EMPLOYMENT TRIBUNALS

Claimant: **Mr P Harris**

Respondent: **Expo Supply Chain UK Ltd**

Heard at: **Southampton** **On:** **29 and 30 October 2018**

Before: **Employment Judge Hargrove**

Representation
Claimant: **In Person**
Respondent: **Ms Scarborough of Counsel**

JUDGMENT

The claimant's complaint of unfair dismissal is not well founded.

REASONS

1. By an ET1 received on 14 December 2017 the claimant brings a claim of unfair dismissal against his former employers Expo Supply Chain UK Ltd. At this hearing the claimant represented himself and the respondent was represented by Ms Scarborough of Counsel.

2. The claimant was employed as a Shunter Driver from 12 May 2011 – 20 September 2017 at the Co-op Distribution Centre in Andover Hants. The respondent was a sub contractor of the Co-op and employed approximately 180 drivers and other support staff including managers at the depot. The task of the drivers was to drive Co-op delivery vehicles on the road; and in the case of the claimant to drive one of five shunter units to manoeuvre trailers on the site.

3. On 14 August 2017 the claimant was driving a shunter unit on site when the trailer dropped from the fifth wheel attached to the shunter unit and damage was caused, although no injury to anybody. The claimant was suspended following an initial report by Ms Liz Dynes, a Transport Supervisor [see pages 98 -99 of the bundle]. There was an initial statement taken from the claimant on that day [see page 95]. It lacks much detail as some of the later explanations made by the claimant.

4. On 19 August another driver, a Mr Todorov, was driving the same shunter unit when the jaws of the fifth wheel let go of the trailer when he was performing the standard tug test for the third time. A manager Mr Parsons directed that the trailer be referred for inspection to the VMU on site [page 103]. The result of that inspection was reported as follows [page 102 of the bundle]:

> Carry out investigation into reported fifth wheel fault. Hitch up to various trailers parked at VMU and aggressively try to uncouple without pressing release button unable to do so. Steam clean six wheel/jaws etc, strip down and examine components – reassemble and re-test on six different trailers again found fifth wheel to be operating as it should do.
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> The test conducted by the VMU on 14 August 2017 at [page 189] wrongly dated 15 July 2017, states:
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> "visually checked fifth wheel including mechanism, checked operation with test pin, checked operation with of fifth wheel mechanism using trailer, tested fifth wheel dual release button no faults found with operation of fifth wheel".

5. Mr S Murray, the Transport Manager directed that all shunters were thereafter to perform six tug tests. After the Todorov incident the fifth wheel was steamed cleaned.

6. On 20 August 2017 another driver, Mr Lush reported that the tractor unit and fifth wheel were covered in grease. It was resubmitted to the VMU for cleaning. The result of that process was a report dated 20 August at page 104.

> "Vehicle came in for clean whist we were asked to look at the jaw movement – although within tolerance agreed to fit jaw kit to alleviate any concerns".

7. On Monday 21 August the claimant was interviewed in the presence of a trade union representative by Mr S Murray the Transport Manager [see pages 116 – 123]. Sometime between 20 and 24 August the fifth wheel was in fact replaced in the circumstances set out in the VMU report [page 104]. Mr Murray decided that in the circumstances the claimant should not be referred for disciplinary proceedings. The fifth wheel was, at that time at least, due to be changed. The claimant was allowed to return to work. The claimant relies upon that event to argue that he should have not have been placed in jeopardy again.

8. However, on 22 August 2017, Mr Lush was re-interviewed on a more detailed basis as to the events of the 20 August and 14 August, when he had also driven the tractor unit after the claimant's accident without mishap. Mr Todorov was also re-interviewed [pages 129 onwards].

9. Sometime around 21 August, after the fifth wheel was replaced, a decision was taken that the investigation into the incident of 14 August be reopened and the claimant was resuspended at the instigation of Mr Child on 24 August

on the basis of new evidence. Mr Child was appointed to conduct the new investigation. He re-interviewed Mr Todorov on 30 August [pages 135 – 145]. He also interviewed the claimant in the presence of the trade union representative Mr Masterson. The claimant claimed that he had done two tug tests and stated that the trailer had come off after he had driven a considerable distance on site. He also mentioned that the red/green light checking system within the cab had been taken out some nine months before.

10. There was a discussion about the fact that the VMU inspections after the accident had all found no fault. Mr Masterson pointed out that the five wheel system had been changed. He asked to see all of the documents. Mr Child said that they would be provided if it moved to a disciplinary hearing.

11. Mr Child also interviewed Mr S Murray as to the circumstances in which he had decided not to recommend disciplinary action. He apparently relied upon the fact that two incidents had occurred to the same vehicle in a short space of time and that the five wheel had been replaced. However, he agreed that he had not seen all of the VMU documents which included the third report.

12. On 4 September 2017, Paul Holiday (PH) wrote to the claimant inviting him to a disciplinary hearing to discuss allegations of gross misconduct namely "that you dropped (a trailer) on 14 August while operating the tractor unit therefore, seriously breaching health and safety Regulations." The letter enclosed a whole series of documents including reports, the witness statements described above, health and safety documents and some maintenance reports.

13. The disciplinary hearing took place on 18 September 2017. The claimant was accompanied by Mr Masterson of Unison [notes at pages 166 – 176]. At this hearing the claimant produced two photographs of the fifth wheel [to be found at pages 226 – 227 of the bundle]. It is unclear when or by whom they were taken but it must have been before fifth wheel was replaced on or after the 21 August. The claimant asserted that the cause of the accident might have been due to metal filings and excessive grease on the fifth wheel. He also produced a copy of the Holland Fifth Wheel Maintenance Guide [see pages 39 – 40] prescribing weekly and monthly actions of a maintenance.

14. PH adjourned the meeting to make further enquiries at the VMU, the Scania Repair Servicing Unit. He interviewed Peter Sullivan a Vehicle Technician and Paul Middleton, the Manager, [page 172]. They confirmed that they had tested the fifth wheel in line with Holland advice documents. The parts had been steamed cleaned and stripped down and nothing was found to be missing or broken. A tester tool had been used and a tug test. No defect had been found. The fifth unit had been in those circumstances changed only to reassure the drivers.

15. PH resumed the disciplinary hearing on 20 September [notes at pages 175 – 178]. He stated that the photographs had not shown a foreign object in the jaws of the fifth wheel. He described what he had been told by the VMU technicians and the manager. He had also made enquiries as to the Co-op policy for servicing shunter units across all sites every six weeks irrespective of the hours which had been undertaken. Some service records were produced.

16. After an adjournment for one and a half hours PH announced his decision. It was based upon the proposition, which he expanded upon in his witness statement to the Tribunal, that there were only three possible explanations for the accident on 14 August 2017 or indeed any accident of this kind. These were:

    (1) Mechanical fault which he excluded on the basis of the three VMU inspection reports and the witness statements.

    (2) Human error.

    (3) Vehicle used not fit for purpose which was not applicable to this accident.

    He stated a reasonable belief that it was human error on the part of the claimant. He announced a decision to dismiss the claimant and this was confirmed by the letter [page 180].

17. The claimant appealed by letter of 27 September 2018 and at page 182. I cite the following paragraphs.

> "I believe the sanction to be too harsh when the reason given was as no mechanical fault was found by the VMU at Andover after the incident, it must have been human error.
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> I accept that when the VMU investigated the fifth wheel after the incident there was no fault to be found but twice in the space of six days after my incident there were a further two reported incidents and it ended up with the VMU looking at the jaw movement and although well within the tolerance agreed to fit a new jaw kit to alleviate any concerns. With this in mind I believe you can't be one hundred percent sure that there was no mechanical fault that day however small and there is a possibility that it could have a bearing on the incident".

18. Paul Murray (PM) was appointed to deal with the appeal. The claimant produced a letter dated 29 September from the Turburg Safety Officer Mr Pollard which states:

> "For the lights to change from red to green the following conditions need to be met:
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> - The Trailer king pin is in the fifth wheel jaws.
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> - The locking mechanism (yolk) has to be in the lock positions. Only when both conditions have been met will the lights change to green".
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> That letter was provided to Mr Murray at the appeal.

19. There were essentially four issues raised by the claimant at the appeal. [The notes of which are at pages 187 – 192]. The claimant was again represented by Mr Masterson.

20. The four issues were:

    (1) The circumstances of the removal of the red/green light system in the cab.

    (2) Build up of grease on the fifth wheel.

    (3) The claimant said that he had a friend who worked at Iceland Swindon depot where there was a process of steaming of grease from the fifth wheel because it can happen if there is too much grease.

    (4) He explained in detail how he had followed the appropriate health and safety procedures on 14 August. It is not in dispute that the claimant had received appropriate training in how to carry out this task. [see in particular, the documents at page 54, 66 and 71 of the bundle].

21. PM adjourned the appeal meeting to make further enquiries on the points raised by the claimant during the appeal hearing. He spoke first to the Co-op Fleet Engineer, Mr Roberts [see page 193]. Mr Roberts effectively discounted the possibility of excess grease being the cause of the accident because in his experience once the pin was locked it would not release. He suggested that the driver might have gone in too low thus causing the pin not being correctly aligned with the jaws. He also suggested that a larger item could have broken the jaws or blocked the jaws but he had never known it to happen. He suggested that nothing had been found in the jaws following the accident. Incidentally, the claimant has suggested during the Tribunal hearing that something might have dropped out when the vehicle has been driven back to the VMU unit from the scene of the accident.

22. PM spoke to the Transport Operations Manager at Iceland Swindon Mr Jenna and to the driver trainer [see page 194]. Mr Jenna denied any knowledge of an incident when excess grease had caused the pin not to click in to the fifth wheel correctly. The driver trainer said he had had a few dropped trailers in his experience which, when checked, had all been done to driver error.

23. Finally, PM spoke to Mr Taylor the Expo Fleet and Engineering General Manager [see page 195] who also stated that grease and debris would not stop the pin from locking in.

24. PM resumed the appeal on 10 November 2017 [see notes at page 196] and described these above investigations. He also confirmed the conclusion of driver error and the penalty which had been imposed by PH.

25. The Employment Tribunal's directions on the law and identification of issues:

    (1) In a misconduct dismissal the employer has to satisfy the Employment Tribunal on the balance of probabilities that the reason or principal reason for dismissal is the employer's belief in misconduct and not some other reason masquerading as a reason relating to conduct. That issue has not been raised as an issue in this case. The claimant has reasonably and sensibly accepted that the reason for his dismissal was a belief in his conduct although he challenges all of the other parts of the test that I have to apply.

26. The test derives from Section 98(4) which defines fairness in the context of a dismissal. In the case of a misconduct dismissal fairness requires the application of the three stage test deriving from Burchell v British Home Stores [1980] ICR [page 302] and a whole series of subsequently reported cases.

27. That three stage test is as follows.

    (1) That the dismissal at the original stage and at the appeal has to entertain a reasonable belief in the conduct alleged.

    (2) At the time the belief was held the employer had carried out as much investigation as was reasonable into the circumstances of the conduct.

    (3) The penalty of dismissal was one which fell within a band of reasonable responses. In fact the band of reasonable responses test applies to all three of the elements of the test.

28. It is to be noted that there is no burden on the employer to prove that these tests are established nor on the claimant to disprove them on the balance of probabilities. The burden is said to be neutral. There will usually however, be an evidential burden on the part of the employer to show what has been done in the events leading up to the dismissal. It is to be emphasised that the Employment Tribunal is not entitled to substitute its own views as to what would have been reasonable for that of the reasonable employer, whatever sympathies the Tribunal may have for a claimant who has been dismissed particularly one with a good previous record.

29. Further, although an employee may adduce evidence after the event, for example at a Tribunal hearing, to show that the tests have not been met or that the dismissal was unfair he will meet difficulties if he has not raised something which could not have been foreseen after the disciplinary process is completed.

30. There are specific issues relating to fairness. These include the claimant's assertion that he should not have been placed in jeopardy at a subsequent disciplinary hearing, having been exonerated of the same allegations at an earlier stage.

31. The evidence called by the parties consists of the two witnesses for the respondent, the Dismissing Officers PH and PM, the claimant in person and Mr Day and witness statements from Mr S Murray and from three character witnesses concerning the claimant.

The conclusions of the Tribunal

32. The Dismissal Officers' beliefs. I am satisfied having considered the evidence of Mr Holloway and Mr Newman that they fairly considered all of the points raised by the claimant throughout the disciplinary process. The essential question was whether they were reasonably entitled to reach the conclusion that the cause of the accident was to be attributed to driver error on the part of the claimant rather than mechanical error. The thought process

pursued by PH, whom I found to be an honest witness who had considered the issues with an open mind and carefully, was one which cannot reasonably be faulted, namely, if mechanical fault could be excluded at least on the balance of probabilities the only alternative was driver error, a suitable vehicle for the task having been provided.

33. The claimant in his appeal letter referred to the fact that PH could not be one hundred percent sure. That is not the standard of proof required in a disciplinary process; reasonable grounds for belief is sufficient, even if it is subsequently established that the belief was a mistaken belief during a tribunal hearing. There was a reasonable basis for their belief that vehicle defect was not the explanation.

34. It lay in the outcome of the three vehicle inspections by the VMU on 14 August wrongly dated the 14 July [page 89]; on 19 August [page 102] and a further inspection on 20 August [page 104]. Furthermore, there were witness statements taken from other drivers before and after the claimant was initially cleared indicating that they were satisfied that the tractor unit was safe to use (see especially the latest statement taken from Mr Lock who had in fact driven the same vehicle also on the 14 August after the claimant's mishap). I reject the claimant's contention that the document at page 188 immediately preceding the VMU report of 14 August demonstrates that the wrong vehicle was inspected on 14 August. The fact that Todorov detected a failure on the third pull on 19 August 2017, does not of itself point to a mechanical defect. I also find that the Dismissal Officers were entitled to reach their conclusions, notwithstanding that the vehicle had been driven by the claimant some distance without a mishap on 14 August 2017 before the accident.

35. I am not able to place much if any weight upon the oral evidence given by Mr Day for the claimant. It goes much further than the summary witness statement which he originally provided. The respondent has had no opportunity to respond to that additional oral evidence. An example is the surprising allegation that forty-eight drivers were dismissed for trailer dropping in the four years Mr Day previously worked at the respondent. He did in his witness statement refer to a point which the claimant raised; that concerning the removal of the red/green light system in the period some nine months before the accident but after Mr Day had left the employment of the respondent.

36. I find that this point was adequately investigated by Mr Holloway. He was satisfied that a decision was made by the Co-op to abandon the checking system because of a history of false positive indications being given that the trailer was safely locked when it was not, leading to drivers placing undue reliance upon the red/green test rather than the pull tests, which was the process recommended by the manufactures. In any event it was the decision of the Co-op to remove them not the respondent. Subsequently, I accept that the device has been removed from some if not all the new trailer vehicles being constructed of this type by the manufacture. I am not satisfied that removal of the system can be said to be causative of the claimant's accident in those circumstances.

37. I find that the initial investigations conducted by Mr Child were reasonably thorough, but the investigation did not stop there. When further explanations

were put forward at the first disciplinary stage and at the appeal they were properly investigated by Mr Holiday and Mr Murray. I do not accept that the initial investigation by Mr S Murray and his decision not to refer the claimant to a disciplinary hearing cast doubt on the thoroughness of Mr Child's investigation. Additional evidence was found and documents considered.

38. To put it another way this is an example of two investigations, one of which was within the band of reasonable responses. The first, Mr S Murray may well not have been thorough. The issue was essentially one of fairness. The fairness of the process as a whole. Additional evidence having been found on the second occasion, the pursuit of disciplinary proceedings at that stage was then justified.

Dismissal

39. Having reached the conclusions that they did, the decision of the Tribunal is that PH and PM were entitled to reach the further conclusions that the claimant was guilty of conduct which amounted to gross misconduct and this employer was entitled to take the view that a clear breach of health and safety which was capable of risking life or limb even on a one off occasion justified summary dismissal. The disciplinary policy of the respondent clearly envisages such a draconian sanction for such conduct and it has certainly occurred on a number of occasions both before and on one occasion since the claimant's dismissal. In these circumstances I find that the sanction of dismissal did fall within the band of reasonable responses in all of the circumstances.

40. Although I have considered the claimant's good work record and the good references provided for him by senior members of the Fire and Rescue Service, these cannot alter the facts as reasonably found by the Dismissal Officers.

41. I found and accept that the claimant was normally a careful driver who normally abided by the health and safety rules. This occasion was on the balance of probabilities an exception. The fact is that the claimant finds it difficult to accept that possibility.

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Employment Judge Hargrove

16 November 2018