RM

EMPLOYMENT TRIBUNALS

Claimant: **Deimantas Kubilius**

Respondent: **Kent Foods Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **19 January 2020**

Before: **Employment Judge Barrett**

Representation
Claimant: In person
Respondent: Mr Richard Maxwell, solicitor

Interpreter Ms L Simkute (Polish language)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **The Claimant's dismissal was fair.**

2. **The Claimant's unfair dismissal claim is dismissed.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by videoconference (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Introduction

1. The Claimant, Mr Deimantas Kubilius, worked for the Respondent, TC Facilities Management Limited, from 25 July 2016 until he was dismissed without notice by a letter which he received on 25 June 2020. On 29 July 2020 he presented an ET1 form bringing a claim for unfair dismissal.

2. The Respondent says it dismissed the Claimant because of his conduct, or alternatively because of third-party pressure which amounted to 'some other substantial reason', and that his dismissal was fair.

The hearing

3. The hearing was conducted on 19 January 2020. The Claimant represented himself. He had the assistance of Ms Laura Simkute, Polish interpreter. The Respondent was represented by Mr Richard Maxwell, solicitor.

4. The Tribunal was provided with an agreed bundle of evidence numbering 68 pages.

5. The Claimant gave evidence on his own behalf.

6. The following witnesses gave evidence on behalf of the Respondent:

    6.1. Mr Kieron Mahon, Transport Planner, who received notification from the client site of the incident said to amount to misconduct.

    6.2. Mr Scott Liddle, Commercial Director, who communicated with the client regarding the incident and the Claimant's site ban.

    6.3. Mr Neil Lagdon, Depot Manager, who was the Claimant's line manager and conducted the investigation.

    6.4. Mr Sol Chinamo, Site Manager, who was the disciplinary decision-maker.

7. After the evidence had been completed, both Mr Maxwell and the Claimant made helpful oral closing submissions.

Findings of fact

The Respondent's business

8. The Claimant commenced employment with the Respondent on 25 July 2020 as a Class 1 Driver. He was based at the Respondent's Basildon depot.

9. The Respondent is a distribution company which transports food products from suppliers to customers. One of its major clients is the sugar company Tate & Lyle ('T&L'). Approximately 90% of the driving work done from the Basildon site involves driving to and from T&L's Thames Refinery site.

10. A good relationship with clients and suppliers is essential to the Respondent's business. Its Employee Handbook provides:

> **'Client/Supplier Relations**

> **The company's success is built upon its relationship with its clients/suppliers. You should, therefore, be courteous and pleasant to clients/suppliers at all times. Rudeness or off-hand treatment of clients/suppliers will not be tolerated, however badly the client/supplier may have behaved. If the relationship between yourself and a client/suppliers is deteriorating you should immediately seek the help of your line manager.'**

11. In relation to health and safety, the Employee Handbook provides:

> **'Health and safety**
>
> **You should take all reasonable steps to safeguard your own health and safety and that of any other person who may be affected by your actions at work. You must co-operate with the company to ensure a healthy and safe working environment.'**

12. Further, the Driver's Handbook stipulates that:

> **'… customer instruction regarding PPE requirement must be followed.'**

13. It is therefore a rule imposed by the Respondent that its drivers must comply with the PPE instructions applied on its customers' own sites.

Incident on 21 May 2020

14. At some point prior to 21 May 2021, T&L took the decision that face masks should always be worn at its Thames Refinery site by all staff as a safety precaution to reduce the risk of coronavirus infection. It did not update its written site rules to reflect this change because it was a temporary rule during the coronavirus pandemic. However, all visitors to the site were issued with facemasks at the gatehouse.

15. On 21 May 2020 the Claimant's work required him to visit T&L's Thames Refinery site.

16. At 08:47 that morning, Mr Mahon received an email from a manager at T&L which stated:

> **'Unfortunately we had an incident with one of your bulk liquid drivers this morning. The driver was asked repeatedly to put his mask on by one of our managers. Every driver receives a mask when he enters site with instructions to wear the mask when on site. He refused, saying he was in his cab and he didn't have to.**
>
> **As a consequence he has now been banned from site on the grounds of noncompliance with health and safety rules. The vehicle registration was […].**
>
> **If you could let us know the name of the driver so that we can put it in our banned driver list.'**

17. Through further email correspondence, Mr Mahon established that the driver in question was the Claimant. He informed Mr Lagdon and Mr Pete Dawkins, the Group Transport Manager, of the incident. He texted the Claimant to tell him that he had been banned from the T&L site.

18. The Claimant responded:

> **'I didn't nothing wrong, I just stay in my cab and staff from Tates came to me and start required to keep mask on my face but I don't must seat in my cab with**

> **mask, my cab is my home. When I leaving my cab I wear mask and first its not the law.'**

(Please note all quotations from the evidence bundle reproduce the original spelling and grammar.)

19. The Claimant sent Mr Mahon a copy of the T&L site instructions and a copy of guidance from the gov.uk website. The site instructions included health and safety guidelines but did not mention facemasks. The Government guidance stated:

> **'Wearing a face covering is optional and is not required by law including in the workplace.'**

20. Mr Mahon passed on the Claimant's response to Mr Lagdon, Mr Dawkins and T&L. Mr Lagdon, the Claimant's line manager, was tasked with investigating the incident.

Investigation meeting on 25 May 2020

21. Mr Lagdon met with the Claimant on 25 May 2020 to interview him about the incident. The minutes of the investigation meeting are as follow:

> **'I explained to DK that statements were being taken from staff involved at T&L**
>
> **When booking in at T & L security gate DK was given a copy of site rules as usual, he was also given a facemask with no additional information as to when to wear the face mask.**
>
> **DK put his hi-vis and hard hat on and was told to park up.**
>
> **After loading he was sitting in his cab and was told by a T&L staff member to put face mask on while he was in the cab, DK refused due to the fact that he was in his cab. The Tates employee told DK to put on his mask at all times, a video of this is available (although DK is having issues sending this from his phone, I have seen the footage). All of this was whilst DK was waiting for his paperwork and at all times DK wore his mask when outside of the cab.**
>
> **I said to DK that this was T&L policy but he said that this was not law and says nothing in the site rules. DK has sent a copy of the site rules given to him.**
>
> **DK said that had he signed something to this effect then he would have done it.**
>
> **DK stated that he had no issue wearing the mask in the open but not in his cab where he was isolated. DK said that he has never worn the mask in the cab on previous visits to the site.'**

22. The Claimant does not challenge the accuracy of the notes or Mr Lagdon's account of the meeting, save that he notes the T&L staff member demanded, rather than requested or instructed, that he wear a mask.

Communications with T&L

23. Mr Liddle was informed of the incident in his role as Commercial Director and had an initial telephone call with Graham Coetzee, the account manager at T&L who dealt with the Respondent. Following the Claimant's investigation meeting, Mr Liddle emailed Mr Coetzee on 26 May 2020. The email stated:

> **'Further to our discussion and the advice last week that one of our drivers had been banned from Thames Refinery due to not following current health and**

> **safety requirements on site, we have now had the opportunity to interview our driver in relation to the incident.**
>
> **His comments are as follows:**
>
> **• It was only in his cab that he did not wear the mask, and that at one point a T&L employee (not wearing hi-vis or hard hat) approached the cab to insist the driver wear the mask inside the cab.**
>
> **• Our driver provided a copy of the T&L site rules (attached) which they are given on entry, at the same time they are given a face mask however according to him no instruction was given when receiving this as to when he should wear it.**
>
> **• The driver also forwarded on a guideline from the Government website on the wearing of face masks {attached).**
>
> **• The driver states that at all times when not in his cab he did have the face mask on, but felt that as he was isolated in his cab as they are not allowed to leave it after loading, he should not have been required to wear it.**
>
> **The disciplinary process we are following allows us to impose various sanctions including dismissal. Clearly if he is unable to load sugar at Tate & Lyle then this materially affects his ability to do the job for which he is employed. I have enormous sympathy with the T&L position on this but I need to make sure that we have collected all evidence in writing before we move to the next stage of the disciplinary process. I would therefore like to request a written statement from T&L in response to the points raised above. We intend to proceed with the next stage of our disciplinary process on Friday so I would be grateful to receive an urgent response form you'.**

24. As a result of this email, T&L obtained two statements from the managers involved in the 21 May 2020 incident at the T&L site.

25. The first manager, Mr Jon Freeman, wrote as follows in an email of 27 May 2020:

> **'…As there was going to be a delay with the paperwork the driver of KFL2 was asked by B Jones to pull off the loading bridge and wait opposite.**
>
> **It was at this point that I noticed that the driver was not wearing his mask (given to him by the gatehouse) he was parked with the drivers window open reading something on his phone.**
>
> **As I continued to set my tank up ready for discharging into 8220 I gestured to the driver to put his mask back on. He didn't seem to understand my gesture so I approached his cab so he could hear me.**
>
> **I asked him to put his mask back on, he told me he didn't need to as he was in his cab. I then explained that with no mask on, all the droplets coming from hls mouth as he spoke were going to land on peoples faces due to his elevated position up in the cab and that the site rules were he need it on until he leaves site, also we were wearing our masks to protect him. He still refused.**
>
> **At this point I noticed Nick Kirbyshire, walking up the walkway and thought that maybe ASR management would have more luck convincing him to put his mask on, concuss that we still needed to pass this driver his paperwork.**
>
> **Nick engaged with the driver again reminding him site rules and asking hlm to put it on, at this point the driver started to film the conversation on his phone and started to drive off as Nick was talking to him.**

> **I didn't realise that B Jones had given the driver his paperwork as I was talking to Nick, until B Jones complaint to me that the driver wasn't wearing his mask when he handed the paperwork up to the driver.'**

26. The second manager, Mr Nick Kirbyshire, wrote in an email of 28 May 2020:

> **'As I came to work on the morning of 21st May, I had changed into uniform and was walking to my office when I was opposite the Bulk loading bays between 8120 and 820 I was stopped by Jon Freeman of Turners.**
>
> **Jon asked me to speak to a Kent Foods driver who was parked up. Jon told me that the driver had been asked a number of times to wear his face mask whilst on site, but was refusing to do so.**
>
> **I walked to the driver's window and I asked him to put on his mask. The driver also refused to do so at this point. He said that he was in his cab and that was his own area. I tried to tell the driver that we are currently trying to manage risk because of the Covid pandemic and our site rule is that all individuals on site wear a mask. He told me that it was not the law and that I could not make him wear a mask. I agreed with him. And tried to make it clear that I could not make him wear that mask, but I could make sure he never returns to site. If he were to put the mask on then there would be no further issue, if he did not, he would be banned. I asked him to choose. He repeated it was not the low. I said NOK, have a good day". I made a note of his vehicle registration and left the area to report the issue.**
>
> **From my perspective, as a manager at a large site, it has been a significant challenge getting Individuals on site engaged with the necessary changes that have to be put in place to protect us all. I frequently still have to speak to individuals to remind them to social distance, to wash/ sanitise their hands regularly and make sure they are wearing face masks correctly. I understand that the masks are uncomfortable, and nobody enjoys wearing them. However, during these conversations, there is always a positive response from the individual. They separate out, if they were in groups, they adjust their masks accordingly. So to have someone, who is a visitor on site blatantly refusing a simple request, is extremely frustrating and it did make me very angry. As that mask was not for his protection. That mask was to protect everyone else on site from any potential Covid risk that the driver has brought in with him.'**

27. These statements were sent to Mr Liddle at the Respondent on 28 May 2020 and he forwarded them to Mr Mahon, Mr Lagdon and Mr Dawkins.

Claimant's statement, suspension and disciplinary letter on 1 June 2020

28. On 1 June 2020 the Claimant submitted his own written statement to Mr Lagdon by email. It said:

> **'The incident at Tates and Lyle**
>
> **Date: 21-05-20**
>
> **After this incident I was under a lot of stress, where I could not come back to my normal life for some time. When on Monday (25-05-20) I was questioned by Neil, I could not answer all the questions he asked me, and I could not understand him properly because of my english language skills and the stress I was under. Because of this reason I am writing a more detailed description of the incident from my perspective.**
>
> **When I arived at Tates and Lyles, I stopped and walked to the security guard, who gave me the "Health and Safety at work act 1974 policy" to sign. After I signed the policy, he gave me a mask, not explaining any rules or instructions. After that, like usually I drove to the spot where I was supposed to be loaded,**

> **where I was told not to leave my cab without a good reason, or if they told me so. When they finished loading my tanker, they gave me a signal to go up and close hatches. Without leaving my cab, I put on my helmet, glasses and a hi-visibility vest, and the policy clearly states that I am not required to wear protective clothing when I am inside my cab. After I finished, I was instructed to park next to a fence and wait for the loading documents. While I was waiting for the documents in the cab, one of the employees outside signaled me to put on my mask, I signaled him by shaking my head, not agreeing with the request, then he approached my cab and started demanding, that I put on my mask right away, I did not follow his request, because there was no signs or instructions that stated, that I have to wear it inside my cab. Furthermore the government website clearly states, that I am not required to wear a mask when I am in public or at work.(Factories, plants and warehouses. 6.1 in this section) After I told him that I will not put it on, because it is not required, he called another employee. When he walked over to me, he was not wearing a helmet or glasses, but most importantly he was not wearing a high visibility west, which is required to be worn at the area I was parked, but he was wearing only a mask, so he did not follow the rules himself, there is a video for proof. When I explained my position about the matter, he said, that if I don't put on the mask I was given, I will not be able to enter the site any longer from that point on, and I refused them again, after that I was given the documents, and I left Tates and Lyles.**
>
> **Also I would like to add that, in my opinion, these employee's attacked me for no reason and broke not only the law but also restricted my human rights.'**

29. Mr Lagdon took the view that the Claimant's statement was consistent with the explanation he had already given during the investigation meeting. He considered that the facts described by the Claimant showed a breach of the requirements in the Employee Handbook to maintain good relationships with customers and suppliers and to cooperate to ensure a safe working environment. This was because the Claimant had admitted to refusing to comply with an instruction regarding PPE at a supplier's site. Mr Lagdon concluded that a disciplinary hearing was warranted.

30. On the same day, Mr Lagdon told the Claimant he was suspended on full pay pending the outcome of the investigation and disciplinary process. Mr Lagdon sent a disciplinary letter to the Claimant inviting him to a hearing on 8 June 2020 to consider the following single allegation of misconduct:

> **'Failure to follow a Health and Safety Instruction from staff on a suppliers premises, regarding the current requirement to wear a face mask when on site.'**

31. In fact, the disciplinary letter was sent to the wrong address resulting in the hearing later being postponed to 12 June 2020. The Claimant received the invitation letter together with copies of Mr Freeman and Mr Kirbyshire's statements in advance of the rescheduled hearing.

Further communications with T&L – site ban confirmed

32. Mr Liddle took the view that the Claimant would come to regret his actions on 23 May 2020 and that the stress of the coronavirus pandemic may have affected the Claimant's judgment. He thought that it would be better for all concerned if T&L would agree to rescind the site ban so the Claimant could continue in his role. It was not possible for the Claimant to carry out his role without visiting the T&L site. All articulated lorry driving roles at the Basildon depot necessarily involved working with T&L.

33. The Claimant suggested (albeit rather tentatively) during the hearing that perhaps he could have been redeployed to a different driving role undertaking rigid vehicle rather than articulated lorry deliveries. This was a less skilled role at a lower salary. I accept the evidence of the Respondent's witnesses that there were no such vacancies at the relevant time.

34. On 1 June 2020, Mr Liddle telephoned Ben Wilson, Head of Supply Chain Operations at T&L. He sought to persuade Mr Wilson to overturn the Claimant's site ban. He followed up the call with an email attaching the Claimant's written statement. Mr Wilson replied that the plant manager would look into the matter again.

35. On 4 June 2020 Mr Wilson emailed Mr Liddle to say that unfortunately T&L's decision to ban the Claimant from their site was confirmed. He attached an email from their plant manager, Liz McColm, who wrote:

> **'I have taken a look at the statements from Nick Kirbyshire and Jon Freeman, and I have also followed up on the comment from the driver about the documentation not saying that masks must be worn with our Security Manager Stuart Brace.**
>
> **It has been pretty clear from mid-April with directions from Security Personnel and a poster at the EP weighbridge that masks are required. The reason it is not on our standard site paperwork is that this is not a permanent change and therefore we are informing people separately from that normal process.**
>
> **It seems to me that the driver concerned had had this made quite clear when he entered site - I assume he has been to site several times. If he had any confusion about this then when informed by Jon Freeman, and then by our Warehouse Manager, Nick, that he needed to wear the mask even in his cab, he should have complied. The fact that this was not on our paperwork is a side issue, that he is using as an excuse.**
>
> **Whilst I sympathise with Kent Foods situation on this, I don't think it is our problem, and the decision stands.'**

Disciplinary hearing on 12 June 2020

36. Mr Chinamo was appointed to conduct the Claimant's disciplinary hearing, which took place on 12 June 2020. The Claimant was accompanied by a friend who assisted with interpretation where the Claimant needed it.

37. The notes of the disciplinary hearing are no longer available. They were lost in a fire at the Respondent's Basildon depot in August 2020. The Claimant did not challenge the account of the meeting given by Mr Chinamo.

38. During the hearing, the Claimant's account of the 21 May 2020 incident was consistent with the explanation he had already given in the investigation meeting and his written statement. He had been given a face mask on entering the T&L site. He was asked to park up and removed the mask while sitting in his cab. He was approached by a member of staff on site and asked to wear his mask. He refused to do so because his cab was his own environment. He was then approached by a different member of staff who repeated the instruction but continued to refuse.

39. Mr Chinamo asked the Claimant why he had not complied with the request, and the Claimant reiterated that the request had been wrong; he was in his own

environment and the government guidelines stated that wearing a mask at work was optional.

40. Mr Chinamo adjourned the hearing to consider his decision.

Dismissal

41. Mr Chinamo came to the conclusion that the Claimant should be dismissed. If the T&L site ban had been rescinded, he may have considered a final written warning as an alternative to dismissal. However, he thought the Claimant's conduct amounted to misconduct meriting a severe sanction. His view was that a deliberate refusal to comply with a health and safety instruction was a serious breach. He thought this was aggravated by the Claimant's lack of remorse in the disciplinary hearing. He considered that the Claimant's misconduct and lack of remorse were more important factors that the T&L site ban in reaching his decision. Even if the site ban had been lifted, he would not have trusted the Claimant not to act similarly in future, potentially endangering the Respondent's good relationship with other customers.

42. Mr Chinamo wrote the Claimant an outcome letter dated 16 June 2020. The letter set out the date of the disciplinary hearing and the disciplinary allegation then went on:

> **'You were given every opportunity to explain and account for your actions. We discussed:**
>
> **• The events that took place on the day, how you arrived at T&L and signed in and was provided with a mask and how you wore this mask to carry out your duties when being loaded and then when you were waiting for paperwork whilst sitting in your truck you did not have the mask on.**
>
> **• How you were gestured by a T&L employee to wear your mask, to which you refused then held a conversation with the T&L employee regarding wearing the mask. This led to another conversation with a T&L manager asking you to wear your mask.**
>
> **• How you felt your space was being invaded as you were in your truck and did not feel it was a requirement to have a mask on. You informed me about the government guidance on wearing masks and I explained to you regarding the rules that T&L have imposed during this pandemic period.**
>
> **• The need to follow the rules, set by T&L despite no amendment in the documentation to state the wearing of masks, however having being provided with a mask on arrival and being asked to wear the mask at the time of realisation that it was not worn.**
>
> **…**
>
> **I am satisfied a full investigation has been conducted and you have failed to provide me with any mitigating factors as to why you did not wear your mask when requested. I consider your actions to be Gross Misconduct and having considered all alternatives have decided to summarily dismiss you with effect from 16th June 2020.'**

43. The dismissal letter also set out the procedure for appealing the decision.

44. The Respondent believed that the Claimant was summarily dismissed on 16 June 2020 and his pay ceased from that date. However, the dismissal letter

(like the disciplinary invitation letter) was originally sent to the wrong address and the Clamant did not receive it.

45. The Claimant telephoned Mr Chinamo on 25 June 2020 to enquire what the outcome of the disciplinary hearing was. Mr Chinamo emailed him a copy of the dismissal letter. The Claimant received and read the letter on that day. The date of dismissal was therefore 25 June 2020.

46. The Claimant did not appeal his dismissal.

47. The Claimant has not brought a breach of contract claim in the Tribunal but would still be within the limitation period to do so in the County Court. The Respondent may wish to rectify the non-payment of wages in the period 16 to 25 June 2020, if it has not done so already.

The law

Unfair dismissal

48. Section 94 Employment Rights Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

49. Section 98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> > **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> >
> > **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it—**
>
> > **…**
> >
> > **(b) relates to the conduct of the employee ... ...**
>
> **(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case.**

50. As noted in *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, the reason for dismissal is the:

> **'… set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.'**

51. The starting-point in misconduct cases is the well-known guidance in *Burchell v British Home Stores* [1980] ICR 303 at 304:

> **'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case'.**

52. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) held:

> **'… the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see J Sainsbury plc v Hitt [2003] ICR 111.'**

53. It is not for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it (*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518). The relevant question is whether an employer, acting reasonably and fairly in the circumstances, could properly have accepted the facts and opinions which they did. The Tribunal must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way in which the employer did.

54. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

55. Third-party pressure to dismiss an employee may amount to 'some other substantial reason' and therefore a potentially fair reason for dismissal within s.98(1)(b) ERA. The tribunal must assess whether the employer has in such a case acted reasonably or unreasonably in treating the third-party pressure as a sufficient reason for dismissing the employee, in accordance with s.94(4) ERA. The relevant circumstances will include whether the employer has taken reasonable steps to avoid or mitigate any injustice caused by the third party's stance. See *Henderson v Connect South Tyneside Ltd* [2010] IRLR 466 at [14]:

> **'… if the employer has done everything that he reasonably can to avoid or mitigate the injustice brought about by the stance of the client – most obviously, by trying to get the client to change his mind and, if that is impossible, by trying to find alternative work for the employee – but has failed, any eventual dismissal will be fair: the outcome may remain unjust, but that is not the result of any unreasonableness on the part of the employer.'**

56. In cases where there is a procedural defect, the question that remains to be answered is whether the employer's procedure constituted a fair process. A

dismissal will be held unfair either where there was a defect of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair (*Fuller v Lloyds Bank plc* [1991] IRLR 336; see also *Slater v Leicestershire Health Authority* [1989] IRLR 16).

Submissions

57. The Claimant contended that it was not reasonable in all the circumstances for the Respondent to dismiss him for not wearing a mask. He did not think that there had been any significant defect in the disciplinary procedure followed though the Respondent ought to have sent him the notes of the disciplinary hearing. He considered that the investigation had failed to take his explanation into account and that the outcome was unfair. The reasons why the Respondent's decision to dismiss was unreasonable were:

    57.1. The Claimant was not instructed on arrival that the mask had to be always worn including in his cab.

    57.2. The T&L site instructions did not refer to wearing masks.

    57.3. The Government guidance at the time said that wearing a mask at work was optional.

    57.4. Inside his cab was his own environment. He agreed to wear the mask whenever he was outside the cab.

58. For the Respondent, Mr Maxwell submitted that there was little or no factual dispute, and that the matters which the Claimant had admitted gave the Respondent reasonable grounds to believe he had committed misconduct. The decision to dismiss fell within the range of reasonable responses because:

    58.1. It was legitimate for the Respondent to wish to protect its relationships with key suppliers such as T&L.

    58.2. The Driver's Handbook imposed an obligation to follow health and safety instructions on customer sites, regardless of broader government guidance regarding face masks. It was up to T&L to decide to adhere to higher safety standards than required in law, and it would be dangerous for drivers to second guess them.

    58.3. The Claimant had not shown any remorse or understanding of the possible impact on the client relationship, which meant the Respondent could not trust him in future.

59. Alternatively, it was submitted that the T&L site ban amounted to some other substantial reason for dismissing the Claimant, because it made it impossible for the employment relationship to continue. The Respondent acted reasonably by seeking to persuade T&L to rescind the ban. There was no other driving work available at the Basildon site at the time, so redeployment was not an available option.

Conclusions

60. The first question to address is whether the Respondent dismissed the Claimant for a potentially fair reason for the purposes of s.98(1) ERA. The Respondent relies on conduct, or alternatively 'some other substantial reason', namely the T&L site ban.

61. What was the reason or principal reason for the Claimant's dismissal? Mr Liddle's evidence is he thought the Claimant's conduct merited a warning, and the reason the Claimant had to be dismissed was because he could no longer carry out his role due to the T&L site ban. However, the decision-maker was Mr Chinamo. I accept his evidence that the factors he attached the most weight to in his decision to dismiss were the Claimant's refusal to comply with an instruction to wear PPE on a client site, together with his lack of remorse afterwards. Therefore, the principal reason for dismissal was the Claimant's conduct. The decision of T&L to ban him from their site forms part of the relevant circumstances to be considered when assessing whether the Respondent's decision was reasonable in all the circumstances.

62. In a dismissal for misconduct, the following issues arise:

    62.1. Did the Respondent have a genuine belief that the Claimant was guilty of misconduct? I accept Mr Chinamo's evidence that he did have a genuine belief.

    62.2. Did the Respondent carry out as much investigation into the matter as was reasonable in the circumstances? The Respondent's investigation fell within the reasonable range of responses. Mr Lagdon interviewed the Claimant and statements were obtained from the relevant managers at T&L. There was no significant factual dispute as to what had occurred, and no further investigation was needed.

    62.3. Were there reasonable grounds for the Respondent to conclude that the Claimant had committed misconduct? There were. The Driver's Handbook imposes an obligation to comply with PPE instructions at a client site. On the Claimant's own account, he had refused to comply with such an instruction.

63. The next issue is whether the Respondent followed a fair procedure. Overall, the Respondent's procedure was fair. The Claimant was able to give his side of the story at the investigation interview, in his written statement, and at the disciplinary hearing. He was informed of the disciplinary allegation and provided with the evidence against him. He was accompanied at the disciplinary hearing by a friend who was able to assist with interpretation as needed. He was given the opportunity to appeal. Although he did not receive the notes of the disciplinary hearing, that was not a defect which affected the fairness of the overall procedure.

64. The final question is whether the Respondent acted reasonably in all the circumstances in treating the alleged misconduct as a sufficient reason for dismissal (s.98(4) ERA).

    64.1. The misconduct concerned a single incident of refusing to comply with a PPE instruction at a client site. I accept the Claimant's evidence that

he was not informed of the requirement to wear a face mask even inside his cab until he was asked to do so by Mr Freeman. The Claimant is a details-oriented person who believed he was following the written site instructions. He was surprised by the instruction, and dug his heels in. As Mr Liddle said, everyone was operating under a level of stress as keyworkers required to work during the coronavirus lockdown. A reasonable employer might have concluded that this instance of misconduct merited a warning rather than summary dismissal.

64.2. However, the question is not what another employer might have done but whether the Respondent's decision fell within the range of reasonable responses. Mr Chinamo was entitled to take into account the importance to the Respondent's business of maintaining good relationships with its suppliers and customers. The Claimant's continued insistence that he had done nothing wrong caused Mr Chinamo to reasonably lose confidence in the Claimant's future conduct.

64.3. A further relevant factor was that it was not feasible for the Claimant to continue in his contractual role due to the T&L site ban. The site ban was a consequence of the Claimant's conduct on 23 May 2020.

65. Taking into account the relevant circumstances, including Claimant's lack of remorse and the practical difficulties caused by the T&L site ban, I conclude that the Respondent's decision to dismiss fell within the range of reasonable responses. Therefore, the Claimant's dismissal was fair.

Employment Judge Barrett

10 February 2021