EMPLOYMENT TRIBUNALS

Claimant: Mr I Kennedy

Respondent: Basell Polyolefins UK Ltd

Heard at: Manchester **On:** 7 and 8 February 2019

Before: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: Mr S Pinder, Solicitor
Respondent: Ms R Eeley, Counsel

JUDGMENT having been sent to the parties on 18 February 2019 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 26 January 2018 the claimant, who was employed by the respondent at its site at Carrington as a Process Operator, complained that his dismissal on 22 September 2017 was unfair. The respondent disputed the claim in its entirety, asserting that the reason for the claimant's dismissal was his conduct.

2. I heard evidence for the respondent from Mr Stephen Ralph who had investigated the circumstances leading to the allegation of misconduct against the claimant; Mr Norman Sambells, the Site Maintenance Manager at the respondent who conducted the disciplinary hearing; and Mr Graham Milligan, the then Site Manager at Carrington. The claimant gave evidence for himself. He called Mr Martin Murray, a former employee, as a witness.

3. I was provided with a bundle of documents by the parties to which I refer where necessary by page number, and witness statements from all the witnesses which I read as their evidence in chief.

Findings of Fact

4. Since the factual background leading to the allegation of misconduct for which the claimant was dismissed is somewhat technical I first set out the position as I understand it to be.

5. The respondent's plant at Carrington primarily deals in the production of polypropylene. That substance is produced by a process called polymerisation which requires the use of catalysts.

6. One of the catalysts used is a substance known as TEA or TEAL which is an abbreviation for the compound triethylaluminium. It is a highly flammable colourless liquid which immediately ignites on exposure to air and reacts explosively upon exposure to water. It causes severe burns upon contact with skin or eyes. I was asked whether I wished to see video clips showing some features of this product which are said to have been shown to all employees in training. Since there was no dispute about the hazardous nature of the substance I did not consider it necessary to do so. I was provided with documents showing the training provided to employees who have to carry out the task of loading TEAL into the plant's own equipment.

7. Since the substance is so hazardous there is a requirement, according to the respondent, which I accept, that in carrying out the work upon which the claimant was engaged when the incident occurred there should be two people performing it and that they should be wearing not only normal safety equipment but personal protective equipment ("PPE") consisting of a full aluminised fire-retardant suit including gloves and a helmet with a visor.

8. There is a specific sequence of tasks which are required to be undertaken by the operator offloading the product into the company's equipment. The full version of that is kept in the office and the steps are also set out on a laminated card which is kept in the offloading bay.

9. The respondent acknowledged that the PPE required for the task was heavy, not very comfortable and restricts dexterity to a degree. It was, however, the equipment that was recommended by the suppliers and although the respondent was investigating the possibility of using other PPE employees were required to use that which was available at the time.

10. In summary, TEAL is provided or delivered to the respondent's premises in large canisters known as "bombs". They were illustrated in the photographs before me. They are of substantial size, weighing in the order of three tonnes. They are rounded at either end of the cylinder and painted red, and part of the reason for their design is if they were to fall off a vehicle during transit the shape of the canister might cause it to bounce and reduce the chance of explosion or the TEAL escaping.

11. Operators are required to offload the TEAL from the bombs, as I have mentioned by following the laid down procedure. I do not need to describe it all.

12. The top of the bomb has two apertures controlled by valves. When they are not being used there is also bolted in place a steel blanking plate across each valved aperture. One aperture is for a dip-tube going into the liquid TEAL. The other is for

nitrogen because TEAL is stored, both in the bomb and when offloaded into the respondent's plant, under nitrogen at pressure. This ensures safe storage and transfer and avoids the risk of contact with the air and ignition or explosion.

13. In the offloading bay there is pipework set on swinging frames so that over the two apertures on the top of the bomb connectors can be positioned in place for the nitrogen and for the TEAL. At the time of the accident there had been a temporary replacement of the pipe to the connector for the TEAL with a flexible tube. This had been assessed and had been found by the respondent to be suitable. It apparently had been used successfully for some months. However, the combination of the flexible TEAL tube and the rigid tube for the nitrogen meant that on the day of the incident the two had become, to some degree, wrapped around one another so as to render the task of postioning them and carrying out the sequence of steps more difficult for the operator.

14. The process set out by the respondent, and which the claimant accepted he had conducted many times before, was to ensure that the steel blanking plates were removed and the gas and TEAL connectors were connected to the valves in the correct order. This was necessary to ensure that at no time were both apertures left unconnected to tubes with the blanking plates removed and the nitrogen under pressure under one valve and the TEAL under another. That was to avoid the possibility that if the TEAL valve were opened inadvertently (and the valves were operated by a lever that moves through an angle of about 90˚) the pressure of the nitrogen could cause an expulsion of the TEAL. It was not in dispute that the correct procedure, if followed, would avoid that risk.

15. It was common ground that whilst undertaking the task of offloading TEAL from a bomb on 7 August 2017 the claimant was not wearing any of the fire protective PPE. He was also working alone.

16. The claimant's case was that it was not possible for him to position the two connectors in the appropriate positions by following the required sequence of steps because of the pipes being entangled with each other. However, he continued with the task and positioned the two valves above the apertures at a point when he had removed both blanking plates. Thus the TEAL in the bomb was contained only by the valve closed by a lever.

17. In the claimant attempting to position the connectors properly inadvertently the TEAL valve was knocked open. Immediately some of the TEAL under pressure came out and ignited on surface of the bomb and on the claimant's glove and causing burns to his hand. He was able to put out the fire on his glove and the fire caused by the TEAL that had spilled out onto the bomb and made the bay safe. He then received assistance and was taken to hospital, where was treated as an inpatient.

18. Mr Ralph was tasked with investigating this incident to establish whether there should be any disciplinary action against the claimant.

19. The respondent also carried out a separate safety investigation called a TRIPOD investigation. That investigation considered more widespread issues than the simple cause of the accident and although Mr Ralph and certainly Mr Milligan

had access to some of the findings of that investigation, the respondent carried out the resulting disciplinary process by reference to the investigation findings of Mr Ralph.

20. As part of the TRIPOD investigation the Operations Manager, Mr Peter Finch, interviewed the claimant on 14 August 2017. In the course of that interview Mr Kennedy said he undertook the task of offloading the bomb on his own and he had always undertaken it alone. He said that he only wore his standard PPE to undertake the task because he found the helmet of the fireproof PPE to restrict his vision and movement, and he gave the explanation about the flexible hose and the fixed loading arm becoming tangled. He gave an account of how in those circumstances the accident, as I have described it, came to occur. The claimant accepted that he had combined step 2 and step 17 of the process set out on the laminated card kept in the offloading bay without carrying out the steps in between. He accepted that if he had carried out the steps in between the incident could not have occurred in the manner that it did. It was not in dispute that the claimant had completed his training and assessment in relation to undertaking the task and had trained others upon it.

21. As part of his investigation Mr Ralph was provided with the statement that Mr Kennedy had provided Mr Finch and Mr Kennedy's answers to follow-up questions asked by Mr Finch. He was also provided with the statements provided by the shift team about the incident.

22. On 14 September 2017 Mr Ralph conducted an investigatory meeting. Notes of the meeting are set out in the trial bundle (144A – 147) and they reveal that Mr Kennedy confirmed what he already said to Mr Finch. The claimant confirmed he was aware that the offloading was a safety critical task but that he thought that the specific PPE was not fit for purpose and therefore chose to undertake the task without it. He referred to the fact that issues with the PPE had been raised with management and that he had undertaken the procedure on numerous occasions and followed the required procedure except on this occasion. He maintained he did not know that it was a two-person task since the laminated version of the instructions in the offloading bay, as compared to the instructions kept in the control room, did not state it was a two-person task.

23. Mr Ralph looked into the matters raised by Mr Kennedy. He reviewed the situation concerning the temporary hose/pipe and found it had been put in place whilst he company worked with the supplier of TEAL on a more permanent solution, that it was fit for purpose and there had been no other complaints. In fact he found that there had been requests to install flexible hoses or pipes on the other plan equipment because it was easier to handle than the rigid pipework.

24. At the conclusion of his investigation Mr Ralph recommended there should be a disciplinary hearing. He considered that the claimant had not performed the task properly and his actions could have endangered other people. He described there was not just one act of misconduct but three, namely: not wearing the correct PPE; disconnecting the valves in the wrong order knowingly; and performing the task on his own. Mr Ralph's position with regard to the latter was that although it was not stated on the laminated version of the procedure the claimant should have known it

from his initial training. He also pointed out that the actions of the claimant were not malicious; the claimant was just trying to get the job done but did not follow the right course of action; that the task was described as safety critical for a reason; that the TRIPOD investigation would produce findings regarding practices and what had become custom and practice in the workforce which the respondent had not known were happening, and whether the company should consider its contribution to the matter by not acting quickly enough in response to the complaints about the PPE.

25. The claimant attended a disciplinary hearing on 21 September 2017 conducted by Mr Sambells. At this meeting the claimant was accompanied by Mr Crank, who made points on his behalf.

26. At the conclusion of the disciplinary meeting it was adjourned in order for Mr Sambells to reflect and reach a decision. The meeting reconvened on 22 September 2017 and Mr Sambells said that he had concluded that the claimant should be summarily dismissed for gross misconduct, for breach of a health and safety procedure, and said that the claimant had a right of appeal, and the claimant was handed a letter (154) in which Mr Sambells set out his position. The reasoning is brief and I quote it in full:

> "On 7 August 2017, whilst carrying out the removal & replacement of a TEAL container, there was a release of material which ignited and burnt the back of your hand. I listened to your representations during our meeting where you highlighted several points. The TRIPOD investigation which has been carried out will identify all the factors leading to the accident and will include corrective actions to be put in place by the company. These however do not detract from your own actions which led to the accident which were:-
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> - You deviated from carrying out the steps in the order specified in the procedure despite being aware that this is a SAFETY CRITICAL TASK;
> - You deviated from the procedure for the safety critical task by carrying out the job on your own although the job is a two-person job. Although this is not specified on the laminated checklist which you were following you have been fully trained on the job and had undertaken the task a number of times previously and should have been aware that this was a two-person job.
> - You were not wearing the correct PPE for the task.
>
> These actions constitute gross misconduct; you breached health and safety rules endangering the health and safety of yourself and others and committed a serious breach of the procedure when carrying out a safety critical task."

27. In his witness statement Mr Sambells said that he considered that each of the health and safety breaches identified by Mr Ralph on its own merited dismissal on the grounds of amounting to gross misconduct. There was no dispute between the parties that the actions of the claimant potentially could amount to gross misconduct.

28. The claimant exercised his right to appeal. On 29 September 2017 he submitted a letter of appeal referring to the investigation, technical issues, training

issues, health and safety issues and procedural issues, and mitigating circumstances (154 – 162).

29. The appeal hearing was conducted by Mr Milligan on 12 October 2017. On this occasion the claimant was accompanied by Mr Carl Stretton, a work colleague, whom I noted also appeared to have been a member of the team that carried out the TRIPOD investigation. One issue was raised that Mr Milligan's name was on the sheet where the members of the TRIPOD investigation had signed it off. Mr Milligan explained that this was because as the site manager when the report was completed he was required to sign it off and that was his only part in the preparation of that report. I accepted that evidence and Mr Pinder on behalf of the claimant did not challenge it.

30. The claimant accepted that the notes of the meetings were a reasonably accurate record of what was said and that he had a proper opportunity to set out the points he wished to make in support of his case.

31. During the appeal meeting that the claimant was offered a number of chances to make his points, namely about not knowing it was a two man job and the point about the pipe tangling on the fixed arm. With regard to training, the claimant said he could not even remember reading the standard operating procedure. That was at variance with his evidence in which he said he had never seen the standard operating procedure. The claimant complained that on the previous occasion when he had used the PPE for the job his neck ached for a month. He prayed in aid the fact that he himself had been responsible for dealing with the fire and ensuring that others were not put at risk even though his hand had just been burnt, but Mr Milligan regrettably had to point out that it was the claimant himself who had created the fire in the first place.

32. On 19 October 2017 Mr Milligan wrote to the claimant upholding the decision to dismiss that Mr Sambells had made. His reasoning was set out in his letter (201 – 202). In substance it was the same reasoning as that adopted by Mr Sambells in reaching his decision. In his conclusion Mr Milligan said:

> "Each of these points stand alone as serious breaches of our company's safety policies and procedures. Combined, I think it was reasonable for Norman to determine your dismissal was justified in accordance with the site disciplinary and dismissal procedure. In reaching this decision, I have considered your service record, the support you command among your colleagues and your personal circumstances. This has not been an easy decision to take and I do not pretend otherwise. However, it is of paramount importance to the company to comply with the non-delegable duties it owes to ensure – so far as reasonably practicable – the health, safety and welfare of all its employees while they are at work, and the consequences of your actions are sufficiently serious that I am upholding the decision to dismiss.
>
> It is with regret that I advise you of my decision."

33. Mr Pinder cross-examined Mr Sambells, the dismissing officer, in relation to what he understood his task to be. Mr Sambells said his job was to read the evidence, to listen to the matters raised at the hearing and decide what level of

discipline should be applied. He was asked whether his decision to dismiss was because he agreed they were all matters of gross misconduct, to which he replied "yes and no". He said, "I take into account Mr Ralph's advice and make my own conclusions". He said that over 40 years he had had several occasions of being trained in carrying out disciplinary proceedings. When he was referred to the disciplinary procedure Mr Pinder put to him that his was his job to decide if it was misconduct, to which Mr Sambells replied "I don't understand your question".

34. When the parties came to make submissions it was on that basis that it was suggested that Mr Sambells did not understand the task of a disciplinary officer, namely to decide whether there was an action which amounted to misconduct, or simply to decide on whether the investigator decided that there was misconduct and then decide the sanction. It was therefore submitted on behalf of the claimant that there had not been a fair hearing because of Mr Sambells' lack of understanding of the appropriate procedural steps to take at that stage of the process.

35. The remaining submissions made by Mr Pinder were more in the nature of points that might be made were these proceedings an action for damages for breach of duty or negligence brought by the claimant against his employer. There were numerous references to risk assessments, whether there should have been some step earlier to replace the flexible hose to avoid the tangling, whether there should have been included on the laminated procedures reference to the fact of it being a two man job, and whether there had been proper supervision of the task during the health and safety walkthroughs that are conducted from time to time.

36. What was conspicuous from Mr Pinder's submissions by its very omission was any reference to the test that the Tribunal has to apply when deciding whether a dismissal was fair or unfair having regard to section 98(4) of the Employment Rights Act 1996.

37. In her submissions Ms Eeley referred to section 98(4) and indeed the decision of the Employment Appeal Tribunal in the classic case of **British Home Stores v Burchell**, and she submitted that the claimant was asking the Tribunal to substitute its decision for that of the employer. Ms Eeley referred to there being three separate acts of misconduct and that the claimant had made several admissions, namely that in particular he did not follow the standard operating procedure in carrying out the task and he clearly failed to wear the correct personal protective equipment. She submitted that he Tribunal should take the evidence of Mr Sambells about what he did at the first stage against the admission that the claimant had made, and that there was no reason to disagree with the investigator and there were reasoned grounds for deciding that all three acts of misconduct could weight together. She submitted that the TRIPOD report had a different function from that of the disciplinary hearing, it was not prepared for the disciplinary hearing, and there was nothing that the claimant had not been able to put to Mr Sambells or Mr Milligan in his disciplinary and appeal hearings. She submitted that Mr Pinder was asking the Tribunal to consider red herrings in the way in which his latter submissions were framed. She pointed out the considerations that might be relevant to the decision of whether there had been negligence or breach of duty on the part of the respondent were not matters that were relevant in an unfair dismissal case.

Discussion and Conclusion

38. I have no doubt that Ms Eeley's submissions are correct in that the function of the Tribunal is to apply the guidance from **British Home Stores v Burchell** in determining the question of fairness of dismissal. Therefore what is required is that I must be satisfied that the employer had a genuine belief that the claimant had committed the conduct alleged; that it had reasonable grounds for that belief and that it formed that belief after as much investigation into the circumstances as was reasonable. Finally, I must be satisfied that the decision, namely to dismiss, was one which lay within the reasonable range of decisions that a reasonable employer could take in response to that conduct as found after that procedure.

39. Further, in considering the application of the test I reminded myself of the decision of the Court of Appeal in **Turner v East Midlands Trains** and the warning given by Lord Justice Mummery in London Ambulance Service where in the Court of Appeal [2009] IRLR 563 and reiterated in **Orr v Milton Keynes Council [2011] ICR 704** the Court of Appeal said:

> "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 question whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

40. I recognise that in that last quotation the Court of Appeal was considering the sort of misconduct in which one describes someone of being guilty or innocent or convicted or acquitted. Some misconduct that employees carry out is of course of a nature which might be akin to that of criminal misconduct. Therefore I remind myself that in reading that passage I need not think of it in those terms and recognise that this is not a case of an employee of clearing his name. Mr Kennedy does not seek to do that. The established principle is that whatever sympathy the circumstances of the incident might give rise to in the mind of the Tribunal, including, as here, the fact that a long-serving employee has lost his job as a result of it, that is not determinative of the question of fairness. However this principle is expressed, I accept the submission of Ms Eeley that it is absolutely not my function to substitute my decision for that of the employer.

41. Against that background I make one further observation: that it seems to me that the matters raised by Mr Pinder, save for his attack upon the scope of Mr Sambells' enquiry and decision making process, were matters, which if they are relevant to be taken into account, might be relevant at the stage of considering remedy. For example if the claimant succeeded in the case, as regrettably he did not, and I was assessing a compensatory award, and having to consider the claimant's conduct, the matters that the claimant raised might (I do not say would because I did not hear submissions on the point) affect how I would approach any argument as to the degree to which the claimant contributed to his own misfortune.

42. So, turning to the specific questions in **British Home Stores v Burchell** I asked myself the questions that are required and I reached the following conclusions.

43. There can be no doubt that the respondent had a genuine belief that the claimant had committed the misconduct of the three health and safety breaches that had occurred.

44. It was open to Mr Sambells and Mr Milligan on the material before them to believe that the claimant knew or had been told that the job ought to have been carried out by two people, and that he had not done so. Whilst Mr Murray had given evidence that supported the claimant's position the respondent had before it evidence from Mr Ralph that there were others who carried it out as a two-man job and in those circumstances the conclusion of Mr Sambells and Mr Milligan was one they were reasonably entitled to reach.

45. There could be no doubt that there were reasonable grounds for the belief in relation to at least the failure to use the proper PPE and the failure to follow the proper sequence of steps in the process. Those matters were admitted by the claimant. I have already said that I consider that there was material upon which Mr Sambells and Mr Milligan could properly come to their conclusion in relation to the claimant's awareness of this being a two-man operation.

46. Did the respondent reach those conclusions at the end of a reasonable investigation? In this context "reasonable investigation" means the entire process leading all the way up to and the conclusion of any appeal. The test to be applied is one and the same as that in relation to sanction, see: **Sainsbury's Supermarkets v Hitt [2003] ICR 111**). Was the investigation one which is within the range of reasonable investigations.

47. In my judgment again that can only be answered in favour of the respondent. The fact that there was another TRIPOD investigation being carried out does not mean that the respondent is required to rely upon that, and it is clear that the TRIPOD investigation would not have assisted the claimant in any of the matters which I have to determine today had it been before Mr Sambells and Mr Milligan in full form at the time they carried out their hearings. The other matters did not affect the question of whether the claimant himself had behaved properly or improperly in the way in which he went about his task, they merely confirmed the findings made by Mr Sambells and Mr Milligan upon the investigation of Mr Ralph.

48. On balance I was not persuaded that the criticism made by Mr Pinder in relation to Mr Sambell's approach to his task was justified. But, even were I to find that Mr Sambells really did not understand the task upon which he was engaged, I have no doubt that the respondent can successful maintain an argument that any defect at that stage was corrected by the appeal. Whilst in the course of cross examination Mr Sambells may have expressed himself in ways which suggested that he did not understand his task, the reality is that he was being asked questions in the context of a procedure in which the initial fact-finding, namely whether the misconduct had occurred, was largely superseded by the admissions of the claimant.

49. I turn finally to the question of whether the decision to dismiss was one which a reasonable employer could reasonably have made. Given the hazardous nature of the material and the safety critical nature of the task in which the claimant, an experienced employee, was engaged, I have little hesitation in saying that the decision to dismiss the claimant was one which any reasonable employer would in these circumstances come to reasonably. This was a decision that lies well within the range of reasonable responses.

50. That is not to say that I reached that decision rejecting the claimant's claim without a significant degree of sympathy for him. It is clear that everybody, from Mr Ralph throughout the process, understood that the claimant did not act maliciously or intend to cause any serious risk. It was perhaps, I venture, one of those cases in which a serious incident occurred due to a lapse or lapses of judgment. Nothing in this decision should be taken by the parties to suggest that I consider that there should be anything less than sympathy for a an employee injured by burning in these circumstances who subsequently loses his job.

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Employment Judge Tom Ryan

Date 6 March 2019

REASONS SENT TO THE PARTIES ON
20 March 2019

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FOR THE TRIBUNAL OFFICE

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