EMPLOYMENT TRIBUNALS

Claimant: Mr K Riggott

Respondent: Cemex UK Operations Limited

Heard at: Birmingham by CVP on 24 and 25 August 2022

Reserved decision 22 September 2022

Before: Employment Judge Hindmarch

Appearances
For the claimant: Mrs N Riggott – Claimant's mother
For the respondent: Miss J Charalambous – Litigation Consultant

JUDGMENT

1. The complaint of unfair dismissal is well founded and upheld.

REASONS

2. This is the Judgment in case no 130640/2020 Mr K Riggott and Cemex UK Operations Limited. This claim of unfair dismissal came before me for a 2-day hearing by Cloud Video Platform on 23 and 24 August 2022. The Claimant was represented by his mother Mrs N Riggott and the Respondent was represented by Miss Charalambous, Litigation Consultant.

3. At the outset of the proceedings, I informed the parties of the documents that were in my possession. I had a witness statement for the Claimant and 3 witness statements for the Respondent, those of Mr Beard, Mr Baker, and Mr Luxon. I had a zip file of documents from the Claimant said to be a bundle, however this formed a number of appendices rather than a paginated bundle. Miss Charalambous informed me she had prepared a separate bundle containing the Claimant and Respondent's documents but missing the ACAS documents that the Claimant had included in his bundle. I did not have that bundle and Mrs Riggott told me she had not received it. I explained I also had 2 separate files – one marked CCTV1 and one marked 're-enactment. Miss Charalambous explained I should have another file marked CCTV2. Again, the Claimant said he did not have CCTV2.

4. After identifying the issues and order of witnesses I adjourned so that the Claimant and I could be sent the Respondent's bundle and the file marked CCTV2. The bundle was received quickly, it ran to 153 pages. We had a further adjournment for Mrs Riggott to familiarise herself with the Respondent's bundle. CCTV2 could not however be sent. During Mr Barker's evidence, Miss Charalambous was able to play CCTV2 for us all to see and the Claimant was satisfied with this.

5. On day 1 we heard evidence from Mr John Beard who was the Unit Manager at the Respondent's site where the Claimant was employed and who acted as the investigating officer, and from Mr Jason Barker who is the Respondent's National Operations Manager and who acted as dismissing officer. Overnight the Respondent's representative sent an additional page for the bundle. On day 2 we heard from Mr Leslie Luxon who is an Area Manager for the Respondent and who acted as appeals officer and from the Claimant. There was insufficient time for me to deliberate or to hear submissions and so I reserved my decision-making and made orders for the parties to exchange written submissions and any submissions in reply.

6. As I have said at the outset of proceedings I identified the issues and explained these to the Claimant. The Respondent accepted dismissing the Claimant, it said by reason of conduct, which is a potentially fair reason for dismissal. It would be for the Respondent to show the reason for dismissal, and it had the burden of proof in that regard. The Tribunal would consider whether a fair procedure had been adopted with regard to s98 (4) Employment Rights Act 1996 – considering the size and administrative resources of the employer's undertaking and all the circumstances of the case and the case of British Home Stores v Burchell, whether the Respondent had carried out as much investigation as was reasonable, whether it had come to a genuine belief in guilt and whether it had applied a reasonable sanction in dismissing the Claimant. I explained the Tribunal would consider the band of reasonable responses and would not substitute its view for that of a reasonable employer.

7. By an ET1 filed on 29 June 2020, following a period of ACAS Early Conciliation from 7 May – 29 May 2020, the Claimant brought a complaint of unfair dismissal. By an ET1 filed on 10 November 2021, the Respondent accepted dismissing the Claimant, it says for gross misconduct.

8. The Claimant was employed by the Respondent from 25 September 2017 to 15 April 2020 in the role of Multi-Skilled Operative. The Respondent is in business as a building materials company and employs over 1000 people. Prior to dismissal the Claimant had a clean disciplinary record.

9. The Claimant was issued with a contract of employment entitled 'conditions of employment for Grade 'D' employees', a copy of which was at pages 52-61 of

the bundle. The Respondent has in place a Disciplinary Policy (pages 36-48). It provides the types of conduct likely to result in summary dismissal included, but are not limited to, 'deliberate or reckless damage to company property or the property of any supplier, employee, worker, customer or member of the public' and 'a serious breach of CEMEX's health and safety rules, or, a single act of negligence or reckless conduct, which causes or could have caused loss, damage or injury to CEMEX, its employees, customers or any member of the public'.

10. During his employment with the Respondent, the Claimant was trained and received a certificate of training in relation to a 'wheeled loading shovel – level 2'. A copy of this certificate was at page 103.

11. The facts leading to the Claimant's dismissal are not in dispute. The unit manager at the site where the Claimant was employed in Leeds was Mr John Beard. Mr Beard had day to day responsibility for the management of the site, including any human resources issues, and had responsibility for the health and safety of any person in attendance at the site. The site is a large site operating as an asphalt and aggregate depot. The Respondent operates its own fleet of lorries which collect and deliver materials to its customers. It also allows customers to bring their own lorries on site to collect materials. To avoid accidents there is a one-way system operated on the site with signage displayed to remind any driver of permissible routes and health and safety rules.

12. Drivers attending the site to collect materials have to attend an induction which confirms where the lorries can and cannot go and any speed limits. Drivers are given a leaflet to further explain the health and safety rules in operation. In the bundle at pages 63-64 were copies of the leaflet given to drivers. The rules printed on this leaflet require drivers to 'only tip/load in designated areas' and state that drivers 'must observe all traffic management routes and one-way systems' and drivers must ensure they have clear direction on where they are to go'. There is further provision that 'drivers must stay in their cabs when tipping or loading' and 'no pedestrians are allowed in areas where mobile plant is operating'.

13. On 19 March 2020, Mr Beard became aware of an incident which had occurred on the yard. He went to investigate and discovered that a loading shovel being driven by the Claimant had collided with a lorry being driven by a customer who was on site to collect materials. The customer lorry should only enter the area where the collision occurred when he receives a signal from the loading shovel driver, in this case the Claimant. Mr Beard spoke to the driver of the lorry who informed him he was aware he should have awaited a signal from the Claimant. He was not sure if he had been given a signal but had nevertheless driven into the area, and the Claimant had reversed the loading shovel into his lorry.

14. Mr Beard asked the Claimant for his account, and he wrote a written statement, pages 71-72 of the bundle.

15. The Claimant wrote that he had started his shift at 6am. Just before 9am a colleague had asked him to use his loading shovel to scrape back some material. He then loaded a truck and proceeded to scrape back. He reversed his vehicle in order to do so and at the last 'split second…caught sight of a truck at the back of me.' He 'slammed on the brakes…' but collided with the truck. He confirmed he did not give the truck driver permission to enter the yard.

16. After this, Mr Beard sent the Claimant home and later called him to suspend him. Mr Beard then took some photographs of the damage to the lorry. Mr Beard also spoke with another of the Respondent's employees, Mr Haig, who had heard the impact of the accident and who also wrote a statement, page 73. He had not seen the collision itself.

17. The following day, 20 March 2020, the driver of the lorry provided a written statement to Mr Beard, pages 69-70 and 75. This confirmed the driver was aware of the procedure in place namely to get permission before entering the yard but 'had clearly made the decision to enter the…yard himself'.

18. Mr Beard carried out some measurements in the area the collision had occurred and reviewed the Respondent's CCTV footage of the collision. Mr Beard asked the Claimant to undergo a drug and alcohol test which was negative, page 77. Mr Beard sought to conduct a recorded re-enactment of the collision and took some photographs to demonstrate the visibility for any driver of the loading shovel, pages 84-85.

19. On 27 March 2020, Mr Beard telephoned the Claimant to ask him some follow up questions and made a note of this, pages 89-93.

20. On 30 March 2020, Mr Beard produced an investigation report, pages 94-95. He formed the view that the Claimant had failed to utilise the safety tools on the loading shovel, (mirrors, reversing camera, 'bleeper', that should alert the driver if he comes within 6 metres of an object) and that it was luck that it was only damage to a vehicle that had occurred, rather than to a person. He did not determine that the Claimant had been speeding, in terms of going faster than the site speed limit, but felt he had been reversing too quickly. He concluded the lorry driver had contributed to the collision by entering the yard without authorisation but felt the Claimant should still have been aware of the presence of the lorry behind him and should have stopped his vehicle before the collision occurred. When questioned about the presence of the lorry diver, Mr Beard explained 'we have (health and safety) systems in place but sometimes drivers ignore basic rules, it's a constant battle'. He recalled other

employees had recoded concerns about drivers not following the health and safety rules including an almost 'near miss' collision. He noted in his report that the Claimant was remorseful. His recommendation was that a disciplinary hearing take place.

21. At the Tribunal hearing we were able to view the CCTV footage of the collision. The Claimant was reversing the loading shovel whilst back blading/scraping back and he was reversing downhill. He initially started reversing on an arc before straightening up shortly before the collision occurred. The Claimant was required to reverse further than usual due to the number of lorries present legitimately, and for the initial time that he was reversing the Claimant was paying attention to another driver to his left. The Respondent's position was that whilst the loading shovel was initially arcing, it cannot be said there would be no blind spots and that by using all driver aids there should be good vision. The loading shovel had straightened by the time of the collision.

22. We also viewed the video footage from the lorry that was hit. The driver did beep his horn to alert the Claimant to his presence however it is clear the site was very noisy and the alert was not easy to hear.

23. Mr Jason Barker was nominated to act as the disciplinary decision maker. He considered Beard's investigation report and the evidence gathered by him as well as the Respondent's disciplinary policy.

24. On 5 April 2022, the Claimant was invited to a disciplinary hearing.

25. The invitation letter is at pages 96-97 of the bundle. The allegation was 'that you have breached CEMEX Health and Safety rules by failing to apply due care and attention whilst driving the wheeled loading shovel which resulted in you hitting a stationary vehicle and causing damage to it. It is alleged that your conduct amounted to recklessness and negligence that could have caused significant damage or injury to people, including you, and did cause damage to property. It is also alleged that you seriously breached safety essentials 1 i.e., 'look after yourself, look after each other' and 7 i.e., 'safe driving' for which you have been trained. This represents a blatant breach of the company's rules and procedures and, if proven, a serious breach of trust'.

26. In cross-examination Mrs Riggott put to Mr Beard that he had telephoned the Claimant on the morning of the disciplinary hearing and told him to 'take it on the chin' and 'let Jason (Mr Barker) have his say'. Mr Beard said 'if I did make a comment it was mainly to put him at ease colleague to colleague'. It was the Claimant's evidence that this phone call, taking place before the disciplinary hearing and coming from his manager, made him think the outcome was not going to be gross misconduct/dismissal.

27. The disciplinary hearing took place on 9 April 2022 via Skype. Ms Tracey Carr, an HR Business Partner for the Respondent, was present as note-taker.

28. Mr Barker concluded that the Claimant's actions amounted to recklessness and negligence and could have caused significant danger or injury, and that the Claimant did not appear to appreciate the severity of his actions. From viewing the evidence Mr Barker concluded the Claimant would have had the lorry in his line of sight (behind him) for 10 seconds, 2 seconds of which the bleeper would be sounding, and that he should have braked and avoided the collision. Mr Barker acknowledged the Claimant's position that the lorry should not have been on the yard but determined that as the lorry driver was not an employee of the Respondent there were 'limited steps' that the Respondent could take 'in regard to him'. He concluded that although the lorry 'may have contributed towards the accident', he did not cause it and the blame lay with the Claimant who had not seen the hazard'. In evidence, Mr Barker said he could not be certain the Claimant would not have another accident which was one of the factors that had led to a decision to discuss.

29. On 15 April 2020, Mr Barker wrote to the Claimant giving his decision that his actions amounted to gross misconduct and imposing a sanction of summary dismissal, pages 108-109. He offered the Claimant the right of appeal. In the outcome letter, Mr Barker recorded that he was satisfied that the Claimant had driven without due care and attention for himself and others, had not used driver aids whilst reversing and had reversed further than training would have advised.

30. The Claimant did appeal and Mr Leslie Lexon was appointed to hear the appeal. He invited the Claimant to an appeal hearing and asked the Claimant to provide any new information and the details of any witnesses he would like Mr Luxon to question by 27 April 2020. The appeal hearing took place on 28 April 2020 by Skype. Mr Peter Hoare was present as note-taker. The appeal minutes record the Claimant saying that 'he took the original (disciplinary) meeting too lightly. He thought he was going to get a warning'. The Claimant referred to there being one of the Respondent's own drivers to his left-hand side which he felt was in a 'danger zone'. The Claimant felt he should take some responsibility, but not all, because of the unauthorised presence of the lorry. The notes record that, due to the hearing being conducted by Skype, part of the call was inaudible or 'sketchy' and that this was noted by the Claimant's colleague, Steven Haigh, who accompanied him. Mr Haigh stated he thought Skype was an inappropriate forum. The notes record the Claimant wanting to bring in the Unit Manager (Mr Beard) as a witness and Mr Luxon refusing this on the basis 'this should have been brought up at the first hearing and would not be possible at this late stage on a Skype call'.

31. Following the appeal hearing, Mr Luxon sent an email to Mr Barker, page 115 of the bundle. He attached the notes of the appeal hearing. He stated 'Kaine

kept trying to go back into investigation to prove his point. A few times I had to say – this should have been brought up at investigation stage… I also feel that Kaine does not recognise the seriousness of the situation – his words were he thought he would get a slap on the wrist – he also stated he would have defended himself more if he had recognised the serious nature of the incident'.

32. On 1 May 2020, Mr Luxon wrote to the Claimant upholding the decision to dismiss, pages 120-121. Mr Luxon was of the view the Claimant should have seen the lorry behind him as he was reversing for some 30 metres and the lorry was stationary on impact. He noted that the lorry driver had tried to alert the Claimant to his presence by beeping. He accepted the lorry should not have entered the yard but felt the Claimant still had an opportunity to avoid the collision. He felt a fatality could have occurred had the Claimant hit a person rather than a vehicle. In his evidence Mr Luxon told me that he had driven loading shovels albeit not the same model as that driven by the Claimant. I asked him whether it is always possible to stop the loading shovel when the bleeper goes off 6 metres away from an object. He thought the loading shovel could usually stop however this was dependant on the surface and condition of the surface. I asked Mr Luxon what he meant by 'Kaine trying to go back to the investigation to prove his point'. He said it was his view that the Claimant had thought he was 'going to get a slap on the wrist' and he felt the Claimant would have 'said a lot or more' had he realised the seriousness of matters. Mr Luxon concluded that the loading shovels' emergency braking system had applied the brakes rather than the Claimant himself. In cross-examination he accepted in fact that there was no emergency braking system, and that the Claimant must have applied the brakes.

33. It was the Claimant's evidence that ACAS completed the ET1 on his behalf. Miss Charalambous remarked on this being unusual and asked me to make a note of it in my Judgment. It Is not relevant to the issues, and no evidence was taken from ACAS on this point, but as a courtesy to Miss Charalambous I note this point at her request.

34. As already noted above, I had written submissions from both parties. In her submissions Miss Charalambous referred me to the established case law on conduct dismissals which I shall return to below where necessary.

35. It was the Respondent's contention that the real reason for dismissal was conduct, rather than as suggested by the Claimant that it was a cost cutting exercise. In the Respondent's submission any concession on the part of Mr Beard that he did call the Claimant on the morning of the disciplinary hearing to offer 'comfort' should have no effect of the seriousness of the conduct and the Claimant's approach to this, particularly given the invitation to the disciplinary hearing made it clear dismissal was an option. The Respondent's position was that any other witness would not have added anything to the

factual matrix. The Respondent suggested the Claimant's initial account changed when he saw the CCTV evidence, accepting that the lorry he hit was in fact stationary at the point of impact. The Respondent accepted there were technical issues with the video method used to conduct the appeal hearing but contended that a video hearing was appropriate given COVID restrictions. The Respondent argued it had a reasonable belief in the Claimant's misconduct and that dismissal was within the band as reasonable responses.

36. In the Claimants written submissions it was argued that the Respondent had failed in its duty of care to the Claimant by allowing the lorry on site without authorisation. Reference was made to the Claimant's unblemished disciplinary record and the fact he himself had sought to draw the Respondent's attention to potential hazards on site. The Claimant contended that if the Respondent had erected a barrier the lorry driver would not have been able to come onto the site.

37. Miss Charalambous sent written submissions in reply. She emphasised the Respondent's decision to dismiss the Claimant was 'maintaining its health and safety policies'.

The Law

38. s98 Employment Rights Act 1996 provides

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or

(2) A reason falls within this subsection if it relates to the conduct of the employee.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the discussed is fair or unfair (having regards to the reason shown by the employer) –

(a) 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
(b) shall be determined in accordance with equity and the substantial merits of the case.

39. It is for the Respondent to show the reason for dismissal and that it is a potentially fair reason falling within s98 (2). The Tribunal first has to make factual findings as to the Respondent's reasons for dismissal.

40. The Tribunal must consider whether the Respondent followed a fair procedure and whether the Respondent acted reasonably in treating the reason relied on (conduct) as a sufficient reason for dismissal. The Tribunal must not substitute its own view for that of a reasonable employer. The Tribunal should confine itself to reviewing the reasonableness of the Respondent's actions. It must assess objectively whether dismissal fell within the range of reasonable response available to the Respondent in the circumstances – Iceland Frozen Foods v Jones (1982) IRLR 439, EAT.

41. In conduct cases a dismissal will only be fair in the following circumstances
- at the time of dismissal, the employer believed the employee to be guilty of misconduct
- at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of the misconduct
- at the time that the employer formed the belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances British Home Stores v Burchell (1980) ICR 303. EAT.

42. It is for the Respondent to show the reason for dismissal and that it believed the Claimant to be guilty of misconduct. The remainder of the test is `neutral' in terms of the burden of proof.

CONCLUSIONS

43. My conclusion is that the Respondent dismissed the Claimant for his conduct on 19 March 2020, namely his reversing the loading shovel he was driving into another vehicle on the yard. I do not accept the Claimant's assertion that there was an ulterior motive namely a dismissal to avoid redundancy/reduce headcount.

44. The first question for me is whether the Respondent has shown the reason for dismissal. It is not in doubt that the Claimant reversed his loading shovel into a customer lorry. The lorry should not have been on the yard. The Respondent's witnesses told me the Respondent takes health and safety very seriously. All drivers on site should receive an induction and are told where they can and cannot go. For reasons best known to himself, the driver of the customer lorry should not have entered the yard without being authorised to do so by the Claimant. The Claimant would not reasonably have been expecting any vehicle to be positioned where the lorry was. The Claimant was entitled to believe the Respondent had properly inducted the lorry driver and that he should have known only to enter the yard on the Claimant's instruction. The Claimant was initially carrying out a legitimate reversing

manoeuvre where he was observing those vehicles that were properly on site. He did in fact see the lorry behind him once he had straightened up his loading shovel and he did apply his brakes, but it was too late to stop and there was a collision.

45. I have to consider whether the Respondent conducted a reasonable investigation and I have to consider whether the Respondent acted reasonably or unreasonably in treating the Claimant's conduct as a sufficient reason for dismissal. Mr Beard who had health and safety responsibility for the site carried out the investigation and found the Claimant was remorseful but should have seen the lorry. On the morning of the disciplinary hearing, for reasons best known to himself, Mr Beard telephoned the Claimant to offer him some reassurance. One can therefore understand why the Claimant was not expecting to be dismissed by Mr Barker and perhaps was inclined to be overly relaxed at the disciplinary hearing. His manager had telephoned him and told him to `listen to Jason.' The Claimant was no doubt expecting a telling off rather than a dismissal. This is reflected in the email Mr Luxon sent to Mr Barker, referenced at paragraph 31 above. The fact Mr Beard agreed to be a witness for the Claimant at the appeal hearing, although Mr Luxon did not allow this, suggests he was sympathetic to the Claimant's position.

46. The appeal hearing was not a rehearing of all the evidence but rather a review of Mr Barker's decision to dismiss. It is clear that Mr Luxon was not inclined to allow the claimant to call witnesses or to address any evidence that had not already been advanced. Whilst the use of Skype during Covid was understandable, I am not satisfied the appeal hearing was conducted fairly. Parts of the call were inaudible, and Mr Luxon's approach to the effect 'this should have been raised at investigation stage' showed a closed mind.

47. The Respondent's witnesses made reference to its firm commitment to good health and safety practice. However, it was the Respondent's own failure to implement such practices which led to the lorry entering the yard without authorisation. The lorry driver was clearly not properly inducted and/or there was no other safety measures in place to prevent him entering the yard. The Claimant was paying due attention to his duties and would not have been expected a lorry behind him. When he did see the lorry he did brake. He was reversing downhill and the Respondent's witnesses accepted the surface and conditions could affect the stopping distances. The Claimant did in fact brake and did stop, unfortunately not before he collided with the lorry. I do not find the accident was entirely the Claimant's fault or that he was negligent or reckless. When he became aware of a hazard that should not have been present, had the Respondent employed safe systems of work, he did attempt to avoid the collision by braking.

48. A reasonable employer would have taken mitigating circumstances into account. The Claimant was remorseful (as noted by Mr Beard), he had a

clean disciplinary record, he was very busy on the day in question and having regard to a number of vehicles, and, importantly, the lorry driver should not have been on the yard. He himself was in breach of the health and safety rules on site. The Respondent led no evidence about any sanction placed on the lorry driver or the company he was driving for, Mr Barker simply saying there were 'limited steps' the Respondent could take. The Respondent also led no evidence into what, if any, investigation had taken place into what induction the lorry driver had been subject to, and what could have been done to prevent him accessing the yard. This is despite Mr Beards evidence that 'sometimes drivers ignore basic rules, it's a constant battle'. It is clear the Respondent knew there was a risk of drivers wrongly entering the yard yet took no steps to prevent this occurring. Assessed objectively, the decision to dismiss was not in the band of reasonable responses. I am aware I would not substitute my view for that of a reasonable employer, however I am satisfied the employer in this case did not act reasonably.

49. During the course of the hearing, Miss Charalambous informed me that the Respondent would be arguing contributory fault, although this had not been pleaded. In her written submissions she addressed this and Polkey. In my view, these matters should fall to be considered as appropriate at the remedy hearing which will now be listed.

Employment Judge Hindmarch

1 November 2022