



EMPLOYMENT TRIBUNALS

Claimant: Mr Piotr Kilan

Respondent: GXO Logistics UK Limited

Heard at: Manchester by CVP

On: 10th May 2022

Before: Employment Judge Asif Mahmood Khan

REPRESENTATION:

Claimant: Mr Jim O'Neill, Lay Representative

Respondent: Mr Hamed Zovidavi, Counsel

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claim for unfair dismissal is dismissed.
2. The claim for wrongful dismissal on failure to pay notice pay is dismissed.

REASONS

The Hearing

1. The hearing took place on the 10th May 2022 by CVP video link. The claimant was represented by Mr Jim O' Neill a Lay representative, and the claimant gave evidence on his own behalf. The respondent was represented by Mr Zovidari counsel for the respondent, and evidence was given by Mr Daniel Dalton, Regional Manager, and Mr Tony Bell, Manager SC operations.
2. A claim form was presented on the 08.10.2021 by Mr Kilan, the claimant which complained of unfair dismissal.
3. The respondent submitted a response. Their position was the claimant had been fairly dismissed for gross misconduct

Issues to be determined

4. Mr Zovidari counsel for the respondent provided a list of issues which were not in dispute. On that basis the issues to be determined by the Tribunal were agreed at the outset by Mr O' Neill as follows:

Was the Claimant dismissed on the grounds of conduct?

Did the Respondent conduct a reasonable investigation?

Did the Respondent have reasonable grounds to believe that the Claimant was guilty of the misconduct alleged?

Did the Respondent believe that the Claimant was guilty of the misconduct alleged?

Was dismissal within the range of reasonable responses open to the Respondent?

If the Claimant's claim is upheld:

What financial compensation is appropriate in all of the circumstances?

Should any compensation awarded be reduced in terms of *Polkey v AE Dayton Services Ltd* [1987] ICR 142 and, if so, what reduction is appropriate?

Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to his dismissal and, if so, what reduction is appropriate?

Has the Claimant mitigated his loss?

Did the respondent follow a reasonably fair procedure?

Was dismissal rather than some lesser disciplinary penalty within the band of reasonable responses to dismiss the claimant rather than impose a lesser penalty such as a warning?

Evidence

5. The tribunal heard oral evidence from the claimant in person Mr Kilan and from the following witnesses on behalf of the respondent:

Mr Daniel Dalton, Regional Manager

Tony Bell, Manager SC operations

Bundle

6. An agreed bundle of documents was provided to both parties and to the tribunal consisting of 158 pages. Written evidence also included a witness statement from Mr Kilan dated 04.02.2022. A witness statement from Mr Tony Bell dated 04.02.2022, and a witness statement from Mr David Dalton dated 04.02.2022

The Law

The Employment Tribunal applied the law at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

“In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

1. *the reason (or, if more than one, the principal reason) for the dismissal, and*
2. *that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”*

Then by sub-section (2):

“A reason falls within this sub section if it:

- b) relates to the conduct of the employee...”*

Then by sub-section (4):

“Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

3. *depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
4. *shall be determined in accordance with equity and the substantial merits of the case.”*

7. In considering this alleged misconduct case, the tribunal applied the long-established guidance of the EAT in **British Home Stores v Burchell [1980] ICR 303**. Thus, firstly did the employer hold a genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances.
8. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98 (4). Thus, as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree UK EAT/0331/09**, this means that the respondent only bears the burden of proof on the first limb of the **Burchell** guidance, which addresses the reason for dismissal, and does not do so on the second and third limbs where the burden is neutral.

9. The tribunal reminded itself that it must not substitute its own view for that of the employer as to what is the proper response on the facts which it finds (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT**) as confirmed in **Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827, CA**). It was held in the case of **Iceland Frozen Foods** that:
10. *“It is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.”*
11. There may be occasions where one reasonable employer would dismiss, and others would not, the question is whether the dismissal is within the band of reasonable responses.
12. The band of reasonable responses test applies to the investigation and procedural requirements as well as to the substantive considerations see **Sainsbury’s Supermarkets Limited v Hitt [2003] IRLR 23, CA**.
13. The Tribunal must take into account whether the employer adopted a fair procedure when dismissing having regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If the Tribunal hold that the respondent failed to adopt a fair procedure the dismissal must be unfair (**Polkey v A E Deighton [1987] IRLR 503, HL**) and any issue relating to what would have happened with a fair procedure would be limited to an assessment of compensation, referred to as a Polkey reduction. The only exception to that principle is where the employer could have reasonably concluded that it would have been utterly useless to have followed the normal procedure (it is not necessary for the employer to have actually applied his mind as to whether the normal procedure would be utterly useless, **Duffy v Yeomans [1994] IRLR, CA**).
14. The Tribunal should also give consideration as to whether, if the dismissal is procedurally unfair, the employee contributed to her own dismissal. If so, to what extent did she contribute to that dismissal such as to reduce the level of any compensation to which she would otherwise be entitled having regard to the principles in **Nelson v BBC (No.2) [1979] IRLR 346, CA**.
15. The test in a wrongful dismissal, or a breach of contract claim, is quite different.
16. Section 86 of the Employment Rights Act 1996 provides that an employer is required to give minimum notice to an employee to terminate his/her contract of employment. This minimum period of notice which an employer is required to give an employee is one weeks notice for each completed year of service up to a maximum of 12 weeks notice.
17. However an employer is entitled to terminate the contract of an employee without notice in circumstances of gross misconduct.

18. The burden is on the respondent to show on the balance of probabilities and relying not only on matters known to it at the time but if necessary on after acquired evidence (**Boston Deep Sea Fishing –v- Ansell**), that the conduct of the claimant was such as to fundamentally repudiate the contract of employment. This is commonly called gross misconduct and was explored by the Court of Appeal decision in **Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 AU ER 285, CA** among others.

Relevant Factual Findings

19. The Employment Tribunal made the following findings of fact on the balance of probabilities (the tribunal made findings of fact only on those matters which were material to the issues to be determined).
20. Mr Kilan had been employed by GXO since 16 February 2004 and at the time of his dismissal he was a Day Shift Warehouse colleague in GXO's warehouse in Haydock Industrial Estate.
21. The Claimant was dismissed on 11th May 2021 for alleged gross misconduct.
22. The witness statements can be summarised as follows:
23. The claimant had worked for the respondent since October 2007 at various depots as a warehouse operator and was currently based at the Haydock depot. The claimant's duties involved driving a reach truck, tray wash, sortation and recently tipping and loading empty cages from wagons removing pallets of returns from retail.
24. On the 8th of April 2021 the claimant was carrying out his normal duties unloading a wagon. The claimant was moving cages to the sortation area and as the claimant was doing so the claimant allowed the cage to roll on its own. The claimant had checked the area in front of the cage and it was clear. The claimant knew this was not the correct process, as it was letting the cages roll on its own, even though this was only for a very small distance the claimant had checked the area in front of the cage.
25. The claimant turned to go and get another cage when the claimant was hit in the side by a PPT truck, which the claimant had not seen and as the claimant fell to the floor the claimant broke his fall by using his left hand.
26. The claimant did not hear a horn sound to make him aware of it approaching him and was shocked with what had happened. The claimant was picked up by the driver of the truck and as the claimant felt okay he continued with his duties but shortly afterwards felt shaky and had a pain in his left wrist. The claimant contended that he should have reported the accident but was in shock and as he initially felt okay he wanted to continue with his duties. The claimant did not believe that the driver of the truck reported the accident either.

27. After a short while the claimant started to feel pain in his wrist and then reported the accident to Mr Paul Goalen who took a statement.
28. The claimant was then asked if he could carry on working and he replied that the pain was getting worse.
29. The claimant claimed that he felt pressured into carrying on working so said he would take paracetamol and returned to unloading. After trying to continue with the role the claimant informed Mr Paul Goalen, who in turn advised the claimant to go on hygiene duties using his right hand. After a short period the claimant was called to a meeting with Mr Dave Hitchin and was suspended for failing to report an accident.
30. The claimant attended an investigation meeting on the 15th of April 2021 where the claimant gave his version of the accident and answered all questions to the best of his ability.
31. The claimant was invited to a disciplinary meeting on the 4th of May 2021 to be conducted by Mr Tony Bell operations manager supported by Rowena Crutchley HR Manager. He was again asked for his version of the accident and answered all questions to the best of his ability.
32. The claimant was shown CCTV footage showing the claimant letting go of cages on three occasions on the day. The claimant at the time could not recall but stated that he would only let go of a cage if it was safe to do so and to save time so that so that the claimant could meet all of the work that was required of him.
33. The meeting was concluded and the claimant was informed that all the information will be reviewed before decision was made.
34. The claimant received his outcome letter dated 11th of May 2021 of which he was summarily dismissed for not reporting the accident immediately and not following safe systems of work.
35. The claimant had been employed for around and accepted that he did not follow the exact procedures but did not think that these issues were such that he should be dismissed for them after such a long and loyal service.
36. The claimant felt that he would have learned from this accident and would've happily attended any further training on the handling of cages required. He did not think that it was fair to blame him for a PPT truck hitting him and trying to continue work.
37. The claimant appealed this decision on the 13th of May 2020 and an appeal was schedule for the 22nd of June 2021. The claimant was unable to arrange representation and notify the company on the 20th of June 2021. The claimant was then informed on the 29th of July that his appeal had been cancelled and the decision to dismiss him had been upheld.

Allegations

38. The respondents understanding is that the disciplinary allegations related to an incident that took place on 8 April 2021. The investigation notes shows that it was reported to GXO that Mr Kilan was injured in an incident whilst moving one of the cages in the warehouse. Mr Kilan was reportedly pushing the cage which was full of equipment across the warehouse. Mr Kilan reportedly let go of the cage allowing it to free wheel across the warehouse floor which is considered a serious breach of the Safe System of Work policy ("SSOW") and which amounts to gross misconduct.
39. The respondent referred the tribunal to page 50, the SSOW of work clearly states
- "NEVER LET GO OF THE CAGE IF IT CAN STILL MOVE. YOU MUST BE IN CONTROL OF THE CAGE AT ALL TIMES".**
40. Clause 6 of the Disciplinary policy (page 58) states that a "serious breach of the *Company's Health and Safety rules*" is considered a gross misconduct offence.
41. Clause 4.7 of the same policy (page 57) states "*In cases of gross misconduct, serious offences or the accumulation of previous warnings, dismissal with or without notice may be warranted*". Mr Kilan then, when turning around after releasing the cage, stepped into the path of a Pedestrian Pallet Truck ("PPT") and Mr Kilan was struck as a result of this. Mr Kilan failed to report this straight away in accordance with GXO's
42. *Organisation Role and Responsibilities Policy* pages 60-61) which amounts to misconduct. It is also worth mentioning that Mr Bell was the disciplinary manager for the PPT driver involved in the incident who was also dismissed following a thorough investigation.
43. Mr Kilan was suspended from his duties on the 8 April 2021 pending investigation.
44. On 15 April 2021 Mr Wilson, the investigating manager, carried out an investigation into the allegations against Mr Kilan. Present at that meeting was Mr Wilson, Mr Kilan and the minute taker, Ms Merry.
45. Following the fact finding interview, GXO concluded that there was a case to answer and that the matter should proceed to a disciplinary hearing, at which point I became involved.

Disciplinary meeting

46. On 27 April 2021 Mr Tony Bell wrote to Mr Kilan, inviting him to a disciplinary meeting on 4 May 2021. In his letter it was confirmed that he was charged with both gross misconduct and misconduct. He was notified of his right to be accompanied and that as the allegation of the failure to handle to cage in line with operational guidelines and SSOW was of gross misconduct, his continued employment may be under threat. Enclosed with the letter, he was

sent Mr Kilan copies of documents that was intended to be reviewed at the disciplinary meeting.

47. Mr Kilan attended the disciplinary meeting on 4 May 2021, the meeting took place via telephone and Mr Kilan was not accompanied. Also present at the meeting to take notes was Rowena Crutchley. Mr Kilan confirmed he was fine without being accompanied so the meeting began by notifying him that one potential disciplinary outcome might be dismissal.
48. At the meeting Mr Bell then took Mr Kilan through the documents that was provided prior to the meeting to confirm he had received them. Mr Bell explained the purpose of the meeting was to discuss the allegations against him.
49. Mr Kilan was then asked a series of questions regarding his history to establish his experience with GXO.
50. Mr Kilan was asked about the SSOW document and what was pointed out to him was that he had signed the document two years ago on 23 May 2019, which he confirmed. Mr Bell then asked Mr Kilan to explain the process of handling the cages and Mr Kilan informed Mr Bell that, according to the SSOW it is to be careful and never let go of the cage if it is moving. Mr Kilan confirmed earlier in the meeting that he had been employed for seventeen years with GXO.
51. Mr Kilan was then asked about the usual process of handling the cages. If this was a one off incident or was it normal practice for him to let them free wheel. Mr Kilan stated that in the investigation he tries to avoid letting cages go if he remembers properly and that it was a one off incident.
52. Mr Kilan was asked whether he believed that continuing to push the cage to its correct location would have prevented the incident from occurring. It was further highlighted because of the advantage of having the CCTV camera, he would not have been hit by the PPT had he handled the cage correctly and not allowed it to free wheel.
53. Mr Bell then discussed the issue on the allegation of misconduct which was Mr Kilan's failure to report the incident straight away. Mr Kilan response at the time was that he was in shock and had no pain, as this had come on later.
54. Mr Kilan confirmed that he failed to report the incident straight away and instead reported it forty five minutes later. I was concerned that Mr Kilan's failure to report the incident meant he continued to work and might have exacerbated his injuries.
55. Mr Kilan was then taken into a room to view the CCTV images at Mr Kilan's request. It was pointed out that when he was struck by the PPT the cage was still moving and even continues to do so whilst the PPT driver stepped off the PPT to assist Mr Kilan.

Disciplinary decision

56. After the meeting Mr Bell considered the allegations carefully, reviewing all the documentation along with Mr Kilan's responses at both meetings and the disciplinary procedure. Mr Bell concluded that Mr Kilan was aware that incidents and accidents should be reported immediately, and that he had signed a Health and Safety Briefing Document on 2 April 2021.
57. Based on the conversation Mr Bell had with Mr Kilan during the disciplinary meeting Mr Bell had reasonable grounds to believe that, if his employment had continued with GXO he would continue to allow the cage to free wheel, which could lead to even more significant injuries. Mr Bell did not think a lesser sanction would have been appropriate on that basis.

Appeal

58. On 13 May 2021, Mr Kilan sent a letter to GXO to appeal its decision to summarily dismiss him.
59. Mr Kilan had raised a number of points in his appeal grounds:
60. He did not report the incident straight away as he was in shock and had no pain at the time,
61. He did not believe the work he did in the forty five minutes between the incident and reporting it exacerbated the injury as the Pedestrian Pallet Truck ("PPT") requires no effort as it has power steering;
62. He felt pressed to go back to work after reporting the accident and injury;
63. He did not believe his failure to control the cage contributed to the accident and instead occurred as a result of the PPT drivers' actions; and the decision about his dismissal was made whilst he was off work due to his broken wrist.
64. On 27 May 2021 Mr Dalton wrote to Mr Kilan and inviting him to an appeal meeting that was to take place on the 22 June 2021.
65. Mr Kilan was notified of his right to be accompanied and was explained who would be present at the meeting.
66. Mr Kilan emailed on the 20 June 2021 requesting that the appeal meeting be rescheduled until he was able to bring a Union representative. He confirmed that the Union had not processed his documentation and therefore he wished to find an alternative date for the meeting. Mr Dalton found this to be a reasonable response and awaited to hear from Mr Kilan with regards to another date for the appeal hearing.

Appeal outcome

67. GXO did not hear from Mr Kilan for a considerable period of time and after consultation with HR contact dealing with Mr Kilan's case. It was decided to proceed without having a further meeting and to consider Mr Kilan's appeal grounds as per his appeal letter.
68. Having reviewed the evidence that was available to Mr Dalton at the time of the disciplinary meeting, Mr Dalton found that it was reasonable to find Mr Kilan's actions had amounted to both gross misconduct and misconduct.
69. Mr Dalton had felt that the evidence was fairly clear: that the CCTV evidence showed Mr Kilan letting go of the cage, allowing it to free wheel and he had failed to provide an explanation as to why he did not follow the correct cage handling procedure as set out in the Safe System of Work ("SSOW").
70. Mr Kilan's length of service was considered however given the fact he had been with GXO for 17 years, an employee with this much experience should have the knowledge and insight to follow the processes and understand how to handle the cage properly.
71. For that reason it was decided to uphold the decision to summarily dismiss. Mr Dalton believed that the breach of the SSOW was a gross misconduct offence and in conjunction with the misconduct of failure to report the incident, summary dismissal was appropriate as per GXO's Disciplinary policy.
72. Mr Dalton had written to Mr Kilan to confirming that they were aware Mr Kilan was appealing the summary dismissal decision against him and an appeals meeting was scheduled for 22 June 2021.
73. However, on 20 June 2021 Mr Kilan requested it be postponed and advised he would make contact once he had organised a Union representative to attend. Mr Kilan had made no further contact and he had been provided with a sufficient period of time to re-arrange the meeting, the appeals process was no longer available to him, and it was confirmed that the decision to dismiss was upheld.

Submissions

74. In his written submission Mr for the claimant highlighted the following points;
75. That the claimant disputes his actions amounted to gross misconduct or that dismissal was within the range of reasonable responses, when all of the circumstances of the incident are taken into account.
76. The Claimant was not warned by the PPT driver by any noise from the machine and it was a complete accident that as he turned around the PPT truck was there. The actions of the Claimant were in no way responsible for his subsequent accident.
77. The Claimant accepts that letting go of the cages is not correct, but in allowing them to move only a few metres, it is submitted that this caused no specific

danger to anyone and in any event could have been rectified with a lesser sanction and retraining. The actions of the Claimant in letting go of the cage could not be considered a gross misconduct offence and no reasonable employer would summarily dismiss for the same actions.

78. The Respondent does not appear to have made any or any reasonable enquiries into how other operators work and or if any operators have also let go of cages. The CCTV clearly shows another colleague pulling cages backwards, using one hand on cages and letting a cage roll, along with allowing an item to fall off a cage.
79. The Claimant has also been criticised and held accountable for not immediately reporting the accident. The Claimant was in shock and not in pain initially, so sought to continue with his work duties. Even after the Claimant did start to feel pain and report the incident, he was made to try and return to work and not sent for medical attention. As such the Claimant in continuing his duties was exactly what he was later instructed to do by the company.
80. The Claimant is not aware of any incident being reported by the PPT driver. The PPT driver was equally responsible for reporting the accident and failed to do so. Furthermore the PPT driver was arguably more responsible for causing the accident, in not being aware of his surroundings when turning the machinery he was operating.
81. The Claimant cooperated throughout the proceedings and had simply sought to get through his duties as efficiently as possible and wanted to continue working after the accident because he felt able to at that time. When he became aware of pain and did not feel able to continue, then the company, in breach of their own health and safety duties pressured the Claimant to continue at work in an alternative role and then allowed him to drive home. The company have referenced that his actions in continuing to work, potentially aggravated his injury, yet the company have also allowed him to continue to work and drive home, potentially aggravating his injury and arguably endangering the Claimant and others.
82. The Claimant has worked for the company, through various transfers and different operators for a significant number of years. The actions in letting go of a cage for a couple of seconds when the surroundings were clear and in not reporting an accident and carry on with his duties did not warrant summary dismissal.
83. The Respondent appears to have blamed the Claimant for being hit when the PPT driver clearly swings around at speed behind the Claimant. The Claimant could have received a lesser sanction and further training and this would have been a reasonable outcome in the circumstances.
84. The Claimant submits that in all the circumstances the dismissal was unfair.

Discussion and Conclusions

85. I had explained to the parties at the outset that the focus must be upon the evidence before the respondent at the time of the dismissal and not on that presented subsequently.
86. The issues remain as identified at the outset of these proceedings and I can now determine them as follows:

Did the respondent genuinely believe the claimant was guilty of misconduct?

87. The respondent considered the allegation faced by the claimant, breach of health and safety to be an act of gross misconduct.
88. The tribunal found that the claimant failed to comply with the policy to report accidents at work. In accordance with GXO's Organisation Role and Responsibilities Policy pages 60-61) which amounts to misconduct.
89. *Immediately report all incidents, dangerous occurrences/near misses and cases of ill health to their manager. Promptly report any defects in machinery, plant, vehicles and equipment (including personal protective equipment), or any obvious health risk.*
90. The tribunal understood the claimant's response for failure to immediately inform the company of the accident was due to suffering from shock. However the company policy was clear on the issue that a failure to report an accident at work immediately amounted to gross misconduct.
91. The tribunal accepted the respondents position the loss of control of the cages and amounted to a breach of company policy.
92. The tribunal was made aware of the claimant's position that letting go of the cages was not correct, even only for a few meters.
93. The respondent considered this was a serious breach of the Safe System of Work policy and the tribunal were guided ("SSOW") and which amounts to gross misconduct.
94. The tribunal was also made aware of page 50, the SSOW of work clearly states
95. **"NEVER LET GO OF THE CAGE IF IT CAN STILL MOVE. YOU MUST BE IN CONTROL OF THE CAGE AT ALL TIMES". Clause 6 of the Disciplinary policy**
96. *(Page 58) states that a "serious breach of the Company's Health and Safety rules" is considered a gross misconduct offence. Clause 4.7 of the same policy (page 57) states "In cases of gross misconduct, serious offences or*

the accumulation of previous warnings, dismissal with or without notice may be warranted”.

97. Having considered the above the tribunal was satisfied that there was a genuine belief the claimant was guilty of misconduct.

Was that belief based upon reasonable grounds?

98. The tribunal found that the claimant Mr Kilan had attended a training course of Safety Focus, Your Role in Health & Safety, on the 2nd April 2021.
99. The tribunal found that the claimant had also signed a document dated the 23rd May 2019 on the safe system of Work Record on handling Roll cages acknowledging that the claimant accepted that he had received the appropriate training required for safely carrying out the task of handling Roll Cages and understand the responsibility to work according to the procedure.
100. In view of the above findings the respondent had reasonable grounds to establish a belief that the claimant had breached the Company's Health and Safety rules which amounted to a gross misconduct offence. This was also reinforced with the help of the CCTV camera footage.

Was that belief formed following a reasonable investigation?

101. The extent of an investigation/procedure and the form it takes will vary according to the circumstances. There is no absolute rule that the investigation should be held separately to the disciplinary hearing so long as it is as full as the circumstances reasonably require.
102. I note the respondent had a dedicated HR function, and had provided an opportunity for a full investigation to take place, as well as further appeal hearings.
103. Having considered the above the tribunal was satisfied that a reasonable investigation had taken place for a genuine belief the claimant was guilty of misconduct.

Did the respondent follow a reasonably fair procedure?

104. The tribunal accepted that it was clear from the investigation that the respondent had followed a reasonably fair procedure.
105. During the investigation the claimant was shown CCTV footage which showed the claimant pushing and letting go of the cages, as well as the collusion with the TTP truck.

106. The tribunal also accepted that the investigation meeting was conducted fairly and Mr Kilan's requests were dealt with. Mr Kilan was also provided with other relevant documentation before the first disciplinary meeting.

107. The claimant had sufficient detail of the allegation and a fair chance to respond by being given the opportunity to put forward evidence in his defence and present mitigation. He was given the right to be accompanied/represented. Following dismissal, he was given a right to an appeal with the same opportunity to respond and be accompanied and represented.

Was dismissal rather than some lesser disciplinary penalty a reasonable sanction?

108. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct.

109. The question is what the reaction of a reasonable employer to this situation would be considering the circumstances, the claimants' good service and conduct.

110. The focus is on their viewpoint and not mine. There is a band or range of reasonable responses within which the employer can lawfully decide the question of penalty. If it is within those parameters then the dismissal is fair.

111. The respondent had to consider whether they could trust the claimant to continue working in her role and/or whether it would be appropriate to take that risk in the light of their wider responsibilities and the need to be consistent with other staff who might find themselves committing this type of behaviour when such examples of breaches could happen with health and safety.

112. The tribunal considered the length of service of the claimant however given the fact he had been with GXO for 17 years, an employee with this much experience should have the knowledge and insight to follow the processes and understand the impact on the breach of company health and safety procedures.

113. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors.

114. The tribunal acknowledged the respondents concern that if Mr Kilan's employment continued with GXO, he would continue to breach the SSOW as his responses in the disciplinary meeting suggest that this was not a one-off incident. Any failure to follow safety procedures could amount to life threatening injuries for either Mr Kilan or another GXO employees.

115. The decision to characterise this matter as gross misconduct justifying summary dismissal was one they were entitled to make and, on that basis, the claimant was fairly dismissed.

Employment Judge Asif Mahmood Khan

13th June 2022

REASONS SENT TO THE PARTIES ON

15 June 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.