EMPLOYMENT TRIBUNALS

Claimant
Mr R Sellen

Respondent
GXO Logistics UK Limited

v

Heard at: Watford (Remotely via CVP) **On**: 4th & 5th July 2022

Before: Employment Judge R Wood

Appearances

For the Claimant: In person
For the Respondent: Mr N Singer, Counsel

JUDGMENT

1. The claimant was fairly dismissed on the grounds of conduct.

EXTEMPORE REASONS

Claims and Issues

1. This is a claim which involves an allegation of unfair dismissal. I am told that another claim for age related discrimination was dismissed upon withdrawal by the claimant. No issues was taken about this. As for the unfair dismissal claim, the claimant, Mr Robert Sellen, alleges that the decision to dismiss him, made in December 2020, was too harsh in the circumstances. He was alleged to have breached health and safety rules by taking a short cut through a safety barrier. When he did so, he was already the subject to a final written warning, which had been issued to him as a result of a breach of Covid related rules in July 2020.

2. For it's part, the respondent resists the claim. So far as it is concerned, the dismissal was a fair sanction in that the breach of health and safety rules in December 2020 was a very serious one in its own right. Further, the respondent argues that it was fair to have regard to the previous final written warning when dismissing the claimant, being as it was a similar breach of health and safety rules.

Procedure, Documents and Evidence Heard

3. The Hearing took place on 4 and 5 July 2022. The claim was heard remotely via CVP. I heard evidence from Mr Shazam Ayub, contract account manager for the respondent at its Wellingborough site; Mr Nigel Henman, Operations Manager at the Milton Keynes site; and the claimant, Mr Robert Sellen, who had been employed by the respondent as a warehouse operative, at the Wellingborough site. I also had an agreed Main Bundle of documents which comprises 130 pages; and a CCTV re-recording of the incident in December 2020. I also had witness statements from the three witness named above.

Legal Framework

4. Section 98 of the Employment Rights Act 1996 ("ERA 1996") is the statutory basis for unfair dismissal and reads as follows,

> "General
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> (1) In determining for the purpose of this part whether the dismissal of an employee is fair or unfair it is for the employer to show–
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> (a) the reason (or if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it-
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> (a) relates to the capability of qualifications of the employee for performing work of the kind which he was employed to do,
> (b) relates to the conduct of the employee,
> (c) is that the employee was redundant, or
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> ……"

5. In broad terms, there are three main questions to be addressed in this type of claim:

   (i) What was the reason given for the decision to dismiss?

(ii) If misconduct, was the Claimant dismissed because of the alleged misconduct?

(iii) Did the employer act reasonably in the circumstances? This should include a consideration of whether it was fair for the respondent to have had regard to the earlier final written warning issued to the claimant in August 2020 (to the extent that it did).

6. In considering whether it was fair to take into account the previous warning, the Tribunal had regard to the cases of *Way v Spectrum Property Care Ltd [2015] EWCA Civ 381; Wincanton Group v Stone [2013] I.R.L.R. 178; and Davies v Sandwell MBC [2013] EWCA Civ 135*. In summary, a response this permitted to take into account a previous warning issued to a employee who faces further disciplinary issues. The ability of the tribunal to go behind the the issuing of a previous warning is limited. Having heard evidence on the point, the tribunal must be in a position to find that the earlier warning was manifestly inappropriate, or that that was issued in bad faith.

7. In the context of this case, it is for the Respondent to prove that there was a fair dismissal of Mr Sellen on the grounds of misconduct. It must do so on a balance of probabilities.

Findings and Reasons

8. I find that misconduct was the stated reason for dismissal, and that this was the genuine reason. Having discussed the matter with Mr Sellen and Mr Singer at the beginning of the hearing, it was apparent that there was no dispute about this. Mr Sellen was quite clear that his claim was based on the proposition that dismissal in the circumstances was too severe, having regard to the nature of the breach of health and safety rules in December 2020. He also argued that it had been unfair to issue him with a final written warning in August 2020, and that by taking the warning into account, the respondent had acted unfairly. I turn then to the question of whether the respondent acted fairly in the circumstances.

9. I find that both Mr Ayub and Mr Henman were credible witnesses. They were experienced managers who I find had a great deal of experience when dealing with company procedures. In particular, I was struck by Mr Ayub's insight into health and safety issues in the workplace. He clearly took his duties as contract manager very seriously, especially in so far as they related to the safety of employees on site. His evidence was important because he had dealt with the disciplinary hearings in August and December 2020. He was therefore in a uniquely position to provide information as to the approach adopted by the respondent.

10. The respondent is a logistics and distribution company. The claimant had worked in it's warehouse in Wellingborough since 2009. He was an experienced employee who spent much of his time driving forklift trucks around the warehouse. These are heavy vehicles, and he was often moving

large loads from one part of the warehouse to another. The claimant properly admitted that it was important that he comply with health and safety rules, and that his employer could trust him to do so.

11. On 2nd December 2020, the claimant was seen to climb through an 'Armco' barrier (a type of safety barrier) into a manual handling equipment charging area, rather than using designated pedestrian pathways. In doing so, he tripped and fell. This was as caught on CCTV, so there was little dispute about what happened. There was an investigatory interview pursuant to the respondent's disciplinary policy (which appears at page 45 of the bundle) on 3 December 2020 during which the claimant accepted that what he had done was "wrong" and "stupid" and he apologised.

12. It is clear that this type of conduct was in breach of the respondent's policies. At page 55 and 58 of the bundle, there are copies of various guidance which directs that pedestrians in the warehouse keep to designated walkways and avoid taking short cuts. I find that the claimant had signed to confirmed that he had read and understood these policies (see pages 56 and 57). In the circumstances of this case, I find that there was some danger of injury associated with the shortcut taken by the claimant, and that the rules were there to prevent such risks. I was not convinced that it was as dangerous as suggested by Mr Ayub, but I accept his more general point that he was responsible for the safety of all employees on the site, and that compliance with these types of rules was important.

13. On 8 December 2020, there was a disciplinary hearing involving Mr Ayub. The claimant stated that at the time of the incident he had been preoccupied with getting his face mask (which he had forgotten), which I accept. He argued that others had been guilty of breaching the same rules in the same way as him. There was insufficient evidence to support this. However, it is not an argument which would have assisted the claimant to any great extent in any event.

14. Mr Ayub concluded that it constituted gross misconduct. However, this was amended to misconduct justifying dismissal with notice by Mr Henman, when he heard the appeal on 6 January 2021.

15. Did the respondent act reasonably in coming to this decision? I am not persuaded that this was a breach of health and safety rules at the top end of a range of severity of breaches. It was my view that Mr Ayub's approach at times lacked pragmatism and flexibility. I can think of any number of types of breach which would be far more serious than this one. In my view, the discussion of batteries exploding, and the risk of death was disproportionate having regard to the incident shown on the CCTV. That being said, this was a serious breach of health and safety rules. The claimant was an experienced member of staff who should have known better. The respondent's disciplinary policy makes it clear that breaches of health and safety rules may constitute gross misconduct (page 53 of the bundle). It should have been apparent to the claimant that such breaches would be dealt with severely. It was my impression of Mr. Ayub that he took his safety

role very seriously. I cannot imagine anyone could spend much time in his presence without appreciating that health and safety compliance was an important issue.

16. Moreover, the claimant was subject to an existing final written warning. As a matter of principle, I find that it was reasonable for the respondent to have taken this into account when making its decision to dismiss. I find that on 18/19 July 2020, the claimant took a Covid test, along with his wife and his daughter. At the time, his daughter was showing some symptoms, although I accept that the claimant and his wife were asymptomatic and taking a test due to concerns as to the vulnerability of the claimant's elderly father in law and/or parents, with who they had contact.

17. At time, the respondent had implemented a policy which required staff to stay away from the workplace in certain Covid related scenarios. The policy documents are at page 60-63. In summary, if a member of staff took a test, then he/she was required to self-isolate until the results were known. Further, if an employee had been in close contact with someone who was suspected of having Covid in the last 14 days, then they were to take leave of absence. I note that employees were paid at the full rate during these absences. I find that the claimant was aware of this policy and its detail.

18. I readily accept that the summer of 2020 was a difficult time for many due to the pandemic. Mr Sellen had a vulnerable father living with him, and vulnerable parents living independently. Mr Sellen was understandably concerned about his father who faced going into a nursing home. However, whilst government guidance was not always consistent, the company policy was, in my view, perfectly clear. I found the claimant's evidence on this issue to be rather muddled. It was difficult to understand why he still had such a hard time appreciating that the policy applied to him. I was left with the impression that he had little insight into the seriousness of the policy, or the implications of breaches of it.

19. I find that the claimant should not have returned to work on 20th July 2020. The policy applied to him because he had tested himself and was awaiting the results. Moreover, his daughter was, on any view, someone who had potentially Covid related symptoms, and was awaiting test results as well. Mr Sellen challenged Mr Ayub about this. However, an examination of the evidence at page 66, which is the note of the investigatory meeting, demonstrates that the claimant stated that his daughter was displaying potentially cover related symptoms. I accept this evidence. The claimant had signed to say the notes were correct. Further, he did not raise any issues relating to the notes at the subsequent disciplinary meeting. Further, at page 71, the claimant confirmed that his daughter was ill on Friday 17 July 2020. I am satisfied that the policy applied to the claimant in the two regards mentioned above.

20. Instead of self-isolating, he returned to work. He didn't even discuss the matter with his line manager before coming into work, as was required by the policy. Accepting that this was a difficult time for the claimant, it remains

puzzling as to why he did not, and still does not, fully appreciate the importance of him staying at home in those circumstances. It placed other staff at risk, and was therefore a serious breach in my judgment, notwithstanding that all tests returned negative a few days later. The claimant's insistence on repeating this fact demonstrated to me that he missed the point. Accordingly, there are insufficient grounds for finding that the final written warning which followed was issued in circumstances which were manifestly inappropriate, or in bad faith.

21. The final written warning was issued pursuant to the company disciplinary policy which states that it will remain on the employee's record for a period of 12 months. This is consistent with the terms of the disciplinary letter at page 86 of the bundle. The claimant suggests that he was told my Mr Ayub just after the conclusion of the meeting that the warning would not be treated as relevant for any other type of disciplinary matter other than one which was Covid related. It is suggested that this was witnessed by the claimant's colleague, Mr McCarthy.

22. One of the problems I have with this part of the claimant's case is that I have not heard from Mr McCarthy myself. Mr Henman investigated this issue and stated to me that Mr McCarthy confirmed to him Mr Seller's recollection. To that extent at least, Mr Henman was in a better position to balance the evidence. I find that his conclusion, that no promise was made, is within a band of reasonable responses in the circumstances, and one with which I agree. Mr Ayub did not strike me as someone who would be quite so pragmatic or flexible. Having gone to the trouble of using a final written warning, it would seem strange to then limit its scope to such a significant degree. I would also have expected Mr Ayub to have stated as such in the disciplinary letter, if it had been said. It was not suggested that Mr Ayub was being deliberately dishonest about this. If it is suggested, then I reject it. I would also have expected the claimant to have sought clarification about the scope of the warning upon reading the letter, which omitted this detail.

23. Accordingly, I find that whilst there may have been some misunderstanding on the claimant's part, I am satisfied that this was not the fault of the respondent, and that the applicability of the warning was not limited as suggested by the claimant. It was reasonable for the respondent to have taking the previous warning into account when making it decision to dismiss.

24. In the context of this case, it therefore becomes a very significant factor in the case. Referring to paragraph 37(6) of the *Wincanton* case, the EAT stated that where a final written warning applies, that any further misconduct of whatever nature will often, and usually will, be met with dismissal, and it is likely to be by way of exceptions that that will not occur. Whilst the claimant argues that it would have been harsh to have dismissed for the December incident in isolation, because he had a final writing warning hanging over his head at the time, it is my view that dismissal was not only within a band of reasonable decisions, that it was the inevitable outcome.

25. I should add that there was no real challenge to the procedure adopted by the respondent. The respondent has a reasonable and fair disciplinary procedure, which complies in all material ways to the requirements of the ACAS guidance, and which in my view it applied correctly. The claimant raised briefly that he had not been warned of the investigatory meeting in December 2020, and that this approach differed to that adopted in July 2020. In my view, there was no requirement for him to be warned. In any event, it did not affect the overall fairness of the process. The investigations were followed by the disciplinary meeting and the appeal, at which the claimant had ample opportunity to consider and put his case. The investigations were thorough and fair, particularly in Mr Henman's case, who was fair enough to allow the appeal, albeit to a limited extent.

26. In my view, the Respondent did act reasonably in the circumstances. I do not accept that the respondent sought to make an example of the claimant. These were two serious breaches of health and safety rules in a short amount of time. I am satisfied that the claimant is a decent man who, in the normal course of events tries to comply with the rules and work hard. Perhaps because his domestic circumstances were difficult, and perhaps due to the problems thrown up by the pandemic, he appears to have made two mistakes, or errors of judgment, which were out of character. That being said, they were serious, and placed himself and other employees at risk, in a variety of ways.

27. In summary, it is my judgement that the Claimant was fairly dismissed on the grounds of misconduct and that the process that the Respondent adopted was reasonable and fair in the circumstances. On other words, the Claimant was fairly dismissed.

28. The claim is therefore dismissed.

8 August 2022

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Employment Judge R Wood

Sent to the parties on: 4 September 2022

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For the Tribunal Office