EMPLOYMENT TRIBUNALS

Claimant: Mr S Taylor

Respondent: SMC Pneumatic UK Ltd

HEARD AT: CAMBRIDGE ET **ON**: 13th & 14th June 2017

BEFORE: **Employment Judge G P Sigsworth**

REPRESENTATION

For the Claimant: In person

For the Respondent: Mr R Dennis, Counsel.

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant was not unfairly dismissed.

2. No order is made as to costs.

REASONS

1. The Claimant brings a claim for unfair dismissal. The dismissal is admitted by the Respondent, and the reason given for it is conduct, a potentially fair reason. Unfair dismissal is denied. The Tribunal heard oral evidence from the Claimant, and on the Respondent's behalf were called two witnesses. These were Mr Clive Norris, regional sales manager; and Mr Dave Westbury, operations manager. The Tribunal was referred to documents in an agreed bundle of documents of some

300 pages, which were read and taken into consideration as was appropriate. At the end of the evidence, the Claimant and Mr Dennis provided written submissions, and they made oral submissions also. Oral Judgment with Reasons was delivered.

FINDINGS OF FACT

2. The Tribunal made the following relevant findings of fact:-

(1) The Respondent's business is as a component manufacturer of automation products. There are 400 employees in the UK, based in Milton Keynes, with a national sales force. The Respondent has a Japanese parent company. The Claimant was employed by the Respondent as an assembly worker, according to his contract of employment, but at the time of his dismissal was working as a semi skilled machine operator. He also held a fork lift truck licence and undertook fork lift truck duties as required. He began his employment with the Respondent on 3rd February 1998, and his employment ended on 2nd December 2016, when it was terminated for alleged gross misconduct.

(2) At the date of his dismissal, the Claimant was the subject of a final written warning, dated 10th August 2016, and live for 12 months, for a health and safety related issue – the use of a Kesto saw which had been put out of use following a Health and Safety Executive visit and on which was placed a 'Do Not Use' sign. The Claimant removed the sign and used the saw, apparently believing that as the managers had looked at it and it did not appear to him to be padlocked or condemned it was alright to use it. The Claimant sought to appeal his final written warning, but his appeal letter was received one day late and therefore the appeal did not go ahead.

(3) As the reason for the Claimant's dismissal, the Respondent relies on three health and safety incidents alleged to have occurred on 19th October 2016, while the Claimant was driving a fork lift truck. The investigation report describes incident 1 as being when an employee, Abigail Baker, was walking in a walkway in the premises when the Claimant on a fork lift truck veered into the walkway forcing her to flatten herself against the racking. Ms Baker believed that the Claimant saw her in the walkway as they made eye contact, but did not move to stop or slow down. Mr Taylor said that he did not recall the incident and then said that it did not happen. The second incident was the Claimant hitting an EMCO machine with his forks. The Claimant admitted that this collision had occurred, but that he only lifted machine and had not dislodged it. The Respondent inspected the machine and found that the bar feed had been misaligned, and also the machine itself as the feet had been moved. The approximate cost of repair was £450. The third incident relied upon was a colleague seeing the Claimant on the fork lift truck banging the forks of the truck onto the wheel

arches and ignoring the warning bleep, and putting the forks in narrow to go between the wheel arches and dropping the forks at full speed until they hit the floor. The Claimant denied doing this. The investigation report was written by Ms Hayley Walker, the HR manager who conducted the disciplinary investigation. She received the accident investigation report which had obtained witness statements, taken photographs and made a recommendation for disciplinary action. However, Ms Walker conducted her own investigation, interviewing the Claimant, Mr Darren Humphries, the Claimant's team leader, Ms Baker, Mr Morris (the banging of the forks on the floor) and Mr Steve Clark (the EMCO machine operator). Her report is dated 14th November 2016. It concluded that it would be reasonable to say that on the day in question the Claimant was acting unusually when driving the fork lift truck as two people confirmed that he was normally a good driver. However, more than one person got the impression that he was unhappy about carrying out the task he had been instructed to do by his team leader. The possibility was that the Claimant was behaving erratically with a fork lift truck due to his mood, believed Ms Walker. She recommended a disciplinary hearing to consider whether he might be guilty of carelessness at work and/or any act which endangered the health and safety of the employer or another person and/or serious breach of the company rules including health and safety. She recommended that a relevant manager hold a disciplinary hearing as soon as possible.

(4) The Claimant continued to drive the fork lift truck until 21st October 2016, and then had a week's holiday. His licence was suspended on 31st October 2016 on his return to work from that holiday. He was suspended from work altogether by Ms Walker on the instruction of Mr Westbury, following a meeting with her on 10th November 2016, and pending her investigation. The Claimant's case to the investigation was that incident one did not happen, that incident two did occur although the machine was lifted but not moved, and incident 3 was denied.

(5) The Claimant was asked to attend a disciplinary hearing, which was re-scheduled and heard on 28th & 29th November 2016. The three charges identified were set out in the letter asking the Claimant to attend the meeting, and he had received in advance all the relevant documents including the witness statements and findings of the investigation. He was told he could call witnesses and produce documents at the hearing, and that he could have a companion, a trade union representative or a colleague. He was also told that a possible outcome of the meeting was summary dismissal for gross misconduct.

(6) In the meantime, the Claimant made two formal complaints or grievances. The first concerned the alleged dangerous fork lift truck driving of a colleague. The second concerned a Ketso saw

allegedly being used by someone not trained to use it. The first grievance was investigated by Ms Walker after the Claimant's dismissal. Those who the Claimant had identified as witnesses were interviewed, and said that the Claimant's allegation was untrue and/or they had no recall of the matter. The second allegation regarding the Kesto saw was investigated, but the trainee was being supervised, although may be not by a Kesto trained person. Also, by the date of the disciplinary hearing, one of those the Claimant complained about had made a counter complaint against him.

(7) The Claimant requested that verbatim notes of the disciplinary hearing be taken by the note taker and they were. Mr Norris was the disciplinary hearing manager. He had the accident investigation report and documents and Ms Walker's report and documents. The meeting began at 4.15 on the afternoon of 28th November 2016, and ran through to about 6.30pm and then re-convened the next day. Mr Norris took the view that the main issue to consider was the incident with Ms Baker. Mr Norris had the Claimant's word against hers. So, he arranged a meeting with Ms Baker. She confirmed the incident as she described it to the investigation. Mr Norris asked her whether there was anyone in the business who disliked the Claimant and/or might try to influence her decision or force her to give false testimony, and she said no. Mr Norris asked her whether she had any previous dealings with the Claimant and she said no. Mr Norris explained to her the severity of her accusations and informed her that the Claimant could potentially lose his job as a result of her evidence. If it was discovered that she was not telling the truth, she was told she would be subjected to disciplinary procedures. Ms Baker confirmed that the incident had taken place. Mr Norris believed her, and could not find any reason to doubt what she had said as she had no reason to lie, and so he concluded that the event had occurred. It is fair to say that the notes of that meeting do not reflect what Mr Norris said in his witness statement, and are simply four lines, viz Mr Norris sets the context of the meeting by explaining that it is regarding Simon Taylor and that he had an additional question about the incident – did this incident really happen? Answer – yes.

(8) So far as incident 2 was concerned, the collision between the Claimant's fork lift truck and the Emco machine, Mr Norris found it to be a genuine accident and recommended no further action.

(9) So far as incident 3 was concerned, Mr Norris found that it happened as set out in the investigation report. He would have recommended a written warning, on the basis that it was in line with wilful damage to company property being misconduct in the disciplinary policy.

(10) So far as incident 1 is concerned, Mr Norris found that it had happened on the balance of probabilities. He believed it to be a serious breach of health and safety. By reference to the disciplinary policy and the examples given therein of gross misconduct, then this would be any act which endangers the health and safety of the employee or another person. As the Claimant had offered no explanation or mitigation for the incident, Mr Norris felt that the appropriate sanction was summary dismissal. Even if there had been mitigation, the fact that the Claimant was subject to a final written warning for a health and safety related matter meant that summary dismissal was still the appropriate sanction, said Mr Norris in the dismissal letter. Mr Norris told the Tribunal that the Claimant encroached on the walkway and nearly hit an employee, and would have done so if Ms Baker had not taken evasive action. Mr Norris said that he had little tolerance for health and safety matters, as he had seen too many accidents.

(11) The Claimant appealed the decision to dismiss him. His appeal was heard by Mr Westbury, who was senior to Mr Norris and experienced in conducting disciplinary hearings and appeals, and said he was always supported therein by HR. The appeal hearing was rescheduled from 22nd December 2016 to 10th January 2017 at the request of the Claimant. Mr Westbury was provided with all relevant documents. At the start of the hearing, the Claimant was asked whether he wanted a companion and he said, no. Mr Westbury explained that the purpose of the hearing was to hear the Claimant's grounds of appeal and consider any new evidence he produced, and to assess whether the decision to dismiss him was fair. The Claimant had every opportunity to say what he wanted to, but essentially he had no new evidence.

(12) Mr Westbury then adjourned the meeting and told the Claimant that he would aim to get an appeal outcome to him within 14 days (which he did). Mr Westbury spoke to Ms Baker, although there were no notes of that conversation. He concluded that Ms Baker had no reason to lie, she was not vindictive and was very factual about the events of that day. Mr Westbury also spoke to Mr Humphries and inspected the Emco machine, noting that the feet were misaligned and also the bar feed, so in his view the machine had been moved by the collision. He agreed with the conclusion of Mr Norris that the incident with Ms Baker did occur, and that there was no evidence or explanation from the Claimant that it had not (just a denial that it had happened at all). Mr Westbury believed that a verbal warning might have been in order for the Emco damage. He also conducted a review of the evidence about the grievances, and quickly concluded that the outcome should stand. Mr Westbury upheld the decision to dismiss the Claimant. One fact in his mind informing his conclusion that Miss Baker was speaking the truth, as he told the Tribunal, was the sequence of events that day. The Claimant drove the

forklift truck recklessly or negligently on the basis of all three incidents. Mr Westbury also took into account the Claimant's final written warning. However, even if the Claimant had not had such a warning, Mr Westbury would still have upheld the decision to dismiss him.

THE LAW

3. The law relating to unfair dismissal is well established.

By section 94(1) of Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer.

Under section 95(1)(a), for the purposes of the unfair dismissal provisions, an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice).

Under section 98(1) & (2), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and in the context of this case that it relates to the conduct of the employee. Conduct is the reason being relied upon by the Respondent. In *Abernethy v Mott, Hay and Anderson [1974] IRLR 213, CA*, it was held that the reason for a dismissal is a set of facts known to the employer or beliefs held by him which caused him to dismiss the employee. By section 98(4), where the employer has shown the reason for dismissal, the determination of the question whether the dismissal is fair or unfair having regard to that reason:

(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.

4. The law to be applied to the reasonable band of responses test is well known. A Tribunal's task is to assess whether the dismissal falls within the band of reasonable responses of an employer. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. I refer generally to the well known case law in this area; namely, *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, EAT*, and *Foley v Post Office; HSBC Plc v Madden [2000] IRLR 827, CA*. The band of reasonable responses test applies equally to the procedural aspects of the dismissal, such as the investigation, as it does to the substantive decision to dismiss – see *Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA*. As far as the investigation is concerned, and the formation of the reasonable belief of the employer about the behaviour, conduct or actions of the employee concerned, then I have in

mind the well known case of *British Homes Stores Ltd v Burchell [1978] ICR 303, EAT*. Did the Respondent have a genuine belief in the Claimant's conduct formed on reasonable grounds after such investigation as was reasonable and appropriate in the circumstances?

In *Taylor v OCS Limited [2006] ICR 1602, CA*, it was held that if an early stage of a disciplinary process is defective and unfair in some way, it does not matter whether or not an internal appeal is technically a rehearing or a review, only whether the disciplinary process as a whole is fair.

5. I was referred to the case of *Wincanton Group Plc v Stone [2013] IRLR 178, EAT*, concerning the entitlement of an employer to take into account a previous warning. In that case, the President (Langstaff J as he then was) said or held that:

> 37. We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of some of an earlier warning. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then;
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> (1) The Tribunal should take into account the fact of that warning.
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> …
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> (3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning when some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.
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> (4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and

therefore the Tribunal, should be alert to give proper value to all those maters.

…

(6) A Tribunal must always remember that it is the employer's act that it to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

The decision of *Wincanton v Stone* was re-enforced by the Court of Appeal in *Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374, CA*. There it was held that the function of the Tribunal is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance which a reasonable employer could reasonably take into account in a decision to dismiss the Claimant for subsequent misconduct. It is relevant for the Tribunal to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material facts in assessing the reasonableness of the decision to dismiss by reference to, inter alia, the circumstances of the final warning.

CONCLUSIONS

6. Having regard to my findings of relevant fact, applying the appropriate law, and talking into account the submissions of the parties, I have reached the following conclusions;

(1) The Respondent has shown the reason for dismissal to be conduct. It was the Claimant's misconduct – as the Respondent saw it – that was in the minds of Mr Norris and Mr Westbury – his breaches of health and safety requirements – that caused him to be dismissed. This misconduct was a potentially fair reason for dismissal.

(2) I turn to the investigation and procedure generally. The Respondent followed their own disciplinary procedure, and it has not been suggested by the Claimant that they did not. This procedure was followed at the investigation point, at the disciplinary hearing and the appeal. I conclude that Mr Westbury was a proper appeal manager, and senior to Mr Norris and independent of events. Although he had counter signed the accident investigation report as Mr C Wood's line manager, recommending a disciplinary process, he was not involved in the subsequent disciplinary investigation by Ms Walker or the decision to dismiss by Mr Norris. The investigation obtained sufficient evidence to found the charges against the Claimant. Although the Ms Baker incident was one word against another, that was because there were no witnesses to

it, so no other evidence could have been obtained, beyond photographs of the location. The Claimant had the opportunity to put his case – at the investigation stage, at the disciplinary hearing and to the appeal hearing – and to call witnesses, if he had been able and wanted to. He had time and the necessary information on which to respond to the allegations against him. There was no unfairness in the procedure.

(3) I turn to consider the so called Burchell test. In particular, did the Respondent have sufficient evidence on which to conclude that incident 1 involving Ms Baker had occurred as alleged? The Respondent had two statements or meeting notes from Ms Baker. Both Mr Norris and Mr Westbury spoke to her themselves. It is perhaps odd that no or no proper minutes of those meetings were made. However, I heard from both of them and I accept their evidence that they were persuaded by Ms Baker that the incident did happen. What is striking is that;

Ms Baker gave a detailed and consistent account of the incident – the type of the fork lift truck the Claimant was driving, where it took place, the Claimant's direction of travel, etc. It was not disputed by the Claimant that he was driving such a fork lift truck, and that he would have been in the vicinity described by Ms Baker.

Photographs show that the fork lift truck could encroach onto the walkway and not hit Ms Baker if she flattened herself against the racking, as she said she did.

The Claimant has not suggested that Ms Baker would have any reason to make up the allegation. They hardly knew each other. Ms Baker had no reason to lie. As the Respondent says, the Claimant on a final written warning had good reason to deny that the incident occurred.

(4) Further, there was the evidence of the Claimant's mood on that day, and also of the other incidents that occurred while he was driving the fork lift truck. These matters point to a negligent or reckless attitude on his part – driving the fork lift truck so badly as to endanger the health and safety of others and risk damage to property. The Claimant admitted the Emco machine collision, which was a good example of his negligent and reckless driving. I conclude that the Burchell test has been satisfied.

(5) The final written warning was also for a health and safety matter. Although the Claimant seeks to challenge it, and gives reasons why he believed it was alright to use the saw, the Respondent reasonably believed otherwise. The Claimant admitted that he removed the 'Do No Use' sign from the saw and used the saw. He did not ask anyone if it was in order to do so, which would have been a sensible thing to do. He was not entitled to rely on the fact

that it was not padlocked. The sign was a clear enough indication that he should not use it. He had to switch on the power and remove the sign in order to use the saw. In any event, on the case law, I am not entitled to go behind the facts of the final written warning to re-open the circumstances in which it was issued, as it has not been established that the final written warning was given for an oblique motive or was manifestly inappropriate. I must therefore assume that it was valid.

(6) The decision to dismiss. Mr Norris did take into account the Claimant's length of service. However, incident 1 was a serious breach of health and safety, putting Ms Baker at risk of serious injury. Mr Norris was apparently a stickler for health and safety matters, as an employer is entitled to be in the sort of potentially dangerous working environment in the Respondent's factory. Because the Claimant denied the incident took place, there was no explanation or mitigation for it. Mr Norris also had in mind the other incidents that day, which indicated a negligent and reckless driving of the fork lift truck, one of which would have merited a written warning. Although Mr Norris said that he focused on the Ms Baker incident in reaching his decision to dismiss the Claimant, he did take into account the final written warning to some extent, and he was entitled to do so. A final written warning always implies – on the case law – that further misconduct will often and usually be met with dismissal. Mr Westbury said that he did take into account the final written warning in his decision to uphold the dismissal.

(7) I stress that I cannot substitute my view of what should have happened to the Claimant for that of the Respondent. The Respondent's managers must be taken to know their own business, and its risks and dangers from a health and safety viewpoint. Once they had reasonably decided that the Claimant was guilty of misconduct alleged (particularly with regard to Ms Baker), and taking into account the final written warning to the extent they did, dismissal, even summary dismissal, became an appropriate sanction. The Claimant was not treated inconsistently with 'Cav', as after a disciplinary investigation into that matter there was no evidence to support the Claimant's allegation. Therefore, I conclude that the decision to dismiss the Claimant was within the band of reasonable responses and was fair.

COSTS

7. The Respondent made an application for the Costs of the proceedings pursuant to Rule 76(1)(b) of the Employment Tribunals Rules of Procedure 2013. They alleged that the Claimant had reasonable prospect of success. The evidence and findings of the Tribunal have confirmed that. I take into account a number of factors. The Claimant was not represented at this hearing although he had taken legal advice. If that legal advice was that he had a reasonable claim, then he cannot

be blamed for that or punished in costs because of that advice. The Respondent did not themselves believe until this hearing that the Claimant had no reasonable prospects of success, because they would have sent him a cost warning letter that is common in these cases. Further, they could have made an application for a Preliminary Hearing at an early stage on the basis of the claim having no reasonable prospects of success, as is often done. The allegation that the Claimant had no reasonable prospects of success is not pleaded in the response. Further, the Claimant has really no means with which to pay the £11,000 plus pounds that the Respondent is claiming. Net earnings of some £1,170 per month, and his outgoings, even before his wife pays the council tax and for there vehicles, amounts to £1,136 per month. He has no savings. I also have in mind that the Respondent has the burden of proving the reason for dismissal in this unfair dismissal case. The Claimant was summary dismissed after 18 years service, which arguably is a tough decision. It was necessary to hear the evidence in support of that decision, before reaching a conclusion about it.

8. In the circumstances, no order for costs will be made.

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Employment Judge G P Sigsworth, Cambridge.

DATE : 21st July 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS