ask the claimant about to genuinely determine the appeal, and as it was the claimant's appeal she had more questions for him that Mr Lancaster. The claimant was given opportunities for breaks. Having considered the detailed notes of the appeal, there is nothing that I can see that was procedurally unfair about it or outside the reasonable range. I can see no evidence that Ms Jones was biased against the claimant.

143. The claimant also complained that the appeal process was unfair because there were not appropriate covid measures in place. That is not a matter, however, that could go to the heart of the fairness of the claimant's dismissal in his case, as opposed to a wider concern as to whether the respondent does not or does not have the correct policies in place[1]. It is not the case that the claimant was asking for particular covid measures, or that he was denied breaks, or that he was saying, for example, that he was rushed or did not get to say what he wanted to say because he felt unsafe in the appeal meeting.

144. The respondent's decision that there was misconduct on the part of the claimant was therefore reached having followed an investigation and a process that were within the reasonable range open to the respondent in the circumstances.

Was the decision to dismiss in the range of reasonable responses in light of that misconduct?

145. Once the respondent had made a finding of misconduct, I find that the decisions to categorise the conduct as gross misconduct and then to impose the sanction of dismissal were within the reasonable range. Mr Lancaster was aware of the claimant's personal circumstances. He was aware and took account of the claimant's long service and good service, he himself had referred to it when trying to encourage the claimant to return to work and avoid disciplinary proceedings. Mr Lancaster's evidence, which I accept, was that he considered

[1] See City and Council of Swansea v Gayle [2013] IRLR 768

whether there was other work he could move the claimant to do. But the claimant did not have the skills for the other work available at the time and fundamentally Mr Lancaster needed the claimant operating a T drill as much of the respondent's work was dependent upon it. Mr Lancaster had taken reasonable steps to get the claimant to return to work operating the old T drill. It was within the reasonable range for Mr Lancaster to refuse to obtain the structural engineer's report the claimant was insisting upon. At that point there was an impasse and it was within the reasonable range for Mr Lancaster to conclude that the claimant did not have sufficient trust in him or the respondent to return to work on the old T drill, there was no reasonable way to rebuild that trust, and therefore dismissal was the appropriate course of action.

146. In all the circumstances, including the size and administrative resources of the respondent, and equity and the substantial merits of the case, I consider the respondent acted reasonably in treating the reason as a sufficient reason to dismiss the claimant. The decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted in the circumstances. The "ordinary" unfair dismissal claim is therefore not well founded and is dismissed.

Wrongful Dismissal

147. In the wrongful dismissal claim I have to consider for myself whether the claimant was in repudiatory breach of contract, such that the respondent could accept that breach and terminate the contract without notice.

148. In my judgement, the claimant, having been through such a long process of exploring with Mr Lancaster what his concerns were and how they may be addressed, and the steps taken in response by Mr Lancaster (including the obtaining of the risk assessment by the health and safety consultant done at the claimant's request), in then refusing the instruction to return to work on the old T drill unless Mr Lancaster obtained and funded a structural engineer's report was conduct which undermined trust and confidence.

149. I accept that the claimant was genuinely worried about whether the use of the mezzanine floor was safe, was looking for reassurance from a third party, and I accept that the HSE had by the end mentioned a structural engineer's report to the claimant. But it was not something in their gift to insist upon. Importantly, the claimant had told Mr Lancaster, amongst other things, that the work to strengthen the floor followed by the risk assessment would suffice. He knew, and had seen, that the health and safety consultant was working on the basis of calculations done by a structural engineer. He had seen the emails from Amapola about use of the mezzanine floor. He knew and had seen that the machine had been slowed down and additional structural beams added under the old T drill to improve stability. He could give no sensible reason in evidence as to why he did not trust the health and safety consultant instructed by the respondent to do the

risk assessment, which was the step, undertaken by a third party, he had asked for. The respondent was justified in the circumstances in declining to fund and obtain a structural engineer's report to address the claimant's concerns. In my judgement, in those circumstances and given the history of the matter, the claimant's conduct in refusing to return to work did undermine trust and confidence to such an extent that the respondent should no longer be required to retain the claimant in employment. The claimant was ultimately refusing to return to work to undertake the duties he was being reasonably directed to do by his employer. He was therefore in repudiatory breach of contract and the respondent was entitled to accept that repudiation and terminate the contract without notice. The wrongful dismissal claim is not well founded and is dismissed.

Unauthorised deduction from wages

150. In the list of issues EJ Sharp indicated that the claimant needed to set out the wages he said he had been underpaid. He did so at [310], with the respondent's comments in reply at [311-312].

151. Mr Probert confirmed in closing submissions that if the Tribunal's concluded the claimant was at any point reasonable in refusing to operate the old T drill, then it was accepted that there had been an unauthorised deduction from wages for the days the claimant went unpaid. That analysis would accord with the decision of the Court of Appeal in Luke v Stoke on Trent City Council [2007] EWCA Civ 761 in which it was said that there are reciprocal obligations in an employment relationship and an employee is under a duty to comply with an employer's reasonable requirements so long as they fell within the scope of the employment contract. On the facts of that case, the employment tribunal there had found the employer was reasonable in not returning the claimant to a particular workplace, as she was refusing to accept the contents of a particular report. The Court of Appeal observed that there was nothing in the contract of employment that entitled the claimant in that case to set the terms on which she would return to work, or entitled her to continued receipt of pay when she was not working as reasonably required by her employer and within the scope of the contract. It was in her power to return to work and receive pay. It was said to be a straightforward case of "no work, no pay" and there was no need to look to the question of implied terms as the claim for arrears of salary was in the employment relationship itself, which was governed by the express contract.

152. In North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387 it was said uncontroversial common law principles from the authorities included that "*If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction to their pay."* It was also said that an inability to work due to the result of a third party decision, or external constraint or one that was "involuntary" or due to an "unavoidable impediment" may render the deduction of pay unlawful. The Court of Appeal also went on to say (albeit in the context of a case about deductions

from pay during suspension enforced by a third party) that the starting point should be to assess whether the deduction of pay was in accordance with an express or implied term/custom and practice, and that only if the answer was in the negative, then the common law principle falls to be considered.

153. Mr Probert also accepted that for the dates when the claimant was reimbursed pay, after Ms Jones heard the appeal, the claimant may be entitled to a declaration, on the basis that there may have been an unauthorised deduction from wages when the wages were not paid to the claimant at the original time they would have been due. Albeit he also said it could be said that at the point the original deductions were made they were legitimate at the time and therefore not a deduction.

154. In my judgement, it was reasonable for the claimant to decline to operate the old T drill until he was in receipt of the risk assessment from the health and safety consultant on 19 March. Mr Lancaster had said early on 2 March he would consider getting such a report. The claimant, given his experience of the movement of the machine and of the floor, was acting reasonably in waiting for the machine to be slowed down and the structural work to be done to the floor. He was thereafter acting reasonably in seeking an updated risk assessment before returning to use the old T drill. Mr Lancaster had said on 10 March the risk assessments would be updated once the work on the floor was done. But after 19 March the claimant acted unreasonably in refusing to operate the machine, which meant he went unpaid by the respondent.

155. It follows there was an unauthorised deduction from wages on 18, 22, 23, 24, 25 February 2021, and 1, 2, 3, 4, 8, 9,10, 11, 15, 16, 17, and 18th March 2021, but not on the other days prior to the claimant's dismissal when he went unpaid. There is a potential tension between the Luke and Gregg cases as to whether the principle of "no work, no pay" is an express contractual term inherent in the employment relationship or whether it is a matter of common law. I cannot see, however, that it makes a different to the analysis in this case. There was no case presented on the basis of any implied term. Whether it is looked at as a matter of being an express contractual term or a matter of common law, the claimant was under a duty to comply with his employer's reasonable requirements so long as they fell within the scope of the employment contract. If he did not do so, then he was not ready, willing and able to perform that work and is not entitled to pay. On the other hand, where his employer was making unreasonable requirements, and the claimant was otherwise ready, willing and able to perform other work allocated on a reasonable basis (but none was forthcoming), he had a legal entitlement (whether under contract or the common law) to be paid.

156. It follows that the claimant is entitled to a declaration that there was an unauthorised deduction from wages, in not paying him at the time the wages were originally due for the working days 18, 22 and 23 February 2021. The claimant has already been reimbursed those days by the respondent and

therefore financial award is made for those 3 days. The claimant is also entitled to a declaration there was an unauthorised deduction from wages on 24, 25 February 2021, and 1, 2, 3, 4, 8, 9,10, 11, 15, 16, 17, and 18th March 2021. That amounts to 14 days pay. Utilising the figures set out at [311] which gives a net earning earnings of £11,825.20 a year, on a gross basis would be £12,133.00. That produces a gross daily rate of pay of £58.33. 14 x £58.33 totals **£816.62.** Tax and employee national insurance contributions will be due from this sum.

Employment Judge R Harfield
Dated: 16 June 2022

JUDGMENT SENT TO THE PARTIES ON 21 June 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche