Appeal No. UKEAT/0165/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 14 December 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

MS G MILLS CBE

MR P L C PAGLIARI

MR D D HODGSON — APPELLANT

MENZIES AVIATION (UK) LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS JENNIFER McCARTHY (Solicitor) Conway McColl Solicitors Ltd 40a Bramhall Lane South Bramhall Stockport SK7 1AH
For the Respondent	MR STEFAN BROCHWICZ-LEWINSKI (of Counsel) Instructed by: Maclay Murray & Spens LLP 1 George Square Glasgow G2 1AL

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

An Employment Appeal Tribunal ("EAT") was entitled to conclude, on the evidence, that the Respondent acted reasonably and fairly in dismissing the Appellant for gross misconduct. The Respondent had been entitled to look at the conduct as a whole and in the round in reaching its conclusion, including the attitude that the Appellant had taken to the investigation and disciplinary procedure.

HIS HONOUR JUDGE MARTYN BARKLEM

1. In this Judgment we shall refer to the parties as they were before the Tribunal. The appeal is against a Decision of the Employment Tribunal sitting at Manchester (Employment Judge Sharkett sitting alone) in which it dismissed the Claimant's claims of unfair dismissal and breach of contract.

2. The Claimant is represented before us by Ms McCarthy, who appeared below. Mr Brochwicz-Lewinski, who did not appear below, represented the Respondent. Each has provided us with a helpful skeleton argument and has expanded on those orally before us; we are grateful for the succinct way in which they have put their cases.

3. The background to the case is relatively straightforward. The Respondent is a company which provides services to airlines, including the provision of ground handling services to aircraft at Manchester airport. The Claimant started work as a Ground Service Operative on 16 February 2004 and his employment was transferred to the Respondent in July 2012. Among his duties were meeting flights, providing necessary technical equipment, and loading and unloading passengers' baggage.

4. On 21 January 2017 the Claimant, together with a relatively junior member of staff, Mr Buckley, who was accompanying him, was supposed to meet an incoming Flybe flight from the Isle of Man. Shortly before being allocated this flight the Claimant was in the crew room on a 30-minute break following the departure of the last flight on which he had been tasked. Updated information on expected arrival time and the stand number was given on a display in the crew room.

5. Rather than accompany other crew members to the stand (which was stand 18) to meet the inbound aircraft, the Claimant, accompanied by Mr Buckley, went for a cigarette. This entailed him taking a baggage trolley, in breach of the rules, to a place near a smoking area and then returning with that trolley, arriving at the stand only after the aircraft had got there and after Mr Collins, the team leader, had chocked the nosewheel of the aircraft.

6. The aircraft concerned was an ATR turboprop aircraft. The ATR requires a ground power unit ("GPU") to be plugged in when it is on the ground to enable both engines to be shut down. Without ground power in order to provide electrical power to the aircraft systems, one of the engines has to be run in "hotel" mode, that is with the propeller secured and immobile, which is costly in terms of fuel use.

7. Flybe operates another type of aircraft, the Bombardier Dash 8, referred to in the Tribunal's Judgment as the "Dash". This aircraft type does not require external ground power to be supplied in order to keep the aircraft systems operating when at the stand. The Claimant, who was responsible for the obtaining and fitting of appropriate GPU equipment when required, had not arranged for the necessary equipment to be present on the stand. He went to another stand (Stand 11) where he was able to obtain what was needed and take it to stand 18. The aircraft had had to run on one of its engines in hotel mode for 10 minutes or so.

8. There were particular concerns among the Respondent's management about shortcomings in the services it provided to Flybe, as there had been an incident some days earlier - of which the Tribunal found the Claimant was possibly unaware - when the Managing Director of that company had been aboard a flight which had not been met on time. This had caused concerns as to the risk to the contract going forward. More generally, the Tribunal held that the

provision of services, such as those supplied by the Respondent, were highly competitive and there was pressure on it to perform from both the airlines and the owners of the airport.

9. In the investigation which followed, the Claimant accepted that he had been caught "*with his pants down*" when the aircraft arrived at the stand earlier than he had expected (Tribunal Judgment, paragraph 31). He gave differing accounts, initially saying that he was there as the aircraft taxied in, but later accepted that this was not correct. He blamed Mr Buckley for giving him incorrect information as to the latest estimated arrival time as they left the crew room, leading him to think that there was time for a cigarette break; and for telling him that the flight was a "prop flight" leading him to assume it was a Dash, which did not need the GPU. When interviewed a second time the Claimant said that Mr Buckley had, in fact, told him that the aircraft would be a Dash. Mr Buckley denied giving any incorrect information.

10. A disciplinary hearing was convened, the Claimant having been charged with (1) bringing the company into disrepute, (2) failing to follow a reasonable request, and (3) failing to carry out his normal duties; each case arising from his failure to meet the aircraft on arrival. The letter informing him of the charge made clear that the allegations were serious, could potentially amount to gross misconduct and, if well-founded, could result in his dismissal.

11. The Tribunal summarised the course of the disciplinary meeting in the following terms (it should be noted that in this extract the "Mr Brown" referred to was the Claimant's Unite representative):

> **"42. During the course of the disciplinary meeting the claimant indicated that at first he had not understood what he had done wrong but the suspension time had given him time to think. He indicated that he did not agree with the timescales put forward and that he was unaware that the aircraft was an ATR and would therefore require ground power. When Mr Harrison put to him that if he had not gone for a cigarette, he would have been there with the equipment in time to receive the aircraft the claimant responded that the plane had left on time and the bags were delivered within the required timescale. The claimant contended that he was good at his job and was always safe. In response Mr Harrison expressed a concern that the claimant**

did not think he had done anything wrong and he referred him to the statements of Mr Collins and Mr Buckley. The claimant said that he realised that he should have been there and he knew he had done wrong. The claimant went on to apologise and say that he knew he should not have gone for a cigarette, had genuinely learned that he had to be there and be prepared and that it would not happen again. He stated that he was good at his job and apologised again. Mr Harrison did not find that the claimant was genuine in his apology and told the tribunal that he believed he was just paying lip service to an apology and there was no sincerity behind it. Mr Brown in oral evidence confirmed that the claimant had apologised but agreed that the manner in which it was delivered may have led Mr Harrison to reasonably consider it was not meant.

43. Mr Harrison adjourned the meeting on the basis that he wanted 24 hours to consider and to 'look into other incident' [sic] (p76). The hearing was not reconvened until 9 February 2017 when Mr Harrison did not provide the claimant with any further information but simply asked whether there was anything that the claimant wanted to add. The claimant was told that he was being dismissed for gross misconduct because Mr Harrison had found that the claimant had made a conscious decision to go for a cigarette instead of going to the ramp and his doing so amounted to gross misconduct.

44. Mr Harrison told the Tribunal in oral evidence that he had considered the claimant's length of service and experience of working on the airfield. He considered whether there was any other sanction that could be imposed as an alternative to dismissal, such as moving the claimant to another department. Mr Harrison concluded that there was not because whereas some people make mistakes that can be remedied by training, he did not feel that this could be achieved with the claimant. Mr Harrison believed that the claimant knew well what was required of him in his duties but had taken a deliberate decision to go for a cigarette instead of doing his job. He believed that the claimant had tried to make a nonsense of the allegations against him and did not think he had done anything wrong because the aircraft had left in time. Mr Harrison took into account the fact that the claimant had changed his story a number of times and remained adamant throughout that he had done nothing wrong, referring back all the time to the fact that he had been given incorrect information by Mr Buckley.

45. The claimant was notified of his dismissal by a letter of the same date (p82). The allegation that the claimant had failed to meet an aircraft on arrival despite being given ample time and instruction to do so was repeated. Mr Harrison found that the fact that the claimant had thought that the aircraft was a Dash and not an ATR had no bearing whatsoever on his being late to meet the aircraft. He did not accept that the claimant arriving three minutes late had no impact on 'the turn' as it still departed on time, because his lateness and unpreparedness had led to the aircraft waiting ten minutes for ground power after arrival. The letter went on to say that his failure to attend the aircraft on time had resulted in a significant financial cost to the airline and the captain becoming extremely irate "*which has brought our company into disrepute with the airline*".

46. The letter acknowledged the claimant's admission that he was late to the aircraft due to going for a smoke break. However, Mr Harrison found his behaviour to be inexcusable because he had just finished a break during which time he had ample time to go for a cigarette. Mr Harrison found that the claimant had been given plenty of advance information about the flight arrival but had instead made a conscious decision to go for a smoke break. He confirmed that the claimant was to be summarily dismissed because in his view Mr Harrison found that the allegations were found proven under each area of the disciplinary procedure considered, which was:

(a) bringing the company into disrepute;

(b) failure to follow a reasonable request; and

(c) failure to carry out his normal duties."

12. An appeal followed. The Claimant raised a number of issues, seeking evidence from the captain of the flight and details of the cost of fuel wasted etc; these were not permitted to be sought. At the appeal hearing the Claimant changed his account in a number of aspects from

those previously given. The upshot of the appeal hearing is set out at paragraph 55 of the Judgment:

> **"55. Having received responses to the questions he asked of Mr Harrison, which included a question about the sanction of dismissal, Mr Burrows decided to uphold the decision to dismiss the claimant. Mr Burrows was aware that employees should not be dismissed lightly and wanted to make sure that the decision of Mr Harrison was made on sound grounds before making his own decision on the appeal. He communicated this by letter of 5 May 2017 in which he confirmed his finding that the claimant had gone for a cigarette after his break had finished. He advised the claimant that he had considered the harshness of the sanction of dismissal but had decided that because the claimant had made a conscious decision to break the rules for his own benefit, and at no point accepted any wrongdoing and instead sought to create false justification, he decided that dismissal was appropriate. He advised the claimant that if he had admitted an error in judgment and given assurance that there would have been no repetition to his actions that Mr Burrows may have had some scope to substitute the sanction of dismissal with a formal written warning. However, this had not been the case and therefore he found himself in full agreement with Mr Harrison that dismissal was appropriate in the circumstances. In his written statement Mr Burrows explained that throughout the appeal hearing the claimant showed no regret or remorse for his actions and did not take ownership of what he had done. Mr Burrows explained that he had also heard the appeals of the employees involved in the case involving the complaint made by the Chief Executive of Flybe. Those two employees were not dismissed but did have disciplinary sanctions imposed. Mr Burrows explained in his statement that the reason the most serious sanction was imposed on the claimant was because he had shown no remorse and was unable to grasp what he had done wrong. He explained that this approach had continued even up to the appeal hearing where he referred to the matter as 'getting caught with his pants down'."**

13. The Tribunal then set out the relevant law and applied the law to the facts as found. In so doing, it noted that the Claimant accepted in evidence that he knew he was required to be in attendance at the time the aircraft arrived at the stand and that had he asked for permission to go for a cigarette break when he did, it would have been refused. The Tribunal held that the disciplinary officer held a genuine belief on reasonable grounds that the Claimant had failed in his obligation to be on the stand ready to meet the aircraft on time. This is because, instead of finishing his break and proceeding to the stand, he took another break to have a cigarette.

14. The Tribunal set out its reasons for concluding this dismissal was within the range of reasonable responses in some detail. Given the grounds of appeal, it is necessary to set out the relevant findings, including the finding in relation to the breach of contract:

> **"91. The Tribunal finds, it has been clear to the claimant from the outset that he was disciplined, and ultimately dismissed, because instead of finishing his break and going to stand 18 to meet the aircraft allocated to him, he went for another break to have a cigarette. By doing this, he arrived late to meet the aircraft in breach of the respondent's obligations to the airline. Although the respondent has sought to pin labels on his actions to 'fit them into' the respondent's disciplinary policy the actual act of misconduct which resulted in his dismissal is**

set out above. The Tribunal is satisfied that it is this conduct which has formed the basis of the disciplinary process and his unfair dismissal claim. The question then is whether the respondent's decision to dismiss the claimant for this conduct was within the band of reasonable responses open to a reasonable employer.

92. It is not disputed that the respondent does not cite either going for a cigarette during working hours or a failure to meet an aircraft on time as potential acts of gross misconduct. The Tribunal finds that a simple act of going for a cigarette without permission would not in the absence of previous warnings, be conduct that would potentially give rise to a fair dismissal. The same can be said for being late on stand to meet an aircraft on one occasion. However, during the course of hearing from the claimant, it is clear that he has worked in the industry for a considerable length of time and knows the importance of the contracts secured by the respondent. He knows that contracts can be lost if the respondent does not meet the standard expected by the airline under the contract awarded to it.

93. The Tribunal is satisfied that the claimant was aware that there was an expectation for him to be at the stand in time for the aircraft arriving unless there were circumstances which made this not possible. The Tribunal find that the claimant was aware of this expectation on him even though he was not aware of the Flybe incident that had only recently occurred.

94. The claimant was aware that he had been allocated the Isle of Man flight before he left the crew room at the end of his break. He also knew that Mr Collins had already set off to go to the stand with a tug. The claimant knew that his decision to go for a cigarette before going to the stand himself was one that would not have been approved by any of his seniors. In oral evidence he said he would not have been given permission to go for a cigarette if he had asked. On that basis it is clear that the claimant must have known that he was not following the instruction he had been given which was to go and meet the aircraft. His decision to take a further break for a cigarette and delay doing his job, led to his late arrival on the stand and the aircraft having to run on hotel mode because the claimant had not got a connector unit for the power. Had the claimant followed the instruction he was given he would have been in attendance before the aircraft arrived and could have complied with his duty to secure all necessary equipment in preparation for the aircraft's arrival.

95. In considering whether the decision of Mr Harrison to dismiss the claimant fell within the band of reasonable responses, the Tribunal has also considered the manner in which he has dealt with the two employees who were disciplined because of the Flybe incident. The Tribunal notes that Mr Harrison conducted the disciplinary hearings on these two employees and issued sanctions short of dismissal. He explained that he did this because there were different reasons why they had been late and they were both extremely remorseful for what had happened.

96. It is true that the claimant also apologised at his disciplinary hearing but Mr Harrison did not believe the apology was sincere. Although Mr Harrison did not say this to the claimant, Mr Brown who was at the disciplinary meeting has explained that it would have been possible for Mr Harrison to have reached a conclusion that the claimant was not sincere in his apology because of the way in which it was delivered.

97. Ms McCathy [sic] submits that it is obvious that these two employees would have been remorseful because they knew what it was that they had done wrong and they were aware that their actions had in fact brought the respondent into disrepute. The claimant, she submits, did not know what he had done wrong. The Tribunal does not accept this argument, because the claimant was at all times aware of the reason why he was being disciplined. It is true that he may not have been formally asked about the five minute rule before he attended the disciplinary hearing, but he did know that he was expected to be ready and waiting for the aircraft when it arrived unless there was some good reason why he could not. Going for a cigarette would not by any standard be deemed to be a good reason not to be there.

98. Throughout the course of the disciplinary proceedings the claimant changed his account of what happened and did not accept that he had done anything wrong. He continued to rely on the fact that he would have been at the stand in time if the aircraft had not come in early. He has maintained that stance throughout and does not appear even now to appreciate that had he been following the instructions he was given to go and meet the aircraft he would have been there on time.

99. Whilst no formal complaint was received from the airline or MAG it is quite obvious to this Tribunal that the airline would not have welcomed the delay that followed, however short, or the cost incurred burning jet fuel that would not otherwise have been needed. The potential for damage to the reputation of the respondent was real and whilst there are occasions when it is

not possible to attend an aircraft on time, this was a situation that could have been avoided had the claimant done his job as instructed.

100. The Tribunal finds, that given the circumstances of this case as set out above, the claimant's failure to fully recognise his wrongdoing and the potential consequences his actions could have had on the respondent; the decision of Mr Harrison to dismiss the claimant for failing to meet an aircraft in time, in the circumstances described, does fall within the band of reasonable responses open to a reasonable employer. The claimant's dismissal was not unfair. His claim of unfair dismissal is not well founded and is dismissed.

101. In acting in the manner in which he did, the claimant's actions did not just amount to misconduct because he went for a cigarette without permission, or arrived late to meet an aircraft. In taking the actions that he did, the claimant had disregard for the consequences of his actions on the respondent and failed to take responsibility for them when they were raised with him. In doing this, the claimant breached his fundamental duty of trust and confidence with the respondent. Thus the respondent was entitled to accept the breach and dismiss the claimant without notice or payment in lieu of notice. The claimant's breach of contract claim is not well founded and is dismissed."

15. This matter was allowed to proceed to appeal on two grounds by Her Honour Judge Eady QC, who also directed that this Tribunal should sit with lay members, the key issue on the appeal being as to the application of the band of reasonable responses test. The two grounds are, in summary, that the Tribunal erred in law in finding that: (1) although the allegations did not amount to gross misconduct, summary dismissal on the first offence was justified; and (2) that the Respondent was entitled to dismiss without notice.

16. In respect of the first grounds Ms McCarthy, for the Claimant who appeared below, makes the following points:

- The Claimant could not have been aware that the offending behaviour could amount to gross misconduct before the offending took place. The point is made that (at paragraph 92 of its Judgment) the Tribunal said that each element individually (the cigarette break and arriving late) would not have amounted to gross misconduct.
- The ACAS Code provides that dismissal for a first offence should only happen in relation to misconduct and that examples should be given in relevant disciplinary rules. She accepts though, following the case of **Quintiles Commercial UK Ltd v Barongo** UKEAT/0255/17 - a very recent decision of this Tribunal - that there is no

rule of law that an employee cannot be dismissed on a first offence for conduct falling short of gross misconduct.

- The Tribunal failed to apply the principles in the case of **Lock v Cardiff Railway Company Ltd** [1998] IRLR 358, namely that an employee should be aware of what conduct would amount to gross misconduct.
- The Tribunal erred in taking into account the Claimant knowing the importance of contracts, his awareness that he was excepted to be on time, his awareness of the specific flight to which he had been allocated, and his awareness of the cigarette break if requested would not have been granted, but not taking into account other factors; these are the fact that the disciplinary policy is silent on smoking and on the type of conduct in question. The Claimant could have been unaware of the earlier incident when the Managing Director of Flybe was aboard; no information about this or the increased sensitivity as to lateness having been communicated to staff.

17. In respect of the second ground, Ms McCarthy asserts that the Claimant's behaviour in arriving at the flight late was not culpable. The Tribunal having found that the Claimant did not know his action would make him late for the aircraft - see that part of the Judgment in which the Tribunal accepted that the Claimant had at the time of leaving the crew room not seen a subsequent change to the arrival time making the flight five minutes earlier. She repeats the point made in ground 1 as to the factual findings set out in the last bullet point above.

18. Ms McCarthy has referred us to the decision of the EAT in **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** UKEAT/0032/09, and in particular to paragraphs 109 to 113 of that decision. In our judgment it is necessary, for a proper understanding of the decision, to begin at paragraph 108:

"108. Whilst recognising that the Employment Tribunal had accepted that the authority of *Stoker v Lancashire County Council* [1992] IRLR 75 should not be applied in a mechanistic way, we do not regard it as a particularly illuminating authority so far as the instant appeal is concerned. It is a case concerned with the contractual right to an internal appeal. No doubt some of its logic might be transferrable to this case but the issue here is whether the fact that the Trust had a belief that the Respondent had been guilty of gross misconduct is dispositive, in the sense that all that can be asked is whether that belief was within the band of reasonable responses? Ms Morgan submits that is all that can be asked and that the Trust was entitled to regard failure to adhere to Trust policy as gross misconduct. Failure to adhere to Trust policy had been stipulated as gross misconduct in the Trust's disciplinary code and once the Trust concluded that its policy had been breached, it was entitled to conclude that breach amounted to gross misconduct. Accordingly it was an error of law for the Employment Tribunal to constrain gross misconduct to deliberate wrong doing or gross negligence. If what the Respondent had done amounted to a breach of Trust policy, then the Trust had stipulated that amounted to gross misconduct and that was an end of the matter; the Employment Tribunal could not look behind it.

109. We do not accept that submission. It is not clear to us what the breach of Trust policy actually was. The conduct complained of was taking the patient outside. Assuming that is a breach of Trust policy, it still remains to be asked - how serious a breach is that? Is it so serious that it amounts to gross misconduct? In our judgment that is not a question always confined simply to the reasonableness of the employer's belief. We think two things need to be distinguished. Firstly, the conduct alleged must be capable of amounting to gross misconduct. Secondly the employer must have a reasonable belief that the employee has committed such misconduct. In many cases the first will not arise. For example, many misconduct cases involve the theft of goods or money. That gives rise to no issue so far as the character of the misconduct is concerned. Stealing is gross misconduct. What is usually in issue in such cases is the reasonableness of the belief that the employee has committed the theft.

110. In this case it is the other way around. There is no dispute as to the commission of the act alleged to constitute misconduct. What is at issue is the character of the act. The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. In our judgment the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal or in the context of breach of contract. What then is the direction as to law that the employer should give itself and the employment tribunal apply when considering the employer's decision making?

111. Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee: see *Wilson v Racher* [1974] ICR 428, CA per Edmund Davies LJ at page 432 (citing Harman LJ in *Pepper v Webb* [1969] 1 WLR 514 at 517):

> **"Now what will justify an instant dismissal? - something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract"**

and at page 433 where he cites Russell LJ in *Pepper* (page 518) that the conduct "must be taken as conduct repudiatory of the contract justifying summary dismissal". In the disobedience case of *Laws v London Chronicle (indicator Newspapers) Ltd* [1959] 1 WLR 698 at page 710 Evershed MR said:

> **"the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions."**

So, the conduct must be a deliberate and wilful contradiction of the contractual terms.

112. Alternatively it must amount to very considerable negligence, historically summarised as "gross negligence". A relatively modern example of "gross negligence", as considered in relation to "gross misconduct", is to be found in *Dietman v LB Brent* [1987] ICR 737 at page 759.

113. Consequently we think that the Employment Tribunal was quite correct to direct itself at paragraph 27.1.4(b) (see page 18 of the bundle) that "gross misconduct" involves either deliberate wrongdoing or gross negligence. Having given a correct self direction in terms of law, thereafter it fell to the Employment Tribunal to consider both the character of the conduct and whether it was reasonable for the Trust to regard the conduct as having the character of gross misconduct on the facts. The decision reached in that paragraph, whilst accepting that

her conduct was "a failure of professional judgment" and a "serious one" and "fell short of the high standards demanded of a nurse", concluded that it could not be reasonably characterised as deliberate wrongdoing or gross negligence. In our judgment that was a decision open to the Employment Tribunal to make on the facts."

19. She argues that in all the circumstances the Tribunal was obliged to conclude that the Respondent was not entitled to dismiss the Claimant, for the "offence", alternatively that that dismissal ought to have been on notice. The latter point grounds the contractual claim made for notice monies.

20. It follows that in relation to both grounds of appeal the question for us is whether, judged objectively, there were reasonable grounds for the Tribunal to conclude that there was misconduct serious enough to justify dismissal and whether dismissal was within the range of reasonable responses open to an employer? To an extent, the two grounds are two sides of the same coin.

21. In **Lock v Cardiff Railway Company Ltd** the issue before the EAT was whether the dismissal of a train guard, for putting off the train a young person who had no ticket, was within the range of reasonable responses. At paragraphs 15 and 16 Morison LJ (then President) said this:

"15. I should say at the outset that this a case where I have turned to my lay members for guidance. It seems to me that they are in a particularly good position to advise me as to whether they found the tribunal's decision one which, having regard to the fact that they are the fact-finding tribunal, could be regarded as acceptable in the sense of whether it was rational.

16. It is their view, having regard to the standard laid down by the Code of Practice, to which I have referred, that the decision of the industrial tribunal departs from the standards of sound industrial experience as put into practice. It is their view, with which I entirely agree, that no reasonable tribunal properly directing itself could have concluded that a one-off act of the sort referred to could justify a dismissal."

22. Insofar as the question as to whether a disciplinary offence was sufficiently detailed, the EAT said at paragraph 22:

> **"22. It seems to us essential that employees should be given due warning of which types of misconduct will, on a first breach, lead to dismissal. They are entitled to know before they are dismissed what they may be in for if they break that particular rule. It seems to us to be no answer to say that this was an agreed code and that Mr Lock's agent, his union, made the agreement, because, as it seems to us, the union cannot be taken on Mr Lock's behalf to have agreed that any one-off breach of any one of the rules set out in 15.1 would thereby justify a dismissal for gross misconduct. It is clear from paragraph 16 that any breach of any of those rules might have led to action short of dismissal. It seems to us that the fact that the unions may have agreed to a code, does not deprive Mr Lock of the benefit of good industrial relations practices."**

23. For the Respondent, Mr Brochwicz-Lewinski seeks to uphold the Tribunal's Decision. He focuses on the chain of decisions which the Claimant made, principally:

- he breached company rules in taking the baggage trolley in order to have a smoking break;
- he failed to ensure that he had the GPU equipment at the stand, causing the aircraft to have to keep an engine running for 10 minutes;
- he knew, because he accepted it, that had he requested it a smoke break would have been refused;
- he advanced different accounts at different stages, blaming another member of staff for telling him that the aircraft was a Dash, not an ATR as the skeleton argument reads; and that it was due to arrive at the stand much later than he knew it was to.

24. Mr Brochwicz-Lewinski seeks to support the Tribunal's conclusions at paragraphs 100 and 101 of the Judgment, particularly that the Claimant must have known that he was not following instructions he was given, that he knew the potential for reputational damage, and by his approach to the investigation and disciplinary process breached the fundamental duty of trust and confidence. He argues that the fact that the aircraft arrived four minutes earlier than the final estimate demonstrates why the unwritten rule - that the team should be at the stand five minutes ahead of the estimated time - existed.

25. Mr Brochwicz-Lewinski also reminds us that the Tribunal made reference, in the Judgment, to the case of **Wincanton plc v Atkinson and Another** UKEAT/0040/11. That was a case in which two HGV drivers had allowed their licences to lapse with severe *potential* consequences for their employer, which had not in fact been suffered. The conduct was described as "*a stupid and serious mistake*". The ET had held that it was outside the range of reasonable responses for the employer to have dismissed in the circumstances. At paragraph 27 Silber J, then presiding at the EAT, said this:

> **"27. In our view, this decision which entailed not attaching suitable importance to this potential serious damage to justify a dismissal was outside the reasonable range of responses for an employer is an error of law because it would mean that employees, who negligently act in breach of their contracts of employment by not renewing their licenses, could not be fairly dismissed if the illegal act has no repercussions for the employer. That might well, for example, mean that if a driver or pilot inadvertently or negligently consumes so much alcohol so as to be well in excess of the proper limit but then completes a journey safely without actual damage, it would not then be *possible* for them to be dismissed fairly irrespective of the seriousness of the potential damage which could have occurred, but which did not occur. No authority has been cited to us or justification given for this conclusion.**
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> **28. We must add that the lay members of this Appeal Tribunal, who have very great experience of personnel relations consider that an employer in the position of the Respondent was obliged to attach great importance to the *potential* problems that could have been caused by the Respondents driving without having the requisite HGV licenses when those consequences could be as serious as they were in this case. We repeat that the Employment Tribunal found that "*the consequences of driving a lorry loaded with dangerous goods, as in this case, without insurance are horrific to contemplate*" [9]."**

26. As in the cases of **Lock v Cardiff Railway Company Ltd** and **Wincanton plc v Atkinson and Another**, I have had the considerable benefit of sitting together with lay members today, each having very considerable experience in the field of industrial relations. We have considered all the stages of the process with care and have had regard to the lengthy list and categorisation of misconduct set out in the Respondent's disciplinary documentation. We agree with Mr Brochwicz-Lewinski that this is plainly not a **Lock v Cardiff Railway Company Ltd** case.

27. The lay members are of the view that it did not need a high degree of specificity in those documents for the Claimant to have realised that if he were to behave as he did, he was putting

himself at risk of dismissal. This is not a simple case of lateness, nor of taking an extra cigarette break. The conduct has to be taken in the round. It involved a reckless decision to take a cigarette break, which he implicitly accepted that he ought not to have taken, which not only resulted in his arrival at the aircraft late, as he was eventually to admit, but without the necessary equipment; meaning that he had to go to another stand to collect it. They reject the notion – as do I – that in order for a disciplinary code to be compliant it has to contain an exhaustive list of possible offences.

28. We consider the Tribunal's Decision to be careful and balanced. Issues such as the earlier Flybe incident were raised, we consider, because it was plainly a relevant factor, but one which we think the Tribunal discounted in the sense that there was an acceptance that the Claimant did not know about it. We do not consider that anything in the findings of the Tribunal suggest that the rules changed after that incident, or that conduct which would earlier have been regarded as relatively minor suddenly became more serious.

29. The range of reasonable responses is engaged at all stages of a disciplinary process. Our unanimous view is that it was entirely reasonable to regard the conduct in this case, taken overall, as misconduct sufficiently grave to justify immediate dismissal and known to the Claimant to be such.

30. The next question, therefore, is whether dismissal was within the range of reasonable responses open to the Respondent? In that regard it was no more open to the Tribunal than it is to us to substitute its or our view for that of the employer, provided that the action taken was within the band. We note that in endorsing the dismissal to appeal, following the hearing Mr Burrows, the appeal officer, said:

> **"Finally, I have given consideration as to whether dismissal had been too harsh a sanction in this case. People make mistakes and through retraining we can rectify that, but you made this conscious decision to break the rules purely for your own benefit. Furthermore at no point in this process have you accepted any wrong doing on your part and have sought to create false justifications for your actions.**
>
> **Had you admitted to an error of judgement and given reassurance that there would be no future repetition of this behaviour, I may have had some scope to substitute a final warning instead of dismissal, however you have not."**

31. We consider that the Tribunal made no error of law in reaching the conclusions that it did, summarised pithily at paragraphs 100 and 101 of its Judgment set out above. We dismiss this appeal.