EMPLOYMENT TRIBUNALS

Claimant: Mr S Tighe

Respondent: J & J Ormerod Plc

Heard at: Manchester **On:** 2 December 2018

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: Mr D Calvert (Counsel)
Respondent: Mrs T Modessa-Parekh (Solicitor)

JUDGMENT

1. The claimant's claim for unfair dismissal is not founded and does not succeed.

2. The claimant did not pursue his claim for holiday pay and it was accordingly dismissed.

Written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was dismissed by the claimant for gross misconduct, after he smoked on the respondent's site. The respondent's case was that it had a very strict policy and that employees knew both about the policy and about the likely sanction for smoking on site. The claimant contended that the dismissal was unfair.

Claims and issues

2. This is a claim for unfair dismissal. The parties had not agreed a single list of issues prior to the hearing and they each produced a list. However there was no real dispute about what the issues to be determined were, albeit there was a difference of view about how those issues should be phrased. In practice the issues to be determined (drawing the key points from each list) were:

- What was the reason for the claimant's dismissal? The respondent says that it was misconduct.
- Did the respondent carry out a reasonable investigation in the circumstances?
- Was a fair procedure followed by the respondent?
- Did the respondent have a genuine belief in the misconduct which was the reason for the dismissal?
- Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?
- Was the decision to dismiss within the range of reasonable responses for a reasonable employer in the circumstances? In his list of issues, the claimant asked that this question be considered in the context of the reason why the claimant left his workstation.

3. The parties also identified the following issues to be relevant to the issues identified above:

- Was the policy of summary dismissal for smoking in undesignated smoking areas fairly and equally applied to all employees, regardless of their status and length of service?
- Were the grounds of the claimant's dismissal fairly applied to all employees at all times and in a reasonable manner?
- Was smoking strictly forbidden in all areas and was it fairly applied?
- Would the respondent summarily dismiss any employee when furnished with evidence of smoking in undesignated smoking areas?

4. In the claim form the claimant had raised a claim for holiday pay. No evidence was given about this and his representative confirmed when giving submissions that it was not being pursued, and accordingly it was dismissed.

Procedure

5. The Employment Tribunal heard evidence from the claimant, Mr Eatough (the respondent's Production Manager), and Mr Greenhalgh (the respondent's Managing Director). The Employment Tribunal was also provided with a bundle of documents.

6. The Tribunal was provided with a written witness statement of Mr Stephen Jenkins. He did not attend the hearing, his statement made reference to an email which the Tribunal did not see, and the evidence of those who did attend denied what was said by Mr Jenkins. As a result, his statement was not given any weight at all.

7. At the end of the hearing both parties made oral submissions, the respondent's representative having also prepared a written submissions document.

The Facts

8. The claimant was employed by the respondent for over 26 years as a Production Operative. The evidence is that he was a longstanding and valued employee.

The policy

9. The respondent has a strict no smoking policy on site, except for its designated smoking areas. The claimant accepted that he was aware of this and it had been raised with him in "toolbox" talks on occasion. This is a longstanding policy. The claimant had signed to accept memos outlining it in 1996 and 2005 (pages 43/44 and 51/52), the former highlighting that it would be punishable by instant dismissal. A smoking policy is in the respondent's handbook that says smoking will be treated as gross misconduct except where it occurs in designated smoking areas (page 39). The claimant never actually read the handbook, but he did sign to say he had received it in 2011 (page 54).

10. In the hearing the claimant's representative challenged the clarity of this policy and its application. He particularly highlighted differences between what was said in different documents and, in particular, how the wording was to be interpreted as applying to certain areas of the respondent's site.

11. The tribunal found that the claimant would clearly have been aware that smoking on site was prohibited and that it was prohibited in the location where he did in fact smoke. He smoked/was found to be smoking just outside the fire door of a building which was part of the main site.

12. There may well have been some grey area in terms of precisely where the site stopped and started for the purposes of the policy, such as with regard to a bridge which adjoined the main site and the car parks, and had the claimant been smoking in one of those areas the position may have been different.

13. The respondent had good reasons for their policy. It was accepted that it: was a site with flammable materials; had a history of fire; and had an insurance policy which meant that the site was not covered if smoking had occurred on site (outside of the

designated areas). If smoking had occurred and a fire had happened, then it would have jeopardised the employment of all those on site.

14. The evidence available was that those who had been caught smoking on site (at least in recent years) had been dismissed. There was one specific exception where a person who had been charged with misconduct arising from smoking in the toilets, had argued that they had not been the person who had been smoking. No one had actually seen them smoking. That element of doubt had led to a different sanction. Whilst the claimant's evidence was that others had smoked on site (outside the designated areas), there was no evidence that the respondent knew about any other such incidents (at least in the relevant areas to which the application of the policy was clear).

The photograph

15. The tribunal was shown and heard evidence about a photograph that had been provided to the claimant after his dismissal (page 94). This photograph showed a senior employee of the respondent smoking a cigarette on a footbridge, accompanied by Mr Eatough. It was suggested that this showed that the respondent did not apply its policy consistently, or at least not consistently to all employees. The respondent said that the bridge in the photograph was outside the relevant area of the site and smoking was not prohibited in that location. Mr Greenhalgh gave evidence that it was the equivalent of being outside the factory gates, it was a publicly accessible area.

16. The claimant's representative argued that the respondent had essentially put together what he described as a cock and bull story about this, to explain away what was shown in the photograph. The tribunal does not agree with this argument, and finds that the explanation provided by the respondent was genuine.

17. There was an element of inconsistency between what is shown in the photograph and the wording of some of the policies and other documents in the bundle in terms of location and whether smoking was prohibited at those locations. However there was no evidence before the tribunal that anyone identified by the respondent smoking when located on what was clearly the factory site, had not been dismissed.

16 May 2019

18. On 16 May 2019 the claimant started a shift at 6.00am. At 8.30am he felt lightheaded. Wisely, he stopped working on a saw and took a break outside the room in which he was working. He then smoked a cigarette.

19. Mr Casey and Mr Myers found the claimant. They said that they found him smoking a cigarette on the chair, he said he had finished smoking but admitted it to them when challenged: nothing turns on that. The claimant said to them that he did not want to lose his job. The claimant's answer to questioning at the tribunal hearing was to confirm that when he was spoken to by Mr Casey and Mr Myers he thought he might lose his job, but would not necessarily do so. He said that during the time he had been smoking he had not given dismissal any thought.

20. On 16 May 2019, the claimant could have smoked in a designated nonsmoking area, he could have told a manager he was feeling unwell, and he could have gone to the canteen. The claimant did not do any of those things.

The procedure followed

21. The claimant was subsequently suspended. Mr Eatough conducted an investigation (page 129). He obtained statements (pages 130-131). One of those providing a statement to Mr Eatough was Mr Eatough's own line manager. He invited the claimant to a disciplinary hearing (pages 134-135), and he conducted a ten minute disciplinary hearing on 21 May 2019 in which little was actually said (pages 137-138). The claimant was given the opportunity to say things in that meeting and given an opportunity to explain any mitigating circumstances. The claimant said that if he was given the choice he would not do it again. As part of his explanation he said "*unfortunately I lit a cigarette*".

22. Mr Eatough did undertake some further investigation. He reconvened the hearing on 23 May 2019 and dismissed the claimant. He said he was left with no alternative but to dismiss. There were two grounds for dismissal given in the dismissal letter (pages 139-140), but in practice only the one was really relied upon.

23. The evidence which Mr Eatough gave to the tribunal was, in summary, that there was nothing really that the claimant could have said in that hearing that would have made any difference or would have avoided the dismissal. His view was that this was something for which there was a factory policy which said an employee should be dismissed, and therefore effectively only one outcome.

24. The claimant appealed (page 141) and the appeal hearing was conducted by Mr Greenhalgh, the Managing Director of the respondent. This was held on 12 June 2019, after an appropriate invite (page 143). This was a re-hearing. The claimant was given a full opportunity to raise anything he wished to (pages 146-147). The claimant raised that he thought he had been treated inconsistently and he raised his medical condition. Mr Greenhalgh did consider the mitigating circumstances which were presented to him in that hearing.

25. Mr Greenhalgh adjourned the appeal and checked the disciplinary records to see if there was any inconsistent treatment, as the claimant had suggested. He identified the one case that is referred to at paragraph 14 of this judgment. He concluded that there was a reason for the different outcome. Mr Greenhalgh chose not to investigate the medical issue further, and his reason for doing so was stated in his statement as being "*while I do not dispute that he may have felt lightheaded or dizzy at the time I could not reasonably conclude that this was a mitigating factor in then deciding to light a cigarette*".

26. The appeal was rejected and the dismissal upheld in a lengthy decision letter of 21 June 2019 (pages 148-150).

The Law

27. The relevant legal principles that the tribunal must apply were not substantially in dispute. The respondent bears the burden of proving, on a balance of probabilities, that the dismissal was for misconduct. If the respondent fails to persuade the Tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair.

28. If the respondent does persuade the Tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The Tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

29. In conduct cases, when considering the question of reasonableness, the Tribunal is required to have regard to the test outlined in **British Home Stores v Burchell**. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

30. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach. The Tribunal must ensure that it does not substitute its own view for that of the employer.

31. Relevant to this decision was consideration of consistency, as if an employer is inconsistent in the sanction applied to comparable circumstances that can (and often will) render a dismissal unfair, even if the dismissal would otherwise have been fair. The respondent's representative submitted that decisions should only be challenged if the facts are materially or essentially the same, relying upon **Paul v East Surrey District Health Authority [1995] IRLR 305**.

32. Also of importance is: the extent to which the claimant was aware of the rule with which he had not complied; and whether he was aware of the potential sanction for breaching that rule, and, in particular, whether breaching that rule was potentially dismissible.

33. The tribunal had the benefit of submissions from both parties and took the submissions made and the authorities raised into account. The respondent also relied upon **London Borough of Lambeth v Agoreyo [2019] EWCA Civ 322**, **Royal Society for the Protection of Birds v Croucher [1984] IRLR 42**, **Secretary of State for Scotland v Campbell [1992] IRLR 263** and **AAH Pharmaceuticals v Carmichael EAT 0325/03**.

34. It is important that the tribunal does not substitute its own view for that of the respondent. The tribunal did take into account the passage from **London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220** at paragraph 43 which was highlighted by the respondent:

"*It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal*"

35. It is important that the tribunal does not substitute its own decision for that of the respondent. Whether or not the tribunal considered the decision to be harsh was not the question which the tribunal needed to determine, nor should a view that it was harsh alter the outcome (if the decision was within the range of reasonable responses). The key question is whether the decision was within the range of reasonable responses.

36. The tribunal is required to take into account the ACAS code of practice on disciplinary and grievance procedures. The tribunal considered all of the ACAS code but two things within the ACAS Code were identified as being of particular importance.

37. The Code says, at paragraph 4, that "*Whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly*". There are a number of elements to this, and one of those is that "*Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made*".

38. Paragraph 6 of the Code says "*In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing*". **Conclusions**

39. The tribunal finds that the reason for the claimant's dismissal was misconduct. He was dismissed for smoking on site in a non-designated area.

40. The tribunal does find that the respondent carried out a reasonable investigation in the circumstances and that a fair procedure was followed.

41. The procedure did have flaws as at the end of the disciplinary hearing. There were two such flaws. It was unfair, in the light of what is said in the ACAS Code, for

Mr Eatough to investigate and conduct the hearing. This was especially the case where one of the witnesses was his own line manager. The tribunal also finds that Mr Eatough closed his mind to any other sanction, before he heard from the claimant. He had made his mind up what the outcome would be before the hearing and before the claimant had his say. That would have rendered the dismissal unfair.

42. However, those defects were essentially rectified by the full and thorough appeal hearing conducted, which was a re-hearing. At the appeal hearing, the claimant was able to put his case and raise anything that he wished to. What he raised was considered. Whether a dismissal is fair and reasonable is to be determined by the tribunal as at the end of the process, and here that is the end of the appeal.

43. The claimant's representative did submit that Mr Greenhalgh had closed his mind and should have investigated further with the GP. The tribunal does not agree he closed his mind. The tribunal finds that Mr Greenhalgh did take into account what the claimant said in the appeal. Even though his evidence was that in 99 out of 100 cases this would have resulted in dismissal, he nonetheless did hear the appeal fairly and considered (and investigated) what the claimant had raised. As explained above, the tribunal accepts Mr Greenhalgh's reason for not investigating issues with the GP, and the tribunal does not believe there was any need for him to do so – further explanation as to why the claimant needed a break from his work would not have explained why the claimant chose to smoke (or indeed smoke outside a designated area).

44. In terms of the other questions that the tribunal was asked to determine in the lists of issues:

- The tribunal does find that the decision to dismiss was within the range of reasonable responses for a reasonable employer in the circumstances. That was the case even with the reason why the claimant left his workstation. This is a case where the importance of the tribunal not substituting its own view for that of the employer was important, however the decision reached was within the range of reasonable responses particularly in the light of the reasons for the respondent having the rule in place (as detailed above).

- The policy of summary dismissal for smoking in undesignated smoking areas was fairly and equally applied to all employees, regardless of their status and length of service, on the evidence the tribunal heard.

- In answer to whether the grounds of the claimant's dismissal were fairly applied to all employees at all times and in a reasonable manner, the tribunal finds that they were in the circumstances where the respondent was aware of them.

- The tribunal did not need to determine the issue about whether smoking being strictly forbidden in all areas was fairly applied, the tribunal found that

it was to the main site as relevant to the location where the claimant was smoking.

- The tribunal finds that the respondent would have summarily dismissed any employee when furnished with evidence of smoking on site outside designated smoking areas, within the area of the factory.
- The respondent did have a genuine belief in the misconduct, which was the reason for the dismissal.
- The respondent did hold that belief in the claimant's misconduct on reasonable grounds.

45. In the light of the decision reached and the conclusion that the dismissal was fair, the tribunal did not need to go on and consider contributory fault or *Polkey*.

Employment Judge Phil Allen

20 December 2019

REASONS SENT TO THE PARTIES ON

24 December 2019

FOR THE TRIBUNAL OFFICE