



EMPLOYMENT TRIBUNALS

Claimant: Mr G Percy

Respondent: Imperial Chemical Industries Limited t/a Akzonobel

Heard at: Manorview House, Newcastle-upon-Tyne **On:** 11 March 2019

Before: Employment Judge A.M.S. Green

Representation

Claimant: In person

Respondent: Ms L Banerjee - Counsel

RESERVED JUDGMENT

The Claimant's claim for unfair dismissal is dismissed.

REASONS

Introduction

1. The Claimant has claimed unfair dismissal. The effective date of termination of his employment was 24 July 2018. After a period of ACAS early conciliation, he presented his claim to the Tribunal on 18 October 2018. The Respondent has resisted the claim.
2. By consent, the designation of the Respondent was amended as per the Instance.
3. The parties filed and served their evidence bundle in advance of the hearing. Additional documentation was tendered by the Claimant and admitted into evidence at the hearing. This related to his remedy (mitigation) and was added into the hearing bundle [266-276]. The Claimant, Mrs Shirley Spoons and Mr Jeff Hope adopted their witness statements and gave evidence. Ms Banerjee and the Claimant made closing submissions.

The claim

4. The Claimant has claimed unfair dismissal pursuant to Employment Rights Act 1996, section 98 (“ERA”).
5. As disclosed in the Claim Form, the Claimant’s claim is broken down into four elements:
 - a. He does not believe that the disciplinary process was conducted correctly. In particular, he claims that the decision-maker did not properly consider the evidence he gave at his disciplinary hearing before reaching her decision.
 - b. There was an error in the system which caused the incident leading to his dismissal.
 - c. The investigation was carried out by Richard Henderson who would have been responsible for ensuring the system was in proper working order. In circumstances where system failure played a significant part in causing the error, he alleges that the investigation was not conducted by someone who was impartial. He alleges that it was in Mr Henderson’s best interest to divert attention from the failure of the system and to blame the Claimant
 - d. The penalty imposed on him was too harsh.

The issues

6. The parties agreed the following list of issues:
 - a. Was the Claimant unfairly dismissed pursuant to section 98 ERA? In particular:
 - i. Was the Claimant dismissed for a fair reason, namely his conduct, in accordance with section 92 (2) (b) ERA?
 - ii. Did the Respondent genuinely believe that the Claimant was guilty of misconduct?
 - iii. Did the Respondent had reasonable grounds for believing that the Claimant was guilty of that misconduct?
 - iv. At the time the Respondent held that belief, had the Respondent carried out as much investigation as was reasonable?
 - v. Did the Respondent act reasonably in all the circumstances in treating the misconduct as a sufficient reason for dismissing the Claimant?
 - vi. Did the Respondent follow a fair procedure in dismissing the Claimant?

- vii. Was the decision to dismiss the Claimant within the band of reasonable responses?
 - b. If the Claimant was unfairly dismissed on the basis that the Respondent failed to follow a fair process, should any award of compensation be reduced to reflect the fact that the Claimant would have been fairly dismissed in any event, in accordance with **Polkey v AE Dayton Services Ltd [1988] ICR 142?**
 - c. If the Claimant was unfairly dismissed, should any compensation awarded be reduced to reflect the Claimant's contribution to his dismissal?
 - d. If the Claimant was unfairly dismissed, should any compensation be capped or reduced to reflect any failure on the part of the Claimant to mitigate his losses?

Basis of decision

7. In reaching my decision, I have carefully considered the oral and documentary evidence, the closing submissions, Ms Banerjee's skeleton argument and my record of proceedings. The fact that I have not referred to every document in the evidence bundle should not be taken to mean that I have not considered it.

Findings of fact

8. By way of general observation, I found the Claimant, Mrs Spoor and Mr Hope to be reliable witnesses when giving their oral evidence. They answered the questions that they were asked, and they were neither vague nor evasive.
9. The Claimant was employed by the Respondent as a Manufacturing Support Operator ("MSO") based at its Ashington plant. He started his employment on 6 January 2014 and was summarily dismissed by the Respondent on 24 July 2018. The Respondent gave the reason for the dismissal as gross misconduct.
10. The Claimant entered into a contract of employment with the Respondent which he signed on 27 December 2013 [34-47]. The following provisions are relevant:
 - a. Clause 10.7 provided that the Respondent reserved the right to terminate the Claimant's employment without notice in the event of any act of gross misconduct or serious breach of the terms of the agreement.
 - b. Clause 18 of the contract provided that the health and safety of individuals and the safe operation of all activities was of fundamental importance to the Respondent. It further provided that the Claimant, as an employee, was responsible to the Respondent and to his colleagues to work safely and he was required to keep himself informed of current safety procedures and policy and of the

Respondent's rules in respect to safety and good practice which would be explained to him when he joined the Respondent.

11. The Respondent operates a disciplinary policy [240A-240J]. Section 2 provides that the policy applies to all employees working under an employment contract. It is expressed not to form part of any employee's contract of employment. Section 4.2 deals with gross misconduct and defines it to mean misconduct serious enough to breach the employment contract between an employee and the Respondent and/or is likely to result in a fundamental breakdown in trust and confidence in the employment relationship. It goes on to provide a non-exhaustive list of examples of gross misconduct including serious breaches of the health and safety rules, willful neglect of duty or serious negligence, serious failure to comply with the Respondent's policies and procedures. It provides that gross misconduct may, in the absence of exceptional circumstances (when a final written warning may be given instead) lead to summary dismissal without payment in lieu of notice. The Claimant was aware of the disciplinary policy.
12. The Claimant was aware of the Respondent's "Ashington One Team Handbook" and, chapter 1 which is entitled "Employee Commitment to Health, Safety, Environment, Quality and Sustainability" [264] and "Golden Principle and Life Saving Rules" [265]. This states, amongst other things:

We all share an obligation to ourselves and each other to make safety our number one priority and ensure that we never accept risks that places in danger. Therefore it is important that we commit to maintaining a good safety culture and always strive to improve the safety of our workplace. Alongside our "Golden Principle" and "Life Saving Rules", we must uphold the following Health, Safety, Environment, Quality and Sustainability core values:

...

7. Show consistency and alignment-if a rule or standard is deemed to be inappropriate or unnecessary, it can only be changed through control procedures to ensure risks are adequately assessed e.g. raised as a go, look, see and reviewed at your MDI, but never undermine the approved practice.

...

13. The Claimant was responsible for coordinating the delivery of materials, including chemicals, which are used to manufacture paints and coatings at the Respondent's plant. It was an essential requirement for the Respondent's operations that chemicals used in the manufacturing process are stored safely. If wrong chemical substances come into contact with each other this can result in a harmful chemical reaction potentially endangering the health and safety of people working on the site and third parties who might be affected by the operation of the Respondent's undertaking. In order to manage the risks associated with the storage and use of these chemicals, the Respondent had procedures in place which were known as standardised work documents. All

employees were required to follow these standardised work documents to manage and reduce the risks associated with these chemicals.

14. When the Claimant was initially employed, the Ashington plant was being constructed. The Claimant worked for nearly 2 years on the commissioning of the plant. He was part of the team that created the standardised work document for offloading tanks entitled "Bulk Liquid Driver Offload Procedure SWD-PD-L-0441" ("Bulk Offload Procedure") [241-251].
15. The Claimant was trained up to level 4 on the Bulk Offload Procedure [185-194]. This meant that he was confident to train others. He had also completed "one-point lessons" that explained the tanker discharge procedure for offloading materials to bulk holding tanks and screenshots of information which is displayed on the Human Machine Interface ("HMI") screen [238].
16. At the beginning of every week, a delivery schedule would be shared with the MSOs (including the Claimant) to ensure that they knew what deliveries to expect during each shift. The delivery schedule was discussed twice daily at the beginning of shift meetings. These were known as Managing Daily Improvement meetings ("MDI"). Updates were communicated to the Team Leaders and MSOs responsible for the deliveries.
17. The Respondent's tanker delivery procedure was as follows:
 - a. The MSO was required to accompany the delivery driver through the entry gate. Whilst there, they were required to use the HMI monitor to scan the driver's card and enter the delivery details. The HMI monitor, which is controlled by a computerised system called SIMATIC IT Manufacturing Execution System (MES), would then direct the MSO and the driver to the correct offload point.
 - b. The MSO was also required to conduct several cross-checks to ensure the correct offload point had been selected by the MES system. In particular, the MSO was required to confirm that the delivery note which had been given to the driver by the material supplier corresponded with the information displayed on the HMI monitor, namely the customer number, delivery number, material description and quantity. If there was any confusion, the MSO could refer to the delivery schedule which could be checked on the MES system or in hard copy.
 - c. Having completed these checks, the tanker and the MSO would then proceed to the weighbridge to take an entry weight before the tanker was accompanied to the offload point.
 - d. On reaching the offload point, the MSO would instruct the driver to connect his tanker hoses to the offload points together with an earth lead for resin deliveries. The MSO would then proceed to the control cabin, from which the tanker is always visible. Whilst in the cabin, the MSO would scan his card onto the tank farm HMI monitor and follow a series of prompts to stop the delivery. These prompts

included confirmation of correct offload point and material. Once all the information had been verified, the tanker would then commence offloading the materials.

The Claimant was very familiar with this procedure and had completed 100s of tanker offloads.

18. The Claimant was involved in an incident on 3 July 2018 regarding the delivery of resin being offloaded into the wrong bulk tank, T131. The incident was brought to the Respondent's attention on 4 July 2018. The details of the incident are as follows:
 - a. Approximately 27,000 kg of X102-537 (an oil alkyd resin) was pumped into the wrong tank containing approximately 65,000 kg of material X101-600 (a thixotropic urethane alkyd which is supplied in a low aromatic white spirit).
 - b. Because of this, the Respondent had to place 39,000 L of paint on hold which required additional evaluation for eight days prior to the release. The Respondent also suspended site manufacture for three days, causing an additional loss of production of 90,000 L of paint.
19. The Respondent estimated that the incident caused it a loss of over £200,000 and there were still 90,000 L of product which could not be used in normal standard weekly production schedules because of the cross contamination.
20. The Claimant was the MSO assigned to this delivery. He gave a statement to Mr Potts and Mr Bickerton of the Respondent on 4 July 2018 [66-67]. The Claimant admitted that he realised that the paperwork did not match the information passed over to him by the delivery driver and he assumed there was an error in the handover information. He stated that he would usually check the delivery schedule but did not do so on this occasion as he had missed the MDI to take over the MSO role from another employee, John Harker who was coming off shift. The purchase order number was not on the piece of paper handed over to him and he was unable to match it up with the driver's paperwork. He admitted that he would usually do this. He assumed that the product "Andecal" went to T131 and thought the description on the paperwork must be a supplier description of the material for T131. He opened the manual valve to T131 after the HMI prompted him to do so having scanned the card. When he was asked about the training that he had for the task and whether the standardised work documentation could be improved he stated that he had been part of the team who had created the standardised work documentation for the task. He stated that he was very familiar with the procedure and have been involved with training other operators on the task. He identified several areas that could improve the standardised work documentation including checking paperwork and the manual start of the pump to get the level pot active and ready for auto offload. He stated that he was going to review the document later the same day.
21. The Respondent investigated the incident and interviewed other employees. The investigation was led by Richard Henderson, the

Respondent's IT Stack Manager. The Respondent also compiled an incident report [109-114]. Mr Potts was the investigation leader. The incident report concluded that the Claimant was responsible for offload and established:

- a. No reference to delivery schedule was used or check of material correctness prior to offload.
 - b. Delivery paperwork was checked and identified as incorrect but not flagged as a problem. An assumption was made that the material was correct due to previous issues with supplier material descriptions.
 - c. No checks were made prior to the offload to confirm delivery details were correct (i.e. material COSHH datasheet, delivery ID, PO Reference, Tank Number).
 - d. Production was continued as the process excursion had not been communicated effectively nor understood by the shift leadership team.
 - e. The root cause was that the Claimant failed to follow the standardised work document or take appropriate escalating actions once an error on delivery paperwork had been identified. The Claimant had confirmed that the task was not carried out as per normal procedure.
22. Mr Henderson led the disciplinary investigation because he understood the MES system and the processes involved in the incident. He was not responsible for ensuring the MES system was functioning correctly and in good working order. That was the responsibility of the maintenance team at the plant. There was nothing in the evidence to suggest that Mr Henderson had a conflict of interest or was shifting the blame onto the Claimant or that he lacked impartiality during the investigation.
23. The Claimant attended an investigation interview on 10 July 2018. Minutes of the interview were taken [121-122]. During the interview, the Claimant accepted responsibility for what had happened and admitted that he should have escalated the matter. He is recorded as saying

assumed Reggie had written it wrong, held up hands from start and should have escalated. Didn't have PO number, assumed as there was only one delivery expected that night. Continued the process, made a mistake and hadn't realised what was happening. System flagged at the exit gate there was an issue, wasn't sure what the issue was. As soon as realised, went and told Ian Ducat.

...

Put my hands up, first bulk delivery; done 100s without any issues. I was a bit stressed-Grandma rushed to hospital. Not an excuse. Since incident, try to put right so this doesn't happen again.

24. Having completed the investigation, the Mr Henderson concluded that disciplinary action was appropriate. Consequently, he wrote to the Claimant on 11 July 2018 inviting him to attend a disciplinary hearing on 13 July 2018 [131]. He told the Claimant that the purpose of the hearing was to consider whether disciplinary action should be taken against him in respect of alleged gross misconduct. The allegation was that he seriously breached the Respondent's rules and procedures, causing significant disruption to production and incurring potentially significant costs. Paragraph 4 of the letter set out in detail the allegations against him. He also included a summary of the investigation's findings and copies of relevant witness statements that had been taken during the investigation and which might be used at the disciplinary hearing. He was invited to identify any further documents that the Claimant might wish to be considered at the hearing. He was referred to the disciplinary procedure which could be obtained from the Respondent's intranet site. He was warned that a possible outcome of the disciplinary hearing could be his dismissal. He was notified of his right to bring a companion who could be either an employee or a trade union representative. The Claimant acknowledged receipt of the letter and asked for the hearing to be rearranged. The hearing was rearranged for 24 July 2018.
25. Mrs Spoons, the Respondent's production manager chaired the disciplinary hearing. Kirstie Hudson attended as a note taker. The Claimant was accompanied by David Narey, a work colleague. The Claimant signed the minutes on 24 July 2018 and there is no suggestion that any part of them have been challenged as incorrect [155-159].
26. At the beginning of the disciplinary hearing, the Claimant apologised and said "it was just an accident, emphasise how sorry I am, it was an accident". The Claimant understood the potential severity of offloading the wrong material. The Claimant was given an opportunity to state his case and to refer to any mitigating circumstances. The Claimant acknowledged that he knew the process that he should have followed but was unable to explain why he had not done that. Although it has been suggested by the Claimant that Mrs Spoons did not properly consider the evidence that he produced, there is no evidence to substantiate that.
27. After the disciplinary hearing was conducted, Mrs Spoons considered the evidence and wrote to the Claimant on 27 July 2018 confirming her decision that his employment should be terminated without notice for gross misconduct [160]. She was not satisfied that the Claimant had provided a reason as to why he failed to follow the Respondent's procedures and concluded that there was a breakdown of trust in his ability to follow the Respondent's rules and procedures. She concluded that this was a serious breach of his obligations and warranted dismissing him without notice. She notified the Claimant of his right to appeal the decision.
28. The Claimant appealed the decision by an undated letter [162-163]. The Appeal was chaired by Mr Hope, the Respondent's Site Manager on 23 August 2018. The Claimant was accompanied by Mr Narey. Jennifer Beattie was the note taker. Minutes of the meeting were produced [172-175]. The Claimant was given an opportunity to state his case at the appeal hearing.

29. On 31 August 2018 Mr Hope wrote to the Claimant to confirm that he was upholding the original decision to dismiss him [180]. Mr Hope stated the following, amongst other things:

You stated that you believed the disciplinary process was not conducted properly and that Shirley Spoor did not take account of all the points you had raised. I questioned what you meant by this, you explained that standardised work procedures were incorrect. I have reviewed all of the evidence, procedures and 1-point lessons. The procedure leads you to the 1-point lesson and this then states it is the Operator's responsibility to carry out certain checks.

You confirmed you understood the checks but stated that the live documents contradict themselves. You stated that information contained in the two documents are different. However you confirmed you were aware of the 1-point lessons in place at the time of incident and have been trained in accordance with it. In addition, it is clear and you agreed in the meeting that you have responsibility for carrying out the necessary checks. I questioned if you were aware of the checks you were responsible for completing. You confirmed you were aware of the checks but believed the documents were confusing. You stated procedures clearly identified cheques for the Driver and the Operator. You also queried the quality of the process confirmation. Process confirmations are carried out on Operators on a regular basis; it is not relevant to go through every procedure.

Regardless of your views about the documentation, we established that you were aware of the checks that should have been performed. You were dismissed as you failed to carry out the necessary checks which then led to the delivery of resins being pumped into the incorrect tank. If you had conducted the appropriate checks then the incident could have been avoided.

The checks are in place for a reason, the Operator's role is to carry out certain checks. You felt that if automation were aware, they should have shut the process down and the incident wouldn't have happened. I understand your point, but I also stressed that it is the Operator's responsibility to make these checks and you failed in this responsibility. If the system worked flawlessly there would be no reason to employ Operators. Standards and processes are in place to ensure all employees work to a specific standard and ensure necessary checks are in place to prevent this type of incident from happening.

...

Not following procedures poses a risk to you, other employees and the site. AkzoNobel has high standards and a good reputation for safety and this is why it is imperative that our employees are able to follow the rules. You do not appear to be able to follow standards and rules in place which gives me concerns about whether you are safe to work on site. I have a responsibility to ensure everyone on site is safe and protected hence the investment of time training our employees and the rules we put in place.

You felt Richard Henderson had a vested interest in saying the kit was working. I assign resource where I see fit and I felt Richard had the most knowledge in this field and therefore the best person to understand what you were explaining during the investigation meetings I cannot see any evidence to suggest that Richard has not conducted his investigation fairly and appropriately. Shirley also had the opportunity to investigate further if she had any concerns about the original investigation.

Applicable law

30. The circumstances under which an employee is dismissed are set out in section 94 ERA follows:

“(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)...., only if) –

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

...

31. The fairness of a dismissal is set out in section 98 ERA Act as follows:

“(1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

...

(b) relates to the conduct of the employee,

...

(4) Where the employer has fulfilled the requirement 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,

(b) shall be determined in accordance with equity and the substantial merits of the case."

32. The employer must show that misconduct was the reason for the dismissal. According to the Employment Appeal Tribunal in **British Home Stores Limited v Burchell 1980 ICR 303**, a threefold test applies. The employer must show that:
- a. It believed that the employee was guilty of misconduct;
 - b. it had in mind reasonable grounds upon which to sustain that belief; and
 - c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

This means that the employer need not have conclusive direct proof of the employee's misconduct; only a genuine and reasonable belief, reasonably tested.

33. Exactly what type of behaviour amounts to gross misconduct depends upon the facts of each case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract) (**Wilson v Racher ICR 428, CA**). The conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence.

Application of the law to the facts

34. The Respondent dismissed the Claimant for a potentially fair reason namely his conduct. I agree with Ms Banerjee that the Claimant has not asserted any alternative reason for his dismissal.
35. The Respondent genuinely believed that the Claimant was guilty of gross misconduct. He admitted that he had failed to follow the correct procedure. He admitted that he had failed to escalate the matter to management once he had identified that there was a discrepancy in the paperwork. He admitted that he had not checked the discrepancy in the paperwork when it arose. There was no confusion in the Claimant's evidence. He knew what he was supposed to do and he had been trained specifically for the task. Even if there was a problem with the documentation, he simply had to escalate the matter. It was reasonable for the Respondent to hold that genuine belief given that the Claimant had admitted his error.
36. The second aspect of the Claimant's claim is that he believed there was an error in the system. The whole point of the Claimant's role as MSO was to act as a failsafe in such circumstances. In the real world, systems can fail and his job was to deal with this before it became a problem. Had the Claimant done his job properly any error in the system

would have been nullified. That was the purpose of carrying out the checks in the paperwork before executing the bulk offload. Once the Claimant identified the discrepancy, he was responsible for escalating it and he failed to do that. Instead he carried on with the offload in breach of procedure.

37. I do not think there is any merit in the Claimant's claim that Mr Henderson was working to a hidden agenda and had a conflict-of-interest. He was not responsible for the day-to-day running of the system and had nothing to hide. Furthermore, there was an incident report prepared by a different individual, Mr Potts, which came to the same conclusion. The Claimant had not complained about that. The incident report clearly points to the Claimant's failure to follow procedure is the root cause. The Claimant had admitted all the relevant facts and I cannot see how Mr Henderson's investigation could be said to have been unfair.
38. The Respondent conducted a fair and reasonable investigation. The Claimant was interviewed as were other key witnesses. He was given an opportunity to put his side of the story across.
39. The Respondent acted reasonably in treating the misconduct as sufficient to dismiss the Claimant. The Claimant's conduct in failing to escalate the discrepancy between his handover document, the electronic records and the delivery notes created a situation which caused significant losses to the Respondent's business and could have been a major health and safety incident. The Claimant was working in a safety critical environment and through his behaviour he demonstrated that his judgement could not be relied upon even though he had been properly trained for the role. Indeed, he was competent to train others. It is difficult to see how further training could have obviated this risk. During the investigation and disciplinary meetings, the Claimant never suggested that he lacked the requisite training to do his job. Indeed, he appears to have been extensively trained as evidenced by his records which were exhibited in the hearing bundle. The Claimant had enough training and experience to know what to do and he simply failed to do his job properly. I agree with Ms Banerjee in her submissions that training would not have helped the matter. The Respondent was entitled to mistrust the Claimant and it was reasonable, under such circumstances, for it to terminate the employment relationship. The Respondent could not take the risk of continuing his employment given the potentially very serious health and safety consequences that might arise if he failed to do his job properly on another occasion.
40. The process followed by the Respondent was fair. The Claimant knew what the case was that he had to answer and he was given a proper opportunity to put his position forward including any mitigating circumstances.
41. The penalty was appropriate and reasonable. It was in accordance with the disciplinary policy. The Claimant had contractual obligations in clauses 10 and 18 of his employment contract which he failed to follow. This was clearly an act of gross negligence and breach of an important health and safety policy and it would be unreasonable to expect an employer in the position of the Respondent to continue to employ the

Case No: 2503289/2018

Claimant under such circumstances. The Respondent was justified in losing trust in the Claimant's ability to do his job properly and it could not be expected to wait until a serious health and safety incident occurred before dismissing him.

Employment Judge A.M.S. Green

Date 13 March 2019