



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Dascombe

**Respondent:** SIPS (UK) Ltd

## FINAL HEARING

**Heard at:** Bury St Edmunds Employment Tribunal (video, CVP)  
**On:** 13 and 14 April 2023

**Before:** Employment Judge Mason

### Appearances

**Claimant:** In person

**Respondent:** Ms. Letts, Employment Tribunal Advocate (Citation)

## JUDGMENT

The decision of the Tribunal is that the Claimant's claims of unfair dismissal and wrongful dismissal fail and are dismissed.

[The Remedy Hearing provisionally listed for 15 May 2023 is vacated]

## REASONS

### Background

1. The Claimant was employed by the Respondent as Factory Manager and was summarily dismissed by the Respondent on 12 July 2022.
2. The Claimant contacted Acas on 22 July 2022 and an Early Conciliation Certificate was issued on 2 September 2022.
3. The Claimant presented this claim on 20 September 2022; he claims he was unfairly and wrongfully dismissed. The Respondent submitted a response on 2 November 2022 defending the claims on the basis the Claimant was dismissed for gross misconduct (alternatively for some other substantial reason).

## The issues

4. As discussed and agreed with the parties, the issues are as follows:

### **Unfair dismissal**

5. What was the principal reason for the Claimant's dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (ERA)?:

The Respondent asserts that it was a reason relating to the Claimant's conduct which is a potentially fair reason. Alternatively, the Respondent says it was for "some other substantial reason", namely an irretrievable breakdown in trust and confidence.

6. If the principal reason for dismissal was a fair one, was the dismissal fair or unfair in accordance with section 98(4) ERA, and, in particular, did the Respondent in all respects act within the so-called "band of reasonable responses"?

6.1 Did the procedure followed fall within the range of reasonable responses of a reasonable employer?

6.2 Did dismissal fall within the range of options available to a reasonable employer in the circumstances?

It is the Respondent's conduct which must be assessed and it is not for the Tribunal to impose its own standards

7. If the Claimant was unfairly dismissed and the remedy is compensation:

7.1 Should compensation be reduced to reflect mitigation?

7.2 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed on 12 July 2022 or have been dismissed in time anyway (**Polkey**)?

7.3 Contributory conduct:

(i) Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal pursuant to s122(2) ERA and, if so, to what extent?

(ii) Did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and, if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to s123(6) ERA?

7.4 Did either party fail to comply with a relevant Acas code and if so, should any compensation awarded be increased or decreased (by up to 25%)?

### **Wrongful dismissal**

8. Did the Claimant fundamentally breach the contract of employment by an act of so-called gross misconduct? This requires the Respondent to prove on the balance of probabilities that the Claimant actually committed gross misconduct.

9. If the Claimant was wrongfully dismissed, how much is he entitled to by way of damages for breach of contract? The parties agree that the Claimant's

contractual/statutory notice entitlement was entitled to 12 weeks. Should any damages be adjusted to reflect mitigation and /or failure by either party to comply with a relevant Acas code?

### **Procedure at the Hearing**

10. The Claimant attended and was not represented. Ms. Letts represented the Respondent. Mr. Palmer, Director of the Respondent (and the Respondent's only witness) attended throughout. This was a remote hearing conducted by video (CVP). At the start of the hearing, Mr. Palmer was unable to make himself heard. At Ms. Lett's suggestion, and by agreement, he joined the hearing using his phone with his computer on mute; in this way he could still see and be seen but could also hear and be heard.
11. I was provided with the following documents:
  - 11.1. A bundle of documents (123 pages). Any reference to a page number in this Judgment is to the relevant page number in the bundle. I have only considered documents which are referred to in the witness statements and which I was taken to at the hearing.
  - 11.2 Witness statements for the Claimant and Mr. Palmer (who took the decision to dismiss).
12. Having explained the procedure and agreed the issues I adjourned for 45 minutes to read the papers and the witness statements. I then heard from Mr. Palmer and the Claimant. The Claimant cross-examined Mr. Palmer and the Claimant was cross-examined by Ms. Letts. I asked both witnesses further questions for the purposes of clarification.
13. At the conclusion of the evidence Ms. Letts and the Claimant made verbal submissions. I reserved my decision and we agreed a provisional date for a Remedy Hearing via CVP on 15 May 2023 at 10.00am; the Claimant agreed to provide the Respondent with payslips from his new employment and details of any pay rise (expected in April) by 28 April 2023.

### **Findings of Fact**

14. Having considered all the evidence, on the balance of probabilities I have made the following findings of fact.
15. The Respondent manufactures Structured Insulated Panels (SIPs). At the relevant time, it employed 16 people. Mr. and Mrs. Palmer are directors.
16. The Claimant's employment with the Respondent started on 23 March 2009. He worked 41.5 hours per week; his gross monthly salary was £2,500 (£1,908 net).
17. The Claimant's job title was Factory Manager. I have not been provided with a Job Description for the Claimant. Mr. Palmer told me that the Claimant, as Factory Manager, was responsible for "*all aspects of the operation of the factory*" and I accept this.

18. On 31 July 2029, the Claimant signed a Contract of Employment [pages 27-31]; he also received an Employee Handbook [pages 32-58]. The Disciplinary Procedure is set out in the Handbook and examples of Gross Misconduct are specified [at pages 46-47]; the appeal procedure is at page 47.
19. I have not been provided with any training records for the Claimant or other evidence of training but it is not in dispute that:
  - 19.1 the Claimant was an experienced Fork Lift Truck driver and had received relevant training; and
  - 19.2 he had received training on loading and unloading; manual handling and operating specific machinery.
20. With regard to health and safety:
  - 20.1 I have not been provided with any health and safety policies other than the brief policy in the Employee Handbook [pages 41-42]:

*"You are required to take reasonable care of your own well-being and that of all other employees. The relevant health and safety notices are posted around the premises and you are expected to be familiar with their requirements. If you have an accident or injury at work you must enter the incident in the Accident Book. The date, time and nature of the incident should be entered and whether it was witnessed".*
  - 20.2 I accept that both the Claimant and Mr. Palmer had responsibility for health and safety;
  - 20.3 The Claimant carried out risk assessments including the operation of specific machinery.
21. Mr. Palmer told me there were other incidents and problems with the Claimant's performance and ability prior to May 2022. However, there is no mention of this in the Grounds of Resistance or in Mr. Palmer's witness statement, nor is there any documentation in the bundle. I therefore find that the Claimant had a clean disciplinary record prior to his dismissal.
22. In May 2022, the Respondent relocated from its site in Rushden to a new site in Kettering. Mr. Palmer says that the Claimant was shown photos of the new premises and there were discussions about where to put equipment; however, on cross-examination Mr. Palmer accepted that the Claimant was not involved in site visits or where equipment would be placed as it was beyond his [the Claimant's] capability to plan the lay-out. I therefore find that the Claimant was not involved in visits to potential new sites and had little input into general decisions regarding the relocation.
23. The following facts are not in dispute:
  - 23.1 A number of machines including a large, heavy unwieldy Wall Saw needed to be transported from Rushden to Kettering. The Wall Saw is 6 or 7 feet high and has a heavy motor arm which makes it awkward to move. It also has a dust collector which consists of a plastic curtain which goes top to bottom and from side to side, the full length of the saw. It has metal feet.
  - 23.2 The machines and equipment were loaded at the old Rushden site. To transport the equipment and machinery, the Respondent used an artic vehicle and

- sometimes a Hiab crane attached to the vehicle to lift heavy and awkward materials and machinery.
- 23.3 The Claimant, as instructed by Mr. Palmer, attended the new Kettering site to take responsibility for unloading and storing the machines and equipment as they were delivered. Mr. Palmer accepted on cross-examination that the Claimant was (effectively) instructed to unload whatever turned up on whatever vehicle. The Claimant unloaded on his own using a forklift. The delivery driver would assist the Claimant by unfastening the vehicle's curtains and fixing straps.
- 23.4 Given that the Claimant was working on his own at Kettering and his role was Factory Manager, I find that the Claimant was responsible for health and safety at the Kettering site and therefore for all health and safety aspects of unloading and storing machinery and equipment transported from Rushden.
24. Prior to transportation, at the Rushden site, the Wall Saw was attached to a purpose made wooden frame. Two junior employees loaded the Wall Saw onto the frame and then onto a lorry using a forklift. Tony the driver then secured the Saw with straps and ratchets and locked it into place. The Respondent had not removed the heavy motor arm of the saw before loading it; the arm was attached to the left hand side of the Saw and therefore its weight was distributed unevenly.
25. I accept Mr. Palmer's verbal evidence that prior to loading the Wall Saw:
- 25.1 He contacted the manufacturer of the Wall Saw to see if they would move it but they were unable to do so within the Respondent's "movement window";
- 25.2 He considered whether the Wall Saw could be lifted from the top but concluded that the Saw was too delicate;
- 25.3 He decided against removing the heavy motor arm as this would involve particular expertise and electricians and there was insufficient time;
- 25.4 He did not consider it was necessary to use specialist equipment (such as a crane) for unloading the Wall Saw as it had been loaded onto the lorry with a forklift and it was therefore reasonable to assume it could be unloaded in the same way.
26. There is a dispute between the parties as to what was discussed (if at all) between Mr. Palmer and the Claimant regarding loading and transporting the Wall Saw:
- 26.1 Mr. Palmer says in his witness statement [para. 12]:  
*"We had spoken about the job a few days beforehand and discussed the machine as it was unstable and wanted to fall forwards. This was why we had fabricated a timber lifting frame"*.
- 26.2 The Claimant on the other hand says there was no such discussion and he was consistent about this at the investigation meeting, the disciplinary hearing and in his Tribunal claim form. However, in his own tribunal witness statement he contradicts this; he says: *"I was instructed by Mr. Palmer to lift the Saw from the bottom on a wooden frame"*. This clearly shows that a conversation did take place about moving the Wall Saw and for this reason I must prefer Mr. Palmer's evidence on this point.
- 26.3 I also find that the Claimant had moved this type of Saw before; he confirmed this at the disciplinary hearing when he said *".. .I must have moved one many years ago, moved it around before – yes."*
27. On Friday 27 May 2022, the Saw and motor arm fell whilst the Claimant was unloading it at Kettering. The Saw and forklift were damaged and the Claimant

sustained minor injuries. The Claimant reported this to Mrs. Palmer on her mobile phone at around 5.10pm after he had left the site.

28. On Monday 30 May 2022, the Claimant went to the Rushden site as he was unclear which factory to report to, Kettering or Rushden. He saw Mrs. Palmer there who told him that he was suspended until further notice pending further investigations with regard to the accident with the Wall Saw. She told him to go home and write a report of what had happened and send it to the Respondent. There is a dispute between the parties as to what happened next. The Claimant says he was in "*total shock and disbelief*" and walked out of the factory and into the yard; he telephoned his wife and explained what had happened and accepts that he was louder than he would normally have been and so finished that conversation in his car. Mrs. Palmer on the other hand says [page 72] the Claimant was "*quite angry and aggressive*" and was "*shouting and swearing*" but "*to be totally honest I don't know if it was at me or someone he was on the phone with*". She says she "*was very shaken up and intimidated and very upset*" but acknowledges that she does not know if he was shouting at her or someone he was on the phone to.
29. The Claimant's suspension on full pay was confirmed in a letter from Mrs. Palmer dated 30 May 2022 [pages 60-61]. This states:  
*"It's alleged that on 27<sup>th</sup> May that you failed to take sufficient care and attention when unloading the companies [sic] wall saw resulting in it being written off"*.

## Investigation

30. The Respondent took statements from the Claimant [pages 73-74], Mrs. Palmer [page 72] and Tony, the driver of the lorry delivering the Saw to the Kettering site [pages 70-71]. The Respondent did not take a witness statement from another driver who drove who delivered two forklift trucks to the Kettering site at around the same time ("the Bennie driver").
31. On 10 June 2022, Mr. Palmer wrote to the Claimant [page 62] inviting him to attend an investigation meeting on 17 June 2022. I accept the Claimant's evidence that he did not receive this letter until 16 June 2022. The Claimant was informed in this letter that the investigation was to discuss an allegation of:  
*"a. alleged failure to unload company equipment safely to prevent a fall, resulting in equipment to the cost of £20,000 being damaged and unrepairable"*  
Included with the letter were photographs showing the damage caused to the Wall Saw. There is no mention in that letter of the allegation that he was aggressive towards Mrs. Palmer on 30 May 2022.
32. On 17 June 2022, the Claimant attended an Investigation Meeting conducted by video link. The notes of that meeting [pages 63-69] show that the following people attended: Mr. Farrer of Citation (Chair); Mr. Palmer; Ms. Cattell of Citation (notetaker) and the Claimant. I accept the Claimant's evidence that he felt under duress at that meeting which lasted from 13.00 until 13.33
33. Mr Farrer opened the meeting by explaining that the allegation was:

*“Alleged failure to unload company equipment safely to prevent a fall, resulting in equipment to cost of £20,000 being damaged and unreparable”.*

Again there is no mention in that letter of the allegation that he was aggressive towards Mrs. Palmer on 30 May 2022.

## Disciplinary hearing

34. On 29 June 2022, the Claimant was invited to a disciplinary hearing to take place on 5 July 2022 [pages 75-76] to consider the following three allegations:

*“a. On or about the 27<sup>th</sup> May 2022, you allegedly failed to unload company equipment in a safe manner, causing significant damage to company property, in excess of £20,000, as evidenced by the attached.*

*b. In relation to allegation one above, this posed a significant risk to the health and safety of yourself, and/or others as evidence by the attached.*

*c. On or about the 30 May 2022 you were verbally aggressive and/or intimidating with a colleague as evidenced by the attached”.*

Enclosed with that letter were the statements (taken from the Claimant, Mrs. Palmer and Tony) and notes of the investigation meeting on 17 June 2022. The Claimant was informed of his right to be accompanied. It was made clear in that letter that one possible outcome of the hearing was summary dismissal

35. A disciplinary hearing took place on 5 July 2022. The hearing was recorded and the notes of that hearing [pages 77-83] show that the following people were in attendance: Chair: Ms. Rhodes (Citation); Notetaker: Mr. Jones (Citation); Mr Palmer; Claimant’s companion: Mr. Zoltan Orsos (fellow employee). The hearing started at 11.00am and finished at 11.30am. The Claimant does not dispute the accuracy of the notes.

36. The Claimant’s account of events on 27 May 2022 (as rehearsed in his investigation statement, the investigation meeting and the disciplinary hearing) were largely accepted by the Respondent and the following facts are not disputed:

36.1 At about 3.30pm, two lorries arrived at the new Kettering site. The first lorry carried two fork lift trucks and was driven by a driver engaged by Bennie Equipment (“the Bennie driver”) who unloaded the forklifts. The second lorry carrying the Wall Saw arrived about 10 minutes later driven by Tony. The Kettering site was due to be locked at 5pm.

36.2 The motor arm was strapped to the Saw and the Saw was screwed to the timber frame. On arrival, Tony started to undo the straps.

36.3 The Claimant noted the heavy motor arm was on the left-hand side and therefore that was where the weight was. He went alongside the left hand side of the lorry in a fork lift truck.

36.4 He initially put the forks of the fork lift truck under the metal Wall Saw as opposed to the timber frame. He started to lift but then Tony told him the Saw was attached to the wooden frame. He then extended the forks back, lowered them and put the forks under the frame and lifted it 6-12” off the bed of the lorry.

36.5 Then the Saw tilted, the remaining straps became loose, the frame collapsed and the Wall Saw crashed down on to the forklift cab. The Saw and the forklift were damaged and the Claimant sustained minor injuries.

36.6 Tony ran to the back of the Saw to support it and the Bennie driver held the front of the Saw to try and steady it.

- 36.7 The Claimant tried to lower the Saw back onto the bed of the lorry but it was jammed onto the forklift and the Claimant was unable to dislodge it.
- 36.8 The Claimant stopped the forklift and got out of the cab. At that point, the motor arm of the Saw became unmoored from the Saw and hit the floor, the forklift cab door and the Claimant.
- 36.9 With the help of the two drivers, the Claimant picked the motor arm off the floor and tied it to the Wall Saw. The Wall Saw was then strapped to the forklift to stop it keeling over and was moved into the building to be stored still attached to the forklift.
- 36.10 Tony and the Claimant looked at the Saw and noticed the metal feet had been bent forward and come away from the timber frame which he believed had caused the Saw to fall forward and lodge onto the forklift.
- 36.11 After the machine had been moved into the building, at about 4.45pm, the Claimant attempted to phone Mr. Palmer at Rushden to ask for help and explain what had happened. No one answered the phone and the Claimant was unable to contact Mr. Palmer on his mobile. The Claimant contacted Mrs. Palmer on her mobile at around 5.10pm; he told her he had left the site, that the Wall Saw had fallen onto the forklift causing damage to the Wall Saw and the forklift and that he had sustained some injuries (cuts and bruises) to his left hand and wrist and right ankle.
37. The Claimant also said he thought the wind got behind the curtain/dust collector on the Saw and acted like a sail and pushed it forward; this is disputed by the Respondent. On the balance of probabilities, I prefer the Respondent's evidence given the size and weight of the machine and the absence of any mention of this in in Tony's statement which otherwise corroborates the Claimant's account.
38. Mrs. Palmer's statement corroborates the Claimant's version of events on Monday 30 May 2022, with the exception of the Claimant's conduct.
39. In addition to rehearsing the events outlined in para 36 above, the Claimant stated at the Investigation Meeting as follows:
- 39.1 He was asked if he had had a conversation with Mr. Palmer about being careful when moving the machine a few days before the incident; he replied:  
*"We did have a conversation, but not about moving the saw"*
- 39.2 The Claimant was asked if with hindsight he would have done anything differently. He replied  
*"Yes. All the other heavy machinery has been brought over with a higher crane usage. We've used this on a low loader and used a forklift to onload and offload. Over the weeks I've thought about it and how we should have thought about it. It's an awkward machine to move"*
- 39.3 The Claimant was asked if he was responsible for the damage or if the fault lay elsewhere. He replied:  
*"I don't necessarily think its myself to blame Occurrences happen, it was various things. Initially the wind did catch that curtain and that was the start of it."*
- 39.4 The Claimant was asked about his conversation with Mrs. Palmer on 30 May 2022. He denied swearing and shouting and being aggressive. He accepted he raised his voice because he was *"upset with the situation"*.
40. In addition to rehearsing the events outlined in para. 36 above, the Claimant stated at the Disciplinary Hearing as follows:



- 40.1 He confirmed the Saw was large and unwieldy when asked if this was the first time he had moved this type of object he replied: *"I must have moved one many years ago, moved it around before – yes."*
- 40.2 He confirmed he had moved other unwieldy equipment before and that before moving such equipment he would look around to make sure *"it's not obstructing in any way, obviously look at the weight of the material you're moving, then obviously the lifting point"*.
- 40.3 He was asked about any prior discussion between him and Mr. Palmer about how to lift this type of equipment. The Claimant said:  
*"There was no discussion between me, and [Mr. Palmer] - on the Wednesday I believe about the transportation on the Friday afternoon, but no discussion with [Mr. Palmer] on how to move the saw"*.  
He confirmed he knew the two lorries were coming to Kettering from Rushden on the Friday with two forklifts and the Wall Saw.
- 40.4 When asked if it is general procedure that once forks are in place to get off the forklift and see where the forks are he replied:  
*"You do a visual check, in the right position and that decision is made when you're in the cab to whatever sitting point you are"*
- 40.5 He did not secure the Wall Saw to the fork and did not accept that it would have been sensible to do so.
- 40.6 With regard to the weather, he said it was a hot summers day; he did not know how windy it was as he was in an enclosed cab with the door closed.
- 40.7 Mr. Orsos queried whether the Saw could have been lifted from the top rather than the bottom. Ms Rhodes said she did not know and this would be considered in the outcome letter.
- 40.8 The Claimant pointed out that two people had loaded at Rushden whereas it was just him unloading at Kettering; he was a lone worker and should not have been put in that position. He said that this was an accident; he did his best to sort the situation out.
- 40.9 With regard to his conversation with Mrs. Palmer on 30 May 2023, he said that after Mrs. Palmer told him he was suspended, he walked out of the factory; he said he was *"gobsmacked"* but did not raise his voice or swear at Mrs Palmer. He then phoned his wife and accepted that he did raise his voice but by this point Mrs. Palmer was about 10 feet away. He said Mrs. Palmer did not appear to be upset.

## Decision to dismiss

41. On 12 July 2022, M Palmer telephoned the Claimant to give him a "heads up" that the decision had been taken to dismiss him. The Claimant then received a letter from Mr. Palmer dated 13 July 2022 [pages 84-84] confirming this. I accept the Claimant's evidence that he did not receive this until 2 weeks later. The letter of dismissal states as follows:
- 41.1 It rehearses the 3 allegations as set out above (para. 34).
- 41.2 The first allegation was upheld. It was not accepted that someone else should have assisted him and the fact that it was windy was immaterial.  
*"When assessing the lift of large, heavy and unwieldy piece of equipment, it should be secured before it is lifted. You undertook no meaningful assessment of the task you were required to perform. Had the wall saw been adequately secured before the lift, it would not have fallen forwards and caused such damage. It is equally important to note that whilst the lorry driver was there to deliver the equipment, he was still there and was providing support to you when the Wall Saw was being unloaded"*

*"I believe you were in a hurry to unload the equipment given it was towards the end of the day. You simply got in the forklift and commenced unloading. It was not the fault of anyone else that it fell. Straps should have been secured and given your experience in your role, this is something which was well known to you. I do not accept that if you had secured the saw to the forks, it would still have fallen. You should have undertaken all reasonable steps before you lifted the machine, which you neglected to do so. In the event that it was inherently unsafe to move the machine, for whatever reason, I would expect any employee to seek assistance and/or guidance. You did not do any of this."*

41.3 The second allegation was also upheld:

*"Your representative commented that the saw could have been lifted from above, via a crane. I take that as a point of potential unloading, but this was not considered by you at the time, nor did you seek any assistance, or adequately secure the saw in question. We had previously taken a very close look to ascertain if the saw could have been lifted from above but had found that this option was not available hence why we constructed a lifted frame. Therefore, I regard this point as irrelevant."*

*"I will not repeat the above comments from allegation one, save that the arm of the wall saw did come away from the machine (despite being strapped) when it fell forwards. This swung towards the cab and hit you in the arm sustaining minor injuries. The point of this allegation was that had the wall saw fallen off the cab, or had anyone been stood in an alternative position, such a device (either the arm or the saw itself) because it was not adequately secured could have caused serious harm or even death."*

41.4 The third allegation was also upheld:

*"From review of Tracy's statement and having talked to her about it, it is very clear she regarded your actions as intimidating. She remarked that she was shaking after it. Tracy does believe that you swore, but she was not sure if this was at her, or in general conversation, but she regarded the overall conversation as scary.*

*I accept that I have rarely ever heard you swear or behave aggressively, but that being said, it is not for you to determine how your actions come across.. I take no issue with swearing in conversation, given the industrial nature of our profession, but I cannot accept any form of conversation (regardless as to who it is directed at) where someone feels intimidated in their place of work. It is clear to me that Tracy was intimidated to the point where she was shaking with fear. "I believe on the balance of probabilities ... that you were verbally aggressive and/or intimidating with a colleague and thus I have decided to uphold this allegation against you"*

41.5 Mr. Palmer concludes the letter by stating that:

*"Because the responsibility of the saw falling rests entirely with you, the weather conditions or the amount of people present at the unloading is irrelevant"*

*"I have taken on board your long length of service with the company. ... However, I do not believe you have shown any serious remorse for your actions... You have sought to divert the blame away from yourself, .... You have been especially evasive when you were questioned over the lack of rachets/straps to secure the saw."*

*"... because of your overt acts in relation to the third allegation, I believe this has caused an irretrievable breakdown in the working relationship. Tracy as my wife, Director and business owner and I cannot work with someone who would leave any colleague feeling so intimidated."*

41.6 The Claimant was dismissed with effect from 12 July 2022 without notice or pay in lieu and advised of his right to appeal within 5 days.

42. Mr. Palmer says in his witness statement:

*"35. Ultimately, ... it came down to the fact that some of the issues were issues relating to him having not listened and not done his job properly. In addition to the fact that he appeared in all of the meetings to seek to shift the blame away from his own wrongdoing at every stage.*

*36. It was also a big issue that he had left another director and owner of the business feeling intimidated"*

*"39. It was clear to me from the meetings that Roy had decided to ignore the advice that we had spoken about a few days before the incident and decided to go off and do the job his own way to try and get it done quickly rather than safely"*

*"I did not believe that it was reasonable for Roy to accept no responsibility and his actions ultimately caused and irretrievable breakdown in the working relationship"*

I accept Mr. Palmer's evidence that he took into account the Claimant's length of service and the weather on the day in making his decision.

## Appeal

43. On 18 July 2022 the Claimant appealed [pages 88-89] The grounds of appeal were as follows:
  - 43.1 He was not given any information verbally or in writing as to how to lift and move the Wall Saw and was not given a risk assessment.
  - 43.2 The Respondent failed to obtain a witness statement from the Bennie driver.
  - 43.3 He had looked into the process of how to move and transport a Wall Saw; this requires removal of the vertical motor beam (the arm) before transporting, and then with the aid of lifting straps, the wall saw can be lifted from the top of the machine
  - 43.4 He accepts he raised his voice slightly when Mrs. Palmer told him he was suspended but denies he was aggressive, threatening or intimidating. He certainly did not swear although she may have heard him on the phone to his wife.
44. He enclosed with that appeal letter screenshots of pages from the manufacturers website [pages 90-91]. The first page is a photograph of a saw machine ready for delivery and being lifted from the top. The second page states: *"It is important that if you ever move a ... saw you first remove the saw beam"*  
It is not in dispute that this is research undertaken by the Claimant after the incident on 27 May 2022 and was not provided to the Respondent at the time Mr. Palmer took the decision to dismiss.
45. The Claimant was invited to an appeal hearing to take place on 15 August 2022. The Claimant declined this date as he was on holiday. I accept that he subsequently provided other dates and times but that the Respondent did not accept these alternative dates as they were outside working hours. I also accept that the Claimant was not prepared to attend an appeal hearing within working hours as he had just started a new job. An appeal hearing therefore never took place.
46. The Claimant contacted Acas and then presented this claim on 20 September 2022
47. The Claimant found new employment on 8 August 2022. His new salary is £2,083.00 gross per month. He was unable to tell me at the hearing what his new net monthly salary is; he mentioned he receives a bonus every 3 months and is expecting a pay rise in April.

## Relevant Law

### Unfair dismissal

- 48 Under **section 94** of the Employment Rights Act 1996 (ERA) an employee has the right not to be unfairly dismissed by his employer.

49. **Section 98 ERA** provides:

*“(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, ... “*

*(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. “*

50. The principles for determining the fairness of a misconduct dismissal (established in **British Home Stores Ltd v Burchell 1980 ICR 303, EAT** (amplified by subsequent case law)) are as follows:

50.1 Did the Respondent genuinely believe that the Claimant was guilty? An employer does not need to have conclusive direct proof of the employee’s misconduct, only that it believed the employee guilty of misconduct.

50.2 Did the Respondent have had in mind reasonable grounds upon which to sustain that belief?

50.3 At the stage at which that belief was formed on those grounds, has the Respondent carried out as much investigation into the matter as was reasonable in the circumstances?

50.4 Was dismissal within the range of reasonable responses?

50.5 Was the procedure carried out within the range of reasonable responses?

51. “Conduct” does not have to be blameworthy, culpable or reprehensible. Misconduct can be deliberate or inadvertent. Gross negligence, omission or carelessness as well as deliberate wrongdoing, can amount to misconduct and can constitute misconduct even where the behaviour is not wilful, or even blameworthy. It is not necessary for a tribunal to decide whether misconduct amounts to gross misconduct before it can come to a decision as to whether dismissal for that misconduct was unfair as unfair dismissal is a statutory concept which considers the reasonableness of the employer’s belief.

52. “Range of Reasonable Responses”

52.1 When assessing whether the Burchell test has been met, the Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The ‘range of reasonable responses’ test applies both to the decision to dismiss and to the procedure by which that decision was reached. The

relevant question is whether the decision and procedure fell within the range of reasonable responses that a reasonable employer might have adopted.

- 52.2 The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted; the test is whether the Respondent's conduct in dismissing the Claimant was within the range of reasonable responses open to it (**Iceland Frozen Foods v Jones** [1982] IRLR 439, **London Ambulance Services NHS Trust v Small** [2009] IRLR 563).
- 52.3 In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. However, the band is not infinitely wide and is not a matter of procedural box ticking
- 52.4 The provisions of the Acas Code of Practice for Disciplinary and Grievance Procedures must be taken into account but is not determinative of the decision.
- 52.5 The impact of mitigation must be consider on the on the reasonableness of the sanction imposed.

### 53. Compensation

- 53.1 In addition to a basic award (section 119 ERA), **Section 123(1) ERA** provides for a compensatory award: "*Subject to the provisions of this section ... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".
- 53.2 Contributory conduct:
- (i) **Section 122(2) ERA** states:  
"*Where the tribunal considers that any conduct of the complainant before the dismissal ... was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*"
- (ii) **Section 123(6) ERA** states:  
"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complaint, it shall reduce the amount of the compensatory award by such proportion regard to that finding*".
- (iii) Before making any finding of contribution:
- a. A claimant must be found guilty of blameworthy or culpable conduct; that enquiry is directed solely towards the conduct of the claimant and not towards the conduct of the employer or other employees.

- b. For the purposes of a contributory fault reduction the employee's conduct must be known to the employer at the time of dismissal and have been a cause of the dismissal.
- c. Once a finding of blameworthy or culpable conduct is made the Tribunal must make a contributory fault reduction, the proportion of the reduction being such amount as it considers to be just and equitable.

53.3. Mitigation:

**Section 123(4) ERA** requires a claimant to mitigate their loss and a claimant is expected to explain to the tribunal what actions they have taken by way of mitigation. This includes looking for another job and applying for available state benefits. The tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the claimant to take will then be a question of fact for its determination.

53.4 Polkey:

Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full compensatory award should be made. In others, the tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

- 53.5 I have also considered **section 207A** of the **Trade Union and Labour Relations (Consolidation) Act 1992**, and in particular section 207A(2), (referred to as "s. 207A(2)") and the **ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009** ("the ACAS Code").

### Wrongful dismissal

54. **Section 3(2) ERA and Article 3 of Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 SI 1994/1623** gives the Tribunal jurisdiction to hear claims for damages for breach of contract of this kind provided the claim arose on termination of the contract of employment and has been brought in time.

- 54.1 Subject to any defining terms in the contract of employment, summary dismissal is only permissible if the claimant's conduct amounted to a repudiatory or fundamental breach of contract. The employer must show that the employee behaved in such a way as to fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract). The conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence (a serious dereliction of duty) which undermined trust and confidence.

- 54.2 In accordance with **s86 ERA**, employees are entitled to one week's notice for each complete year of service unless dismissed for gross misconduct. If an employee

proves that they have been dismissed (constructively or otherwise) without due notice, this will give rise to a claim for damages for wrongful dismissal.

54.3 Section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**, and in particular section 207A(2) and (3) may apply.

### **Submissions**

55. On behalf of the Respondent, Ms. Letts made the following submissions:

55.1 The facts are mostly agreed and the central issue is about who is to blame.

55.2 The Respondent followed a fair procedure:

(i) The Claimant has only raised two issues regarding the procedure:

(a) he says he felt intimidated at the Investigation Meeting but he raised this only for the first time at the Tribunal hearing; Ms. Letts says that whilst he did not have a representative present, there was no obligation on the Respondent to allow him to do so.

(b) the Respondent should have obtained a witness statement from the Bennie driver as part of the investigation; Ms Letts says the driver did not help unload the Wall Saw and was only involved after the Wall Saw had fallen

(ii) The Claimant accepts he received invitations to attend meetings, copies of notes and supporting documents.

(iii) The Claimant appealed and was called to an appeal hearing but it was not possible to accommodate the Claimant's suggested dates and times as they were outside working hours and because of this, the appeal hearing did not take place.

55.3 Ms. Letts submits the Respondent had a fair reason for dismissing the Claimant, either Gross Misconduct or Some other Substantial Reason (specifically loss of trust and confidence:

(i) The damage to the Wall Saw is not in dispute;

(ii) The Respondent reasonably believed that damage was due to the Claimant's actions;

(iii) The Claimant accepts he was responsible for risk assessments and for health and safety as Factory Manager;

(iv) The Claimant agreed he was a competent fork lift truck driver; he said he would assess the task, identify the lifting points, and decide whether or not it was safe to move. However, on this occasion, despite no risk assessment and despite the fact he knew days before that he would be responsible for unloading/moving the saw, he lifted the Wall Saw without using the lifting points. He says the Saw should have been lifted from the top, not the bottom, but this is something he only looked into after the incident.

(v) At the meeting, he confirmed he had moved the Saw before. The Claimant says there was no prior conversation about how to move the Saw; this conflicts with his own witness statement (para 42) in which he says "*I was instructed by Mr. Palmer to lift the Saw from the bottom on a wooden frame*".

(vii) The Respondent reasonably concluded that the Claimant had incorrectly unloaded and lifted the Saw and that this is why the damage occurred. Further more, the Claimant then failed to secure the Saw to the forklift before moving.

(viii) Throughout the process the Claimant refused to accept responsibility.

- (ix) The Respondent did not accept the wind contributed to the Saw falling; the Saw is particularly heavy.
  - (x) There were no issues with loading and transporting the Saw.
  - (xi) Regarding the conversation with Mrs. Palmer, the Respondent was entitled to prefer Mrs. Palmer's version of events.
- 55.4 Ms Letts submits that dismissal was within the band of reasonable responses. Mr. Palmer considered the Claimant's length of service but this does not mean a lesser sanction was suitable.
- 55.5 If the Claimant was unfairly dismissed, the Respondent says:
- (i) If there was any procedural unfairness, this made no difference as the Claimant would have been dismissed in any event.
  - (ii) The Claimant contributed to his dismissal and compensation should be reduced by 100%
56. The Claimant made verbal submissions as follows:
- 56.1 The Claimant submits his dismissal was unfair. The Saw was delivered late on Friday afternoon and he was presented with an impossible situation. He was following instructions to take the Saw off the vehicle.
- 56.2 He did not do risk assessments outside the factory and he was not consulted about the move.
- 56.3 He points out Mr. Palmer said in evidence that it was too complex to take the arm off the Saw off in time but sent the Saw to Kettering anyway; this is contrary to the manufacturers instructions.
- 56.4 The damage to the Saw was not his fault; it was an accident and it was unfair to dismiss him.

## **Conclusions**

57. Applying the relevant law to the findings of fact to determine the issues, I have reached the following conclusions.
58. I am satisfied that the principal reason for the Claimant's dismissal was conduct which is a potentially fair reason. I have reminded myself I must decide whether there was sufficient material in front of Mr. Palmer which satisfied him of the Claimant's misconduct.
- 58.1 Mr. Palmer genuinely believed the Claimant was responsible for the Saw falling and that this was gross misconduct. Mr. Palmer had in mind reasonable grounds upon which to sustain that belief:
- (i) I have reminded myself that (as mentioned above) "conduct" (or misconduct) does not have to be blameworthy, culpable or reprehensible; it can be deliberate or inadvertent. Gross negligence, omission or carelessness as well as deliberate wrongdoing, can amount to misconduct and can constitute misconduct even where the behaviour is not wilful, or even blameworthy.
  - (ii) The damage to the Saw was self-evident and it was not in dispute that the damage had been incurred when the Claimant was unloading/moving it and that unloading/moving the Saw was the Claimant's sole responsibility.



- (iii) Mr. Palmer reasonably concluded that the Claimant was in a hurry and had failed to take any meaningful assessment of the task of unloading the Saw; he did not take all reasonable steps before he lifted the Saw to include securing the Saw.
- (iv) I have accepted that whilst the Claimant had little involvement in decisions regarding the relocation, he did have a conversation about moving the Saw with Mr. Palmer beforehand and knew it would be arriving on a wooden frame. Despite this, the Claimant by his own account initially put the forks under the Saw and not the wooden frame.
- (v) The Claimant's arguments that the Saw should have been loaded/transported in a different way do not negate the fact that the Claimant was solely responsible for the health and safety aspects of unloading and moving the Saw. If he felt it was unsafe to unload, he could have phoned the Respondent when the Saw arrived or refused to unload it.

58.2 With regard to the third allegation regarding the Claimant's interaction with Mrs Palmer on 30 My 2022, I accept that there was sufficient material in front of Mr. Palmer to satisfy him that this was also misconduct. However, I do not accept that in isolation this was gross misconduct given Mrs. Palmer's statement that she could not be sure that the Claimant was raising his voice and swearing at her rather than someone on the other end of the telephone.

59. I accept that the procedure followed well within the range of reasonable responses of a reasonable employer:

59.1 The Claimant was suspended on full pay, an investigation took place, he attended an Investigation Meeting and was subsequently given the notes; he attended a Disciplinary Hearing with a companion and was subsequently given the notes; he was given the opportunity to appeal and the lack of an appeal hearing was not the Respondent's fault.

59.2 The investigation the Respondent carried out was appropriate and reasonable; given that what happened on 27 May 2022 was largely not in dispute it would have been pointless to obtain a further statement from the Bennie driver. I accept the Claimant's evidence that he felt intimidated at the Investigation Meeting. It was certainly "top heavy" in terms of Respondent personnel but I also accept there was no obligation to allow the Claimant to be accompanied at that meeting. It would have been fairer to allow him a companion but having said that, this alone does not render the process unfair.

59.3 With regard to the appeal, the lack of an appeal hearing is down to the Claimant insisting on a meeting taking place outside working hours. I understand his reasons but he cannot then argue that the Respondent was at fault.

60. I find that dismissal fell within the range of options available to a reasonable employer in the circumstances and fell within the band of reasonable responses.

60.1 The Claimant was in a senior position and had previous experience of moving a similar saw and other unwieldy equipment.

60.2 Mr. Palmer gave due consideration to the Claimant's length of service and the possible weather conditions but such factors were outweighed by the Claimant's lack of remorse.

60.3 As a result of his conduct, the Saw incurred significant damage and the Claimant was injured. The potential consequences could have been fatal.

- 60.4 His conduct at the meeting with Mrs. Palmer on 30 May 2023, whilst falling short of gross misconduct in itself, was an exacerbating feature.
61. I accept that another employer in the same circumstances may well have chosen to give the Claimant a warning but I cannot say that the Respondent's decision to part ways with the Claimant was outside the band of reasonable responses. The Claimant's claim of unfair dismissal therefore fails.
62. With regard to the wrongful dismissal claim, it is a different test and I must determine whether or not (and to what extent) the Claimant was in breach of contract by his conduct. On the balance of probabilities I find that the Claimant was in breach of contract for all the reasons set out above and find that the Claimant behaved in a way as to fundamentally undermine the employment contract in that his conduct amounted to a serious dereliction of duty.
63. In conclusion, the Claimant's claim fails and the Remedy Hearing provisionally listed for 15 May 2023 will be vacated.

Employment Judge Mason

20 April 2023

Sent to the parties on:

22 May 2023

.....  
For the Tribunal Office:

J Moossavi

.....