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EMPLOYMENT TRIBUNALS

Claimant: **Keith Johnson**

Respondent: **Lancaster Motor Company Limited t/a Birmingham Honda**

Heard at: **Birmingham** **On:** **4 and 5 May 2017**

Before: **Employment JudgeSelf**

Representation
Claimant:
Respondent:

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

The Claim for unfair dismissal succeeds but no compensation is payable in respect thereof.

The Claim for wrongful dismissal is dismissed.

REASONS

1. By a Claim Form dated 2 February 2017 the Claimant seeks compensation for what he contends was his unfair and wrongful dismissal. The Respondent denied both claims in their Response dated 6 March.

2. I have heard oral evidence from Mr Davies (General Manager) and Mr Penman (Sales Director) on behalf of the Respondent and I have also heard the Claimant and Alison Hughes for the Claimant. I have considered such documents as I have been taken to within the bundle and I have also listened carefully to the representatives' closing submissions and the written documents they gave me in support of their cases.

3. The Claimant who was almost 59 at the date of the hearing had worked with the Respondent or its' predecessors for all of his working life, some 42 years. At the time of his dismissal the Claimant was the Service Manager at the Respondent's Honda main dealership in Birmingham. The Respondent to this matter had taken over the dealership on 9 June 2016 and is part of the substantial Jardine Motors Group which has dealerships across the country. Prior to that the dealership was owned by, and the Claimant employed by, Colliers. The Claimant's employment was subject to a TUPE transfer.

4. It is apparent that the Respondent had a very different set of expectations and standards than Colliers. They had different ways of working and, as so often when there is a transfer, changes were made in methods of working. It is for the Respondent to set the standards that they consider to be acceptable and whilst the basic terms and conditions may stay the same, change is often a culture shock for employees who are used to a specific way and standard of working.

5. One of the areas that appeared to need something of a shake-up was in regards to health and safety. David Anstey was the Divisional Health and Safety Officer and he first visited the Birmingham site on 22 June 2016. Following that visit there was a long "to do" list in respect of health and safety issues and a perusal of that list gives the impression that the Birmingham dealership had not placed such matters at the forefront of their mind, with some of the matters appearing to be very basic (124-125). At Colliers, Health and Safety issues were outsourced. One of the matters was that a cabinet for airbag storage was ordered as a matter of urgency and was due for next day delivery.

6. On 6 October Mr Anstey wrote to the Claimant wherein he stated that he had been told that the airbag situation had previously been sorted but he had discovered that the problem had in fact increased and that the Respondent was in breach of its explosive licence and that in his view staff and the business were in danger. He stated that there was a "serious lack of control" in ordering the airbags. The Claimant asserted that he had not seen this e-mail before going on holiday that day. Whilst not finding that he did see the e-mail his failure to check his e-mails on his last afternoon to see if there was anything outstanding is surprising.

7. On 10 October a site report was written by Mr Tomkinson in relation to what was described even at that stage as "a serious breach of health and safety compliance relating to the processing and safe storage of vehicle airbags". It noted a chaotic situation with the administration of the airbags, which should only have been ordered when a vehicle had an appointment for a change to be effected under warranty. Some airbags had clearly been there for some time and had not been returned as they should and concerns were raised as to the ad hoc storage of many of the bags around the premises. It was noted that there was a risk of loss to the business on account of the air bags not being returned timeously.

8. To be more precise Honda had made a general safety recall in respect of air bags which necessitated air bags being replaced in vehicles. The process would be that the customer would contact the dealership and an appointment to book that customer in for the airbag replacement within a specific time frame should have been made. That act would trigger an airbag to be delivered to the dealership and originate a Work in Progress record which could be tracked and observed. The work would then be done and the old air bag disposed of. If certain time frames were not met then the obligation for Honda to foot the bill would pass over to the dealership who would suffer a loss, subject to any negotiation that might take place.

9. The net result should have been that every air bag on site should have been clearly attributable to a specific vehicle which had an appointment for the same to be fitted. There was no reason why there should have been excessive air bags on site and there were procedures in place for ensuring that the Claimant was aware as to the status of each Work in Progress and that time frames were being met. As noted above there were significant failings in this regard and I am satisfied that those failings could properly be laid at the door of the Claimant.

10. On 17 October 2016 the Claimant was invited to an investigation to consider allegations of what was described as (1) “serious breach of health and safety rules” and (2) “negligence in performance of normal duties leading to material actual or potential financial loss to the Company” (181-182). More specifically the Claimant was told in the letter that the allegations were in relation to “an overall lack of management control in the Parts department and failure to address a health and safety concern involving air bags on site”.

11. Martin Wilcock conducted the investigatory meeting which took place on 20 October. The Claimant was accompanied by Alison Hughes and the discussion ranged over a number of areas but did raise the issue of air bag storage. At the conclusion of the meeting Mr Wilcock suspended the Claimant expressing that he had no confidence in the Claimant in relation to a range of issues including health and safety following the meeting and the responses that the Claimant had made to matters raised.

12. On 26 October the Claimant received an invitation to a disciplinary meeting on 31 October 2016 (196-197). The headline allegations were the same as (1) and (2) as set out at paragraph 6 above but the specifics were amended after the investigation so as to read “an overall lack of management control, failure to correctly administer a manufacturer recall programme and failure to address a Health and safety concern involving air bags on site”. Mr Wilcock who was based at a VW dealership in Aylesbury and who had conducted the investigation was going to present the case and Mr Davies also from Aylesbury was going to adjudicate.

13. The Claimant was warned in the letter that the allegations were deemed to be potentially gross misconduct and one of the outcomes could be the Claimant’s dismissal. The meeting took place on the date

scheduled and was then reconvened on the following day. At that meeting the Claimant was dismissed for gross misconduct and informed of his right to appeal.

14. The letter of dismissal was sent on 8 November 2016 (230). Mr Davies stated that he considered that the two allegations had been proven. His rationale was as follows:

    a) There had been a very clear breach of processes within the service department which has generated excess air bags….. The Claimant was directly responsible for the warranty processes that trigger the ordering of the air bags. There was no control of the work in progress in terms of booking customers in and raising WIP's.
    b) Due to the non-management of the air bags, the warranty process and failure to return the aging stock significant financial loss to the business had occurred.
    c) In addition the failings had resulted in circa 400 air bags being on site that "posed an immediate danger to life due to the explosive element of the air bags". It was asserted that the issue had been amply demonstrated to the Claimant over time and assertions that the Claimant had made that he had dealt with the issue proved not to be correct.

15. On 7 November 2016 the Claimant submitted his appeal which in essence seeks to deny that the responsibility lay with him and also that dismissal was too harsh a penalty taking into account his exceptionally long unblemished disciplinary record.

16. The appeal was heard by Mr Penman on 24 November and the notes of this meeting (as every other meeting) were within the bundle. On 30 November the decision was sent out in a letter within which the appeal was dismissed and the original decision to dismiss was upheld. Within that letter Mr Penman states:

    "… given the severity of the health and safety issue highlighted, the matter was considered to be deemed as a gross misconduct offence, so the outcome of the disciplinary can be dismissal, even if there were no warnings on file for a similar issue. So with this in mind, length of service was not a point for consideration when the decision to dismiss was made."

17. The statutory provisions for unfair dismissal are set out in the Employment Rights Act 1996. It is for the Respondent to show that the Claimant has been dismissed for a potentially fair reason and in this case the Respondent asserts that the Claimant was dismissed for a reason related to his conduct. If the Respondent is able to demonstrate that the Claimant was dismissed for a potentially fair reason then I have to consider whether or not in all the circumstances including the size and administrative resources of the Respondent the Respondent acted reasonably in treating it as a sufficient reason for dismissing the Claimant in accordance with equity and the substantial merits of the case.

18. I remind myself that it is not my role to substitute my own view for that of the Respondent and that I need to ask myself whether the Respondent's actions fell within a band of reasonable responses. In considering the fairness of the dismissal I need to consider all the circumstances but I need to look at the process by which the Claimant was dismissed and also the Burchell test which has held sway since 1980 in which I have to consider whether the Respondent held a genuine belief in the guilt of the Claimant based upon reasonable grounds after a reasonable investigation.

19. It is readily apparent to me that at the material time the Claimant was presiding over a chaotic set of circumstances in which he had permitted the airbag situation to get completely out of hand. Even though the Claimant had the tools at his disposal to adequately monitor and manage the situation he had clearly failed to do so and there was no indication that there was any likelihood of matters improving or even that the Claimant had the capability to do so.

20. The context for this Claim was effectively the aftermath of a take-over by the Respondent in June of that same year. I was told that Mr Thomas who was the General Manager of the dealership left the organisation around the same time and it seems reasonable to conclude that the Respondents were unhappy at the standards employed on a daily basis at Birmingham Honda and decided that action need to be taken to drive those standards up. They were entitled so to do.

21. Following on from the concerns in early October I consider that taking account of the issues found in Mr Tomkinson's report as to the chaos surrounding the air bags it was inevitable that a formal investigation was commenced against the Claimant and the same fell well within a band of reasonable responses.

22. It is important to bear in mind that there were, in effect, two separate strands to the investigation and although both are linked in with the issue of air bags they are clearly different.

23. The first strand was said to be negligence in the performance of normal duties leading to material actual or potential financial loss to the company. This was related to the Claimant's alleged failure to manage the air bag situation which in turn might have financial ramifications for the Company. At the root of this allegation is the Claimant's competence or otherwise or to place it in the terms of a potentially fair reason – capability. It is acknowledged however that issues of capability can be so extreme so as to amount to conduct. In the invitation to the investigation meeting this was characterised factually as "an overall lack of management control in the Parts department" and in the invitation to the disciplinary meeting as "an overall lack of management control – failure to correctly administer a manufacturer recall programme."

24. The second strand was in relation to alleged serious breaches of health and safety rules which was characterised by the failure to address a health and safety concern involving air bags on site. It seems to me

that this aspect is clearly a conduct issue although the reason for why there may have been a failure could also flow from the Claimant's capability or lack of it.

25. So far as the disciplinary process is concerned I consider that the necessary elements were in place to enable the Claimant to have his say on the issues that had arisen. I do not accept that there was any pre- ordained agenda to have the Claimant removed from the organisation although the Respondent was certainly keen to raise standards at Birmingham Honda generally. I am of the view that at all stages those seized of the enquiry dealt with matters seriously and honestly.

26. So far as the first strand of the enquiry is concerned there can be no doubt on the evidence presented to the disciplinary enquiry and from what was heard at the tribunal hearing that the Claimant's handling of the air bag recall process was woefully deficient. The Claimant failed to get on top of the issue which then escalated and led to the position that the Respondent found when it made its enquiries. It seems to me that the Claimant's performance in this area was incompetent and that incompetence could have led to financial loss to the Company. I consider that getting himself into this position could reasonably be described as negligent and there was little sign of remedial action or really much attempt at any such action.

27. As a matter of fact, however, at the time of the disciplinary hearing and as at the date hereof it had not led to any financial loss and I note that is contrary to the finding made by Mr Davies that "the non-management of the airbags, the warranty process and failure to return the aging stock has resulted in a significant financial loss to the business" (231). That finding is quite simply wrong and is a material one as incompetence must be compounded if there is actual loss as opposed to there being the possibility of loss or exposing the Respondent to potential loss. The latter is serious but not as serious as actual loss

28. Whilst I am prepared to accept that Mr Davies had a genuine belief that the Claimant's incompetence (or negligence as he deemed it) had caused loss he did not have reasonable grounds for that belief as it was simply not correct and that may in turn have flowed from a failure to investigate whether or not actual loss as opposed to potential loss had occurred. The problem that causes is that the lack of investigation has led to an erroneous conclusion which has made the Claimant's actions appear more serious than they actually were. I accept however that on the evidence Mr Davies had before him he could have found that the Claimant's actions had created the possibility of loss.

29. I further consider that Mr Davies also fell into error when he concluded that there was a serious breach of health and safety rules in relating to the storage of the air bags and when he concluded that the 400 plus air bags "posed an immediate danger to life".

30. In my view this is an area where there was a singular lack of investigation and an area that was wholly characterised by

assumption. Whilst I am satisfied that the air bags should have been stored in a metal container it is by no means clear to me what the threat from these air bags was. As an example I note that the air bags are transported in bulk within cardboard boxes which would not seem to present a great issue to those who transport them. When I made enquiries as to the actual level of risk posed both of the Respondent's witnesses effectively told me that the risk was obvious and it was clear to me that in actual fact neither of them had made any form of enquiry as to the specific risk posed and whether that risk was materially heightened by the fact that 400 were on site. In particular there was not the slightest shred of objective evidence that the air bags on site produced "an immediate danger to life".

31. As in the previous allegation I fully accept that Mr Davies had a genuine belief in the risk which he found as a fact but he did not have reasonable grounds for so doing as he had made no specific investigation into the risk. In those circumstances I find that the Burchell test was not met by Mr Davies with the result that the conclusions he came to were far more serious against the Claimant than was merited on the facts in respect of both strands to the Claim. Those failures were important and must have impacted upon the decision to dismiss. At most Mr Davies could have found on the information before him that the Claimant was incompetent and no loss had been caused to date and that there was a potential risk of some description because of the storage of the air bags.

32. In those circumstances the failures to investigate and the consequent lack of reasonable grounds upon which to found a genuine belief renders Mr Davies' dismissal unfair as the conclusions upon which he based the dismissal were erroneous on account of the flaws highlighted above.

33. I have considered whether or not the defects were cured on appeal. They were not. I take no issue with the findings that Mr. Penman makes at paragraph 1 of his rationale in respect of the wholesale system failures that the Claimant presided over. Indeed I find it to be a clear and concise summary of the issues that had gone so badly wrong. I also note that no mention is made of the issue of loss to the business and it is unclear to me as to whether Mr Penman accepted that or not.

34. However Mr Penman fell into precisely the same trap as Mr Davies when he relies upon the seriousness and severity of the health and safety breach to be such so that any mitigation that the Claimant may put forward such as a clean disciplinary record and /or such long service would be irrelevant. Mr Penman made no additional investigations as to the actual seriousness of the Health and safety risks and it seems to me therefore that he too has failed to investigate and did not have proper ground upon which to form his belief. His ultimate decision to dismiss and the balancing process he was obliged to undertake vis a vis his findings of misconduct as against the potential mitigation for the Claimant must have been unfair because he had come to a conclusion that was not, in part, supported by evidence. The dismissal was unfair.

35. I now consider whether or not Polkey applies or in this case to put it another way what would have happened had the investigations been carried out properly. I consider it inevitable that so far as the second strand is concerned that some level of risk would have been found but quite simply have no evidence to speculate as to what risk that would be and what effect that would have. On the other hand I consider that the Claimant's performance was so woeful in respect of the air bag issue that even had it have been found that there was only potential loss as opposed to actual loss following a proper investigation and event taking into account the Claimant's long service and previous disciplinary record it was inevitable that the Claimant would have been dismissed in any event at the same time taking into account the Respondent's need for improvement and the lack of any sign within the process of the Claimant really being up to the job for which he was employed. In those circumstances no compensatory award is payable.

36. Further I need to deal with contributory fault. I am obliged to take into account the Claimant's blameworthy and culpable conduct. I find that the Claimant is the author of his own misfortunes in this case. I find that whilst capability may have been at the root of his ills the Claimant failed to undertake his job with any reasonable level of due diligence or competence with the consequences arising for him in the form of his dismissal. It cannot be right for the Claimant to benefit financially from effectively his own woeful incompetence which I am satisfied equated to misconduct and accordingly I reduce both Basic and Compensatory awards as would be due by 100%.

37. There is also a claim for wrongful dismissal in that the Claimant was not paid his 12 weeks' notice because he was summarily dismissed for gross misconduct. If the Respondent demonstrates that the Claimant's conduct was for gross misconduct then their defence must succeed as no notice would have been due and owing.

38. Wrongful dismissal is a common law action based upon breach of contract. The reasonableness or otherwise of an employer's actions are irrelevant as all that has to be considered is whether or not the Claimant guilty of conduct so serious as to amount to a repudiatory breach of contract of employment entitling the Respondent to summarily terminate the contract.

39. The burden lies upon the Respondent to show a repudiatory breach of contract. The degree of misconduct necessary for the employee's behaviour to amount to a repudiatory breach is a matter of fact. I have considered the matter carefully and concluded that the Claimant's conduct as detailed above in relation to his management of the airbag situation and the potential consequences of that in financial terms and the potential risk (at whatever level) in having air bags stored across the site in a manner that was not recommended did "so undermine the trust and confidence which is inherent in the particular contract of employment that the Respondent should be no longer required to retain the employee in his employment". (Briscoe v Lubrizol (2002) IRLR 607.

40. Accordingly I consider that the Claimant was not wrongfully dismissed and the decision to dismiss the Claimant summarily was one that the Respondent was contractually entitled to take even after stripping away the findings that they were not entitled to make on the evidence.

41. The outcome of this case, therefore, is that the Claimant is deemed to have been unfairly dismissed but not wrongfully dismissed but that he should be paid no compensation. I did hear evidence in respect of remedy and it was clear to me that the Claimant had not been actively seeking roles that he was amply qualified to do and that there were many local roles out there which the Claimant could have undertaken at a similar salary. I would have found that the Claimant could have found work at the same remuneration three months after his dismissal and any compensatory award would have been capped at that level.

Employment Judge Self

Date: 7 June 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

12 June 2017