EMPLOYMENT TRIBUNALS

Claimant: Mr J Chamberlain

Respondent: Greencore Prepared Food

HELD AT: Manchester **ON:** 9 July 2020

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: In person
Respondent: Miss J Stanton, General Manager

Judgment having been sent to the parties on 10 July 2020, and written reasons having been requested by the claimant in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided.

REASONS

Preliminary

1. The heading to these reasons is marked, "Code V". All this means is that the hearing took place on a remote video platform. Neither party objected to the format of the hearing.

Issues

2. The claimant is a former employee of the respondent. It is common ground that he was continuously employed from February 2014 until he was dismissed on 22 November 2019. By a claim form presented on 1 March 2020, he raised a single complaint of unfair dismissal, contrary to section 94 of the Employment Rights Act 1996 ("ERA"). The fairness or otherwise of his dismissal falls to be determined according to the provisions of section 98.
3. At the start of the hearing we clarified the issues that I had to determine.
   3.1. First, I had to decide whether the respondent could prove that the sole or principal reason for the dismissal was its belief that the claimant had falsified

records and committed a serious breach of health and safety. (If that was the respondent's sole or main reason, then it was clearly one which related to the claimant's conduct.)

3.2. Second, I had to decide whether the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason to dismiss the claimant.

4. Further issues would have arisen in relation to remedy had the dismissal been found to be unfair.

Evidence

5. I heard oral evidence from Mr Martin, Mr Davies and from Miss Stanton for the respondent. Then the claimant gave evidence on his own behalf. All four witnesses confirmed the truth of their written statements and answered questions. I also considered the contents of a 278-page bundle which I pre-read.

Facts

6. The respondent runs a large food-processing business with over 9,000 employees. Its operation includes a factory in Warrington. Products have to be moved around the factory. This is generally done using small powered vehicles. The fleet includes numerous pallet trucks called Manriders. They are operated by a single standing rider. The brand name appears to assume that the operatives are male and, as it happens, all the operatives concerned with this case were men.

7. With almost any powered transport comes a risk of injury. The risk increases if operators are not properly trained. Manriders are no exception. In order to guard against this risk, the respondent's Manriders are designed so that they can only be operated with an electronic fob. The respondent's safety procedures include a system for allocating fobs only to trained operatives. From 10 May 2019 until 20 November 2019, the claimant was in charge of that system. His responsibilities included introducing the fleet, ensuring that operatives were trained and that the training was documented, and overseeing the issuing of fobs to the trained operatives.

8. The claimant's responsibilities were part of his role of Despatch Manager, to which he was promoted on 10 May 2019. With the promotion came a new written statement of terms. Paragraph 18 of that statement was headed, "Disciplinary Rules and Procedures". It contained non-exhaustive examples of gross misconduct. One of these examples was falsification of reports.

9. In April 2018 the respondent issued a written disciplinary policy. The rubric contained further examples of gross misconduct. These included, "deliberate falsification of records" and "serious breaches of health and safety rules resulting in, or likely to cause, injury to others".

10. On 13 December 2018 the claimant completed a series of training records for, amongst other people, Mr Chandra Serou and Mr Alamin Mohammed. These records appeared to show that, on that day, those two individuals had been observed operating a Manrider. They also indicated that their standard of driving had been assessed as competent, and that, consequently, they were each fit to be issued with fobs.

11. The information in those forms was incorrect. It is now common ground that neither Mr Serou nor Mr Mohammed was actually in work on 13 December 2018. As it happened, Mr Serou did actually receive Manrider training at some stage. More controversial is the question of whether or not Mr Mohammed was ever trained. I return to that question later in these reasons.

12. It is possible that the discrepancy in the training records might never have come to light, had it not been for an unfortunate accident that happened nearly a year later. On 9 November 2019, Mr Piotr Sokal was operating a Manrider when he drove it into collision with another worker, fracturing a bone in that worker's foot. Mr Sokal had not been trained to use the Manrider. The accident was investigated by Mr Chris Baker. Naturally, he was concerned to find out how an untrained operator came to be using a Manrider fob. Amongst others, Mr Baker interviewed the claimant, Mr Sokal, Mr Serou, Mr Mohammed and a colleague called Mr Luke Spindler.

13. The claimant was first interviewed on 14 November 2019. He told Mr Baker that there was no formal record of training for the Manriders, but that all the operatives had been trained and there was a record of who had been issued with fobs.

14. Mr Sokal in his interview confirmed that he had not been trained, and that he had borrowed the fob because he was in a rush. He did not suggest that the claimant knew that he had borrowed the fob on that occasion.

15. Mr Serou told Mr Baker that he, personally, had been trained. He went on to say, however, that two people had missed the training. One of these was Mr Mohammed. The other was Mr Spindler. According to the record of his interview, Mr Serou said:

> "I asked [the claimant] to train them, but he just handed me the fobs and asked me to get them to sign them without doing the training."

16. When Mr Mohammed was interviewed, he said that he had a fob for the Manrider. Mr Baker asked Mr Mohammed who had trained him. His reply was noted as:

> "On holiday on training day and [Mr Serou] gave me the key and I signed form."

17. Mr Spindler told the investigation that he also had operated Manriders without training. He said that fobs were just passed around:

> "If someone needs to use truck whoever has one will pass it to them".

18. In apparent contradiction of Mr Serou's account, Mr Spindler went on to say that he had not personally been issued with a fob.

19. The claimant was invited to a second interview which took place on 18 November 2019. Mr Baker showed the claimant the records of Mr Serou's and Mr Mohammed's interviews. He also provided the claimant with the training records of 13 December 2018 which appeared to show Mr Serou's and Mr Mohammed's training on that day. The claimant denied issuing fobs to untrained operatives. When it was put to him that an operative was on holiday on the day of the training, he replied that he might have trained operatives on the night shift and then completed the paperwork the day afterwards. Mr Baker warned the claimant

that, "issuing paperwork which is possibly falsified is classed as gross misconduct" and checked that the claimant understood. The claimant reiterated that he may have got the dates wrong as a result of training operatives who were working nights. At the conclusion of the interview, Mr Baker informed the claimant that he was being suspended.

20. By letter dated 19 December 2018, the claimant was invited to a disciplinary meeting. The letter warned him that one of the outcomes might be dismissal. Rather opaquely, the grounds for disciplinary action were stated to be:

> "with regard to your code and conduct and breaching health and safety".

21. A further letter of the same date confirmed the claimant's suspension. He was requested to refrain making contact with his colleagues without the respondent's permission. He was given a point of contact to raise any queries.

22. Were it not for that prohibition, the claimant might have approached Mr Mohammed as a potential witness. He did not ask the respondent either for permission to approach Mr Mohammed or for an investigator to put particular questions to him, or for the opportunity to question Mr Mohammed at a meeting.

23. The disciplinary meeting took place on 22 November 2019. Chairing the meeting was Mr Jay Davies, Supply Chain Manager.

24. By the time the meeting started, Mr Davies had obtained a significant quantity of further training documents. Some of the training records had not been signed by the trainees to whom they related. There also appeared to be some operatives for whom no records could be found.

25. Part of the meeting was taken up with questions about the missing and unsigned training records. Mr Davies then moved onto the question of whether operatives had been trained at all. He asked the claimant to comment on the evidence from operatives who had denied receiving training. The claimant replied by pointing out the inconsistency between Mr Spindler's account and that of Mr Serou. He said that he must have made a mistake with the records of Mr Spindler's and Mr Serou's training. In mitigation, the claimant pointed out that it was the respondent's "duty of care" to ensure that the claimant had proper training.

26. Mr Davies took 10 minutes to consider his decision. It has not been easy for me to reconstruct what went through his mind during that brief period of time. He attached considerable importance to the fact that some of the training records were missing and others had not been signed. What mattered most to Mr Davies was that the poor quality of documents meant that the respondent could not prove to external investigators that the operatives had been trained. It was not clear to me what kind of misconduct Mr Davies thought the claimant had committed by failing to obtain the signatures and keep the records. When giving oral evidence to me, Mr Davies also told me that he had formed the belief that a number of individuals, such as Mr Serou, had never actually received the training, which was a serious health and safety breach. I accepted that that is what he believed at the time, but could not ignore the fact that this belief was clearly incorrect on the face of the evidence he had before him. For example, there was a plain record of Mr Serou telling Mr Baker that he had received the Manrider training.

27. Having made that observation, I am satisfied that, amongst the muddle, Mr Davies also reached a more straightforward conclusion. Mr Davies was clear in his mind that Mr Mohammed and Mr Serou had not been trained on 13 December 2018 and yet the claimant had completed a record falsely stating that they had been. In Mr Davies' opinion, falsifying health and safety documents was gross misconduct.

28. Mr Davies believed that the appropriate sanction for his conduct as a whole was summary dismissal.

29. The disciplinary meeting reconvened. Mr Davies briefly explained his findings which included a conclusion of falsifying documents. He told the claimant he was being dismissed without notice. His decision was confirmed in a letter dated 25 November 2019.

30. By letter dated 27 November 2019, the claimant appealed against his dismissal. His appeal was considered by the Factory General Manager, Ms Jane Stanton, who met with the claimant on 9 December 2019. Their discussion covered a number of topics. Two of them are particularly significant for this claim:

    30.1. The first subject related to undocumented operators. These were people, such as Mr Spindler, who had told Mr Baker that they had not been trained and for whom no training record could be found. The claimant told Ms Stanton that the absence of records could be explained by those records having being deleted. He said that he had saved some training records in the Health and Safety folder on the respondent's computer system and that they had been modified. He also mentioned that he had stored some of the training records at home.

    30.2. The second topic was Mr Mohammed's training record for 13 December 2008. For the first time, the claimant admitted that he had not trained Mr Mohammed at all. Pausing here, it is important to understand the difference between what the claimant said and what he privately thought. It is possible that, at the time of the appeal meeting, the claimant was still holding on to the belief that he had trained Mr Mohammed. He may have felt cornered into making an admission that he did not actually think was warranted. But that is not the way it came across to Ms Stanton. She took his words at face value.

31. Following the meeting, Ms Stanton decided to make some further enquiries. She spoke to the IT Service Desk Manager and asked him to investigate the claimant's assertion that training records had been deleted from the computer system. It is unclear what words she used and whether or not she specifically asked the Manager to look in the Health and Safety folder. At any rate, the Manager told Ms Stanton, essentially, that he could not confirm or deny the claimant's assertion. He explained to her that training records had been stored on a shared drive. His opinion, as he expressed it to her, was that it was impossible to know what files had been on the shared drive and what had happened to them.

32. Ms Stanton then set about making her decision. Unlike Mr Davies, Ms Stanton kept a clear focus on the issue of falsification. What stood out in her mind was the record for Mr Mohammed. It was not, as the claimant had said to Mr Baker,

merely a matter of getting the date wrong on the form. Having taken the claimant at his word that Mr Mohammed had never been trained, she was clear in her mind that the training record was completely false. To her mind, making a false training record was a very serious matter. The training records were her only way of demonstrating to an auditor that the Manrider operators had been trained. The claimant had been trusted with ensuring that those documents were genuine and reliable. Once one of them had been exposed as a fake, she could not trust the claimant to be responsible for a documented training system.

33. Ms Stanton made a further finding that the claimant had failed to keep records of those operators who had been trained. She did not believe the claimant's account that some of the records had been deleted from the computer system. In coming to this view, she took account that some of the existing records were unsigned and that the claimant had thought it appropriate to store others at home. These factors, in her view, made it more likely that the claimant had simply failed to create the record in the first place.

34. Having reached these findings, Ms Stanton concluded that the original decision to dismiss the claimant should stand. She informed the claimant of the outcome by letter dated 16 December 2019.

Relevant law

35. Section 98 of ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal and
>
> (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it…(b) relates to the conduct of the employee…
>
> (4) 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 a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

36. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

37. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a reasonable

investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

38. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

39. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

Conclusions

40. Having set out the relevant legal principles, what I next had to do was to apply those principles to the facts as I had found them.

Reason for dismissal

41. I was persuaded that the reason for dismissal was the beliefs held by Mr Davies and Ms Stanton that the claimant had falsified at least one training document and had committed a serious breach of health and safety by issuing or causing to be issued at least one fob to an operative who had not been trained. That set of beliefs all related to the claimant's conduct. I was therefore required to consider whether the respondent had acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant.

Reasonable grounds

42. Having satisfied myself that the respondent's belief was genuine, I next asked myself whether or not it was based on reasonable grounds. Here I reached different conclusions in respect of Mr Davies and Ms Stanton.

43. As I have already commented, Mr Davies' reasoning appeared to me to be somewhat confused. His decision was based, in part, on an erroneous and groundless belief that individuals such as Mr Serou had not been trained. On the other hand, he had ample grounds for believing that Mr Mohammed had never been trained and that the training record was completely false. Mr Mohammed was plainly recorded by Mr Baker as having said that he had been on holiday when the training was delivered, but that he had been asked to sign the record anyway. Mr Davies also had reasonable grounds for concluding that Mr Mohammed had been given a fob: both Mr Mohammed and Mr Serou had said so.

44. Ms Stanton had even stronger grounds for believing that Mr Mohammed had never been trained. The claimant had made what appeared to be a clear admission during the appeal meeting. Ms Stanton's reasoning was not clouded, as was Mr Davies' thinking, by mistakes about who had been and who had not been trained. It was serious enough in her view that there was a clearly false document in relation to Mr Mohammed.

Reasonable investigation

45. The next question to consider was whether there was a reasonable investigation. My starting point was that the respondent was a large business. It could be expected to devote considerable administrative resources to carrying out a thorough and fair investigation. Against that background I started by taking an overview. The claimant was invited to two investigation meetings, a disciplinary meeting and an appeal meeting. The appeal involved not just considering particular grounds of appeal but examining the evidence as a whole and carrying out further investigations. Unless there were some particular flaw in the process, I would generally regard such a procedure as reasonable.

46. This took me to the claimant's specific criticisms of the investigation. I addressed what I considered to be the claimant's main points in turn:

Lack of access to evidence during suspension

47. The claimant was unable to approach Mr Mohammed during his suspension. In this respect his difficulty was not unique. It is a problem commonly faced by suspended employees that they are hampered in their ability to gather evidence in support of their own defence. Employers have to balance this difficulty against the risk that the suspended employee might interfere with the investigation and unfairly influence the evidence that their colleagues might give. This is a particular risk where the suspended employee is in a position of management authority over the potential witness, as the claimant was over Mr Mohammed. It was not unreasonable of the respondent to guard against this risk by restricting the claimant's contact with colleagues. Of course, the employer can reasonably be expected to compensate for the resulting imbalance by investigating with particular care. In this case, the fact that the claimant could not speak to the witnesses himself meant that the respondent had an additional responsibility to seek out evidence that might help the claimant's case as well as harm it. In this case I was satisfied that that is what the respondent had done. There was no particular reason for the respondent to think that Mr Mohammed's account would support that of the claimant. It might have been different had the claimant asked for a specific question to be put to Mr Mohammed, or asked permission to call him at the disciplinary meeting.

Lack of advance information about disciplinary allegations

48. The claimant's next criticism was that he did not know in advance of the disciplinary meeting what was the misconduct of which he was being accused. Looking at the disciplinary invitation letter on its own, I might have seen more force in the claimant's argument. The letter did not tell him meaningfully what allegations he faced. But the claimant could not ignore what had gone before. Mr Baker had warned him very clearly at the second investigation meeting that he was concerned about falsification of training records, which would be viewed as gross misconduct. This remark followed a conversation about Mr Mohammed's interview record and the claimant's explanation for it. The claimant must have known that he was suspected of falsifying Mr Mohammed's record, even if it was possible that Mr Baker was also referring to the records of other operatives too. What is more, at the conclusion of the disciplinary meeting, Mr Davies told the claimant that he was being dismissed for falsification of records, giving the claimant a fair opportunity to confront that finding on appeal.

Insufficient investigation of computer system

49. Next, the claimant argued that there had not been an adequate follow-up of his assertion at the appeal that his training records had been deleted. It is quite possible that there was a flaw in the investigation here. I was unable to make any finding of fact about where, exactly, the IT Service Desk Manager had looked. The expression "shared drive" might include the location of the Health and Safety folder, but it is also possible that the Manager was looking in the wrong place. I had to allow for the possibility that Ms Stanton did not specifically mention the Health and Safety folder, or the Manager misunderstood her request. Even assuming that they did get their wires crossed, however, I would not have found that this misunderstanding took the entire investigation outside the reasonable range. Ms Stanton, at the appeal stage, took on the role of investigating a point in the claimant's favour. There was another reason why this flaw was not as significant as the claimant argued it was. Even if the Manager had uncovered further training records for other operatives, the claimant would still have been stuck with his admission that Mr Mohammed had never been trained, yet he had signed a record to say that he had.

Reasonable sanction

50. The next issue for me to look at was whether or not the sanction of dismissal fell within the range of reasonable responses. I had to assess the sanction against the background of the claimant's position of trust. He was specifically responsible for a system designed to ensure and prove that Manriders were only used by trained operators. The system was not mere red tape: it was meant to reduce the risk of injury caused by untrained operatives driving Manriders into collision with people. Fundamental to that system was a genuine and reliable record of who had been trained. Having reasonably taken the view that the claimant had falsified at least one health and safety document, it was open to Mr Davies and Ms Stanton to decide that they could no longer trust the claimant to be responsible for that system going forward. A reasonable employer could in those circumstances decide to dismiss.

Fairness

51. Finally I stood back and asked myself the statutory question posed by section 98(4). Did the respondent act reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing him? I decided that the respondent acted reasonably. I therefore concluded that the dismissal was fair.

Post-script

52. The reader of these reasons will note that I have not expressed any positive finding of fact about whether or not the claimant actually did falsify Mr Mohammed's training record or indeed that of anyone else. I have deliberately held back from making such a finding. For completeness, however, I should add that, since the claimant's appeal, evidence has emerged that might show the claimant's conduct in a different light. Once his employment came to an end, the claimant had more freedom to speak to the individuals involved in the disciplinary investigation. After his appeal had been dismissed, the claimant approached Mr Mohammed. At the claimant's invitation, Mr Mohammed made a statement to say that he had in fact been trained on at least one type of Manrider. The statement explained that there were two colours of Manrider. When Mr Mohammed had told Mr Baker that he had not been trained, he was referring only

to one colour. This information was never made available to either Mr Davies or to Ms Stanton until long after the claimant's employment had ended. Had Mr Mohammed come forward with that information in time, it might be that the respondent might have taken a less serious view of the inaccurate training record for 13 December 2018. I cannot say. My remit was not to determine, retrospectively, whether or not the respondent's decision was *correct.* I had to assess whether the respondent acted reasonably or unreasonably in the light of the information it had at the time, or could reasonably have been expected to acquire. Mr Mohammed's later statement does not alter my conclusions in that regard.

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Employment Judge Horne

21 September 2020

SENT TO THE PARTIES ON

30 October 2020

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FOR THE TRIBUNAL OFFICE