IN THE EMPLOYMENT TRIBUNAL

Case No. 54 of 2019

BETWEEN:

JUAN CARLOS ROJAS DE FEDERICO

Claimant

-and-

EDEN BOTANICS LIMITED

Respondent

DECISION

Ms Claire Pizarello, assisted by Ms Jemma Emmerson of Messrs Hassans, acting for the Claimant

Ms Grace Marie Lima, of Messrs Attias & Levy, acting for the Respondent

Introduction

1. The Claimant was employed as a gardener by the Respondent in its business of creating plantings and gardening arrangements at offices and homes from the 21st July 2011 until his employment was terminated on 2nd September 2019. Prior to this, he had previously worked as a gardener for Gibral Flora Limited for 8 years. There were approximately 5 employees when he started working for the Respondent, and which had increased to approximately 10 by 2018 and 12/13 by the date of his dismissal. By then all but two of the Respondent's employees were able to drive the Respondent's vehicles as part of their duties, including the Respondent.

2. The Claimant had a number of qualifications/certificates as a gardener including a Certificate for Attendance at a Course on Security Standards and D.C.I. for Contract Workers in 1998; a Certificate of Attendance in

2006 from the Spanish Association of Arboriculture for completing a theoretical and practical course on the pruning and climbing of ornamental trees; a Certificate of Care Maintenance and Preservation of Palm Trees in 2000; a Certificate of Attendance at the Maintenance and Pruning of Palm Trees in 2006; a Certificate of Achievement on theory and practical course on Rescue in Arboriculture Works in 2008 working systems in arboriculture, management of works, risk plans, emergency mechanism, rescue protocol, first aid; and a Lantra Awards Certificate of Training on Chainsaw Maintenance and Cross-cutting in 2017.

3. On 20th August 2019 the Claimant was instructed to drive a two year old tipper van (**Tipper Van**) to a work site at the Schomberg Estate to cut and clear vegetation and branches, load the cuttings onto the Tipper Van and then return to the Depot once the cuttings had been unloaded at another site (**Work Task**). AM, a Spanish university student on work experience, was assigned to assist the Claimant in this task (***AM***). The Tipper Van had a container, resembling a metal cage, where heavy loads were placed. As the Claimant drove the Tipper Van from the Schomberg Estate to unload it at another site, its rear door swung open and hit the windscreen of an on-coming motor vehicle at Europa Point (near the old incinerator site) some 2km from the Schomberg Estate (**Accident**). Mr Christian Buttigieg (***Mr Buttigieg***), the Respondent's Managing Director since 24th October 2007, attended the scene of the Accident, and then instructed Ms Jacqueline Anderson (***Ms Anderson***), the Respondent's Administrative Assistant with a secretarial role since 14th September 2015 - and who undertook most administrative and clerical tasks for the Respondent, including liaising with clients, taking minutes during meetings, putting arrangements in place for employees to undergo training, keeping records/bookkeeping and some HR - to interview both the Claimant and AM separately about the Accident. This she did on 21st August 2021 with Mr Manuel Valadez Vera (***Mr Valadez***), the Respondent's garden supervisor since 7th May 2018, also present. The Claimant was not accompanied by a work colleague or trade union colleague at this meeting. The Claimant was then suspended on full pay at the end of his interview, and the Tipper Van inspected by Mr Valadez and Ms Anderson. On receiving the report from Ms Anderson with the attendance note of the interviews on 21st August 2019 undertaken by her with the Claimant (**Claimant Attendance Note**) and AM separately (**AM Attendance Note**) and reviewing other matters, Mr Buttigieg dismissed the Claimant by letter dated 23rd August 2019 with effect from 2nd September 2019 (**Dismissal Letter**). The Claimant appealed against the decision to dismiss him, which Mr Buttigieg also dealt with by way of a review, having discussed it with his co-director, and before dismissing the appeal.

The grounds on which it is claimed dismissal was unfair

4. The general grounds on which the Claimant's alleges he was unfairly dismissed in his Claim Form, and in evidence, are by way of summary that:-

   a. Having always performed his duties in a diligent and professional manner, the Respondent attributed the Accident to the Claimant's negligence despite his explanation that it was AM who had "*failed to securely close the back door of the van and, as a consequence, it hit another car and broke the window*";
   b. It was the Respondent's own failure to fix and properly maintain the door of the Tipper Van despite prior notification by the Claimant and other employees of its disrepair that caused the Accident, and which was indicative of poor working conditions generally and the use of unsafe and broken safety equipment;
   c. The Claimant received no reply to his appeal, or to the communications of the Claimant's trade union convenor;
   d. The Respondent acted unreasonably in dismissing the Claimant as:-
      - it failed to conduct a proper investigation and fair disciplinary hearing, and at a short meeting at the Respondent's offices where he was unrepresented, he was unable to challenge any statements made by AM that might be contrary to his version of events, was not given the opportunity to explain his version of events, including to Mr Buttigieg, and to respond to the specific allegations made, contrary to natural justice.

- the previous warnings referred to in the Dismissal Letter had not been issued and the prior incidents relied on in the Dismissal Letter had not occurred or been previously discussed, and did not justify summary dismissal.
- no disciplinary charges of disregarding the Respondent's health and safety rules was put to him.

5. The Claim Form included a claim for breach of contract namely for the Claimant's contractual notice pay, being for a weekly paid employee with more than 8 but less than 10 years' service on the date of his dismissal 2 months' pay.

The grounds on which it is claimed that the dismissal was fair

6. The Respondent made no contractual claim against the Claimant, and defended the Claim for unfair dismissal on the grounds that:-

a. The Claimant's work was not always of the appropriate standard and whilst for a period of time he responded to informal discussions and informal verbal reprimands and improved his conduct or standard of work, as time went on and in particular from 2015 onwards, his performance became increasingly more variable in standard and careless with equipment to the point where he was not complying with the Respondent's essential health and safety rules;
b. The Claimant received numerous instructions on health and safety issues and on standards of work through team meetings, informal discussions with Mr Buttigieg and Mr Valadez, formal training courses and formal disciplinary procedures which included meetings and on one occasion, a written warning;
c. As the driver of the Tipper Van in the Work Task the Claimant was responsible for checking the van doors and gate, the tyres, brakes, lights, petrol, oil, and water as part of the Respondent's safety routines, and as the more experienced member of the team and carrying out one of the simpler tasks of the day, AM was allocated to be the Claimant's assistant whilst doing his work experience. The Claimant, as the driver and senior member of this small two person team, was responsible for ensuring that all tasks were carried out in a proper and safe manner, that all health and safety checks were carried out to the Tipper Van before driving-off including the secure locking of it doors. These duties had been regularly communicated at team meetings and discussions;
d. As the rear door had not been secured properly and not checked to ensure this was the case before driving off, it swung open and hit the windscreen of an on-coming vehicle;
e. On 21st August 2019 the Claimant and AM were interviewed at length by Ms. Anderson and Mr Valadez to obtain their explanation of the incident, Mr Valadez inspected the van to check for damage and to ensure that the locking mechanisms were fully functional; Mr Valadez visited the site of the Accident to observe how the incident might have taken place and fully understand it and reports of the interviews and Mr Valadez' findings were passed to Mr Buttigieg for his consideration;
f. Because this was such a serious breach of health and safety instructions, it was felt that it constituted gross misconduct and the Claimant was suspended with pay after his interview on 21st August 2019 pending consideration of the findings of the investigation;
g. On 22nd August 2019, Mr Buttigieg spoke at length with Mr Valadez about this incident and the Claimant's previous history of conduct at work: "*The Managing Director concluded that the seriousness of this latest incident as a result of negligence in applying company rules amounted to gross misconduct through ignoring regularly communicated instructions*". He decided that the Claimant should be dismissed but with a week's paid notice to help a family man while he sought alternative employment;
h. The appeal process involved a review by another company director at a meeting between the two company directors where the Claimant's appeal was discussed including the facts of the incident of 20th August 2019 as well as the examples of the Claimant's history of unacceptable conduct, whether he could change his behaviour significantly in the future given that the Claimant had been dismissed

by the Respondent in 2017 for gross misconduct at the time and which was waived on appeal at the time, a disciplinary interview in September 2018 after a series of incidents had led to a written warning, and despite this warning, there were several more incidents of neglectful behaviour leading to verbal reprimands and reminders of the warning. *"It was decided by the directors that the incident of 20th of August was the latest in a series of incidents caused by conduct which the employee appeared unwilling to change"* and the decision to dismiss was therefore upheld by the Respondent's directors. A letter dated 12th September 2019 explaining that the appeal had been unsuccessful was posted to the Claimant in Spain.

The issues to be determined

Unfair dismissal

7. The issue of whether the dismissal was fair or unfair normally involves four questions, two of which, namely whether the Claimant qualified to claim for unfair dismissal, and whether he was dismissed, can both be answered in the affirmative and are not an issue in this Claim, leaving two questions for the Employment Tribunal to determine:-

   a. Has the Respondent discharged the burden of proving under section 65(1) of the Employment Act 1932 ("**the Act**") that the reason, or the principal reason, for the dismissal was a reason falling within section 65 (2) of the Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held, so as to be a potentially fair reason for dismissal? If the Respondent cannot prove that, then the dismissal is automatically unfair; and
   b. If the answer to this first question is in the affirmative, did the Claimant act reasonably or unreasonably in treating the reason, or the principal reason, as constituting a sufficient reason for dismissing the Complainant and which question is to be determined in accordance with equity and the substantial merits of the case.

Applicable Law

Reason for dismissal

8. Section 65(1) and (2) of the Act provide:-

> *"65.(1) In determining for the purposes of sections 59 and 70 whether the dismissal of an employee was fair or unfair, it shall be for the employer to show:-*
>
> *(a) what was the reason (or, if there was more than one, the principal reason) for the dismissal; and*
> *(b) that it was a reason falling within the next following subsection, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.*
>
> *(2) In subsection (1)(b) the reference to a reason falling which this subsection is a reference to a reason which:-*
>
> *(a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;*
> *(b) related to the conduct of the employee;*
> *(c) was that the employee was redundant;*
> *(d) was that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under any enactment."*

9. Section 65(1) imposes the burden of proof on the Respondent to establish the reason, or if more than one, the principal reason for the dismissal (*Maund v Penwith District Council* [1984] ICR 143). If the Respondent cannot do so, the dismissal is automatically unfair. This only requires the Respondent to show the reason for the dismissal, not that the reason is based on reasonable grounds: *Trust House Forte Leisure Ltd v Aquilar* [1977] IRLR 251, *Maintenance Co Ltd v Dormer* [1982] IRLR 491. It is then for the Tribunal to determine whether that reason engages one of the five potentially fair reasons [*West Midlands Co-operative Society v Tipton* [1986] IRLR 112].

10. The principal reason the Respondent relies on for dismissing the Claimant is conduct under Section 65(2)(b)(ii) of the Act. To assess whether section 65(2)(b)(ii) is engaged, the question that needs to be determined is whether the dismissal of the Claimant was caused wholly or mainly by his failing to comply with lawful instructions in dereliction of his duties.

11. The guidelines for tribunals to apply when dealing with cases of alleged misconduct in the case of *British Home Stores Ltd v Burchell* (1980) ICR 303 at 304C (approved by the Court of Appeal in *W. Weddel & Co Ltd v Tepper (1980) ICR 286)* set out a three-limb test that needs to be answered:-

    a. Whether there was a genuine belief by the Respondent that the Claimant had committed an act of misconduct in failing to ensure as the driver of the Tipper Van in accordance with instructions given to him by the Respondent that the door was properly closed, and which was the cause of the Accident and not that the door was broken;
    b. Whether there were reasonable grounds to sustain the belief; and
    c. Whether the Respondent, at the stage it formed that belief, had carried out as much investigation as was reasonable in all the circumstances of the case.

12. If the Tribunal considers the three-limb test in *BHS v Burchell* to be satisfied by the Respondent it must still go on to consider whether the Respondent acted reasonably in treating the reason as sufficient to dismiss.

Whether the Respondent acted reasonably in the circumstances in treating it as a sufficient reason to dismiss the Claimant – the band of reasonable responses

13. Once the Respondent has established a potentially fair reason, section 65(6) provides:

    "Subject to subsections (4) and (5) the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case."

14. In determining this question, which is a neutral question on the facts and on which neither party bears the burden of proof as to whether the Respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss in all the circumstances, I must consider the test set out in (*Iceland Frozen Foods Limited v Jones* [1982] IRLR:-

    (1) The reasonableness of the Respondent's conduct, not simply whether I consider the dismissal to be fair;
    (2) In judging reasonableness of the Respondent's conduct, I must not substitute my decision as to what is the right course to adopt for that of the Respondent. The standard is that of the hypothetical reasonable employer.
    (3) In many cases there is a band of reasonable responses whereby one employer might reasonably take one view, another quite reasonably another. A dismissal is only unfair if no reasonable employer would have dismissed;
    (4) The function of the Tribunal, as an industrial jury, is to determine whether in the particular circumstances of the 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 the band, the dismissal is fair, if the dismissal falls outside the band, it is unfair;

(5) To gather all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances whether the dismissal of the Claimant was such that a reasonable employer carrying on the Respondent's business would have regarded the dismissal as a reasonable response and whether, in all the circumstances of the case, the dismissal was carried out in a fair way.

Procedural fairness

15. Procedural unfairness, namely the manner in which the decision was made, is only relevant to the extent that it affects the fairness of the reason shown by the Respondent for the dismissal *Polkey v AE Dayton Services Limited* (1988) AC 344, (HL) at 357F where the House of Lords opted for the analysis of Browne-Wilkinson J (as he was then) in *Sillifant v Powell Duffryn Timber Limited (1983) IRLR 91 at p. 97*:- *"The only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. A [tribunal] is not bound to hold that any procedural failure by the employer renders the dismissal unfair: it is one of the factors to be weighed by the [tribunal] in deciding whether or not the dismissal was reasonable within section 57(3). The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of dismissal, not on the actual consequence of such failure. Thus in the case of a failure to give an opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, a [tribunal] would be likely to hold that the lack of 'equity' inherent in the failure would render the dismissal unfair. But there may be cases where the offence is so heinous and the facts so manifestly clear that a reasonable employer could, on the facts known to him at the time of dismissal, take the view that whatever explanation the employee advanced it would make no difference…"*

16. Lord Bridge of Harwich at page 364C in Polkey summarises the essence of procedural fairness as follows:-

> *"But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation…If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by s.[98(4)] (*s.65(6) in Gibraltar) *is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken."*

Compensation

17. Where a dismissal is found to be unfair as a result of any procedural unfairness, a *Polkey* deduction can be applied by reducing the award of compensation to nil on the ground that the Complainant's failure did not affect the outcome: *Polkey*; *Fisher v California Cake & Cookie Limited* [1997] IRLR 212; *Parkinson v March Consulting Ltd* [1997] IRLR 308. If the Tribunal is unwilling to award no compensation, it can limit the award to a nominal amount by the application of the *Polkey* deduction [*Constantine v Mcgregor Cory Limited* [2000] UKEAT/236/99]. There is no need for an all or nothing decision. If the Tribunal considers there is doubt whether or not the Respondent would have been dismissed, that element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the Respondent would still have lost his employment.

Breach of contract – notice entitlement

18. Section 56 of the Employment Act provides:-

> "*56(1) Notwithstanding the provisions of sections 54 and 55 an employer may dismiss an employee and an employee may abandon the service of an employer, without giving notice and without any liability to make payment as provided in subsections (1) and (2) if there is good and sufficient cause for such dismissal or abandonment of service: Provided that an employer shall not be entitled to set up as good and sufficient cause under this section (a) that the employee's lack, loss or impairment of skill, ability or efficiency makes the fulfilment of the contract of service impossible; or (b) that the employee no longer enjoys the employer's confidence*."

The Evidence

Incident on 20th August 2019

19. On 20th August *2019* the Claimant was instructed to carry out the Work Task with AM, a Spanish university student seeking a few weeks of unpaid work experience during the summer holidays and whose father-in-law was the foreman for an entity the Respondent worked with. Mr Buttigieg wanted to keep on good terms with AM's father-in-law by employing AM. Mr Buttigieg assigned AM simple tasks, and considered the Work Task to be one that AM could learn some basic skills from the Claimant, who was one of the more experienced members of the team. Both Ms Anderson and Mr Buttigieg confirmed that AM had only been working for the Respondent for a number of weeks, but had not been registered to work at the Department of Employment as he should have been. Mr Valadez thought AM had been working for the Respondent for between 4 to 6 months. The Claimant referred to this on cross-examination, but when it was put to him that Mr Valadez was not involved in administrative matters, and that Mr Buttigieg and Ms Anderson had both stated that AM had only been working for the Respondent for a few weeks, the Claimant accepted that AM had been working with the maintenance group for approximately 1 month to 1½ months only, from about mid-June. This also accorded with the description the Claimant was recorded as having given AM in the Claimant Attendance Note as "*the new boy*" on "*work experience*", and which description was not challenged by the Claimant.

20. On receiving a call from the Claimant that he had been involved in the Accident, Mr Buttigieg attended at the scene of the Accident and observed the Tipper Van on one side of the road, a car with two elderly people on the opposite side of the road some 100m away and an RGP officer by the Tipper Van speaking to the Claimant and AM. Mr Buttigieg observed on checking the door of the Tipper Van that it had buckled with the impact, and he was not at first able to close it properly. Mr Buttigieg says that he then asked who had closed the door and the Claimant replied that AM had. The Claimant says that Mr Buttigieg did not speak to him at the scene of the Accident about this, and this explanation is consistent with what the Claimant is recorded as saying in the Claimant Attendance Note. Mr Buttigieg explained on cross-examination that AM had informed him at the scene of the Accident that he had applied one lock and elastic band. This is not recorded in the AM Attendance Note. AM is recorded as saying in the AM Attendance Note that when Mr Buttigieg arrived he spoke to the Claimant, the RGP and the passengers in the car, but there is no mention of him speaking specifically to AM other than the instruction for him to get in the Tipper Van with the Claimant before they drove off. Mr Buttigieg then asked the elderly people what had happened. They explained to him that the doors of the cage of the Tipper Van where the tree trunks, logs, and branches were loaded had swung open whilst the Tipper Van was moving and had hit the windscreen of their car and frightened them. Mr Buttigieg could see where the edge of the Tipper Van cage door had struck the car windscreen with sufficient force to smash the glass of the windscreen, and buckle part of the car framework. Mr Buttigieg then realised that had the cage door struck an on-coming motorcycle driver with the same force, it was most likely that there would have been a fatality.

21. Mr Buttigieg telephoned Mr Valadez at the Depot to let him know what had happened, and then Ms Anderson to ask her to take a brief note of the incident as Mr Buttigieg described it over the telephone and to arrange to interview both AM and the Claimant. With the assistance of AM and the Claimant, Mr Buttigieg removed the gate and the Tipper Van was taken to the tip to unload it, before returning for the gate and driving back to the Depot where a member of the team booked it in to repair the buckled gate. The Claimant was allowed to continue working that day. At this stage, Mr Buttigieg's evidence is that he had already formed the view that the Claimant, as the driver of the Tipper Van, was responsible for it and could not delegate to AM the duty of ensuring that the rear door of the Tipper Van had been properly locked.

22. Ms. Anderson arranged to interview AM and the Claimant separately to establish what exactly had happened and to give them both the opportunity to explain themselves. She asked Mr Valadez to be present with her as he spoke better Spanish than she did and she would feel more comfortable with him present as the Claimant had become aggressive with other members of staff in the past. Mr Valadez confirmed Ms Anderson concerns about the Claimant's temper as did Mr Buttigieg who had experienced his temper on prior occasions.

23. Ms Anderson interviewed the Claimant and AM on 21st August 2019 and prepared the Claimant Attendance Note and AM Attendance Note following each separate interview, with the former stating that the purpose of the interview was not only to establish the Claimant's recollection and perception of the events leading to the Accident but also that "*the company needed to understand what had happened, how it had happened and what steps needed to be taken to ensure this sort of occurrence could not happen again. Mr Rojas agreed he understood and he agreed that this was in keeping with his experience of the company having gone through the process of ISO some years previously and making health and safety at work a high priority for all staff*". Mr Buttigieg's evidence is that the Claimant had been made aware at that interview that the Accident was a very serious matter and would result in some form of disciplinary action. It is clear from the Claimant's Attendance Note that Ms Anderson only informed the Claimant at the very end of the interview that the Claimant's Attendance Note would be passed to Mr Buttigieg "*and he would take a view on what course of disciplinary action might follow*". He had not been informed of this before attending the interview, or before providing his explanation or answering any questions put to him. He got annoyed when he heard this as well as his suspension at the end of the interview.

24. Mr Buttigieg's evidence is that after speaking to both Ms Anderson and Mr Valadez following the interviews with both AM and the Claimant, he formed the view that there was gross misconduct in causing damage to a third party's vehicle and placing members of the public at risk of serious injury and potentially loss of life, and that he personally took the decision as managing director to suspend the Claimant immediately pending final determination. This was inconsistent with Ms Anderson's account that the Claimant was suspended by her immediately at the end of the interview with the Claimant after a brief discussion with Mr Valadez on how best to proceed, and not with Mr Buttigieg, who was not present at either of those interviews. Mr Buttigieg sought to explain this inconsistency on the basis that the process was not perfect but that they had tried their best, and which did not explain this important contradiction in the Respondent's evidence. Ms Anderson stated that it was agreed with Mr Valadez that the Claimant's conduct had been neglectful and could be potentially considered gross misconduct, and she informed the Claimant that he would be suspended on full pay pending further investigation and a decision by Mr Buttigieg. The Claimant became angry on hearing of this, and left the office shouting.

25. The Claimant's Attendance Note records the Claimant acknowledging that he had instructed AM to close the door of the Tipper Van before leaving the Schomberg Estate and that *"he believed that AM had not closed the door properly and had then not checked when he re-entered the lorry when they prepared to leave the site to go to the tip"*. When challenged by Mr Valadez about the seriousness of his failure in not checking as the designated driver that the gate was properly closed before driving off with a full load in breach of health and safety procedures and his duty to ensure the Tipper Van was safe, and by Ms

Anderson for not supervising closely the work of AM as a trainee as the longest serving employee and the most experienced, the Claimant became angry and defensive in tone and said if he was going to supervise work he expected a supervisor's wage, and that he refused to work above his pay grade which was very low and that he deserved a pay rise. Mr Valadez was very concerned at his refusal to accept any responsibility for the door not being closed properly by AM, and for not checking himself to ensure this, but accepted that sometimes one can delegate such a task.

26. The Claimant's evidence at the Tribunal hearing by way of explanation for the Accident was, firstly, that he had taught AM the day before when working with him how to properly close the door of the Tipper Van, and that AM did not need a course on how to do this. The AM Attendance Note, hearsay evidence which the Claimant never had the opportunity to challenge, states otherwise (emphasis added by me):-

> "*He* [AM] *said to his recollection, no checks of the vehicle were made at all before starting it up to leave the HQ…. At the work site, he took the tools out of the lorry and closed the door. He thought it was properly closed* ***but that Mr Rojas did not check, nor was it shown him how to use all the different bolts*** (emphasis added)*, and to his knowledge the door was closed properly as he emulated what he had seen Mr Rojas do to close the door….. He was called into the passenger seat of the cab of the lorry and they drove off towards the tip.* ***He asserted that the lorry was not checked at all, nor the cage door, before setting off****. He confirmed that Mr Rojas was driving the vehicle……He said that Mr Buttigieg then arrived on the scene and spoke to Mr Rojas and to the police and the people in the damaged car".*

27. Secondly, that AM had forgotten to tie one of the ropes, and was not qualified/insured in any event to work downhill on a cliff loading large sized trunks without a harness as there was only one very old expired harness available. On cross-examination, the Claimant admitted that he knew how to lock the cage door properly with the locking mechanism so when asked why he did not inspect the vehicle door to make sure that it had been properly closed by AM before he left the site, he stated that it was properly closed at all times, but that the blue bungees had not been fitted. It was then put to him that that explanation contradicted paragraph 2 of the Claim Form which stated: "*The Claimant's colleague failed to securely close the back door of the van and, as a consequence, it hit another car and broke the window*". The Claimant explained that this was a mistake in translation, and that he had never said that the doors had been wrongly closed by AM, but that the doors were not in good working order condition. In fact, the Claimant's Attendance Note also records the Claimant as saying that AM "*had not closed the door properly*". The Claimant then stated on cross examination that AM had told Mr Valadez that AM had not fitted the blue bungees on, and that the blue bungees were used to hold the doors open/close them. The Claimant admitted in evidence to advising AM to tell Mr Valadez that he had put the blue bungees on, but as he was pressed by Mr Valadez, AM admitted he had not done so. When asked how could he maintain that the gate had been securely locked if he had never inspected it before leaving the Schomberg Estate, he answered because he knew it was closed, and when pressed again, explained because it would have opened earlier than it did if it had not been closed given the distance it travelled from Schomberg to Europa (the old incinerator site) before the gate opened. In the Claimant's Attendance Note, the Claimant is also recorded as stating that he had not checked to see if the vehicle door was properly closed and secured. He nevertheless insisted on cross-examination that he did check that the door was closed properly despite having said twice that it had not been otherwise the door would have opened far earlier than it did. When asked whether he had carried out a risk assessment before leaving the Schomberg Estate to make sure the door was locked securely, and would have been negligent if he had not done so, he replied it was closed and that if AM worked with him he was qualified to work and check this himself, and he would not accept responsibility for AM as the driver of the vehicle for doing so, that AM did not need supervision having worked with him the previous day and that his obligation was to take the logs to the skip. In any event, the doors were properly closed, and he had checked this. On re-examination, the Claimant maintained that he checked to make sure the door was closed before the trunks were thrown in and there was no need to inspect again.

28. Thirdly, that the door of the Tipper Van would not close properly as the rear door locks had been broken for several months with the door opening when moving despite both himself and Robert Gomez Vasquez ("**Mr Gomez**") notifying Mr Buttigieg of this on several occasions prior to the Accident and which Mr Gomez confirmed in his evidence. The Claimant's evidence is that Mr Buttigieg had ignored these complaints of disrepair, so his team used one single blue bungee to keep the door closed, a temporary measure, with the other one being added after the Accident. He was unaware of a longer pin being inserted in the Tipper Van by Mr Valadez shortly before the Accident. On cross-examination, the Claimant admitted that he knew how to lock the cage door properly with the locking mechanism so when asked why he did not inspect the Tipper Van door to make sure that it had been properly closed by AM before he left Schomberg, he stated that it was properly closed at all times, but that the blue bungee had not been fitted. Mr Valadez confirmed that the door of the Tipper Van had swung open once before, but when this occurred the Tipper Van had been adapted to ensure that the locking mechanisms would prevent this occurring again. The Claimant did not deny this.

29. The Claimant's Attendance Note records Ms Anderson and Mr Valadez inspecting the Tipper Van, and that all the main metal locks/bolts were found to be working except for one small bolt used to open/close one of the side leaves of the cage which had been worked loose but which was considered to have had no effect on the door opening if it had been shut properly (Lock C: see paragraph 31 below). This indicated to Mr Valadez that the door of the cage had not been properly closed, and neglect on the part of the Claimant. Mr Valadez confirmed that this was exactly how he had found the vehicle when he inspected it a short time after the Accident. He also found that the '*bungee*' elastic, which was used as an extra, had snapped when the door swung open. Mr Valadez on cross-examination sated that he had checked the Tipper Van at the Depot on 20th August 2019 even though this is not mentioned in his Witness Statement and saw the door had buckled, and denied that the door had been removed that day even though Mr Buttigieg stated it had. He admitted that he had no qualifications for vehicles, would not check the vehicles on a monthly basis and nor would forms be completed to show that vehicles had been properly checked by the Respondent.

30. Ms Anderson's evidence was that she and Mr Valadez concluded that the small bolt used to open one of the side leaves to the cage door (Lock C) had been worked loose which coupled with the snapped bungee would not have caused the cage door to swing open if the cage door had otherwise been properly locked. On cross-examination she could not recall seeing the broken bolt, or reporting that it needed to be repaired. She admitted that other than her observations of what she saw, she had no experience in vehicle maintenance. Ms Anderson further clarified that where it stated "*Second Investigation of Vehicle*" in the Claimant's Attendance Note, it was her first investigation but Mr Valadez' second. The door of the Tipper Van had not opened again since the Accident. On re-examination she confirmed that she would record what she saw and what was in the Claimant's Attendance Note, and which was clearer then than her recollection when giving evidence at this hearing.

31. Mr Buttigieg's evidence is that having received the reports from Ms Anderson and Mr Valadez, he did not want to rush into a decision but wanted to give the matter serious consideration so he personally checked the Tipper Van himself. He explained in evidence that the gate had a three-part bolt locking security mechanism to ensure that the gate door would not open-and then subsequently referred to as a four-part mechanism on cross-examination – comprising, firstly, of two bottom lock safety clips fitted to the base of each leaf of the gate ("**Lock A**") which would be locked and clipped together. This was an add-on by the Respondent. Secondly, the pin fitted to the large central middle lock, and with a white string and screw added by staff later, which constituted the second, and arguably, third mechanism [both "**Lock B**"]. Thirdly, a large central pin fitted on the inside leaf of the gate to the base of the vehicle ("**Lock C**"). Mr Buttigieg stated that if only Lock C was used the vibrations of the vehicle when travelling would result in the gate opening. Mr Buttigieg's evidence was that if Lock B had been properly closed, and even only Lock A, the gate would not have opened. With both Lock A and Lock B applied it was impossible for the gate to have opened. Lock A was additional security for Lock B failing. Mr Buttigieg explained that the Claimant had been

instructed to close the gate with Lock A and Lock B, but could not remember if he had told him how to use Lock C but he believed he had. When cross-examined further, he referred to explaining to gardeners how to use these, but he could not recall specifically telling the Claimant this, but this would have been the norm. Mr Buttigieg's evidence was that any upwards and downwards movement of the Tipper Van as it was moving would not have caused the door to open had it been properly locked using these locking mechanisms.

32. Mr Valadez' evidence was that the Claimant knew that Lock A and Lock B should have been applied. However, Mr Valadez could not recall specifically instructing the Claimant how to properly lock the door, but he believed he had, as he had explained to the gardeners generally how to apply Lock A and Lock B. The blue bungees were to hold the door open, not shut, and elastic was not good for closing. The door had opened "*way before*" August 2019, as there was a problem with the Lock C bolt, so two additional bolts were added namely Lock A and Lock B. If Lock B was closed, and not Lock A, the door would not open. From his inspection, and he accepted it was not on the day of the Accident, Lock A and Lock B had not been applied, but just Lock C with the bungee, otherwise the door would not have opened. He accepted that accidents could happen.

33. Mr Buttigieg's evidence was that the blue elastic bungees were hooked on either side of the cage gate to keep the gate open when loading or unloading so that it did not swing shut. It was not part of the safety locking mechanism, but supplementary to another holding device that was already in place to hold the door open. The bungee had snapped. The original problem with Lock C was that the original pin had been too short so it was replaced by a longer one prior to the accident. Mr Buttigieg found that Lock C was broken, but as it only served to secure one leaf of the door to the floor of the Tipper Van, with the second leaf being closed into place with Lock A and B secured. The doors would not have opened had the gate been closed properly with Lock A and Lock B which were working perfectly well and would have provided the robust support needed to transport a full load even up a hill. Mr Buttigieg could only assume that the blue bungee had been applied, and not the other locks. The door had opened sometime before the Accident when only Lock C was in use so Lock A and Lock B were added on to prevent this happening again. He accepted that accidents could happen. The door had some minor buckling at the outer lower corner where it had impacted the car windscreen and which the Respondent had to repair.

34. Mr Buttigieg was shocked to read in the Claimant's Attendance Note the Claimant's dismissive attitude and inability to understand what he had done wrong despite the seriousness of the situation, and how quick he was to blame AM, a student whose actions should have been supervised at all times. Mr Buttigieg admitted on cross-examination that he did not meet with the Claimant as he wanted to avoid a confrontation with him as the Claimant could get a bit violent and had pushed someone that worked for the Respondent. Mr Buttigieg's evidence was that the Respondent had always stressed to its employees the importance of storing any load (which normally involved heavy branches, tree trunks and other flora) securely as if this were to open during transportation it could have devastating effects. Having been employed by the Company for 8 years at the time, Mr Buttigieg believed that the Claimant was well aware that AM was to undertake the task under his instruction and supervision at all times.

35. Mr Buttigieg also alleged that the Claimant had failed to check the back wheel of the Tipper Van which was very loose, and would have come off. AM had said in the AM Attendance Note that no checks were carried out by Claimant on the Tipper Van. Mr Valadez on re-examination confirmed that the wheel of the Tipper Van was loose and that it fell off when he kicked it at the Respondent's Depot. This was not mentioned in the Dismissal Letter, the Attendance Notes or in the Witness Statements of Mr Buttigieg or Mr Valadez. Mr Buttigieg explained this on the basis that the main issue was the locks, and not the wheels. However, he could not say when the last monthly check of the Tipper Van had been carried out by the Respondent.

36. Fourthly, that the Respondent's failure to fix the door of the Tipper Van despite prior notifications of the need to do so coupled with the use of unsafe and broken safety equipment generally was indicative of poor health and safety practices and working conditions. Several alleged examples of this were given by the Claimant, without specifying any dates, including the use of old, worn and expired safety harnesses without being replaced for over 8 years, denied by Mr Buttigieg; that staff were instructed to lift heavy loads (not put to Mr Buttigieg) without any safety measures in place; that there was a system of defective vehicle maintenance in operation as the front wheel of a second-hand Suzuki Carry purchased without any inspection came off which Mr Buttigieg had no recollection of; that the police had stopped a vehicle and observed 8 faults with it; on another occasion the Claimant had been left on top of an elevator lorry because one of the hydraulic circuit sleeves was rusty and had failed which Mr Buttigieg admitted stating that accidents can happen where no one is to blame/just need to repair the vehicle and which were in any event subject to 6 monthly service, and that the Respondent had only been fined once for vehicles other than parking tickets. Mr Valadez would check vehicles monthly but there were no formal record of this. Mr Buttigieg said he would review vehicles daily as they often had minor damage and would get them fixed and it would take about 2 minutes only to do as employees would never report any damage to him. Ms Anderson stated on cross-examination that the men generally checked vehicles, but one was designated monthly who reported to her/Mr Buttigieg directly, even if the Minutes barely referred to vehicle checks.

37. Despite the very generalised nature of the Claimant's allegations, including in paragraph 7 of his Witness Statement that new employees of the Respondent with no experience at all did not get any type of training on safety, and just started work so as not to waste time as money was the sole object of the Respondent, the Claimant admitted on cross-examination that as from 2015 the Respondent had commenced an induction programme for new employee gardeners and that as the most experienced gardener he would show the new gardeners how to work; that his general allegations of lack of safety equipment/procedures pre-dated 2015; that they had had to do a course in hazardous substances, and acknowledged that such a course was not required in Gibraltar; he knew what safety measures to take; that H&S was very important to the Respondent; that Mr Buttigieg took H&S very seriously but that when they went on a job the Respondent relied on its employees a lot which he then acknowledged was precisely what the various H & S Minutes of Team Meetings recorded the employees being instructed to do. Having made these important admissions, on re-examination the Claimant then stated that written policies were not provided, meetings were oral, and nothing was in writing as to how to use the equipment.

38. Mr Buttigieg's evidence is that the Respondent tried to have team meetings once a month but sometimes it could not do so as it was very difficult for a small company to do this. They had a Whatsapp conversation group. He had a lot of infrequent discussions, sometimes once a week, to discuss things not in the H & S Minutes of Team Meetings concerning the use of equipment, health and safety and daily issues. He spent a lot of money putting all PPE in place as this was a necessity. If anyone wanted equipment, they could simply go and buy it and there was no issue if it was not in storage. However clear his instructions were, the employees would often not do what he asked them to do. He tried to tell them every day to use helmets/PPE, but it just wouldn't happen. Even if the H& S Minutes of Team Meetings did not refer to the details as to vehicles, Mr Buttigieg's evidence was that he would always instruct them on vehicle safety including safety locks, chainsaw, the necessity of having PPE, and of the need to check vehicles before they were used.

39. Ms Anderson on cross-examination stated that staff were trained on PPE by Mr Buttigieg, albeit that it was informal but frequent. No formal external training was undertaken. In 2015 the Respondent got ISO achievements/awards and she understood that Mr Buttigieg had engaged a consultant at the time. The systems for PPE were in place, checked etc, and staff just needed to ask for it to be replaced/restocked. Ms Anderson on re-examination stated that in formal meetings attendees had to sign-in. The ISO process needed to show that everyone had received the training. The purpose was to remind people to assess risks, especially in manual work, using power tools and vehicles. It was intended as a refresher these were

open and frequent discussions with the team as shown in the minutes and many were not recorded and would have discussed appropriate PPE to wear. Employees had their own responsibilities for boots/PPE. There were constant reviews and a budget for PPE as it was important that procurement of PPE was undertaken by Mr Valadez when he was engaged as supervisor in May 2019. Prior to this, Mr Buttigieg had done this. It was checked as much as possible, but whilst the employer was responsible so were employees ie to report broken equipment so it could be replaced or repaired. She only provided minutes relevant to this Claim, but normally there were monthly meetings, except for a period from May 2019 to August 2019 when meetings became less frequent and less formal as Ms Anderson was away for 3 months accompanying her daughter in the UK for heart surgery, and she was working remotely on a part-time basis, and then had to catch up when she got back. However, Mr Valadez on cross-examination stated in relation to the Respondent's HSE procedure and team meetings where HSE was discussed, that since he started he only remembered one such meeting.

40. Various H & S Minutes of Team Meetings were adduced in evidence including of 9th November 2015 recording that the Claimant was present (compliance with the ISO process and safety issues, health and safety procedures, PPE, the importance of staff carrying out risk assessments, including COSHH ones, and the introduction of purchase orders for PPE training needs); of 11th May 2016 at which the Claimant was also present, stating that Mr Buttigieg was available 24/7 and could be called at any time on H&S issues and that gardeners needed to use their logic/initiative and what their responsibilities were as well as standards expected from them. The Claimant acknowledged that this showed Mr Buttigieg's accessibility, and how important HSE was to the Respondent and how accessible Mr Buttigieg was to staff and never placed staff at risk and that if he placed himself at risk it was because he was acting contrary to his instructions and of his obligation to take care of himself. At the foot of this minute for 11th May 2016 it stated in English, but also Spanish, that: *"By signing your attendance you confirm that you have attended the meeting and are aware and understand the issues discussed including any changes in policy, procedure and in particular your responsibilities in terms of your work and in terms of all health and safety regulations and requirements of the company";* of 8th November 2016, where the Claimant was also present, recorded that its specific purpose was to review company health and safety procedures especially for the benefit of new members of staff and to advise staff of the impending ISO inspection; and of 12th July 2017 to review health and safety and PPE and work to achieve ISO standards with Mr Buttigieg expressing concern that he felt standards had slipped over the past year and these need to be picked up urgently. The Claimant acknowledged that he was at this meeting and that they were again reminded of PPE, even the small detail of sun protection being emphasised. The Claimant said he could not remember this.

41. Ms Anderson did not initially recall giving the Claimant a copy of the AM Attendance Note, but on re-examination she stated that the Claimant never asked for it otherwise she would have given it to him. However, she also stated that AM had informed her that he was so nervous, scared and intimidated by the new team he was working with that she had to assure him that neither the Claimant nor the others would be privy to the discussions they had had and she gave her word not to disclose these. Having done so, she did not give the Claimant the AM Attendance Note but would have if asked for it by the Claimant. Mr Buttigieg stated that the Claimant did not see AM's account of events as he did not ask for it, and was not therefore allowed to comment on it. For that matter, nor was the Claimant provided with the Claimant's Attendance Note to confirm what it contained was an accurate record of what was discussed. The Claimant therefore had no opportunity to comment on AM's interview, or its contents, or what he was recorded as having said in his.

42. Mr Buttigieg then instructed Ms Anderson to prepare the Dismissal Letter in English, and to give the Claimant notice to the 2nd September 2019 rather than be dismissed summarily as Ms Anderson stated that Mr Buttigieg did not wish to deprive the Claimant and his family immediately of an income, and which stated (emphasis added):-

"Dear Juan Carlos,

It is with regret that I must inform you of my decision to terminate your employment on 2nd September 2019 as a result of ***persistent neglect*** *of company health and safety rules and your insubordination in* ***ignoring instructions*** *to check equipment and* ***use it with due care****, which resulted in a serious incident on Tuesday 20th August 2019.*

During your discussion with your supervisor, Mr. Valadez, and my assistant, Mrs Jackie Anderson, you were ***reminded of the several instances where your lack of care and your wilful disregard of health and safety rules have led to serious incidents and damage to company equipment and vehicles****. These incidences* ***included*** *the following:*

- *Damage to the windscreen of the Suziki carry van when you loaded it up without due care and caution and proceeded to slam the rear door which propelled the load internally to impact against the windscreen.*
- *Earlier this year, you caused several hundreds of pounds worth of damage to the small chain saw when you used it to saw tree logs knowing this was not the appropriate machinery for the job, and causing the motor to burn out. You did this despite having attended chain saw training sessions which had been provided for you by our company.*
- *In March 2019 you caused damage to a client's topographical survey camera when you lifted your jacket without first removing the camera which was resting upon it, resulting in it falling on the floor. Eden Botanics paid several hundred pounds for its repair and were fortunate the client retained good relations with us.*
- *In September of 2018, you were neglectful in the care of the Nissan Cabstar truck, of which you were the designated driver during the course of tipping materials at the waste tip, resulting in damage to the vehicle.*

On 18th September you were issued with a written and verbal warning of the seriousness of not attending to your work with due care attention. The warning advised you that an improvement in work standards had to be attained. The incident of Tuesday 20th August in addition to those incidents described above indicate to me that there has been no improvement in your approach to work and in particular, in your very worrying disregard of health and safety rules which we have repeatedly discussed as a team, including in formal work meetings.

On Tuesday 20th August you were given charge of the new Isuzu truck in order to clear some logs and waste from a site. To assist you, we allocated our volunteer trainee, Alex, who is with the company to obtain some hands-on work experience over the summer. The task was reasonably straight forward and as a very experienced member of our team, I opined that he would work well under your instruction and care. I was then appalled to discover that you had set off from site without carrying out the obligatory safety checks on the vehicle and on the equipment you were to use. This is standard daily practice and your not having done so, especially with a trainee in your care, is very poor. You then did not supervise the trainee in his closing and securing the door which has several securing mechanisms and set off for site.

On arrival at the site, you asked the trainee to remove the tools from the rear of the truck and close the door. You then commenced work, once again without checking that the container was ready and secure to receive the load. You then cleared the site by throwing the logs into the container cage, without opening the door. Once the truck's container cage was full of logs, you climbed into the cab, leaving the young trainee to clear the last of the small branches from the road. You left your tools on site to collect later. ***The trainee then climbed into the cab and you drove off towards the waste tip without checking the vehicle was safe and secure. This was clearly your responsibility as senior operative on that job and as the truck driver****.*

As you drove up the hill towards the waste tip, the rear door of the cage swung open and impacted against on oncoming vehicle, seriously damaging the windscreen and chassis. It was fortunate that the

two passengers were not injured. Had this occurred to an oncoming motorcycle, it is highly likely that a fatal incident would have occurred.

I cannot emphasise enough how serious this incident was. It is clear to me, given your record in the past few years, that your disregard for health and safety rules continues, inevitably placing your colleagues and the public risk and I cannot permit that in my company. You are therefore dismissed from your employment and your contract terminated.

You do have the right to appeal this decision. If you wish to do so, you should make your appeal in writing (we are willing to accept this in your native language) ***and your appeal will be forwarded to the other company director for his review.*** *You will then be informed of the outcome of your appeal in writing."*

43. The Department of Employment Termination of Employment Form ("*ETB Termination Notice*") signed by the Respondent on 2nd September 2019, but not the Claimant, stated that the date on which notice of termination was given by the Respondent was 27th August 2019, and that the reason for termination was *"Insubordination shown by persistent disregard of company health and safety rules leading to a number of incidents including damage to company property".* It detailed that £120 gross (£108 net) was paid to the Claimant. Ms. Anderson confirmed in evidence that the Claimant had been paid net £280.57 for the week ending 23 August 2019, £240.07 for the week ending 30 August 2019 and £108.00 net up to and including 2nd September 2019.

44. Mr Buttigieg's evidence as to why he decided to dismiss the Claimant was that, firstly, it was a very serious incident that could have led to a fatality. It was by good fortune only that there were actually no evident injuries. He discussed it with Mr Valadez who had been regularly impressing upon the team members the importance of safety at work, especially when using vehicles. At that point he did not know whether the car driver or passenger who had been victims of the impact might have been affected by shock or by whiplash from the impact. It was clear to him that the cause of the Accident was that the cage gate had not been properly secured as per standard instructions of the Respondent despite all of the vans having appropriate locking mechanisms to avoid this type of incident, including bolts additional to those already provided with the Tipper Van. He was especially concerned that the Claimant as driver had delegated to AM, a work experience student, the duty of securing that the cage door was properly closed and driven off without first carrying out the security checks which he had been instructed to do repeatedly as per standard practice of the Respondent to ensure the door was properly closed. It was too important a duty to delegate to a trainee such as AM. Mr Buttigieg denied that he did not want to attribute blame to AM because of his relationship to his father-in-law. Secondly, that it constituted misconduct and insubordination for not following clearly communicated instructions regarding the checking of vehicles and disregarding the clear health and safety implications of not following those instructions and taking into account the Claimant's experience, the fact that he had attended numerous meetings where health and safety and the responsibility of drivers of vehicles had been emphasised as per the various minutes of the Respondent's '*Team Talks'* referred to in paragraph 39 above and which began in November 2015. Whilst sometimes these consisted of informal discussions at the start of the day, some meetings were minuted with attendance noted including sessions that covered vehicle care and safety, and which tried to emphasise the need for drivers to check the vehicles for safety each time they drove. The other area emphasised during such meetings, informal or otherwise, was the use of Personal Protective Equipment ("PPE"), the safe use of chemicals and the Control of Substances that are Hazardous to Health ("COSHH"), and also risk assessments. The Respondent emphasised the importance of abiding by these rules, and the Claimant was present during these talks. Also discussed were any further training needs, whether involving skills, health and safety, first aid or otherwise, which could be arranged with members of the Respondent's team which issues, and the feedback of staff and clients, Mr Buttigieg took very seriously. Thirdly, apart from the Accident, Mr Buttigieg took into account prior incidents involving the Claimant where his lack of care and casual and unprofessional attitude to his work had resulted in damage to vehicles, poor standard of work, complaints from clients and

damage to the Respondent's property, and demonstrated disrespect and even aggression towards Mr Buttigieg, and when he had refused to work late, or had left work early, causing strain to the Respondent and additional work to Mr Buttigieg. These incidents had increased in frequency over time. Fifthly, on re-examination Mr Buttigieg admitted: "*I would not have dismissed for this incident alone as mistakes happen. However, this was complete negligence and not an isolated incident. Maybe I would not have considered it serious enough to dismiss for gross misconduct but it was the final straw*". So in his evidence Mr Buttigieg considered the events surrounding the Accident to be the "*final straw*" due the risk of injury and loss of life to members of the public, but it was not in itself sufficient to warrant summary dismissal.

45. The Dismissal letter specifically stated*: "During your discussion with your supervisor, Mr. Valadez, and my assistant, Mrs Jackie Anderson, you were reminded of the several instances where your lack of care and your wilful disregard of health and safety rules have led to serious incidents and damage to company equipment and vehicles. These incidences included the following…".* No specific incidents are recorded as being discussed with the Claimant in the Claimant's Attendance Note, let alone the four specific incidents referred to in the Dismissal Letter namely, and firstly, that the Claimant had damaged a client's topographical survey camera in the middle of February 2019 which cost the Respondent £265.72 to repair on 17th April 2019 when the Claimant is alleged to have removed his jacket from the camera stand without first removing the camera. The Claimant's explanation for this in his evidence was that the camera, fitted on iron spiked legs on the ground, was carelessly left by its owners in the middle of an accessway where the gardeners had to pass by with their tools including a large sized ladder, and with a slight bump one of the legs slid out of its opening and it fell to the ground. He was not convinced it needed replacing. Secondly, damaging a small chainsaw head, the most expensive, powerful but lightweight one the Respondent had according to Ms Anderson, causing several hundreds of pounds worth of damage as it had to be replaced. No receipt was adduced in evidence of the damage caused. Ms Anderson's evidence, based solely on what Mr Buttigieg told her at the time, was that this incident happened on the 14th February 2019 and involved the professional grade chainsaw, which Ms Anderson explained on cross-examination the Claimant had been used to saw tree logs, and not for what it was meant to be used namely, tree roots, knowing it was not the appropriate machinery for the assigned task as the chain saw training sessions provided by the Respondent would have stipulated, and despite the specialist Chainsaw Maintenance and Cross-Cutting Certificate the Claimant had obtained in 2017. In paragraph 9(a) of her Witness Statement she said it was used it to cut tree roots in a position and place it should not have been so used. Mr Buttigieg's evidence was that the Claimant wrongly used it to saw tree logs. The Claimant's evidence was that as an item of mechanical equipment a chainsaw could always break down, and not only as a consequence of improper use. He was only one of three in the group who could have done it, and he was not at work at the time. Notwithstanding that, he refused to accept that he used the wrong one for cutting the logs which caused the damage to its engine, and that its breakdown did not mean that it had been misused. Mr Valadez confirmed on cross-examination that the Claimant said nothing about the damage to the chainsaw. Thirdly, damaging the windscreen of the Suzuki carry van when, according to Mr Buttigieg's evidence, he placed a pole on the inside of the vehicle instead of on the roof rack, so that when he closed the back door, the windscreen broke. The Claimant did not report this to him despite the driver being responsible for the van, and the Respondent for its MOT. Mr Buttigieg stated that the Claimant got paid an additional £5.00 for driving duties which was not mentioned in his witness statement. The Claimant's evidence was to challenge who had told Mr Buttigieg that the Claimant had done this as he had not done so, as Kyle Bosio did it, and was only a scratch and did not need replacing. It was put to the Claimant that as the allocated and experienced driver he should have secured the van and ensured that this did not happen, and prevented the pole being placed in the car by Mr Bosio. His answer to that was that the van did not have a roof rack, and this was the only place the pole could have been placed. Fourthly, Mr Buttigieg's evidence was that on or about the 18th September 2018, the Claimant took the Respondent's Nissan Cabstar van on his own to the tip to unload it. He had been instructed previously not to allow the operatives of the tip to use the mechanical grabber as it would bend the van's cage. This instruction was ignored and the operative permitted to use the grabber which seriously damaged the van in the process, resulted in valuable work

time being wasted to have it repaired, and an additional expense for the Respondent. Mr Buttigieg's evidence was that the Claimant failed to notify him of this damage and that he only became aware of this when he noticed the damage himself. He asked the Claimant to request the tip operator to pay for the damage caused which he did not do as he had in fact asked the tip operator to do so. Mr Buttigieg admitted that there was no written rule/policy about this, but this was a normal verbal instruction. The Claimant referred to this on cross-examination as an "*accident*", and denied ever being instructed to this effect. He had told Mr Buttigieg of the damage at Eastern Beach, and Mr Gomez and him had had it fixed at no cost to the Respondent at Selinas. They did not notify Mr Buttigieg immediately because he was not there. However, nor did they attempt to do so by mobile. He insisted that it was only then that he was told by Mr Buttigieg not to use the grabber, and that he had told Mr Buttigieg about it, and not that Mr Buttigieg had asked him about it. He accepted that unlike the other incidents, this one and the typographical camera were down to him, but the rest were a group issue, and not that serious. In his witness statement, the Claimant gave a different explanation, namely that the Nissan van had a thin aluminium bar in the rear part which joined the two sides of the lorry so that the cage would not open and on throwing the trunks in, one of the longer trunks hit it and displaced it and both he and his companion.

Formal written warning

46. The Dismissal Letter also referred to an earlier "*written and verbal warning*" of 18th September 2018. Mr Buttigieg's evidence was that at a meeting in September 2018 ("*September 2018 Disciplinary Meeting*") to discuss various issues and incidents with the Claimant, including to remind him of the various times that he had left the van parked with the door unlocked and the keys in the ignition contrary to the Respondent's policy, the failure to report the broken equipment and the other incidents which he was responsible for, he informed the Claimant that these amounted to very poor performance on his part and gave the Respondent a bad image. The Claimant had received informal verbal warnings for each of these incidents which were causing the Respondent loss, and which were, as always, explained to him in Spanish, and an improvement in his attitude and performance requested. The September 2018 Disciplinary Meeting had to be cut short, according to Mr Buttigieg, as the Claimant simply denied all the allegations of poor performance on his part.

47. As a consequence of those various incidents, and the September 2018 Disciplinary Meeting, the Respondent alleges that it gave the Claimant a disciplinary written warning about his performance and conduct dated 18th September 2018 ("*September 2018 Warning Letter*") in English, which the Claimant said he could not read in, and posted it to his residential address in La Linea de la Concepcion, Spain. It listed a number of previous incidents (emphasis added):-

> "*Dear Juan Carlos,*
> *It is with regret that I am obliged to put in writing to you a warning that your performance at work is failing to reach the standards that are required from you as an employee of this company.*
> *You have worked with Eden Botanics Ltd. for some seven years now and as such I have openly expected you to know your work thoroughly, know the company expectations thoroughly and to be able to set an example to more junior members of staff.*
> *However, on the following occasions, I have had reason to observe a lowering in the standard of work and to bring these verbally to your attention:*
> *1. You were asked to carry out a pruning of trees outside Regal House on 24/08/2018. For this specific job I arranged there to be two of you, so that the work could be completed in half a day. In fact, you and your companion tool a full day, which affected other clients. You should understand by now that I allocate resources very reasonably but that we do have many clients and are a busy company, therefore we cannot afford to waste time. This was a simply job, easy for two men to complete in half a day, and as the more senior of the two involved in this job, I had expected you to set the pace and ensure the work was done on time. Please make sure that in future, there is a steady work rate so that there is a good rate of productivity for the company.*

2. In a similar way, you were involved in a job at the Loreto Convent on that same week when I allocated one of our junior team members to work with you. This is because I expected the work to be carried out more quickly with two of you, and because your junior colleague could learn from you. What you were able to convey to him was the attitude that even though there only remained a small amount of work to be done to complete the job, because that amount would have meant you worked a few minutes beyond "clearing up time" and may have meant you finished work a little after 4pm, you left site with debris left lying around in order to go home. This resulted in a customer complaint to me, and in my having to attend site after hours and complete the job myself – giving a very poor image of the company. This is not the first time that you have walked off a job. It is totally unacceptable and I must insist it never happens again. In future, if you are running late please call me to arrange to stay a little longer and – provided there is a reasonable explanation for this – this overtime will be reflected in your wages.

3. I have had more than one occasion to speak to all the team about the condition of the vehicle fleet. During the course of the summer you managed to a) Leave a vehicle with its lights on all during the course of a weekend which meant unnecessary expenditure on recharging the batter and b) Leave a vehicle in an unacceptably filthy condition with tools thrown all over the place. We have spoken before of the need to show respect to me, to the company and to the company's resources, including vehicles and tools. Your behaviour towards company assets over the past few months is very poor. ***I cannot continue to tolerate this and therefore I must warn you that if you do not take reasonable care of your working environment, your tools and the vehicles I trust you to use, I will need to review your commitment to the company and whether your employment with us can reasonably continue.***

4. As a trusted company driver you were given use of the new truck and on 7th September to load it with logs far beyond the permitted limit, and then left it parked fully loaded which was likely to put unnecessary stress on the vehicle. This undue care of equipment is unacceptable.

5. On Tuesday 18th September, you took the Nissan Cabstar to the tip to unload and dispose of some old pots. You had already been instructed not to permit the operatives at the tip to use the mechanical grabber. Yet, you ignored this instruction and the operative not only used the grabber but seriously damaged the truck in the process. This is now going to incur substantial expense and waste time that is needed in carrying out contracted work for clients. This action puts Eden Botanics Ltd at risk and is clear disregard of rules and instructions.

This letter is a formal warning that improvement in your working standards and attitude towards your work must be now immediate *(emphasis added). I expect you to work hard throughout the day, to use common sense and your experience to care for the company's clients and for the company's equipment at all times. You are to ensure that you apply all our health and safety policies and that you exert due care and attention while at work to avoid any unnecessary damage or, indeed, injury. You are to ensure that you carry out instructions to the best of your ability and set a good example to junior staff. I expect you to communicate problems that you cannot deal with directly to me so that I can advise or intervene as necessary or to discuss additional time requirements on jobs. I expect you to work closely in your team with your colleague and be equally responsible for his work as he should be of yours. I expect you to treat customers with respect and the company with respect.*

Please note that should your work improve forthwith and there be no further drop in standards of work during a period of twelve months from the date of this letter, then this warning will be removed from your records.

You do have the right to appeal this decision. *If you wish to do so, you should make your appeal in writing (we are willing accept this in your native language) and your appeal will be forwarded to the other company director for his review. You will then be informed of the outcome of your appeal in writing.*

Yours faithfully,
Mr Christian Buttigieg
Managing Director
Eden Botancis Ltd."

48. The Claimant denied receiving the September 2018 Warning Letter. However, he admitted on cross-examination that he knew of the events referred to in it as he had discussed them with Mr Buttigieg and Ms Anderson when the events happened, and that he had not ignored the warnings, written or oral, as he had always tried to improve as best he could but mistakes would happen. This confirmed Mr Buttigieg's evidence that he had discussed with the Claimant the concerns expressed in the September 2018 Warning Letter, and given warnings about them. Mr Buttigieg on cross-examination initially said that the Claimant had refused to accept the September 2018 Warning Letter, but then said he was unsure if he had, but that he had refused to do so before and did not sign for the ETB Notice of Termination. Ms Anderson stated on cross-examination that she had spoken to the Claimant before preparing the September 2018 Warning Letter, and explained to him that she was drafting a letter to him to improve his performance and which made him quite angry. She said that she did not want to be alone with him in the office when she handed him the September 2018 Warning Letter and was anxious about doing so, so instead she posted it to him in English. He had told her that he was quite happy to receive it in English, and would use his translator app to read it. On re-examination Ms Anderson added that she recalled it being a very warm afternoon when she explained the contents of the September 2018 Warning Letter he would be receiving and could appeal. She could not explain this to him in any significant detail as he got angry, and she had had to ask him to calm down. He then left the office, and which was one of the reasons she says she posted it. She spoke to him in Spanish as she was able to converse in Spanish.

49. The incidents specifically referred to in the September 2018 Warning Letter were, firstly, that on or about the 24th August 2018 the Claimant took a whole day to complete a simple task of pruning some trees where no difficulties had arisen in carrying out the task, and which would normally take half a day in Mr Buttigieg's opinion, which meant that other jobs were delayed. Mr Buttigieg explained that he was a tree surgeon, and had been a gardener for 16 years, so he knew how long such a task should take. The Claimant's evidence is that one of the ways in which he was unfairly treated by Mr Buttigieg from the outset of his employment was that he not agree with the manner in which Mr Buttigieg allocated tasks, and the amount of time he estimated was required to complete them, and felt Mr Buttigieg was unreasonable with the targets he set and that whenever he questioned those time allocations, Mr Buttigieg would answer that he was an experienced gardener himself and that the Claimant would have time to do the work, and that he found this was particularly difficult when his hours were reduced to 28 hours, as he was still being tasked to do a 39 hour week and that what he used to do on his own was now done by two gardeners. Secondly, that there had been several instances where the Claimant had walked off tasks, leaving them half-finished and resulting in customer complaints, and giving the Respondent a bad image. An example was in late August/early September 2018 when the Respondent had been engaged in replanting and maintaining the Loreto School Green Wall prior to the start of the autumn term, and it was under pressure to adhere to the deadlines. The Claimant was involved in this task with others, and he refused to clear up after completing it, as it would require him to stay a few minutes more. Mr Buttigieg received a complaint from the client. Mr Buttigieg explained that the Claimant was aware of the need occasionally to stay after hours to complete tasks in a professional manner and avoid giving the Respondent a bad image. He had informed him previously that should he need to stay a little longer (i.e. after 4pm) to complete any contracted tasks, including cleaning up, he should call Mr Buttigieg and any overtime would be reflected in his wages. On this occasion, it would have taken a mere 15 minutes, a job he left until the next day inviting a client complaint. The Claimant's evidence on cross-examination was that Mr Buttigieg never asked him to stay on otherwise he would have as it was a well remunerated job, and his colleagues were well paid for doing it. However, he also added that if he had had to stay more time Mr Buttigieg would not have paid him to do so, since without seeing the amount of work, he would tell him how much time the task should take without taking into account any unforeseen circumstances. Moreover, even though the job was not finished, he and his colleagues would leave everything clean. When it was put to the Claimant on cross-examination that he knew how important this job was to the Respondent, and its reputation, and yet failed to stay behind to clear up, he stated he could not remember the incident too well, but they left everything tidy in a corner to be cleared up the next day and the school did not open the next day. This was never put to Mr Buttigieg. The

Claimant added that this did not mean he would not have stayed after hours to clear up. In any event, the Claimant maintained that this was a group problem and Mr Buttigieg could not say if anyone else got a warning for it. Thirdly, when the building of a new green wall at Notre Dame School, a local Government school, as well as other essential tasks, had to be carried out before the weekend, the Claimant was instructed to take the van to load up the cut logs on site and take them to the waste tip. He had proceeded to overload the van beyond its permitted capacity (which could damage the tyres) despite being specifically instructed previously as part of Respondent's standard practice not to do so according to Mr Buttigieg, especially for long periods of time, and to be careful with this new and very expensive addition to the Respondent's fleet of vehicles. Instead of going to the tip to unload, the Claimant left the van parked up fully loaded for the long National bank holiday weekend given that the National Day holiday was on Monday 10th September 2018, and went home contrary to standard instructions. As it was filled with logs and not leaves, common sense dictated it should not have been left like this according to Mr Buttigieg. Mr Buttigieg said the wheel cap was nearly touching the ground. As a consequence, when Mr Buttigieg saw the overloaded vehicle in the Depot, and that the employees had already gone home for the weekend, he unloaded part of the logs on his own to take the excess weight off. The Claimant on cross-examination stated that he had never been at Notre Dame School, and that Mr Buttigieg had asked his colleague, not him, to stay behind otherwise he would have done it as it involved a lot of additional pay. Fourthly, that on separate occasions during the summer of 2018, there were various instances when the Claimant's performance fell below the standard expected of him and he showed a complete disregard of the Respondent's resources. By way of example, he left the van's lights on all weekend at a loss to the Respondent which had to incur expenditure to recharge the battery, and also left the vehicle in a filthy state with tools scattered everywhere. He was warned verbally several times of the need to show respect to the Respondent's resources and if his complete disregard to this continued, he was verbally warned that his employment would be reviewed. Mr Buttigieg accepted on cross-examination that such incidents were a mistake, and would not warrant dismissal. The Claimant had according to Mr Buttigieg left the lights on twice over the last 2 years, maybe 3 times, and other incidents, which was not normal. Ms Anderson's supporting evidence on this was based solely on reports she had received from Mr Buttigieg.

50. A number of further incidents preceding the September 2018 Warning Letter were referred to in the Respondent's evidence. Firstly, in early 2018, the Claimant notified Mr Buttigieg that he had run out of diesel whilst driving a vehicle in the course of his employment and Mr Buttigieg had to stop the work he was doing, drive to the garage, and meet the Claimant with a container of diesel which the Claimant then dropped onto the road causing a spillage of diesel over the road. The diesel spillage kit was not in the van. Mr Buttigieg maintained that the Claimant had taken the diesel spillage kit out of the van he had been driving contrary to the Respondent's standard policy and without prior authorisation. As a consequence of the spillage kit not being immediately available, Mr Buttigieg had to notify the RGP, and guard the area to avoid any accidents while lorries arrived with sand and made the area safe. An entire work afternoon was wasted specifically as a direct result of the Claimant breaking the Company's Control of Substances Hazardous to Health Regulations ("COSHH") safety rules and removing the spillage kit. This was after team meetings and training on COSHH had been carried out and discussions taking place on how to use the spillage kits which Mr Buttigieg had carried out in person. Mr Buttigieg was dismayed by this incident as the Respondent, in particular Ms Anderson, had put in many hours of work to prepare the Respondent for International Organisation for Standardisation ("ISO") certification and personally talking to each member of the team including the Claimant about safety, the need for PPE, and safety procedures. On cross-examination, Mr Buttigieg accepted that anyone could have removed the oil spillage kit from the vehicle given its use by several drivers/where the keys were kept. Mr Buttigieg nevertheless insisted that checking whether this was in the vehicle was the driver's responsibility. However, he could not confirm what policy set out this requirement. The fact that this incident was not referred to in the September 2018 Warning Letter was explained by Mr Buttigieg on the basis that he did not want to include all issues that had arisen otherwise he could have, and not because it was not considered sufficiently serious to include.

51. Secondly, on 2nd October 2017 Mr Buttigieg prepared an Incident Report Form in relation to an incident involving the Claimant and two other employees, including Mr Gomez, who had gone to his home during their working hours to remonstrate with him about pay and other issues, and were shouting loudly at him with one of them-not the Claimant- coming up to his face and shouting at him aggressively in public, and neglecting to carry out urgent jobs for very important private clients who the Respondent had a number of maintenance contracts with and constituted a major part of its contract portfolio and a significant proportion of its income. They refused to comply with Mr Buttigieg's instructions to attend to their duties at the allocated sites, and in Mr Buttigieg's view constituted acts of insubordination and gross misconduct. He accepted on cross-examination that only Mr Gomez and Mr Martinez had threatened him, and not the Claimant. The Claimant admitted on cross-examination that on 2nd October 2017 after driving to Mr Buttigieg's house with his two work colleagues, he subsequently ascertained that Mr Gomez had been dismissed and so he left his place of work again to return, this time, to the Depot to mediate between them. He stated that Mr Buttigieg was very angry, and threatened to fire him too unless he returned to his allocated workplace. The Claimant replied that he would leave rather than be threatened like that. The Claimant admitted to refusing to return to work despite being instructed nine times by Mr Buttigieg to do so. As a consequence of their non-attendance to their duties, a written complaint ensued from a customer on 2nd October 2017 as the Claimant and Mr Martinez had not attended at that customer's house. On 3rd October 2017 they were notified that they were being dismissed for insubordination in disobeying instructions and leaving work without permission. The reason stated for dismissal of the Claimant in the Department of Employment Notice of Termination of Employment Form of 3rd October 2017 was "*gross misconduct and insubordination*". Contrary to what was stated in Mr Buttigieg's witness statement, the decision to dismiss was taken on 2nd October 2017 and not on 3rd October 2017. The dismissal was subsequently withdrawn having received a verbal appeal from the Claimant coupled with an apology from him as well as assurances that there would not be a repetition of his gross misconduct. Ms Anderson confirmed what Mr Buttigieg said his reasons were for reinstating the Claimant, and on re-examination that Mr Buttigieg was incredibly patient and forgiving, gave people opportunities and support as he considered the employees part of his family even if he worked them hard but expected high standards from them. She was surprised Mr Buttigieg had given them a further chance as these were serious incidents, as they nearly came to blows in their face-to-face shouting, and she expected dismissals. The Claimant also admits that he apologised and accepted a warning, but then stated that Mr Buttigieg also apologised to him. This alleged apology on the part of Mr Buttigieg was never put to Mr Buttigieg on cross examination. The Claimant also stated that Mr Martinez was the main culprit on that day and had acted in an unacceptable manner by threatening Mr Buttigieg, his superior, outside the family home with his neighbours witnessing this incident. He could not say that Mr Martinez did not deserve to be dismissed, but Mr Martinez was about to become a father and had worked for the Respondent for a long time. Notwithstanding what could only reasonably be described as serious incidents, no formal written or final written warning ensued as a consequence of the 2nd October 2017 incident and which was not even referred to in the September 2018 Warning Letter or the Dismissal Letter. Mr Buttigieg explained this on the basis that he thought that by giving the Claimant a chance he would change his attitude but he did not.

52. In paragraph 10 of her Witness Statement, Ms Anderson described an almost identical incident having occurred on the 2nd October 2018 to that which occurred a year earlier on the 2nd October 2017, *"and asking Mr Buttigieg if he wanted to take further action given that the Claimant had received a conduct warning in writing in September 2018 and she was instructed to prepare a Notice of Termination which was subsequently withdrawn as Mr Buttigieg told me that the Claimant had called him to apologise that same evening and accepted the loss of bonus because of his 'accidents' and 'poor work conduct' and he felt that he ought to give him another chance. Christian explained that he felt that given the whole issue with Brexit and difficulty with jobs, he wanted to avoid an employee losing his job*." This was less than one month after the 2018 September Warning Letter. On cross-examination, Ms Anderson stated that there was an argument at the HQ, when she was standing by the window, she did not hear the precise words but only the tone of their voices but that this was a different incident to the one she had recorded on 2nd and 3rd

October 2017. Mr Buttigieg was prepared to give them a chance to get better. It was put to her that she may have got the dates confused as the facts she was explaining were almost identical to the connected incidents of 2nd and 3rd October 2017, involving the 3 same staff being aggressive towards Mr Buttigieg, where she was asked by Mr Buttigieg to withdraw the termination letters as they had apologised, they had gone to Mr Buttigieg's house, and they continued these actions at the Depot when they came up to talk to Mr Buttigieg. The alleged incident of 2nd October 2018 was not referred to in the Dismissal Letter as Ms Anderson said it was not appropriate to do so. When it was put to her that the October 2017 incident was one and the same as the 2018 one given the strong similarities between the two, she was adamant that it was an entirely different incident, and explained that in October 2018, it was the afternoon, at the Depot, at about 3.15pm, and a few staff came to the office and started getting angry and very aggressive in her presence.

53. Ms Anderson's evidence is that things then settled down for the next few months, before a number of further incidents involving the Claimant arose, and then between May 2018 and August 2019 nothing further happened. The meetings were more informal and less frequent. Ms Anderson was away for 3 months during this period in London, and was only working part-time and remotely. Mr Buttigieg's evidence was that 95% of the incidents involving the Claimant arose in the last 2 years of his employment, which he said was strongly indicative in his mind of the fact that the Claimant's conduct and performance was deteriorating, and not improving with time.

54. In answer to what was done by the Respondent to assist the Claimant after the September 2018 Warning Letter, Mr Buttigieg explained that it was not really about his performance but his attitude in not taking care of clients and doing pretty basic things that he should do, or for that matter not do. Despite the warnings, including the September 2018 Warning Letter, the only written warning ever issued, further incidents arose in 2019, none of which are referred to in the Dismissal Letter, and did not result in any form of warnings. Firstly, on the 12th March 2019, whilst undertaking a task near the home of a family member of Mr Buttigieg's wife, the Claimant allowed 8 metres of large branches to fall onto that person's terrace, causing damage to the person's cable and posing a serious risk of injury to the persons residing there including a child with Down's Syndrome, and instead of dropping a cable to prevent this. The Claimant explained that he was assigned to work on this task as part of a team with Mr Gomez, and was not the sole person involved. Secondly, in the month of May 2019, Mr Buttigieg decided not to pay that month's discretionary attendance bonus because of the breakages and expenses that the Claimant had caused because of his poor conduct at work. This included an incident in early May 2019 at Buena Vista Park Villages, a luxury residential property, following a complaint from the owner at the appalling state the Claimant and his work colleague had left the bathroom/garden in. Mr Albert Freyone, a director of Green Is In Limited, a company specialising in garden design and maintenance, had subcontracted the Respondent to do these works which involved the distribution of soils into planters. The owner had refused to let the Claimant and his colleague back on the property because of the state it was in . The Respondent had to send its best employees in to clean up the mess, but the customer instructed Green Is In Limited not to use the Respondent again, and the Respondent's contract terminated. The Claimant's response to this was that he was only one of a group of three, and that it could not be shown who specifically made this mess/failed to clean it up. Mr Freyone's evidence was that the Respondent's employees were the only persons at this property on the day in question.

55. Thirdly, on 21 June 2019, the Chief Minister's wife called Mr Buttigieg to complain that the Claimant had climbed over the wall into her garden as he had been pruning a tree next door and a branch had fallen into her garden. Mr Buttigieg's evidence was that the Respondent always instructed its staff to ensure there was a safe working environment and that branches would not fall into a neighbouring garden, and if they did, to first ask the neighbours for permission if they needed to do so and to always act courteously or to call Mr Buttigieg to obtain further instructions. Mr Buttigieg stated that the Claimant was fully aware that this was the Chief Minister's home, and still risked arrest from security guards, and also the scandal and

embarrassment it would cause the Respondent. Mr Buttigieg's explanation as to why this incident was not mentioned in the Dismissal Letter is that maybe because it was discussed in one of their meetings.

56. There was a further incident after the September 2018 Warning Letter that was not mentioned in Mr Buttigieg's witness statement, the Dismissal Letter or any minutes. It involved one Jeremy Rogers, a customer, whose son had been murdered. Mr Rogers had complained in 2018 to Mr Buttigieg about Mr Martinez, Mr Gomez' cousin, impersonating his voice. Mr Buttigieg went down to Four Corners and Mr Rogers pointed out who the driver was. Mr Gomez, Mr Martinez and the Claimant went face-to-face with Mr Rogers, and Mr Buttigieg had to separate them as they were shouting into Mr Rogers' face. Mr Rogers told Mr Buttigieg not to come again and terminated the Respondent's contract. It was put to Mr Buttigieg on cross-examination that there was no evidence that the Claimant was shouting at Mr Rogers. Mr Buttigieg answered that one person shouted out of the window of the vehicle, and then they were all laughing at Mr Rogers. Mr Buttigieg explained that no action was taken against the staff involved as Mr Rogers refused to provide a witness statement, and therefore nor was it mentioned in the September 2018 Warning Letter or the Dismissal Letter and why it was. He nevertheless had had a meeting 1 month after the incident with the Claimant, and spoke to him about it.

57. Ms Anderson mentioned another incident *on* 21st June 2019 at Queensway Quay whilst she was having a coffee at the Waterfront Restaurant on her day off when the Respondent's cherry picker truck drove onto the quayside to access the trees that they were working on and despite members of the public being in the area, the Claimant failed to notice the low cables he needed to pass by with care and almost pulled down some of the restaurant awnings only stopping when he heard restaurant guests, his colleagues and Ms Anderson shouting, and then backed to disentangle the cables. Mr Buttigieg attended and reprimanded the Claimant verbally and asked him to drive with care. Ms Anderson was unable to say if it was such a small cable that it was difficult for the driver to see. On re-examination she stated she was sure the Claimant was licensed to drive this cherry picker even though she had been unsure on cross examination. Ms Anderson explained its omission from the Dismissal Letter on the grounds that the Respondent would not have dismissed the Claimant for this single incident, but this was the kind of incident that was relevant when considering dismissal.

58. Mr Buttigieg stated that all of the issues in the Dismissal Letter were discussed and explained to the Claimant during the meeting on the 21 August 2019, in Spanish. There is no record of this in the Claimant's Attendance Note. Mr Buttigieg decided that the Claimant should be given notice to the 2 September 2019 rather than be dismissed summarily, which given the seriousness of the incident, he felt the Respondent had been entitled to do. He wanted to give the Claimant an opportunity to organise his personal affairs without the immediate stress of no income at all. He also was aware that the Claimant had made enquiries with other local gardening companies and believed he had a good chance of finding alternative work quickly.

59. Mr Buttigieg's evidence was that the Dismissal Letter was given to Mr Gomez to deliver to the Claimant. Ms Anderson could not recall whether she gave the Claimant the Dismissal Letter, or to a colleague, but it was not translated into Spanish. However she did recall him coming in and refusing to sign the ETB Termination Notice and asking for it to be sent to his union representative. The Dismissal Letter may have been written 23rd August 2019, but the ETB Termination Notice stated it was given to the Claimant on 27th August 2019 as Ms Anderson was a part-timer. On re-examination Ms Anderson confirmed that she was instructed to prepare the Dismissal Letter on 23rd August 2019 which she did.

60. Mr Buttigieg's evidence was that on 3rd September 2019 he had a call from Ms Anderson to say that the Claimant had called into the office, had refused to sign the ETB Termination Notice and had taken a photo of the ETB Termination Notice. The Claimant had told her that he would take it to the Union, and left a letter dated 28th August 2019 appealing against the decision to dismiss him (**Appeal Notice**) which stated:-

"I have been advised that if I am to be made redundant this position has come out of the blue, that there has been no consultation, no selection and therefore the real reason I am being dismissed is because of the incident involving the van and as such this would be considered unfair dismissal and I will have my union's support.

In addition I would also like to appeal your letter dated 23rd August 2019, as I do not agree with the sequence of events of the 20th August 2019 stated in your letter.

A full and proper investigation was not undertaken which renders such dismissal unfair outside the band of reasonable responses.

Had a full investigation been undertaken then the proper facts surrounding incidents of the 20th August 2019 might have been established.

Firstly with regards to your letter, I would like to point out that I was never given the warning as you mention neither verbally nor written.

With regards to the topographic camera, it should be mentioned that the cameras should have been placed on soft ground in order to enable the spikes to properly support it. This was not the case in this instance. The camera had been placed on a tiled floor and when I happened to walk by, I accidently knocked it over. This was an unfortunate accident that could have been easily avoided if the camera had been installed properly.

You stress the importance of Health and Safety but I have been made to climb trees without any protection in order to complete jobs and this as any other concern I or my colleagues have made have fallen onto deaf ears when reported.

We have been forced to load small vans with up to 1000kg of logs which exceed the vehicles allowed weight and having to secure the vehicle with ropes as the doors do not close as the closing mechanisms are broken.

Awaiting your reply.

Yours sincerely

Mr. Juan Carlos Rojas de Federico."

61. Ms Anderson confirmed that Mr Buttigieg dealt with the appeal as Managing Director. Mr Buttigieg reviewed all the documentation on the incident and his original decision as the Respondent was a small company and he played an important role in all decisions concerning the Respondent and proceeded to discuss the details of the Accident with Ms Anderson and Mr Valadez to ensure that he had taken every possibility and concern into account. He checked the vehicle again and looked at the Respondent's records on the Claimant's past behaviour to consider the likelihood of an incident of gross misconduct as this one of occurring again. He also arranged to meet with the Respondent's co-director, Mr Louis Lombard, who had had no executive involvement with the Respondent, but Mr Buttigieg felt it was important to obtain another perspective from his. Mr Lombard was not called as a witness for the Respondent.

62. Mr Buttigieg did not agree with the Claimant's perspective in some respects, but also found that some of the issues he claimed were simply not true. He had never obliged anyone to climb a tree or work without protective equipment. That was false. To the contrary, he frequently found himself having to stop works in order to insist that the men, including the Claimant, wore their personal protective equipment in accordance with prior instructions to do so. The Respondent had spent a good deal of money ensuring that his team had protective equipment and that this was regularly checked and tested. He had never obliged the Claimant to overload the vehicles and in fact had verbally reprimanded him for doing so, including on occasions when he had had to take the trucks for repair as a result of careless overloading. When the

Appeal Letter referred to a lock on the van gate door having broken, Mr Buttigieg's view was that that lock only served to secure one leaf of the door to the floor of the Tipper Van and that the second leaf was closed into place and the full locks secured. The doors would not have opened had the gate been closed properly. Immediately after this incident the Tipper Van was placed in a garage to repair the faulty lock and the lorry continued in use. Mr Buttigieg's also disagreed entirely with the Claimant's allegation that a full investigation had not taken place in connection with the incident of the 20 August 2019. Not only was Mr Buttigieg at the scene of the incident shortly after it took place and personally spoke to the victims and the police officers and saw the damage himself, but he also ensured that the gardening supervisor, Mr Valadez, investigated the damage to the vehicle, and that Ms Anderson and Mr Valadez interviewed both team members involved to ensure insofar as possible, that an impartial objective account of the incident was provided so that Mr Buttigieg could make the decision as objectively as possible. Having considered the Appeal Letter, he found that there was no sufficient reason to overturn his original decision as the Claimant's conduct had not improved, and there continued to be a pattern of repetitive misconduct to the point that this had resulted in an incident of gross misconduct, and despite verbal instructions and a written warning on the 18th September 2018, the Claimant's behaviour and attitude towards his work had not improved and was unlikely to improve. He spoke about the appeal with Mr Lombard, but at the end of the day, he took the decision as he was the Managing Director.

63. The appeal decision contained in a letter dated 12th September 2019 from Mr Buttigieg to the Claimant (**Appeal Decision**) stated:-

> "*Dear Juan Carlos,*
> *As you will be aware from a text message sent to you by my secretary, Mrs Jackie Anderson, on 11th September 2019, I received your letter of 28th August 2019 and, taking due note of its contents, I accepted your appeal that I review my decision to terminate your contract of employment.*
> *This morning, company director Louis Lombard, along with me, reviewed all the information that we have gathered in relation to the incident of 20th August 2019. We also reviewed your overall performance in respect of my repeated requests to you to apply health and safety procedures, and to work with due care and attention at all times. This review also took into account our letter of September 2018 when you received a warning regarding other incidences in which your lack of care led to damage of company vehicles, as well as your overall poor attitude to work leading to poor performance.*
> *As you know, we are constantly working towards improving our work practices and our business and that the cardinal expectation from all employees is that they work with a professional attitude and apply good standards of health and safety in all they do. Given that – despite the number of warnings that you have been given that your overall neglectful attitude towards company property and your work responsibilities as well as informal, verbal advice given over this issue in the past year – there has been no evident or long term improvement in your behaviour or work performance, I regret that we feel we have no option but to uphold the decision taken on 23rd August 2019 to terminate your contract of employment with Eden Botanics Ltd.*
> *We have worked together for a number of years, and this is not a decision that has been made lightly but through careful thought and evaluation of the facts before us. I take this opportunity to express my hope that this eventuality will serve to encourage you to take up higher standard of work and that you will find success in your future endeavours.*
> *Yours sincerely,*
> *Mr Christian Buttigieg*
> *Managing Director*
> *Eden Botanics Ltd.*"

64. Mr Buttigieg's evidence is that a week or so after the Appeal Decision he received a telephone call from a local trade union representative asking if he was prepared to reconsider his decision to dismiss the Claimant, and specifically to consider reviewing his reasons for dismissing him in order to facilitate him

receiving social security payments. Mr Buttigieg said he was willing to meet with him to discuss the case, but he heard nothing further.

65. A few days later, Mr Buttigieg received a telephone call from a Rose Azzopardi (**Ms Azzopardi**), the Claimant's cousin, wanting to meet with Mr Buttigieg to ensure payment of his notice and leave entitlements, which Mr Buttigieg agreed to provided that the Claimant agreed to this, and to see if he could end the working relationship on an amicable basis. At this stage Mr Buttigieg felt that he had made the right decision to dismiss the Claimant as he had placed the Respondent at serious risk and he believed he would continue to do so. However, he intended to listen to him with an open mind and to have an amicable discussion and give him an opportunity to see the error of his ways, which would be useful feedback for him to have when seeking future employment.

66. Mr Buttigieg met with Ms Azzopardi, her husband and the Claimant in Ocean Village at around 3.30pm on 31st October 2019 with Ms Anderson. Ms Azzopardi believed that the Claimant should have been given eight weeks' notice. Ms Anderson explained that this would be the case for most terminations, but not for gross misconduct. Mr Buttigieg explained that he had given a week's pay as a gesture of goodwill only to help the Claimant feed his family while he got his affairs sorted, but that he had been under no legal obligation to do so. However, Mr Buttigieg agreed to look into this further, but not to take the Claimant back. Mr Buttigieg was already aware that the Claimant had begun working for Gibral Flora Limited within a few weeks of his dismissal. The Claimant stated that he had never received a reply to his appeal. Ms Anderson told him that this had been posted to his home address. He asked for a copy to be emailed to him, which was agreed to. Up until that point, the Respondent had never been provided with an email address for the Claimant. The documents were sent by e-mail to the Claimant in early November 2019 by Ms Anderson. He also asked for his contributions report for Hacienda, which Mr Buttigieg agreed to send him via email.

67. As Mr Buttigieg would not agree with the Claimant, and reminded him of some of his repeated acts of carelessness to explain the context of his final decision, the Claimant lost his temper, began shouting, raising his voice, talking over Mr Buttigieg and proceeded to insult him and rose to his feet. At this point, Ms Anderson stepped in and called the meeting to an end as the Claimant became very angry and verbally aggressive with Mr Buttigieg whenever examples of his carelessness were highlighted, in much the same way as he had reacted previously to any attempt to get him to raise his standards and acknowledge the need to improve. Ms Anderson described the Claimant as an "*angry*" man, and being quite rude, but with insults flying both ways as things escalated between him and Mr Buttigieg.

Findings and determination

68. The Claimant was an experienced gardener, having worked as one for over 16 years, and with several certifications/qualifications in gardening. He could not maintain, as he did in his Claim Form, that he had always performed his duties in a diligent and professional manner. He had a significant disciplinary history with the Respondent, and especially in the last two years of his employment, as reflected by the number of disciplinary incidents that occurred in that very short period of time even if he failed to acknowledge any wrongdoing in relation to several of those incidents. At the same time, given the number of incidents that did occur over that two year period, it is equally clear that the Respondent did not follow through with any form of formal disciplinary process or action until the September 2018 Warning Letter, and leaving aside for one moment, whether that letter was received by the Claimant, it was not described by any of the Respondent's witnesses as a final written warning. Several disciplinary incidents occurred after it was given, and yet no action was taken until the Accident. If Ms Anderson's evidence was correct, then a repeat 2nd October 2017 incident of gross insubordination occurred similar to, if not identical, that earlier one on 2nd October 2018, a mere one month after the September 2018 Warning Letter. Yet no further action was taken, and nor was it mentioned in the Dismissal Letter. I find that Ms Anderson must have confused the 2nd October 2018 incident with the 2017 one as no one else mentioned this very serious later incident.

69. There is no legal requirement for Gibraltar employers to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (ACAS Code). However, common sense notions of procedural fairness should have been observed, and were not. Firstly, Mr Buttigieg, having attended at the scene of the Accident, was effectively already investigating what had caused the Accident and according to his evidence at least, he asked both AM and the Claimant for an explanation of what had happened, and left there believing that the Accident had been very serious as there could have been a fatality (para. 20 above), that the Claimant should not have delegated the duty of locking the Tipper Van door to AM (para. 21 above), and that these failures constituted gross misconduct (para. 24 above). He then purported to initiate a further investigation into the Claimant's conduct by Ms Anderson despite what he then already knew. However, on his own evidence, he himself took the decision to suspend the Claimant following his discussions with Ms Anderson and Mr Valadez, contrary to their evidence and the Claimant's Attendance Note. This contradiction in the evidence could only have arisen if the decision to suspend had already been taken by Mr Buttigieg in advance of the interviews, and an instruction given to that effect. The interviews were conducted to obtain formal confirmation of what Mr Buttigieg already knew or thought had transpired. Secondly, having obtained the Claimant's Attendance Note and AM's Attendance Note, and having already reached the determinations he had on the day of the Accident, and taken the decision to suspend, Mr Buttigieg determined whether a disciplinary offence had taken place, and what sanction would be appropriate, without giving the Claimant a reasonable opportunity to contest the disciplinary charges and put forward any extenuating or mitigating circumstances. Mr Buttigieg made this decision with his mind already made up from the moment he attended the scene of the Accident. Thirdly, at no stage prior to, or at the commencement of the interview with Ms Anderson, was the Claimant made aware that serious disciplinary action was being contemplated against him, let alone that his dismissal. He attended the interview with Ms Anderson unaccompanied by any colleague or trade union representative. Fourthly, there was no independent disciplinary hearing with supporting evidence of the disciplinary charges provided to him in advance of it, and nor was he ever permitted to see, or challenge, the AM Attendance Note and the manner it contradicted his own version of events, and for that matter the Claimant's Attendance Note. The Claimant was not allowed a proper opportunity to state his case at any such disciplinary hearing, or to make any representations as to extenuating or mitigating circumstances which should be taken into account with respect to any sanction including dismissal. No penalty other than dismissal was effectively being considered. Fifthly, the appeal against his decision to dismiss was effectively dealt with by Mr Buttigieg on a review basis only. His co-director's role must have been very limited as was never even called to give evidence. Any procedural flaws and defects in the original disciplinary process and decision to dismiss could not be cured by such a limited review involving primarily, if not exclusively, the original decision maker himself.

70. Whilst I am of course mindful of the size and administrative resources of the Respondent when highlighting these procedural flaws, and procedural flaws do not necessarily automatically make a substantively fair dismissal unfair, there were matters to be properly investigated and the Respondent had not carried out as much investigation as was reasonable in all the circumstances, even if there was a genuine belief on his misconduct, and reasonable grounds to sustain it. Firstly, was it the Respondent's own failure to fix and properly maintain the door of the Tipper Van despite prior notification by the Claimant and other employees of this disrepair that caused the Accident? Secondly, who had actually shown/directed the Claimant on how to close the Tipper Van door using the Lock A and Lock B locking mechanism? Mr Buttigieg on cross-examination could not recall specifically telling the Claimant how to do this but that it would have been the norm (para. 31). Lock A and Lock B had been fitted because Lock C had broken before the Accident and was unfit for purpose. Mr Valadez was equally uncertain of whether he had specifically instructed the Claimant on this but had given this general instruction (para. 32). Given that Locks A and B were add-ons by the Respondent to make the Tipper Van safe when transporting heavy loads because Lock C was not keeping the door closed, this was an issue for consideration as to what instructions were given and where was this formally recorded, if at all. Thirdly, should AM himself have been given some basic training, and what instructions were given to the Claimant concerning how AM should be supervised. Fourthly, was it reasonable after AM had been working for 4-6 weeks for the Claimant to be permitted to delegate to him

the locking of the gate if he had shown him how to do this the previous day on another work assignment and that AM did not need a course on how to do so (para.26)? The Clamant was not a supervisor, and on the minimum wage after 8 years of employment. Mr Valadez acknowledged that sometimes one could delegate tasks (para.25). The fact that AM denied that he was ever shown how to do this would of course have been an issue for determination at a disciplinary hearing. Fourthly, whilst the original finding was that these failures were gross misconduct, Mr Buttigieg's evidence was that this incident, as a single isolated act, would not have resulted in the Claimant's dismissal and therefore the issue of the September 2018 Warning Letter should have been considered, including its delivery, before the sanction was determined.

71. As Lord Bridge of Harwich at page 364C in Polkey summarised in part the essence of procedural fairness:-

"....If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by s.[98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken."

72. Whether the September 2018 Warning Letter issued on 18th September 2018 was actually received by the Claimant after it was posted to him in La Linea, Spain because of Ms Anderson discomfort at handing it to him personally (para. 48) is an important one. Despite the Respondent's witnesses not describing it as a final written warning, it did state explicitly that any further failures in exercising care would result in a review to determine whether his employment could reasonably continue. The Claimant acknowledged that he knew of the events referred to in it as he had discussed them with both Mr Buttigieg and Ms Anderson when they happened and tried to improve but it might not have been made as clear to him verbally as it was in the September 2018 Warning Letter what the implications of such further failings would be. Moreover, none of the disciplinary incidents that arose after the September 2018 Warning Letter were actioned formally, other than in some cases informally. An employer that seeks to rely on such an important letter should ensure that it can prove, when the need arises, that it was received by the employee. I cannot be satisfied that this was the case, when the Claimant denies receipt and the letter was sent by registered post.

73. I find that the disciplinary process was so procedurally flawed as to render the substantive decision to dismiss unfair, and despite being a small business in Gibraltar terms, the Respondent's size and administrative resources would, if an applicable factor for consideration, be a single factor to be considered as to whether a reasonable investigation was undertaken. The requirements of s.65(6) and the expressions of principle by the House of Lords in *Polkey v A E Dayton Services* indicate that although there are some cases of misconduct that are so heinous that even a large employer well versed in the best employment practices would be justified in taking the view that no explanation or mitigation would make any difference, in the present case the misconduct in question was not so heinous as to admit of only one answer given how the Respondent had dealt with similar failures in the past, and in the absence of any satisfactory proof that the September 2018 Warning Letter had been received by the Claimant.

74. Following such a finding of unfair dismissal, section 70(2) and (3) of the Act stipulate:-

"(2) Where on a complaint relating to dismissal the tribunal-

(a) finds that the grounds of the complaint .....are well-founded; and

(b) considers that it would be practicable, and in accordance with equity, for the complainant to be re-engaged by the employer or to be engaged by a successor of the employer or by an associated employer,

the tribunal shall make a recommendation to that effect, stating the terms on which it considers that it would be reasonable for the complainant to be so re-engaged or engaged.

(3) Where in such a complaint the tribunal finds that the grounds of the complaint are well-founded, but-

(a) does not make such a recommendation as is mentioned in subsection (2); or

(b) makes such a recommendation, and (for whatever reason) the recommendation is not complied with,

the tribunal shall make an award of compensation, to be paid by the employer to the complainant, in respect of the dismissal."

75. An order of re-engagement was not sought by the Claimant in paragraph 7.1 of the Claim Form, but simply compensation and an apology. It is, in any event, a discretionary remedy and a non-binding form of order, and would in my view have been wholly impracticable to make such a recommendation even if the Claimant had sought it. Moreover, even if I had the power to order the Respondent to issue the Claimant with an apology, on the evidence I have heard I would make no such order.

76. Section 71 of the Act provides that where an Employment Tribunal makes an award of compensation for unfair dismissal under section 70 the award shall consist of both a basic award and a compensatory award to be calculated in the manner prescribed by the Minister in Regulations. Regulation 2(1) of the Employment Tribunal (Calculation of Compensation) Regulations 2016 (**Regulations**) provides:- "*The amount of the basic award provided in section 71(a) of the Employment Act, shall be £2,200 or such higher amount as calculated by- (a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed, (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and (c) allowing the appropriate amount for each of those years of employment*". The "*appropriate amount*" is defined in regulation 1(2): "*(a) one and half weeks' pay or three times the weekly minimum wage, whichever is the greater, for a year of employment in which the employee was not below the age of forty-one, (b) one week's pay or twice the weekly minimum wage, whichever is the greater, for a year of employment (not within paragraph (a)) in which he was not below the age of twenty two, and (c) half a week's pay or the weekly minimum wage, whichever is the greater, for a year of employment not within paragraph (a) or (b)*". The "*weekly minimum wage*" is defined in regulation 1(2) as being "*the amount prescribed as the minimum weekly remuneration payable under the Conditions of Employment (Standard Minimum Wage) Order 2001 as amended from time to time or under any such Order that prescribes the minimum weekly remuneration payable*". This is currently £292.50.

77. The current minimum wage of £292.50 is marginally higher than the Claimant's then weekly wage of approximately £280.57. Having completed 8 years of service, and being aged 44 at the date of dismissal, the 3 years completed service over the age of 41 would result in a basic award of three times the weekly minimum wage for each of those 3 years (£292.50 x 3 x 3) namely £2,632.50, and for each of the 5 years under the age of 41 twice the weekly minimum wage (£292.50 x 2 x 5) = £565.50) amounting to a further £2,925.00. This would result in a total basic award of £5,557.50 subject to any reductions or deductions I might be minded to make.

78. Regulation 2(5) of the Regulations provides that:- "*Where the Employment Tribunal considers that any conduct of the employee before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Employment Tribunal shall reduce or further reduce that amount accordingly*". I consider that it would be just and equitable to reduce the basic award, for a number of reasons. Firstly, the Claimant accepted on cross-examination that it was fair to say that he had appropriate qualifications and experience to know what standards were expected of him as a gardener; that it was not the first time he had worked without a supervisor in his job; that his manager needed to entrust him with duties which usually included doing his own risk assessments for carrying out any tasks he was instructed to carry out at work. Secondly, AM was inexperienced to the knowledge of the Claimant. There is little doubt in my mind having heard the totality of the evidence that the Claimant did not check to see if AM had locked the door properly, and given the confused and contradictory nature of his evidence before this Tribunal set out in paragraph 27 of this Decision, supports AM's hearsay account on this issue and also that the Claimant did not show

him how to lock the door properly. The Claimant could not admit to this as otherwise his main contention that the lock was broken was substantially weakened as it would not have been the cause of the Accident. As the driver of the Tipper Van, he had responsibility to ensure that what was carried in it was being safely transported. It was not a question of him not being paid as a supervisory grade. Thirdly, AM stated, albeit hearsay evidence, that he had not been taught by the Claimant how to close the door contrary to the Claimant's explanation. If he taught him the day before, then at best it was to apply Lock C and the blue bungee which was wrong. Having made so much about the prior incidents when the door had opened, it is almost inconceivable that the Claimant, with his experience, would not have known that the Lock A and B add-ons needed to be locked to transport a load safely, and that the blue bungees were not part of the locking system. To the untrained and inexperienced AM, he could be forgiven for thinking otherwise if he had not been shown how to lock it properly. It is most likely on the evidence that AM had not been shown by the Claimant how to close the gate and used the defective Lock C and blue bungee to do so. Applying Locks A and B would have taken mere seconds to do, or to explain to AM how to do. I find the Respondent's evidence on how the locking mechanism worked entirely credible and consistent and that the Claimant would have known, despite his assertions otherwise, that the blue bungees were not part of the locking mechanism for transporting heavy loads safely. The four-lock mechanism was obvious to apply, and why one would use the bungee one might ask. Whilst neither Mr Valadez and Mr Buttigieg could say with absolute certainty that they had specifically notified the Claimant of the locking system, I am satisfied having heard the evidence that he knew how to do this, and the reason why he tried to wrongly influence AM's explanations of what had transpired. Sixthly, despite making a series of generalised allegations of poor working/safety practices, the Claimant admitted that as from 2015 there was a material change and that Mr Buttigieg took H & S very seriously (supra, para.37) and relied on its employees to comply with this (paras. 36-40). Seventhly, I accept Mr Buttigieg's evidence that being a good gardener entails having good standards, respect for clients, looking after them, meeting their expectations but that in the Claimant's case, whilst his gardening was alright, he lacked the will to do it better. I also accept Mr Buttigieg's evidence when he said on re-examination that it was not easy to dismiss the Claimant because he had looked after him and didn't want him to be without a job. He showed that when he reinstated the Claimant after the October 2017 dismissal. Eighthly, the Claimant was unable to let go of issues, and he was aggrieved from the outset of his employment with what he perceived as low pay, being assigned the work of two gardeners, not receiving any annual leave and many other issues. Nor did he get on with Mr Valadez, saying that all his problems had begun with him, as he wanted everyone to accept his instructions even if there was no reason to do so, and the Claimant would not accept what he already knew what to do. Mr Valadez only began working for the Respondent on the 7th May 2018, as a supervisor, and by then the October 2017 incident had already occurred and which he could not be blamed for. Ninthly, despite the September 2018 Written Warning, there were further incidents, culminating with the incident of the 20th August 2019, which was serious in itself. Ms Anderson's evidence was that she and Mr Buttigieg "*in the 3 years prior to the date of his termination, noticed a deterioration in the Claimant's performance, which was a cause for concern as they were receiving client complaints, and it had caused financial losses for the Respondent. It also meant that they lost faith and trust in the Claimant as to his ability to improve his general attitude and effort towards his work, despite numerous warnings provided and opportunities given for him to improve the same. These resulted in various warnings, either verbal or in writing being given to the Claimant*". Taking all these factors into account, I will reduce the basic award by 75% to £1389.37 for the Claimant's own contribution to his dismissal. There is no minimum basic award as there was under the earlier legislation.

79. With respect of the "compensatory award", regulation 3 of the Regulation stipulates:

> "*(1) Subject to the provisions of this Regulation, the amount of the compensatory award shall be such amount as the Employment Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

(2) *The loss referred to in subregulation 3(1) includes (a) any expenses reasonably incurred by the Claimant in consequence of the dismissal; and (b) subject to subregulation 3(3), loss of any benefit which the complainant might reasonably be expected to have had but for the dismissal.*

(4) *In ascertaining the loss referred to in subregulation (1) the Employment Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of Gibraltar.*

(6) *Where the Employment Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

(8) The amount of a compensatory award to a person calculated for the purposes of section 72 of the Employment Act, shall not exceed the lesser of (a) the amount which, in the case of the person who has presented a complaint under section 70 of the Employment Act, represents 104 weeks' pay; or (b) the amount calculated as follows - 104 x (2 x the weekly minimum wage), whichever is the less.

(10)The limit imposed by this regulation applies to the amount which the Employment Tribunal would, apart from this regulation, award in respect of the subject matter of the complaint after taking into account- (a) any payment made by the respondent to the complainant in respect of that matter, and (b) any reduction in the amount of the award required by any enactment or rule of law.

80. The calculation of the Compensatory Award, broadly, can be considered in three, stages given that the Claimant mitigated his loss almost immediately following the dismissal. Firstly, to assess the loss of employment which involves the Tribunal taking a view as to how long the Claimant would have been employed but for the dismissal, and working out the loss, in terms both of pay and other benefits, during that period and which the employee has sustained in consequence of the dismissal, and in so far as the loss is attributable to action taken by the employer. It is for the employee to establish his loss. The Claimant started working sometime after 2nd September 2019 for Gibral Flora Limited at a marginally increased grossly wage of £300 per week according to paragraph 6.3 of the Claim Form, and remained in its employ at the time of this hearing. He was earning approximately £280.57 with the Respondent at the time of his dismissal. In the circumstances, the actual loss would be at best approximately 3 weeks' pay, and given the weekly differential of £19.43 per week between his new and old salary, would have resulted in a negligible if not nil loss. Secondly, had the Respondent followed a fair procedure, the dismissal is most likely to have occurred in any event and would have applied not only the Polkey deduction (para.17 above), but also under regulation 3(6) found that the Claimant caused or contributed to his own dismissal by 75% for the same reasons as I have given in paragraph 78 of this Decision. Thirdly, the overriding duty on the Tribunal is to award what is "*just and equitable*" in the circumstances, and not just the loss, and it would not be just and equitable having heard the totality of the evidence to make any further award in addition to the basic award if there had been any such loss after making the deduction for causing his own dismissal, and which I find there was not in any event.

Contractual Claim

81. The Claimant claims a minimum statutory notice of eight weeks in accordance with section 54 of the Employment Act 1932 given that the Claimant's length of service was more than 8 years but less than 10 years on the date of dismissal, with the termination taking place 10 days after notice was given and the Claimant being paid up to 2nd September 2019, namely a week's notice for the reasons Mr Buttigieg explained in evidence. The Claimant claims 8 weeks at £240 net per week amounting to £1,920.00, but in light of the fact he received 1 weeks' notice, the actual amount recoverable is £1,680.00.

82. Mr Buttigieg's evidence is that he would not have dismissed for this single isolated incident, because mistakes can happen just as vehicles can break down but it was nevertheless a serious matter in his mind.

Such a concession does not in itself mean that this was not a breach of an important term of the employment contract such as to justify the termination of the Claimant's employment summarily and without notice, even if it would be unfair to have done so for an isolated act. A persistent pattern and record of misconduct/dereliction of duty and unsatisfactory behaviour may tip the balance in favour of the single isolated act being such as to constitute good and sufficient cause for a summary dismissal even when not in itself sufficient to do so, and here there were persistent issues of wrongdoing.

83. However, Mr Buttigieg stated in evidence (see para.43 above) that the Claimant's carelessness had reached such a level that Mr Buttigieg had lost all trust in the Claimant's capacity to improve, that the Claimant had no respect for Mr Buttigieg, the Respondent or for his colleagues, and did not take his job role seriously. Mr Buttigieg said he could not risk this sort of incident occurring in the future, with possibly a worse outcome. The relationship, a difficult one in the last two years, had irretrievably broken down, with the Accident being the final straw, and Mr Buttigieg stating that he had lost all confidence in the Claimant. On that basis I find that although there was prima facie good and sufficient cause to dismiss for repeated carelessness and dereliction of duty, the caveat and proviso of section 56(1) (b) comes into play, because having indulged so many failings of the Claimant in the manner it had, the loss of confidence played a material role in this dismissal. I therefore find that the Claimant is entitled to the further sum of £1,680.00 for wages due in lieu of his notice entitlement.

Mark Isola QC

Chairperson

20th June 2022