EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr G Clayton	v	**Heineken UK Limited**

HEARING

Heard at: **Sheffield** **On:** **6 & 7 June 2018**

Before: **Employment Judge O'Neill**

Appearance:

For the Claimant: **Mr P Morgan, of Counsel**

For the Respondent: **Mr H Menon, of Counsel**

JUDGMENT

1. The claim for holiday pay and unauthorised deduction from wages is dismissed on withdrawal.

2. The claim of unfair dismissal succeeds.

3. I make a finding of contribution of 80% and the basic and compensatory awards shall be so reduced.

4. The claim for breach of contract (notice pay) succeeds.

REASONS

Background and issues

1. The claimant claims unfair dismissal. He accepts that the reason for his dismissal was conduct but asserts that the conduct for which he was dismissed did not constitute gross misconduct and in all the circumstances dismissal fell outside the band of reasonable responses.

2. The claimant also relies on procedural unfairness in that both the dismissing officer and the appeal officer took evidence from Mr Darren Maston after their hearings with the claimant without informing him, without making a note of the interview and without giving the claimant the opportunity of responding.

3. The respondent dismissed the claimant for a breach of health and safety procedures and contends that such a breach amounted to a gross violation of

the health and safety procedures and as such gross misconduct and summary dismissal was therefore justified.

Evidence

4. There was an agreed bundle of documents paginated and indexed; at the outset of the hearing the respondent invited the Tribunal to view a video clip. This had not been seen by the claimant's representative and no formal application had been made previously to view it at the hearing and therefore there was no machinery on which to do so apart from the respondent's Counsel's laptop. I adjourned to read the statements and in that time directed that Counsel for the claimant view the video. Having done so Counsel for the claimant submitted that it did not add anything directly to the matter before us which was not already covered by the documents and Counsel for the respondent did not demure. Therefore I decided it would not be necessary to view the video.

5. Witnesses

   I heard from the dismissing officer Mr Meredith, the appeals officer Mr Ginley, from the claimant, and from Mr J Craig the Senior Trade Union representative and Health and Safety representative on site. Witness statements had been submitted and were taken as read and the witnesses cross-examined.

Law

6. The relevant sections of the Employment Rights Act 1996 (ERA 96) are section 94, 98 119 and 123. As both parties have been represented by Counsel I do not set out those sections in full.

7. I had regard to the well known case of British Home Stores Limited v Burchell 1978 IRLR 379 and the Burchell tests which may be summarised as follows:

   Did the respondents have a genuine belief in the misconduct?

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

   Have the respondents carried out as much investigation as was reasonable and was dismissal a fair sanction to impose under section 98(4).

8. In addition I gave consideration to the case of Iceland Frozen Foods v Jones 1982 IRLR 432 and reminded myself about the direction regarding substitution set out in Tayth v Barchester Health Care Limited 2013 IRLR 387.

Findings

9. Having considered all of the evidence both oral and documentary I make the following findings of facts on the balance of probabilities which are relevant to the issues to be determined. When I heard or read evidence about which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider that particular matter assists me in determining the issues. Some of my findings are also set out in my conclusions below in an attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.

10. The respondent is a well known international brewing company and the claimant was employed at the John Smiths Brewery as a Production Operative. He had been so employed since September 2005 and had an unblemished

record. He was described by Mr Meredith as a competent and experienced worker, throughout the internal proceedings he was found to have acted honestly and openly and acknowledged his mistakes frankly and swiftly.

11. I find the claimant was a man who took health and safety matters seriously. In the past he had reported the transgressions of an external contractor and had highlighted the safety issues relating to the magnetic door catches and had adapted his own procedures to make them safer by opening, locking and pinning two doors rather than simply one in the light of the door failure and the incident involving his colleague Jamie. The claimant had an unblemished disciplinary record and had had no warnings or counselling regarding any previous health and safety issue.

12. I find that the respondent company took the matter of health and safety extremely seriously. They had a number of health and safety policies and recognised Unite the Trade Union whose Shop Stewards also served as health and safety representatives. The union and the respondent worked closely to create exemplary health and safety practices and policies. Mr Craig was the Unite Senior Steward and the Senior Health and Safety representative on site; he was also qualified by the professional body IOSH. The respondent was particularly vigilant in respect of health and safety in connection with the palletiser/depalletiser following two fatalities in or about 2010 (one in Spain and one in Portugal).

13. The union and the respondent had also entered into a collective agreement on disciplinary and grievance procedure which was in turn incorporated into the individual contracts of employment of the employees. The agreement listed gross misconduct at paragraph 4.5(b)(xi) as *"a gross violation of health and safety procedure"*.

14. The claimant worked on the palletiser in respect of which there was a specific standard operating procedure (SOP) in which the claimant had been trained. A minor intervention included entering the machine to clear blockages and that is what the claimant was doing at the time of his breach.

15. In respect of a minor intervention the policy listed the SOP requirements as follows:

    The SOP in respect of minor interventions lists as a required precaution

    1) Castell key in pocket
    2) Check locking pins are in place before entering the danger zone
    3) Full PPE to be worn
    4) LOTO signage on main control panel
    5) Lower the pallet to conveyor level when removing fallen packs from the lift area.

    In respect of this matter items 1 & 2 and 3 & 4 are the key precautions.

16. On 26 September 2017 the claimant entered the machine to clear a blockage, he was wearing a high visibility jacket and had pinned and locked two doors before entering. Using the Castell key he had turned the machine off but had not removed the key itself to his pocket, he was discovered by his line manager Mr Maston to have entered the machine without removing the Castell key to his pocket, the claimant acknowledged his error and claimed to have been

distracted by the alarms and later claimed to be tired having been on an extreme dieting regime because of a recent diagnosis of Type 2 Diabetes.

17. The claimant was suspended, an investigation conducted by a Manager called Andrew Ridley which in turn led to a disciplinary hearing before Mr Meredith on 8 November 2017.

18. The facts were not in dispute. The question for Mr Meredith was whether this breach of policy was such that it constituted a gross violation of health and safety policy and whether the circumstances of the claimant's health and safety breach and his exemplary past service justified dismissal.

19. There are no complaints levelled against Mr Meredith about the conduct of the disciplinary hearing save for the matter relating to Mr Maston the line manager. After the disciplinary hearing Mr Meredith spoke to Mr Maston and it emerged that he suspected that the claimant may not have turned the key to the off position. (It subsequently transpired that Mr Maston could not say whether or not the key had been in the off position). Mr Meredith did not make a note of this conversation, he did not inform the claimant of it or what had been said, he did not give the claimant an opportunity to deal with what Mr Maston had said which had cast doubt on whether or not the claimant had turned the key into the off position.

20. I find that the claimant did leave the key in the turned off position. He has been consistent about that throughout. Mr Maston does not make any such allegation that it had been left in the on position in his statement of 26 November 2017 which was contemporaneous. In his later conversation with Mr Ginley it would appear that the most he said was that Mr Maston confirmed the key was in the machine but he could not be sure what position it was in.

21. Mr Meredith does not mention this in his letter of dismissal. But in his statement before the Tribunal he frankly volunteered that this troubled him because he could not otherwise understand why an employee who had turned off a machine using the key should not have taken the key out as an automatic procedure. However, I accept the respondent's evidence in the round that the misconduct relied on is simply the claimant's failure to remove the key as expressly required by the SOP.

22. Both Mr Meredith and Mr Ginley the appeals officer accept that the claimant had not acted as he did deliberately or wilfully and that he had an unblemished record and had acted as he did inadvertently when he was momentarily distracted.

23. The appeals officer Mr Ginley was at some stage told about the suspicions of Mr Maston and he also spoke to him without informing the claimant or giving the claimant an opportunity to respond. The appeals officer is sure that he based his decision to uphold the dismissal on the basis of the key had not been removed contrary to the SOP irrespective of its position.

24. I have before me photographs of the plant and the witnesses very helpfully explained how the machinery worked and how the claimant did what he did on the day.

25. At the point at which the claimant had entered into the machine he was not in the vicinity of the hoist which was the most dangerous element of the palletiser.

He had not taken the key from the control panel but had turned it to the off position. He had also raised two doors and was wearing a high visibility jacket.

26. The machine could not start unless someone turned the key into the on position and closed each of the doors. The doors had a magnetised safety locking system which would prevent the machine restarting whilst still open. The claimant had made it his habit to open two doors at any one time to make the system even safer. The doors would have to be closed separately one at a time.

27. Should another employee have arrived at the machine to turn the key into the on position he would have been standing at the control panel only a metre or so from the claimant who would have been readily visible wearing his high visibility vest, the walls of the machine being Perspex and six to eight feet of door would have been open.

28. Should the employee at the control panel have failed to notice the claimant the machine would not restart until he closed the doors. He would then have had to move nearer the claimant to close each of the doors one by one. At that point the claimant would have been immediately in front of him, less than a metre away and visible through the open doors which were each an arm span wide.

29. Mr Ginley accepted that in the particular circumstances of this case the chances of the claimant not being seen were extremely small.

30. In real terms I find the risk at that point to the claimant was extremely low to be almost negligible.

31. The claimant and Mr Craig readily agree that the safest thing to have done was to have removed the key as stipulated by the SOP.

Conclusions

32. The claimant was dismissed for misconduct. The respondent managers held a genuine belief to that effect. The claimant admits having failed to follow the SOP in that he had failed to remove the key. That failure is what the respondents regard as the misconduct.

33. I find the procedure was fair and although the respondent maybe criticised for the way in which its managers dealt with the evidence of Mr Maston I do not conclude that such a procedural defect renders the dismissal unfair. The misconduct for which he was dismissed was the failure to remove the Castell key in accordance with the SOP and the position of the key was ultimately not a relevant factor.

34. I am in no doubt that the misconduct warranted disciplinary action, the claimant accepts that and contends that he could have been issued with a final written warning. The question is whether dismissal falls within the band of reasonable responses.

35. I remind myself that I am not permitted to substitute my view for that of the employer.

36. I also remind myself that it is my function to determine whether in the particular circumstances of this case the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted.

37. The circumstances of this case include the good record of the claimant and his past keen adherence to health and safety policy and good practice. His honesty

throughout the internal proceedings and before the Tribunal and his readiness to own up and acknowledge his mistake including his own suggestion that he participate in any training programme to underline the importance of adhering to the SOP.

38. The circumstances also include the respondent's genuine and serious attitude and approach to health and safety, their international reputation, their particular concerns with this machine given the historical fatalities and the good operating practices they have developed to minimise any risk.

39. In the context of this dismissal the circumstances include the various company documents before me starting with the definition of gross misconduct which includes "gross violation of health and safety procedures". This leads me and any employee to believe that the parties to the agreement being both the union and the respondent, intended gross misconduct to apply in the context of health and safety only to the extreme and flagrant breaches of that policy and practice such as to amount to a gross violation. It is the view of Mr Craig, the Senior Steward, and health and safety representative on the site, that the claimant's breach falls short of being such a gross violation. I note equally that that is not the view of Mr Meredith and Mr Ginley, the respondent managers.

40. The respondent's health and safety policies and practices include in respect of the palletiser the LOTO procedure (Lock Out Tag Out).

41. This is a complex safety procedure involving padlocks and tagging. It applies only when the task is not a minor intervention therefore a distinction is made in the company's own documentation between tasks which are classed as a minor intervention and which are considered a lower level of risk and have a simpler and reduced level of protective steps in the SOP (such steps being regarded as adequate to meet the safety standards) as required in respect of a minor intervention.

42. The task the claimant was doing at the time was classed as a minor intervention.

43. When undertaking that task the claimant failed to follow the procedure for a minor intervention about which he knew and had been trained in. He failed in one respect namely that he left the key in the control panel and did not take it out and put it in his pocket. He did follow all other appropriate safety steps and further added an additional safety measure of his own by locking and pinning two doors rather than just one. Removing the key is the most important step in the SOP.

44. By way of explanation the claimant has referred to being distracted by three alarms sounding on three machines under his control, his tiredness which may have been related to his crash diet following his Type 2 Diabetes diagnosis. I accept that the managers acted reasonably in considering these factors but in giving little weight to them particularly in the light of the occupational health report they received.

45. It is accepted that in leaving the key in the control panel the claimant did not do so wilfully or deliberately but it was a momentary lapse. In determining whether this was a gross violation the fact that the claimant did not act deliberately or wilfully or with malice is a factor to be weighed against such a finding.

46. The company issued a document entitled 'Lifesaving Rules' which referred to the full LOTO procedure but not to the minor intervention procedure. The Lifesaving Rules are the safety rules which the respondent regards as the most important.

47. Again a distinction is drawn between minor intervention and those requiring the full LOTO procedure and I note the exclusion of the former from the Lifesaving Rules which again point to a reduced level of risk in the respect of the minor intervention.

48. As a companion to those rules the respondent published a series of frequently asked questions (FAQ's) which highlight in terms that if an employee is in breach of the full LOTO procedure (that being the part of the LOTO procedure to which the Lifesaving Rules apply) it 'will result in disciplinary action up to and including termination of employment'.

49. Such a notice was not given by the company in respect of breaches of the minor intervention procedure in which the claimant was engaged.

50. I accept the company managers' evidence that the respondent operates to the highest standards of health and safety and health and safety is their highest priority. However, it necessarily follows that not all breaches of health and safety fall within the respondent's own definition of gross violation of health and safety procedures.

51. In the circumstances of this particular case I find that the minor intervention undertaken by the claimant without removing the key was not a gross violation of health and safety procedures. I make this finding on the basis that:

    a) the claimant did not act wilfully deliberately or in flagrant breach of the rules. It was a momentary lapse.

    b) the claimant was not actually in any real or imminent danger because of the configuration of the machine and its Perspex construction, there was no real risk that he would not be seen and because of the safety steps he had taken there was no real or imminent risk of the machinery starting.

    c) the respondent's own policies draw a distinction between an act which is a minor intervention and one that is not, such that a common sense reading of the respondent's documentation and policies is that a minor intervention is at a lower level of risk and thus a breach of its SOP presents a lower level of risk and culpability.

    d) the material issued to staff in connection with the Lifesaving Rules on a commonsense reading points to dismissal as being a likely consequence of a breach of the full LOTO procedure but it does not put employees on notice that dismissal is likely to follow breach of the minor intervention procedures.

52. In the circumstances given the claimant's length of service, an unblemished record in the context of the respondent's own procedures and documentation I find that no reasonable employer acting reasonably would have dismissed and I find the dismissal to be unfair.

53. Given the importance that the respondent gives to matters of health and safety, given the information training and procedures that it has put in place to protect its staff and the fact that the claimant admits the misconduct and acknowledges

he had been trained in and was well aware of the SOP in respect of a minor intervention, it is wholly reasonable that he was disciplined for the breach.

54. For the same reasons in failing to follow the SOP I find that the claimant committed a significant act of misconduct and by so doing contributed to his dismissal and I make a finding of contribution of 80%.

55. The conduct falls short of gross misconduct as defined in the contract and the respondent was not entitled to dismiss the claimant summarily without notice and the claim for breach of contract in respect of notice pay succeeds.

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Employment Judge O'Neill

13 July 2018