**EMPLOYMENT TRIBUNALS**

Claimant: **JONASZ SKORSKI**

Respondent: **CRONIMET (GREAT BRITAIN) LIMITED**

Heard at: **Birmingham Employment Tribunal** on **5 & 6 December 2019**

Before:**Employment Judge McCluggage**

**Representation**

Claimant: In person
Respondent: Mr Swanson, Consultant

**JUDGMENT**

1) The claim of unfair dismissal is well founded and succeeds.
2) The Claimant contributed to his dismissal and his basic and compensatory awards are reduced by 50% to reflect this.
3) The Respondent is to pay the Claimant the sum of £5,949.49 in compensation.

## REASONS

### Introduction

1. By an ET1 dated 15 August 2019 the Claimant brings a claim for unfair dismissal under section 98 of the *Employment Rights Act 1996.*

2. I was provided with an agreed bundle of documents, 126 pages in length.

3. I was provided with a witness statement from the Claimant, and on behalf of the Respondent, from Mr Graham Parr (Managing Director), Mr James Jones (Yard Manager), Paul Hughes (Transport Manager), Stuart Royle (Lab Supervisor).

4. The Claimant's first language is Polish. Though he spoke some English, he preferred to use a translator. The translator assisted the Claimant throughout the hearing, including with his evidence.

5. I note that the Respondent's witness statements were entirely unsatisfactory for the purposes of this case. They had been served shortly before the hearing. The main statement, that of Graham Parr the decision-maker, was a rehash of the ET3 and was not written in his own words or anything like it. The statement read like a civil court pleading in places and cited case law. It provided little account of the decisionmaker's reasoning. Mr Parr, who was in person an impressive witness, was not well served by the witness statement. The reality was that much of the Respondent's case was heard for the first time in oral evidence. This reduced the weight which I could give such evidence and was undoubtedly prejudicial to the Respondent's case.

6. Despite very late service of the Respondent's witness statements, the Claimant was content for the hearing to proceed.

7. Though there was a passing reference to nationality issues in the ET1, there was no application by the Claimant to amend his claim to include race discrimination. As it happens, I was entirely convinced by Mr Parr's evidence that he dismissed the Claimant focused upon the alleged misconduct, whatever the merits of the dismissal.

### Facts

8. The Claimant was employed from 18 February 2008 to 5 June 2019.

9. The Respondent's business was buying, processing and selling scrap metal. This was a sophisticated operation which would sell the product onto mills for recycling. All witnesses who gave evidence were intelligent and articulate.

10. The Claimant's job title at material times was Yard Supervisor. He had initially been a Labourer and then a Work Operative.

11. Up to the events forming the subject of this case in 2019, the Claimant enjoyed a clean disciplinary record.

12. The Respondent's Disciplinary Procedures, which appeared from [58] of the bundle stated that an employee would not normally be dismissed for a first breach of discipline, except in the case of gross misconduct. The procedure divided conduct into levels of seriousness – "unsatisfactory conduct", "misconduct", "serious misconduct" and "gross misconduct". Gross misconduct was described in the procedures as being "very rare" and the examples given included the standard fare of "theft or fraud", "breach of health and safety rules that endangers the lives of, or may cause serious injury, to employees or any other person".

13. In early 2019 the Claimant was given an additional responsibility – to monitor and operate the yard's weighbridge. A previous employee tasked with the responsibility had not coped with it. Hence it was not an entirely straightforward operation.

14. Operation of the weighbridge was an important job as it monitored matters such as the speed and weight of trucks. It also performed a radiation scan for each truck entering and leaving the yard. The radiation scan was of some importance in part because of the health and safety for employees who might be in close contact with the metal being brought into the yard but also because if radioactive metal left the yard for a customer, there could be considerable commercial implications if such material was used by a customer. Mr Parr described how there might also potentially be public safety implications if a truck containing radioactive material was involved in an accident. Mr Parr described and I accepted that there was a small chance of material for example from the radiology department of a hospital ending up in scrap metal material.

15. 9 January 2019 was the Claimant's first day of work in the weighbridge.

16. He was not exclusively working in the weighbridge but had other responsibilities in addition.

17. He received some informal training from James Jones, the yard manager.

18. James Jones' witness statement said nothing whatsoever about training. He gave some oral evidence about the training provided. Whilst I thought that Mr Jones was doing his best during evidence, the lack of any documentary evidence or written witness evidence relating to the training meant that I had to be cautious about his recollection.

19. The Claimant's evidence was that there was no mention of radioactive materials during his training. In contrast, Mr Jones told me in oral evidence that he explained the procedure of scanning trucks for radiation.

20. I concluded that there was only cursory mention of the radiation scanning procedure and no focus on its importance or the potential dramatic consequences for the company if the procedure was no observed . The main focus of the fairly limited training was showing the Claimant how to enter weights and codes for the Respondent's SAP data analysis system. I was not satisfied that the training in total would have lasted for more than 30 minutes.

21. There was no written record of the training itself or even the fact it had been given. This contrasted with the certificates of training the Claimant had been provided with as to use of a scrap handler [54] and on manual handling training [55] by way of example.

22. The bundle contained [66-72] a selection of pages showing screen printouts demonstrating the process of dealing with radiation scanning. On my express enquiry it turned out that the production of this documentation post-dated the events of the case.

23. On 12 March 2019 a gamma alert was sounded in the Weighbridge office when the Claimant was working. An alarm sounded. A printout of a truck was printed. The Claimant sought advice from James Jones and Paul Hughes. They advised the Claimant based upon the print out that this was "a background error". In other words, the alarm could raise a false alarm based on levels of dust in the atmosphere and similar.

24. I concluded that both on the initial training and in discussion on 12 March 2019 there was no stress placed upon the importance of a positive radiation scan. There was no mention that failure to deal in a specific way with a radiation alarm would constitute gross misconduct. There was no mention of the potentially severe consequences to the Respondent if a radiation alarm was not responded to.

25. On 21 March 2019 the radiation alarm was triggered when the Claimant was working in the weighbridge office as a lorry drove through the weighbridge on its way into the yard. The alarm was turned off. The Claimant did not seek assistance or advice from others.

26. On 22 March 2019 the radiation alarm was again triggered when a lorry drove through the weighbridge on its way out of the yard. It is probable that this was the same lorry. Again the alarm was turned off. The Claimant did not seek assistance or advice from others. The Claimant at no stage of the disciplinary procedures disputed that he had omitted to bring these alarms to his line manager's attention.

27. During the investigation which ensued, the Respondent had viewed CCTV evidence which showed that the Claimant must have been responsible for turning off the alarm on both occasions.

28. On 1 April 2019, over a week after the incidents, the Claimant was called into an investigatory meeting. The Claimant said that he did not realise it was a Gamma alarm that had signalled. He said that he did not check the report ticket which was printed. He said that he was busy generally.

29. My assessment of this was that the Claimant probably did realise it was the Gamma alarm and that the Respondent was during the disciplinary process entitled to take the view that he knew that.

30. In the bundle was a further document titled "witness statement" dated 8 April 2019 which was unsigned which appears to contain further answers from the Claimant which I found was likely following a further investigatory meeting on 8 or 9 April 2019. This mentioned that that the Claimant had brought to Mr Jones and Mr Paul Hughes' attention a gamma alarm on another occasion and was told that the alarms were probably just caused by dust. Within this document the Claimant also complained that he had not been trained properly and had been busy.

31. On 11 April 2019 the Claimant was invited to a disciplinary hearing following the 9 April 2019 meeting. This suspended the Claimant from work on full pay. The letter noted that the Respondent's reputation had been put at risk with its major client. The disciplinary charges were that the Claimant:

    i. Was guilty of gross negligence by failing to report the gamma ray alarms which could result in serious financial loss.
    ii. "Did not make the correct judgments based on facts and training available to you"
    iii. "You did not ask the right questions required to assess and advise correctly"
    iv. "You did not apply appropriate technical knowledge… in stating that you felt as that you had not received sufficient training, you had managed to follow the full and correct procedure 8 days prior to the incident, namely on 12 March 2019"

32. A full disciplinary hearing took place on 15 April 2019. Mr Parr was the decision-maker. Another Polish employee, Tomasz Milek, attended as the Claimant's workplace friend and to assist with translation. In the meeting the Claimant emphasised how busy he was and the lack of training. He could not recollect cancelling the alarm on the days in question. On [96] of the bundle the Claimant said that no-one told him how big the problem could be if he ignored warnings for speeding or the gamma alarm. At [98] he commented that when bringing up the issue on 21 March it seemed not a big deal as it was just a background error. At [100] the Claimant was questioned about the importance of

radiation scanning and on a number of occasions he repeated that he did not appreciate the importance of the issue and had never had it explained to him. The Claimant acknowledged that he now realised how serious the gamma alarm was having had the various meetings and gone thought documents [102]. He emphasised that he was still on probation at the time and thought that people would be monitoring him.

33. Mr Parr was sent an email by Tomasz Milek on 29 April 2019 saying that the Claimant had expressed confidence in the weighbridge job prior to the relevant events.

34. The decision to dismiss was taken some 2 ½ weeks after the hearing, by letter dated 2 May 2019 [105]. The dismissal letter was formulaic and in many ways just repeated the content of the letter inviting the Claimant to the disciplinary hearing. It did not deal with the points raised by the Claimant in the hearing relating to his training and lack of knowledge.

35. Though it nowhere appeared in the documentation, in the dismissal letter or in his witness statement, Mr Parr in oral evidence explained that he considered the Claimant's conduct so serious as to amount to gross misconduct because he had deliberately cancelled the alarm and therefore it seemed he understood the process. Mr. Parr noted that he himself was relatively new to the business having joined as managing director late the previous year on 3 December 2018. Mr Parr acknowledged that he did not have a detailed knowledge of the Claimant's responsibilities or the operation of the weighbridge. Overall, he did not consider that the Claimant's tasks were complicated given the latter's experience in the industry. In answer to a question by the Claimant that he had no experience whatsoever with office-based work such as that on the weighbridge, Mr Parr said that he did not think any experience was necessary.

36. Mr Parr stated that he considered when making his decision that the Claimant had made a mistake on 21 March 2019 when the vehicle was entering and sounded the alarm and that the Claimant had panicked on 22 March when the same vehicle was leaving as he was concerned he would get found out. While this was suggested at one point during the disciplinary hearing, it is concerning that it did not appear in the decision-letter or in Mr Parr's witness statement if that was his reasoning. When asked why the matter was so serious as to justify dismissal, Mr Parr responded that if there had only been 1 incident he would have considered a final written warning but he felt the Claimant had tried to cover matters up and that changed the level of seriousness.

37. Mr Parr said that the Respondent had received a bill for £5,000 as a result of a need for anti-contamination procedures at the client's premises which received the contaminated lorry. This however was after the dismissal.

38. The Respondent company employed 31 persons over 2 premises, had a turnover of £40m and was profitable.

39. The Claimant appealed against the dismissal on 11 May 2019. The thrust of the grounds of appeal were that he had not been trained and not been told the seriousness of a radiation alert. He also submitted that given he was still in his probation period in the new job, dismissal was too harsh a sanction.

40. On 17 June 2019 there was an appeal hearing which the Claimant did not attend. This was presided over by a Mr Patrick Kiernan of Peninsula, who are on record acting for the Respondent in this litigation.

41. The Claimant only received notice of the first date set for the appeal hearing 2 hours after it was due to start. He received notice of the second appeal date on Saturday 15 June 2019. He complained in correspondence dated 16 June 2019 [108] that this was inadequate time to prepare. I was told that this letter was not received by the Respondent.

42. On 25 June 2019 the appeal was dismissed. A report was prepared by Mr Kiernan which had recommended he appeal should not succeed.

43. Since the Claimant's dismissal there has been introduced structured training in connection with the weighbridge involving written instructions, including full detail of the importance of the radiation scanning. A certificate of completion of such training was introduced.

**Law**

44. Section 98(1) of the *Employment Rights Act 1996* requires an employer to establish a potentially fair reason for a dismissal. In considering the fairness of the dismissal the tribunal is required to apply the considerations set out in section 98(4) of the *Employment Rights Act*. This entails consideration of whether the dismissal was fair or unfair having regard to the reason shown by the employer whereby the tribunal takes into account the circumstances of the case, size of the employer and equity.

45. Although the statutory test is of course overlaid with much case law where conduct is concerned, the consideration within Section 98(4) ultimately is the starting point and indeed the end point for any judgment applied to the facts found by the tribunal.

46. Following British Home Stores Ltd -v- Burchell [1978] IRLR 378, I applied the following guidelines relevant to the Respondent's case that this was a conduct dismissal: (i) whether the employer genuinely believed that the employee was guilty of the alleged

conduct; (ii) whether there was a reasonable investigation; (iii) whether the employer had reasonable grounds for that decision.

47. Following the decision of the EAT in Iceland Frozen Foods -v- Jones and the Court of Appeal's decision in Tayeh . Barchester Healthcare [2013] EWCA Civ 29, I approached those Burchell questions by considering the range of reasonable responses open to an employer in the course of an investigation and in the grounds for a decision, including as the sanction. I had to consider whether a fair procedure was followed as part of the overall question of whether the dismissal was fair.

48. There is no burden where the question of reasonableness is concerned.

49. I have reminded myself that the law obliges me to be careful not to substitute my subjective judgment for that of the employer and I was referred by the Respondent to London Ambulance Service v. Small [2009] EWCA Civ 220.

50. The Court of Appeal in Graham v Secretary of State for Work and Pensions (Jobcentre Plus) [2012] IRLR 759 has provided useful guidance on the reasonableness of a decision to dismiss once the BHS v. Burchell questions have been answered, *per* Aikens LJ:

> "36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice.''

51. A failure to provide requisite training could in some circumstances render an otherwise fair dismissal unfair. Examples of cases where the lack of proper instruction or training was considered relevant to determining that the dismissal was unfair, see Davison v Kent

Meters Ltd [1975] IRLR 145 and Burrows v Ace Caravan Co (Hull) Ltd [1972] IRLR 4, the latter being a case of inadequate training being provided to a promoted employee.

52. There are issues of contributory fault raised within these proceedings. Insofar as the dismissal was unfair, I was referred to the contents of section 122 and 123 of the Employment Rights Act 1996. I had to consider the extent to which conduct has contributed to the dismissal, not to its unfairness. I am required to analyse whether the employee's conduct played any part at all in the history of events leading to dismissal: Robert Whiting Designs Limited v. Lamb [1978] ICR 89.

**Analysis and Conclusions**

*Unfair Dismissal*

53. I was satisfied that Mr Parr was a truthful witness and dismissed the Claimant for conduct reasons.

54. During the hearing the Claimant made limited criticism made of the Respondent's investigation. I considered that there was little evidence of investigation made into the Claimant's role and responsibilities or the level of training he received despite his raising this as an issue on numerous occasions during the process. However, what investigation there was in my judgment just exceeded the threshold of what was required of a reasonable employer in this case.

55. In my view there were reasonable grounds on which a reasonable employer could find the Claimant guilty of the misconduct given there was clear evidence that the gamma alarms had sounded and that the Claimant was in charge at the relevant time and had not alerted his line manager as he should. The earlier event on 12 March did indicate that the Claimant knew he should take some action in such circumstances. However, I found that a reasonable employer could not have concluded that the Claimant had failed to alert his employer as to the second alarm as a means of trying to "cover up" the fact that the alarm had sounded the day before. I also heeded that this was not the way in which the disciplinary charge was put. There was no material before Mr Parr that the Claimant had any basis for thinking there would be an effective "cover up" by letting the truck out of the premises without alerting his line manager.

56. I had difficulty with the Respondent's reasoning as to why dismissal was justified. Mr Parr did not wrestle in his decision-making process with the dichotomy between on one hand the seriousness placed upon an employee's omission with radiation scanning and on the other the lack of proper training and instruction to the employee as to the process. Radiation scanning was seemingly of significant importance such that it could potentially

cause substantial commercial damage to the company. yet the task was left to a probationary employee doing unfamiliar work who had received no documented training on the task at all. Mr Parr said nothing as to the implication of there being no evidence that the Claimant had been instructed or trained on the *importance* of the radiation issue.

57. In my view there was insufficient material before the decision-maker to show that the Claimant's conduct could be evaluated (equivalent to theft or dishonesty) as a matter of gross misconduct. One could easily see how a busy and barely trained employee whose previous experience of the alarms was that they were false alerts could think the most efficient thing to do was simply to cancel the alarm and not bother his line manager.

58. The fact that the Claimant was a long-standing employee with a good disciplinary record should have encouraged a reasonable employer to look harder at itself as to how this had happened rather than dismissing such an employee for a first instance of misconduct. It seemed to me that there was a strong scent of scapegoating over the dismissal.

59. Thus I concluded that the decision to dismiss lay outside of the band of responses open to a reasonable employer in the overall circumstances of the case. A reasonable employer would have given a warning rather than dismissed the Claimant for this first disciplinary offence given the lack of training.

*Contributory fault*

60. Where contributory fault is concerned, I accepted that the Claimant should have alerted his line manager as to the radiation alarm. It was a conduct issue, though with substantial mitigation.

61. The fact of the Claimant being an experienced employee cuts two ways. On one hand the Respondent might have viewed his default more leniently; on the other the Claimant's experience might have led to a more confidence in approaching his line manager over the alarms.

62. I concluded that the Claimant contributed to his dismissal and that it was equitable and just to reduce the Claimant's award by 50%. This was not a trivial error by the Claimant but neither did it deserve dismissal.

*Remedy*

63. The Claimant seeks compensation only as his remedy. His date of birth is 11 February 1985.

64. A Schedule of Loss was prepared by the Claimant to which there was no Counter-Schedule.

65. The Respondent did not challenge the Claimant's account of his earnings or his arithmetic.

66. A week's pay for the Claimant was £440.86. He had 11 years complete year of employment amounting to £4,849.46 at one week's pay for each full year for employment.

67. Where the compensatory award was concerned, the appropriate calculation was:

    a. Loss of earnings for 17 weeks at £357.79 net per week until the Claimant obtained new employment on 2 September 2019 amounting to £6,082.43.
    b. Unpaid holiday pay at £667.08.
    c. Loss of statutory rights at £300.

68. The total of the basic and compensatory award is £11,898.97 which when reduced by 50% to reflect contributory fault amounts to £5,949.49.

**Employment Judge McCluggage**

Date: 30 December 2019