Case No: 2502147/2024

EMPLOYMENT TRIBUNALS

Claimant: **N Guy**

Respondent: **GLC Projects Ltd**

Heard at: **Newcastle (by video)** **On: 5-6 June 2025**

Before: **Employment Judge O'Dempsey**

Representation
Claimant: Murphy (uncle of claimant)
Respondent: Cochrane (Director of respondent)

JUDGMENT

1. The claimant's claim for unfair dismissal succeeds;
2. The respondent shall pay to the claimant
   a. Basic award of £843.38
   b. Subject to recoupment of benefits, compensatory element of £1777.62

The Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349, apply. In accordance with those Regulations: (a) the total monetary award made to the claimant is £2621; (b) the amount of the prescribed element is £1777.62; (c) the dates of the period to which the prescribed element is attributable are 4 September 2024 to 18 September 2024; (d) the amount by which the monetary award exceeds the prescribed element is £843.38.

REASONS

1) The respondent requested written reasons for the decision.

2) I gave brief oral reasons at the hearing so that parties would know the main, but not exclusive factors, I considered.

3) The claimant was employed as a demolition labourer from 17 August 2021 until he was summarily dismissed by letter dated 4 September 2024. He was dismissed in the following circumstances, about which there was little dispute. He was the driver of an excavator on 3 September 2024 when it overturned as a result of being manouvered in a manner which gave rise to a risk that it would

might overturn. There was a risk that a much more major incident might have occurred due to the presence of gas and electricity pipes in the area, which the overturning vehicle might have ruptured. This carried with it a risk to life for those in the vicinity.

4) The director of this small company, Mr Cochrane, gave evidence to me as did Mr Green (Operations Manager) and Mr Kendall (Project Manager). The latter supervised a trial crossing of the bridge which the client had put up over a service trench which was the main route for the excavator. He also said that he conducted some safe start briefings, without indicating what these involved. On the day of the incident he noticed that the claimant was carrying out excavator operations correctly. Mr Green indicated that he immediately returned to the site on hearing (at 13.10) of the incident and that shortly after he had ensured the work areas was safe, and whilst the claimant was resting inside, the claimant was called into an interview with the client team. He expressed shock that so close after the event the client team would be requesting a statement from the claimant. Following that, he, the director and Mr Kendall discussed next steps and they went to talk to the claimant. Mr Kendell describes that as a "conversation" with the claimant.

5) It is clear from Mr Green's evidence that the director asked a number of questions including why the excavator bucket was attached to the vehicle (which it should not have been at that point); why the excavator boom was at full reach; and why two bags were attached to the excavator. The claimant confirmed that he extended the boom arm over the scaffolding handrail. He adds that the claimant did not provide "any other rational explanation" regarding the excavator bucket or increased bulk bags. Whilst this suggests that some explanation was given but Mr Green did not think it was rational, I was not provided with any evidence of what was said, and none of the managers appear to have kept notes. The claimant, as he has done throughout, accepted responsibility for his actions. Mr Green said that the director explained to the claimant that he would be suspended from work while an investigation was carried out and confirmed the suspension was in accordance with company policies and procedures.

6) Mr Green made the point that the claimant stayed in the office for a short time after that conversation and was supported by staff from the client and from the respondent. The managers from the respondent he said then returned outside to make arrangements for the recovery of the excavator. After that Mr Green's evidence was that the director asked him to make arrangements with the claimant to be taken home. He did so, and texted the claimant to confirm that the claimant had said that he was "fine" to go home on his own without a lift. Mr Green noted that when the machine was switched on the overload alarm was operating. He thought this meant it would have been operating when the excavator overturned. The machine was righted by 17.30 hours, so the whole of the above took place between 13.10 and 17.30. Mr Kendall's evidence was to the same effect.

7) Whilst I accept much of what the director told me, I found his evidence at certain points to be evasive, and his answers were on occasion not aimed to assist the tribunal with information. I found this in particular in relation to his evidence on the procedure that he was following, the timing of his consideration and the reasons why he did not involve any of the other staff in the disciplinary investigation which he told me he followed and which he said formed a distinct phase of the process he followed. I also found his answers, at points,

argumentative, for example when describing what the claimant said in the sole conversation that the director had with him about the incident, the director inserted his own commentary. The director's answers relating to whether the claimant had done what he did deliberately also exhibited the same type of evasion and argumentativeness. His evidence that it was deliberate because the claimant intended each of the component actions was plainly argumentative.

Fact findings

8) The claimant's role, at the commercial site on which the respondent's contract with a particular client, involved him operating a tracked vehicle with a lifting arm moving building waste to a skip. That lifting needed to be done in a particular direction and with certain safeguards in order to be safe. The vehicle itself had warning signs on it concerning the use of the lifting arm and an electronic signal which sounds if the lifting arm becomes overextended in relation to the load that is being lifted.

9) The claimant was trained and in relation to the particular site had engaged in trial runs of picking up and transporting the waste. Safety is a matter which this small employer takes very seriously, as is appropriate.

10) The claimant lifted a load (which was overweight as a result of two bags being put on it by the banksman) in the wrong direction. During the lift he extended the boom (whilst lifting) to lift over the adjacent scaffold, thus in turn increasing the radius of the lift. Essentially the excavator overbalanced as a result of this. The claimant explained in his own words that he lifted two bags. As he lifted them there was a pedestrian barrier in the way. He decided to slew to the left (the opposite direction to the usual) to miss the barrier. (This took the arm over a scaffolding barrier). As he was slewing left he lifted the bag a little bit higher to miss a scaffolding rail; then he got about 50-75% through the lift, and was just about to clear the last rail, when the machine started to tip over.

11) After the incident the claimant was in shock, and was plainly in shock. Mr Green described him as being white and he was concerned as to whether the claimant was sufficiently recovered from the incident to drive himself home. The claimant insisted that he was and was allowed to do this, but Mr Green was sufficiently concerned about him to require him to confirm he was ok when he reached home. There was also sufficient concern about the claimant that after the interview with the director he was supported by staff from the client and from the respondent.

12) At all times the claimant has accepted responsibility for what happened; he did not accept that he had done it deliberately. However at the time he was spoken to by the director he did not make any argumentative point of this nature. The director did not give evidence that he had put to the claimant that he thought he had done it deliberately and so the claimant did not have a fair opportunity to meet that allegation which appeared to play a significant role in the decision making of the director in determining dismissal.

13) The director said in evidence that he knew that the claimant had been seen by paramedics, but said he did not know that the claimant had been in shock. I do not accept this evidence. I consider that anyone thinking at all about what the claimant had just experienced would have known that it was likely that he was going to be in shock for some time after the incident. Moreover there was

sufficient concern about the claimant's well being after the incident for Mr Green to be concerned about whether he was fit to drive home on his own.

14) The director thought that it was vital to conduct an immediate health and safety inquiry into what had happened. He therefore spoke to the claimant about what had happened. He kept no notes of this conversation. He asked the claimant multiple questions about what had happened. Unfortunately the director could not remember the claimant's explanation for the positioning of the excavator bucket; he said he confirmed the problem with the boom was the only explanation for what happened.

15) He did not question the banksman, whose job it was to attach the load for lifting of the bulk bags of waste. He said that the respondent's team had been stood down. It appears that he never asked the other staff to prepare statements. This was done by Mr Green who simply says that he asked them to draft witness statements. These appear to deal with the events, but do not appear to account for the other employee's involvement, or give explanations for their activities.

16) The director stated that he regarded the conversation with the claimant as a formal conversation, saying at one point in evidence that he considered every conversation to be a formal statement. I found his evidence on this point to be evasive: when questioned about whether the conversation he held with the claimant was part of the disciplinary process, he said that it formed part of the "formal process"; he then conceded that the claimant was not made aware that the conversation was a formal hearing under the disciplinary procedure. He said that the claimant was not, at the time of the conversation, and that there was no formal disciplinary procedure. He then stated that the formality he was talking about was around the health and safety investigation and not in respect of discipline.

17) The director did not send to the claimant the notes he made, on return to his office from the client's site, so that the claimant did not have any opportunity to correct them or comment on them in any way before being dismissed. The claimant was not told that his job was on the line before this conversation. The claimant was given no time to prepare what he wanted to say in reply to the director's questions or to prepare mitigation which he might want to present.

18) The director, when asked whether he considered that the claimant had enough time to prepare for the questions he asked replied that he did because it was a very softly spoken conversation given the circumstances. He thought that a formal "sit down" meeting did not need to take place because he had one of those with the client. There was, he said no need to conduct an indepth meeting. The conversation was not one which the claimant needed to prepare for because the director was asking what happened leading up to the incident.

19) The director said that he thought the claimant had the opportunity to present mitigation at that conversation, and did not. He then added that after the claimant was dismissed he had the opportunity to provide mitigation. The director was concerned that the claimant had not followed procedure.

20) The director claimed to have carried out a disciplinary procedure. He first carried out the health and safety investigation. This, as noted, was not sent to the claimant for his consideration. The director, immediately after concluding the health and safety investigation, conducted what he told me was a disciplinary

investigation. When asked when he started the disciplinary investigation he said "almost immediately because we are a small business". He explained that he wore different hats and once he had conducted the "root cause" investigation and understood it, he put on his HR had and "carried out a series of tests in line with our disciplinary procedure". This appears to have consisted of asking himself: what is the severity of the conduct that the claimant had committed. Once it was ascertained, the next point was communicating in accordance with the discplinary procedure.

21) When asked what led him to the conclusion that it was gross misconduct, the director replied that he had asked whether there were any mitigating circumstances that were so severe that were reported in the health and safety investigation, and how compelling was the evidence of the claimant's conduct.

22) The director stated that the evidence of his conduct was compelling because of his "blatant disregard" of the contract and company procedure. When asked what that evidence was the director said that he had seen the excavator overturned and understood that this was because the operator had overreached the excavator beyond its lifting capacity. In doing that the director said that he thought that the claimant had

(a) ignored the safety procedures and his training but also every failsafe system, including the computer system, which gives an indication of the safe working load and what capacity the vehicle is at.
(b) ignored the alarm which goes off at 70-80% of the load and continued to ignore those two key points in his actions.
(c) ignored the safe system of work and should not have overreached the machine.
(d) the blade should not have been in the up position;
(e) the bucket should not have been attached to the excavator whilst lifting.
(f) Only the operative was in control of the vehicle.

23) The director said that there was no alternative to it being deliberate misconduct.

24) There is no evidence that the director explored when the alarm started to go off, whether there was an explanation for why the claimant overreached the arm (he established only that he did overreach it), and similarly for the other matters that he took into account. He did not conduct an investigation other than the root causes investigation for health and safety purposes.

25) He had concluded that it could not be a mistake because of the checks and balances in place. (I comment that had a reasonable investigation been carried out, that might have been a reasonable conclusion for him to reach, but there was no investigation of whether the claimant's actions were deliberate or were the result of mistake).

26) The director did not send any of the materials on which he based his decision, i.e. the evidence gathered during the health and safety investigation, to the claimant before dismissing him. In fact the claimant appealed against the dismissal on 10th September and was sent the material on 10th September but after the claimant had sent his appeal in. The director considered that any appeal would be futile. He said that the only possible conclusion was that the claimant was guilty of gross misconduct.

27) The director stated that given the severity of the conduct the claimant did not have a right to appeal. The policy provides: that in the event of gross misconduct with compelling evidence and limited mitigating circumstances the right to appeal will be at the discretion of the company. This would be communicated to the employee. Here the discretion of the director was not exercised rationally. Having reached a conclusion without giving the opportunity to the claimant to state his case or provide mitigation, the respondent then denied an appeal during which the claimant might have been able to make the points which a reasonable employer would have considered.

28) The company policy was not sent to the claimant, and was not included with the dismissal letter. He had last received it 2 years previously.

29) As a result of all these omissions what the claimant might have said in defence of his job was not heard by the respondent. It emerged at the hearing that the claimant was questioning whether the safe lifting plan was ever fully explained, and in particular whether the diagram suggesting that only one direction of lift was permissible. The director's response on this was that the staff have the opportunity to ask questions, but this is plainly not the same as having a detailed plan explained to them. The director accepted that with hindsight the safe start process, by which the employees are briefed on the safe process daily, could be expanded. There was evidence that the same photographs had been used to document safe starts on different days.

30) The claimant would have wanted to put in his defence, it seems, that he had never seen the risk assessment or lift plan, and was not aware that 4 chains should be used, and was not told that he should not have had the blade up when slewing in the way that he would have it down when lifting straight from the floor. Instead of seeing the plan (and the diagram showing lift direction therefore) the plan was read out or he was told about it. He says he was not fully briefed on it, despite the check list document. He says he was not told about the track management or about transporting the bags. He says he was not told about the requirement for the load to be a certain distance from the ground or not to be a certain distance away from the machine. He explained in evidence that at the time he thought he had been fully briefed but it emerged that he had not been briefed on these points. He understood or thought he understood what Mr Green had told him, but did not know that not everything had been covered. He thought he was conducting the process properly and so did not ask any further questions.

31) As to the alarm, the claimant might have pointed to the fact that another colleague, who was first over to the digger and switched the machine off, did not note in his witness statement that the alarm was sounding. He was sure that the alarm did not go off before the vehicle overturned. He could not explain why the alarm was not going off.

32) He thought that the computer he had in the cab was working. It had put out alerts a couple of times in the week before when he was carrying out lifting activities. When it did he would put the load down.

33) The staff sign off a list which the director said showed that they were asked specific points. However on closer examination of the relevant document the manager was given a checklist which asked whether there was any feedback

from the team, and he said that this was evidence that the staff were questioned about safety matters.

34) I am not in a position, in the time that was allocated for the case, to determine what the success or otherwise of these matters would have been. Unfortunately the director's approach to his evidence rendered his tendentious answers in relation to what would have happened unreliable.

35) In terms of the staff who were present at the incident, there appears to have been no questioning of them, other than to ask them to write a statement about what happened. There appears to have been no investigation as to whether the banksman had any responsibility for what happened by overloading (or even whether the banksman's activities might have contributed to what happened). Although the director rejected in evidence that the banksman's actions could have made a difference to his reasoning in relation to the claimant, there is no evidence that the director tried to obtain details. He said that this was because he was conducting the health and safety investigation at that point and then when asked about when he had his HR had on, he said that he was considering the conduct of the claimant at that time. He said that there was no point in asking the other employees because there were so many things that the claimant had failed to do, and the director emphasized the breach of contract and procedure by the claimant.

36) When asked about the difference between capability and conduct the director said that he would regard capability as being something the company could "re-educate". Conduct he felt was something that was so severe that one cannot re-educate because it is deliberate. The HR process took around 90 minutes from the end of the health and safety investigation. There was no attempt by the director to decide whether the behaviour was something away from which the claimant could be "re-educated". A reasonable employer would have considered, in the context of the claimant's previous service and the belief that the employer had about the claimant's general ability, whether there was an alternative to dismissal and without doing that in addition to the other reasons which are sufficient in and of themselves, the decision to dismiss for gross misconduct was outside the range of reasonable responses to the incident.

37) The director said that he went into the HR investigation with an open mind. I reject that evidence. I find that he was not open to anything that the claimant could have put to him in relation to lack of training or guidance or any other matter of mitigation. He said that the claimant had received every opportunity to state his case in the health and safety investigation. Other than that he did not have the opportunity, but the director said that this was within the respondent's procedure. Such an approach was not reasonable in the circumstances of the case. The HR investigation and the Health and Safety investigation were completed very quickly indeed, and there was little or no pause for thought by the director.

The law

38) The dismissal of an employee for a reason which "relates to the conduct of the employee" is potentially fair (section 98(2)(b), Employment Rights Act 1996 (ERA 1996)). The conduct in question does not need to be "reprehensible" or culpable (see CJD v Royal Bank of Scotland [2013] CSIH 86 and JP Morgan Securities Plc v Ktorza UKEAT/0311/16).

39) The burden of proof to show the potential reason for the dismissal is on the respondent. The reason for dismissal is the set of facts known to the employer (or it may be) of the beliefs held by the employer which cause the employer to dismiss the employee.

40) It can be difficult for the employer to know which potentially fair reason applies, and sometimes it is difficult to differentiate, and the tribunal is unlikely to think adversely of the respondent, provided the employer has done enough to make clear to the employee what the allegation is and the matter is investigated reasonably. It is a principle of natural justice that the employee is sufficiently informed to be able to put their side of the story.

41) I must apply the test set out in section 98(4) of Employment Rights Act 1996:

> ”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.”

42) In considering this case I must consider the procedure that was followed and whether the respondent acted reasonably in the sense given above in treating the claimant’s conduct as a sufficient reason for dismissal. There is a “neutral” burden when it comes to deciding whether the dismissal was reasonable in the circumstances.

43) In considering those questions I have to consider

- Whether the respondent genuinely believed the claimant to be guilty of misconduct.
- Whether the respondent had reasonable grounds for that belief.
- Whether the belief was based on a reasonable investigation.
- Whether dismissal was within the range of reasonable responses open to a reasonable employer.

44) When considering whether the respondent had a genuine belief based on reasonable grounds, I must have regard to the material on which the respondent’s purported belief was based. However, the question is not whether I would have believed the claimant to be guilty of conduct based on that material, but whether the respondent acted reasonably in forming that belief. The question of whether the employer acted reasonably is to be judged objectively and I must not simply substitute my view for that of the employer. So it is it is irrelevant whether or not I would have dismissed the claimant if I had been in the respondent’s shoes: I must not “substitute my view” for that of the respondent. I was particularly conscious of that principle in this case because of the nature of the incident, the fact that the respondent’s director has a clear and justified passion for health and safety, and the context in which the incident occurred.

45) In considering the investigation and the dismissal itself I must decide whether the respondent’s decision to dismiss the claimant fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might reasonably have adopted.

46) The concept of the band of reasonable responses gives the respondent some latitude over every element of the test. I must consider that any particular aspect falls outside that range of reasonable responses to the reason for dismissal.

47) I must consider the reasonableness of the investigation, consider in the context of all the circumstances of the case including the impact that a dismissal for a reason will have on the employee's future, how a reasonable employer would view that factor, as well as considering the strength of the first glance case against the employee.

48) An investigation needs to be even-handed if it is to be reasonable.

49)The basic principles of procedural fairness are that The employee should know the case against them. The employee should know that they are at risk of dismissal. They should be allowed to make representations (usually at a disciplinary hearing).The employee should be allowed a right of appeal. Lock v Cardiff Railway Co Ltd [1998] IRLR 358, the importance of a tribunal's express focus on the Acas Code as a guide to what is good sound industrial relations policy and practice. The Code set the standards on which the employer's conduct should be judged. Procedural breaches of the Code have weight in and of themselves.

50)The Acas Code provides that the employer, before dismissing for misconduct, should investigate the issues and inform the employee of the issues in writing. The employer should conduct a disciplinary hearing or meeting with the employee, give the decision in writing and give the employee a right of appeal. At the start of the hearing the employer should explain the complaint and go through the evidence that has been gathered. The employee should be given a reasonable opportunity ask questions, present evidence and call relevant witnesses.

51)The Acas Code (para 23) states
"Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct."

52) I must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. Context is very important, and the employer ought to investigate the seriousness of the offence before dismissing.

53) The dividing line between conduct and capability "can be paper thin and even porous. Some behaviours or acts or omissions which fall within the definition of extreme negligence can be considered as either capability matters or conduct matters and can properly be described as either" (Philander v Leonard Cheshire Disability [2018] UKEAT/0275/17). That principle relates to the label the employer puts on reason for dismissal and does not affect whether in choosing one label or the other, in the circumstances of a particular case, the employer acts reasonably or unreasonably in treating the chosen reason as a sufficient reason for dismissal in accordance with the statutory test.

54) There is no general rule that dismissal for gross misconduct will always fall within the range of reasonable responses, because even if gross misconduct is reasonably found by the employer, and dismissal is almost inevitable, there may be mitigating factors which suggest that dismissal is not in reality a reasonable response (see Brito-Babapulle v Ealing Hospital NHS Trust [2014] EWCA Civ 1626). The consequences of the dismissal for the employee could be one such factor.

55) Whilst it is good practice to ask the employee whether they have anything to say by way of mitigation after announcing a finding of gross misconduct but before making the decision to dismiss, failure to do so would not necessarily render a dismissal unfair.

56) I also have to ask whether, in the circumstances of the case, the claimant was unduly prejudiced by any procedural failings of the employer. Only faults which are likely to have an impact on the employers decision to dismiss are likely to affect the reasonableness of the procedure. For example I should ask myself whether the employer's actions prevented the employee from putting forward mitigatory material at a hearing (NHS 24 v Pillar [2017] UKEATS/0005/16).

57) It is a mistake to equate what is in the employer's policy with whether the decision to dismiss was fair in all the circumstances (see e.g. Taylor v Parsons Peebles NEI Bruce Peebles Ltd [1981] IRLR 119). I have to consider whether the content of that policy and its invocation in the circumstances of the case was reasonable according to the statutory test. For example I must consider whether the decision maker had approached the process of dismissal with an open mind or whether he regarded dismissal as an inevitable consequence of the offence charged against the employee.

58) Polkey v AE Dayton Services Ltd [1987] IRLR 503 established that where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" to establish that the dismissal is fair, in effect arguing that the dismissal should be regarded as fair because it would have made no difference to the outcome. This rule is subject to a limited exception, where the procedure would have been **utterly futile**. However if I find that the dismissal was unfair I should consider reducing the amount of compensation to reflect the chance that there would have been a fair dismissal if the dismissal had not been procedurally unfair. The dividing line between a procedurally unfair dismissal and other types of unfair dismissal is one which I do not need to consider on the facts of this case; the Polkey principle is aimed at a tribunal ascertaining what the just and equitable sum for the compensatory element of the award should be in all the circumstances of the case.

Conclusions

59) I found the dismissal to be unfair due to a lack of any reasonable procedure followed by the respondent and I have concluded that it would not have been wholly futile to have followed a fair procedure. I have found that the director did not approach the decision whether to dismiss with an open mind. Having concluded the health and safety investigation, which was not a reasonable investigation for the purposes of reaching any conclusion on the question of whether the claimant had acted deliberately or whether there was any prospect of the same behaviour occurring in the future, the director reasoned immediately from the attribution of responsibility for health and safety purposes to the

conclusion that the act must have been one of gross misconduct. He did not consider any mitigation, because he did not give the claimant any opportunity to present it within what the director told me he regarded as a separate procedure for HR purposes.

60) One of the fundamental principles, to which there are very few exceptions, of unfair dismissal law relating to misconduct is that the claimant should have the opportunity to state their case and to put materials before the respondent which might present a defence or mitigation of a disciplinary offence.

61) In this case the company, which is a very small company, conducted a health and safety investigation and immediately thereafter conducted a form of human resources or personnel investigation but this did not involve giving the claimant any opportunity to deal with the case against him. The claimant was only sent the materials relating to what he had done after he had lodged his appeal on or about the same date that he appealed against dismissal, and only after he had appealed without knowing the evidence against him. He was then denied an appeal at all.

62) So prior to dismissing the claimant the respondent had not given him the opportunity to show, if he could, that what had happened was not as a result of deliberate conduct and the opportunity was not given to him to show any mitigating circumstances, in particular what he wished to say about his training on the excavator, and what he had been told about the relevant procedure for its use.

63) I considered whether a reasonable employer in these circumstances could have treated the reason for dismissal (conduct) as a sufficient reason for dismissal without giving the person accused the opportunity to answer the charge against him fairly. I concluded, having regard to the small size of this business, but also equity and the substantial merits of the case, that a reasonable employer in these circumstance would have given the employee the opportunity to provide mitigation. That opportunity would be an important opportunity for any employee in this situation because a reasonable employer would have considered that the label that is given to a worker's dismissal can have serious consequences for their future employment and in particular a finding of gross misconduct is a serious label to place on the facts. I also considered the resources available to the employer in this case. It seemed to me that there was nothing, apart from taking a little greater time, required by way of resources from this employer, and so considering how a reasonable small employer would have behaved in similar circumstances, I consider that the question of dismissal would have been considered having had regard to what the employee might say if he was given the opportunity to present his defence or mitigation, other than on the day of the incident itself.

64) However I also reached the conclusion that whilst the reasonable employer would have given that opportunity the only difference that it would have made would be to the date of dismissal and possibly the label that was placed on the dismissal. My conclusion is that the reasonable employer would very probably have dismissed after a disciplinary hearing and after the claimant had been given the opportunity to state his case in the light of the materials provided. This is because the claimant is a comparatively short service employee who had made a very sizeable error and had, potentially, caused great damage to the business

(albeit that might only have become apparent in the following two weeks after the incident).

65) It was unreasonable for the employer not to hold the meeting with the claimant partly in the light of the fact that the claimant had answered questions for the purposes of the health and safety investigation which had been put to him at a time close to the incident. It would have been clear to a reasonable employer that the day of the incident was not an appropriate circumstance in which to be asking him questions relating to his future employment, or to provide mitigation in respect of any question of discipline. The director told me that he was not directly aware at that point of the claimant's shock but he could reasonably have been aware from the other managers, had he made any reasonable inquiries or investigation for the purposes of deciding the disciplinary question. Regardless of that point the respondent acted unreasonably in failing to provide details of what he had said in the one interview that took place, or what the other workers said (so that the claimant could elicit further information from them), and in failing to provide the claimant any opportunity to deal with the details of what had been said against him and which, without that input, the respondent decision-maker had concluded meant that the incident was a deliberate action by the claimant.

66) There was in this case no attempt to examine from a human resources perspective any of the elements that went to the explanation for the actions of the claimant for which he was being dismissed so as to be able to draw a rational conclusion as to whether they were deliberate pieces of conduct or whether they are examples of incompetence.

67) The claimant was unable to put forward criticisms of the training he had received, or to address the director on whether there was some basis for saying in the light of the quality of work he had performed before for the employer and the time and effort the employer had expended on his training, he should not be dismissed. The claimant wished to explain what happened (as he did to the client and was documented by that client); he wished to challenge the training and briefing he had received. A reasonable employer would, in the light of what he had to say, have investigated these matters and that process would have taken a period of time.

68) The respondent genuinely believed the claimant to be guilty of misconduct. The respondent did have reasonable grounds for that belief but the belief, was not based on a reasonable investigation and dismissal was not within the range of reasonable responses open to a reasonable employer at that time.

69) I concluded that if a fair procedure had been followed the outcome would very probably have been dismissal but it would have been at a later date (and probably for capability as opposed to gross misconduct). From the evidence of the size and administrative resources of the respondent and having regard to the concession rightly made by the director in his closing submission, about the length of time that the process would probably have taken it is my view that the claimant would have been dismissed 2 weeks later. This quantification simply represents what I regard as the just and equitable sum having regard to the loss caused by the dismissal. Whilst there is a chance that a reasonable employer would have in fact retained the claimant with a warning, I regard this as an insubstantial chance in the light of the importance given to health and safety matters so that it would not be appropriate to adopt any other approach to the

compensatory element (for example by applying a percentage reduction). It is also of course irrelevant to the finding of liability. It is likely that having heard all the mitigation and disputes concerning training, the reasonable employer would still have dismissed. I am mindful of the reasonable passion which the director exhibited in relation to matters of health and safety, and a reasonable employer in the circumstances of this case, having heard, with a proper procedure, what the claimant had to say would probably still have dismissed (whether for conduct or capability). In the context of ascertaining the just and equitable sum it does not matter whether it would have been a reasonable dismissal for conduct or a reasonable dismissal for capability.

70) So the claimant is entitled to a declaration that he was unfairly dismissed and he is entitled to compensation consisting of a basic award and 2 weeks net pay as the compensatory element. The recruitment regulations apply.

71) I made the orders for compensation in the Judgment.

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Employment Judge **O'Dempsey**

17 July 2025

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