EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr A Kurklis	**v**	**Sps Aerostructures Limited**

RESERVED JUDGMENT

Heard at: **Nottingham**

On: **10-12 May 2021**

RESERVED TO: 25 May 2021 (in chambers)

Before: **Employment Judge Blackwell (sitting alone)**

Appearances

For the Claimant: **Ms Beech – Counsel**
Ms Crombie - Solicitor

For the Respondent: **Ms Vittorio - Solicitor**

Decision

1. The claim of unfair dismissal pursuant to Sections 94 and 98 of the Employment Rights Act 1996 (1996 Act) succeeds but:-

    1.1 It would be just and equitable to reduce the amount of the basic award pursuant to Section 122(2) of the 1996 Act by 75 percent.

    1.2 It would be just and equitable to reduce the amount of the compensatory award pursuant to Section 123(6) of 1996 Act by 75 percent.

2. The claim of wrongful dismissal also succeeds.

REASONS

1. Miss Beech represented Mr Kurklis whom she called to give evidence. She also called Mr Bettison who at the relevant time had been Mr Kurklis's manager.

Ms Vittorio the Respondents and she called Mr Abraham who determined Mr Kurklis's appeal against dismissal. There was an agreed bundle of documents and references

are the page numbers in that bundle. I am grateful to both advocates for the manner in which they conducted their cases and in particular, for providing helpful and comprehensive written submissions.

Issues and the law

Unfair dismissal

Section 98 Employment Rights Act 1996

(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:-

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,
(ba) is retirement of the employee,**]**

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(2A) Subsections (1) and (2) are subject to sections 98ZA to 98ZF.**]**

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

5. It is not in dispute that the reason for dismissal was a matter of conduct, a potentially fair reason for dismissal. The conduct in question was Mr Kirklis sustaining an injury to his right hand on 14 February 2020.

6. The Tribunal is therefore required to apply to that potentially fair reason for dismissal. The test set out in Sub-section 4 of Section 98 above.

7. Further, as a matter of case law, the Tribunal must apply the three-part test from **British Home Stores Limited -v- Birchall 1978 IRLR379**:-

7.1 Did the employer have a genuine belief in the misconduct complained of

7.2 Were there reasonable grounds for such a belief

7.3 Was there a reasonable investigation. The burden is on the employer to prove the first limb and neutral in respect of the second and third.

8. Also, as a matter of case law and at the heart of this case is the well-known test of the band of reasonable responses, perhaps best formulated in the case of

Iceland Frozen Foods Limited -v- Jones 1983 ICR17:-

8.1 *The function of the Industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.*

9. It is also common ground as a matter of case law that the Tribunal can only take into account those matters which were known to the employer at the time of the decision to dismiss.

Wrongful dismissal

1. The question for the Tribunal is whether Mr Kurklis has committed a repudiatory breach of contract. Again, the parties are helpfully at one as to the applicable law. It is agreed that objectively judged the breach "must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment. Further that the act must be deliberate and a willful contradiction of the contractual terms or amount to gross negligence.

Findings of fact

1. Mr Kurlis was employed by SPS as a Maintenance Engineer from 1 April 2017 to his summary dismissal on 4 March 2020. The 4 March 2020 being the effective date of termination.

2. SPS are the British subsidiary of a large multinational concern. They produce components for aircraft engines and gas turbines. They have a dedicated HR department.

3. On 14 February 2020 Mr Kurklis was sent to deal with a lodged cutting tool on the MAG1CNC Milling Machine. There are helpful photographs of the machine at pages 177, 252 and 253.

4. As to the photograph at page 177, Mr Kurklis accepted that that depicts the position he was in immediately before he was injured.

5. Mr Kurklis's task was to remove the cutting tool, see photographs 289 and 290, the cutting edges are razor sharp and therefore dangerous as Mr Kurklis himself observed during his appeal. The tool had become lodged in the spindle or chuck and it was therefore a task for a Maintenance Engineer to remove.

6. The earliest account of the accident suffered by Mr Kurklis is in the Accident and Incident Investigation form at pages 235 and 236 as follows:

> *"A tool changer error was reported on the Mag 1 so I.P (Mr Kurklis) went to fix the issue. He needed to release the tool from the spindle so he brought the spindle to the operator door. He leant in to the machine and dropped the step down in to position for him to stand on. He then moved the control panel closer to the door opening as he had to press the tool release button and hold the tooling at the same time. He then stepped into the machine onto the step turned to press the tool release button and his foot slipped. As he slipped he reached to stop himself from falling and grabbed the tool which was still in the spindle which then cut his right hand".*

7. At 236 is Mr Kurklis's own account. Contrary to Ms Vittorio's cross examination, Mr Kurklis's description of the accident has been consistent throughtout. I also note that Mr Abraham's, in hearing the appeal, did not have access to this report. Further, I was not told whether it was available to Mr Steffen.

8. There followed an investigatory meeting with Mr Tate at 177a is Mr Kurklis's account of what occurred. At 177b Mr Kurklis states as follows:-

> "*Although I have performed this task 1000 times, I think a Standard Operating Procedure should be created to perform this task. Perhaps make it a two man job in the future?"*

9. Mr Kurklis conceded from the very beginning that he was not wearing cut resistant gloves at the time of the accident. He conceded at 177c that he should have cleaned the step, called another person to operate the button and had gloves on.

10. On 19 February, Mr Kurklis was invited to a Disciplinary Investigation Meeting to discuss "serious breach of cardinal rules of safety points 1, 4 and 9 as follows:-

> *1. Do not knowingly allow anyone to work in an unsafe matter or cause harm to the environment as specified by these rules.*
>
> *4. Always wear approved for protection, respiratory protection, and electrical or chemical safety equipment as required for the job and in accordance with regulations.*
>
> *9. Do not participate in activities or take actions which may endanger your health and safety or the that of another person, or be detrimental to the environment."*

11. At 188 is a further consistent account by Mr Kurklis. He also says as follows at

the end of the meeting:-

> *"In terms of risk assessments I do it in my head always before. I didn't think I needed gloves as I wasn't reaching out for the tool. The plan was to hold the holder. There is no written SOP for the task. No where does it say that gloves need to be worn when handling or entering the machine. E.G. no one wears gloves in the tool room which is full of tools. It was the slip that caused the accident which had nothing to do with the gloves. On the job, task safety book, which I had no training how to use since day 1. No training how to fill it in. I've come straight back to work and been honest and thought of the Company's interest."*

12. On 27 February Mr Kurklis was invited to attend the Disciplinary Hearing on 4 March 2020 to be conducted by Mr Steffen in addition to the alleged Breaches of Cardinal Rules was added the following allegation;-

> *"On Friday 14 February 2020 it is alleged that you failed to wear the correct PPE when undertaking maintenance activities resulting in you injuring yourself and receiving a laceration to your hand."*

13. Mr Kurklis was warned that dismissal might be a possible sanction. The letter

enclosed the following;-

Disability Policy
Safety Cardinal Rules
Safe Working Procedure//Risk Assessment
Training sign off
Investigation meeting Arturs Kurklis 24.02.2020
Investigation meeting Aidy Walters 19.02.2020
Investigation Meeting Kemal Ekiztas 20.02.2020

14. The notes at the Disciplinary Meeting begin at page 191. At 192 Mr Kurklis again makes the concession that he should have asked for an Operators help and that he should have worn gloves. At page 193 Mr Kurklis says as follows:-

> "*I have been honest. Was there options to avoid this… 100% yes. I was confident and that's why the risk assessment was probably in the background and I can skip a few steps. The attitude has been "Too confident, just go for it". It is a good wake up call, there is no need to rush, this has resulted in that I've been off for weeks and let myself and the company down and it is not beneficial".*

15. After an adjournment of 19 minutes Mr Steffen summarily dismisses Mr Kurklis and it is recorded:-

> "*My reasons for this are simply you have admitted the allegations and confirmed you were aware of your responsibilities. You knew breaches of the Cardinal rules of Safety are gross misconduct. You knew not to do it. You admitted you have done it. You stated it could have been avoided. You have not provided any mitigation for your actions".*

16. That decision was confirmed in a letter of the same date at page 195 and 196, Mr Steffen records that Mr Kurklis had admitted all of the allegations against him and he went on:-

> *"In the hearing you admitted the allegations and we discussed the requirement to carry out a risk assessment and adherence to the Cardinal rules of Safety. You confirmed you should have taken more care and had 'probably skipped steps' when moving a column inside a machine which had a sharp tool attached to it. You confirmed you should have worn protective gloves for this task. You suffered a serious injury to your hand.*
>
> *In making my decision I considered that you are a likeable, honest member of the team. However, you have knowingly disregarded specific safety rules and there is no evidence to show otherwise. It is gross misconduct to breach the Cardinal rules of Safety and you are aware of this.*

17. Mr Steffen later recorded:-

> *"Whilst I am sorry it has come to this, if I gave you another chance, I am fearful that I would be providing an inconsistent message. If you rush jobs and make mistakes such as with this incident, then based on that risk I can't guarantee this will not happen again".*

18. Mr Steffen's letter records the right to appeal against the decision which Mr Kurklis did by letter of 5 March set out at pages 197 - 200.

19. By that time, Mr Kurklis had taken advice. In summary, the grounds of his appeal were as follows:-

19.1 That his conduct was not deliberate or wilful.

19.2 That he had not admitted all of the allegations.

19.3 That the disciplinary process was inadequate and the decision to dismiss was pre-determined.

19.4 That there had been no investigation as to why the steps were slippery.

19.5 No investigation had taken place into whether it was normal practice to wear gloves, that he had received no specific training in respect of the task of removing a lodged tool. There was no standard operating procedure for so doing.

19.6 That a Supervisor, Mr Dawson, had received a less serious sanction for a similar offence.

19.7 That he had a clean disciplinary record and was a hard worker.

20. He concluded *"further training and a lesser sanction would have been more appropriate. I am young and relatively inexperienced and have learnt from the accident. I am keen to learn and willing to undertake any training necessary."*

21. An Appeal Hearing was heard by Mr Abraham on 30 March 2020 and the notes begin at page 202. Mr Abraham went through what he perceived to be the ground of appeal. Mr Abraham repeatedly concluded that his view was that Mr Kurklis knew he should have worn gloves and that he should have carried out a risk assessment before carrying out the task. At page 204 Mr Abraham says *"At some stage you would have to handle the spindle tool, so the PPE should have been worn regardless. So you would have known there could have been swarf as this was half way through a job so you would have known you were going to walk over the bed. That is a high risk operation so just because you didn't wear clothes in the past you should always do a risk assessment even if it's a mental risk assessment. It appears that you have rushed into the job and you didn't do a risk assessment. You thought about the task rather than the precautions."* Mr Kurklis replies "*Yes you are right. In hindsight now I realise that".* Mr Abraham, having examined the training record concluded that Mr Kurklis had received the exquisite training.

22. The hearing was adjourned at 2:20pm and reconvened at 3:00pm and Mr Abraham's determined to uphold the decision dismiss. The outcome is recorded in a short letter of 31 March 2020 at pages 209 and 210. The letter is perfunctory and deals only with the issue of training and the conclusion that Mr Kurklis should have done a risk assessment, worn gloves and cleaned the steps.

23. In relation to the evidence of Mr Abraham, there was a conflict of evidence in respect of what is recorded at page 205 (part of the Appeal Hearing notes):-

> 23.1 *"Lee Bettison was spoken to and asked the question of whether this task requires gloves to which Lee has responded "yes gloves are required".* Mr Bettison's evidence was that he was asked "*If I ever said that gloves were not needed for the task" I responded by saying no and that I fully endorsed any PPE that my team deem necessary for the task".*

24. In cross examination it emerged that Mr Bettison's approach was that in general he left the matter of the wearing of PPE to the discretion of the team member involved.

25. Mr Bettison further confirmed that there was no SOP for the task that Mr Kurkis was undertaking and that he had no knowledge of whether it was standard practice to wear gloves.

26. Mr Bettison also gave evidence that a SOP was introduced shortly after the accident and before he left the Respondents in May 2020 whereby it became a two man operation and that the tool was removed from the rear of the machine rather than the front, as Mr Kurklis was attempting at the time of the accident.

27. I found Mr Bettison to be a straightforward and credible witness and I accept all of his evidence.

Conclusion

28. Firstly, it is hard to see how either Mr Steffen or Mr Abraham could have had a genuine belief that Mr Kurklis was in breach of Cardinal Rules 1 and 4 though I accept that both had a genuine belief that Mr Kurklis had failed to wear gloves and that he was in breach of Cardinal Rule 9 in that he carried out an activity without giving due thought to the risks involved. As to the second limb of virtual, there are two criticisms made of the investigation. Firstly, that there should have been an investigation into why the steps were slippery. I do not consider that that is a fair criticism. It was well

known to all, including Mr Kurklis that by reason of the presence of oil and cooling fluid, the machine room itself and the steps were likely to be slippery.

29. The second criticism is that there should have been an investigation into whether cut resistant gloves were worn in practice.

30. I remind myself that the test is whether the carrying out of such investigation would fall within the band of reasonable responses. In my view, it does because whilst there may be clear rules about the wearing of PPE, but whether the rule is observed is entirely another matter. The only evidence on the point is that of Mr Kurklis himself whose evidence throughout, including during the investigatory and disciplinary process was that gloves were not worn as a matter of course and that his Supervisors' were aware of that. It follows that that would have been a significant finding in Mr Kurkls's favour.

31. On the evidence set out in the Findings of Fact, in my view it would have been reasonable for SPS to conclude:-

31.1 That Mr Kurklis had failed to wear gloves and that the wearing of gloves, as Mr Kurklis conceded in evidence, would have reduced the severity of the cut that he suffered.

31.2 That Mr Kurklis had failed to risk assess the task that he was to carry out and in particular, had ignored the known risk that the step on which he balanced himself, was likely to be slippery.

31.3 That Mr Kurklis had undergone a degree of training, predominantly on paper with one tool box talk relevant to the task.

31.4 That there was no SOP in place at the time of the accident. That a SOP was introduced shortly thereafter which changed the job to a two-man task.

31.5 That Mr Kurklis had a clear disciplinary record, had expressed regret and had asked for further training. Against that, SPS were entitled to conclude that Mr Kurklis was not inexperienced in his role. As well as nearly three years with SPS, he had had some six years' experience in a similar capacity with a previous employer.

32. As to the ground for Appeal advanced by Mr Kurklis in respect of the treatment of a Supervisor, Mr Dawson, although there are similarities i.e that Mr Dawson's disciplinary offence was the failure to wear PPE in that case, ear defenders, it does not seem to me that on the facts derived from set out in the documentary evidence, see pages 168-176, there are sufficient similarities for there to be an argument of inequality in the sense set out in the case of **Newbould -v- Thames Water Utilities Limited 2015IRLR734** but nonetheless, I accept Ms Beech's submission that the final written warning issued to Mr Dawson is a bench mark for what a reasonable employer in a broadly comparable situation would do. It is as Ms Beech submits, an indicator of what falls within the band of reasonable responses.

33. Did the decision to dismiss fall within the band of reasonable responses. I remind myself that I must not substitute my views and I accept Ms Vittorio's submission that if a reasonable employer might reasonably have dismissed Mr Kurklis in all the circumstances, then the dismissal was fair. Balancing all the factors above, I am of the view that the dismissal does not fall with the band of reasonable responses.

ACAS Code of Practice

34. Ms Beech argues that there are two breaches, firstly that Mr Bettison's comments as to Mr Kurklis rushing jobs were not put to him. As a matter of fact, that is correct. The second allegation is that the Disciplinary Hearing took place only three days after the Investigatory Hearing and that that is insufficient time to review any documents and prepare. I accept as a matter of fact that only three days did follow. I do not accept however, that there was insufficient time to prepare. The facts were well known and straightforward. I do not consider in either respect that SPS's conduct was unreasonable and I therefore decline to increase any award pursuant to Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

Polkey

35. I do not consider that there are any facts from which I could conclude that a fair procedure has not been followed. As both advocates submit, this is a case about whether the decision to dismiss fell within the band of reasonable responses.

Contributory Fault

36. There are two relevant provisions:-

Section 122(2) ERA 1996

36.1 *Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*

Section 123(6) ERA 1996

36.2 Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

37. The two statutory tests set out above are different in terms but I see no reason to reach a different conclusion because of the difference in terms.

38. As a matter of case law, it is well established that there are two tests to be satisfied. Firstly, that there has to be a causal or connection between the Claimant's conduct and that that conduct must be culpable or blameworthy. Both advocates referred me to the case of **Nelson -v- BBC 208 ICR** beginning at page 110.

39. F on page 121 Lord Justice Brandon states:-

39.1 "*It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not in my view, necessarily involve any conduct of the complainant, amounting to a breach of contract or a Tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, was not amounting to a breach of contract or a Tort, is nevertheless perverse or foolish, or if I may use the colloquialism,*

bloody minded".

40. It is not in question that Mr Kurklis's conduct on 14 February caused his dismissal.

41. As I have found above, Mr Kurklis is an experienced Maintenance Engineer and is highly paid for his skill and experience. In my view, the culpable or blameworthy conduct is as follows:-

41.1 Not wearing protective gloves when, if the operation had gone to plan, his hand would have been within inches of a razor-sharp part of the tool.

41.2 Not taking account of the known hazard that the step on which he placed his foot was likely to be slippery by reason of contamination of oil and/or cooling fluid.

41.3 Though this was not a matter in the mind of SPS during the course of the dismissal process, not seeking out an operator to obtain the G Code which would have meant that the tool would have been closer to him, rendering the operation safer in that he would not have had to use the step.

42. Having regard to the words of Lord Justice Brandon, I would categorise Mr Kurklis's conduct as foolish. He was, as he has always accepted, careless.

43. Having regard to the relevant authorities including that of **Hollier -v- Plysu Limited 1983 IRLR260** which was helpfully drawn to my attention by Ms Vittorio, I would place the degree of fault at 75 percent.

44. I conclude that Mr Kurklis, in all the circumstances, was largely to blame thus arriving at a contribution of 75 percent.

Wrongful dismissal

45. Again, helpfully, the parties are at one as to the relevant law. The act of gross misconduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence, see **Laws -v- London Chronicle Limited 1959 1WLR698.** Ms Vittorio submits that Mr Kurklis made a willful and deliberate decision not to wear gloves. In my view, this is an incorrect characterization of his actions. I accept that he was negligent, foolish and careless but it does not seem to me that his conduct was deliberate and willful, he did not give proper thought to the risks involved thus, his conduct falls short of gross negligence as well. I therefore conclude that the claim of wrongful dismissal succeeds.

Remedy

46. The hearing dealt only with the merits of the action. As to the Schedule of Loss, I would only comment that the period of eight weeks which Mr Kurklis took to find what was nearly comparable employment, I am likely to regard as a reasonable period. I would hope that the parties can come to terms without the necessity for a Remedy Hearing. If one is required, however, the Claimant must apply to the Tribunal for such within 28 days of the date that this Judgment is sent to the parties.

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management': https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

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Employment Judge Blackwell

Date: 25 June 2021