EMPLOYMENT TRIBUNALS

Claimant: Mr D Gardner

Respondent: FTL Seals Technology Limited trading as FTL Technology

HELD AT: Leeds **ON:** 3, 4 and 5 December 2018

BEFORE: Employment Judge D N Jones

REPRESENTATION:

Claimant: In person
Respondent: Miss L Kaye, Counsel

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. It is just and equitable to reduce the basic and compensatory awards by 40% having regard to conduct of the claimant which arose prior to the dismissal and which contributed to it.

REASONS

1. In this case Mr D Gardner, the claimant, presents a claim of unfair dismissal against his former employer, FTL Seals Technology Limited, trading as FTL Technology.

2. The issues which arise are:

> [i] Did the reason for the dismissal relate to conduct, or was it that the respondent had an alternative agenda; a personal dislike of the claimant because of issues he had raised at work?
> [ii] Was dismissal for the stated reason, if established, reasonable in all the circumstances of the case; had the decision makers reached an honest and reasonable belief about the allegations and had there been a

reasonable investigation? Had the treatment of other employees for similar matters been so lenient that dismissal of the claimant was unfair? [iii] If dismissal was unfair should any compensation be reduced for reasons of conduct of the claimant or on the ground that, if a fair procedure had been followed, he would or might have been dismissed in any event?

Evidence

3. Evidence was given by the claimant and, for the respondent, Mr David Cook, Finance Manager, Mr Hayden Fox, Sales Operations Manager and Mr Andrew Hewitt, Business Unit Leader. A bundle of documents of 229 pages was submitted. I viewed the CCTV footage of 7 minutes and 37 seconds concerning the driving of the forklift truck, in respect of which disciplinary proceedings were brought.

Background/Findings of Fact

4. The respondent is an engineering solutions business based in Morley, Leeds. It employs 33 staff, 6 of whom are managers.

5. The claimant began working for the respondent on 9 May 2011 as a production operator. In 2016 he undertook training and qualified as a forklift truck driver. For the last two years of his employment he was one of four such drivers who worked on a rota, with the consequence that he was driving such a truck every fortnight.

6. On 17 March 2018 the claimant removed a load of mechanical face seals, constructed of cast iron, from a lorry with a forklift truck. The pallets were double stacked, that is one on top of another. The first four loads were removed from the lorry and transported from the yard in which the vehicle was parked into the warehouse. The claimant loaded the fifth load of two pallets, double stacked, onto the forks of the truck. The upper load was not positioned squarely on top of the lower one, but overhung it slightly. Having reversed from the trailer of the lorry the claimant manoeuvred the forklift truck to drive towards the warehouse, where he intended to unload the pallets and place them with the others. Mr Darryl Preston, the goods-in manager, waved to the claimant shortly after he had had commenced moving forward with the load, to instruct him to place it outside the warehouse. The claimant changed direction and, just before the entrance to the warehouse, made a left turn more sharply than the load could safely bear, because the change of direction and speed of the vehicle led to the top load toppling from the pallet on which it was sitting. Upon inspection, the casing was found to be damaged. The face seals were intact.

7. Mr Walker, the operations director, had seen the events leading up to the accident. He spoke to the claimant immediately after the load had fallen. The claimant said to him, "*these things happen – I'll know for next time*". He then completed unloading the last two pallets from the lorry with his forklift truck.

8. The following day Mr Walker obtained and viewed CCTV footage of the incident. It covered most of the unloading process and lasted seven minutes and 37 seconds. The sequence concerning the removal of the fifth load to the point at which

the accident occurred lasted 51 seconds. He sent a copy of it to Mr Greenwood who had responsibility for health and safety. He asked his opinion.

9. Mr Greenwood watched the video and make three points. Firstly, he said that he thought the driver would have noted that the pallets were not located on each other, making the load potentially unstable. Secondly, he said that the driver looked to be driving quickly and cornering at any speed with a load can cause issues. Thirdly, he stated that the load looked unstable and was flexing the truck from being picked up, albeit he was not aware of how much it weighed. He concluded that the speed, visibility and sharp cornering were instrumental in the incident. He said that double loading within the limits of the truck would be acceptable if the top pallet was sitting squarely on the bottom one, but that did not look to be the case.

10. Mr Walker prepared a statement on 2 April 2018. Having described the event he witnessed, he stated he was disappointed with what the claimant had said at the time and that he did not apologise and that he was concerned of a lack of appreciation that it could lead to further incidents. He pointed out the value of the goods was £14,000. In respect of the CCTV footage, he commented that the load was not stable, the driver had not carried out a risk assessment, the forklift truck was driven at excessive speed, before turning left the driver swerved out erratically to the right to help negotiate the corner, the corner was taken at excessive speed, and that prior to the incident the driver could be seen driving across the yard with excessive speed and not slowing down as he entered the goods inward area and that he drove with excessive speed in reverse. He had obtained the test results of the claimant, when he had qualified to drive forklift trucks. He referred to the tests relating to properly checking for an unevenly stacked load. He expressed the opinion that the instructor had presumably discussed this with the claimant, but it had not been heeded on this occasion.

11. Mr Cook commenced an investigation. On 4 April 2018 the claimant was shown the 51 second clip of the incident by Mr Walker. On 6 April 2018 Mr Cook interviewed the claimant about the incident. He prepared a report that day. He concluded with a written recommendation: the claimant should undertake a retest of his FLT licence and be suspended from driving until the retest was carried out.

12. The report was submitted to the human resources department. Mr Cook was advised that he should remove his recommendation because that was what might be an outcome of a disciplinary meeting. He was advised that an example of a recommendation to an investigation report might be that the conduct warranted disciplinary proceedings. Mr Cook removed his recommendation entirely but submitted it to human resources to proceed through a disciplinary route.

13. On 9 April 2018 the claimant was invited to attend a disciplinary hearing on 11 April 2018 with Mr Fox. The letter stated that he was charged with serious negligence that could or does result in unacceptable loss, damage or injury. He was informed the outcome could be dismissal. The claimant prepared a personal statement that date and submitted it to the disciplinary hearing.

14. The meeting proceeded on 11 April 2018. The claimant chose not to be accompanied. Ms Barlow, HR adviser was present. (Notes of the disciplinary meeting wrongly recorded it as having taken place on 11 March 2018). The meeting

lasted about 20 minutes. Mr Fox spent just over an hour deliberating and reconvened to inform the claimant that he was to be summarily dismissed. He informed the claimant, having reviewed the statements and notes, that there was a consistent message relating to speed and it was lucky that no incident had happened previously. He said that the claimant had not taken correct procedures to align the pallet, that he did not believe he had taken the severity of the situation seriously, and not learnt errors he had made when he had undertaken his FLT test and although he had apologised in his statements he had not shown any remorse at the meeting. He said the claimant had openly admitted to driving with speed and that that was the way he had always driven. In Mr Fox's opinion this showed that the claimant repeated his behaviour and did not correct it. In a letter written on 12 April 2018, Mr Fox confirmed the decision, stating that he had a reasonable belief that an act of gross misconduct had been committed.

15. The claimant submitted grounds of appeal on 16 April 2018. He drew attention to a number of errors in the witness statement of Mr Walker and the investigation report of Mr Cook. He set out mitigating circumstances, including that his mother had been diagnosed with second stage breast cancer the previous week and had signed consent papers for surgery the previous day. He said this added to his lapse in concentration. He expressed the view that he suspected his dismissal was retaliation for him having made a hotline report, which concerned other workers in the warehouse misusing the internet. He drew attention to other incidents when roller shutter doors had been damaged and no action had been taken. He said he had become involved in the iSay project, which was a scheme whereby employees could make suggestions for improvements, and he emphasised that he went above and beyond what was expected of him.

16. The appeal meeting took place on 19 April 2018 with Mr Hewitt who was accompanied by Ashley McCarrick, HR manager. The claimant attended alone. Mr Hewitt dismissed the appeal. He said that the incident showed serious negligence which could or did result in unacceptable loss damage or injury. He referred to an incident in the previous year, in which an employee had lost a finger and that the respondent took health and safety of all employees very seriously. He stated that the incident could have caused serious injury to an individual or to the claimant, especially if someone had been walking in the designated visitors and employees pedestrian walkway where the pallet was dropped. He upheld the findings and comments of Mr Fox. He confirmed them in a letter of the same date.

17. The respondent has a written policy concerning health and safety which requires employees to comply with the code of conduct and to ensure health and safety of all within the workplace. In addition the respondent has a disciplinary policy which the claimant had received and acknowledged by signature. It stated that an employer would not be dismissed for a first offence unless it was gross misconduct and illustrations of gross misconduct included serious negligence that could or does result in unacceptable loss, damage or injury.

The Law

18. By Section 98(1) of the Employment Rights Act (ERA 1996) it is for the employer to show the reason for the dismissal and that it falls within a category recognised in Section 98(1) or (2), one of which relates to conduct, see Section 98(2)(b).

19. Under Section 98(4) of ERA "*where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
>
> (b) *shall be determined in accordance with equity and the substantial merits of the case.*

20. There is no burden of proof in respect of the analysis to be undertaken under Section 98(4) of the ERA. Material considerations in a case where the reason for the dismissal was conduct, will include whether the employer undertook a reasonable investigation and formed a reasonable and honest belief in the misconduct for which the employee was dismissed[1]. It is not for the Tribunal to substitute its own view, but rather to review the decision-making process against the statutory criteria and, if it fell within a reasonable band of responses, the decision will be regarded as fair[2]. The 'reasonable band of responses' consideration includes not only the determination of whether there was misconduct and the choice of sanction, but will include the investigation[3]. A fair investigation will involve an employer exploring avenues of enquiry which may establish the employee's innocence of the allegations as well as those which may establish his guilt. That is of particular significance in the event the dismissal will impact upon the employee's future career[4]. With regard to any procedural deficiencies the Tribunal must have regard to the fairness of the process overall. Early deficiencies may be corrected by a fair appeal[5].

21. By Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal, a Code of Practice issued by ACAS is admissible and any provision in the Code which appears to be relevant to any question arising in the proceedings should be taken into account in determining that question.

22. The ACAS Code of Practice on Discipline and Grievance Procedures 2015 is one such Code. It must be read in full but a number of provisions are particularly pertinent. Paragraph 19 provides that it is usual to give a written warning where

[1] BHS v Burchell [1980] ICR 303.
[2] Iceland Frozen Foods v Jones [1983] ICR 17.
[3] J Sainsbury PLC v Hitt [2003] ICR 111.
[4] Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457.
[5] Taylor v OCS Group Ltd [2006] ICR 1602

misconduct is confirmed in the hearing and, a further act of misconduct or failure to improve performance within a set period would normally result in a final written warning. Paragraph 20 provides that if the employee's first act of misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. It is stated that this may be appropriate if the employee's actions had or were liable to have a serious or harmful impact on the organisation. Paragraph 23 provides that some acts are so serious in themselves, or have such serious consequences, that they may call for dismissal without notice for a first offence. These are termed as acts of gross misconduct. It continues, that a fair disciplinary process should always be followed, before dismissing for gross misconduct.

23. The ACAS Guide to Discipline and Grievance at Work describes such misconduct as so serious to overturn the contract between the employer and the employee. Examples are provided such as, theft or fraud, physical violence or bullying, causing loss, damage or injury through serious negligence and a serious breach of health and safety rules.

24. If an employer is inconsistent in the manner in which it disciplines employees for the same misconduct, it is a factor which is relevant to considerations of equity and to the substantial merits of the case. It is necessary to have regard to whether the circumstances of the comparator are true parallel. The tribunal has to have regard to the need for employers to act flexibly. A significant factor may be whether employees had been led to believe that certain conduct would not result in dismissal, because of the lesser sanctions imposed upon others in the workplace for the same or similar conduct. Disparity in treatment also may inform the tribunal as to whether or not the true reason for the dismissal was as alleged[6].

25. If a claim of unfair dismissal is established, the Tribunal shall make a basic and compensatory award, if no order for re-instatement or re-engagement is sought, see section 118 of the ERA. Formula for calculating awards is contained in Section 119 and Section 123 of the ERA.

26. Under section 122(2) of the ERA, where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, it shall reduce or further reduce that amount accordingly.

27. By Section 123(1) of the ERA, the amount of the compensatory award should be such amount as the Tribunal considers just and reasonable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. If the dismissal is unfair for procedural reasons, the Tribunal may reduce or extinguish any compensatory award, if the Tribunal concludes that the complainant would or might have been dismissed had the procedures been fair[7].

[6] Hadjioannou v Coral Casinos Ltd [1981] IRLR 352.
[7] Polkey v A E Dayton Services Ltd [1988] ICR 142.

28. Under Section 123(6) of the ERA, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to the finding.

Analysis and Conclusions

The reason for the dismissal

29. In the claim form, the claimant expressed the opinion that his dismissal was, in part, motivated by Mr Walker's dislike of him. In his witness statement he also complained that Mr Hewitt may have similar motivations of personal dislike.

30. There were aspects to the evidence which called into question whether the sole or principal reason for the dismissal did relate to conduct. The original recommendation of the investigating officer was that the claimant should submit himself to a new FLT test and be suspended in the meantime. He was advised to remove that recommendation. A disciplinary process followed which reached a fundamentally different conclusion, summary dismissal. Bearing in mind that this was a judgment of two managers of the respondent on the same facts, one can understand the claimant's scepticism. Two colleagues who were experienced forklift truck drivers, expressed their surprise that what had happened resulted in the claimant's summary dismissal.

31. Because the claimant believes that the outcome of the disciplinary proceedings was so disproportionate to the criticisms made of him, he has considered what other aspects of the working relationships he had with his managers might explain the decision. He believes a number of the suggestions he had made in the iSay scheme were not welcomed by Mr Walker, albeit he implemented one and agreed to another which had not been implemented by the time the claim was dismissed. In respect of one such suggestion, Mr Walker expressed his disagreement and only reluctantly change his mind when the claimant believes he had to acknowledge its benefit.

32. Another incident occurred the day before the accident, when the claimant was spoken to by Mr Hewitt and reproached for becoming involved in a discussion about safety issues with another worker. Mr Hewitt made a record in the communications log as to what he had said to the claimant about that and an email he had sent about skip supply. He had told him he needed to concentrate on his own job and stop trying to do everyone else's. He said he needed to be a team player and approach colleagues in a supportive manner rather than being intent on causing friction. He told the claimant any future disruptive or challenging behaviour would not be tolerated and would lead to future action. The claimant was not involved in the incident concerning the shoes, but I am satisfied that Mr Hewitt genuinely albeit mistakenly believed he had been.

33. The claimant believed that a Hotmail complaint, which drew attention to misuse of the Internet by warehouse employees, had been identified by Mr Hewitt as having come from the claimant, notwithstanding these were made anonymously. Mr Hewitt had spoken to the warehouse employees to inform them such a complaint had emanated from one of their number. Ultimately the complaint led to the

instigation of a disciplinary enquiry and had been taken seriously. In the course of the evidence it emerged the complaint raised by the claimant had not been the one which had been investigated.

34. The reference by Mr Hewitt to a serious health and safety incident the previous year, in the appeal meeting, did nothing to alleviate the claimant's suspicion that he was being singled out. That other employee who had climbed upon some shelving to retrieve his knife, who subsequently fell and degloved his ring finger, was not disciplined for any health and safety breach. Nor were two employees who had damaged some roller doors a few years previously.

35. Having heard Mr Fox and Mr Hewitt, I am satisfied that the claimant's conduct in his driving of the vehicle on 27 March 2018 was the principal reason for his dismissal. They were questioned about the other issues. It was never suggested that Mr Fox had any detailed knowledge of these matters, but rather the claimant suspected that there had been discussion about him amongst management. I did not draw that inference from the evidence. Mr Hewitt was not particularly concerned about the Hotmail complaint, and its provenance, nor influenced by reason of the discussion he had had with the claimant the previous day in which he had criticised him. In respect of the different approach to health and safety issues, I accepted his evidence that he was sympathetic to the plight of the employee who had lost the end of his ring finger and undergone difficult attempts at restorative surgery over six months, such that disciplinary action was not taken. In respect of the other matters, there were some years earlier and were distinguishable. The serious aspects of the incident concerning the claimant were that the fall of heavy items from the truck he operated could have caused a significant loss. There were good reasons to take disciplinary action against other employees, but I am not satisfied the different approach reflects upon the reason action was taken against the claimant.

Section 98 (4) of the ERA

36. I have found that Mr Fox and Mr Hewitt had a genuine belief that the claimant had driven the forklift truck in a manner which created a danger. From viewing the CCTV footage and reading the documentation it is clear that the assessment of Mr Greenwood was well-founded. By failing to notice that the loads were not properly aligned, or noticing that they were and misjudging its significance, the claimant commenced a journey which carried the potential for the load to topple and fall. He sharply manoeuvred the truck at a speed which could not sustain the balance of the top load. The claimant's actions led to the accident. The belief that the claimant's misconduct fell below a standard which was acceptable was reasonable, insofar as it concerned the 51 seconds of driving which immediately preceded the accident. The decision to dismiss, however was based upon the claimant's manner of driving over the entire period of nearly 8 minutes and, for reasons I set out below, I am not satisfied that the investigation in respect of those broader considerations was sufficient, by reference to a reasonable employer and the finding of misconduct extending beyond the circumstances relating to the accident was not reasonable.

37. The investigation betrayed a number of factual errors. Mr Cook described the accident occurring just before the fork lift truck entered the warehouse; in fact, the claimant had been instructed to leave the load in the yard and so was not intending to enter the warehouse. He mistakenly stated that the seals were steel; they were

iron. He stated that he could not ascertain whether there had been any damage to the seals, but by the date of his report it was known there was not. In respect of the FLT test undertaken by the claimant, he stated that the examiner had scored faults at 23 points against a failure rate of 25 points; insofar as this was intended to convey anything relevant, it could only have been that the claimant had narrowly passed. In fact, the pass score was 40. He criticised the claimant for saying he only found the high-vis jacket to be useful when it rained. He said that his view was that it should be worn at all times, but in cross-examination Mr Cook accepted that he had no knowledge as to whether or not this was accepted practice. It was not.

38. Mr Cook referred to 'zigzagging' motions of the vehicle before turning left. That implies a significant change in manoeuvre on several occasions. That is an exaggerated description of the more modest changes to the direction of travel prior to what was an ill judged sharp left turn.

39. Mr Cook stated that the claimant was unaware that the risk assessment stated that there should be daily checks to the forklift truck and the claimant felt that was over the top. He said in cross-examination that he had made no record of the reference to 'over the top'. The claimant denied saying any such thing. I preferred the claimant's evidence. I do not accept that Mr Cook would have failed to make a note of such a significant remark. In addition, his record of the claimant's answer was not that he had said he was unaware there were daily checks. He had said he did not know when the checks had changed but they used to be daily. There were different types of checks and the maintenance ones had previously been changed from daily to weekly. This was what the claimant was explaining. Immediately after he had informed Mr Cook when he had done the weekly maintenance check, Mr Cook had followed with a two-word question "daily checks?". The sequence of those questions, chosen by Mr Cook, was to give emphasis to the weekly practice of maintenance checks which were recorded and the claimant was simply making the point that this practice had been changed from daily to weekly.

40. The extent to which these errors impacted upon the reasonableness of the dismissal must be considered against the process overall. The claimant is understandably troubled by an investigation report which has inaccuracies which portray greater and more concerns than were justified on the known facts. Some of those are clearly more significant than others. The fact Mr Cook thought the seals were steel rather than iron had no relevance to the dangerousness of the claimant's driving and so does not undermine the reasonableness of the decision to dismiss. Moreover, Mr Cook was not the person who made the decision to dismiss the claimant and so criticism of his mistakes are of limited assistance unless they can be shown to have influenced Mr Fox and Mr Hewitt. Errors at earlier stages in a disciplinary process can be identified and eliminated by a fair hearing. The employee can identify them and correct them. That can be seen to have happened in respect of the mistake about the passmark for the fork lift truck test. On the other hand, reliance placed by both decision makers upon two parts of that test which the claimant failed was tenuous, at best, a matter I shall address below.

41. Neither Mr Hewitt nor Mr Fox made any reference to the claimant's ignorance of daily checks or use of a high visibility jacket and I do not regard these errors as having any real significance in respect of the fairness of the decision to dismiss.

42. I do accept there was one aspect to Mr Cook's report which was of real relevance to the decision to dismiss and was a major aspect to the decision of both Mr Fox and Mr Hewitt. That concerned the speed the FLT was driven at throughout the recorded 7 minute sequence in the video. The decision makers did not limit their criticism to the events which immediately preceded and caused the accident. They found the speed was excessive throughout. At the end of the disciplinary hearing Mr Fox said "*there was a consistent message relating to speed and…it was lucky that no incidents had happened previously*". That theme had been picked up from earlier aspects to the investigation. The witness statement of Mr Walker, at paragraph (v), criticised the claimant for his "excessive" speed driving across the yard prior to the incident, not slowing and excessive speed in reverse. Mr Cook, similarly, criticised the speed, not only in respect of the incident leading to the accident, but more generally and particularly when driving backwards.

43. The claimant submits the investigation was flawed because Mr Fox and Mr Hewitt relied upon a judgment about his speed and associated dangers without having the necessary experience and training on such questions and without obtaining suitable information about the safe driving of fork lift trucks from an informed source. He argues that their own assessment of the video was insufficient, and it was unfairly influenced by these observations in the investigative report.

44. I accept the claimant's criticism of the inadequacy of the investigation in this respect. The claimant had drawn attention to his speed being comparable with other drivers, that he had never been criticised for it in the past and that he had had no other incidents in his 2 years of fork lift truck use. Whether or not this manner of driving, as regards to speed, was the norm, was a factor which was material to an assessment of the gravity of his behaviour and the potential for it to be corrected by training. No speed limitations had been imposed, either in the yard or on the vehicle itself. Neither Mr Fox nor Mr Hewitt made any enquiry of the health and safety officer or any other appropriate supervisor about customary or safe speeds. Mr Greenwood, the health and safety officer, had described the vehicle as having been driven quickly, but in the context of the accident. This was no more than was acknowledged by the claimant in the disciplinary process. Mr Greenwood had not criticised the speed of the vehicle at other times, used term 'excessive' or otherwise addressed the broader aspects of vehicle use which Mr Walker and Mr Cook had criticised.

45. I am satisfied that in basing their decision on the totality of the fork lift truck use, over the 7 minute period, as well as the aspect of the driving which caused the accident, both Mr Fox and Mr Hewitt either misunderstood, or misrepresented, the claimant's responses to the allegations made against him. In their evidence, both were adamant that it was the claimant's attitude which led them to rule out any alternative sanction to dismissal. They said he belittled his responsibility for this accident and did not demonstrate any remorse. I accept the claimant's submission that this criticism is not borne out by the records of the disciplinary investigation and hearings. In response, Mr Fox and Mr Hewitt rely heavily upon their own assessments of his demeanour and attitude at both hearings. That is an important feature to which I would give deference, if I accepted it was how the claimant had presented. But I am not persuaded it was. The many acknowledgements of fault and responsibility in the documents contradict that. I accepted the claimant's evidence. By conflating the accident and the more general criticisms of the

claimant's driving, Mr Fox and Mr Hewitt portrayed an employee who was in denial about his shortcomings. When the two aspects are considered separately, it can be seen that the claimant accepted the complaints of his conduct which led to the accident, but not those of his general use of the vehicle.

46. In the immediate aftermath to the accident the claimant made a rather glib remark to Mr Walker, but then repeatedly accepted his lack of care in respect of the accident. The written statement he submitted to the disciplinary hearing, the record of his comments to that hearing, his interview with Mr Cook, his grounds of appeal and the written record of the appeal hearing are consistent. To Mr Cook, he had said it had been a "*kick up the backside/a reminder*" and that in future he would pay careful attention. He repeated this in his personal statement for the disciplinary hearing. He said he would "*take away a few lessons from this incident, one being speed and the other is not being overconfident got complacent in my FLT abilities*", that "*there is no one more disappointed, annoyed and frustrated than myself that it happened*", "*that lapse of concentration and a little overconfidence is what led to the top pallet coming off*". In his grounds of appeal, the claimant stated, "*I have learned from mistakes during my time at FTL so to think I would let this happen again or that I don't appreciate what happened, or indeed that I am not sorry for that matter, couldn't be further from the truth…".* The claimant described the speed of the vehicle, as displayed on the video, as looking horrific, a matter to which emphasis was understandably placed when reflecting the serious aspects to the claimant's conduct.

47. Both Mr Fox and Mr Hewitt found support for their conclusions upon analysis of the paperwork of the fork lift truck test. They said these demonstrated that claimant had not learnt from the errors where failings had been highlighted. These concerned incorrect stacking and destacking and failing to check direction of travel. Had this incident occurred within a few weeks of the test, it may have been thought the possibility for improvement by training or learning from this salutary experience was remote. But a reasonable employer could not fairly reach such a view considering there had been an intervening period of two years during which the claimant had regularly used the trucks without any health and safety incident or complaint.

48. In the hearing it was said that a particular concern was that a person could have been injured by the claimant's careless driving and this was in an area where workers would walk. The driver of the lorry from which the goods were unloaded and Mr Walker could be seen in the video, but there was no footage to demonstrate the claimant came dangerously close to any pedestrian or that his attention was such that he had put anyone at risk. Any moving vehicle could cause serious of fatal injury if it, or its load, makes physical contact with a pedestrian, but that does not establish that it is not driven within tolerably safe and generally accepted parameters. No such concerns were expressed by the health and safety officer, Mr Greenwood.

49. One might have thought the question of a reduced visibility would have been a major concern. The view of the driver, in the immediate direction of forward travel was obscured by the top load. This would not have been the case if only one load had been transported. In cross examination, the claimant said that this was standard practice and that a sufficient view could be obtained from the peripheral lines of sight

beyond the top pallet. By reference to a health and safety booklet on fork lift trucks, Miss Kaye pointed out an example of "forklift don'ts" when the load obstructed the forward view, in which case the driver should manoeuvre by reversing. In fairness to the claimant, that example was one in which the entire view of the driver was obstructed ahead, including all peripheral sightlines.

50. This point highlights the need for informed opinion on how safely to use a forklift truck. One might have thought that driving forward with any obstruction to the forward sightline was dangerous and unsafe. That was not, however, the view of the health and safety officer, who stated that the double load was within the truck limits and would have been fine had the load been squarely balanced. Neither Mr Fox nor Mr Hewitt based their finding upon the danger created by double loading, doubtless because of the opinion of their health and safety officer. In contrast, in respect of the speed at which the vehicle was driven forward and in reverse, both decision makers felt able to conclude that this behaviour was dangerous without checking whether it was customary with all drivers they employed, as the claimant alleged, if so whether that was known to the managers in the warehouse and, most importantly, whether that was within acceptable limits.

51. In summary, the broader criticisms about unsafe speed and reversing practices were not properly and sufficiently investigated and therefore soundly based. The heavy reliance upon the claimant's alleged defiance to criticisms were unfair and not objectively justified. Those shortcomings in the procedure and analysis undermined the decision to dismiss to such a degree it was unreasonable and fell outside a reasonable band of responses.

52. For reasons I have already addressed, I do not regard the comparators who were not disciplined by Mr Hewitt as of any real assistance on the question of whether dismissal of the claimant was reasonable and fair.

Conduct

53. By his own admission, the claimant drove the forklift truck carelessly and this led to an accident which could have caused a significant financial loss. In evaluating contributory conduct, it is for the Tribunal to determine the level of culpability, not to determine whether the respondent's decision makers reached a decision which fell within an acceptable and reasonable range open to an employer.

54. I would not have categorised the errors as so severe as to amount to gross negligence. I have seen the video footage and considered the comments of all the witnesses and the observations of the health and safety officer. The claimant failed to check the load was properly stacked and then cornered the vehicle at a speed which could not be tolerated by the load, causing it to topple and fall. This involved a number of misjudgements.

55. This carelessness contributed to the dismissal, in addition to the other complaints about speed and reversing which I have commented upon. In these circumstances it is just and equitable to reduce the compensatory award by 40% to reflect such conduct.

56. In respect to the basic award, it is not necessary for such conduct to contribute to the dismissal; the question is whether it is just and equitable to take conduct which preceded the dismissal into account. I consider it is, and reduce the basic award also by 40% as there is no good reason to differentiate from the reduction made from the compensatory award.

Polkey

57. I am not satisfied, had a fair procedure been adopted, that the claimant would have been dismissed. Mr Cook had recommended training, in the outcome to his investigation. The claimant had no previous relevant incidents of fork lift truck misuse. I consider a fair procedure would have led to a warning; possibly even a final written warning, but had this employer investigated the allegations more fully and had it fairly considered his response, there was no quantifiable chance of a dismissal. I make no further reduction.

Employment Judge D N Jones
14 January 2019