EMPLOYMENT TRIBUNALS

Claimant: Mr J Jelinek

Respondent: Reigate and Banstead Borough Council

Heard at: London South **On: 21 August 2020**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: in person
For the respondent: Mrs C Musgrave, Counsel

RESERVED JUDGMENT

The complaint of Unfair Dismissal under S.111 Employment rights Act 1996 is not well founded. The claim is dismissed.

Reasons

Appearances, documents and claims

1. By a claim form presented on 10 February 2020, the claimant made a complaint of unfair dismissal following a period of early conciliation via ACAS between 10 December 2019 and 10 January 2020.

2. The claimant appeared in person. The respondent was represented by Mrs. C Musgrave, counsel.

3. The claimant gave evidence and had prepared a witness statement. The respondent called three witnesses: Ms. Sharon Quinn, Neighbourhood Operations Senior Manager (investigation), Mr. Richard Robinson, Head of Housing (disciplinary/dismissal) and Mr. Frank Etheridge, Strategic Head of Neighbourhood Services (appeal).

4. There was an agreed bundle of documents running to 390 pages.

5. Before the hearing commenced, the Tribunal was asked to view a CCTV clip which showed footage of the incident involving the claimant's HGV manoeuvre which ultimately led to his dismissal (which will be considered below). This was done with the consent of both parties. It was not otherwise viewed during the course of the hearing. The Tribunal announced at the outset of the hearing what it had observed and seen which was not controversial or disputed by the parties.

6. The Tribunal was also directed to a pre-hearing reading list which comprised of the investigation report at pages 177 to 183 of the bundle, the disciplinary decision letter at pages 301 to 304 of the bundle, the grounds of appeal at 311 to 320 of the bundle, the response to the claimant's grounds of appeal at pages 321 to 324 of the bundle and the appeal outcome letter at pages 325 to 327 of the bundle.

7. At the outset of the hearing the law in relation to unfair dismissal in a conduct case was explained to the claimant, in particular the ***'Burchell'*** test and the range of reasonable responses (see below under 'Applicable Law'). This was to assist the claimant as he appeared as a litigant in person.

Relevant Findings of fact

8. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them and taking into account the Tribunal's assessment of the witness evidence.

9. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

10. The claimant was employed by the respondent as a driver/charge hand until his dismissal for gross misconduct on 25th September 2019.

11. The claimant's main role was to drive a refuse and recycling HGV vehicle for waste loading and waste disposal at the respondent's contracted site with Suez. As part of the role, the claimant needed to tip the contents of his HGV refuse and recycling vehicle at least once a day.

12. There were two versions of the respondent's fleet driving policy in the bundle but in both versions, a driver's responsibility for their own safety and for the safety of others was set out. It was stated the drivers are required operate their vehicles in a manner that is safe and appropriate to the conditions. This was at page 83 and 103 of the bundle.

13. There was a section on manoeuvring and reversing in both versions. In version 1.2 it was stated that it was the driver's responsibility to make certain that the way was clear. Also, it was stated:

    "Always use a banksman, if available, or get out of the vehicle to look around"

14. In version 1.3 it was stated that the use of a reversing assistant, which the Tribunal understood to mean a banksman, was recommended and mandatory on waste and recycling routes highlighted as requiring a reversing manoeuvre unless an exception applied. An exception included if a reversing assistant was not available. The Tribunal was not taken to the highlighted routes (page 104).

15. The claimant had signed a copy of version 1.2 of the fleet driving policy which was at page116 of the bundle. This signature acknowledged receipt of the policy and that he understood the failure to comply with the policy may result in action being taken against him under the respondent's disciplinary procedure.

16. There was a site health and safety induction document from Suez at pages189 to 206 of the bundle. The claimant said he had no knowledge of receiving this induction. There was also an acknowledgement, signed by the claimant, at page 153 & 207 of the bundle confirming receipt of site specific health and safety induction on 27 February 2019 which the claimant said related to the induction document at page 158 to165 of the bundle (non-landfill site user rules). The Tribunal noted that within this document it was stated that the rules applied to all site users and visitors, that all speed limit signs and signals and instructions given by site staff needed to be obeyed. Further, under a specific section dealing with vehicles delivering or collecting waste/recycling materials, site users were expected to obey all speed restrictions and traffic signs and travel only by designated routes.

17. There was also a health and safety site induction signed by the claimant on 20 March 2017 at page 152 of the bundle.

18. On 25 July 2019, the claimant was issued with an infringement notice by Suez personnel stating that the claimant had reversed around the one-way system against the flow of traffic without a reversing banksman. This was at page 208 of the bundle. The notice stated that the claimant had failed to observe the one-way system which was considered to be a serious infringement of health and safety rules which would bring about an immediate banning of the claimant from the site. The claimant refused to sign the notice and this was recorded on document.

19. In an email from the Suez site manager dated 31 July 2019, the claimant was banned from the site for one year. This was at page 175 of the bundle.

20. Following the claimant's annual leave between 29 July and 12 August 2019, the claimant was invited to attend an investigation meeting in relation to the notice of site infringement of health and safety. The invitation letter was at page 176. It made reference to the site ban for one year. The claimant was also given the right to be accompanied at the investigation meeting.

21. The disciplinary policy was at page 138 to149. On page 146, the policy cited examples of gross misconduct which included serious breaches of health and safety including potentially endangering other people.

22. The minutes of the investigation meeting were at page 185 of the bundle. The claimant was accompanied by a work colleague. Ms. Quinn chaired the investigation meeting and there was a note taker from HR, Ms. Christine Smith.

23. Within this meeting, the claimant stated that he had progressed around the 'one-way system', he confirmed that he always used a banksman for reversing but he did not consider that his manoeuvre was dangerous. Ms. Quinn commented that if he had requested a Suez banksman, this would not have been agreed to as a safer option was to wait for the arctic lorry in front of him to finish. There was no challenge at time (during the disciplinary or appeal process) that the minutes of this investigation meeting were not accurate, neither was it addressed in the claimant's witness statement. The respondent had appointed a designated notetaker who had taken contemporaneous notes. The Tribunal accepted that it was open to the respondent to conclude that these notes were a fair summary of the meeting.

24. An investigation meeting took place with the Suez site manager (Mr. Blood) on 16 August 2019. Miss Smith from HR was also present during this interview. The minutes of this meeting were at page 187 of the bundle. Mr. Blood confirmed that he had been informed by one of his operatives about the claimant's manoeuvre and to check that the description had not been exaggerated, he viewed the CCTV footage and explained that he was "shocked by the recklessness of the manoeuvre". With regard to the length of the ban, he referred to an incident whereby another driver had been banned from site for nine months following a much less serious infringement.

25. Ms. Quinn also interviewed Mr. Anthony Hathaway, the respondent's fleet manager. Having viewed the CCTV, his view was that the claimant had driven around the one-way system before stopping and then reversing unaided back around the one- way system taking a 45 degrees blind right hand turn, which he believed was carried out at reasonable speed and the driver would have no view around the corner.

26. A further meeting took place with Mr. Blood on 21st of August 2019 when some of the matters raised by the claimant at the investigation meeting on 16 August 2019 were put to Mr. Blood including that the Suez site did not provide banksman. Mr. Blood stated that one would be deployed if required and was satisfied that the site was safe. In relation to whether traffic had to be stopped behind the claimant's vehicle, he could not be sure of this as he did not have CCTV available, although the CCTV did show another vehicle entering the facility shortly after the claimant.

27. Following her investigation, Ms. Quinn recommended that a disciplinary hearing take place - pages 182 to 183 of the bundle.

28. The claimant was invited to a disciplinary hearing to answer charges of gross misconduct and misconduct including other breach of the claimant's contractual terms because of his ban from the site one year. The gross misconduct charge was:

    "*that the claimant had performed a dangerous manoeuvre in that he reversed along a one-way road in the wrong direction, around a blind bend at speed and without a reversing banksman, within the Suez tipping facility. The manoeuvre had the potential to cause injury or damage and Suez issued a notice of infringement of health and safety rules due to the breach of Suez Health and safety regulations. Under the respondent's disciplinary rules and conduct, if proven, this allegation could be considered Gross Misconduct namely a serious breach of Health and safety precautions including the neglect of safety equipment, which may potentially endanger other people."*

    The claimant was forewarned of the possibility of dismissal and was given the right to be accompanied. The letter was at page 250 to 251 of the bundle and included the disciplinary policy and procedure and the disciplinary investigation report with appendices.

29. The disciplinary hearing took place on 11 September 2019. There were no notes of this hearing. Mr. Robinson's witness statement referred to notes he said he took at the time and typed up thereafter. These were shown in red font. The Tribunal accepted he had done this but without the supporting notes could not be certain that his statement captured all of matters discussed. The claimant did not however challenge the content at the Tribunal hearing. In respect of his questions of the claimant, the claimant had stated that he carried out a risk assessment in his head regarding the danger of reversing around a blind corner. Further in relation to whether he required any training which he hadn't received, he replied 'No'. He also mentioned that the CPC (certificate of professional competence) meant he carried out five days of training every five years, usually one day a year. In response to whether the claimant had ever seen other people reversing on the one-way system with no banks man, he replied he had not. The claimant also confirmed he had relied upon the rear camera on screen during this reversing incident.

30. The hearing was adjourned to allow further investigation to be to be carried out. This entailed getting photographs of the signage on the site and also a plan of the site. This was to ascertain the flow of traffic around the site.

31. Photographs were obtained which were in the bundle between pages 283 and 300 and also a plan of the site. The claimant commented that the one-way signs were all new and had been put up recently but the claimant's accompanying companion confirmed that at least sign 'A' had been there for some time and before the incident. This was at page 294 of the bundle and referenced in paragraph 33 of Mr. Robinson's statement, although it had incorrectly referred to page 295.

32. Following the conclusion of the disciplinary hearing, Mr. Robinson decided to dismiss the claimant. He was satisfied that the claimant had performed a dangerous manoeuvre in reversing around a one-way road in the wrong direction around a blind bend without a reversing banksman. He believed that the manoeuvre had the potential to cause injury or damage and Suez had issued a notice of infringement of health and safety rules due to the breach of Suez health and safety regulations.

33. The outcome letter was at page 301 to 304. Mr. Robinson took into account that the claimant had shown little remorse for his actions and that the claimant had entered the site on multiple occasions breaching the ban which had been extended as a result. Mr. Robinson rejected the claimant's explanation that the ban only applied to the claimant as a driver. In addition to the signed non-landfill site user rules booklet in February 2019, Mr. Robinson was also satisfied that the claimant had attended the Suez site specific health and safety induction which included slides confirming that users must obey safety signs at all times and that traffic entering the site will drive in and follow the designated one-way system on the site (page 201). Mr. Robinson noted the claimant's assertion that he had no recollection of this induction. He also concluded the manoeuvre breached section 15 of the fleet driver policy. He had taken advice from the council's transport manager about the sole use of mirrors and a reverse camera which was considered unsatisfactory for blind spots and blind corners.

34. Mr. Robinson also considered redeployment of the claimant as a loader but rejected this because of the seriousness of the claimant's actions and his attitude towards health and safety. This was explained in more detail in Mr. Robinson's witness statement when he stated that the claimant did not know if he had read the fleet driver policy even though he had signed it and he could not remember if he had read the health and safety policy or the Suez site induction training booklet. The dismissal was for gross misconduct.

35. The claimant appealed against his dismissal. The appeal letter was at pages 311 to 320 of the bundle. A response to the claimant's appeal statement was submitted by Mr. Robinson which was at pages 321 to 324 (Mr. Robinson had also submitted a statement of case for the appeal – pages 306 – 310). The appeal was heard by Mr. Etheridge who was independent and supported by Ms. Jackie Martlew, HR business partner. The hearing was scheduled for 7 November 2019 but which was changed at the claimant's request and rescheduled for 5 December 2019. However, the claimant's detailed grounds of appeal were not received by the respondent until 3 December 2019. As a result, the appeal hearing on 5 December 2019 was postponed until 14th of January 2020 because of the respondent's commitments relating to the general election and because of the claimant's further unavailability.

36. In relation to the claimant's grounds of appeal, within Mr. Robinson's response, he had confirmed that the question of the claimant's speed was not part of his decision. Further, Mr. Robinson noted that the claimant had accepted the two further photographs (5 & 6) showed one-way signs which the claimant accepted were present at the time (pages 313, 322 and 323). In relation to the Suez site health and safety induction which the claimant was saying he had not received,

Mr Robinson's conclusion was that the claimant had in any event, received the refresher booklet (non-landfill site user rules) and the fleet driver policy. He also stated that as an experienced HGV driver he should be aware of health and safety rules/driving in a safe manner.

37. There were no minutes of the appeal hearing. As with the disciplinary hearing this was somewhat surprising.

38. The claimant was accompanied at the appeal hearing. The Tribunal accepts the evidence of Mr. Etheridge in paragraphs 7 to 9 of his witness statement about the discussions which took place at the appeal hearing. The Tribunal finds that the claimant's appeal grounds were essentially those set out in the written grounds of appeal which Mr. Robinson had responded to in his written document in reply. Neither party gave any evidence or questioned any witness about any further detail discussed at the appeal hearing. The Tribunal does find that CCTV was also viewed by the appeal officer. The decision on the appeal was reserved.

39. The appeal was rejected. The outcome letter was at page 325 to 327 of the bundle. Mr Etheridge concluded that the claimant's manoeuvre was dangerous and reckless as the claimant had reversed around a blind bend against a well-established one-way system in breach of site rules of which the claimant was aware resulting in a 12-month site ban. Mr. Etheridge understood the claimant to receive yearly CPC training which was consistent with the claimant's own view. Mr. Etheridge dismissed the claimant's explanation that his route ahead was obstructed by a stationary articulated lorry and concluded that the claimant was unwilling to wait for that vehicle to move. The use of side mirrors and the rear-view camera was not sufficient to provide full vision around a bend. Mr. Etheridge considered the claimant's actions to be a serious breach of health and safety and no longer had confidence in the claimant's ability to operate a vehicle safely in the future. He referred to the claimant's statement in his appeal grounds wherein he had stated he had not put himself or anybody else into danger. Mr. Etheridge also viewed the claimant's disregard for health and safety rules was compounded by the claimant's further six-month ban as he continued to enter the site.

40. Mr. Etheridge took into consideration that the claimant was an experienced HGV driver, that the waste industry was a dangerous place to work given the heavy plant and machinery employed and reversing was a hazardous manoeuvre and should only be undertaken when necessary. Mr. Etheridge considered the claimant's actions to result in a breach of trust and that he could no longer be sure that the claimant could operate the equipment for which he was responsible safely. Further, as a charge hand he was required to manage the activity of two refuse loaders in his crew to ensure that they also acted in a responsible and safe manner and Mr. Etheridge no longer had confidence that the claimant to do so. The Tribunal finds that if not explicit, it was implicit that redeployment to any other role was considered but ruled out by Mr. Etheridge. In addition, it was not advanced by the claimant as a ground of appeal as an alternative to dismissal.

Applicable Law

41. Pursuant to S. 98 (2) Employment Rights Act 1996 ('ERA'), an employer needs to have a potentially fair reason for dismissal. The burden is on the employer to establish the reason. Conduct is one of the reasons and is relied upon by the respondent in this case.

42. Pursuant to S.98 (4) ERA, the Tribunal needs to be satisfied, having regard to the reason shown, that the employer acted reasonably in treating that reason as a sufficient reason for dismissal. This is a neutral burden.

43. In conduct cases, it is settled that the 'Burchell' test is to be applied from the case of ***British Home Stores Ltd Burchell 1978 IRLR 379:***

- Did the employer have a genuine belief in the claimant's misconduct?
- Was that belief based on reasonable grounds?
- Did the employer carry out as much investigation as was reasonable?

The '***Burchell'*** test

44. The Tribunal must also have regard to the 'range of reasonable responses' test. It has long been established that, under section 98(4), a Tribunal must assess objectively whether dismissal fell within the range of reasonable responses available to the employer. Whether or not the Tribunal would have dismissed the employee if it had been in the employer's shoes is irrelevant: the Tribunal must not "substitute its view" for that of the employer. (***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439)***. The range of reasonable responses test applies not only to the question of whether the sanction of dismissal was permissible, but also to that of whether the employer's procedures leading to dismissal were adequate. (***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).***

Conclusions and analysis

45. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

Burchell

Genuine belief and reasonable grounds

46. The Tribunal concluded that the respondent had a genuine belief in the claimant's misconduct. There was no other competing reason for dismissal before the Tribunal. There was no ulterior or sinister agenda or for example an outstanding complaint or grievance. The claimant's actions had been assessed through the eyes and views of three independent managers and heads of

function with appropriate HR support following a specific incident for which there was clear enough CCTV footage available too. Whilst there were alternative charges of misconduct made against the claimant, the Tribunal concludes that the respondent's belief at the time of dismissal and appeal was one of gross misconduct. The offence for which the claimant was charged and dismissed was listed as an example of gross misconduct.

47. The respondent had reasonable grounds upon which to hold its belief. It relied on the CCTV footage and the views of the Suez site head Mr. Blood, who had issued a notice of infringement of health and safety rules believing these to be serious and who had expressed shock at the recklessness of claims manoeuvre. The respondent had also sought the views of Mr. Hathaway, the fleet manager who had viewed the CCTV too. The respondent relied upon the claimant's signed receipt of the fleet driving policy and at least the undisputed site health and safety booklet containing the site rules - pages 158 to 165 of the bundle. Mr. Robinson believed that the claimant would have received the other site induction via presentation but as part of the appeal process, he believed in any case that the other two aforementioned documents plus the claimant's own HGV driving experience was sufficient advance notice that the claimant's manoeuvre could be considered dangerous.

48. The variance between the two fleet driver policies about which the respondent's witnesses were questioned at the Tribunal hearing was not part of the claimant's case at the time. In any event, the Tribunal concludes that there was no material difference as the respondent was of the opinion, that if a banksman was not available, the manoeuvre should not have been carried out. In addition, it was common ground that claimant had not enquired if a banksman was available. To the extent that there was ambiguity between the two versions which might have impacted on the claimant's understanding, the Tribunal concluded that the respondent was entitled to disregard that having regard to the manoeuvre being carried out in the wrong direction of one-way traffic flow. The respondent also relied upon the presence of one-way sign signage. By the conclusion of the appeal hearing the claimant and his accompanying companion had accepted the presence of at least three one-way signs at the time.

49. The claimant had also received certificate of professional competence (CPC) training yearly. Although the Tribunal was not taken to the content of this training, its relevance was not disputed by the claimant and it was the claimant who had raised it at the disciplinary hearing.

50. The respondent was also entitled to rely upon, as it did, in the generality, the claimant's long HGV driving experience and expected awareness of general health and safety driving expectations.

51. There was an occasion 3 years previous when the claimant had received a site ban. That was not considered to be directly relevant to the case against the claimant but to the extent that it might have impacted on the length of the ban by the third party, Suez, this was beyond the respondent's control and in any

event Mr. Blood had confirmed to Ms. Quinn that a previous person had been banned for 9 months for a lesser incident.

52. It was not clear why Ms. Quinn had stated to the claimant that the traffic behind the claimant's vehicle needed to be stopped and when this information was conveyed to her and whether this was by Mr. Blood or somebody else. The Tribunal concluded that ultimately this was not something which formed part of the reason for the claimant's dismissal at the disciplinary or appeal stage.

Reasonable investigation

53. The respondent carried out a reasonable investigation. There was a thorough investigation report followed by a disciplinary hearing which took place in two parts to allow further investigation. The appeal outcome was also reserved following the appeal hearing in order for a considered decision to be reached. Following the completion of the first disciplinary hearing, a specific investigation was undertaken in relation to the plan of the site and photographs of the presence of one-way signage. It was not specifically alleged that any previous examples of any comparable infringement on the site should or could have been investigated. This question was posed at the disciplinary hearing as set out in paragraph 23 of Mr. Robinson's witness statement. The claimant was not seeking to rely on any alleged inconsistency of treatment. In response to Tribunal questioning however, the claimant made reference to 3 occasions in five years when he had seen a vehicle travelling in the wrong direction. The Tribunal concluded that this was not a matter raised at the time, neither was it comparable evidence as it was not specific evidence of a reversing manoeuvre and furthermore it did in fact compound the respondent's view that this was a one-way site such that infringements were highly irregular and rare demonstrated by the claimant's own evidence.

54. Despite the respondent's investigation into one-way signage, it was not clear why in the claimant's appeal statement he maintained in two separate places that he was not aware of one-way signage. He had also accepted this at the investigation meeting and his challenge to those minutes was never raised at the disciplinary or appeal stage.

55. The claimant had also stated in his claim form that just because CCTV footage existed it did not mean that the driver of the vehicle could be recognised. It appeared to the Tribunal that this was not an area of investigation which was required at all as it was never part of the claimant's case that he was not the driver of the vehicle in connection with the incident on that day.

56. The appeal process was conducted more like a re-hearing than a review of the original decision to dismiss given the written and oral input from the disciplinary decision maker and questions of him. A re-hearing, whilst not required, is generally a more reasonable process.

Range of Reasonable responses

57. The Tribunal concluded that the claimant's dismissal both substantively and procedurally was entirely within the range of reasonable responses.

58. The Tribunal concluded that the respondent did give consideration to an alternative to dismissal in the form of redeployment to a loader. This was dealt with in paragraph 41 of Mr. Robinson's witness statement but rejected as a possibility by him. The Tribunal concludes that this was dealt with more generally by Mr. Etheridge at the appeal stage but because of the loss of trust, the claimant could not be trusted to operate equipment safely which was more than simply driving safely.

59. The respondent also factored in the claimant's lack of remorse/lack of appreciation as to the seriousness of the incident claiming that he did not consider his actions to be unsafe.

60. The respondent's reliance upon general health and safety/driving safety, site-specific health and safety and the driving policy, was sufficient and reasonable.

61. In all the circumstances, this was a situation which was not about any inadequacy of training, induction or knowledge of rules. The claimant, an experienced driver, reversed an HGV truck against the one-way flow of traffic around a blind bend. He said at the time he carried out a risk assessment in his head. He confirmed in evidence that this was about his judgment and he accepted he was responsible for his actions. Within the jurisdiction of the range of reasonable responses, the respondent's actions and the decision to dismiss cannot be interfered with.

62. The claim is dismissed.

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Employment Judge Khalil

9 October 2020

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