EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Cooper	v	Tesco Stores Limited

Heard at: Watford **On**: 20 & 21 November 2019

Before: Employment Judge George

Appearances
For the Claimant: Ms S Morgan-Gayle, McKenzie Friend
For the Respondent: Mr A Johnston, Counsel

JUDGMENT having been sent to the parties on 6 December 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case I have had the benefit of a joint bundle of documents running to some 286 pages. Page numbers in these reasons refer to that joint bundle. The claimant gave evidence in support of his claims with reference to a written witness statement upon which he was cross examined and which he adopted in evidence.

2. Four witnesses were called on behalf of the respondent who also adopted as their evidence in chief written statements which had been prepared on their behalf and were cross examined. They were:

    - Mark Fellows, the Warehouse Shift Manager
    - Peter Fisher, the Day Shift Manager
    - Kate Fairbrother, the Distribution Centre Manager, and
    - Nicholas Potter, National Packaged Distribution Manager

3. I was also shown some CCTV footage which I viewed several times during the course of the hearing. Each of the witnesses were shown the CCTV footage during their evidence and asked questions about it. I heard representations from both representatives who conducted their respective cases with skill and courtesy for which I am grateful.

4. I have found this to be a sad case. On the night of 28 to 29 September 2018, the claimant was driving his Reach Truck, which is a type of Forklift Truck, in Staffordshire. The respondent is a nationally known company that

owns and runs a chain of supermarkets and the Litchfield Distribution Centre supports this business.

5. Towards the end of his night shift the claimant turned into aisle DX to carry out a put-away. I will go into more detail about the conclusions that I have reached about what happened on that occasion in due course. What was not in dispute was that one of the claimant's colleagues (KW) was working behind his own forklift truck which was stationery on the left-hand side of aisle DX, unloading produce. There was a collision between the two trucks as a result of which the colleague was trapped between his own forklift truck and the claimant's forklift truck. The colleague suffered broken legs and a crushed hip as I can see for the Health and Safety Report at page 141 of the bundle. The claimant accepts (see his paragraph 3) that KW was seriously injured in this collision.

6. I am conscious that this incident must have been shocking one for all concerned. I notice that the minutes of one of the claimant's meetings with Mr Fisher (page 204), the claimant explains his desire not to see the CCTV footage in the following way. He says, "I don't want to go through the emotional stress". There is no suggestion that the claimant intended any harm to come to his colleague. He apologised in his meeting with GA, (see page 173) and in that with Mr Fisher on 13 November (see page 208), saying on the latter occasion that he was "sorry to my heart for everyone involved". That is not to say that, by that apology, he accepted that he caused the collision, but he was clearly extremely sorry that a colleague had been hurt as a result of it.

7. The collision led to an investigation of an allegation that the claimant was not driving with due care and attention and, following a series of meetings, he was eventually dismissed.

The issues and the law applicable to the claim

8. Section 94 of the Employment Rights Act 1996 (hereafter referred to as the ERA) sets out the right of an employee not to be unfairly dismissed. Dismissal is accepted in the present case and therefore the first issue is whether the respondent has shown that the reason or principal reason for the dismissal was a potentially fair one (within the meaning of s.98(2) of the ERA). In the present case the respondent alleges that the reason for dismissal related to the claimant's conduct (s.98(2) of the ERA) and, if I am satisfied of that, it is a potentially fair reason.

9. When the employee's conduct is said to be the reason for dismissal then I find guidance for the approach I should take to that task in the case of British Homes Stores v Burchall [1980] ICR 303 EAT and other subsequent cases which built upon the test which has become known as the "Burchall test". I need to ask the following series of questions.

    a. Did the respondent have a genuine belief that the claimant was guilty of the misconduct for which he was dismissed?

    b. At the time that belief was formed, did the respondent have reasonable grounds for it?

c. Had the respondent carried out as much investigation as was reasonable in all the circumstances?

10. Was the decision to dismiss fair or unfair in all the circumstances? The question of whether the dismissal was fair or unfair in all the circumstances is often said to have a neutral burden of proof. I must ask myself whether the conduct of the respondent fell within what has been described as the "range of reasonable responses". It is not whether I would have reached the same conclusion as the employers in question, but whether their conclusion or decision was one within the range of reasonable responses to the employee's conduct.

11. I should take the same approach to considering the employer's conduct of their investigation into the claimant's alleged misconduct. The question for me is whether the investigation was within the range of reasonable responses which a reasonable employer might have adopted: J Sainsbury plc v Hitt [2003] ICR 111, CA.

12. Particular matters that are relied on by the claimant that he argues should lead to a conclusion that the dismissal was not fair are that:

a. He alleges that there was a failure on the part of the respondent's decision makers to take account of the conditions of the floor at the time that he was driving. The claimant says that it was wet or that there was some other substance on the floor that caused the forklift truck to skid and it is fair to say that this has been his consistent account of the collision.

b. He criticises the decision makers for failing to interview another colleague whom he says would have been a relevant witness (EJ) until very recently: the statement in the bundle is dated October 2019. EJ was one of the two Health & Safety Reps for the Distribution Centre, he was the one on shift at the time and he arrived on the scene within a very short period after the collision had occurred.

c. The claimant also criticizes the respondent for failing to preserve some CCTV footage timed prior to the collision which he says would have been relevant as it would have shown the state of the floor.

d. He argues that there were no reasonable grounds for concluding that the collision was due to a failure on his part to take due care and attention.

e. He also argues that there was unfairness in relation to the CCTV footage not being provided to him at an appropriate point in the investigation and he criticizes the respondent's decision makers for not thoroughly analysing it.

f. He points to other evidence that was in the pack supporting a conclusion that he had been driving carefully. In particular, in the

statement of a third forklift truck driver present in the aisle at the time of the collision (EvJ) found at page 170 of the bundle. In his statement, EvJ's evidence was to the effect that the claimant was driving slowly.

g. The claimant points to his long service and his good record. He had started work as a Warehouse Operative on 20 August 2012 and, therefore, at the time of the incident he had more than six years' service.

h. Overall, he argues that the sanction is too harsh for what it could reasonably be concluded was his contribution to the collision. He also argues that in this respect the respondent had not taken account of the contribution of EvJ to the collision and that the respondent should not have concluded that this was a point that he raised at the second stage appeal with Mr Potter and not before.

13. If I conclude that the dismissal was unfair then I am asked by the respondent to make a finding of contributory conduct on the part of the claimant. The provisions of s.122(2) and 123(6) of the ERA set out the powers of the tribunal to reduce any basic and compensatory awards because of conduct or contributory fault respectively.

14. If I reach the conclusion that there was any procedural failing which means that the dismissal was unfair, it is also argued that any compensation should be reduced to take account of the likelihood that the respondent would have dismissed him fairly in any event in accordance with the principles set out in Polkey v A E Dayton Services Limited [1987] IRLR 503.

15. The claimant also brings a complaint of breach of contract or wrongful dismissal because he was dismissed summarily. When considering a wrongful dismissal claim the situation is different to an unfair dismissal claim in that I must actually consider whether or not the claimant was in fundamental breach of contract. I must therefore consider whether or not the claimant was guilty of gross misconduct. If the claimant had committed gross misconduct then that would justify the respondent's termination of his contract of employment without notice and the claimant's complaint of wrongful dismissal would fail. Otherwise the respondent would be in breach of contract in failing to give notice of termination of employment. It is for the respondent to prove that the claimant was in repudiatory breach of contract.

16. The claimant argues that he took all reasonable measures to avoid the hazard that he perceived, ie KW, and he says that his visibility was obscured by J, who was driving another forklift truck, initially on the left-hand side of the aisle but then moving to in front of the claimant's forklift truck. Ms Morgan-Gayle argued that I should not fall into the trap of deducing from the fact of the collision that the claimant must have been at fault and it is alleged that that is what the respondent did. The respondent argues that I should find the claimant's driving did not show due care and attention and that that was the root cause of the accident. For that reason, they argued that I should find the claimant was not wrongfully dismissed and should rely on the same conduct to lead to a one hundred percent contributory conduct deduction.

17. The claimant also relies on the temporary lifting of the suspension which he considers showed an inconsistent approach on the part of the respondent towards him.

Chronology

18. A brief procedural chronology of the case is that, following the effective date of termination of 19 November 2018 and a period of conciliation that started on 16 January, the claimant presented his ET1. This was originally presented on 5 February 2019 and was rejected on 21 February 2019 because although conciliation had commenced, it had not been completed and the claimant therefore did not have an EC certificate. The claimant wrote six days later to explain the omission and provided the EC Certificate. The claim was then accepted as having been presented on 4 March 2019 and case management orders were sent out.

19. The respondent defended the claim and their ET3 was presented on 1 April 2019. The initial hearing date of one day was extended to two days. There was an application for disclosure by the claimant. It was particularised in his letter to the respondent and to the tribunal of 9 October 2019, although he had initially made the application a little earlier. This was responded to by the respondent on 31 October 2019.

20. By the time of the final hearing before me, for the most part, it appeared that the disclosure application had been dealt with in correspondence. The respondent denied that a number of the documents were in existence and the claimant was not able to go behind that denial. However, the claimant complained that there were two categories of document that the respondent had said they would provide and had not yet provided. Mr Johnson took instructions and confirmed that the respondent had not yet provided the claimant with a relevant RIDOR form and this was disclosed on day 1 of the hearing.

21. The claimant argued that the disclosure application had not been fully dealt with because he wished to have sight of correspondence between his Trade Union and the respondent. However, he accepted that his application had not specified that this was particular correspondence that he considered to be relevant to the issues in the case. He had made a broad application for all documents that referred to his name. Such a broad category of documents was not likely to be ordered within the Tribunal proceedings because it would not be confined to those relevant to the issues between the parties. The claimant has also complained to the Information Commissioner's Office that the respondent has not disclosed everything that they had in their possession as a result of his subject access request. The respondent's obligations to the claimant under the GDPR are different to their disclosure obligations in these proceedings.

22. I decline to make an order at this late stage for two principle reasons. First, there was no discernable relevance of the documents sought (whether Trade Union correspondence or all documents referring to the claimant) to the issues that I had to decide based on what the parties were able to tell me of the issues and the issues as I outlined earlier in this judgment. The

next reason was that it was not a request that had been specified prior to the start of the hearing and requesting a search to be untaken seemed to me to be disproportionate use of time which might impact upon the orderly conduct of the hearing.

Findings of Fact

23. I make my findings of fact after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by all of those concerned about the relevant factual matters from time to time and the witness evidence, both statement evidence and oral testimony. Where it is has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including with documentary evidence. I do not set out all of the evidence in these reasons; I set out my principle findings of fact on the evidence before me, those which it was necessary for me to make in order for me to decide the issues which the parties have asked me to decide.

24. Following the collision on 28 September, the claimant was interviewed by GA (see page 144). He was suspended and interviewed, again by GA - who was conducting the investigation, on 29 September (see page 156).

25. It is fair to say that in the two interview meetings with GA, the claimant did not mention having seen EvJ at all in the aisle. In the first meeting on 28 September 2018, he said that he had been aware of the presence of KW, he had applied the brakes, that the brakes had not worked, and he had skidded. He referred to seeing some plastic or something under the truck when it had come to a stop and said that the floor appeared to have been newly cleaned.

26. It is apparent that by the time of the next meeting on 29 September 2018 that GA had seen the CCTV footage although the claimant had not yet seen it. He still did not mention the presence of EvJ. His explanation for having moved to the left was to keep the aisle clear as there were pickers in the aisle.

27. GA then interviewed two individuals, AW (who was picking in aisle DX) and EvJ. He conducted those interviews on 4 October 2018. They are at pages 164 and 168 of the bundle respectively. He prepared a summary of his investigation which is at page 167. In the meantime, the forklift truck had been tested and no fault found with it. That test took place on 1 October (see page 159).

28. AW and EvJ did not in fact see the collision itself. EvJ, who had been driving his forklift truck, had gone past the point of impact when it happened and AW, who was standing in the aisle, had not seen the collision but heard KW call out as a result of it.

29. It is also relevant to note that EvJ said that he had thought it was safe to pull out in front of the claimant. He had stopped to see if the claimant was going to go past him and considered, based on what he saw, that he was

not and, therefore, as he put it, "I felt safe to overtake KW". KWnwas working on the left-hand side of the aisle.

30. As a result of his investigations, GA decided that this should go to a disciplinary meeting and an invitation was sent out on 11 October 2018 (page 174). In it the claimant was warned of the possible consequences to his continued employment as a result of a disciplinary action and he was told that he had the right to bring a companion. He wished to do so and so the first meeting was adjourned, and the disciplinary meeting eventually took place on 26 October 2018. It was conducted by Mr Fellows. The notes are at page 176. It is clear from those notes that the claimant's USDAW representative had seen the CCTV footage as he comments upon it. The claimant's account at that meeting remained that he skidded and that that explained the collision.

31. Mr Fellows gave evidence before me that the floor in the warehouse is cleaned on a rolling basis and therefore that it had not been possible to find out when immediately prior to the collision it had last been cleaned. Again, the claimant did not, in his account of the incident, mention EvJ having any significant part in the reasons for his own actions. It is recorded in the minutes of the meeting that Mr Fellows, during the course of the meeting, stated that, from his own knowledge, the floor was not wet – he said that he had arrived on the scene five minutes after the collision.

32. Mr Fellows took the decision to escalate the matter for a final decision. Effectively, his conclusion, I find, based on the oral evidence and his explanation of his role, was that there were potentially sufficiently serious consequences of the evidence against the claimant that there should be a second opinion on what should happen rather than he making a disciplinary decision. It was not that he did not have the authority to decide whether to dismiss or not but that rather he thought there should be a second opinion upon it. He therefore did not make the decision to dismiss itself and I infer that the people whose belief I should focus on when considering the first Burchall question are Mr Fisher, Ms Fairbrother and Mr Potter.

33. It is noteworthy that in interview with Mr Fellows the claimant did not ask for EJ to be interviewed and he did not specifically ask for CCTV of an earlier period in the run up to the collision to be viewed. The respondent's evidence, which I accept, is that after 31 days the CCTV footage is automatically deleted.

34. Mr Fisher considered the case over the course of three meetings. The first was on 1 November 2018, page 188. The meeting was resumed on 13 November 2018 (page 204) and then again on 19 November 2018 (page 218) when the outcome was delivered to the claimant.

35. Over the course of these meetings I am satisfied that the claimant was asked for a full account of how the collision happened. His explanation included the following comments. He said that the vehicle kept going to the left. He said that he "mashed my brakes" and referred to experiences where forklift trucks can go out of control if that happens, particularly, in conjunction with the surface conditions.

36. In the first meeting with Mr Fisher on 1 November 2018, the claimant declined to watch the CCTV footage (see page 192) and I have already referred to his explanation on 13 November 2018 as to why he found it difficult to do so. The Trade Union Representative argued on his behalf that the floor was not one hundred percent dry and he made comments on the video. He commented about the marks and what they might show; he gave his opinion as a forklift truck driver as to what it would be like in those circumstances and how the surface conditions might make a possible contribution to the collision. He asked Mr Fisher to infer from the claimant's previous good record that he was likely not to have made a simple error and referred to the evidence (see paragraph 12.f. above) that the claimant was driving at a normal speed. Mr Fisher, I am satisfied, asked the claimant why he had not sounded an alarm by beeping his horn.

37. He also considered that there was a possible Health and Safety breach and resuspended the claimant as a result. The parties did not go into this aspect of the case in great detail but I understand that while the disciplinary proceedings were pending, the claimant's suspension had been reviewed and lifted and then he was given two weeks' holiday before he returned to work. However, he had not returned as a forklift truck driver, driving other vehicles and it was Mr Fisher who decided to resuspend him. I understand the claimant's confusion about this decision. He makes the point and suggests that the respondent is inconsistent in its approach to him. However, my view is that what happened was that a more senior manager was taking a different view of what was necessary pending a final resolution of the matter. And, I do not consider that it displays an inconsistency of approach or conduct outside the range of reasonable responses.

38. When the meeting resumed on 13 November 2018, Mr Fisher ensured that the claimant watched the CCTV footage. In my view it was important that he did that because it gave the claimant the opportunity to give his side of events and to comment on deductions that Mr Fisher was likely to draw from having viewed the CCTV footage.

39. I am satisfied that Mr Fisher explored issues such as why the claimant had not warned KW in any way. I can see from the minutes of 13 November 2018 that the claimant had the opportunity to make comments on the CCTV footage and he suggested that the footage is consistent with his account of drifting towards the point of impact.

40. Mr Cooper's explanation for not having shouted or beeped his horn was that he panicked and he said that that had also been concerned with why he was unable to stop. I have noted, in particular, him saying "I panicked and couldn't stop". Mr Fisher asked whether the claimant considered himself to be too close to EvJ's forklift truck and the claimant said "It looks like it from the camera but he had already entered the aisle and he continued. He had enough space to continue". That therefore suggests that on the first viewing of the CCTV footage there was no recollection triggered in the claimant of action by EvJ that had caused him to take evasive action. He did not blame EvJ when he first viewed the CCTV footage. He denied that he was tired, and he mentioned the alleged inconsistency of the decision to suspend him then that being lifted and then him being resuspended.

41. So, the points that the claimant now makes were all made before Mr Fisher who had them in his mind when he was making his decision. That decision was given in the outcome meeting on 19 November 2018.

42. I have considered the outcome letter, at page 218, because it sets out, on the face of it, three particular reasons why Mr Fisher decided to dismiss. Having heard Mr Fisher's explanation I am satisfied that points 2 and 3 are particularisation of the principal reason set out at point 1 on page 218, namely that of driving without due care and attention.

43. The following day the claimant put in an appeal (page 219) and he was invited to an appeal which was conducted by Ms Fairbrother. The original hearing date had to be postponed and it was in fact heard on 28 January 2019, the notes of that are at page 238.

44. The grounds for his appeal were that he wished to put forward more evidence; that the respondent had not had in mind the full facts when making their decision and that other employees had been treated in a different way.

45. I have read the notes of the appeal hearing very carefully and, in my view, Ms Fairbrother carried out a very thorough appeal which was in the nature of a reinvestigation. You can trace the points that the claimant made in his letter at page 219 - and at the appeal hearing itself as noted by Ms Fairbrother at page 239 through discussion in the notes to her conclusions which are at page 242. So, for example, the allegation that there was unfair comparison with others was discussed in the notes at page 240 to 241 and she came to, what I regard to be, the permissible conclusion that the one instance that he put forward was not comparable and, having read that example, I agree with that conclusion. She gave oral evidence before me that although there were some similarities in every case, each case should be treated on their own merits and seems to me to be an approach that was one open to her.

46. So far as the allegation that the respondent had made the decision when they were not in possession of the full facts, this centered on the claimant's allegation that the floor was wet. That is plain from his explanation at the top of page 239. He complained not only that the floor was wet but there were no hazard signs to alert him of that fact. However, Mr Fisher and Ms Fairbrother herself had evidence in front of them from which they were able to conclude that the three other witnesses thought that the floor was dry. Therefore, they drew the permissible conclusion that the floor had not been particularly hazardous to drive over.

47. I see from paragraph 11 to 14 (and 14 in particular) of Ms Fairbrother's witness statement that she studied the CCTV footage carefully. She was concerned that it appeared to show the claimant moved off very close to EvJ's forklift truck which had pulled out in front of him as EvJ pulled around KW's stationery truck Ms Fairbrother put that to the claimant and suggested that he should not move off so close behind another truck. This was a significant factor in her decision making.

48. When the claimant was discussing this point in his oral evidence he

accepted, or indeed volunteered, that he had had his view of the aisle in front of him obscured by the forklift truck driven by EvJ and by the load on the pallet on the back of that forklift truck. It might be arguable that EvJ took a risk when he pulled out in front of the claimant but the former explained why he had thought it was safe to do so in his investigation interview. However, having viewed the CCTV footage a number of times I can see the claimant slowed almost to a stop and that was accepted by the claimant. But then he did not stop; he continued moving and he moved faster than he had been moving at the point when EvJ pulled out in front of him. The only conclusion that can be drawn from that is that the claimant must have applied the accelerator. His forklift truck moves from being nearly stopped to moving forward and that can have happened no other way.

49. I accept the evidence in paragraph 14 of Ms Fairbrother's statement and conclude that she analysed the CCTV footage quite carefully. She wanted to see what time was available to the claimant to warn his colleague (KW). She decided that there was about eight seconds available and I accept that. The only explanation for that failure to warn put forward by the claimant to any of the decision makers, was that he had panicked. Although that may be a very human and understandable reaction, in my view it is also something that is quite permissible for the respondents to take in to account when deciding whether the claimant had driven with due care and attention.

50. At page 243 of the notes of the meeting that she had with him on 28 January, Ms Fairbrother put forward to the claimant the proposition that one could drive even if there was a spillage in the aisle. Mirroring the evidence that Mr Fellows that there is a rolling cleaning going on but that spills do occur, she said "It takes time to get a cleaner" and "everyone is responsible for their own health and safety". She said that the CCTV footage did not appear to her to show that the floor surface was wet or that there was a spillage.

51. This evidence that people should drive to the surface conditions mirrored that given by Mr Fisher in his oral evidence to me and stands to reason. The claimant accepted that spillages were something that happened from time-to-time in the warehouse. Having considered all of the evidence on this point, my view is that the surface conditions were not the root cause of the collision either because they were unremarkable or because the claimant should have been driving to those conditions.

52. Ms Fairbrother may have accepted that there was some dampness or she might be inferred to have accepted there was some dampness by the use of her phrase "not freshly wet" but it was not relevant to her conclusions. The lack of due care that she thought had led to the collision was the proximity of the claimant to EvJ's forklift truck and his failure to warn KW of his approach. That was the basis for her conclusion.

53. The respondent has a two-stage appeal process and at the second stage the second stage Appeal Officer, in this case Mr Potter, has a more limited role. He had a meeting with the claimant on 3 May 2019 following the second stage appeal letter that was put in on 5 February 2019. The minutes of the meeting with Mr Potter are at page 252.

54. Again, I have looked carefully at the appeal letter and the discussion and one can trace through that that Mr Potter noted, discussed, considered and drew conclusions in respect of each of the points that were raised by the claimant.

55. The main one was that the claimant, who by this stage was no longer represented by his union, had the opportunity to study the CCTV evidence and consequently, because of the argument raised by the claimant, the actions of EvJ were analysed in more detail at the second stage appeal than had been necessary previously. The claimant described EvJ as having crossed him whereas his recollection of the incident shortly after did not particularly rely on that. He also asked Mr Potter to look in to the appearance of the floor on the CCTV footage. It is true that in the tyre marks on the floor, one can see the appearance of a white colouring. This was was pointed out by the claimant who suggested suggesting that there had been a white substance on the floor and asked Mr Potter to look in to who did the cleaning and what chemicals had been used by them.

56. Mr Cooper's explanation to Mr Potter about the incident with the benefit of viewing the CCTV footage is at pages 256 to 257. I particularly note his account given at the bottom of 257. Mr Potter asked him "When the other forklift truck moved off [i.e. that driven by EvJ], what did you do?". The claimant answered "I decided not to pass because he clearly came in front of me so I decided to come across. I applied my brakes but glided across". That broadly accords with evidence about the incident that he gave orally at this tribunal.

57. I come to the point where I record what I myself viewed on the CCTV footage.

    a. After the claimant pulls into the aisle he is on the right-hand side and EvJ's forklift truck is on the left-hand side. As the claimant proceeds down the aisle there comes a point where it appears to be the case that there is a slight overlap between the claimant and EvJ's forklift truck. I say appears to be the case; the line of sight of the camera is directly behind the forklift trucks rather than side on but the claimant's truck on the right hand side appears to have a slight overlap with the rear wheels of EvJ's truck on the left hand side. Mr Fisher accepted that to be the case when he viewed it; that was the conclusion that he had also drawn.

    b. One can see the face of EvJ turning over his right shoulder and then turning back towards the direction of travel. He moves off, as I say at the point where there appears to be an overlap between the back of his forklift truck and the front of the claimant's.

    c. The claimant slows and almost stops, and the claimant accepted that that was what the CCTV footage showed.

    d. EvJ pulls out and in front of the claimant. As he does so, the claimant's forklift truck starts to move forward and to the left and then keeps on going around in an left-hand arc leaving tyre marks behind him.

e. As pointed out by Ms Morgan-Gayle, in the tyre marks on the ground, at one point there is something white. There was some debate before me about whether they should be referred to as skid marks or tyre marks. There was some debate about whether I could infer that the truck had run through a liquid that ran off the tyres as it moved forward and the marks were tyre marks; or that they were a skid mark which might have been caused by rubber being left on the surface of the floor because the wheels had locked. There is no expert evidence on this. I am not going to speculate as it would be quite wrong of me to speculate about what the marks are based on CCTV footage. In any event, whether they are tyre marks or skid marks does not affect my judgement on this matter as I will explain.

58. I reject any suggestion that the claimant might have fallen asleep; That was not seriously pursued. The claimant did seem to recreate events after viewing the CCTV footage rather than recalling the events. However, this is perhaps not as surprising as all that; he was probably very shocked. I can infer that from his reluctance, initially, to view the CCTV footage. But it did lead to a difficulty for Mr Fellows and Mr Fisher in understanding how the collision occurred in the absence of an explanation from the claimant, and I need to take that in to account in considering the reasonableness of their conclusions.

59. His oral evidence to me and his evidence to Mr Potter, at page 256, is that he took a deliberate decision to move to the left-hand side of the aisle. I can see from the CCTV footage that he was close to stationery before moving off and, therefore, although it all happened very quickly, at the point where he took that deliberate decision EvJ's forklift truck was moving away from him. His first account was that he saw KW in the aisle as soon as he turned in to it. EvJ, I can see form the CCTV footage, moved out to the right. From the point of view of the claimant I do accept the respondent's submission that this should have triggered in him the question as to why EvJ had moved out and whether EvJ was moving around something. The claimant was behind EvJ. In order to take proper account of his surroundings he should have waited until he had proper visibility. Instead he took what he accepts as a deliberate act to turn to the left; He must have accelerated, otherwise the vehicle would not have moved in the way that he conceded it did as shown by the CCTV footage. His evidence, from the point of view of the driver, is that something then happened that meant that he could not, or did not, stop. But even if he is correct and even if his brakes mashed and the surface led to skidding, he would not have been in that position had he not started to move forward and turn left when he had insufficient visibility to make it safe to do so.

Conclusions

60. I now set out my conclusions on the issues, applying the relevant law to the facts which I have found. I do not repeat all of the facts here since that would add unnecessarily to the length of the judgement but I have them all in mind in reaching these conclusions.

61. On the unfair dismissal case I should focus not on my conclusions about

what happened but on the respondent's reasonable belief about what happened.

62. I accept that Mr Fisher, Ms Fairbrother and Mr Potter genuinely believed that the claimant's driving was a culpable factor in a collision that caused a serious injury. This was a matter which related to the claimant's conduct and was a potentially fair reason for dismissal. Did they have reasonable grounds for that belief?

63. The claimant argues that they took insufficient account of the evidence about the floor condition. It seems to me to have been open to them to accept eye-witness evidence of AW, EvJ and Mr Fellows that the floor was not wet and to reject the claimant's account.

64. He criticises the respondent's managers for failing to interview EJ, both as an eye-witness and as a health and safety representative who was there on the scene. In fact, he does not appear to have either been tasked with or tasked himself with investigating the matter and his health and safety responsibilities do not of themselves make him a relevant witness. He responded to the incident (he can be seen arriving after the collision on a small vehicle) and left to seek first aid.

65. The question I have to ask myself was whether no reasonable employer would have failed to interview EJ when the claimant did not ask for it and the CCTV footage did not suggest that he had something material to add to the investigation. My view is that the answer to that question is no.

66. In relation to the CCTV footage of the earlier period, the claimant again did not specifically ask for it. The respondent had eye-witness evidence of the surface conditions and, for the reasons that I have already outlined, ultimately, the surface conditions were not an issue. Even if one considers the earlier points in the investigation where the claimant's account did not include his evidence that he had taken a deliberate decision to move to the left, Mr Fisher and Ms Fairbrother reasonably thought that the reasonably competent forklift truck driver should be able to drive to the conditions and take account of any instability in the surface.

67. The claimant did not want to view the CCTV footage. It was provided to his representative. And, in those circumstances, I do not consider that when the claimant complains that he was not provided with the CCTV footage, the actions of the respondent were outside the range of reasonable responses.

68. I accept that the respondents, when making their decision, took account of the whole of the statements that were available to them, including statements that the claimant had been going to normal or slow speed, but that does not affect the reasonableness of their conclusion that his actions were culpably negligent when he turned without apparent reason, failed to stop and failed to sound his horn. Those were reasonable conclusions for them to draw. I accept that the respondent had grounds from which they could reasonably conclude that those matters amounted to culpable negligence, leading to a finding of failure to drive with due care and attention.

69. I can see from the documents that record the decision-making process that his long service and good conduct were put before Mr Fisher, Ms Fairbrother and Mr Potter and I accept that they had those matters in mind. I have also noted points in the process where good conduct and long service were urged upon the decision makers by his representative.

70. The process itself leads to the conclusion that options other than dismissal was considered. In particular, I am thinking of the referral from Mr Fellows to Mr Fisher. It shows that the respondent gave careful consideration to whether or not to dismiss the claimant's for his actions and weighed up the seriousness of the incident, the conduct of the claimant and the impact on the claimant when deciding to dismiss. They did not simply look at the fact that a collision had occurred and conclude from that that the claimant was at fault. There was sufficient investigation, there was a fair process and the sanction was within the range of reasonable responses.

71. Where an employer operating a warehouse reasonably concludes that a person in the claimant's position, driving a forklift truck, has driven without due care and attention, it must be within the range of reasonable responses for them to decide that an appropriate sanction is dismissal.

72. For all those reasons I have decided to reject the unfair dismissal claim.

73. I have concluded that there were no procedural errors and I do not need to go on to consider the arguments that there should be a deduction for compensation to take account of the prospect that there could have been a fair dismissal in any event. However, I do consider the arguments about contribution.

74. I have set out my findings about what happened (see paragraph 57 above) and, in my view, this is one of those unusual cases where the conduct of the claimant was the sole and entire reason for his dismissal. Had I been in the position where I had to make a decision on conduct contributory conduct under s.122(2) or s.123(6) of the ERA, I would have made a one hundred percent deduction from any compensation payable.

75. I move on to considering the wrongful dismissal claim and I remind myself about my finding about the actions of the claimant on 28 September 2018.

76. I accept that he was shocked by the incident and it is probable that he cannot explain to himself how it came to happen. I accept that the claimant did not act deliberately but his actions were, in my view, culpably negligent and they did amount to driving without due care and attention. I agree that for a person in the claimant's position the risk of serious injury or death in a collision caused by driving without due care and attention means that that when the claimant drove without due care and attention, that was an act of gross misconduct which entitled the respondent to dismiss summarily. For that reason, I dismiss the wrongful dismissal claim.

77. Following my decision on liability and dismissal of the claims, the respondent made an application that the claimant should pay the costs of and occasioned by their defence of the claim. This application was made on two bases.

a. Firstly, it was said that Rule 76(1)(b) of the Employment Tribunal Rules of Procedure 2013 was satisfied. This applies when the claim had no reasonable prospect of success. This is a high threshold. The submission on this point, by Mr Johnson, was primarily that my findings as to what the CCTV footage showed that the actions of the claimant were what caused the collision and he never had any realistic prospects of success.

b. There was a specific criticism by the claimant about the alleged failure to interview EvJ. The respondent went to the trouble of getting a statement from him, that is at page 285 of the bundle, dated 1 October 2019, two to three weeks before the start of the hearing and that had not previously been done.

78. In the end, the point raised by the claimant that the respondent's investigation could be criticised for failure to interview the Health and Safety Representative from the shift, who was on the scene and that he had not been approached for his account or his impressions of the surrounding environment, was not one on which I found in the claimant's favour, but it was not an obviously bad point. And for that reason alone, I reject the argument that the claim had no reasonable prospects of success. In my view, had this been raised at a preliminary hearing stage and all of the different criticisms raised by the claimant put forward, including that point in particular, I do not think that the claim would have been struck out. I appreciate that that is not the test for whether the threshold for a costs application has been met which is whether, looking at the matter at the time the application is made, were there no reasonable prospects of success. Mr Johnson very fairly says that that allegation that there are no reasonable prospects of success is not in the pleading and the respondent did not have sufficient confidence that there were no, or little reasonable prospects of success that they made application for a deposit order at an earlier stage.

79. It is also argued that the claimant has displayed unreasonable conduct at least that is the way that it was argued in front of me. The respondent's representative in their letter of 14 August 2019, suggested that the conduct went so far as to have elements of vexatiousness but Mr Johnson very sensibly focused on whether the claimant has behaved unreasonably in the conduct of the proceedings. In particular, there is reference to him continuing after 14 August 2019 letter, which is headed Without Prejudice save to costs". That is costs warning letter inviting the claimant to withdraw his claim on or before 21 August 2019 and putting him on notice of an application of the kind that has in fact now been made. It sets out in some detail, as one would expect from a reputable firm of solicitors, the basis on which they argue that there are no reasonable prospects of success or that the claim would ultimately be unsuccessful.

80. I have in mind that the claimant is a litigant in person and the authorities in this area direct the Employment Judge to bear in mind that one cannot expect the objective and dispassionate appraisal of the legal prospects of the claim from a litigant in person that one would have from a represented party who is advised by solicitors. The claimant's representative mentions a number of occasions on which the claimant sought to settle these

proceedings and those are referred to in his witness statement. Although I do not criticise the respondent for not necessarily accepting exactly what he offered, I do notice that one of the things that he sought was a revocation of the finding of gross misconduct and, it seems to me, that this was something that was an important part of his reason for deciding to continue. I understand that the respondents can be frustrated for having to defend an Employment Tribunal claim which has ultimately been unsuccessful but I conclude that this claimant was not guilty of unreasonable conduct in pursing his claim after receipt of the letter of 14 August 2019. The application for costs is rejected.

_____
Employment Judge George

Date: ……8 January 2020 ….

Judgment sent to the parties on

.....10.01.20.....

.....
For the Tribunal office