EMPLOYMENT TRIBUNALS

Claimant: Mr Jonathan Ledger

Respondent: Magpie Recycling Co-operative Limited

Heard at: Croydon **On:** 1, 2, 3 and 13 February 2023

Before: Employment Judge Ganner

Representation

Claimant: Mr A Lo (Counsel).
Respondent: In Person by Mr Jones-Mantel.

RESERVED JUDGMENT

1. The Judgment of the Tribunal is that the Claimant was fairly dismissed. The unfair dismissal complaint is dismissed.

2. The Claimant's claim for breach of contract fails and is dismissed.

3. The Respondent's counterclaim for breach of contract is withdrawn and is dismissed.

REASONS

Introduction

1. By a claim form presented on 15 February 2019, the Claimant complained of unfair and wrongful dismissal from Magpie Recycling Company Limited, the Respondent. Related claims of disability discrimination and holiday pay were dismissed upon withdrawal at an earlier stage.

2. By a response form of 23 April 2019, the Respondent resisted the complaints. Their position was that the Claimant was fairly dismissed for gross misconduct and that they were also not contractually required to pay notice pay.

3. The Respondent's counterclaim for breach of contract was withdrawn at the conclusion of the evidence and was then dismissed.

Issues

4. I discussed the issues to be determined at the start of the hearing. They had been outlined by Employment Judge Howden-Evans in her case management order following a preliminary hearing on 7 February 2022. These are as follows: -

4.1 Employment status

4.1.1 Was the Claimant an employee or a worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?

- The Respondent asserts the Claimant was a worker (see their emails to the tribunal of 18th and 27th November 2019)
- The Claimant assets he was an employee (see their email of 29th November 2019).

4.2 Continuous Service

4.2.1 Was the Claimant continuously employed for the 2 years immediately prior to the termination of his employment? (See section 108 Employment Rights Act 1996)

- The Respondent asserts the Claimant's continuous service was broken during a period of medical suspension.

4.3 Unfair dismissal

If the Claimant was an employee and had been continuously employed for the 2 years immediately prior to the termination of his employment, the Employment Judge will go on to consider the unfair dismissal claim.

4.3.1 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Employment Judge will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

4.3.2 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

- The Claimant asserts it did not (see paras 40 to 42 of Grounds of Complaint).
- The Respondent asserts it did (see pages 10 to 12 of Grounds of Resistance)

4.3.3 The Employment Judge will usually decide, in particular, whether:

4.3.3.1 there were reasonable grounds for that belief;
4.3.3.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
4.3.3.3 the Respondent otherwise acted in a procedurally fair manner;
4.3.3.4 dismissal was within the range of reasonable responses

4.9 Wrongful dismissal / Notice pay

4.9.1 What was the Claimant's notice period?

4.9.2 Was the Claimant paid for that notice period?

4.9.3 If not, was the Claimant guilty of gross misconduct? ie did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

Evidence and Witnesses

5. There was an agreed bundle of documents which ran to 550 pages and any reference in this Judgment to page numbers in brackets '[ ]' is a reference to that bundle. The Respondent called Ms Tracey Stripp, Bookkeeper/Personnel and the Claimant gave evidence on his own account.

Facts

6. I now set out my factual findings which largely involve a chronology of events that are not in dispute. Any consequential findings/inferences will be addressed within the discussion and conclusions section below.

7. The Claimant worked as a recycling contractor for the Respondent, a workers' co-operative that the Claimant helped to co-found as a director in February 1992.

8. On 23 July 2008, the Claimant signed and acknowledged receipt of a statement of particulars of terms and conditions of employment [108-111]. The Claimant told me this was prepared to formalise his status as an employee. Paragraph 8 of this document incorporated a disciplinary procedure [505]. This states, at paragraph 4, that if an employee is guilty of gross misconduct, this may result in summary dismissal without notice. '*Gross misconduct may include breach of a reasonable refusal to carry out reasonable instruction without good reason*.' Within the statement particulars, at paragraph 9, there was reference to a Health and Safety Policy and this went on to say that '*The company and all its employees have a duty of care for each other's Health and Safety at work as far as reasonably practicable. You are responsible for your own safety whilst at work and that*

of your colleagues. Failure to comply with the company's Health and Safety Policy may result in dismissal/disciplinary action'. [110]

9. On 4 October 2017, the Claimant fell ill and was admitted to the CCU Unit at the Royal Sussex Hospital. He underwent an ablation operation on his heart and had a subcutaneous implant of cardioverter-defibrillator ('ICD') implanted.

10. On 10 November 2017 [118], the Claimant attended a meeting to discuss a return-to-work plan which he was happy to do. He indicated that he was happy to do and help out with light work for a fortnight at the end of which he wished to return full-time. He queried [119] whether the whole exercise was an attempt to 'once again' get rid of him.

11. In a letter dated 14 November [120] the Claimant wrote to the Respondent as follows: -

My sick note runs out on Wednesday,15 November so I will assume that as I am contracted to work five days per week and I no longer have a sick note, I should return to work on Thursday, 16th. However, I accept that because I can't drive and do the veg box round, I may be surplus to requirements so unless requested to come in, I will take a day's holiday and come in on Friday, 17th. From then on, I will continue to work as usual.'

12. On 16 November 2017 [117], the Claimant attempted to return to work but was sent home. The Respondent indicated in a letter incorrectly dated 16 November 2016 as follows: -

'Understandably, we are very sympathetic to your current circumstances; we are unable to allow your return to work until a fit-to-work note from your doctor or Consultant stating that you are fit to return to strenuous manual handling and driving commercial vehicles, confirmation from DVLA that you are fit to drive commercial vehicles a return-to-work ban has been assessed and put into place including risk assessments. We would ask that you do not attend to return to work on Friday, 16 [they meant 17th] November. If you do come in, you will be asked to leave, and any attendance will be handled according to our disciplinary procedures. Magpie's duty of care to you, employees and the general public mean we should ask questions of an appropriate medical person/department in order to prepare a return-to-work plan.

13. On 20 November 2017, the Respondent sent a form [121] for consent to investigate the Claimant's medical condition. This was to facilitate compliance with proper Health and Safety procedures on hours and types of work. The Respondent felt that this could only progress with them having answers to concerns responded to in a manner we could rely on. The letter made it clear that they would only be able to make a considered decision when they had a medical report; it also stated that the Claimant was not obliged to give his consent to this course.

14. The Claimant replied by way of a letter on 20 November 2017 [122], that he would not give his consent. He said that his doctor had provided a sick note already 'knowing what my job entails' and that he had received confirmation from DVLA that he could keep his licence and was permitted to drive from the very next day, 21 November 2017.

15. On 27 November 2017, the Respondent sent a letter [123-4] explaining that their requests to ask permission had come about on the advice of ACAS and that they were also following HSE Guidance for workers absence through illness. The letter indicated that they had taken this course in order to ascertain safe working practices and to protect themselves from any corporate liabilities. They wanted reliable and comprehensive reports in order to make reasonable and correct decisions. The letter indicated that the Respondent was sensitive to the Claimant's concerns about medical confidentiality and was flexible as to the type of evidence that would be acceptable to enable them to make a decision.

16. On 27 November 2017 [125], the Claimant gave his consent to disclosure of his medical records and suggested that there was a government website, Fit-for-Work.Org, dedicated to resolving issues with providing a pre-assessment service for people who had been off work for four weeks plus. He was enthusiastic about utilising this website so that he could return as soon as possible.

17. On 29 November 2017, the Claimant wrote [126] to the Respondent indicating that he had an exercise test which had gone well, and a copy would be sent to them. He expressed dissatisfaction about not having heard from the Respondent as to what tests were required of him for his return to work and what sort of discussion would take place regarding his return.

18. On 8 December 2017, the Respondent replied [127] that they had begun the process of referral to Fit-to-Work.Org but required answers to certain occupational health questions before the form could be submitted. These questions were required for both Health and Safety, and their employer's liability insurance purposes.

19. On 4 January 2018, the Claimant sent the results of his exercise test [133] to the Respondent. These indicated normal results.

20. On 11 January 2018, the Respondent sent the Claimant a response from Fit-for-Work.Org [138-139]. It stated that the free service had been withdrawn on 15 December 2018 [they meant 2017]. Fit-For-Work.Org nonetheless sent to the Respondent some general advice which included suggestions that they should consult the DVLA in respect of an employee's driving with an ICD and, as an employer, the Respondent would need to consider completing relevant risk assessments for the employee for their liability insurance purposes. The Respondent's letter to the Claimant made it clear that they needed a detailed understanding to complete these assessments so they could understand the risks involved. The letter informed the Claimant that his employment was suspended whilst the Respondent established those safe working practices indicating that specific advice was needed with a lot of work required then to be followed through with a return-to-work meeting.

21. The Respondent followed that up with a letter sent to the Claimant's GP [140] on 11 January asking a number of specific and detailed questions, e.g., what would happen if an employee was driving and his arterial cardioverter-defibrillator is activated, whether they should be concerned about any issues regarding medication, whether there were issues relating to short to medium bursts of heavy manual handling which was 'sometimes extremely

strenuous'.

22. On 15 January 2018, the Claimant again attempted to work but was told to go home. [Chronology 11]. His job was suspended.

23. On 15 January 2018, the Claimant wrote to the Respondent [141] referencing the letter sent to his doctor's surgery. He indicated that it was too complicated for the doctor to give an answer and recommended that the letter be forwarded to his consultant. The Claimant's position was that he had answered many of the questions in the original return-to-work meeting back in November. He therefore withdrew his permission for the Respondent to approach any medical professionals involved in his care.

24. On 17 January 2018, the Claimant was sent a letter [141] complaining that he had provided the Respondent with all the information made available to him from both his doctor and Cardiologist and hidden nothing.

25. On 17 January 2018, the Claimant's Trade Union representative contacted the Respondent to confirm support of its position. The letter [143] alleged discriminatory treatment preventing him from returning to work and warned the Respondent that their decisions were open to legal challenge.

26. The Claimant told me of his feelings at this time. He said he began to feel he was losing his job in a company he had made for himself and that he had helped create from the start. He said that now the company was ruled by a new "sociocratic" structure which he had voted against, he found himself legally responsible for a company over which he had no control.

27. On 1 February 2018 [146-7], the Respondent wrote to the Claimant stating that they still needed fuller information. The letter sought to allay the Claimant's concerns regarding confidentiality by suggesting that he could share a redacted letter from the Consultant using links that had been sent to him that would perhaps enable them to draft a reply /risk assessment. They found it confusing that the Claimant had withdrawn his consent and asked him to reconsider some form of consent [146] to move things forward.
The letter stated that a return to work depended on the quality of the proof provided and answers to questions with medical evidence was needed.

28. On 1 February 2018, the Claimant replied [148] that he had discussed the matter with his Trade Union representative who had advised him that he did not need to provide any further proof of fitness to return-to-work beyond his doctor's fit note which was received back in November.

29. On 8 February 2018, the Respondent wrote to the Claimant [149] setting out the requirements needed for a safe return to light duties following risk assessment. The letter said:

'***light duties such as yard work, ground level, preparing/painting of exterior walls and sorting materials in the yard under the new process had been assessed. They were prepared/discussed as far back as October 2017 and even if partial answers to your medical team had come back promptly … this … may have been concluded by now.'***

30. On 12 February 2018 [150], the Claimant replied that he had nothing to add

to his email sent on 1 February 2018. He repeated that the Respondent had received his doctor's notes stating that he was ready to return to work from November and he had not been allowed to do so. He invoked a grievance procedure on the basis that he was being discriminated against under the Equalities Act 2010.

31. The grievance process then took its course between 20 February 2018 and 12 June 2018. [157-161]

32. On 28 March 2018, there was a grievance meeting attended by the Claimant and his union representative. This was heard by Ms Stripp and Mr Glover.

33. The Claimant's position was as it had been all the way along. He stated he was fit to work. His doctor had told him he was fit to work and the DVLA had said that he was allowed to keep his licence. Therefore, he argued there was no reason why he should not be allowed to drive and no reason why he was not allowed back.

34. The outcome of the grievance investigation was given in a comprehensive document running to twenty-four pages [162-186] on 1 May 2018. Its findings included the Respondent's view that there was insufficient evidence that the Claimant's doctor had been made fully aware of his job description which involved manual handling. It also referenced concern they had seen from the British Heart Foundation concerning manual work, in effect, that 'if you do manual work that involves lifting or moving heavy objects, etc, you should talk to your GP or Heart Specialist about it'.

35. The Respondent was sceptical as to what the doctors had been told. They also felt that they only had the Claimant's word that the DVLA had been informed of his heart condition and recent operation involving the fitting of an ICD. They considered the Claimant's position that Magpie only needed to know that his licence was currently valid was not acceptable.

36. The Respondent concluded there were no grounds for the grievance and dismissed it. The Claimant subsequently appealed against the grievance outcome [187] and that appeal meeting took place on 11 June 2018 and was dismissed with the Claimant receiving the outcome letter on 12 June 2018 [190].

37. Following the appeal decision, the Respondent wrote to the Claimant on 14 June 2018 [191] asking him to indicate whether he accepted or refused the offer of employment "so far understood to be safe." They said this was outlined in the grievance appeal documents and was described as "yard and outdoor work i.e., as in the 8 February 2018 letter.

38. On 15 June 2018, the Claimant wrote [192] to the Respondent asking if, before he accepted their offer, they could confirm yard and outdoor work is part of a 'phased return' to work and how the phased return would progress.

39. A risk assessment for light duties was prepared by Mr Gary Fisher, an employee of the Respondent, on or about 19 June 2018 [193-196]. The Claimant told me that the Respondent had made a 'big song and dance' about the need for a risk assessment before he could come back to work.

The document set out the various activities that might be undertaken by the Claimant and described the general controls that would need to be applied to the activities in question.

40. Under light duties, it stated 'no manual handling that could potentially aggravate the healing of scar tissue of operation or cause any other health issues. No strenuous lifting to be undertaken whilst on light work'. Under physiological and stress management, it stated 'employees to work at own comfortable pace with rest breaks to be taken as often as needed'.

41. In a letter dictated 13 June and typed on 20 June 2018, the Claimant's Consultant [197-198] wrote to him as follows: -

'I am sorry to hear that your employers, Magpie Recycling Co-Op, have a number of issues regarding your cardiac condition. If you have completed the cardiac re-hab and feel physically well and able to do your job, then I would support you working normally. I think it will be important to you, you do not over-strain yourself and have assistance if you are required to lift and carry heavy furniture. I am pleased to hear you informed the DVLA and they will have a standard procedure for patients like yourself who have an ICD.'

42. This letter was not received by the Respondent until after they had drafted the risk assessment.

43. On 26 June 2018 [199], the Respondent sent a letter to the Claimant indicating that they had completed the risk assessment for him to return to work to light duties and wanted him to start on Thursday, 5 July 2018. The letter indicated that the light duties for his return to work were set out within the documents of the investigation conclusion and were, until further notice, "solely light duties … painting and yard work. Please refer to risk assessments attached."

44. On 27 June 2018 [200], the Claimant asked again whether the offer of work involving light duties was part of his phased return to work. He wanted to have a clear answer before he agreed to the proposal.

45. On 28 June 2018 [201], the Respondent replied that the Claimant had been offered work regarding light duties and referenced the matters set out in the earlier correspondence concerning yard work, etc. The letter went on to say that the 'return to work process has hinged on the Health and Safety risk assessments at the lack of shared information between Jock, his medical teams and Magpie'.

46. On 29 June 2018 [202], the Respondent wrote further to say that the return to work had been offered to the Claimant by Magpie collectively and work was to start on Thursday, 5 July 2018 at 10.00am.

47. On 4 July 2018 [203], the Claimant responded to this letter and wrote:

'I am advised that your refusal to answer my query regarding the return to work offers means that I must accept that the work is part of a phased return to work. Therefore, secure in the knowledge that this job offered is part of a phased return to work, I will see you at 10.00am on Thursday morning'.

48. The Claimant told me that he knew that he was only allowed to come back for six hours on Thursday, that he was to paint the outside of the building, was prohibited from using ladders, could only paint what he could reach, and that he was not allowed to lift any furniture. He said that he found the process degrading but hoped it might be 'a stepping-stone to getting back to the job that he had loved for so long and for that reason, he knuckled down and got on with it'.

49. On 5 July 2018 [204], the Claimant returned to work and had a Health and Safety induction meeting with Mr Ollie Glover and Ms Tracy Stripp. His opening remark was recorded as 'my union will have something to say about that'.

50. Mr Glover indicated that the process was 'work to stay at ground level, no step ladders to be used and only painting as high as you can comfortably reach. Your job role is solely to prepare and paint the exterior walls, not to serve customers, answer the phone, not to go to workshops because of the charges, not to go into the yard or near the milk floats mainly because of the electro-magnetic field, not to lift furniture'. The Claimant responded he wanted to make clear that this was part of his phased return to work and that was the reason why he had come back.

51. On receipt of an email from the Respondent asking the Claimant to come back into work on Thursday, 12 July 2018 'when they should have to start painting' [206], the Claimant replied:

'I acknowledge your request for me to attend work on Thursday, 12th, 10am-3pm. I understand that it is part of my phased return to work and as such I will receive my usual salary'.

52. On Thursday, 26 July 2018, Ms Stripp [206] went down to the Co-Operative shop and saw the Claimant was behind the counter answering the telephone. She was informed by an employee, Ms Wyatt, that the Claimant had offered to cover her lunch. Ms Stripp asked the Claimant not to go behind the counter. His reply was 'I am just going back to do the painting then'.

53. On 27 July 2018, the Claimant wrote [207] complaining he had only been paid for the hours he had attended for his phased return to work. He indicated that he did not agree to these deductions and had been advised they were illegal. He went on to state 'I will therefore be returning to work on Monday morning to resume my normal duties on full pay as there are no medical reasons for me not to return to work. See you all at 9.00am on Monday morning'.

54. He followed this up with an email to say that he would be returning at 1.30pm on Monday as he had to collect his son from the airport that morning.

55. On Monday 30 July 2018, the Claimant turned up as promised. He, again, went behind the counter serving customers and answering the telephone. He went to another employee and helped him unload a van. He was reported as saying to the employee [216], 'I am back now, five days a week. Am I coming out with you?' and the Claimant at this point helped the employee put a table into the shop. This was witnessed by another member of staff who saw the Claimant carrying a mattress on his own and 'thought what the hell was going

on'. The Claimant was reported as saying 'I am not trying to be facetious; I just want my job back'.

56. At 1.30pm on Monday, 30 July, the Claimant had tried to engage Ms Stripp in discussions about his situation [208-209-transcript]. She had told him he was not meant to be in until the Thursday which was his rostered day. She told me and, I accepted that this was a tense meeting as she did not feel comfortable about individually answering questions which were really a matter of collective decision making by the Co-Operative as a whole. The Claimant said 'nobody has assessed me to see if I am fit to come to work. I have just been left to paint the wall outside'. Ms Stripp indicated 'your return to work at the moment is painting. Whether that changes in the future, I cannot answer'.

57. On 31 July 2018, the Respondent wrote [212] to the Claimant saying that there was no medical evidence that permitted safe employment other than what had been decided. The letter went on to recite the allegations that on 26 July 2018 he was behind the counter answering the telephone and serving a customer and that on 30 July 2018 he was again serving behind the counter and then helped unload a van. It suspended his employment. The letter stated that this was in consideration of his and others' Health and Safety and mentioned their duty of care as an employer.

58. On 24 August 2018 [218], the Claimant was informed by letter that an investigation was being conducted in respect of his actions concerning breaches of the Health and Safety risk assessment of 19 June 2018, the allegation of serving customers and answering the phone on 26th and 30th July and of unloading on Monday, 30 July 2018.

59. Ms Stripp took over and conducted the investigation whose aim was to gather as much relevant background information as possible. The Claimant was invited to attend an investigatory meeting where he could answer questions and explain his version of events, but his suspension was to continue.

60. The investigation meeting was duly heard [220-255]. The Claimant admitted to working behind the counter/answering the telephone on 26 and 30 July and helping his colleague to unload the van on 30 July. The reason he gave for this was that he had not been paid his contracted salary and his union rep had advised him that he should go to work as he normally would do, five days a week on a five-day basis and do his normal job and 'that is what I told you I would do'. He went on to say, 'I am fit to do the job and there were no risks in me helping Mark unload the van with a couple of items of furniture and there is certainly no risk serving customers on the telephone' [221].

61. The investigation [225] concluded on 12 September that:

    (1) the risk assessment document was sent to the Claimant and verbally clarified on his return to work day on 5 July and clearly set out his job role and descriptions; and
    (2) that all members, employees and employers had a duty to abide by the Health and Safety at Work Act and to adhere to risk assessments put in place; and
    (3) that the light duties job was fully risk assessed and determined to be

safe and had been agreed by members. Any other tasks had not been risk assessed prior to the starting date of 5 July 2018 due to the Claimant's failure to allow Magpie to access his medical records that were requested in the letter of 11 January 2018 [249]: and

(4) it was for the Magpie to deem what role was suitably safe for the Claimant not himself. Having received full wages from October 2017 to June 2018 whilst being on medical suspension, he was offered an alternative job preparing and painting the lower outside of the building as a return to work that was between three to eight hours per week. It was felt that the Claimant was fully aware that he was breaching the risk assessment put there to protect himself, the public and the company.

62. It was recommended that this was dealt with as a disciplinary record and passed to a panel for further action.

63. On 17 September 2018, the Claimant wrote a letter [256] to the Respondent asking them to read its contents before the meeting to discuss the final investigation into my actions that may be found to be in breach of working conditions assigned to me as light duties.

64. The letter said:

'I have been attempting to return to work for almost the past year now. My absence is not due to continuing illness, it is due to a failure to find sufficient information to satisfy Health and Safety criteria set by Magpie from my medical team to me to return with safety to my job …

I understand this issue might need to be more confidently assessed therefore I have re-issued my employee's permission slip so that my information can be obtained …'

65. He went on to say [257]:

'My actions are as a result of … frustration. I could not see any other way of proving my fitness to return to work other than to demonstrate it so, yes, I carried a couple of items of furniture out of a van but nothing I did not feel totally comfortable with …

the position with the light duties that I began in July has perhaps been misunderstood by me …

if I have indeed misunderstood the intended changes to my contract then I request that I be allowed to return to this light duties job and given an opportunity to discuss what is required from me in order to return to my original job …

I will happily abide with all the restrictions imposed on this job whilst my fitness is investigated and will accept whatever conditions are reached by a neutral occupational therapist, we are all happy with …'.

66. On 28 September 2018 [275], the Respondent wrote to the Claimant [258] indicating he was required to attend a disciplinary meeting on 12 October 2018. The letter stated that the question of disciplinary action in accordance with the company's disciplinary procedure that the possible consequences arising from the meeting could range from a verbal warning through to

dismissal. The Claimant was told of his right to be accompanied by a trade union representative or colleague, and the swop of one member of the panel.

67. The disciplinary meeting took place on 12 October 2018 [259-274] and was chaired by Ms Olly Grover and Mr George O'Leary. The Claimant had the assistance of a union representative.

68. In respect of serving behind the counter on 26 July 2018, the Claimant stated [260], 'as we all know, we jump in and do other people's duties even though they are not our duty as we work across, we always have done. We work across very many different jobs, don't we?'. The Claimant reiterated that he had a fit note from his doctor. His assumption had been that there was a phased return to work and that the Respondent, by refusing to give him an answer, had deliberately tried to mislead him.

69. In respect of the incident on 30 July 2018, the Claimant's position was that he had been 'conned' into a possible change of contract, so his union had advised him to go back to his normal job so 'I turned up on the Monday when Dave was there to make myself available to carry out, what I regard as, my normal job. Okay, yeah, I started doing what I normally do … acting on the advice of the GMB to come back and carry out my normal duties so that is what I have done. So, that's why I went behind the till and that's why I helped unload the van … I am not denying it' [271].

70. The Claimant indicated that he did not think that he had done anything wrong in disregarding the letter concerning the return to work which had given the instructions restricting his duties. The Claimant replied that he did not think that there were any grounds to impose the restrictions that had been put on him and the meeting's response to that by Mr O'Leary was recorded as follows: 'Okay, nothing further to add. No special circumstances to be taken into account'.

71. After this, the Claimant added that he had now re-submitted his consent form to allow the Respondent to carry out further investigations and was happy to conform with whatever Health and Safety restrictions and see an occupational therapist if that was the only way of satisfying the Respondent's criteria. He said that he was willing to do anything to prove that he was fit to do the job that he had done for so long.

72. On 24 October 2018 [275], the Respondent wrote to the Claimant informing him that the outcome of the disciplinary meeting was that he should be dismissed. The letter stated:

'With reference to the incidents on 28 July 2018 and the two separate incidents on 30 July 2018, it is felt you wilfully disregarded Magpie's instructions on the Health and Safety policy and specific risk assessments that were tailored for your safe return to work set out to protect yourself, Magpie and the general public. Your actions are interpreted as gross misconduct.

You were told your return to work would be limited to specific tasks on 8 February 2018, 26 June 2018, 28 June 2018 and in the return to work meeting on 5 July 2018.

Your return to work was specific to the duties required of you. By serving

customer, answering the phone and lifting furniture out of the van without any agreement from your employer, you broke the specific terms of your return to work.

In regard to your statement that you have been treated with extra harshness on your referral to the previous disciplinary history, you are correct in saying this and that the spent written warnings and final written warnings were repeated attempts to correct your actions.

During the disciplinary hearing of 12.10.2018 you were asked if you felt you had done anything wrong to which you replied 'no'. This shows no remorse and a disregard of Health and Safety guidance. All members have a duty to abide by the Health and Safety at Work Act 1974 and to adhere to risk assessments put in place. As employer/employee we all have a duty that requires us to prevent harm to ourselves and others.'

73. The letter indicated that he had a right to appeal within seven days.

74. On 29 October 2018, the Claimant sent a letter [276] indicating that he wished to exercise his right to appeal.

75. On 5 November 2018 [277], the Respondent wrote to the Claimant indicating that his appeal would be heard by the whole Co-Op who would meet and listen to the aspects of the disciplinary procedure as well as 'any further information your representatives have to offer'. He was told of his right to be accompanied by a union representative or work colleague.

76. The appeal meeting took place on 16 November 2018 [279-284]. It was agreed that anyone who had been involved in the disciplinary investigation would leave the room and take no part. The Claimant stated, 'whilst I might have been in contravention of that regulation that had been created for me, the sanction of sacking me for that contravention is completely disproportionate and you should consider that decision and [get] clear answers to who made the decision to disregard the Consultant's, the situation is I am okay to return to work and disregard my doctor's fit note' [280].

77. The union representative demanded to know if anyone from the committee had any professional qualifications and being told by Ms Stripp this was nothing to do with the disciplinary, wanted to know why the Co-Operative had overridden a professional. The union representative continued to dispute [282] the reasons the risk assessment was put in place given the Claimant was, in his view, 'fit for work'. Ms Stripp [283] made it clear the Claimant was well aware of the duties and that the duties given were to paint and prepare the outside of the building. She reiterated that this was made clear on the day he had returned. The Claimant said [283] that he was never consulted at any stage during the risk assessment which he had been sent. Ms Stripp concluded the appeal by saying that there was not much to summarise because nothing different had been discussed than what the Respondent had already had in the letter and the investigations. The representative replied that it was because 'we never had any questions answered. It is unbelievable. It is farcical' [284].

78. On 19 November 2018 [285], the Respondent wrote to the Claimant informing him of the outcome of the appeal meeting which was that the decision to dismiss stood. That decision had been arrived at by a secret ballot with a

majority voting in favour of a dismissal outcome.

79. Ms Stripp was not able to provide the Tribunal with much further detail of the deliberation process of the appeal meeting. A debate occurred and her recollection was that the decision to be made was to either uphold or not uphold the disciplinary.

80. Mr Lo therefore suggested the committee had consider the question of mitigation. Ms Stripp had difficulties in saying what had gone through the minds of her colleagues. In answer to questions from me, she stated that they were affected 'quite a lot' by what they saw as a disruptive conduct of the meeting by the union representative and that this had been a continuous problem throughout the whole process. Her view was that 'things might have been different' if the Claimant had said sorry or expressed some kind of remorse.

Relevant Legal Principles

Unfair Dismissal

81. If a potentially fair reason within section 98 is shown, such as a reason relating to conduct, the general test of fairness in section 98(4) will apply. This reads as follows:

> "(4) Where the employer has fulfilled the requirements of sub-section (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."

82. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

83. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

84. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

85. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

86. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

87. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

88. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

89. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13.** Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

<u>Disobedience</u>

90. Implied into every employment contract is an obligation on the employee to obey the employer's lawful (i.e., contractual) and reasonable orders. Refusal to do so is a potentially fair reason to dismiss for misconduct.

91. However, the mere fact that an employee has disobeyed an instruction — even if he or she is in breach of contract — does not guarantee that a tribunal will find the dismissal fair. The question of whether the employee was in breach of contract in disobeying the order is a relevant, but not conclusive, factor. This stems from the fact that the fairness of a dismissal under S.98(4) of the Employment Rights Act 1996 (ERA) is based on the question of reasonableness.

92. There are three main issues:

- whether the order given was legitimate
- whether the order was reasonable
- the reasonableness of the employee's refusal.

93. The answer to the question of whether an order was legitimate will normally depend on whether it was one that the employer could give under the terms of the contract. If it was, then by disobeying that order the employee will usually be committing an act of misconduct; if it was not, then the employer's insistence on compliance will almost certainly be in breach of contract.

94. Employees are not bound to obey all lawful instructions. While the contractual obligations are important, it is the reasonableness of the instruction (and whether the employer acted within the band of reasonable responses in dismissing) that is crucial in an unfair dismissal claim. As at common law, employees may refuse lawful instructions that are dangerous or unreasonable.

95. In cases where an employee complains of being dismissed for refusing to comply with an order, it is not only the nature of the employer's order which is relevant under S.98(4) but also the reasonableness of the employee's refusal to carry it out — *Union of Construction, Allied Trades and Technicians v Brain 1981 ICR 542, CA*. In that case, the editor of the union's newspaper refused to sign an undertaking which effectively meant that he would be liable for any libels against a construction industry journal that were printed in the paper even though he had no way of controlling the content of articles written by senior officers. He was dismissed — unfairly, held the Court of Appeal. Lord Justice Donaldson said that when dismissal is for refusal to obey an instruction, 'the primary factor which falls to be considered by the reasonable employer deciding whether or not to dismiss his recalcitrant employee is the question, "Is the employee acting reasonably or could he be acting reasonably in refusing to obey my instruction?"' According to the Court, even if the employer had been acting reasonably in ordering the employee to sign the undertaking (which it doubted), the employee's refusal to sign was reasonable and so the dismissal was unfair.

Wrongful Dismissal

96. An employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract, which will be the case if an employee commits an act of gross misconduct.

Submissions

97. At the conclusion of the evidence, the parties made written submissions which are a matter of record and therefore not reproduced in this judgment. These were briefly supplemented by oral submissions and I now briefly summarise their main points.

98. I carefully considered all the arguments raised by the parties.

99. Mr Lo argued that there were clear factors demonstrative of the Claimant being an employee by reference to established legal principles. He highlighted the statement of particulars of terms and conditions of employment document, the degree of control exercised by the Respondent, the lack of a right of substitution and the characterisation of the Claimant as an employee in documents and evidence. The Claimant argued there was no break in continuity of employment following his return to work on light duties.

100. Mr Lo argued dismissal was a disproportionate sanction and that the Respondent had failed to carry out a reasonable investigation. He submitted there was no evidence the Respondent had considered the proportionality of the decision to dismiss as part of its investigation or taken into account the Claimant's long service and founder status in the co-operative.

101. Counsel then submitted there were no reasonable grounds for believing the Claimant was guilty of misconduct nor had it carried out a reasonable investigation. This argument was based on the established principle that an employee is only required to follow reasonable and lawful orders and that an employee was entitled to disobey an unreasonable order. He relied upon In **Union of Construction and Allied Trades and Technicians v Brain [1981] IRLR 224.**

102. He then criticised the Respondent's decision not to amend their instructions to the Claimant once he had submitted the cardiologist's letter and contended the instructions given went well beyond the risk assessment in terms of what was reasonable. He submitted there was no rational basis for the order not to answer the phone or serve customers and that the restriction concerning manual handling was similarly unreasonable.

103. Mr Lo, having taken instructions, withdrew his written submission that the disciplinary process was indelibly tainted by bad faith.

104. Mr Jones-Mantel made a written submission on employment status focussing upon the management structure of the co-operative and its model of internal governance. He contended there was a right of substitution which militated against the Claimant being an employee. He argued that the Claimant's continuity of employment had been broken and that he returned to work under a new arrangement in which he had not served the qualifying period necessary to bring a claim for unfair dismissal.

105. In relation to unfair dismissal, Mr Jones-Mantel emphasised the grave consequences of a breach of Health and Safety provisions. He submitted the dismissal was fair and reasonable, that the Claimants actions were gross misconduct of which they had clear evidence and that they followed a fair procedure. He argued the Claimant had been unreasonable and defiant and that added weight to the argument dismissal was the right sanction. He would just not comply. He asked me to bear in mind the Respondent was a small organisation with limited resources.

Diiscussions and Conclusions

106. I began by considering the two preliminary questions which determined whether the Tribunal had jurisdiction to consider the unfair dismissal claim.

Employment Status

107. The first question is whether the Claimant was an employee or a worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996. Weighing up all the relevant factors, I am satisfied the Claimant was an employee.

108. I reject the Respondent's argument that the Claimant had a right of substitution which is inconsistent with implied status. Whilst the Claimant did carry out some work independently of the Respondent, that was nothing to do with his contract which, in any event, did not provide for a right to substitution. Even if there *had* been a right of substitution, it would not automatically negate employed status since a limited or occasional power of delegation is not inconsistent with a contract of service.

109. There was a contract of employment which imposed an obligation on the Claimant to provide service personally. There was mutuality of obligation and a significant element of control over the Claimant's work by the Respondent. The process of disciplinary action which the Claimant was subjected to is also consistent with that of employment status.

110. To be clear, I accept Mr Lo's written submissions on this question in their entirety.

Continuous Service

111. The next question is whether the Claimant was continuously employed for the two years immediately prior to the termination of his employment (section 108, Employment Rights Act 1996).

112. I have not been able to determine the exact date upon which the Claimant began his employment. He told the Tribunal that he decided to set up Magpie Recycling Co-operative Limited as a workers' co-operative in February 1992. His initial status was as a company director, a title he still retains, so I do not know whether he was an employee from the outset. The statement of particulars of terms and conditions of employment is dated 23 July 2008. The Claimant told me he signed this document to regularise his position. His employment clearly began some while before 2008.

113. Whether described as a return to work or a 'phased return' to work, the intention was that the Claimant should have been able to resume his normal duties providing that the Respondent was satisfied by medical evidence that he was fit to work. I do not consider that his medical suspension broke his continuous service nor did his redeployment have this effect by creating some kind of 'new' contract of employment. In these circumstances, I am satisfied that the Claimant does have the applicable length of continuous service to claim unfair dismissal.

Unfair Dismissal

114. The Claimant accepted (and it would have been my finding in any event), dismissal was for a reason related to his conduct which is a potentially fair one.

115. In these circumstances, the sole issue for me to decide was whether dismissal was fair or unfair in accordance with the provisions of section 98(4) of the Employment Rights Act set out above.

Genuine belief

116. I was satisfied the decision makers at the disciplinary and appeal genuinely believed that the Claimant was guilty of misconduct in the terms of his refusal to abide by the instructions he was to carry out light duties as variously set out in a risk assessment and more specifically, on 8 February 2018, 26 June 2018, 28 June 2018 and on 5 July 2018 (at a Health and Safety induction meeting).

Reasonable Belief

117. The Respondent had the cumulative effect of statements and interviews from employees who had witnessed the misconduct upon which to base and sustain reasonable grounds for establishing a belief in the misconduct alleged. They also had admissions from the Claimant before and during the disciplinary process.

118. The Claimant's arguments here was not so much that the Respondent lacked grounds to believe he had disobeyed instructions but that he was not *required* to do so as they were unreasonable and/or it was reasonable for the Claimant to disobey them even if lawful/contractual.

119. Reliance was placed on **Union of Construction and Allied Trade and Technicians v Brain [1981] IRLR 224**. That case appears to be a rare example of a situation in which an employee might be acting reasonably in refusing to comply with a lawful order even if he had never acted strictly in breach of contract **[Harvey 1380]**. There was in this case a wholly unreasonable demand by the employer 'which ought never to have been made' requiring the employee to compromise/inter-meddle with legal proceedings, something they had no right to require him to do. The Court of Appeal held that even assuming the order was lawful and reasonable, it was wholly unreasonable to expect the employee to comply with it.

120. The "reasonableness" question in this matter needs to be considered in light of an accumulation of facts beginning when the Claimant sought to return to work in November 2017 through to the post grievance appeal and concluding on to 30 July 2018 when the "unloading" incident took place.

121. Based on these facts, the Respondent acted reasonably in seeking information from the Claimant so they could plan on a safe return to work. They sought advice concerning their various responsibilities from ACAS and the HSE and considered the issue of potential legal/insurance liabilities towards the Claimant and others.

122. The Claimant did not provide the consent which would have enabled the Respondent to get the answers they needed from medical professionals concerning his fitness to carry out certain types of manual work.

123. It was unreasonable of the Claimant to take a position that the Respondent's hands were effectively tied by the limited information he had given them and that it had no choice but to allow him to return to normal duties.

124. Lacking the full and correct medical information and without wholehearted co-operation from the Claimant, it was reasonable for the Respondent to err on the side of caution and limit his duties accordingly especially the stipulation of 'no strenuous lifting whilst on light duties' (risk assessment) and 'not to lift furniture', 'Your job is solely to prepare and paint exterior walls', (in July 2018 meeting).

125. In these circumstances, I reject the argument that the Respondent (not being medically qualified), had no right to go behind the medical information the Claimant had provided. They needed to make a proper assessment of what he could or could not do on his return to work.

126. I also reject the submission made on behalf of the Claimant that the Respondent has provided no compelling evidence why it was reasonable not to amend the Claimant's duties in the light of the Cardiologist's letter dated 20 June 2018. That letter which, in any event only gave qualified support to "normal working" was based on information from the Claimant with no input from Magpie as to what his "normal duties" entailed. I do not consider the Respondent was in any way obliged to de-restrict his duties along the lines set out within the letter. They needed more comprehensive information to do that.

127. I therefore find the instructions given were both legitimate and reasonable.

128. Furthermore, I am unable to find that the Claimant was acting reasonably by his refusal to carry out the instructions. He was fully aware of the applicable policy considerations having previously failed to establish a grievance in respect of his return to work. Neither does the fact he was acting on the advice of his union (if that was the position) make his disobedience reasonable.

129. It is instructive to reflect here on the contents of the Claimant's letter of 17 September 2018 in which he appears to have acknowledged that his absence was due to 'a failure to find sufficient information to satisfy Health and Safety criteria set by Magpie … to enable him to return safely to his job'.

Reasonable Investigation/Procedure

130. In terms of fairness generally, the Claimant had sufficient detail of the allegations and a fair chance to respond by being given the opportunity to be able to put forward evidence in his defence and present mitigation. He was accompanied and represented. Following dismissal, he was given the right to appeal.

131. The extent of an investigation and the form it takes will vary according to the circumstances. This was a small workers co-operative without a dedicated HR function and with limited resources.

132. The only witness called by the Respondent was Ms Tracey Stripp. She featured heavily in all aspects of this matter especially in the grievance procedure and appeal outcome. No witness was called in respect of the conduct of the disciplinary proceedings, and it was therefore necessary for Mr Lo to direct all his questions to Ms Stripp who could not be expected to know what was in all minds of the other participants whether in the disciplinary meeting or the appeal where the outcome was determined by secret ballot. I accept Mr Lo was hampered to an extent by only having the one person to question but the fact is most of the significant interactions throughout the process were recorded and/or transcribed. Moreover, the facts and chronology of events are largely undisputed.

133. Mr Lo's submissions here overlap with his arguments on the question of sanction. The essential point is that, once again, the reasonableness of prohibitions was not 'substantively considered' during the disciplinary process or the appeal.

134. It is. in my judgment, fully evident from the transcripts of the disciplinary and appeal that the Respondent *did* emphatically consider the prohibitions were reasonable. It had, over time repeatedly articulated this as its main concern based on the lack of medical evidence which it felt could easily have been provided to give the full picture. I infer the reasonableness of the prohibitions must have been a constant factor that stayed in the minds of the applicable decision makers throughout. The point bears repeating that this was a small workers co-operative.

135. The Claimant told the Tribunal that he merely helped to carry a light mattress, some kitchen chairs and a kitchen table, believing that he did not strain being 'very careful' as per his Cardiologist's advice. The emphasis on the "light" mattress was not before the decision makers at the disciplinary hearings so I must disregard it as I am only considering whether the respondent's decision was within the band of reasonable responses based on what they had *at that time* and not evidence that has emerged later.

136. Although the Respondent could have explored this question, it was essentially a matter for the Claimant to raise himself. Whether this would have been a decisive point is less clear.

137. Overall, I considered the investigation and procedure were thorough and fair.

<u>Sanction</u>

138. I have to consider whether the sanction to dismiss the Claimant, rather than impose some lesser disciplinary punishment, fell within the band of reasonable responses.

139. The answer to this question depends on whether a reasonable employer could have dismissed him for the reasons they found. How I would have handled it is irrelevant.

140. The Respondent had a legal duty to ensure health, safety and welfare at work to protect employees and others from harm and to manage risks including those specific to manual handling. The Claimant had a corresponding legal duty to co-operate with the Respondent to ensure that duty is complied with. The Respondent was required to obtain correct information to obtain protection under their employers' liability insurance.

141. I am satisfied the Claimant had, some time prior to his return to work, formed an intention to disregard the instructions restricting him to light duties and that he did so with determination and some aggression. His culpability was therefore high and rightly characterised as gross misconduct. His actions in unloading furniture from the van on 30 July 2018 were in breach of necessarily strict instructions relating to health and safety.

142. In mitigation, the Claimant had been very unwell necessitating an operation to his heart. He is a hardworking and resourceful individual who was motivated by a wish to return to work and to the job 'he loved'. The Claimant had co-founded Magpie which had undergone change much of which was not to his liking. It is clear he was finding it difficult to adjust to the new regime.

143. In his September 2018 letter, the claimant appeared to take a more conciliatory position which re surfaced at the very end of the appeal hearing when he said he was now willing to provide medical consent and do anything to prove he was fit to return to his job. However, his stance within the proceedings themselves was at variance with this position as he continued to dispute the legitimacy of requests to provide fuller information to enable his fitness to return to be assessed.

144. Ms Stripp seemed to imply that if true remorse had been expressed things could have gone differently at the appeal but this is difficult to gauge as the outcome was decided by a secret ballot.

145. I find it was within the band of reasonable responses for the Respondent to conclude, as they must have done, the gravity of the matter outweighed any mitigating factors and that summary dismissal was therefore warranted.

146. The disciplinary outcome indicated the Claimant had been treated with' extra harshness' by reference to his previous disciplinary history which largely involved expired matters.

147. However, for the reasons above I conclude that the Respondent would have been justified in dismissing the Claimant for the "unloading" incident alone even without a disciplinary history.

148. I do not consider it would have been reasonable for the Respondent to have dismissed the Claimant merely for serving customers and answering the telephone on 26th and 30th July 2018 albeit these incidents do provide evidence that shows an unwillingness on his part to follow instructions at the material times.

Conclusions

149. For the above reasons, this was a fair dismissal. The claim for unfair dismissal fails.

150. Based on the facts found above, the Claimant has committed a repudiatory breach of contract by committing acts of gross misconduct. The claim for breach of contract in relation to notice pay fails.

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Employment Judge Ganner

Date: 4th March 2023