Case No: 2501005/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr Gary Usher

Respondent: Polyfoam XPS Limited

Heard at: Newcastle (via CVP video platform) **On: 8 December 2020**

Before: Employment Judge A.M.S. Green

Representation
Claimant: Mr Smurthwaite - representative
Respondent: Mr Wyeth - Counsel

JUDGMENT

The claimant's claim for ordinary unfair dismissal is dismissed.

REASONS

Introduction

1. For ease of reading, I have referred to the claimant as "Mr Usher" and the respondent as "Polyfoam".

2. I conducted a remote video hearing using the CVP platform. The parties worked from a digital bundle. The hearing was limited to liability. The following people adopted their witness statements and gave oral evidence:

    a. Mr Usher

    b. Mr Graeme Riches, Polyfoam's Maintenance & Health and Safety Manager

    c. Mr Stuart Bell, Polyfoam's Managing Director

    The representatives made closing oral submissions and I reserved judgment.

3. In reaching my decision, I have carefully considered the oral and documentary evidence, the oral submissions, applicable legislation, the case authorities, my record of proceedings and the ACAS Code on Disciplinary and Grievance Procedures (the "Code") and the ACAS Guide: "Discipline and

Grievances at Work" (the "Guide"). The Code is relevant to liability and will be considered when determining the reasonableness of the dismissal.

4. The fact that I have not referred to every document in the hearing bundle in my decision should not be taken to mean that I have not considered it.

5. Mr Usher must establish his claim on a balance of probabilities.

The claim and the response

6. Mr Usher is claiming ordinary unfair dismissal. There is no dispute that he was summarily dismissed, and that he has the requisite two years qualifying service to claim unfair dismissal. Polyfoam says that they dismissed Mr Usher because of his conduct arising from an incident on 1 March 2020 (the "Incident"). Mr Usher was driving a forklift truck which he reversed into another forklift truck causing damage to it and a pallet of laminated boarding. Polyfoam regarded the Incident as a serious health and safety matter amounting to an act of gross misconduct which warranted Mr Usher's summary dismissal.

7. Mr Usher told the Tribunal that he accepted that the Incident occurred and that his conduct was the reason relied upon by Polyfoam for his dismissal. However, he says dismissal was too harsh a sanction given his length of service (28 years), his unblemished record and his mitigating personal circumstances. He also says that Polyfoam acted inconsistently in dismissing him and refers to a comparative forklift truck incident in 2018 where a temporary agency worker was not disciplined and was subsequently employed by Polyfoam. Mr Usher believes that in his own case, a lesser sanction, such as a warning, would have been appropriate under the circumstances.

8. Mr Usher also alleges that there were procedural irregularities relating to the investigation and disciplinary procedure. He claims that no formal investigation was launched and that he remained at work throughout and was not suspended. He claims that the dismissal manager was switched at short notice and allowed the meeting to continue. He also claims that the pace of the disciplinary action was swift and only took 4 days from his dismissal and his appeal. He claims that witness statements that were taken as part of the investigation into the Incident were done so on a one-to-one basis and were "led" to create statements based on the use of a CCTV commentary. He claims that all documents used at the dismissal and appeal hearings were not disclosed by Polyfoam and that key evidence and comparator cases were discounted prior to and during the appeal hearing.

The issues

9. The issues relating to liability that the Tribunal must determine are:

    a. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

b. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did Polyfoam, in all respects act within the so-called 'band of reasonable responses'?

Findings of fact

10. Polyfoam manufactures closed cell, extruded polystyrene insulation. It operates from warehouse premises in Hartlepool. It employs approximately 30 people.

11. Mr Riches is Polyfoam's Maintenance & Health and Safety Manager. He is responsible for ensuring that all health and safety policies are kept up to date. All policies and work instructions are available to employees to access from Polyfoam's shared drive. Mr Riches has worked for Polyfoam for seven years and during his career he has dealt with several disciplinary proceedings, especially in relation to health and safety breaches. In his witness statement, he states that he is fully aware of ACAS guidance and I have no reason to doubt that.

12. Polyfoam's Plant Manager is David Noble. He was Mr Usher's line manager and was appointed to investigate the Incident. He recommended disciplinary action. Initially Mr Noble was also tasked with chairing the disciplinary hearing but ultimately that role was allocated to Mr Riches who dismissed Mr Usher. Mr Usher appealed that decision. Mr Stuart Bell heard the appeal. Mr Bell is Polyfoam's managing director.

13. In his evidence, Mr Bell stated that Polyfoam has the most up-to-date health and safety standards and as an industry leader in health and safety. Its standards have been verified by external audits. I have no reason to doubt this. I discuss examples of these standards and policies below.

14. Mr Usher started working for Polyfoam on 1 February 1982. As at the date of his dismissal, he was employed as a Team Leader. A job description for the position of Team Leader was produced to the Tribunal [55]. There is no dispute that this accurately describes what Mr Usher was required to do in fulfilling his duties in that role. As a Team Leader Mr Usher reported to Mr Noble. Mr Usher was responsible, amongst other things, for ensuring that plant was always operated in compliance with plant standards to achieve safety, quality, and manufacturing efficiency.

15. Mr Usher's job required him to operate a forklift truck in the warehouse and production areas at Polyfoam's premises. Because of the nature of Polyfoam's business, health and safety was of critical importance. I was satisfied from the evidence that I heard that Polyfoam took breach of its health and safety protocols very seriously. For example, this was reflected in several documents including the Polyfoam XPS Policy Manual [58] (the "Manual"). One of the policy objectives was "Ensuring the health and safety of our workers, contractors, visitors, neighbours and other persons who may be affected by our activities, we endeavour to prevent injury and ill-health of our workers and visitors, & contractors" [61].

16. There is a section in the Manual entitled "Fork Lift Trucks" [78]. Section 6.1 identifies the need for risk assessments associated with forklift operations. Section 6.1.3 identifies several hazards associated with forklifts including

travelling too fast. Section 6.3.1 provides that only a trained, qualified and authorised person can operate a forklift on the site. Section 6.3.5 prescribes, amongst other things, the following mandatory rules when operating a forklift: always look in the direction of travel. Section 6.5 addresses training. It provides that any person who operates a forklift should receive sufficient and appropriate training. On successfully completing a course, that person will receive a forklift training certificate which is to be retained by the company. It also provides that retraining is to take place every 5 years or when deemed necessary by the company. Retraining may be deemed necessary following identification of poor operating practices. Section 6.5.4 identifies the following elements that should be included in training as follows:

a. Correct operation and use of a forklift

b. Knowledge of inspection and maintenance requirements

c. Ability to recognise defects that may make a forklift unsafe

d. How to ensure that the forklift is suitable for its intended use

e. How to identify unsafe working or workplace conditions

f. How to safely secure and position a load

g. Knowledge of workplace rules

17. The Manual contains a telephone policy [83]. Section 3 of that policy provides that dependent on the nature and location of the employee's work, they may be required to leave their mobile phone in a locked, on "silent" mode or switched off while they are working (for example, the health and safety reasons). Section 5 provides that the employee must take reasonable care for their own health and safety, and those of people around them, whenever using telephones and, in particular, mobile phones. They are required to observe safety rules, at all times. For example, regarding the use of phones and plant areas, and never to use a hand-held phone whilst driving. It reminds employees that such behaviour would be a criminal offence as well as a serious breach of the company's health and safety policy and will result in disciplinary action.

18. Mr Usher was fully trained on the operation of a forklift truck. He received refresher training on 26 October 2016 [52]. He also completed an IOSH accredited course entitled "Managing Safely" and received a certificate dated 19 November 2015 [54].

19. The Manual contains a section entitled "Accidents, Incidents, & Near Misses" [77a - g]. Section 3 defines an accident as an "undesired event giving rise to death, ill-health, injury, damage, quality or other loss". An incident is defined as an "event that gave rise to an accident or have the potential to lead to an accident". Section 4 sets out a procedure which is illustrated with a flow diagram describing the process for reporting, prioritising, investigating and action being accidents and incidents. If there is an accident or an incident, the procedure requires an immediate initial supervisor's report which must be conducted as soon as possible after the event. This process enables a decision to be made on whether an investigation is required. A Team

Leader/manager is responsible for deciding whether an investigation is required, and such decision must be made upon reviewing the incident. The process also states that an investigation is required where, amongst other things, other property and equipment damage incidents occur. It also states that the Health & Safety Manager should be involved if an accident or incident is likely to be reportable to the Health & Safety Executive ("HSE"). The Team Leader/manager is tasked with investigating the event and this should take place preferably within 24 hours of entry into incident report. The rest of the procedure requires identification of improvement themes, agreement of ownership and timescales, initiating improvement actions, verifying effectiveness of actions and if necessary, reporting to the HSE under RIDDOR.

20. On 25 January 2018, there was an incident involving an employee who reversed his forklift truck into a parked trailer. The forklift truck suffered a smashed rear window and some ancillary equipment damage. The operator was not injured. A copy of the incident report was produced in the bundle [140]. The operator of the forklift truck was an agency worker. He was not employed by Polyfoam at the time. The agency worker was permitted to continue working for a limited time, but he was required to undertake compulsory re-training. In his evidence, Mr Riches stated that the agency worker was driving the forklift truck in a controlled manner at all times. He also stated that the agency worker was looking in the direction of where he was travelling and was not speeding at the time of the accident. The cause of the accident was the agency worker misjudging the space into which he was travelling rather than breaching health and safety regulations. I have no reason to doubt Mr Riche's evidence in this respect. Polyfoam subsequently employed the agency worker.

21. Under cross-examination, Mr Riches said that the individual concerned had not been driving excessively fast and had been looking where he was going. He also told me that he was a temporary worker and was not employed at the time of the incident. He been provided by an agency. He was not subject to Polyfoam's disciplinary procedure and could not be disciplined. Had "disciplinary" action be necessary, the only option would have been to tell the agency that the worker was not wanted back. That option was not exercised because during the investigation, the worker said that he had never been shown how to remove pallets from the truck. Mr Riches said that he considered that representation. He also told me that he believed that the worker had done his best, had looked behind him and had taken care. In his opinion, he considered to be conscientious. Mr Riches said that he would show the worker what to do and put him on a forklift truck refresher course. This evidence was not challenged under cross-examination. On re-examination, Mr Riches stated that he did not consider the worker's behaviour to have been reckless. I give his evidence weight.

22. On 28 February 2019 Mr Noble observed Mr Usher using his mobile phone while operating machinery (a laminator). He was told that using his phone while operating machinery was unacceptable, and Mr Usher reassured Mr Noble that it would not happen again and he apologised. A copy of the note setting this information out was produced [164].

23. In his witness statement, Mr Riches refers to an incident on 14 December 2020 which involved damage to pallets whilst operating a forklift truck. The

employee concerned was dismissed. This evidence has not been challenged and I have no reason to doubt what Mr Riches is saying.

24. The Incident occurred on 1 March 2020 when Mr Usher was involved in a collision with another forklift truck whilst he was reversing his forklift truck. An investigation into the Incident was opened. The Incident was witnessed by Robert Hanratty (Shift Maintenance Technician), Ian Leslie (Shift Operator) and Steve O'Malley (Shift Operator). Mr Usher reported the Incident to Mr Riches in an email at 12:15 hours on the same day [199]. He stated:

> *All*
>
> *We had an incident at approximately 11:25 which I've hopefully reported correctly in agility. I hit 2 pallets Steve's truck was loaded with going to the warehouse. Thinking now about what happened, I am at fault here, I never looked back before reversing. Obviously I will explain more clearly when I see you tomorrow.*

The inevitable conclusion that I draw from this email is that Mr Usher assumed full responsibility for the Incident. He reported it less than one hour after it occurred. His alacrity in reporting the Incident does not vitiate or lessen his responsibility for causing the accident.

25. Mr Noble interviewed Mr Usher on 2 March 2020 at 16:00 hours. A copy of the interview note has been produced [202]. The following extracts are relevant:

> *DN Talk me through what happened*
>
> *GU I got off the forklift and walked to the lab, I had to go into the lab to input the thermal results into the computer or refresh the logbook. I walked back to the truck, got back on the forklift and reversed without looking backwards it was my fault I know*
>
> *…*
>
> *DN I explained to Gary that I was going to show him the CCTV footage from one of the cameras and we would talk through it.*
>
> *GU Gary said he was shocked when he seen the footage played back.*
>
> *DN I explained to Gary that he did not look back at all when he reversed away on the FLT, or did he see the blue spot from the approaching forklift truck before the collision.*
>
> *GU again said it was his fault and he felt anxious thinking what could have happened.*
>
> *…*
>
> *DN asked Gary if he was listening to music because he had ear buds around his neck.*

GU said he had been expecting a phone call from Dawn [**i.e his partner – my note**] *and he doesn't listen to music.*

GU asked if this could be resolved today written warning or something

DN explained that I had to follow company procedures and interview everyone involved to make a fair reflection on how the incident may have happened before taking further action.

DN Gary was informed that further investigation needs to be done and I will speak again to Gary next week.

GU said he didn't know if he could continue working because he felt full of stress and anxiety and he had to further night shifts to do.

DN explained that if Gary felt that way, he needs to see his GP

GU said he would see how he felt the following day.

Mr Noble and Mr Usher signed the note of the interview on 3 March 2020. There is nothing to suggest that Mr Usher disagreed with the contents of what was written in that note. This is a contemporaneous note of evidence taken from Mr Usher. It is common knowledge that notes taken at or shortly after the time of an incident are frequently more accurate and reliable than statements taken from people many months later when memories start to fade. I give this note significant evidential weight. Mr Usher clearly accepted his guilt in causing the accident. He accepts responsibility for the Incident. He put forward mitigating circumstances. Mr Noble clearly indicated to Mr Usher that he could not draw a line under the matter as it required further investigation which would involve speaking to other witnesses and that is what he did. All this is in line with the section of the Manual dealing with "Accidents, Incidents, & Near Misses".

26. Mr Noble conducted his investigation into the Incident which included interviewing the witnesses in addition to interviewing Mr Usher. He concluded that there was a disciplinary case to answer and he wrote to Mr Usher inviting to attend a disciplinary hearing on 16 March 2020 at 10 AM [211]. He stated that he would be chairing the hearing. He identified five allegations of misconduct:

    a. That on Sunday 1st March 2020 he was responsible for a forklift truck collision which resulted in damage to goods

    b. At the time he was driving the forklift truck in a reckless manner and was wearing headphones/earpieces

    c. On 28 February 2019 he was operating machinery whilst using a mobile phone for an extended period

    d. These constituted serious breaches of health and safety rules

    e. These constituted serious negligence which may have led to serious injury.

Mr Noble indicated that the allegations were serious and were tantamount to gross misconduct and if found proven, he was at risk of being dismissed. He notified Mr Usher of his right to be accompanied by a willing work colleague or appropriate trade union representative. He enclosed a copy of the disciplinary policy and statements and notes that would be referred to in the hearing. He invited Mr Usher to indicate whether he intended to produce any evidence himself.

27. The disciplinary hearing was held on 16 March 2020 and started at 10 AM. Mr Riches chaired the hearing. Mr Usher attended. He did not bring a companion to the hearing. Notes were taken by Ms Gillian Sedgwick. A copy of the hearing notes was produced to the Tribunal [212]. The following extracts are relevant. Mr Usher is recorded to have said the following:

> *I did not look back to see where I was going, I admitted that to DN [i.e., Mr Noble], if we can start from the morning, I already knew I was on laminator, the last night I worked I swapped over with [ ] then stopped back with JD, ongoing issues during the shift. There was only two online end, and Robbie, on my first day off I had granddaughter from 11.15. I have a large family and we have 10 grandkids. Things got on top of us from time to time. That morning my daughter came around she has a lot of family problems, her problems became my problems, we discussed my life plan etc… [ ] came around with second youngest grandson, we chatted about my life plan. Later she started sending me messages about secret chats about my life plan with my daughter etc…[ ] thought I was talking about this behind her back and not including her, she was not happy. On the morning of the incident we had not spoke that morning, we had swapped various texts. On Friday previous I had also buried a friend and [ ] was there also. On the Sunday I knew I was laminating, you ache from the demands, as I came in I did QC check, the lads mentioned the board concern and I knew I needed to look at that, the issues with the planer blade. 10:30 go upstairs to give [ ] a break. Ian phoned between 1030 to 1115…*
>
> *… I normally wear push in plugs, I put ear piece in thinking [ ] may ring back. I use earplugs because of background noise, my hearing is not the best. I don't have music on my phone as I don't have room because of all the family pictures.*
>
> *I can recall getting on truck, as I walked I looked right and nothing was there, I believed the truck was locked off, I now believe it wasn't. I put my foot to the floor, which is why it went so far. I have hardly slept. I am shocked from my actions, I have let everybody down. I have had a lot on my mind it has been a bit of a rollercoaster, what with [ ] and my sister.*

The notes record that Mr Riches offered to stop if Mr Usher wanted to because he appeared quite upset. It is then recorded that Mr Usher was content to continue. I then note that Mr Usher referred to various family members suffering from ill health and coming to work with those concerns on his mind. Mr Usher is then recorded to have said:

I can't say sorry enough, it's so bad, I admit I should have looked back, I should not have been looking at phone, I certainly was not listening to music or talking on phone at that time. If trucks have audible alarm I would have heard [ ].

Mr Usher not only admitted his guilt but the severity of what he had done when he used the words "it's so bad". He admitted that he was distracted because he was looking at his phone.

28. Mr Riches is noted to have said that Mr Usher did not brush the Incident under the carpet and had admitted that he was wrong. He is also recorded to have said that he was very sympathetic to Mr Usher's situation, but he had to look at the allegations as set out in the disciplinary letter. He is recorded as saying that he was extremely sympathetic to the issues relating to Mr Usher's private/family life but if the allegations were upheld, he would have to dismiss him for gross misconduct under health and safety rules. He will be given five days to appeal the decision and he would be notified in writing.

29. Mr Riches deliberated and decided to dismiss Mr Usher setting out his reasons for doing so in a disciplinary outcome letter addressed to Mr Usher [217]. He states, amongst other things:

> *You admitted that she did not look back when driving the FLT on Sunday 1st March. You said you were preoccupied by domestic issues. You said that you though [sic] the FLT was locked off.*
>
> *You also admitted wearing headphones/earpieces on both occasions above but that you were not listening to music at the time. He said he felt stressed at the time and that the job was demanding.*
>
> *After adjourning the meeting for consideration of the evidence I reconvened and informed you of my decision as follows.*
>
> *I confirm that I decided, as Hearing Officer, that the above allegations were tantamount to gross misconduct and proven.*
>
> *In determining the appropriate sanction, I did acknowledge your previous service and that you had domestic concerns. However, it was clear to me that actions were serious breaches of the Health and Safety rules and could have led to serious injury.*
>
> *I confirm that you are dismissed from your employment with immediate effect.*
>
> *You have the right to appeal against this outcome by writing to Stuart Bell within 5 working days of receiving this letter. Your letter must state the grounds for appeal.*

30. At the time when Mr Riches decided to dismiss Mr Usher there was an ongoing accident and incident investigation as per the policy set out in the Manual, but it had not reached any conclusions. In his is evidence, he accepted that the final accident report was never given to Mr Usher, but he justified this by saying that there were separate processes. The accident investigation related to the root causes of the Incident from a health and

safety perspective. This was not to be conflated with the separate disciplinary process. Mr Riches had limited his remit to the material that had been provided to him by Mr Noble as a result of his investigations and also what he heard from Mr Usher during the disciplinary hearing.

31. Mr Usher appealed the decision to dismiss him setting out his reasons in an undated handwritten letter addressed to Mr Bell [219]. His grounds of appeal were as follows:

    a. He was not chatting or listening to music on his mobile phone at the time of the Incident

    b. He did not admit to wearing headphones/earpieces on both occasions. He only admitted to wearing them on the date of the Incident and his hearing would have been reduced because he would have been wearing earplugs in any event

    c. There were no audible alarms on any of the forklift trucks and he had said on a few times in the hearing that his hearing was not great.

    d. The incident on 28 February 2019 should not have been deemed gross misconduct because no warning was issued.

32. On 17 March 2020, Mr Bell replied to Mr Usher stating that his appeal hearing would be convened on 20 March 2020 at 10 AM. He confirmed that he would chair the hearing and he was invited to attend and state his case. He notified Mr Usher of his right to be accompanied by either a trade union representative or a willing work colleague.

33. The appeal hearing took place on 20 March 2020. It was chaired by Mr Bell and Ms Sedgwick took notes. Mr Usher attended without a companion. Notes of the appeal hearing were produced to the Tribunal [222]. The notes clearly show that Mr Bell noted each of the points set out in Mr Usher's grounds of appeal. There was an adjournment for Mr Bell to consider what he heard.

34. On 20 March 2020, Mr Bell wrote to Mr Usher confirming that he had not upheld his appeal [231]. He concluded the following

    a. He agreed that the evidence on the file did not prove that he had been chatting or listening to music on the date of the Incident

    b. He agreed that the evidence showed that earpieces were evident on 1st March only

    c. He agreed that there were no audible alarms on forklift trucks but could only assume that Mr Usher had raised the issue about his hearing, however both points were relevant to the investigation

    d. He agreed that the incident on 28 February was not seen as gross misconduct and that this would go on his personnel file only. However, this was a recent episode, and he was reminded about his obligation in the strongest possible terms when handling machinery to focus and give all his attention to the task in hand and he failed to do so. Both the

incidents were linked to health and safety rules and therefore should be considered at the hearing.

35. Mr Bell then summarised the points that Mr Usher raised at the appeal hearing. Having gone through all the witness statements, videos and disciplinary meeting notes he concluded as follows:

    a. Mr Usher was responsible for the Incident which resulted in damage to goods. There was no evidence to the contrary

    b. At the time and he was driving the forklift truck in a reckless manner and he was wearing headphones/earpieces. The evidence supported this.

    c. On 28 February 2019, he was operating machinery in an unsafe manner whilst using a mobile phone for an extended period. The evidence supported that.

36. Mr Bell stated that the three allegations upheld constituted serious breaches of health and safety rules and amounted to serious negligence which could lead to serious injury. He could find no evidence of victimisation and no reason to overrule or impose an alternative sanction to the decision that he should be dismissed on 16 March 2020.

37. Under cross-examination, Mr Bell admitted that he was aware of the earlier incident involving the temporary agency worker, but he did not consider it as part of the appeal. He had not done so because he believed it had nothing to do with Mr Usher's reckless actions and he regarded it as a different case altogether. He also noted that whilst Mr Usher had not initially been told not to continue operating the forklift truck that position had changed. Mr Noble had instructed Mr Usher to stop operating plant and machinery including the forklift truck. Although there was no documentary evidence to support this, there had been a conversation between Mr Noble and the claimant to support that conclusion. I have no reason to disbelieve what Mr Bell stated in his evidence.

38. On the evidence, it was also clear to me that Mr Usher was well regarded employee who had worked for Polyfoam for 28 years. Indeed, the company had no axe to grind with him and he was well valued employee. It was clear from both Mr Riches and Mr Bell that neither wanted to see him dismissed.

Applicable law

39. The circumstances under which an employee is dismissed are set out in section 95 of ERA as follows:

> *(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)…., only if) –*
>
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*

…

40. The fairness of a dismissal is set out in section 98 of ERA as follows:

> *(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 it 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 requirement 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,*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

41. Polyfoam must show that Mr Usher's misconduct was the reason for the dismissal. According to the Employment Appeal Tribunal in **British Home Stores Limited v Burchell 1980 ICR 303**, a threefold test applies. Polyfoam must show that:

    a. It believed that Mr Usher was guilty of misconduct

    b. it had in mind reasonable grounds upon which to sustain that belief; and

    c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

    This means that Polyfoam need not have conclusive direct proof of the Mr Usher's misconduct; only a genuine and reasonable belief, reasonably tested.

42. The **Burchell** guidelines are clearly most appropriate where misconduct is suspected. Little purpose would be served by an investigation where the

misconduct is admitted. However, the reasonableness test contained in section 98 (4) ERA must still be applied and the employer must consider whether that particular conduct warranted dismissal. There may also be special circumstances in which the reasonable employer would still be expected to carry out its own investigation. In **CRO Ports London Ltd v Wiltshire EAT 0344/14** the claimant had admitted that he bore full responsibility for an accident involving a heavy lift, which had come about because of his breach of health and safety rules. However, at a disciplinary hearing he pointed out that the employer had effectively condoned the practice as a means of dealing with time pressures. Despite this, he was summarily dismissed. An employment tribunal found the dismissal unfair because the employer had not carried out a reasonable investigation into the employee's explanation for his misconduct. Upholding an appeal against that decision, the EAT stressed that where the grounds relied upon by the employer to justify dismissal include the employee's admission of his or her misconduct, the question becomes whether the employer acted within the range of reasonable responses of the reasonable employer in limiting the scope of its investigation in the light of those admissions.

43. An employer who establishes a reasonable belief that the employee is guilty of misconduct in question should still hold a meeting in here the employee's case, including any mitigating circumstances that might lead to a lesser sanction.

44. Exactly what type of behaviour amounts to gross misconduct depends upon the facts of each case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e., it must be repudiatory conduct by the employee going to the route of the contract) (**Wilson v Racher ICR 428, CA**). The conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence.

45. An employer is expected to have regard to the principles for handling disciplinary and grievance procedures in the workplace set out in the Code. The Code recognises that an employee might be dismissed even for a first offence where it constitutes gross misconduct. A non-exhaustive list of examples is given in paragraph 88 of the Guide. This includes causing loss, damage or injury through serious negligence and a serious breach of health and safety rules.

46. Single acts of misconduct must be particularly serious to justify summary dismissal. For 'gross misconduct' to be found the conduct is likely to be considered 'such as to show the servant to have disregarded the essential conditions of the contract service' although a single act of negligence might justify summary dismissal at common law, as Lord Maugham commented in **Jupiter General Insurance Co Ltd v Shroff [1937] 3 All ER 67**, this will be in exceptional circumstances only

47. Although dismissal for gross misconduct will often fall within the range of reasonable responses, this is not invariably so. This was made clear by the EAT in **Brito-Babapulle v Ealing Hospital NHS trust 2013 IRLR 854, EAT** which overturned an employment tribunal's decision because it was based upon that false premise. The EAT noted that the Tribunal's approach gave no scope for consideration of whether mitigating factors rendered the dismissal

unfair, notwithstanding the gross misconduct. Such factors might include the employee's long service, the consequences of dismissal and any previous unblemished record. The tribunal was suggesting that the existence of gross misconduct, which is often a contractual issue, is determinative of whether a dismissal is unfair, whereas the test for unfair dismissal depends upon the separate consideration called for under section 98 ERA. This decision is reflected in the Guide which states that when deciding whether a disciplinary penalty as appropriate and what form it should take, consideration should be given to, among other things, the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service; any special circumstances that might make it appropriate to adjust the severity of the penalty; and whether the proposed penalties reasonable in view of all the circumstances.

48. I remind myself that in this case Mr Usher has put in issue his length of service as a factor to be weighed in the decision whether to dismiss, especially if it is long service with little or nothing by way of disciplinary record. I am reminded that the starting point here is that in a case of gross misconduct there may be little role for long service. In **AEI Cables Ltd v McLay [1980] IRLR 84, Ct Sess** it was said that in such a case it would be wholly unreasonable to expect an employer to have any further confidence in the employee and to continue the employment; the gravity of the offence outweighed the factor of the length of service. The basic proposition in **McLay** was described as 'trite law' in **London Borough of Harrow v Cunningham [1996] IRLR 256, EAT**.

49. Inconsistency of punishment for misconduct may give rise to a finding of unfair dismissal, as the Court of Appeal recognised in **Post Office v Fennell 1981 IRLR 221, CA**. In that case F have been dismissed for striking a colleague during a quarrel in the canteen. A tribunal found the dismissal unfair, pointing out that the Post-Office had acted differently in comparable cases, and ordered a re- engagement. In the Courts of Appeal Lord Justice Brandon cited the words "having regard to equity and the substantial merits of the case" (contained in the precursor to section 98 (4) ERA) and said:

> *It seems to me that the expression "equity" as there used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that (a) the Tribunal is entitled to say that, where that is not done, and one man is penalised more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal.*

Brandon LJ made two further observations. First, it is for the tribunal to decide whether, on the facts, there was sufficient evidence of inconsistent treatment. As he pointed out, the Tribunal would have less detailed information regarding other cases allegedly dealt with more leniently by the employer than the information in the case before it. His second point stressed that while a degree of consistency was necessary, there must also be considerable latitude in the way in which an individual employer deals with particular cases.

50. I remind myself that in **Hadijioanno v Coral Casinos Ltd 1981 IRLR 352, EAT**, the EAT held that a complaint of unreasonableness by an employee

based on inconsistency of treatment would only be relevant in limited circumstances:

a. Where employees have been led by an employer to believe that certain conduct will not lead to dismissal

b. Where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason

c. Where decisions made by an employer and truly parallel circumstances indicate that it was not reasonable for the employer to dismiss

51. Although the decision in **Fennell** was not referred to, **Hadjioanno** simply placed different emphasis on the same rule. Employers, while retaining flexibility of response to employee behaviour, must act reasonably in the sanctions they choose to apply. Any change of punishment policy without warning, any dismissal for faults previously condoned or any unjustified difference in treatment of employees in similar positions will contribute towards making the dismissal unfair.

52. When determining whether or not dismissal is a fair sanction, it is not for the Tribunal to substitute its own view of the appropriate penalty for that of the employer. The position was stated most succinctly by Phillips J giving judgment for the EAT in **Trust Houses Forte Leisure Ltd v Aquilar [1976] IRLR 251**:

> *It has to be recognised that when the management is confronted with a decision to dismiss an employee in particular circumstances there may well be cases where reasonable managements might take either of two decisions: to dismiss or not to dismiss. It does not necessarily mean if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible.*

53. Consequently, there is an area of discretion with which management may decide on a range of penalties, all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable, but whether or not dismissal was reasonable: see the Court of Appeal decision in **British Leyland v Swift [1981] IRLR 91**, more recently applied by the Court of Appeal in **Securicor Ltd v Smith [1989] IRLR 356** (which concerned an alleged inconsistency in treatment between two employees). But this discretion is not untrammelled, and dismissal may still be too harsh a sanction for an act of misconduct.

54. In para 3 of the ACAS Code, it is stated that:

> *Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case.*

55. There are a whole range of potential factors which might make a dismissal unfair. Many of these are likely to be relevant in all unfair dismissal cases. In

misconduct cases they include especially the employee's length of service and the need for consistency by the employer. The importance of length of service and past conduct were emphasised by the EAT in the early case of **Trusthouse Forte (Catering) Ltd v Adonis [1984] IRLR 382** as being proper factors for a tribunal to take into account when considering whether the sanction imposed falls within the band of reasonable sanctions. Moreover, it was later accepted by the Court of Appeal that the severity of the consequences to the employee of a finding of guilt may be a factor in determining whether the thoroughness of the investigation justified dismissal: **Roldan v Royal Salford NHS Foundation Trust [2010] EWCA Civ 522**, (dismissal likely to lead to revocation of work permit and deportation). While this latter point has obvious sense behind it (particularly where, for example, some form of professional status is in grave jeopardy), it was suggested subsequently in **Monji v Boots Management Services Ltd UKEAT/0292/13** (20 March 2014, unreported) that some care may be needed in its application; the basic principle was not doubted, but three caveats were mentioned:

a. This is an area where the EAT must be particularly careful not to substitute its own view on the facts for that of the Tribunal

b. It may be that the **Roldan** principle may be most applicable to facts such as those in that case itself, namely where there is an acute conflict of fact with little corroborating material either way, and/or where the case against the employee starts to 'unravel' as it proceeds, in which case it makes sense to expect a higher level of investigation and adjudication on the part of the employer in the light of the severe effects of dismissal on that employee

c. The question is whether the Tribunal has in fact applied the **Roldan** approach, not just whether they have done so expressly, though the EAT did add that in such a case a tribunal is advised to make it clear in their judgment that this has been part of their reasoning.

56. One other area where it is particularly important for the Tribunal to apply the correct 'range' test is where the claimant argues that he or she should have been given a lesser penalty than dismissal on the facts. In principle that is not the question posed by the legislation, which is whether the dismissal actually imposed was or was not fair. However, the (split) decision of the NICA in **Connolly v Western Health and Social Care Trust [2017] NICA 61**, may at first sight appear to question this because the majority held that dismissal on the (rather harsh) facts was disproportionate and thought that the possibility of a lesser penalty (ignored by the Tribunal) was relevant to the question of proportionality when applying the ultimate ERA 1996 s 98(4) test of 'in the light of equity and the substantial merits of the case'. Did this imply criticism of the range test itself? The clue may be in the passage in the majority judgment which poses the question 'whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct' (emphasis added). In applying the ultimate lodestone, all factors are relevant and the italicised phrase suggests that the possibility of a lesser penalty can be one such factor provided it is used in applying the correct range test – not whether the Tribunal thinks the employer should have imposed that lesser penalty but whether a reasonable employer could still have dismissed in spite of that lesser possibility.

57. One final point to note is that, although misconduct can take so many forms, there is no hierarchy or gradation of the 'range' test, which simply must be applied in all the circumstances. Clearly, there can be instances where an employer wishes (or indeed needs) to take a 'zero tolerance' approach to a certain form of misconduct, an obvious and pressing example being abuse of children or vulnerable adults. This can of course be a factor (and indeed in that particular example it can occasionally justify dismissal on suspicion rather than belief), especially if made sufficiently clear to employees in advance. However, conceptually this does not alter the range test itself. This was made clear by the Court of Appeal in **Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, [2015] IRLR 734** in another particularly sensitive area. Breaches of health and safety rules by an employee are usually treated particularly seriously by employers but in this case the court affirmed that they do not constitute a separate subset in unfair dismissal, in which the range of reasonable responses open to the employer is wider than normal.

58. In **Newbound**, the claimant was dismissed for a serious breach of procedures in going into an enclosed space without breathing apparatus. His senior who had permitted it was given a lesser penalty. The claimant had over 30 years' service with the employer, but the latter considered that in these circumstances this acted as an aggravation of the misconduct, not mitigation. The tribunal found that the dismissal was unfair generally, partly in the light of the long service, and also specifically because of the disparity in treatment in comparison with his senior; this was subject to 40% contributory fault. The EAT allowed the employer's appeal, considering that the Tribunal had substituted its own view for that of the employer. Allowing the employee's further appeal, the judgment of Bean LJ is largely concerned with the role of the EAT in such cases, finding that it had overstepped the mark and that the tribunal had applied the law properly and reached conclusions open to it; the EAT had been wrong to intervene. On the specific health and safety point above, however, the employers had argued that in such cases the margin of appreciation given to employers ordinarily by the range test should as a matter of principle be widened, but the Court of Appeal disagreed and held that the normal rules on fairness still must be applied.

Discussion and conclusions

59. Having considered the law and the evidence, I find that the principal reason for Mr Usher's dismissal was conduct which is a potentially fair one in accordance with sections 98(1) and (2) of ERA. I find the dismissal was fair in accordance with ERA section 98(4), and that Polyfoam, in all respects acted within the so-called 'band of reasonable responses. I have reached this conclusion for the following reasons.

60. Mr Usher accepted, almost immediately, after the Incident that he was at fault. He maintained that position during the investigation and at the disciplinary hearing. Operating forklift trucks is an inherently dangerous operation which is why Polyfoam had a detailed policy in the Manual and required employees to be properly trained and aware of the dangers before being authorised to drive them. It had to be strict because the potential consequences of a forklift truck accident are often very serious resulting in personal injury or death. It had dismissed another employee because of an earlier incident involving a fork lift truck.

61. That Mr Usher was a long-standing employee who was well-regarded is not in issue. Furthermore, I have seen no evidence to contradict that conclusion such as malicious intent or the operation of a hidden agenda culminating in his dismissal. Polyfoam did not want to dismiss him. Ironically, his length of service and his position of Team Leader may have militated against him in this case because he was not only properly trained but also experienced in operating forklift trucks and should, therefore, have not had the accident. Put another way, a man of his position and experience should have known better. Notwithstanding this, I am satisfied that his length of service was considered in mitigation. The point was well made by Mr Wyeth in his submissions where he pointed out that forklift truck operations were inherently dangerous and where an individual drives recklessly, they can be prosecuted and convicted under the health and safety legislation. The matter was acerbated by the fact that Mr Usher was distracted because he was looking at his phone. Such behaviour can and does lead to catastrophic consequences. He was a Team Leader who should and must have led by example. I cannot ignore the proposition that the starting point here is that in a case of gross misconduct there may be little role for long service.

62. I am also satisfied that Polyfoam considered Mr Usher's personal circumstances on the day of the Incident when conducting the disciplinary and appeal hearings. Whilst it is regrettable that he was having difficulties with his family and his private life, I can fully understand why Polyfoam acted in the way that it did. The point was well made by Mr Wyeth in his submissions. The slightest willful breach or disregard of health and safety could have led to a catastrophic outcome such as death or serious injury. Whilst Mr Usher's personal circumstances may have impacted on his performance on the day of the Incident and contributed to its cause, health and safety was paramount and there would be too much risk. Zero tolerance was essential. Put another way, he should not have allowed his personal problems to encroach on his work. In evidence, I heard that he was experiencing difficulties with his partner which seems to suggest jealousy that she felt regarding conversations he was having with his daughter. There had been cross words between Mr Usher and on the day of the Incident and he was expecting a call from her. This was why he was looking at his mobile phone. He should not have had his telephone with him when he was driving a forklift truck. Alternatively, telephone should have been switched off. This was the view that Polyform reached on the evidence and it is certainly one which any reasonable employer could have reached.

63. Much was made of the inconsistent treatment meted out to the temporary agency worker and Mr Usher. Superficially, I can see the attraction of that argument. However, on further consideration, whilst both incidents concerned a forklift truck accident, they were substantially different. The temporary agency worker had not received full training and was inexperienced. There was no suggestion that they were behaving recklessly, and, with appropriate training, they were allowed to continue and, indeed, were employed by Polyfoam. Mr Usher's case is different. He admitted that he put his foot to the floor and accepted full responsibility for his actions. He admitted that what he had done was "so bad". This suggests an element of reckless or seriously negligent behaviour that was absent in the other case. Therefore, it is reasonable and entirely understandable why Polyfoam chose to deal with each case differently.

64. It is trite law that all employers have a contractual and a statutory duty to maintain a safe working environment to protect their employees and third parties from the consequences of the operation of their undertaking. It is fundamental to health and safety law and dictates the risk assessment basis of the management of health and safety. A propos Polyform, this is exemplified by the health and safety elements of the Manual, the forklift training programme, the toolbox talks on forklift operations, incident and accident reporting, the external Quality Assurance standard that Polyfoam achieved and so on. Furthermore, the obligation is mutual because the Health and Safety at Work etc. Act 1974, section 7 imposes the obligation of working in a safe way on employees. As an employee Mr Usher was subject to that obligation which could lead to an individual prosecution if breached.

65. I am also satisfied that the Incident was thoroughly investigated and dealt with appropriately at the dismissal and appeal stages. It clearly followed the spirit of the ACAS Code. Initially, Mr Noble was tasked with conducting the investigation and hearing the disciplinary case. I would have had concerns about the inherent fairness of the process had that come to pass given the Polyfoam's size and organizational resources which would call for different people to investigate, to hear the disciplinary case and to hear the appeal. However, any concerns in that regard were dispelled when Mr Noble's role was subsequently limited to conducting the investigation and Mr Riches was substituted as the dismissing officer. One must also not lose sight of the fact that this is a case where conduct was admitted from the outset and this has a bearing on the extent of the investigation required to ensure fairness. Polyfoam acted within the range of reasonable responses of the reasonable employer in limiting the scope of its investigation in the light of Mr Usher's admission of guilt.

66. I also find that Mr Usher was given a proper opportunity to state his case at the disciplinary hearing and at the appeal hearing. These were noted and considered by Mr Riches and Mr Bell. On both occasions, he was offered the right to be accompanied by a work colleague or trade union representative.

67. One must not lose sight of the fact that a man of 28 years' service, who was well regarded, was summarily dismissed. This was a tragic end to a long and largely successful career with the same employer. His summary dismissal was exceptional but it was justified in all the circumstances of the case; it came within the range of reasonable responses.

Ultimately, health and safety cannot be compromised where recklessness or gross negligence occurs in respect of forklift truck operations.

Employment Judge Green
Date 21 December 2020