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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr A Ballard

Respondents
Eurotunnel Services Ltd

Held at Ashford on 1 March 2017

Representation

Claimant: Mr E Hammer, Solicitor

Respondent: Mr M Lee, Counsel

Employment Judge Wallis (sitting alone)

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant was not unfairly dismissed, neither was he wrongfully dismissed;
2. The claims therefore failed and were dismissed;
3. The claim for holiday pay was dismissed upon withdrawal by the Claimant.

REASONS

ISSUES

1. By a claim form presented 1 November 2016 the Claimant claimed that he had been unfairly dismissed. He said that he was entitled to notice pay because he had not acted in such a way as to justify summary dismissal. He also originally claimed holiday pay, but that had been dealt with and was withdrawn at the start of the hearing.

2. The issues for the Tribunal were agreed in accordance with a draft list prepared by the Respondent and were as follows:-
 - i. What was the reason for the dismissal – the parties agreed that the reason was conduct, in respect of alleged health and safety breaches on 7 June 2016;
 - ii. Did the Respondent have a genuine belief that the misconduct had taken place;
 - iii. If so, was that belief based on reasonable grounds following a reasonable investigation;
 - iv. Was a fair procedure followed;
 - v. Did the decision to dismiss the Claimant fall within the band of reasonable responses open to a reasonable employer – the Claimant suggested that he was possibly dismissed because he was on more lucrative contractual terms than others on his grade and that the decision was inconsistent compared to what had happened after a fire in the Channel Tunnel in January 2015;
 - vi. If the dismissal was unfair, was there any contributory conduct and/or Polkey reduction in respect of any compensation;
 - vii. With regard to the claim for notice pay, the issue was whether the Claimant had acted in such a way as to justify summary dismissal, or if he had not, whether he was entitled to notice pay.

DOCUMENTS AND EVIDENCE

3. There was an agreed bundle of documents, written submissions from both representatives, a draft list of issues and written statements from each of the witnesses. I was also given copies of the following cases ***Tayeh-v-Barchester Healthcare Limited [2013] IRLR 387; Pennine Care NHS Foundation Trust – v-Mundangepfupfu EAT/01/09/15; and Linfood Cash and Carry Limited-v-Thompson [1989] ICR 518; Hadjioannou-v-Coral Casinos Limited [1981] IRLR 352.*** I also had a copy of ***General Mills (Berwick) Limited-v-Glowacki EAT/0139/11.***
4. I heard evidence from Mr Brett Barnes, train crew manager and the person who dismissed the Claimant; Mr Stuart Griffiths, UK customer service director of the Respondent and the person who heard the Claimant's appeal against dismissal; and from the Claimant himself Mr Anthony Ballard.

FINDINGS OF FACT

5. The Respondent operates passenger and freight services through the Channel Tunnel. The Claimant was employed as a customer services agent between March 1993 and 8 July 2016 when he was summarily dismissed on the grounds of gross misconduct.
6. There was no dispute that the Claimant's role, known as Agent 5 CSA, included assisting with the loading of arriving trucks onto Eurotunnel freight shuttles. The role is to open the rear loader wagon to allow vehicles to load (they are driven on by the vehicle drivers) and then to reclose the rear loader at the end of the loading, ensure the train is safely loaded, and leave the train prior to its departure. Agent 5 CSAs do not have unloading responsibilities. The drivers of the vehicles leave their vehicles once they are on board and are picked up by a Eurotunnel bus which drives the length of the train collecting them all and taking them to the passenger amenity coach situated behind the lead locomotive on each train.
7. The Claimant's duties included checking the electric platform height detection equipment, which checked that the vehicles and any protruding items such as aerials and so on would not come into contact with cables or other infrastructure on the journey (some of the wagons are open). He then had to open the rear loader wagon and direct the vehicles to board the train. Once loading was completed, he closed the loader wagon and ensured that it was safely closed before leaving the train. In order to assist the vehicles to move from the platform onto the train, bridge plates were opened across the gap, and closed for departure, by the Claimant. Each vehicle has its wheels chocked for the journey.
8. The Claimant was working on 7 June 2016, as usual loading freight vehicles onto individual trains at the Respondent's UK terminal. He told the disciplinary panel that he had received a call on his personal radio telling him to attend at platform B8 to unload the trucks from the train. However, there was no dispute that his role was to load trains rather than unload them. In addition, he also told the disciplinary panel that he attended at B8 because he did not have his reading glasses with him and had misread the rota. Although it was the Claimant's case that the radio was often not functioning correctly, I found that it was not unreasonable for the Respondent to be concerned that the Claimant had attended the wrong platform and then gave various versions as to why he had done so. However, that was the least of their concerns.
9. When the Claimant arrived at B8 he boarded the train. The train had in fact been loaded and was ready to depart. However, he unchocked the last vehicle and lowered the bridge plates. He then stepped off the train to deal with vehicles that were arriving and at that point he realised that they were arriving for loading on the train at platform B9, the neighbouring platform. He realised that he had made a mistake and that the train that he had got on was actually waiting to depart. There was no dispute that the Respondent, which has lengthy and detailed procedures, requires its employees to make what is called a 'flash flash flash' emergency call if it is necessary to delay the departure of a train because it is in

a dangerous state. However, the Claimant did not do that. He accepted at the disciplinary hearing that he was aware that was the procedure.

10. He re-boarded the train to close the bridge plates and then moved across to B9 to start loading that train. He did not stay with the train while the bridge plates were functioning, despite the requirement that the agent should remain within an arms length of the emergency stop button on the loader control panel while the stabilisation jacks and bridge plates are in motion.
11. The Respondent has a control tower monitoring the platforms. Each platform is the subject of CCTV recording. The Claimant suggested that the officers in the control tower must have seen what he had done and yet they allowed the train to depart in a dangerous state. I accepted the Respondent's evidence that the train captain had radioed that he had lost function. This had happened, although he did not know it, because the bridge plates had been put into operation by the Claimant. While they were investigating that loss of power, the Claimant closed the bridge plates and the train captain confirmed that he had regained power and was then able to operate the train. I accepted the Respondent's evidence that the CCTV is not monitored in real time and that as far as they could tell, it was only some time later that the CCTV footage was viewed and they realised that the Claimant had been on board and had in fact operated the plates and unchocked the last vehicle. The train departed and throughout the journey that last vehicle remained unchocked.
12. In the notes of the Claimant's line manager, who approached the Claimant almost immediately to see what was happening, it states that "later" he was told that the last vehicle was unchocked. His note records that he thought that he had approached the Claimant some 10 or 15 minutes after the incident. I accepted the Respondent's evidence that given the time lag there would have been little or no time for the Respondent to have stopped the train, because it was likely that it had arrived at its destination on the other side of the tunnel before events became clear. I rejected the Claimant's suggestion that the Respondent should carry some blame because they had not stopped the train.
13. The Respondent was concerned that the Claimant himself had not reported the situation to his manager, but had only told his manager about it when his manager asked him what was happening. I found that in the circumstances this concern on the part of the Respondent was not unreasonable.
14. At the disciplinary hearing the Claimant also accepted that he had not carried out the necessary aerial detector test to confirm that the trucks to be loaded had clearance before embarking. However, he had signed the check sheets to say that he had carried out that check. There was a dispute about that, but I found that he had signed that check sheet and indicated that the check had been carried out.
15. There was an investigation into all these matters and the Claimant was then invited to a disciplinary hearing on 1 July 2016. The letter of invitation set out the

charges against him. In summary, he was charged with a number of breaches of the Respondent's procedures and a failure to report the incidents.

16. Mr Barnes chaired the disciplinary hearing with assistance from two human resources officers. The Claimant was accompanied by his company council representative. I found that there was a detailed discussion of what had happened. I noted that the Claimant was quite candid with the Respondent in respect of his failings. He said that he was annoyed at himself that he had got on the wrong train and that day and had been concerned about getting off the train before it departed. He confirmed that he was aware of the procedures that should have been followed. He reiterated his apology for having made the errors.
17. Having considered the matter, Mr Barnes decided to dismiss the Claimant. He found that he had failed to report a serious incident. He found that he had failed to follow procedures. He found that he had failed to test the aerial detector function. He found that he boarded a shuttle without verbal authorisation, which was part of the procedure. In other words, the Claimant had got on to the wrong train and had not waited to see the platform bus, as required by procedures. Had he followed that procedure, it was unlikely that he would have boarded the wrong train. In addition, he found that the Claimant had unchocked the last vehicle in contravention of the Respondent's health and safety policy and had re-closed the loader but failed to remain within an arms length of the emergency stop button while doing so.
18. Mr Barnes told the Claimant that he had lost confidence in him because of those errors and because of the way he had given different versions of events through the disciplinary process.
19. Mr Barnes explained that the control tower did not monitor the CCTV footage in real time and did not focus on any particular platform in detail. The Claimant had suggested that the train captain had asked for the trouble-shooters to check why he had lost function and he suggested that had they attended they would have noted what had happened. Mr Barnes explained that this was not the case. The trouble-shooters would have attended to investigate the reason that the train captain had detected that one of the three loader wagons appeared to be open. They would not, as the Claimant suggested, have checked or noticed that the last vehicle had been unchocked.
20. I accepted Mr Barnes' evidence that he had not dismissed the Claimant because he was paid more than employees who were more recently employed by the Respondent. I accepted that he was unaware of the details of the Claimant's pay.
21. The Claimant appealed against the dismissal. The appeal was heard by an appeal panel on 5 August 2016. Mr Griffiths chaired the meeting; the other members were Mr Hawley, head of human resources in the UK, and Mr Baxter

Smith, UK Occupational Health and Safety manager. Notes were taken. The Claimant was accompanied by his employee representative.

22. I found that again there was a detailed discussion about the events of 7 June 2016. The Claimant suggested that the sanction was too harsh and he complained about the way in which the disciplinary meeting was held. He also complained that he was dismissed by email.
23. Mr Griffiths noted that the Claimant had been dismissed at the meeting on 8 July 2016 by Mr Barnes. The email attached the letter confirming dismissal. It was suggested by the Claimant that lots of trains arrived from France unchocked and nothing was done about it. Mr Griffiths disputed that and said that if such an event was reported it was always followed up and he was unaware of any such reports.
24. The Claimant assured the panel that he was sorry for what had happened and that he would improve.
25. After an adjournment the panel decided not to uphold the appeal. Detailed reasons were set out in the outcome letter sent on 10 August 2016. Mr Griffith explained, in response to the Claimant's suggestion that the disciplinary procedure was unfair because the meeting had been adjourned, that it was normal for the disciplinary meeting to have been adjourned and reconvened at a later date. He said that the breaches of various procedures were not the expected actions of an employee who had been with the Respondent for 22 years and who had undergone regular training and briefings. He said that trust and confidence in the Claimant had been eroded. He explained that the panel was unconvinced that the Claimant had learned from the incident.
26. As far as the Claimant's service was concerned, the panel considered that with such long service the Claimant should have known the correct procedure to follow in such circumstances. The Claimant's lack of openness and honesty from the start had undermined their trust in him.
27. The Claimant added to the trial bundle the report in respect of the fire in the Channel Tunnel in January 2015. He suggested that no-one had been dismissed as a result and therefore, by comparison, his dismissal was too harsh. I was referred to various passages in that report. The fire was apparently caused because the aerial of one of the vehicles on the train had touched the cables in the Tunnel. It appeared that the aerial detector had not been working properly. I accepted the Respondent's evidence that the aerial detector system had been upgraded and that the upgrade was in place by the time of the incident involving the Claimant. I found therefore that it was not a valid excuse for the Claimant to suggest that the aerial detector was not checked because it was not working.
28. As far as any dismissals in connection with the fire were concerned, the Respondent's evidence was that as far as they could recall nobody was dismissed. No-one had been held personally responsible for what had occurred.

The Respondent's evidence was that person watching the vehicles load on that occasion was a new member of staff and had had some concerns about the height of one of the aerials that he saw. He mentioned this to the bus driver who reassured him that the aerial detector system would have alerted the loading agents if there was a problem. If the aerial detector system was not functioning correctly, then the problem would not have been recognised. I accepted the Respondent's evidence that there were no grounds for dismissing anyone involved in that incident. The Claimant himself was not aware whether anyone had been dismissed.

SUBMISSIONS

29. On behalf of the Claimant, Mr Hammer suggested that the Claimant had not been involved in any previous such incidents, although it was accepted that he did not have a completely clear disciplinary record. He said that the error lasted about five minutes and threw the Claimant off balance. He admitted that he had not checked the aerial detector but had always done so in the past. There were no grounds for suggesting that the Claimant had become complacent. One error could not amount to gross misconduct particularly in the context of a 23 year service record. The Claimant acknowledged his error immediately and in the disciplinary process. He told the Respondent it would not happen again.
30. He submitted that the Respondent could not show that they genuinely believed that there had been gross misconduct. He submitted that the Claimant had not breached the contract by making one error. He could have worked his notice doing other duties because he had undertaken other duties in the past.
31. The Claimant had been working a long shift and this was a time-pressured environment. He suggested that it was a recognised procedure to remove the end chocks before the employees who came to unload the vehicles arrived. The Claimant had forgotten that he had done this when he got off the train so as far as he was concerned there was no need to raise the alarm.
32. He submitted that no-one had been dismissed as a result of the fire in January 2015 so there was no reason to dismiss the Claimant. He suggested that the Claimant was paid more than others and that was the reason for dismissal.
33. On behalf of the Respondent, Mr Lee submitted that this was not a minor mistake. It was not a "non-incident", there were several failures to comply with the detailed health and safety process. The Claimant had not checked the aerial but signed to say that he had. He boarded the train without authority and without seeing the bus. He removed the chocks of the last vehicle. He got on and off and he operated the plates without being near the emergency button. He submitted that those were serious breaches that justified dismissal. This was a working environment with heavy machinery and fast moving vehicles. The Claimant failed to take steps to stop that train or make an emergency call. He simply went over to the next platform. During the disciplinary hearing he said he had done so partly because he feared being in trouble.

34. He submitted that the reasonableness of the sanction was the central issue and the question was whether it was within the range of reasonable responses. Mr Barnes and Mr Griffiths had considered the Claimant's position and weighed that with the implications for customer safety. He submitted that they were entitled to take into account the way in which the Claimant presented himself and the way in which he gave different explanations. They formed the view that they had no confidence that it would not happen again. In those circumstances the decision fell within the range of reasonable responses.
35. He submitted that the consistency argument was developed during the course of the Tribunal proceedings and was not raised with Mr Barnes or Mr Griffiths. There was no evidence about that. If the Respondent wanted to get rid of the Claimant, then arguably they would have done so rather than give him the previous warning that he had received. He never raised with them that his terms and conditions were the reason for dismissal. He had been represented at all meetings.
36. As far as the claim of wrongful dismissal was concerned, the suggestion that the Claimant should have been given other duties during his notice period was not the correct test. The test was whether on the balance of probabilities what he did amounted to gross misconduct, which it plainly did and justified summary dismissal.
37. He submitted that it was clear from the Claimant's evidence to the Tribunal that any suggestion that the radio did not work properly all of the time had nothing to do with him being on that train. It was clear that he did not follow the procedure when he was on the train and he had accepted that. The circumstances of the dismissal were made entirely by the Claimant. What he had done amounted to gross negligence.
38. As I was to reserve my decision in view of the time, I asked the representatives to address me on contributory conduct and **Polkey**, and they did so in brief terms.

A BRIEF SUMMARY OF THE LAW

39. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal. It must be a reason falling within subsection (2) or some other substantial reason which justifies the dismissal of an employee holding the position which the employee held.
40. In this case, the reason relied upon by the Respondent is conduct. In the case of British Home Stores v Burchell [1978] IRLR 379 it was decided that the test was whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must establish that they did believe that the misconduct had occurred; (see Post Office v Foley; Boys and Girls Welfare Society v

- McDonald). As far as the other two limbs of the test are concerned, these go to the question of reasonableness under section 98(4) of the Act (see Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09). So, the burden of proof is neutral in respect of the second and third questions laid down in Burchell namely whether there were reasonable grounds for the belief and whether there was a reasonable investigation.
41. In Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 it was held that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances, as it does to other procedural and substantive aspects of the decision to dismiss.
42. In order to decide whether the dismissal is fair or unfair, having regard to the reason shown by the employer, the Tribunal must consider 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 that question shall be determined in accordance with equity and the substantial merits of the case (section 98(4)). It is quite clear from decisions such as that in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the Tribunal therefore is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. Quite simply, if the dismissal falls within that band, then the dismissal is fair; if the dismissal falls outside that band, it is unfair. That decision was subsequently approved by the Court of Appeal in Post Office v Foley [2000] IRLR 827. It was emphasised that the process must always be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to the Tribunal's own subjective view of what they in fact would have done as an employer in the same circumstances.
43. In a claim of wrongful dismissal, essentially a breach of contract claim under the Extension of Jurisdiction Order 1994, the test is whether the Claimant has acted in such a way as to justify summary dismissal. If he has not, then he would be entitled to notice pay.

CONCLUSIONS

44. I concluded that the reason for dismissal was conduct. Although the Claimant had suggested that perhaps it was his terms and conditions, and more

particularly his pay, which led to his dismissal, he presented no evidence to support that assertion. I was not drawn to his contract of employment. I was not told what he was paid and what others were paid. In view of the circumstances that were investigated by the Respondent and which led to the disciplinary hearing, and in view of the Claimant's admissions about all of the breaches that he had carried out on that day, I concluded that there was ample evidence to show that the reason for dismissal was conduct.

45. I therefore considered the test in **Burchell**. I concluded that Mr Barnes had a genuine belief that there had been misconduct. That was absolutely clear from the investigation report and from the admissions by the Claimant himself. That belief was based on reasonable grounds following a reasonable investigation.
46. As far as the procedure was concerned, I concluded that the procedure was fair and that the Claimant was given every opportunity to put forward everything he wanted to say about the charges against him. He was also encouraged to put all of his points at appeal.
47. The nub of the case was really whether the Respondent made a reasonable decision to dismiss the Claimant. In other words, could it be said that no reasonable employer would have dismissed in these circumstances. The circumstances were that the a long-serving employee, who accepted that he had been fully-trained and who was fully aware of all of the detailed procedures attached to his job, failed in a number of respects on a particular job and left the train, or certainly the last vehicle, in a potentially unsafe position, without voluntarily reporting the situation to his manager. The fact that no accident occurred was not relevant. The length of the Claimant's service mitigated against him to a large degree, because he was expected to know exactly what he was doing and to do it properly and in accordance with the procedures. He accepted that he had not done so. Neither had he been completely frank with his manager until the manager raised it with him. The situation was compounded by the Claimant giving different versions of events during the investigation as to why he boarded the wrong train. In addition, he did not satisfy Mr Barnes nor Mr Griffiths that he had learned a lesson and that he would know how to proceed in future.
48. In all of those circumstances, I concluded that I could not say that no reasonable employer would have dismissed the Claimant. I concluded that a reasonable employer could reasonably have dismissed him. That being so, the dismissal was not unfair.
49. That claim was therefore dismissed.
50. Turning to the claim of wrongful dismissal, the test is whether the Claimant acted in such a way as to justify summary dismissal. I concluded that the Claimant's actions amounted to gross misconduct in the context in which this incident occurred and having regard to his experience and training. There could have been serious consequences because of his actions. Despite realising his error,

he did not take the opportunity to immediately alert the Respondent to the situation. Taking all of those circumstances into account I concluded that the Claimant had acted in such a way as to justify summary dismissal.

51. Accordingly, the claim of wrongful dismissal was also dismissed.

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Employment Judge Wallis
24 March 2017