EMPLOYMENT TRIBUNALS

Claimant: Mihail Oprescu

Respondent: Berryworld Limited t/a Prepworld (Level 5)

Heard at: London South (by CVP) **On**: 29 & 30 November 2023

Before: Employment Judge Cheetham KC

Representation:
Claimant: Mr K Zaman (counsel)
Respondent: Mr C Baran (counsel)

JUDGMENT

1. The claim for unfair dismissal is dismissed.

REASONS

1. This is a claim that was brought on 9 June 2023 and arises from the Claimant's employment as a Machine Operator between 11 August 2014 and 9 March 2023, when he was dismissed.

2. The Tribunal heard evidence from the Claimant and – for the Respondent – from Zoe Butler (Shift Manager), Chris Thomas (Head of Sales) and Gurdeep Dhanda (Head of Finance). There was an agreed bundle of documents running to 257 pages. The hearing was conducted with the assistance of an interpreter (Romanian).

3. The hearing lasted two days, which was just enough to hear all of the evidence. The need for an interpreter meant that the pace of the hearing was necessarily slow. The parties were therefore given the choice of returning for a third day at a later date for submissions (which was the Tribunal's preference) or providing written submissions. As the Claimant would not have had funding for representation on a third day, it was agreed that submissions would be in writing.

4. **Credibility**. The Claimant failed to answer straightforward questions and seemed reluctant to engage with what had actually happened and what he had said at the time. He also raised matters for the first time, such as the

veracity of meeting notes and his need for an interpreter at meetings, and departed several times from his witness statement. His counsel had cross-examined the Respondent's witnesses carefully and skilfully, but found the basis for some of that cross-examination removed by his own witness' evidence.

5. Given that, in contrast, all of the Respondent's witnesses gave their evidence in a straightforward and helpful way, the Tribunal preferred their evidence as being more credible wherever there was a conflict as to what had occurred or been said.

6. **Findings of fact**. The Claimant operated machinery and, on the day of the incident leading to his dismissal, was operating a GT Machine, which printed the code for expiry dates. That machine was one of a several in a large space, which had several conveyor belts and numerous employees involved in all the stages for producing packages of fruit.

7. Previously, on 22 November 2022, the Claimant had been given a final written warning in respect of absences, including two unauthorised absences. These were given by his manager, Zoe Butler, following a meeting held on 22 November. The Claimant did not appeal that sanction and there was nothing to suggest that the warning was not given in good faith.

8. On 22 February 2023, the incident took place that led to the Claimant's dismissal. CCTV footage showed him working alongside the GT machine, which had a screen or monitor at head level. The Claimant could be seen to tap it repeatedly and then, at one point, he gave it a sharp blow with (what looked like) the heel of his hand, although it seemed quite a light blow. He returned to the screen several times later, as did other colleagues.

9. Immediately before the Claimant struck the screen, his Team Leader, Celeste Gomez, was standing next to him and appeared to take a picture of the screen on her mobile phone. There was another operative working next to the Claimant, who Ms Butler thought was an agency worker.

10. Ms Butler's evidence was that she spoke to the Claimant shortly after the incident, which she herself did not witness, and he explained to her that he had been angry and had punched the screen. She also checked the screen herself and found it to be broken.

11. An investigation meeting took place. In the invitation letter, the Claimant was asked if he required an interpreter and he was asked again at the meeting, but he declined. From the minutes of the meeting, as well as from the various documents that he wrote, it is hard to disagree with Ms Butler's impression that he speaks and understands English well.

12. The Claimant confirmed this in examination-in-chief, when he said, "*Because I understood everything, I didn't ask them to translate at all*". However, in cross-examination, he also said that he had always requested an interpreter, but none was available. The Tribunal found that this was

unlikely to be true, because (a) there was no record of any request being made and (b) the Claimant did indeed appear to understand everything, as he previously confirmed.

13. Of course, none of this implies any criticism of the Claimant for preferring to have an interpreter at this hearing, only that the evidence clearly suggests that he understood what was being said to him at the time and at subsequent meetings.

14. At the investigation meeting, the Claimant answered the question, "*Do you know why you are here?*", by saying, "*Yes, I broke one screen on GT printer*". He then gave an account of what happened and said that he punched the metal of the screen and the screen cracked, as he was frustrated. He said, "*I know I'm guilty coz I done it*".

15. In cross-examination, he denied saying any of that. He claimed that he said he touched the metallic part of the screen with his fingers and that the screen only cracked because there was water inside. The Claimant told the tribunal that the meeting notes were false, although this was not something he had alleged in his witness statement and nor was it put to the Respondent's witnesses.

16. The Tribunal found that the investigation notes were likely to be accurate and that Ms Butler was the more reliable witness. The Claimant's evidence about the investigation meeting in cross-examination was being put forward for the first time and (as with his evidence about needing an interpreter) did not reflect the way his case had been put to the Respondent's witnesses, no doubt on his instructions.

17. Ms Butler could not recall whether she saw the CCTV footage before or after this meeting, but she had the Claimant's own account to rely upon – which she accepted - and the matter was then referred to a disciplinary hearing.

18. That hearing was conducted by Mr Thomas, who had had no previous involvement with the matter. He was sent copies of the investigation meeting notes and the CCTV and a disciplinary hearing was then arranged. The Claimant was not sent the notes or CCTV prior to the meeting.

19. At the meeting, at which the Claimant declined the opportunity of having a colleague or trade union representative present, he again candidly accepted what he had done. The minutes record him saying, "*I was a little pissed off at the time this incidence happened. Some component of the multipond worked for few hours and then stopped working. Stressed as trying to meet up with target because I have reset the printer about four-five times and it was still not working. So I hit the metal covering the printer and the glass/screen cracked. It was not a hard punch, but I was pissed off*".

20. During the short meeting, he repeated that he had punched the printer and the screen had broken. He said, "*It was not a very hard punch and I know what I did was not good or nice neither was it acceptable*".

21. In cross-examination the Claimant for the first time denied saying this and again told the tribunal that the notes were inaccurate. He said that Human Resources wrote these things to have a reason to dismiss him, although he did not suggest why they would have wanted to do that. The Tribunal found as a fact that the meeting was accurately reflected in the notes and in Mr Thomas's credible evidence.

22. At the end of the meeting, there was a short adjournment and then the Claimant was told that he was summarily dismissed, although Mr Thomas decided to pay him one week's notice pay. In total, the meeting lasted 13 minutes.

23. In his evidence, Mr Thomas made clear that the final written warning was a factor in the dismissal and said that, had it not been for the warning, he might not have dismissed the Claimant. However, he also repeatedly said that the incident was serious enough to amount to gross misconduct. He referred to what he had been told was the repair costs of about £1200 and the fact that the production line was "down" as a result, causing further loss.

24. Mr Thomas was asked about other employees being treated more leniently in similar circumstances, but had no knowledge of this and the tribunal was not provided with any evidence to show this had occurred.

25. The Claimant brought an appeal. Significantly, this was not on the basis that he had not punched or broken the machine. His appeal letter referred to his final written warning, the pressures of work and made a complaint against a manager.

26. Mr Dhanda heard the appeal, at which the Claimant declined having a representative, but did have an interpreter. At this Tribunal hearing, the Claimant once again said the notes were not reliable, but there was no basis for this assertion (again being made for the first time). The notes showed Mr Dhanda going through the incident, with the Claimant this time saying that he had only touched the screen, which had water inside. However, he expressly accepted that he had broken the machine.

27. Mr Dhanda also went through the Claimant's grounds of appeal, but he did not uphold the appeal, as set out in his reasoned letter of 27 March 2023. He concluded: "*You confirmed that you had damaged the screen. While it was noted that the printer was already broken, you did not dispute that you physically hit and broke the screen, and this is unacceptable behaviour*".

28. **The law.** This is a conduct dismissal, so the well-established questions that the tribunal must ask itself are whether the employer had a genuine belief in the Claimant's culpability, which was based on reasonably held grounds after a proper investigation. In all the circumstances, including the procedures that were followed, was this a fair dismissal?

29. Regarding the relevance of a previous final written warning, in ***Davies v Sandwell MBC*** [2013] IRLR 374, the Court of Appeal made these points.

First, the starting point should always be ERA s.98(4), in other words, whether it was reasonable for the employer to treat the conduct, taken together with the circumstances of the final written warning, as sufficient to dismiss the claimant. Secondly, it is not for the tribunal to reopen the final warning and consider whether it was legally valid or a nullity. Thirdly, the questions of whether the warning was issued in good faith, whether there were prima facie grounds for imposing it, and whether it was "manifestly inappropriate", are all relevant to the question of whether the dismissal was reasonable, having regard, among other things, to the circumstances of the warning. However, the Court confirmed that only rarely would it be legitimate for a tribunal to go behind a final written warning given before dismissal. In addition, where there has been no appeal against a final warning, there would need to be exceptional circumstances for a tribunal to, in effect, reopen the earlier disciplinary process.

30. In ***Wincanton Group plc v Stone*** [2013] IRLR 178, Langstaff P. summarised the general principles to be applied by tribunals as to the relevance of earlier warnings when determining the fairness of a dismissal.

(i) the tribunal should take into account earlier warnings issued in good faith;

(ii) if the tribunal considers that a warning was issued in bad faith, it will not be valid and cannot be relied upon by the employer to justify any subsequent dismissal;

(iii) where a warning was issued in good faith, the tribunal should take account of any relevant proceedings, such as internal appeals, that may affect the validity of the warning, and give them such weight as it considers appropriate;

(iv) the tribunal may not 'go behind' a valid warning to hold that it should not have been issued or that a 'lesser category' of warning should have been issued;

(v) the tribunal will not be going behind the warning where it takes into account the factual circumstances giving rise to it. There may be a considerable difference between the circumstances giving rise to the first warning and those considered later. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way;

(vi) the tribunal may also take account of the employer's treatment of other employees since the warning was issued. This may show that an employer has subsequently been more or less lenient in similar circumstances; and

(vii) the tribunal must remember that a final written warning always implies, subject only to any contractual terms to the contrary, that any

subsequent misconduct of whatever nature will usually be met with dismissal, and only exceptionally will dismissal not occur.

31. **Submissions.** Both counsel submitted detailed written submissions. Given that the conclusions below address those competing submissions, there is no need to set them out in detail.

32. For the Claimant, Mr Zaman carried out something of a damage limitation exercise on the contradictions in the Claimant's evidence, but much of his focus was understandably on what he identified as procedural failings , as well as a detailed deconstruction of what can be seen on the CCTV footage.

33. For the Respondent, the thrust of Mr Baran's submissions was that the facts were straightforward and, within the disciplinary process, they were admitted by the Claimant, whatever he might have said at this hearing. Given those admissions, it did not make any difference that, for example, he was not shown the CCTV evidence at the disciplinary meeting.

34. **Conclusions.** The difficulty that the Claimant faces is that both the investigator and the dismissing officer relied very largely upon what he admitted doing. Where an employee has repeatedly volunteered that he punched a piece of equipment, which broke, there is no obvious reason why the investigator and the dismissing officer should not believe him and act accordingly. That is what happened here.

35. Therefore, while there is force in the submission that – for example - the Claimant should have been shown the CCTV before the disciplinary meeting, one is bound to ask what difference that would have made. It simply showed him doing what, at both the investigation and disciplinary meetings, he admitted that he had done.

36. Equally, while there is also force in the submission that a forensic examination of the CCTV footage raises a number of questions about who saw what (for instance, Ms Gomez), the one thing one can be confident about is what the Claimant admitted to doing, irrespective of what anyone else saw.

37. Therefore, it is quite clear that the Respondent genuinely believed that the Claimant had broken the machine out of frustration and irritation and that it had reasonable grounds for this belief, following a proper investigation. Overall, the procedure followed was fair, although as a matter of course, an employee should generally be shown all of the relevant evidence relied upon.

38. Damage to this machine, in the way it was caused and with the consequences that followed, amounted to conduct that the employer was entitled to treat as gross misconduct in all of the circumstances. There was no reason why the decision makers should not take into account the final written warning and no basis at all for this Tribunal to go beyond that warning. Therefore, dismissal was a sanction reasonably open to the Respondent.

39. Even were it the case that the procedural failings in respect of – in particular - the failure to show the Claimant the CCTV footage made the process unfair, there is a 100% chance that the Claimant would have been dismissed in any event, based upon what he admitted having done.

40. Therefore, in all the circumstances, this was a fair dismissal and the claim is dismissed.

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Employment Judge S Cheetham KC
Date: 23 December 2023