THE INDUSTRIAL TRIBUNALS

CASE REF: 6384/17

CLAIMANT: **Marc Bowater**

RESPONDENT: **Kilkeel Seafoods Limited**

DECISION

The decision of the tribunal is that the claimant's claims are dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Ó Murray**

Members: **Mr M McKeown**
Mr I O'Hea

APPEARANCES:

The claimant was represented by Mr C Hamilton, Barrister-at-Law, instructed by Fisher and Fisher Solicitors.

The respondent was represented by Ms S Agnew, Barrister-at-Law, instructed by A&L Goodbody Solicitors.

THE CLAIM

1. The claimant claimed unfair dismissal and automatic unfair dismissal on grounds of having made a protected disclosure. He also claimed arrears of pay, notice pay and breach of contract in relation to the alleged unfair dismissal. The respondent's case was that the claimant was fairly dismissed for gross misconduct. The claim for disability discrimination was withdrawn prior to the hearing.

2. The claim for whistleblowing was withdrawn at the outset of the hearing and was dismissed at the outset of the hearing. The remaining claims therefore related to unfair dismissal under ordinary principles.

THE ISSUES

3. The issues for the tribunal were therefore as follows:

(i) Did the managers who took the decision to dismiss believe that the claimant was guilty of the misconduct alleged and was that based on reasonable grounds following a reasonable investigation?

(ii) Was there compliance with the SDP?

(iii) Were the process and the penalty within the band of reasonable responses for a reasonable employer and was the dismissal fair or unfair in accordance with equity and the substantial merits of the case?

(iv) If the claimant was unfairly dismissed was there contributory conduct and/or should a ***Polkey*** deduction be made?

SOURCES OF EVIDENCE

4. We heard evidence from the following witnesses for the respondent: Mr Bleakley, the Health and Safety and HR Manager; Mr Cassidy who dealt with the grievance; Mr Eakins the claimant's supervisor; Ms Johnston the claimant's manager; Mr Newell the director of the respondent company who dealt with the appeal.

5. We heard evidence from the claimant on his own behalf.

6. We viewed three clips of CCTV footage relating to 3 August 2017, 9 August 2017 and 17 August 2017. The first clip was relied upon by the respondent to show the correct technique for pushing the conveyor belt in issue. The two other clips related firstly, to the technique used by the claimant and, secondly, to the incident of 17 August 2017 being one of the incidents which ultimately led to the claimant being dismissed.

7. We had regard to all the documentation to which we were referred including the claim and response forms. We also had regard to the oral evidence from the above named witnesses and to the CCTV footage.

THE LAW

8. The right not to be unfairly dismissed is enshrined in the Employment Rights (NI) Order 1996 (as amended) (ERO). At Article 130 of ERO it is stipulated that it is for the employer to show the reason for the dismissal and that the reason falls within one of the fair reasons outlined at Article 130(2). One of the potentially fair reasons for dismissal, listed at Article 130(2)(b), relates to the conduct of the employee. If the tribunal finds that the employer has dismissed for a potentially fair reason, the tribunal must then go on to consider whether the dismissal was fair or unfair in accordance with Article 130(4) which states:

> *"(4) Where the employer has fulfilled the requirements of paragraph (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".

9. The task for the tribunal in a misconduct dismissal case is set out as follows in ***British Home Stores Ltd v Burchell 1980 ICR 303***:

> *"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question … entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case".*

10. The Northern Ireland Court of Appeal decision in the case of ***Rogan v The South Eastern Health and Social Care Trust 2009 NICA 47*** endorses the **Burchell** approach and outlines the task for the tribunal in a misconduct dismissal case. The test is whether dismissal was within the band of reasonable responses for a reasonable employer. The tribunal must not substitute its own view for that of the employer but must assess whether the employer's act in dismissing the employee fell outside the band of reasonable responses for a reasonable employer to adopt in the circumstances. This assessment applies to both procedure and penalty.

11. The case of **Connolly v Western Health and Social Care Trust [2017]** NICA states as regards dismissal for gross misconduct for a first offence:

> *"[22] The decision is whether or not a reasonable employer in the circumstances could dismiss bearing in mind 'equity and the substantial merits of the case'. I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non dismissal i.e. some lesser sanction such as a final written warning.*
>
> *[23] The authority for the Tribunal's statement given in Harvey, Industrial Relations at paragraph [975] is the decision of the Court of Appeal in England in British Leyland UK Limited v Swift [1981] IRLR 91. Lord Denning MR said the following at p. 93:*
>
> > *"The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said:*

'… A reasonable employer would in our opinion, have considered that a lesser penalty was appropriate'.

I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."

Ackner LJ and Griffiths LJ, as they then were, gave concurring ex tempore judgments. None of those say that a lesser penalty was not a consideration that was relevant for the Tribunal to take into account. They were stating what the overall test was. I think it important to bear this in mind. Harvey also cites in support Gair v Bevan Harris Limited [1983] IRLR 368. The judgment of the Lord Justice Clerk does indeed cite and follow the decision in British Leyland but it does not exclude consideration of a lesser sanction as a relevant consideration".

12. The **Connolly** decision confirms that the task of the tribunal is not to substitute its view for the employer's. The tribunal must look at whether the actions of the employer with regard to process and penalty were within the band of reasonable responses for a reasonable employer in the circumstances. The tribunal must then determine whether the dismissal was fair or unfair in accordance with equity and the substantial merits of the case. As part of this assessment the tribunal must look at whether a lesser sanction was appropriate in the circumstances.

13. The statutory Disciplinary and Dismissal Procedures (SDP) are set out in the Employment (NI) Order 2003 (Dispute Resolution) Regulations 2004 and in the Employment (NI) Order 2003. Essentially there are three steps in the minimum disciplinary and dismissal procedure. Step one involves the employer writing to the employee setting out the grounds for the proposed action and inviting the employee to a disciplinary meeting to discuss the matter. Step two involves holding a meeting and notifying the employee of the decision and the right of appeal. Step three involves inviting the employee to an appeal meeting if the employee avails of the appeal process and notifying the employee of the appeal decision.

FINDINGS OF FACT AND CONCLUSIONS

14. We considered all of the evidence both oral and documentary to reach the following principal findings of fact on a balance of probabilities. We considered the submissions of both sides and applied the legal principles to the facts found in order to reach the following conclusions.

Introduction

15. The claimant was employed from 1 January 1992 by the respondent and its predecessors until 8 September 2017 when he was sacked for gross misconduct. At the time of his dismissal the claimant was employed as a Hygiene Operative on the nightshift cleaning the machinery and equipment used to prepare seafood. For a period of several months before his dismissal the claimant had been a supervisor in that team but he relinquished that post on 10 April 2017 of his own volition and resumed his job on the hygiene team thereafter.

16. The business of the respondent is the preparation of seafood and the claimant worked with machinery which was involved with the preparation of prawns. It was common case that the hygiene team's job was very important and, in order to do it correctly, they had to have the machinery in operation and moving and also had to move large conveyor belts in order to clean them and the surrounding area. The hygiene team worked on the night shift.

17. The background to this series of events was the fact that the company had been taken over by a company based in England. It was common case that the area where the claimant worked had become much busier because it was a much bigger operation; that the claimant was very busy indeed; and his team had increased in size. It was also common case that there were hygiene standards which had to be closely monitored and improved given that the nature of the respondent's business involved the preparation of food for human consumption.

18. Ms Johnston was a new manager who was in post from November 2016 and Mr Eakins, the claimant's supervisor, joined the company in June 2017. Mr Eakins had a background in the construction industry and had had experience of health and safety and industrial accidents including fatal accidents.

19. Part of Ms Johnston's role was to monitor and improve hygiene standards as required. She had had valid reason to speak formally to the claimant about his performance as supervisor of, and as a member of, the hygiene team because of shortcomings in his method of work.

Assessment of Witnesses' Reliability

20. There were two key disputes in the evidence of Mr Bleakley and Mr Eakins on the one hand and the claimant on the other hand. The first was in relation to a conversation Mr Bleakley had had with the claimant following his suspension and the second was in relation to Mr Eakins' assertion that he had repeatedly had to admonish the claimant verbally about the way he moved the equipment and had outlined the risks involved in that.

21. We have looked carefully at the evidence in relation to assessing the reliability of these witnesses' evidence and have concluded that the claimant was not a reliable witness. For this reason where it came to a conflict between his evidence and the evidence of Mr Bleakley and Mr Eakins in particular we preferred their evidence. Our principal reasons for regarding the claimant's evidence as unreliable relate to the following important changes in his case;

(i) One of the points made by the claimant against Ms Johnston was that she had told him at a particular meeting that he had to relinquish the supervisor post or she would demote him. In cross-examination the claimant resiled from that case as it was clear from the documents that he himself had asked the nurse (in advance of meeting Ms Johnston) to tell Ms Johnston that he did not want the supervisor post any longer because the stress of being a supervisor was having an adverse effect on his health. He therefore relinquished the post of his own volition.

(ii) Whilst the claimant denied that he would push the conveyor belt with his head down, in cross-examination he confirmed that the CCTV footage showed him pushing the conveyor with his head down and he agreed that he would thus not have been able to see what was happening ahead of him.

(iii) The claimant raised several allegations in his oral evidence which had not formed part of the case before one of which was that he was told by Mr Bleakley at the conclusion of the disciplinary process that he would have a chance to respond in full during the appeal hearing so that he should not worry about not saying much at the disciplinary hearing. This point was first made by the claimant during the tribunal hearing, was not borne out by the documentation, had not been put to Mr Bleakley in cross-examination and we find that this change in evidence reflects adversely on the claimant's reliability and veracity.

(iv) Whilst the claimant at first denied that Mr Eakins had verbally told him that his behaviour in relation to moving the conveyor belts had to change, he finally agreed in hearing that Mr Eakins had spoken to him in this regard several times but his point in tribunal was that he was not spoken to all the time. This was a key point in this case and this belated change of evidence tainted the reliability of the claimant's evidence generally. The point being made by Mr Eakins was that he had had to speak to the claimant several times because of what he, Mr Eakins, observed and also because of complaints by other colleagues about the claimant acting in a forceful way by pushing the equipment and thus creating a risk of injury to himself and his colleagues.

The Health and Safety Incidents

22. There were three incidents which occurred in August 2017 within a period of approximately fifteen days which ultimately led to the claimant's dismissal for breach of health and safety requirements.

23. We accept the evidence of Mr Eakins which was that the wheels on the conveyor belt in issue were like shopping trolley wheels and thus had to be manoeuvred in a careful steady way. It was uncontested that the conveyer belts in issue were 8 metres long and weighed approximately 300 kgs. It was common case that this was a two-man job given that the conveyor belts were very long and unwieldy and thus needed to be manoeuvred carefully.

24. The first incident occurred on 2 August 2017 and involved Mr Ferguson. On that occasion the claimant pushed a conveyor belt so hard that Mr Ferguson became trapped between two small conveyors.

25. Another incident involved Mr Burns and occurred on 17 August 2017 when the claimant pushed the central conveyor belt with such force that Mr Burns' leg became caught.

26. Another incident on 11 August 2017 involved the claimant's Supervisor Mr Eakins when both he and the claimant were replacing plates in defroster equipment. Mr Eakins' fingers were almost caught in the mechanism several times despite Mr Eakins' shouting at him. Mr Eakins' point was that this was due to the claimant forcing the plates in rather than liaising with him to try to do it in a safe way.

27. Accident records were completed in relation to all three incidents. It was common case that no actual injuries were suffered by the three workers but the respondent's point was that these were near misses which involved clear health and safety risks and were due to the claimant's actions.

28. The claimant made the point in tribunal for the first time that in the incident with Mr Eakins he (ie the claimant) also got his fingers almost caught several times. His point seemed to be that the fault lay with the way the equipment was set up and he pointed to the fact that the next morning another worker had had to use a pipe to move the equipment in a particular way. It was clear from the documents to do with the internal disciplinary processes that the claimant did raise the issue of the worker having to use a pipe the next morning. However the claimant clearly missed the point which was being made to him namely that he should not have tried to force the equipment because it was that action on his part which led to the risk of injury.

The Investigation

29. Statements were taken from the three men involved in the near miss incidents and those statements were taken on 21 August 2017. Some CCTV footage was obtained and viewed at that stage and the decision was taken to suspend the claimant from duty. The claimant was therefore suspended on 18 August 2017 and this was confirmed by letter of 21 August 2017. On 21 August 2017 an investigation began, conducted by Ms Rogers, into the three incidents that had been reported and recorded.

30. Mr Bleakley who was the HR and Health and Safety Manager, spoke to the claimant face-to-face after the suspension letter. We accept his account that when he spoke to the claimant and when the claimant asked why he was being suspended, Mr Bleakley's response was that it was about the claimant moving conveyors forcefully. Whilst the claimant denied that he was told this at that meeting, we accept Mr Bleakley's account and therefore find that the claimant from that stage knew precisely what the problem was that was being investigated particularly as he had previously been spoken to repeatedly about this issue.

31. Ms Rogers (QA Manager) produced an investigation report on 25 August 2017 which was very detailed and recommended disciplinary action. The claimant was not interviewed as part of that investigation. The investigation considered the accident reports, and statements from those involved in the incidents.

32. We have assessed the documentation and the oral evidence and we find that the claimant knew that he was being taken to task about the three incidents that had happened in the previous three weeks. We accept the evidence of Mr Eakins that

he had spoken to the claimant several times informally firstly, about his propensity to be forceful with this equipment and secondly, about the way that he dealt with the equipment and the way he went about his job had caused safety risks to himself and his colleagues and that his behaviour therefore had to change.

The Step One Letter

33. The letter of 28 August 2017 invited the claimant to a disciplinary meeting and was relied upon as the step one letter for the SDP. The claimant's case in tribunal was that that letter gave insufficient information about the allegations so that it did not comply with the SDP and the effect was that the claimant did not know enough about the allegations that he was due to face in the disciplinary hearing.

34. The relevant reference in the letter is as follows:

> *"Failure to comply with health and safety arrangements along with putting yourself and other colleagues in danger".*

35. We find that this was sufficiently specific in circumstances where the claimant had been told face-to-face a few days before by Mr Bleakley that his suspension was about his moving of the conveyers forcefully. This was on top of the fact that the claimant was aware firstly, that there had been three near misses and secondly, that he had been spoken to several times by Mr Eakins over the previous few weeks. We therefore do not accept the claimant's case that he did not know what the disciplinary process was to be about. We find the letter of 28 August 2017 to comply with the requirements of the SDP and its contents to be reasonable in the circumstances.

The Disciplinary Hearing

36. The disciplinary hearing took place on 31 August 2017. The claimant declined the opportunity to be accompanied, so at the meeting were the claimant, Mr Bleakley, and Mr Eakins. Mr Eakins was asked to attend as he had knowledge of the equipment and processes on the shop floor and Mr Bleakley was not familiar with those matters. The claimant did not make the case in tribunal that the involvement of Mr Eakins at this stage, constituted any sort of flaw in the procedures. We find that Mr Eakins' involvement was within the band of reasonable responses for a reasonable employer in the circumstances as it is clear from the evidence that he was not involved in the decision to dismiss. We find that that decision was taken by Mr Bleakley alone.

37. We are satisfied from the documentation and from the evidence of all concerned that in the disciplinary hearing Mr Eakins and Mr Bleakley went through the statements and the accident reports and the details of the allegations against the claimant. The claimant was also shown the CCTV clips and we find that there was discussion back and forth about the managers' view of the health and safety risks and the claimant thus had ample opportunity to put his side of the case and he did so.

38. The CCTV evidence supports the account given by Mr Eakins as it shows two men manoeuvring the conveyor belt carefully whilst communicating with each other and watching each other. The second clip in the CCTV footage shows the claimant

pushing the conveyor with force with his head down and his colleague struggling to control the conveyor belt because of the forceful way the claimant was moving it without reference to him. The CCTV footage also shows the level of force being used in that other parts of the machinery were clearly jolted because of the force being applied by the claimant.

39. We find that during the disciplinary hearing the claimant did not accept any responsibility for the incidents which had occurred and his approach was to deflect on to other matters and to seek to blame the equipment. He appeared to have no insight into the seriousness of the matters and regarded them as minor matters because they did not result in actual injury nor in first aid having to be administered. We find that Mr Bleakley was right to be concerned about this approach by the claimant and was right, given that they involved health and safety issues, to view them very seriously indeed. We accept the evidence of Mr Bleakley and Mr Eakins that near misses were very important because in health and safety matters managers should not have to wait until there is actual injury before acting to minimise evident risks.

40. The claimant waited until he was in the tribunal hearing to accept that he did indeed have some responsibility for the incidents but he maintained in tribunal that any deficiencies in that regard really lay with the equipment.

41. The fact that the claimant continued to maintain in tribunal that, because there were no injuries actually caused, this meant that these incidents were really not important, illustrated his approach and supported for us the valid concerns that the respondent's managers had had. Essentially the claimant gave Mr Bleakley no indication that he understood the risks nor that he would change his way of working in the future. We accept that it was reasonable for managers to be very concerned indeed about the claimant's attitude given their obligation in relation to the health and safety of the claimant and that of other workers and it was reasonable for them to consider that they could not afford to wait for an actual accident to happen.

42. In relation to the penalty we are satisfied that Mr Bleakley assessed and took into account the claimant's record and his long service. However, we find that it was within the band of reasonableness for managers to decide that any considerations in this regard were outweighed by firstly, the claimant's repeated refusal to accept that he had done anything wrong, secondly, that these were serious matters, and thirdly, the lack of any indication that he would do things differently in the future. Given that these were health and safety issues on a nightshift involving unwieldy machinery with moving parts, and given that there was clear scope for, at the very least, crushing injuries, managers were right to take a very serious view of the claimant's attitude going forward. We accept that Mr Bleakley considered whether a lesser penalty was appropriate and we accept that it was reasonable to him to conclude that dismissal was appropriate given the seriousness of the incidents and the risk going forward in view of the claimant's attitude.

43. Mr Bleakley was clear that if the claimant had said he had accepted that there was a problem, that he bore some responsibility and that he would change his way of operating in the future, then Mr Bleakley might have thought differently about the penalty. In the circumstances Mr Bleakley felt that dismissal was the only option given the potential risk to the claimant and others. We regard this as a reasonable conclusion in the circumstances.

44. The following exchange recorded in the note of the disciplinary hearing exemplifies the claimant's approach to the points being put to him:

> *"Mr Bleakley: "Pushing those belts the way you do Mark do you not see a danger when you are doing that?*
>
> *Mr Bowater: The biggest danger in this factory is the tanks out the back.*
>
> *Mr Bleakley: That does not answer the question I had Mark we don't want to divert from the issue in hand."*

45. The outcome letter was dated 1 September 2017 and stated that the claimant was dismissed summarily for gross misconduct. The letter states: *"As you are aware it was found that you failed to comply with health and safety arrangements along with putting yourself and other colleagues in danger*. *In the company's view, this allegation constitutes gross misconduct."*

The Appeal

46. The claimant appealed by letter dated 1 September 2017. It is noteworthy that in the appeal letter the claimant makes no reference to any allegation that he did not have a chance to put his side of the case at the disciplinary hearing. It also makes no mention of his not having sight of the statements and the investigation report. The key ground of appeal is the allegation that there were no deliberate breaches of health and safety and that they were accidental.

47. Mr Newell had an appeal hearing on 8 September 2017 and it transpired to be a very short meeting. We find that the claimant was given ample opportunity at the appeal to put his side of the case. In tribunal the claimant's evidence was that he decided not to engage with Mr Newell because by that stage he had decided that he did not want to work for the respondent any longer.

48. In the appeal hearing Mr Newell gave the claimant five chances to say something in his defence and the claimant did not engage for the reason given to us at tribunal. Contrary to Mr Hamilton's submissions, we do not interpret the claimant's silence as acceptance that he had done something wrong because we had no evidence before us to suggest that this was the case. In contrast the claimant waited until the tribunal hearing to admit that he was at fault in any way.

49. Mr Newell upheld the decision to dismiss. We accept that it was reasonable of him to do so because we accept his evidence that he regarded the fact that there were three incidents in a fifteen day period as very serious indeed as they demonstrated a trend and amounted to too many health and safety issues in a short period. We find that he was right not to regard these matters as minor and he reasonably concluded that they showed a worrying attitude towards health and safety by the claimant.

Alleged Procedural Flaws

50. We find that the procedure complied with the statutory dismissal procedure and reject the allegation that the Step 1 letter was insufficiently detailed.

51. In submissions Mr Hamilton stated that it was a flaw in procedure that the claimant was not questioned in the course of the investigation. This did not form part of the claimant's claim and in tribunal was not put to any of the respondent's witnesses. It is our experience that normally at investigation stage the investigator speaks to the employee against whom allegations are being made. In some circumstances this is not necessary, for example, if what has happened is beyond contention so that the employee's view is not necessary. It may be in this case that, because of the CCTV evidence which supported the evidence being given by the three colleagues including the supervisor, a view was taken that it was unnecessary to question the claimant in the investigation and that the procedure should move straight to disciplinary hearing. As this point was not part of the claimant's case nor put to managers in hearing we do not know what any reason might have been.

52. On the evidence before us if this did constitute a flaw it was not sufficiently serious to undermine the decisions to dismiss and to confirm the dismissal on appeal. In reaching this conclusion we have looked at the circumstances as a whole and the fact that firstly, these were important health and safety issues raised by colleagues, secondly they were supported by CCTV and thirdly the claimant gave, no reason to impugn any of those who were accusing him of these matters.

53. A further flaw alleged by the claimant's side in tribunal was that the claimant did not receive in advance of the disciplinary hearing, a copy of the statements taken from the three men involved in the three incidents and he did not have a copy of the investigation report. In our experience we would have expected the claimant to have received that documentation at some point during the internal processes. We find it to be a flaw that these were not given to the claimant but in the circumstances in this case do not find that flaw to be sufficiently serious to undermine the decisions which were taken. Our principal reason for so finding is that we accept that Mr Bleakley and Mr Eakins in the disciplinary hearing went through the statements, the detail of the allegations and the CCTV footage and there was no doubt that the claimant knew exactly what he was being accused of. He also did not dispute the mechanics of the incidents but disputed their seriousness. The documents show that the claimant was able to put his side of the case. This is not a case where the written statements are lengthy or detailed or involve very complex, disputed allegations. Assessing the matter as a whole we find that this flaw did not undermine fairness of the process to the extent that it undermined the fairness of the dismissal.

Other Allegations

54. The claimant's case was that the real reason for him being dismissed was because Ms Johnston had been building a case against him to try to get him out of the company. The claimant's case in this regard changed at various points in that he alleged that the company wanted to dismiss him in order to save redundancy money; that he had raised disclosures about areas of concern and that this was the reason they wanted to get rid of him; and that Ms Johnston was picking on him. The allegations about redundancy and protected disclosure were no longer relied upon by the claimant by the time of the hearing before this tribunal.

55. Having assessed all of the documentation and evidence we are satisfied that Ms Johnston acted as a reasonable manager by actively and reasonably addressing processes and the performance of the hygiene team to ensure that

hygiene standards were improved. Her focus was on the claimant as the supervisor at the relevant time and we find this to be the action of a reasonable manager. We do not accept that Ms Johnston was unreasonably picking on the claimant in the circumstances.

56. Hygiene standards were particularly important given the nature of the respondent's business and the potential risks to health if hygiene standards were not maintained. We accept that Ms Johnston's actions were reasonable and did not amount to micromanaging or to excessive scrutiny of the claimant. She acted as a conscientious manager trying to get the claimant to improve. As set out above we specifically reject the claimant's case which was that she threatened to demote him if he did not relinquish the supervisor post.

57. One of the matters raised by the claimant during the internal process was his hearing impairment in that he wears a hearing aid in one ear and has normal hearing in the other. The claimant then discounted that as an element which had a bearing on the incidents. The disability discrimination claim originally lodged with the tribunal was withdrawn in advance of the hearing.

58. The claimant made the case in tribunal that Mr Eakins was over cautious about health and safety matters because of his experience in the construction industry. We do not accept that point made by the claimant and find that it is another example of the claimant down-playing the seriousness of the near misses which occurred.

59. In the internal processes the claimant raised an issue about the wheels on a particular conveyor belt being defective. It is clear from the evidence that was before the relevant managers and from the evidence produced in tribunal, that the only person raising the issue of defective wheels was the claimant. In the relevant period weekly inspection reports completed by an engineer did not reveal any defect with the wheels. We accept the evidence of Mr Eakins that, whilst the nature of the wheels was such that care had to be taken in manoeuvring the conveyor belt, the wheels were not defective. This is borne out by the exchanges in the disciplinary hearing. In addition the only reports of incidents or near misses all involved the claimant and the respondent was therefore right to focus on his actions and his attitude to health and safety. Whilst the claimant consistently stated that there was a problem with the wheels and that conveyor belt he had at no point reported that to anyone. Even on his own case therefore, the claimant was deficient in alerting relevant managers to potential health and safety issues.

60. In submissions the point was made for the first time that the charges did not constitute gross misconduct under the claimant's contract. This had not formed part of the claimant's claim before, it was not in his witness statement, and the respondent's witnesses were not cross-examined on this point. We have therefore disregarded this issue as it was not part of the case before us.

Summary

61. The managers who took the decision to dismiss and to confirm the dismissal genuinely believed the claimant was guilty of gross misconduct in relation to health and safety breaches and they had reasonable grounds upon which to base that belief. The investigation was reasonable in the circumstances given the nature of

the incidents, the CCTV evidence, and the fact that the claimant admitted that they had occurred.

62. The fact that the witness statements and investigation report were not actually handed over to the claimant did not in our judgment undermine the decision to dismiss in this case given that the incidents were gone through in detail, the claimant knew exactly what he was being accused of and he had a full opportunity to put his side of the case. At no point in tribunal did the claimant give any reason for those witnesses to lie and indeed the claimant specifically confirmed that he had had a good relationship with Mr Eakins and did not impugn him in any way.

63. It was evident from the documents that the claimant's tack in answering specific points was to deflect onto other issues and to blame equipment rather than to take any responsibility for his actions. The involvement of Mr Eakins in the disciplinary hearing was explicable; did not render the decision to dismiss unfair, as he was a supervisor and was thus familiar with the area and the processes involved; and he was not a decision-maker.

64. The reasons for the dismissal related to the seriousness of the incidents and the fact that the claimant displayed no insight into that seriousness, took no responsibility for them and displayed no remorse. Mr Bleakley and Mr Newell reasonably concluded that there was no likelihood of the claimant changing his way of operating even if he had been given more training and coaching (over and above that which he had already received) given his lack of improvement following repeated verbal admonishment by Mr Eakins. It was clear from the evidence before us that managers regarded the claimant as a good worker and were reluctant to lose him but were rightly very mindful of their obligations towards him and others in relation to health and safety given the working environment. We find that this approach by managers was well within the band of reasonable responses in the circumstances in this business.

65. The disciplinary process revealed a pattern of a worrying attitude to health and safety on the part of the claimant and managers were right to regard this as very serious indeed. Given the lack of insight on the claimant's part into the seriousness of the risks involved and his attitude to the points being put to him, managers were right to be worried about his attitude going forward. In circumstances where this involved moving machinery on the nightshift with evident risks to the health and safety of the claimant and his colleagues, a lesser penalty was considered but was reasonably found not to be appropriate.

66. We are therefore satisfied that the claimant was fairly dismissed for gross misconduct and that the penalty of dismissal was within the band of reasonable responses following a reasonable investigation. We find that, in all the circumstances and in accordance with equity and the substantial merits of the case, the employer acted reasonably in treating the misconduct as sufficient to justify

dismissal, rather than a lesser penalty. The claims are therefore dismissed in their entirety.

Employment Judge:

Date and place of hearing: **11, 12 and 13 March 2019, Belfast.**

Date decision recorded in register and issued to parties: