



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Lythgoe

**Respondent:** Northern Packaging Limited

**Heard at:** Manchester (remotely, by CVP)

**On:** 6 July 2021

**Before:** Employment Judge Whittaker

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr Rhodes of Counsel

# JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair dismissal fails and is dismissed.

# REASONS

## The Issues

1. The respondent relied on a single act of gross misconduct to summarily dismiss the claimant. The claimant accepted that on 1 September 2020, when he was a supervisor of the premises of the respondent, that he smoked a cigarette whilst seated on a gas powered forklift truck.

## The Facts

2. The claimant, by the time of that incident, had been an employee of the company for some 15 years, and for ten of those years he had been a supervisor. The claimant during this hearing, and during the disciplinary and appeal process, accepted that he understood the policies and procedures of the company, including its strict no smoking policy. That policy insisted that employees were only allowed to smoke in designated smoking areas, and that they were only allowed to smoke during

designated smoking breaks. The claimant was spotted smoking this cigarette whilst talking to one of the drivers of the respondent company. One of those who saw the claimant was his line manager, and he recognised the incident in question as being particularly serious bearing in mind that the claimant was smoking whilst seated on a gas powered forklift truck. The line manager therefore reported the matter.

3. There was no need for any disciplinary investigation because the claimant all along accepted that he had smoked a cigarette while seated on a gas powered forklift truck. There was a designated smoking area approximately four or five metres away, but the claimant did not use that facility. He was not on any designated smoking break either.

4. The claimant complained that the disciplinary procedures which led to his dismissal were not those of a reasonable employer because the claimant's line manager, who had observed him smoking, was also the person who prepared witness statements and details of the incident to report to his own line manager, which then led to a disciplinary hearing being conducted by Mr Bright. However, there was actually no need for any investigation at all because the facts were straightforward and admitted by the claimant from the outset. It was therefore a misnomer to suggest that there was a disciplinary investigation. All that actually happened was that witness statements were taken, and the agreed facts were then reported to a higher level of management. The fact that this was done by the claimant's line manager, who also observed the claimant smoking, did not in the opinion of the Tribunal affect the overall reasonableness of the procedures followed.

5. The claimant had suggested that there were breaches of the ACAS Code of Practice relating to disciplinary and grievance procedures, but the issue relating to the investigation which has just been set out above was the only criticism made by the claimant.

6. The ACAS Code of Practice requires an employee to be properly notified of the allegations that he has to answer at a disciplinary hearing, and that was clearly set out in the disciplinary invite letter, and during today's hearing the claimant acknowledged that that was the case. The claimant had a full opportunity to participate and to put over his points of view during the course of the disciplinary hearing. The claimant was then told in a letter that he had been dismissed and was told the reasons for that decision. The claimant then appealed and set out five grounds of appeal. There was then an appeal hearing and again the respondent wrote to address each of the points of appeal and to tell the claimant that his appeal had been rejected. In the opinion of the Tribunal, therefore, there was no failure to follow the ACAS Code of Practice, and the process and procedures which the respondent followed certainly met the test that it must be the reasonable procedure of a reasonable employer.

## **The Law**

7. An employer who dismisses an employee is required to indicate under section 98 of the Employment Rights Act 1996 the reason why the claimant was dismissed. It was clear at all time and to everyone that conduct, indeed gross misconduct, was the reason relied upon by the respondent.

## Conclusions

8. The respondent had a written disciplinary and grievance procedure and this was included at page 56 in the bundle. Employees were told that if after a full investigation it is confirmed that an employee has committed an offence of gross misconduct, that the “normal consequence” will be dismissal without notice or payment in lieu of notice. Examples were then set out of what the company would consider to be gross misconduct. One of these was “actions and negligence which endanger the safety of the company’s employees”.

9. The respondent was particularly concerned that the claimant had been smoking a cigarette while sitting on a forklift truck which was powered by gas. In the opinion of the Tribunal, the respondent took the obvious common sense view that to smoke in such circumstances created an obvious hazard. However, the respondent went further and contacted the manufacturers of the forklift truck. They sent an email (page 79) in which the manufacturers pointed out that by smoking in the workplace the claimant had broken the law which prohibits smoking in the workplace. However, more importantly they indicated that there were obvious dangers of smoking on a gas powered forklift truck. They indicated that no piece of machinery is ever perfect and that leaks on the gas bottle or pipework or vaporiser were always possible.

10. The forklift truck was stationary. The manufacturers commented that if there had been a leak that this could lead to a build-up of gas around the truck or under the bonnet, and that the introduction of a source of ignition such as a cigarette could lead to an explosion. In the opinion of the Tribunal, this was a real and obvious risk in any event. Such an explosion would clearly put lives at risk, including the life of the claimant and, depending on the size of the explosion, there was at least some risk that fire would spread to the premises of the respondent which were full of obviously inflammable materials including paper and cardboard, bearing in mind that the nature of the respondent’s business was packaging.

11. The Tribunal, at some length, discussed with the claimant that the Employment Judge must not and was not entitled under any circumstances to substitute his own view for that of a reasonable employer. The claimant had never been aware of the approach which an Employment Tribunal must take to a claim of unfair dismissal. The claimant was unaware that the responsibility of the Tribunal was to determine whether or not the decision to dismiss the claimant, summarily and without notice, fell within the range of reasonable responses to the conduct of the claimant.

12. During those discussions the claimant openly and responsibly acknowledged, after some thought, that the lowest penalty which a reasonable employer would have imposed was a final written warning. The Tribunal therefore carefully explained to the claimant that it would need to determine whether or not the range of reasonable responses extended upwards in terms of severity from a final written warning to include dismissal and/or dismissal without notice which had been imposed in this case.

13. There was no doubt whatsoever that the claimant had breached the strict no smoking policies of the respondent. He had been a supervisor for ten years and he acknowledged that one of those prime responsibilities as a supervisor was to ensure that other employees followed the policies and procedures of the company. He was

therefore expected to set an example. What understandably, in the opinion of the Tribunal, really concerned the company (who was represented by Mr Bright who carried out the disciplinary hearing and Mr Markey who conducted the appeal) was that the claimant did not appear to acknowledge the severity of the incident which led to his dismissal. When he was asked how he would have dealt with that incident if he had observed another employee smoking in the same way, the claimant indicated that he would have told that employee off but would only have reported it to more senior management and considered it to be a serious disciplinary matter if the incident happened again. In the opinion of the Tribunal, this was understandably a serious concern on the part of the company and appeared to demonstrate a failure on the part of the claimant to recognise his responsibilities as a supervisor and the risks which he was putting the company under if he adopted such a lenient attitude towards policies and procedures of the company which, if breached, could have very serious consequences for the employees and for the premises of the respondent.

14. The Tribunal concluded that taking into account what had happened, in particular the obvious risks associated with smoking on a gas powered piece of machinery, taking into account the fact that the claimant was a supervisor and had been a supervisor for some ten years, and taking into account his approach to a similar incident if he were to come across one in his capacity as a supervisor, that the appropriate decision was to terminate the employment of the claimant without notice. In the opinion of the Tribunal, this decision fell within the range of reasonable responses of a reasonable employer.

15. The claimant pleaded in his favour the fact that he had 15 years' service and ten of those had been as a supervisor. However, in the opinion of the Tribunal, that was both a plus and a minus. It was clearly a factor of significant mitigation, but at the same time it meant that the claimant had, for some 15 years, been well aware of the strict policies of the company, and for ten years as a supervisor the claimant had actually been responsible for leading by example, and was therefore responsible for enforcing the policies and procedures and ensuring that other employees followed them. The claimant was also responsible for enforcing those policies and procedures where necessary, but he had indicated during the disciplinary process that he did not recognise the seriousness of the matter, suggesting that if he had encountered similar circumstances he would have simply told the employee off and would only have taken more serious action, such as raising it with senior management, if it happened on a second occasion. Understandably, in the opinion of the Tribunal, this was a response by the claimant which was of very significant concern to the respondent.

16. In the opinion of the Tribunal, it was a matter of obvious common sense that smoking on a vehicle which was stationary, and which was powered by gas, created an obvious and real risk. The company had strict no smoking policies and the claimant was well aware of this. The only explanation he offered was that he had been under stress that day because he was very busy, and that smoking in those circumstances had been a momentary lapse of concentration. Indeed, there was no evidence that the claimant had behaved in such a way previously. However, the potential consequences of the incident in question were very significant indeed. Furthermore, his attitude to similar circumstances was of genuine and understandable concern to the respondent. It was, in the opinion of the Tribunal, obvious common sense that

smoking in such circumstances created a very serious and real risk of injury and damage.

17. The claimant had suggested to the Tribunal that there were no notices regarding no smoking fixed to the forklift truck, but in all the circumstances the Tribunal did not consider that to be any failure on the part of the respondent. It was a matter of simple and obvious common sense, in the opinion of the Tribunal, that smoking in such circumstances created a real and obvious danger.

18. The claimant also suggested that there were other incidents where there had been fires associated with cardboard catching underneath forklift trucks and then catching light. Indeed the claimant indicated that he had seen such fires and observed them being put out with water. There was, however, no evidence put to the Tribunal that those incidents had ever been reported to management. The claimant asserted, very clearly, that management was aware of such incidents, but there was no evidence to that effect and Mr Bright, who dismissed the claimant, was adamant that he was entirely unaware of any such incidents and that if they did occur they should have been reported and that the company would have taken it very seriously.

19. The claimant accepted that he had never reported such matters. This again indicated to the Tribunal an unfortunate approach of the claimant to his responsibilities as a supervisor and his responsibilities to ensure that the policies and procedures of the company were adhered to, and when he observed obvious dangers that they were reported formally and thoroughly to the managers of the company. There was no evidence that that had taken place. In the opinion of the Tribunal, this again contributed to the conclusion that the decision to dismiss the claimant fell within the range of reasonable responses available to a reasonable employer.

20. The claimant had not submitted a witness statement to this hearing. He had not understood that it was necessary for him to do so. He had submitted a number of statements which appeared to consist of statements from disgruntled ex-employees of the company, but none of these had been presented to either Mr Bright or Mr Markey at the time of the dismissal or appeal, and the Tribunal therefore told the claimant that they were unwilling and indeed unable to consider those statements, bearing in mind that they were not available to the respondent at the time he was dismissed or at his appeal.

21. As the claimant had not submitted a statement then the Tribunal discussed with him the reasons why he believed that his dismissal was unfair in order to ensure that those issues were properly addressed by the Tribunal. The claimant told the Tribunal that in view of the fact that the smoking incident took place outside whilst the vehicle was turned off, this meant that the incident was not sufficiently serious to justify his dismissal. He pleaded in his favour that there was a designated smoking area only five yards away. In the opinion of the Tribunal, however, this was again a double-edged sword. It meant that the claimant could and indeed ought to have used that if he was so desperate to need a cigarette because of his working conditions on that day. The claimant did not offer an explanation at all as to why he had not used the designated smoking area.

22. The claimant also indicated that he did not believe that there was a real risk of fire because the forklift truck was stationary and was turned off. However the manufacturers painted a very different picture indeed to the respondents.

23. To assist the claimant, he was referred by the Tribunal to his letter of appeal dated 30 October 2020 which appeared at page 111. In that letter he listed a number of points indicating why he felt that the decision to dismiss him was unfair. He raised the issue of the disciplinary investigation having been conducted by the person who saw him smoking. The Tribunal has already dealt with that issue above.

24. The claimant also said that there was insufficient consideration of his explanation of the circumstances. In the opinion of the Tribunal it was clear from the correspondence, and in particular clear from the notes of the appeal hearing and the dismissal hearing, that proper thought had been given by both Mr Bright and Mr Markey about all the issues, but they were understandably concerned by the attitude of the claimant and the flagrant and serious breach of the “no smoking” policies.

25. The claimant indicated that dismissal was too harsh a penalty, and of course that was the focus of this Tribunal hearing today.

26. The claimant raised his previous disciplinary record and his length of service. As the Tribunal has indicated, those were proper issues for the claimant to raise, but at the same time there is a plus and a minus to a length of service, and a plus and minus to the years that the claimant had spent as a supervisor where he was responsible for recognising and policing the policies and procedures of the company, and he was expected to lead by example, but he had failed to do that and he had failed in a manner which had caused serious risk of damage, and even possible loss of life.

27. In summary, therefore, the Tribunal concluded that the range of reasonable responses to the gross misconduct of the claimant was at the lower end a minimum of a final written warning, which the claimant had accepted. However, the Tribunal was equally strongly persuaded that summary dismissal in all the circumstances also fell within the range of reasonable responses, even though it was the most severe penalty which could be imposed by the respondent on the claimant. The claimant was told in the disciplinary procedures of the company that the “normal sanction” for gross misconduct would indeed be summary dismissal. The respondents procedures set out a list, and one of those was an accurate summary of the claimant's conduct whilst smoking on a gas powered forklift truck. The claimant was aware, therefore, at all times that the normal sanction imposed by the respondent would be summary dismissal. They had therefore explained to the claimant and to all other employees that it would be an exception rather than the rule for employees not to be dismissed.

28. In those circumstances, therefore, the Tribunal was satisfied that there had been gross misconduct on the part of the claimant and that the decision to dismiss the claimant fell within the band of reasonable responses available to a reasonable employer.

29. The claim of unfair dismissal therefore fails and is rejected.

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Employment Judge Whittaker  
Date: 21<sup>st</sup> July 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
22 July 2021

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