EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Royal	**v**	**Atalian Servest Ltd**

Heard at: Bury St Edmunds **On:** 12th November 2021

Before: Employment Judge King

Appearances
For the Claimant: Mr Otchie (Counsel)
For the Respondent: Ms B Breslin (Counsel).

RESERVED JUDGMENT

1. The claimant's claim for a redundancy payment is dismissed on withdrawal.
2. The claimant was unfairly dismissed.

RESERVED REASONS

1. The claimant was represented by Mr Otchie (counsel). The respondent was represented by Ms Breslin (counsel). I heard evidence from the claimant. Another witness statement was served on behalf of the claimant for Mr Awoben but he did not give evidence before the Tribunal.

2. I heard evidence from Teodora Begovska, Andrew Zeiten and Shane Farrell on behalf of the respondent. The claimant and respondent exchanged witness statements in advance and prepared an agreed bundle of documents.

3. At the outset the claims were identified as unfair dismissal and a claim for redundancy payment. At the outset of the hearing the claims were clarified and counsel for the claimant confirmed that the claimant did not wish to pursue the redundancy payments claim and it was withdrawn and is dismissed on withdrawal.

4. The hearing was listed for one day but given that there were four witnesses this left insufficient time to conclude the case and the Tribunal had to reserve judgment in the case. We sat later than usual to conclude submissions.

5. During the course of the hearing it transpired that the claimant was unable to read. This made cross examination of the claimant more difficult and it was agreed that counsel would read out any passages in the bundle which I would ensure were accurate. The parties adapted to this well and both counsel are commended for the professional approach taken in this regard. An additional break was taken so that the Tribunal could be satisfied that the claimant had understood his witness statement and it could be taken as his evidence in chief. His counsel took time to read this to him and there were no amendments.

6. The issues as to liability were identified at the outset of the hearing as follows. The claimant being an employee with the requisite service to bring a claim. Dismissal was not in dispute.

   Unfair dismissal

   6.1 What was the reason for dismissal? The respondent relied on conduct as the reason for dismissal or in the alternative some other substantial reason in that the refusal to sign the document amounted to a fundamental breach of the implied term of trust and confidence.

   6.2 If so was the dismissal fair or unfair in accordance with s98(4) ERA 1996 and did the respondent act within the band of reasonable responses specifically that?

      6.2.1 Did the respondent hold a genuine belief in the claimant's misconduct on reasonable grounds?

      6.2.2 Was the decision to dismiss a fair sanction i.e. within the range of reasonable responses for a reasonable employer?

   6.3 If the dismissal was unfair, did the claimant contribute by culpable conduct?

   6.4 Does the respondent show that if there had been a fair procedure the claimant would have been dismissed in any event, and if so, to what extent and when?

The Law

7. Dismissal under s.95 of the Employment Right Act 1996 not being in dispute, the claimant has the right not to be unfairly dismissed by the respondent under s.94 of the Employment Rights Act 1996.

8. S.98 of the Employment Rights Act 1996 states that:

> **"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) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (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 case.
>
> (5) ….
>
> (6) …."

9. The respondent relies on contributory conduct and seeks a reduction of the basic and compensatory award in the event that the claimant is successful in his claims. In addition to the statutory tests, the case of *Nelson v BBC (No. 2) [1979] IRLR 346* has a helpful summary of the factors to be considered in such cases. The relevant provisions are found in 122 and s123 of the Employment Rights Act 1996 as follows:

10. S122 of the Employment Rights Act 1996 states that:

122.— Basic award: reductions.

(1) ….

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

(3)
(4)…
(5)…

11. S123 of the Employment Rights Act 1996 states that:

123.— Compensatory award.
(1) Subject to the provisions of this section and [sections 124, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
(b) any expectation of such a payment,
only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122 in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5) ……

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

(6A) …..
(7) ….
(8) ….

12. In conduct cases one must have regard to the case of *British Homes Stores Ltd v Burchell [1980] ICR 303* which set out a three-step test where the respondent must hold a reasonable belief, formed on reasonable grounds and following a reasonable investigation. Regard must also be had to the ACAS Code of Practice on Discipline and Grievance (COP1).

13. In addition, the respondent's counsel drew my attention to a number of cases within her helpful written submissions as follows:

Orr v Milton Keynes Council [2011] EWCA Civ 62
British Leyland Ltd v Swift [1981] IRLR 91
Sainsbury's Supermarkets v Hitt [2002] EWCA Civ
Taylor v OCS Group Ltd [2006] EWCA Civ 702
Union of Construction, Allied Trades and Technicians v Brain [1981] ICR 542
Iceland v Frozen Foods Ltd v Jones [1983] ICR 17
Foley v Post Office [2000] ICR 1283
London Ambulance Service NHS Trust v Small [2009] EQCA Civ 220
Polkey v AE Dayton Services Ltd [1987] ICR 142

14. The claimant's counsel gave helpful oral submissions and made reference to the authority of *Strouthos v London Underground Ltd [2004] EWCA Civ 402*.

15. I have had regard to these cases.

Findings of Fact

16. The claimant was employed by Voith Industrial Services Ltd from 15th May 1997 as a tanker. This involved refilling trains with water. The claimant's employed transferred under TUPE to another provider Leadec Limited and then again to the respondent on 10th February 2020. At the time of the transfer the claimant was employed as a Tanker window and button.

17. The respondent is a provider of outsourced facilities management services. The claimant was based at Euston station although the respondent operated across different sites.

18. There was a dispute about when and if the claimant was moved to the role of cleaning operative before the transfer. The respondent based its information on the employer at the time and that which was given to it. The transferor was required to provide information to the respondent as part of the TUPE process. This made reference to the claimant being a cleaning operative. It was the claimant's position that his role was Tanker Window and Button, that this involved cleaning yellow buttons on the outside of trains and any other reasonable duties that the manager or supervisor required. The claimant accepted that there was an element of cleaning involved and that he never changed his role to turnaround cleaner. I prefer the evidence of the claimant on this point. He has been in the role for 23 years and was clearly experienced. The claimant also

had a back problem and dizziness when bending which he said were not suited to the role of turnaround cleaner. The claimant referred to these as his disabilities but the legal definition of which has not been tested and I make no finding in this regard.

19. The claimant took pride in his role and his job title was important to him and it was clear that he considered the role of turnaround cleaner to be unsuitable for him and a step backwards. The claimant's Network rail ID badge still identified him as a tanker.

20. In June 2020 the claimant raised a grievance as he felt that the respondent was trying to change his job title and that the previous employer had attempted to do so since 2018. In the outcome to the grievance letter dated 21st July 2020 the respondent told the claimant that whilst his duties were amended in 2018 but his job title was not changed so no consultation was required. The grievance was not upheld. The claimant remained suspicious that the respondent was trying to make his role into that of turnaround cleaner. The respondent made a referral to occupational health about the claimant's health concerns.

21. On 3rd August 2020 the claimant signed a training record of the respondent which included health and safety training and site hazard training. This was completed with his job title as Tanking and window butting. The claimant said that this included sharps and biohazard training and that he had been doing the role for a long time and that this was standard. I accept that evidence albeit that this was not detailed training but an overview as to risks in the summer. This risk had been present to the claimant for some time in his role.

22. On or around 17th September 2020 following a needle incident at Euston, the respondent briefed its employees about needlestick sharps. It is not in dispute that the claimant attended that briefing. There was a great deal of confusion about what document the claimant was asked to sign on that day. It transpired during the course of the hearing that the claimant could not read and would have been unable to read the document in front of him. The respondent did not know this at the time and neither the claimant nor his union representative drew this to the attention of the disciplining officer or appeal officer which would have been the sensible thing to do.

23. The claimant was adamant that the document he was asked to sign was another form like the one on 3rd August 2020 but with the job title "turnaround cleaner" and that is why he refused to sign it. He thought the respondent was trying to change his job title given the recent grievance and was suspicious. The claimant when asked was adamant the form was not the form presented to the tribunal as this was very pictorial with pictures of the broken glass, a hand and the sharps clean up kit. As such he was clear that he would have known the difference. I prefer the claimant's evidence on this. There is no reason why he would refuse to sign the form if was as asserted the needle picture as a list of names and signatures was present but no job titles.

24. It is however agreed that he refused to sign a document from the respondent. This is not in dispute. The claimant then went on annual leave and returned to work on 5th October 2020.

25. In between the claimant instructed a solicitor who wrote to the respondent setting out that he had been asked to perform turnaround duties, it made no reference to the document he was asked to sign within the body of that letter. It does refer to the occupational health advice but that this was obtained with the wrong job title. The respondent did not reply to that letter.

26. The claimant returned to work on 5th October 2020 and in the morning in a meeting with Mr Argote his line manager he was asked to sign the document again. The claimant advised that he would do so if the job title was changed. The claimant then went about his duties. At around lunchtime that day the claimant was called into the meeting again and asked if he would sign it and the claimant refused. He was suspended by Mr Argote and the claimant became agitated at this. The claimant raised his race and that he was not being treated fairly. The claimant went to see his union member and he went to see Mr Argote and was told the claimant had refused to sign a safety briefing but that no threatening behaviour was referenced. The first part is not in dispute in so far as the claimant was suspended for failing to sign a respondent's document. The second element is in dispute and I can only attach very limited weight to the union officer's statement as he was not present to be cross examined and it is not signed with the usual statement of truth.

27. Having considered both sides evidence on the matter of what was said on the 5th October 2020 I prefer the claimant's evidence although I accept that he did become agitated by the matter as the respondent suggests albeit not to the extent alleged. The claimant was a credible and straightforward witness who has a limited grasp of reading but it is clear he was very passionate about his role and being suspended in the manner he was agitated him. He did not understand why he was being suspended when all the respondent had to do is change the job title. He did not understand what he was being asked to sign and was concerned that his contract was being changed on the sly.

28. By letter dated 6th October 2020 the claimant's suspension from duty was confirmed. The letter confirmed that an investigation was being conducted but not the reasons why the claimant was suspended. The letter came from Zoe Stonehouse HR Business Partner who did not give evidence before the Tribunal but was heavily involved in the whole process in this case.

29. By letter dated 12th October 2020 the claimant was invited to attend a disciplinary investigation meeting on 16th October 2020 at 12 noon at Euston station and the claimant was told that he had no right to be

accompanied. Again no detail as to the allegations was included at that stage.

30. The investigation meeting was held by Teodora Begovska. In advance of the investigation meeting Zoe Stonehouse, HR Business Partner reviewed the evidence and provided the investigating officer with a series of questions to be asked and closed with the comment that "Please do ensure that you cover all of the above as we really need a detailed and coherent investigation".

31. The claimant attended the meeting on 16th October 2020 and was permitted to be accompanied by his union representative notwithstanding the invitation said he had no such right. Notes were made of the meeting. The claimant did not sign the notes at the end of the meeting preferring to take them away and review them without the pressure before signing. Of course what we know now (but was not known to the investigating officer) is that the claimant could not have read them to confirm their accuracy.

32. By letter dated 29th October 2020 the respondent confirmed that investigations were still continuing into the matter and that they would be in touch. During this period the claimant remained suspended. It is not clear who decided that the matter should progress to a disciplinary hearing and the allegations but as the letter came from HR this was likely to be her decision.

33. By letter dated 10th November 2020 the claimant was invited to attend a disciplinary hearing on 18th November 2020. The letter set out two allegations which if proven amounted to gross misconduct. The letter was again drafted by Zoe Stonehouse HR Business Partner. The meeting was with Andrew Zeitzen Account Director and a range of possible outcomes were cited up to and including dismissal. The allegations contained within the letter were:

    - *"Refusal to acknowledge the content of, or sign to confirm agreement with a sharps and biohazard safety meeting which is vital to ensure the safety of colleagues at work;*
    - *Threatening and intimidating and unacceptable behaviour toward your site manager, Mr Jorge Argote specifically in relation to the following:*
        - *Accusing Mr Argote of being racist*
        - *Advising Mr Argote that he should be careful as you have a police officer in your family*
        - *Advising Mr Argote that you will make sure he leaves his job before you do."*

34. The claimant failed to attend the meeting and a revised meeting was arranged for 25th November 2020. The letter inviting the claimant to the meeting enclosed a number of statements and the investigation meeting notes and the alleged sharps and biohazard safety briefing as well as the disciplinary policy.

35. The respondent's disciplinary policy had examples of misconduct, serious misconduct and gross misconduct. Under misconduct the respondent listed; general unacceptable behaviour – impoliteness of vernal abuse of colleagues or customers, failure to follow a reasonable management request, failure to implement the company's polices and procedures, failure to abide by the general health and safety rules and procedures. Under serious misconduct it listed; repeated or wilful failure to carry out safe working practices. Under gross misconduct it listed; deliberate infringement of health and safety policy or legislation and failure to carry out any reasonable management instructions including acts of serious insubordination. The lists all had other examples not relevant to this case.

36. The sanctions under the disciplinary policy included dismissal but only if the first and written warnings had been used or if the case was one of gross misconduct. It was not in dispute that the claimant had both long service and a clean disciplinary record.

37. The claimant attended the reconvened meeting on 25th November 2020 with his union representative. In the meeting the claimant highlighted that it was not the sharps record he was asked to sign and he did not receive the outcome of the grievance earlier in 2020. Mr Argote attended the meeting and confirmed that he "*asked him to sign the needle stack brief. My intention was to ask him to sign the training record. The reason I asked him was initially his supervisor asked him and he refused to sign*." This appears to support the claimant's case that the training record was the document he was asked to sign but this is not picked up by the respondent. It is not clear why Mr Argote would reference this document otherwise. The training record was the document the claimant said he refused to sign with the wrong job title, this was agreed between the parties.

38. The claimant was asked about the allegations of what he was said to have said to Mr Argote. In connection with the police comment the claimant said he reported the matter to the police and they noted down the details on a stop and search card. This is the same evidence the claimant gave t the Tribunal. The claimant accepted that he felt that black people were treated differently in the disciplinary hearing. The union representative raised that he was not sure where the gross misconduct was coming from and that it was too strong for the allegations. The meeting concluded with Mr Zeitzen going away to look into whether anyone else had refused to sign the briefs and he would "*take on board the level that we are at with gross misconduct or misconduct."*

39. By email dated 2nd December 2020 Mr Zietzen drew his conclusions and sent these to Zoe Stonehouse HR Business Partner. On the briefing his conclusion was:

"Mr Royal's refusal to sign the safety brief constitutes gross misconduct as he has failed to follow a reasonable management request and health and

safety guidelines as well as compromising his safety and the safety of his colleagues. It should be noted that Mr Royal has failed to sign the last eight safety briefs dating back to Mar 20. "

40. In evidence Mr Zeitzen accepted that he could not recall whether this information had come from and accepted that it was however incorrect nevertheless it was a factor in his mind when he made the decision. In respect of the threatening behaviour his conclusion was:

"I believe Mr Royal's behaviour was threatening and intimidating but does not constitute gross misconduct as his conduct, in my opinion was at the lower level and more of a result of his issues and frustrations with his job title. "

41. In the hearing Mr Zeitzen accepted that he would not have dismissed for the second allegation. His conclusion in the email was that the claimant should be dismissed for gross misconduct for failing to sign the safety briefing.

42. By letter dated 9th December 2020 this email was added to and edited considerably to provide Mr Zeitzen's reasons and this letter was accepted to have been drafted by HR but Mr Zeitzen accepted that he had seen it before it was sent and did not disagree with it. The letter confirmed the claimant's summary dismissal in line with the reason given in the email and this was with effect from the date of the letter. The claimant was given the right of appeal.

43. The claimant exercised his right to appeal. The claimant attended an appeal hearing with his union representative on 19th January 2021. The meeting had to be rescheduled. The appeal was heard by Shane Farrell. The appeal officer dismissed the appeal for the reasons stated in the letter dated 8th February 2021. The appeal officer concluded that the decision should be upheld because they had formed the reasonable belief that the claimant "*refused (and continued to refuse) to acknowledge and confirm your agreement with a heath and safety document which is put in place to ensure the safety of colleagues and passengers and is therefore of critical importance."*

44. Both the appeal officer and the dismissing officer accepted that at no point did they ask the claimant to sign the document before they reached their decision. The appeal officer further accepted that there was no basis for the statement made as set out above.

45. The respondent is not a small employer and has the resources of a HR department including senior members of HR team.

46. The claimant commenced ACAS early conciliation after his dismissal on 11th December 2020 and his ACAS early conciliation certificate is dated the same day. The claimant presented his claim to the Tribunal on 20th

January 2021 and there are no issues with time and thus jurisdiction in this case.

Conclusions

47. I remind myself that it is not for the tribunal to substitute it's view for the respondent, it must merely satisfy itself that dismissal fell within a range of reasonable responses. It is not for me to establish the guilt or innocence of the claimant in these proceedings. It is about what the respondent knew or ought to have know at the relevant time and the respondent's actions in this case. The question of the claimant's conduct then becomes relevant on the issue of contributory fault.

48. In particular in this case it is important to remind oneself that it was clear and apparent to the Tribunal and the parties that the claimant could not read but this was a fact not known to the respondent at the time. It is surprising given the dispute about the document that the claimant was asked to sign that neither the claimant nor his union representative raised this matter at the relevant time. The respondent must however be judged on the facts at the time and not on this new matter which has come to light. Turning to the list of issues:

<u>What was the reason for dismissal?</u>

49. The respondent alleges conduct as its primary reason. It is for the respondent to establish the reason for dismissal. In this case no other reason is asserted by the claimant as being the real reason he was dismissed.

50. It was the claimant's actions which led to the disciplinary matter and as such I accept that there are no other reasons for dismissal other than conduct.

51. The respondent asserts that this was a gross misconduct case and for the reasons set out below this is clearly not gross misconduct as a matter of common sense or in line with its own policy.

52. The respondent relies in the alternative as a SOSR justifying dismissal as the claimant was in fundamental breach of the implied term of trust and confidence entitling it to dismiss. This was a one off incident and not serious in nature to constitute gross misconduct and in effect it cannot therefore be a fundamental breach of trust and confidence.

<u>Did the respondent hold a reasonable belief in the claimant's misconduct on reasonable grounds?</u>

53. The respondent carried out an investigation and took a number of statements in this case. An independent manager heard the investigation and the claimant was permitted to be accompanied by his union

representative. The notes were never agreed and no statement was produced although this is not fatal.

54. The claimant was not shown the safety briefing in the investigation meeting so the issue over what he had been asked to sign was not apparent. Further investigations were done and the process was not rushed.

55. By the time it came to the disciplinary hearing he had been shown the purported document and was quite clear this was not what he was asked to sign. The respondent had not considered Mr Argote's odd comment about it being his intention to get the claimant to sign the training record instead.

56. Mr Zitzen accepted that it was not correct that this was the eight time he had refused and it was clear that this was not put to the claimant and yet this formed part of his decision. It was fundamentally flawed and this belief was not held on reasonable grounds following a reasonable investigation.

57. It appears that Zoe Stonehouse was heavily involved in the investigation including the questions to be answered and that it needed to be detailed and coherent which could suggest a level of predetermination. No evidence was led as to who concluded it was gross misconduct and should proceed to disciplinary and then dismissal. The investigating officer accepted she would not have dismissed. The Tribunal is troubled by the HR involvement and that Mr Zietzen's emailed reasons have been added to and indeed embellished considerably for gravity in the outcome letter. Again, there is HR involvement and there is no audit trail as to how the appeal officer reached those conclusions as the letter was not signed off by him. It is not clear if they gave their thoughts orally or in an email to HR to be turned into the outcome letter. It is not clear how much HR influenced the decision and she did not give evidence in this case.

58. The dismissing officer did not consider the conduct towards Mr Argote by the claimant on the day in question to be serious enough to warrant more than misconduct and a warning. When asked in evidence which gross misconduct example in the disciplinary policy he relied on for establishing gross misconduct in respect of the briefing, he said it was a deliberate infringement of health and safety policy or legislation. However he could not point to any such relevant health and safety policy or legislation that required health and safety briefings to be signed. No policy has been established. Instead his belief was founded on incorrect information from an unknown source that the claimant had refused on eight occasions perhaps to sustain the deliberate point. This is a gross exaggeration of the reality of the situation. It is not a belief that could be held on reasonable grounds following a reasonable investigation.

59. It was agreed that the claimant refused to sign a document and at best this would be failure to follow a reasonable management request and

misconduct. The issue is whether it was a reasonable management request. If it was the document the respondent relies on (which I do not accept as stated above) then the claimant would have failed to follow a reasonable management request. Needles were not a new hazard, the claimant had been in the role 23 years and had attended the safety briefing in question and had had numerous safety briefings and training in the summer that year. If the claimant was asked to sign a training record with the wrong job title on which the respondent refused to change when he asked them to then this would not be a reasonable management request in the first place.

60. However the respondent did not know that the claimant could not read and had evidence to conclude that the claimant had failed to follow a reasonable management instruction in refusing to sign the form. It had statements and on this basis could hold that belief in the claimant's misconduct on those grounds which would be reasonable. It had done as much of an investigation in line with BHS as was reasonable in the circumstances. It however went much further.

61. There is no evidence to sustain the respondent's belief that the claimant failed to follow health and safety guidelines as well as compromising his safety and that of colleagues and that he had failed to sign the last eight safety briefings. Without this additional element the claimant was not and no reasonable employer would conclude he was guilty of gross misconduct.

62. The respondent further never asked the claimant to sign the form in either the investigation, disciplinary or appeal meeting and there is no evidence to sustain the appeal officers conclusions (if indeed they were his and not the HR business partner's) that he still refused to do so. This forms a fundamental part of the appeal conclusions which is unsustainable. Again this belief was not held on reasonable grounds following a reasonable investigation.

63. The respondent could hold a reasonable belief in the claimant's failure to follow a reasonable management instruction on reasonable grounds for failing to sign a safety briefing given the evidence before it at that time. The respondent only had to establish a reasonable belief but it could not sustain a belief that the claimant committed an act of gross misconduct for the reasons stated above.

<u>Was the decision to dismiss a fair sanction, ie within the range of reasonable responses for a reasonable employer?</u>

64. I have reminded myself of the established point that I must not substitute my view for that of the respondent. To this end I have reviewed the authorities referred to above and considered whether dismissal was in the range.

65. Given my findings of fact above, I find that in the circumstances of this case given the nature of the conduct relied upon by the respondent, I do not find that dismissal was in the range of reasonable responses for the employer to take. No reasonable employer faced with these circumstances would dismiss the claimant for the reason given. Summary dismissal in the circumstances was wholly unreasonable. The claimant had 23 years service and a clean disciplinary record. Dismissal was not within the range of reasonable responses of a reasonable employer.

66. The respondent's interpretation was not reasonable in the circumstances. The claimant had an otherwise unblemished record. There was evidence before the respondent that others who had refused to sign were disciplined but it had not established that others were also dismissed. Disciplinary action for failure to follow a reasonable management instruction is one thing. Gross misconduct and dismissal for a refusal on that day is something else entirely. The respondent led no evidence that others had been treated with the same severity but we know the disciplinary policy would have been applied. The respondent has sought to apply its policy after the event to justify the decision it took. No reasonable employer would class the claimant's actions with regards to the refusal to sign as gross misconduct. The respondent already accepted his other conduct was not gross misconduct but misconduct which warranted a lesser sanction.

67. I must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case.

68. The label attached to the conduct is more akin to misconduct as the respondent's own disciplinary policy specifies that this was not gross misconduct but rather misconduct.

69. I must also consider the procedural unfairness in this case and whether is impacts on s98(4). The respondent's HR involvement (as I raised with the parties) has caused the Tribunal concern. Had Mr Zeitzen not been such a credible witness and the email confirmed his decision I would have had concerns that HR were the investigator, disciplinary decision maker and the appeal officer such was their involvement. The appeal did not correct any issues as the appeal officer's letter was not supported by any findings at the time or notes as to how the decision was reached. In all reality it was crafted by HR. Without the disciplinary officer being able to rely on his conclusions (albeit flawed as he accepted) then I would have found the process equally unfair as HR was the decision maker behind the scenes in breach of its own policy and procedure and the ACAS COP1 as well as general principles as to equity.

70. In light of all of the above dismissal was not within the range of reasonable responses and the claimant has been unfairly dismissed.

If the dismissal was unfair, did the claimant contribute by culpable conduct?

71. There is no requirement for the conduct or action of the claimant in question to amount to gross misconduct for it to be relevant conduct or action for the purposes of s122 or s123. All that is required is for the conduct to be culpable, blameworthy, foolish or similar and this includes conduct that falls short of gross misconduct, and need not necessarily amount to a breach of contract.

72. Was the Claimant's conduct blameworthy as defined in BBC V Nelson ? *"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."*

73. In this case I cannot say that the claimant did not act in a bloody minded or foolish way. The frustrations he felt and the way he handled the matter was blameworthy conduct. I do however have doubts given my findings that the document that the claimant refused to sign that day was the safety brief. If it was then this would be blameworthy conduct. If it was the training record it was not unreasonable or foolish to not sign it and I can understand why he would have the concerns he did. However, there were two allegations of conduct in this case. The claimant's conduct towards Mr Argote was blameworthy conduct.

74. In relation to the compensatory award, did it cause or contribute to the Claimant's dismissal? The claimant's frustrations and agitations did not cause his dismissal as this was a minor conduct matter. It did however contribute to the outcome. The claimant's refusal to sign the document did contribute to his dismissal.

75. I have spent considerable time debating contributory fault as If the Claimant's conduct was blameworthy, would it be just and equitable to reduce the basic and/or compensatory awards? I consider that it is not the sort of case where no contribution should be found but it is a case where the contribution is minimal for the factors set out above. I consider it just and equitable to reduce the claimant's basic and compensatory awards by 25% as a result of his contributory conduct.

Does the respondent show that if it had been a fair procedure the claimant would have been dismissed in any event, and to what extent and when?

76. Here I repeat my conclusions above. The process was not fundamentally flawed but given the conduct was not gross misconduct in any event the claimant should not have been dismissed. There is no need to make a Polkey deduction. There is no evidence for me to conclude that had the claimant been given a written warning for misconduct he would then have been dismissed anyway. On the contrary the evidence was he was happy to sign the health and safety briefing but was never asked to do so at either hearing so the respondent cannot demonstrate that any continued refusal would have resulted in additional warnings then dismissal.

77. Given the above I cannot say with any certainty that the claimant would have been dismissed fairly in any event as a percentage likelihood or after a passage of time. There should be no Polkey reduction.

78. The matter is listed for a remedy hearing next year which will take place in due course. Separate case management orders will also be sent to the parties in connection with the same.

S King

_____

Employment Judge S King

Date: ……23.12.21……..

Sent to the parties on: 5/1/2022

N Gotecha

.

For the Tribunal Office