# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Allen

**Respondent:** Luxus Limited

**Heard at:** Lincoln and Nottingham

**On:** 29 March 2018 and 9 May 2018

**Before:** Employment Judge Blackwell (Sitting Alone)

**Representation**
**Claimant:** Miss S Bewley, of Counsel
**Respondent:** Mr L Varnum, of Counsel

# RESERVED JUDGMENT

1. The claim of unfair dismissal succeeds but:

   a) It is just and equitable pursuant to Section 122 (2) of the Employment Rights Act 1996 to reduce the basic award by 70%; and

   b) It is just and equitable to reduce the compensatory award pursuant to Section 123 (6) of the 1996 Act by the same 70%.

2. The claim of wrongful dismissal fails and is dismissed.

# RESERVED REASONS

## BACKGROUND

1. Miss S Bewley represented the Claimant who she called to give evidence together with a former colleague Mr M Betteridge. Mr L Varnum represented the Respondents and he called their Production Manager Mr Richard Whyatt, their Operations & Performance Improvement Manager Mr Jason Andrews, and their Managing Director Mr Peter Atterby. There was an agreed bundle of documents and references are to page numbers in that bundle. Because there was insufficient time the parties were ordered to provide written submissions and both commented on each other's submission. I am grateful to both Counsel, not only for the

way in which they conducted the hearing, but also for the clarity of their written submissions.

## ISSUES & THE LAW

2. Mr Allen's first claim is one of unfair dismissal. As a matter of law it is for the employer to prove a potentially fair reason for dismissal as set out in Section 98 Subsection 1 and 2 of the Employment Rights Act 1996. One of the potentially fair reasons is conduct and that is relied upon by the Respondents in this case in that they say that Mr Allen was witnessed jumping over a moving conveyor at about 8.00 am on the morning of the 16th August 2017. The Claimant's case is that there was conspiracy between Mr Whyatt and Mr Andrews, who took the decision to dismiss to get rid of him and the misconduct on 16th August was a pretext.

3. If the potentially fair reason is proven by the Respondents (Luxus) then it is for the Tribunal to apply to that potentially fair reason to the statutory test of fairness set out in Subsection 4 of Section 98 Employment Rights Act 1996:-

> "In any other case 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."

4. Both counsel have of course referred me to the well-known case **British Home Stores Ltd v Burchell [1980] ICR 303** which requires that:

1. The employer had a genuine belief in the misconduct complained of; and
2. That at the time of dismissal the employer had reasonable grounds for sustaining that belief; and
3. That the employer had carried out an investigation which was reasonable in all the circumstances of the case.

5. As well as the Burchell test the well know band of reasonable responses test is to be applied, not only to the decision to dismiss, but also to the procedure which led to that dismissal. A reasonable responses test is perhaps best expressed in the judgment of Mr Justice Brown Wilkinson in the case of **Iceland Frozen Foods Ltd v Jones [1983] ICR** – page 17 and I am particularly mindful that the starting point should always be the words of Subsection 4 of Section 98 Employment Rights Act 1996.

6. In the context of the claim of unfair dismissal there is also an issue as to the effective date of termination. Mr Allen alleging that it was the 16th August, whereas Luxus maintain that it was the 18th August.

7. There is also an issue as to the reliance of Luxus, on what they claim to be a first written warning issued on 11th July 2017. Mr Allen alleges that they are not entitled to rely upon that alleged written warning for a variety of reasons including the fact that the contractual disciplinary procedure was not followed.

8. Mr Allen also maintains that there are a number of procedural failings in relation to the disciplinary process and argues for an adjustment of any compensatory award pursuant to Section 207 A of the Trade Union & Labour Relations (Consolidation) Act 1992.

9. Mr Allen's second claim is of wrongful dismissal. It is for Luxus to prove that Mr Allen has committed a fundamental breach going to the root of the contract entitling them to treat that breach as a repudiatory breach which would as a consequence entitle them to dismiss summarily.

## FINDINGS OF FACT

10. Mr Allen was employed as a running grinder from May 2007.

11. Luxus is a producer and technical compounder of thermos-plastics on 2 sites.

12. In 2012 Mr Allen suffered an injury at work. He made a personal injury claim against Luxus which was settled.

13. In May 2016 Mr Allen suffered another injury at work, he made a second personal injury claim which has yet to be resolved.

14. In May 2017 Mr Allen was suspended from work on full pay pending investigation into an allegation of contamination of a blender. No action was taken against Mr Allen and he resumed work.

15. On 11th July 2017 an incident occurred where a piece of electrical equipment suffered what appears to be deliberate damage (see page 64). As a consequence, Luxus allege that a first written warning of 11th July 2017 (see page 69) was sent to Mr Allen. I accept Mr Allen's evidence that he did not receive that written communication.

16. At about 7.50 am on the morning of 16th August Mr Whyatt, Luxus' Production Manager, saw Mr Allen jump over a conveyor known as the 'swan neck conveyor'. In Mr Whyatt's words "he jumped over it once to go and get a broom and then a second time whilst carrying the broom".

17. Mr Whyatt then met with Mr Andrews, the Operations & Performance Improvement Manager, and Mr Whyatt's line manager. They jointly viewed CCTV which confirmed Mr Whyatt's account above.

18. Mr Wyatt then summoned Mr Allen and his team leader Mr Ciopcinski and orally dismissed Mr Allen.

19. Mr Andrews then took advice from Luxus' HR department and at about 10:30 am rang Mr Allen, who by then had been sent home, to state that he had been suspended and not dismissed.

20. By letter of the same date Mr Allen was formally suspended pending investigations into "allegations of repeated serious and reckless disregard for health and safety" (see page 71).

21. Still on the same day, a statement was taken from Mr Whyatt (see page 72). The statement makes reference to the incident described above, refers to a sanction against Mr Allen in relation to a nightshift TBN incident in July 2017.

22. Mr Whyatt in that statement which is unsigned alleges that he suspended Mr Allen. Still on the same day a further letter is sent (see page 73) requiring Mr Allen to attend a disciplinary meeting to be held on 18th August at 9:30 am. No material accompanies the letter.

23. Mr Andrews holds the disciplinary meeting on the 18th August and the notes which are largely unchallenged by Mr Allen are at pages 76 to 78. The meeting was adjourned at 9.45 am for some 50 minutes whilst Mr Andrews considered his decision. He concluded as follows:

"This had been a difficult case and he had deliberated but ultimately he had a responsibility to safeguard CA, his colleagues and the company. It was not only this instance but there had been at least 3 others in the last 2 years for health and safety, eroding the trust and confidence that CA had genuinely changed. I make this decision on what I believe is the risk to you, your colleagues and the business and conclude the only route is gross misconduct dismissal.

Had this been a one off and you had a totally clean record, then there may have been other opportunities but I do not believe you understand the severity of your actions. In this day and age H&S is number one priority – whatever company you work for."

24. That decision was confirmed by a letter of 18th August (at pages 79 & 80). Mr Andrews wrote as follows:

"I write to confirm my decision given to you verbally today following the disciplinary hearing, to summarily dismiss you from employment with Luxus Limited.

Having considered the results of our investigation and the explanation you provided, I concluded dismissal on the grounds of gross misconduct to be the appropriate disciplinary action. After very serious and careful consideration, I believe that you have seriously broken the trust and confidence of the employment relationship by:

1. Serious breach of health and safety by jumping over a moving conveyor leading to the granulator putting yourself at risk of major injury or death. This serious breach of H&S is deemed as gross misconduct in the Company's disciplinary procedure.

2. You already have a warning on file dated 10 July 2017 for health and safety together with a history of concerns.

3. During the hearing you reported various health and safety issues you had witnessed during your employment. Whilst we will investigate these matters I have pointed out to you that it was your responsibility to report these at the time of them being witnessed."

25. As he was entitled to do Mr Allen appealed by letter of 19th August which reads as follows:

"I am writing to appeal against my dismiss of employment, as I do not think this is what I deserve after 10 hard years of service, did Mr Whyatt mention that when he saw me jump over the conveyor I turned it back on, on the switch on the belt itself, this is why I did not see a problem with me carrying out the task."

26. An appeal meeting was held on 29th September by the Managing Director Mr Atterby (the notes are at pages 83 and 84) again the contents are not significantly disputed. The meeting was obviously very brief.

27. Mr Atterby's decision (at page 85) was equally brief and read as follows:

"I have reviewed the process and circumstances of your dismissal and am satisfied that the process was followed correctly and that an unacceptable health and safety risk was taken on this occasion and that the live warning and previous history of health and safety concerns bring me to this conclusion. This decision is final and there is no further right of appeal through the Company's procedures."

## CONCLUSIONS

### Unfair Dismissal

28. The first matter is whether or not Luxus have proved a potentially fair reason for dismissal. They rely primarily upon the incident of 16th August 2017. Linked to the question of proof of a potentially fair reason is whether or not the employer in the form of Mr Andrews and Mr Atterby genuinely believed in the misconduct complained of. In alleging that Luxus were intent on dismissing him Mr Allen cites the 2 personal injury claims. In the disciplinary hearing of 18th August he says as follows:

"He believed RW had something against him as he knows more about the machines. He wants all long servers out and does not like I will change operators around."

29. At the appeal hearing of 29th August Mr Allen commented:

"Whyatt was a bully and he had tried to blame CA for a contamination issue relating to blender 30. It was later proved (according to Carl) that the contamination may have come from the top of the blender and CA was not to blame. In CA's view Richard Whyatt wanted the experience people recycling staff out of the company."

30. Mr Betteridge gave evidence as follows:

> "It does not shock me that Luxus wanted to get rid of Carl, they wanted to ever since he was off work with hernias and they messed up his wage. When Carl was off with Hernias Luxus said they would pay him in full, but went back on this."

31. Against this unsurprisingly Messrs White, Andrews and Atterby all deny such a conspiracy and confirm that the reason for dismissal was primarily the incident of the 16th August.

32. I also take into account Miss Bewley submissions as to the events of the 16th August. It seems to me not to matter whether the dismissal took place on the 16th or the 18th August, but what does matter is Mr Whyatt's immediate dismissal of Mr Allen without any process whatsoever. Arguably that supports the conspiracy theory. However, on balance I prefer the evidence from Luxus and find that Luxus have proven a potentially fair reason for dismissal and further that they had a genuine belief in the misconduct complained of.

33. Did Luxus have reasonable grounds to hold that belief? Mr Whyatt's evidence has been consistent throughout, namely that he saw Mr Allen twice jump over the moving swan neck conveyor. That conveyor's dimensions are 85 cm in height and 60 cm in width. Clearly whether the conveyor was moving compounds the risk of tripping and falling because there is the added risk of Mr Allen and/or his clothing becoming trapped in a moving conveyor. Both Mr Whyatt and Mr Andrews viewed CCTV and their evidence is that that confirmed Mr Whyatt's initial conclusion. In the disciplinary hearing of 18th August Mr Allen admitted that he had crossed a moving conveyor. In his appeal letter there is a suggestion that he had turned the belt back on after crossing it. Mr Atterby discounted this change of account and stated that he had not believed the revised version of events.

34. In my view at the time of dismissal and appeal, Luxus had reasonable grounds to believe that Mr Allen had twice jumped over a moving conveyor, and no further investigation as to that allegation was necessary.

35. I turn now to the first written warning. As I have said above, I accept that Mr Allen did not see the letter (which is at page 69). Miss Bewley makes a number of submissions as to its authenticity and goes as far as to allege that it is a fake designed to shore up a flawed dismissal. Miss Bewley also alleges and I agree with her that even had the letter of 11th July been sent to and received by Mr Allen, it fell well short of the contractual disciplinary process which was not complied with in a number of ways.

36. Against this however, Mr Andrews in the disciplinary hearing stated that:

> "JA reminded CA that he had been moved from nightshift to days in July due to failing to follow TPM and fraudulently signing to confirm an electrical check had been carried out and therefore failing to notice a severed cable."

37. In the appeal hearing the following is recorded:

> "PNA reminded CA that he had had a previous warning in July of this year for a health and safety related issue concerning a cable being cut. CA agreed this was the case."

38. Whilst the use of the word 'fraudulently' was wrong, it is clear from these documents and Mr Allen's evidence that he knew that he had been warned because he had signed to confirm that an inspection had been carried out when it had not, although I accept that it was Mr Allen himself who reported the damage, but only after he had signed the report. It is clear that both Mr Andrews and Mr Atterby put that warning in the balance in reaching their respective conclusions. Not with standing that proper process was not followed I conclude that they were entitled to do so.

39. Throughout the process Mr Allen made a number of statements which in summary allege that the crossing of conveyors was condoned. On the 18th August he said:

> "CA said he had been doing that since day 1, all the operators do it as it is easier than walking round. The man from Copes Safety Management had seem me do it and did not say anything."

40. In relation to this Mr Whyatt's evidence was that he checked with the in-house Health and Safety Officer, a Mr Staneacki, whether Cope Safety Management, which are in effect auditors of Luxus' health and safety practices, had raised such an issue and had confirmed that nothing like that had been reported. There was no evidence from Cope at that time, but there is a letter (at page 86) where the Managing Director confirmed that: "had I witnessed any individual walking over a conveyor and where I considered that to pose a risk, I would have taken action", which is in my view a somewhat ambiguous statement.

41. In the disciplinary hearing Mr Andrews appears to have undertaken to view further CCTV but there is no evidence that he did so. Mr Allen repeated his assertions at the appeal hearing. Mr Atterby appears to have relied upon the same evidence as Mr Andrews and did no further investigation.

42. I am conscious that I must not substitute my views as to the adequacy of an investigation for that of the reasonable employer, however Mr Allen had spent a considerable proportion of his working life with Luxus on the nightshift. Mr Allen said in the disciplinary hearing on nights: "they have no one walking around." Mr Allen himself acted up as team leader when the regular team leader was absent. It seems to me applying the band of reasonable responses test that a reasonable employer of the size of Luxus ought to have investigated the point further with team leaders particularly on the nightshift. In my view the investigation carried out by Luxus does not meet a band of reasonable responses test. Whether the practice had been condoned on the nightshift was a matter that ought to have been investigated because it has an effect on whether the decision to dismiss fell within a band of reasonable responses. For this reason I find that the dismissal was unfair.

**Procedural Unfairness**

43. Miss Bewley makes a number of submissions firstly based upon the contention that the dismissal took place on 16th August without any process. It is clear that Mr Whyatt did indeed dismiss Mr Allen without process. However, I am satisfied that there was mutual agreement that employment would continue. I accept Miss Bewley's submissions that Mr Allen is not a sophisticated individual and that he would not have understood the legal path which followed, however even from a layman's point of view it is clear that he was paid and continued to act in accordance with the disciplinary process including appealing.

44. It is clear that the process was perfunctory. It was hurried through and as to the appeal Mr Atterby's consideration of the decision confined itself to dealing with whether fair process had been followed, Miss Bewley rightly submits that the contractual process was not followed, but it seems to me that the test I need to apply is to look at the process overall and see whether it had been fair. Mr Allen always understood the major allegation made against him. He also understood that he had been warned for his conduct in July and why and that he had been moved to dayshifts where a better eye could be kept on him because of the concerns as to his adherence to health and safety. On balance I find the process to have been fair, save for the point I have made above about failing to investigate adequately Mr Allen's allegations of condonation.

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45. I am required to assess what would have occurred had the investigation, which I say should have taken place, had taken place. I have the evidence of Mr Whyatt and Mr Andrews to the effect that they have not witnessed employees crossing a conveyor. On the other hand Mr Allen's evidence is that it did occur and he is supported by Mr Betteridge, although given Mr Betteridge's attitude towards health and safety, I take his evidence with a pinch of salt. I also take Mr Varnum's point that what exactly was being condoned ie was it crossing over a moving conveyor or was it crossing a stationary conveyor? Plainly these are very different.

46. It seems to me that this is one of those sets of circumstances where it is impossible to speculate as to the outcome of such an investigation. I would therefore make no reduction in either the basic or compensatory award because I cannot form a conclusion as to what the outcome of that investigation would have been.

**Contributory Fault**

47. In relation to the basic award the operative provision of the Employment Rights Act 1996 is Section 122 (2):

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

48. As to the compensatory award the operative provision is Section 123 (6) of the Employment Rights Act 1996:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

49. It is trite law to state that the employees conduct must be culpable or blameworthy and there must be a causal connection between that conduct and the dismissal. Having regard to the evidence of Mr Whyatt and the somewhat equivocal evidence of Mr Allen in cross examination, I am satisfied on the balance of probabilities that on the morning of 16th August 2017 Mr Allen twice crossed the swan neck conveyor which was in motion at the time of his crossing. That conduct is plainly culpable and blameworthy and indeed dangerous. There is no doubt that that conduct led to the dismissal. I also take into account the fact that Mr Allen had been warned in July, though I place little weight on that warning. I accept Mr Varnum's submission that the same percentage of contribution should apply to both the basic and compensatory award, because I see no reason for a different contribution and indeed although Miss Bewley says there should be, she advances no factual or case law basis for her contention.

50. The final question therefore is the extent of that contribution and the reduction in both the basic and compensatory award. The risks consequent upon Mr Allen's conduct for his own health and safety are obvious. In my view the appropriate reduction is 70%.

**Wrongful Dismissal**

51. For the reasons given above and particularly in relation to contributory fault I am of the view that having regard to Mr Allen's conduct of the 16th August and his previous warning they amount to a repudiatory breach of his contract entitling Luxus to bring the contract to an end. Thus, the claim of wrongful dismissal fails.

**Remedy**

52. I trust that given the limited ground for disagreement the parties will come to terms but, if not, the Claimant must apply for a remedy hearing within 28 days of the date on which this decision is sent to the parties.

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Employment Judge Blackwell

Date: 23 May 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

02 June 2018

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FOR EMPLOYMENT TRIBUNALS