Case Number: 3201292/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Egbuzie**

Respondent: **Laing O'Rourke Group Services Ltd**

Heard at: **East London Hearing Centre** **On: 24-25 April 2018**

Before: **Employment Judge O'Brien sitting alone**

Representation:

Claimant: Dr O'Shea of Counsel

Respondent: Ms Barrett of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. **The claimant's complaint of unfair dismissal fails and is dismissed.**

2. **The claimant's claim for damages for wrongful dismissal fails and is dismissed.**

3. **The claimant's claim for unpaid holiday pay is dismissed upon withdrawal.**

REASONS

1 On 6 October 2017, the claimant presented complaints of unfair dismissal, race discrimination, notice pay, holiday pay, arrears of pay and other payments. The claim was amended on 7 December 2017 to withdraw the claim of race discrimination and to "concentrate on the unfair dismissal", although allegations were still intimated of notice pay, holiday pay and other payments. The claimant's schedule loss refers only to damages for unfair dismissal and for unpaid holiday pay but not notice pay.

2 It was confirmed on the first day of the hearing that the holiday pay claim is withdrawn and so I give judgement that affect.

3 The respondent resists the claims.

ISSUES

4 A list of issues as agreed between the parties is to found in the bundle at pages 53 and 54 and is limited to unfair dismissal only, although it seems tolerably clear both from the claim form and the claimant's closing submissions that the claimant still complains that he ought not to have been dismissed summarily for gross misconduct. If I am satisfied that a valid claim for notice pay is before me, or that I should give permission for the claim to be amended to add one, the issues I will have to determine are:

4.1 Whether the claimant was in fundamental breach of contract.

4.2 Whether the respondent dismissed the claimant because of that breach.

EVIDENCE

5 The tribunal heard evidence on the respondent's behalf from Jamie Baxter, Eamon Dolan (disciplinary officer) and Alex Warrington (appeal officer). The claimant gave evidence on his own behalf. The tribunal was provided with a bundle of approximately 350 pages plus a DVD containing CCTV footage of the incident in question.

6 At the beginning of evidence, the claimant applied to exclude the respondent's witnesses until such time as it was their turn to give evidence. The basis of application was in order to minimise the risk of evidence being changed to ensure consistency. However, no basis was put before me to suggest that there would be any risk of the witnesses being anything other than entirely straightforward and it appeared to me not to be in the interest of justice to depart from the norm. Therefore, I refused the claimant's application.

FINDINGS OF FACT

7 The respondent is a global construction and engineering company. The claimant was employed by the respondent, latterly as a slinger a bleak signal from 19 July 2010 to 3 July 2017.

8 The claimant was responsible for attaching/detaching the load to and from the crane hook, checking the condition and status of their lifting accessories and ensuring the correct use. The role involves ensuring the safety of the crane operators and other site visitors and working alongside the lifting team, directing safe movement of the crane and load. Slinger/signallers use a system of hand signals or radio links to assist during lifting operations.

9 According to the claimant's contract, he was entitled to one week's notice per completed year of employment up to maximum of 12 weeks unless he committed gross misconduct, gross negligence or he was dismissed in other circumstances which justified summary dismissal. Examples of gross conduct were set out in the respondent's disciplinary procedure and included in particular "serious breach of health and safety regulations".

10 Safety is manifestly paramount in the construction industry. The respondent has a publication, adherence to which it expects of all its employees, entitled "Safe Working Operations". On the very first page of the very first section, that manual says the following:

> "This document is issued with the authority of Laing O'Rourke. It must be

> adhered to on every site or other place of work in the United Kingdom where the company, its subsidiaries and/or their subcontractors are using cranes or other lifting equipment.
>
> "Any lifting incident has the potential to cause serious injury or death. Also have serious cost and program indications, as well as generating considerable adverse publicity. Therefore, every individual connected with lifting activities must understand their full personal responsibility for their part in the planning, selection and operation of lifting equipment and accessories.
>
> "Except where otherwise stated, this document refers to all cranes or other lifting equipment whether internally or externally hired, or supplied as part of a contract. Where the company is operating in workplaces under the control of third parties or in partnership with other companies, then this document dictates the minimum standard will apply to lifting operations."

11 The document also sets out on the same first page the principles for a safe system of work and says in particular the following:

> "Health and safety legislation requires that, in any work situation, there is a safe system of work. Development of the safe system of work for lifting shall include the following main steps:
>
> - Gathering information
> - Defining the lifting requirements
> - Establishing the organisation
> - Identifying hazards and assessing risk
> - Planning the operation
> - Communicating the safe system
> - Implementing the plan
> - Monitoring to ensure the brief plan is implemented."

12 Also provided in the bundle, and also a document to which respondent expected its employees to adhere, was a code of practice including certain guiding principles in respect of health and safety. These principles prescribed in particular that the organisation would always speak out immediately against unsafe behaviours or conditions and stop working until safe to do so. The organisation would never ignore unsafe behaviours or conditions, or assume that health and safety was someone else's responsibility.

13 The claimant's was a skilled and responsible role for which he was required to have a valid construction plant competent scheme card. It was a claimant's own evidence that he had requalified under that scheme as recently as early 2017.

14 On 21 February 2017, the claimant received a first written warning for his part in an incident on 18 February 2017 which was charged as a breach of health and safety. The first written warning says amongst other things:

> "In particular we discussed in detail that you failed to stop a lifting operation in time to prevent the chains catching on a protruding steel beam. You attempted to mitigate this error by saying that the crane was in too high a gear. The fact that you allow the lift to proceed despite there being a protruding beam in the area was wrong. You should have stopped the lift and asked for this to be removed before starting. You stated that you do not feel confident to do these fearing possible consequences to your role. This was not true and the business would also support anyone stopping works due to legitimate safety concern.

15 The first written warning required certain improvements to the claimant's behaviour: if he believed that he had a legitimate safety concern when required to carry out a task he was not to begin or was to stop what he was doing immediately and raise any concerns with his supervisor. The warning was to remain on the claimant's record for six months and he did not appeal either the fact or substance of the warning.

16 On 22 June 2017, the claimant was on site at the respondent’s South Quay Plaza project. He was assisting in the lifting of a load of peri shutters. Another slinger, Emmanuel, was the lead slinger and was primarily responsible for communications with crane driver. During the lift, just after the final two chains had been attached to the slings and the block was being centred above the load, the chains/slings fouled the topmost shutter causing it to move and then to slip almost completely off the lorry.

17 It is agreed that the claimant called out at that point for the crane operations to stop, although it appears that Emmanuel had would have done the same in any event.

18 All those involved were interviewed and the crane driver, the claimant and Emmanuel were sent home and suspended. Operations were suspended on the site for two weeks and the respondent was embargoed from further tendering for the client, Berkeley group. The embargo is likely to be lifted within the next two weeks.

19 The shutdown cost the respondent in the order of half million pounds and the incident is likely to have caused considerable reputational damage to the respondent.

20 All those interviewed agreed that Emmanuel was in charge of communications with the driver. The claimant's account of the incident was as follows:

> "Normally I bank TC1 but because Carl is off today I was helping Emmanuel with TC2. I help with TC2 regularly. The wagon arrived and Nick asked me to move a palette, with a pallet truck to make space to land the shutter. I arrived back at the wagon after moving the pallet and helped Emmanuel. We were both standing on east side. We were going to use a rope to move the chains to the west side to save the crane from moving the block. However I think the rope didn't work and so Emmanuel asked the crane driver to trolley out and lower the chains so we could reach and attach the slings. Emmanuel attached the slings on the west side. I was watching the slings and chains on the east side. I was standing on the ground. Emmanuel asked the crane driver to trolley in to centralise the block. As the block moved the panel

> moved towards me. I shouted to Emmanuel to stop. He radioed the crane to stop, but the load carried on moving and slowly felt ground. I made sure I was out of the way. There were no persons in the area at the time."

21 Nick's (Harnak Soodi's) account was that he told the claimant and Emmanuel to "get the lorry ready" before going to the toilet and that the incident had occurred by the time he returned. None of those interviewed said that it had been planned to use 4 slingers for the job.

22 Radio channel 4 was being used for the job for TC2 because radio channel 2 was suffering from interference.

23 Senior health and safety adviser Ronnie Lett undertook an investigation which identified primary and secondary causes for the incident which it is not necessary to rehearse in their entirety. It is sufficient to say that the primary cause was identified as "failure of the site slingers involved in the operation to ensure that load was safely secured to the crane before instructing the crane to manoeuvre".

24 By a letter dated 29 June 2017, the claimant was invited to a disciplinary hearing on 3 July 2017 in respect of "a serious breach of health and safety whilst carrying out slinger/signaller duties.". The health and safety report and statements were enclosed with that letter.

25 The claimant attended the disciplinary hearing without representation but was content to proceed. The claimant gave his account of what happened. When asked if the operations had been safe, the claimant said, "I was not in charge of the lift. I was only assisting Emmanuel. He had the radio and it was his tower crane." When the claimant was asked why load angels had not been used, the claimant replied, "We could have used the load angel but I have already said it was Emmanuel who was in charge of the lift." Again, no mention was made of any plan that four people would be used for the lift.

26 Mr Baxter and Mr Dolan formed the view that the claimant had been culpable in a breach of health and safety and had shown no insight into his own culpability.

27 According to the outcome letter, the contents of which were not challenged on appeal, the claimant also conceded that there were concerns over how the load was slung and that neither he nor Emmanuel had properly checked the load and used the load angel. Manifestly, these admissions formed part of the thought process of the decision-makers.

28 Mr Dolan had not wanted to dismiss either Emmanuel or the claimant but was informed by Mr Baxter of the claimant's extant first written warning. The panel of two found that they could not safely allow the claimant to return to the workplace; he had demonstrated an inability to learn from his mistakes. Emmanuel, on the other hand, had accepted his culpability and the panel were satisfied that he would learn from the incident and gave Emmanuel a final written warning.

29 The claimant appealed on 9 July 2017. In his appeal letter, he firmly blamed Emmanuel for the incident, saying such things as that he was not radio controller at the time of the incident but that Emanuel was and that had Emanuel not ordered the crane driver at the time he did the incident would not have occurred, and complained that it was unfair that he should be dismissed because of an act of negligence by his colleague. No

express complaint was made, however, about the inconsistency of treatment between the claimant and Emmanuel nor was there any suggestion that the incident had been caused by a failure to provide 4 men for the job.

30 At the hearing on 7 February, the claimant reiterated that primary responsibility for the incident was Emmanuel's. For the first time, the claimant mentioned that an earlier load had been lifted for which the load angels had not been used. However, he conceded that the loads were different and that the load angels should have been used for the load in question. The claimant also suggested at that time that four people were necessary for the job. Having considered all the representations, Mr Worthington upheld the dismissal.

Facts for wrongful dismissal and contributory fault

31 There was no express instruction on the day that 4 men would be involved in the job in question.

32 Even if the claimant had assumed that 4 people would be involved, he nevertheless participated in connecting the chains without 4 men present or with the use of the load angels.

33 Given the height of the load, load angels were necessary to see whether chains or slings were in contact with the top of the load. Load angels were nearby at the time.

34 Connecting the chains to the slings went beyond getting the lorry ready, as the team had been instructed to do, and formed part of the lift itself. The claimant knew or ought to have known this. The incident would have to be avoided had the load angels been used.

35 This was the second incident in which the claimant had failed to ensure the health and safety of crane operations in circumstances where, had he had performed his role appropriately, the incident would have been avoided.

36 The claimant had turned his radio off and so was out of communications with the rest of the team at the time of the incident in question.

THE LAW

37 Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer.

38 Section 98 of the Employment Rights Act 1996 (ERA) provides:

> ‘(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it—*
>
> *…*
>
> *(b) relates to the conduct of the employee,*

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(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.

…'

39 It is for the employer to prove its reason for dismissing the claimant and that it is a potentially fair reason. Thereafter, the Tribunal will determine the question of fairness pursuant to s98(4) ERA with no burden of proof on either party.

40 Where the reason for dismissal is conduct, the Tribunal will consider whether the employer held a genuine belief in the employee's guilt, reached on reasonable grounds following a reasonable investigation. As said in **British Home Stores Ltd v Burchell [1978] IRLR 379**:

> '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. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being 'sure' as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter 'beyond reasonable doubt'. The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion.'

41 The question in each respect, and in respect of the sanction of dismissal, is whether the employer acted within the range of reasonable responses. It is not for the Tribunal to substitute its own view of what the employer should have done.

42 It is not for me to go behind an earlier warning unless that warning was manifestly inappropriate (including it having been made in bad faith or without any grounds to make it) (**Davies v Sandwell MBC [2013] IRLR 374**).

43 Exceptionally dismissal might be considered an unfair sanction because the employer has in the past treated other employees guilty of similar misconduct more leniently. Such a dismissal may then be unfair because it is not in accordance with equity within the meaning of s98(4) (see **Post Office v Fennell [1981] IRLR 221** per Brandon LJ). However, provided the employer has considered previous situations and distinguished them on rational grounds, it will not be possible to say that the sanction of dismissal is inappropriate.

44 In **Paul v East Surrey District Health Authority 1995 IRLR 305**, the Court of Appeal held that an employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any personal circumstances affecting the employee. That case concerned a nurse who was dismissed for drinking on duty. He argued that his dismissal was unfair since colleagues who had also been drinking on duty had not been dismissed. The Court found that the attitude of the employee to his or her conduct may be a relevant factor in deciding whether a repetition of it is likely and commented: 'Thus an employee who admits that the conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely.'

45 The dismissal as a whole must be considered. Therefore, a defective appeal can sometimes render unfair an otherwise fair dismissal, and conversely, a defective dismissal can occasionally be rendered fair via the appeal. In **Taylor v OCS [2006] IRLR 613**, at paragraph 47 it was said:

> 'The use of the words 'rehearing' and 'review', albeit only intended by way of illustration, does create a risk that ETs will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if ETs realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.'

Breach of Contract

46 Pursuant to art 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, a claim may be brought in the Employment Tribunal for damages in respect of a breach of contract arising or outstanding on termination of employment.

47 An employer is only entitled to dismiss an employee without sufficient contractual notice (or pay in lieu, the contract so permits) if dismissing in acceptance of a repudiatory breach on the part of the employee.

48 Whether misconduct is sufficient to justify summary dismissal is a question of fact; conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment (**Neary v the Dean of Westminster [1999] IRLR 288**).

49 The burden lies on the employer to prove that the employee was in fundamental breach of contract.

CONCLUSIONS

50 It is clear from my findings that I accept that Mr Baxter, Mr Dolan, and subsequently Mr Worthington all believed that the Claimant had committed a serious health and safety breach while performing his role as a slinger/signaller on the South Quay site on 22 June 2017. This can properly be considered a matter of the claimant's conduct. I am also satisfied that the respondent undertook an investigation which was reasonable in all the circumstances.

51 Therefore, the material issues in the unfair dismissal claim are whether the respondent had reasonable grounds to conclude that the claimant was guilty of the misconduct in question and whether dismissal in those circumstances fell within the range of reasonable responses.

52 Mr Dolan Mr Baxter had formed the view that:

52.1 Everyone involved in lifting operations is responsible for the safety of those operations.

52.2 Any such person could "take five" to call a halt to the operations if they thought the situation was becoming unsafe.

52.3 On a number of occasions what was occurring during the incident in question was manifestly unsafe.

52.4 Principally, this was because no one could see what was happening with the chains or slings on top of the load.

52.5 The claimant could and should have a halted the lift long before the load had moved.

52.6 The claimant had abrogated all responsibility and was blaming the entirety of the incident on Emmanuel.

52.7 The claimant had not learned the lessons arising from his earlier warning.

53 These were all reasonable conclusions on the evidence before them and together these formed reasonable grounds to conclude that the claimant was guilty of the

misconduct in question and indeed was guilty of either gross misconduct or gross negligence.

54 The incident in question had potentially fatal consequences. It caused significant financial and reputational damage to the respondent. The claimant had had a previous warning for a similar incident. These were matters all in the minds of the disciplinary panel and rendered dismissal in the circumstances within the range of reasonable responses.

55 Emmanuel had a clean record until the incident in question and during the disciplinary hearing had shown insight into his own culpability. The claimant, on the other hand, had shown no insight and had an earlier warning. Therefore, notwithstanding the fact that Emmanuel had control of the radios on the day in question, the respondent was entitled to consider there was a material distinction between the two cases such as to entitle it to dismiss the claimant but not Emmanuel. In other words, there was no materially inconsistent treatment such as to render the claimant's dismissal unfair.

56 The claimant did not raise inconsistency during the disciplinary process and the appeal and therefore it was not unfair for the appeal officer to fail to examine Emmanuel's case in any great detail.

57 In conclusion, therefore, the claimant's dismissal was fair.

58 In any event, the claimant’s behaviour was objectively so unsafe, especially in respect of failing to use load angels and in respect of turning off the radios (such as to render him out of communications with his colleagues), that even if I had found the dismissal to have been unfair, I would have found that his conduct contributed 100% to his dismissal, extinguishing both basic and compensatory award.

59 Moreover, I am entirely satisfied that this incident on its own was sufficiently serious as to constitute a fundamental breach of contract. Even if I am wrong about that, the fact that the claimant had acted with such a lack of skill and care as to seriously endanger health and safety on two occasions in a 4-month period of time would together have constituted a course of conduct which was fundamentally in breach of contract.

60 It follows that, even if it wasn't contentious that a notice pay was before me, I would have found that no notice pay was due. Therefore, the wrongful dismissal claim fails.

Employment Judge O’Brien

18 May 2018