



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr Szymon Winckiewicz

v

**Respondent**

Unipart Group

**Heard at:** Bury St Edmunds

**On:** 8 December 2022

**Before:** Employment Judge K J Palmer (sitting alone)

**Appearances**

**For the Claimant:** Mr O Fullar, Counsel

**For the Respondent:** Mr P Nainthy, Solicitor

**Interpreter:** Polish Interpreter

## RESERVED JUDGMENT

It is the Judgment of this Tribunal that the Claimant's claim for unfair dismissal fails and is dismissed.

## REASONS

1. This matter came before me today with a one day time listing which based on the information in front of me was always going to be an inadequate listing to enable Judgment to be given.
2. The Claimant presented a claim to this Tribunal on 23 February 2022. In it he claims unfair dismissal.
3. The Claimant was employed as a Fork Lift Truck Driver by the Respondents from November 2008 to 23 December 2021 when he was dismissed summarily, purportedly by reason of conduct.
4. I heard evidence from the Claimant and for the Respondents from a Mr Ian Toole, Shift Manager, and from Scot Robertson, Operations Manager. I had before me a Bundle running to some 157 pages.
5. The only claim before me was a claim for unfair dismissal.
6. I had an agreed List of Issues which entirely reflected that.

7. The Respondents argue that the dismissal was fair by reason of conduct.

### Findings of Fact

8. The Respondents are a large company which operate a significant warehouse at a site in Bury St Edmunds. This warehouse is involved in the NHS supply chain. They store and supply single use consumable items for the NHS. Lorries will arrive with deliveries of items which will be unloaded, booked in and moved to the racking within the warehouse. The items will ultimately be placed at floor level when they are needed so that they can be picked by pickers for delivery to NHS sites such as hospitals and GP Surgeries.
9. The Claimant was employed as a Fork Lift Truck Driver.
10. Moving goods such as these in the warehouse dictates that the Respondents have to be extremely careful about Health and Safety. The Claimant had been fully trained by the Respondents in all necessary aspects of Health and Safety related to his role as a Fork Lift Truck Driver. I had before me a document evidencing this and the Claimant in his own evidence confirmed that he had been fully trained.
11. More particularly, the Claimant signed by way of acknowledgement, a letter sent to him on 18 November 2020 which specifically detailed the Respondent's Policy with respect to the reporting of accidents and incidents.
12. The letter reads as follows:

"The purpose of this letter is to ensure that you are fully aware of the procedure when involved in an accident or incident when on site, it is your responsibility to report this immediately to your Line Manager, or if not available, your Shift Manager.

Please be aware that any failures to comply with this procedure may be deemed as an act of misconduct which may result in disciplinary action being taken against you.

Your co-operation in this matter is greatly appreciated."

The letter is signed by Matthew Traquair, the General Manager. The Claimant has signed and dated the letter by way of acceptance.

13. In May 2021, the Claimant was subject to a Disciplinary Hearing which took place on 7 May 2021. The purpose of the Hearing was to discuss two allegations against the Claimant for misuse of the Fork Lift Truck and breach of the company's Safety Procedure. The nature of the failure involved a failure to engage the hand brake before using the hydraulics and a further breach by turning the Fork Lift Truck with the forks raised.

14. As a result of this, the Claimant received a formal misconduct warning which was stated to remain on his personnel file for six months. The outcome was communicated to him in a letter dated 13 May 2021. That warning would therefore remain in place until 12 November 2021.
15. That warning would remain in place for six months. With the date of the incident that would mean until 6 November 2021.
16. A further incident then occurred which has subsequently led to the Claimant's dismissal and these proceedings. That incident took place on 19 August 2021 whilst the formal misconduct warning remained live.
17. The Claimant was involved in an incident where essentially whilst attempting to move a palette, the palette was dropped or collapsed. The Claimant then failed to comply with company Policy in that he should have stopped immediately what he was doing and reported the incident so that it could be properly investigated. In fact, he failed to do this, by his own admission and put the stock back on the palette, rewrapped it and replaced it. Nobody was injured.
18. This was in clear breach of company Policy to which the Claimant, by his own admissions, was fully aware of and had signed to confirm the same.
19. The incident was captured on CCTV.
20. The incident was reported by a colleague of the Claimant's, Sigita Jakaite, who was a Warehouse Operative.
21. As a result, the Claimant was interviewed on 26 August 2021 and admitted that he had failed to report the incident / accident immediately and had essentially attempted to rectify the problem after the accident and had carried on working.
22. As a result, the Respondents initiated a Disciplinary Investigation and I had all those documents before me. When interviewed during this process, the Claimant had no explanation for his failure to report the incident and for his subsequent actions which on the face of it looked as if he was trying to cover up the accident. He was contrite and said he was ashamed of what he had done. The Investigation consisted of interviewing Sigita Jakaite, the only witness, the Claimant himself and viewing the CCTV footage.
23. I should point out that I also had the opportunity of viewing the CCTV footage during the course of these proceedings.
24. Pursuant to that Investigation, the Claimant was invited to a Disciplinary Hearing by letter dated 3 November 2021. The Hearing took place on 11 November 2021. The Disciplinary Investigation had concluded that there was a case to answer.

25. I heard evidence from Ian Toole who was charged with the duty of conducting the Disciplinary Hearing, ultimately reaching a decision.
26. Mr Toole was adequately qualified to conduct this process and I heard detailed evidence from him. He is a Shift Manager on a static night shift, he completed a Certificate in Management in 2007 which included training on dealing with Disciplinary Hearings. He estimates in his evidence that he has dealt with at least 20 – 30 Disciplinary Hearings as a Manager.
27. He had no direct line Management responsibility for the Claimant as he did not work on the same shift as Mr Toole. He had previously worked on the same shift and did know him.
28. He conducted the Disciplinary Hearing on 11 November 2021.
29. The letter sets out the nature of the allegations being serious negligence, e.g. error or omission that could or does result in unacceptable loss, damage or injury and a dangerous act and / or omission.
30. The letter mentions the former misconduct warning still in place, advises the Claimant that he has a right to bring an accompanying Representative and attaches the Disciplinary Investigation Pack.
31. The Claimant attended the Disciplinary Hearing with a chosen companion, a Mr Kownik. Hannah Field from Human Resources attended as a note taker. I had the notes of the Disciplinary Hearing before me.
32. At that Disciplinary Hearing, the Claimant admitted that he had made a mistake and that what he had done was wrong. The CCTV footage was watched during the course of that Hearing. It emerged whilst viewing that CCTV footage, that the Claimant had also after the incident, driven his Fork Lift Truck with the forks forward facing which is potentially extremely dangerous and is in breach of the Respondent's Health and Safety Rule. The Claimant readily admitted that he had done this and that this was dangerous and could potentially kill someone.
33. The Claimant readily admitted that he had been involved in an incident / accident and had failed to report it.
34. He admits that it is his mistake and he said he should not have done it. He was very contrite, but offered little explanation as to why he had done it, other than through his mitigation that there were other issues in his life going on at the time.
35. Mr Toole decided that he needed further time to consider the matter before coming to a decision. In his evidence he specified that he wanted to have sufficient time as he realised that the allegations were very serious and that the dismissal of the Claimant was a very real possibility. He said he did not wish to rush into a decision and wanted to ensure that he had taken as long as he needed to before making it. He therefore sought to reconvene the

Disciplinary Hearing after 25 minutes and explained to the Claimant that he wanted further time. He explained to the Claimant he would send him another letter inviting him to another Disciplinary Hearing at which he would be able to give a decision.

36. He wrote to the Claimant on 12 November 2021, inviting him to a reconvened Hearing on Tuesday 16 November 2021. In that letter, Mr Toole added a further additional allegation as a result of what had emerged at the first Hearing when the CCTV footage had been viewed, namely that the Claimant drove his Fork Lift Truck with the forks facing forward rather than backwards which is in direct contravention of the MHE training the Claimant had undergone.
37. There then followed a series of exchanges where the Claimant indicated he was not able to attend the reconvened Hearing as he was signed off sick with back pain.
38. The reconvened Hearing was therefore postponed and Mr Toole wrote to the Claimant on both 30 November 2021 and 7 December 2021, asking him to keep in contact with respect to the current situation with regard to his back pain as he had not been doing so. The original sick note was due to expire on 13 December 2021. Accordingly, on 9 December 2021, Mr Toole wrote to the Claimant inviting him to a reconvened Disciplinary Hearing on 31 December 2021. On the same day, the Claimant emailed Mr Toole explaining that he had consulted his GP and had his sick note extended to 2 January 2022.
39. Accordingly, Mr Toole wrote back to the Claimant asking him why this meant that he was unable to attend the reconvened Disciplinary Hearing. The Respondents then offered to transport the Claimant to the Hearing, or to conduct the Hearing via a conference call.
40. We heard evidence from Mr Toole that he received no satisfactory response from the Claimant and the only thing he had was a sick note indicating that the Claimant had a bad back. On 20 December 2021, Mr Toole wrote to the Claimant again indicating that a reconvened Hearing would take place on 23 December 2021 and that in the absence of any good reason for non-attendance, it may be held in his absence. Mr Toole gave evidence that this was particularly the case given that the main purpose of the reconvened Hearing was for him to communicate a decision to the Claimant as opposed to examining the allegations and discussing them with him, which had already been done. He said he took into account that the fit notes gave the reasons for absence as back pain and not stress or anxiety.
41. The Hearing reconvened on 23 December 2021 and Hannah Field was again present as the note taker. The Claimant did not attend and neither did he send in any further information or submissions in writing, or any explanation as to why he could not attend. Mr Toole reviewed the CCTV footage again and took 20 minutes to finalise his decision. Accordingly, he wrote to the Claimant on 23 December 2021 setting out the outcome

pursuant to the Disciplinary process. In the letter, Mr Toole dismissed the Claimant summarily without notice from 23 December 2021. He explained that the reason was that the actions of the Claimant on 19 August 2021 in respect of the non-reporting of the incident and the driving of the Fork Lift Truck with the forks facing forward, constituted gross misconduct and serious negligence and dangerous acts or omissions.

42. The letter specifies that at the time of the incident there was a live misconduct warning in place.
43. In evidence, Mr Toole said that he concluded that the evidence supported the allegations, not least because the Claimant had readily admitted having the accident, not reporting it, seeking to cover it up and then driving the Fork Lift Truck with the forks facing forward. He said he considered the seriousness of the allegations and took the view that they were so serious they did amount to gross misconduct. He had considered any mitigation on the part of the Claimant, including his 13 years of service. He said he had to balance this with the fact that at the time of the incident the Claimant had a live formal warning for misconduct. He made the decision to terminate the Claimant's employment summarily. He wrote to the Claimant accordingly. The letter also contained a Right to Appeal.
44. The Claimant purported to pursue an Appeal and in this respect the matter was referred to Scot Robertson Operations Manager, from whom I also heard evidence. The Claimant wrote to the Respondents on 29 December 2021 indicating that he felt he had been treated unfairly on the basis that he was dismissed during his sickness, in respect of which he had a sick note. He referred to his 13 years of service and that he had been dismissed just before Christmas. He asked for an extension of time to Appeal to reconsider his position. The extension was granted.
45. The Claimant emailed Scot Robertson on 5 January 2022, indicating that he wished to Appeal against the disciplinary decision to dismiss him. He said the Grounds of his Appeal was the fact that he was an employee for 13 years and he had full rights to get a redundancy payment.
46. Mr Robertson wrote back to him on 11 January 2022 by email, referring to those Grounds of Appeal and explaining that neither of the Grounds being 13 years' service and an entitlement to a redundancy payment constituted appropriate grounds for an Appeal under the terms of the Disciplinary Policy.
47. He explained that the Claimant had been summarily dismissed in line with the Disciplinary Policy on the basis of gross misconduct and explained that the Claimant had not been made redundant therefore he was not entitled to a redundancy payment. He explained that the window for the Appeal had closed and that there was no further opportunity for the Claimant to Appeal.
48. The Claimant did not respond to that email.

## The Evidence

49. I heard evidence from the Claimant, Mr Toole and Mr Robertson.
50. I regard the evidence I heard from Mr Toole to have been given in an honest and straightforward fashion. He reacted with clarity and without evasion.
51. The Claimant's Counsel cross examined him, taking him to correspondence including the letter of invitation to the Disciplinary Hearing which he said illustrated that Mr Toole had prejudged the situation and had formulated a decision to dismiss. This was denied by Mr Toole. I accept his evidence. The wording of the standard template used by Mr Toole might in certain circumstances be better drafted, but I am content to find that Mr Toole's response to this suggestion was entirely credible. He had not prejudged or prompted the outcome of the Disciplinary Hearing. In fact, the evidence is to the contrary. He adjourned the original Hearing for some time in order to properly consider the responses of the Claimant before arriving at a decision. He even invited the Claimant to a reconvened Hearing, the principal purpose of which was the delivery of that outcome. All evidence suggests that no predetermination was made.
52. Further, much was made by Claimant's Counsel of the fact that the dismissal letter did not reflect fully the evidence given by Mr Toole as to what factors he weighed when arriving at the decision to dismiss. It was put to him that the explanation as to how he arrived at the decision in the dismissal letter was short. He agreed with this, but he said he had taken into account length of service, the Claimant's remorse or contrition, his good record and the fact that he had a live warning at the time of the second incident. I entirely accept Mr Toole's evidence in this respect. I believe he did take these things into account, albeit he did not mention them in detail, in the dismissal letter.
53. As to the evidence of the Claimant, I have taken into account that the Claimant's first language is not English and that there was an interpreter present. However, the Claimant was able on many occasions to understand and speak English and only used the good offices of the Interpreter when required. Despite this, I did find that the Claimant was evasive on a number of occasions when questions were put to him by Mr Nainthy. He seemed to struggle to explain the reasoning behind why he had not stopped when the accident or incident on 19 August 2021 occurred and reported it. He seemed to say he was ashamed. It was continually put to him that he attempted to cover up the accident because he was fearful of losing his job. In essence, he evaded that question and refused to answer it. I was not impressed with his evidence generally. I find that it is more likely than not that his actions post the incident were a deliberate attempt to cover up the incident in light of the existing warning he was under.

## The Law

54. This is a claim for unfair dismissal brought under s.111 of the Employment Rights Act 1996 (“ERA”). Unfair dismissals are dealt with under s.98 of the ERA 1996.
55. This states as follows:
- 98(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
    - (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-
    - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer 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.
  - (3) ...
  - (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
    - (a) depends 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
    - (b) shall be determined in accordance with equity and the substantial merits of the case.
56. Essentially, the onus is on the Respondent to show what was the reason for the dismissal and that it was a potentially fair reason under s.98(2) ERA 1996. If those hurdles are surmounted then the Tribunal must decide whether the decision to dismiss was fair under s.98(4) ERA 1996.
57. The Tribunal is assisted by a number of Authorities, the principal amongst which is the case of Iceland Frozen Food v Jones [1987] ICR17, which



states the Tribunal must determine whether the decision to dismiss fell within a band of reasonable responses open to the employer. It is very important that the Tribunal does not substitute its own view as to what was reasonable in those circumstances.

58. In conduct related cases, the Tribunal is assisted in its deliberations by what is known as the Burchell Test, from the case of British Home Stores v Burchell [1978] ICR303. The Burchell Test is essentially in three parts, as follows:

58.1 Did the employer hold a genuine belief in the Claimant's misconduct?

58.2 Was that genuine belief reasonably held?

58.3 Was that belief arrived at pursuant to a proper investigation in all the circumstances?

59. The Tribunal must also consider whether a dismissal is procedurally unfair.

### **Conclusions**

60. In this case, on the evidence put before me, I have no difficulty in concluding that the reason for the dismissal was conduct. That is a potentially fair reason under s.98(2) Employment Rights Act 1996.

61. With respect to the tests under s.98(4) ERA 1996, assisted by the Authorities outlined above, I am satisfied that the Burchell Test was passed by the Respondents. They genuinely believed that the Claimant had been guilty of serious or gross misconduct. The nature of the incident and the Claimant's failure to report it, his explanation for not doing so and his admission, made it clear that this was a genuine belief. He also admitted the ancillary allegation of driving the Fork Lift Truck with the forks pointing forwards.

62. In light of the evidence before them, I also conclude that that belief was reasonably held. They also conducted a thorough investigation in all the circumstances. A Disciplinary Investigation was undertaken and a Report produced. Thereafter, Mr Toole conducted a disciplinary process prior to making a decision to dismiss. In all the circumstances there was a full and detailed investigation prior to the decision being taken.

63. Counsel for the Claimant has made much play throughout these proceedings, both in cross examination of Mr Toole principally, but also Mr Robertson, of procedural failures. Which he says fall at the door of the Respondent.

64. Principal amongst these are that Mr Toole conducted the reconvened Disciplinary Hearing on 23 December 2021 without the Claimant. However, the Claimant had been given ample opportunity to attend that reconvened Hearing. The nature of that reconvened Hearing was to allow the Claimant to hear at first hand the decision of Mr Toole pursuant to the Disciplinary Hearing on 11 November 2021. It was also to consider the second

allegation which arose during that Disciplinary Hearing when Mr Toole and the Claimant watched the CCTV footage, namely the fact that the Claimant drove the Fork Lift Truck with the forks pointing forwards. He had admitted both the original incident and the failure to report it and that he drove the Fork Lift Truck with the forks pointing forwards. The purpose of the reconvened Hearing, therefore, was simply to explain the outcome of the disciplinary process. No further detailed examination of the facts was necessary or would have taken place, even had the Claimant attended. Moreover, the Claimant was given plenty of opportunity to attend and I do not accept that he could not do so by video link or that there was any sufficient evidence of his bad back which reasonably precluded him from attending that Hearing, either in person or by video link. It was therefore reasonable and appropriate for Mr Toole to proceed in his absence.

65. As to delay, there was some delay between the incident on 19 August 2021 and the Disciplinary Hearing, but there was evidence that during this time the Claimant was on an extensive holiday break. Allowing for that, the delay was not unusual or contumelious.
66. The further delays prior to the dismissal being effected were because the Claimant was unwilling to attend the reconvened Hearing. There is no procedural failure there on behalf of the Respondent.
67. Counsel also made play of the nature of the Respondent's Disciplinary Policy and questioned why Mr Toole had chosen to move immediately from a formal misconduct warning, which was in place pursuant to the disciplinary process in May of 2021, to a dismissal post the disciplinary process pursuant to the incident in August 2021. On any reading of the Disciplinary Policy, it is permissible in circumstances where appropriate for the disciplinary outcome to be immediate dismissal, without necessarily going through the preliminary stages set out in the Policy. Mr Toole reasonably believed that the employee had committed an act of gross misconduct. He was entitled to dismiss.
68. There was also argument put on behalf of the Claimant in respect of the manner in which Mr Robertson, appointed to deal with any Appeal, handled that process. He applied the company Policy and on the basis of the grounds put forward by the Claimant for an Appeal being his length of service and the fact that he believed he was owed a redundancy payment, concluded that no proper grounds under the Policy had been put forward and regarded the matter as closed. Interestingly, the Claimant raised no objection to that. It was argued on the Claimant's behalf at an earlier email where the Claimant was looking to extend time for him to lodge an Appeal, should have alerted Mr Robertson to the fact that the Ground of Appeal was that he had been treated unfairly. I do not accept that this is a fair interpretation of the email on Wednesday 29 December 2021.
69. The mention of unfairness was linked only to alleged dismissal during sickness, but was not cited as a Ground of Appeal. The purpose of that email was to seek an extension to lodge Grounds of Appeal, which he

subsequently did on 5 January 2022. These were properly rejected by Mr Robertson. I therefore see no failure of procedure at this point.

**Band of Reasonable Responses**

70. I conclude, therefore, that Mr Toole was entitled to take the decision that he did and that that decision fell within the band of reasonable responses open to him.

**Procedure**

71. I further conclude that the Respondent's procedure was not flawed and that they conducted a full and proper procedure in all the circumstances. Proceeding with the reconvened Hearing in the absence of the Claimant was not a failure of procedure, nor was rejection of the Grounds of Appeal by Mr Robertson.

72. For all the reasons set out above, the Claimant's claim must fail. It does and it is dismissed.

25 January 2023

---

Employment Judge K J Palmer

Sent to the parties on: 2/2/2023

NG

For the Tribunal Office.