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EMPLOYMENT TRIBUNALS

Claimant: **Mr M Maher**

Respondent: **Vinci Construction UK Limited**

Heard at: **East London Hearing Centre**

On: **6 September 2016**

Before: **Employment Judge Ferris**

Representation

Claimant: In person
Respondent: Ms C Davies (Counsel)

JUDGMENT

The judgment of the Tribunal is that the Claimant's complaint of unfair dismissal is dismissed.

REASONS

1 The Claimant was employed as a Works Manager by the Respondent and had worked in the Respondent's (and its predecessor's) construction business from May 1996 to 8 March 2016 when the Claimant was dismissed for gross misconduct. Briefly, the circumstances which led to the dismissal are as follows. The Claimant was in charge of a site on a public road. While the Claimant was working in another area on the site a telehandler was driven with the two near side wheels in a trench about 250mm deep while carrying an under slung concrete load in a skip. The telehandler fell on its side. Although the equipment (the telehandler/forklift truck) was an appropriate vehicle for moving the concrete skip, and the telehandler was driven by a qualified and experienced operator, and the method in use had been tested on a trial run supervised by the Claimant and agreed to by the experienced operator, and there was evidence to suggest that after the Claimant had approved the working method the skip load was increased, a decision was made and notwithstanding the Claimant's long and efficient service, to dismiss him for approving an unsafe working method.

2 The contract being worked on at the time was part of the well-known Respondent construction company's Cross Rail obligations and the work was taking place in a public location. No one was injured in the accident and the equipment was undamaged. The Respondent acknowledged in its evidence that this was a severe albeit reasonable sanction in all the circumstances.

3 Section 98 of the Employment Rights Act 1996 sets out how the Tribunal should approach the question of whether the dismissal is fair. There are two stages:

- First the employer showed the reason for the dismissal and that it is one of a potentially fair reason set out in Section 98(1)(2) – in this case conduct

- If the employer is successful in the first stage the Tribunal must then determine whether the dismissal was fair or unfair under Section 98(3A)(4).

4 This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given. It is the employer who must show that misconduct was the reason for dismissal. According to the Employment Appeal Tribunal in *British Home Stores v Burchell [1980] ICR 303* a three fold test applies. The employer must show that:

- It believed the employee was guilty of misconduct

- It had in mind reasonable grounds upon which to sustain that belief; and

- At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

5 This means that the employer need not have conclusive direct proof of the employee's misconduct – only a genuine and reasonable belief, reasonably tested. Establishing that the reason for dismissal relates to the employee's conduct under Section 98(2)(b) ERA is simply the first stage in the process. While the *Burchell* test is relevant to establishing the employer's belief in the employee's guilt – and therefore to establishing the reason for dismissal – it applies equally to the question of whether it was reasonable for the employer to treat that reason as a sufficient reason to dismiss in the circumstances.

6 When assessing whether the *Burchell* test has been met the Tribunal must ask itself whether what occurred fell within the range of reasonable responses of a reasonable employer. The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached – see *J Sainsbury Plc v Hitt [2003] ICR 111 CA*.

7 Whether an employee's behaviour amounts to misconduct or gross misconduct can have important consequences. Gross misconduct may result in summary dismissal, thus relieving the employer of the obligation to pay notice pay and potentially justifying the sanction of summary dismissal. Paragraph 23 of the Acas Code states that the employer's disciplinary rules should give examples of what the employer regards as gross

misconduct i.e. conduct that he considers serious enough to justify summary dismissal. The Code suggests that this might include (among other matters) gross negligence. In work places with significant health and safety risks any breach of a health and safety procedure or some error of judgment which carries health and safety consequences may be viewed as gross misconduct justifying dismissal, whereas a similar breach in a workplace where workers are not exposed to the same level of risk may warrant only a warning.

8 Before turning to the evidence in this case in making findings of fact I shall record that the Claimant presented his case and cross questioned the Respondent's witnesses with intelligence and skill. In the presentation of the evidence, and notwithstanding the Respondent's conclusion in the disciplinary proceedings, it was apparent that the Respondent had had and continued to have considerable respect and regard for the working skills of the Claimant which had been provided for the benefit of the Respondent over a period of very many years.

9 At the outset of the case when in response to a question from the Tribunal the Claimant confirmed that he had already found replacement work at a management level which was better paid than his work for the Respondent, the body language of the Respondent's witnesses sitting at the back of the Tribunal gave a clear indication that they were pleased and relieved that this was the case.

10 I heard evidence from Mr Jones, the Investigation Officer, and Mr Johnson the Disciplinary Officer and Mr Whitman, the Appeal Officer. I also heard evidence from the Claimant. I made the following findings of fact.

11 Chris Jones has worked in health and safety for 11 years and in June 2013 was promoted to health and safety manager in the Respondent's business and took charge of their Victoria Station Project.

12 On 15 February 2016 Mr Jones was notified that a machine turned over on the Victoria Dock Road. When he arrived the following day he was instructed to start a health and safety investigation into the accident. When he arrived on site statements were in the process of being taken from individuals involved in the accident. Mr Cojacaru the banks man was interviewed. The Claimant was interviewed. On a later occasion the driver Mr Pavelescu (who was still shaken following the incident) was also interviewed.

13 Briefly, the circumstances of the accident were as follows. As a result of subsidence in the public highway presumably attributable to Cross Rail excavation the Respondent was detailed to repair the roadway. That involved cutting through the surface of the highway and excavating the subsided ground beneath and refilling it with a stable base media and then filling the trench with reinforced concrete and topping off with tarmac. There was a three day window of opportunity to complete these emergency road repair works on Victoria Dock Road There was an emergency road closure between 15 and 19 February 2016. The actual works were to take place over three days to allow time for the concrete trench fill to cure before they reopened the road to traffic.

14 The initial stages of the work were completed ahead of time and accordingly on 15 February the Claimant as the works manager made enquiries about the possibility of procuring a concrete delivery to site of short notice. At about 3.00pm that afternoon the

Claimant put together a team of operatives to lay the concrete. He discussed using a telehandler to get the concrete from the roadside cement lorry to the trench location. It was agreed to use a telehandler lifting a concrete skip via a hook attachment. The week before the window of opportunity it had been proposed to use the telehandler operated on flat ground straddling the trench.

15 Unfortunately that was not possible on the day because there was a lamp post or bus stop post one side of the trench which made it impossible to straddle the trench with the telehandler wheels. It would have been possible to bridge the trench so that the telehandler could work round the post but that would have taken a little more time. Accordingly the Claimant and the telehandler driver discussed a proposal to the move of the telehandler so as to put its two near side wheels down into the trench approximately 250mm lower than its offside wheels and in that fashion to drive along the trench carrying the concrete which was then to be let out of the skip at the end of the trench and spread by hand over the reinforcing bar already laid in the trench.

16 Evidently the decision to drive the telehandler on one side down into the trench put it at risk of instability, an instability which was compounded by the swinging load of fluid concrete inside the skip. According to the statements taken and then collated by Mr Jones in his investigation Mr Cojacaru and Mr Pavelescu the banks man and driver respectively both said to the Claimant that they were uncomfortable with the method. According to Mr Pavelescu the Claimant said that he had undertaken this method of work in the past and it had been successful. A trial was undertaken first of all without a load attached and then with a half full skip attached. On the basis of those trials the Claimant and Mr Pavelescu agreed that the method was acceptable and they proceeded with the operation. The first, second and third loads were moved along the trench in the method suggested and approved by the Claimant and without incident.

17 At the end of the first three concrete pours the Claimant moved to work on another section of trench about 25 meters away. The operatives in the road side tanker supplying the concrete suggested that as the mix was a little dry additional water should be added to the fourth pour to make it more workable (to facilitate the manual distribution of the concrete pour at the bottom of the trench). Water was added to the fourth load while it was on the mixer lorry and when that fourth load was put in the skip swinging below the telehandler front arm the driver said that the telehandler felt heavier and less stable, but he continued with the operation. He did not refer to the Claimant. As the driver was manoeuvring the telehandler with two of its wheels down in the trench the concrete skip started to swing towards the near side of the vehicle, the telehandler overbalanced and landed on its side and the driver climbed out through the rear window. The telehandler had fallen on an area of pavement which was guarded by banks men but which was nevertheless a public space. No one was injured.

18 The investigation report found that the root causes of the incident were "a misplaced motivation in getting the work done" quickly and that there had been a "procedural breakdown" which included "poor planning, assessment, records and briefing on work done". In particular Mr Jones, the investigator considered that the Claimant had failed to comply with company procedures in the way he planned his work. He found that the Claimant did not produce a task control sheet (including a point of work risk assessment and associated control measures) and that the Claimant had altered the planned method of work for the following day unnecessarily (by bringing forward the task

of pouring the concrete). The motivation of the Claimant was clear. He had acted in what he felt was the best interests of the Respondent and that is to complete the work speedily and efficiently.

19 Notwithstanding the Claimant's motivation to benefit the Respondent the investigating officer reached the clear conclusion that the method of work (that is to say using a telehandler on uneven ground with a swinging load) was fundamentally risky and that public safety and the safety of the workforce had been put at risk. As the investigator explained to me, the Respondent as a construction company carrying out important public contracts often in public locations, the Respondent cannot afford to have people working for it who take unnecessary risks, and employees must not work without appropriate regard for the health and safety implications of a particular method of work.

20 During the course of the investigation the Claimant I find had told the investigator that he had previous experience as a telehandler and the investigation concluded that such previous experience should have contradicted the use of the telehandler in the way prescribed by the Claimant. The investigator also concluded that the Claimant was the most senior person on the site on that day and in charge of dozens of people. The investigator concluded that the telehandler operator felt a certain element of pressure as a junior member of staff and his willingness to execute what was proposed by the Claimant reflected a degree of pressure.

21 The Claimant was invited to a disciplinary hearing on 7 March 2016. At that hearing the Claimant acknowledged the method he had adopted to use the telehandler was not the best way to carry out the work. He acknowledged frankly at the Tribunal that it had been "a bad call". Nevertheless he made the point at the disciplinary hearing that no one had been hurt, no harm had been done, and responsibility for what had happened should be shared to an extent by the experienced telehandler operator who had in the Claimant's honest opinion appeared to be reasonably content with the proposed method of work which had been decided on following a careful trial.

22 The Claimant explained at the disciplinary hearing that he had not been present when the parameters of the method of work had been changed, so that the concrete load had been made more liquid with the addition of water and in all probability a slightly larger or heavier load had been placed in the skip, two factors which were significant as contributors to the accident.

23 The disciplinary officer Mr Neil Johnson is currently contracts' director for Taylor Woodrow Construction. Taylor Woodrow is the civil engineering division of the Respondent. He is responsible for two projects Cross Rail West and Filton Bank, both Network Rail projects. He has overall responsibility for these two projects with respect to safety, quality, programme, profitability and customer relationship. As part of his role with the Respondent he is responsible for conducting disciplinary hearings as required in the rail sector.

24 Following the Claimant's suspension from work (on full pay) on 26 February 2016 pending the disciplinary hearing the Claimant was invited in an appropriate letter to attend a disciplinary hearing on 7 March 2016. The accident investigation report, root cause analysis, together with statements from the banks man, senior manager John Sherman, the Claimant and the driver, and extracts from the employee handbook were all available

for the disciplinary officer and also for the Claimant prior to that hearing.

25 Misconduct is identified in the extract from the employee handbook to include "workmanship below the standard required by the company for the purposes of the particular site" and in a passage dealing with gross misconduct:

> "The following list which is not exhaustive sets up the information of employees examples of gross misconduct and/or gross negligence which are likely to lead to dismissal without notice… serious breach of Health and Safety Work Act 1974… conduct likely to endangered persons or property … conduct liable to bring the company into disrepute… serious breach of company procedures …"

26 Mr Johnson explained to the Tribunal in his evidence that as the investigation report was very comprehensive there were relatively few issues that were unclear. He prepared some questions on a number of issues highlighted by the investigation which the Claimant responded to at the disciplinary hearing. The purpose of the questions was for Mr Johnson to determine the root cause of the accident and the responsibility that the Claimant held in relation to the decisions leading up to the accident. The meeting took something over an hour.

27 Mr Johnson noted that there had been a walk round of the site in the week before the accident when the Claimant's line manager John Sherman and the Claimant had agreed how the concrete would be delivered to the trench. It had been agreed that the wheels on the telehandler would straddle the trench on even ground. That was because the telehandler was to be carrying a swinging load which is potentially more dangerous, less stable than a fixed load. The Claimant had not produced a task control sheet which was a requirement of the company procedures and the disciplinary officer decided that the Claimant had made a decision to change the method in haste, and unnecessarily. That decision had been made in the conclusion of Mr Johnson without proper regard to health and safety.

28 Mr Johnson did not feel that it was right for the Claimant having regard to his experience and seniority to put the blame on the driver. The failure to identify the boundaries of the way in which the telehandler should engage in this risky work method allowed the operators to change the parameters (by increasing the load and increasing the fluidity of the load) which compounded the risk of an accident.

29 In giving his evidence to the Tribunal Mr Johnson acknowledged the severity of the sanction particularly having regard to the Claimant's length of loyal and good service. He said that he had considered a final written warning or demotion but in all the circumstances including the Respondent's reputation, and what he felt was the Claimant's refusal to accept full culpability, in his judgment a dismissal was warranted and justified. The same day as he made the decision to dismiss the Claimant (but the day before he actually communicated that decision to the Claimant) he reached the conclusion that a sanction less than dismissal was appropriate for the telehandler, to whom he gave a written warning.

30 Had I been the disciplinary officer on the day I would not have concluded that the Claimant's role in the circumstances leading to the accident amounted to gross misconduct. On the basis of the information which I heard there were grounds for

criticising the Claimant but on balance although I would have identified an error of judgment and possibly misconduct in that, I would not have identified gross misconduct. That is primarily because telehandlers are designed to work on uneven ground and are fitted with large diameter heavy profile tiles to enable them to function on the uneven surfaces which are commonplace on building sites. The use of the telehandler on a building site inevitably involves its use on uneven ground. The use of a telehandler to carry a swinging load is also commonplace. It was not until January 2016 that a further training scheme was introduced to deal with the inherent instability and associated risks of telehandlers carrying swinging loads.

31 However it is not my function as an Employment Judge in this case to reach an independent conclusion on balance of probabilities as to whether or not (in my judgment) this was gross misconduct. I am not able to say that no reasonable employer would have reached the conclusion in the circumstances of this case that what the Claimant did was gross misconduct. I am constrained by the law to respect the decision that was made by Mr Johnson in the way that I have explained and despite my own and different judgment on the issue.

32 As to the sanction engaged by Mr Johnson, again, while it would not have been the sanction I would have imposed had I been in Mr Johnson's shoes, that is that is not my function in this case. I cannot say that no reasonable employer would have decided to dismiss this long serving employee once that employer had reached the conclusion that there had been gross misconduct, and after giving due consideration to all the circumstances which I find was done by Mr Johnson.

33 The Claimant appealed the decision to dismiss. The appeal was heard by Mr Peter Whitman who has since 2014 been Highways Sector Director for the Respondent. He has responsibility for compliance with health and safety legislation and company health and safety policy and procedures. He conducted the disciplinary appeal hearing on 7 April 2016. The Claimant appealed on the basis that he had consulted with the telehandler operator on a safe system of transporting the concrete using the telehandler, and

33.1 The operator in his own experience of judgment was satisfied that there was a competent method of delivery

33.2 The Claimant had insisted on a trial run initially without a load and then with half full skips and instructions had been given to proceed with a skip containing no more than half a load.

33.3 On the fourth delivery the skip was over full (certainly more than half full) and the Claimant was not present and had not been consulted on the change in the working parameters.

33.4 The Claimant had an impeccable health and safety record in the 19 years employed by the business.

33.5 The Claimant had made such liability laden decisions in the past on many occasions and in particular when his senior construction manager had not been available.

34 At that appeal hearing the Claimant acknowledged that it was a serious incident but expressed his relief that no one was injured. Having heard the evidence and reflected upon it Mr Whitman decided that the method of working specified by the Claimant was responsible for the accident. In Mr Whitman's view there was an unacceptably high level of risk which should have been apparent to the Claimant. It was Mr Whitman's view that the company was fortunate that no one was injured. The Claimant was a senior manager responsible for that area of works. He could not deflect that responsibility to a junior driver. Accordingly Mr Whitman upheld the decision to dismiss.

35 In my judgment and notwithstanding the points that I have made about gross misconduct and sanction I cannot say that this was an unfair dismissal. The procedure engaged in the investigation, the disciplinary hearing, and the appeal, was exemplary. This was a fair dismissal within the law as I have identified it. The claim for unfair dismissal fails.

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Employment Judge Ferris

22 September 2016