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EMPLOYMENT TRIBUNALS

Claimant: **Mr A Purse**

Respondent: **Co-Operative Group Limited**

Heard at: **East London Hearing Centre**

On: **28, 29 & 30 August 2018**

Before: **Employment Judge B N Speker OBE DL**
Ms J Houzer – Member
Mr M Rowe - Member

Representation

Claimant: In Person
Respondent: Ms K Anderson, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:-

1. The Claimant was not subjected to disability discrimination and his discrimination claim is dismissed.

2. The Claimant was fairly dismissed and accordingly his claim of unfair dismissal is dismissed.

REASONS

1 These claims of unfair dismissal and disability discrimination are brought by Mr Alan Purse against his former employer Co-operative Group Limited, arising out of his employment as an HGV driver. There had been a number of interlocutory applications as to whether the Employment Tribunal had jurisdiction related to the Early Conciliation Certificate and as to compliance with management directions.

2 No specific jurisdictional issue had been established through the Preliminary Hearing s and therefore the Tribunal had jurisdiction to hear these claims. Unfortunately, this Tribunal did not have the benefit of a list of issues agreed between the parties as the relevant matters, as would normally happen in a case such as this. In particular, the disability discrimination claim had not been subjected to what are normal standard directions. Shortly before the Hearing date, the Respondent's solicitors had written to the Tribunal stating that they were not clear about the scope of the Claimant's disability discrimination claim or the case they had to meet and they raised a number of specific questions. Mr Purse has submitted replies which had not been seen by Counsel until the Hearing commenced. However, Counsel was able to read these replies.

3 There was discussion at the start of the Hearing about the specifics of the disability discrimination claim. Mr Purse admitted that he had been, and still was, unclear himself, as to the discrimination claim which he could bring or was bringing. He conceded that many of his concerns about his treatment in relation to his medical problems (described as sleep apnoea and involuntary leg movements), went back over many years. He had been told by his Union that he could not and should not be bringing those claims at the relevant times. He was absent from work for an extended period and had returned to work ultimately at the beginning of 2016 and returned to driving duties in May 2016.

4 The Tribunal has considered the question of jurisdiction as to the discrimination claim and decided that this claim will be considered as to events from 12 September 2016 onwards, but including consideration of grievance documents in July and August 2016.

5 Both the Claimant and Counsel for the Respondent agreed that the treatment being complained of by the claimant in relation to disability was the dismissal and the events immediately leading up to it as well as the procedures undertaken by the Respondent with respect to discipline.

6 The Tribunal was provided with a bundle of documents ultimately consisting of 724 pages.

7 For the Respondent, two witnesses gave oral evidence. They were Mr Bradley Rymer the Transport Operations Manager of Food Operations Logistics at the company's West Thurrock Distribution Centre in Essex, who was the dismisser, and Mr Mark Dunkley, Regional Support Manager, who was involved in the second stage appeal against dismissal.

8 The Claimant gave evidence himself and produced written emails from three of the trade union officials who had been involved on his behalf, namely Paul Travers, Steve Tagg and Edward Plum.

Findings of Fact

9 We found the following facts.

9.1 Co-Operative Group Limited is a national company with retail outlets throughout the country. Within the group there is an integrated logistics service providing transportation of goods to the retail outlets. The Respondent has distribution centres, one of which is situated at West

Thurrock in Essex. The Transport operation consists of a team of approximately 330 drivers, 23 managers and 27 support staff.

9.2 The Claimant had a long working history as an HGV Class 1 driver. He commenced employment with the Respondent in that capacity on 27 January 2008.

9.3 In 2009, the Claimant was diagnosed with sleep apnoea and underwent medical assessments. During 2010 he was deemed unfit to drive and the DVLA was informed. He was eventually able to return to driving with adjustments. A Work Adjustment Plan (WAP) was made for him by the Respondent. The position fluctuated over a number of years during periods which the Tribunal does not need to consider in detail or at all, as these are outside the scope of the complaints which are within the scope of this hearing.

9.4 The Claimant was for some periods of time medically suspended from work. Ultimately he was off for 18 months on full pay although he had a dispute as to whether he should have been paid for 48 hours rather than the 40 hours for which he received payment. The payment of these wages was the result of involvement on the Claimant's behalf by the Trade Union.

9.5 By 2016 the disability, namely sleep apnoea, had been medically resolved on a long term basis by the utilisation of a CPAP breathing machine and that continues to be the case. Therefore, the disability appears not to have been an issue with regard to Mr Purse continuing to work as a driver from May 2016.

9.6 During summer 2016, there was an issue regarding a leg problem which meant that the Claimant could only drive automatic and not manual vehicles. There was a delay in a formal Work Adjustment Plan (WAP) being arranged. This caused a disagreement between the Claimant and his then manager, Wayne Horsfall. The Claimant raised a formal grievance about this. It was partially upheld to the extent that it was found that a WAP should have been issued sooner and this was then set up. The allegation against Wayne Horsfall of bullying and intimidation was not upheld, it being decided by Nick Thorne the Transport Manager that Wayne Horsfall's management had been assertive but not bullying or intimidation. The Claimant was granted a right of appeal with regard to that grievance, but he did not exercise this.

9.7 In September 2016, the Claimant had a short absence from work for a hernia operation. WAPs were made for him from time to time by way of an adjustment in order to accommodate his health needs, for example, as to how many cages on the vehicles he could deal with, but these did not relate to the disability to which reference has already been made.

9.8 On 27 October 2016, the Claimant was involved in a vehicle collision. He was invited to an investigation meeting on 3 November 2016 with his team leader, Claudette Clark. He was accompanied by his trade union official,

Dave Wiseman. The meeting was adjourned as the Claimant had been involved in a further traffic incident on 1 November and therefore the investigation meeting was resumed on 11 November 2016. The Claimant was then represented by Liam Overall. It was decided that the matters should be referred to a disciplinary meeting which was then held by Wayne Horsfall, the day shift Transport Manager who invited the Claimant to attend. The Claimant did not attend but wrote to Wayne Horsfall saying that he did not consider that Wayne Horsfall was the right person to hold the meeting in view of the issues between them and that another manager should be appointed. Wayne Horsfall wrote to the Claimant inviting him again to attend on 25 November and Mr Purse was told that if he did not attend, then the matter would proceed in his absence. He was told that he could appoint a representative to attend for him or submit written evidence. The Claimant replied that he was intending to write to Richard Pennycook, the Group Chief Executive, asking that the meeting on 25 November be cancelled. However, the meeting went ahead in the Claimant's absence. Wayne Horsfall reviewed information about the two traffic incidents and he issued a first written warning to the Claimant to be in force for six months. The Claimant was notified of this on 25 November and told of his right of appeal.

9.9 The Claimant exercised the right of appeal against the imposition of the warning, suggesting that the punishment was unfair and that the process had been unfair.

9.10 The appeal was heard by Bradley Rymer, Transport Operations Manager. The hearing was originally set for 15 December 2-16 but rearranged for 4 January 2017. The Claimant was accompanied by Liam Overall, Trade Union Officer. The appeal was unsuccessful, Mr Rymer finding that the damage to the vehicles and the cost to the business was severe, that Wayne Horsfall was the appropriate person to deal with the hearing, that it was not for the employee to choose who should manage him and that the warning was appropriate.

9.11 The Claimant was then subject to investigation for three further matters which occurred on 27, 28 and 29 December 2016. These related to a driving incident on a motorway slip road reported by members of the public, a refusal by Mr Purse to complete a TPN penalty charge notice pro-forma and failing to deliver necessary consignments or to report his difficulties. The investigation meeting was opened on 7 January 2017 and re-convened on 13 January 2017. It was held by Kevin Harris. The Claimant was accompanied by Liam Overall. The decision was to refer the matter for a disciplinary meeting.

9.12 The disciplinary meeting took place on 18 January 2017 and was chaired by Piotr Ciszek. The Claimant attended and was accompanied by Liam Overall. The decision made was to impose a final written warning which was to remain on record for 12 months.

9.13 The Claimant appealed against that outcome and the appeal was heard on 8 February 2017 by Janet John. The Claimant attended and was

represented by Liam Overall. The appeal was refused and the decision was notified on 14 February 2017.

9.14 On 3 February 2017 an incident had occurred in relation to the Respondent's Twickenham store when the Claimant arrived with his lorry earlier than directed by the store risk assessment (SRA). An investigation meeting was held on 13 February 2017 by Claudette Clark who then referred the issue to a disciplinary meeting.

9.15 On 1 March 2017, a disciplinary meeting was held relating to that incident. It was chaired by Bradley Rymer. The Claimant attended and was accompanied by Steve Tagg. The decision was that the Claimant be dismissed for serious misconduct, taking into account the previous disciplinary action which had been taken. The Claimant had admitted that he had not read the SRA until getting to the Twickenham store. Mr Rymer had obtained evidence from Emma Linford the Assessor responsible for preparing the SRAs, with regard to the relevant SAR.

9.16 The Claimant appealed against his dismissal. The appeal was heard on 19 May 2017 by John Lacey who then adjourned it for further consideration on 23 May 2017. The Claimant was accompanied by Tony Lewington from his Union. Mr Lacey found no evidence of the personal vendetta which Mr Purse alleged existed with regard to Mr Brad Rymer or any fault as to the way in which the disciplinary hearing had taken place resulting in the dismissal. He also found that the SRA which Mr Purse failed to follow was correct at the relevant time and that any unanswered questions raised by the Union at the hearing before Mr Rymer, would not have affected the outcome.

9.17 Mr Purse exercised his second right of appeal which was heard on 21 August 2017 by Mr Mark Dunkey who considered that there was no new evidence provided. He found no reason to change the outcome. He considered in detail all of the points which had been made with regard to the SRA.

Submissions

10 On behalf of the Respondent, Ms Anderson provided detailed submissions in writing which referred to the relevant legislation and a number of leading cases as to the appropriate approach of Tribunals with regard to consideration of unfair dismissal claims. She made detailed points on the question of the timing of warnings and dealt with the question of whether the fact that an appeal in relation to one level of discipline was still outstanding, meant that that final written warning could or could not be taken into account in the subsequent disciplinary process. She also commented with regard to various aspects of the evidence produced at stages in the chronology. She submitted that the dismissal was fair and that the procedure operated by the Respondent was also fair and reasonable in all the circumstances and in accordance with the law. She argued that Mr Purse was fairly dismissed for misconduct at a time when a final written warning had been imposed upon him.

11 On his behalf, Mr Purse made oral submissions. He referred to a number of matters going back in the past and to some outstanding grievances he had with various managers who had been involved in dealings with him. He suggested that he still had an outstanding grievance with regard to the fact that during his long medical suspension he was paid for only 40 hours rather than 48 hours. He explained to the Tribunal his continuing disagreement with regard to the way in which the disciplinary processes had been dealt with and the fact that he considered that others were to blame in relation to the number of the incidents which had been held against him including the driving incidents; the collision with what he said were unlawfully parked vehicles; the unreasonableness of asking him to complete a pro forma without giving a proper explanation for it and his disagreement with the SAR which he maintained had been altered between the incident and its production within the disciplinary process. He argued that his dismissal was unfair and resulted from a conspiracy amongst a number of managers in the company who had a vendetta against him and considered him a difficult employee by virtue of the fact that he tended to challenge authority by standing up for what he considered to be right and raising grievances when he felt that he had not been fairly treated.

The Law

12 Unfair Dismissal

The relevant law governing unfair dismissal is set out in the Employment Rights Act 1996 section 98 and in particular section 98(4).

13 Disability Discrimination

The relevant legislation with regard to that claim is section 13 of the Disability Discrimination Act and section 15 of the Equality Act 2010.

Findings

14 Disability Discrimination

As to disability discrimination, the claim remained unclear through the hearing and it had only been on detailed questioning of the Claimant that it was possible to identify that he claimed that his dismissal resulted from a conspiracy amongst management and that this partially arose out of his disability and decisions which had been taken in relation to it. However, on the evidence presented to the Tribunal, there was no suggestion of any direct connection between the disability which was successfully medically managed and the decision to dismiss. The Tribunal accepted that the Claimant was, at the relevant time, a disabled person but that his disability was under control from the time of his return to work in 2016. The Claimant admitted this himself. The Tribunal found no basis for finding that the dismissal or any of the various disciplinary actions taken against him were related in any way to the Claimant's disability. There was no evidence to the effect that any reasonable adjustments should have been made which were not made. In addition there was no provision, criterion or practice established within the evidence or applicable throughout all the disciplinary processes which put the Claimant at any disadvantage or subjected him to any detriment. No claim was established under the Disability Discrimination Act or the Equality Act.

15 Unfair Dismissal

Under section 98(1) of the Employment Rights Act 1996, in determining for the purposes of the Act whether a dismissal is fair or unfair, it is for the employer to show the reason or if more than one, the principal reason for the dismissal and that it is a reason falling within section 98(2) which includes capability or conduct. The Tribunal finds with no difficulty, that the reason for dismissal in this case was a reason which related to the conduct of the employee, namely misconduct, and this was against a background of previous disciplinary findings in particular, a written warning and a final written warning.

16 When considering conduct dismissals, it is helpful for the Tribunal to be reminded of the guidance given in the case of *British Home Stores Limited v Birchell 1978 IRLR 379* and to answer the three questions posed in the judgment of Mr Justice Arnold. Firstly, did the employer have a bona fide belief that the employee had been guilty of the misconduct alleged against him? Secondly did the employer have reasonable grounds for that belief? Thirdly, did the employer carry out such investigation as was reasonable in the circumstances?

17 The Tribunal finds that the employer did have a bona fide belief that the employee had committed the conduct alleged. Secondly, there was clear evidence upon which they could base that belief in relation to the matter for which the Claimant was dismissed, namely the evidence that there was an SRA which clearly stated that delivery should not take place before 9:00am and the fact that it was on record and admitted by Mr Purse that he attended well before that time. Thirdly, we find that there was an appropriate and full investigation of the circumstances, both in the investigation meeting and the gathering and consideration of relevant evidence and full consideration at the disciplinary hearing and this was reconsidered during the first and second appeals.

18 We find that the Respondent had a sophisticated and comprehensive disciplinary policy and that this was followed at all times. The Claimant was a party to the investigations and was able to attend all of the meetings, although as indicated, he chose not to attend one of them. He was afforded the opportunity to be represented and was represented by his union. At all stages he was able to state his case. He also had the right of appeal which he exercised at every stage, including the two-stage appeal following dismissal.

19 There were two specific areas where Mr Purse suggested that processes were unfair. One of these related to Wayne Horsfall dealing with the first disciplinary meeting when the first written warning was imposed. As indicated earlier in this decision, the Claimant's objection was based upon his prior dealings with Wayne Horsfall and the fact that he considered that he had been bullied and intimidated. However, we have taken into account that this was the subject of a detailed grievance which concerned the late provision of a WAP and that the grievance was upheld as to the WAP but not as to the allegation of bullying and intimidation. It was found that Wayne Horsfall had an assertive management style and it was indicated to Mr Purse that all managers would be reminded of the company's respect at work policy. Accordingly, we do not find that there was any unfairness in the fact that Wayne Horsfall was the relevant manager undertaking the disciplinary role. This was a matter which was fully considered during the appeal against the imposition of the warning.

20 A further matter which concerned Mr Purse was that the evidence of Emma Linford as to the SRA at Twickenham was preferred to his account. However we found that this was a matter within the discretion of the Respondent in considering relevant evidence.

21 We applied the statutory test of unfair dismissal set out in section 98(4) Employment Rights Act 1996 as well as the guidance in decided cases namely, whether the decision taken by the Respondent fell within the band of reasonable responses open to a reasonable employer- *Foley v Post Office; HSBC plc (formerly Midland Bank plc) v Madden 2000 ICR 1283 CA* We have been careful not to substitute our own view of what we would have done for that of the employer - Iceland Frozen Foods Ltd v Jones 1983 ICR 17EAT. Our role as a Tribunal is to consider the decision to dismiss which was taken by the Respondent and the reasonableness of it. We find that the final incident with regard to the SRA was regarded by the Respondent as serious misconduct. The requirement not to attend at Twickenham before 9:00am was clearly set out and the Claimant as a responsible driver should have read the SRA before arriving at the store and in fact before leaving the depot. This was the view taken by the Respondent. The SRA contained restrictions for very good reasons and a failure to comply could have had serious consequences for the company and for the store. The final incident was against the background of the Claimant having a written warning and a final written warning for various types of misconduct including driving collisions, inconsiderate driving, refusal to follow reasonable management instructions and non-communication with regard to difficulties with deliveries. We find that the decision by the Respondent to dismiss Mr Purse fell within the band of reasonable responses open to a reasonable employer in all the circumstances and taking into account the size and administrative resources of the employer. It was a progression through a number of incidences of misconduct dealt with by the employer following due process. Accordingly, the decision of the Tribunal is that Mr Purse was fairly dismissed and therefore his claim is unsuccessful.

22 **Other Matters**

22.1 Public Access to Employment Tribunal Decisions
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Speker

28 September 2018