



EMPLOYMENT TRIBUNALS

Claimant: Mr G Moore

Respondent: Great Bear Distribution Limited

HEARD AT: BURY ST EDMUNDS **ON:** 15th & 16th May 2017

BEFORE: Employment Judge Postle

REPRESENTATION

For the Claimant: In person

For the Respondent: Mr Scorer (HR Advisor)

JUDGMENT

1. The Claimant was unfairly dismissed.
2. The Claimant contributed towards his dismissal and his compensatory award is reduced by 20%.
3. The Respondents are ordered to pay compensation to the Claimant including Tribunal Fees in the sum of £11,307.71.

REASONS

1. The Claimant brings claims to the Tribunal on the grounds that he was unfairly dismissed on the 10th October 2016, particularly he claims that; the decision to dismiss him was procedurally flawed, that he was subjected to inconsistent treatment, no mitigation of his length of service

was considered or his unblemished record, or alternative sanctions rather than dismissal.

2. The Respondents defend the claim on the grounds that the Claimant was dismissed for gross misconduct.
3. In the course of this Tribunal we have heard evidence from Mr Greaves, Shift Supervisor, Mr Pursglove who conducted the Disciplinary Hearing, and Mr Hollingsworth who conducted the Appeal. For the Claimant we heard evidence from the Claimant, from Mr Barratt a work colleague and Miss Hudson although her evidence was not challenged. All those witnesses gave their evidence through prepared witness statements, the Tribunal also the benefit of a bundle of documents consisting of 176 pages.
4. The facts of this case show that the Respondents is in business as a nationwide logistics warehousing and distribution service for manufacturers and retailers and it employs approximately 2,500 people across the UK.
5. The Claimant had been employed by the Respondents from the 16th May 2011 as a four-on, four-off Shift Supervisor at it's Desborough Depot. Throughout the Claimant's employment he had an unblemished record and appears to have been committed to the Respondents, clearly willing to go the extra mile covering sometimes shifts when other employees were absent. The Claimant was responsible for managing up to 60 warehouse operatives and 1 Team Leader, his main duties appeared to be managing the workforce and shift performance including managing what is known as the very narrow aisle trucks.
6. Following a fatality in the warehouse in January 2016 a new procedure was instituted by the Respondents for changing aisle procedure for these very narrow aisle trucks and we see that at page 88. The Claimant signed to say that he had read this new procedure, basically it requires Supervisors to oversee VNA aisle changes. The company appeared to expect the Supervisors or Managers would oversee the aisle changes and ensure that the VNA drivers knew what aisles they were allocated to, to ensure no fatalities or that two VNA trucks were not in the same aisle at the same time. What the document does not state is that any failure to adhere to it however minor would lead to summary dismissal or indeed any disciplinary action. Each driver of a very narrow aisle truck has a screen on his vehicle and that will also advise of the aisle to operate in. At the time of the fatality it would appear those responsible were not disciplined at the time or dismissed. In fact the evidence before the Tribunal is somewhat confusing Mr Pursglove is not aware of any dismissal following that fatality, Mr Hollingsworth said that he believed someone may have been dismissed much more recently but really couldn't say any more than that.

7. The Claimant was on duty at 1800 hours on the 5th October, he was due to complete it at 0600 hours on the 6th October and by all accounts that shift had been very busy, previously there had been a power cut and they were behind with their work on that shift. Around 0400 hours the Claimant moved some very narrow aisle trucks at the same time a Mr Oravan had asked the Claimant to get some pallets from the F chamber, the Claimant then walked to F chamber with one of the VNAs he had moved.
8. Sometime after 4.00am the Shift Supervisor asked the Claimant if he had spoken to Tom Dulan a VNA driver, the Claimant was unsure, the Claimant was advised he had misread his screen on his VNA and that driver started to enter into the wrong aisle. As soon as he realised his mistake, the driver stopped there was no injury or collision between the VNA drivers.
9. Following the above shift the Claimant was interviewed by Chris Balchin the Operations Manager and we see that interview at 67 at which the Claimant was asked his understanding of the VNA aisle change procedure and the Claimant indicated he was. The Claimant was asked whether he had told Dulan about the aisle change and initially then the Claimant said he had not told him. The Claimant says at the time he was not given any warning about this meeting and was somewhat flustered having not been placed in that position before.
10. Statements were then taken from a Tom Dulan which is undated and prepared by Mr Greaves and signed by Mr Dulan and he said "on changing aisle from C5 to C6 Tom was then allocated to C1 & C2, Tom said that he took a quick look at his ROT screen and thought he was C10. He stated he did stand up, he stated as he drove past the aisle he did check before reversing, he says he didn't see VNA which was already in aisle C10, he states that he heard no horn, he states that when he looked at PND he realised that at that point he was in the wrong aisle, he states that he still didn't realised another VNA in aisle he then returned to C1 which was where the aisle was allocated to him", he was not asked surprisingly whether he had verbal instructions to change aisles.
11. We then have a statement from Mr Greaves which doesn't really take us anywhere because he didn't actually see the incident and was working in his office at the time and apparently you can't really see the warehouse floor from the office.
12. Now as I said Mr Dulan was never asked whether in fact the Claimant instructed him verbally to change aisles, Mr Dulan seemingly was never disciplined, I've seen no evidence to that effect despite him not checking his screen and entering the wrong aisle and clearly there must be some duty on the VNA drivers also.
13. The Claimant was then suspended, he was invited to a Disciplinary Hearing by letter of 7th October from Mr Pursglove who was to conduct the Disciplinary Hearing, he blandly admits that although he was to

conduct the Disciplinary Hearing he did not read the letter before it was sent out, nor did he did not check it's contents before the Disciplinary Hearing, in fact his attitude towards the Disciplinary Hearing has to be said was somewhat blasé and casual. The letter did not include any of the evidence or witness statements taken, it did not include the edited CCTV footage or even the Claimant's note of the investigatory interview.

14. The above was despite during the course of this Hearing Mr Pursglove maintaining at paragraph 10 of his witness statement that these documents had been sent out prior to the Disciplinary Hearing. His evidence before this Tribunal was;

“They may have been included, I'm not certain, I've no idea whether the Claimant had the documents before the Disciplinary. I did not check at the Disciplinary, if I was referring to any documents at the Disciplinary I would have given them to him, with hindsight I should have showed the CCTV, no paperwork was provided at the end of the Disciplinary”

15. Finally Mr Pursglove accepts that he did not check with the Claimant whether in fact he had these documents which the Respondents may or may not have been relying on. The fact of the matter is he's entitled to have all of those documents.
16. The Claimant had prepared his submissions for the Disciplinary Hearing and we see that at 91, in which he sets out some background to some personal problems and the fact he's has an unblemished record with the Company. The Minutes of the Disciplinary Hearing are very short and shows that the Claimant had indicated he was not a hundred percent sure, “I told him the direction where he is going” reference to aisle changes and at the same time this was all going on the Claimant was being asked to get some pallets from the F chamber. The Claimant repeats “I'm not really sure, normally very persistent in filling or following the structure usually I stand there and wait for the driver to move”.
17. Mr Pursglove accepts that he took into account that Mr Dulan knew he was on the wrong aisle and had not looked at the screen, but he never went back to check with him or indeed other drivers whether this happens on frequent occasions.
18. The Disciplinary Hearing concludes and the same day Mr Pursglove or somebody on his behalf, I suspect sends out a letter of dismissal refers to gross misconduct, however there is no mention of any consideration that he may have given for mitigation, length of service, unblemished record, lesser sanctions, demotion, he simply says your explanation is unacceptable and you are dismissed on two grounds. The odd thing about the dismissal on two grounds is where it refers to a Health and Safety brief Mr Pursglove couldn't even identify what that document was, but he was adamant that the document did exist, in fact the reality is no separate document does exist it simply is the VNA Vehicle Changing

Aisle Procedure. So one wonders whether the reference to 2 documents was an attempt by Mr Pursglove or of those writing the letter for him to in fact 'beef up' the dismissal.

19. The Claimant was given a right of appeal and he does so at 99, and one of the grounds for appeal is since the fatality there have been occasions of VNAs occupying the same aisles and no one has been disciplined on those occasions. The Claimant points out that he has an unblemished record and doesn't feel that that was taken into account. The Claimant submits further grounds for appeal at 101 providing more detail.
20. The Claimant's Appeal is conducted by Mr Hollingsworth but it's not clear whether that Appeal was by way of a re-hearing or a review of the sanction. It's accepted that the Claimant had an opportunity at that hearing to put forward his views, but it is only prior to the appeal hearing following a request by the Claimant for evidence that he finally receives at 109 the edited CCTV, the witness statements that were taken, Health and Safety brief in relation to the VNA Aisle Changing Procedure and various other documents which of course should have been sent prior to the Disciplinary Hearing.
21. The CCTV which the Claimant had requested the full version not the edited version which he was entitled to ask for, may have thrown some light on whether he was seen talking to Mr Dulan or not. Mr Hollingsworth on checking found out that the CCTV as is often the case is wiped after 21 days, and no attempt had been made to preserve the CCTV pending the Claimant's appeal.
22. It is also not clear whether Mr Hollingsworth from his evidence had the Claimant's personnel file in front of him, and he accepted there was no other Health and Safety brief as referred to in the dismissal letter.
23. Mr Hollingsworth in one sense was candid and said "there was no account of the length of service or unblemished record, in effect no lesser sanction of demotion, to his mind as there was a fatality earlier in the year there was nowhere to go, dismissal was the only sanction." He did not consider investigating the inconsistencies as raised by the Claimant in his evidence. He did not uphold the appeal and sets out his reasoning in a letter at 131.
24. The law on this is uncontroversial, under Section 98(2) (Employment Rights Act 1996) a potentially fair reason to dismiss, one of which is conduct – that's not the end of the matter, one then has to have regard to the overall fairness as set out at Section 98(4) and in a conduct case such as this one has regard to the leading case of *British Homes v Burchell* which sets out a well trodden path way to follow namely, the employer must show that:-

(1) It believed the employee was guilty of misconduct.

- (2) It had in mind reasonable grounds to sustain that belief, and
- (3) At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

Finally, that the decision to dismiss was within the bands of reasonable response of a reasonable employer. When considering the overall fairness one has to look at the right of a Claimant, the review however irrelevant a Respondent may think all the evidence they have in their possession. They ought to consider the mitigation, they ought to consider which they didn't in this case that there might be inconsistencies, there appears certainly from the evidence no attempt to consider alternatives or lesser sanctions to that of dismissal.

25. I also remind myself it is not for me to substitute my own view but one I repeat has to look at the overall fairness.

Conclusion

26. I do question whether it is in fact a conduct dismissal, gross misconduct because even if it is right that the Claimant didn't instruct verbally Mr Dulan to change aisles, it is arguable that must cast some doubts as to whether that falls within gross misconduct or whether in fact that is a training issue.
27. Bearing in mind also the VNA driver Mr Dulan has a screen and there must be some responsibility on drivers given the background of the fatality earlier in the year for them to check their screen before entering aisles. No one spoke to Mr Dulan or indeed other drivers to see whether this regularly happens. It is also clear to me that the Disciplinary Officer Mr Pursglove was not taking the disciplinary seriously. He had a cavalier approach to it. He doesn't even on his own evidence bother to read the letter that is sent out to the Claimant inviting him to a Disciplinary Hearing. He doesn't check to see whether the documents that the Respondents had in their possession and they were certainly using were sent to the Claimant. How much reliance they placed on them is a different matter, he never checked to see whether the Claimant had them with the letter inviting to Disciplinary Hearing and, he didn't check at the outset of the Disciplinary Hearing. Indeed doesn't in fact check at any point during the Disciplinary Hearing whether the Claimant's received these documents.
28. There is the confusing evidence of Mr Pursglove as to what the second Health and Safety brief is, to which he relied upon as grounds justifying the dismissal which turns out not to exist at all. The Disciplinary Hearing lasted 15 minutes at most – no evidence that he considered alternatives, final warnings, length of service, demotion, the mitigation and in particular inconsistent treatment, by that the fact that a fatality occurred earlier in the year but nothing seems to have happened to those

responsible at the time by way of any disciplinary. The fact that Mr Dulan, the driver had also made a mistake, and there is no evidence before me that he was in any way disciplined or suffered a sanction of any kind. So taking all those matters into account the decision to dismiss the Claimant was unfair.

Remedy and Compensation

29. We now turn to Remedy and Compensation. At which point both parties were able to further address the Tribunal on the question of mitigation, future loss and contribution.
30. The Claimant argues it will take some 12 months to find suitable alternative employment at the same level. The Respondent's counter that with their view there are a number of vacancies in the Claimant's area which he could apply and should therefore be able to obtain suitable alternative employment within 8 weeks.
31. So far as contribution is concerned the Claimant accepts some responsibility for the position he finds himself in today, but feels any deduction should be at a small percentage.
32. The Respondents believe that the contribution should in the region of 45%.
33. It is accepted that given the fact the Claimant found alternative employment albeit through an Agency fairly soon after his dismissal that the issue of failure to mitigate is not pursued by the Respondents.
34. It is agreed between the parties that the Claimants net income per month with the Respondents was £1,813.24 which equates to a weekly sum of £418.44. It was also agreed that the Claimant's average income from his Agency work is £250 per week. The following awards were therefore made:-

Basic Award

Given the Claimants age at the date of dismissal and the number of complete years. £3,562.50

Immediate Loss

In this respect the Respondents confirm that the Claimant was paid to the end of October, and the Claimant confirmed that this was the case. Therefore immediate loss runs from the 1st November 2016 to the date of today's hearing 16th May 2017, that is 29 weeks at the Claimants weekly income with the Respondents equates to £12,134.76 less 29 weeks at £250 which equates to £7,250 the Claimant's net immediate loss is £4,884.76

Future Loss

Dealing with future loss having regard to the buoyancy of the labour market and given the fact that I have every confidence the Claimant will obtain permanent full time work in the very near future I have assessed the future loss at 12 weeks and that equates to £5,021.28 less income received in the interim period £3,000 gives a balance of £2,021.28. £2,021.28

It is agreed that the Claimant's pension loss per week is £22.43, that is the Employers contribution and that equates to £650.47. £650.47

The total excluding the basic award is £7,556.51

Having considered that the Claimant accepts he is in someway responsible and considering the lack of any disciplinary against the driver, and the fact that it was never made clear any breach of the VNA Aisle Changing Process would lead to disciplinary action or indeed summary dismissal the contribution for blameworthy conduct I assess at 20%, that is £1,511.30 gives a balance on the immediate future loss and pension loss of £6,045.21.

35. The award is therefore as follows:-

Basic Award	£3,562.50
Immediate future loss, pension loss and deduction for contribution.	£6,045.21
Loss of Statutory Rights	£500.00
Re-imburement of Tribunal Fees	£1,200.00
Total award payable by the Respondents to the Claimant is:-	<u>£11,307.71</u>

36. The award is subject to recoupment for the period 2nd to 22nd November 2016.

Employment Judge Postle, Bury St Edmunds.
Date: 10 July 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS