EMPLOYMENT TRIBUNALS

Claimant: Mr J Heydon

Respondent: LB Europe Ltd

Heard at: Manchester **On:** 12 & 13 February 2018

Before: Employment Judge Tom Ryan
Ms L Atkinson
Mr S Stott

REPRESENTATION:

Claimant: Miss J Hughes, Counsel
Respondent: Mr B Williams, Counsel

Judgment having been sent to the parties on 14 February 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim presented to the Tribunal on 3 August 2017 the claimant, Mr James Heydon, who at the material time was 68 years of age, presented a complaint of unfair dismissal and direct discrimination in respect of the protected characteristic of age against his former employer, LB Europe Ltd, for whom he worked for some years at their premises at Wythenshawe. He was an assembly operator. His employment began in 2009 or 2010 and ended when he was dismissed by a decision of the employer on 23 March 2017.

2. The respondent disputed liability for the claims and the matter was considered at a preliminary hearing by Employment Judge Franey on 16 October 2017. In Annex B to that decision sent to the parties on 19 October 2017 the Employment Judge set out there the issues in the case. We do not need to repeat them here save to say that as to the first issue, which was that in dismissing the claimant the respondent treated him less favourably because of age than it treated his colleague, Des Lynch, it became clear during the course of the hearing that the claimant also sought to rely upon another comparator, Lucasz Chisco. Mr Williams for the respondent accepted there was no reason why the claimant could not rely upon him for that purpose, and so we gave permission for the

claimant to rely upon Mr Chisco as a comparator without the need for a formal amendment.

3. The issues having been set out we recite that we saw witness statements from Mr Bunworth for the respondent who was the dismissing officer; Mr Adams, the appeals officer; the claimant himself and his sister-in-law, Mrs Heydon-Burke, who accompanied him to the appeal hearing. In the event she was not called to give evidence orally. Although her statement was not accepted, we read it and took it into account, but it was not a statement in respect of which either counsel asked the Tribunal to hear her oral evidence as well. We were provided with a bundle of documents to which we will refer where necessary by page number. At the conclusion of the evidence both parties made oral submissions.

The Facts

4. The claimant worked night shifts, and the night shift in question took place on 9 and 10 March 2017. He was operating a pedestrian operated forklift truck known as a "Pedop". He needed to place a pallet full of materials on some racking. The Pedop and the racking are shown in the photograph at page 51 which is a still from a CCTV recording of the incident that occurred. He was working with a colleague, Mr Lynch. Mr Lynch was not trained or authorised to use the Pedop, and indeed he did not do so.

5. The factual position is that in order to get his pallet of materials, the components in fact for making up wine sack fittings, he needed to place materials on a rack. He could not get his Pedop into the appropriate position to do that because below the space he need to access with his forks there was another pallet on which a large piece of heavy equipment, a compressor, was sitting. That it was heavy is not in doubt. It appears to have been so heavy that it had actually broken the pallet on which it was sitting.

6. Mr Heydon put his pallet of materials down to one side. He managed to pick up the compressor on its broken pallet and move it out of the way and he put it down. He then picked up the pallet of fittings he was trying to put away and placed that on the rack. At that stage the compressor on its pallet was then in the gangway and needed to be moved back.

7. Mr Heydon attempted to put the forks of the truck into the space below the top surface of the pallet but was prevented from doing so because the compressor had caused that pallet to break and this restricted the space for the forks. Mr Heydon managed to get the forks partway into the pallet and thus began to move it into the racking, but as he did so, and probably because the forks were not all the way in, the pallet or the compressor upon it wobbled and tipped off, coming to rest as he was later to describe against the back of the racking and indeed, according to either the claimant or Mr Lynch when asked, it had caused the cabinet behind the racking to move.

8. It was never suggested at any stage of these proceedings that up to that point Mr Heydon had done anything wrong. What he did not then do was immediately report the falling off the pallet of the heavy compressor. What he did instead was, without notifying those in charge, he went with Mr Lynch and got some chains.

He was not authorised or qualified, as far as the respondent was concerned, to use chains and they had never trained him in using chains or slings in the moving of materials. He got an eye bolt. Using the eye bolt and an eyelet on the compressor he attached the chains to the compressor and the forklift truck. The chains were not directly above the compressor and, according to Mr Bunworth's enquiries, were also offset: in other words the compressor was not central to the centre line of the Pedop when the other end of the chains were attached to the forks of the Pedop. Nevertheless, in that position Mr Heydon began to lift the forks of the truck which caused the chains to tension. As the compressor was lifted, and presumably because of the alignment, instead of simply lifting it also swung. In swinging it caused the Pedop to become off balance, tipping (standing from the operator's position) to the right, and, as it happened, towards Mr Lynch who was standing to one side, presumably with the intention of guiding Mr Heydon in the manoeuvre.

9. Whether the falling forklift truck, as it did fall, would have struck Mr Lynch or not, it was common ground that if it had not struck him it was at the very least a near miss. Mr Lynch moved quickly out of the way and, according to at least one account, sought safety under some racking. The forklift truck went over. Mercifully neither man was injured. It was obviously a very shocking event. The battery on the Pedop began to leak. Mr Lynch attempted to clean up some of the battery acid and Mr Heydon went off and reported the matter to the charge hand or the shift leader, Gavin Jackson.

10. Mr Jackson took over. He sent the claimant for a cup of tea in the canteen. The claimant asked if he could go home and Mr Jackson said he should go and wait in his car. It was never explained why this happened but it was probably, in our judgment, because it was recognised that the claimant was shaken up and Mr Jackson did not want him driving in that state. At all events after an hour or so, having had a cigarette and sat in his car and collected himself, the claimant went back in and continued. He was restricted by Mr Jackson immediately from being permitted to use the machinery of that kind again, and he completed his shift and went home.

11. He was not due to be in work again until 14 March. However, it appears from the documents that he went back in at 5.00pm that afternoon, that is the afternoon of 10 March, and the process began of the investigation. Mr Jackson had been instructed to interview him, and he did so (53). The claimant was asked if he had ever had training on the use of slings and chains, and the claimant "many years ago at another job". He said:

> Question: Having looked at the CCTV I can see Des was in the line of fire of the truck. Why was he there?
>
> Answer: He was just trying to help me guide the tool. It was him that noticed the truck was tipping over. I was really concerned that he could have been really hurt. With hindsight it was a dangerous thing to do.
>
> Question: Did you report this to me as soon as it happened?

> Answer: We tried to clean up a little at first as I was concerned about what was coming out of the battery but I realised I needed to come and report to you."

12. The effect of that was that when the claimant next went back in on shift the Production Manager, Nathemba Mopofu, spoke to him and suspended him from work. That was confirmed in a letter of the same day, 14 March 2017 (54).

13. As to the comment by the claimant about "Des being in the line of fire", the photograph (51), by common agreement, shows in the upper right-hand corner the Pedop, presumably with the chains and the compressor still attached, beginning to tip to its side away from the camera. To the right clearly at the operator's position, because the Pedop is operated by a handle with a pole that connects it to the back of the Pedop, that is the side away from the forks, is a man standing who by common agreement is the claimant. Apparently, in line laterally with the masts which are the uprights on the Pedop, or at least very close to the line of the uprights, there is an image of a man in black whom we assume to be, and find to be, Mr Lynch standing with his arms apparently raised or half raised. The claimant's evidence was that as the Pedop began to fall Mr Lynch moved to a position somewhere alongside or behind him, that is away from the mast and the forks of the Pedop, which then crashed to the ground.

14. The claimant having been suspended Mr Lynch was interviewed on 15 March (55) by Mr Jackson. He gave an account consistently with that of the claimant. He accepted there was no discussion about using the chains, "We both just went off and got the chains". When he was asked to give an account of the accident, he said:

> "I didn't feel I was in the line of fire. I was stood quite a distance back. I believed Jimmy was going to pull the tool back a little [the tool being the compressor] so we could get somebody else to lift it onto a pallet. I don't know how it looked when reviewed but I didn't feel like it would be possible for it to fall on me. As Jimmy was lifting the chains the fork did seem to be going quite high and then as the chains became tight the tool suddenly and that is when the truck went over. I ran out of the way which was just a natural reaction."

15. On 17 March 2017 whilst still suspended Mr Mopofu wrote to the claimant again confirming there would be a formal disciplinary hearing at 9.30 in the morning on 23 March to be taken by Mr Bunworth.

16. Apparently on 14 March, the day of suspension, the claimant's car was being repaired and having suspended him Mr Mopofu drove him home. In the course of driving him home, according to the claimant, Mr Mopofu said that when the claimant came in for the disciplinary hearing, or the next meeting, he would see him. From that the claimant inferred that Mr Mopofu was going to carry out the meeting, and from that he constructed a theory that, when Mr Bunworth conducted the meeting in accordance with the policy, the reality was that it was a set up job, the whole thing was a sham and Mr Bunworth had already decided to dismiss him.

17. The evidence of Mr Bunworth was that sometimes Mr Mopofu would hold such meetings, sometimes it would be even the charge hand or the shift leader, Mr Jackson, sometimes it was him. It would depend on availability. In the circumstances it cannot have been said by the claimant to be improper for Mr Bunworth to conduct the disciplinary hearing. There is no direct evidence as to how he was assigned and there is no direct evidence to show beyond the claimant's supposition as a result of the conversation with Mr Mopofu that it was a set up job or sham.

18. With the invitation to the disciplinary hearing the claimant was sent the minutes of his own investigation meeting, a copy of the incident report and a copy of the company's disciplinary policy. He was not sent a copy of Mr Lynch's interview and neither was he sent or was he shown at this stage, that is the disciplinary stage, the CCTV recording.

19. The meeting took place on 23 March. Notes were taken by a member Human Resources (58 & 59). The meeting was brief. Mr Bunworth described the sequence of events that day. He said that he had read the comments and statements made to Mr Jackson and the claimant was asked for his answer. He said: "I panicked. Just wanted to get on with the job. Shouldn't have done it". "Was there anything else I should take into account?" asked Mr Bunworth. "Sorry it happened. Nothing else to add".

20. Mr Bunworth explained what should have been done, namely when the incident first happened (that is the compressor falling off the pallet) it should have been reported. Next, as to the getting of the chains, the claimant had not been trained to do that. The result was an incident which could have resulted itself in injury, fatality or damage to the machinery. He asked, "Are you clear that you should have reported it at first instance?" and again Mr Heydon said, "Panicked, tried to tidy then did report it", and he repeated the words "Shouldn't have done it".

21. Having had an adjournment Mr Bunworth came back in and summarised the matter. He said he had reviewed everything that had been put forward. He said that based upon the severity of the incident and the high potential risk he had no choice but to dismiss, but did so with notice rather than for gross misconduct, due to the fact that it had not been intentional, not malicious and taking into account the claimant's service. The nature of the incident, the lack of the reporting and the timing and the misuse of equipment without training led to the decision to dismiss. He said the outcome would be given in writing and the claimant would have seven days in which to appeal to Mr Adams. He asked the claimant if he wanted to add anything and he said "No".

22. The disciplinary hearing outcome letter reflects that account (60-61), except it does not mention gross misconduct although it was mentioned in the minutes of the meeting. In it Mr Bunworth referred to the failure to report the initial incident when the injection moulding press (we have called it a compressor but it may be a press tool) fell off the pallet, misuse of the equipment and reiterated the seriousness of the incident and the high potential risk of injury, fatality or damage to equipment. He recounted and reported, apparently accurately, the claimant's account and explained that his employment would be terminated with notice due to the serious nature of the incident.

23. It was contended by the claimant in this case that Mr Bunworth was not telling the truth when he said that it amounted to gross misconduct at the time. We are satisfied that Mr Bunworth gave evidence that whilst it may not have been wholly accurate in every last detail was essentially an honest and accurate account of what occurred and based upon the minute and his evidence we accept that gross misconduct was in mind. He is a safety specialist and he thought that this was an act of sufficiently serious breach of health and safety that it could fall within the ambit of gross misconduct, and the only reason that he did not dismiss the claimant for that reason but dismiss him for misconduct with notice pay was because of the claimant's length of service and his frank admissions as to what he had done and the fact it had not been an intentional breach.

24. As far as that is concerned, it was pointed out at some point in the hearing that the company could have referred to it as an act of gross misconduct in this letter but nonetheless still decided to dismiss with notice. Be that as it may, on the same day Mrs Heydon-Burke appears to have written a letter on behalf of her brother-in-law, the claimant (62 & 63) indicating an intention to appeal. She referred in that to the claimant feeling that perhaps he was asked to do an unsafe task, and it was clarified with the claimant in evidence that that referred to moving the press tool or compressor rather than being asked to put the chains on the forks and try and put it back on its pallet.

25. The company also disciplined Mr Lynch. He went to a disciplinary hearing on 24 March which resulted in him being given a final written warning (66 and 67). As to that, Mr Lynch's case, the only charge he had faced was not reporting the incident when initially the compressor (or press) fell off the pallet. Mr Jackson who conducted this meeting asked Mr Lynch if he understood about the critical safety behaviour sheet which he had apparently signed on 7 June and 18 July 2016, to which Mr Lynch replied, "It's just a piece of paper which gets shown around and I signed it". When it was explained that was certainly not the case as there had been an update to the sheet in the light of these incidents and all personnel had been spoken to, Mr Lynch just shrugged. He then asked what was the outcome of the meeting. Mr Jackson said the outcome would come later. Mr Lynch insisted he should know the outcome now not later and that he could not work like this, the pressure would stress him out and instead he would go home straightaway and wait to hear.

26. As Mr Bunworth put it when he was asked about attitude and whether that influenced his decision he said, "People sometimes have an attitude because of their culture or because of the incident, but you don't dismiss them because of their attitude first off, you try and work with them and see if it will change". In the event that appears to have been Mr Jackson's decision because he gave a final written warning of a breach which he, Mr Jackson, considered to be an act or gross misconduct.

27. The claimant instructed solicitors on 30 March. There was correspondence about documentation passing between the solicitors and also correspondence about the date of the appeal hearing.

28. On 18 April 2017 the claimant submitted a statement for the appeal hearing. It was probably drafted with the assistance at least of Mrs Heydon-Burke or his

solicitors. It makes reference to Mr Lynch moving under the railings but otherwise essentially confirms the factual account that we have already recited.

29. The claimant's solicitors wrote on 3 May (pages 98-99) about documentation and indicating the claimant's statement of position on the appeal.

30. The respondent has a four stage process in its disciplinary policy: a verbal warning, written warning, final written warning and dismissal, and it was accepted that stages one and two of that were not engaged and in reality the respondent's choice, it seems to be accepted by all sides, was between a final written warning or some other sanction. Together with the final written warning the policy would have allowed the respondent in this case to attach or consider other sanctions. The policy has a contractual effect. After dealing with the stages to which we will return there are paragraphs dealing with alternative sanctions short of dismissal which refer to demotion, transfer, suspension without pay, loss of seniority, reduction in pay, loss of increments and loss of overtime, and says that they may be used in conjunction with a written warning.

31. Under the heading of "dismissal with notice":

> "The examples of offences which may result in dismissal with notice include –
>
> - Disregard of safety procedures or requiring subordinates to disregard safety procedures
>
> - Behaviour inconsistent with or likely to undermine the authority invested in an individual
>
> - Abuse of any privileges of acts of a similar gravity"

32. Under the heading of the examples of gross misconduct one sees the usual sort of behaviours: working under the influence of alcohol or drugs, theft, insulting or abusive behaviour, affray, falsifying documents, matters of that sort. There is no reference in that list to health and safety or anything that might be construed in that way, but the last bullet, as in the previous section, speaks about "acts of a similar gravity".

33. We deal at this stage with what is said in the stage three and stage four. Stage three of the respondent's policy says:

> "A final written warning will usually be given for misconduct where there is already an active written warning on your record, or cases where there is no active written warning on file but we consider the misconduct is sufficiently serious to warrant a final written warning."

34. Under "dismissal" it says:

> "We may decide to dismiss you in the following circumstances:
>
> (1) Misconduct during your probationary period; or

(2) Misconduct where there is an active final written warning on your record; or

(3) Gross misconduct regardless of whether you received any previous warnings."

35. The appeal came before Mr Adams on 5 May 2017. Notes were taken both by Mrs Heydon-Burke for the claimant (101-104) and for the respondent (105-106). There is little between them. The matter is summarised in the outcome letter.

36. One matter that arises is that in the course of the hearing, that is the appeal hearing, which Mr Bunworth attended he was asked a question as to why the claimant had been permitted to continue working before being suspended, and he appears to have said he would investigate that. He did not investigate it; in fact what happened is that Mr Adams spoke to Mr Jackson and investigated it directly with him, and Mr Bunworth did not respond. Mr Bunworth's evidence was that although that is what he said at the appeal hearing, afterwards he remembered as to what had happened, namely that the claimant was due to go in on 14 March and in the course of that Mr Mopofu had met him and decided to suspend him. But it is obviously correct that the claimant was not immediately suspended.

37. In the outcome letter (110) Mr Adams summarised the meeting and what he decided. It is not necessary to recite it in full: it goes on for three pages. In summary the claimant accepted he received significant safety training, in particular that employees should report an unsafe act as soon as they become aware of one, and employees are at liberty to stop what they are doing if it is unsafe. According to the letter, the claimant confirmed he had not been trained in the use of slings and chains with a pedestrian operated truck; that was disputed later but it is consistent with what the claimant had previously said. The claimant agreed with his solicitor's statement that the actions were in breach of health and safety policy and the main point of contention was the sanction. The solicitor's letter was quoted and Mr Adams said that in order to understand the decision he had asked Mr Bunworth who was present to explain, and he then recorded this:

> "John explained that this was a very serious incident with a high potential for serious injury and that he had considered three different disciplinary options. These were final written warning, dismissal with notice or dismissal through gross misconduct. John explained that there was more than one safety breach involved i.e. not reporting the incident when the tool fell off the pallet, getting the chains and deciding to use them with the pedestrian operated truck to attempt to lift the tool off the floor, and negligence; hence John did not believe that a final written warning was appropriate but that dismissal was the correct option. John decided against gross misconduct because Mr Heydon had been cooperative in the investigations following the incident and because of his previous service and record of employment with the company. He therefore decided that dismissal with notice was the correct course of action to take."

38. Mr Adams recalls the question about the claimant being allowed to continue working before suspension. He recounts what his conversation was with Mr

Jackson about the matter and sets that out, and then concluded that he was confident there had been a serious breach of safety policy; the claimant had admitted misconduct and that due diligence was carried out in management and he relied on the appropriate sanction. We should record that in both sets of minutes it appears that the CCTV recording was played in the appeal hearing, and by the time of the appeal hearing we also record that the claimant and his representative had been provided with Mr Lynch's interview.

39. The claimant could not remember the CCTV being played but he appears to accept that it was, and at least Mrs Heydon-Burke was aware of it because she comments on it, agreeing that it was a near miss. Immediately after that, it was apparently played in the appeal hearing. We are satisfied that the appeal hearing did see the CCTV and insofar as there was a procedural breach by the claimant not having Mr Lynch's notes of interview or sight of the CCTV at the disciplinary hearing, the respondent is entitled to at least argue that such breach was corrected at the appeal hearing.

40. Between the claimant's dismissal and the appealan incident took place involving Mr Chisco. Documents in relation to that were included in the bundle (71 & 80). Mr Chisco was using a similar Pedop on, apparently 7 April 2017. He was required, in common with others who adopted the same practice - although the company subsequently considered this to be unsafe and changed it - to raise the forks of his Pedop, insert them under two large, that is to say wide packages of material and lift them downwards and then presumably to move them to some other part of the premises. When he did so the forks were not central under the two packages which appeared to have been stacked one on the other. He reported that when he lifted them the packaging wobbled. Instead of lowering them again and re-centering the forks he continued to extract the packages from the racking with the intention of lowering them. Because they were unbalanced they tipped over, causing the Pedop forklift to fall over, and that is illustrated in a photograph in the bundle of documents also.

41. Mr Chisco reported the incident. He was subjected to disciplinary proceedings in relation to what was alleged (80) by the respondent to be "an incident of serious misconduct, a serious contravention of the company's safety rules and procedures".

2. In the disciplinary outcome letter for Mr Chisco (84) two bullets are referred to:

- Before attempting to lift a load the operator must always ensure that the weight of the load is evenly spread.

- The load is stable. Do not attempt to lift a dangerous insecure load. Inform your supervisor immediately.

42. Mr Mopofu carried out this disciplinary hearing. We pause to say that the fact that three different managers have carried out the disciplinary hearings we have heard about in this case supported Mr Bunworth's position that their disciplinary hearings are, as it were, distributed somewhat at random.

43. Mr Mopofu recorded that Mr Chisco had said that he thought he would get away with it after the load wobbled by successfully taking the pallet out. He said that he had erred in judgment when it was put to him he had contravened his training. He apologised. It was also put to him by Mr Mopofu that the truck was not suitable for the task and the reason for that apparently was that it was more to do with the fact that the operator had to do something called "overriding the front cross member". Mr Chisco said that he had seen other people do it.

44. Mr Mopofu recorded that he decided to issue Mr Chisco with a final written warning if it were not, he said, from the fact that from his investigation this same practice appears to have been undertaken by other people he would have made a sterner decision.

45. It is clear that the operating instructions of the forklift truck had later been amended to prevent using a Pedop forklift to put materials in or take materials out of racking.

46. In those circumstances that was the comparison that we were asked to consider.

47. Both counsel made submissions at the conclusion of the evidence. We refer as and where necessary to the position as it appears from the submissions of Miss Hughes.

The Law

48. As far as the act of discrimination is concerned, we should perhaps begin by summarising the relevant legal principles.

49. Claims of direct discrimination are provided for and governed by section 13 of the Equality Act 2010. Section 136 of that Act provides for the burden of proof, and we note that the guidance given by the Court of Appeal in **Igen v Wong**[1] in 2005 in respect of the statutory provisions replaced by the Equality Act 2010 is still applicable.

50. In summary, to succeed in a claim of direct discrimination a claimant must prove facts from which the Tribunal could conclude that he or she was subjected to some detriment by the respondent (a detriment in this context could include a dismissal) and that he was thereby treated less favourably than the employer treated or would have treated an appropriate comparator of a different protected characteristic. In the case of age, that is a characteristic of somebody in a different age group. The comparator, of course, need not be a real person, but in this case the claimant relies upon the comparators of Mr Lynch and Mr Chisco. Section 23 relied upon by Mr Williams provides that on a comparison for the purpose of section 13 there must be no material difference between the circumstances relating to each case.

51. In order to prove the facts which would cause the burden to pass it is not enough for the claimant simply to prove the less favourable treatment amounting to a detriment and a difference in characteristic. Something more is needed to show

[1] [2005] IRLR 258 CA

some link between the treatment and the difference in race, and the authority for that is the Court of Appeal decision in **Madarassy v Nomura International**[2].

52. What are the principles in relation to unfair dismissal? This is the position. In cases where the reason for dismissal relates to conduct the test established in **British Home Stores v Burchell**[3] restated and affirmed in many cases remains good law. In a case relating to conduct the Tribunal must be satisfied that the employer genuinely believed that the claimant was guilty of the conduct alleged. That belief must be based upon reasonable grounds, and it must be formed after as much investigation into the circumstances as is reasonable. Finally, the decision, namely whether the decision to dismiss was fair or unfair, is not, as we say, governed by what the Tribunal would have done or would do, or what another employer would do, but whether it can be said that no reasonable employer could reasonably have reached this decision i.e. was it a decision which lay within the reasonable range of responses opened the employer. That same "reasonable range" test applies also when considering the adequacy of the investigation.

53. We note especially the warning given by Mummery LJ in the **London Ambulance Service**[4] case quoted by Moore-Bick LJ in paragraph 50 of **Orr v Milton Keynes**[5]:

> "… it is not the function of the employment tribunal to place itself in the position of the employer. Mummery L.J., with whom Lawrence Collins and Hughes L.JJ. agreed, said this:
>
> > "43. It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question-whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

Conclusions

54. It is the respondent's case that the comparison with the two men are not apt. No argument has been made on the alternative basis of a hypothetical comparator. As far as the actual comparators are concerned, that is with Mr Lynch and Mr Chisco, we do consider that there are material differences, and they are significant. In our judgment, the way in which the matter is analysed by Mr Bunworth and as recorded by Mr Adams is ample justification for that. The breach of health and safety is argued on Mr Chisco's part by Miss Hughes to contain two components and the earlier incident involving the claimant contains more than one component. That as an argument is factually true, but it is simplistic to the point of being unpersuasive.

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[2] [2007] IRLR 246 CA
[3] [1978] IRLR 379 EAT
[4] [2009] IRLR 563 CA
[5] [2011] ICR 704 CA

55. The reality in this case is that Mr Chisco adopted a practice that others had done and made an error or judgment. He is not to be criticised, as Mr Mopofu clearly thought, just for the practice in itself because that had been done by a number of other people, even perhaps though they should not have done so. He had an accident because he had failed to centre his forks and that caused the load to overbalance, and recognising a problem he had carried on and did it anyway. But he reported the matter immediately, which the claimant by contrast did not. He did nothing more than that and for that he received a final written warning.

56. As far as the claimant was concerned, having had the initial problem, that is the press took falling off the pallet, Mr Heydon did not report it. To that point he was in a similar position, one might say, with Mr Lynch, who equally did not report it, but thereafter the distinction between Mr Heydon and Mr Chisco and Mr Heydon and Mr Lynch is significant. He went off, albeit accompanied by Mr Lynch, and obtained chains which he then elected to use in conjunction with his forklift truck. He had not been trained on how to do this with a Pedop truck by the respondent, and because there are clearly health and safety implications that was a breach of health and safety procedure. He attached them in such a way that the operation he was intending to carry out could not be done without the risk of the forklift overbalancing. Whether he saw that risk at the time or not it was a risk and it was one in respect of which there was then a potential for serious danger. That there was serious danger was amply demonstrated by the photograph at page 51 which shows, apparently, the claimant operating the forklift in this potentially difficult way at a point in time when Mr Lynch is in the immediate vicinity and perhaps in line with the mast toppling over or at least if not in line so close that it was rightly conceded to be a near miss. The suggestion that this is a similar situation as between Mr Lynch's default and that of the claimant for the purposes of comparison, or as between Mr Heydon and Mr Chisco, the Tribunal simply does not accept.

57. That is sufficient to dispose of the claim of age discrimination, but it goes further, because in truth the best that Mr Hughes could do was to put to the respondent's deciding officers, Mr Bunworth and Mr Adams, that they had decided to give Mr Lynch another chance despite his bad attitude whereas they did not want to give an older person the opportunity mend his ways by retaining him in employment. Both men have roundly disputed that there was any age related component in their decision making process, and no other fact was adduced before the Tribunal which would give rise to the burden of proof passing in accordance with **Madarassy**.

58. In those circumstances we hold that the claimant has not established facts which would cause the burden of proof to pass. In any event, having considered the evidence and seen the outcome letters produced by Mr Bunworth and Mr Adams, we are satisfied that they genuinely reflect the reasons for their decision and there is no age related component detectable in them. In other words, even if the burden of proof did pass we would acquit the respondent of age discrimination.

59. So far as the other component is concerned for age discrimination, namely that where there is a difference in treatment and a difference in age it is open to the employer to show that it was a proportionate means of achieving a legitimate aim, that is simply a matter that was not canvassed in the evidence or the arguments

but we record it simply to say that is why we have not made any determination about that.

60. We return to the position in relation to unfair dismissal. We were reminded by Mr Williams that it is not appropriate for the Tribunal to substitute its decision for that of the employer.

61. The argument here by the claimant is that the ultimate decision was harsh. We understand why he should think that was so. We do not necessarily disagree. For a man of his age to be dismissed at this stage with little possibility of re-employment is, in human terms, harsh; but harsh, as Mr Williams says, is not necessarily unfair. As to the conduct, the conduct was admitted. It cannot be suggested that the respondent did not have a genuine belief in it.

62. As far as reasonable grounds are concerned, the reasonable grounds are the CCTV which spoke for itself and the claimant's acknowledgement that what he did was wrong. Nothing more was needed. If the investigation had not considered the circumstances further, save in relation to sanction, no significant criticism could have been levelled at the respondent. Criticism was made by Miss Hughes of the decision to suspend; in our judgment there is nothing in that.

63. A principal argument as to the procedure procedure is that this was a contractual policy and the contractual policy in the ACAS Code seemed to suggest in both cases that for misconduct, or a first instance of misconduct, you cannot normally dismiss but should give a warning, save in cases where there is gross misconduct. In our judgment that it not the position in law. What is clear is that the ACAS Code is written in terms of “may” and the policy of the respondent is written in similar terms. As far as our judgment is concerned, the policy is written in terms which, although they might be clearer, is wide enough to amply permit the respondent from reacting to the conduct that occurred on this occasion as it did.

64. In any event it is clear and we have accepted that the respondent did consider this to be gross misconduct. In our judgment a reasonable employer would be reasonably entitled to do so. The nature of the incident is such that there was grave risk of harm yet mercifully none manifested itself in physical injury or worse. That is enough, in our judgment, given the circumstances of this case and all the circumstances of the works, for the employer to form that view. Mr Adams put it quite clearly. He thought this was an employee who should have been dismissed without notice because it was gross misconduct. It was a view to which an employer could have come, and not necessarily one with which the Tribunal could have interfered.

65. In fact the real foundation of the argument is to do with the way in which Mr Bunworth expressed it. Miss Hughes sought to build her edifice on the basis of the fact that Mr Bunworth described it as misconduct, which he did, and therefore argued it could not be gross misconduct. That is a fallacy.

66. The reality, in our judgment, is this: that absent that procedural point being available to the claimant then the test is, was this a decision to which no reasonable employer could have come? We regret to say that we do not accept

the argument of the claimant. Whilst not every employer would have dismissed him for this with no injury having manifested itself and no serious damage to property, undoubtedly it cannot be said that no reasonable employer could reasonably have dismissed for this incident. To say otherwise would be to fall into the substitution trap and that we decline to do.

67. Whilst we recognise and have sympathy for the claimant's position, this was not an unfair dismissal and the claims of unfair dismissal and discrimination are dismissed for those reasons.

68. Finally, we extend an apology to the parties for the delay in sending this written judgment and reasons. This has been due to the pressure of other work.

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Employment Judge Tom Ryan

Date 20 June 2018

REASONS SENT TO THE PARTIES ON

19 July 2018

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FOR THE TRIBUNAL OFFICE