EMPLOYMENT TRIBUNALS

Claimant: Mr Michael Wagstaff

Respondent: Wilko Retail Limited

FINAL HEARING

Heard at: Nottingham (in public) **On:** 1 February 2018

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: in person
For the respondent: Mr J Meichen, counsel

RESERVED JUDGMENT

(1) The claimant was unfairly dismissed.

(2) If the remedy is compensation:

(a) no reduction to any compensatory award is appropriate in accordance with the so-called Polkey principle (see Polkey v AE Dayton Services Ltd [1987] UKHL 8);

(b) both the basic award and any compensatory award are to be reduced by 80 percent pursuant to sections 122(2) and 123(6) of the Employment Rights Act 1996.

REASONS

1. The claimant was employed by the respondent from 2 June 2008 to 9 May 2017, latterly as a High Bay Truck Driver. His employment ended when he was summarily dismissed for what the respondent considered to be gross misconduct, namely failing promptly to report an accident. Following a period of early conciliation, the claimant presented his Claim Form on 11 September 2017. He has a single complaint: unfair dismissal.

2. In relation to whether the claimant was unfairly dismissed, there are two main issues I have to decide.

- What was the principal reason for dismissal and was it a reason relating to the claimant's conduct?

- Was the dismissal fair or unfair in all the circumstances, in accordance with equity and the substantial merits of the case, pursuant to section 98(4) of the Employment Rights Act 1996 ("ERA")?

3. Deciding those two main issues involves me looking at the following subsidiary issues:

   3.1 did the respondent genuinely believe the claimant guilty of the misconduct alleged?

   3.2 did the respondent have reasonable grounds on which to sustain that belief?

   3.3 had the respondent carried out as much investigation into the matter as was reasonable in the circumstances at the final stage at which it formed that belief?

   3.4 did the respondent, in deciding that dismissal was the appropriate sanction and in relation to all other matters, including the procedure followed, act as a reasonable employer might have done, i.e. within the so-called 'band of reasonable responses'?

   It was agreed at the start of the hearing that if I took the view that the claimant was unfairly dismissed, I would decide the following issues at the same time as deciding liability for unfair dismissal: if the remedy is compensation –

   3.5 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; ["Polkey issue" / "Polkey principle"]

   3.6 would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

   3.7 did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

4. The relevant law appears substantially in the issues as set out above. My starting point is the wording of ERA section 98 itself. I also have in mind the well-known 'Burchell test', originally expounded in British Home Stores Limited v Burchell [1978] IRLR 379. I note that the burden of proving 'general reasonableness' under ERA section 98(4) is not on the employer as it was when Burchell was decided; the burden of proving a potentially fair reason under subsection (1) is [on the employer], but the burden is neutral under subsection (4).

5. In relation to ERA section 98(4), I consider the whole of the well-known passage from the judgment of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test. That test, which I shall also call the "*band of*

reasonableness" test, applies in all circumstances, to both procedural and substantive questions: see Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588.

6. Hand in hand with the fact that the band of reasonableness test applies is the fact that I may not substitute my view of what should have been done for that of the reasonable employer. I have to guard myself against slipping "*into the substitution mindset*" (London Ambulance Service NHS Trust v Small [2009] IRLR 563 at paragraph 43) and to remind myself that only if the respondent acted as no reasonable employer could have done was the dismissal unfair. Nevertheless (see Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677): the 'band of reasonable responses' test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend the tribunal's consideration simply to be a matter of procedural box-ticking.

7. In A v B , the EAT stated, when considering the standard of reasonableness in a 'gross misconduct' case, at para 62 that: "*the relevant circumstances do in fact include a consideration of the gravity of the charges and their potential effect upon the employee*". The judgment continued at paragraph 64: "*Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.*"

8. In relation to the issue of fairness under ERA section 98(4), I also take into account the ACAS Code of Practice on disciplinary and grievance procedures, at the same time bearing in mind that compliance or non-compliance with the Code is not determinative of that issue.

9. In relation to ERA sections 122(2) and 123(6), I seek to apply the law as set out in paragraphs 8 to 12 of the decision of the EAT (HH Judge Eady QC) in Jinadu v Docklands Buses Ltd [2016] UKEAT 0166_16_3110.

10. In practice in this case, it seems to me that there is one issue and one issue only that arises in relation to liability, namely was it fair and reasonable in all the circumstances to dismiss the claimant rather than to impose a lesser sanction.

11. Nothing, or hardly anything, of importance is in dispute on the facts.

12. The claimant was a very experienced driver. He was also a qualified first aider and acted in that capacity during his employment with the respondent.

13. A few years ago, possibly in 2014 or 2015, one of the respondent's employees was killed in an accident at work. Following that incident, and other incidents of serious injury, the respondent decided that it would, as a company, really focus

on health and safety. This has been a gradual process which continued through 2016 to 2017.

14. Mr Adam Brown, who handled the stage 2 appeal in the claimant's case, began working for the respondent in October 2016 and told me that he had seen considerable improvements in health and safety during his time with the Company. One of the ways in which the respondent has been tightening up on health and safety is by actually enforcing its existing procedures; the impression I get is that the problem was not with the respondent's procedures but with them not being followed.

15. On 2 March 2016, the claimant was given some specific training on accident reporting. There is a document attached to that training called "*Awareness Brief Accident Reporting*". In that document, amongst other things, it states that an accident is, "*any adverse event occurring on our premises or within our area of control that involves a person, no matter how minor that injury appears to be. …*". Later in that document, it states that one of the actions that must be taken in the event of an accident is to, "*report this immediately to your leadership team*".

16. The respondent's concerns in relation to prompt accident reporting stem from the following things: first, compliance with legislation; secondly, identifying health and safety risks, with a view to ensuring that so far as possible they are eliminated; thirdly, related to the second point, taking steps to ensure that a repetition of the accident does not occur, either to the victim or to someone else, with a subsidiary issue or concern being that if it happened again it might be more serious; fourthly, ensuring that accidents are investigated quickly and evidence preserved. The claimant knew about all of those things, or at least ought to have done; certainly, the respondent reasonably believed that he did.

17. In relation to the second and third of those things (at least), it would not particularly matter how serious the injury caused in the accident was. The whole point was the elimination of risk so as to avoid more serious incidents in the future. This is a point that seems to have escaped the claimant at the time and seems still to have escaped the claimant to this day. He disagreed and disagrees with the accident reporting policy, in that he thought, and apparently still thinks, that incidents involving only minor injury should not be reported, essentially because it is time-consuming and disruptive. As was pointed out to him during the disciplinary process, that was not his 'call'.

18. In March 2016, the claimant hurt his shoulder at work. Whatever the rights and wrongs of that particular incident, he was taken to task by the respondent for not reporting it promptly. Although he was not subject to formal disciplinary action, he was spoken to by his department leader, Mrs Lisa Murcott, in a meeting at which he describes being "*hauled over the coals*". The discussion between the two of them at the meeting was recorded in a letter of 24 May 2016. In that letter, there was, amongst other things, reference to "*the importance of reporting accidents straight away*". It concluded: "*Hopefully no further action will be necessary and we look forward to an improvement in this*

area. However, as discussed I would like to clarify that any further incidents of this nature may lead to disciplinary action."

19. In summary, whatever he may have thought of the policy, the claimant could be under doubt what was required of him: any incident, even one involving the most minor injury, had to be reported straight away.

20. On 5 April 2017, the claimant had another accident at work. The particular circumstances of the accident do not really matter for present purposes, nor does it matter whether or not the claimant was himself at fault. He banged his hand sufficiently hard to make him swear and say something to a colleague like, "*that bloody hurt*". He also had a mark on his hand that was visible for 15 minutes or so.

21. The claimant told the respondent during the disciplinary process, and tells me, that he has a high pain threshold. He seemed to be trying to suggest that that was a mitigating factor. It seems to me, and seemed to the respondent, that it was not. If he does have a high pain threshold then he might be much more seriously injured than he thought. This would make it, if anything, more important that he reported minor incidents than would otherwise be the case.

22. It turned out that the claimant had fractured his wrist. Acute pain set in around 7 days after the incident. At that point, he reported it to the respondent and took himself off to A & E.

23. Within a week or so the matter had evidently come to the attention of HR and an investigation and disciplinary process ensued. This involved:

    23.1 two investigatory meetings between the claimant and the investigating officer, who was Mrs Murcott, which took place on 25 and 28 April 2017;

    23.2 a meeting between Mrs Murcott and a Mr Shore (who was a witness to the accident) on 26 April 2017;

    23.3 the claimant's suspension on or about 5 May 2017;

    23.4 a disciplinary hearing on 9 May 2017 before a Mr Stewart Halpin (a DC Manager / Shift Leader), at the conclusion of which the claimant was summarily dismissed;

    23.5 confirmation of summary dismissal and the grounds for it in a letter dated 23 May 2017;

    23.6 a first stage appeal by the claimant, on grounds set out in a letter of 9 May 2017;

    23.7 a first stage appeal hearing on 9 June 2017 in front of Jackie Lea (Operations Leader). That appeal hearing was adjourned for Mrs Lea to look into the matter further and to deliberate. The meeting was reconvened on 13 June 2017 and after a very brief introduction Mrs Lea gave her decision, which was to uphold the decision to dismiss;

    23.8 confirmation of Mrs Lea's decision in a letter of 21 June 2017;

23.9 the claimant's second appeal (the respondent had a two stage appeal process). The second stage appeal was before Mr Adam Brown (Retail Programme Manager) on 20 July 2017;

23.10 Mr Brown doing some further investigation after the meeting on 20 July, in particular looking into the claimant's suggestion that he had been treated inconsistently with others. The product of those investigations was Mr Brown being told by Human Resources that in (or about) 2016 three individuals who failed to report accidents were dealt with either by a verbal warning or a letter of concern, but that, earlier in 2017, two individuals were dismissed for failing to report accidents. Mr Brown was not aware of the circumstances of the previous cases. In his witness statement, he suggested that the previous incidents in 2016 were before the respondent "*invested significant time and expense in improving health and safety standards across the business as a whole*". However, that does not appear to be correct in that the tightening up of health and safety was well underway by then, albeit the process continued through 2016 and into 2017. Mr Brown also did not know whether the individuals who had been given lesser sanctions had undergone similar training to that which the claimant had undergone in March 2016. He told me he just assumed that any training that those individuals received was after a lesser sanction had been imposed. I note that the claimant himself was given a lesser sanction than dismissal – indeed he was given no disciplinary sanction at all – for failure to promptly report an accident <u>after</u> he had received that training;

23.11 Mr Brown giving his decision at a meeting on 31 July 2017 and in a letter dated 28 July 2017. He upheld the original decision.

24. At all relevant meetings, the claimant was assisted by a representative from his trade union. All meetings were noted and/or recorded and I refer to the notes / transcripts. No procedural points were taken by the claimant or on his behalf during the process and, apart from the things mentioned below, he has not raised any particular procedural points in front of me. I accept that there was substantial compliance with the ACAS Code.

25. I note that both appeals were by way of review of the original decision rather than being full rehearings. That is an observation rather than a negative criticism. It was fair and well within the band of reasonable responses to have appeal hearings conducted in this way.

26. During the hearing, I identified for myself a handful of areas of concern about what could broadly be described as procedural matters. The claimant has also highlighted one of two things he is concerned about. My decision in relation to such matters is, in summary, that looking at the investigation and disciplinary process as a whole, they do not, whether taken individually or accumulatively, make the dismissal unfair. For example:

26.1 the claimant is convinced that in discussions outside the appeal hearing that she conducted, Jackie Lea told him that overturning the decision to dismiss him and reinstate him was "*above my* [her] *pay grade*". I am satisfied that the claimant misheard and/or misunderstood and/or took the

remark about something being above her pay grade out of context. Mrs Lea clearly did have the power to reinstate the claimant; and she would hardly tell him otherwise. She gave unchallenged evidence that she has in the past overturned decisions to dismiss and reinstated dismissed employees on appeal. And she explained adequately in her witness evidence – see paragraph 28 of her witness statement – the context within which a remark about something being above her pay grade was made;

26.2 it is clear from their evidence and from the contemporaneous documentation that during the disciplinary process both Mr Halpin and Mrs Lea did form the view that the claimant was to blame for the accident which he failed to report promptly. My concern was that this might, consciously or unconsciously, have influenced their decision to dismiss. Although I do have some nagging doubts about this, particularly in relation to Mr Halpin, my conclusion on the balance of probabilities is that their views about the cause of and blame for the accident did not influence their decision-making to any unfair extent. In any event, there was a second appeal and Mr Brown was very clear in his own mind that the decision he was making was about, and only about, the failure to promptly to report the accident;

26.3 Mr Brown took into account the product of the investigations that were undertaken by HR into whether there was previous inconsistent treatment and he made in his decision against the claimant before the claimant had any opportunity to see or comment upon the product of those investigations. This is definitely not best practice. It would have been very easy for Mr Brown to have written to the claimant and the claimant's trade union representative stating something like, "This is what we have discovered. Do you want to comment on it before I make my final decision?" Further, this arguably constitutes a minor, technical breach of the ACAS Code. However, upon reflection, I do not think this has actually caused any unfairness to the claimant in the particular circumstances of this case. Mr Brown was checking-up on something that the claimant had told him. The product of his research confirmed what the claimant had told him about disciplinary cases from 2016. He also uncovered some information about disciplinary cases from 2017, but the claimant does not suggest that that information was inaccurate. Indeed, neither the claimant nor, it seems, his trade union representative were aware of the 2017 cases; they were in no position constructively to comment on them. I don't think it is reasonably conceivable that anything the claimant might have said to Mr Brown, had he been given the opportunity to comment, would have materially affected Mr Brown's decision. It was, in short, within the band of reasonableness for the respondent not to give the claimant the opportunity to comment on the information HR had provided about two people having been sacked for failing promptly to report accidents in 2017.

27. During the course of submissions, I explained to the parties my provisional view that the one and only thing of that potentially made this an unfair dismissal was: the respondent's failure to set out anywhere clearly that failure to report an

accident promptly was potentially gross misconduct, in circumstances where previously it had not been deemed gross misconduct.

28. When I asked her about this, Mrs Lea in her oral evidence recalled having told groups of employees during training that it was (gross misconduct). She could not, though, recall whether the claimant had attended any of the relevant training that she delivered. She also gave evidence to the effect that she was sure that failing promptly to report accidents was specified as potential gross misconduct in the respondent's written procedures. This proved, on the evidence available to me, to be wrong. What the respondent's written procedures state – and what I think she probably told people – was that the respondent was taking health and safety very seriously and that "*serious infringement of health and safety rules, for example: actions that might endanger yourself or others*", was a gross misconduct offence.

29. I should say that I am sure Mrs Lea genuinely believed what she told me; she was simply mistaken. It is likely that in her mind she combined what was stated in the procedures with her personal opinion that failing promptly to report an accident was a serious infringement of health and safety rules that might endanger people.

30. This has been a very difficult case to decide. It is extremely finely balanced. It is one of those cases where I have had repeatedly to ask myself whether I was slipping into the substitution mindset. It is, dare I say it, a case where I would really have benefitted from the input of Members. I have to come down on one side or the other, though, and by the smallest of margins I have decided that the claimant <u>was</u> unfairly dismissed.

31. I have made my decision in the claimant's favour purely on this basis: in my view, it is unfair and unreasonable for an employer substantially to change the 'tariff' for a particular disciplinary offence, by making conduct that would previously have resulted in a non-disciplinary sanction into a gross misconduct offence, without clearly telling employees that this is what is happening. The warning given to the claimant in Mrs Murcott's letter to him of 24 May 2016 is nowhere near sufficient. Telling somebody they "*may"* be subject to "*disciplinary action*" if they do something again is not fair warning to an employee who has worked for you for 17 years off and on that from that point onwards it is likely to be 'one strike and you're out'. In those particular circumstances, this particular dismissal was outside the band of reasonable responses and, in any event, unfair in accordance with equity and the substantial merits of the case.

32. My decision is not that the respondent had to specify in its disciplinary procedure or somewhere else that failure promptly to report an accident was potentially gross misconduct. In other circumstances, it would be enough to say that a serious breach of health and safety was potentially gross misconduct and to make clear to staff that failing properly to report accidents was a serious breach of health and safety. It is not inherently outside the band of reasonable responses and/or unfair for the respondent summarily to dismiss for failing promptly to report accidents. The one and only reason for my decision is that it

was unfair to dismiss this particular employee at this particular time on the basis of a policy or practice (i.e. what disciplinary sanction was deemed appropriate for failing promptly to report accidents) that had changed substantially given the failure to warn him beforehand that it had changed.

33. I have limited sympathy for the claimant. He knew what he was supposed to do. He knew it was a health and safety matter. He should have known it was a serious health and safety matter. He did not do what he should have done because he thought he knew better. I have not been asked to and make no findings about whether, had he previously been warned that failing promptly to report accidents was potentially gross misconduct, he would have mended his ways; but I have my doubts. Be that as it may, this was not a procedurally unfair dismissal and the respondent has not sought to argue that the claimant would have been dismissed in any event had, for example, a final written warning been imposed. Accordingly, it is not appropriate to reduce any compensatory award in accordance with the Polkey principle.

34. However, as should be clear from what has just been stated, the claimant was largely the author of his own misfortune and was guilty of highly blameworthy conduct. I think the fairest reflection of my decision – if compensation is the remedy – is to make a substantial reduction to the basic award and to any compensatory award. It has not been suggested to me that the percentage reduction should be different for each of them. I reduce both by 80 percent, pursuant to ERA sections 122(2) and 123(6).

35. The claimant told me at the end of the hearing that he was no longer seeking reinstatement or re-engagement but compensation only. I am nevertheless obliged by the ERA to explain to him that the tribunal has power to make an order for reinstatement or an order for re-engagement. An order for reinstatement is an order that the employer shall treat the claimant in all respects as if he had not been dismissed. In other words, he is put back in his old job and it is as if he had never been dismissed. An order for re-engagement is an order that the claimant goes back to work for the respondent or for an associated employer in a job different from, but comparable to, the job he was doing before dismissal.

36. So far as I am aware, re-engagement is not relevant in this case.

37. In relation to reinstatement, I note that one of the factors which the tribunal has to take into account is "*where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement*". Given this, the fact that I have found the claimant contributed to his dismissal and have reduced his compensation by 80 percent as a result may be very significant if he seeks reinstatement as a remedy.

CASE MANAGEMENT ORDER

The claimant must within 14 days of the date this is sent to him inform the respondent and the tribunal whether he seeks an order for reinstatement or re-engagement. The parties must within 21 days of the date the claimant provides that information inform the tribunal whether or not a remedy hearing will be necessary and what case management orders, if any, they propose should be made in relation to any such remedy hearing.

SENT TO THE PARTIES ON

24 March 2018

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FOR THE TRIBUNAL OFFICE