Case Number: 3300053/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Gilham	v	Crystal Press Limited

Heard at: Watford **On**: 22-23 August 2017

Before: Employment Judge Hyams **Members:** Mr M Bhatti
Ms N Kendrick

Appearances:

For the Claimant: Ms L Millin, of Counsel

For the Respondent: Ms H Compton, of Counsel

UNANIMOUS RESERVED JUDGMENT

(1) The claimant was not dismissed unfairly.

(2) The claimant's summary dismissal was lawful, i.e. the respondent was entitled at common law to dismiss him without notice.

REASONS

Introduction; the claims

1 The claimant was employed by the respondent at the time of his dismissal as a "No 1 Komori Press Minder". The respondent is a printing business. The claimant was dismissed summarily by the respondent on 12 October 2016, and he claims (1) that he was dismissed unfairly, and (2) that his dismissal

was wrongful, i.e. that he did not commit a fundamental breach or repudiation of his contract of employment, so that he was entitled to notice pay.

2 The claimant originally claimed that he was discriminated against because of his age, but that claim had, by the time of the hearing before us, been withdrawn.

The tribunal's constitution

3 Apparently as a result of an understanding that the claims still included one of age discrimination, the tribunal administration allocated lay members to hear the case. No consideration had been given before the hearing to the question whether it was desirable by reason of the factors set out in section 4(5) of the Employment Tribunals Act 1996 ("ETA 1996") for the tribunal to be constituted with lay members as well as an Employment Judge.

4 The Employment Judge therefore, at the start of the hearing, invited representations from the parties' counsel about the matter. Ms Millin had already taken instructions, having seen that the tribunal was not yet properly constituted as a 3-person tribunal, said that the tribunal should consist of an Employment Judge alone. The reason she gave for that contention was that it is now exceptional for tribunals hearing claims of unfair and wrongful dismissal to include lay members appointed under section 4 of the ETA 1996. Ms Compton's submission in this regard was that the tribunal was best constituted as a 3-person tribunal, not only because it was generally desirable for the tribunal to include lay members but also because of the facts of this particular case.

5 The Employment Judge's view, subject to the submissions of the parties, was that there was here "a likelihood of a dispute arising on the facts which [made] it desirable for the proceedings to be heard" (these words being in section 4(5)(a) of the ETA 1996) by a tribunal including lay members. This was because it was clear from the pleadings that the key issue in the case was likely to be whether or not it was within the range of reasonable responses of a reasonable employer to dismiss the claimant for the conduct for which the respondent said it had dismissed him in the circumstance that he had been given no formal warning at all before being dismissed that he might be dismissed for conduct of the sort for which he was said to have been dismissed. Having heard the parties' submissions on the issue, the Employment Judge concluded that it was desirable within the meaning of section 4(5)(a) of the ETA 1996 for the proceedings to be heard by a 3-person tribunal, and that it should be so heard. Accordingly, the hearing continued with the tribunal constituted in accordance with section 4(1) of the ETA 1996.

The evidence

6 The tribunal heard oral evidence from the claimant on his own behalf and from the following witnesses on behalf of the respondent: (1) Mr Mark Kempster, currently the respondent's Managing Director but its Commercial Director at the time of the claimant's dismissal, (2) Mr Jan Ladbrooke, the respondent's General Manager, and (3) Mr Simon Kempster, the respondent's Sales Director. We read the documents referred to by those witnesses in their witness statements and such other documents in the bundle put before us to which we were otherwise referred. Having done so, we made the following findings of fact. While they are extensive, we do not refer to all of the relevant evidence in these reasons. This is because of the way that the claimant's case was ultimately put and because of our view of the issues as they stood after hearing the evidence. We state those issues below. We do not set out the parties' submissions in detail, but refer to them so far as material when stating conclusions.

The facts

7 The respondent carries on a commercial printing business. The claimant was employed as a press minder. He was one of the most experienced employees of the respondent. He had, by the time of his dismissal, been employed in the printing industry for approximately 40 years. At the time of his dismissal, he was in charge of the operation of a 6-colour printing press.

8 The claimant commenced his employment with the respondent on 19 April 2010. At the time of his dismissal, he worked a 36-hour week. The respondent operated on a 24-hour per day basis during the week, closing on Saturday at 6pm. The claimant was paid for his 36 hours per week without having to prove that he had worked those hours: he was trusted to work them. The same was true of the other printing staff. Only if they did more than 36 hours would they be paid overtime, and that would occur only if they were specifically asked by their line manager to do so.

9 Mr Mark Kempster's evidence included this passage, which was not challenged and which we in any event accepted, about the claimant's working pattern:

> "The Claimant worked continental shifts. This means in one week, he would work Thursday, Friday and Saturday 6 am to 6 pm. He would then have Sunday off, and the following week he would work Monday, Tuesday and Wednesday 6 am to 6 pm. He would then have the next 7 days off, resuming work on Thursday the following week."

Clocking in and out

10 The respondent's business has grown in size in recent years. At no time were the staff required to "clock" in and out, but in 2012 the respondent introduced a system for clocking in and out called the Bodet time management system. It was operated by a hand-sensor, and there was a back-up in the form of a personal identification number ("PIN") keypad. Its arrival was announced in a small part of a newsletter (at pages 62-66 of the bundle), in the following terms:

> "We also now have operational our Bodet Time Management System which tells us who is in the premises at any one time and supports our health and safety policies."

11 In the following years, according to Mr Mark Kempster, the hand sensor worked consistently, and according to the claimant, it worked inconsistently. During the first part of 2016, the Bodet system was updated and repaired. The respondent then, on 19 July 2016, issued a newsletter, which dealt with the Bodet system only. The text of the newsletter (at page 70) was in the following terms:

> "**CLOCKING IN PROCEDURE UPDATE**
>
> The Bodet Time Management System has now been updated and repaired.
>
> With effect from Monday 1st August 2016, all staff commencing their attendance schedule at work are required to clock in using the hand profile system. Conversely, when leaving Crystal at the end of your working pattern / shift all staff are to clock out.
>
> For those employees that are relatively new to Crystal, the machine operates by scanning your hand profile and marrying this to a personal identification code that you will be given. It is perfectly hygienic, painless, and legal. It does not contravene any human rights or data protection laws.
>
> For any person not registered on this scheme Phil Jackman will spend a couple of minutes with you and get your details registered. Once this is done it should literally take you no more than 10 seconds to clock in and clock out.
>
> As well as this [being] a reasonable request and a management tool that provides payroll backup for the business, it also enhances your personal security by allowing Crystal to understand whom is / was in the building at any onetime.

> Please comply with this instruction and start using this on Monday 1st August 2016."

12 In the claimant's witness statement, he said (in paragraph 15) this about the Bodet system:

> "In July 2016 the workforce was advised that a new clocking in system was to be put in place (see page 70). Whilst this was a good system and a good idea, it was simply not enforced as it might have been and old practises continued. Whether this was right or wrong, it was not ever challenged and therefore the clocking-in system was seen as a bit of a joke."

13 In addition, the claimant described in his witness statement what he referred to in paragraph 7 as a "relaxed attitude" of the respondent to health and safety matters, which he said in that paragraph "also applied to working time". In that and the following paragraph, he said these things:

> "7. The relaxed attitude also applied to working time. Once a job was completed, providing there was no ... work that could be started, you were allowed to leave. We were salaried employees and, for example, if a run finished 30 minutes before the end of your shift and you could not start a new job, you were allowed to leave. Previously there had been a 15-minute shift handover. This ensured that the shift stayed on to handover. However, in order to cut costs, this handover was taken away sometime ago.
>
> 8. When I first started, I questioned this practise but everyone did it, there was never any comment or criticism from the management and therefore I just followed the crowd."

14 The claimant corrected the third sentence of paragraph 7 of his witness statement at the start of his oral evidence: he accepted that he was not a salaried employee, that he was paid by the hour, and that he was expected to work 36 hours per week. Mr Mark Kempster's oral evidence about the use of the Bodet system was that it was not used primarily to ensure that the employees worked their contracted hours. Rather, he said: "we trusted our employees to tell us what hours they had done". He said that the Bodet system was used for health and safety reasons, i.e. so that in the event of a fire the respondent could know who had been in the building when the fire broke out, "but also but also as a back-up to check that what they [i.e. employees] were saying was correct. We found it was not working properly in 2016, sorted it and then sent the further letter."

15 When asked in cross-examination about the use of the Bodet system, the claimant said that "it was not taken seriously by me and some of my

colleagues." He said that some of the office staff did not use the system, and that he and his colleagues "collectively" decided not to take it seriously.

16 The claimant's oral evidence was in this regard was that he and his fellow-press minders "questioned" the new approach of the respondent to the use of the Bodet system. He said that they thought that if it was being used only for insurance and health and safety purposes, and not everyone was using it, and the press minders had not used it in the past, then why should they, the press minders, now use it? He said that they asked themselves whether it was being installed to monitor their time-keeping, but immediately said that there was nothing wrong with that, he supposed. In fact, as the newsletter at page 70 showed, the respondent was indeed now stating that it was going to be using the Bodet time management system as providing "payroll backup for the business".

17 When asked by the tribunal who led the discussions of the press minders about the new approach of the respondent to the use of the Bodet system, the claimant said that it was the "senior press minders". Only after a little probing did he accept that he was one of them.

The newsletter of 20 July 2016

18 The day after issuing the newsletter about the new approach to the use of the Bodet system, the respondent issued the newsletter at pages 71-72. It was issued in Mr Mark Kempster's name, and included this highly material passage:

> "As you are aware there has been a huge amount of change over the past 6 months in areas like personnel, shift patterns, procedures and additional equipment. Whilst the majority of you have worked with us to help minimise the effect of this change there have been a small minority that have used it to exploit the company in various ways.
>
> For example, there have been multiple occasions where staff have; been late with no reasonable explanation, used the companies sick policy to extend their holiday entitlement, purposely avoided clocking in and out of the building, continued to use mobile phones on the shop floor, eaten food whilst operating machinery, used their position to forcibly influence other staff members, exploited certain situations to cause problems for the management team and generally looked for any opportunity to cause the maximum possible disruption for their colleagues, management and ultimately the company.
>
> This disruptive behaviour has to stop!
>
> Crystal provides a safe, secure and fair place to work. All staff members are treated with respect and courtesy, all staff are looked

> after whenever necessary and provided with everything required to have a happy, productive work place. There is therefore no reason for this disruptive behaviour to continue.
>
> Moving forward the management team will not tolerate the disruptive behaviours detailed above or any other behaviour that is not in the best interest of your fellow colleagues, the management team or the company. If any staff member does continue to display any form of disruptive behaviour it will be dealt with under the company's disciplinary process, which may ultimately lead to their dismissal.
>
> I would like to emphasise at this point the vast majority of you have nothing to worry about and we urge you to continue working hard for Crystal."

Pallet trucks

19 The respondent had on its Press Room floor a number of pallet trucks, which were used to move heavy items such as bales of paper around. They were moved by being pushed or pulled and had no independent means of propulsion. They were steered by a tiller, which needed to be turned in the opposite direction to that which the person pushing the truck wanted to go. The trucks had forks, which could be raised by pumping the handle which was also the tiller. The pumping caused a hydraulic lift to operate. In effect, the pallet trucks were hand-operated low-level fork-lift trucks. The pallet trucks weighed about 80-100kg unladen.

20 During the period from February to April 2016, the respondent bought and put onto the floor of the Press Room of its Hoddesdon factory a new printing press. Mr Mark Kempster's evidence was that the claimant and the other Press Room employees were consulted about the placement of that press, but the claimant denied being so consulted. Whether or not he was consulted, he must have known that the 5 and 6 colour presses were moved closer together than previously. It was Mr Mark Kempster's evidence that "it was decided that the employees would not use the pallet truck in this space", i.e. the space between those two presses. Those presses were described in one place in the bundle (in the notes of the disciplinary hearing which led to the claimant's dismissal) as costing "millions" of pounds. That was at page 120, to which we refer further below. The reference was made by Mr Mark Kempster himself.

21 The claimant's evidence about the use of pallet trucks was inconsistent. In paragraph 4 of his witness statement, he said this:

> "If I am honest, the approach to health and safety in the workplace was quite lax. This is not to say that there were regular accidents nor any real issues, it was just that everyone got on with their work and the

> management allowed certain practises to go ahead unchallenged. It seemed that providing the work got done, there was no issue. Specifically, this included things like riding pallet trucks in order to get from place to place (as in pages 101-108)."

22 Those pages constituted print-outs from the CCTV footage to which we refer below. The claimant continued in paragraph 5 of his witness statement:

> "As I state in my ET1, I actually worked with the Health and Safety Officer on the factory floor. The issues that led to my dismissal, particularly riding a pallet truck were accepted as, in reality, it did not represent any real hazard. For the Respondent to now state that there was criticism of this practise is simply not true. Even if there were notices issue[d], they were not enforced and despite the company being awar[e] of the practice, they did nothing to stop it."

23 The one thing about which the claimant and Mr Mark Kempster agreed was that in April 2016, Mr Kempster saw the claimant going to use a pallet truck as a means of getting from one place to another in the factory. It was in an area which was nowhere near the printing presses. Mr Kempster said this in paragraph 24 of his witness statement:

> "The Claimant was further aware that riding the pallet truck was strictly prohibited and is a breach of Health and Safety rules. This is because on 15 April 2016, I caught the Claimant riding the pallet truck in the middle of the building. I gave him an informal verbal warning and he readily acknowledged that it was not acceptable behaviour. He had immediately stepped down from the pallet truck and apologised for his behaviour. I did not feel it necessary to instigate a formal disciplinary procedure at the time as I believed that it was a one-time offence and the Claimant realised his mistake."

24 Mr Kempster then caused Mr Ladbrooke to put a note in the claimant's personnel file. That note was not shown to the claimant before he was dismissed, and he was not aware of it at that time. It was at page 68, and was in these terms:

> "15/4/16
>
> MK - Paul Gilham riding pallet truck. Told not to do it."

25 In paragraph 14 of his witness statement, the claimant said this about that "warning":

> "The formality of the way in which issues were dealt with is perfectly illustrated by the 'warning' at page 68. I do not recall any such

> conversation and, if this were such an offence, warranting a disciplinary sanction, surely formal action would have been taken at that time."

26 However, in oral evidence, the claimant acknowledged that he had indeed had a conversation with Mr Mark Kempster in April 2016 about his use of a pallet truck. He said that he knew that it was wrong, but that it was tacitly condoned by the management of the respondent. He said that they "cherry-picked other health and safety issues" and that there was "no signage, no warning" about the use of a pallet truck. He said, however, he was indeed "told off" by Mr Kempster for riding on a pallet truck in April 2016, and that he "put [his] hands up and moved on". When asked whether it was right that Mr Mark Kempster had told him off for using the pallet truck, he said: "No. I got off as soon as I saw him." He also acknowledged that the incident had occurred not between the machines, but "at the other end of the factory".

Locking up on Saturdays

27 Until 2011, the respondent's factory was based close to the stadium of Tottenham Hotspurs' football club. On Saturdays, after 5pm, on match days, getting away from the factory was difficult because of the amount of traffic resulting from attendance at the match.

28 The most senior staff present at the factory on Saturdays were the press minder staff, which of course included the claimant. Before 2011, it was agreed informally with the Press Room staff that the press minders would lock up the factory premises on Saturdays, that the factory would close at 5pm rather than 6pm on those days, apparently irrespective of whether the day was a match day, and that the press minders would still be paid as if they had worked until 6pm, i.e. they would be paid an extra hour's pay for the responsibility of locking up the premises.

CCTV footage

29 The respondent had in place a CCTV system. It was described in one of the respondent's policies (which the claimant said that he had never seen; he denied having received a copy of the unsigned contract at pages 32-39, and he denied knowledge of the contents of the respondent's employee handbook) in this way (at page 47):

> "**CCTV SURVEILLANCE**
>
> Crystal has Closed Circuit Television (CCTV) in place across its area of operations to safeguard the employees and property of the Company by monitoring the entrances, exits and other work areas. Cameras are monitored randomly and the recordings retained for at least a 1-month period. Crystal reserves the right to extend levels of monitoring by CCTV to further improve employee and Company security."

The events that led to the claimant's dismissal

30 The events which led up to the claimant's dismissal were described by Mr Mark Kempster in paragraphs 5 and 6 of his witness statement. Paragraph 5 was the operative paragraph, and it was in these terms:

> "On or around 28 September 2016, an employee from the Finishing made a passing comment that on 24 September 2016 all the Press Minders, including the Claimant, left the building for what they believed to be a prolonged lunch break and then also finished their shift almost an hour earlier than when their shift would normally end."

31 That led to a review by Mr Kempster of the CCTV footage of the previous Saturday, 24 September. He described what he saw in paragraphs 10-21 of his witness statement. All of those paragraphs are highly material. They describe the footage in which the claimant can be seen to have "ridden" a pallet truck between "the 5 and 6 colour presses", the space between which was "narrow", so that there was a danger of collision with either of the presses and other machinery and related gear. Mr Kempster described the claimant "using his feet to speed up the truck and then riding the pallet truck with only one hand".

32 In short, there was a danger, if the claimant lost control of the pallet truck, of "serious and/or fatal injuries to the Claimant and anyone in the vicinity", and of "significant damage to the machines". In addition, the presses were fed by a 250 amp electrical supply created by two transformers and there was in the area a circuit board. The transformers were in cases, of course, as was the circuit board. That did not mean that there was no danger if they were hit by a pallet truck. There were, in addition, Losses suffered by reason of the fact that she would have left her employment with the Respondent walkways for employees working on the 5 colour press, and "If one of the employees stepped down and collided with the Claimant riding the pallet truck, it could have caused serious injuries to both the Claimant and the employee they collided with". As Mr Mark Kempster said (in paragraph 19 of his witness statement:

> "In addition to this there is a blind access point between the 5 colour and 6 colour press (please see Doc 20 page 94) which is used for staff to move between the presses. If another employee had stepped out into the walkway in front of the Claimant whilst he was riding the pallet truck he would have no way of stopping or moving the truck out of the way and would almost certainly have directly hit them causing serious injuries to both parties."

The claimant's working hours and his use of the Bodet system

33 Mr Kempster also caused an investigation into the claimant's working hours on that day. That investigation showed that the claimant had started the press for which he was responsible at 6.28am, that the press had been stopped at 10.16am and restarted at 11.16am, and that the press had stopped printing at 3.00pm. The claimant had then, according to the CCTV footage, left the building at 4.29pm. He had not clocked out using the Bodet system. That prompted a check of the claimant's hours in the preceding 3-month period, by reference to his clocking in and clocking out using the Bodet system. That showed among other things that in that period, the claimant had worked on seven Saturdays and that on four of them, he did not clock in or out.

Mr Jan Ladbrooke's evidence

34 Mr Ladbrooke's evidence was mainly about the procedure followed in relation to the claimant's dismissal. It included this paragraph (number 17) about the claimant:

> 'I did have genuine concerns about the Claimant's character and attitude. In my opinion, he exhibited an ignorant and arrogant attitude in the workplace. He saw it as a challenge to continually test, ignore and break rules and reasonable procedures that "management" put in place to improve workplace conditions. It disturbed me that he could have such a reckless attitude regarding Health and Safety. He did not accept and to many extent still does not recognise the potential serious damage or at worst life threatening implications of his actions.'

The procedure followed in deciding that the claimant should be dismissed

35 On 3 October 2016, Mr Ladbrooke wrote to the claimant, inviting him to come to an investigatory meeting on 6 October 2016 (pages 110-111). The letter stated the allegations in the following manner:

> '• You arrived late for the start of your shift on Saturday 24th September 2016
> • You left work early on Saturday 24th September 2016 whilst also having a break
> • You ran, jumped onto and rode a pallet truck between the 5 and 6 colour presses
> • You failed to "clock off" using the Bodet time management system when leaving the building for the final time
> • As part of your contractual agreement allowing you to leave one hour early on Saturdays the Press Minders are meant to lock and secure the building. You did not do this.'

36 The claimant attended that meeting. There was a note of what he said at it at page 112. He responded to each allegation "No comment" and when invited to comment further, said: "No, you're the one doing the investigation." He then, when pressed, did respond further, albeit briefly.

37 The claimant was then invited to a disciplinary meeting on 10 October 2016, and suspended pending that meeting. The notes of the meeting were at pages 118-121. Mr Kempster summarised the claimant's response to the allegations neatly in paragraph 40 of his witness statement, in the following manner:

> "In summary the Claimant:
> 40.2. acknowledged his lateness and leaving work early but did not feel that this had been done deliberately or maliciously;
> 40.3. accepted that he had failed to use the Bodet system on numerous occasion;
> 40.4. alleged that he had not been aware of the importance of using the Bodet system and that the Respondent had never raised any issues with regard to not using the Bodet system;
> 40.5. explained the reason he stopped work early on 24 September 2016;
> 40.6. stated that he never worked through his lunch break and that if he left work early, it would have been because he had worked part of his lunch break.
> 40.7. admitted to riding the pallet truck and that this was a "weakness of his";
> 40.8. admitted to not locking and securing the building on 24 September 2016 and on other Saturdays when the Finishers worked later than 5 pm;
> 40.9. admitted that the Press Minders had not been given permission to leave early and not lock up; and
> 40.10. suggested that there should be [a] clear sign that CCTV was in operation."

38 We noted in particular the following exchanges in the notes of the disciplinary hearing of 10 October 2016 (at pages 119-120):

> "• Mark raised the issue of Paul riding the pallet truck. Paul responded by stating that he remembered Mark seeing him ride a pallet truck previously and that "it must be a weakness of his".
>
> • Paul said, I know it is wrong; I hold my hands up but please don't crucify me. I apologise for the lapse in getting on the pallet truck.
>
> • Mark explained that riding the pallet truck was a serious health and safety issue that could endanger himself and he might have a serious accident for which Crystal and the directors would be liable.

> He also explained that the riding of the pallets took place next to multi million pound equipment, chemicals, pallets of paper and other colleagues.
>
> • Paul responded by saying that there were other health and safety issues in the building such as the binder that were not addressed.
>
> ...
>
> • Mark said the action raised the issue of whether Paul could be trusted to work alone on a Saturday without repeating this action.
>
> • Paul said he thought the threat of dismissal was harsh and that a final warning letter was more appropriate."

39 In his oral evidence, the claimant referred to only one matter which he said was an instance of a breach of the requirements of health and safety, and that was the use of a large fan to cool the 6 colour press for several weeks in the summer of 2016, when the weather was particularly hot.

40 Mr Kempster also held disciplinary hearings with other employees who had been revealed by the investigation which followed from the "passing comment" to which we refer in paragraph 30 above. Mr Kempster then used what he called "a point based scoring matrix" in deciding what sanction to give each employee. As he described it in paragraph 44 of his witness statement, it took this form:

> "This matrix used a points range of between 1 to 6, with 1 being minor incidents, such as failing to use the Bodet system on a few occasions, and 6 being the most serious incidents, such as a breach of Health and Safety rules."

41 Mr Mark Kempster confined his consideration of the misuse of the Bodet system to the period after 1 August 2016. He concluded in that regard that the claimant had known that he should use that system, and had failed to use it "at all on 2 separate occasions (Friday 26 August and Monday 29 August)", and that this to him "suggested a deliberate act of insubordination".

42 Mr Mark Kempster decided that the claimant should be dismissed (rather than merely being given a final written warning) for the reasons stated in paragraph 45 of his witness statement, which we accepted were the true reasons for the claimant's dismissal. In Mr Mark Kempster's letter of dismissal, he gave the claimant access to the CCTV footage. That was the first time that the claimant was given such access. Mr Mark Kemp's oral evidence was that if the claimant had not used the pallet truck as a means of getting around the factory, then he would have given the claimant only a final written warning. However, the claimant had, despite knowing that it was wrong to do so, ridden

the pallet truck between the 5 and 6 colour presses, and he, Mr Mark Kempster, could not trust him not to do the same thing again. His justification for not giving the claimant a written warning when he saw him get on and then get off the pallet truck in April 2015 was that the claimant had immediately acknowledged that he was wrong to do it, and that it had not been in an area where it was not merely dangerous in itself but also dangerous because if the claimant had lost control of the pallet truck, then it could have caused serious injury not just to himself or others but also serious damage to the printing presses. We accepted all that evidence of Mr Mark Kempster.

43 The claimant appealed against the decision to dismiss him. The appeal was heard by Mr Simon Kempster. The claimant's only complaint about the appeal process was that it smacked of collusion between the brothers. Mr Simon Kempster undoubtedly did consult his brother and Mr Ladbrooke in deciding whether to allow the claimant's appeal. However, Mr Simon Kempster was clear in his evidence that ultimately the decision whether to allow the appeal was his, and his alone. We accepted that evidence, not least because, after being asked how he saw the claimant's conduct in the form of riding the pallet truck, he said (after gentle encouragement to speak his mind) that he was angry about it, because the staff were clearly not supposed to do it and it was dangerous, especially between the printing presses and near the transformers and "electrical kit".

44 Mr Simon Kempster held an appeal hearing on 27 October 2016. There were notes of the hearing at pages 127-131. It was of note that the claimant said this (as recorded at page 128) about the pallet truck riding:

> "The running and Jumping on the pallet truck is misleading. Admittedly it was a lapse in concentration – it is something I have done before and have been seen doing it before by Mark Kempster."

45 He also said this (noted at the bottom of the next page):

> "I don't believe this is Gross Misconduct.
> I feel a bit victimised – I have seen other issues with other people; riding pallet trucks / leaving early, and for me it has been done innocently – it isn't me, I am confused on some of the timings as I can't remember from weeks/months ago."

46 The claimant did not give the name of any other employee who rode pallet trucks. Mr Mark Kempster said that the CCTV footage was self-deleted and over-rode the earlier recordings after a certain period. He said that there was footage only for the 2-week period before 24 September 2016. He said that he had had the footage for that period looked at to see whether or not other employees could be seen riding pallet trucks, and he said that no other employee could be seen riding a pallet truck.

47 The things that the claimant said to Mr Simon Kempster as noted at pages 127-131 showed that he took issue in relation to the precise times when he had started and finished work and the length of the break which he had taken on Saturday 24 September 2016. We accepted that the position in that regard was not as stark as it had at first appeared to the respondent.

The claimant's main stated concerns about the fact and manner of his dismissal

48 There were in the claimant's witness statement two paragraphs which showed why he believed that he had been treated unfairly. The first was paragraph 9, in which he said that while he enjoyed his job, "in mid-2016 [he] began to get the feeling that [his] days were numbered at the factory" because Mark Kempster had told him that "the workforce was 'long in the tooth', making reference to our age and that he wanted a younger workforce in place." The second paragraph which showed why the claimant believed that he had been treated unfairly was paragraph 12, in which he said this:

> "The Respondents factory was a nice place to work as the management were not constantly on top of you. I accepted and worked within that environment. My claim is that it is unfair for me to be sacked for merely working in this way with little, or no, criticism or formal reprimand in my 6.5 years service."

49 The claimant also said that he thought that there was little chance that Mr Simon Kempster would disagree with his brother's decision. He also said (in paragraph 39) that the conduct for which he was dismissed was

> "not close to being gross misconduct and whilst I accept that I could have improved, this was never, or never adequately communicated to me. I feel let down by the company as all they had to do was issue me training or, for example, a formal warning and it would have stopped."

The claimant's oral evidence before us on riding pallet trucks

50 The claimant's evidence about his riding of pallet trucks was that he had done it throughout his 40-year career as a printer. However, he knew that it was wrong because it could be dangerous because by doing it he might injure himself, or cause damage, either by bumping into a pallet or the side of a machine. He also said this:

> "It was never put across to me before that it was wrong; I did not see it as a thing that was wrong."

The relevant law

(1) Unfair dismissal

51 The parties agreed that the reason for the claimant's dismissal was his conduct. Ms Millin reminded us of the need to apply the *Burchell* test, i.e. that in paragraph 2 of the decision of the Employment Appeal Tribunal in *British Home Stores v Burchell* [1978] IRLR 379, which has been subsequently approved on many occasions. She also reminded us of the need to apply the decision of the Court of Appeal in *J Sainsbury plc v Hitt* [2003] ICR 111. We bore in mind the fact that the test is ultimately whether or not what was done was unfair within the meaning of section 98(4) of the Employment Rights Act 1996 ("ERA 1996"), which in practice means whether or not it was within the range of reasonable responses of a reasonable employer, and that we must not determine the matter by reference to whether or not we thought that the decision was fair.

52 We took into account the following passage in paragraph 2 of *Burchell*:

> "What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

(2) Wrongful dismissal

53 The issue for us was whether or not the claimant had committed such conduct as to justify (in the law of contract) his summary dismissal. Thus, if he had committed a fundamental breach of his contract of employment, or if he was in repudiation of it (i.e. he had shown an intention no longer to be bound by the terms of that contract in some essential respect), then the respondent was entitled to dismiss him without giving him notice or pay in lieu of notice. The parties accepted that the test was ultimately whether or not what the claimant had done was a breach of the implied term of trust and confidence, namely the obligation not, without reasonable and proper cause, to act in a way which is likely seriously to damage or to destroy the relationship of trust and

confidence which exists, or should exist, between employer and employer as employer and employee.

Our conclusions

Was the claimant dismissed unfairly?

54 While Ms Millin accepted that the respondent had a genuine belief that the claimant had committed the misconduct for which he was dismissed, she argued that there were not reasonable grounds for determining that the claimant had ridden the pallet truck since it was done only sporadically. She also argued that there were not reasonable grounds for determining that the claimant had wrongly not used the Bodet system. This was, she said, because he had used it on some occasions. She also submitted that there had not been a reasonable investigation because the respondent had looked only at two weeks' CCTV footage.

55 We could not accept those submissions. In our view there were indeed reasonable grounds for concluding that the claimant had committed the misconduct for which he was dismissed. Most notably, there was the CCTV footage of what the claimant had done on 24 September 2016 at a time when he did not realise that his conduct was being recorded. We could not accept that the respondent's investigation was not a reasonable one.

56 For us, the main issue was the reasonableness of dismissing the claimant in the circumstance that he had not been given formal warnings of any sort before he was dismissed, even when Mr Mark Kempster had seen him riding the pallet truck in April 2016. The fact that the claimant was dismissed for gross misconduct and was not given notice was in our view irrelevant in itself to the question of the fairness of his dismissal. What was material was the fact that he was dismissed without having been given any formal warning not to ride pallet trucks.

57 Our clear and unanimous conclusion was that in the circumstances, it was within the range of reasonable responses of a reasonable employer to dismiss the claimant for the misconduct for which he was in fact dismissed, namely (in summary) leaving work before his shift would normally have ended on the occasions when he did so, not using the Bodet system properly, not locking up on Saturdays and leaving that to other (non-press minding staff), and, most importantly, riding pallet trucks. That was because it was within the range of reasonable responses of a reasonable employer to conclude that the claimant could not be trusted not to do it again. That in turn was because he at no time showed contrition for doing so, and saw it merely as resulting from "a lapse in concentration" (page 128). It was said during the appeal hearing on his behalf, by his trade union representative (see the same page) that it was not gross misconduct. He himself said (as recorded on page 129 and noted in paragraph 45 above):

"I don't believe this is Gross Misconduct."

58 Ms Millin submitted that it was also outside the range of reasonable responses of a reasonable employer to use the points system to which we refer in paragraph 40 above. We disagreed. We thought that it was helpful to have some sort of system for comparing the situations of the various employees, since the alternative was no such system, which would have given rise to a risk of the (rare) kind of unfairness which can occur through truly inconsistent treatment of employees. In any event, the key factor here was that the claimant was dismissed because he had ridden the pallet truck in the manner and circumstances in which he had done so on Saturday 24 September 2016 and that it was within the range of reasonable responses of a reasonable employer to conclude that he might well do it again.

59 We concluded also that Mr Ladbrooke's view of the claimant, set out in paragraph 34 above, was incidental and had no effect on the decisions of Mr Mark Kempster and Mr Simon Kempster, both of whom in our view made their decisions independently and conscientiously, even though they consulted the other and Mr Ladbrooke before making their decisions. We ourselves took into account Mr Ladbrooke's view set out in paragraph 34 above only in considering whether the claimant had been unfairly singled out in being dismissed. For the reasons stated in the preceding paragraphs above, we concluded that he had not been.

Wrongful dismissal

60 We discussed with the parties the possibility of an employer relying on multiple instances of misconduct as an accumulation of conduct which, taken together, amounted to a breach of the implied term of trust and confidence. We did so because there is no clear authority on that point, and because it might be said that while it is plainly open to an employee to rely on an accumulation of conduct as constituting a breach by the employer of that term, that principle could not be applied in favour of the employer.

61 We saw no reason to conclude that an employer should not be able to rely on such an accumulation of conduct by an employee. It is sometimes said that what is sauce for the goose is sauce for the gander. That maxim applies in this regard, in our view.

62 In fact, we concluded that what the claimant did by riding the pallet truck between the 5 colour press and the 6 colour press on 24 September 2016 as described by us in paragraph 31 above was in itself a breach of the implied term of trust and confidence. If we had not so concluded, then we would have concluded that doing that, together with what we concluded was a clear and deliberate decision not to use the Bodet system even after 1 August 2016, constituted a breach of the implied term of trust and confidence.

Contributory fault and the question of compensation

63 Finally, we record that if we had found the claimant to have been dismissed unfairly, then we would have concluded also that he should receive neither a basic award within the meaning of section 119 of the ERA 1996 nor a compensatory award within the meaning of section 123 of that Act. This was because his conduct was such that it would not be just and equitable for him to receive either such award (despite, in the case of the basic award, the fact that the basic award is in the nature of an award for long service).

A final comment

64 There is one factor which, to his great credit, was apparent from the claimant's evidence. That was that he was scrupulously honest when it came to giving evidence before us. We had no doubt about his integrity in that regard. Nevertheless, for the reasons given above, his claims could not succeed.

_____
Employment Judge Hyams

5 September 2017
Date: ……..……..

Sent to the parties on: ……..

……..
For the Tribunal Office