Case number: 1300620/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr Marek Miecznikowski

Respondent: DHL Services Limited

Heard at: Birmingham **On: 06 & 07 October 2022**

Before: Employment Judge C Taylor

Representation

Claimant: In person
Respondent: Mr Boyd (Counsel)

RESERVED JUDGMENT

1. The claim of unfair dismissal is not well founded and is dismissed.

2. The claim for a redundancy payment is not well founded and is dismissed.

Introduction

3. The claimant was employed by the respondent as a warehouse operative from 16 July 2016 until 09 November 2020. Early conciliation started on 20 December 2020 and ended on 19 January 2021. The claim was presented on 22 February 2022.

The Claims

4. The Claimant brings claims of unfair dismissal and a claim for a redundancy payment.

Preliminary Matters

5. The claimant had named the respondent on the claim form as "DHL Tyrefort". The respondent states that the claimant's employer was DHL Services Limited and requested that the DHL Services Limited be substituted as the correct name of the respondent.

6. I applied the principles in Selkent Bus Company Limited v Moore [1996] ICR 836 in deciding whether to allow the amendment to the name of the respondent, taking into account all the circumstances and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

7. The respondent had received the claim form and had responded to the claim. No confusion had been caused as to who was the correct respondent to the claim. The respondent was ready and able to defend the claim at this hearing and indeed sought the change in the grounds of resistance. I concluded that there was no hardship or injustice to the respondent in allowing the amendment. If the amendment was not allowed, the claimant would lose the opportunity to pursue his claims and, if successful, be given a remedy. I considered that the balance of injustice and hardship lay in favour of allowing the amendment. I ordered that the name of the respondent be amended to DHL Services Limited.

The Issues

8. The Issues are recorded in the case management order of 23 March 2022 as below.

Unfair Dismissal

a. What was the reason or principal reason for dismissal? The claimant says it was redundancy and/or to avoid paying a redundancy payment. The respondent says the reason was conduct.

b. If the reason was misconduct did the respondent act reasonably in all the circumstances treating that as a sufficient reason to dismiss the claimant? In particular:
    (i) Were there reasonable grounds for that belief?
    (ii) At the time the belief was formed had the respondent carried out a reasonable investigation?
    (iii) The respondent acted in an otherwise procedurally fair manner.
    (iv) Dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

c. If there is a compensatory award, how much should the award be? The Tribunal will decide:

    (i) What financial losses has the dismissal caused the claimant?
    (ii) Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    (iii) If not, for what period of loss should the claimant be compensated?
    (iv) Is there a chance the claimant would have ben fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
    (v) If so, should the claimant's compensation be reduced? By how much?
    (vi) If the claimant was unfairly dismissed, did he cause or contribute towards his dismissal by blameworthy conduct?
    (vii) If so would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
    (viii) Does the statutory cap of fifty-two weeks pay apply?

d. What basic award is payable to the claimant if any?

e. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before dismissal? If so, to what extent?

Procedure, Documents and Evidence Heard

9. The hearing took place on 06 and 07 October 2022. The parties and their representatives attended remotely, no party objected to this and I am satisfied that the hearing was fair.

10. The claimant was unrepresented participated in the hearing with the assistance of an interpreter. At the outset of the hearing I ensured that the claimant and the interpreter could understand each other and asked the claimant to inform me immediately if he did not understand.

11. I had before me a bundle of 157 pages which included a statement of the claimant. I had witness statements from Mr Dean Silcox who conducted the claimant's disciplinary hearing and Mr Darren Styles who considered the claimant's appeal. I heard evidence from the claimant, Mr Silcox and Mr Styles.

12. At the outset of the hearing I clarified the issues and informed the claimant where the list of issues could be found within the bundle. I explained the running order I intended to adopt, including that the claimant be cross-examined first so that he could see how this was done as he was a litigant in person.

Relevant findings of fact

13. The claimant was employed by the respondent as a warehouse operative. At the time of his dismissal he was a fork lift driver. The claimant was placed on furlough in April 2020 and returned from furlough in July 2020.

14. On 27 October 2020 the claimant was involved in an incident where he and a colleague were challenged for not adhering to social distancing in the canteen. The claimant was instructed to attend a meeting with the Operations Manager about that incident.

15. On 28 October 2020 the claimant was working in the warehouse without wearing a face covering in contravention of the respondent's health and safety policy. After being observed without a face make the claimant was asked to report to the office but did not attend. The claimant was suspended from work on 28 October on full pay whilst an investigation was carried out.

16. An investigatory meeting took place on 03 November 2020 and a disciplinary hearing took place on 06 November 2020. The claimant was dismissed without notice, this decision was confirmed in a letter dated 10 November 2020. The claimant appealed this decision and an appeal hearing took place on 08 December 2020.

17. The claimant confirmed in his oral evidence that he was aware of the requirement to wear a face covering which became mandatory in September 2020.

18. The policy is respect of face coverings was wide. The face covering could be anything that covered the nose and mouth whilst allowing the wearer to breath comfortably including a mask or visor. The only exemption to wearing a face covering were people who could prove that they were medically exempt.

19. I outline below the contents of the documentary evidence in respect of the meetings held, the contents of this documentary evidence was not challenged by either party.

20. The letter inviting the claimant to attend the investigatory meeting made no reference to the canteen incident on 27 October. The allegation related to a failure to wear correct PPE on 28 October 2020 and failing to follow a reasonable request. The original investigation meeting was adjourned to allow the claimant time to find someone to assist him with interpretation. The claimant was unable to find anyone and the meeting went ahead and the claimant was asked to state if he had any difficulties understanding. The claimant did not raise this as an issue within the meeting.

21. In the investigatory meeting the claimant accepted that he knew he had to wear a mask but that he had breathing difficulties when doing so and that he had informed his first line manager of this.

22. The investigator informed the claimant that visors were being issued to people who could not wear face masks. The claimant stated that he asked his first line manager about a face shield repeatedly and the first line manager stated that he will talk and health and safety and come back to him and then did not.

23. When asked, if provided with a visor, would he be willing to wear it, the claimant responded yes to this question on two occasions.

24. The letter inviting he claimant to attend a disciplinary meeting makes reference to the incident on 28 October 2020. The correspondence makes no reference to enclosing any documents or statements in respect of the allegation of failing to wear PPE. Mr Silcox conducted the disciplinary meeting.

25. In the disciplinary meeting the claimant stated that he had told his first line manager that he needed a visor and that health and safety had informed him that he needed medical evidence to obtain a visor. The claimant stated that he cannot breath in a mask, that he told his first line manager this and that he was waiting for a visor. He did not ask for a visor on 28 October 2020 as he was being shouted at.

26. The claimant stated that he did not refuse to go to the office when called on 28 October 2020 but that he was told to go back to work. Mr Silcox stated that visors are provided immediately to anyone who asks for them.

27. The appeal hearing was conducted by Mr Styles. The letter inviting the claimant to the hearing did not reference enclosing any documents or statements. Within the appeal hearing the claimant maintained that he had requested a visor on many occasions from first line managers, namely “Muddy, Ryan Barrowcliff and Sean.” The claimant stated “that if a visor had been provided there would be no issue.”

28. In the appeal meeting Mr Styles stated that no-one had been denied a visor and that anyone with a medical exemption must contact H&S. Mr Styles references

conversations with first line managers Muddy and Ryan and stated they both stated that the claimant did not ask for a visor. Mr Styles also refers to an incident where he had previously challenged the claimant about not wearing a face covering and the claimant had not asked him for a visor.

29. Mr Styles then stated that not one person stated that the claimant asked for a visor, but also that the claimant had spoken to Tina in health and safety. Mr Styles then stated that he had 70 visors and had not restricted anyone from wearing one and if the claimant had asked him for a visor he would have provided one straight away.

30. Following the appeal hearing Mr Styles approached first line manager Mr Sean Ashurst as requested by the claimant. Mr Ashurst's response is at page 134 of the bundle and confirms that the claimant did raise breathing difficulties with him and that he had asked H&S re the provision of a visor and was told that medical evidence would be required.

31. The canteen incident was raised in both the investigatory and disciplinary meetings but was not noted within the written allegations contained in the letters inviting the claimant to the meetings. The canteen incident was also raised in the appeal hearing.

32. I now consider relevant points from the oral evidence.

33. I asked Mr Silcox to clarify the procedure for the provision of visors to me, he stated that if the claimant had asked for a visor he could have been provided with one straight away. Mr Silcox further clarified to me that he was not aware whether the claimant was provided with the statements referred to in the disciplinary meeting and that there was a redundancy situation at the time of the claimant's dismissal.

34. In re-examination Mr Silcox stated that after 21 September 2020 medical evidence was required for the provision of a visor, but at some point visors were simply provided if asked for, and he could not remember when that change occurred. Mr Silcox also confirmed reference in the disciplinary meeting record to statements being sent to the claimant and the claimant confirming receipt of these.

35. In his oral evidence Mr Styles stated that there was no change in the policy of the provision of visors. The issue of visors was on medical needs only due to PPE shortages. He also stated that when PPE became more readily available then visors were issued on request rather than medical need.

36. Mr Styles stated there was a redundancy situation at the time of the claimant's dismissal but that no-one doing the claimant's job was made redundant as that was a skill set of which there was a shortage.

37. Mr Styles clarified for me that the policy on visors would have been communicated to staff via a brief which could have been either via email, communication on internal tv screens or a letter.

38. Mr Styles further clarified for me that he believed that statements were sent to the claimant before the appeal hearing and that any further conversations he had with witnesses before the hearing was to ensure that the evidence he had before him was a true recollection of the facts, it was for the purpose of confirming the contents of the available statements and not to take further facts.

39. Mr Styles clarified for me that the claimant had to simply ask for a visor and provide any medical evidence, something as simple as a letter from a GP would have been sufficient. Mr Styles also clarified to me that the fact that he had spoken to the claimant about not wearing a face mask himself did not affect his independence or ability to conduct the appeal hearing.

40. In re-examination Mr Styles stated that the claimant did not say at any point that he had not received any of the statements he was referring to.

41. I find that the reason for dismissal was the claimant's conduct, in particular the fact that he was not consistently wearing a face covering at a time when the respondent's policy on face coverings made them mandatory.

42. Although the respondent has accepted that there was a redundancy situation at the same time. I accept the respondent's evidence that no-one with the claimant's skill set was made redundant. There is no evidence to indicate otherwise.

Relevant Legal Framework

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

Reason for dismissal

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

45. A reason relating to the claimant's conduct or capability is a potentially fair reason falling within section 98(2). Where an employer alleges that its reason for dismissing the claimant was related to the claimant's conduct, the employer must prove that, at the time of dismissal, it genuinely believed that the claimant had committed the conduct in question; and that this was the reason for dismissing the claimant.

Fairness

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

47. Section 98(4) ERA provides that: "…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

48. The Employment Appeal Tribunal (EAT) set out guidelines as to how this test that should be applied to cases of alleged misconduct in the case of British Home Stores v Burchell [1980] ICR 303. The EAT stated that what the Tribunal should decide is whether the employer had reasonable grounds for believing the claimant had committed the misconduct alleged and had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

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

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

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

52. In applying section 98(4) the Tribunal must also ask itself whether dismissal was a fair sanction for the employee to apply in the circumstances. The test is an objective one. It is irrelevant whether or not the Tribunal would have taken the same course had it been in the employer’s place. Similarly it is irrelevant that a lesser sanction may be reasonable. Rather, section 98(4) requires the Tribunal to decide whether the employer’s decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted.

53. This “range of reasonable responses” test applies equally to the procedure by which the decision to dismiss is reached (Sainsbury’s Supermarkets Ltd v Hitt [2003] IRLR 23).

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

Remedy

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

56. Where the Tribunal considered that any conduct of the claimant prior to dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, it must reduce the amount accordingly. In this regard the Case No. 2404481/2016 7 question is not whether the employer believed the claimant committed the conduct in question, but whether the Tribunal so believes.

57. So far as the compensatory award is concerned, ERA provides that the amount of compensation shall be such amount as is just and equitable based on the loss arising out of the unfair dismissal. In Polkey v AE Dayton Services Ltd [1987] ICR 142 the House of Lords stated that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been fairly dismissed in any event had

a fair procedure been followed. A degree of uncertainty is an inevitable feature of this exercise, and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. Nevertheless, there will sometimes be cases in which the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction can be made.

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

Submissions

59. The claimant submitted that he did not receive any statements from any witnesses prior to the investigatory meeting. If the respondent had given him a visor he is 100% sure that he would not have been dismissed. Requiring medical evidence for the provision of a visor, despite the respondent stating that they were being handed out upon request was not right.

60. The respondent submitted that the obvious reason for dismissal was conduct and not the avoidance of a redundancy situation. The respondent took health and safety very seriously and genuinely believed that the claimant was not following the rules.

61. The claimant understood the rules. The claimant seems to assert that he breached the rules for good reason however he has provided no medical evidence of that at the time of the event, the disciplinary process or indeed this hearing. The investigation spoke to the key individuals involved and the claimant was given the opportunity to consider the evidence and set out his position in the course of the disciplinary and appeal hearings. At the end of that process a fair and reasonable conclusion of guilt was arrived at.

62. With regard to the visor issue, on balance, the claimant was being told that he would need to provide medical evidence because of PPE availability issues and a limited number of visors which the respondent needed to allocate according to medical need. The fact that this policy changed at some point is not relevant.

63. Dismissal was within a range of reasonable responses. Whilst some employers may have given a final written warning, it cannot be said that no reasonable employer would have dismissed.

64. It was submitted that the procedure was entirely within a range of reasonable procedures however, if the Tribunal finds otherwise, looking at the broader situation this is a 100% Polkey case.

Conclusions

65. The Respondent was in receipt of an abundance of evidence from numerous members of the management and health and safety staff that the claimant had not worn a face covering at all times. The claimant accepted this and confirmed that he was aware of the rules on face coverings.

66. I accept that the respondent genuinely believed that the claimant was guilty of misconduct, by not wearing a face covering at all times and that this belief was based on reasonable grounds.

67. I consider that the investigation carried out was reasonable. Evidence was gathered from numerous members of staff and a further statement taken from Mr Ashurst at the request of the claimant following the appeal hearing.

68. I now consider whether the respondent followed a reasonably fair procedure. The correspondence inviting the claimant to the investigatory and the disciplinary meetings only raised the incident on 28 October 2020, the failing to wear a face mask and refusing the reasonable request to wear a face covering. Within both of those meetings the claimant was also met with allegations about the canteen incident on 27 October 2020.

69. As to whether the claimant was provided with any documents before the investigatory meeting, there is no reference to documents being enclosed with the letter inviting the claimant to the meeting. The meeting notes reference a conversation between the claimant and Carl, there is also reference to the claimant's conversation with David Murphy. I can see no reference that statements in respect of these conversations were shared with the claimant.

70. In the disciplinary meeting the claimant stated that he did not mention his witnesses in the investigation meeting as he had not been sent statements. I accept that the claimant was not sent evidence in advance of the investigatory meeting, however this was cured within later proceedings.

71. The claimant was sent some statements in advance of the disciplinary meeting, he confirmed this in the meeting. However, one email from Mr Barrowclift could not have been sent to him in advance of the disciplinary meeting as it was dated the same day.

72. The claimant was given the opportunity to respond to allegations and an appeal hearing was conducted. I accept that documents were sent to the claimant in advance of the appeal hearing. The claimant made no reference to not having received these statements during the appeal hearing. Again, in the appeal hearing, the allegations were not confined to the wearing of a face covering on 28 October 2020. In addition to the canteen incident, Mr Styles raised a time when he himself had spoken to the claimant about mask wearing. Both of these allegations fed into Mr Styles' decision making, as confirmed at page 7 of his witness statement.

73. In the appeal meeting Mr Styles makes reference to having conversations with witnesses, Mr Styles has confirmed that these conversations were for confirmation that he had true recollections in front of him.

74. Although the investigatory meeting was originally delayed to enable the claimant to locate an interpreter, which he was unable to do, at no point during the investigatory, disciplinary or appeal hearing did the claimant raise having issues understanding. The claimant engaged in all three meetings and responded to questions.

75. Although, not without fault, considering matters in the round, on balance I find that the procedure was, just, within a range of reasonable procedures. The lack of provision of the email from Mr Barrowclift was corrected on appeal. The further incidents discussed, such as the canteen incident and Mr Styles previously seeing the claimant not wearing a mask were not determinative, there was a wealth of other evidence that the claimant was not wearing a face covering at all times and, indeed, the claimant

accepted this. The claimant was afforded the opportunity to respond to all points put to him. His request that further enquiries be made of Mr Ashurst was acted upon and no weight was attached to evidence from Mr Faulkner, a trade union representative who the claimant thought had a personal issue with him.

76. I now consider whether dismissal was within the band of reasonable responses and remind myself that I am not substituting my own view for that of the employer.

77. The background to the decision to dismiss is important. In late 2020 the world was still very much in the midst of a global pandemic. The respondent had appropriate health and safety procedures in place in light of this. Face masks were provided, alternative face coverings were allowed and there was a procedure in place for the provision of visors which had been communicated to the claimant. The claimant was not able to provide the required medical evidence for the respondent to provide a visor. The requirement for medical evidence was in place due to PPE shortages.

78. Whilst a simple solution may have been for the respondent to simply provide the claimant with a visor, they were entitled to have policies in place about when these would be provided and it is not for the Tribunal to decide the reasonableness of such policies. In any event, the policy in place, with the aim of preserving visors for those most in need of them, is not one which it can be said no reasonable employer would have had in place.

79. The claimant had been spoken with on numerous occasions by numerous managers and health and safety staff about wearing a face covering and confirmed that he was aware of the requirement. The respondent had a responsibility towards the health and safety of all staff members during a global pandemic. Further the wearing of face masks was a requirement of Jaguar Land Rover who controlled the site overall and were the customer of the respondent.

80. The respondent's policy on gross misconduct gives numerous examples, including deliberate or serious breaches of conduct, standards/rules and procedures and refusal to carry our reasonable management instructions.

81. It was reasonable to instruct the claimant to wear a face covering and not doing so was a serious breach of the respondent's rules and procedures amounting to gross misconduct.

82. In those circumstances I find that dismissal was within the range of reasonable responses, it cannot be said that no reasonable employer would dismiss and the dismissal was therefore not unfair.

Employment Judge C Taylor
02 November 2022

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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