EMPLOYMENT TRIBUNALS

Claimant: Mr W McGinty

Respondent: Vistry Homes Limited

Heard at: London South (by CVP) **On:** 22 February 2021

Before: Employment Judge Leach

REPRESENTATION:

Claimant: In person
Respondent: Mr Wyeth, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed and his complaint of unfair dismissal is dismissed.

2. The claimant's complaint of wrongful dismissal does not succeed and is dismissed.

3. The claimant's complaint that the respondent refused to provide a rest break (contrary to regulation 12 of the Working Time Regulations 1998) does not succeed and is dismissed.

REASONS

A. Introduction

1. The claimant was employed by the respondent as a forklift truck (FLT) driver. Prior to his dismissal on 12 December 2019, the claimant had been based at a construction site called Hurstpierpoint at Bramble Park, West Sussex.

2. On 28 November 2019, the claimant fell asleep whilst operating a FLT. He was seen and woken by one of the respondent's health and safety advisers who was conducting a site visit at the time.

3. The claimant was suspended from work later that day, pending an investigation. A disciplinary hearing was held on 12 December 2019 following which the claimant was dismissed. The claimant appealed against his dismissal but this was unsuccessful.

4. The claimant has not sought to deny that he fell asleep whilst operating the FLT. However, he claims to have been particularly tired on the morning of 28 November 2019 as his work was so busy the previous day that he had been unable to take his half hour unpaid lunch break. This, he claims, was a breach of the Working Time Regulations 1998 (WTR).

5. The claimant also claims that his dismissal was unfair and in breach of contract.

B. The Issues

6. The respondent provided a List of issues which were reviewed at the beginning of the hearing and were accepted as appropriate for this case. I set them out below:-

Unfair Dismissal

(1) Was the claimant dismissed by reason of misconduct?

(2) Did the respondent:

(a) Genuinely believe that the claimant had committed misconduct?

(b) Have reasonable grounds upon which to sustain that belief?

(c) Carry out as much investigation as was reasonable in the circumstances at the point at which the belief was formed on those grounds?

(3) Did the respondent follow a fair procedure prior to dismissing the claimant?

(4) Was the dismissal within the range of reasonable responses?

Wrongful Dismissal

(5) Was the termination in breach of the claimant's contract of employment?

(6) Is the claimant entitled to notice pay?

Failure to permit rest breaks under the Working Time Regulations 1998 ('WTR')

(7) Did the respondent permit the claimant to take reasonable rest breaks during the working day?

Quantum

(8) If it is found that the claimant was unfairly dismissed:

(a) What financial losses has he suffered?

(b) What, if any, compensation award is appropriate in accordance with the ERA 1996?

(c) Should any compensatory award be reduced on the basis that:

(i) The claimant has failed to mitigate any purported loss;

(ii) Would have been dismissed in any event; and/or

(iii) The claimant has contributed to his dismissal through his own conduct?

(9) What, if any, compensation is appropriate in accordance with the Employment Rights Act 1996 or the Working Time Regulations 1998?

C. The Hearing

7. The claimant represented himself. Mrs McGinty, the claimant's wife was also present in the same room as the claimant and was able to provide some assistance.

8. The respondent was represented by Mr Wyeth of counsel.

9. I heard evidence from Mr Imray (dismissing manager), Mr Moran (who heard the appeal against dismissal) and from the claimant himself.

10. The hearing was held by Cloud Video Platform (CVP) as it took place during a lockdown period in the COVID-19 Pandemic. All participants could be heard clearly and the parties were able to ask all relevant questions and make all representations they had. I am satisfied that a fair hearing took place.

D. Findings of Fact

Relevant Events of 28 November 2019

11. On 28 November 2019, the claimant was working at the respondent's site at Bramble Park (Site). At about 10.00am, the claimant was in the process of operating a FLT to lift a pallet of roofing tiles up to a team of roofer contractors who were working from scaffolding. The pallet was lifted by the forks on the FLT which was stationary whilst the pallet was being unloaded by operators overhead on the

scaffolding. The engine of the FLT was running, the handbrake was on and the FLT's stabilizers had been lowered to provide some stability.

12. Chris Coleman (health and safety adviser) was carrying out a site inspection at the time. He and the site manager came up to the FLT and saw the claimant slumped in his seat in the cab of the FLT. Initially they thought the claimant was speaking on his phone but as they went up to the cab they realised that the claimant was asleep. They had to knock on the window of the cab to waken the claimant.

13. The claimant had been asleep for a good few minutes. At one stage in the disciplinary process he estimated five minutes and on another three minutes.

14. The claimant was not stopped from continuing with his work once he had been woken up. However, later that same day the claimant was suspended, pending a disciplinary investigation.

15. The claimant accepts that it was wrong of him to have fallen asleep but that this was due to him being so exhausted from working the day before (27 November 2019).

Relevant events of 27 November 2019

16. The Site is one of the respondent's larger sites. Generally, only one FLT operator is in place at a site but here, because the site was so large, 2 were deployed.

17. On 27 November 2019, the other FLT operator (John) was absent from work. A replacement driver had not been engaged for that day and so the claimant was the only FLT operator working at the Site.

18. When the claimant was asked about the incident on 28 November 2019 (when he was caught sleeping) he said that work had been particularly busy on the previous day and he had not been able to take his lunchbreak. As a consequence, he was very tired when in work on 28 November 2019.

19. The claimant first raised this in an investigation meeting on 3 December 2019.

20. At the investigation meeting the claimant was asked whether on 27 November 2019, he had raised with the site manager that he did not feel able to take his break. He said that he was too busy to do so.

21. A print out of the FLT's activity for 27 November 2019 shows the engine to have been running for almost all the time between 8am and 4pm. There are several short times when the engine is switched off. The longest of these is for 6 minutes at 1147-11.53.

22. I make the following findings:-

(1) The claimant worked his usual hours on 27 November 2019, being from 07.30am until around 4.30pm. He was not then required to attend work until 07.30am on the following day.

(2) The claimant is entitled to a half hour unpaid lunch break and generally takes this. (the claimant accepted this in response to a question from me).

(3) The claimant was busy on the site on 27 November 2019. He was the only FLT operator and usually there are 2 on the site.

(4) On balance I find that the claimant did not take his full 30-minute lunch break on this day. I note that it is possible the claimant could have taken a break and left the engine running in the FLT but on balance I find that there was not an occasion when a full, uninterrupted 30 minutes (or even an uninterrupted 20 minutes) was taken. I do however find that he took short breaks during the day including a break at 11.47 to 11.53.

(5) The claimant did not raise any difficulty in being unable to take his lunch break on 27 November 2019.

(6) The respondent provides a site canteen at the Site, with facilities for its employees to use during rest break periods.

The claimant's suspension and investigation

23. The respondent wrote to the claimant by letter dated 28 November 2019 to confirm the suspension and the reasons for it. That letter makes clear that the concern was that the claimant had been found asleep at the wheel of the FLT, when the engine was running and it was in the process of lifting materials.

24. It is clear that this was the sole focus of the respondent's investigation which followed the suspension. The claimant has raised other concerns about whether it was alleged that he had broken the speed limit or been involved in some careless driving incidents as there were some general criticisms of the claimant's in the account from the site manager. However, these matters did not form part of the respondent's disciplinary investigation. This was confirmed to the claimant in the investigation meeting on 3 December 2019 (page 112).

The Disciplinary Hearing and Dismissal

25. The claimant attended a disciplinary hearing on 12 December 2019, chaired by Mark Imray ("MI") Regional Build Director. The claimant understood what was alleged against him and had been provided with an invitation letter providing copy statements and extracts from the respondent's health and safety policy. The claimant knew that dismissal was a potential outcome of the hearing. He was provided with a right to be accompanied to the hearing.

26. The claimant attended the hearing with a pre-prepared statement. this included a response to issues raised about whether the claimant had been speeding and involved in other negligent driving actions. MI informed the claimant that he was

only considering the events of 28 November 2019. I am satisfied that MI did confine matters to the events of 28 November 2019.

27. As for the 28 November, in his written statement, the claimant accepted that there had been a *"dangerous and serious error of judgment"* on his part and accepted that it "*compromised the safety of both myself and others*" and that "*I have deeply reflected on this incident which I deeply regret and am very sorry*."

28. In mitigation, the clamant again turned his attention to the events of the previous day when he had been very busy and he had driven his FLT from 8am until 4pm without a break; that he was sorry and would ensure that, in the future, he works more proactively to ensure he takes more frequent rest breaks during the day.

The decision to dismiss the claimant

29. MI decided to dismiss the claimant. I find the reason for dismissal to be the events of 28 November 2019 for the reasons stated in the dismissal letter dated 12 December 2019:-

> ***1. A serious breach of your health and safety obligations***
>
> *During the disciplinary hearing you acknowledge that you did fall asleep while in charge of the forklift machine. You also acknowledged that the machine was running while you were asleep with people unloading tiles at elevation. Additionally, you acknowledged that this event could have resulted in an accident and a potential fatality.*
>
> *Accordingly, I uphold this allegation. As this is a finding of serious breach of health and safety obligations I am satisfied that in itself this amounts to gross misconduct.*
>
> ***2. An alleged dereliction of duties***
>
> *During the disciplinary hearing you acknowledged that you were solely responsible for the forklift machine and additionally acknowledged the importance of driving this machine responsibly. You stated that you had been tired from a busy day at work the day preceding the incident. However as clarified in the investigation hearing notes, you failed to raise this to your manager. Your actions therefore demonstrate a clear dereliction of duties and put lives at risk.*
>
> *Accordingly, I am satisfied that this amounts to gross misconduct as it is a serious knee collection of your duties and a serious breach interest and confidence.*
>
> ***Decision***
>
> *For the reasons set out above, I have decided to uphold all allegations against you. There is no place for conduct like this within a professional environment. Your actions put the health and safety of staff and contractors at risk and cannot be tolerated within the workplace. Accordingly, I have*

concluded that each of the allegations either individually or cumulatively amounts to gross misconduct.

Having reached the conclusion, I then have had to consider the appropriate sanction in the circumstances. During the disciplinary hearing, you showed remorse for your actions, however that does not negate the health and safety implications that business would risk should we allow you to continue working on site.

Given the severity of this matter and the findings of gross misconduct against you, I decided that the only appropriate sanction would be to dismiss you with immediate effect, without notice or payment in lieu of notice. This decision was confirmed to you verbally on 12 December 2019.

30. Having read and heard the evidence of MI I also find that MI:

(1) did not accept the claimant's account of not being able to take breaks;

(2) did not accept that, even if the claimant had missed a rest break the day before, that explained why the claimant had fallen asleep at about 10.20am the following morning, whilst operating a FLT;

(3) decided that it was the claimant's responsibility to ensure that at all times when operating the forklift truck, he was alert enough to do so;

(4) regarded the act of falling asleep whilst the FLT was operational, in the middle of lifting a pallet of materials to workers working from height, was very irresponsible and put the health and safety of others at risk.

Appeal against Dismissal

31. The claimant appealed against his dismissal by letter dated 19 December 2019. His appeal was heard by Paul Moran ("PM") the respondent's regional managing director. The claimant noted the following points in his appeal:-

(1) That he had received no previous warnings and therefore the decision was harsh and disproportionate;

(2) That whilst he accepted that he had committed a dangerous and serous error of judgement, extreme fatigue was a major contributing factor in that he took no rest breaks on 27 November;

(3) That he accepted he had a role in ensuring he took appropriate breaks but that he also considers there is a hostile culture at the site towards him taking breaks. Here the claimant provided an example of one occasion earlier in 2019 when he was taking a break but asked to attend to a delivery urgently as otherwise the respondent would incur a fee for delay.

The claimant did not say that he was prevented from restarting his rest break or taking a rest break on another time of the day in question;

(4) The claimant accepted that he had never been told he cannot take a break although asserted that breaks were interrupted;

(5) That whilst he was busy on 27 November 2019, the claimant accepted that he caught his usual train home.

32. Other issues were raised at the appeal, including the claimant being required to undertake labouring earlier in the year and allegations that the claimant was unable to record an accident in the site accident book. I find these issues were not relevant to the decision to dismiss.

33. PM decided to uphold the decision to dismiss the claimant. The decision letter includes:-

(1) That PM did not understand why the claimant had not raised issues about his breaks before the incident on 28 November 2019;

(2) That although it was clear from a print out of the FLT that the engine was switched on for almost the whole time between 8.00am and 4.00pm on 27 November 2019, but that PM did not consider this explained in any sufficient way, his reckless action of falling asleep at the wheel at 10.00am on the following day;

(3) That he did not raise his fatigue with anyone on 28 November 2019;

(4) That he considered the decision to dismiss to be correct and fitting with the seriousness of the incident.

Rest Breaks

34. The claimant raises the issue of rest breaks in the detailed grounds of complaint document. In this document claimant alleges as follows:

(1) That the working arrangements on the site often did not allow the claimant to take his rest breaks:

(2) The level of activities on the site were such that the claimant was asked by many colleagues to carry out tasks simultaneously and he would have outstanding requests for work for the whole day;

(3) That the site managers failed to put in place any working arrangements on the site, such as scheduled rest breaks, to allow the claimant to take the breaks to which he was entitled;

(4) That when the site managers did permit the claimant to take rest breaks they often made him feel guilty and interrupt his breaks within minutes of

them starting, and further that they failed to permit the claimant to take his break in the canteen or otherwise away from his workstation.

35. In relation to his dismissal, the claimant states as follows in the grounds of complaint document:-

> *"R failed to investigate the basic and root causes of C's conduct as was required under its own health, safety and welfare policy and as a reasonable employer would have done in any event in that:*
>
> *(i) Failed to adequately investigate the practice at the site of not permitting C to take rest breaks…*
>
> *(ii) Failed to adequately investigate the failure to permit C to take rest breaks on 27/11/2019…."*

36. At the investigatory interview when discussing the incident when the claimant fell asleep, the notes record the claimant saying as follows:

> *"I've been here coming on three years and no-one has ever said to me 'have a break'. If I stop the machine others complain that the machine is not working. No machine on site can do 100% work punctures etc.* [The respondent] *have changed the attitude about punctures; take the whole wheel off and patch the inside, need to dry it out to put the glue on – four hours. Under pressure all the time.*
>
> and specifically about 27 and 28 November 2019:
>
> *"On Wednesday I got up in the morning, not a problem – I think it was a blip when I had stopped – I just went to sleep. If I go for a break I go to the other end of the site. If I go to the canteen for a break, I get told I need a lift, we are pressurised to do things. The roofers came Wednesday and Friday. Pressurised when you are doing things. Both me and John get pressured, people never come to us and say 'take a break'."*

37. At the disciplinary hearing the claimant mentioned that on 27 November 2019 he had experienced what he called "*the most pressurised day of my time at* [the respondent] *when I drove my forklift all day from 8.00am to 4.00pm without taking any kind of rest break in order to meet the needs of the trades".*

38. As is apparent from the comments made by the claimant at various stages, the issue of rest breaks took on increasing seriousness following the claimant's suspension. The claimant had not raised any issue in relation to rest breaks prior to his suspension; at the investigatory interview the claimant made some general comments about how busy the site was and breaks were mentioned in the context of no one instructing him to break at a particular time. By the stage of issuing the Employment Tribunal Claim form, the allegation was of a widespread practice at the Site of not allowing breaks.

39. I make the following findings:

(1) The claimant was contractually entitled to a half hour lunch break (statement of terms and conditions of employment at para e). This half hour break incorporated the 20-minute rest break required by Regulation 12(1) WTR.

(2) The Site did not have a specific lunch break when it shut down. The claimant was able to decide when to take his break and this timing would inevitably also be influenced by the work that he was undertaking.

(3) The claimant had not raised any complaint about his inability to take a break until the incident on 28 November 2019.

(4) In evidence at the Tribunal the claimant accepted that he generally was able to take his breaks and that 27 November 2019 was an exception. It would have been surprising otherwise. The lunch break was unpaid and had the claimant not taken it then he would not have been paid for work done.

(5) The respondent provides a canteen for workers at the Site. The respondent has not in some way stopped the claimant from using that canteen.

(6) MI saw the claimant on a number of occasions in his FLT, parked up away from the main site, taking a break. I note here that the claimant did not dispute that he chose to park up, away from the main site, and take a break in that way.

(7) On one occasion MI spoke with the claimant and recommended to him that he take his break away from the FLT and use the canteen.

(8) The claimant was not, as he has alleged, generally disturbed whilst on his break. No one told the claimant that he could not take breaks. The claimant knew that he was able to take a 30-minute lunch break and he generally did so.

(9) There was one occasion which the claimant provided evidence about when an urgent load had arrived on the site and he was told that a fine would have been incurred if unloading had not occurred quickly. The claimant was on his break at the time and agreed to help out. I find that this was an exception and, further, there was no indication that the claimant could not resume his break or restart the break once he had cooperated by unloading.

(10) I also note on this issue that on 29 April 2019, the respondent held a meeting with the claimant to discuss his sickness absence. It was and long and open discussion involving a member of the respondent's HR team (notes at pages 92-97). The claimant was critical about several matters in this meeting but when asked about his work he said he loved it. No reference was made to being overworked and unable to take a break.

Other Incidents

40. In his witness statement the claimant made allegations that John, the other forklift driver, had been involved in serious work accidents "between the period 2018/2019". The two accidents specified were:

(1) Knocking down a garden wall (approximately 6-foot-high and 30 feet long) of a completed house that was occupied at the time.

(2) Damage a motor vehicle.

41. In relation to the occasion when the claimant alleged to have seen John knock down the garden wall in early 2018, he claims that a person he described as "*the Managing Director on site called Martin*", said *"don't worry, accidents happen."*

42. Part of the claimant's complaint of unfair dismissal at the Tribunal is that the respondent did not treat its employees consistently when applying disciplinary measures in that John had been involved in serious life-threatening incidents but no disciplinary action had been taken against him, whereas the claimant had been dismissed. I make the following findings:

(1) The claimant had not raised these issues at any stage of the internal proceedings. The claimant was well prepared for the disciplinary and appeal hearing including submitting written statements. Those statements even commented on driving incidents that he believed he was being criticised for and yet made no mention of incidents involving other drivers.

(2) No mention of these incidents is made in the grounds of complaint document. I have taken into account that the claimant is a litigant in person. However, the grounds of complaint document attached to the claim form is very detailed and expertly drafted.

(3) Neither MI nor PM were aware of these alleged incidents until reading them in the claimant's witness statement prepared for these proceedings. I note particularly that the claimant alleges the garden wall incident happened in early 2018, almost three years before he first mentioned this.

43. I do not accept the claimant's evidence in relation to these other incidents. Had a garden wall of such dimensions of an occupied house been knocked down by a moving forklift truck as described by the claimant then:

(1) It is very likely that the incident would have had some notoriety in the business;

(2) The claimant would not have overlooked an incident such as this when he believed he was being criticised, not just in relation to the falling asleep incident but generally in relation to his performance as a forklift truck driver. I note that the claimant believed he was being criticised for damaging a generator, damaging materials on site, unsafe driving practices.

44. As for the other incident involving a motor vehicle, no detail at all has been provided by the claimant of this: no date, detail of who was involved other than one driver, no indication about the seriousness of the damage. My comments at 42(2) above are relevant here.

The Claimant's Sickness absence

45. The claimant has alleged that there was a culture of fear about his taking time off due to sickness. The claimant had a relatively long period of sickness absence earlier in 2019. Unfortunately, he had required major neck surgery in February 2019 which meant that he was unable to attend work for 2 months or so.

46. When he returned, the claimant was asked to attend an informal review meeting to discuss the extent of his absences due to sickness. Almost all the most recent absence was due to the neck injury and operation. The sickness review however also referred to absences over the previous 2 years. Reference was made to the claimant having taken a lot of Mondays off in this period and that the respondent needed him to be in work on Mondays. At that meeting the claimant accepted that he needed to try harder to get to work on Mondays, also noting the long commute he had. Understandably in this meeting the claimant also referred to the pain and other difficulties that his injury and the operation had caused.

47. The respondent wrote to the clamant following this meeting (2 May 2019, at page 98) to summarise the discussions and to note that no further action will be taken in relation to the absence. The letter did end with this message:-

> *"Please note that your sickness absence will continue to be monitored and should you have any further casual sickness over the next 6 months which is unaccompanied by a doctor's note, this will result in a formal meeting taking place in which disciplinary sanctions could be imposed."*

48. I find that this message addressed the "casual" sickness of the previous 2 years and not the long time off because of the neck injury and operation. To be told (having accepted some responsibility for taking a number of Monday's as sickness) that no action would be taken but that absence would continue to be monitored with the possibility of disciplinary sanctions in the event of a repetition of the casual sickness, did not creating a culture of fear as the claimant alleges.

E. The Law

Unfair dismissal.

49. In a case such as this, a respondent bears the burden of proving, on the balance of probabilities, the reason why it dismissed the claimant and that the

reason for dismissal was one of the potentially fair reasons stated in s98(1) and (2) ERA. If the respondent fails to persuade the Employment Tribunal that it had a genuine belief in the reason and that it dismissed him for that reason, the dismissal will be unfair.

50. The reason for dismissal is a set of facts known to the respondent or a set of beliefs held by it, which caused it to dismiss the claimant.

51. If the respondent does persuade the Employment Tribunal that it held that genuine belief and that it did dismiss the claimant for one of the potentially fair reasons, the dismissal is only potentially fair. Consideration must then be given to the general reasonableness of that dismissal, applying section 98(4) ERA.

52. Section 98 (4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

53. In considering the question of reasonableness of a dismissal, an Employment Tribunal should have regard to the decisions in **British Home Stores v Burchell [1980] ICR 303 EAT**; **Iceland Frozen Foods Limited v Jones [1993] ICR 17 EAT; Foley v Post Office, Midland Bank plc v Madden [2000] IRLR 827 CA** and **Sainsbury's Supermarkets v Hitt [2003] IRLR 23** ("Sainsbury").

54. In summary, these decisions require that an Employment Tribunal focuses on whether the respondent held an honest belief that the claimant had carried out the acts of misconduct alleged and whether it had a reasonable basis for that belief having carried out as much investigation in to the matter as was reasonable. A Tribunal should not however put itself in the position of the respondent and decide the fairness of the dismissal on what the Tribunal itself would have done. It is not for the Tribunal hearing and deciding on the case, to weigh up the evidence and substitute its own conclusion as if the Tribunal was conducting the process afresh. Instead, it is required to take a view of the matter from the standpoint of the reasonable employer.

55. The function of the Tribunal is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses. This band applies not only to the decision to dismiss but also to the procedure by which that decision was reached.

56. When determining compensation for unfair dismissal, employment tribunals must apply s123 ERA:

> *"s123(1) ….the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the*

dismissal insofar as that loss is attributable to action taken by the employer.

….

S123(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

57. Compensation is reduced under just and equitable principles under s123(1) in 2 broad categories of cases:-

(1) Where the employer can show that the employee was guilty of misconduct which would have justified dismissal, even if the employer was not aware of this at the time of the dismissal.

(2) Where it is just and equitable to apply a "Polkey" reduction (applying the case of **Polkey v. AE Dayton Services Limited 1988 AC 344)**.

58. Provisions providing for an adjustment to the basic award are at section 122(2) ERA which requires a tribunal to reduce the amount of a basic award where it is just and equitable to do so, having regard to the claimant's conduct before the dismissal.

Working Time Regulations 1998

59. Regulation 12 of WTR provides that a worker is entitled to an uninterrupted rest break of not less than 20 minutes where he has worked more than six hours.

60. Regulation 30 provides that a worker may present a complaint to an Employment Tribunal where his employer has refused to permit him his rest break entitlement under regulation 12.

61. In his submissions, Mr Wyeth referred to the EAT decision in **Grange v. Abellio London Limited UKEAT 2017 ICR 287 ("Grange")** which I have considered. In Grange the EAT considered a potential conflict between 2 previous decisions of the EAT; the case of **Miles v. Linkage Community Trust Limited 2008 IRLR 602** and **Scottish Ambulance Service v. Truslove UKEATS/0028/11 ("Truslove")** paying close attention to the purpose and effect of the Working Time Directive ("WTD"). I note the following at paragraph 47 of the decision in Grange:

"Adopting an approach that both allows for a common-sense construction of Regulation 30(1) read together with Regulation 12(1) and still meets the purpose of the WTD, I consider the answer is thus to be found in the EAT's judgment in Truslove: the employer has an obligation ("duty") to afford the worker the entitlement to take a rest

> *break…. That entitlement will be refused by the employer if it puts in to place working arrangements that fail to allow the taking of 20-minute rest breaks….. If, however the employer has taken active steps to ensure working arrangements that enable the worker to take the requisite rest break, it will have met the obligation upon it; workers cannot be forced to take the rest breaks but they are to be positively enabled to do so."*

F. Conclusions

62. Having made findings of fact I have reached the following conclusions in relation to the questions asked by the issues:

Was the claimant dismissed by reason of misconduct?

63. I find that the claimant was dismissed because of the findings made in relation to the incident on 28 November 2019.

Did the respondent genuinely believe that the claimant had committed misconduct?

64. I find that MI (the dismissing manager) did believe the claimant had committed the misconduct. In fairness to the claimant, he did not seek to hide it.

Did the respondent have reasonable grounds on which to sustain that belief?

65. The claimant admitted the conduct.

Did the respondent carry out as much investigation as was reasonable in the circumstances at the point at which the belief was formed on these grounds?

66. I find that the investigation was reasonable. The claimant was interviewed as was the manager who discovered the claimant whilst asleep. The claimant was permitted to provide a written statement which was considered. The alleged similar incidents (John's alleged accidents) were not investigated because the claimant had not mentioned them or any other indicator of inconsistent treatment.

Did the respondent follow a fair procedure prior to dismissing the claimant?

67. The claimant had notice of an investigation meeting, of the disciplinary meeting and of the appeal. The claimant was provided with relevant information and knew what was alleged against him. There is no criticism of the process.

Was dismissal within the range of reasonable responses?

68. The claimant raises the following reasons why dismissal was disproportionate and unfair:

(1) He was denied his right to take rest breaks. I have made findings of fact on this. The claimant was not denied a right to take rest breaks. The claimant was busy on 27 November 2019. However, there is not a culture at the respondent where breaks are not respected. The claimant could have taken a rest break and, if he considered that he was in difficulty finding a time on that day, could and should have raised this with the Site manager.

(2) That he was allowed to continue to drive his forklift truck after he had been woken up. Some employers may have acted immediately and refused to allow the claimant to continue and therefore suspended him immediately. The respondent did not do that. Suspension took place the same day, but not until later that day. We have not heard evidence from the employee who suspended the claimant. In his submissions Mr Wyeth noted that it is likely that enquiries were made about what action to take and whether suspension was appropriate. Had the claimant appeared to have been under the influence of drugs or alcohol, it is likely that this respondent would have acted more quickly. But no one has suggested that was the situation here and I have not made a finding that it was the situation. The respondent acted quickly but not with undue haste.

(3) That the decision to dismiss was inconsistent. Here the claimant refers to the treatment afforded to the other forklift truck driver, John, in that he was not disciplined/dismissed for being involved in other incidents. I have made clear in my findings of fact that I do not accept the claimant's evidence in relation to these other incidents. The incidents as described by the claimant did not occur.

(4) Vistry Homes created a culture of fear for the claimant to take further sick leave. I have made a finding here. The purpose and effect of the letter of 2 May was to make sure that the claimant did (in the claimant's words) try harder to get to work on those occasional casual days that he had not previously. That might well have made the claimant consider carefully about calling in sick when he felt tired, but the message in this letter does not in any way excuse for the claimant not to be alert when operating the FLT on the morning of 27 November 2019.

69. I also note here that the claimant accepted his serious wrongdoing and apologised. In the light of such candour by an employee, some employers may decide not to dismiss the employee but to apply a lesser sanction. However, other employers acting reasonably would decide to dismiss for this misconduct. Having regard to the authorities noted at paragraph 53 above, I am required to consider whether the decision to dismiss the claimant was in the range of reasonable responses that a reasonable employer would take. I find that it was.

Wrongful Dismissal

70. The claimant's disciplinary policy makes clear that a serious breach of health and safety obligations amounts to gross misconduct. I find that the claimant's conduct amounted to a fundamental breach of the contract of employment, entitling the employer to terminate the claimant's contract without notice or payment in lieu of notice.

Working Time Regulations

71. I have considered and applied the judgment in the Grange decision. There were no working arrangements which failed to allow the claimant his 20-minute rest break. In fact, the working arrangements were such that the claimant was allowed to take his 20-minute rest break and generally he did. The claimant was not forced to take his rest break but he was positively enabled to.

72. Prior to 27 November 2019, the working arrangements in place at the Site had not caused the claimant difficulties in taking his rest break. On 27 November 2019 he was exceptionally busy. However, nobody stopped the claimant from taking his break. If the claimant had considered that there was something that was stopping him then he could have raised the matter with the site manager. He did not do so.

Employment Judge Leach

Date: **3 March 2021**

JUDGMENT AND REASONS SENT TO THE PARTIES ON

Date: **24 March 2021**
FOR THE TRIBUNAL OFFICE