EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4110372/2021

Hearing held in Glasgow on 22-24 February 2022

Employment Judge D Hoey

Mr Barr	**Claimant** **Represented by:** **Himself**
Royal Mail Group	**Respondent** **Represented by:** **Ms Moscardini** **(Solicitor)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Judgment having been sent to the parties on 25 February 2022 following oral judgment issued on 24 February 2022 dismissing the claims and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. This was a claim for unfair dismissal and wrongful dismissed raised in a claim form presented on 8 July 2021. The hearing lasted 3 days and covered liability and remedy. As the claimant was not legally represented I explained the rules to him both with regard to the claims being made and the procedure followed and how evidence is led and a decision reached. The claimant

confirmed that he had understood the position and he was able to set out his case in detail.

2. I explained to the parties the importance of the overriding objective, of the need to ensure that all decisions area just and fair and that the parties work together. The parties worked together to achieve the overriding objective.

3. The parties had agreed productions running to 320 pages with a supplementary bundle of 16 pages. That included a joint statement of agreed facts. Remedy had been agreed in the event of a successful claim (subject to the period of loss and the issue of shares). The claimant sought reinstatement which failing reengagement. The respondent argued that it would not be practicable to reinstate or re-engage the claimant if the claimant was successful.

4. At the start of the hearing we agreed a timetable in respect of evidence and the Tribunal heard from Mr Turner (the disciplinary officer), Mr Payne (fact finder), Mr Brown (appeal officer) and the claimant.

Issues

5. It was conceded that the claimant was dismissed and so the first issue was whether the reason for his dismissal was misconduct, a potentially fair reason.

6. If the reason was misconduct, the next issue was whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal would have to decide whether:

    1. there were reasonable grounds for that belief;

    2. at the time the belief was formed the respondent had carried out a reasonable investigation;

    3. the respondent otherwise acted in a procedurally fair manner;

    4. dismissal was within the range of reasonable responses.

7. Given the claimant wished to be reinstated to his previous employment which failing re-engaged, if the claim was upheld, the Tribunal would consider whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just and equitable.

8. With regard to re-engagement, the Tribunal would consider whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just and equitable.

9. If there is a compensatory award, how much should it be?

10. What basic award is payable to the claimant, if any?

11. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

12. The claimant was summarily dismissed and claimed notice pay. The issue is whether the claimant did something so serious that the respondent was entitled to dismiss without notice.

Facts

13. I was able to make the following findings of fact from the evidence presented to the Tribunal orally and in writing. I only make the findings that are necessary to determine the issues to be determined.

Background

14. The respondent is responsible (amongst other things) for the delivery of letters throughout the country**.** The claimant was employed as a postman, technically entitled “operational postal grade” based at the Thornhill Delivery Office. He had very lengthy service having begun as a casual worker in 1994 and then been engaged as an employee from 5 October 1998 until his employment ended on 11 March 2021.

15. The claimant was engaged via a contract of employment, which had not been provided to the Tribunal. There were also a large number of policy and related documents.

Policy documents

16. The conduct policy set out the procedure to be followed in cases of misconduct. This included the need for a fair investigation, disciplinary hearing and right of appeal.

17. With regard to conduct which could lead to summary dismissal, the policy stated that "some types of behaviour are so serious and so unacceptable, if proved, as to warrant dismissal without notice (summary dismissal) or pay in lieu of notice. It is not possible to construct a definitive list of what constitutes gross misconduct and in any event all cases will be dealt with on their merits." Examples were then given of behaviour which in certain circumstances could be justified to be gross misconduct. The examples included deliberate disregard of health, safety and security procedures or instructions.

18. There were business standards which staff required to follow and there was a Safe Driving Code of Practice which required all staff to ensure their own and others' safety.

19. Health and safety was of the highest importance to the respondent and the health and safety policy made it clear that all staff had a responsibility for their own and others' safety.

20. As the respondent had one of the largest vehicle fleets in the country, the respondent had sought to ensure that the driving practices of all drivers was safe. There had been a number of accidents and in particular incidents where vehicles had not been left secure when the driver had left the vehicle, called a "rollback". To minimise the risk of such incidents recurring the respondent introduced a policy called "HIT" – handbrake on, in gear/ignition off and turn wheels. This was to eliminate or reduce the risk of rollback and injury/damage.

21. This policy was well known throughout the respondent and was regularly communicated to staff. This was done orally and in writing. Training briefs were given to staff on a very regular basis. One such brief took place on 20 May 2020 at which the claimant was present. It was made clear to all staff that a failure to follow that policy could lead to disciplinary action.

22. The claimant understood the seriousness of this policy and of the risk of failing to comply with the policy. He had previously breached the policy in 2016. His dismissal was considered at that time but due to his work record, the sanction was "suspended dismissal" for a period of 2 years. The importance of following the policy was clear to the claimant and he understood that dismissal was an option in the event of failure to follow that process.

Investigation

23. Mr Simmons, a senior manager, had been appointed to investigate an incident that occurred on 7 October 2020 which involved the claimant. He spoke with the claimant, undertook a visit to the locus (a private dwelling estate) and made enquiries. He prepared a detailed report setting out his findings.

24. The report summary noted that at around 1430 on 7 October 2020 the claimant had been delivering mail to a private estate. The claimant had left the vehicle leaving the keys in the ignition and the engine running. Upon returning to the vehicle he realised he had another letter to deliver and left the vehicle again with the keys in the ignition and engine running. Upon leaving the vehicle he saw that the vehicle had begun to roll away and he attempted to stop it, thereby sustaining a minor injury as he fell. The vehicle had rolled around 20 metres in a curved trajectory. Minor damage was sustained to a plant pot as the vehicle stopped.

25. The report noted that the vehicle had passed its inspection and the brakes (including the handbrake) were working. Vehicle data suggested that the ignition was on at the time of the incident.

26. The report summarised a number of road traffic incidents in which the claimant had been involved, including a previous roll back incident in 2016.

27. The report noted that the claimant had arthritis and an irregular heart beat which had been diagnosed after the incident.

28. At the time of the incident the claimant was around 95% complete of his shift, having started work at 0645. The claimant had not followed the HIT process.

29. Following the incident the claimant had been absent by reason of illness from work (and remained absent until his last day of service on 11 March 2021).

Fact finding

30. On 11 November 2020 the claimant was invited to a fact finding interview with Mr Payne, a manager with around 15 year's service. The claimant attended with his trade union representative. The claimant explained that at the time of the incident he had felt fatigued. It had been a very busy few days. He said he could not remember if he had applied the handbrake or whether he had left the vehicle in gear. He said he had fallen as he had seen the vehicle begun to roll back and tried to stop it. The claimant explained he had seen his GP prior to the day in question and nothing had been identified health wise. He thought it may simply have been old age but he had been feeling breathless. He could not recall whether he had advised his manager as to his health concern at the time. He was awaiting an appointment with a radiologist.

Disciplinary hearing

31. The matter was remitted to a disciplinary hearing with the claimant being invited to the hearing on 3 December 2020. The hearing was to be chaired by Mr Turner, a manager with 37 year's service. Mr Turner had worked with the claimant for a period in excess of 20 years and had a good working relationship with the claimant. Mr Turner knew the claimant was a conscientious worker and he was extremely positive about the claimant and his work ethic.

32. The allegation facing the claimant was that on 7 October 2020 the claimant had failed to follow the relevant business standard and left the engine running

which resulted in a rollaway incident. The claimant was given a copy of all the investigation paperwork.

33. The claimant attended the hearing with his trade union representative. The hearing lasted around 75 minutes. At the hearing the claimant said he could not remember whether or not he had applied the handbrake on the day in question. He explained at the hearing that it was his normal practice to stall the engine (to switch the engine off) but he could not recall if he had done this on the day in question.

34. He said he had previously felt very fit but was feeling breathless at the time but could not remember if he had told his manager about his health concerns. Mr Turner acquired the claimant's consent to seek an occupational health report with regard to the health concerns.

35. The claimant's trade union representative asked Mr Turner about interventions that had previously been put in place in respect of the claimant, including following the previous rollaway incident for which the claimant was responsible in 2016. The claimant had previously been in control of a vehicle which had rolled back. He had left the vehicle on that occasion in an unsafe state (having failed to follow the HIT process). The respondent chose to issue a penalty short of dismissal given the claimant's work ethic and approach and he was given a "suspended dismissal" sanction. Extensive training was given to the claimant and he was made aware of the seriousness of failure to comply with the HIT policy.

Occupational health reports

36. On 19 February 2021 an occupational health report was provided to the respondent confirming that the claimant had begun to experience shortness of breath in January 2020 which had developed into tiredness and fatigue with occasional dizziness.

37. On 17 February 2021 a further report was obtained which noted the claimant had been referred to a cardiologist in December 2020. Psychological symptoms had lasted for around 19 months due to personal stressors in the

claimant's life and due to stress and anxiety. The claimant had atrial fibrillation. The occupational health physician did not believe the claimant was fit to drive.

38. The claimant's condition was manageable and would settle in time. The occupational health physician believed the condition did amount to a disability in terms of the Equality Act 2010 as a result of depression/anxiety and atrial fibrillation.

39. In response to being asked whether the condition contributed to the behaviour in question, the occupational health physician stated that "fatigue and shortness of breath can be a contributing factor" as could the psychological symptoms. It ought to improve in time.

Outcome - dismissal

40. Mr Turner considered the information the claimant had provided together with the investigation material and occupational health reports. He invited the claimant to a meeting on 11 March 2021. At the meeting Mr Turner set out his conclusion and reasons which was that he believed the claimant had been guilty of gross misconduct.

41. He concluded the claimant had failed to follow the HIT process and had left his vehicle with the engine running. He had turned his wheels.

42. Mr Turner considered the claimant's health conditions. He was concerned that the claimant had not reported his health concerns to his manager. While his health condition was likely to be present on the day in question, Mr Turner concluded that it had not affected the claimant's ability to make decisions. He had been able to attend his work and carry out his duties and was able to drive. No concerns had been raised at the time.

43. The claimant confirmed that his GP advised him that he was able to drive, albeit not for lengthy periods of time (and not as part of his job).

44. Mr Turner took account of all the circumstances, particularly the claimant's lengthy service. He concluded that the claimant had known about the

seriousness of the policy, not least given his knowledge of the position following the rollaway incident in 2016. Mr Turner was not confident the claimant would comply with the relevant policies in the future if he were retained in employment.

45. He concluded that the claimant should be summarily dismissed.

46. Mr Turner did consider whether there were any non driving roles available but there was none in the claimant's then work location. There was none in Dumfries, which Mr Turner noted was around 16 miles from the claimant's then current location and given the occupational health physician had indicated the claimant should not be driving, driving such a distance may have caused issues.

Appeal against dismissal

47. The claimant appealed against his dismissal and his union representative set out his grounds of appeal. He provided a timeline and points offered in mitigation. The appeal submission noted the claimant had been suffering from a health condition (the details of which were unknown to him at the time) and that the chance of recurrence was low. The claimant had been very busy on the day in question having worked hard the preceding days. The location of the incident should also be taken into account. The submission concluded asking for the dismissal to be rescinded and a penalty short of dismissal, such as suspended dismissal of over a year substituted.

Appeal hearing

48. The appeal hearing was conducted by Mr Brown, a very experienced independent case worker with 35 year's service. The appeal meeting took place on 6 April 2021 and lasted around an hour. The appeal meeting amounted to a full rehearing of the matter, providing the claimant with the opportunity to present any evidence in support of his position. Mr Brown reconsidered the issue in full and the appeal hearing amounted to a full rehearing of the case.

49. The claimant attended the appeal meeting with his union representative and set out his position.

50. Mr Brown considered each of the points the claimant raised together with all the information before the disciplinary hearing. He issued a detailed outcome letter which contained a very detailed and thorough analysis of the facts and a considered response in respect of each point the claimant had raised.

51. Following the hearing, Mr Brown had interviewed Mr Turner to satisfy himself that the full circumstances had been taken into account. The claimant had received a copy of the notes following that meeting and was given the chance to comment upon them.

Appeal dismissed

52. The claimant's appeal was not upheld. The claimant's medical situation was considered in detail and Mr Brown concluded that the medical condition had not contributed to the incident in question from the information before the respondent. From the material before the respondent it was decided that the claimant had not ensured the handbrake had been applied sufficiently before leaving the vehicle. Mr Brown concluded that the claimant had been able to make conscious and rational choices on the day in question such that his health condition had not materially impacted his approach to driving when the incident occurred.

53. Mr Brown noted that immediately following the incident on the day in question the claimant had made number of calls to the office to secure the mail. Mr Brown was satisfied that the claimant's state of mind was sufficient to make rational decisions that day. The medical conditions, on the facts of this case, had not caused or contributed to the claimant's misconduct.

54. He concluded that the claimant had already been given training and support to ensure no repetition of the conduct in question. He took into account the fact that the claimant had very lengthy service and had been a conscientious worker.

55. The environment and impact of the incident was also considered and the fact limited damage had been caused but Mr Brown concluded the failure to follow the process left the vehicle in a very unsafe position thereby creating potential for serious injury and damage.

56. Mr Brown was satisfied that Mr Turner had fully considered the psychological issues facing the claimant and that the full facts had been considered, which he had done himself.

57. Mr Brown noted that the claimant had candidly disclosed his practice of stalling the vehicle, to cut the engine out. That practice itself was not one which had been condoned by the respondent and created its own risks. The claimant had shown an inability to follow the respondent's procedures and he had failed to follow a safe approach.

58. All the context was considered, including the claimant's age, how busy he had been at the time, his ability to concentrate and the fact the claimant was a very good worker.

59. Mr Brown shared Mr Turner's lack of confidence that the claimant would be able to follow the respondent's practices consistently if he were retained.

60. The claimant was found to have committed gross misconduct, With regard to penalty, Mr Brown considered that summary dismissal was appropriate. He had lost all trust and confidence in the claimant in his ability to follow appropriate policies and was concerned that could extend beyond driving policies.

61. While other roles were considered, there was no suitable vacancy.

Post dismissal actions

62. Following his dismissal the claimant was unfit for work. He had intended to retire within a year of his dismissal**.** He attended 2 interviews for work but had not secured alternative employment.

63. The claimant received state benefits, in the form of job seeker's allowance.

64. The claimant's role had been filled by the respondent prior to receipt of the ET1 and there were no suitable vacancies in existence during the disciplinary and appeal process.

Findings in respect of breach of contract

65. With regard to the breach of contract claim, the Tribunal makes the following findings of fact from the evidence before it.

66. The claimant knew the rules to be followed with regard to parking his vehicle when at work. On the day in question the claimant had failed to follow the procedure. He left his vehicle with the ignition on and engine running. The handbrake had not been properly applied and he had turned the wheels. It had been parked on a slight gradient and the vehicle moved some 20 metres before coming to a halt having followed a curved trajectory.

67. The claimant was guilty of conduct that fundamentally breached the contract of employment. Parking vehicles and following the correct policy was of paramount importance given the job the claimant did and the risks that could be realised when in control of vehicles.

68. The reason why the claimant had not followed the policy on the day in question was not due to any medical impairment but due to the claimant's inattention. He was capable of making rational decisions.

69. The claimant's conduct on the day in question was of sufficient seriousness to justify his dismissal without notice.

Observations on the evidence

70. Each of the witnesses were candid and provided the Tribunal with a truthful account of the position. There were few, if any, factual disputes arising and the issue was essentially the severity of the sanction, a matter the claimant conceded was within the respondent's discretion.

Law

71. This is a claim for unfair dismissal. The Tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within section 98(1) and (2) of the Employment Rights Act 1996 and whether it had a genuine belief in that reason. One of the potentially fair reasons is for matters relating to "conduct". The burden of proof here rests on the respondent who must persuade the Tribunal that it had a genuine belief that the employee committed the relevant misconduct (or that the reason was some other substantial reason) and that belief was the reason for dismissal.

72. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98(2), the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98(4).

73. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer): "*Depends on whether in the circumstances (including the size and administrative rescores 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."*

74. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably; ***Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden*** *2000 ICR 1283.* It should be recognised that different employers may reasonably react in different ways and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.

75. Mr Justice Browne-Wilkinson in his judgement in ***Iceland Frozen Foods Ltd v Jones*** *ICR 17*, in the Employment Appeal Tribunal, summarised the law. The approach the Tribunal must adopt is as follows:

> "*The starting out should always be the words of section 98(4) themselves. In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair*
>
> *In judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt*
>
> *In many (though not all) cases there is a band of reasonable responses to the employee's conduct which in which the employer acting reasonably may take one view, another quite reasonably take another. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."*

76. In terms of procedural fairness, the (then) *House of Lords in* ***Polkey v AE Dayton Services Ltd 1988 ICR 142*** firmly establishes that procedural fairness is highly relevant to the reasonableness test under section 98(4).

77. Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing: "in the case of misconduct, the employer will normally not act reasonably unless he

investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

78. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the Employment Appeal Tribunal in **British Home Stores v Burchell** 1980 ICR 303 the employer must show:

    1. It believed the employee guilty of misconduct

    2. It had in mind reasonable grounds upon which to sustain that belief

    3. At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity and the substantial merits of the case.

79. In ***Ilea v Gravett 1988 IRLR 487*** the Employment Appeal Tribunal considered the Burchill principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance of probabilities, that the employee was guilty of misconduct and that in all the circumstances based upon the knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety of facts that can arise. At one extreme there will be cases where the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will increase. It may be that after hearing the employee further investigation ought

reasonably to be made. The question is whether a reasonable employer could have reached the conclusion on the available relevant evidence.

80. In that case the Employment Appeal Tribunal upheld the Tribunal which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.

81. The amount of investigation needed will vary from case to case. In ***RSPB v Croucher*** *1984 IRLR 425* the Employment Appeal Tribunal held that where dishonest conduct is admitted there is very little by way of investigation needed since there is little doubt as to whether or not the misconduct occurred.

82. A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable employer would do, applying the statutory test, to ensure the employer had reasonable grounds to sustain the belief in the employee's guilt after as much investigation as was reasonable was carried out. *In* ***Ulsterbus v Henderson*** *1989 IRLR 251* the Northern Irish Court of Appeal found that a Tribunal was wrong to find that in certain circumstances a reasonable employer would carry out a quasi-judicial investigation with confrontation of witnesses and cross-examination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a "most meticulous review of all the evidence" and considered whether there was any possibility that a mistake had been made. The court emphasised that the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.

83. Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The Employment Appeal Tribunal emphasised in **Fuller v Lloyds Bank** 1991 IRLR 336 that where there is a procedural defect, the question to be answered is whether the procedure

amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where the result of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see **Sainsburys v Hitt** 2003 IRLR 23).

84. The Court in **Babapulle v Ealing** 2013 IRLR 854 emphasised that a finding of gross misconduct does not automatically justify dismissal since mitigating factors should be taken into account and the employer must act reasonably. Length of service can be taken into account (**Strouthous v London Underground** 2004 IRLR 636).

85. In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct. This includes conducting the necessary investigations, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter and allowing an appeal.

86. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process *(**West Midland v Tipton** 1986 ICR 192*). This was confirmed in ***Taylor v OCS** 2006 IRLR 613* where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and that a mere review never is). The Tribunal should consider the disciplinary process as a whole and apply the statutory test and consider the fairness of the whole disciplinary process. If there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

87. Where a claimant has been unfairly dismissed compensation is awarded by way of a basic award (calculated as per section 119 of the Employment Rights act 1996) and a compensatory award, per section 123 of the Employment Rights Act 1996 (“the 1996 Act”), being such amount as is just and equitable

so far as attributable to action taken by the employer. The Tribunal can also make a reinstatement or reengagement order.

Notice pay

88. Under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 a Tribunal can award a claimant damages for breach of contract where the claim arises or is outstanding on termination of employment. The cap of the award that a Tribunal can make is currently £25,000.

89. For claims of breach of contract for notice pay, such as in this case, where an employee has been dismissed by reason of breach of contract for gross misconduct, the Tribunal requires to make findings from the evidence it has heard to determine whether or not the claimant was as a matter of fact in breach of contract such that the respondent was entitled to terminate the contract summarily. If the employer did not have grounds that entitled it to dismiss the employee summarily, notice pay can be awarded (subject to the rules as to mitigation).

90. In ***British Heart Foundation v Roy*** *UKEAT/49/15* the Employment Appeal Tribunal (Mr Langstaff, President, as he then was) noted, at paragraph 6: "Whereas the focus in unfair dismissal is on the employer's reasons for the dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or whether in fact the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal, There the question is indeed whether the misconduct actually occurred."

Submissions

91. The parties had made submissions upon conclusion of the Hearing which were fully taken into account in reaching my decision. They are referred to, where relevant, below.

Discussion and decision

92. I shall approach each of the issues in turn.

Reason for dismissal

93. The reason for the claimant's dismissal, the set of facts or beliefs in the employer's "mind" that caused it to dismiss was the claimant's conduct. The claimant conceded that the reason why he was dismissed was due to the respondent's belief that he had failed to follow the relevant policy. The reason for his dismissal was a potentially fair reason.

Genuine belief in guilt held honestly

94. I was satisfied the respondent genuinely believed in the claimant's guilt. The evidence from the disciplinary and appeals officer was very clear. They each fully considered the facts and genuinely believed that the claimant had failed to follow the policy thereby creating a potentially very serious situation. That was a genuine belief which was held honestly.

Reasonable investigation

95. I was satisfied that the respondent carried out a full and thorough investigation in this case to sustain the genuine and honest belief in the claimant's guilt. The facts were largely accepted by the claimant. The vehicle had rolled back some 20 metres and the engine had been running. The handbrake had not been applied correctly (albeit he had turned the wheels).

96. A full investigation had taken place and the claimant was given a number of opportunities to set out his response to the allegation, which he understood.

97. The respondent had also obtained medical information to seek to understand the medical position prior to making any conclusions. The medical information was reasonably considered and the impact of the claimant's health assessed with the facts from the day in question.

98. The medical evidence, at its highest, said the claimant's impairments *may* have contributed to the incident in question.

99. The disciplinary process was carried out with an open mind and the claimant's position was fully taken into account and considered in detail.

100. The appeal hearing was a full rehearing of the matter and the analysis that was carried out was detailed and thorough. The process was reasonable.

101. There was no point the claimant had raised which had not been considered.

102. The respondent had carried out as much investigation as was reasonable in the circumstances of this case. The respondent had acted fairly and reasonably with regard to the procedure (including the investigation and disciplinary hearings) in his case.

Decision to dismiss

103. The claimant understood the importance of complying with the HIT policy. The conduct in question was reasonably considered to amount to gross misconduct. The claimant had failed to follow the HIT policy. The conduct was extremely serious given the risks arising. The fact the claimant had been injured underlined the risks in this situation.

104. It was reasonable for the respondent to conclude that the claimant's health had not in fact contributed to the incident on the day in question. There are a number of reasons for this.

105. Firstly the medical evidence state that the medical position "may" contribute to the event in question. It did not say that it had done so (or must have done so) on the day in question.

106. Secondly the claimant had failed to follow the policy (and did the same thing – a rollback) in 2016, at a time when the impairments the claimant had in 2021 were not present. That supported the conclusion that the reason for the failure to follow the policy on the day in question might not be related to his medical position.

107. Thirdly the claimant had been able to carry out his role on the day in question and make rational decisions both before and after the incident in question. It

was reasonable to assume he had made rational decisions during the incident itself. He had been able to carry out his duties fully. He had been able to turn the wheel when he parked the vehicle. He had also been able to take steps immediately following the incident to protect the mail and advise his manager as to the position. He was capable of rational thought such as to reasonably lead to the conclusion that his medical position was not a contributory factor to his leaving the vehicle in a potentially dangerous state.

108. In all the circumstances it was reasonable for the respondent on the facts of this case to conclude that the claimant was guilty of gross misconduct and that he had been responsible for the act in question at the time.

Was dismissal reasonable

109. A finding of gross misconduct does not of itself mean that dismissal is inevitable. A reasonable employer would consider the full context in deciding upon penalty. In this case the decision to dismiss the claimant on the facts before the respondent was a decision that a reasonable employer could make. The respondent acted fairly and reasonably in dismissing the claimant by reason of his conduct.

110. The claimant had made powerful points during his disciplinary hearing and appeal process. Those points were fully considered by the respondent. While a reasonable employer could have decided not to dismiss the claimant and imposed a lesser penalty, I am satisfied that an equally reasonable employer could decide to dismiss the claimant on the facts before them. The full background and mitigation presented by the claimant was taken into account prior to dismissing the claimant and the respondent acted fairly and reasonably in in their approach.

111. The claimant had known about the importance attached to safety and following the HIT process. The training and consequences of his failure in 2016 emphasised to him the importance of following the process and of how seriously the respondent would regard any subsequent failure to follow that

policy. He had been present at training sessions and briefings and knew how important it was to follow the HIT process.

112. The claimant had shown a failure to follow the respondent's policy by stalling the engine. He understood that this was wrong but believed that it would save seconds of time (which built up over the day). He believed that would help the respondent but failed to appreciate the risks to which this gave rise, which was precisely the issue with regard to his failure to follow the HIT process. The risks arising were potentially fatal and the instruction to follow the policy was an important instruction, being there to protect the claimant and others.

113. There was no medical evidence that suggested the claimant's decision making ability was impaired. It was reasonable for the respondent to conclude from the evidence before them that the claimant's medical position had not contributed to the incident in question and that he had made the decision himself to park in the way he did, in breach of the policy. The respondent's conclusion from the material before them was reasonable.

114. While the respondent had concluded that the claimant was guilty of gross misconduct and there was no confidence the claimant would follow policies going forward, the respondent did consider whether there were any other roles that could be considered for him. Those required to be non driving roles. There was no vacancy of which the claimant was aware and there was no such vacancy in existence. The respondent's actions in dismissing the claimant were reasonable on the facts before the respondent.

115. While the claimant intended to retire within a relatively short period of time following the incident, that was not something that was certain. The claimant could change his mind. In the absence of a vacancy and given the issues arising in this case, it was reasonable for the respondent to dismiss the claimant. The respondent had reasonably concluded the claimant had been guilty of gross misconduct. They reasonably concluded that there was a risk the claimant would not follow important policies even if he were retained on a non-driving role.

116. The respondent took account of the facts of this case and the full factual matrix. The decision to dismiss the claimant on account of his conduct was fair and reasonable. It was a decision that fell within the range of reasonable responses open to the employer in this case taking account of the size and resources of the respondent, equity and the substantial merits of this case.

117. One issue the claimant raised was the way in which he considered the respondent used disparaging words or place the most negative spin on how the claimant had acted. I considered that submission but did not find that the respondent's approach had been unfair or unreasonable. From the facts before the respondent at the time the respondent had acted fairly and reasonably in dismissing the claimant. While the claimant was unhappy with regard to the conclusion reached, he had accepted that the respondent had a discretion. Their exercise of their discretion in this case was reasonable.

Dismissal was fair

118. In summary the procedure that the respondent followed in this case fell within the range of responses open to a reasonable employer. The decision that the claimant was guilty of conduct that justified his dismissal fell within the range of responses open to a reasonable employer. The decision to dismiss the claimant in light of those facts fell within the range of responses open to a reasonable employer on the material before the respondent.

119. The claimant was not unfairly dismissed.

Breach of contract

120. From the facts before the Tribunal the claimant's conduct went to the root of the contract. He was guilty of conduct that entitled the respondent to dismiss him without notice. The claimant's claim for notice pay is ill founded.

Observations

121. As indicated during the oral judgment that was issued in this case, the claimant's conscientious approach to his work was fully recognised by the respondent. Mr Turner had spoken extremely positively about the claimant

and his work ethic and approach to his work. This case arose as a result of an unfortunate incident.

122. The Tribunal has sympathy for the claimant given the circumstances facing him at the time but, as he conceded, the respondent had a discretion as to how to approach this matter and it was my judgment that the actions of the respondent fell within the range of actions open to a reasonable employer. While the claimant believed the respondent had failed to give sufficient weight to the points he had made, the respondent acted fairly and reasonably in all the circumstances.

123. The Tribunal concluded by thanking both parties for their professionalism.

Employment Judge: David Hoey
Date of Judgment: 10 March 2022
Entered in register: 11 March 2022
and copied to parties