EMPLOYMENT TRIBUNALS

Claimant:	Mr G Hoole
Respondent:	Finning (UK) Limited
Heard at:	Nottingham
Heard on:	26 April 2023
Before:	Employment Judge Victoria Butler (sitting alone)
Representation	
Claimant:	In person
Respondent:	Mr C Edwards, Counsel Ms Vance, Trainee Solicitor

RESERVED JUDGMENT

The decision of the Employment Judge is:

1. The Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Background

1. The Claimant presented his claim to the Employment Tribunal on 13 December 2022 following a period of Early Conciliation between 7 October 2022 and 17 November 2022. He was employed by the Respondent from 8 April 2019 until his employment was terminated summarily on 2 August 2022.

The Issues

2. What was the principal reason for the Claimant's dismissal and was it potentially fair

in accordance with section 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was a reason relating to the Claimant's conduct or alternatively some other substantial reason.

3. If so, was the dismissal fair or unfair in accordance with section 98(4) ERA and, in particular, did the Respondent in all respects act within the so called *"band of reasonable responses"*?

4. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway?

5. Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

6. Did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and, if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

The hearing and the evidence

7. The hearing was listed for one day which allowed time to hear the witness evidence and submissions, but I had to reserve my judgment.

8. I heard evidence from the Claimant. For the Respondent, I heard evidence from Ms Kathryn Palmer (Service Direct Manager) and Mr Mark Brealey (Head of Contract Performance and Support Services).

9. I found all three witnesses to be honest. There was some discrepancy in the Claimant's oral evidence versus the contemporaneous documents, but I do not believe there was any intent to mislead.

The Facts

10. I made my findings of fact based on the material before me, taking into account the contemporaneous documents where they existed and the conduct of those concerned at the time. I resolved any conflicts of evidence on the balance of probabilities.

Background

11. The Respondent is an industrial equipment dealer specialising in Caterpillar ("Cat") products. It sells, rents and provides parts and services for equipment and engines to customers across different industries worldwide.

12. It has a comprehensive set of policies and procedures including a disciplinary procedure which provides that the following amount to gross misconduct:

- *"a serious breach of the Company's rules, including but not restricted to, health and safety rules and rules of computer use"*

- *"a failure to observe for any reason the Company's procedures and instructions concerned with safe working practices"* (pages 425-426).

13. The Respondent also has the following policies/procedures which are relevant: installation procedure for front axle (page 415): removal procedure for front axle (page 417): lift plan risk assessment (page 430): Global Standards for Lifting and Hoisting (page 431-434): Lifesaving Rules (page 436-451); and Global Safe Loading and Unloading (page 452-456).

14. The Lifesaving Rules have six core safety standards which include (i) the requirement to undertake a risk assessment and re-visit it '*when any aspect of the job changes'* and (ii) the requirement to follow lifting and jacking standards and procedures.

15. The Life Saving training, which was undertaken by the Claimant, emphasises that *"any level of improvisation is not acceptable"* (page 482).

The Claimant's employment

16. The Claimant commenced employment with the Respondent in the role of Customer Service Controller on 8 April 2019. His offer letter provided:

> *"Policies, Guidelines, and Procedure*
>
> *Upon acceptance of this offer, you agreed to abide by all current and future policies, rules and procedures established by the Company at all times and that failure to do so will result in the disciplinary procedure being invoked. Full details regarding Company policies are available from the Global Policy Portal.*
>
> *It is your duty to comply with the requirements laid down in the Health and Safety at Work Act 1974, as amended, and any other relevant legislation in place from time to time, and to comply with the Company's Health and Safety and Hygiene Policy…."* (page 103).

17. On 1 September 2021, the Claimant was offered the position of Rebuild Repair Engineer and his offer letter contained the same provisions as above in respect of the Respondent's policies, guidelines and procedures (pages 107-112).

18. At the material time, the Claimant worked alongside a colleague, Mr Buck. Mr Buck had only been employed by the Respondent for a matter of weeks in a field-based role. However, he had been brought into the workshop to gain more experience of the Respondent's business before going back out in the field.

The lift on 29 June 2022

19. Prior to the lifting of any equipment, the Respondent's employees are required to complete a pre-task assessment form and a lifting plan to ensure their health and safety and the health and safety of others.

20. On 28 June 2022, the Claimant's Line Manager, Jamie Clifford, assigned the Claimant and his colleague Mr Buck, a task to replace the front axle on a CAT 990 Wheel Loader the following day.

21. Prior to starting the work, a pre-task assessment and lifting plan were completed. The lift was a "*single lift"* requiring a spreader beam and chains.

22. When the Claimant and Mr Buck started the task, it became apparent that the correct chains were not available. Accordingly, they improvised and undertook a *"complex lift"* which entailed lifting the axle from two points rather than one and using a forklift truck and overheard crane. During the procedure, the Claimant had control of the crane despite not having the appropriate training or licence, albeit he had operated them in the past.

23. The Claimant and Mr Buck failed to revisit the pre-task assessment or lifting plan and took the view that their improvised approach was safe.

24. The procedure took circa ninety minutes. Within that time, two colleagues observed the lift and were concerned that it was unsafe but felt unable to approach the Claimant and Mr Buck directly. Accordingly, they approached the Workshop Controller to share their concerns who, in turn, asked Mr Clifford to intervene. However, by the time Mr Clifford arrived in the workshop, the axle was already lifted.

25. Thereafter, an unnamed colleague submitted a "near miss" report stating that a complex lift had been undertaken using more than one lifting device (page 136).

The investigations

26. The Respondent undertook an initial health and safety investigation the same day. The meeting was chaired by Ms Lisa Craddock, Service Operations Manager. She interviewed the Claimant who said that it was Mr Buck's plan to undertake the complex lift and his own view had been that: "*If it works well, I will go with it, if it looks "wild" or "dangerous" the task would be stopped".*

27. The Claimant acknowledged that the lift itself was improvised and the pre-task assessment was not revisited. He also confirmed that he did not have overhead crane training or licence. In terms of the procedure itself, the Claimant said that Mr Buck had operated both the forklift truck and the overhead crane.

28. Mr Buck was also interviewed the same day and he confirmed that it was his idea to use the forklift and crane. He also admitted to operating the forklift truck but said the Claimant operated the overhead crane.

29. At the conclusion of the investigation Miss Craddock observed the following: that the Claimant had i) contravened the Respondent's Lifesaving Rules, and the Global Standard for Lifting ii) the pre-task assessment was not revisited before the procedure was undertaken iii) the Claimant did not have the Respondent's overhead crane training or licence but used an overhead crane anyway iv) that he had ignored concerns from colleagues v) that the nature of the lift was improvised and mechanical handling guidelines were not followed vi) an additional lifting plan was not devised by a competent person vii) the improvised nature of the lift put people in the line of

fire and viii) the Claimant, along with all employees, had a duty under section 7 of the Health and Safety at Work Act to comply with information, instruction and training (page 134).

30. The Claimant attended a further investigatory meeting on 13 July 2022 chaired by Mr Sanderson, Customer Service Manager. In the meeting, the Claimant admitted that he had not re-visited the pre-task assessment or carried out a formal lifting plan as was required with complex lifts under the Lifesaving Rules and Global Standards**.**

The invite to the disciplinary hearing and the Claimant's request to postpone

31. On 21 July 2022 and by e-mail timed at 11.29am, the Claimant was invited to attend a disciplinary hearing at 1pm on 22 July 2022 (page 190). He was advised of his right to be accompanied and that the allegations against him were as follows:

    - *Completing an unsafe complex lift when reinstalling a front axle on a 990-wheel loader.*
    - *Failure to revisit pre-task assessment prior to improvising on the task.*
    - *Failure to complete a lifting plan/revised lifting plan.*
    - *Failure to follow the correct SIS procedure.*
    - *Disregard for the Finning Lifesaving Rules/Lifting.*
    - *Disregard for the Finning Global Standard/Lifting.*
    - *Use of overhead crane without the appropriate training at Finning* (pages 191-192).

32. The Claimant received just over twenty-four hours' notice of the hearing. However, he did not read the e-mail until later in the day and, therefore, had less time to prepare. He asked for a postponement of the hearing which was refused by the Chair, Ms Kathryn Palmer, Service Direct Manager. As she understood it, the Claimant had received twenty-four hours' notice in line with the Respondent's procedure disciplinary procedure and in her view, there were no mitigating reasons to postpone it.

The disciplinary hearing

33. At the start of the hearing, the Claimant confirmed that he was happy to proceed unaccompanied.

34. During the hearing, the Claimant acknowledged that he was not trained by the Respondent in using the overhead crane albeit had been trained by previous employers. He had requested the training, but it had not yet happened. He also admitted to not having visited the pre-task assessment or carrying out a formal lifting plan as was required with complex lifts under the Lifesaving Rules and Global Standards.

35. Ms Palmer asked the Claimant why he had proceeded with the complex lift knowing that he did not have all the equipment, nor all the appropriate training and why he had not told a manager that he could not complete the task. The Claimant said that in hindsight that is what should have happened.

36. Ms Palmer asked the Claimant to talk through *"Each step of how you think you should have approached the task".* He replied:

> *"I would have said I couldn't do the task. I am not trained, don't have all the equipment, no methodology, no banksman, no lifting and slinging training. With hindsight I should have said no, but with the influence and maybe peer pressure around needing to get the job done, requirement to fulfil the task, the feeling of responsibility to assist with the tasking and keep the workshop running. We did the job as safely as we could with the equipment available to us in order to get it done"* (page 212).

37. In his defence, the Claimant said that other people had observed the procedure but not told him to stop. Further, it was his view that because Mr Buck had received appropriate training for the lifting equipment, he was under Mr Buck's supervision and guidance during the task.

38. After the close of the hearing, the Claimant was sent a copy of the minutes and was given opportunity to make any amendments.

Ms Palmer's decision to dismiss

39. Thereafter, Ms Palmer undertook further investigation but ultimately concluded, particularly given the Claimant's admissions, that he had been guilty of gross misconduct. He had admitted to breaching two of the Life Saving rules, namely the requirement to complete a risk assessment because he had failed to revisit the pre-task assessment and the lifting and hoisting standard. Accordingly, he had shown a complete disregard for the Respondent's Health and Safety Procedures.

40. The Claimant's improvisation without the correct equipment, weightage or training in her view amounted to gross incompetence and negligence in the performance of his duties. He had placed himself and colleagues at serious risk of injury or worse still, of fatality.

41. In considering the Claimant's argument that he was under the supervision of Mr Buck, Ms Palmer concluded that the Claimant's service with the Respondent meant that he was in a better position to know the health and safety procedures and culture at the Respondent and their upmost importance within the workshop environment. Comparatively, Mr Buck was very new to the Respondent.

42. Ms Palmer confirmed her outcome in a comprehensive letter dated 2 August 2022 and that he was summarily dismissed with effect from 2 August 2022 (pages 267-270). In particular she said:

> "*What you should have done in this situation was to stop, realise that you did not have the correct equipment or training and to tell the Workshop Controller that you were not in a position to continue with the task. You did not do this and in doing so you have shown a complete disregard for the Finning Health*

and Safety Policies and Procedures and put your own life and safety at risk as well as those around you. You have responsibility as an employee for your own health and safety and that of others. The axle, which was lifted incorrectly, weighed 5 tons which could have caused death or serious injury. Improvising a lift of this nature was very dangerous and incredibly reckless and was a serious contravention of our health and safety standards, H&S Finning's Lifesaving Rules – Lifting and Finning's Global Standards – Lifting".

43. Mr Buck was also dismissed.

The appeal

44. The Claimant appealed the decision to dismiss him and raised thirty-seven grounds of appeal.

45. Mr Mark Brealey, Head of Contract Performance and Support Services, was appointed to hear the Appeal which took place on 19 August 2022 via Teams.

46. Prior to the hearing, Mr Brealey read the relevant documents and undertook initial investigations into the matters leading to the Claimant's dismissal.

47. In the hearing itself, Mr Brealey covered every single point of appeal. Thereafter, the Claimant was given opportunity to comment on the minutes (pages 315-332).

48. After extensive investigation, Mr Brealey concluded that the decision to dismiss the Claimant should be upheld. He confirmed his findings in a detailed letter dated 25 October 2022 and responded to every single point of appeal (pages 389 – 403).

49. The only ground of appeal Mr Brealey upheld was the Claimant's complaint that he had been denied a postponement of the disciplinary hearing. However, he did not find that not postponing the hearing would have made any material difference to the outcome given that he had already had the opportunity to provide his version of events during the health and safety investigation and disciplinary investigation meetings.

The Law

50. Section 98 ERA provides:

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

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

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

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……..

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

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

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

……"

51. Procedural fairness is an essential part of the fairness test under section 98(4) ERA. In determining the question of reasonableness, I have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures.

52. I must not substitute my own decision as to the reasonableness of the investigation. The question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted - **Sainsburys Supermarkets v Hitt [2003] IRLR 23**. Nor must I substitute my own decision as to the reasonableness of the action taken by the Respondent. My role is to determine whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted in the particular circumstances of the case - **Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827**.

Conclusions

53. I am satisfied that the reason for the Claimant's dismissal was his conduct, and the Claimant does not seek to argue otherwise. Following the improvised complex lift on 29 June 2022, he was invited to a health and safety investigation and a further investigation meeting on 13 July 2022. Thereafter, he was called to a disciplinary hearing and, following an admission of failure to adhere to the Respondent's Health and Safety Policies and Procedures, was dismissed for gross misconduct.

54. In terms of the investigation undertaken, I am satisfied that it was reasonable in all the circumstances. The initial health and safety investigation was conducted on the day of the incident when memories were fresh, during which the Claimant admitted to improvising the lift. On 13 July 2022, he attended an investigatory meeting after which he was given opportunity to comment on the minutes and correct any

inaccuracies.

55. Thereafter, the Claimant, Mr Buck and appropriate witnesses were interviewed. The Claimant was given full opportunity to state his case and Ms Palmer undertook further appropriate further investigations after the disciplinary hearing.

56. The Claimant was technically given over twenty-four hours' notice of the disciplinary hearing in accordance with the Respondent's procedure. I accept that, in real terms, he probably had less time to prepare for the hearing given his evidence that he did not read the email until later in the day. However, I do not consider that this rendered the process unfair. The Claimant was given every opportunity to state his case at the investigatory stage and at the disciplinary hearing itself. He also given the opportunity to annotate the minutes and correct any inaccuracies.

57. Furthermore, given the Claimant's admissions during the investigation and the hearing itself, the Claimant was not at any disadvantage. In any event, any unfairness was most certainly remedied at the appeal stage when Mr Brealey investigated and/or considered all thirty-seven grounds of appeal but, ultimately upheld the decision to dismiss.

58. In terms of the substantive fairness, I can only conclude that the decision to dismiss fell within the range of reasonable responses given the Claimant's own admission that he failed to comply with the Respondent's health and safety procedures. The disciplinary procedure provides that *a serious breach of the Company's rules, including but not restricted to, health and safety rules and rules of computer use"* and *"a failure to observe for any reason the Company's procedures and instructions concerned with safe working practices"* amount to gross misconduct and the Claimant admitted to both.

59. In mitigation, he argues that onlookers in the workshop did not stop them undertaking the lift. However, I am satisfied that the Respondent was reasonable in taking the view that this did not mitigate his actions. It was his responsibility to comply with the relevant procedures.

60. The Claimant submitted was that no-one was injured or hurt as a result of the lift, but this somewhat misses the point. The Respondent has stringent health and safety policies and procedures which, in its view, go above and beyond the requirements of Health and Safety legislation to prevent the risk of injury or death. The Claimant was fully aware of their importance and his disregard of them led the Respondent to consider that there had been an irreparable breach of trust and confidence in his ability to safely undertake his role.

61. I am satisfied that the Respondent acted reasonably in taking this view and, furthermore, that a lesser sanction was not appropriate. The fact that no-one was injured was fortunate but did not mitigate the seriousness of his actions.

62. Accordingly, I have no hesitation in concluding that the Claimant's dismissal fell within the range of reasonable responses that a reasonable employer might have adopted and was, therefore, fair. Accordingly, his claim fails and is dismissed.

Employment Judge Victoria Butler

Date: 1 June 2023

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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