EMPLOYMENT TRIBUNALS

Claimants: **Mr G Griffiths**
Mr Patrick Fawcett

Respondent: **H J Enthoven & Sons Limited**

Heard at: **Nottingham**

On: **30 August 2016**
16 and 17 January 2017

Before: **Employment Judge Ahmed (sitting alone)**

Representation
Claimants: **Ms M Stanley of Counsel**
Respondent: **Ms L Gould of Counsel**

JUDGMENT

1. The judgment of the Tribunal is that both Claimants were unfairly dismissed but contributed to their dismissals. The basic and compensatory awards shall be reduced by 50% in each case.

2. Both Claimants were dismissed in breach of contract.

3. The issue of remedy is adjourned.

REASONS

1. By claim forms presented on 8 April 2015, Mr Gary Griffiths and Mr Patrick Fawcett bring complaints of unfair dismissal and breach of contract. Both Claimants were employed as Labourers. They both have fairly lengthy periods of service. Mr Griffiths was employed from 11 September 2000 and Mr Fawcett from 11 October 1999. They were dismissed by reason of gross misconduct. The effective date of termination was the also the same namely 13 November 2015. Both Claimants have been represented throughout by Thompsons Solicitors. The Respondents have throughout been represented by Elliot Mather Solicitors.

2. This hearing was initially listed for one day to take place on 30 August 2016. Unfortunately it was clear that this would be insufficient having regard to the amount of evidence and it was adjourned part-heard for 2 further days to 16 and 17 January 2017. Regrettably there was still insufficient time to deal with the issue of remedy and that will take place on another day.

3. In coming to my decision I have taken into account the evidence of both Claimants, Mr Nigel Levin a trade union officer who also gave evidence on their behalf, Mr John Manning, the Respondent's Manufacturing Manager and dismissing officer and Mr Peter Allbutt, the Respondent's Site Director and the appeal officer in this case. I grateful to Counsel on both sides namely Ms Stanley for the Claimants and Ms Gould for the Respondents their helpful submissions and assistance throughout the hearing.

4. The facts of this case are relatively straightforward and unless otherwise indicated are not in dispute. The Respondent's primary business is in the recycling of car batteries. It has a production factory which operates both a day and night shift. The factory has a production line through which ingot lead castings pass. Molten lead is poured into moulds (or casts) and it proceeds down a conveyor belt whilst it cools and compacts. The resulting product is a lead ingot which is then stacked up in large quantities. Mr Fawcett's job is primarily to label each bundle or stack of ingots and record their weight. Mr Griffiths undertakes various duties. On the day in question he was 'skimming' which involves taking off any excess molten lead from the ingots. The duties around the factory are rotated. They include 'fourth manning' which allows team members to have a comfort break or go to the toilet as necessary. On the night in question, Mr Griffiths and Mr Fawcett were both working on the same shift. Also working on the same shift were Mr Andy Porteous and Mr Anthony Crowder, Labourers. Mr Crowder was a member of the health and safety committee.

5. The various processes in the factory are potentially very hazardous. There is no doubt that the Respondent takes health and safety seriously. In 2013 it introduced 8 'key site golden rules' aimed at reducing accidents and personal injury on site. In September 2015 there was a serious incident at a sister company in Italy when a stack of ingots fell on an employee causing serious injury. As a consequence the company issued a health and safety alert which was placed on notice boards around the site. Employees were briefed to be extra vigilant and to have safety in the forefront of their minds at all times. There are CCTV cameras in the factory area

6. On the night shift of 28/29 October 2015, both Mr Griffiths and Mr Fawcett were on the same shift which starts at around 6:40 pm and finishes at 6:40 am. Mr Andy Mycock, a Site Coordinator, was doing his usual rounds which included supervision of the production line. When he got to the casting machine, he saw one of the employees "slumped in a chair" as he described it. As he came closer he noticed that the worker had his head down. He recognised the person as Mr Griffiths. Mr Mycock's account is that he then approached Mr Griffiths and believing him to be asleep tapped him lightly on the leg. He also told him: "don't go falling asleep on the job". Mr Mycock then continued on his rounds into the warehouse. He noticed someone else sitting with their feet up on a chair. He approached and recognised it was Mr Fawcett. He concluded that Mr Fawcett was also asleep as his eyes were shut and his head was bobbing to the side. He

tapped Mr Fawcett on the boot and, according to Mr Mycock, Mr Fawcett apologised, got up and went over to the machine where he should have been. Mr Mycock made a contemporaneous note on 30 October 2015 which he then handed over to his managers. In the note he said that he was "100% sure" that both Mr Griffiths and Mr Fawcett were asleep. He went on to say that he had also approached Mr Crowder and reprimanded him for allowing his colleagues to fall asleep on the job.

7. As a consequence of the note/report from Mr Mycock, both Claimants were invited to investigatory meetings on 30 October 2015. They vehemently denied the allegation that they were asleep. Mr Griffiths said that it would have been impossible for him to fall asleep as he was in a standing position. It is now accepted that whilst he was not technically sat down he was resting on a 'seated' part of the wall rather than purely standing or sitting. Mr Griffiths was awaiting a knee replacement operation. He said that he was in considerable pain and discomfort at the time and resting his knee having worn a calliper for the last couple of years and being assigned light duties for that reason. He had told Mr Porteous that he was going to rest his knee for a short while and was thus stepping away from the production line for a short while. Mr Porteous had agreed to this. Mr Griffiths was 'fourth manning' on the shift thus effectively there to provide relief cover if required.

8. Mr Griffiths' strongly disputed Mr Mycock's account of him being asleep. He says that whilst his head was bent down, he was rubbing his knee in an effort to afford himself some relief from pain. He was wearing dark safety glasses which had been issued by the Respondent to reduce glare and a helmet with the visor pulled down. In those circumstances it would be impossible to tell if someone had their eyes closed. He accepts that he may momentarily have had his eyes closed when Mr Mycock approached him but categorically denied being asleep. He accepted that when Mr Mycock approached him he knocked him on the knee, which he says was his bad knee but far from waking him he was annoyed and said to Mr Mycock "oh, you cunt", to which Mr Mycock said: "don't drop off on the job". Mr Griffiths says that he replied: "I am not".

9. In relation to Mr Fawcett, the investigation meeting also took place on 30 October and was conducted by Mr Gyte. Mr Gyte did not given evidence at the hearing even though there is an issue as to the reasonableness of the investigation. Mr Fawcett's explanation of the events was that he had seen Mr Mycock in the refinery a few minutes before he had been approached when Mr Mycock was still at the top of the stairs some distance to the casting machine. Mr Fawcett accepted that he had his feet up on a chair but that was also because he too had trouble with his knees and his employers were well aware of this. Mr Fawcett accepted that Mr Mycock came over to him and tapped him on the foot and although he had seen a few minutes earlier he did not see Mr Mycock approaching him. Mr Fawcett denied being asleep but accepts that he may have had his eyes shut briefly. He pointed out that it takes an average of 3 minutes between the machine completing the bundling process and for him to get up and mark the bundle with a number and a fix a label. In that time it would not be possible for him to fall asleep. Moreover there was a lot of noise in the factory and a loud klaxon automatically sounds when a stack moves on down the line to the banding machine.

10. Unlike Mr Griffiths, Mr Fawcett did not say that he respond angrily. He said

he saw Mr Mycock motioning fingers towards the machine without speaking which Mr Fawcett took to mean that he should be watching the machine. Mr Fawcett did not recall Mr Mycock actually speaking to him although he detected that Mr Mycock was in a bad mood. Mr Fawcett says he may have said to him "Alright Andy" as an acknowledgement of Mr Mycock's presence but that was all. Mr Mycock then went over to Mr Crowder who was about 12 yards further down the warehouse. Mr Crowder did not hear any conversation but he also felt that Mr Mycock was in a bad mood. Mr Fawcett was also wearing safety glasses but in his case they were clear. He also wearing a safety helmet but no visor. He says that the exchange with Mr Mycock lasted no more than a few seconds.

11. Following the investigation, both Claimants were called to a disciplinary hearing on 6 November 2015. The allegations against them were in identical terms and were as follows:

"1. You were observed asleep at your workstation which is a breach of the company's health and safety policy.

2. You failed to carry out your work activities allocated to you as a result of being, asleep or being away from your workstation with your eyes closed.

3. Your failure to carry out your work duties allocated to you could have had an adverse effect on the operation of the plant.

4. You failed in your duty of care to protect your own health and safety and as far as possible to protect your colleague's health and safety when you fell asleep. Given that you work in a heavy industrial environment, this could have caused an accident.

5. You were not paying due care and attention whilst operating machinery (by having your eyes closed).

6. You attended work in an unfit state."

12. Mr John Manning who conducted the disciplinary hearing decided that in the case of Mr Griffiths all of the allegations with the exception of allegation 6 would be upheld. Mr Griffiths was found to have been found guilty of gross misconduct and the decision was to dismiss him with immediate effect. In the case of Mr Fawcett allegations 2, 3 and 6 were held to be unfounded but on the basis of the remaining allegations, Mr Fawcett would also be dismissed for gross misconduct.

13. The subsequent appeals, undertaken by Mr Albert, were later dismissed. No significant issue for our purposes arises out of the appeal.

THE LAW

14. Sections 98(1)(2) and (4) of the Employment Rights Act 1996 ("ERA"), so far as they are relevant, state:

"(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."

15. In applying section 98(4) ERA, I have borne in mind the guidance given in **HSBC Bank plc v Madden** [2000] ICR 1283, originally set out in **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439, namely that:-

"(1) The starting point should always be the words of section [98(4) ERA] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute its decision as to what was the right course to adopt.

(4) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(5) The function of the Employment 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."

16. It is now well-established that the range of reasonable responses test applies equally to the investigation as it does to the decision to dismiss (**Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23)

17. In **British Home Stores v Burchell** [1980] ICR 383, the Court of Appeal set out the appropriate criteria to be applied in cases of dismissal by reason of dismissals for alleged misconduct. Firstly, the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the misconduct in question. Secondly, the Tribunal must consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly, at the stage at which the employer formed its belief, whether it had carried out as much as investigation of the matter as was reasonable in all of the circumstances. Although **Burchell** was decided before changes were made to the burden of proof, the three-step process is still helpful in determining cases involving dismissal for misconduct.

18. In **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220 the Court of Appeal reminded Tribunals of the importance of not substituting their views for that of the employer. I have been conscious of the importance of not doing so.

CONCLUSIONS

19. It is agreed between both parties that this case essentially depends upon the Tribunal's application of the **Burchell** criteria. The touchstone is of course 'reasonableness' under section 98(4) ERA but **Burchell** represents an important guide as to the interpretation and application of section 98(4) ERA. There are different considerations that apply in relation to the breach of contract claim.

20. I begin firstly with the duty of the employer to establish a potentially fair reason under Section 98(1) and (2) ERA. I am satisfied that the dismissal related to the 'conduct' of the employees and that the Respondent has discharged its burden of establishing a potentially fair reason under Section 98(1) and (2) ERA.

21. The decision to dismiss the Claimants was largely based on the account of Mr Mycock and his note of the events of 28/29 October and the CCTV evidence. I accept the Claimants' evidence that it was they who pressed for the CCTV evidence to be viewed by the Respondent rather than the Respondent taking the initiative as a basis for further investigations. That of course would be a rather risky step for the Claimants not having seen it before they made the suggestion but it bolsters their account that they were anxious to establish their 'innocence' that they had not fallen asleep.

22. The parties were agreed that I should also view the CCTV evidence which I did in open Tribunal. Having done so, I agree with Mr Manning when he states that the footage was 'largely inconclusive' and the quality of the recording proves very little either way.

23. Given that this was a case of dismissal of two very long-serving employees who had worked on the night shift for many years, and against whom no similar allegations had been levelled in the past, the evidence of Mr Mycock was not only critical to the decision to dismiss but also had to be treated with a great deal of care. I am satisfied that the Respondent failed to exercise the necessary degree of care and caution and I find that the decision to dismiss fell outside the band of reasonable responses for the following reasons:-

23.1 There was a significant dispute as to the question of whether the Claimants were asleep without any corroborative evidence on either side. In those circumstances it would undoubtedly be difficult to decide who should be believed. It was very much a case of one person's word against another. There was no objective reason as to why the Respondent chose to believe Mr Mycock as opposed to the Claimants;

23.2 Mr Griffiths said, and it was accepted at the disciplinary hearing, that Mr Griffiths was wearing dark safety glasses at the time together with a helmet which had a visor. Mr Mycock agreed that this was so. In the circumstances it was difficult to see how Mr Mycock could be "100% sure" that Mr Griffiths was asleep or why the Respondent would accept that statement without reservation. That is not to say that Mr Mycock's account could or should not have been believed (as that would be entirely in the domain of the Respondent) but Mr Mycock's absolute confidence needed to be treated with caution in the absence of any corroborative or supporting evidence. It is of course entirely conceivable that a witness may be '100% sure' but merely to say does not add to the credibility or weight to the account. In this case the Respondents appear to have placed a considerable amount of weight on Mr Mycock being "100% sure" in

circumstances where it might not have been reasonably possible for him to have that level of certainty.

23.3 The CCTV evidence was regarded by Mr Manning as "largely inconclusive". Yet he appears to have relied on it in coming to his decision. It was unreasonable and outside the band of reasonable responses open to a reasonable employer for Mr Mycock to conclude that the CCTV evidence demonstrated an intention to sleep showing Mr Fawcett when he was in a "sleeping position for 5 minutes" and to conclude that one of the Claimants was also asleep when his head was 'bobbing'. In other words movement signified sleep as did no movement!

23.4 There was a wholesale absence of any support or corroboration of Mr Mycock's statement from other employees who were in the vicinity at the time. Neither of the two other employees who were in close vicinity had said that they had seen the Claimants asleep. Mr Porteous who was in the vicinity at the time does not appear to have been interviewed at all. That at the very least rendered the investigation defective.

23.5 There was a failure on the part of the investigating officer as well as the dismissing officer to consider an inconsistency in Mr Mycock's note, which was one of the few things that could be rebutted by the CCTV evidence, namely that Mr Griffiths was "slumped in his chair". Given that it is accepted that Mr Griffiths was not sat in a chair, that inconsistency alone should have given the Respondent reason to doubt the accuracy of Mr Mycock's level of certainty.

23.6. Mr Leven gave evidence was that he was aware of past acrimony between Mr Mycock and Mr Griffiths. Mr Levin's evidence was that at the disciplinary hearing he clearly recalls telling Mr Manning that according to Mr Griffiths there had been an issue between all three. There had been a disagreement in 2001 when Mr Fawcett had apparently taken an unauthorised shower. Mr Griffiths had raised his concerns with Mr Mycock as to how the issue had been dealt with. Mr Levin said that he clearly recalled Mr Griffiths had made a complaint at the time to his shop steward about the incident. There was a dispute as to whether this matter was raised in the disciplinary hearing at all as it is not referred to in the written notes of the meeting. However, having regard to the evidence given by Mr Levin, which I find credible, I am satisfied that the issue *was* raised notwithstanding the absence of any note to that effect. I prefer his oral evidence given under oath over the note of the meeting. That being so the issue was never investigated and any antipathy between those involved, whether real or imagined, was a matter which was never fully explored.

23.7 In the case of Mr Fawcett (although puzzlingly not in the case of Mr Griffiths), Mr Manning says that in relation to the first allegation he prefers the account of Mr Mycock because "*his version of events is more likely to be true taking everything into consideration, including his seniority in the company*…..". It is difficult to see how seniority was relevant to the issue of who should be believed.

24. For those reasons, I am satisfied that whilst the Respondents held an honest and genuine belief in misconduct, the belief was not based upon reasonable grounds nor was the investigation within the range of reasonable responses.

25. I am satisfied however that there was contributory conduct on the part of both Claimants. Both of them admitted to having their eyes closed, which even if momentary, could have had serious health and safety implications. Mr Fawcett accepts that he was away from his usual location and may not have been in the best position to deal with any health and safety emergency if it arose. In a dangerous environment as the one in which the Claimants worked, a momentary lapse of concentration could well be dangerous. Mr Griffiths also accepts that he was leaning against a wall which could cause him to lose concentration. Both employees were well aware of the importance of health and safety. I am satisfied that there was culpable and blameworthy conduct which ultimately contributed to their dismissal and that it is just and equitable to reduce the award by a percentage that reflects their conduct. It seems to me that it is appropriate to reduce any compensation for contributory fault by 50% in all of the circumstances. Whilst I accept that there are slightly different legal considerations which apply to the assessment of contributory conduct for basic awards as opposed to compensatory awards, it seems to me that as it is just and equitable that both basic and compensatory awards in this case should be reduced by the same percentage.

26. In relation to the breach of contract complaint, the band of reasonable responses test does not of course apply. It is necessary for the Respondent to establish a repudiatory breach on the part of the Claimants. This it has failed to do given that it has not called any evidence to establish the fact of the Claimants actually being asleep whilst at their workstation or in relation to the conduct alleged. For the avoidance of doubt I am not satisfied that the Respondent has proved, on a balance of probabilities, the fact of misconduct. Accordingly, the complaint of breach of contract must succeed and the claimants are entitled to their full contractual or statutory notice pay, whichever is the greater.

27. The issue of remedy both as to unfair dismissal and breach of contract is adjourned.

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Employment Judge Ahmed

Date: 8 March 2017

JUDGMENT SENT TO THE PARTIES ON

.....13 March 2017.....

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FOR THE TRIBUNAL OFFICE