EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Grant	**v**	**Siemens plc**

Heard at: Watford **On**: 8, 9, 10 May 2017

Before: Employment Judge Alliott

Appearances

For the Claimant: Mr J Sykes, Advocate
For the Respondent: Mr P Nainthy, Solicitor

JUDGMENT

The judgment of the tribunal is that:

1. The claimant was not unfairly dismissed.

2. The claim is dismissed.

REASONS

Introduction

1. Mr Jack Grant was employed by the respondent on 1 July 2010 as a stores co-ordinator at the Heathrow Express train care facility at Acton. Prior to that he had worked for the respondent as an agency worker from January 2010. He was dismissed with notice on 27 June 2016. The effective date of termination was 22 August 2016. He brings a claim of unfair dismissal, the alleged age discrimination claim having been withdrawn.

The issues

2. At a preliminary hearing held on 6 December 2016 Employment Judge Heal recorded the issues as follows:-

> "Unfair dismissal claim

4.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for s.98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for the dismissal. The respondent says that the misconduct was as follows:

The claimant was seen coming out of the depressed area ("the pit") without a "bump cap". A bump cap is mandatory. The claimant was challenged by a manager, Mr Sansford, who told him to go and get a bump cap. The claimant refused. The claimant then walked across rail lines when a train was due in and walked back down into the depressed area still with no bump cap. The claimant disputes that a train was due in and says that the manager entered the train time falsely into the log.

4.2 Insofar as the facts were in dispute did the respondent hold its belief in the claimant's misconduct on reasonable grounds having carried out as much investigation as was reasonable in all the circumstances?

4.3 The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

4.3.1 The claimant did not fail to obey a reasonable instruction. He says that the instruction was not reasonable because:

4.3.1.1 It was not necessary to walk around the pit instead of through it if there was no train coming in (the respondent says that the instruction was to go and get a bump cap).

4.3.1.2 The claimant could see a train coming in if it was coming and the manager too would have been able to see that there was no train coming in and therefore the bump cap was unnecessary. A bump cap was also unnecessary because there was no train being worked on in the pit.

4.3.1.3 The bump cap was not protected headwear.

4.3.2 The respondent erred in moving straight to a finding of fault to a determination of sanction without considering mitigation.

4.4 Was the decision to dismiss a fair sanction, that is was it within the reasonable range of responses for a reasonable employer?

4.5 If the dismissal was unfair did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove on the balance of probabilities that the claimant actually committed the misconduct alleged. The respondent identifies the conduct relied upon as: The claimant was in the depressed area without a bump cap. He refused to follow instructions to get a bump cap and re-entered the depressed area without a bump cap.

4.6 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? If so, what is the percentage chance of a fair dismissal and when."

The law

3. It is for the respondent to show the reason for the dismissal and that it is a potentially fair reason. If that is fulfilled the determination of the fairness 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 to dismiss and shall be determined in accordance with equity and the substantial merits of the case (s.98(4) of the Employment Rights Act 1996).

4. The respondent must have a genuine belief in the reason for the dismissal based on reasonable grounds following a reasonable investigation. In addition, and in my judgment of particular importance in this case, the decision to dismiss must be a reasonable decision within the band of reasonable responses of a reasonable employer and I cite Mr Justice Brown-Wilkinson as he then was in the case of Iceland Frozen Foods Ltd v Jones [1983] ICR 17 EAT:

> "We consider that the authorities established that in law the correct approach for the tribunal to adopt in answering the question posed by s.98(4) is as follows:
>
> (1) The starting point should always be the words of s.98(4) themselves
>
> (2) In applying the section a tribunal must consider the reasonableness of the employer's conduct not simply whether they (the members of the tribunal) consider the dismissal to be fair.
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> (3) In judging the reasonableness of the employer's conduct a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.
>
> (4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another quite reasonably take another.
>
> (5) The function of the tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case 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."

5. Further Mr Sykes took me to the following authorities in support of the following propositions: Garratt v Mirror Group Newspapers Ltd [2011] IRLR 591. He relied on this case as identifying the factors to be taken into consideration when considering whether a unilateral management policy had acquired contractual status. For my part I did not find this a particularly helpful authority as I do not consider this case involves the importation of a specific health and safety policy (here the wearing of the bump cap in the depressed area) into the claimant's contract of employment other than via the general term already there that it is an employee's duty to observe health and safety policy.

6. The second case Mr Sykes took me to is Taylor v Parsons Peebles NEI Bruce Peebles Ltd [1981] IRLR 119. This is authority for the proposition that an employer's policy was not determinative on the issue of the reasonableness of a dismissal and that the standard is that of the reasonable employer applying s.98(4) ERA 1996. I have no difficulty in accepting that proposition. Then Mr Sykes took me to the case of Chamberlain Vinyl Products Ltd v Patel [1995] ICR 113 in support of the following proposition having cited an extract of Lord Bridge's judgment in the case of Culkey:

> "We do not understand Lord Bridge there to have implied that the employer's duty is to be strictly limited to hearing the employee's mitigation and that his duty of investigation is to be strictly limited to the issue of guilt or innocence. In the great majority of cases that will be an adequate procedure but in our view there may be cases where some aspect of the background needs to be investigated in order to put the misconduct into proper context. In those circumstances an industrial tribunal may in our judgment be justified in criticising the employer for failing to investigate a point raised in mitigation by the employee."

7. Again, I have no difficulty in accepting that proposition of law.

8. Mr Sykes also took me to the case of Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854 which is authority for the proposition that once a finding of gross misconduct has been made it is wrong to approach the issue on the basis that dismissal cannot be outside the range of reasonable responses of a reasonable employer. Again I have no difficulty in accepting that as a proposition.

9. Lastly, Mr Nainthy took me to two extracts from the IDS Employment Law Handbook on unfair dismissal. In the section dealing with disobedience he cited the following at 6.71:

> "Tribunals faced with disobedience dismissals usually concentrate on three main issues:
>
> - Whether the order given was legitimate;
> - Whether the order was reasonable;
> - The reasonableness of the employee's refusal."

10. And at 6.89:

> "Tribunals will look at the way an employer has handled wilful or persistent disobedience of specific orders in deciding whether a dismissal was fair. As the EAT said in Kaye v Blackwell (Contracts) Ltd EAT 765/78:
>
> > "There may be circumstances where, there having been several requests followed by a repeated and settled refusal to do the work, it is right and proper for the employer to dismiss albeit there has been no previous written or oral warning.""

11. And in fairness to Mr Grant, Mr Sykes also wanted me to take into account the following paragraph, namely:

> "Wilful disobedience will not always merit dismissal. However in Blue Mink Ltd TA Caledonia Crane Hire v Thompson EAT 291/85 the employee was unfairly dismissed for refusing to come to work one morning because of a hangover. The EAT held that such misconduct was only one of the material considerations the tribunal had to consider. Others included the employee's previous good conduct."

The evidence

12. I heard evidence from three witnesses for the respondent, namely; Mr Alex Sansford, depot supervisor at Acton with overall responsibility for health and safety on site; Mr Philip Carson, fleet head of materials based at Acton and Ilford. He was the claimant's line manager; Mr David Lockey, materials performance manager south. I also heard evidence from the claimant. I have been provided with a 186 page agreed bundle of documents. To that has been added a document, namely the Initial Event Reporting form dated 20 May 2016 which, somewhat surprisingly, was neither disclosed nor requested prior to the day before yesterday.

The facts

13. The Heathrow Express train care facility at Acton is where the respondent carries out the repair and maintenance of all trains on the Heathrow Express line. There is a large shed at Acton. It has three roads or tracks leading into it. There is a walkway, described as the apron, at ground level around three sides of the roads. Underneath the three roads there is an area variously described as the depressed area or the recessed area or the pit area. I shall use the term depressed area. The roads or track are supported on columns and the depressed area allows access to the underside of the rolling stock for engineers to work on it.

14. The claimant was employed as a stores co-ordinator. Initially in 2010 he said that the only personal protective equipment (PPE) issued to him was safety footwear and a high-vis vest. At some unidentified time he issued himself with a bump cap as he needed one. The claimant describes the bump cap as a glorified golfer's cap of thin material. The respondent describes it as a head protector with a hard plastic protector covered by a thin piece of material with a peaked visor. An example has been shown to me. It is in the shape of a baseball or golfer's cap. It has a hard plastic shell with a layer of ventilated foam inside acting as a cushion between the head and the plastic shell. It is clearly a head protector but not as substantial as a hard hat or helmet seen on construction sites. Since the issue is in dispute, I find that it is an item of protective headwear and formed part of the PPE issued to the workforce. The bump cap was introduced for use in the depressed area in around 2010. The respondent has a 20 strong health and safety department for the rail division and a rise in reported head injuries prompted an investigation and the identification of the bump cap as best suited to stop similar incidents. The respondent has produced a briefing acknowledgment and feedback form dated 10 March 2010 which states:

> "Due to the recent rise in the number of reported head injuries it is now a mandatory requirement to wear bump caps in area the below sole bar level. This includes all areas

> accessed via the ramps at the C/E [Country End] and L/E [London End] of roads 1 and 2. Also the pit area of road 3."

15. That document related to a briefing carried out by Mr Sansford to his team. No similar signed document has been produced in relation to the claimant and the claimant says he did not receive the briefing then or after. The claimant did receive an induction on starting work at Acton in January 2010. This consisted of being taken around the depot by a supervisor who explained procedures at various points. The respondent has produced a series of slides or power point presentations for the induction of new workers but these are dated 2014. I have no evidence of what was or was not available before that. The claimant says he did not see the slides ever. Be that as it may, the claimant said he was shown the depressed area. He could not recall what was said about PPE therein. However, every two years he had to complete a questionnaire on depot safety. This is a 25 question multiple choice test. We had the claimant's questionnaires from January 2012, December 2013 and January 2016. There is no question specifically about the depressed area and the wearing of bump caps. The nearest is a question about what PPE must be worn when going on or near the track with safety footwear and high-vis clothing the correct answer.

16. A central feature of this case is as to what exactly was the policy as regards the wearing of the bump cap in the depressed area. It was the only area to which the bump cap applied. It did not have to be worn anywhere else on site and no hard hats or helmets were worn on site either. The respondent's case is that a bump cap had to be worn at all times in the depressed area. It was mandatory in accordance with the March 10th briefing form.

17. The claimant's case in his ET1 is that not wearing one was not misconduct as it was not dangerous with no train coming into the depot. In his witness statement the claimant argues that it was custom and practice that when a worker worked on a train a bump cap was worn in the depressed area. His case is that when no train was approaching the shed or no train was being worked on, the bump cap did not need to be worn in the pit. He states:

> "It was not mandatory practice in all circumstances to wear the bump cap in the pit."

18. He also suggests that the requirement for a bump cap was not strictly enforced with many supervisors and managers not wearing one at all. I will return to this issue in due course with my findings.

19. In January 2016 the claimant had various health issues and was placed on light duties. He was instructed not to drive a fork-lift truck or operate the overhead crane. Much of the factual account of events on 20 May 2016 is not in any substantial way challenged. On 20 May 2016 a delivery of stores was made at Acton. The delivery run sheet records delivery time as 10.21 and depart time as 10.59. In order to unload the stores the claimant needed a fork-lift truck. The stores are situated adjacent to the apron alongside road 3. Further along towards the "London End" from where trains entered the shed is the supervisor's office where Mr Sansford was based. The claimant

went to Mr Sansford's office to seek authorisation to get someone to drive the fork-lift truck for him. No-one was in the office. At the time roads 1 and 3 were clear. Road 2 had a train on it. This train was both in and out of the shed. It stuck out of the shed at the London end blocking the apron which would allow an individual to walk around across road 2 and to the apron between roads 2 and 1. Because the claimant had left the stores to go to the supervisor's office and not to go into the depressed area, so he did not have a bump cap with him. As he said in interview on 24 May 2016, in answer to the question "Was wearing of the PPE part of the task" he answered "If I knew I was going into the pit I would take my bump cap. Yes, this would be part of the brief".

20. The claimant wanted to get to the other side of the train on road 2 to look for someone to drive the fork-lift truck for him. The train was blocking the apron across road 2 so he had two options: firstly, he could walk out of the shed and around the train which would have been some substantial distance; or he could take a short cut down into the depressed area under road 2 and up the other side. He could have gone back to the stores to get a bump cap but he did not do so. The claimant took the shortcut in the depressed area without a bump cap on. He emerged on to the apron between roads 1 and 2 and there encountered Mr Sansford and Mr Dan Black, an engineer who had been working in the depressed area. No-one else was in the depressed area as they were all on a tea break. Mr Sansford challenged the claimant for not wearing a bump cap. Thus far there is no dispute as to the claimant's actions. There is a very substantial dispute as to what Mr Sansford was doing at the time and I will return to this issue in due course with my findings.

21. Following the incident between Mr Sansford and the claimant, both were interviewed by Mr Litwin, the health and safety officer, along with Mr Black. The claimant was interviewed on 24 May 2016 and Mr Sansford and Mr Black on 26 May 2016, ie within a week of 20 May 2016. The interviews were question and answer with pre-prepared questions which I have. The claimant had an opportunity to read and correct the answers and he has signed the answers sheet. As regards the verbal exchange between the claimant and Mr Sansford, the claimant does not really dispute what is said by the three people present. Mr Black says that Mr Sansford pulled up the claimant straightaway about wearing a bump cap. The claimant's evidence was that Mr Sansford said he needed to wear a bump cap saying '"where is your bump cap, you should have a bump cap in the depressed area". The claimant said in oral evidence that his response was to ask Mr Sansford where his was and Mr Sansford replied he didn't need one as he had come the long way round and he wanted the claimant to go the long way round back. On all accounts Mr Sansford made the point about the bump cap several times. In interview the claimant is recorded as saying in answer to the question "What was said?" - "He said I can't go into a pit without the bump cap. I thought he was being awkward. I said I'm going anyway. We had the same exchange (a) few times."

22. Mr Sansford said in interview that the claimant responded that there was no-one working down there, he was not working down there. Mr Sansford went on to say:

> "On the third occasion I informed him it was mandatory to wear the bump cap and if he did not adhere there will be consequences."

23. In his interview to the question "What were the instructions?" the claimant answered: "Go round the unit and not through the pit". When asked the question: "In your opinion what caused the incident report?" the claimant answered: "I didn't listen to him I didn't follow his order". Mr Black stated that at some stage when challenged the claimant's response was "Just raise the near-miss then". The claimant accepted all these exchanges as accurate. The comment about raising a near-miss came before the claimant had crossed road 1 on the apron as he left the incident. It demonstrates to me and I find that the "near-miss" reporting process of the respondent is used to report any incident where there was a potential for an accident to happen and was not confined to a person nearly being hit by a train. Mr Black volunteered to drive the fork-lift truck. At the conclusion of the incident the claimant, without a bump cap on, crossed road 1 on the apron, descended into the depressed area without a bump cap on, walked along beside road 1 before going under road 1 and climbing out of the depressed area at the country end (ie the other end to the London end). Mr Sansford took a photograph of the claimant in the depressed area without a bump cap and that is timed at 10.38. Thereafter Mr Sansford completed Form FM371 which was an Initial Event Report Form. That is the form that has only recently been produced. In my judgment this is an important document.

24. The details of the event are reported as follows:

> "Whilst observing a train into road 1 shed 1 I noticed IP walk under pit road 2 and towards me between roads 1 and 2 apron area without a bump cap on. I informed the IP that it was mandatory to wear a bump cap when in the pit roads. I explained this several times. I also explained that it was my responsibility being controller of site safety that I ensure this procedure is complied with. The IP then proceeded to ignore my request and walk over road 1 rails which had an incoming unit approaching into the pit on road 1 northside and under road 1 at the county end of the shed still in the pit."

25. In that document Mr Sansford indicated that he considered the investigation report was sufficient and was <u>not</u> advocating either further investigation or a formal enquiry. The two 'causes determined' were failure to use protective equipment properly and non-compliance with standards. His recommendation as to what action should be taken was to brief, presumably the claimant, regarding PPE. Whilst this document does refer to walking across road 1 with an incoming unit, I find that this document was, as Mr Sansford told me, predominantly about the failure to wear PPE and the ignoring of the request not to go into the depressed area without a bump cap. That report form appears to have been sent to Mr Litwin, the health and safety officer, and it clearly reached Mr Nick Latchford who rang Mr Carson and told him in general terms about the incident. Mr Carson was just about to go on two weeks' annual leave. It would appear that Mr Litwin

thereafter conducted the investigation into this incident. I assume that it was Mr Litwin who made the decision to escalate the matter into an investigation. As part of the investigation Mr Litwin interviewed the claimant, Mr Sansford and Mr Black. Thus far the account of the events on 20 May is largely un-contentious.

26. I now turn to two major areas of dispute. The first is what was the policy on wearing bump caps in the depressed area and was the claimant aware of it. I find that there was a policy of mandatory wearing of bump caps as from March 2010 in accordance with the document I have already referred to. I accept that the respondent cannot demonstrate that this was expressly brought to the claimant's attention either on induction or subsequently. However, all the respondent's witnesses refer to bump caps as being mandatory as a matter of course. That is to say that it was so well known that no employee would not have been aware. In the investigatory interview the claimant was asked "What are the general precautions in this area" and he answered: "Wear bump cap and glasses". To the question, "Is there any signage? If yes, what signage can you recall?" he answered "Bump caps must be worn".

27. There was a blue sign in the depressed area which had a figure of a head with a hard hat on it and the words 'safety helmet must be worn in this area'. The colour of the sign, blue, indicates that it is a mandatory instruction and the claimant knew this. I agree with Mr Sykes that the picture is of a hard hat but I accept the evidence that it is generic to the wearing of protective headwear and did not confuse the claimant as his answer indicates. The claimant did not complain at any time at the disciplinary hearing or the appeal hearing that wearing a bump cap was not mandatory. The shed in question was plainly potentially a very dangerous environment with, for example, wires carrying high voltage electricity and heavy rolling stock moving in proximity to the workforce. I accept that the respondent took its health and safety obligations seriously. I find it implausible that the respondent would have allowed a policy of only requiring bump caps if working in the depressed area. A purpose of the bump caps was to prevent employees bumping their heads when ducking under the rails. This risk would be present irrespective of whether a train was moving in the shed or being worked on. Health and safety rules are to protect employees from themselves in many cases. I find it inherently implausible that an employer would leave it to the discretion of an employee as to when he should or shouldn't wear a bump cap in an area that has been identified as dangerous. I find that the claimant knew perfectly well that the wearing of bump caps in the depressed area was mandatory at all times. I reject the claimant's evidence that the policy was not strictly enforced. The reference to an unidentified worker having a photograph which was not produced of a supervisor in the depressed area without a bump cap fell far short in my judgment of establishing this. Mr. Sansford's instant reaction on seeing the claimant without a bump cap demonstrates to me that the policy was strictly enforced.

28. The second area of dispute relates to what Mr Sansford was doing at the time of the exchange between him and the claimant. His case that he was awaiting a train being driven into the shed on road 1. He explained the procedure in general terms was that when he was alerted by a driver or indeed control that a train was arriving he would flick a switch in the supervisor's office which allowed the points to be changed so that a train could move from the main line into the sidings. Thereafter he would move down to the apron where there was a control panel with a second switch. This was situated between road 1 and road 2. This switch when turned on would activate strobe lighting above the road that the train was coming into, an audible siren would sound and a derailer device preventing ingress into the shed would be retracted. The claimant says nothing of the sort was taking place at the time of the exchange between him and Mr Sansford. He said there was no strobe lighting activated and no siren sounding. Mr Sykes, on behalf of the claimant, very robustly challenged Mr Sansford as lying and falsifying documents in order to bolster the complaint about the claimant. In particular, he referred to the sequence of events revealed by entries on the movements log and the shift report. In particular, the reference at 10.40 to the train units '009 and 002 berth road 1 shed'. It is to be noted that if that is accurate it is two minutes after the photograph was taken of the claimant departing this incident. He points to the supervisor's shift report which refers to the incident FM371 being raised 10.50. Various moves made to allow for crack checks are recorded at 11.00 hours and e contrasts that with the movement log which only records movements of the rolling stock beginning at 11.50, that is to say 50 minutes later.

29. Mr Sykes seeks to advance a case that the timings simply do not add up. He asserts that the delays are suspicious and he advances a case that Mr Sansford falsely claimed that the train had moved into the shed at 10.40 in order to bolster and aggravate the complaint he made about the claimant in the form FM371. The suggestion is that Mr. Sansford brought forward the train movement times to aggravate the claimant's conduct in that it took place with a train arriving into the shed. I accept that there are some troubling inconsistencies in Mr Sansford's evidence between his statement and his oral evidence. Principally, he says that he went down to the apron from the office having received a call from the driver, whereas in his oral evidence he stated that the first contact from the driver occurred at 10.40 when he received a call on the walkie-talkie. He states he had moved down and activated the siren and strobe lighting in anticipation of the train arriving as he was aware of its imminent arrival from control and it only took 20 minutes from Paddington. I have looked carefully at whether there is anything in the allegation that Mr Sansford and indeed Mr Black, who also gave evidence in the interview that the strobe lights were on, have falsified the account about the train. I have come to the conclusion and I find that the strobe lighting and the audible siren was activated at the time of the exchange between Mr Sansford and the claimant. I find the suggestion that it has all being manufactured as being fanciful in the extreme.

30. In my judgment if Mr Sansford was seeking to promote a false case against the claimant, he would not have filled in the incident report form FM371 in

the way he did, hence its significance. I note that he did not seek to escalate the incident to an investigation and merely suggested that the incident form was sufficient. That is totally inconsistent with him trying to aggravate the perception of the conduct of the claimant. I find that many of the times that have been analysed in some detail are at best approximates and it is noticeable that certainly Mr Sansford appears to enter times on the various logs to the nearest 10 minutes. I have found nothing suspicious about the logs. The delays in moving the trains have been explained, both by Mr Sansford and Mr Carson, as not being unusual. I have no reason to doubt that uncoupling trains and arranging for their movement may take some time. I find that at the time of the incident between Mr Sansford and the claimant, the strobe lights were on and the siren was sounding, albeit that the train was some distance away and not as close as Mr Litwin concluded in his investigation report. In all probability, in my judgment, Mr Litwin was misled by the reference to the train being berthed at 10.40 in that he probably took that as meaning the train had arrived in the shed. In Mr Sansford's evidence it clearly had not. Further Form371 uses words that probably misled Mr. Litwin into thinking the train was a lot closer than in reality it was. The extract already cited states "whilst observing a train into road 1" and "…road 1 rails which had an incoming unit approaching …". Mr .Sansford stated that the train was not in sight and, travelling at 3mph, was some distance away at the time. He explained that he used the word 'observing' not as seeing but overseeing the movement. That explains why the investigation report of Mr Litwin refers to the claimant going into a road with the unit approaching. I find that the misunderstanding of how close the train was at the time was entirely innocent and not an invention to aggravate the actions of the claimant.

31. What Mr. Litwin's report does do is identify three issues, namely going in the depressed area without the bump cap, crossing road 1 in the face of an approaching train and failing to follow verbal instructions given by Mr Sansford not to re-enter the depressed area without a bump cap. I note that the report includes underlying causes and deals with reduced attention as far as the claimant is concerned as a result of his health issue and also tunnel vision in that his daily routine was described as horrendous. I assume that that is a reference to him wanting to get the job done in terms of obtaining a fork-lift truck driver.

32. On his return Mr Carson was supplied with the investigation report from Mr Litwin and on the basis of that it was his decision to suspend the claimant. It was his decision to instigate disciplinary proceedings and he did so in a letter dated 15 June 2016. The allegations were simply described as "near-miss incident 20/5/2016" and there was a reference to finding enclosed information in relation to the misconduct alleged. I have already found that the 'near miss' procedure relates to any potential accident and is not confined to where a person could be said to have almost been hit by a train. It would appear that the information was not actually attached to that letter and eventually it was all sent to the claimant in advance of the disciplinary hearing on 20 June.

33. The evidence pack supplied to the claimant consisted of the following:

    33.1 Near-miss investigation report of Mr Litwin;
    33.2 Copy of supervisor's log book;
    33.3 Copy of supervisor's shift report;
    33.4 Copy of UPR distribution run sheet;
    33.5 The interview notes taken by Mr Litwin for Mr Sansford, Mr Black and Mr Grant.

34. The disciplinary hearing was held on 27 June 2016. Mr Grant confirmed that he had received the invitation to the hearing, the evidence pack and was aware of his right to be accompanied but did not wish to be so. I have two pages of notes of a disciplinary hearing that on the evidence lasted some half an hour. It is quite clear to me that these notes are extremely brief and do not even begin to cover the issues that were discussed. It is clear that the failure to wear the bump cap in the depressed area and the train movement at the time was discussed. The claimant did not advance a case that the wearing of bump caps was not mandatory in certain circumstances that applied at the time he had been in the depressed area. The claimant disputed that there was a train movement at that time. In one sense he is accurate in that there was no train in the immediate vicinity but, as I have already found, the train incoming procedure was activated at the time. No other evidence was advanced by the claimant at the hearing and no mitigation was advanced by him. He admitted the failure to wear the bump cap and, as already indicated before, he had admitted during the investigation that he had not followed the order not to return to the depressed area.

35. Mr Carson at the conclusion of the substantive part of the hearing took a break and took some advice from HR. That advice is in pretty standard terms and provided appropriate guidance to Mr Carson. In particular it invited him to consider issues of mitigation, two of which were set out in the report. I find that there were no issues of mitigation being advanced that warranted suspending the hearing pending further investigation. Mr Carson decided to dismiss the claimant with notice and the reasons given orally and in the dismissal letter were failure to adhere to health and safety rules and failure to adhere to the instructions given by the depot controller. It is notable that crossing road 1 with a unit approaching was not relied upon, possibly due to the claimant's challenge to that as a fact.

36. The claimant exercised his right to appeal in an email dated 29 June. He cited four reasons for his appeal as follows:

> "I was suspended three weeks after the event even though the investigation was concluded in the first week.
>
> No consideration was given to the difficult working conditions I was forced to work under.
>
> In the six half years I have worked at Siemens this is the first time I have been in trouble.

My contract says I am entitled to two month's notice, not eight weeks."

Once again the claimant did not challenge that the wearing of bump caps was mandatory or assert that the policy was not strictly enforced.

37. The appeal hearing was held on 21 July by Mr Lockey. Mr Lockey told me that he regarded his role as reviewing the matter and not re-hearing it. Again, there was no issue concerning whether or not the claimant had worn a bump cap or whether he was disobeying an order from the maintenance controller. There is a reference to Mr Sansford wanting to get rid of him on occupational health grounds and that the incident was being used as an excuse to get rid of him. The claimant did accept that he had done wrong.

38. Mr Sykes advanced the case that in the circumstances it was incumbent upon Mr Lockey to re-investigate or investigate the issues of mitigation that were being advanced which included the allegation that Mr Sansford was acting out of malice towards him. Mr Lockey did state that he had made some enquiries, although the evidence on this was thin to say the least.

39. Mr Nainthy, on behalf of the respondent, has observed that issues relating to the adequacy of the appeal have neither been raised in the form ET1 nor raised in the list of issues that was compiled when both representatives were present at the preliminary hearing. I do not approach this submission on the basis that that is a knock out blow but I do take it into account when considering the extent to which this is a legitimate complaint. I have concluded that there was no procedural unfairness in Mr Lockey not dealing with those matters outside the confines of the appeal hearing. Of course, issues of mitigation were raised in the initial investigation report of Mr Litwin and the specific mitigating issues raised by the claimant in his appeal were each dealt with in turn during the course of the appeal outcome letter. The appeal was not successful.

Conclusions

40. I find that the claimant was fully aware of the mandatory requirement for bump caps in the depressed area.
41. I find that the claimant decided to take a short cut to find a fork-lift truck driver in breach of that policy.
42. I find that at the time he did so the strobes and the lights were activated indicating a train was due.
43. I find that the train was not imminently arriving in the sense that it was not in sight and would have been travelling, I was told, at three miles an hour.
44. I find that Mr Sansford was correct to pull up the claimant about not wearing his bump cap and directing him not to return to the depressed area without a bump cap. I find that was a legitimate order and a reasonable direction to make.
45. I find that the claimant's objection based on being told previously that he should not leave the shed due to health issues was neither raised at the time and has only been raised lately as some form of justification. In any event I find it would not have been a justification. He should have raised the issue and it would have been sorted out.
46. I find that the claimant's attitude during the interchange with Mr Sansford may well have irritated Mr Sansford in that he was questioning the assertion of the need for a bump cap, inviting him to file a near-miss incident report and disobeyed the order not to return to the depressed area without a bump cap. However, I find the mere fact that Mr Sansford may well have been irritated does not translate into malice when filing the incident report that he did which, as I have already stressed, was based on the premise that the matter would go no further other than briefing the claimant to conform with the policy on bump caps in the future. The decision to escalate to an investigation and disciplinary proceedings was taken by Mr Litwin and Mr Carson and I have no evidence that it was anything to do with Mr Sansford.
47. I find that Mr Litwin conducted a reasonable investigation into the event. I find that the claimant admitted not wearing a bump cap and disobeying Mr Sansford. He disputed whether the train was coming or if the strobe lights were on and the siren activated. He was correct that the train was some way away but not, in my judgment, correct about the lights and siren.
48. I find that the reason for the dismissal was misconduct, namely failing to wear a bump cap in the depressed area and a failure to adhere to instructions. That is a potentially fair reason.
49. I find that the claimant, through Mr Carson, genuinely believed it on reasonable grounds.
50. I have carefully examined whether the decision to dismiss was within the range of reasonable responses of a reasonable employer. Personally I consider the decision was harsh and could be said to warrant a final written warning. However, I cannot substitute my views for those of an employer. I can only interfere if it is outside the range of reasonable responses. I have concluded that it is not. Health and safety is rightly a very important issue in heavy industry, as is obedience to reasonable instructions. The claimant disregarded a known requirement, challenged Mr Sansford when pulled up on it, invited a report to be made about it and disregarded an order not to

return to the pit without a bump cap. I cannot say that dismissal is outside the range of reasonable responses. I find that the respondent acted reasonably in treating it as a sufficient reason to dismiss the claimant.

51. I find that such explanations and mitigation as were advance by the claimant were taken into consideration during the investigation, disciplinary hearing and on appeal. I find there was no failure insofar as reasonable investigation is concerned.
52. I find that the procedure adopted during the disciplinary process was fair.

53. Consequently I find that the claimant was not unfairly dismissed and the claim is dismissed.

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Employment Judge Alliott

Date: 30 May 2017

Sent to the parties on:

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For the Tribunal Office