



# EMPLOYMENT TRIBUNALS

## Claimant

Mr J Clawson

## Respondent

v Muller UK & Ireland Group T/A Muller  
Milk and Ingredients

**Heard at:** Cambridge

**On:** 27<sup>th</sup> & 28<sup>th</sup> February 2023

**Before:** Employment Judge Conley  
Ms H Gunnell  
Ms E Deem

## Appearances

**For the Claimant:** Mr T Guggerty (Representative)

**For the Respondent:** Ms D Kight (Counsel)

## RESERVED JUDGMENT

The Claimant's claim of unfair dismissal is not well founded and is dismissed.

## REASONS

### BACKGROUND

1. By a claim form presented to the Employment Tribunals on 21<sup>st</sup> April 2021, following a period of early conciliation between 13<sup>th</sup> February 2021 and 27<sup>th</sup> March 2021, the Claimant sought to pursue a complaint of 'unfair dismissal' against the Respondent. The principal claim was that, whilst the claimant accepted that he had been responsible for an act of misconduct, the decision to summarily dismiss him as a result was outside of the band of reasonable responses and was, as such, unfair.
2. It was also inferred from the claim form that there was or may have been a separate but related claim for automatic unfair dismissal based on an issue related to a Health & Safety concern, thereby engaging section 100 of the Employment Rights Act 1996. It was for the reason that the hearing was listed before a full Tribunal rather than before an Employment Judge sitting

alone. In the event, during the course of the hearing this aspect of the claim fell away. This will be discussed in greater detail below.

3. The Claim was resisted by the Respondent and on 29<sup>th</sup> June 2021 they presented a Response which included comprehensive Grounds of Resistance to the Claim. In essence, the claim is resisted on the ground that the Claimant had committed an act of gross misconduct, that the matter had been fully and fairly investigated, and that as a result summary dismissal was justified.

## THE ISSUES

4. As stated above, there were ostensibly two heads of claim which were discernible from the ET1 and the witness statements served on behalf of the claimant: automatic unfair dismissal due to raising health and safety concerns and therefore engaging section 100 of the Employment Rights Act 1996; and 'ordinary' unfair dismissal following a dismissal purportedly for conduct reasons.
5. The issues that the Tribunal had to determine in relation to each of these claims are as follows.

### *Automatic unfair dismissal - Health and safety concerns*

6.
  - a. Did the Claimant report concerns about the risk of contracting COVID-19 in the workplace?
  - b. If so, did that amount to circumstances connected with work which the claimant believed were harmful or potentially harmful to health and safety?
  - c. Was that belief reasonable?
  - d. Were those matters brought to the respondent's attention by reasonable means?
  - e. Was that the sole or principal reason for dismissal?
7. Where an individual has been dismissed for misconduct, the issues for the Tribunal to decide (as per *British Home Stores v Burchell*) are:
  - a. Was misconduct the reason for the Claimant's dismissal? (This is not in dispute.)
  - b. Did the Respondent have a genuine belief that the claimant was guilty of the misconduct alleged?
  - c. Were there reasonable grounds on which that belief was founded?
  - d. Was the belief in misconduct arrived at having carried out as much investigation into the matter as was reasonable in all the circumstances of the case?
  - e. Was the procedure within the band of reasonable responses, in other words, would a reasonable employer have carried out the procedure the respondent did?
  - f. Was the sanction within the band of reasonable responses, in other words, would a reasonable employer have imposed the sanction that the respondent did?

## THE EVIDENCE

8. The evidence in this case came from the following sources:
  - a) The written and oral evidence of Luke Eales, Kyle Rutter and Ian Farmer on behalf of the Respondent;
  - b) The written and oral evidence of the Claimant;
  - c) An agreed Bundle of Documents amounting to 186 pages
9. The claimant also sought to rely upon witness statements taken from three former employees of the respondent: Tiago Garcia, David Rea and Dale Steptoe. However, none was available for cross-examination and as such their evidence is given relatively little weight.
10. The Bundle included as its final item a reference to an excerpt from CCTV footage taken from the warehouse floor that captured the incident that led to the disciplinary procedure. The Tribunal was able to view this upon request, using Ms Kight's laptop.
11. The Tribunal was provided with submissions from both Representatives to whom I am grateful, and which we have considered with care.

## FINDINGS OF FACT

12. The Claimant was employed by the Respondent as a Distribution Depot Operative (DDO), which he self-described in his ET1 as a 'Warehouse Picker'. He commenced employment on 1<sup>st</sup> September 2018, and the effective date of termination (EDT) was 10<sup>th</sup> December 2020 when he was summarily dismissed for an act of gross misconduct.
13. His total period of employment, therefore, was 2 years, 3 months and 9 days.
14. However, he he had also previously worked for the Respondent in the same capacity and, up until the incident which led to his dismissal, he had worked for the Respondent for a total of almost 9 years, during which he had never been the subject of any disciplinary action.
15. His Terms and Conditions of Employment, signed by him on 3<sup>rd</sup> September 2020, states the following:
  - 22.1 You are required to comply with any Policies or Procedures which we may issue...Policies and Procedures can be found on our Intranet or are available via the HR Department.
  - 22.2 In the event that you breach our policy/procedures you may be disciplined in accordance with the Disciplinary Policy. In certain circumstances, breach of any Policy may be considered gross misconduct resulting in immediate termination of your employment.
16. The Respondent's Disciplinary Policy states:

4. Gross misconduct

4.1 Gross misconduct is a serious breach of contract and includes misconduct which, in our opinion, is likely to irreparably damage the working relationship and trust between us. Gross misconduct will be dealt with under this policy. If an allegation of gross misconduct is well founded then it will normally lead to dismissal without notice or pay in lieu of notice.

4.2 The following are examples of matters that are normally regarded as gross misconduct:

4.2.14 Serious breach of health and safety rules;

4.2.18 Serious neglect of duties, or a serious or deliberate breach of your contract or operating procedures.

17. On the 11<sup>th</sup> April 2020, the claimant undertook training on Safe Systems of Work (SSOW), which included training in relation to the safe handling of trolleys. In relation to this training, the claimant signed a Trainee Declaration which states:

'I the trainee have understood the procedures laid out in this Safe Systems of Work. I recognise that I must follow the training as detailed in this SSOW at all times.'

18. The declaration is counter-signed by David Williams (trainer) who confirmed the nature of the training provided and that he is satisfied as to the claimant's competence in relation to this activity.

19. At 12.40pm on 2<sup>nd</sup> December 2020, an employee of the respondent, Tim Walsh, observed a group of DDO's, including the claimant, lifting an empty trolley in a way which he considered to be unsafe. The claimant was observed to lift the trolley to at least waist height. Upon seeing this, Mr Walsh said to the claimant, 'Good job I'm not your supervisor because you might not be here for Christmas if I was'. He then observed another member of the group attempting to lift the trolley in the same way. He said to the group 'Is that part of your job, to lift trollies over your head?'

20. In acting in the way that he did, the claimant plainly risked his own safety, and also colluded with others who similarly put their own safety and that of their colleagues at risk.

21. At 1.25pm Mr Walsh reported this incident to a manager, Michael Calland (the Transport Shift Lead), as he 'deemed it suitable to report as it has serious health and safety issues and I would not like someone to get hurt'.

22. At 2.45pm Mr Calland conducting a fact-finding meeting with the claimant into the incident, which was described as an 'Allegation of Serious Horseplay'. During the course of the meeting the claimant admitted that he lifted up an empty trolley sideways to chest height. He stated that 'potentially the other DDOs at the time' could have witnessed the incident, but that he could not remember who they were. He went on to apologise for his actions, stating that, 'it was stupid and I will make sure that I don't do it again'. In evidence, he agreed that it could have been a dangerous thing to do.

23. On 8<sup>th</sup> December 2020, Luke Eales, the Distribution Shift Lead, wrote to the claimant inviting him to a Disciplinary Hearing in order to address the following allegation:

'It is alleged that on 2<sup>nd</sup> December 2020 you have not followed a correct procedure for trolley handling, namely been seen (*sic*) to deadlift a trolley and have therefore breached company's Disciplinary Policy section 4.2.14 Serious breach of health and safety rules; and Section 4.2.18 Serious neglect of duties, or a serious or deliberate breach of your contract or operating procedures.'

24. The letter went on to warn the claimant that because the suspected allegation is regarded as gross misconduct, the outcome of the meeting may be summary dismissal.
25. The claimant was not suspended from work whilst awaiting the Disciplinary Hearing, and continued to work his usual shifts from the day of the incident until the hearing.
26. The Tribunal finds that it was entirely appropriate and in accordance with ACAS guidance to allow the claimant to continue working during the investigation and does not represent an inconsistency with the later decision to dismiss. The respondent could have suspended the claimant, given the fact that his behaviour had jeopardised health and safety at the site, but we accept the explanation that, having now been warned about the risks of his behaviour and the consequences if it were to be repeated, the respondent felt satisfied that there would be no significant risk of repetition during the comparatively short period involved.
27. The meeting took place on 10<sup>th</sup> December 2020, conducted by Mr Eales. The claimant was unaccompanied. During the course of the meeting, the claimant viewed the CCTV footage showing the incident. He named the other DDOs present as being Kyle Taylor, Harvey Tompkins and Josh Nestic. Having viewed the footage, the claimant agreed that the first DDO lifted the trolley to head height, creating a risk that the trolley could land on his head and cause serious harm due to the weight of the trolley; that as he tried to lower the trolley he lost his grip, causing another member of the group to catch it, endangering that second DDO. The claimant agreed that he was the second DDO; and that he then lifted the trolley himself, whereupon Mr Walsh entered the area and observed the incident in progress. Approximately 41 seconds later, after Mr Walsh issued a warning about the behaviour, a third DDO also attempted to lift the trolley.
28. The Tribunal accepts this chronology in light of the CCTV which was view in the course of the hearing, albeit that the quality of the image was poor.
29. There was no legitimate work-related purpose for the claimant's actions. During the course of the meeting, the claimant made comments implying that his actions were carried out in order to lift a fallen trolley; and that this was something on which he had not received training. This was subsequently pleaded in his ET1 form in which he stated that he 'lifted a fallen trolley from the floor' and that there 'was no safe systems of work or risk assessments for lifting trolleys'. However, in evidence the claimant volunteered the explanation that, due to the COVID lockdown, gyms had been shut for a long period of time, and the DDOs (who used to train together) 'wanted to see how heavy the trolleys were'. From the question asked by Mr Eales in the disciplinary meeting, 'do you

not believe that it is good practice and general common knowledge that a heavy metal trolley should not be lifted as if you were at the gym, in a deadlift', this was clearly his understanding of the actions of the DDO's, and it is one which ultimately proved to be correct.

30. Given that there was no work-related purpose, the Tribunal considers that the comparison drawn by the claimant to the weight of pallets and the risk to safety of lifting them is of no relevance. Pallets would be lifted as part of a work-related activity and an appropriate SSOW would apply to that activity. The same finding is made in relation to the assertion by the claimant that the SSOW relating to trollies does not offer adequate guidance in relation to the correct way to lift a trolley in the circumstances of this situation. At the risk of labouring the point, this was a situation that was wholly unnecessary as part of the claimant's role and therefore there would be no reason why an SSOW would need to exist to deal with this act of horseplay.
31. During the course of the meeting, the claimant demonstrated no remorse or insight into his actions, in contrast to his initial fact finding meeting with Mr Calland, in which he had shown acceptance of his wrongdoing and indicated that he would not repeat the behaviour.
32. In evidence the claimant accepted that he had spoke 'defensively' during the course of his meeting with Mr Eales, explaining that this was because he felt that the outcome was a foregone conclusion.
33. Having heard the claimant's representations and adjourned briefly to consider the matter, Mr Eales concluded that the allegation was well founded and that the appropriate sanction was summary dismissal, and this was confirmed in a letter to the claimant of 15<sup>th</sup> December 2020 which stated that the dismissal took effect as from the 10<sup>th</sup> December 2020.
34. All of the employees that were involved in the incident were ultimately dismissed for gross misconduct - three of them on the 10<sup>th</sup> December 2020.
35. The claimant appealed against this decision, citing the following grounds:
  - i. Punishment was far too severe compared to other cases at Muller;*
  - ii. Lack of training and supervision at any time during shifts and time of employment.*
  - iii. Poor standards of health and safety rules and procedures.*
36. An appeal hearing was scheduled to take place on 12<sup>th</sup> January 2021, conducted by Kyle Rutter the operations manager at the respondent company; However this was rearranged at the claimant's request for the 20<sup>th</sup> January 2021 in order to enable his employee representative, Mr Trevor Guggerty (who appeared before the Tribunal) to attend.
37. The claimant did not attend this meeting in person but instead by way of a conference telephone call due to the restrictions that were in place as a result of the COVID-19 pandemic at the time. Mr Guggerty was given permission to speak on behalf of the claimant, and made representations covering the following areas.

38. The Tribunal accepts that it would have been desirable for the claimant to have been present at the meeting in person. It seems likely to us that he would have contributed more to the meeting had this been facilitated. However, we do not find that this amounted to a breach of the ACAS guidance at the time. The decision to conduct the hearing in this way was not imposed upon the claimant. He was given the opportunity to delay the meeting or object to it being conducted remotely - he did neither. It is easy to forget that during this period circumstances were changing constantly and we find that the respondent applied its own policy appropriately, and that policy was fair. We do not find that the appeals procedure was rendered unfair as a result.
39. What is notable is the extent to which Mr Guggerty's contribution to the meeting dominated. He raised a number of issues (such as the safety protocols at the site, and issues relating to discipline of other colleagues) which have not formed part of the evidence presented by the claimant. This has been an unfortunate feature of the hearing before the Tribunal. Mr Guggerty is not a witness to the case, he has never provided a witness statement, and he has at all times acted solely as a representative. However, he has frequently strayed beyond the remit of that role and had to be reminded on numerous occasions that he must not give evidence of matters that are not contained within the witness statements or agreed bundle whilst cross-examining witnesses for the respondent or making submissions. Any evidence that he has given in this way, including the submission of numerous photographs taken by him within the respondent's site (which we are bound to say were of very little relevance if any to the matters that the Tribunal had to determine) has been given no weight in our determination.
40. It was asserted on the claimant's behalf at the appeal that 'he was not aware that this [deadlifting the trolley] was a breach of health and safety'. We do not accept this assertion. It is contradicted by the contrition and level of understanding shown by the claimant in his initial meeting on the day of the incident, and by his own oral evidence during the hearing.
41. We do, however, accept what the claimant himself said during the course of the appeal, and indeed during the entire process, that he had not considered the risks involved and was unaware of how seriously the incident would be viewed by the respondent.
42. Mr Guggerty named a number of individual employees of the respondent who had committed breaches of health and safety procedures and had been issued with warnings rather than being summarily dismissed; He referred to the health and safety star card procedure in which minor breaches of health and safety protocol result in the perpetrator being issued with a star card rather than, as in the case of the claimant being subjected to an immediate disciplinary procedure. He raised a number of aspects of the claimant's competence, standard of work and previous clean disciplinary history, and stated that at the time of the incident the claimant had not realised that what he was doing was a breach of health and safety. He also queried why, if the claimant was a risk to

health and safety why was he not suspended and was allowed to continue work on site for further 8 days.

43. As previously stated, much of the 'evidence' of prior breaches of health & safety protocols advanced on behalf of the claimant was anecdotal at best, or else derived from the witness statements of witnesses that were unavailable for cross-examination. We accept that Mr Rutter would be unable to comment upon these cases individually because of their lack of specificity, and moreover because many of them pre-dated his time with the respondent. However, we accept his general characterisation of the earlier incidents as having been committed in the course of the employees duties, rather than (as in this case) actions that had no legitimate purpose.
44. He also made the following allegation: "Various members of staff have come forward to say that R Reece has had a go at them about COVID. I think he is gunning for them. He said they didn't need to go for a COVID test and one of them came back positive."
45. However, under cross-examination, the claimant admitted that he was not one of the employees who had 'made a stand' or had in any way been involved in any dispute (if indeed there had been one) relating to the COVID testing regime at the site. He further accepted that there was "no way of knowing that there's any connection between COVID and Mr Walsh reporting me for deadliffiting a trolley. It could be connected but there's no evidence of it".
46. The Tribunal therefore concludes that, in the light of this piece of evidence and the lack of any other basis for finding that any issue relating to COVID safety measures could give rise to any claim for automatically unfair dismissal under section 100 of the Employment Rights Act 1996, this issue falls away entirely and as such we need only concentrate upon the 'conduct' issue.
47. On 1<sup>st</sup> February 2020 Mr Rutter wrote to the claimant and set out each of the grounds of appeal as advanced in the hearing, though in relation to each of them upheld the decision to dismiss the claimant.
48. In summary, the reasons given were these. In relation to point 1, the examples of other breaches of health and safety were not sufficiently similar to be taken into account; in relation to point 2, the claimant had signed a SSOW training sheet and had received multiple safety briefings in relation to safe trolley handling; and in relation to point 3, the respondent had worked hard to improve the health and safety culture and had tried to implement a positive culture in that regard.
49. The claimant, via the respondent's employee relations advisor, exercised his right to a second appeal. Once again this was based primarily on the submission that the sanction was too severe when other options were available, but also alleged that it was in fact Kyle Rutter himself, along with another manager, Ryan Reece, that was responsible for the decision to dismiss him rather than Mr Eales - in essence, that neither Mr Eales decision, nor the appeal process conducted by Mr Rutter, were independent of each other.



50. The second appeal took place on the 11<sup>th</sup> February 2021 and was chaired by Ian Farmer the outbound logistics manager for the respondent who was based in Bristol and therefore had greater independence from the procedure thus far . Once again Mr Guggerty represented the Claimant.
51. The same complaint is made in relation to this second appeal that it was unfair to hold it in circumstances where the claimant could not attend in person. The Tribunal repeats the observations made in paragraph 38 above.
52. At this second appeal hearing, two substantive points were raised: firstly, the claimant believed that the decision to dismiss was too severe; and secondly that the decision to dismiss was not made by Mr Eales.
53. The second appeal covered much of the same ground as the first, and was dismissed by letter on 23<sup>rd</sup> March 2021.
54. However, before doing so, Mr Farmer investigated the complaints made in relation to Mr Rutter (regarding application of the respondent's health and safety policy, and also the issue relating to COVID) by interviewing him on 23<sup>rd</sup> February 2021.

## THE LAW AND CONCLUSIONS

### Legislation

55. Subject to any relevant qualifying period of employment (two years in this case) an employee has the right not to be unfairly dismissed by his employer (Employment Rights Act 1996, section 94). The Claimant plainly has served the relevant period and therefore has acquired that statutory right.
56. The legislative basis for 'conduct' being a potentially fair reason for dismissal stems from s98 of the ERA 1996 which reads:

#### *s.98 General*

*(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 some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it—*

*(a) ...*  
*(b) relates to the conduct of the employee,*

*(c) ...*

*(d) ...*

*(3) ...*

*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard 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 issue*

57. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. It is not in dispute that 'conduct' was the reason for dismissal in this claim.
58. Where the potentially fair reason given by the employer is misconduct, the Tribunal is to have regard to the guidance set down in the case of *British Home Stores v Burchell* [1978] IRLR 379, as per the list of issues set out above in paragraph 3 above.
59. *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT: the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. In *Sainsburys Supermarket Ltd v Hitt* [2003] IRLR 23 CA, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal
60. The Court of Appeal in *London Ambulance NHS Trust v Small* [2009] IRLR 563 warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct.

#### *Genuine Belief*

61. Did Mr Eales, acting on behalf of the Respondent, have a genuine belief that the Claimant was guilty of the misconduct alleged? We are quite sure that he did; and in any event it was not disputed by the claimant.

#### *Reasonable Grounds*

62. Having carried out as much investigation into the matter as was reasonable in all the circumstances of the case? Again, this is something of which we are perfectly satisfied. The investigation that was carried out was timely and thorough, and supported by direct eye witness accounts, CCTV footage, and of course a full and (initially at least) frank admission to the conduct alleged.

#### *Procedure*

63. We must next consider whether the procedure that the Respondent adopted was reasonable.
64. The main complaints about the procedure adopted by the respondent are, firstly, that Mr Eales was not acting independently in making the decision to dismiss the claimant, alleging that in fact he was being directed by others senior to him in the organisation, in particular Mr Rutter, who conducted the first appeal - and as a result both the fairness of the initial decision of Mr Eales and the subsequent appeal were tainted; and secondly, that there was a breach of the ACAS code applicable at the time by conducting the appeal hearings remotely.

65. Although initially pleaded, the first of the complaints was not supported by any evidence. Indeed, under cross-examination, the claimant accepted, when it was put to him, that he was indeed Mr Eales that made the decision to dismiss. This complaint therefore is not sustainable. We have already made it clear above that we do not accept that there is any substance in the second complaint in relation to the remote appeal hearings.

*Sanction*

66. Was the sanction within the band of reasonable responses? Ultimately this is the only question to which the Tribunal has had to consider at any length. We accept that there were compelling arguments both for and against dismissal in this case.

67. In favour of dismissal there is the fact that this was a flagrant and deliberate breach of Health & Safety rules, and, as has been stated a number of times already, one which could not be justified in the course of the claimant's employment. It was an act of horseplay rather than an accident or a shortcut taken by an employee.

68. It was also an act that could have had serious consequences. One or more members of staff could have been seriously injured. It was yet further aggravated by the fact that the behaviour did not cease immediately when first challenged, and the fact that the claimant colluded with others who also engaged in the same dangerous behaviour.

69. Finally there is the fact that the misconduct was compounded by the claimant's 'defensive' and unapologetic attitude to his behaviour when challenged by Mr Eales.

70. The Tribunal does not accept the assertions that the claimant was treated disproportionately harshly when compared to others that had committed breaches of health and safety. There is not sufficient evidence that would enable us to reach such a conclusion. Neither do we accept the generalised and largely anecdotal evidence of a culture of non-compliance at the respondent. Even if that were the case, it seems to us that it would be paradoxical to criticise a decision to enforce a health and safety breach merely because there may have historically been other breaches.

71. In favour of retention and issuing a final written warning (which we consider to be the only other feasible option open to the respondent) is the claimant's long and otherwise exemplary record with the respondent, which significantly exceeded the period of continuous employment. Although he was later found to be lacking in remorse, his reaction to Mr Callard was to offer a sincere apology and an insight into his behaviour which we consider to have been genuine.

72. Although there was undoubtedly the potential for serious injury to be caused by this incident, we must of course have regard to the fact that none was caused.

73. We also have regard to the fact that, whilst this was on any view a most unwise act, it was at a time when many people were feeling frustrated and bored as a result of the COVID lockdown which doubtless did impact on behaviour. We are confident that under normal circumstances the claimant would not have behaved in this way.
74. There were different views taken within the Tribunal in relation to this ultimate question. However, the Tribunal must avoid the temptation of substituting its own view for that of the respondent and must adhere to the correct test which is whether the decision to dismiss fell within the range of reasonable responses.
75. The prevailing view, by a majority, is that whilst some employers might not necessarily have dismissed the claimant in these circumstances, it was not unreasonable for the respondent to do so. We therefore conclude that the dismissal was fair.

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Employment Judge Conley

Date: 9 June 2023

Sent to the parties on: 9 June 2023

GDJ  
For the Tribunal Office