EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr M Pateman	**Johnson Matthey PLC**

Heard at: **Watford via Cloud Video Platform** **On: 2-3 December 2021**

Before: **Employment Judge French**

Appearances:
For the Claimant: Ms A Brown, Counsel
For the Respondent: Mr P Nainthy, Solicitor

JUDGMENT

1. The claim of unfair dismissal is well-founded and upheld.
2. The Tribunal will decide the remedy for unfair dismissal at a further hearing on a date to be fixed.

REASONS

Introduction

1. This is a claim brought by Mr Pateman on 17th June 2020 for unfair dismissal following his dismissal from the respondent company on 13th February 2020.

2. In it's grounds for resistance, dated 5th August 2020, the respondent denies liability and asserts that the reason for dismissal was one of gross misconduct for which is it was entitled to summarily dismiss the claimant.

3. The claimant was represented by Ms Brown of Counsel. The respondent was represented by Mr Nainthy, Solicitor.

The Issues

4. On asking the parties at the outset of the hearing what the issues were in the case, the respondent suggested it was one of severity of sanction on the basis that the claimant had accepted wrongdoing. However, Ms Brown on behalf of the claimant confirmed that no admissions had been made as to misconduct. It was however accepted that the reason for dismissal was one of conduct.

5. The issues were therefore as follows:
   a) Did the respondent genuinely believe that the claimant was guilty of misconduct
   b) If so, was this belief based on reasonable grounds?
   c) Had the respondent carried out such an investigation into the matter as was reasonable in the circumstances?
   d) Did the respondent carry out a reasonably fair procedure?
   e) Was it within the band of reasonable responses to dismiss the claimant rather than impose some other sanction?
   f) In that regard, had the respondent treated the claimant consistently with other employees involved in similar incidents?

Evidence

6. The Tribunal heard from the claimant and he did not call any witnesses.

7. For the respondent, the Tribunal heard from Mr Mike Carrey Operations Manager who was the dismissing officer and Ms Ruth Bamber Sector CI Manager who conducted the appeal.

8. In addition to the oral evidence the parties adduced an agreed bundle which consisted of 215 pages.

9. The Tribunal also heard oral closing submissions from both parties.

Fact finding

10. I make the following findings of fact based on the balance of probabilities. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.

11. The claimant was employed by the respondent as a Senior Operator in the respondent's Royston site. The respondent is a global leader in sustainable technologies, operating from 43 major manufacturing sites in more than 30 countries and employing approximately 15,000 people worldwide.

12. The claimant had previously been employed as a Team Leader for the respondent, however he had stepped down from this role at his own request in September 2019. At the time of his dismissal on 13th February 2020 he had been employed by the company for 19 years and had no previous disciplinary record.

The Incident

13. On the 10th January 2020, the claimant had been on shift overnight and at approximately 2.20am noticed a fault on the depositor machine that he was working on. The depositor machine is understood to be a machine on the production line. It is contained within a cage and the equipment collectively within the cage is referred to as the cell.

14. On his own evidence the claimant reached into the machine as a result of the fault in order to remove a part which he described as a catalyst. At this time, the claimant accepted that the machine was still live. The catalyst is an item being produced by the depositor machine and should have been moved to the next stage of production but did not do so as part of the fault identified by the claimant.

15. The claimant, having removed that part, noticed that a noggin, known to be a part of the scales on the depositor, had become loose and understood that to be causing the fault. He stated that as a result he opened the door on the machine which in turn released a pin, which he understood would then isolate the machine. Having taken those steps, the claimant then reached in to fix the noggin.

16. The claimant's access to the machine was via the Perspex guarding at the back of the machine for which he stated it was common practice, procedure and knowledge of staff that by opening the door this would isolate the machine. He therefore believed that the machine was isolated at this time.

17. The claimant then accepts that he climbed up onto the machine in order to reach over the guarding to remove the noggin, at which point the machine turntable indexed and trapped his hand inside of the machine.

18. Two members of the respondent's maintenance team, namely Mr Tim Wright, maintenance engineer and Mr David Norris, maintenance engineer were called to release the claimant's hand from the machine and subsequently attempted to replicate the fault, namely the machine indexing when seemingly isolated by the fact that the door had been opened. Various scenarios were tested and they were unable to replicate the fault.

19. It was accepted by both parties that opening the door should have isolated the machine. The respondent's submission was therefore that the claimant could not have opened the door before reaching in. The respondent also submitted that in any event the claimant had already placed his hand into a live machine by retrieving the first part, namely the catalyst and that this in itself was dangerous.

20. I prefer the claimant's evidence on this issue for the following reasons. He accepted that he had initially reached into the machine without making an attempt to isolate it and was honest and credible in that regard. The claimant had worked for the company for a period of 19 years and was familiar with the equipment. In removing the catalyst he gave evidence that he was aware that the machine could not proceed into the next cycle with that part removed and therefore knew it was safe to take that action. He knew however, that he needed to isolate the machine before attempting to fix the noggin and as such opened the door, releasing the pin to do this. Based on his length of service and knowledge of the machines, I do not consider that he would have taken this step without opening the door which he believed would isolate the machine. I therefore find that the claimant did open the door and for unknown reasons the machine indexed in any event.

21. The respondent submitted that access of the machine via this method was not appropriate and that in order to isolate the machine properly the claimant should have gone to the front gate of the cage which surrounded the cell, which would have had the effect of isolating the whole cell. The claimant accepted that he was aware of this procedure but that he understood the actions that he took to open the door and remove the pin as an equally acceptable practice.

22. In that regard the claimant referred to a lack of training and I am referred to training records at pages 77-81 of the bundle. Those records indicate that the claimant's most recent training was in 2013. None of the training records provided apply to the particular machine being used by the claimant at that time.

23. In response to questions asked about training Ms Ruth Bamber gave evidence that to bypass the guarding, climb on a machine to reach over and failure to isolate it were so fundamental that re-training did not need to be provided. She also gave evidence that despite a lack of training records, informal training was regularly completed and there were various poster campaigns to reinforce that. The tribunal was not provided with any evidence of the same and the claimant's evidence was that the poster campaigns related to the use of personal protective equipment and not on the subject concerned in this case.

24. The Tribunal also heard evidence that during the disciplinary hearing on 12th February 2020, Mr Nigel Goodridge, Trade Union representative on behalf of the claimant raised that there was a lack of training. He also raised that practices and procedures were handed down between staff members and concerns about this had been previously raised with management. Mr Carrey expressed his concern over this. This is at page 141 of the bundle.

25. This suggests a level of complacency day to day which is also supported by the fact that after the incident, the respondent allowed the claimant to continue working despite the conduct and with no additional training or advice. I also note that a hand safety briefing document at pages 58-73 of the bundle was issued by the respondent after the incident involving the claimant.

26. In resolving the issue, I find that there was a lack of training provided to the claimant. The fact that climbing on the machine, reaching over guarding and isolation were so fundamental indicate that regular training should have been provided on this and that it would have been good practice for records to be kept of this. In addition, even if there was informal training, the tribunal was not directed to any evidence of this. In addition no evidence was provided in relation to training concerning the specific machine in use at the time.

27. This is supported by Ms Bamber's recommendations following the appeal hearing at page 167, in which she makes a number of recommendations about practices and procedures for training in the future which I see as an acknowledgement of the respondent's failings.

<u>The investigation</u>

28. Following the incident, on 13th January 2020 an investigation was carried out into the incident by Mr Andrew Gleeson which concluded the next day. As part of that investigation, the claimant, together with Mr Norris and Mr Wright were interviewed. A recommendation was subsequently made that the claimant face disciplinary action.

29. The disciplinary meeting took place on 12th February and concluded on 13th February. It was chaired by Mr Mike Carrey, decision maker. The claimant was accompanied by Mr Nigel Goodridge his local Union Representative.

30. At the disciplinary hearing it was found that the claimant had committed the following acts of gross misconduct:

a) Serious negligence in that he failed to take reasonable care of his own or others person's health and safety, and failed to co-operate with the company in fulfilling its obligations under health and safety; and

b) Serious negligence that caused loss of time or injury to occur.

31. The respondent's disciplinary policy is at pages 47-53 of the bundle and gives the examples cited in paragraph 30 above, as examples of gross misconduct which may lead to summary dismissal.

32. The claimant appealed this decision by way of email sent by Mr Goodridge at page 135 of the bundle. This related to severity of punishment, however it also indicated that further grounds would be raised in the appeal hearing.

33. The appeal hearing took place on 12th March 2020 and was chaired by Ms Ruth Bamber. The claimant was accompanied by Mr Bill Lambe trade union representative. The following grounds of appeal were raised:
a) Mitigation
b) Lack of consistency
c) Beaching Health and safety and training

34. Following the Appeal hearing Ms Bamber carried out a number of further investigatory steps to include speaking to Sean Hagger, Fastcat Operations Manager and Guillermo Sevilla, Fastcat Production Manager. She also tasked Ms Annie Wilson of Human Resources with looking into the treatment of other employees for similar acts of misconduct in terms of the consistency of treatment issues raised.

35. Ms Bamber upheld the original decision and notified the claimant by letter dated 25th March 2020 at page 172.

The Law

36. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant (within section 95(1)(a) of the 1996 Act) on 13 February 2020.

37. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

38. In this case it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

39. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

40. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in British Homes Stores Ltd v Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563).

41. Mr Nainthy and Ms Brown provided me with oral submissions on fairness within section 98(4) which I have considered and refer to where necessary in reaching my conclusions.

42. Inconsistency of punishment for misconduct may give rise to a finding of unfair dismissal, as the Court of Appeal recognised in Post Office v Fennell 1981 IRLR 221, CA. In that case Lord Justice Brandon stated 'It seems to me that the expression "equity" as there used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that [a] tribunal is entitled to say that, where that is not done, and one man is penalised much more heavily than others who have committed similar offences in the past, the

employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal.'

43. The case of Hadjioannou v Coral Casinos Ltd 1981 IRLR 352, EAT is also relevant. Here the EAT accepted the argument that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances:

a) where employees have been led by an employer to believe that certain conduct will not lead to dismissal
b) where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason
c) where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.

44. The parties also directed me to the case of Newbound v Thames Water Utilities Ltd 2015 IRLR 734, CA in which N was part of a team responsible for sewer maintenance. His work took place underground, often in hazardous conditions. Prior to being sent on a job, N had agreed with management that he would wear full breathing apparatus when inside the sewer and he signed a risk assessment form confirming this. However, on the day, with the agreement of A, the manager in charge of that particular job, N entered the sewer without breathing apparatus. When the employer became aware of this, it initiated a disciplinary investigation. The end result was that N was dismissed for gross misconduct, whereas A was given a written warning. Overturning the EAT, the Court of Appeal held that the employment tribunal had been entitled to find that this was not an appropriate case for disparity in treatment and that N's dismissal was unfair. The Court noted the tribunal's key findings: A was in overall charge of the site; he allowed N and the contractor to enter the sewer twice without breathing apparatus; A was charged with misconduct rather than gross misconduct; A was interviewed as part of the investigation before the disciplinary hearings but N was not; and A received a written warning while N was dismissed. Lord Justice Bean observed that he had 'rarely seen such an obvious case of unjustified disparity'.

Conclusions

45. I find that the respondent did have a genuine belief that the claimant had committed gross misconduct. The claimant had made admissions to removing a part from a live machine. In addition, the claimant accepted that he had accessed the noggin having opened the door on the machine, rather than accessing it through the cage door which would have isolated the entire cell. Mr Carrey's and Ms Bamber's evidence was clear about why they dismissed and this was supported in the dismissal and outcome of appeal letters.

46. However, I find that this belief was not based on reasonable grounds. Both the disciplinary outcome letter and appeal outcome letter refer to the claimant being well trained and that he should have known that the approach he adopted was not appropriate. There was no evidence before either decision maker, that the claimant was trained on safe practices for the particular machine in use. The documents relied upon by Mr Carrey related to a different machine. The most recent training document dated back some 7 years to 2013 and again relate to a different machine to the one in use. Ms Bamber suggested that she was aware of informal training however there was no evidence before her to confirm that this informal training had been delivered to the claimant and she accepted in her evidence that had it been delivered on a non working day for the claimant then he would not have received it. No records of the informal training were kept or presented to the Tribunal.

47. Neither Mr Carrey, nor Ms Bamber satisfied themselves on what the respondent did and did not teach the claimant with regards to health and safety. Ms Bamber in her evidence made numerous referrals to what she would have expected the claimant to know and to be trained on but there was no evidence of what he had been trained on. Upon the evidence, all I can conclude is that dismissal based on the claimant's level of training fell outside the band of reasonable responses.

48. The claimant emphasised during both hearings, as did Mr Goodridge that access in the manner he adopted was accepted practice and procedure and that it was passed down between colleagues as such.

49. Neither Mr Carrey, nor Ms Bamber spoke to the claimant's direct line manager Mr Hardy in that regard. Neither did they speak to any of the claimant's immediate colleagues who worked on the machines as to whether this was standard procedure at their level. This goes to the claimant's honest belief that his actions had safely isolated the machine and whether it was accepted practice and procedure in absence of formal training.

50. This is relevant to whether a fair investigation was carried out. The respondent is an extremely large company employing 15,000 people globally. They therefore had access to significant resources and I consider that a reasonable employer would have interviewed the claimants immediate line manger on whether his actions were adopted practice and procedure on the ground as raised by him. This step was within the band of reasonable responses but was not taken.

51. Ms Bamber did speak to Mr Sean Hagger and Mr Guillero Sevilla regarding health and safety and the machine use, however they were not the claimant's immediate line managers. They were senior managers and I form the opinion that their accounts were likely to have been representative of what should have been the case rather than what was actually occurring or known as safe practice.

52. In addition in relation to fairness of the investigation, at the appeal stage the claimant raised inconsistency of treatment when compared to employees that had committed similar acts of misconduct. I do not find in this case, that there has been inconsistency of treatment for the reasons outlined further below. However, on the claimant raising the point during his appeal, Ms Bamber tasked Ms Annie Wilson of Human Resources to look into the matter for her. Ms Wilson subsequently prepared a summary of her findings at page 176-177 of the bundle. Ms Bamber then based her findings on this document.

53. I do not find that the task of delegating the collation of the material to Ms Wilson to be flawed, however I consider that, as the decision maker, Ms Bamber should have reviewed this material herself based on the fact that the claimant was specifically raising inconsistency of treatment. I find that a reasonable decision maker would have reviewed this material herself.

54. For the sake of completeness, in relation to inconsistency of treatment I have regard to the case law cited above. The claimant relies on Case A in which a senior employee breached health and safety procedures by entering the cage without attaching a personal safety padlock. He did this on several occasions. He also accepted that he was aware of the training procedures and was ultimately dealt with by way of final warning. The claimant submitted that this was a comparable case and evidenced that fact that he should have been dealt with by way of a lesser sanction.

55. I do not find Case A, for which the full details appear at pages 185-199 of the bundle, are sufficiently similar to the claimants in order to support the suggestion that there has been inconsistency of treatment by the respondent. The employee in Case A had accessed the machine in the manner which the respondent says was the safe and correct manner thereby isolating the equipment fully. The employee had then however failed to close the cage with a personal safety padlock in order to prevent another from entering and re-starting the equipment. These facts are very different to the claimant's case in which he accepts that he places his hand into a live machine.

56. For those reasons I find the claimant was unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1998.

57. I was not addressed on what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have

been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in Polkey v AE Dayton Services Ltd [1987] UKHL.

58. I was also not addressed on whether the claimant, by his blameworthy or culpable conduct, caused or contributed to his dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6).

59. Both of these questions will be addressed at the remedy hearing.

Employment Judge French

14th December 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

7/1/2022

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FOR THE TRIBUNALS