EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
MR TOMASZ POTERALOWICZ	**AND**	**DTR VMS LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 27TH / 28TH JULY 2020

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS:**

APPEARANCES:-

FOR THE CLAIMANT:- **MR R MURAWIAK**

FOR THE RESPONDENT:- **MR F CURRIE**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim of unfair dismissal is not well founded and is dismissed.
2. The claimant's claim of wrongful dismissal is not well founded and is dismissed.

Reasons

1. By this claim the claimant brings claims of unfair dismissal and wrongful dismissal.

2. Until his dismissal the claimant had been employed since 2014 by the respondent as a Manufacturing Operator.

3. Between June 2018 and April 2019, prior to the events which led to his dismissal, there were four disciplinary investigations into allegations of misconduct on the part of the claimant. The first resulted in a first verbal warning, but no action was taken in respect of the other three. At the claimant's behest the bundle included documents relating to these previous disciplinary allegations and processes. The respondent's evidence, which I accept, is that none of these played any part in his dismissal which was confined solely to the specific allegations relating to the events set out below. If that is correct, which I accept it is, they have no bearing on the fairness of the dismissal, and it is not therefore necessary to refer to the detail of them in this decision.

4. The central issue concerns the events of 11th June 2019. The claimant was dismissed for allegedly failing to follow a reasonable management instruction that morning. Whilst there are some disputes of fact, as set out below, in outline the events of that morning are not in dispute. The respondent has a practice of forming groups of employees into "cells". Within the cell the employees who, once fully trained are able to operate all of the machines, rotate jobs operating a different machine each day. On Monday 10th June 2019 the claimant had been due to operate Press 43/44 but as that machine was out of operation had operated press 40/41. On 11th June he was, according to the rota, due to be on servicing which he started to carry out at the beginning of his shift. About one hour into his shift he was asked to swap with Jamie Tolley and operate Press 44, which he had missed the day before, by his line manager Dave Seal. The evidence Mr Seal subsequently gave during the investigation was that he had initially put the claimant on servicing but had asked him to swap as he had missed his rotation on press 44 the previous day. When he did so the claimant refused. The shift leader was Danny Clubb. His evidence in the investigation was that he had asked Mr Seal to move the claimant to work on press 44. Subsequently, after he had been asked to do so by Mr Seal and refused, the claimant asked Mr Clubb to intervene, apparently in the expectation that Mr Clubb would support him. However, Mr Clubb repeated the request to move but the claimant again refused. Mr Clubb took the claimant to Mr Jon Fell the Production Supervisor. Mr Fell's evidence to the investigation was that he too asked the claimant to operate Press 44 but the claimant again refused. Mr Fell consulted his line manager, Mr Rob Turner, and the claimant was suspended. The only point that is in dispute in this outline is whether the claimant refused to operate Press 44 when asked by Mr Fell as Mr Fell told the investigation, or whether, as the claimant asserts, Mr Fell was simply informed by Mr Clubb that the claimant had refused to do so. For the reasons set out below in my judgement this is a relatively minor dispute which does not fundamentally affect any of the issues in the case.

5. Mr Mark Jones was tasked with investigating the incident and interviewed all those involved (from which the account as summarised above is derived). His conclusion was that "*Tomas Poteralowicz was asked to run a job which by his own admission he was capable of doing. He accepts that it was a reasonable request. However, he refused to carry this out. He claims the reason he refused was that he should have*

been servicing and that it was not explained to him why he had to change." He concluded from this that the claimant had refused to follow a reasonable management instruction.

6. As is set out in that extract from the report the claimant maintained that his refusal was justified both because he was rostered to work on servicing that day and because he was not provided with an explanation for being required to swap. In addition, in the investigatory interview with the claimant Mr Jones expressed the opinion that it would have been unreasonable to ask the claimant to swap without giving him an explanation. This opinion would obviously not bind either Mr Turner or Mr Franklin, but the claimant relies on it as supporting his contention that he did not act unreasonably in refusing to swap. However, on 17th June 2019 in anticipation of the disciplinary hearing Mr Murawiak, who describes himself as the claimant's legal advisor, wrote to the respondent setting out the claimant's case. In respect of the point made by the claimant that the purpose of asking him to swap had not been explained to him, the letter explicitly sets out, as does the claimant's witness statement in these proceedings, that he had been given the explanation at least by Mr Clubb, but had not accepted it as he did not believe that it was correct, as "*The explanation was not in line with the rotation system*." In his investigatory interview he explained his understanding of the system was that if you missed one day's allocation for whatever reason you moved on to the next. That remains his view, and in essence he has never wavered from his belief that his understanding of the system was correct and that all of the managers involved on the day and those who conducted the disciplinary and appeal process are wrong. It is not therefore in reality in dispute that he had been provided with an explanation that he should swap because he had missed his rotation the previous day; it was simply not one he accepted or would abide by.

7. Following the investigation the claimant was summoned to a disciplinary meeting by a letter dated 14th June, the disciplinary charge being "..refusing a reasonable request from your Team Leader", which falls within the definition of misconduct in section 6.13.3 of the respondent's disciplinary policy. The meeting took place on 18th June 2019 and was conducted by Mr Rob Turner the respondents Production Manager. The claimant was represented by his union representative Eamonn McGrane. Prior to the meeting the claimant had been supplied with the report which contained the summary of the investigation interviews produced by Mr Jones, but not the notes of interview with the individual witnesses.

8. During the meeting the claimant stated that he had nothing further to add than that which was contained in Mr Murawiak's letter of 17th June. He was effectively asserting and maintaining that he had a right to refuse to operate a press on which he was trained and which would form a normal part of his rotation, as he did not accept that his immediate line manager, or any other manager, could legitimately require him to do so on that day as he had been rostered to do servicing.

9. Mr Turner concluded that "*Tomasz's conduct went to the heart of his relationship with the Company. He undermined the team leader, shift leader and shift supervisor in front of the rest of his team. The Company take this conduct very seriously and I felt*

that a consistent approach was needed. The presses are a busy and crucial part of the business. Ultimately, Tomasz took it upon himself to say which part of the process he wanted to work on, dismissing the views of his three direct line managers. The Company takes a zero tolerance approach to this sort of behaviour and therefore I felt that there was no alternative but to dismiss. The Company's ability to meet production requirements and meet customer demand would be significantly impacted if employees could simply refuse the role that they were asked to perform and elect to do something different in line with their own preferences." Mr Turner concluded that the claimant had on three occasions refused a reasonable managerial request, that this amounted to gross misconduct and that the claimant would be summarily dismissed.

10. The claimant appealed and his appeal was heard by Mr Michael Franklin, the respondent's Operations Director. There were three meetings, on 21st, 22nd and 29th August 2019. At each meeting the claimant was represented by Mr McGrane his trade union representative In his appeal the claimant maintained the same basic position that it was not appropriate or fair to ask him to work on Press 44 on a day when he should be servicing according to the rotation. Mr Franklin concluded that the request was fair and reasonable, that it had been refused by the claimant when elevated through three levels of management, that the rotation system is simply guidance and that staff are required to be flexible. He concluded that the refusal was gross misconduct falling within 6.13.3 of the respondent's disciplinary procedure being conducted "..of such a serious and fundamental nature that it breaches the contractual relationship between the company and the employee." Accordingly, he upheld the decision to dismiss. In respect of the specific grounds of appeal he concluded that the failure to supply the notes of interview had not prejudiced the claimant as the report had accurately summarised what they had said; and that the failure to interview the witnesses suggested by the claimant equally caused no prejudice as the fundamental issue that the claimant had refused the instruction was not in dispute.

11. There is a dispute as to one of Mr Franklin's factual conclusions. He considered it likely that the claimant had been late that morning which was why another operator had been put on Press 44 at the start of the shift. The claimant disputes this but in my judgement it is not a dispute of any significance. No one disputes that the claimant commenced doing servicing and was then asked to move. The circumstances in which he had been allocated servicing is not relevant to the issue of his conduct when he was asked to move, and necessarily does not bear on the central questions of whether and why the claimant had refused a management request.

Conclusions

Unfair Dismissal

12. The first question for the tribunal is whether the claimant has been dismissed for a potentially fair reason. Conduct is a potentially fair reason and I accept that the claimant was dismissed, and his appeal in turn was dismissed, because both

managers genuinely believed that he had persistently refused a reasonable management instruction. As is set out above both found, as I accept entirely genuinely, that the conduct was gross misconduct which went to the heart of the employment relationship

13. That being the case, in relation to whether the dismissal was fair I have to ask the well-known Burchell questions. Was there a reasonable investigation? Were reasonable conclusions as to the misconduct drawn from that investigation? Was dismissal a reasonable sanction? In respect of each of those questions the range of reasonable responses test applies (See: Sainsburys Supermarket v Hitt).

14. Before dealing with the specific issues I should state as set out above that I accept the evidence of Mr Turner and Mr Franklin that their conclusions were based entirely on the events of 11th June 2019 and that they did not take any account of any previous disciplinary investigations which are therefore irrelevant for the purposes of my decision.

15. The claimant submits that the respondent failed to conduct a reasonable investigation. Firstly, it failed to follow its own disciplinary procedure in that it failed to provide the notes of the witness interviews on which Mr Jones report was based at any stage during the internal process. They were only seen by the claimant when disclosed in this litigation. The respondent submits that section 6.18 of the Disciplinary Procedure on which the claimant relies, provides that they “should” but not “must” be provided and therefore presupposes that they will not necessarily be disclosed in all cases. There is therefore no explicit contractual right to be provided with them. Even if that section creates a reasonable expectation that they will be provided unless there are specific and good reasons for not doing so, and if the tribunal concludes that they should have been provided in this case that the failure to do so did not on the facts of this case cause the claimant any prejudice as was found, and the respondent submits correctly found, by Mr Franklin. There was only one significant factual dispute, which was whether the claimant had refused an instruction from Mr Fell as well as Mr Seal and Mr Clubb. Despite not seeing Mr Fell’s statement the important parts of his evidence were summarised by Mr Jones and the claimant therefore knew precisely what was alleged against him. Further given that it was not in dispute that he had refused the requests of both Mr Seal and Mr Clubb, and as by that stage of the disciplinary hearing following Mr Murakwiak’s letter no dispute that at least Mr Clubb had provided him with an explanation there can be no significant prejudice in the failure to provide the notes themselves as the basic facts were not in dispute.

16. Secondly the claimant contends that the respondent failed to interview witnesses he wished them to, and whom they should have interviewed. The respondent submits that firstly, the claimant was represented by his trade union representative and he could therefore have called any witnesses he wanted if he thought their evidence was relevant. In any event they were not, even on the claimant’s account witnesses he wanted called not because their evidence was relevant to any specific factual dispute but because they were of the opinion, and apparently supported the claimant in his view, that the request was unreasonable and that the rotation system was not being

administered fairly. The respondent submits that it was investigating whether the claimant had refused a specific instruction to work on a particular machine on a particular day. Since that was not in reality in dispute, save for whether he had done so twice or three times, there was no need or reason to interview witnesses.

17. In my judgement the respondent is right in respect of both propositions. I accept that the disciplinary procedure states that the notes of interview/statements should be supplied and I can see no good reason why they were not in this case. However, the question for me is whether, and if so to what extent, that undermined the fairness of the investigation. As set out above the only potentially significant dispute of fact was whether the claimant had or had not refused a request from Mr Fell. In relation to Mr Fell the claimant knew from the report what he had said and did not suffer any prejudice from not seeing the underlying notes of interview.

18. In respect of the failure to interview the other witnesses in my judgement their evidence could only go to mitigation. If the claimant was accepting that he had wrongly refused to adhere to a management instruction but that the history of the application of the rotation system explained his conduct the witnesses may have been relevant. The difficulty for the claimant was that that was not his case at all, but rather he was entirely justified in refusing. I cannot see how their evidence could have been relevant to or affected Mr Turner or Mr Franklin's decision. The situation they were dealing with was an admitted refusal to follow a management instruction. In any event, as the respondent points out, the claimant was represented by both his trade union and had the support of Mr Murawiak his legal advisor, and if the claimant thought their evidence significant he could have called them.

19. In terms of the conclusions in my judgement the respondent was bound to conclude that the claimant had refused a management instruction, since he did not dispute it; the only dispute being whether he had done so twice or three times. In respect of whether that instruction was reasonable the claimant was being asked to work on a press on which he was trained to work and which formed part of his normal duties. In those circumstances in my judgement it was reasonably and rationally open to both Mr Turner and Mr Franklin to conclude that the instruction was reasonable.

20. As set out above there are two challenges to the factual findings of Mr Turner and Mr Franklin. Firstly, both concluded that the claimant had refused the instruction of all three managers including Mr Fell, which the claimant disputes. In my judgement it was rationally open to both, not least because the claimant accepts refusing the instruction of Mr Seal and Mr Clubb, to accept Mr Fell's account; and in any event it is of little significance as the claimant has continued to maintain he was right. There is no suggestion that he would have accepted an instruction from Mr Fell any more than either of the other managers. Secondly Mr Franklin drew the conclusion that the claimant was likely to have been late on the morning of 11th June. Again, the claimant disputes this. In my judgement this is of no significance whatsoever. Even if Mr Franklin is wrong the claimant was not dismissed for being late and it has no bearing on the underlying issues.

21. In terms of sanction the claimant had been given, on Mr Turner and Mr Franklin's findings, three opportunities to comply with a reasonable managerial instruction and had refused to do so. An unreasonable refusal to work as directed necessarily goes to the heart of the wage work bargain which is fundamental to a contract of employment. It follows in my judgement that they were entitled to treat it as gross misconduct. Given that there was in effect no mitigation, as the claimant asserted throughout that he was entitled to act as he did, in my judgement they were equally entitled to conclude that dismissal was the appropriate sanction. Certainly, that decision fell well within the range reasonably open to both.

22. It follows that as the Burchell questions have been answered in the respondent's favour that the claimant's claim for unfair dismissal must be dismissed

Contributory Fault

23. As I have dismissed this claim it is not strictly necessary to address this issue. However, for the avoidance of doubt and in the event that I am wrong in those conclusions I would have made a finding of 100% contributory fault on the basis that the claimant's dismissal was caused completely by his deliberate and persistent failure to perform a role which he was trained to perform and fell within his duties.

Wrongful Dismissal

24. In respect of this claim the test is not whether the respondent reasonably believed that the claimant had committed gross misconduct; but whether as a matter of fact he had. There is no dispute before me on his own evidence that the claimant on two occasions refused to move to Press 44, and I will determine this part of the claim on the basis that the claimant is correct as there is no specific evidence from Mr Fell before me to contradict it.

25. The difficulty for the claimant is that his case rests entirely on the proposition that he was entitled to refuse. However, there is no suggestion that the cell or rotation system had any contractual effect, it was simply a convenient method of working; nor any dispute that the press he was asked to move to fell within his competence and ordinary duties. I cannot see in those circumstances how he acquired the right to refuse the request and to determine for himself what duties he would or would not perform. In my judgement it was necessarily a breach of contract on his part, and a fundamental breach is it goes to the heart of the employment relationship.

26. For those reasons the wrongful dismissal claim is also dismissed.

EMPLOYMENT JUDGE CADNEY
Dated: 15th September 2020

Judgment entered into Register
And copies sent to the parties on
18th September 2020
By Mr J McCormick

for Secretary of the Tribunals