EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100696/2017

Held in Glasgow on 27, 28 and 29 November 2017

Employment Judge: Mary Kearns (sitting alone)

Mr M H MacNab	**Claimant** **Represented by:** **Ms K Webb &** **Mr J Anderson** **Strathclyde University Law Clinic**
British Telecommunications plc	**Respondent** **Represented by:** **Mr M Budworth** **of Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal delivered orally with reasons on 29 November 2017 was to dismiss the claim.

REASONS

1. The claimant who is aged 58 years was employed by the respondent as a Radio and Rigger Engineer until his dismissal on 26 January 2017. On 24 April 2017, having complied with the early conciliation requirements he presented an application to the Employment Tribunal in which he claimed that his dismissal was unfair.

Issues

2. The issues for the Tribunal were:-

(i) Whether or not the respondent's dismissal of the claimant was fair;

(ii) If it was unfair, the appropriate remedy.

The respondent admitted dismissal.

Evidence

3. The parties lodged a joint bundle of documents ("J") and referred them by page number. The respondent called the following witnesses: Miss Angela Naysmith, Consultant Cyber Engineer and Investigating Officer; Mr Colin Ringrose, former Area Manager for Scotland who chaired the claimant's Disciplinary Hearing; and Mr Stephen Maddison, former General Manager of the respondent's Exchange Engineering Services, who heard the claimant's appeal. Most of the relevant evidence was not in dispute. The claimant gave evidence on his own behalf and lodged witness statements from three ex colleagues who did not testify. All witnesses who testified gave their evidence carefully. I concluded that all witnesses including the claimant testified to the best of their knowledge and belief and were trying to be as honest as possible.

4. There was a dispute about whether the claimant asked to fetch his reading glasses and work diary prior to the investigatory meeting. Miss Naysmith was adamant that the claimant had not made this request, whereas the claimant was adamant that he had and that the request was declined. I did not find it necessary or possible to resolve this, and concluded that one or other of them had either misremembered or failed to hear. It is not central to the issues I have to decide. I am required to consider the procedure as a whole and determine whether, all parts taken together, it was within the band of reasonable procedures a reasonable employer might have used. It was not in dispute that by the time of

the appeal the claimant had had access to his work diary and work laptop. The point of the investigatory meeting was to determine whether there was a case to answer which should go forward to a disciplinary hearing. On the facts before me, that was inevitable. Furthermore, the claimant had his diary for the disciplinary meeting and the appeal and the claimant's own timeline was accepted by Mr Maddison at the appeal stage.

Findings in Fact

5. The following facts were admitted or found to be proved:-

6. The respondent is a company engaged in the provision of telecommunications.

7. The claimant was employed by the respondent as a radio and rigger engineer from 1 April 1999 until 26 January 2017, when he was dismissed for misconduct. He worked for the respondent's Technology, Service and Operations Division which runs 24/7, 365 days a year and employs 1,200 professional engineers, of whom approximately 120 are radio and rigger engineers like the claimant. The TSO division is responsible for maintaining the respondent's infrastructure which includes 250 radio towers and 5,500 telephone exchanges. Radio and rigger engineers mainly work on the tower estate as they have a unique skill set that includes climbing.

8. As part of the claimant's job description he was required to *"understand and be accountable for the execution of tasks for repair, maintenance, provision, build and ad hoc work assigned as efficiently as possible and to the appropriate standard of quality, in compliance with the requirements defined in BT policy documents; to have regard for health and safety; his job license and skills as agreed with line manager."*

9. The role of a radio and rigger engineer involves carrying out health and safety inspections on radio equipment managed by the respondent as well as to install and maintain the respondent's radio network. Work can be at height aloft

radio/mobile phone towers from 20 to 100 feet using mobile elevation work platforms or climbing techniques. Engineers are entitled to claim an allowance when working away from a safe working platform or ladder at height. This is claimed in 15 minute chunks on a form "A111R". The form contains guidance to this effect. The engineers record their findings on a system called 'peacemaker'. The system holds safety and service records for radio equipment owned and managed by the respondent. It allows notes on hazards and access to be kept along with site directions, equipment installed, cable lengths and transmit and receive levels for faulting or recommissioning. After every inspection the engineer updates and saves the record to the peacemaker system. Any issues with the inspection should be noted and raised to their line manager.

10. Engineers also have rigging diaries to schedule work. These may be prepopulated to allow engineers to see where they're working and who with. Jobs are auto-pinned via the respondent's work allocation system and engineers can sign on remotely and pick work up via a laptop or smartphone. Engineers also often have hand-written diaries they use to keep notes for recording purposes. Engineers generally work in two-man teams. They are out in the field and on site left to their own devices the majority of the time and they have to work without supervision so trust is very important.

11. On 14 October 2016 the claimant was in a two-man team with Mr Kenny McConnell. One of the tasks they were assigned was an 18 monthly health and safety resilience check at the respondent's Thornhill Arqiva site. If these checks were not completed appropriately, health and safety problems could result as another check would not be scheduled for a further 18 months. The claimant and Mr McConnell had attended the site and carried out some external checks but they had not been able to gain entry to the cabin because the keys were missing and the inspection was therefore aborted before completion. Despite having been unable to complete the job, Mr McConnell had signed off the inspection as complete, showing the various checks as having passed (J85). The claimant had not discussed the job with Mr McConnell prior to the latter signing off on the job. The matter came to light because there was a fault at the site on 20 October

2016 and the repair team could not get in. Mr McConnell initially said that he and the claimant had got the keys but later admitted they had not. This raised a further issue because two hour working at height claims had been made by both Mr McConnell and the claimant, when the entire total for all tasks carried out that day was one hour and ten minutes.

12. The information regarding the events of 14 October prompted Miss Angela Naysmith, then Patch Manager for South of Scotland Exchange Engineering Services, to conduct fact finding interviews with Mr McConnell and the claimant on 13 December 2016. The delay of two months was occasioned by annual leave on the part of Miss Naysmith and others. Mr McConnell's interview was first. Ms Naysmith presented him with the information she had pulled from the system showing the length of attendance at the Thornhill Arqiva site, his actions for the rest of the day and how much climbing allowance he had claimed. At the end of the interview Mr McConnell asked to resign. Miss Naysmith told him that was his decision and left him to collect his thoughts while she telephoned HR. When she returned Mr McConnell said he was "bang to rights" and was resigning with immediate effect. He confirmed this in writing and left the business. The misconduct procedure against him was accordingly aborted there and then.

13. Miss Naysmith met with the claimant later the same day. She presented him with the documentary evidence, which included the extract from the peacemaker system stating that all checks had been completed on the Thornhill Arqiva site on 14 October 2016 (J84 – 99); the claimant's weekly height allowance justification form for the week in question (J100) which showed time spent working away from a safe working platform or ladder on 14 October as 2 hours; the claimant's daily efficiency report for 14 October; his ILM report; his electronic timesheet A111R allowance report for that week; and the task details and timings for Thornhill Arqiva and other planned sites that day. These documents showed that the claimant was at Thornhill Arqiva on 14 October, how long he was there and how much climbing money he claimed thereafter. During Miss Naysmith's questioning of the claimant he confirmed that he was aware of the proper process in carrying out 18 monthly site and link compliance inspections and what he

should do if they were not completed. The claimant's ILM report showed that after leaving Thornhill Arqiva he went to Thornhill Telephone exchange for two and a half hours. Miss Naysmith asked the claimant why he had claimed two hours climbing allowance for 14 October when the entire total was only one hour and ten minutes. The claimant said he had asked Mr McConnell how long they had spent climbing and he had said two hours. The claimant was suspended and a misconduct investigation report was prepared in which Miss Naysmith set out her findings. Her report indicated that she had two concerns. The first related to health and safety. The claimant and Mr McConnell had been at Thornhill Arqiva for 42 minutes and the task should take four hours. Miss Naysmith considered there was no way they could have carried out the required safety checks in that time but the checks had been signed off on peacemaker as complete without any issues raised. It had been the responsibility of both members of the team to highlight any safety or access issues and this had not been done. The second concern was that the claimant had admitted to claiming two hours height money on his timesheet for that day but the ILM data showed that he could not have been climbing for two hours that day. Miss Naysmith decided that there was a case to answer in respect of both points and the misconduct investigation report and supporting documentation were passed to Mr Colin Ringrose, who was at that time Area Manager for Scotland.

14. Mr Ringrose convened a disciplinary meeting for 10 January 2017. In the disciplinary invite letter (J120) Mr Ringrose set out the charges and stated that a potential outcome could be dismissal. The claimant was advised of his right to be accompanied. The investigation report was enclosed. The charges were as follows:-

> *"1. FAILURE TO COMPLY WITH THE CORRECT COMPANY SAFETY POLICY AND WORKING PRACTICES in that on the 14th October 2016 whilst working at Thornhill Arqiva you failed to complete all the compliance and safety checks om radio links on the tower and did not gain access to the cabin, whilst working as a two man rigging team.*

2. *FALSIFICATION OF RECORDS FOR FINANCIAL GAIN IN THAT ON THE 14TH October 2016 you claimed for 2 hours allowance for working at height at Thornhill Arqiva and Thornhill Drumcort* [sic] *when there was only a maximum onsite time for the day of only 1 hr 10 minutes."*

15. The claimant attended the disciplinary meeting on 10 January along with his union representative. The meeting was recorded and a transcript prepared. With regard to the health and safety issue, the claimant said he was unaware the appropriate process had not been followed on the job and he thought his colleague had completed the checks and recorded them correctly and that Mr McConnell had signed off on the job. Mr Ringrose asked the claimant what discussions had taken place between them about the job, the health and safety inspection and the fact that they could not gain access to the cabin. The claimant said they had not discussed it. With regard to the second charge, in relation to the claim for two hours' height allowance, the claimant admitted that he had claimed two hours' allowance and said he had done so after checking with Mr McConnell, who had given him the figure. Mr Ringrose asked the claimant what he should have claimed and the claimant replied one hour and not two. The claimant said he had made a mistake and 'let himself down'. He confirmed that he understood time should be claimed in 15 minute blocks.

16. After the meeting Mr Ringrose asked some questions of Mr Bjorkvoll, the claimant's line manager. He then considered the claimant's explanations and the evidence before him. With regard to the first charge he concluded that the safety and compliance check at Thornhill Arqiva on 14 October had not been anywhere near fully complete. The estimated task time for the task is four hours. The claimant had said he had been climbing on the task for half an hour, which was insufficient to complete the external element of the task. In addition, the claimant and his team-mate had had no access to the cabin and therefore could not carry out the internal safety checks required. Mr Ringrose was shocked that the claimant and Mr McConnell had had no conversation following the work

undertaken to discuss whether anything had been complete or whether any issues needed to be raised. On the evidence in front of him Mr Ringrose believed the first charge was proven.

17. With regard to the second charge of falsification of records for financial gain, the claimant had accepted that he had claimed two hours but had climbed closer to one hour in total. His mitigation was that he had filled in his timesheet a week later following a discussion with Mr McConnell. Mr Ringrose concluded from this that the second charge was also proven.

18. Mr Ringrose considered the appropriate response. In doing so he took account of the requirement that the respondent should be able to trust its engineers to go out into the field and work unsupervised. He concluded that the claimant's actions, which he had found proven broke that trust. He considered that the fact that the claimant had not completed the health and safety inspection at Thornhill Arqiva properly, or, if that was not possible, raised it as an issue, was dangerous both for the public and for other colleagues who may work at the site. With regard to the second charge, he concluded that the claimant had admitted claiming money he was not due and that this was a very serious matter. Taking all matters into account, he concluded that summary dismissal was the appropriate sanction as the respondent could no longer trust the claimant to carry out his role in a competent and honest manner going forward. Mr Ringrose confirmed his decision in writing to the claimant by letter of 25 January 2017 (J144). The claimant was informed of his right of appeal.

19. The claimant appealed the decision to dismiss him. His appeal was heard by Mr Stephen Maddison, then General Manager of Exchange Engineering Services. The appeal meeting took place on 10 February 2017. The claimant attended along with his union representative, Mr David McClune. On 2 and 3 February 2017 the claimant requested copies of emails between himself and his line manager Mr Bjorkvoll. He wanted to cross reference the emails and other items with his work diary. On two occasions on 7 and 9 February the claimant was invited to gain supervised access to his emails but there were technical problems

that could not be sorted out at that time. Finally, on the morning of the appeal, these were solved and the claimant was given access to his emails for 10 to 15 minutes before the hearing. Mr Maddison checked with him prior to the hearing that he had got all the documents he required and he said he had. He did not request more time.

20. At the meeting the claimant gave a new detailed timeline of the events of 14 October 2016. His timeline was accepted without question by Mr Maddison. The claimant said that he arrived at the Thornhill Arqiva site at 09:37 and left at 10:11. He then moved onto the Thornhill telephone exchange arriving at 10:37 and leaving at 13:17. The claimant accepted at the meeting (J183) that he was only working at height for a total of 47 minutes that day and that he had claimed for two hours when he had submitted his timesheets a week later. In mitigation he said he had reached the two hour figure after discussing with Mr McConnell and that he wanted it noted that he had previously put in timesheets where he had missed claiming previous climbing time.

21. With regard to the other charge, of failure to comply with correct company safety policy by failing to carry out all compliance and safety checks on the radio tower and to gain access to the cabin at Thornhill Arqiva on 14 October, the claimant accepted on the basis of his new timeline that he had only been at the site for 34 minutes. The estimated task time for the site is four hours. The claimant accepted that the 34 minutes spent on site was not enough time to undertake the tasks signed for. His explanation was that the tasks had been signed off by his colleague Kenny McConnell and the claimant said he was unaware that Mr McConnell had signed the task off. Mr Maddison asked the claimant if he had had any discussions with Mr McConnell about the checks they had and had not carried out at the site and the claimant said they had had no discussions. With regard to another job later that day at the respondent's Drumcork site, the claimant confirmed that he had completed the peacemaker entry for that task. His timeline showed he was at that site for 27 minutes, whereas the time estimate was over 100 minutes.

22. The claimant made a number of complaints about the disciplinary process followed to that point. He complained that he had not had his work diary to refer to at the investigatory meeting with Miss Naysmith and had asked if he could get it, but this was declined, which had meant he had given confused answers. Mr Maddison asked him whether he had had his diary for the disciplinary meeting and prior to the appeal with himself and he confirmed that he had. After the meeting Mr Maddison followed up the claimant's statement that he had been denied access to his work diary before the investigatory meeting with Angela Naysmith. She told him that the claimant had not asked for his diary and had he done so she would have been happy for him to get it.

23. After the meeting Mr Maddison concluded that the claimant's new timeline had made everything much clearer. The claimant had accepted that he had claimed more height allowance than he was due and he concluded that the charge of falsification of records for financial gain was therefore proven. With regard to the job at Thornhill Arqiva, the claimant had accepted he was at the site for 34 minutes. The estimated task time was four hours and the job had not been done properly. Mr Maddison considered that the claimant had also raised the job at Drumcork, which the claimant had marked as complete after only 27 minutes where the time estimate was over 100 minutes. Mr Maddison found it very difficult to believe that no discussion had taken place between the claimant and Mr McConnell regarding next steps, actions or return visits on the Thornhill Arqiva job.

Applicable Law

24. Section 98 of the Employment Rights Act 1996 indicates how a tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of the employee is a potentially fair reason under Section 98(2).

25. To establish that a dismissal was on the grounds of conduct, the employer must show that the person who made the decision to dismiss the claimant believed that he was guilty of misconduct. Thereafter the Employment Tribunal must be satisfied that there were reasonable grounds for that belief and that at the time the dismissing officer reached that belief on those grounds the respondent had conducted an investigation that was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances.

26. If the employer is successful in establishing the reason, the tribunal must then move on to the second stage and apply Section 98(4) of the Act and decide whether the dismissal was reasonable in all the circumstances. In applying that section the Tribunal must consider whether the procedure used by the respondent in coming to its decision was within the range of reasonable procedures a reasonable employer might have used.

27. Finally the Tribunal must consider whether dismissal as a sanction was within the band of reasonable responses a reasonable employer might have adopted to the conduct in question. The Employment Tribunal is not permitted to substitute its view on any of these issues for that of the employer. Instead it must consider whether the process and decisions of the respondent fell within the range of a reasonable employer.

Discussion and Decision

28. I was satisfied that the respondent had shown that the claimant was dismissed for a reason relating to his conduct. It was clear from the evidence that Mr Ringrose and Mr Maddison believed that the claimant had (i) failed to comply with the correct company safety policy and working practices on 14 October 2016 at the Thornhill Arqiva site by failing to complete all the safety checks on the tower; failing to gain access to the cabin and by failing to notify the respondent that the inspection was incomplete. They also believed that (ii) the claimant had falsified records for financial gain by claiming two hours working at height

allowance for that day when he accepted that he could have worked no more than one hour and 10 minutes (and latterly 47 minutes) at height that day.

29. The grounds upon which Mr Ringrose and latterly Mr Maddison reached their belief in the claimant's misconduct were:-

    1. The claimant's admissions in relation to the timeline and the working at height claim. (As Mr Budworth submitted, the claimant had fairly accepted all the way through that he had claimed too much time at height for that date).

    2. The various documents and records showing the claimant's activities and timings on 14 October 2016 and the amount he had claimed. I therefore considered that the foregoing were reasonable grounds to support the belief of Mr Ringrose and Mr Maddison respectively in the claimant's misconduct.

30. In relation to whether sufficient investigation had been carried out, Ms Webb's submission was that the respondent's failure to interview Mr McConnell as a witness in relation to the claimant's case had seriously prejudiced him and rendered the investigation outside the band of reasonable investigations a reasonable employer might have conducted. She pointed out that with regard to the first charge it had been Mr McConnell and not the claimant who had completed the peacemaker record and the claimant had had no knowledge that it had been done incorrectly. It was accepted by the respondent that the secondary EIN was not emailed or notified about what the primary EIN had submitted. It was normal practice that only one team member did the peacemaker input and no instruction had been given that they were to look over each other's shoulders. The claimant had been entitled, she said, to rely on Mr McConnell's vast experience and assume things had been done correctly. Ms Webb submitted that Mr McConnell's evidence was also relevant to the second charge as the claimant had relied on his time estimate for his working at height claim. I considered all these points carefully. In relation to the failure to interview

Mr McConnell as a witness and provide his statement to the claimant, I concluded that this was not a fatal flaw in the circumstances. Mr Ringrose and Mr Maddison were both clear that they accepted the claimant's own account of what had taken place. In particular, they accepted from the claimant without question that it had been Mr McConnell who had put the Thornhill job into peacemaker; that the claimant had not been sent a copy; that there had been no discussion between the claimant and Mr McConnell before he did this; and that the claimant had asked him for a time estimate for his working at height claim and Mr McConnell had told him two hours. In these circumstances, it is difficult to see what a statement from Mr McConnell would have added. I concluded that the investigation done by the respondent was reasonably thorough and was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances.

31. In all the circumstances, I am satisfied that the respondent has shown that the claimant was dismissed for a reason relating to his conduct. That is a potentially fair reason for the purposes of Section 98(2) of the Employment Rights Act 1996 (ERA).

32. I considered the application of Section 98(4) to the facts of this case. In the context of the reason for dismissal I considered the procedure adopted by the respondent in reaching its decision. Ms Webb submitted that the respondent had prejudged the outcome and that their failure to interview Mr McConnell was evidence of this. She also said that neither the investigating officer, nor the disciplining officer nor the appeal officer had considered whether the claimant had made an honest mistake and their failure to interview Mr McConnell was also evidence of this. She pointed to the delay between 14 October and the investigatory interview on 13 December and said that this was unreasonable. With regard to the failure to interview Mr McConnell, that has already been considered. Since the claimant's account of events was accepted that is not critical. There was a delay of two months in this case. This was explained by Miss Naysmith in terms of annual leave of the various parties and witnesses. Although two months is quite a long time, by the time of the disciplinary meeting

and certainly by the appeal, the claimant had access to documentary records which enabled him to clarify the events of 14 October and prepare his case and I did not, therefore conclude that the delay took the process outside the band. It is quite normal for an employee to be questioned at the investigatory stage without prior notification. With regard to the diary issue, this was later rectified and the claimant had had access to the diary by the time of the disciplinary meeting. There was reference to the job at Drumcork, which had not been part of the original charges (though it was mentioned in relation to charge 2). I did think that this was a flaw in the procedure. However, it did appear to have been brought up by the claimant himself J148, third paragraph).

33. On balance, I concluded that the claimant had a proper opportunity to prepare and present his case, taking the procedure in the round. The process was perhaps not perfect, but it complied with the ACAS Code and was, in my view, within the band of reasonable procedures a reasonable employer might have adopted in the circumstances.

34. With regard to whether dismissal was within the band of reasonable responses, Ms Webb stated that the claimant disputed that his actions were in breach of accepted workplace practices. She submitted that it was clear that it was common practice for one member of the team to complete the peacemaker form and there was no requirement to communicate with the other team member. The secondary EIN did not receive a copy of the form. She submitted that the claimant had been entitled to rely on Mr McConnell completing the form correctly given his experience. Furthermore, there had been no formal training on how to fill the peacemaker in. Mr Budworth submitted that this was not a matter where training would be relevant. It was not an issue about how the peacemaker had been used. The claimant had a personal responsibility to carry out the work and ensure accurate reporting. I agreed with Mr Budworth regarding this. It seemed to me that, whatever the respective duties of the team members, they were a team and they both knew that the inspection at Thornhill Arqiva had not been done properly on 14 October. It seemed to me that in the circumstances, the respondent was entitled to view the claimant's failure to discuss the job with Mr McConnell and

ensure that its non-completion was properly reported as an abdication of his responsibility and a breach of trust.

35. With regard to the second charge, Ms Webb stated that the claimant had made an honest mistake and the amount claimed in excess of that to which he was entitled was only £16. Ms Webb pointed to the claimant's long service and clean disciplinary record and suggested that dismissal was not within the band of reasonable responses in the circumstances of this case. I agree that the decision was at the harsher end of the scale and that some employers may have chosen to give a warning in the circumstances of this case, but I have concluded that given the requirement for trust and for engineers to work unsupervised, dismissal was within the range of reasonable responses a reasonable employer might have adopted in the circumstances. It follows that the dismissal was fair, and the claim is dismissed.

Employment Judge: Mary Kearns
Date of Judgment: 04 December 2017
Entered in Register: 08 December 2017
and Copied to Parties