Case No. 2400753/2020
Code V

EMPLOYMENT TRIBUNALS

Claimant: Mr A Hedderman

Respondent: Fowler Welch Limited

Heard at: Manchester (remotely, by CVP) **On:** 13 and 14 April 2021

Before: Employment Judge Whittaker
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr Chapman, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair dismissal fails and is dismissed.

REASONS

1. Unusually, persuaded by the Claimant due to the clarity, force and content of representations made to the Tribunal by the claimant during the hearing, the Tribunal revisited the final written warning which was issued to the claimant in January 2020. The Tribunal reconsidered the procedures which were adopted by the respondent at that time, and revisited the decision of the respondent to issue the claimant with a final written warning in order to decide whether or not the procedures were those of a reasonable employer in all the circumstances, and to decide whether or not the decision to issue the claimant with a final written warning was manifestly inappropriate.

2. Overnight on 13 April 2021 the claimant was invited to prepare a list of the reasons why he believed that neither the employer nor the Tribunal should be entitled to rely upon the final written warning when deciding whether the claimant was unfairly dismissed. The final written warning had been taken into account by the respondent and was a contributing factor to their decision to dismiss the claimant for misconduct.

3. Some of the reasons which were explained to the Tribunal and to the respondent's solicitor, Mr Chapman, were recognised by the claimant as not being views which would usefully assist the claimant but others were recognised and they are not set out below with the reasoning of the Tribunal.

(a) The claimant objected to Mr Kelly who had held the disciplinary hearing at which the claimant had initially been dismissed for gross misconduct. He said that Mr Kelly was someone who the respondent knew very well the claimant did not get on with. However, the Tribunal did not believe this argument had any merit as it was clear that Mr Glover had carried out a very thorough review of the procedures which had led to the dismissal of the claimant. He had overturned the decision to dismiss and had instead issued the claimant with a final written warning. The claimant had raised no objections at all to the conduct of Mr Glover, and indeed had described the appeal meeting with him as a "proper meeting". The Tribunal was satisfied, therefore, that any errors which may have been associated with Mr Kelly were more than adequately dealt with by the thorough and comprehensive review which was then carried out by Mr Glover.

(b) The claimant said that it was entirely inappropriate for the HR representative who attended the disciplinary hearing to ask the claimant questions. The decision of the Tribunal was that it was not unusual for HR representatives to ask some questions during the course of disciplinary/investigation meetings. In any event, as set out above, Mr Glover had thoroughly and comprehensively reviewed all the evidence and all the procedures before the reducing the decision to dismiss to a decision to issue the claimant with a final written warning.

(c) The claimant alleged that the disciplinary investigation was a biased investigation because at all times the focus of the respondent had been on him and not on another employee. The decision of the Tribunal, however, was that it was entirely appropriate for the respondent to have concentrated on the claimant. The misconduct in question was misconduct of the claimant. The accident which had occurred was the fault of the claimant. The claimant had attempted to direct the focus of the respondent elsewhere, but in the opinion of the Tribunal it was entirely appropriate that the focus had remained at all times on the conduct of the claimant.

(d) The claimant raised a number of criticisms about another employee by the name of Aiden. However, the Tribunal dismissed these complaints. The Tribunal found that the only thing that Aiden could be criticised for was not blocking off the aisle that the claimant had driven down, but it was clear that he had not blocked this off because at the time the company had lax policies and procedures in connection with this. However, those policies were reinforced and reintroduced in writing after the claimant was issued with a final written warning. The Tribunal could not find any reasons why it would have been appropriate for disciplinary action to have been taken against Aiden.

4. The Tribunal asked itself, therefore, whether or not it believed that the procedures which the respondent had followed which led to the claimant ultimately

being issued with a final written warning (pages 120-121 of the bundle) were the reasonable procedures of a reasonable employer, and was satisfied that they were. Indeed, the claimant ultimately described the appeal meeting as a "proper meeting", and it was very clear that Mr Glover had comprehensively reviewed all the information in front of him and indeed had come to a different conclusion. The original decision had been to dismiss the claimant for gross misconduct but Mr Glover, the appeal manager, lowered this to a final written warning.

5. The Tribunal then asked itself whether or not there were reasonable grounds for the claimant being issued with a final written warning. It was clear that the claimant had driven down an aisle without looking and without taking proper care. This was in breach of the procedures of the company. The vehicle being driven by the claimant had collided with another stationary vehicle in one of the aisles of the warehouse operated by the respondent. There was some risk of both damage and injury being caused by the conduct of the claimant. Furthermore, even though the accident was the fault of the claimant in the opinion of the Tribunal, and in the opinion of the respondent, the claimant ought to have but had not filled out an accident report form. The conclusion of the Tribunal was that there was certainly misconduct, and even possible gross misconduct, on the part of the claimant. The original decision to dismiss the claimant summarily had been reduced by Mr Glover to a final written warning. During discussions with the Tribunal the claimant had, with hindsight, reflected on his conduct and told the Tribunal that he believed that it would have been fair and reasonable for the respondent to have issued him with a written warning. The Tribunal therefore considered what it believed was the range of reasonable responses to the conduct of the claimant. The Tribunal was easily satisfied that a final written warning was within the band of reasonable responses, and even believed that a more serious view might have been taken by an equally reasonable employer.

6. There were therefore no grounds at all for the Tribunal to conclude that the issue of a final written warning had been manifestly inappropriate. Indeed the conclusion of the Tribunal was that it was entirely fair and reasonable in all the circumstances for the claimant to have been issued with a final written warning. It was therefore entirely fair and reasonable for the Respondent and the Tribunal to take that final written warning into account when approximately 6½ months later the claimant was again guilty of very similar misconduct.

7. The Tribunal took careful note of the fact that in the appeal letter, which was sent by Mr Glover, the appeal manager, he concluded by saying, "The sanction will remain on your file for the period of 12 months, furthermore any further conduct issues within this period may result in disciplinary action and your subsequent dismissal". The claimant acknowledged that he had received that decision letter from Mr Glover. At the time of the subsequent misconduct, therefore, in May 2020 the claimant had a "live" final written warning on his record for misconduct.

8. The claimant had a positive work record of over eight years before the final written warning. The claimant told the Tribunal during this hearing that when he was given the final written warning that he was not really concerned about it because he was satisfied that there would be no further issues of misconduct on his part, and to that extent the final written warning would come and pass without event. The Tribunal noted, of course, that the whole idea of a final written warning is that an employee should be given the opportunity to learn from their mistakes, but that during the time

that the warning is in place the employee is very much at risk if they do behave in a way which is again subject to criticism.

9. Following the decision in January 2020 to overturn the summary dismissal of the claimant and instead impose a final written warning, the claimant was also required to undergo a formal process of retraining and reminder of the safe systems of work of the respondent, particularly insofar as they related to the driving duties of the claimant within the warehouse. Those records appeared at pages 122-130 of the bundle.

10. The claimant was then involved in a further incident on 28 May 2020, some 6/7 months into the 12 month period of the final written warning. Another employee had placed a "no entry" sign across the entrance to one of the aisles in the warehouse. This was a circular large notice which was attached by chains at each end to the supports of the racking within the warehouse. However, the claimant drove his forklift truck into the "no entry" sign. He reversed into the entrance to the aisle without seeing the "no entry" sign, but when he dislodged it with the force of his vehicle that incident made a noise which alerted the claimant. He dismounted from his vehicle and found that he had torn the "no entry" sign and chain from its mountings. What therefore was immediately clear to the claimant was that a "no entry" signed had been placed across the entrance to this aisle. The claimant told the Tribunal that he was well aware that the purpose of placing a "no entry" sign at the entrance to an aisle was to indicate that there was another employee working down that aisle, and that neither the claimant nor anybody else should enter that aisle with a forklift truck.

11. The claimant said that when reversing into the entrance of the aisle with the intention of travelling down it to collect some goods which were positioned on that aisle as part of his "pick", there was a blind spot in his mirror and that is why he had not seen the "no entry" sign. This was not however the first time that the claimant was aware of this blind spot. The claimant accepted that the seat within the forklift truck would swivel 45 degrees which would then have enabled the claimant to have a much better rear view. The claimant also accepted that he was quite able to turn around and look over his shoulder in order to have a much better rear view, and indeed he told the Tribunal that he had done that on a number of other occasions during his employment. However, the claimant did not carry out either of these manoeuvres before reversing and then tearing the "no entry" sign from it mountings.

12. Having caused this damage and having torn the "no entry" sign from its mountings the claimant then proceeded, despite the obvious warning, to drive down the aisle to the area where he could "pick" the goods which he needed to, despite the fact that the claimant told the Tribunal very clearly indeed that if he had seen the "no entry" before colliding with it he would not under any circumstances have driven down the aisle. However, this was completely inconsistent with the claimant then dislodging the sign, getting out of his vehicle and then seeing that it was a "no entry" sign which he had dislodged. Despite that the claimant then drove his vehicle down the aisle.

13. At the time that the claimant was issued with a final written warning the policies and procedures of the company regarding blocking off aisles for the safety of its employees were lax. However, following the final written warning they were reinforced and introduced into writing. It was very clear that the claimant was aware of the reason for the "no entry" sign and what it prevented him from doing. Indeed it had been the claimant who during the course of his final written warning hearings had complained about the lax attitude to blocking off aisles, and therefore it was as a result of his

representations that these were tightened up. The claimant was therefore well aware that he had been part of the process which had led to the clear enforcement and use of these blocking manoeuvres.

14. When driving down the aisle the claimant shouted to try to alert his presence to anyone else who was there, but he accepted that he never used his horn to try to alert any other employees even though that was part of the safety procedures of the respondent. The claimant in giving evidence frankly admitted that he had "taken a risk" and that he had taken a "calculated risk" when driving down the aisle contrary to the clear presence of the "no entry" sign. The claimant told the Tribunal that he knew very well that the presence of the "no entry" sign meant that there was a colleague down the aisle and so in the opinion of the Tribunal there was an obvious and real danger created by the claimant ignoring the "no entry" sign. The claimant told the Tribunal that the aisle was approximately 100 metres long and it was obviously therefore not possible for the claimant to see everyone and everything in an aisle of that length.

15. The other employee eventually made himself known to the claimant but he also became aware that the claimant had driven down the aisle in contravention of the "no entry" which he had placed across the entrance to the aisle. Despite this breach of procedure, the claimant did not complete a written accident report form even though the incident was his responsibility. When questioned at the Employment Tribunal the claimant, with the benefit of hindsight, accepted that the incident was a "near miss" and should therefore have been reported by him. It was recognised by the claimant that as he drove down the aisle he had no idea at all where the person who had put the sign up was. The claimant had for himself decided that driving down the aisle and shouting to try to alert his presence to anyone who might be about was sufficient. This was the calculated risk to which the claimant had referred when giving evidence.

16. The policies of the company were in writing and clear and those at page 122 were of relevance. They told the claimant that no-one should ever enter a narrow aisle if there were people there. The aisle the claimant drove down was accepted by everyone as being a narrow aisle. The presence of the "no entry" sign alerted the claimant to the fact that there was somebody else in the aisle, but in effect the claimant ignored that and drove down it in any event.

17. When the incident in question came to the attention of the respondent an investigation was carried out. The claimant raised a number of criticisms about that procedure, but in the opinion of the Tribunal there was no real need for any detailed investigation about what had happened at all because the facts were clear and obvious and indeed openly admitted by the claimant. There was no dispute about what he had done and the fact that it was in clear breach of the health and safety procedures of the company. The Tribunal noted that there was an investigation process, the claimant was properly and fairly invited to a disciplinary hearing and at the conclusion of that he was dismissed for misconduct, with notice. The respondent took into account the existing final written warning and took into account the fact that the claimant had been retrained/reminded of the respondent's expectations a few days after the claimant had been issued with a final written warning.

18. The claimant then appealed. The Tribunal noted with some concern the tone of the appeal letter and the nature of the allegations and points which the claimant raised. There was more than a suggestion in the letter of appeal that the claimant did

not believe that he had done anything wrong and that having been dismissed he should simply be reinstated and, to use his own words, should be reinstated by the company and they could then could then get rid of 'all this mess'". That did not demonstrate any indication on the part of the claimant that he recognised the seriousness of the situation and the seriousness of what he had done on his own description of events. The points raised by the claimant in his appeal letter were carefully considered by Mr Lee, the appeals manager. Furthermore, he believed that it was appropriate to re-interview the people who were involved, including the managers who had been involved in the investigation and the disciplinary. This was not because he believed that there were any significant misdemeanours but he was clearly persuaded to do so by the stringent tone of the letter of appeal. The Tribunal accepted that Mr Lee had carried out that further investigation and carried out further interviews, and that he had taken a proper period of time to reflect on the appeal before confirming the decision to dismiss the claimant for misconduct, albeit with the claimant being paid in lieu of any notice to which he was entitled.

19. Having considered the conduct of the claimant and having considered the investigation and procedures which were adopted by the respondent, the Tribunal was satisfied that the respondent held a more than reasonable belief in the misconduct of the claimant. It was obvious that there were reasonable grounds for the belief in the misconduct because in effect the claimant had, quite property, admitted that he was at fault. The Tribunal was satisfied that the respondent had carried out such reasonable and proper enquiries as were appropriate. They fully considered the allegations of misconduct which were raised against the other employee by the claimant, but in the opinion of the Tribunal those allegations were dismissed as being largely irrelevant. It was at all times the conduct of the claimant by driving down the aisle which had caused the incident in question. Another employee had been working in the aisle. He had therefore taken the proper step of putting the "no entry" sign at the entrance to the aisle, but it was the claimant who had then reversed into it and effectively ignored the "no entry" sign entirely and taken the risk to drive down the aisle in any event, even though he had no idea who was down the aisle or whether indeed anyone was down the aisle and where they were at the time. The incident therefore was the fault of the claimant and not the fault of anyone else, in the opinion of the Tribunal the respondent came to that decision on reasonable grounds and after a proper and reasonable enquiry.

20. At the conclusion of the disciplinary process, therefore, the respondent was dealing with an employee who had been issued with a final written warning. That written warning had been issued for misconduct and it was clear to the Tribunal that it was misconduct of a very similar nature. On each occasion the claimant had failed to report the incident to management. The second incident occurred only 6½ months into a 12 month final written warning. The employee had undergone a period of retraining and reminder of the health and safety policies of the respondent. In May 2020 the claimant had then been involved in obvious misconduct, and in the opinion of the Tribunal the incident was serious. The incident for which the claimant was issued with a final written warning and the incident which led to his dismissal were both allegations of the claimant driving down an aisle in circumstances which created an obvious risk of damage and injury.

21. The decision of the respondent was to dismiss the claimant for misconduct, paying the claimant in lieu of notice. The Tribunal considered whether or not that

decision fell within the band of reasonable responses available to a reasonable employer and was completely satisfied that it did. In the opinion of the Tribunal, the minimum response of a reasonable employer would have been to issue a further final written warning, but in the opinion of the Tribunal there would have been a substantial number of reasonable employers who would have dismissed the claimant for gross misconduct. The decision to dismiss the claimant for misconduct, paying him in lieu of notice, therefore fell very much within the band of reasonable responses available to a reasonable employer. The claimant had been clearly warned in the appeal letter that "any further conduct issues may result in disciplinary action and your subsequent dismissal".

22. The claimant's claim of unfair dismissal therefore fails and is dismissed.

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Employment Judge Whittaker

Date: 15th April 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 April 2021

FOR THE TRIBUNAL OFFICE