EMPLOYMENT TRIBUNALS

Claimant: Mr S Bradley

Respondent: WM Morrison Supermarkets Plc

Heard at: London South Employment Tribunal **On:** 15 June 2021

Before: Employment Judge Keogh

Representation
Claimant: Mr Stephenson of Counsel
Respondent: Mr Holloway of Counsel

JUDGMENT

1. The name of the respondent shall be changed to WM Morrison Supermarkets Plc

2. The claimant's claim for unfair dismissal is unsuccessful and is dismissed

3. The claimant's claim for wrongful dismissal is unsuccessful and is dismissed

REASONS

1. The consolidated claims are for unfair dismissal and wrongful dismissal. It was not clear whether there was a freestanding claim in respect of accrued holiday pay or bonus pay, but in any event such claims were not pursued.

2. At the outset of the hearing it was decided that due to time constraints the hearing today would address the issue of liability only. The claimant was represented by Mr Stephenson of Counsel and the respondent was represented by Mr Holloway of Counsel. I received a bundle of documents and received witness statements and heard oral evidence from Mr Paul Chapman and Mr Sean Fellows for the respondent and from the claimant.

Issues

3. The following issues arise:

Unfair dismissal

(a) What was the reason for the dismissal? Was it a potentially fair reason? The respondent says the reason for dismissal was conduct. The claimant says his dismissal was pre-determined.

(b) If the reason was conduct, did the respondent hold a reasonable belief that the claimant was guilty of gross misconduct? The claimant contends there was a failure properly to establish misconduct had taken place so as to justify disciplinary action.

(c) Did the respondent conduct a reasonable investigation? The claimant contends there was a failure to carry out a proper investigation.

(d) Was the dismissal procedurally fair? The claimant contends he was not afforded the right to be accompanied.

(e) Was the dismissal within the range of reasonable responses? The claimant contends the sanction was too harsh and the respondent failed to take into account mitigating circumstances.

(f) If the dismissal was procedurally unfair, should the damages awarded to the claimant be reduced on the basis that had there been a fair procedure the claimant was likely to have been dismissed (*Polkey*)?

(g) If the dismissal was unfair, should the damages awarded to the claimant be reduced as a result of any contributory fault?

(h) If the dismissal was unfair, should the damages be increased due to any failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures? The claimant relies on his suspension as being contrary to the Code.

Wrongful dismissal

(i) Was the claimant's dismissal without notice pay in breach of contract?

Facts

4. The claimant was employed by the respondent as a store manager from 27 March 2017 to 8 May 2020 when he was dismissed. The claimant joined the respondent's Gravesend store on 13 January 2020. As store manager, the claimant had the ultimate responsibility for health and safety in the store.

5. By email dated 28 January 2020 the claimant was sent a handover document, which included checklists to ensure that the store was safe and legal. The claimant did not read this at the time. The handover document reiterated an existing policy in relation to fork lift truck use, which included reference to requiring refresher training every three years.

6. On a number of occasions the claimant used a fork lift truck in the store's warehouse. He had obtained a license some 10 to 12 years previously, which he did not have a copy of. He had not undertaken refresher training every three years as required and his licence had expired.

7. Around 18 February 2020 the claimant decided to move some racking in the store. The racking was bolted down and bolts had to be removed in order to move it. The claimant moved it himself. He secured the shelving by leaning it against a wall and attaching clips to it. He did not bolt it down.

8. While the claimant was on leave from 24 to 28 February, two individuals visited the store in order to check other matters and discovered the racking. They ensured the pallets were removed from it and it was taken out of use immediately as being unsafe. A report was prepared however this was not made available to the claimant.

9. On 13 April 2020 the respondent received a whistleblowing complaint from an employee who stated that they were deeply concerned at witnessing the store manager using the forklift truck erratically in the warehouse and not for the first time, and that they would be surprised if he had a licence to do so. It was alleged that the claimant had knocked over a stack of wine whilst using the truck and was not trained. He had taken racking down with tools from home and flew pallets into the air without the racking being screwed to the floor. They were concerned it could have fallen down at any time, endangering someone's life.

10. On 15 April 2020 an email was sent to all stores about fork lift truck training, amending the approach to refresher training. The claimant says that it was at this point he realised his license must have expired.

11. On 16 April 2020 the store received an email from the Area Health and Safety Manager asking for confirmation that only drivers with valid licenses were operating the fork lift truck. Further detail was provided on 22 April 2020 that an allegation was made that the claimant was using the fork lift truck without being trained or licenced and was using it dangerously. The caller stated that there had already been an incident where a stack of pallets had been knocked over. A further suggestion was made that the claimant had brought in a toolkit from home and had altered the racking.

12. On 21 April 2020 the Area Manager, Mr Ramparsad, visited the claimant to discuss the whistleblower complaint. The claimant informed Mr Ramparsad that he had used the fork lift truck and agreed that he should not have done as his licence was expired. Mr Ramparsad said he was a good operator and that Gravesend was a good opportunity for him. The claimant took from this that the complaint had been informally dealt with by Mr Ramparsad and would not be taken further. Mr Ramparsad later gave evidence however that he knew the matter would be investigated and therefore did nothing further himself.

13. The whistleblowing complaint was assigned to Ms Peta Richards to investigate on 22 April 2020. Ms Richards interviewed Mr Stevens, senior manager, Ms Vanderson and Mr Tapsfield, the Market Street manager before interviewing the claimant. She also interviewed Mr Ramparsad and Mr Lock, the safe and legal auditor. The claimant was not told of the specific allegations against him in writing before his interview. He was questioned about driving a fork lift truck and about racking, and was told the specific allegations towards the end of his interview. He was not invited to be accompanied for the investigation interview.

14. By letter dated 6 May 2020 the claimant was invited to a disciplinary hearing on 8 May 2020 at 2pm. The letter did set out the detailed allegations against him and warned that a potential outcome of the hearing may be dismissal for gross misconduct. It was noted that there was a live warning on file which would be taken into account. A series of documents were sent with the letter.

15. At the hearing on 8 May 2020 the claimant attended alone and confirmed that he did not require representation. He indicated he had had enough time to prepare for the hearing. The hearing was chaired by Mr Chapman.

16. The initial part of the hearing lasted around two hours. Mr Chapman then took an hour and twenty minutes to review the matter. He then reconvened the meeting and asked if the claimant had anything to add. The claimant discussed his mitigation. Mr Chapman adjourned for approximately a further twenty minutes and then announced his decision that the claimant should be dismissed.

17. The outcome was confirmed in writing by letter dated 11 May 2020. Mr Chapman noted that the claimant had admitted to driving the fork lift truck on multiple occasions without a valid licence. He stated that it was his reasonable belief that the claimant was aware that his licence had expired. The letter referred to a number of store documents noting the correct position in relation to the expiry of fork lift truck licenses. In relation to racking, it was noted that the claimant had admitted to moving the warehouse racking and placing pallets on it despite knowing that it wasn't securely bolted to the floor. It was noted that it was not within the claimant's remit to move racking as that was a job which must be carried out by a specialist racking contractor. It was stated that the claimant's actions had put colleagues at risk of serious injury or even death. The decision of summary dismissal was confirmed.

18. The claimant appealed the decision to dismiss him. Hi appeal was heard by Mr Fellows on 25 June 2020 and at a reconvened hearing on 6 July 2020. An appeal outcome letter was sent on 13 July 2020, confirming the decision to dismiss.

Conclusions

Unfair dismissal

19. I remind myself that in a claim for unfair dismissal a tribunal must not substitute its own decision but must consider whether the actions of the respondent were within a band of reasonable responses.

20. In closing submissions Mr Stephenson for the claimant accepted that the reason for dismissal was conduct. I find that both Mr Chapman and Mr Fellows held the belief that the claimant was guilty of gross misconduct.

21. I then considered whether the belief held was reasonable. The claimant contends there was a failure properly to establish misconduct had taken place so as to justify disciplinary action. In closing submissions Mr Stephenson was unable to expand on this. Given that the claimant had accepted he had driven a fork lift truck without a licence and had moved racking himself and not bolted it down, misconduct was established.

22. There were a number of aggravating features which led Mr Chapman, supported by Mr Fellows, to conclude that there was gross misconduct, namely a serious breach of health and safety procedures. Mr Chapman considered that given the claimant had attended for lift truck driver training 10 to 12 years previously and thought it would remain valid for 5 to 10 years, it was his belief that the claimant was aware his licence had expired. The claimant was referred to a Store Manager Transfer checklist which made specific reference to the expiry of fork lift truck licenses after 3 years; risk assessments which as Store manager the claimant was required to complete which include specific risk assessments relating to the fork lift truck and refer to a three yearly training requirement; a Store manager Self Audit tool which the claimant was required to complete; a Store Manager's safe and legal log book which required the claimant to check specific points within the warehouse; a Safe and Legal update which was sent to store managers in November 2019 and which covered the training and requirements relating to the fork lift truck. In each case the claimant indicated he had not read these documents, either because there was insufficient time for him to do so or because he had delegated tasks to other managers. Mr Chapman concluded that as Store Manager it would be expected that the claimant would take responsibility for reviewing any company updates and communications. I find that Mr Chapman's belief that there was gross misconduct as a result of these features was reasonably held.

23. In relation to racking, Mr Chapman concluded that the claimant had failed to follow the correct procedure in relation to moving the racking, resulting in the racking being unsafe and unstable, which put colleagues at risk of serious injury or even death. He considered that as Store Manager it was the claimant's responsibility to ensure that all Safe and Legal and Health and Safety policies and procedures were adhered to. I find that given the potentially very serious consequences of moving the racking and not re-bolting it Mr Chapman's belief that there had been gross misconduct was reasonable.

24. In relation to the investigation, the claimant contended that interviewing individuals before the claimant 'tainted' the investigation. I find that it was reasonable for the respondent to investigate with others before the claimant to discover the extent of the misconduct alleged, and that this is not unusual practice. Although it would have been helpful to the claimant to have the allegations against him set out in writing before the investigation meeting, again this is not a requirement of an investigation. In any event the claimant was aware of the complaint which had been made as he had been told about this by Mr Ramparsad.

25. In relation to procedure the claimant contends that he was not afforded the right to be accompanied at the investigation meeting. The ACAS Guide to Investigations suggests this is good practice. It is not however a statutory requirement, nor a breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures. This was an initial investigation meeting and I find that it was reasonable for the respondent to conduct it in the way that they did. The claimant was offered the right to be accompanied at his disciplinary hearing and appeal hearing.

26. It was suggested that Mr Fellows had made up his mind about the matter and did not properly consider it. I find that Mr Fellows was independent and approached the claimant's appeal in a thorough and detailed manner. His approach was reasonable and I find that he had not made up his mind in advance as to what the outcome should be. I have also considered the position of Mr Chapman. I find that he was also independent and did not come with a pre-determined view. There was a final written warning which could have been taken into account had Mr Chapman formed a pre-determined view that the claimant should be dismissed, however Mr Chapman decided that should not be taken into account. I find that both Mr Chapman and Mr Fellows considered the full range of sanctions available to them.

27. I have considered carefully whether the decision to dismiss was in the range of reasonable responses given the mitigation which the claimant put forward. I remind myself again that I must not substitute a decision but must consider the range of responses available. I find that Mr Chapman and Mr Fellows both considered the mitigating features which were put forward. I conclude that given the seriousness of both allegations dismissal was in the range of responses reasonably open to the respondent.

28. In the circumstances, taking into account the size and administrative resources of the respondent and all the features of this case, I find that the dismissal of the claimant was fair. The claim for unfair dismissal is therefore unsuccessful and is dismissed.

Wrongful dismissal

29. In a claim for wrongful dismissal I must consider whether the respondent was in breach of contract by dismissing the claimant without notice. They would be contractually entitled to do so if the claimant was guilty of gross

misconduct. In this claim therefore I must make primary findings of fact as to whether the claimant was in fact guilty of gross misconduct.

30. I find that he was. The claimant as Store Manager was responsible for health and safety in his store and it was incumbent on him to be familiar with policy and procedures and to ensure that he kept himself update with communications which were sent by the respondent. He admitted to driving a fork lift truck without a valid licence. The claimant insisted in his evidence that he considered that the fork lift truck licence would continue indefinitely. However his initial response in the investigation was that he did not know how long it lasted for and thought it would be for 5 to 10 years. As his training was 10 to 12 years previously I find that he knew or at the very least ought to have known that his licence was no longer valid. Further there were multiple opportunities for him to discover that the licence only lasted three years, in documents which it was his responsibility as Store Manager to be familiar with. In relation to racking, it was admitted that the racking was moved without proper procedure being followed and that the racking had been left in a state which was unsafe and gave rise to a risk of serious injury or even death. In the circumstances I conclude that these were very serious breaches of health and safety and the claimant was guilty of gross misconduct. The claim for wrongful dismissal therefore fails and is dismissed.

Employment Judge Keogh

21st June 2021