



EMPLOYMENT TRIBUNALS

Claimant: Benjamin Hill

Respondent: Solomon Commercials Ltd

Heard at: Manchester (CVP Hybrid) **On:** 30th May 2023

Before: Employment Judge Greer

Representation

Claimant: In person

Respondent: Ms Hall (counsel)

JUDGMENT

The Claimant's claim for unfair dismissal is not well founded and is dismissed.

REASONS

Background

1. The Claimant was employed as a Commercial Bodywork Engineer between 23rd April 2019 and 10th October 2022. It is not in dispute that he was dismissed by the Respondent.
2. The Claimant started the ACAS early conciliation process on 5th December 2022. The ACAS certificate was issued on 16th January 2023. The claim was presented, in time, on 3rd January 2023

The Claim

3. The Claimant has claimed unfair dismissal pursuant to Employment Right Act 1996, Section 98 ("ERA"). His claim is that:
 - i. Whilst he accepts that the reason for dismissal was related to his conduct, he does not believe that the disciplinary process was conducted fairly. In particular, he feels that he was deprived of a fair opportunity to participate in a disciplinary hearing because the venue for the meeting was changed at late notice, his companion did not attend on time and he was not allowed to tape record the meeting.

- ii. The penalty imposed on him was too harsh. Incidents and accidents in the workplace were generally dealt with informally. The punishment in his case was excessive.

The issues

4. At the hearing before me, the parties agreed that the following issues fall to be determined in this case:
 - i. 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 Tribunal will usually decide, in particular, whether:
 - a. were reasonable grounds for that belief;
 - b. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - c. the respondent otherwise acted in a procedurally fair manner;
 - d. dismissal was within the range of reasonable responses.

The hearing

5. The hearing took place by way of a hybrid hearing. I was assisted by a carefully prepared, agreed bundle of 134 pages. After introducing the hearing, I stopped the hearing for a few minutes to allow Mr Hill consider the papers and decide whether he wished to question the witnesses. On resumption, Mr Hill told me that he did wish to question the witnesses and that he had prepared questions for each of them.
6. I joined the hearing from Alexandra House, Manchester. The other parties joined in from remote locations over the Cloud Video Platform. The Respondent was represented by Ms Hall. I am satisfied that the participants were able to see and hear each other throughout the hearing. I heard evidence from:
 - i. Robyn Mullarkey
 - ii. Kieran Taylor
 - iii. Paul Starkie
 - iv. Steven Stokes
7. They each adopted their witness statements and were asked questions by Mr Hill.
8. I then heard evidence from Mr Hill who was cross examined by Ms Hall. I then heard helpful submissions from Ms Hall and from Mr Hill. At the end of the hearing, I reserved my determination.
9. In reaching my decision, I have carefully considered the oral and documentary evidence, the closing submissions, and my record of proceedings. The fact that I have not referred to every document in the evidence bundle should not be taken to mean that I have not considered it.
10. Where it has been necessary to make a finding of fact in respect of contested matters, I have done so by deciding which version of events is more likely, taking the evidence in the round.

The Facts

Background

11. The Claimant was employed as a Commercial Bodywork Engineer between 23rd April 2019 and his summary dismissal on 10th October 2022. The Respondent gave gross misconduct as the reason for his dismissal.
12. The Respondent is a limited company in the business of manufacturing temperature-controlled vehicles. It has around 350 employees. Robyn Mullarkey ('RM') is the Respondent's Human Resources Manager. Sian Booth ('SB') is a Human Resources advisor employed by the Respondent. Kieran Taylor ('KT') is the Respondent's Head of Operations. Steven Stokes ('SS') is the Respondent's site manager. Paul Starkie ('PS') is a senior supervisor in the Respondent's assembly department.
13. Section 14 of the employee handbook says the following in respect of Gross Misconduct:

We may suspend you on full pay for a short period while we investigate an allegation of gross misconduct. A disciplinary hearing will then take place. We may summarily dismiss you if we believe your behaviour constitutes gross misconduct. Summary dismissal without notice or payment in lieu of notice.

Gross misconduct examples

The examples below are indicative of matters we regard as gross misconduct. This list is not intended to be exhaustive:

...

- *Serious breaches of health and safety rules or procedures*

14. Employees are required to sign a document headed, "Everyone's Responsibilities," upon taking employment with the Respondent. That document lists several rules as follows:

- *Take reasonable care – Do not do anything that will put you or others at risk*
- *Co-operate with employers or anyone else for reasons of health and safety*
- *Follow safe systems and methods of work*
- *Remain alert to risk*

I have read and understand my role in health and safety as an employee.

By signing this document, I hereby agree that I fully understand the need to conform to all aspects of health and safety towards myself and others.

15. On 7th March 2022 RM wrote to the Claimant in relation to disagreements between the Claimant and various colleagues. The various colleagues are not named on the face of the letter. The letter states:

I therefore expect the following improvements:-

- *You must ensure that you are able to work in teams with your colleagues in a polite and professional manner*

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- *You must ensure that you are able to follow instruction and guidance issued by your supervisor, and are able to work under any person with responsibility within the company*
- *Should you experience any issues, you are to speak to you Supervisor or Manager with immediate effect to resolve the issue without conflict*

Although this is not a formal warning, should there be any repeat of this issue or indeed any issues, you may be subject to formal action. Please find enclosed a copy of the company's disciplinary procedures in this regard.

The Incident

16. On 29th September 2022, the Claimant was assigned to a team along with 2 colleagues Jordan Jacques ('JJ') and Corey Bainbridge ('CB'). As the most experienced of the team, the Claimant was given responsibility for overseeing JJ and CB's work. At around 3pm, the team set about installing a piece of Glass Reinforced Plastic ('GRP') using double sided tape. Their attempts to install this piece of GRP failed. An air bubble formed underneath the plastic, causing it to adhere incorrectly.

17. What happened next is largely agreed. In a note dated 3rd October 2022, the Claimant described the incident in the following terms:

Putting GRP onto the wall in a Sainsbury with double sided tape. One piece went on wrong and had to be taken off. Told [JJ] to step back and when I ripped the GRP away off the wall [JJ] had stepped near again. Due to the tape the GRP came off like a rubber band and hit him in the face. I had warned him about it before we started putting the GRP on.

18. The Claimant accepts that the period of time between telling JJ to step back and the Claimant removing the GRP was brief. The Claimant further accepts that he did not look behind himself in both directions to check his proximity to others before removing the GRP.

19. JJ attended Accident and Emergency at a Blackburn hospital. He was diagnosed with a fracture to the right orbital bone.

The investigation

20. This incident came to the attention of SB who set about investigating the matter. On 3rd October 2022 SB wrote to the Claimant in the following terms:

On 29th September, an incident occurred where a colleague reported sustaining a fractured eye socket as a direct result of your actions, specifically ripping GRP down.

At first sight the above matters would appear to fall within the category of Gross Misconduct, for which you may be liable to summary dismissal, unless you are either exonerated, or the outcome is found to be less serious

...

During the course of your suspension, you are instructed not to contact or to attempt to contact, or influence, anyone connected with the matter in any way, or to discuss the matter with any other employee or client of the Company. However, should you wish to contact any employee who you feel could assist you I preparing an explanation for the allegations made against you, then please contact me in order that arrangements can be made for them to be available at interview.

21. SB conducted 3 interviews, one with each of the men present at the incident on 29th September. The transcript of CB's interview records the following exchange:

CB: Putting GRP on the wall and then Ben wasn't happy with it because it was wrong, so Ben wanted to take it out he shouted move to Jordan and then just ripped it off

SB: Did he give chance for Jordan to move?

CB: No, I wouldn't say he did anyway

...

SB: Did Jordan move back?

CB: Yes

22. The transcript of the interview with JJ records the following exchange with SB:

SB: Did he tell you or Corey to step back before taking the GRP off?

JJ: Ben told me he had told me to move but I don't remember hearing anything. After it happened Corey asked if I had seen my eye and I thought it was because it was cut but Corey told me to go and check it and at that point Ben turned around and said I did tell you to move.

SB: Did you step back of your own accord?

JJ: I didn't have chance to because I genuinely wasn't aware he was going to pull it off like that

23. The Claimant attended an interview with SB, accompanied by his companion PS. The claimant was offered the opportunity to postpone the meeting to another time but declined that offer, stating that he wanted to get the meeting over with. The following exchange took place:

SB: Do you feel what occurred was acceptable?

BH: Not acceptable but avoidable

SB: why not acceptable?

BH: Because someone got injured but it was avoidable because if they had listened to instruction, it would not have happened.

SB: Was this Jordan's first mistake on a job that you had witnessed?

BH: I had to tell him 3 or 4 times on this job and the other week he got something in his eye.

24. The transcript of the interview records an exchange during which SB objects to the Claimant making an audio recording of the interview. The Claimant deleted that recording at SB's request.

25. On 6th October 2022 SB wrote to the Claimant to invite him to a disciplinary meeting with RM on Monday 10th October 2022 at Knowsley road Head Office Training Room – within Panels at 10am. The letter said:

The purpose of the Hearing is to provide you with an opportunity to present your explanation for the following:-

- *Causing serious harm towards a colleague*
- *Failure to work in accordance with health and safety*
- *Failure to work in a professional manner*

26. The letter continued:

Please contact me on 01706 211211, immediately on receipt of this letter, to confirm your attendance at the above hearing. Please also inform us of who has agreed to accompany you so that we can make arrangements for their availability.

27. The Claimant duly attended the Respondent's offices at the arranged time. On arrival he was informed that the venue of the meeting was to be moved to a different room within the complex, around 100- 150 yards away. The Claimant had asked for PS to be his companion at this meeting but PS had not attended by 10am. The Claimant asked for permission to tape record the meeting in PS's absence. RM refused that request. There then followed a heated exchange during which RM gave the Claimant 3 options. Firstly, accept that he had committed gross misconduct and resign. Secondly, act like an adult and answer questions. Thirdly, allow RM to make a decision based on the evidence already before her. The Claimant indicated that he wished to take the third option and left the meeting, asking for a colleague to bring him his tools.

28. The Claimant waited on the Respondent's premises for approximately 30 minutes. PS brought him his tools. PS told the claimant that he had believed that the meeting was scheduled for 10:30am and it is for this reason that he did not attend.

29. On 10th October 2022, RM wrote to the Clamant informing him that he was to be dismissed on grounds of gross misconduct. The letter records the following findings:

- *I have evidence to show that a colleague sustained a fractured right orbit (evidence that would have been provided to you during the meeting on 10.10.2022 – this was not provided prior due to personal information being held within the document)*
- *I have evidence to show the injuries sustained by your colleague in the form on picture (evidence that would have been provided to you during the meeting on 10/10/2022 – this was not provided prior due to personal information being held within the document)*
- *I find injuring a colleague at work to be unacceptable, especially in a situation where it was so easily avoidable*
- *You have showed no remorse for your actions*
- *You admit that your actions were not acceptable*

The Appeal

30. The claimant appealed against that decision, enjoying as he did a right of appeal under his contract of employment. His appeal went before KT at an in-person hearing at the Respondent's offices on 28th October 2022. In addition to the Appellant PS and SB were present, PS as the Claimant's companion and SB as the Respondent's note taker. In a written decision dated 31st October 2022, KT dismissed the Claimant's appeal.

The Law

31. Potentially fair reasons for dismissal are set out at section 98 ERA Act as follows:

“(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 –
...
(b) relates to the conduct of the employee,
...
(4) Where the employer has fulfilled the requirement 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,

(b) shall be determined in accordance with equity and the substantial merits of the case.”

32. In a case in which the employee's conduct is said to be the reason for dismissal, the employer must show that misconduct was the reason for the dismissal. According to the Employment Appeal Tribunal in **British Home Stores Limited v Burchell 1980 ICR 303**, a threefold test applies. The employer must show that:

- a. It believed that the employee was guilty of misconduct;
- b. it had in mind reasonable grounds upon which to sustain that belief;
- and
- c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

33. This means that the employer need not have conclusive direct proof of the employee's misconduct; only a genuine and reasonable belief, reasonably tested.

34. In **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** the EAT held that the function of the Employment Tribunal was to determine whether in the particular circumstances of each case 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.

35. Exactly what type of behaviour amounts to gross misconduct depends upon the facts of each case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract) (**Wilson v Racher ICR 428, CA**). The conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence.

36. In **Paul v East Surrey District Health Authority 1995 IRLR305 , CA**, the Court of Appeal held that an employer is entitled to take into account not only the nature

of the conduct and the surrounding facts but also any personal circumstances affecting the employee. The Court found that the attitude of the employee to his or her conduct may be a relevant factor in deciding whether a repetition of it is likely and commented: *'Thus an employee who admits that the conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely.'*

37. When considering dismissal for gross misconduct, the Tribunal has to be satisfied that the employer acted reasonably both in characterising it as gross misconduct, and then in deciding that dismissal was the appropriate punishment (**Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854**).

Conclusions

Potentially Fair Reason

38. I find that the Respondent dismissed the Claimant for a potentially fair reason, namely, his conduct. The Claimant has not asserted any alternative reason for his dismissal. The Respondent was consistent throughout the disciplinary process that the reason for the claimant's dismissal was his conduct.
39. I find that the Respondent genuinely believed that the Claimant breached its health and safety rules by failing to check whether others were close to him and by failing to give an adequate warning before removing the GRP. The Respondent believed that this incident could have been avoided entirely, had the Claimant given a proper warning and checked his surroundings before removing the GRP. Because of the severity of JJ's injuries, it was reasonable for the Respondent to regard that breach of health and safety rules as serious.
40. The Respondent genuinely believed this to be a breach of the company health and safety policy and of such severity as to amount to gross misconduct.

Reasonable Grounds for belief following a reasonable Investigation

41. The Respondent conducted a fair and reasonable investigation in establishing the facts. There were 3 eyewitnesses to the incident in which JJ was injured. Each of the 3 witnesses to the incident, including the Claimant, were interviewed. The Claimant was given an opportunity to put his side of the story across during this interview. In the absence of any other evidence of the incident, the Respondent could have done nothing more at this stage.
42. The Claimant asserts that the investigation was unfair for 2 reasons. Firstly, he was required to delete a tape recording that he made of the interview and, secondly, the transcript taken by SB was said to be inaccurate. I find that these criticisms of the investigation do not amount to procedural unfairness. This is because the claimant was accompanied by a work colleague who had the opportunity to make their own note of the interview. Moreover, the Applicant was provided with a copy of the transcript prior to the disciplinary hearing and had a fair opportunity to make any corrections to the transcript that he wished.
43. At the hearing before me, the Claimant asserted that the investigation was unfair because SB did not put to JJ or CB in interview that JJ was not wearing his safety goggles at the time of the incident. The Claimant argued that, whilst this would not have prevented the incident, this would have reduced the risk of harm and would have been a material consideration when determining the severity of the conduct. The difficulty with this suggestion is that the Claimant did not mention his belief

that JJ was not wearing goggles at the time of the incident until he came to issue his ET1 in January 2023. The Claimant did not make this point in his appeal. The Respondent had no obligation to investigate a premise that was not put to it.

Procedurally fair disciplinary process

44. The process followed by the Respondent was fair. The Claimant knew what the case was that he had to answer, and he was given a proper opportunity to put his position forward including any mitigating circumstances. Whilst the time between the investigation and the disciplinary hearing was brief, I am satisfied that the Claimant had adequate time to prepare for the hearing, given the nature of the case against him.
45. The Claimant was given a fair opportunity to attend a disciplinary hearing. Although the hearing did not take place with the Claimant's participation, this is entirely due to the Claimant's refusal to engage with the process. It was reasonable for the Respondent to refuse consent for an audio recording to take place, owing to privacy concerns and the fact that the medical condition of a third party was likely to be discussed at the meeting.
46. I find that the change to the venue of the meeting made no difference to the fairness of the hearing. This is because the new venue was within the same complex of buildings. The change did not cause any delay to the meeting or affect the Claimant's ability to attend.
47. I find that the Claimant was informed of his right to attend the meeting with a colleague. It is proper to note that the colleague chosen by the Claimant was not present at the beginning of the meeting. However, that colleague was present elsewhere on the Respondent's premises and could have been contacted and asked to attend. It was open to the Claimant to ask for the hearing to be put back for a few minutes while inquiries as to PS's whereabouts were made.
48. I agree with the Claimant that RM's language was intemperate when she suggested the Claimant ought to behave like an adult and answer questions. But this must be viewed in the context of a heated exchange in which on both sides expressed themselves in robust terms. I do not find that this comment was reflective of a closed mind or that this comment affected the overall fairness of proceedings.
49. I agree with the claimant that it was wrong of RM to state in the letter dismissing the Claimant that the Claimant had admitted that his actions were not acceptable. This was not a reasonable conclusion from the transcript of the Claimant's interview with SB. It was not reasonable to conclude that the Claimant's refusal to participate in a disciplinary meeting to be an admission of guilt. However, this mistake of fact was immaterial to the outcome, bearing in mind the other conclusions reached and the fact that the Claimant did not make any arguments of substance at the disciplinary hearing.
50. In any event, the Claimant enjoyed a fair appeal hearing before KT. The Claimant had received sufficient notice of this hearing and was accompanied by PS. The Claimant complains that SB was present at this hearing. I do not find that this affected the fairness of proceedings. Although SB was involved at the investigation stage, she formed no part of the decision-making process in either the decision to dismiss or in the determination of the Claimant's appeal. She was there as a note taker. Moreover, the Appeal hearing gave the Claimant the opportunity to make the arguments that he might have made, had he participated in his disciplinary hearing with RM. Those arguments were rejected for lawful reasons in KT's letter following the hearing.

Range of Reasonable Responses

51. The employer acted reasonably both in characterising the Claimant's conduct as gross misconduct, and then in deciding that dismissal was the appropriate punishment
52. The Claimant asserts that his dismissal for gross misconduct was unfair because other similar incidents were dealt with informally and did not result in disciplinary action. The unchallenged evidence before the Tribunal was that there had been no similar incidents during the Claimant's time working for the Respondent. The example given by the Claimant of a crane hitting a box cannot be said to be truly comparable as no one suffered an injury in that incident. For this reason, the Respondent was justified in treating the incidents differently.
53. It is important to note that the Claimant did not apologise to JJ after the incident in which JJ was injured and the Claimant maintained that JJ was entirely to blame for the incident for the remainder of his time working for the Respondent. He accepted no responsibility for his part, believing himself to be completely blameless. This is apparent from the transcripts of the interviews with SB and the appeal hearing. In this context, the Respondent was justified in losing trust in the Claimant's ability to do his job safely and it could not be expected to wait until another serious health and safety incident occurred before dismissing him.
54. The Respondent's decision to summarily dismiss the Claimant is undoubtedly at the severe end of the band of reasonable responses. It nonetheless falls within it.

Employment Judge Greer

Date 31st May 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

8 June 2023

FOR THE TRIBUNAL OFFICE