EMPLOYMENT TRIBUNALS

Claimant: **Mr D Stachura**

Respondent: **Hydro Extrusion UK Ltd**

Heard at: **Bristol** **On: 18 & 19 March 2020**

Before: Employment Judge Maxwell

Representation
Claimant: in person
Respondent: Ms O'Halloran, Counsel

JUDGMENT

1. The Claimant's claim of unfair dismissal is not well-founded and is dismissed.

2. The Claimant's claim of breach of contract with respect to notice pay is not well-founded and is dismissed.

3. The Claimant's claim for the difference between contractual sick pay and SSP is well-founded and he is entitled to £820.

REASONS

Claims

4. By a claim form presented on 30 August 2019, the Claimant brought complaints of:

    4.1. unfair dismissal;

    4.2. breach of contract (notice pay);

    4.3. non-payment of contractual sick pay.

Evidence

5. I was provided with documentary evidence:

    5.1. an agreed bundle of documents running to 62 pages;

    5.2. an additional unpaginated bundle of documents from the Respondent, provided on the morning of day 1;

    5.3. further additional documents from the Respondent, provided by email during the lunch adjournment on day 1 (there was a short adjournment for the Claimant to read the same and he did not object to their admission into evidence).

6. I heard evidence from:

    6.1. Daniel Stachura, the Claimant;

    6.2. Keith Curnock, Line Manager;

    6.3. Kieran Veal, Health & Safety Technician;

    6.4. Mark Szeptycki, Plant Manager.

7. The parties made oral closing submissions and the Respondent produced a skeleton argument.

Facts

8. The Claimant was employed by the Respondent between 26 May 2009 and 2 July 2019. At the time of his dismissal he worked as a forklift truck ("FLT") driver.

Terms

9. The Claimant's offer letter provided that:

> **No sick pay will be paid in the first twelve months of your employment. Thereafter sick pay will be in accordance with the current sick pay scheme which may be revised annually. Sick pay is paid at the discretion of the company.**

10. No written sick pay scheme was put in evidence. I was, however, referred to the Respondent's Absence Management Procedure from circa 2016, which included:

> **There will be an annual review of site absence performance, if the site's absence performance exceeds 3.0% for the full budget year (January to December) Management reserve the right to amend sickness benefit as a step to ensuring the Company target is met. Based on the scale of the issue on site, consideration will be given to remove Company sickness benefit and reduce to SSP only for all employees with absence above 3%.**

11. The examples of gross misconduct in the Respondent's disciplinary procedure included:

> **Gross carelessness or negligence: including any action or failure to act which threatens the health or safety of any fellow Co-worker or member of the public including the disregard of safety rules which jeopardises the safety of those on the Company's premises.**
>
> **Failure to comply with the provisions of the Company's Health and Safety Policy.**

<u>Holiday</u>

12. On 4 June 2019, Mr Szeptycki sent an email saying that the Claimant:

    12.1. took 6 weeks of sick leave in July 2018;

    12.2. had just taken 2 weeks off sick with a sports injury;

    12.3. was due to return to work for a final shift that day before beginning a pre-booked holiday;

    12.4. instead handed in a fit note at the gatehouse and "joked" that he could now claim back his holiday.

    Mr Szeptycki described the fit note as being "convenient" (by which he meant suspicious) and stated that he did not want the Claimant to be paid for his recent sick leave. He concluded "there is no way on earth I want him paying, and we can deal with him when he is back".

13. In reply, Samantha Jayne Archer (HR) said that because the Claimant had exceeded 3% absence, payment should be SSP only, in line with the "Annual Site Absence Review". She noted that the absence reporting procedure had not been followed and "he's an ideal candidate for an absence disciplinary where this can all be legitimately raised and sanctioned against." She also

asked for asked for reports on several sites of those with more than 3 absences in a rolling 12-month period, to “start the absence management process again”.

14. In the event, no attendance management process was commenced with the Claimant. Another matter arose, shortly after his return to work.

FLT

15. The Claimant received appropriate initial training in FLT driving and undertook refresher courses. The training covered various aspects of health and safety. Formal training was supplemented by periodic ‘Toolbox Talks’, including on pedestrian safety.

16. On 17 June 2019, Mr Szeptycki noted that Claimant’s posture whilst driving a FLT and believed he may have been doing so without keeping his hand on the steering wheel. He took this concern up with Mr Curnock and asked him to retrieve the CCTV footage from the area. This task was given to Mr Veal, as only he and Mr Szeptycki had access to the relevant IT system.

17. The footage was viewed and the Claimant’s managers believed it confirmed that he had indeed driven the FLT without hands on the wheel. Mr Curnock and Mr Veal called the Claimant in to view the footage. The Claimant’s response to this included “I don’t think it was as far as you say and I had my knee resting on the wheel guiding the truck”. Mr Curnock said “It is quite clear you were driving the truck with no hands on the steering wheel and this is a very serious issue. You have admitted to driving the fork lift truck in a dangerous way putting your co-workers at risk.” Mr Curnock suspended the Claimant. It was not entirely accurate for Mr Curnock to say the Claimant had admitted to dangerous driving, rather he had admitted driving without his hands on the steering wheel, which was conduct Mr Curnock believed to be dangerous.

18. The CCTV footage was played during the Tribunal hearing:

    18.1. the clip is 11 seconds long, runs in real time and shows the Claimant covering a distance, which on Mr Szeptycki’s evidence was circa 60m;

    18.2. the Claimant said he was travelling at 1mph, but observation of the CCTV and the distance measured suggest a higher speed;

    18.3. the Claimant agreed in cross-examination that the CCTV showed he had no hands on the steering wheel and was not guiding it with his knee;

    18.4. the parties agree this was a pedestrian area and some colleagues can be seen in the vicinity;

    18.5. the parties agree the FLT weighed about 1 1/2 tons and had “sharp prongs” on the front;

18.6. the Claimant agreed in cross-examination that collision with a pedestrian might cause serious injury but was unsure about a fatality.

19. By a letter of 28 June 2019, the Claimant was required to attend a disciplinary hearing in connection with a "Health and Safety Breach", in particular "CCTV clearly shows you driving the FLT over the zebra crossing and alongside the roller correction machine with no hands on the FLT steering wheel at any time".

20. The Claimant's disciplinary hearing took place on 2 July 2019. Mr Szeptycki was the decision-maker. The Claimant was represented by Henry Jackson. During the disciplinary:

 20.1. the Claimant admitted the CCTV showed him driving hands free;

 20.2. the Claimant said his hand was painful following an operation;

 20.3. the Claimant objected to the Respondent relying on the CCTV, believing this was improper;

 20.4. the Claimant emphasised that no harm was done to any person;

 20.5. the Claimant said he did not recall driving hands free;

 20.6. Mr Jackson suggested the Claimant was being looked at more closely because of the dispute over sick pay.

21. Mr Szeptycki decided to dismiss. He said he was very alarmed by the Claimant using the phrase "unconscious behaviour". The Claimant denied having black outs and said he had no issues at work in the previous 13 years. Mr Szeptycki said the Claimant being unaware of driving hands free was a serious issue.

22. In evidence at the Tribunal, the Claimant said Mr Szeptycki told him he would not be able to sleep at night if he did not dismiss. The Claimant suggested he did not know why Mr Szeptycki would say such a thing, whereas the obvious inference is that it was because he believed this to be a most serious incident and that it would not be safe to leave the Claimant in post.

23. Mr Szeptycki told the Tribunal that injury and fatality caused by mobile vehicles and avoiding the same is a key objective for the Respondent. Nor was this a mere theoretical risk, tragic events have occurred in the past.

24. The decision to dismiss was confirmed by letter, which reminded him of his right to appeal. The Claimant did not appeal.

25. The Claimant received only SSP for the period of absence covered by his June 2019 fit note.

Law

26. Pursuant to section 98(1)(a) of the **Employment Rights Act 1996** ("ERA"), it is for the respondent to show that the reason for the claimant's dismissal was potentially fair and fell within section 98(1)(b).

27. If the reason for dismissal falls within section 98(1)(b), neither party has the burden of proving fairness or unfairness within section 98(4) of ERA, which provides:

> **In any case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair having regard to the reason shown by the employer -**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

28. Where the reason for dismissal is conduct the employment tribunal will take into account the guidance of the EAT in **BHS v Burchell [1978] IRLR 379**. The employment tribunal must be satisfied:

    28.1. that the respondent had a genuine belief that the claimant was guilty of the misconduct;

    28.2. that such belief was based on reasonable grounds;

    28.3. that such belief was reached after a reasonable investigation.

29. The employment tribunal must also be satisfied that the misconduct was sufficient to justify dismissing the claimant.

30. The function of the employment tribunal is to review the reasonableness of the employer's decision and not to substitute its own view. The question for the employment tribunal is whether the decision to dismiss fell within the band of reasonable responses, which is to say that a reasonable employer may have considered it sufficient to justify dismissal; see **Iceland Frozen Foods v Jones [1983] IRLR 439 EAT**.

31. The band of reasonable responses test applies as much to the **Burchell** criteria as it does to whether the misconduct was sufficiently serious to justify dismissal; see **Sainsbury's Supermarkets v Hitt [2003] IRLR 23 CA**.

Unfair Dismissal

Reason

32. I am satisfied the reason for dismissal was the genuine belief by the Respondent, in the person of Mr Mr Szeptycki, that the Claimant was guilty of misconduct, namely driving the FLT without hands on the steering wheel.

Investigation

33. The investigation here was limited in nature, comprising:

    33.1. the CCTV being obtained;

    33.2. managers viewing the CCTV;

    33.3. the Claimant being shown the CCTV and invited to comment upon it.

34. In these circumstances, however, there was little further investigation that could be done or that it would have been unreasonable for the Respondent not to have undertaken:

    34.1. the CCTV spoke for itself;

    34.2. there was little if any disagreement about what the CCTV contained;

    34.3. the Claimant admitted driving with no hand on the wheel;

    34.4. to the extent any question arose about whether the Claimant had his knee “guiding” the steering wheel:

        34.4.1. the CCTV suggested otherwise, as the Claimant conceded at the Tribunal;

        34.4.2. it would seem unlikely that an employee in the vicinity would be able to speak to such a point;

        34.4.3. the use of the knee would not likely be considered as an acceptable alternative to the Claimant using his hands to steer the FLT.

35. The investigation was well within the band of that which a reasonable employer might carry out.

Grounds

36. The Respondent had reasonable grounds for its belief in the Claimant’s guilt of the misconduct:

    36.1. the Claimant admitted driving the FLT without his hands on the steering wheel;

36.2. The CCTV showed the Claimant driving the FLT without hands on the steering wheel.

Procedure

37. The Claimant said he had understood the CCTV was only to be used where there was an accident. Asked, even if that were the case, why it would be unfair for his employer to rely upon CCTV footage if it captured an employee committing misconduct, he said it would not be unfair. He also said it would have made no difference to what happened on this occasion if he had known the CCTV could be used in disciplinary hearings

38. The Claimant said he was only being watched by Mr Szeptycki because of the sick pay issue; this assertion was not put to Mr Szeptycki in cross-examination. Asked, even if that were the case, if he was then seen to commit misconduct whether it would be unfair to act on that, he said it would not be.

39. I am satisfied the Respondent followed a fair procedure:

    39.1. the Claimant was given a very early opportunity to view and comment on the CCTV, when called to a meeting the same day;

    39.2. the Claimant was invited to a disciplinary hearing, warned that his driving of the FLT without hands was considered as potential gross misconduct, he was at risk of dismissal and entitled to be accompanied;

    39.3. the Claimant understood the allegation;

    39.4. the Claimant was accompanied at the disciplinary hearing;

    39.5. the Claimant had a full opportunity to both contest the fact of what he had done (of which he did very little) and put forward mitigation (of which he did more).

40. Whilst there are arguments that can be made for someone other than Mr Szeptycki discharging the role of dismissal decision-maker, I do not find this factor takes the procedure adopted outside the reasonable band:

    40.1. although Mr Szeptycki's initial observation prompted the obtaining of CCTV evidence, once that had been done it was the video which was relied upon and not his eye witness account;

    40.2. Mr Szeptycki was a senior person within the Respondent, familiar with the safety issues surrounding FLT use;

    40.3. I am satisfied that Mr Szeptycki believed the FLT driving to be a very serious matter and that his view about this was not influenced or exacerbated by concerns around absence and sick pay.

Sanction

41. As set above, appropriate training and guidance was provided to the Claimant in FLT truck driving. Some of the associated written material was put in evidence. Whilst the Respondent is unable to point to a specific rule or guidance document which says "do not drive without a hand on the steering wheel" this can be explained by it being so obvious as to be unnecessary. As Ms O'Halloran fairly observed, the Respondent, similarly, does not have an express rule against driving with eyes closed.

42. The parties agree the Claimant drove through a pedestrian area. The CCTV shows some colleagues on foot to his left and there may have been others to his right out of the camera view.

43. By not having a hand on the steering wheel, the Claimant did not have full control of the FLT. Whilst it is true that he could have put his foot on the brake, that is only one means by which control is maintained. In the event of a pedestrian stepping into the Claimant's path unexpectedly, without a hand on the wheel he could not evade collision by steering.

44. The risks from driving a heavy FLT, through a pedestrian, without maintaining full control, are obvious. Had the Claimant collided with a coleague, serious injury or death may have resulted. These were not fanciful risks in the circumstances.

45. The Claimant had long service with Respondent and a clean disciplinary record. Such factors would not, however, offer much mitigation in circumstances where the Respondent was concerned about misconduct which created a real risk to health and safety. The Claimant argued that his driving without a hand on the steering wheel was not a serious or dangerous matter, which position would not tend to give the Respondent confidence that he had insight into his failing and recognised the associated risks. The Respondent could also, legitimately, be concerned by the Claimant not being able to recollect having driven hands free, given he was shown the CCTV shortly thereafter.

46. For the reasons set out above, I am satisfied the decision to dismiss was well within the band of reasonable responses. The Respondent's lack of confidence in the Claimant being safe going forward was understandable.

Breach of Contract

47. I find that the Claimant drove the FLT on 17 June 2019 through a pedestrian area, without hands or knees on the steering wheel, in circumstances where this created a clear risk to the health and safety of colleagues working in the vicinity. He did not maintain proper control of a potentially dangerous vehicle. After the event, the Claimant failed to show any insight into this serious failure on his part, or even to recall the same. Objectively, this was conduct likely to

seriously damage or destroy trust and confidence. The Claimant was guilty of gross misconduct. The Respondent was entitled to summarily dismiss him.

Sick Pay

48. The Claimant's offer letter included that after the first 12 months, sick pay would be paid in accordance with the terms of the current sick pay scheme. The relevant provision also said that sick pay was at the discretion of the company. Given this somewhat mixed formulation, the question arises whether and to what extent any entitlement to sick pay was contractual or discretionary?

49. The relevant clause stated that "sick pay will be paid", which suggests payment under the scheme was mandatory, although the terms also allowed for the sick pay scheme to be revised once a year. In these circumstances, the reference to sick pay being at the Respondent's discretion, must refer to the power to vary the scheme, to reducing the benefit or perhaps withdraw it entirely.

50. Varying the scheme would require a conscious decision to be made on the Respondent's behalf. Choosing not to apply the scheme to an individual employee or misunderstanding its terms would not amount to a variation.

51. On this basis, I am satisfied the Claimant was contractually entitled to receive sick pay in accordance with terms of the Respondent's sick pay scheme, as at the date of any absence.

52. The Respondent's primary position was that sick pay was entirely discretionary, subject only to the requirement that such discretion not be exercised in an irrational or perverse manner. For the reasons set out above, I do not agree.

53. I turn then to whether the Claimant was paid in accordance with the Respondent's sick pay scheme.

54. Beyond the payment of sick pay being entirely discretionary, the only other basis upon which the Respondent contested the Claimant's sick pay claim was that it applied the ("3%") provision taken from the Respondent's Absence Management Procedure and was entitled under that to pay SSP only.

55. The first sentence of the 3% provision ties in with the Claimant's offer letter, since it requires an annual review of absence performance at each site and reserves the right to the Respondent to amend the sickness benefit where that percentage is exceeded. The next sentence requires that "based on the scale of the issue on site, consideration will be given" to limit sick pay to SSP for individual employees whose absence is above 3%. This wording allows for but does not require paying SSP in such circumstances.

56. I am satisfied the 3% provision comprises two elements:

56.1. a trigger, namely site absence exceeding 3%, which permits amendment of the sickness scheme;

56.2. a requirement, when the trigger is met, to consider paying SSP only to employees with absence above 3%.

57. Whilst the Claimant's individual absence history put him above the 3% figure, there was no evidence as to whether the site trigger had been met.

58. Miss O'Halloran invited me to draw an inference from Ms Archer's email of 5 June 2019, arguing that as she worked in HR and given her reference to "due process", it must be that she knew the site trigger had been met. I do not agree. The specific absence information Ms Archer cites is in relation to the Claimant, indeed she requests information (Focus reports) about the sites more generally for the previous 12 months, so that she can identify the absence position for other employees. Furthermore, it may be that Ms Archer has read the two sentences of the 3% provision as operating separately and not, as I have found, with the first being a trigger.

59. Beyond its arguments on the application of the 3% provision and discretion (generally and in whether or how to apply the 3% provision) the Respondent did not otherwise dispute the Claimant would have been entitled to contractual sick pay. To the extent the Respondent seeks to rely upon site absence exceeding 3% in order to defend his claim for contractual sick pay, then it is for the Respondent to prove that was the case on the balance of probabilities and I am not satisfied it has done so.

60. Accordingly, the Claimant should have received contractual sick pay rather than SSP and is entitled to the shortfall in that regard.

Remedy

61. The parties agreed, subject to liability, that the difference between SSP and contractual sick pay in the relevant period was £820.

Employment Judge Maxwell
Date: 19 March 2020