EMPLOYMENT TRIBUNALS

Claimant: Mr Oreschnick

Respondent: W M Morrison Supermarkets Limited

Heard at: Cardiff (via video) **On:** 7th & 8th November 2023

Before: Employment Judge Howden-Evans

Representation:
Claimant: Mr Golin, Counsel
Respondent: Mr Kohanzad, Counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Employment Judge's decision was that the Claimant had been unfairly dismissed and the Claimant's complaint of breach of contract in respect of notice pay was well-founded.

Background

1. The Respondent is a well-known retailer. The Claimant commenced employment with the Respondent on 5th October 2015. By the time of his dismissal, he had been a store manager for 6 years and was working as the store manager of the Ty Glas store in Llanishen, Cardiff. He had performed that role for 2 years. His salary was circa £97,000 and he had an unblemished disciplinary record.

2. Following a disciplinary hearing on 22nd September 2022, chaired by Ms Denton the claimant was summarily dismissed. The Claimant appealed this decision. Following an appeal hearing on 25th October 2022, chaired by Mr McMullen and reconvened on 30th October 2022, the Claimant was informed his appeal had been unsuccessful.

3. On 19th December 2022 the Claimant contacted ACAS. ACAS early conciliation procedures continued until 30th January 2023.

4. The Claimant presented his ET1 claim on 28th February 2023. This alleged unfair dismissal and wrongful dismissal. The Respondent denied the allegations in their entirety.

5. On 6th June 2023, standard case management directions were issued, and the case was listed for a 1-day hearing. When filing the Response, the Respondent's representative explained a 2-day hearing was necessary and on 24th July a further day was added to the listing.

The Hearing

6. The 2-day final hearing was conducted wholly remotely by video, before an employment judge sitting alone. Both parties were represented by counsel.

7. I had the benefit of a bundle of documents of approximately 392 pages.

8. At the start of the hearing, we discussed and agreed the List of Issues. On the morning of the 8th November 2023, in response to a request from the Respondent's counsel, Mr Golin circulated a list of points of alleged unfairness / unreasonableness.

9. I heard evidence on oath from

   9.1 Ms Denton (who took the decision to dismiss the Claimant) on Day 1;
   9.2 Mr McMullen (who considered the Claimant's appeal) on Day 1; and
   9.3 the Claimant on Day 2 .

10. All witnesses relied upon written witness statements which I had read prior to witnesses giving evidence on oath. The procedure adopted for each witness was the same – there was opportunity for supplemental questions, followed by questions from the other side, my questions and then finally an opportunity for re-examination.

11. Both counsel provided oral closing submissions. I considered my decision during the afternoon of Day 2 before providing an oral decision and reasons.

The Issues

12. By the time of closing arguments, the issues the judge had to determine were:

Unfair Dismissal

1. What was the reason for dismissal? The Respondent asserted that it was a reason related to conduct which is a potentially fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

2. Did the Respondent genuinely believe the Claimant had committed misconduct?

3. Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant?, In particular,

a. were there reasonable grounds for that belief (that the Claimant had committed misconduct);

b. at the time the belief was formed, had the Respondent carried out a reasonable investigation;

c. did the Respondent act in a procedurally fair manner; and

d. was dismissal within the range of reasonable responses?

Notice Pay

4. It is agreed that the Respondent dismissed the Claimant without notice.

5. Can the Respondent show that it was entitled to dismiss the Claimant without notice because the Claimant had committed gross misconduct?

Summary of closing submissions

13. Claimant's Counsel asserted the following were examples of unfairness / unreasonableness in the Respondent's decision making:

13.1 concluding the Claimant had witnessed erratic forklift truck ("FLT") driving from NM.

13.2 concluding the Claimant should have suspended NM, given the Respondent's subsequent failure to suspend NM, AD or CH, and bearing in mind the Claimant's belief at the time about NM's licence.

13.3 Concluding the Claimant should be held accountable for AD's decision to move the FLT.

13.4 Concluding the Claimant ought to have declared the scissor lift as not fit for purpose / taken it out of action, or giving this issue unreasonable weight.

13.5 Failing to speak to AC and/or MB in respect of the Claimant's attempts to escalate the scissor lift problems.

13.6 Failing to consider properly the content of the Allianz engineering reports.

13.7 Treating the Claimant as a scapegoat for the maintenance department's failings in respect of the scissor lift.

13.8 Treating the use (or non-use) of safety shoes as part of the disciplinary procedure, or giving this issue unreasonable weight.

13.9 Treating the use (or non-use) of high vis jackets as a dismissible offence, or giving this issue unreasonable weight.

13.10 Failing to give any / any adequate weight to Claimant's clean disciplinary record, length of service and/or exceptional mitigating circumstances.

13.11 Accepting NM's change of evidence without questioning it and/or failing to give the Claimant an opportunity to comment upon it, when the change of account implied deceit on the part of the Claimant.

13.12 Pre-determining C's dismissal.

13.13 Dismissal was outside the range of reasonable responses.

14. Respondent's counsel submitted the investigation and decision to dismiss were both within the range of reasonable responses. He submitted that the fact the Claimant was a manager and in cross examination accepted the dismissing officer's conclusions were factually open to her was relevant to the range of reasonable responses test. He also drew my attention to the importance of the Respondent's policy on use of FLTs and the health and safety concerns surrounding them.

Findings of fact

15. I am mindful of the importance of not substituting my view for those of the Respondent's officers – in this part of the findings of fact I am considering only the evidence that the dismissing officer and appeal officer were aware of at the time of taking their decisions.

16. The Claimant commenced employment with the Respondent on 5th October 2015. By the time of his dismissal, he had been a store manager for 6 years and was working as the store manager of the Ty Glas store in Llanishen, Cardiff. He had been the store manager of the Ty Glas store for 2 years. His salary was circa £97,000 and he had an unblemished disciplinary record.

17. The Ty Glas store does not have a loading dock for deliveries. To unload stock from lorries, staff need to use the scissor lift or stock needs to be delivered in a lorry that has a tail lift.

18. The Respondent has a policy regarding the use of forklift trucks ("FLT"). As FLT can cause considerable harm if operated incorrectly, the Respondent has banned staff from using FLT unless they have completed the Respondent's own FLT training and hold the Respondent's FLT licence.

19. In Spring / Summer 2022 the Claimant was experiencing a very difficult time in his personal life – his father in law died in February 2022, shortly after this the Claimant was acutely unwell and admitted to hospital with a serious illness and as the Claimant was recovering from this illness the Claimant's father died suddenly

in USA and the Claimant had to travel to USA to arrange his father's affairs. In April 2022 the Claimant was prescribed sleeping tablets and counselling to help manage his stress, anxiety and exhaustion. The Claimant returned to work in April 2022 but admits he was not really well enough to return to work. By 21st July 2022 (the date of the incidents) the Claimant had not slept properly for months, his relationship with his wife and young children was fraught and in particular during the evening of 21st July 2022 he was "petrified" his wife was leaving him.

20. On 21st July 2022, during the evening, at approximately 8 to 9pm , there was an accident in the Claimant's store, which resulted in MD, the night manager, being injured. At the time of the accident, the Claimant was at home having completed his own work shift earlier in the day. The Twilight Manager, AD, phoned the Claimant at home to report the accident.

21. On 3rd August 2022 an anonymous whistleblowing report was made which alleged there were unsafe working practices at Ty Glas store regarding the use of forklift trucks. Matthew Dyer, the Respondent's Regional Trading Standards Manager investigated this complaint and concluded that formal investigations should take place in relation to three people, NM (Replenishment Manager), AD (Twilight Manager) and the Claimant.

22. Alice Clark, the Respondent's Investigating Officer, interviewed the Claimant on 22nd August 2022 and subsequently interviewed other colleagues including AD, and NM.

The Claimant's Disciplinary Hearing

23. By letter of 5th September 2022, the Claimant was invited to attend a disciplinay hearing with Ms Denton. The Claimant's invitation to disciplinary hearing identified the Respondent was considering the following allegations:

    (1) "A serious breach of health and safety whereby you have witnessed a manager [NM] driving a forklift truck (FLT) on Thursday 21st July knowing he had no licence to drive a FLT with Morrisons.
    (2) A serious breach of health and safety whereby you knowingly gave permission for [AD] to drive a FLT who did not have a licence on the evening of Thursday 21st July.
    (3) A serious breach of health and safety whereby the Operations Manager [CH] drove the FLT who did not have a licence.
    (4) A serious breach of health and safety where the scissor lift in the Cardiff store is not fit for purpose and should not be used by colleagues, the use of the lift contributed to a serious accident that occurred on Thursday 21st July at 20.51pm.
    (5) A serious breach of health and safety whereby you have not worn a High Vis in the warehouse yard on Thursday 21st July.
    (6) A serious breach of trust and integrity whereby the health and safety of colleagues have not been the main priority for you as store manage in Cardiff including:
        i. High Vis jackets not being available for colleagues or manager in the store

ii. Safety shoes not being worn by managers or colleagues in the store when unloading a wagon
iii. The awareness of colleagues FLT trained in the store who could have driven the FLT on Thursday 21st July"

24. The disciplinary hearing took place on 22nd September 2022 and commenced at 9.01am. The Claimant attended the hearing with his representative, Mr John, store manager. At 10.39am the hearing was adjourned; at 11.50 it was reconvened, and Ms Denton stated her decision was to summarily dismiss the Claimant.

25. At the outset of the disciplinary hearing and throughout the hearing, the Claimant explained the exceptionally difficult circumstances he had experienced in his personal life (as noted in paragraph 19 above). Ms Denton accepted the Claimant had been through a "torrid time" and noted the Claimant had observed that his judgement had been clouded and he had maybe not made the right decision in his conversation with AD during the evening of 21st July 2022.

26. In the Claimant's investigation meeting, the Claimant had made it clear that 21st July 2022 was the first time he had ever seen NM driving a FLT, that the Claimant had challenged NM when he saw him driving a FLT on 21st July and had been told by NM that he did have a FLT licence. The Claimant's account as recorded in the investigation meeting minutes was that during the afternoon of 21st July, he checked the Respondent's list of FLT licences and realised NM didn't have a FLT licence with the Respondent and shortly after this he sat down with NM during the afternoon of 21st July 2022 and had in depth conversation with NM, reprimanding him for driving without a Morrison's FLT licence.

27. The Claimant repeated this account in his disciplinary hearing *"Context: I've challenged him, asked have you got a licence, and I accepted that..."*

28. I accept that in the disciplinary hearing the Claimant told Ms Denton that he had accepted that NM had a FLT licence, at that moment in time, ie when he spotted NM driving the FLT. The Claimant was telling Ms Denton that at the point he witnessed NM driving, the Claimant believed NM had a FLT licence.

29. Whilst stating her decision, Ms Denton explained that in relation to each allegation she had concluded:

(1) The Claimant had witnessed NM driving the FLT without a licence which put other colleagues at risk and the Claimant had failed to take sufficient action as Ms Denton's view was that the Claimant should have suspended NM at the time the Claimant witnessed him driving the FLT.
(2) The Claimant gave unclear instructions to AD during the evening of 21st July 2022 which put others at risk.
(3) The Claimant had not been aware CH drove the FLT so this allegation was dropped.
(4) The scissor lift may or may not have contributed to MD's accident, but the accident had been caused by where the FLT was placed, and it had been placed there by a colleague who did not have a FLT licence. Ms Denton concluded the deadman switch on the scissor lift was not working and the

Claimant should have taken more action to escalate the issue with the scissor lift.

(5) & (6) The Claimant should have taken his health and safety responsibilities more seriously and should have personally conducted a return to work interview with MD when he returned to work.

30. By letter of 28th September 2022, Ms Denton confirmed her decision to summarily dismiss the Claimant and gave further information about her findings in relation to each allegation:

(1) "A serious breach of health and safety whereby you have witnessed a manager NM driving a forklift truck on Thursday 21st July knowing he had no licence to drive a FLT with Morrisons. In the disciplinary hearing you told me that on 21st July 2022 NM was driving the FLT and that you challenged him by asking him if he had a licence to be driving the FLT. You told me that you accepted what he told you, but that you then "thought better of what I had allowed" and told me that you had followed up with him. That follow up took place on 27th August 2022 in the form of an email to NM. As this was some five weeks later, I do not accept you took appropriate steps, in a timely enough manner….Reviewing the CCTV footage with you during the disciplinary hearing , NM's driving of the FLT was reckless in that he hit a stationary pump truck. I believe…you should have taken immediate action and suspended him. By not doing so you have not created a safe working environment and have knowingly not protected colleagues".

(2) "A serious breach of health and safety whereby you knowingly gave permission for AD to drive a FLT who did not have a licence on the evening of Thursday 21st July. In the disciplinary hearing you told me that you had a telephone conversation with AD on 21st July 2022 when she described that "MD was crushed". During that conversation AD asked you if she could move the FLT and you told her "you have to do what you have to do". By your own admission you did not give AD, who does not hold a FLT licence a clear instruction and therefore it was highly likely that AD would operate the FLT and in doing so would put herself and other colleagues at significant risk. I believe that you should not have allowed AD to use the FLT and that you should have been more direct to stop it. By giving an unclear instruction you've not created a safe working environment and have knowingly not protected colleagues."

(3) Insufficient evidence for any finding.

(4) *"A serious breach of health and safety where the scissor lift in the Cardiff store is not fit for purpose and should not be used by colleagues. The use of the scissor lift contributed to an accident that occurred on Thursday 21st July at 20.51 PM. In the disciplinary hearing you told me that no one had ever told you that the scissor lift was not safe, that nothing was included in the Allianz reports to say that it is not fit for purpose, but that you were aware that the dead man's switch was not working. You told me that you had been in contact with AC [the Respondent's] Property Specialist Maintenance Sales to get the scissor lift replaced and that it has been on*

the capital replacement list for two years. Despite several colleagues making you aware of issues with the scissor lift you did not escalate these issues to the business other than to AC…As the store manager it is your responsibility to ensure a safe working environment and I believe that you should have taken more action and been more tenacious in escalating the unsafe scissor lift to the business…..In the disciplinary hearing we also discussed that the return to work interview for MD was completed three weeks later…and to a poor standard, and by CH who is the same level as MD. As the Store Manager…you should have completed this return to work interview on his first day back and by not doing so you have not demonstrated the appropriate duty of care…."

(5) "A serious breach of health and safety whereby you have not worn High Vis in the warehouse yard on Thursday 21st July. In the disciplinary hearing you told me that colleagues haven't been wearing high vis in the yard as it's considered part of the warehouse and that this was something you had inherited. It is your responsibility as the store manager to ensure a safe working environment and I believe that you should have identified and taken action to ensure colleagues are wearing high vis in the yard and are working safely. This includes wearing a high viz yourself when working in the yard. By not taking action and not role modelling the correct behaviours you've not created a safe working environment and have knowingly not protected colleagues."

NM and AD's disciplinary hearings

31. On 4th October 2022, both NM and AD were separately invited to attend disciplinary hearings to consider identical allegations of gross misconduct, namely that on 21st July 2022 they had each driven a FLT without a licence and had not worn a High Vis or safety shoes.

32. During NM's disciplinary hearing he confirmed he had a FLT licence with a previous employer but had not completed training to gain the Respondent's FLT licence. Later in the disciplinary hearing the minutes report that NM was asked

> *"In the investigation you talked about a conversation with [the Claimant], that he gave you a "drilling". Did that actually happen?"*

NM is recorded as replying

> "*In all honesty, no. The plan was to protect him [the Claimant] as much as possible, but we all know what happened…. the conversation didn't happen"*

33. When making these comments NM was facing gross misconduct charges and the very real risk of being dismissed. Ultimately NM was summarily dismissed for gross misconduct.

The Claimant's appeal

34. The Claimant submitted a 3 page letter of appeal on 10th October 2022 and noted in relation to each finding

"(1) I did not knowingly allow NM to operate the FLT without a FLT licence - he stated when asked, when I saw him on the FLT, that he had one. I followed up with NM on the 21st July afternoon, having checked the licence list and took action accordingly.

(2) AD is a signed off Manager in Charge trained to create and uphold a safe working environment. AD has taken the decision to move the FLT and therefore create an unsafe working environment. Had I not taken the phone call in my own time, when dealing with my marriage breakdown, the decision made by AD to move the FLT would highly likely have been the same. I cannot be held responsible and accountable for someone else's actions when I am not in the building."

(4) Scissor lift… I was aware that the safety bar switch was not working as highlighted in the Allianz report, as was the business. The safety bar is not a dead man's switch. It is not a materially important part of the scissor lift from a safety perspective. It has no health and safety bearing as the lift is Goods Only (also confirmed in the Allianz report). This is why the function is not described as "A" rated "could cause danger to persons".
The description of the scissor lift as "dangerous" is a referral to the fact we are all aware that the scissor lift was and continues to be part of a replacement programme. Whether it be the short ramp, or potential trip hazards, 7 foot pallets that sometimes weigh in excess of 1.3 tonnes are challenging to offload without the support of colleagues and regularly fall over or break apart due to poor stacking. This is the biggest complaint and driver of the "dangerous" terminology description of the scissor lift - not that it is so dangerous that it should have been taken out of action.

At no point has it ever been highlighted from any engineer, Morrisons maintenance department or head office that the scissor lift is not fit for purpose and shouldn't be used.

For clarity the procedure of Allianz reports is as follows the report goes directly to SMB insurance, the report then is forwarded to the regional maintenance manager to action all recommendations, the report is also CCd to the store. There is no facility for stores to be able to action any repairs or maintenance on scissor lifts. That can only be done through the regional maintenance manager. The business was and is fully aware of defective elements of the scissor lift. The person responsible for arranging and ensuring repairs take place was fully aware of what needed to be done. I am being used as a scapegoat for the failures of the business and the maintenance team to take appropriate action to ensure the defects highlighted are repaired. The business has been aware that the scissor lift is an accident waiting to happen ie the access ramp presenting a trip hazard has been highlighted for two years on the Allienz report and have neglected to take action. I am being held accountable for not having escalated the issues identified with the scissor lift appropriately however the business was and is fully aware. I have spoken with AC regarding the identified issues on several occasions. The

business is fully aware and as such negligent in its own approach to health and safety and putting the blame for this at my door.

(5) High vis jackets – This is not a serious breach of health and safety it is classed as a minor non-conformity on the Morrisons Safe and Legal Audit. Every colleague investigated highlighted high vis vest were available and described where they were kept. There is no requirement to wear safety shoes in the Group Health and Safety Document – Vehicle Unloading and Loading Procedures. I tried to explain this at the disciplinary meeting and was ignored.

35. The Claimant's appeal also objected the sanction was too harsh, disciplinary sanctions were not properly investigated, process was unfair and biased, evidence had been ignored, his mitigation had not been addressed in the oral decision to dismiss, his current ill health appeared to be a burden on the business – when returning to work in April 2022 he had not had a return to work interview, there was no stress management plan or reasonable adjustments. The claimant also objected the decision to dismiss seemed to include matters that had not been set out in the invitation to disciplinary hearing, for instance failing to complete a return to work interview with MD.

36. The Claimant's appeal was considered by Mr McMullen (Regional Manager) who met the Claimant on 25th October 2022 at the appeal hearing and subsequently reconvened the appeal hearing on 30th November 2022 to provide his decision. Mr McMullen upheld the decision to summarily dismiss the Claimant.

37. In his appeal outcome letter of 30th November 2022, Mr McMullen confirmed he was not upholding any of the Claimant's points of appeal. He confirmed the decision to summarily dismiss the Claimant. I note the following comment in the appeal outcome letter:

"During his disciplinary hearing NM was very open about the conversation that you had with him on 21st July 2022 and that this conversation did not happen and that he said this in his investigation in an effort to protect you….on balance I believe this conversation did not happen"

NM changing his account of events on 21st July 2022

38. In the Particulars of Claim, the Claimant asserts the appeal outcome letter revealed Mr McMullen had taken into account additional evidence that the Claimant had not been given an opportunity to comment upon or rebut, namely evidence given by NM during NM's disciplinary hearing.

39. During NM's disciplinary hearing, NM did change his account of the incident on 21st July 2022 (as set out in paragraph 32 above). Prior to NM's disciplinary hearing, NM had agreed with the Claimant's evidence that the Claimant had confronted NM about his lack of a Morrison's FLT licence on 21st July; during the investigation meeting on 30th August 2022, NM was asked whether he could recall the Claimant speaking to him and is noted to have responded *"absolute drilling, best way to put it… although you have licence before, you don't here…you don't use it…grilling me").*

40. It is accepted that the Claimant was not provided with the minutes of NM's disciplinary meeting (in which NM changed his account of events) prior to the Claimant's appeal hearing, nor was he given any reasonable opportunity to comment on this change of evidence or adduce evidence to rebut this new account prior to the outcome of his appeal.

41. I accept the Claimant's evidence that Mr McMullen made a comment at the start of the Claimant's appeal hearing (which was not included in the minutes) along the lines of Mr McMullen had just read NM's disciplinary hearing minutes and had found them to be very enlightening.

42. In this regard, the Claimant's evidence is supported by a comment in the minutes of the Claimant's reconvened appeal hearing that recorded the Claimant as saying (after the appeal outcome had been read to him)

"You have added evidence that has never been presented to me, in that you have added in things from the disciplinary hearings that have taken place afterwards. And you have made a decision based strongly around this new evidence."

43. Further I accept that NM's comments, as recorded in the minutes of NM's disciplinary hearing portrayed the Claimant in a very poor light, calling into question the Claimant's honesty and integrity. It implied the Claimant had been trying to deceive the Respondent by counterfeiting evidence. I accept this had an impact on Mr McMullen's view of the Claimant and the weight he attached to the Claimant's account of events. I accept this was both procedurally and substantially unfair as it went to the heart of Mr McMullen's decision making. Mr McMullen chose to completely dismiss the Claimant's evidence that on 21st July 2022, as soon as he found out NM didn't have FLT licence, the Claimant gave NM an absolute grilling for driving without a FLT licence.

44. I note that in the disciplinary hearing and in his appeal, the Claimant referred to the annual Allianz reports that had inspected the safety of the scissor lift and also said he had referred concerns about the safety of the scissor lift to the regional maintenance manager. Despite this being key evidence which could support the Claimant, neither Ms Denton, nor Mr McMullen chose to look at the Allianz reports or seek to interview the maintenance manager.

Findings of Fact relevant to the wrongful dismissal claim

44. In addition to the findings of fact in the unfair dismissal claim, I note the following facts – this includes facts that may not have been known or appreciated by the dismissing officer and/or appeal officer at the time they took the decisions they did.

45. When the Claimant became manager of the Ty Glas store, he inherited a store with an old scissor lift and a team of staff that had established ways of working. He has not made any significant changes to those ways of working – the area in question has never been regarded to be a high vis / safety shoe area. The Respondent's witnesses accepted that not wearing high vis jackets or safety shoes or enforcing the wearing of these would not be regarded as an act of gross misconduct.

46. The Allianz inspection report of 3rd November 2020 records the scissor lift does not have any "category A" defects (defects that could cause a danger to persons). It identifies the following as being "category B" repairs (parts that are identified as requiring rectification):

    46.1 access ramp entry edge is risen from the floor presenting a trip hazard;
    46.2 nearside platform side panel is deformed;
    46.3 forward section of protection curtain is not folding correctly on its down travel.

47. The Allianz inspection report of 2nd November 2021 records the scissor lift does not have any "category A" defects (defects that could cause a danger to persons). In addition to the items listed in paragraph 45, it identifies the following as being "category B" repairs (parts that are identified as requiring rectification):

    47.1 Rear central section of protection curtain is holed
    47.2 Nearside vehicle buffer deformed and detached at lower fixing
    47.3 Platform nearside safety barrier bar switch is defective and inspection cover missing its lower fixing
    47.4 Pendant control supply unit cover detached at its lower fixing.

48. At all times, the Claimant has taken appropriate action to address these defects and ensure the health and safety of colleagues, as he had referred this maintenance work to AC, the regional maintenance manager, and chased these repairs on a number of occasions.

49. In July 2022, the Claimant was considerably unwell and had not received a return to work interview (when he returned to work in April 2022) or appropriate stress management support. His decision-making was affected by his ill health.

50. I accept the Claimant had not seen NM drive a FLT prior to 22 July 2022 and when he spotted him driving the FLT he challenged NM and was told NM had a FLT licence. I accept that later that day the Claimant checked the records and realised NM did not have a Morrisons FLT licence and at that point reprimanded NM and made it clear NM should never drive a FLT again without the Morrison's FLT licence. I accept the Claimant had not been present and did not have any knowledge that NM had driven the FLT in a reckless and dangerous manner. At no time has the Claimant permitted NM to drive a FLT knowing NM did not have the Morrison's FLT licence.

51. The morning of 22 July 2022 was a very stressful shift for the Claimant. Five lorries turned up with deliveries at the same time, which caused a logistical headache for the Claimant with limited staff to assist in unloading them. At the same time the main blast freezer failed, and, in addition, it was discovered that there was a failure of the freezer section covering 8 bays of freezers. This meant numerous freezers had to be emptied as products were over temperature. The Claimant had to report faults and take immediate action on a number of fronts. This was all happening at that time the Claimant spotted NM driving the FLT.

52. Later that evening when the Claimant was at home, his wife was in the process of walking out of their relationship, a very distressing event for the Claimant, his wife and their young children. The Claimant took a call from the Twilight Manager who reported the Night Manager had been involved in an accident and had become trapped. The Claimant did not have the benefit of seeing the scene. The Twilight Manager was trained to run the store in the Claimant's absence and was in a much better position to assess the situation and decide whether it was necessary, to move the FLT a few feet, despite not having a Morrisons FLT licence. Ms Denton suggested the Claimant should have phoned a different store to get a FLT driver dispatched to assist in the situation. The Claimant believed a person was trapped, which didn't give him, or the Night Manager, the time it would have taken for someone to travel to the store. In addition, the Claimant was having to make an instantaneous decision when he was experiencing a distressing event at home, so it is understandable that his response may have been confusing. In the circumstances, I accept the Claimant was doing the best he could with the information available to him. He did say the Twilight Manager should not drive the FLT without a licence, but also said she needed to do what she needed to do, which was a reasonable and appropriate instruction given it was an emergency situation, that he could not see with his own eyes.

53. The Claimant had spoken to each of the people that had driven a FLT without a Morrison's FLT licence and had explained they must not drive the FLT again without a Morrison's FLT licence. It was reasonable for him to decide it was not necessary to suspend or discipline them; they were relatively new managers and employees still learning their roles. The Respondent's other managers did not immediately suspend or discipline those that had driven FLT without a Morrison's FLT licence.

The Law

Unfair dismissal

54. The Respondent bears the burden of proving, on a balance of probabilities, that the Claimant was dismissed for one of the potentially fair reasons set out in Section 98(2) of the Employment Rights Act 1996 (ERA). The Respondent states that the Claimant was dismissed by reason of his misconduct; see Section 98(2)(b) ERA. If the Respondent establishes that it did have a genuine belief in the Claimant's misconduct, and that it did dismiss him for that potentially fair reason, I must go on to consider the general reasonableness of that dismissal under Section 98(4) ERA.

55. Section 98(4) ERA provides that the determination of the question of whether the dismissal is fair or unfair depends upon whether in the circumstances (including the Respondent's size and administrative resources) the Respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing the Claimant. This should be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

56. In considering the question of reasonableness, I have had regard to the decisions in *British Home Stores Ltd v. Burchell* [1980] ICR 303 EAT; *Iceland Frozen Foods*

Ltd v. Jones [1993] ICR 17 EAT; the joined appeals of *Foley v. Post Office and Midland Bank plc v. Madden* [2000] IRLR 82 CA; and *Sainsbury's Supermarkets Limited v. Hitt* [2003] IRLR 23 CA. In short:

56.1 When considering Section 98(4) ERA, I should focus my enquiry on whether there was a reasonable basis for the Respondent's belief and test the reasonableness of its investigation.

56.2 However, I should not put myself in the position of the Respondent and test the reasonableness of its actions by reference to what I would have done in the same or similar circumstances. This is of particular importance in a case such as this where the Claimant is seeking, in effect, to "clear his name".

56.3 In particular, it is not for me to weigh up the evidence that was before the Respondent at the time of its decision to dismiss (or indeed the evidence that was before me at the Hearing) and substitute my conclusions as if I was conducting the process myself. Employers have at their disposal a band of reasonable responses to the alleged misconduct of employees and it is instead my function to determine whether, in the circumstances, this Respondent's decision to dismiss this Claimant fell within that band. (see for instance Turner v East Midlands Trains Ltd [2012] EWCA Civ 1470, [2013] IRLR 107)

56.4 The band of reasonable responses applies not only to the decision to dismiss but also to the procedure by which that decision is reached – was the procedure adopted within the reasonable band of options that were available to the employer? (see *Whitbread v Hall* [2001] EWCA Civ 268).

56.5 It is sufficient that the employer genuinely believed on reasonable grounds that the employee was guilty of misconduct. The employer does not have to prove the offence or inadequacy — *Alidair Ltd v Taylor 1978 ICR 445, CA*. Furthermore, an honest belief held on reasonable grounds will be enough, even if it is wrong.

56.6 The fact that the employee did not in fact commit the misconduct is irrelevant. The relevant question is simply whether the employer had reasonably concluded that he did at the time of dismissal (see *Devis (W) & Sons Ltd v Atkins* [1977] AC 931).

57. Following the ACAS Code of Practice on Discipline and Grievance Procedures ('the Acas Code') is an important factor in determining whether the disciplinary procedure adopted was fair (*see Lock v Cardiff Railway Co Ltd* [1998] IRLR 358).

58. The ACAS Code provides

"<u>Inform the employee of the problem</u>

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its

possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

Decide on appropriate action

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct. [Tribunal emphasis]

59. The Acas guide, Discipline and grievances at work ("the Acas guide") that accompanies the ACAS Code, provides

"Investigating cases

When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against. [Tribunal emphasis]

60. In deciding whether disciplinary action is appropriate and, if so, what form it should take, the Acas guide suggests that employers consider:

60.1 whether the rules of the organisation indicate what the likely penalty will be as a result of the particular misconduct

60.2 whether standards of other employees are acceptable, and whether this employee is being unfairly singled out

60.3 the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service

60.4 any special circumstances which might make it appropriate to adjust the severity of the penalty

60.5 whether the proposed penalty is reasonable in all the circumstances; and

60.6 whether any training, additional support or adjustments to the work are necessary

61. I note the Acas guide is non-statutory and non-binding and just provides guidelines – employers are not required to follow this guidance to the letter.

62. In Strouthos v London Underground Ltd 2004 IRLR 636, the Court of Appeal explained it is important that the employee knows the full allegations against him, that disciplinary charges should be precisely framed, evidence should be limited

to those particulars and the employee should know the evidence the employer is relying on.

Relevant law – wrongful dismissal

63. In a wrongful dismissal claim, the Tribunal has to ask whether the Claimant was guilty of conduct that was so serious it amounted to a repudiatory breach of the contract of employment, entitling the employer to terminate the contract without notice. I must be satisfied that there was an actual repudiation of the contract by the Claimant.

64. It is generally accepted that the Claimant must commit 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 1974 ICR 428, CA*.

65. In Briscoe v Lubrizol Ltd 2002 IRLR 607, the Court of Appeal confirmed the Claimant's conduct *'must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment' and confirmed* the Claimant's conduct should be viewed objectively – it is possible for an employee to repudiate the contract even without an intention to do so.

Conclusions

66. Turning to the List of Issues, the Judge's conclusions were as follows:

Unfair Dismissal

Question 1 - What was the reason for dismissal?

67. I did accept that both Ms Denton and Mr McMullen had a genuine belief that the Claimant had committed acts of misconduct, in not enforcing the respondent's FLT policy / health and safety rigorously enough.

68. Unfortunately, Ms Denton had conflated cctv footage that she had viewed of NM driving a FLT in a reckless manner, with what the Claimant had actually seen which was NM driving the FLT in a reasonable manner. Ms Denton did not have a good understanding of the scissor lift's faults and viewed it as being a danger to people when Allianz reports did not note any Category A fault.

69. Mr McMullen also erroneously had a belief that the Claimant had seen NM driving in an unsafe manner and that the Claimant had not reprimanded NM on 21st July 2022. They both had an erroneous belief that the Claimant was condoning reckless FLT driving.

Question 2: Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant?

Question 2 a & b: were there reasonable grounds for that belief (that the Claimant had committed misconduct) and at the time the belief was formed, had the Respondent carried out a reasonable investigation

70. The Claimant's account in the investigation, disciplinary hearing and disciplinary appeal remained the same – he had never seen NM drive a FLT until 21st July, he challenged NM as soon as he saw him driving the FLT and was told by NM that NM had a FLT licence – he accepted that answer in the moment as he was dealing with a number of urgent issues and then checked the FLT register during the afternoon of 21st July. Upon checking the FLT register he realised NM didn't have a Morrison's FLT license and that same day reprimanded NM for driving the FLT without a Morrison's FLT licence. This account was supported by NM throughout the investigation and NM only departed from this account when he was trying to save his own job during his own disciplinary hearing for gross misconduct.

71. I accept that in accepting and relying completely on NM's changed account of events, given in the circumstances in which he changed his evidence, without any further investigation to test the voracity of NM's account, Mr McMullen was relying on grounds that were outside the range of reasonable grounds that a reasonable employer could rely upon.

72. Further and in the alternative, in choosing to accept NM's changed account of events, without any further investigation, this took the investigation beyond the range of reasonable investigations that a reasonable employer would regard as being reasonable.

73. Further and in the alternative, the decision makers' conclusions about the safety of the scissor lift and their conclusions about the Claimant's failing to escalate concerns about the lift were not based on grounds that a reasonable employer (of the size of the Respondent) could regard as being within the range of reasonable grounds to form this conclusion. Decision makers had not had adequate regard to the Allianz inspection reports for the scissor lift and had not interviewed the regional maintenance manager, despite the Claimant informing them he had repeatedly chased the repair of the lift with the regional maintenance manager.

74. Further and in the alternative, as noted in the ACAS guide, disciplinary officers (and appeal officers) should look for evidence that supports the Claimant's case. In failing to interview or make enquiries of the regional maintenance manager, this meant this investigation fell outside the range of reasonable investigations that a reasonable employer (of this size) could regard as being reasonable.

Question 2c did the Respondent act in a procedurally fair manner

75. Further and in the alternative, relying upon NM's changed account, without giving the Claimant prior notice of this account, clear details of what had been said by

NM in his changed account or an opportunity to call evidence to rebut this account rendered the appeal procedurally unfair.

76. Further and in the alternative, in failing to make suitable enquiries of the regional maintenance manager, to establish whether there was evidence that supported the Claimant, this also rendered the disciplinary hearing and appeal procedurally unfair.

Question 2d: was dismissal within the range of reasonable responses?

77. Further and in the alternative, I accept that, given the Claimant's clean disciplinary record, the exceptional circumstances he experienced in Spring / Summer 2022 and also on the day and evening of 21st July 2022, and given the size and resources of the Respondent, dismissal was beyond the range of reasonable responses.

78. For each of the reasons set out in paragraphs 70 to 77, I accept, in all the circumstances (including the respondent's size and administrative resources), the Respondent did act unreasonable in treating this conduct as sufficient reason to dismiss the claimant.

Notice Pay

79. Had the Claimant committed gross misconduct? I refer to the findings set out in paragraphs 44 to 53 of this judgment. I did not find the Claimant had committed any breach of his employment contract – he had used his best endeavours in very difficult circumstances. I certainly did not find he had committed an act of misconduct that was so serious it amounted to a repudiatory breach of the contract of employment. The Respondent has wrongfully dismissed the Claimant, by dismissing him without notice.

Employment Judge Howden-Evans
Date 26th January 2024

REASONS SENT TO THE PARTIES ON 29 January 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche