# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Riley

**Respondent:** IKO PLC

**Heard at:** Liverpool (by CVP) **On:** 11 September 2024
4 October 2024
(in Chambers)

**Before:** Employment Judge Ainscough
(sitting alone)

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Ms Knowles, Counsel

# JUDGMENT

The judgment of the Tribunal is that the complaint of unfair dismissal is unsuccessful and is dismissed.

# REASONS

**Introduction**

1. The claimant was dismissed from his role as a Production Operative with the respondent, a company which specialises in the design, manufacture and installation of roofing, waterproofing and insulation systems, on 29 February 2024.

2. The claimant commenced early conciliation with ACAS on 28 March 2024 and received the certificate on 2 April 2024. On 9 April 2024 the claimant submitted his claim to the Employment Tribunal. On 4 June 2024 the respondent submitted the response.

**Issues**

3. The issues for the Tribunal are as follows:

Dismissal

(a) The claimant was dismissed on 29 February 2024.

Reason

(b) Has the respondent shown the reason or principal reason for dismissal?

(c) Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

(d) If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as a sufficient reason to dismiss the claimant?

(e) 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:

(i) The respondent genuinely believed the claimant had committed misconduct;

(ii) There were reasonable grounds for that belief;

(iii) At the time the belief was formed the respondent had carried out a reasonable investigation;

(iv) The respondent followed a reasonably fair procedure; and

(v) Dismissal was within the band of reasonable responses.

**Evidence**

4. The parties agreed a joint bundle of evidence totalling 287 pages. The respondent's representative also submitted a cast list, chronology and opening skeleton argument.

5. I heard evidence from Sarah Mooney, the respondent's Site Manager, and the manager responsible for dismissing the claimant. I also heard evidence from the claimant. I then heard submissions from the respondent's representative and the claimant.

6. It was not possible to provide judgment at the conclusion of the hearing and this decision was reserved.

## Relevant Findings of Fact

Claimant's Employment

7. The claimant worked for the respondent from 7 January 2017 until 29 February 2024. The claimant's role as a Production Operative involved assisting with the manufacturing of products on the production line. One of the claimant's tasks was the operation of the "MSK machine". This machine bands rolls of roofing felt onto pallets using heat.

8. The claimant's contract of employment provided for a grievance procedure and a disciplinary procedure, but neither were contractual. In addition, the claimant was expected to comply with the duties under the Health and Safety at Work Act 1974, and in particular, the claimant was required to follow safe systems of work and site rules.

9. The claimant signed the contract of employment on 23 May 2017 confirming that he had received and read and agreed to work in accordance with the terms and conditions.

10. The claimant's job description confirmed that a principal objective was to "ensure that effective implementation of the company health and safety policy is maintained". As part of adherence to that objective, the claimant signed various risk assessments and safe operating procedures to confirm that he understood the content of those documents and agreed to abide by what was required.

11. The claimant was given training in the "lock-out tag-out procedure". This was necessary to work on the MSK machine because it required, in its simplest form, those entering the machine to keep the gate key on their person so that they could not get locked in the machine. If there was more than one person working on the machine, the gate key was to be placed in a box and each person had to secure a padlock to the box to reflect the number of people working in the machine.

12. The respondent's disciplinary procedure provided for an investigation stage, a disciplinary hearing stage and (if necessary) an appeal stage. The procedure set out a non-exhaustive list of examples of gross misconduct. It also stated that "other acts of misconduct may come within the general definition of gross misconduct".

The claimant's final written warning

13. On 13 September 2023 the claimant received a final written warning for breaching the respondent's dignity at work policy, social media policy and mobile phone policy. The final written warning was issued by Lee Halsall and the claimant was informed that it would be active for a period of 12 months. The respondent's disciplinary policy confirmed that if there were further acts of misconduct following a final written warning, an employee may be dismissed.

14. The claimant did not appeal against the final written warning. When asked about this during evidence, the claimant said that he did not believe he had to do so because he had not lost his job. However, during the course of these proceedings the claimant has relied on this final written warning as evidence that the dismissal

manager, Sarah Mooney, had the claimant on her "hit list" and therefore, her decision to dismiss the claimant was unfair.

17 January 2024

15. On 17 January 2024, the claimant was working on the MSK machine. During the operation of the machine, the claimant entered the machine without following the lock-out tag-out procedure. The claimant subsequently climbed onto the machine to secure a pallet and fell, hitting his head on the machine and injured himself. The failure to follow the lock-out tag-out procedure was not the cause of the claimant's injury.

16. The claimant filed an accident report and took a period of time off work.

Health and safety investigation

17. On 18 January 2024 Chris Nicholson, the Operations Manager, conducted an investigation into a failure to adhere to the respondent's health and safety principles.

18. On 29 January 2024 the claimant's solicitor wrote a pre-action protocol letter to the respondent setting out a potential claim for personal injury that the claimant could pursue as a result of the incident.

19. On 7 February 2024, Chris Nicholson, completed a RIDDOR report to the Health and Safety Executive setting out the details of the incident.

20. At the conclusion of that investigation on 13 February 2024, Chris Nicholson recommended that the claimant and his colleague, Jack Halsall, should face disciplinary action for failing to adhere to the lock-out tag-out procedure. Chris Nicholson had formed the view that the claimant had entered the MSK machine and left the gate key in the gate. Chris Nicholson had also concluded that Jack Halsall had subsequently entered the machine and left the gate key in the gate.

Disciplinary Procedure

21. On 20 February 2024 the claimant returned to work. The claimant met with Chris Nicholson and provided a statement. The statement was added to Chris Nicholson's investigation report, and Chris Nicholson maintained that the claimant and Jack Halsall should face disciplinary action.

22. On 22 February 2024 the claimant was invited to a disciplinary hearing to take place on 26 February 2024 and to be chaired by Sarah Mooney, the Site Manager. The claimant was informed that he was being asked to attend such a hearing because of a "serious breach of the company's rules, including, but not restricted to, health and safety rules, with regard to failing to adhere to the health and safety of themselves and others". The claimant was warned that the outcome could result in his dismissal. The claimant was provided with the minutes of the investigatory meetings, other materials and a copy of the disciplinary policy.

23. The claimant attended the disciplinary hearing on 26 February 2024 accompanied by his trade union representative. Sarah Mooney was assisted by a

notetaker. At the outset of the hearing, the claimant was given an opportunity to view the CCTV footage from 17 January 2024. After the claimant had viewed the CCTV footage, he informed the respondent that he understood he was subject to the hearing because he had not followed the lock-out tag-out procedure.

24. The claimant's trade union representative suggested that the claimant may have been feeling rushed and just forgot to operate the lock-out tag-out procedure.

25. Sarah Mooney informed the claimant that she was going to take some time to consider her decision and reconvene the hearing in a few days' time. Prior to reconvening the hearing, Sarah Mooney investigated the assertion that the claimant had felt rushed which led him to forget to do the lock-out tag-out procedure. Sarah Mooney discovered that the respondent was not short-staffed on that date and in fact the line was not running when the claimant entered the machine. Sarah Mooney also had access to the claimant's training record.

26. Sarah Mooney reconvened the disciplinary hearing on 29 February 2024 and informed the claimant that he was being dismissed with immediate effect. The claimant's dismissal was confirmed by way of a letter on 1 March 2024. The letter set out that a sanction other than dismissal was not considered because the claimant had a live final written warning for conduct on his file and therefore dismissal was the appropriate outcome.

27. On 5 March 2024 the claimant submitted an appeal. In his appeal letter the claimant stated that there was a culture of getting the job done as quickly as possible. The claimant asked the respondent to consider checking the CCTV footage to see whether the claimant was the only one who had not followed the lock-out tag-out procedure.

28. The respondent convened an appeal meeting on 12 March 2024, but the claimant was unable to attend. The respondent communicated with the claimant on two further occasions to agree a time for the appeal hearing but the claimant was unable to agree a time. Finally, the claimant and the respondent agreed to an appeal meeting on 27 March 2024. However, on 26 March 2024 the claimant cancelled the appeal meeting. The respondent rescheduled the appeal meeting for 3 April 2024.

29. The claimant subsequently informed the respondent that he no longer wanted to continue with the appeal because he had started the Employment Tribunal proceedings.

## Relevant Legal Principles

30. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

31. The primary provision is section 98 which, so far as relevant, provides 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 sub-section (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 sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable 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".**

32. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

33. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, but which was subsequently approved in a number of decisions of the Court of Appeal.

34. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing termination of employment.

35. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

36. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

## Submissions

Respondent's Submissions

37. The respondent contended that the dismissal was for the claimant's misconduct. The respondent submitted that the argument put forward by the claimant that it was a sham reason was not credible. The respondent contended that the claimant had accepted at the time and during this hearing that he had not followed the correct procedure and therefore the dismissal manager had a genuine belief of misconduct.

38. The respondent asked the Tribunal to note that the claimant's assertion that his line manager often entered the machine without following the lock-out tag-out procedure was a new allegation made during these proceedings. The respondent contended that this was not raised during the disciplinary process and therefore the disciplinary manager could not investigate this matter after she adjourned the hearing.

39. The respondent submitted that the dismissal manager had a reasonable belief of the claimant's misconduct because of his admissions and his confirmation that he understood the correct procedure. It was the respondent's position that the dismissal of the claimant was reasonable because his colleagues did not have a live disciplinary warning which had to be taken into account.

40. The respondent submitted that the final written warning was not appealed by the claimant and the issue of the validity of the warning has only been raised in these proceedings.

Claimant's Submissions

41. The claimant maintained that the respondent had been inconsistent in applying disciplinary sanctions. It was the claimant's position that his colleagues had performed the same misconduct but had only received verbal warnings.

42. The claimant contended that the respondent had deleted the CCTV footage so that further investigation could not be undertaken about the actions of his colleagues.

43. It was the claimant's position that if the machines had been in working order he would not have been put in this situation and would not have been dismissed.

## Discussion and Conclusions

44. It was accepted and agreed by the parties that the claimant was dismissed on 29 February 2024.

Reason for dismissal

45. The respondent has maintained throughout the proceedings that the reason for the claimant's dismissal was his conduct on 17 January 2024. The claimant has

submitted that in fact the real reason for his dismissal was because the dismissing manager, Sarah Mooney, had a vendetta against him and he was on her "hit list".

46. In her witness evidence, Sarah Mooney stated that the claimant was not on her hit list. Sarah Mooney pointed to evidence such as not being responsible for the claimant's final written warning, and adjourning the disciplinary hearing before making a final decision so that she could investigate further the claimant's assertion that he was rushed.

47. The Tribunal has also had the opportunity to consider the notes of the claimant's investigatory meeting, and the transcript of the disciplinary hearing. In both the meeting and the hearing, the claimant admitted to not following the lock-out tag-out procedure, and further stated that he would not have done anything differently if given the opportunity to do so. Therefore, the claimant admitted to a failure to follow the health and safety procedure.

48. The Tribunal has concluded that the reason for the claimant's dismissal was his conduct.

49. For the same reasons, the Tribunal has also concluded that Sarah Mooney had a genuine belief of the claimant's misconduct. The claimant admitted in the investigation meeting and the disciplinary hearing that he had not followed the correct lock-out tag-out procedure. Sarah Mooney also had the opportunity to view the CCTV, as did the claimant, and could see that he had not followed the procedure.

Reasonableness

50. Following the accident report, the respondent conducted an investigation into potential breaches of health and safety procedures. The respondent considered the CCTV, the accident report and statements from the claimant's colleagues. Prior to inviting the claimant to the disciplinary hearing, the claimant was spoken to by the investigating manager on his return to work and asked to provide a written statement.

51. It is the claimant's contention that the respondent did not conduct a reasonable investigation because it did not consider the actions of other members of his shift on the CCTV footage. The respondent's explanation was that it had received an accident report of a particular incident and therefore investigated that incident, and subsequently discovered that the claimant had not followed the correct health and safety procedure. The respondent had not received reports of any further incidents so did not look at other parts of the CCTV footage.

52. The Tribunal has determined that the respondent conducted a reasonable investigation into the claimant's conduct. The investigating officer spoke to those present at the time that the claimant was injured and considered the CCTV footage from the time of the claimant's injury prior to making the recommendation for a disciplinary hearing. The investigating manager also specifically asked the claimant whether he was aware of the lock-out tag-out procedure and noted that the claimant said he would not do anything differently, before reaching his conclusion.

53. Having conducted a reasonable investigation, the dismissal manager was given an opportunity to ask relevant questions of the claimant during the disciplinary hearing. The dismissal manager ensured the claimant had an opportunity to view the CCTV, more than once if he had wanted to. The claimant admitted that he had not followed the lock-out tag-out procedure and provided mitigation that it was because he was rushed due to the culture of keeping the line going.

54. Prior to forming her view of the claimant's conduct, Sarah Mooney adjourned the disciplinary hearing so that she could investigate the assertion by the claimant's trade union representative that the claimant had been rushed and had forgotten to follow the procedure.

55. Sarah Mooney undertook further investigation and discovered that the production line had in fact stopped at the time of the incident and the claimant was not under pressure to keep it going when he entered the machine. Further, Sarah Mooney was able to consider the claimant's training file and discovered that the claimant had been properly trained and understood the correct procedures when using the MSK machine.

56. Therefore, by the time Sarah Mooney reconvened the disciplinary hearing, the Tribunal determines that, she had a reasonable belief of the claimant's misconduct. Sarah Mooney had considered the investigation conducted by Chris Nicholson and had conducted a further investigation based on what the claimant had told her during the disciplinary hearing.

57. In the dismissal letter the respondent set out that it had no choice but to dismiss the claimant because he was on a live final written warning.

58. The claimant contended that he and a colleague were disciplined for the same failure to follow the procedure, yet his colleague only received a verbal warning. When asked about this in evidence Sarah Mooney stated that she had considered the claimant's final written warning prior to reaching the decision to dismiss the claimant. It was Sarah Mooney's evidence that the colleague did not have a live final written warning and she was able to issue a verbal warning to that colleague but did not have the same luxury with the claimant.

59. Sarah Mooney was clear in evidence that she had not issued the final written warning – this had been done by a different manager – and therefore the claimant was not on her "hit list". The claimant did not appeal the final written warning and subsequently did not appeal his dismissal.

60. The Tribunal has concluded that the claimant's dismissal was within the range of reasonable responses. Sarah Mooney was clear that the claimant had conduct issues which were live for the respondent, and this further admitted serious breach of health and safety policy meant the respondent no longer wanted to employ the claimant.

Conclusion

61. The claimant's complaint of unfair dismissal is therefore unsuccessful and is dismissed.

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Employment Judge Ainscough

Date: 11 November 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

13 November 2024

FOR THE TRIBUNAL OFFICE

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