EMPLOYMENT TRIBUNALS

Claimant: Mr R Boyce

Respondent: Howden Joinery People Services Ltd

Heard at: Cambridge (CVP) **On:** 15-18 March 2021

Before: Employment Judge S Moore
Mr D Snashall
Mr T Doyle

Appearances
For the Claimant: Mrs D Boyce
For the Respondent: Mr R Dunn, Counsel

This has been a remote hearing on the papers to which the parties/consented did not object. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and all matters could be determined in a remote hearing.

JUDGMENT

(1) The correct name of the Respondent is Howden Joinery People Services Ltd.
(2) The claim of unfair dismissal is dismissed.
(3) The claim of direct race discrimination is dismissed.

REASONS

Introduction

1. This was claim of unfair dismissal and direct race discrimination. We heard evidence from the Claimant, and from his wife, Mrs Debbie Boyce. For the Respondent we heard evidence from Mr Rob Nicolaou (RN), Transport Manager based in Raunds, Mr Steve Robson (SR), Transport Manager based in Howden, Mr Charlie Nissen (CN), National Transport Manager of the Respondent's Supply division, and Mrs Sharron Shulver (SS), Employee

Relations Specialist. We were also referred to two agreed bundle of documents. On the basis of that evidence we make the following findings of fact.

Facts

2. The Howden Group is a manufacturer and supplier of kitchens and joinery products operating from a network of depots across the UK. It is divided into two divisions: Supply and Trade. The Supply division manufactures and supplies products to the Group's network of depots which are operated by the Trade division. The two divisions are separate group companies and operate autonomously with separate management teams and HR functions.

3. The Claimant was employed by the Supply division as an HGV driver delivering goods from the Respondent's manufacturing sites to the Respondent's depots and assisting in the unloading of those goods. His employment commenced on 1 June 1999 and he was dismissed with effect from 24 July 2018 for gross misconduct, namely a serious breach of health and safety.

4. The relevant background to the health and safety incident in question is as follows:

5. In 2014 an employee of the Howden Group suffered a fatal accident, involving an HGV and a forklift truck (FLT).

6. After that accident the Howden Group revised its health and safety procedures and, in particular, implemented a procedure known as the 4 x 4 Rule. This procedure requires the HGV driver and a "watcher" to take 4 large steps from the front or rear of the trailer and then 4 large steps away from the vehicle to create an invisible rectangular zone which must be kept clear while the FLT is operating. The driver and the watcher must stand at the edge of this zone and the driver must have vacated and locked the HGV cab.

7. Prior to every delivery each HGV driver is required to sign a "POD" sheet referring to "4x4 Safe Unloading/Loading Declaration" stating that they have had specific training in unloading/loading. The "POD" also states that "any instances of non-conformance to the recognised and trained procedures, in addition to any situation where something has happened that could have resulted in an accident, must be reported through respective Near Miss reporting channels in the standard manner".

8. After each delivery both the HGV driver and the Supervisor must also fill in and sign a Control Form stating whether or not the delivery was "4 x 4 compliant".

9. The Claimant completed training in respect of the 4 x 4 Rule on 27 June 2016 and training on "Near Miss" reporting on 13 June 2017.

10. On 25 June 2018 a whistle-blower made an allegation by email in relation to a breach of health and safety policy at the Respondent's Waterlooville depot that was said to have occurred on 7 June 2018. Amongst other things, the whistle-blower alleged an HGV had been mobile whilst stock was being unloaded on

the nearside of the lorry and had hit the forklift truck that was doing the unloading.

11. Since the allegation predominantly related to employees of the Waterlooville depot, who are employees of the Trade division, Alyson Evans, the Regional Safety Adviser for the Trade division conducted a health and safety investigation. She took statements from John Campbell (JC), the Assistant Manager of the site, Arron Gooderham (AG), the forklift truck driver and Jamie Artemiou (JA) and Steve Blake (SB) who were both in the office at the time of the incident. Since the incident involved a HGV the Supply division was also made aware of the allegation and the Claimant, who was the driver in question, was asked to provide a statement which he did in late June or early July 2018.

12. Ms Evans found that:

> "In order to save time and/or effort in moving the LGV across the yard to increase the working space for the forklift truck (FLT) on the near side (standard practice) a decision was made between JC and [the Claimant] that the FLT would lift the pallet of longs clear of the trailer and then hold the pallet at height whilst the LGV was driven forwards. Once the LGV was clear, the FLT would drop the pallet onto the ground as there would then be sufficient room to turn with it once the LGV had moved forward. The pallet of longs was located at the rear of the trailer.
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> At the point where the FLT driver (AG) had lifted the load off the trailer bed the LGV moved forwards, however, due to lack of space for the FLT to reverse far enough to clear the trailer with stock, the back of the trailer hit the stock on the pallet. This made a loud bang which alerted the attention of the staff in the office and caused JC to shout "whoa" to the driver. The curtain was partially open at this point to allow the FLT to access the pallet which was now stuck.
>
> It was decided that AG should attempt to put the pallet of longs properly back onto the trailer bed, but he struggled to do so, partly because a downpipe was hindering his reversing area and general lack of space. JC took over on the FLT and it is not clear what happened next, as the statements of AG, JA and JC are all different, but the load was finally removed."

13. Ms Evans also found that the Depot Manager (Sam Howarth (SH)) had been informed on the day by someone employed in the office that there had been a serious breach of health and safety but had not done anything about it other than speak to JC, AG and JA. In the event the Trade division bought disciplinary proceedings against JC and SH. JC was dismissed for a serious breach of health and safety, SH was issued with a final written warning and AG was issued with a letter of concern.

14. In the meantime, RN, who was the Claimant's line manager was provided with a copy of the investigation report and Ms Evan's conclusion that the forklift truck and the HGV had been in operation simultaneously. In early July 2018, after conversations with HR, it was decided that the Supply division should conduct a formal investigation into the Claimant's actions during the incident.

15. The Claimant was invited to an investigation interview on 9 July 2018 and told that an investigation was being conducted into an allegation that on 7 June 2018 he seriously breached health and safety procedures, namely he had allowed a FLT driver to place his forks under the pallet on the truck and reverse backwards while the Claimant pulled the truck forward. The Claimant agreed this had happened, and further agreed that the pallet got caught on the trailer, but said that he stopped the truck as soon as the watcher shouted stop. He considered the stock had been removed safely and there had been no damage to the stock or harm to staff.

16. Following the investigation, RN decided that there was a disciplinary case to answer.

17. On 18 and 19 July 2018 the Claimant was on annual leave.

18. At some point during the day on 19 July 2018 RN called the Claimant to tell him that he was stood down from work on Friday 20 July and Monday 23 July 2018, and that he was required to attend a disciplinary hearing on 24 July 2018, however the Claimant did not answer that call. Instead, the Claimant was given that information by someone in the office when he called the office on the evening of 19 July 2018 to find out his schedule for the next day. Later that evening he received a WhatsApp message from RN asking him to call about 9am the next day. The next day (20 July) the Claimant responded to say he would call RN after 9am as he was going to attend his daughter's school assembly. He spoke to RN later that morning and was asked to collect a letter inviting him to a disciplinary hearing on Tuesday 24 July. The Claimant collected the letter that afternoon which also enclosed Ms Evans' report, the Claimant's statement he had provided to that investigation, a copy of the Respondent's 4 x 4 Operating Procedures and his training log.

19. On Monday 23 July 2018, the Claimant sent RN a WhatsApp message asking for a copy of the POD form from Waterlooville, which he was sent by WhatsApp later that day, along with the Control Form.

20. The disciplinary hearing was conducted by SR. At the hearing the Claimant "said it was his idea to do the procedure this way – considering the space available it was the best option." "I was in the cab, all 3 (warehouse person, FLT driver, and Assistant Manager) all agreed…the curtain was open and the forklift was under the pallet – once under the pallet I got into my vehicle and started the engine and rolled forward – probably about 1-2 miles per hour. [JC] shouted stop, so I stopped. I climbed out of the cab and went round to the back of the trailer. The pallet of longs had wedged behind the lip on the back of the trailer. The forklift driver tried to reverse back but there was a downpipe – because of this they changed the fork-lift driver (more experienced)." The Claimant was asked, "So you started to move, then over the sound of the engine you heard someone shout stop?" He said, "Yes. There were no loud bangs."

21. The Claimant also confirmed he knew the 4 x 4 Rule, and that he had seen videos and the brief the Howden Group had issued in respect of the 4 x 4 Rule.

22. As regards the POD declaration the Claimant said at the hearing, “As a driver I fully understand that I have the full responsibility to be able to stop the procedure at any time if required. It seemed like a good idea. I did not think about it till after. No one else said anything.”

23. As regards the Control Form, the Claimant admitted he had filled it in and signed it to say that the 4 x 4 Rule had been complied with, although in hindsight the criteria had not been met.

24. As regards the incident not being reported as a near miss, the Claimant agreed he knew the definition of a near-miss, namely the potential to cause damage or harm. He did not consider reporting the incident as a near miss at the time, but agreed it was in fact a near miss.

25. When the risks were pointed out to the Claimant, that he was moving forward, that the curtain of the trailer was open, that he could not see the spotter or the FLT driver, and that he may not have heard the shout to stop, the Claimant said he could hear when to stop, that he was only crawling forward and that if he had been going faster the skirting board would have crumpled. Although he hadn’t followed the procedure, it was because of the space available.

26. At the conclusion of the hearing, SR found that the Claimant was guilty of gross misconduct, namely a serious breach of health and safety operating procedures, and that dismissal was the appropriate sanction. A dismissal letter dated 27 July 2018 states:

> ‘The following was noted during the hearing:
>
> - You admitted you had not followed the 4 x 4 rules of unloading, despite inserting a “Y” for Yes on the control form dated 7 June 2018 that all 4 x 4 procedures had been adhered to;
> - During the meeting you acknowledged that you had not followed the 4 x 4 procedures and you had allowed the Depot FLT to place his forks directly on your truck whilst you had proceeded to drive the vehicle forwards. You also admitted at the point you moved the truck forward you did not have clear visibility of the rear of the truck, and FLT operator.
> - You did not follow procedure and report the incident as a “near miss” upon your return to the Transport Office as it was your opinion as no comments had been placed on the POD by the Assistant Manager at the Depot (JC) and nobody had been hurt and no stock had been damaged. During the hearing it is noted you admitted that in hindsight you should have reported the incident.”

27. The Claimant appealed his dismissal on 27 July 2018. An appeal hearing was held by CN on 8 August 2018 and on 13 August 2018 the Claimant was informed his appeal was unsuccessful.

Conclusions

Unfair dismissal

28. In a case of alleged misconduct, the Tribunal cannot substitute its views for that of the employer. The role of the Tribunal is to consider (i) whether the Respondent had a genuine belief that the employee was guilty of the misconduct alleged; (ii) whether there were reasonable grounds for that belief following a reasonable investigation; (iii) whether a fair procedure was followed in arriving at that conclusion; and (iv) whether in all the circumstances of the case the sanction of dismissal was within the range of reasonable responses open to the Respondent.

29. As regards whether the Respondent had a genuine belief the Claimant was guilty of a serious breach of health and safety, we are satisfied this was the case. It was argued on behalf of the Claimant that if the Respondent genuinely believed the Claimant to be guilty of a serious breach of health and safety there would not have been such a long delay between the incident on 7 June 2018 and 20 July 2018, when the Claimant was stood down and invited to a disciplinary hearing and/or that he would have been suspended much more quickly.

30. However, we find there was an explanation for the delay. Namely that the whistle-blower did not send an email reporting the incident until 25 June 2018. Further that email was sent to, and initially investigated by Trade, which is a separate company from the Supply part of the business where the Claimant is employed. RN did not consider disciplinary action against the Claimant was necessary until he saw Ms Evans' report. Although the statement the Claimant gave Ms Evans as part of her investigation might have alerted RN to the Claimant's part in the incident prior to seeing that report, the fact that RN waited to see the report before initiating disciplinary proceedings against the Claimant and conducting an investigatory interview was not indicative that the Respondent's concern about the incident was not genuine.

31. As regards whether there were reasonable grounds for the Respondent's belief following a reasonable investigation, the Claimant contends that there were inconsistencies in the witnesses interviewed by Ms Evans' and that the Respondent should have re-interviewed those witnesses to get to the bottom of what happened. In this respect, as part of her report Ms Evans sets out and compares the evidence of the witnesses in tabular form, which was a very thorough way of approaching the matter. As part of this exercise she notes that one witness had "embellished" his statement by stating that both curtains of the trailer had been open, rather than one, and that the driver of the FLT (AG) was the only witness who stated the FLT had been tipped sideways onto 2 wheels. She also notes inconsistencies in the statements as regards how the stuck pallet was eventually extracted from the trailer and lowered to the ground. However these matters were not relevant to the substance of the Claimant's alleged wrongdoing. As regards those matters, which are set out in the dismissal letter and above at paragraph 26, there was no dispute of fact. The Claimant admitted what had happened but considered his actions acceptable because no harm had been incurred, and he considered the method he (and

JC) had deployed had been safe. In these circumstances there was no need for the Respondent to undertake any further investigations.

32. As to whether the Respondent had reasonable grounds to take the view that a serious breach of health and safety had occurred, the 4 x 4 Rule had been implemented following the death of an employee and we accept the evidence of CN and SS that the Respondent regarded that rule as sacrosanct. Furthermore, the importance of following that rule was reinforced with every delivery and the completion of both the POD declaration and the Control Form. Since at the disciplinary hearing the Claimant admitted not complying with the 4 x 4 rule, filling out the Control Form to state that it had been complied with, and also that the incident constituted a near-miss which he should have reported, the Respondent plainly had grounds for believing that a serious breach of health and safety had occurred. We note that while the risk of something going wrong may have been small, the consequences, were it to do so, were potentially catastrophic and it is that small risk of something catastrophic happening that the 4 x 4 Rule is intended to remove.

33. As to whether a reasonable procedure was followed, the Claimant says that he should have been given a formal invite to the investigatory meeting that took place on 9 July 2018. However there is no such requirement in the Respondent's disciplinary procedures and it is difficult to see how the lack of a such a letter disadvantaged the Claimant. The nature of the allegation was set out clearly at the outset of the meeting and a note of the meeting was taken, which the Claimant signed. Further, even if the Claimant was taken by surprise at the meeting, he had plenty of time afterwards, and at the disciplinary hearing and the appeal, to correct any mistaken impression and/or say whatever he wanted to say in his defence.

34. The Claimant also says he wasn't given enough time to prepare for the disciplinary hearing. The Respondent's procedures require that an employee be given at least 24 hrs notice of such a hearing, and in this case the Claimant was informed on the evening of Thursday 19th July that he was to attend a hearing on Tuesday 24th July. Further whilst that no doubt came as very unwelcome news, and it is unfortunate that he heard it from the office rather than from RN, it cannot have been totally unexpected given the fact that he had attended an investigatory interview about the same matter on 9 July 2018. The Claimant obtained his letter inviting him to the hearing, and the enclosures, on 20 July 2018 (3 days prior to the hearing), and requested and received the POD the day before. In these circumstances we do not consider the Claimant had inadequate time to prepare.

35. Furthermore, the Claimant could have requested an adjournment. The notes of the hearing record the Claimant being asked to confirm he was happy to proceed, and the Claimant also being told he could request an adjournment at any point. Notably, when the Claimant appealed the dismissal decision he did not allege he had been given insufficient time to prepare for the disciplinary, and when asked why not during this hearing, he said there was no need because he could make any further points he thought of at the appeal anyway. During this hearing, the Claimant did say that if he had had more time before the disciplinary hearing, he would not have conceded the incident in question

amounted to a near-miss and that he should have reported it. However, this would not have made any difference to the outcome. The Respondent's witnesses were firmly of the view that the matter did amount to a near-miss and would have maintained that view whether or not the Claimant conceded the point. Further, we consider the Respondent's view to be a reasonable one.

36. The Claimant also relies on the fact that he was sent back to the Waterlooville depot on 28 June 2018. It is unclear why he considers this an unfairness since nothing of any note appears to have happened on that occasion. Furthermore, since that return visit happened before the Claimant was asked to provide a statement for Ms Evans' investigation, and before her report was provided to the Supply side of the business, it is not something for which the Respondent can reasonably be criticised.

37. Finally, the Claimant relies on the fact that he was informed he was stood down by the office, rather than by RN, and that on 23 July 2018 he was provided with documentation by WhatsApp rather than by email. Although it is unfortunate the Claimant was not told about the forthcoming disciplinary hearing by RN, and we do consider RN should have made more effort to contact the Claimant on 18 or 19 July 2018, this is not a matter which affects the fairness of the dismissal decision. Nor does the fact that the Claimant was sent documentation by WhatsApp rather than by email.

38. In the light of the above we find there was no procedural unfairness in the dismissal decision.

39. Turning to whether dismissal was a sanction that was within the range of reasonable responses, the Respondent relies on **Wincanton PLC v Atkinson [2011] UKEAT 0040/11/DM**. In that case Silber J of the EAT overturned a decision of the ET, which had found an employer's decision to dismiss unreasonable, on the grounds the ET had failed to adequately consider the potential consequences of the claimant's conduct and had focused instead on the actual consequences.

40. In this case, the Respondent's 4 x 4 Rule was introduced following a fatality. It was described by the Respondent's witnesses as sacrosanct and the importance attached to that rule is evidenced by the paperwork that must be completed on each delivery to ensure it is abided by. Further, the Respondent has also put in place a "near miss" reporting system to further support and ensure the effectiveness of their health and safety policies. In this case, whether or not the FLT was tipped onto two wheels, it is not disputed that the 4 x 4 Rule was not followed, that in fact the FLT was in operation at the same time as the HGV and that the Claimant couldn't see either the FLT driver or the spotter. Although the decision was a joint one with JC, and agreed to by AG, the Claimant was party to that decision and in fact had suggested the manoeuvre. Further the potential for something to have gone wrong is demonstrated by the fact the pallet did in fact get caught on the trailer. The Respondent was also entitled to take into account the Claimant's view, expressed both during the disciplinary procedure and during this hearing, that he was entitled to disregard the 4 x 4 Rule because he and others perceived the risk of injury and/or damage as low, and the fact he stated in the appeal

hearing that if the same thing happened again he wasn't sure he would do anything differently. In these circumstances the Respondent could reasonably take the view that it couldn't trust the Claimant to follow the 4 x 4 Rule in the future.

41. It follows that the Respondent was entitled to regard the incident on 7 June 2018 as a serious breach of health and safety which justified the Claimant's dismissal, notwithstanding his long service.

42. The Claimant also sought to argue that his dismissal was unfair because he had been penalised for failing to follow health and safety procedures, including not reporting a near miss, when the Claimant had not been required to fill out a near miss form concerning an incident at Radlett in 2013. On that occasion the Claimant and a colleague had collected trailers from a depot in Radlett when a union protest was underway. The Claimant's colleague was assaulted, resulting in police attendance.

43. We do not consider this matter to have any relevance to the Claimant's dismissal. The incident at Radlett was entirely different to the one that led to the Claimant's dismissal. Further, even if, taking the Claimant's point at its highest, the Respondent did not follow its own reporting policies on that occasion, the Claimant cannot reasonably have thought he therefore didn't have to follow the Respondent's health and safety procedures in respect of unloading his HGV, and the Respondent cannot be prevented from enforcing compliance with those policies by disciplinary action.

44. Finally, as regards the Claimant's assertion that his dismissal was tainted by race discrimination, this assertion is addressed and rejected below.

45. For all these reasons the claim for unfair dismissal is dismissed.

Race Discrimination

46. The Claimant is man of black Afro-Caribbean ethnic origin. He alleges that his dismissal was an act of direct race discrimination contrary to section 13 Equality Act 2010. That provision provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

47. In support of this claim the Claimant identified a white comparator known as "Employee A" who was dismissed in November 2016 for a breach of health and safety. The Claimant's argument was that Employee A was re-employed by the Respondent in July 2018 (to a different position at a different location) following an application process. However, since the Claimant has not applied to the Respondent for another position (still less had such an application rejected) he has not identified any less favourable treatment of himself compared to Employee A that falls within the scope of section 13.

48. Further, there are no grounds on which the Claimant could argue that he has been treated less favourably than a hypothetical white comparator would have been treated. In this case JC, the assistant manager of the Waterlooville depot,

a white man, was dismissed (by the Trade side of the business) for the same breach of health and safety as the Claimant. The evidence in fact shows a consistency of treatment by the Howden Group towards serious health and safety breaches, irrespective of the race of those who commit them.

49. At one point the Claimant sought to compare himself to SH, who was not dismissed but issued a Final Written Warning. However, there was a material difference between the Claimant's circumstances and those of SH, since SH was not present at the incident and received a Final Written Warning for failing to escalate the matter when she was told about it at a later date.

50. Finally, the Claimant said that there had been a delay of 6 weeks before he received his P45, and that this had been an act of race discrimination. Since this allegation had not been identified as a separate issue when the issues in the case were identified at a Preliminary Hearing, the Respondent did not lead any evidence to explain that delay. However, even if such a new claim were permitted to proceed, in the light of all our other findings there is no basis whatsoever for believing that the delay the Claimant says he experienced in receiving his P45, which would have been the responsibility of the payroll function than that of any manager involved in his dismissal, was an act of race discrimination.

51. It follows that the claim of race discrimination is also dismissed.

Respondent's Name

52. From 1 January 2008 the Claimant's employment contract was with a company called Group People Services, and on 15 September 2010 the name of that company changed to Howden Joinery People Services Limited. Accordingly, that latter name is the correct name of the Respondent.

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Employment Judge S Moore

Date: 18 March 2021

Sent to the parties on:

14 April 2021

For the Tribunal: