



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr B Owen

**Respondent** Newmoor Group Limited

**Heard at:** Mold **On:** 10 & 11 April 2017

**Before:** Employment Judge S Davies (sitting alone)

**Members:**

**Representation:**

Claimant: Mr G Edwards, legal executive

Respondent: Mr J Merry, solicitor

## JUDGMENT

It is the judgment of the Employment Judge sitting alone that the Claimant was:

1. unfairly dismissed; and
2. wrongfully dismissed.

## REASONS

1. Judgment with full reasons was given orally at the hearing; these written reasons are produced at the request of the respondent.
2. Judgment on remedy was made by consent in a judgment dated 11 April 2017.

### Issues

3. what was the reason for dismissal; the Respondent asserts this was conduct, whereas the Claimant suggests an ulterior motive in that he was sacked because his brother was bringing a personal injury claim against the Respondent;
4. with regard to 'belief' the Claimant suggests there is no genuine belief in his misconduct and that there was an attempt to discredit the Claimant as a witness of truth in the personal injury claim;
5. as for the reasonableness of the disciplinary investigation I was asked to consider issues including:
  - a. the delay in instigating disciplinary procedures,
  - b. the delay in interviewing witnesses,
  - c. the motives of witnesses responsible for set up of the machine at which the Claimant's brother had an accident,
  - d. the fact that notes of meetings with the Claimant were not confirmed by him as being accurate,
  - e. the adequacy of trials carried out on the machine; in particular issue was taken with an alleged lack of precision as to when the roll he was working on was changed and the size of the roll at the time of the accident.
6. it is asserted that the grounds for dismissal are affected by the inadequacy of the investigation;
7. turning finally to **Polkey** and deductions, the Respondent asserts that if delay was found to be a factor affecting fairness, that the Respondent would have dismissed the Claimant in any event.

### Hearing

8. I heard from the Claimant and on his behalf from his brother Mr T C Owen (formerly employed by the Respondent). For the Respondent, I heard from Mr Russell Lawson, Production Manager. I also read a witness statement from Mr Toby Morris, Managing Director, who did not attend due to medical conditions. I place less weight on the evidence provided in written form only.
9. It was notable that the Respondent elected not to call certain witnesses in circumstances where for example, the veracity of their meeting notes was challenged and there were factual disputes as to who invited whom to a certain meeting.

10. I was referred to an agreed bundle of documents and I was also shown some video evidence of machine trials. References to page numbers are to documents in the bundle.

### **Background**

11. The Respondent manufactures wall coverings; it is an international business. The Claimant and his brother worked in production on the shop floor, in a role described as "pot man"; this work including taking paste from a hopper and putting it onto a roll of material as it passed through machinery.

12. The Claimant had 27 years' service and, prior to 2011, had not received any warnings. There were 2 minor warnings on his file after that date, but these were not taken into account by the Respondent when dismissing him.

### **Alleged accident**

13. The Claimant's brother, Mr T C Owen, alleges he suffered an accident on 28 January 2015 which is now subject to pre-action stages of a personal injury claim, yet to be issued. As part of that pre-action stage of the claim the Respondent has accepted liability for the personal injury and as of today has not yet applied to the Court to withdraw that acceptance of liability.

14. The Claimant and his brother worked next to each other on the shop floor during the evening shift on the 28 January 2015. The Claimant says that he heard an allen key fall from his brother's machine; this that made him look over to see his brother attempting to unhook an air pipe around the machine and that his hand was between the parts of that machinery.

15. Both brothers say this incident seems to have happened as a result of a string breaking; the Respondent accepts that a string was used to restrain a break arm on the machinery. Since the accident the Respondent has replaced that string with a chain. It is therefore established as an accepted fact that there was a string attached to the machine and the string broke.

16. Following the incident, Mr T C Owen carried on with his shift for a few hours that evening, although it is not clear in what capacity. He then attended hospital later in the evening. He took sick leave for a number of days, returned to work for a few weeks and then was off again on long term sickness absence. He provided GP sick notes during his absence and was under the care of a consultant. Mr T C Owen was also seen by the Respondent's occupational health advisers, who provided reports

referring to pain and swelling on his hand, confirming that he was not fit (for example page 76).

### Mr T C Owen's dismissal

17. The Respondent began to have doubts about the veracity of what Mr T C Owen said about the accident; they instructed a private investigator to conduct video surveillance and attach a tracker to his car. Occupational health was asked to comment on evidence provided by the private investigator; at page 93, the OH nurse suggested she felt that Mr T C Owen would have been fit to work. Her conclusions and the other evidence gathered culminated in Mr T C Owen's dismissal in March 2016 for faking the accident or exaggerating his symptoms.

### Internal investigation

18. Returning now to what happened immediately after the accident. The accident was recorded that evening by Mr Richard Ingrams, page 52; "*– accident happened by a break arm on an air bar shaft swing around. Cause:- string was tied to this break arm, it broke and swung around catching Clive's right hand. ....Injury to thumb base area. Went to hospital to have it checked over as it had swollen up later in the evening.*"

19. A report was made to the HSE (starts at page 65). It is notable that there is no reference to the string within that report.

20. An internal investigation was also carried out by the Respondent (starts at page 68). The document is signed by Mr Lawson, Mr T C Owen and Ms Reddy the Health and Safety Officer at page 73. I note that at page 70 of that report in the section which says "Contributing actions and personal factors" the following entry is included, "*during the discussion with Clive on 4 February 2015 he stated that he should not have tried to catch the air pipe, he should have just let it fall. There was in fact no need to attempt to catch the break arm as it would have been stopped from rotating by the stop bar.*" I will return to that part of the report in a moment.

21. The respondent accepts that, for the purposes of their investigation, the Claimant was not asked to check the accuracy of notes taken of conversations with him on 29 January or 5 February 2015. The Claimant disputes the content of the latter as being accurate. I was referred extensively to pages 64 and 74, which disclose disparity in what is recorded as having happened and when.

22. The disparities relate in principle to the meeting on 5 February 2015, in that there is a dispute as to who invited who to the meeting and secondly

the content of what was said. This to me is illustrative of the importance of ensuring that notes of such conversations are agreed by all parties.

23. The Claimant's witness evidence in this regard is at paragraphs 45 – 46. Paragraphs 44 and 45 were unchallenged; the Claimant asserted on 29 January 2015 that it was only Ms Reddy and Ms Jones that were present in the meeting. This was a short meeting which he described as taking 5 minutes. Mr Lawson in his evidence at paragraph 11 suggested that Ms Reddy's questioning was limited to 2 questions which were: "did you see the incident last night?" and "where were you at the time of the accident?"
24. Paragraph 46 of the Claimant's witness statement is disputed; it relates to who invited who to the meeting on 5 February 2015. Ms Reddy the Health and Safety Officer did not give evidence, which is surprising considering the dispute. Mr Lawson, at paragraph 11, says that he understands that the Claimant had asked to speak to Ms Reddy again. Mr Lawson was not a direct witness to this conversation and the Claimant denies this version of events saying that he was asked by Ms Reddy to attend another meeting. There is a reference in Mr Lawson's statement to the Claimant asking Dilwyn Morris to speak again with Ms Reddy. Mr Morris was not called as a witness.
25. I accept the Claimant's evidence that he was asked to attend the meeting on 5 February. I consider on the balance of probability that the record at page 64 is inaccurate in this respect. In coming to that conclusion, I take into account the document at page 74, which I think is ambiguous at best as to who was in attendance on 5 February. It could be read either way, but since it reflects the content of both meetings I conclude that "*Barry Owen was asked to attend a small meeting*" refers to the meeting on 5 February 2015.
26. Turning now to the content of the notes; both page 64 and 74 refer to the drop of the allen key, which the Claimant agrees was always asserted. The Claimant then disagrees that he used the word "trapped" with regard to his brother's hand (page 64) rather that his hand was between the brake arm and the frame (as recorded on page 74). There was no evidence before me as to when page 64 was created and I note again that the Claimant was not asked to agree these notes. There was no explanation from any direct witness who could have explained this discrepancy on behalf of the Respondent.
27. The Respondent started to have doubts about the veracity of Mr T C Owen's account of the accident by summer 2015, instructing a private investigator. Subsequently in 2016, an internal investigation starts with regard to Mr T C Owen. The Respondent takes no action to speak with the Claimant until February 2016, more than a year after the accident.

28. The Claimant and others who were working on the shift on 28 January 2015 were interviewed on 18 February 2016; handwritten notes at 98-99 and typed notes of the other witnesses at 101-104.
29. There are again discrepancies in the Claimant's account between his version of events and the handwritten and typed version of the notes at 96 and 98. There is reference in the Respondent's notes to the Claimant saying he saw the string break. The Claimant denies this; rather he asserts that what he said at the time was that he had seen the string was broke. Again, the Claimant was not asked to verify the notes as accurate. I consider this is a fundamental flaw in the process when the use of words is so key to the outcome.
30. There are no other witnesses who saw the alleged accident with Mr T C Owen and I referred myself to pages 101-104 to consider what the other employees said.
31. Mr Derek Edwards, page 101, admitted that he had changed the string on the machine in question 2 weeks previously but does not recall what was running that evening. This is unsurprising since it was a year ago.
32. Mr Kevin Davies, page 102, says he did not see the accident, but corroborates the Claimant's version of events as he says he heard the allen key drop and then saw Mr T C Owen jumping around as his hand was hurting.
33. Page 104 records two meetings with Mr Glyn Davies, who was the operator of the machine on which Mr T C Owen worked. In these accounts Mr Glyn Davies asserts that there were 400 metres left on the roll at the time and Mr Edwards had set up the machine earlier. He also implies ill motive on the part of Mr T C Owen as follows: "*GD also explained that there was only about 400 metres on the roll and not the amount that is shown in the photo. GD said it seemed strange that the string held in place through Derek's shift and only snapped when GD wasn't around - he noted that the first he knew about the accident was when CO wanted to go home which was several hours after the accident, he also noted that CO returned to work for about 3 weeks potting on and working with his hand before going off sick.*"
34. I accept the submission, made on behalf of the Claimant, that Mr Glyn Davies' motive in giving his evidence was not properly weighed in decision making. As a machine operator, there was a clear potential for repercussions for Mr Glyn Davies in circumstances where an accident had occurred, yet the reasons for accepting his opinion was not explained at all in the disciplinary outcome letter.

### Claimant's dismissal

35. After this investigation process, an allegation was put to the Claimant, in a letter of 7 April 2016 at page 116, that he had been dishonest in the evidence that he had given. It states with reference to Mr T C Owen's dismissal "*You will see that one of the reasons for the company's decision in respect of Clive is that the only person who claimed to have witnessed the accident was you, and that your evidence was considered to be inconsistent and was not believed. It is alleged that you did not witness the alleged accident and, accordingly, that the evidence that you provided to the company that is referred to above was deliberately dishonest.*"
36. A disciplinary meeting was convened, adjourned for some further tests to be carried on the machine, and then reconvened culminating in dismissal. The dismissal letter dated 16 May 2016 is at page 141 and I will return to the reasons provided for that dismissal in my conclusions.
37. The Claimant was offered a right of an appeal which he exercised; his appeal was rejected by Mr Morris who did not give live evidence to the Tribunal.
38. I was asked to make a specific finding as to whether the Claimant had been provided with minutes of the meetings that constituted his disciplinary process (referred to in the letter at page 146 which refers to them being enclosed). I note that no issue was raised about this until cross examination of the Claimant and on the balance of probabilities I conclude that the notes of the meetings were sent to the Claimant. This may be a matter of confusion on his part and does not indicate to me that he is being untruthful on this point.

### The law

Section 98(2)(b) Employment Rights Act 1996 (ERA) provides that "conduct" is a potentially fair reason for dismissal. The burden of proof is on the Respondent to show the reason for dismissal.

Section 98(4) ERA provides that *where the employer has shown conduct, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)— 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 shall be determined in accordance with equity and the substantial merits of the case.*

39. **BHS v Burchell [1978] IRLR 379** sets out the three stage test for fairness of a conduct dismissal:

- a) did the Respondent have genuine belief that the Claimant was guilty of misconduct at the time of dismissal? (Burden of proof is on the Respondent)
- b) was that belief based on reasonable grounds at the time of dismissal? (neutral burden of proof)
- c) at the time the Respondent formed that belief on those grounds, had it carried out as much investigation as was reasonable in the circumstances? (neutral burden of proof)

40. The Tribunal must consider whether the Respondent's investigation was such that it was reasonable in all the circumstances. A Tribunal should not substitute its own view of what a reasonable investigation should be; it should ask whether the employer's actions had been within the "band of reasonable responses" (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 (CA)**).

41. I was also referred to the cases of **A v B [2002] UKEAT 1167/01/1411** and **RSPCA v Crudden [1986] IRLR 83** with regard to delay and its effect on fairness. I also note that **A v B's** standard of reasonableness for investigation, in that it should be more diligent the more serious the repercussions for the person alleged to have carried out wrongdoing.

42. The Tribunal must consider whether or not the dismissal is a fair sanction to impose. The test is whether it was within the band of reasonable responses for the employer to treat the misconduct as a sufficient reason to dismiss (**Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**). The Tribunal must not substitute its own view on the action taken.

43. With regard to wrongful dismissal the Claimant need only establish that notice was not paid, which is accepted, for the burden of proof to shift to the Respondent to show on the balance of probabilities; that the employee did the act on which it relies, that the act amounts to a fundamental breach of contract and the Respondent dismissed for that reason.

## Conclusion

44. Dealing first with the reason for dismissal, I note the hurdle is low for a Respondent to establish a potentially fair reason.



45. I was asked to consider motivation; I do not accept that dismissal was carried out in order to 'cover up' the Claimant's brother's personal injury claim. That line of argument does not appear to me to assist the Claimant, as the personal injury claim will subsist regardless of the Claimant's dismissal.
46. The submission that dismissal may have been carried out to discredit the Claimant as a witness is more plausible. The Claimant's reaction to that being put to him in cross examination is not conclusive in my view - so he may not have fully understood the context of the question. Mr Lawson explained during cross examination that he was not involved in Mr T C Owen's personal injury claim, but I note that there may be an organisational pull to conform to the views of others, such as Mr Stevens who dismissed Mr T C Owen and particularly where Mr Stevens played such a major part in the disciplinary meeting for the Claimant (I make that observation from having read the minutes of the meeting). That said I consider that Mr Lawson was straightforward in giving his evidence and that he was motivated to dismiss for what he believed to be conduct rather than to discredit the Claimant as a witness. In reaching this conclusion I take into account that he adjourned the disciplinary meeting to carry out some further tests following which it was reconvened; this demonstrated his willingness to listen to what the Claimant said to him at the initial disciplinary meeting. I conclude therefore that the reason for dismissal was conduct and this is potentially a fair reason.
47. Turning to the process I must consider the test in **Burchell**. When considering the Respondent's 'belief', I was referred to the existence of the personal injury claim and the Respondent's admission of liability. I accept the submission made on behalf of the Respondent that a company may admit liability for personal injury claims for a variety of reasons on advice from their insurers. One of those reasons could be commercial grounds; I do not consider the admission of liability to be conclusive. Although it could be seen as inconsistent not to have withdrawn the admission in light of subsequent events, I note that the personal injury claim has not in fact yet been issued, so I conclude that nothing turns on this point alone. I consider that Mr Lawson's belief was genuine; the unfairness relates to the investigation and the impact that had on the grounds for belief.
48. Turning now to the investigation; I referred to Mr Lawson's letter, pages 141 and 142. The first reason for dismissal given is a lack of consistency in the Claimant's description of events. I reject the Respondent's submission, and the reasonableness of the Respondent's reason for dismissal, in this regard. The account given by a witness will depend on the questions they are asked. Accounts will change on successive occasions if different questions are asked and I note that the questions

asked were different over time. This consideration must be combined with the Respondent's total failure to obtain the Claimant's agreement to the content of their notes.

49. On this point, I was referred extensively to the evidence given about Mr T C Owen attempting to "hold the break arm" at the time of the accident. This was mentioned by the Claimant in the latter stages during his disciplinary process. The Respondent has submitted that not mentioning this earlier was indicative of untruthfulness on his part combined with him using the wrong arm when physically illustrating the motion during the disciplinary meeting. I note that the Claimant himself is right handed and I consider that the use of the hand during that physical demonstration is not conclusive of untruthfulness. It may just have been an error. Finally, I note that, at page 70, in the Respondents own contemporaneous internal investigation, there is a reference to stopping the break arm. It says there was in fact no need to attempt to catch the break arm. I think this is relevant because it must have been raised by somebody at the time in question and so lends credibility to the Claimant's account.
50. Turning now to the elapse of time between accounts. The Claimant was not asked to produce a full witness statement at the time of the accident; instead he had a quick chat and was not asked to confirm the notes of that discussion. He was then asked to recall events again over a year later. Memory of events is fallible. We reconstruct events when we recall them, no doubt that there will be some inconsistency over time when recounting events. I consider it is wholly unreasonable to rely on small differences in those accounts in light of the time elapsed and the failings in the Respondent's record keeping of evidence.
51. Turning now to the position of the allen key when it dropped, which was relied upon in dismissing the Claimant. I note that the Claimant carried out his own test of when the allen key might drop and the positioning of the brake arm at the time. Although this was an issue that he raised during the disciplinary it was not one of the further tests the Respondent carried out. In evidence Mr Lawson accepted that the natural pull of gravity would mean that there was an increased likelihood of the allen key dropping once it had gone past the 1 o'clock position. A test of this nature was simple; it could and should have been carried out. There would have been no substantial cost to the Respondent, other than a short amount of time, in circumstances where they had already carried out extensive other tests.
52. Mr Lawson referred to inconsistency in account with regard to the positioning of the air pipe; Mr Lawson preferred the evidence of Mr Glyn Davies, who did not witness the accident and whose motives were not properly considered, or if they were considered was not explained in the disciplinary outcome letter.

53. I was referred extensively to conflicting evidence about the size of the roll at the point of time that the accident happened and the impact that would have. This took up quite a significant portion of the hearing. The decision making on this point is only articulated in writing in the appeal outcome, page 156, although Mr Morris did not appear as a witness. The differing account is that Mr Glyn Davies offered his opinion that there were 400 metres left on the roll; this figure was provided more than a year after the incident in question. The Claimant, in contrast, suggested that around 3000 metres were left on the roll. The reason this is an important factor is; if the roll was small it would have been moving fast whereas if it was large it would have been moving slowly. However, the timing of the changing of the roll and the size are not factors that were properly investigated contemporaneously. Witnesses were not asked at the time and it is not referred to in the reports of 2015. The size of the roll only comes up as a factor in 2016 over a year later. The parties cannot be sure what size the roll was and the worth of the oral evidence diminishes on both sides over time. Factors such as hitches in production or specific incidents occurring on the night in question may have affected the speed at which the roll was processed. There are possible motivations on both sides for giving their opinion as to the size, however motivation only seems to have been considered at all with respect to the Claimant.
54. In this regard, I rely on **A v B** which requires a higher standard of investigation when the issue has more serious consequences for the Claimant and in circumstances where the allegation is denied. This is an honesty offence and has very serious implications for the Claimant. A higher standard of care is required in investigation for it to be reasonable.
55. Turning now to delay. Firstly, delay in instituting disciplinary proceedings; I note that the disciplinary process for both brothers could have been run in tandem. This is an organisation with sufficient resources, that different managers, or perhaps external assistance, could have been deployed. However, I accept the Respondent's explanation for delay; it wished to have a clear understanding of the outcome from Mr T C Owen, as the matters were inter-related. I do not consider that that approach is unreasonable and I note that the disciplinary issue with regard to the Claimant only came up latterly, once the investigation into Mr T C Owen had reached its conclusion and allegations were made against him.
56. The second way in which delay is relevant is in interviewing witnesses. I consider that this is a fatal flaw with regard to evidence of the incident itself. The elapse of time and different questions being asked will deliver differing accounts. In the context where the Respondent is relying on inconsistency as a reason for dismissal, delay makes the decision unfair.

57. The Claimant's dismissal was unfair. It follows from my conclusions that I also uphold the wrongful dismissal claim.

58. I find that the Claimant has not contributed to his dismissal.

59. I asked for submissions about **Polkey**; there was a submission that dismissal would have taken place in any event if delay was a factor. I reject that submission. If the quality of evidence collected was adversely affected by the delay it is not possible to reconstruct what would have happened if it had been properly investigated at the time.

60. It seems to me that the size of the roll point also potentially relevant to **Polkey**. As Mr Lawson suggested that the outcome was damning for the Claimant either way; whether the role was 3000 metres where it would stop easily or 400 where it would have been too quick to stop. During cross examination of the Claimant another figure was suggested of 1100 metres. What this demonstrates is there is a lack of precision, due to not collecting the evidence at the time. The true size of the roll may be none of these figures. In light of other areas of unfairness in the process, I reject any suggestion that whoever was right about the size of the roll would make no difference to the outcome.

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Employment Judge S Davies  
Dated: 25 May 2017

JUDGMENT SENT TO THE PARTIES ON  
26 May 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS  
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