5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4100442/2021 (V)

Held on 1 and 2 June 2021 (By CVP)

10

Employment Judge: Mr B Campbell

15 **Mr Christopher Hampton**	**Claimant** **Represented by:** **Mr Alan Watt –** **Solicitor**
20 **Saint-Gobain Building Distribution Limited**	**Respondent** **Represented by:** **Mr Changez Khan -** **Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. the claimant was not unfairly dismissed contrary to section 94 of the
30 Employment Rights Act 1996 and

2. the claim is therefore dismissed.

REASONS

GENERAL

1. This claim arises out of the claimant's employment by the respondent which began on 16 June 2003 and ended with his dismissal on 13 November 2020.

5 2. The Tribunal heard evidence from Mr Trevor Norval, Site Operations Manager (Inverurie), Mr Tony Campbell, Operations Manager and Ms Elizabeth Watson, HR Manager, all on behalf of the respondent, as well as the claimant himself.

3. An indexed joint bundle of documents was provided and pages within it are
10 referred to below in square brackets. Due to time pressure on the last day of the hearing, the parties' representatives provided written submissions on a later date which were considered in reaching the conclusions below.

LEGAL ISSUES

4. The legal questions before the tribunal were as follows:

15 4.1. Was the claimant's dismissal on 13 November 2020 by reason of his conduct, and thus a potentially fair reason under section 98(2)(b) of the Employment Rights Act 1996 ('ERA');

4.2. If so did the respondent meet the requirements of section 98(4) ERA so that the dismissal was fair overall; and

20 4.3. If not in either case, and the claimant was therefore unfairly dismissed, what compensation should be awarded?

APPLICABLE LAW

5. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on
25 matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at

least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that consideration.

6. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.

FINDINGS OF FACT

7. The following findings of fact were made as they are relevant to the issues in the claim.

Background

8. The claimant was an employee of the respondent from 16 June 2003 to 13 November 2020. On the latter date he was dismissed without notice. The respondent maintains that he was dismissed for gross misconduct.

9. The respondent is a company which produces timber frames and other components and materials. It has premises in Cumbernauld where the claimant was employed. The claimant was employed as a Joiner.

10. The claimant was initially engaged by Scotframe Timber Engineering Limited which was acquired by the respondent in 2019. The Transfer of Undertakings (Protection of Employment) Regulations 2006 applied to the acquisition and the claimant's contract transferred to the respondent. His terms and conditions of employment, including continuity of employment, were preserved. An updated statement of terms and conditions of employment was issued to the claimant [20-45]. The contract was sent in duplicate and the claimant was asked to countersign and return one copy. He did so [51]. From

that point on the respondent's non-contractual policies and procedures, as contained in its Employee Handbook, applied to the claimant.

11. The respondent operates a disciplinary policy and procedure to deal with conduct matters [92-105]. It contains a non-exhaustive list of matters which the respondent would normally consider to be gross misconduct. That includes:

    'Disregarding company health and safety and security rules and regulations and endangering persons, plant, machinery or property'; and

    'Serious breach of the company's policies, procedures and/or legislation'.

12. In the canteen area of the respondent's Cumbernauld premises a sign was attached to the wall and a photograph of it was produced [106]. It stated in capital letters 'NO SMOKING; NO VAPING; TOBACCO SMOKE & E-CIGARETTES PROHIBITED; THANK YOU' along with illustrations of a cigarette and an e-cigarette each within a circle and crossed through with a line. The canteen adjoins the factory floor. No similar sign was displayed on the factory floor itself.

13. The respondent's Employee Handbook contained rules in relation to smoking and vaping as follows [81]:

    'Smoking and Vaping

    In line with the law, we operate a no smoking policy in all our buildings and company vehicles. This includes the use of e-cigarettes. Smoking and the use of e-cigarettes (more commonly known as vaping) is only allowed in designated locations, to protect everyone from the risks of passive smoke or vapour inhalation.

    In areas where smoking is allowed, make sure cigarettes and matches are properly extinguished and disposed of. Do not smoke next to flammable substances or where the presence of gas is suspected.

Care must also be taken with the storage and carrying of e-cigarettes as these are heat generating electronic devices that can present a risk of burns or ignition.

You will find further information in our Smoking Policy within EDM.'

5 14. The Smoking Policy was a separate document, concerned primarily with ensuring that the respondent and its staff complied with the general laws in relation to smoking indoors which were introduced by the Scottish government in 2006. It did not specifically refer to vaping.

15. All of the key events with which the claim is concerned occurred in 2020.

10 **Initial disciplinary warning – August 2020**

16. On 19 August 2020 the respondent's Operations Director, Tony Campbell, wrote to the claimant to invite him to attend a disciplinary hearing on 21 August 2020 at 9am [52]. The issue was the claimant's absence record in the preceding 12 months. The letter purported to include a list of the absences by
15 date which was not included in the hearing bundle.

17. The hearing proceeded as arranged, chaired by Mr Campbell who was accompanied by a Mr Angus Wiseman, who was the Cumbernauld Factory Manager and the claimant's line manager. The claimant was accompanied by a colleague, Mr Colin Scott. Following discussion Mr Campbell issued a
20 verbal warning to last for 6 months, to expire on 21 February 2021. A note was kept [53-56] and the outcome confirmed to the claimant in writing [57]. The claimant was given the option to appeal against the warning but did not do so.

Investigation – November 2020

25 18. In early November 2020 Mr Wiseman noticed by viewing CCTV of the workshop that the claimant appeared to be using a vaping device whilst on duty. He viewed the footage in response to a tip off from one of the claimant's colleagues. He checked footage randomly covering a number of days between 2 and 6 November 2020 and noted around 10 occasions when he

believed the claimant appeared to be vaping in the workshop. Those are recorded in a note he made [58].

19. Briefly, the instances of suspected vaping were on the dates of 2, 3, 4, 5 (two occasions) and 6 November 2020 (5 occasions). Mr Wiseman noted:

5 *'I did not check each day in full so there may have been other occasions which are not listed. It is clear in footage that he uses it in full view of other employees in the finishing's area.'*

20. Mr Wiseman suspended the claimant on 6 November 2020 as he was leaving work at the end of the day.

10 21. Following the claimant's suspension Mr Wiseman decided to review earlier CCTV footage of the workshop. It is unclear which dates he viewed but he noted that on 24 August and 2 September 2020 there was one further instance on each day of apparent vaping by the claimant.

22. Mr Wiseman telephoned the claimant on 9 November 2020 to discuss his
15 apparent use of a vape at work. He prepared a note of the discussion which is entitled 'Investigation Meeting' [59]. The note states that the conversation began at 13:39 and ended on 13:51. The claimant did not appreciate that the conversation was part of a disciplinary investigation in any formal sense. The note is accepted as a generally accurate summary.

20 23. In the discussion the claimant accepted he had used a vape, although said he did not activate it, but rather just put it in his mouth through force of habit. Mr Wiseman asked if the claimant used the external smoke shelter, which the claimant confirmed he did, but only before the beginning of the working day. Mr Wiseman then asked the claimant if he knew vaping on the factory floor
25 was against health and safety rules. The claimant replied that he knew it went against company policy.

24. The claimant sent Mr Wiseman a text message during the evening of 9 November 2020. It was not reproduced but the essence was that the claimant

divulged that he had split from his long-time partner and had become more dependent on the vape as a coping device.

25. Mr Wiseman did not reply by text but telephoned the claimant in the afternoon of the following day, 10 November 2020. The claimant said he immediately regretted sending the text. He said that he was sure that the vape was switched off when he had used it on the factory floor, as it required a button to be pressed 5 times to switch it off, implying that it could not be left on by accident. Mr Wiseman replied that on at least one occasion on 5 November 2020 there was smoke visible coming from the device. The claimant stated that he didn't want any process to follow to be humiliating, and asked how long it would take. Mr Wiseman undertook to clarify that the following day and call the claimant again. The call ended. Mr Wiseman again made a note which is accepted to be an accurate record [60].

26. On 11 November 2020 Mr Wiseman called the claimant to say that a disciplinary hearing was being arranged for Friday 13 November 2020 at 8.30am. The claimant confirmed he would attend [61].

27. Mr Wiseman emailed an invitation letter to the claimant [62]. The hearing was to be chaired by Trevor Norval, the manager of the respondent's Inverurie factory. The allegation was phrased as follows:

> ***'Purpose of the hearing:*** *to discuss the report that you were seen using a Vape/e-cigarette in the Cumbernauld factory on 6th November 2020 in contravention of Saint Gobain Health and Safety regulations.*
>
> *The nature of this incident is such that it may be considered as gross misconduct and as such I must advise you that a possible outcome of the hearing could be dismissal.*
>
> *Further details of the company's disciplinary procedure including possible outcomes of the disciplinary hearing are contained in the Employment Handbook.*

Disciplinary hearing - 13 November 2020

28. The disciplinary hearing proceeded on 13 November 2020. The claimant opted not to bring a companion. A Mr Stuart Randall attended to take minutes which were produced [63-66].

29. The hearing took place remotely using Microsoft Teams given the physical distance between the individuals involved, and also as national restrictions on travel applied as a result of the prevalence of the Covid-19 virus. Mr Norval had been nominated as he was physically removed from the Cumbernauld premises and considered to be more impartial as a result.

30. There were some connection difficulties which were largely alleviated when Mr Randall came to join Mr Norval in the same room rather than use a separate connection from a different room. Mr Randall wore a face mask which was visible to the claimant on screen. He had drawn on the mask so that it resembled a smile. The claimant did not comment on that at the time but raised it in his evidence before the tribunal.

31. The disciplinary allegation was confirmed to be the use of a vape at 15:56 on 6 November 2020, being the occasion when the vape appeared to be activated, emitting smoke or vapour.

32. Mr Norval read through Mr Wiseman's investigations notes and asked the claimant if he wished to comment or add anything. The claimant explained what he had said to Mr Wiseman in his text message about separating from his partner and using the vape to help cope. He said he had become dependent on the vape. He said his nerves were shot and was finding times hard.

33. The claimant was asked about changing his position in relation to use of the vape, in that he initially had said he had it switched it off when he put it to his mouth, but then conceded that the footage showed it had been activated. He said he had never used it in communal areas, and that *'When someone challenges you for a disciplinary you are not thinking straight.'*

34. Mr Norval asked the claimant if he was aware that it was prohibited to use a vape in the factory. The claimant said there were no notices and it was *'only word of mouth'*, but that he was aware.

35. When it was put to him that he may be rendering his and his colleagues' working environment unsafe the claimant queried how he could be doing so. Mr Norval said that vaping devices were a fire hazard. The claimant said he didn't know that.

36. Mr Norval went on to say that the claimant was using his vape next to the CNC machine – a piece of equipment used for shaping wooden blocks into items such as door frames by carving away sections. The operation of the machine generates wood shavings and sawdust. He said that he was surprised the claimant could consider it acceptable to use the vape in the factory at all, let alone next to a machine or in an area where there could be sawdust or shavings. He asked the claimant whether this was acceptable and the claimant conceded that it was *'probably not'*. He referred to other employees listening to music while working or dropping chewing gum on the floor as other potential safety issues. When asked if he realised the seriousness of his actions he replied *'Yes'*.

37. Mr Norval asked the claimant if he wished to raise any mitigating factors, and he referred back to what he had said before about splitting from his partner and relying more on the vape to cope.

38. The meeting to this point had taken just over an hour. Mr Norval adjourned to make a decision. It is not noted how long he took but he reconvened the meeting and confirmed that he had decided to dismiss the claimant with immediate effect on grounds of gross misconduct. He said that the decision could be appealed, and a letter would follow confirming everything. In response the claimant stated that he had been told during a daily briefing to ignore the Employee Handbook, and referred to his 17 years of service. The meeting ended.

39. A letter also dated 13 November 2020 was sent to the claimant confirming his dismissal [67]. The reason for dismissal was stated as follows:

> *'As discussed with you the reason for this decision is due to your behaviour on 6th November 2020 when you carried out an unsafe act by using a Vape in the factory leading to an unsafe work environment.'*

40. The claimant was given the option to appeal within 7 days to Liz Watson, the respondent's HR Manager.

41. As stated in his evidence before the tribunal, Mr Norval could not trust the claimant to refrain from vaping again in the factory had he been given a lesser sanction and allowed to continue in his role. This was founded largely on the claimant's perceived lack of candour in what he had done and the way he changed his account in relation to whether he had used the vape at work and whether he had done so consciously.

42. Mr Norval was also conscious of the effect that imposing a lower sanction might have on others. He thought that the message in that case would be that the offence was not serious, when in fact it was.

Appeal

43. The claimant instructed his solicitor to help in relation to his appeal and the solicitor wrote to the respondent on 25 November 2020 to set out the grounds on which an appeal was being made [68]. Those were that (i) there was no verbal warning, (ii) there was no written warning and (iii) there was no final written warning.

44. The letter also stated that the specific act of vaping was not listed as an example of gross misconduct within the respondent's disciplinary policy and procedures, although it was recognised that the list of examples given there was not exhaustive.

45. The letter went on to say that the claimant's dismissal was believed to be unfair as the claimant's conduct was not sufficient to constitute misconduct and *'The procedure was not followed'*.

46. Ms Watson replied to the solicitor's letter to acknowledge it, confirming that the claimant would not be permitted to have a solicitor present in any meeting as the process was an internal one. The contents of the letter were however accepted as the claimant's basis of appeal and a hearing was arranged.

47. Ms Watson wrote to the claimant on 27 November 2020 to invite him to an appeal hearing on 2 December 2020 [70]. The hearing was to be chaired by Tony Campbell, Operations Director. It was clarified that the claimant could be accompanied by a colleague or trade union representative.

48. At the appeal hearing the claimant was accompanied by Colin Scott and a Lewis Scott attended to take notes which were later produced and are found to be generally accurate as a summary of the discussion [73-80].

49. The claimant confirmed that he did not consider his actions to amount to gross misconduct. He said that there were no signs to state that vaping was forbidden. There was discussion about the claimant initially denying using the vape, then admitting he did after it was raised that there was footage to show this. The claimant acknowledged his position had changed but would not go so far as to agree he had initially lied. He said by way of clarification that he could see he was facing losing his job at the age of 64 and would find it difficult to gain further employment. The implication was that he had said what he felt was needed under pressure to protect his job.

50. The claimant returned to his argument that the respondent's decision to dismiss him was *'over the top'* and that there was nothing in the Employee Handbook to alert him to the possibility of his conduct being treated in that way.

51. Mr Campbell stated that vaping was classed as smoking. The claimant disagreed, albeit on the basis of the difference in impact on health rather than in relation to any immediate workplace risk which might be created.

52. The claimant was asked whether he was aware of other employees being dismissed for smoking on the premises. He confirmed he was, but said that this was in relation to cigarettes and not vaping.

53. There was also discussion about the quality of the disciplinary hearing which had been held virtually, in a technical sense. The claimant raised that he had experienced difficulty with his connection and felt that his opportunity to put across his case had been adversely affected. Mr Campbell agreed to look into it. The hearing was brought to an end.

54. Mr Campbell confirmed his decision in a letter dated 11 December 2020 [71-72]. He noted that the claimant didn't believe vaping in the factory was misconduct or a dismissible offence, but also that he had acknowledged in the original disciplinary hearing that vaping was a serious matter and could lead to him losing his job.

55. Mr Campbell also referred to the fact that the claimant had seemingly tried to conceal his vape use until proof was put to him. This suggested to him that the claimant was aware of the seriousness of his conduct.

56. The letter also stated that Mr Campbell had looked into issues relating to the quality of the Teams facility which had been used for the disciplinary hearing, but was satisfied that the claimant had adequate opportunity to understand the case against him and put forward his own.

57. As a result, Mr Campbell concluded that the original decision to dismiss the claimant on 13 November 2020 should stand. He confirmed that no further right of appeal was available.

DISCUSSION AND CONCLUSIONS

General reasonableness of the respondent's process

58. The parties appeared to agree that the claimant had been dismissed because of his conduct, but disagree over whether the requirements of section 98(4) ERA had been satisfied. In any event it is found that conduct was the reason for the claimant's dismissal. That is evident from all the documents in the process, particularly the disciplinary hearing and appeal outcome letters. There was no material evidence of the respondent having another reason and the claimant did not suggest an ulterior motive.

59. In assessing the overall reasonableness of an employer's actions in such cases ***British Home Stores Ltd v Burchell [1978] IRLR 379*** will apply. That decision requires three things to be established before a conduct dismissal can be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

60. There appears to be little doubt that Mr Norval, as disciplinary hearer and the person who decided to dismiss the claimant, genuinely considered the claimant was guilty of misconduct. His outcome letter of 13 November 2020 makes this clear. He concluded that by using an e-cigarette on the factory floor, and in particular near to the CNC machine, the claimant had knowingly breached a workplace rule maintained by the respondent and created a safety risk to himself and others in the form of potential ignition of wood shavings or sawdust particles. He also considered that the claimant had recognised he had broken this rule when asked about it, and had denied what he had done until shown the visual evidence.

61. It is next necessary to consider whether the respondent had reasonable grounds for holding the belief that the claimant was guilty of misconduct. Looking at whether there was evidence of the misconduct which Mr Norval had found to have occurred, there was CCTV footage which appeared to show the claimant's vape emitting smoke and this was not disputed by the claimant. He ultimately admitted that he had used the vape both to Mr Wiseman and to Mr Norval himself. He also admitted that he knew there was a rule against using a vape, albeit one which had been communicated verbally.

62. The third limb of ***Burchell*** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to uncover every metaphorical stone, but no obviously relevant line of enquiry should be omitted.

63. Considering again the disciplinary allegation raised, the evidence gathered and the claimant's response, it is found that the respondent's investigation met the required legal standard. As emphasised in ***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** the question is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have dealt with any particular aspect differently. When considering the adequacy of an employer's investigation, a relevant aspect will be the degree to which the potentially offending actions or behaviour are contested or admitted by the accused employee. In this case there was video evidence of the conduct which the respondent based its decision on, and the claimant admitted he acted as the footage suggested. There were no obvious further lines of enquiry to follow.

The band of reasonable responses

64. In addition to the ***Burchell*** test, a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.***

65. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would only issue a warning.

66. It is also important that it is the assessment of the employer which must be evaluated. Whether an employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer against the above standard.

How the employee faced with the disciplinary allegations responds to them may also be relevant.

67. Mindful of the above approach which a tribunal must take in dealing with the question of reasonableness, it is found that dismissal of the claimant was within the band of reasonable responses open to the respondent in these circumstances. In particular, whilst one might have some sympathy with the claimant who was dismissed for essentially a single rule breach after 17 years of service where no harm was caused, the respondent was also entitled to consider (as it did) the significant potential safety risk his conduct created and also conclude that there was too great a likelihood that he would repeat his transgression. This was informed particularly by the claimant conceding he was essentially unable to prevent himself from using the vape, and the way his account of his actions had changed as he was faced with more evidence.

68. An issue of contention between the parties in the tribunal hearing was whether the sign which was displayed in the canteen area had been put up before or after November 2020. It is found on balance that it had already been put up by that time based on the evidence of Mr Norval which was clearer. In any event that was secondary to the point that the claimant already knew, as he ultimately admitted, that vaping was forbidden inside the building. He may not genuinely have appreciated why the respondent considered it to be such a high risk activity, but the rule existed and was one which it was reasonable to create and enforce. The risk of a fire or explosion was sufficiently real and evidence-based for the rule to be justified and carry such a strict sanction should it be breached.

69. The claimant raised in the tribunal hearing that another employee had been caught smoking or vaping within the Cumbernauld premises, albeit within an enclosed office rather than the factory floor. He did not raise this point at any time during the disciplinary process and so the only relevance it could have would be as part of a submission that the respondent had acted inconsistently in dismissing the claimant.

70. The EAT decision in ***Hadjioannou v Coral Casinos Ltd [1981] IRLR 352*** confirms that an inconsistency argument can only be well founded if one or more of the following apply:

    70.1. The respondent has treated conduct similar to that which the current employee is accused of more leniently in the past, thus creating an expectation of how it will be dealt with in later cases;

    70.2. Previous treatment of similar conduct goes so far as to suggest that conduct is not the real reason for dismissal in the current case; and/or

    70.3. Employees in 'truly parallel' circumstances are treated differently.

71. The argument put forward by the claimant fell into the third of those categories. However, insufficient evidence was provided of the circumstances of the alleged other case, which was not admitted by the respondent's witnesses in cross-examination. Therefore it is not possible to make a finding that the claimant was treated inconsistently with another employee in a way which rendered his dismissal unfair.

72. The claimant took exception to the appearance of the face mask worn by Mr Randall in the disciplinary hearing. It had what appeared to be a smile drawn on it. It is found that this is most likely to have been done some time in advance of the hearing and not deliberately in connection with it. If Mr Randall were participating from a different room from Mr Norval as had been the intention, he would not have had to wear a mask at all. It is most likely that he put the mask on as a result of having to sit at a short distance from Mr Norval so as to share a screen. He did that at short notice and would not have been anticipating doing so. In any event, it did not affect the fairness of the hearing.

73. Accordingly, whilst dismissal of the claimant may have been towards the harsher end of the band of reasonable responses, it did fall within that range on the evidence in this case.

Conclusions

74. As a result of the above findings it is not necessary to address further matters such as contributory conduct, ***Polkey,*** mitigation or other aspects or remedy.

75. According to the relevant legal tests it is determined that the claimant was not unfairly dismissed and therefore his claim is dismissed.

Employment Judge: Brian Campbell
Date of Judgment: 16 July 2021
Entered in register: 19 July 2021
and copied to parties