EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Wayne Gates **v Suez Recycling and Recovery UK Ltd**

Heard at: Watford
On: 24,25 and 26 July 2024
Before: Employment Judge Alliott

Appearances
For the Claimant: Ms Madeira (stepmother)
For the Respondent: Mr Cook (counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant was unfairly dismissed and his complaint of unfair dismissal is well founded.

2. The claimant was dismissed in breach of contract and he is entitled to notice pay.

REASONS

Introduction

1. The claimant was employed by the respondent on 10 June 2019 as a Machine Driver. He was summarily dismissed on 7 February 2023. By a claim form presented on 16 June 2023, following a period of early conciliation from 5 April to 17 May 2023, the claimant presents claims of unfair dismissal and wrongful dismissal. The respondent defends the claims. It is the respondent's case that the claimant was dismissed for gross misconduct.

The issues

2. I have taken the issues from the respondent's list.

> "Liability
>
> Unfair dismissal

1. What was the reason or principal reason for the Claimant's dismissal? The Respondent relies upon conduct, which is a potentially fair reason for dismissal.

2. If conduct was the reason or principal reason for dismissal, the Tribunal should consider the questions identified in British Home Stores Ltd v Burchell [1978] IRLR 379, EAT:

    2.1 Did the Respondent genuinely believe the claimant was guilty of misconduct?

    2.2 If so, was that belief held on reasonable grounds?

    2.3 Did the Respondent conduct as much investigation as was reasonable in the circumstances of the case?

3. Was the dismissal within the range of reasonable responses for a reasonable employer?

Wrongful Dismissal

4. Has the Respondent proved, on the balance of probabilities, that the Claimant was guilty of gross misconduct such as to entitle the respondent to dismiss the Claimant without notice?

5. If not, what was the Claimant's notice entitlement and was he paid in accordance with that entitlement?

Remedy

6. Did the Respondent pay wages to the Claimant post-dismissal? If so, over what period and in what amount? If so, should those payments be set off against any entitlement to notice pay and/or taken into account for the purposes of calculating the compensatory award?

7. If the Claimant's wrongful dismissal claim succeeds, to what compensation (if any) is he entitled in respect of notice pay?

8. If the Claimant's unfair dismissal claim succeeds:

    8.1 Is the Claimant entitled to a basic award? If so in what amount.

    8.2 Should the Tribunal make a compensatory award, and if so in what amount?

    8.3 Should any compensatory award be reduced or extinguished to reflect the chance of the Claimant being fairly dismissed in any event pursuant to the **Polkey** principle? This may be assessed either as a percentage chance or based on the passage of time (or both provided both methods of assessment are not applied to the same period of loss).

    8.4 Should the basic award and/or compensatory award be reduced or extinguished due to contributory conduct? The Tribunal should consider:

8.4.1 Was the Claimant's conduct culpable or blameworthy?

8.4.2 If so, did it cause or contribute to his dismissal (this limb of the test is relevant only to reductions to the compensatory award, not to reductions to the basic award)?

8.4.3 If so, by what percentage would it be just and equitable to reduce the basic and/or compensatory awards?

8.5 Has the Claimant unreasonably failed to mitigate his losses?

8.6 Is it appropriate to make an order for reinstatement or re-engagement?"

The law

3. S.98 of the Employment Rights Act 1996 provides as follows:-

> "98 General.
>
> (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."

4. Conduct is potentially fair reason.

5. S.98(4) provides as follows:-

> "(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."

6. As per the IDS Handbook on unfair dismissal at 6.3:-

> "Establishing reason for dismissal.
>
> It is the employer who must show that misconduct was the reason for dismissal. According to the EAT in British Home Stores Ltd v Burchell [1980] ICR 303, EAT, a three-fold test applies. The employer must show that:

- It believed the employee guilty of misconduct.
- It had in mind reasonable grounds form which to sustain that belief, and
- At the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances."

7. And at 6.103:-

> "Minor, one off or first beaches of company rules.

I have taken into account the following:

> "However, there may be circumstances where single breaches of the rules may found a fair dismissal. This was the case in AAH Pharmaceuticals v Carmichael EAT 0325/03, where the employee was found to have been fairly dismissed for breaching company rules on leaving pharmaceutical drugs in his delivery van overnight. The EAT commented: "In any particular case, exceptions can be imagined, where, for example, the penalty of dismissal might not be imposed, but equally, in our judgment, when a breach of a necessary strict rule has been properly proved, exceptional service, previously long service and/or previous good conduct may properly not be considered sufficient to reduce a penalty of dismissal."

8. As per the IDS Handbook at 6.202:-

> "Dishonesty. Dishonest conduct may be less clear cut than theft."

9. And as at 7.52:-

> "Absence of bias
>
> It is a cardinal principle of natural justice that the person conducting the proceedings should not be a "judge in his own cause". In other words the decision maker should not have a direct interest in the outcome of the proceedings and should not give any appearance of bias or partiality. Commonly cited evidence of bias is where a supervisor or manager involved in the disciplinary proceedings was also involved at an earlier stage in the case and so may already have formed an opinion. In order to minimise the possibility of bias, the disciplinary procedure should separate the processes of investigation, decision making and appeal wherever possible."

10. And at 7.102:-

> "The conduct of the appeal hearing is therefore very important. The principles of natural justice should be observed so far as possible… However, there is one principle of natural justice that is, in the EAT's view, often too impracticable in the commercial context to be insisted on rigidly: That is the rule that there should be different people handling every stage of the disciplinary process and that they should avoid having contact with each other during that process – see Rowe v Radio Rentals Ltd [1982] IRLR 177, EAT. There the EAT recognised that it was inevitable that those involved in the original decision to dismiss would be in daily contact with their superiors in line management and that total disconnection

cannot be achieved. For the decided cases, what appears to be relevant is the degree of involvement by the same person at the different stages."

11. And as per 3.43:-

"Dealing with the band (or range) of reasonable responses test:-

"The test was applied in Iceland Frozen Foods Ltd v Jones [1983] ICR **17** EAT… The EAT held that the tribunal had misdirected itself by substituting its own opinion for the objective test of the band of reasonable responses. Mr Justice Brown Wilkinson summarised the law concisely and his summary is frequently quoted and applied by tribunals:

"We consider that the authorities establish that in law the correct approach for the … tribunal to adopt in answering the question posed by s.98(4) is as follows:

(1) The starting point should always be the words of s.98(4) themselves;

(2) In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;

(3) In judging the reasonableness of the employer's conduct a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) The function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: If the dismissal falls outside the band it is unfair."

12. In addition, Mr Cook, on behalf of the respondent, has made extensive submissions on the law. I record here that I have read and taken into account his submissions and, in particular: -

"The ET must take great care not to substitute its own view of the circumstances giving rise to the dismissal, and the reasonableness of the decision making, for that of the employer see, eg, London Ambulance Service NHS Trust v Small [2009] IRLR 563, CA."

13. Mr Cook has set out an extract from Mummery LJ concluding with:-

"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

Unfair dismissal – appeals

14. It is a well established legal principle that earlier defects in a disciplinary process at the investigation or dismissal stage can be "cured" on appeal. It is not necessary for an appeal to proceed by way of re-hearing, rather than a review, to "cure" and earlier procedural defect (Taylor v OCS Group Ltd [2006] ICR 1602. CA).

15. In addition, Mr Cook has made submissions relating to Polkey and contribution.

16. As regards the Acas Code of Practice on Disciplinary & Grievance Procedures at 6:-

> "In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing."

17. Further, in the Acas Guide in the section dealing with "What should be considered before deciding any disciplinary penalty?" the following is set out:-

> "When deciding whether a disciplinary penalty is appropriate and what form it should take, consideration should be given to:
>
> - Whether the rules of the organisation indicate what the likely penalty will be as a result of the particular misconduct.
> - The employee's disciplinary record, general work record, work experience, position and length of service.
> - Any special circumstances which might make it appropriate to adjust the severity of the penalty.
> - Whether the proposed penalty is reasonable in view of all the circumstances."

The evidence

18. I had a hearing bundle of 359 pages. Both parties provided me with a cast list, chronology and list of issues. The claimant provided colour photographs of the waste yard and loading shovel.

19. I had witness statements and heard evidence from the following:

    19.1 Ms Kristie Bruin, HR manager at the respondent.
    19.2 Mr Bobby Bahara, Senior Site manager, who conducted the investigation.
    19.3 Mr Iain Gladman, who dismissed the claimant.
    19.4 Mr Javier Cordon, who heard the appeal.
    19.5 The claimant.

20. In addition, I had a hearsay statement from Mr Trevor Knowles, Trade Union Representative.

The facts

21. The Suez Group is an international group of companies specialising in waste management, recycling and water services. The respondent provides recycling and resourcing management to businesses and local authorities across the UK.

22. The claimant was employed by the respondent as a Machine Driver or Compactor Operator on 10 June 2019. He worked at the respondent's waste transfer site at Victoria Road, South Ruislip, London.

23. The claimant's contract of employment references the disciplinary and grievance procedure contained in the Employee Handbook. The disciplinary policy that has been produced to me contains the following:-

> "Disciplinary offences
>
> …
>
> (A) Misconduct
>
> … Minor breach of health and safety rules and instructions.
>
> (B) Gross misconduct
>
> One (or more) act, omission or behaviour that is deemed to be serious enough to justify summary dismissal, for example:
>
> …
>
> - Dishonesty
> - Gross negligence with regard to the performance of duties:
>
> - Serious breach of health and safety rules and instructions including failure to cooperate with Suez Recycling and recovery UK in its duty to comply with health and safety legislation;
>
> …
>
> - Failure to follow the reporting procedure for any incident involving damage to property belonging to Suez recycling and Recovery UK or a third party, or any action by any other employee which has caused damage to property of Suez Recycling and Recovery UK or a third party;
>
> - Disobeying or failing to abide by any or all of Suez Recycling and Recovery UK policies and procedures;"

And

> "(4) Dismissal

…

Where an allegation of gross misconduct is proven against an employee but there are strong mitigating circumstances, the following disciplinary actions short of dismissal may be considered at the discretion of the decision maker and consultation with your HR Manager:

- Demotion.
- Transfer to alternative duties or location.
- A final written warning."

24. Pausing there, I note that the examples relating to disobeying or failing to abide with the respondent's policies and procedures is prefixed by 'Gross negligence' (my underlining).

25. On 10 June 2019 the claimant undertook a Health & Safety induction. The claimant signed to indicate that he had received 29 policy documents. One of them was the Loading Shovel Operations Safe Working Procedure. It is six pages long so the volume of documentation provided on induction must have been voluminous. The procedure provided:-

> "7 Daily Pre-start checks are carried out & recorded on all items of mobile plant, with any defects noted & reported to the supervisor/manager immediately.
>
> …
>
> 2.1 All plant operators shall carry out daily checks using the standard defect procedure. All items must be checked, including any ancillary, plant-mounted equipment. You must ensure that any defects are reported to your supervisor/line manager with immediate effect.
>
> …
>
> 2.4 If any defects develop during any period of use, you must report the matter to your supervisor or line manager immediately."

26. There was some issue before me as to whether checks should be done once a day at the start of the shift or at the start of each driver's operation. However, given the claimant's understanding of the procedures it is not strictly necessary for me to deal with this issue, but it is the respondent's case that the checks should be done each time a driver started.

27. In addition, the respondent has produced a health and safety responsibilities document which the claimant signed to confirm receipt on 25 June 2021. This indicates that it is applicable to all employees and provides:-

> "These general rules apply to all employees of Suez Recycling and Recovery UK. They must be followed at all times in addition to any specific procedures and instructions that are in place.

> …
>
> • Use any equipment, substance or safety device in accordance with instructions and training.
>
> …
>
> • Report any fault or defect immediately.
>
> • Carry out daily checks as instructed and report defects immediately."

28. The document ends as follows:-

> "I understand that failure to comply with the law or Suez's health and safety policies and procedures including any instruction given in the interests of health and safety may render me liable to internal disciplinary action."

29. To an extent, reference to the policies is unnecessary as the claimant has always acknowledged that he was aware of the requirement to report damage immediately and the requirement to undertake pre-start safety checks on the loading shovel and record the same on the daily check sheet and defect report. That said, no evidence has been placed before me that the seriousness or potential consequences of not conducting pre-start safety checks was specifically highlighted to the workforce.

30. The check sheet is a one page tick box exercise with 36 items to be checked. Some items such as oil and coolant levels require the engine casing to be raised. Others required a walk round inspection. Some could be done from the cab such as checking steering/foot brake. The loading shovel looks like an articulated bulldozer. It has a large bucket at the front for moving waste around the yard.

31. The claimant's site received waste. Dust carts and 'cages' would drop off household waste and more bulky waste was also delivered.

32. The claimant obviously gave evidence before me. Ms Madeira has submitted that the claimant has learning difficulties, problems with reading and writing and lacks confidence in certain circumstances. This is not relevant to the claim as it was only brought to the respondent's attention at the appeal stage informally and was not relied upon by the claimant's trade union representative. No medical evidence has been placed before me.

33. However, having observed the claimant as he answered questions, I gained the impression that he was somewhat suggestable and answered in monosyllables, principally saying just 'yes' to many propositions. Some of his acknowledgement was justifiable but sometimes it was questionable. Rather startlingly, at one stage, he claimed that he had conducted pre-start safety checks on 2 January 2023 in stark contrast to what he has said all along in the investigatory, disciplinary and appeal process. Consequently, I have approached the claimant's oral evidence on the basis that it is not entirely credible both when in his favour and against his case. I make plain I do not find that the claimant has deliberately set out to mislead but that I

am not entirely convinced he always understood the whole question or the proposition being put to him despite repetition and simplification. This is in no way a criticism of Mr Cook who went out of his way to pose questions fairly. Consequently, I have relied quite heavily on contemporaneous documentation.

34. On 2 January 2023, a bank holiday, the claimant attended work at 6am. He told me that there were three other members of staff on site, normally there would be about eight. So, in that sense, it was short staffed. He told me that there was an excessive amount of waste in the yard. Dusts carts would drop off in the area called "The Pit" normally but he stated that that was full. Whether it was closed or not is academic. In the disciplinary hearing Mr Bahara indicated that rubbish levels were high. The respondent's documentation shows waste levels were at amber and clearly, on occasions, could get higher. I find that the waste levels were high and that dust carts were probably going to have to drop off in the yard or tipping hall as the pit was full.

35. The loading shovel could only be started with the key once an operator fob had been inserted. The telemetric data shows that on 2 January 2023 the claimant's fob was used to operate the loading shovel from 7.15-8.39, 10.03-10.45, 11.07-11.32 and 12.25-13.25. No other operator's fob was used at other times in the morning. The difference in geographic locations has been explained as GPS inaccuracy as the loading shovel never left site.

36. The claimant suggested that another individual drove the shovel during his break as he heard it from the canteen. He also told me he would not leave his fob in the cab. I find that this did not happen. Another operator, probably Mr Umair Butt, did operate the loading shovel in the afternoon after the claimant left site on 2 January. Whoever operated the shovel, it is noteworthy that he did not fill in the pre-start safety check list. There is doubt about who operated the shovel in the afternoon as the operator fob is simply recorded as 'unknown operator (valid key).' In my judgment the fact that the pre-start check list was not filled in makes it probable that the pre-start checks were not done. It is much less likely that they were done and the form was not completed.

37. The claimant did not go to work on 3 January 2023. On 3 January Mr Adrian Coftas reported damage to the rear of the loading shovel to Mr Iain Gladman. In the appeal meeting on 10 March 2023 the claimant stated:-

> "Adrian was actually already driving the shovel when someone else spotted the damage."

38. The claimant elaborates on this at paragraph 6 of his witness statement where he states:-

> "Adrian said while operating the loading shovel Gerry Garry (fitter) stopped him and pointed out the alleged damage."

39. If that is correct, it suggests that Mr Adrian Coftas began operating the loading shovel without doing pre-start safety checks. The claimant has asserted that others such as "Big Ron", Mr Umair Butt and Mr Gerry Garry drove the loading shovel before Mr Adrian Coftas. The respondent witnesses doubted this as they said Mr Coftas started early on 3 January 2023. However, the position does not appear to have been investigated as regards 3 January. Umair Butt and Gerry Garry were asked if they had operated it on 2 January. Mr Garry said "No" and Mr Butt said "He didn't feel comfortable answering as it was so long ago" (He was questioned on 20 March 2023).

40. Mr Gladman then looked at the CCTV. On 4 January Mr Gladman emailed Mr Javier Cordon as follows:-

> "Hi Javier,
>
> I have found out that damage has been caused to the loading without being reported.
>
> Nobody had owned up to it so myself and Stan have done some investigating and found out it was done by Wayne Gates on 2.1.23 at 13:13 in the tipping hall clearly seen on CCTV. He was pushing the bulky waste up but for whatever reason reversed into the trailer that was on packer 1, he clearly knew what he did as he was seen to stop for a while and then tried to manoeuvre away from the trailer.
>
> I think this is totally unacceptable and I want Wayne to go through the process and answer for his actions, the message needs to be sent out to all staff that there will be repercussions if failure to not only report damage but abuse to Mobile Plant.
>
> Question is, does an investigation need to take place for this given the evidence I have found? If yes who can I get to investigate this as I am still to have investigation training through Suez?
>
> On the back of this two other members of staff have driven the shovel after damage caused but only one of them had reported it."

41. I find that Mr Gladman was expressing a concluded view that the claimant had caused the collision, knew he had done so and failed to report it. Further, that he wanted the claimant disciplined for it. I find that Mr Gladman was aware that at least one subsequent operator had not reported the damage and by necessary implication had not conducted a pre-start safety check.

42. I find that the contents of the email should have disqualified Mr Gladman from holding the disciplinary hearing and potentially compromised Mr Cordon from holding the appeal. It was not just "suboptimal" as Mr Cook puts it but wrong and unfair with a clear appearance of bias and partiality.

43. Further, it indicates to me that no action appears to have been taken due to the failure of at least one of the operators to undertake pre-start safety checks. The CCTV does not appear to have been reviewed to identify the

operator and see if he had undertaken pre-start checks. This indicates to me that such a failure was not as serious as the respondent now seeks to make out during the course of this hearing. In my judgment, it does not cross the threshold of gross negligence and so constitute gross misconduct. I find that I am supported in this view by the information that "Big Rob" was subsequently disciplined for not conducting pre-start safety checks at a different time after the respondent had tightened up its processes in order to check the situation and only received a final written warning.

44. On 5 June Mr Gladman sent an email to HR seeking clarification on a number of issues. Once again, Mr Gladman expresses firm views as follows:-

> "Nobody owned up to causing this damage so I checked the CCTV and found the culprit and saw the incident, Wayne Gates reversed the loading shovel into a parked trailer that was attached to a compactor when pushing waste up. Although he did not get out and check his machine or the trailer for damage, in my opinion he definitely knew he hit something as he stopped for a 5-6 seconds and had to manoeuvre a certain way to get away from the trailer.
>
> To make matters worse his supervisor spoke with Wayne about the damage and he did not admit this incident to him."

45. On the advice of HR the claimant was suspended on full pay on 6 January 2023.

46. Mr Bahara was appointed to investigate He viewed the CCTV of the entire shift from 6 to 13.25. He found the incident at 13.15 which he was confident was when the damage was caused but said he could not be certain the claimant had, or should have, realised. He also noticed that the claimant had approached the loading shovel vaping and got into it without completing the pre-start safety checks. He then inspected the check list sheet and found it had been completed.

47. Mr Bahara invited the claimant to an investigation meeting on 13 January 2023. The notes of the hearing record the following:-

> "The claimant was asked if he understood why he had been asked to come in and replied:-
>
> > "Yes I'm being accused of damaging the loading shovel but I didn't know I had or I would have reported it and I wasn't the only operative to operate the shovel that day."

48. Later he was asked:-

> "Mr Bahara: On 2 January 2023 I can see you done a pre-start check sheet – was this completed at the start of the shift and before using the loading shovel?
>
> Mr Gates: Yes"

That was clearly a lie.

"Mr Bahara: On the 2/1/23 was you the only operative to operate the loading shovel?

Mr Gates: No. Umair took over from me when I left at 2pm.

Mr Bahara: So you were the only operative to operate the loading shovel between 6am and 2pm.

Mr Gates: Yes.

Mr Bahara: Did anyone cover your breaks during your shift?

Mr Gates: No."

49. Later, during the investigation meeting the following exchange was recorded concerning the pre-start check:-

"Mr Bahara: Ok – going back to your pre-start check you say you carried out on the day of the incident, the CCTV does not show you carry out any inspection, is this correct?

Mr Gates: Yes, I didn't carry out the pre-start check out.

Mr Bahara: Can you tell me why you did not carry out the pre-start check?

Mr gates: No I can't remember.

Mr Bahara: So you didn't complete a pre-start check but you did complete the book, can you tell me when the pre-start book was completed?

Mr Gates: I remember during my shift I hadn't completed the book and at that point completed the book.

Mr Bahara: Still with no checks?

Mr Gates: Yes."

50. Mr Bahara prepared an investigation report and recommended three allegations be made against the claimant.

51. In his witness statement Mr Bahara states:

> "It was clear on the CCTV at the start of the shift at 06.00 on 2 January that there was no damage to the back of the loading shovel…The damage to the loading shovel was clearly evident on the CCTV after the incident and before the claimant exited the machine."

52. Despite being at the disciplinary and both appeal hearings there is no record of Mr Bahara stating this at any point. Given that the claimant was continually asking for the other potential drivers to be interviewed to see if they had caused the damage, this is surprising. It would have demonstrated to the claimant beyond doubt that the damage had been caused whilst he was driving.

53. On 26 January 2023 the claimant was invited to a disciplinary hearing. The allegations were as follows:-

> "1 Allegation of Gross Misconduct for failing reporting procedure involving damage caused to the Loading Shovel.
>
> 2 Allegation of Misconduct, specifically smoking or using an e-cigarette in a non-designated smoking area at work.
>
> 3 Allegation of Gross Misconduct, specifically failure to carry out pre-start defect check on mobile plant prior to use and falsifying defect check record to state it had been completed."

54. The claimant was sent all relevant documents including a written warning that he had received on 2 December 2021 at least three days in advance by email. I find that the inclusion of the written warning was not a factor taken into account but was there to demonstrate that he was aware that damage needed to be reported.

55. The disciplinary hearing was heard on 30 January 2023 by Mr Gladman. During the course of the hearing the claimant stated that Umair drove the vehicle on the day after. I do not deal with the collision as ultimately that was overturned on appeal. The claimant was asked about the pre-start safety checks as follows:-

> "IG: Ok, I have made a note of those points. The third allegation is regarding the pre-start checks in the morning and then falsely completing the defect book.
>
> WG: Can't say nothing to that, that's the truth, what I said in interview.
>
> IG: Is there any reason why you wouldn't do them?
>
> WG: I was doing the doors and the shovel. Come into the yard, jumped on the shovel to push up. I just got distracted and forgot.
>
> IG: Ok. Going forward, what can you say to me to give me confidence that you won't forget again?
>
> WG: I do them, you can see from the book that I do them normally.
>
> KB: I think what Iain means is, with hindsight, if you found yourself in a similar situation where you could get distracted what could you do differently so it doesn't get missed?
>
> WG: I don't know.
>
> IG: And when you discovered that you had forgot, you completed the book but then didn't do the checks as per the list?
>
> WG: "Shrugs shoulders" I can't make it sound better."

56. Mr Gladman found allegations 1 and 3 proved and decided to dismiss the claimant. The claimant was informed in a letter dated 7 February 2023. I

find that the reason for dismissal was gross misconduct. I find that Mr Gladman genuinely believed in the reason. I find that the investigation was reasonable save for the fact that Mr Gladman had expressed a very firm and decided view at an early stage. As such, I find that the decision to dismiss was unfair in all the circumstances as Mr Gladman had already made his mind up. As such, I find he did not have reasonable grounds to dismiss the claimant.

57. The claimant was sent a letter of dismissal on 7 February 2023. As regards the pre-start check issue the following is set out:

> "2. Gross misconduct, specifically failure to carry out prestart defect check on mobile plant prior to use and falsifying defect check record to state it had been completed.
>
> You did not carry out the prestart checks before you operated the loading shovel like you were supposed to and filled it in later in the day without checking the loading shovel. You have said on both the investigation and Disciplinary hearing that you did not follow the procedure and did not carry out checks to the loading shovel before use, this is stated on both Health & Safety Responsibilities and Loading Shovel Operations (SWP:VR038) and they clearly state that you need to carry out prestart checks to the loading shovel and you did not even though you have read and signed them both to say you understand."

The falsification of the defect check record is not referenced in the decision.

58. The claimant appealed on 20 February 2023 within the 14 day appeal period.

59. I was told that the CCTV was automatically recorded over and deleted 30 days after 2 January, and so, unfortunately, had been deleted by the time of the dismissal. Further, Mr Bahara had deleted the extract on his mobile.

60. The grounds of appeal were:

> "I do not believe the process and reasons given for the decision are fair. In fact, I believe that I have been unfairly disadvantaged.
>
> 1. Decision to dismiss is far too serve [severe] and disproportionate given the circumstances of the case.
>
> 2. I do not believe a full and proper investigation was carried out before disciplinary.
>
> 3. A reasonable response's employer would not have been dismissed in the circumstances.
>
> 4. Failure to take into account mitigating factors.
>
> 5. Unfair dismissal."

61. The claimant prepared an appeal statement. Most of it relates to the issue concerning the collision. However, the claimant states:-

> "Regarding the defect book and reporting damage: Wayne did not complete the check list before driving the shovel machine due to the excessive workload he was trying to complete. Please note has not been taken into account at all throughout this whole disciplinary procedure. Wayne had every intention of completing the check list but unfortunately got carried away trying to complete his workload and forgot."

62. The document goes on to assert that others had driven the loading shovel after the claimant on 2 January 2023 until Adrian discovered the damage on 3 January 2023 and asserts that three people did not write in the defect book.

63. The appeal hearing was heard by Mr Cordon on 10 March 2023. The claimant had trade union representation by this time. Most of the notes of the hearing record that it was the collision issue that was principally dealt with. The only reference to defect reporting was as follows:-

> "TK: Ok, regarding the defect forms, in policy says "Before using mobile plant" but other people have used the shovel during this period and haven't done a defect check. It does not state that once a day is sufficient.
>
> KB: Javier, what is common practice at West London?
>
> JC: They should be doing their own defect checks before use. I have made a note of this and will look into that.
>
> I am going to look for the CCTV and the rota also".

64. Mr Cordon adjourned the appeal hearing in order to make further enquiries and gather further evidence, including finding missing defect checks.

65. The appeal hearing was scheduled to be reconvened on 24 March and once again the claimant submitted a document in advance on 23 March 2023. Once again, the claimant highlighted his assertion that other staff members operated the shovel and did not complete defect sheets.

66. The appeal hearing was reconvened on 24 March 2023 and there is a verbatim transcript of that hearing. The following exchanges are recorded:-

> "WG: And also can I just say that day the pits were full so the dust carts were having to tip inside the shed where usually they would be tipping down the pit.
>
> J: That's not what the waste flow report says.
>
> WG: Sorry.
>
> J: So the waste levels on site that day were ok.
>
> WG: I'm not saying that the levels were not ok, what I'm saying is because I had so much to do I was covering the shovel, doing the doors on the tub. I was under pressure. I didn't have the time to constantly keep on top of the rubbish pushing up so when I've come to push the rubbish up the waste

that's added up it's a mess. I'm not on about the levels of the yard that day, I'm on about my situation when I was pushing up."

67. There was an exchange between the claimant and Mr Bahara that he had not mentioned the pressures of work during the investigation. The claimant responded by saying that when he was doing his investigation Mr Bahara must have seen on the cameras that he was, "doing other jobs like around by the packers for instance, doing the door, giving the bays a scratch".

68. As regards the defect book the claimant again asserted that some people taking over the loading shovel were not doing the defect book.

69. The following is recorded:-

> "WG: I'm asking why I'm being dismissed for what I have done for failing to sign the defect book, when everyone else is doing it.
>
> …
>
> KB: So you are saying you don't remember that you're supposed to fill in the defect check.
>
> WG: I'm not saying I don't remember. What I'm saying is I didn't do my defect check book and there's other staff, more or less everyone, that's doing exactly the same, so why am I being targeted and dismissed for it."

70. In due course the hearing specifically turned to point 2, gross misconduct, specifically failure to carry out pre-start defect checks on mobile plant prior to use and falsifying the defect record to state that it had been completed. The following is recorded:-

> "KB: So failure to carry out the pre-start check, you've said yes you didn't do that in previous hearings. You've also confirmed that once you did realise you hadn't done it you did go back and fill it in but you didn't get out and do the check at that point. Your stance regarding that one so you know that your supposed to do a defect check, you know that you need to do all the checks that are on the list but you haven't done that on the day because of how busy you were.
>
> WG: Correct.
>
> KB: Ok are there any other reasons other than the amount, your perception about being busy, is there anything else that contributed to you not doing it and then falsifying that record?
>
> WG: We were understaffed, we had three people in that day. I was under pressure and I feel like you haven't taken that into consideration. If you go back in my history you'll see I always do my defect check book.
>
> KB: Ok."

71. Mr Knowles then tried to develop an argument along the lines that some of the checks must have been done when the claimant was in the cab. To an extent that is accurate because the check list, for example, has the

hours/odometer reading on it which looks as if it is correct. Some other checks must have been, in reality, done during operation, for example foot brake, parking brake, seat and seat belt, cab condition/cleanliness.

72. The claimant was asked if he had done it before and he said he had not and it was a one off.

73. On 31 March 2023 the claimant was notified of the appeal outcome. Mr Cordon accepted the appeal in relation to the collision stating:-

> "I have made the decision to overturn the original decision because I could not determine whether you realised you did damage the mobile plant or not."

74. That was principally on the basis that the CCTV had been deleted.

75. Mr Cordon's finding in relation to the failure to carry out the pre-start defect check and the falsifying of the defect check record was as follows:-

> "I have made the decision to uphold the original decision because, for me, there are no grounds to justify your failure to carry out the pre-start checks, and what is worse, you falsified them, and you have admitted this several times during the disciplinary process."

76. On 14 August 2023 there was a very serious incident at the respondent's premises when person or persons unknown broke in and caused considerable damage running into hundreds of thousands of pounds. The telemetric evidence is that the fob registered to the claimant was used to start the loading shovel. The respondent invites me to take this into account. I can not make any findings concerning that serious incident. The claimant has made a witness statement denying that he was involved and providing an alibi. There are any number of persons who could have had access to the fob and consequently I disregard this incident wholly.

Conclusions

77. I have examined the information that was before the respondent. The claimant was dismissed due to failing to undertake a pre-start defect check and falsifying the defect check record.

78. I find that the reason for the dismissal was conduct.

79. I find that Mr Cordon genuinely believed in the reason.

80. I find that the genuine belief of Mr Cordon was based on reasonable grounds following a reasonable investigation. The claimant had admitted both aspects throughout the disciplinary process.

81. I have looked at all the circumstances in assessing the fairness of the decision to dismiss. In my judgment, the seriousness of not undertaking a pre-start check list was not that great. In my judgment, the reaction to the discovery that other personnel had potentially not undertaken pre-start checks and had not completed the defect check records demonstrates to

me that it was not treated as seriously as the respondent now contends it was. Umair was not apparently investigated. Adrian potentially could have been investigated but wasn't. It would appear that "Big Rob" was investigated for misconduct at a different time but the outcome was a final written warning (albeit that I accept that may be against the fact that he was charged with gross misconduct).

82. I accept that the claimant's circumstances were different and more serious than a simple failure to conduct a check. The claimant had falsified the records. I accept that that is dishonesty.

83. That said, in terms of the degree of dishonesty, I do not consider it that serious. More to the point, I do not consider that a reasonable employer acting reasonably would have considered it was that serious and constituted gross negligence. This was a routine, albeit important, check to be undertaken. The information before the respondent was that the claimant was feeling under pressure to clear space for incoming lorries and was simply getting on with his job. The claimant was clearly wrong to have just ticked the boxes without undertaking the checks. However, this was a one-off, the claimant was a good operator and, as indicated, he was just trying to do his job. In the circumstances, in my judgment, a reasonable employer acting reasonably would have not dismissed the claimant. Consequently, I find that the decision to dismiss was outside the range of reasonable responses of a reasonable employer.

84. In the circumstances, I make no findings in relation to Polkey.

85. I have considered contributory conduct. In my judgment, the claimant did not contribute to his dismissal. Apart from his initial lie about doing the prestart check, which he quickly owed up to, he was candid throughout the investigation.

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Employment Judge Alliott

Date: 17 September 2024

Sent to the parties on: 17/09/2024

For the Tribunal Office

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