Case Number: 2303047/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH (Ashford)**

BEFORE: **EMPLOYMENT JUDGE HARRINGTON**

BETWEEN:

Mr A B Sesay **Claimant**

and

R. Durtnell & Sons Limited **Respondent**

ON: **1 February 2019**

APPEARANCES:

For the Claimant: **In person**

For the Respondent: **Dr G Burke, Counsel**

JUDGMENT

(1) The Claimant's claim of unfair dismissal is not well founded and is dismissed.

(2) The Claimant was not wrongfully dismissed.

REASONS

Introduction

1 By an ET1 received by the Tribunal on 15 August 2018 the Claimant, Mr Abu Bakarr Sesay, brings claims of unfair dismissal and wrongful dismissal against the Respondent, R Durtnell & Sons Limited. The Claimant was employed by the Respondent, Britain's oldest building company, as an experienced telehandler operator from 12 November 1998 until 1 May 2018, when he was summarily dismissed for gross misconduct.

2 At the start of the hearing I was provided with the following:

2.1 A bundle of documents paginated 1-109 with pages 73 (i) – 73 (iv) being added during the course of the hearing [page numbers from the bundle are referenced in square brackets throughout this judgment];

2.2 Respondent's opening note and list of issues;

2.3 Witness statements from the Claimant, Mr Ward, Mr Routh, Mr Durtnell, Miss Hamilton, Mr Kalkat and Mr Lock.

3 I heard oral evidence from the Claimant and his former colleague, Mr Ward and in support of the Respondent's case from Mr Routh, the Respondent's Finance Director, Mr Durtnell, a Director and Chairman of the Respondent business and Miss Hamilton, the Respondent's Health and Safety Manager.

4 Mr Kalkat and Mr Lock did not attend the Tribunal. The Claimant agreed that I should read their witness statements and I did so. However I attached less weight to their evidence than the evidence I heard from those witnesses who attended the hearing and answered questions.

5 The Claimant represented himself and the Respondent was represented by Dr Burke of Counsel. Following the oral evidence, both parties made closing submissions. I am grateful to both the Claimant and Dr Burke for the focused presentation of their cases.

6 At the start of the hearing, the issues to be determined were clarified with the parties. It was agreed that the issues for the Tribunal were as follows:

Unfair Dismissal

6.1 What was the reason for the Claimant's dismissal? Was it a potentially fair reason pursuant to section 98(2)(b) of the Employment Rights Act 1996 ('ERA 1996'), namely conduct?

The Respondent's case is that the Claimant was dismissed for gross misconduct. The Claimant accepted that this was the Respondent's reason for dismissing him.

6.2 Did the Respondent act reasonably in treating the Claimant's conduct as a sufficient reason for dismissing the Claimant, in that:

a) Did the Respondent form a genuine belief that the Claimant was guilty of gross misconduct?

b) Did the Respondent have reasonable grounds for that belief?

c) Did the Respondent form that belief based on an investigation which was reasonable in all the circumstances?

6.3 Was the dismissal fair in all of the circumstances? In particular, was the dismissal within section 98(4) of the ERA 1996 and the band of reasonable responses available to the Respondent? The Claimant says that his dismissal was unfair because of the following specific issues:

a) He wasn't trained at a proper training centre;

b) He didn't have a site induction until after the accident;

c) There was no Risk Assessment Method Statement ('RAMS');

d) He only had one appeal.

6.4 If the dismissal was unfair, what award should be made to the Claimant? Should any compensation be reduced to take account of: contributory conduct and / or Polkey and if so, by what proportion?

Wrongful Dismissal

6.5 Was the Claimant entitled to any notice of the termination of his contract of employment? If so, how much notice was he entitled to and did he receive that notice?

The Facts

7 The findings of fact are set out below. The standard of proof is on the balance of probabilities, namely what is more likely than not.

8 The Respondent is a building company working throughout London and the South East, undertaking private and publicly funded building contracts. The Claimant began his employment with the Respondent on 12 November 1998. He was initially employed as a labourer but after a number of years, began working as a telehandler operator. A telehandler is a lifting machine which incorporates a telescopic boom fitted with a lifting attachment. In or around April 2016, the Respondent started working at a site known as the Norwood Cinema complex ('the site'). It was at this site, on 11 April 2018, that an accident occurred which led to the Claimant's dismissal.

9 It is the Respondent's case that prior to working on site, all labourers were required to have a site induction carried out by a site manager and that the Claimant attended such an induction for the site, signing the relevant record [45b].

10 The Claimant denied that he had attended an induction before the material accident. In his witness statement, the Claimant alleges that he was asked to fill in an induction form on 23 April 2018. He describes giving his induction form to Mr Ian Lock, Site Manager and that Mr Lock threw it onto the floor and stepped on it, to make it look old (see paragraph 10, Claimant's witness statement).

11 When asked about the signed Induction Record contained in the bundle, the Claimant confirmed that he did sign it. When asked questions by Dr Burke, his response was '*Yes – this I signed in 2016*'. He also accepted that this was the only record before the Tribunal in respect of a Site Induction and that any record that had been stepped on, as he described, had not been produced.

12 I am satisfied that the Claimant did attend a site induction before the material accident in April 2018 and that he signed a record to confirm his attendance. As set out above, whilst suggesting otherwise in his witness statement, in his oral evidence the Claimant accepted that he had signed the induction form in 2016. I note that this oral evidence from the Claimant is consistent with the witness statement of Mr Kalkat, in which he confirms that he witnessed the Claimant signing the record in October 2016 (see paragraph 5, witness statement).

13 The Claimant's changing evidence on this issue is an example of how he presented his case generally in respect of a number of pertinent matters, with his evidence altering through the course of the hearing. Where relevant I have referred to these changes throughout this Judgment. Due to the nature of the changes and the issues these concerned, I did conclude that on a number of important matters the Claimant's recollection was unreliable and that he was a poor historian.

14 On the site, a copy of the Respondent's Health and Safety Policy statement was displayed [45]. This recorded that all employees were

required to take reasonable care for the health and safety of themselves and all other persons who might be affected by their actions or omissions.

15 With regards to specific plant, the Claimant attended some training in the use of the telehandler. The Claimant accepts that he attended a refresher course in 2016 [56].

16 In addition, each task performed on the site required a signed risk assessment method statement ('RAMS'). In his witness statement the Claimant asserts that there was no method statement or risk assessment given to him. The Respondent produced a RAMS for the Telescopic Handler, signed by the Claimant [51a-f]. The RAMS contained the following statement,

'strops or chains for lifting must not be put over the forks for lifting. Lifting device as shown must be used. Long chains/strops must not be used as the load can cause stability issues when moved (Pendulum action) which could result in overturn' [51f]

17 In his oral evidence, the Claimant denied signing the statement before then accepting that he had signed it but contending that it was after the accident. Miss Hamilton told me that she thought the Claimant had signed it well in advance of the accident because she would have checked that it had been signed when reviewing things in June 2017.

18 On balance I accept that the Claimant was provided with the RAMS before the accident and that he signed it before the accident. The Claimant accepted that it was usual to be given one and, as noted, the Claimant changed his evidence on this matter when pressed, to accepting that he did actually sign it although then contending that this was at a later date. In contrast to the Claimant, I found Miss Hamilton's evidence to be clear that her processes of checking through documentation would have ensured that the Claimant had signed the RAMS shortly after it was issued. I also noted that the Claimant did not raise the issue of the RAMS after the accident with either Miss Hamilton or Mr Routh at the disciplinary hearing. If the Claimant had not been provided with the RAMS until after the accident, I consider it likely that he would have raised this matter with the Respondents. For example, when the Respondent asserted that the Claimant had acted in an unsafe way by moving the skip as he did, it would have been an extremely obvious point for the Claimant to make that he had not been provided with the method statement until after the accident. He did not raise this point and I conclude that he did not do so because he had in fact been given the RAMS and he had signed it well in advance of the date of the accident.

19 On 11 April 2018 the Claimant was working on the site. In his witness statement, the Claimant describes that day as being extremely busy and that he had moved various items around the site including pallets of bricks and bags of sand (see paragraph 6, Claimant's witness statement). It is

agreed by the parties that the Claimant used the telehandler to move a skip to the back of the site. The Claimant's motive for doing this was to try to help clear the site so that the groundworkers could begin to break up an area of concrete.

20 The Claimant lifted the skip by using one strop attached to the forks of the telehandler. The Claimant was assisted by four colleagues, each of whom stood on a corner of the skip to guide the telehandler as it moved to the back of the site. In the course of moving the skip Mr Eric Price, one of the colleagues assisting, was struck on the leg by the wheel of the telehandler, causing him injury. Mr Price was taken from the site to hospital.

21 Mr Ian Lock, Site Manager, was asked by Miss Hamilton, the Health and Safety Manager, to obtain witness statements on the day from those involved. Statements were obtained from the Claimant, Creaton Alexander Ward, Ian Locke and Kevin Parker [73a-d]. After the accident the Claimant was also told that his authorisation to operate the telehandler was withdrawn whilst an investigation was carried out.

22 Miss Hamilton attended the site on 12 April 2018. She reviewed the witness statements and CCTV, took photographs and spoke to the Claimant. It is agreed by Miss Hamilton and the Claimant, that he accepted that his statement was true [73a] and that he was remorseful, apologising for the incident.

23 In the event, Miss Hamilton produced an investigation report [74-79]. She made the following findings:

23.1 The Claimant made a decision to move an empty skip from the front of the site to the rear, using the telehandler;

23.2 The Claimant lifted the skip with the telehandler using one strop attached to the forks of the telehandler. He had not used a lifting attachment, which was contrary to the RAMS. Using the strop could cause the load to pendulum and sway;

23.3 The Claimant had asked four colleagues to stand at each corner of the skip as it was moved;

23.4 Mr Price was in the Claimant's blind spot. As the telehandler moved forward, Mr Price caught his foot on some plywood under the fence which caused him to lose his balance. As he put his foot down on the floor to recover his balance, the telehandler's wheel hit him on the leg. The Claimant was alerted to the issue by Mr Ward, as the Claimant himself could not see Mr Price.

24 Miss Hamilton accepted that the Claimant intended to be helpful but he had acted against the guidance of the RAMS and not in accordance with his training and the Health and Safety legislation.

25 By a letter from Mr Routh, dated 25 April 2018 [80-82], the Claimant was invited to a disciplinary hearing. The Claimant was given a copy of an investigation report from November 2017 relating to an earlier incident [65-70], a copy of his AITT telehandler operator certificate [56], a copy of the telehandler risk assessment [46-51], the Respondent's health and safety policy statement [45], the investigation report into the incident on 11 April 2018 and a copy of the Respondent's disciplinary rules [41-43].

26 The disciplinary hearing took place on 1 May 2018 and was attended by Mr Routh, the decision maker, the Claimant and Mr Brook, a Director of the Respondent company who acted as a notetaker. The Claimant was asked at the start of the meeting if he was happy with Mr Brook as notetaker and the Claimant confirmed that he was. Miss Hamilton also attended the first part of the hearing to answer any queries about technical matters that might be raised. In the event, the Claimant did not have any such questions and so Miss Hamilton was not required to stay.

27 It is agreed by the parties that during the disciplinary hearing, the Claimant accepted the content of Miss Hamilton's report. Rather than challenging the Report's conclusions, the Claimant told Mr Routh that he regretted what he had done and he then broke down in tears, becoming very upset. In answer to a question from the Claimant, Mr Routh stated in his oral evidence,

'I heard all your evidence of which in summary you agreed to everything in the letter – you had nothing to say and agreed that the incident occurred as was outlined in the letter...'

28 I accept that this is what happened at the disciplinary hearing. As noted, the parties agree in their recollection and the notes of the meeting, which the Claimant accepts as accurate, record that the Claimant accepted the contents of Miss Hamilton's report and that the Claimant apologised for what he had done, saying it would never happen again [82a-d]. Mr Routh adjourned the hearing to consider the entirety of the evidence and relevant factual background, including the length of time the Claimant had worked for the Respondent. For the avoidance of doubt, whilst the Claimant was provided with an investigation report into an earlier incident, I entirely accept Mr Routh's evidence that his decision at the end of the disciplinary hearing took no account of any earlier matters and was entirely based on the incident which had occurred on 11 April 2018.

29 Mr Routh concluded that the Claimant's conduct on that day did amount to gross misconduct and that the Claimant should be dismissed without notice. As stated, in reaching this decision Mr Routh did not rely upon any earlier warnings given to the Claimant. Mr Routh called the Claimant back into the meeting and told him the decision. The Claimant described to me that he then begged for his job but that he was told that the decision was final. The decision was confirmed the following day in writing [83-84].

30 The Claimant appealed against the decision in a letter dated 4 May 2018 [85-86]. An appeal hearing was held on 17 May 2018 and was chaired by Mr Alex Durtnell, Chairman of the Respondent. Ms Amanda Woodrow was present as a notetaker. Notes of the appeal hearing, which was conducted as a rehearing, appear in the bundle [92-94].

31 In his evidence, Mr Durtnell recalled that during the appeal hearing the Claimant was upset. The Claimant raised four issues: that he should not have been dismissed without notice, that he had not been given a copy of the company's disciplinary and grievance procedures, that he disagreed with elements of Miss Hamilton's investigation report and finally, he made reference to a tower crane incident which took place in 2005.

32 Mr Durtnell considered each of the matters. With regards to the investigation report, the Claimant's points related to minor corrections within the report such as the date he had obtained his forklift certificate and the size of the skip. With regards to the material incident on 11 April 2018 the Claimant accepted that he had used the telehandler contrary to his training and the method statement.

33 Mr Durtnell concluded that the Claimant operated the telehandler in breach of the site risk assessment and without a proper lifting plan, which resulted in an injury to another worker and that this amounted to gross misconduct. He considered sanctions other than dismissal but was particularly concerned with the seriousness of the incident and the fact that the Claimant accepted he had acted in the way alleged. Mr Durtnell was worried about the health and safety ethos at the Respondent business and that such incidents could affect the Respondent's ability to win work going forward, as the incident would have to be recorded. Accordingly he concluded that dismissal was appropriate. The Claimant was notified of the outcome to his appeal in a letter dated 21 May 2018 [95-98].

34 It is relevant to note at this stage that two further matters were raised by the Claimant during the course of the Tribunal hearing, namely the knowledge of the site managers and the adequacy of his training.

35 In his witness statement, the Claimant alleges that the site managers, Messrs Kalkat and Lock, were '*both quite aware'* of the ways in which skips were being moved to the rear of the site (see paragraph 7, Claimant's witness statement). During the course of the oral evidence and questions to witnesses, the Claimant referred to having moved the skip before, using a strop attached to the telehandler, and that Mr Kalkat and Mr Lock knew that he was doing so and had witnessed it from the smoking area.

36 When I asked the Claimant about this matter further, he confirmed that he had not actually raised these points (i.e. that he had moved a skip like this before or that the site managers knew about it) with Miss Hamilton either during the investigation or afterwards. With regards to Mr Routh, the

Claimant initially said that he did not tell Mr Routh that the managers saw him but he then changed his evidence and said that he did tell Mr Routh at some point during the disciplinary hearing when Miss Hamilton was not there.

37 Having considered the evidence on this issue, I do not accept on the balance of probabilities that the Claimant did raise this issue with Mr Routh or anyone else at the Respondent prior to his dismissal.

38 In reaching this conclusion I have taken into account that this, again, was an example of the Claimant changing his evidence as the hearing progressed, as to whether he had or had not referred to this issue at the meeting with Mr Routh. On balance I prefer Mr Routh's evidence as to what was said at the meeting. I also note that the Claimant did not raise the issue with Mr Durtnell at the appeal hearing and I consider if he had raised it with Mr Routh, it is more likely than not that he would have done so with Mr Durtnell aswell.

39 The Claimant also referred to the quality and adequacy of his training. He asserted that he had moved the skip in accordance with training he had received. When asked about this, the Claimant accepted that the diagram in the bundle was accurate [76] and that the manoeuvre he undertook was extremely dangerous involving other people being placed in front of the wheels of the telehandler, when at least one of those individuals was in his blind spot and where the load wasn't properly balanced or secured.

40 Taking that evidence into account, I do not accept that this method of moving a skip was in accordance with the training received by the Claimant. I prefer and accept Miss Hamilton's evidence that the Claimant was not trained to put someone in front of the wheels of the telehandler, in what was the Claimant's blind spot. I am entirely satisfied that the manoeuvre carried out by the Claimant went against even the basic principles of health and safety with regards to ensuring operatives are safe when heavy plant is being moved around. Further and importantly, I am satisfied that the Claimant did not raise the issue of training either during the investigation or the disciplinary process.

The Law

41 Sections 98(1) and (2) of the Employment Rights Act 1996 ('the ERA 1996') set out the potentially fair reasons for dismissing an employee. The list includes a reason related to the conduct of the employee (section 98(2)(b)).

42 Section 98(4) of the ERA 1996 deals with the fairness of dismissals. It reads in part as follows:

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

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

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

43 I have reminded myself of the guidance from the Employment Appeal Tribunal set out in **British Home Stores –v- Burchell** [1978] IRLR 379 as to the task for the tribunal where an employee is dismissed because the employer suspects that he has committed an act of misconduct. It indicated that the tribunal should concentrate upon three questions:

(a) Did the employer believe that the employee was guilty of the misconduct in question?

(b) Did the employer have in his mind reasonable grounds upon which to sustain that belief?

(c) Had the employer at the stage at which he formed that belief on those grounds, carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

44 The employer need not have conclusive direct proof of the employee's misconduct but rather a genuine and reasonable belief, reasonably tested. In respect of the meaning of 'reasonable' I refer to the guidance from the EAT in **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17. The EAT stated that the correct approach in answering the questions posed by Section 98(4) of the ERA 1996 was as follows:

(a) The starting point should always be the words of section 98(4) themselves.

(b) In applying this section the Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether the members of the Employment Tribunal consider the dismissal to be fair.

(c) In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(d) In many though not all cases there is a band of reasonable responses to the employee's conduct within which one employer

might reasonably take one view and another quite reasonably take another.

(e) The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within a band then the dismissal is fair. If the dismissal falls outside the band it is unfair.

45 Accordingly I am aware that it is not for me to substitute my own personal decision in this case. What I must do is consider whether the Respondent acted reasonably and whether the decision to dismiss the Claimant in all of the circumstances fell within the band of reasonable responses. As detailed by Lord Denning MR in **British Leyland (UK) Ltd v Swift** 1981 IRLR 91, CA, the correct test is was it reasonable for the employer to dismiss the employee,

'If no reasonable employer would have dismissed him then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness within which one employer might reasonably take one view and another quite reasonably take a different view.'

46 The 'band of reasonable responses' test also applies to the procedure followed by the employer in reaching the decision to dismiss (see **Whitbread Plc v Hall** [2001] ICR 699). Employers are advised to consult the ACAS Code of Practice in respect of Disciplinary and Grievance Procedures to which the tribunals will have regard. The Code emphasises the core requirements for procedural fairness including a full investigation and giving the employee an opportunity to explain himself.

47 It is always the case that what is required in respect of procedure will depend on the facts of the individual case, however the basic principles of natural justice require that an employee should know the accusations made against him, should be given an opportunity to state his case and that members of the disciplinary panel should act in good faith (see **Khanum v Mid-Glamorgan Area Health Authority** [1979] ICR 40).

Closing Submissions

48 In closing submissions, Dr Burke referred to the fact that the parties agreed that the Claimant had been dismissed by reason of gross misconduct. With regards to the reasonableness of the investigation, Dr Burke submitted that the Claimant accepted the investigation was reasonable. The additional issues raised by the Claimant now, for example a lack of training and that the site managers had seen him move

skips in the manner concerned, were not raised by the Claimant at the material time. When asked at the disciplinary hearing about Miss Hamilton's report, the Claimant accepted it. Accordingly it is submitted that the Respondent cannot be criticised for failing to investigate any other matters.

49 With regards to the other points raised by the Claimant, Dr Burke submitted that it was not contested that the Claimant had not asked for a second appeal. Further, on the agreed facts, there would seem to have been no reason to offer a second appeal as the Claimant was not querying any particular points concerning the misconduct other than seeking to be given a second chance.

50 It was also submitted on behalf of the Respondent that the Claimant's evidence generally had lacked credibility – for example, his contention that he had never been given a RAMS. Further, that in the relevant factual context of this case, the dismissal was within the range of reasonable responses.

51 Referring to the Claimant's contract claim, the Respondent submitted that notice did not have to be given as this was an instance of gross misconduct.

52 The Claimant submitted that the Respondent was not actually safety conscious and that he disagreed that the Respondent put safety first as the training he received was only 'a matter of hours' and was poor. He also told me that he thought he had been treated like an animal after he had worked for the company for 20 years.

Conclusions

53 I have carefully considered all of the evidence to which I have been referred including witness statements, documents within the bundle and the oral evidence. I have also taken into account the entirety of the submissions made by both parties.

54 It is agreed by the parties that the Claimant was dismissed and I accept that the reason for that dismissal was the Claimant's conduct; conduct being one of the potentially fair reasons for dismissing an employee. The Claimant has not disputed that this was the reason for his dismissal and the evidence overwhelmingly supports the fact that it was principally the incident on 11 April 2018 that was relied upon by the Respondent and did indeed form the basis for the Respondent's dismissal of the Claimant.

55 I entirely accept that both Mr Routh and Mr Durtnell believed that the Claimant was guilty of performing the unsafe manoeuvre to move the skip across the site on 11 April 2018 and that they had in mind reasonable grounds upon which to sustain that belief. Those reasonable grounds

were principally the Claimant's acceptance that his conduct was as described in Miss Hamilton's investigation report.

56 I am satisfied that as much investigation into the matter as was reasonable in all the circumstances of the case, had been carried out prior to the disciplinary hearing. Witness statements had been taken from relevant individuals on the day of the accident and Miss Hamilton visited the site on the following day beginning an investigation, which culminated in the production of her investigation report. As set out in my findings of fact, I do not accept that the Claimant raised the issues of the knowledge of the site managers and a lack of or inappropriate training during the investigation. Accordingly I do not find that these were matters which Miss Hamilton should have pursued in her investigation. I am satisfied that the investigation was reasonable, particularly in the circumstances where the Claimant was accepting what he had done and that he had acted in the manner alleged.

57 Referring to the specific matters raised by the Claimant as set out in paragraph 6.3 (a) – (c) above, the Claimant asserts that his dismissal was unfair because he wasn't trained at a 'proper training centre'. I do not accept that the content of the Claimant's training, as provided by the Respondent, was inadequate, improper or deficient in any material way. The Claimant had been trained and the Respondent had then ensured that the Claimant had attended refresher training. There was no evidence that the Claimant had complained about the content of the training prior to the accident in April 2018 nor was there any detailed evidence as to what part of the training the Claimant alleged was deficient or required him to attend a training centre.

58 In any event, the Claimant accepted that the accident occurred as described in the investigation report and that he had performed an inherently dangerous manoeuvre. I do not accept that the issue of training was of particular relevance to this incident as the way in which the skip was being moved was so obviously dangerous. The Claimant accepted that Mr Price had been positioned in a place where the Claimant could not see him and whilst I entirely accept that the use of a strop was unsafe, it was putting a colleague in his blind spot that was the fundamental problem with moving the skip in this manner. That was not a particularly technical matter that would necessarily have been affected by training.

59 Further, I am satisfied that the Claimant never raised training as a relevant matter throughout the investigation and disciplinary process. Accordingly I do not accept that the issue of training was relevant to the fairness of the Claimant's dismissal.

60 The Claimant alleges that his dismissal was unfair because he didn't have a site induction until after the accident and there was no RAMS. As set out in my findings of fact, I am satisfied that the Claimant did attend a site induction far in advance of the material accident and that there was a

RAMS in existence before the accident. Accordingly I do not accept that either of these issues rendered the Claimant's dismissal unfair.

61 With regards to the process followed, the Claimant raises a complaint that he only had one appeal and asserted that he should have been given the opportunity to appeal again. It is clear from ACAS Guidance that the opportunity to appeal against a disciplinary decision is essential to natural justice and in this case the Respondent gave the Claimant the opportunity to appeal with the appeal hearing being conducted as a rehearing by Mr Durtnell. A typical two tier process was followed with a disciplinary hearing and then an appeal hearing.

63 The Claimant asserts that he should have had a second appeal but has not particularised why he makes this argument. I have considered the totality of the evidence and I am unable to identify any factors which would appear to have demanded the holding of a second appeal. For example, there is no suggestion nor is there any evidence that the appeal process was defective such that a further appeal hearing should have been held. I am unable to identify any matter which required a second appeal be held and there is nothing in the evidence I have heard which rendered it procedurally unfair to proceed with the usual practice of a hearing and then an appeal. Further, it is relevant to note, that at the appeal hearing the Claimant accepted the conduct in question.

64 This case is a sad one because the Claimant had been employed by the Respondent for a significant period of time and was a well-liked and loyal employee. However I must consider whether the decision to dismiss him fell within the band of reasonable responses available to the Respondent. In circumstances in which the Claimant accepted that he performed a dangerous manoeuvre with heavy plant involving colleagues and causing injury to one colleague, I find that it did. The fact that other employers may well have imposed a different sanction is of no consequence.

65 I am entirely satisfied that dismissing the Claimant was a decision which fell within the band of reasonable responses and that the Claimant's conduct could reasonably be viewed as gross misconduct. In my judgment, the decision to dismiss the Claimant was both substantively and procedurally fair.

66 I am also entirely satisfied that the Claimant's conduct fundamentally breached his contract of employment and permitted the Respondent to dismiss him without notice.

67 In conclusion therefore the Claimant's claims of unfair dismissal and wrongful dismissal are not well founded and are dismissed.

Employment Judge Harrington
Date: 28.03.2019