EMPLOYMENT TRIBUNALS

Claimant: **Mr D Horrocks**

Respondent: **Wm Morrison Supermarkets Plc**

Heard at: **Middlesbrough** **On:** **26,27 & 28 March 2019**

Before: **Employment Judge A.M.S. Green**

Representation

Claimant: Mr R Lassey - Counsel
Respondent: Mr H Zovidavi - Counsel

Reasons

1. Judgment in favour of the claimant upholding his claim for ordinary unfair dismissal with oral reasons was given on 28 March 2019. The Respondent has requested written reasons.

   The Claim and the issues

2. The claimant has claimed ordinary unfair dismissal.

3. The issues are:

   a. What was the principal reason for the dismissal and was it a potentially fair one in accordance with the Employment Rights Act 1996, sections 98(1) and 98(2) ("ERA")?

   b. The respondent asserts that the dismissal was a reason relating to the claimant's conduct. The respondent avers that the claimant was guilty of gross misconduct, justifying his summary dismissal.

   c. If so, was the dismissal fair or unfair, in accordance with ERA section 98 (4) and, in particular, did the respondent under all the circumstances act within the so-called band of reasonable responses.

   Documentation and hearing

4. The parties produced a paginated and indexed hearing bundle comprising 179 pages. The following people adopted their witness statements and gave oral evidence:

a. David Galloway, the respondent's company trainer.

b. Mark Lancaster the respondent's ambient warehouse manager.

c. David Machen, the respondent's transport manager.

d. Mark Sugden, the respondent's head of transport.

e. The claimant.

f. Lisa Collins, who is employed by the Union of Shop, Distributive and Allied Workers ("USDAW").

5. Mr Zovidavi provided a skeleton argument. The representatives made closing submissions and it was agreed that I would issue a decision on liability only.

Basis of my decision.

6. I have based my decision on the oral and documentary evidence, the skeleton argument and the representative's submissions and the skeleton argument. The fact that I have not referred to every document in the hearing bundle should not be taken to mean that I have not considered it.

The burden and standard of proof

7. The claimant must establish his claim on a balance of probabilities

Findings of fact

8. Having considered the evidence, I find as follows.

9. The claimant worked for the respondent at their Stockton Regional Distribution Centre from 28 November 2004 until he was dismissed on 14 June 2018. He was employed as a warehouseman and he worked in the Ambient Department. The Respondent is a well-known major national supermarket chain.

10. His primary role was picking but he also worked on loading wagons with pallets. Loading and unloading pallets required the claimant to use mechanical heavy equipment, otherwise known as MHE.

11. He would load pallets onto a trailer from the gantry. The respondent's loading procedure [151-266] required the dock plate or dock leveler to be engaged to bridge the gap and level any height differences between the trailer and the gantry. The MHE could then be driven across the gap and the pallet loaded onto the trailer.

12. The claimant underwent training for loading and unloading procedure in 2012. Under cross examination, he accepted that the procedure remained substantially the same. It was the claimant's responsibility to ensure that the trailer was level with the dock plate as loads could vary from being very small to very large. Trailer heights could also vary.

13. The claimant was comfortable with the procedure for using the dock plate as part of the loading process. He was familiar with the procedure and had used it for about six years. It was a straightforward procedure engaging the dock plate as it simply entailed pressing a button.

14. The respondent had issues at the Stockton Regional Distribution Centre with

employees who did not follow the loading procedure. This created a health and safety risk if the procedure was not followed. There was a risk of serious injury or death and or damage to the respondent's property. In addressing this risk, the respondent decided to re-train employees who were tasked with loading trailers. Re-training was rolled out between March and May 2018. Mr Galloway was one of two trainers responsible for this exercise. The claimant was re-trained on 29 May 2018.

15. A record of training was kept [95D] in case of the claimant. On 29 May 2018, the claimant signed the following documents as part of his re-training:

    a. New Traffic Light Loading Bay Door Procedure [92].

    b. Loading Bay Door Procedure [93]. This stated that any infringement of the company rules could result in immediate suspension.

    c. New loading bay roller doors [94].

    d. Traffic Light interlock system for loading bay door procedure [95]. This stated that any infringement of the company rules could result in immediate suspension.

16. There was conflicting evidence about the extent of the re-training that the claimant received. Mr Galloway stated under cross-examination that he would have talked the claimant through the procedures and then there was a practical demonstration in Bay 1. He estimated that the process could take between 10 and 30 minutes, depending on the numbers of employees who are being trained at any particular time. Contrary to this, the claimant was adamant that there was no practical demonstration. He said he was simply called in to read and sign the documents that I have referred to above. I preferred the claimant's version. Mr Galloway did not seem certain whether there had been a practical demonstration in any event, I do not think much really turns on this because the claimant, on his own admission, was very well versed in the procedure and had followed it for many years. He was comfortable with the process and he knew what to do.

17. On 7 June 2018, the claimant received a call from his sister to say that she had been diagnosed with lung cancer. This upset the claimant and, later that day, the claimant was using the MHE to load pallets onto a trailer from the gantry. He failed to engage the dock plate before attempting to drive onto the trailer. This caused the wheels of the MHE to become stuck in the gap between the trailer and the gantry. The claimant produced a contemporaneous handwritten note explaining what had happened. He accepted that he had forgotten to place the dock plate and it was too late to stop the trailer which continued to roll forwards for a few inches [100].

18. Brian Shepherd was instructed to investigate the incident. He suspended the claimant with immediate effect on 7 June 2018. The claimant with breath tested for alcohol and drugs and this proved to be negative [102].

19. The claimant’s suspension was confirmed in writing and he was invited to an investigatory interview on 8 June 2018 [103]. Mr Shepherd completed an incident investigation progress checks sheet on 8 June 2018 [106 – 111]. It recorded that the claimant had not placed the dock plate into the trailer truck off gantry he did not raise the dock plate and place it into the trailer. He attempted to load the trailer, causing the wheels of the truck to go between the trailer and the gantry. The root cause of the incident was that the claimant had not followed the training by not placing the dock plate into the trailer before commencing loading.

20. The claimant attended an investigatory meeting with Mr Shepherd on 8 June 2018. He was accompanied by Jimmy Smith an USDAW representative. Justin Pritchard was the notetaker. A record of the meeting was taken [112- 214]. Mr Shepherd warned the claimant that the matter could lead to disciplinary action and he could ultimately be dismissed.

21. The claimant admitted that he made a mistake. He had asked Paul Boyle to help him. He immediately reported what had happened. Mr Shepherd asked the claimant if there was anything he wanted to say in mitigation. The claimant replied "just a silly human error mistake not in my nature just this one issue". He wanted to get the loading done. He said that he caught sight of Paul Boyle and this took his mind away. The claimant did not mention anything about the telephone call with his sister at that stage.

22. Mr Shepherd concluded that the claimant had a case to answer and disciplinary action was instigated. He was notified of this by letter dated 8 June 2018 [115]. He was invited to a disciplinary hearing on 12 June 2018. Two allegations were made. The first was that the claimant breached health and safety by not driving the MHE in a manner for which he had been trained, including failure to engage the dock plate to ensure that the dock plate was correctly positioned prior to loading a trailer. The second allegation was breach of the work truck procedures by not signing in prior to use. His behaviour was deemed as gross misconduct and a breach of health and safety procedures. The letter enclosed the claimant's training documents the notes of the investigation meeting his suspension letter and the incident investigation paperwork. He was notified of his right to be accompanied. He was warned that a possible outcome of a finding of gross misconduct could be summary dismissal.

23. The claimant's disciplinary hearing was held on 12 June 2018. It was chaired by Mark Lancaster and the claimant attended with Jimmy Smith and Naomi Wise took [117-119]. The following points are noteworthy. The claimant mentioned the phone call with his sister on 7 June. He admitted that he had not told anyone about this whilst he was on shift because he regarded it to be a personal matter. He had never had an accident previously; it was a one-off issue. The meeting was adjourned between 10:25 and 10:52.

24. On resuming, Mr Lancaster referred to the phone call that the claimant had with his sister and suggested that when such things happened, he should speak to HR as they are there to support him. He said that the claimant's mind was not on the job 3 tons MHE and load could cause a fatality. The meeting was adjourned to 14 June 2018 for Mr Lancaster to consider his decision.

25. The disciplinary hearing was reconvened on 14 June 2018 and notes were taken [120]. Mr Lancaster concluded that there had been a major health and safety breach and a total disregard for health and safety that amounted to gross misconduct. The claimant had taken no steps to prevent breaching health and safety. He referred to the claimant's training on 29 May 2018 and noted that the incident was about a week later, he referred to the fact that if the claimant had a personal circumstance affecting his ability to perform his role. It was his responsibility to make sure someone was aware. He confirmed that the claimant would be summary dismissed and he notified him of his right of appeal.

26. Mr Lancaster confirmed his decision in writing in a letter to the claimant dated 15 June 2018 [122 - 123]. He confirmed that he was unable to consider the claimant's length of service and unblemished record because he was dealing with a serious breach of health and safety. He regarded the incident to be of a kind to have potential to cause serious harm to the claimant and others.

27. Despite characterising the incident as a serious breach of health and safety, Mr Lancaster admitted under cross-examination that he had not referred the matter to any health and safety specialists. I also noted that when he was cross examined, Mr Lancaster was equivocal about whether he considered if the claimant had simply made a mistake as opposed to disregarding or deliberately ignoring the loading procedure.

28. I also note that Mr Lancaster did not see fit to interview Paul Boyle, who was a potential witness. He was aware that the he was aware of the respondent's disciplinary policy which stated, amongst other things, that as part of the investigation "it is critical to establish the facts of the case to ensure we make informed decisions. This may involve holding investigatory meetings, or if not possible, taking witness statements with colleagues or anyone involved, or who saw the incident" [34].

29. Mr Lancaster was also aware of the relevance of mitigating circumstances when making a decision as set out in the disciplinary procedure mitigating factors were listed to include showing remorse or relevant personal circumstances, long service and clean disciplinary record. Mitigation is stated to be different in all circumstances. There needed to be a genuine belief that the incident would not have happened if those reasons had been absent in gross misconduct cases a final written warning would always be considered if mitigation was present.

30. Mr Lancaster knew about the claimant's long service and his clean disciplinary record. He also knew about the telephone call that the claimant had had with his sister on the day of the incident. He disregarded these when in reaching his decision.

31. The claimant appealed the decision, the hearing was held on 26 June 2018. David Machen chaired the appeal. The claimant was accompanied by Mrs Collins and Mr Smith observed the hearing; Helen Guy was the notetaker [124-129].

32. Under cross-examination, Mr Machen understood that his role was to review whether a fair process had been followed as per the respondent's disciplinary procedure [38]. Mr Machen admitted that he hadn't interviewed Mr Boyle because he did not think this was necessary as the claimant had admitted causing the incident. Furthermore, under cross-examination, he also accepted that he understood that neither Mr Shepherd nor Mr Lancaster had taken specialist health and safety advice and he accepted that Mr Lancaster had decided to dismiss the claimant without such advice. He agreed with Mr Lassey that involving health and safety would have been a basic consideration. Furthermore, in recognising this procedural defect, he did not think to speak to health and safety himself. Mr Machen told me that he had received some training about five years ago.

33. During the appeal hearing, the claimant told Mr Machen about his sister and that [125]. He said that he was sorry for what he had done and that it was unintentional [125] and he had shown remorse. He also referred to his length of service and unblemished service record. Mr Machen acknowledged that during the claimant's 14 years of service nothing like this had happened.

34. The Tribunal had the benefit of Mr Machen's notes for the appeal and it is telling that Mr Lancaster had stated in the disciplinary and dismissal letter that he couldn't consider the claimant's length of service and unblemished record as mitigation. Mr Machen upheld the decision to dismiss the claimant and he notified him of this in a letter dated 28 June 2018 [131-132]. He did not refer to any mitigating circumstances put forward by the claimant.

35. The claimant had a further right of appeal, which he exercised. His second appeal was heard by Mr Sugden on 6 August 2018. The claimant attended with Mrs Collins although she is referred to under her maiden name in the notes. There was a note taker.

36. Mr Sugden was aware of the appeal process and procedure when he was cross examined. He admitted that he had not spoken to Mr Lancaster or Mr Machen about Paul Boyle. He also admitted that Mr Shepherd, Mr Lancaster, Mr Machen had not involved any health and safety specialists prior to reaching their decisions and he accepted under cross examination that this was a procedural flaw which he had not corrected.

37. Mr Sugden upheld the original decision to dismiss the claimant. he notified the claimant of that fact in a letter dated 10 August 2018 [144-145]. He stated, amongst other things, he believed that the manager who took the decision to dismiss and the appeal manager that arrived at the decision to uphold the decision did take into consideration several points which did include length of service and the claimant's unblemished record. However, due to the nature of the breach in the circumstances surrounding this matter, this did not change his views on the outcome reached. He believed his responsibility as a senior manager was to ensure the safety of all colleagues in safe working practices on site and he believed that the decision to dismiss was appropriate. He could not ignore that this was a serious disregard of health and safety procedures that it occurred despite his only having received refresher training a number of weeks previously. He said that h considered his personal circumstances in relation to the incident in conjunction with his responsibility to raise any concerns he had prior to operating machinery that could impact on his ability to work in a safe manner. He said he believed he was fully aware of his responsibility in this area and therefore in relation to the breach. He believed that the decision to dismiss was correct. Mr Sugden also referred to any mitigation offered earlier despite what Mr Sugden said about Mr Lancaster and Mr Machen considering the claimant's length of service and unblemished record. This was not the case under cross-examination when Mr Sugden he admitted that had not spoken to either of these people about these mitigating circumstances. In fact, he had read Mr Lancaster's letter confirming dismissing the claimant in which he expressly stated that he was unable to consider the claimant's length of service and unblemished record. Mr Sugden had also read Mr Machen's letter upholding the original decision which was silent regarding these mitigating circumstances.

38. The only conclusion that I can draw is that Mr Sugden was simply speculating that Mr Lancaster and Mr Machen had considered mitigating circumstances. In fact, when Mr Sugden was questioned on this, he had to be repeatedly asked the question before he eventually admitted that he could not have based his decision regarding mitigating circumstances on those letters. The respondent's disciplinary policy provides that a possible outcome of upholding a conduct allegation is re-engagement [39]. The policy provides that a colleague can be offered an alternative position within the company, which may be on a different terms, (e.g. at an alternative level or to new location or a new department or at different hours with continuity of service). Mr Lancaster did not consider re-engagement neither did Mr Machen nor Mr Sugden.

39. After Mr Sugden issued his decision, the claimant became appeal rights exhausted.

Applicable law

40. The circumstances under which an employee is dismissed are set out in section

95(1) ERA. This provides that an employee is dismissed by his employer if and, subject to subsection 2, only, if the contract under which he is employed is terminated by the employer, whether with or without notice.

41. The fairness of a dismissal is set out in section 98 ERA 1996. In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason or, if more than one, the principal reason for the dismissal and 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 in which the employee held.

42. Section 98(2) ERA, states a reason falls within this subsection if it relates to the conduct of the employee. Section 98(4) provides that 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 reasons shown by the employer 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 shall be determined in accordance with equity and the substantial merits of the case. The employer must show that misconduct was the reason for the dismissal.

43. I am reminded that in **British Home Stores Ltd in Burchell 1980 ICR 3038** a threefold test applies. The employer must show it believed that the employee was guilty of misconduct, that it had in mind reasonable grounds upon which to sustain that belief and 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 not need not have conclusive direct proof of the employee's misconduct, only a genuine and reasonable belief, reasonably held. The tribunal has to decide whether the respondent's decision to dismiss the claimant fell within the range of reasonable responses that a reasonable employer in those circumstances, and in that business might have adopted (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**) It is irrelevant whether or not the Tribunal would have dismissed the claimant if it had been in the respondent's shoes. The Tribunal must not substitute its view for that of the respondent.

44. 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 Rasch ICR 48)**. The conduct must be deliberate and willful contradiction of the contractual terms or amount to gross negligence, even where gross misconduct may justify summary dismissal.

45. An employer suspecting an employee of such conduct should still follow a fair procedure including a full investigation of the facts. If an employer does establish a reasonable belief that the employee was guilty of misconduct in question, he must still hold a meeting and consider the employee's case, including any mitigating circumstances that might lead to a lesser sanction. Accordingly, even if the employee has committed an act of gross misconduct, the fairness or otherwise of any subsequent dismissal remains to be determined in accordance with the statutory test. Conduct dismissals will not normally be treated as fair, unless certain procedural steps have been followed. Without following the steps, it will not be in general possible for an employer to show that he acted reasonably in treating the conduct as a sufficient reason to dismiss. In **Polkey**, Lord Bridge set out the procedural steps to be followed. There should be a full investigation of the

conduct and a fair hearing to hear what the employee wants to say in explanation and in mitigation.

46. The ACAS code sets out the basic requirements for fairness that will be applicable in most conduct cases, it is intended to provide a standard of reasonable behaviour in most instances.

Applying the law to the facts

47. The respondent dismissed the claimant for conduct. This is a potentially fair reason for dismissal. The claimant accepted responsibility for the incident on 7 June 2018. He contributed to his own dismissal.

48. The respondent did not follow its own disciplinary procedure. Paul Boyle witnessed the incident. He was never interviewed. Although the claimant admitted responsibility for the incident had Mr Boyle been interviewed his evidence might have had a bearing on the decision. For example, he could have provided a potentially mitigating circumstance. This was a procedural error that could have been rectified by Mr Machen and/or Mr Sugden.

49. The respondent was concerned about the health and safety implications of the claimant's behaviour. There is nothing wrong with maintaining high standards of health and safety. Indeed, it is to be expected. However, I am concerned that there that none of the people involved in this process from the investigation to be the final feel appeal thought to take health and safety advice. None of those individuals professed expertise in health and safety. One of them had had some IOSH training, albeit five years ago.

50. It was also suggested that the claimant was guilty of disregarding the respondent's health and safety policy concerning loading and unloading. A standard dictionary definition of disregard is “pay no attention to, to ignore”. This connotes a positive act on the part of the wrongdoer. The evidence in the claimant's case is that he was distracted or wanted to finish his job. This suggests carelessness. That is not an act of disregarding. He freely admitted that he had made a mistake.

51. In the absence of taking advice from health and safety is difficult to see how the dismissing officer could reasonably conclude there had been a serious breach of health and safety. Furthermore, Mr Sugden acknowledged this under cross examination.

52. Adequacy of training was raised by both parties. I believe that the claimant was adequately trained and was experienced in the operation of the dock plate. However, I have serious concerns about how the claimant's mitigating circumstances were dealt with. He had received distressing news from his sister on the morning of the incident. She told him that she had lung cancer. At that stage he decided to keep it a personal matter; that is plausible. Mr Lancaster disregarded this because he said that the claimant had only raised it for the first time at the disciplinary hearing. The implication is that he thought the claimant was bolstering his claim. I don't think that is fair because there was nothing to suggest that the claimant was being dishonest. Indeed, he was a long serving employee with an unblemished service record. The claimant also showed remorse and had immediately reported the matter to his superior. Nobody was injured and no property was damaged. He had worked for the respondent for many years. He had good appraisals and an unblemished service record. None of these things mattered and Mr Lancaster or Mr Machan or Mr Sugden. These were mitigating circumstances that were referred to in the disciplinary policy which, if properly considered, could have resulted in a final written warning instead of a dismissal.

53. Mr Lancaster said that he was unable to consider length of service and the claimant's clean record. The policy required him to do that. This was not the behaviour of a reasonable employer. The purpose of the appeals process was to rectify procedural errors but that did not happen. Mr Machen didn't refer to mitigation his letter, he didn't speak to Mr Lancaster and he accepted that there had been a procedural defect. Mr Sugden knew that the claimant was remorseful. He knew about the claimant's sister. He knew about the claimant's length of service and his clean disciplinary record. He didn't speak to Mr Lancaster or to Mr Machen about that and yet he concluded in his appeal outcome letter that these two men had considered mitigation. That patently was not the case, it was simply supposition on Mr Sugden's part.

54. It was open to Mr Lancaster to consider re-engagement as a possible outcome to the disciplinary process. In my opinion, the process was tainted with unfairness throughout. The claimant has never denied responsibility for the incident on 7 June 2018. Dismissing him did not feel fall within the range of reasonable responses that a reasonable employer in those circumstances, and in that business. might have adopted. So, my judgement is that the claimant's claim for ordinary unfair dismissal is upheld.

Employment Judge A.M.S. Green

Date 5 April 2019

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.