EMPLOYMENT TRIBUNALS

Claimant: Mr J Madeley

Respondent: Novia Logistic Services Limited

HELD AT: Manchester **ON:** 15 and 21 March 2017

BEFORE: Employment Judge Rice-Birchall

REPRESENTATION:

Claimant: Miss J Hughes of Counsel
Respondent: Mrs S Shaw, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed by the Respondent and the claimant's claim for unfair dismissal succeeds.

2. The matter is to be listed for a hearing to determine remedy, directions in relation to which are provided below.

REASONS

The Hearing

3. The Tribunal heard evidence on behalf of the respondent from Mr Clague, Plant Manager, and Mr Thompson, Supplier Development, Product Quality and Packing Manager. The claimant, who was represented at the hearing, gave

evidence on his own behalf. During the hearing, the Tribunal was referred to documents contained within an agreed bundle.

Claims and Issues

4. The parties accepted that the claimant was an employee of the respondent and had sufficient qualifying service to bring a claim of unfair dismissal.

5. The issues, therefore, for the Tribunal to determine were: whether the respondent had shown a potentially fair reason for dismissing the claimant; and if so, whether that dismissal was fair or unfair applying the test in section 98(4) of the Employment Rights Act 1996 (ERA).

6. The respondent said it dismissed for a reason related to conduct of the claimant, which is one of the potentially fair reasons for dismissal within section 98(2) ERA.

7. The questions for the Tribunal to determine were whether the respondent had a genuine belief that the claimant was guilty of the conduct alleged; and whether the respondent did in fact dismiss for that reason.

8. If the respondent satisfies the Tribunal that it dismissed for a reason related to conduct, the next issue for the Tribunal to consider would be whether, in the circumstances, the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissal.

9. It was agreed at the outset that if the Tribunal found that there was an unfair dismissal it would go on immediately to make any relevant findings as to the following matters and that therefore any evidence and submissions relevant to these issues should be led at the same time as evidence and submissions as to liability:

    a. If the dismissal was found to be procedurally unfair, what the percentage chance was that the claimant would have been dismissed fairly in any event had a fair procedure been adopted; and

    b. Whether the claimant caused or contributed to his dismissal in such a way that it should result in a reduction to any compensation that might be awarded.

Findings of Fact

10. The facts of this case are straightforward. There were few conflicts of evidence in relation to the facts.

11. The respondent is engaged in industrial contract logistics, which includes providing warehousing for Perkins' aftermarket sales.

12. The respondent offers a next day delivery service for parts ordered before 345pm, for delivery across Europe. It is very important to maintain high standards, which includes ensuring that the correct parts, in the correct quantities, are sent to the right place.

13. To that end, the respondent has in place a points-based error management system which was updated (to the Tribunal's knowledge without opposition) in January 2014. The purpose of both the old and new systems was/is to minimise errors in the identity and number of parts being distributed.

14. The new policy was a notably stricter policy than had previously been in place and been operated, and there was some dispute as to how clearly that new policy was communicated. Some of the documentation in relation to implementation was a little unclear, for example as to whether the policy would operate over a rolling three month basis or over an actual three month period. Nonetheless, the policy was never challenged, either on implementation or during the disciplinary process by the claimant, and the Tribunal is satisfied that the reason for the change in the policy was to try to improve the error rate as that was and is a key target for the respondent in relation to its customer.

15. Under the new error management system four points are given for picking the wrong part and two points are given for picking the incorrect number of parts. Once the figure of seven is reached, which obviously means that there are either two picking wrong part errors; four picking incorrect number of parts errors; or a mixture of those, then that is when a disciplinary penalty is incurred.

16. The respondent also adopted a standard work process which it expected all warehouse associates to comply with. All warehouse associates are trained in and are expected to comply with this process, which the respondent believes enhances performance and helps to avoid errors.

17. The claimant was employed as a warehouse associate and was employed in that role to carry out a wide range of duties, including driving, picking and packing. Indeed the claimant had, in fact, performed a wide range of duties in his 23 years of service with the respondent. Latterly, however, during the period leading up to the termination of his employment, he had been employed as a picker in what is known as Area F, the area from which most products are picked, and the area in which it is acknowledged that the most errors are recorded. Smaller parts are stored in area F, and they are picked on foot, rather than with fork lift trucks, which the claimant had also worked with.

18. The claimant transferred to the new error management scheme with effect from August 2015. This date was slightly later than the majority of employees because he was already engaged in the former error management process, and the respondent had agreed not to implement the new process in relation to the claimant (or indeed any other employee) who was still subject to the old process until they had a clean slate.

19. The claimant received his first verbal warning in December 2015. He was then absent from work having a pace maker fitted between 26 February and 20 March, but was given a written warning in April 2016. After each warning he received refresher training on the standard work process.

20. The claimant never appealed against the warnings he received. he said he knew there was no point.

21. In May 2016, the claimant had his driving licence revoked when it was suspected that he suffered from sleep apnoea. He was moved to area F as he could pick on foot in that area.

22. The claimant was issued with a final written warning in June 2016.

23. Fortunately, it later transpired that the claimant did not have sleep apnoea but did have sleep disordered breathing. The claimant informed the respondent of this in August 2016.

24. Following further mistakes, the claimant was dismissed in September 2016 following an investigation and disciplinary hearing. The disciplining officer was Mr Clague.

25. During the investigation meeting the claimant accepted that he was not following all of the standard work elements. He also referred to his recent medical history.

26. The claimant was accompanied at the disciplinary hearing. The claimant again referred to his recent medical history and to the fact that Area F was where most errors occur.

27. In making the decision to dismiss the claimant, Mr Clague took into account the fact that the claimant did not appear to help himself as he would not commit to following the standard work procedures. Mr Clague discounted the medical conditions the claimant referred to as he considered that the claimant had a persistently high error rate which existed prior to his medical conditions.

28. Significantly, Mr Clague's statement states that he then considered whether there was another role in the business the claimant could transfer to, and that he considered whether he could be permitted to drive; that a role in packing had been ruled out by an occupational health report; and that the claimant had been shortlisted, but had withdrawn himself, from an internal recruitment exercise for a Customer Service Administrator . However, in oral evidence, Mr Clague simply stated that he made the decision to dismiss based on the continued error rate and confirmed that he did not believe that anything other than dismissal would have been appropriate. The respondent's evidence was contradictory in this regard. The Tribunal does not accept that the respondent considered with an open mind at this stage whether there were alternatives to dismissal.

29. Following an appeal heard by Mr Thompson the decision to dismiss the claimant was upheld. Mr Thompson confirmed, in oral evidence, that his role was simply to validate that the policy was applied correctly.

30. The claimant argued, inter alia, that he had 23 years' loyal service and had had health issues which had caused him stress and had resulted in his driving licence being revoked. Mr Thompson's witness statement confirmed that he had taken into account the claimant's length of service but had concluded that someone with the claimant's length of service should make fewer errors than someone with shorter service. Mr Thompson also concluded that, as the claimant had a consistently high error rate, his health issues were not the reason for the high level of errors.

31. Again, Mr Thompson's witness statement refers to the fact that he considered whether or not the claimant could be transferred to any other role but concluded that there was no suitable work available. However, he confirmed in oral evidence that alternative employment wasn't discussed with the claimant, and that he simply reviewed the consideration given by the disciplining officer, which he considered was correct. He further confirmed that he would have given the claimant another role if he had not been medically unfit (referring to the claimant having had his driving licence removed and having an OH report which stated that he could not stand for long periods. In fact, when questioned, neither Mr Clague or Mr Thompson had actually reviewed the OH report during the disciplinary process.

The Law

32. An employee has the right, under section 94 ERA, not to be unfairly dismissed, subject of course to certain qualifications and conditions set out in ERA.

Reason for dismissal

33. When a complaint of unfair dismissal is made, it is for the employer to prove that it dismissed the claimant for a potentially fair reason, namely a reason falling within section 98(2) ERA or some other substantial reason.

34. A reason relating to the claimant's conduct or capability is a potentially fair reason falling within section 98(2).

35. Where an employer alleges that its reason for dismissing the claimant was related to the claimant's conduct, the employer must prove that, at the time of dismissal, it genuinely believed that the claimant had committed the conduct in question; and that this was the reason for dismissing the claimant.

36. The test is not whether the Tribunal believes the claimant committed the conduct in question, but whether the employer believed the claimant had done so.

Fairness

37. If the respondent proves that it dismissed the claimant for a potentially fair reason the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason, applying the test in section 98(4) ERA.

38. Section 98(4) ERA provides that: "…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case."

39. The Employment Appeal Tribunal (EAT) set out guidelines as to how this test that should be applied to cases of alleged misconduct in the case of *British Home Stores v Burchell [1980] ICR 303.* The EAT stated that what the Tribunal should decide is whether the employer had reasonable grounds for believing the

claimant had committed the misconduct alleged and had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

40. The concept of a reasonable investigation can encompass a number of aspects, including: making proper enquiries to determine the facts; informing the employee of the basis of the problem; giving the employee an opportunity to make representations on allegations made against them and put their case in response; and allowing a right of appeal.

41. In 2009 ACAS issued its current Code of Practice on Disciplinary and Grievance Procedures. The Tribunal must take into account all relevant provisions of the Code when assessing the reasonableness of a dismissal on the grounds of conduct (secion 207(3) of the Trade Union and Labour Relations (Consolidation) Act 1992.

42. Even where procedural safeguards are not strictly observed, a dismissal can be fair. This can be the case where specific procedural defects are not intrinsically unfair and the procedures overall are fair. The Tribunal must determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker, the overall process was fair notwithstanding any deficiencies at the early stage.

43. In applying section 98(4) the Tribunal must also ask itself whether dismissal was a fair sanction for the employee to apply in the circumstances. The test is an objective one. It is irrelevant whether or not the Tribunal would have taken the same course had it been in the employer's place. Similarly it is irrelevant that a lesser sanction may be reasonable. Rather, section 98(4) requires the Tribunal to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted. This "range of reasonable responses" test applies equally to the procedure by which the decision to dismiss is reached (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).*

44. The Employment Appeal Tribunal has emphasised the importance of length of service and past conduct as being factors to take into account when considering whether the sanction imposed fell within the band of reasonable sanctions *(Trusthouse Forte (Catering) Ltd v Adonis [1984] IRLR 382)*.

Remedy

45. If a claim of unfair dismissal is well-founded the claimant may be awarded compensation under section 112(4) ERA. Such compensation comprises a basic award and a compensatory award calculated in accordance with sections 119-126 of the Act.

46. Where the Tribunal considered that any conduct of the claimant prior to dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, it must reduce the amount accordingly. In this regard the

question is not whether the employer believed the claimant committed the conduct in question, but whether the Tribunal so believes.

47. So far as the compensatory award is concerned, ERA provides that the amount of compensation shall be such amount as is just and equitable based on the loss arising out of the unfair dismissal. In *Polkey v AE Dayton Services Ltd [1987] ICR 142* the House of Lords stated that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been fairly dismissed in any event had a fair procedure been followed. A degree of uncertainty is an inevitable feature of this exercise, and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. Nevertheless, there will sometimes be cases in which the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction can be made.

48. Further, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it must reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding. As with any reduction under section 122(2), the question is not whether the employer believed the claimant committed the conduct in question but whether the Tribunal so believes.

Conclusion

Reason for dismissal

49. The decision to dismiss arose following a series of warnings under an established and unchallenged policy of the respondent, the aim of which was to reduce the number of errors. The Tribunal is satisfied that at the time the decision to dismiss was taken, Mr Clague genuinely believed that the claimant had committed the errors complained of and dismissed the claimant for that reason. No ulterior motive has been suggested, nor is there any evidence to indicate that such a motive was in play.

50. The Tribunal accepts the respondent's submission that the claimant's dismissal was by reason of his conduct. The Tribunal notes the respondent's submission in this regard, namely that where poor performance is due to carelessness, negligence or idleness, rather than necessarily a lack of skill or aptitude, the principal reason for dismissal is conduct.

51. Accordingly, the Tribunal is satisfied that the claimant's dismissal was for a potentially fair reason falling within section 98(2) ERA.

Fairness

52. The respondent, through the investigation and the disciplinary process, relied on data which identified errors which the claimant had allegedly made. At no point did the claimant challenge that data.

53. The Tribunal considers that there were some shortcomings on the part of the respondent at the investigation stage, as there was no cross referencing or verification against the records. In this particular case, the respondent may, had

that thorough investigation taken place, have found some discrepancies (as identified by the claimant during the Tribunal hearing). Despite this, the Tribunal is satisfied that the respondent's belief in the claimant's "guilt" was based on reasonable grounds. Mr Clague's belief was based on the data which identified the errors, and the claimant never challenged that evidence.

54. Nonetheless, there were some ways in which the respondent acted unreasonably by the standard of a reasonable employer.

55. First, Mr Thompson's evidence indicated that, far from taking into account the claimant's length of service as a positive for the claimant, he considered it as a negative, indicating that he should make less, rather than more, mistakes. Also, although Mr Clague said in his witness statement that he was conscious of the fact that "Jim was a long-serving employee", in oral evidence he confirmed that he did not consider it when deciding whether or not to dismiss.

56. Second, the respondent did not properly consider, or take into account, the claimant's representations about his health. The claimant's serious health issues had only arisen latterly. In relation to the claimant's medical condition, Mr Clague says: "I considered the fact that he had a pacemaker fitted and sleep apnoea issues but did not accept that either medical condition was a deciding factor." Nonetheless, there is no evidence that there was any discussion with the claimant about his condition or conditions, and any impact it might have had, on which Mr Clague could base his decision.

57. Third, the respondent did not address or properly consider the claimant's representations about the fact that he spent seven hours a day picking, and was working in the area with the highest level of errors. In essence, that meant that the claimant's error rate was proportionately lower than many other colleagues who picked far fewer items. Again, the respondent closed its mind to this argument.

58. Finally, and most significantly, there was no consideration of whether the claimant should be offered alternative employment. A reasonable employer, given an employee with 23 years' service, would at least have considered with an open mind whether there was some alternative work that could be done. Mr Clague confirmed in evidence that there had been no discussion whatsoever with the claimant about other jobs. There had been no consideration of the fact that, as dismissal was imminent, it might be worth the claimant reconsidering his application for the Customer Services Manager role. There was no consideration with the claimant at all of whether a role in packing might be appropriate notwithstanding the fact that the claimant had some issues with his back. There was no consideration of, given the fact that the claimant's apnoea had been misdiagnosed, he would be likely to soon get his driving licence back.

59. Not only was this part of the decision making process not discussed with the claimant, so he did not have any chance to comment, but it also indicates that Mr Clague had no real intention of considering alternative employment for the claimant, despite his assertion to the contrary in his witness statement.

60. The Tribunal also finds that the way the respondent handled the claimant's appeal was unreasonable by the standards of a reasonable employer. The Tribunal is not satisfied that Mr Thompson conducted the appeal impartially and with an open mind. The Tribunal finds support for this conclusion in Mr Thompson's continual referral to his being required to validate that the policy was applied correctly, and also to his comment that he felt that the claimant had raised health issues as a matter of convenience rather than a matter of truth. He failed to engage with the appeal or any of the points raised by the claimant and was simply interested in whether or not the policy had been correctly applied.

61. In particular, by way of example, Mr Thompson stated in oral evidence that he believed the claimant should have been redeployed had it been possible and that he believed there had been sufficient consideration of redeployment at the dismissal stage. Given that Mr Clague admitted that he did not really consider alternative employment as he considered that a move would not improve the performance issues, the Tribunal finds that this conclusion by Mr Thompson was unreasonable by the standards of any employer.

62. The Tribunal reminds itself that in procedural matters there is often a range of reasonable responses available to a reasonable employer. In this case, however, the Tribunal finds that the procedure adopted by the respondent was intrinsically unfair and fell outside the range of reasonable responses open to a reasonable employer in the respondent's position.

63. In light of the above, the Tribunal concludes that, in all the circumstances of the case (including the size and resources of the employer) the respondent acted unreasonably in treating the claimant's conduct as sufficient reason for dismissing him. It follows that the claimant's complaint of unfair dismissal is well-founded.

Remedy

64. It would only be appropriate to reduce compensation to reflect the chance that the claimant would have been dismissed in any event had a fair procedure been followed if that dismissal would have been fair. The Tribunal must, therefore, consider whether such a dismissal would have fallen within the band of reasonable responses open to a reasonable employer.

65. The claimant did make numerous errors and had a high error rate over many years. He also refused to fully engage with the standards of work imposed by the respondent despite numerous warnings.

66. Under the respondent's policy, dismissal was clearly a possibility following the series of warnings the claimant had received.

67. The Tribunal considers that a dismissal could have fallen within the range of reasonable responses of a reasonable employer. The claimant was at the dismissal stage of the error management process.

68. In this case, however, the respondent did not properly consider or address the employee's health or length of service, where the claimant was working or alternative employment. The question therefore is, if those issues had been

considered by a reasonable employer faced with an employee on a final written warning who had committed further errors, whether that reasonable employer would still have dismissed the claimant.

69. In all the circumstances, the Tribunal concludes that dismissal could have been within the range of reasonable responses open to a reasonable employer had all these factors been properly considered with an open mind, for example if none of the alternative employment options, once discussed with the claimant, had been suitable. There will therefore be a reduction in compensation to reflect the chance that the respondent might have dismissed the claimant fairly if it had acted as a reasonable employer.

70. The Tribunal wishes to invite further submissions from the parties before reaching a final decision as to what extent compensation should be reduced in this regard.

71. Before it can reduce a basic award under section 122(2)As ERA or a compensatory award under section 123(6), the Tribunal must be satisfied, on the evidence before it, that the claimant has in fact committed the acts alleged. In contrast to a position when considering whether the dismissal was fair, the test is not simply whether the employer reasonably believed, on the evidence available to the employer at the time, that the claimant was guilty of that misconduct.

72. The respondent invited the Tribunal to find that the claimant contributed substantially to his dismissal given his stated preference to continue with his own preferred way of working, and admittance to not adopting the respondent's standard work processes. The Tribunal is satisfied that the claimant did refuse to adhere 100% to this process and concludes that there should be a reduction in compensation to reflect the claimant's contribution in this regard.

73. In this case, the Tribunal considers that the reduction should be of 25% based on guidance in the case of **Hollier v Plysu Ltd [1983] IRLR 260**. This factor was only slightly to blame, as the principal reason for the dismissal was the error rate, rather than the claimant's failure to adhere to policy, though this was a factor taken into account.

74. The only additional matter remaining for consideration at any further hearing is whether the Tribunal should make an order that the clamant be reinstated (to his old job) or re-engaged (in a different role with the respondent) under ERA Section 113.

75. The Tribunal notes that the claimant indicated on his claim form that he was seeking reinstatement or re-engagement. If that has changed and the claimant does not now wish the Tribunal to consider making an order for reinstatement or reengagement he must inform the Tribunal and the respondent that that is the case, in writing, no later than fourteen days after the date this judgment is sent to the parties.

Remedy

76. The claim is to be listed for a remedy hearing.

77. The parties are to provide their available dates, if they have not already done so, within 14 days of the date of this judgment being sent to the parties.

78. The claimant is to provide the Respondent with an updated Schedule of Loss within 14 days of the date of this judgment being sent to the parties.

79. The parties are to exchange documents relevant to a remedy hearing within 14 days of the date of this judgment being sent to the parties. The claimant should include all evidence of his attempts to mitigate his loss.

80. Witness evidence is to be exchanged 28 days after the exchange of documents.

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Employment Judge Rice-Birchall

5th May 2017

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

8th May 2017
FOR THE TRIBUNAL OFFICE