Case Number: 4104082/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **REGIONAL EMPLOYMENT JUDGE HILDEBRAND (sitting alone)**

BETWEEN:

Claimant **Mr A Banjoko**

AND

Respondent **Sky In-Home Services Limited**

ON: **Thursday, 22nd of February 2018**

APPEARANCES:

For the Claimant: **In Person**

For the Respondent: **Mr K Wilson, Counsel**
Ms T Sehmbi, Solicitor

RESERVED JUDGMENT

The Claimant's claims of unfair dismissal and breach of contract fail and they are dismissed.

REASONS

The Claim Form

1. By a claim presented to the Employment Tribunal in Glasgow on 30 August 2017 the Claimant claimed that he had been unfairly dismissed from his post as a home service engineer with the Respondent which he had held from 3 October 2011 to 2 May 2017. The Claimant also claimed that he was owed other payments.

2. In an e-mail to the Respondent dated 9 January 2018 the Claimant set out the estimated compensation that he was seeking. He stated that he was stopped from working on 2 May 2017 and sought compensation for the loss of earnings caused by his suspension and subsequent dismissal from that date until February 2018 when the hearing was to take place. The Claimant thus did not make any express claim for a breach of contract by summary dismissal and did not tick the box on the claim form in relation to notice pay.

3. At the beginning of the hearing the Tribunal clarified that it appeared that the case was solely one of unfair dismissal. The Claimant responded by saying that the claim was unfair dismissal.

4. The Tribunal sought to make clear that there was no public interest disclosure case brought here and if that was what the Claimant sought to put before the Tribunal he should make that clear at this point. The Claimant accepted that the case was for unfair dismissal only.

The Response

5. The Respondent resisted the claim. It stated in the response that the Claimant was dismissed for gross misconduct. Inspection of work undertaken at properties visited by the Claimant identified that the Claimant had failed to secure his ladder with an eyebolt and had failed to follow the procedure requiring management authorisation for a deviation from the normal working method. The second job inspected following a visit by the Claimant showed a similar failure to secure the ladder with an eyebolt and ratchet strap.

6. The Respondent referred to an investigation and conduct procedure and referred to the remorse shown by the Claimant for his actions demonstrated by a letter of apology. Notwithstanding this the Claimant had been dismissed. There was an appeal process and the decision to dismiss was upheld.

The Issues

7. There was no agreed statement of issues in the case. The Respondent had helpfully prepared a skeleton argument in advance of the hearing and had set out their view of the facts and the legal principles engaged by the case. The Tribunal verified that the Claimant had received this skeleton argument and had an opportunity to consider it. The issues were set out in the Respondent's submissions at page 6 and following where the issues were identified as follows:-

    1) What was the reason for the dismissal? Was it potentially fair?

    2) Did the Respondent have a genuine belief in the Claimant's misconduct?

    3) Were the reasonable grounds for such belief?

    4) Was there a reasonable investigation in all the circumstances?

5) Was dismissal a fair sanction in the circumstances?

6) Was a fair procedure followed?

7) Was any deduction appropriate in the event the dismissal was found to be unfair in relation to the authority of Polkey?

8) Was any reduction for contributory conduct appropriate?

9) Had the Claimant failed to mitigate his loss?

8. At the beginning of the hearing I made clear to the Claimant that the Tribunal would deal with the merits of the case, namely whether the dismissal was fair or unfair and whether any deductions under Polkey or for contributory conduct were appropriate in the first part of the hearing. Material in relation to the Claimant's mitigation of loss would therefore not be considered until the second, or remedy, part of the hearing after a finding of unfair dismissal had been made. The Claimant understood and accepted this.

The Evidence

9. The Tribunal received a bundle of documents comprising some 224 pages. The Tribunal has also received witness statements for the Claimant and for Mr Russell Carless, the dismissing officer and Mr Nick Pamphilon, the appeal officer.

The Findings of Fact

10. The Tribunal made the following relevant finding of fact.

Background

11. Mr Carless is an experienced team manager working for the Respondent. He had dealt with the number of disciplinary appeal and grievance meetings.

12. Mr Carless had no personal relationship with the Claimant. He had no involvement with him although he knew his name as they had worked in the same region. He was appointed to the role of chair of the conduct hearing. The charges related to health and safety procedures and alleged breaches. The Claimant faced specific allegations of failure to follow safe systems of work by securing a ladder with an eyebolt. The Claimant had used a ratchet strap to connect his ladder to the existing bracket by which the satellite receiver dish was affixed to the premises. The procedure required that this should only by undertaken with the express approval of a manager given by telephone.

13. The Claimant's was an engineer involved in installation and maintenance of satellite systems at residential and commercial properties. Engineers work at height with ladders to access dishes and the engineer can be anything up

to 30 feet above ground. Engineers are required to work safely at height to avoid injury to themselves, other engineers, customers and the public. Considerable time is invested in training engineers and the Respondent produced the Claimant's training record which demonstrated regular attendance at face to face training and e-learning together with classroom activities. This training appears to have been delivered at various times through the employment.

14. The Claimant had attended a course specifically on ladder training on 30 October 2014. When working on ladders between 6 feet and 30 feet above ground engineers are required to use fall arrest equipment. This involves a 3 point of contact system securing the ladder to the wall using an eyebolt. A ladder mate is used to stabilise the base and then a piece of equipment called a microlite is used to stabilise the top. The Tribunal was provided with the "Lyte Combination Ladder Policy" setting out relevant safety procedures. A further document, "The Ladder Working Introduction," sets out the appropriate way to set up and work safely with a ladder. An eyebolt is a small device which is drilled into the brickwork to secure the ladder to the building. The ratchet strap is then passed through the rung of the ladder and through the eyebolt and tightened to ensure that the ladder cannot move. The engineers are secured to the ladder by use of a rope grab and harness which forms part of the fall arrest equipment. This prevents an engineer from falling at any time. All of the Respondent's vans have a flow chart visible at the back of the van which is known as the "ladder hierarchy." This guides engineers on what they can and cannot do if a particular piece of equipment cannot be used for any reason. The hierarchy culminates in escalation to a manager for guidance. The "Escalation Process" is provided to engineers and they are aware of it.

15. The Respondent monitors health and safety compliance by its "Homesafe Assessment." The engineer's line manager attends jobs unannounced to check the engineer is working safely in accordance with procedures. Failure can result in investigation and/or disciplinary action.

The Investigation

16. Mr Carless was contacted in April 2017 to chair a conduct hearing. The investigation report was provided. It is found at pages 137-139 of the bundle and records a meeting between the Claimant and Mr Fitchet on Sunday, 13 January 2017. The work undertaken by the Claimant had been considered initially by Mr Ben Cotton-Jones. The Claimant appears not to have appreciated that he is a manager. After initial information on the work was gathered the investigation was handed to Mr Mark Fitchet, Investigation Manager.

17. In relation to job 130859119 the Claimant had left no evidence of an eyebolt being used to secure the combi ladder when working on a dish above the customer's patio door with a ladder based on wooded decking. The Claimant confirmed the process which he should have followed including the use of an

eyebolt and the process for escalation if required. The Claimant indicated that he had secured his ladder to the existing dish bracket. He said he did not use an eyebolt above a glass window. He believed he was allowed to secure the ladder to the existing bracket as a normal process and he did not need to escalate this. He followed the process of securing the ladder to the existing dish bracket when using combi ladders. The report stated the ladder was on wooden decking which is known for ladders slipping. The Claimant had not escalated his method to the duty manager as he believed he did not have to.

18. The second job considered by Mr Fitchet was 130837351. Again, there was no evidence of an eyebolt to secure the combi ladder to the wall. The Claimant confirmed he was aware of the process and that it involved using an eyebolt. He was also aware of the process for escalation. He said that he had secured his ladder as a single length to the existing dish bracket to make it safe, tucking it up behind the bracket. He believed he was allowed to secure the ladder to existing brackets as a normal process and did not feel the need to escalate this. When asked to demonstrate how the ladder had been set up it appeared that it was not possible for it to be set up as the Claimant had described it. The Claimant confirmed he understood what he should have done but he chose not to do this and used another method which he believed he could use without escalation. He said that when he used his ladder as a single section ladder he would ratchet strap the ladder to the existing dish bracket. He did not use an eyebolt because if the dish was a reasonable height and he was just changing the LNB (the low noise blocker which receives the signals) he would tend to strap the ladder to the bracket. He then contradicted himself by saying this was not something he did all the time.

19. Mr Fitchet concluded his report of the interview by saying that the Claimant was aware of the correct processes and it was clear from the inspection visits that the Claimant could demonstrate the correct way to secure a ladder when accessing a dish. The report said that if an engineer wished to strap the ladder to the dish that method needed to be escalated. This requirement was stated in a number of training documents and health and safety working practices and manuals. Notwithstanding these clear indications the Claimant believed he it was for him to choose which method to use and would only escalate if he was unable to do the job safely. He said he could not use an eyebolt on this job because it was above a window but provided no satisfactory reason for this. Failure to follow safe working practices contrary to procedure was demonstrated in both cases. In the second property visited it appeared to Mr Fitchet that it would not have been possible to put the ladder in contact with the dish bracket but it would have to be placed at some distance from the bracket and at too steep an angle to be used safely. The Claimant was questioned but could not explain how his version of events failed to match what was possible. Mr Fitchet concluded the Claimant had failed to follow the preferred method of safe systems of work by securing the ladder with an eyebolt but had instead used a ratchet strap in the first case.

In the second case he had failed to follow safe systems of work and had failed to use an eyebolt and ratchet strap.

20. In advance of the conduct meeting the Claimant was supplied with a full pack of documents together with relevant policy. The Claimant's right to be accompanied was explained. The meeting took place on 2 May 2017.

The Disciplinary Hearing

21. The disciplinary hearing took place on 2 May 2017 and lasted from 10.48am to 15.15pm. The Claimant attended alone and the Respondent attended by the chairperson, Mr Russell Carless and Mr Richard Stocker who took the notes. The charges were put to the Claimant. The procedure was explained and a detailed note was taken by Mr Stocker. The meeting established the Claimant's knowledge of the ladder hierarchy and safe systems of working. The Claimant accepted that on the job he could have drilled an eyebolt. He chose not to follow this method because he wanted to be safe and keep the customer happy and limit damage to their property.

22. In the second instance he failed to follow procedure and he gave as the reason the fact that there was a bay window that it was big window. There was a limitation on space around the ladder and the wall was rendered. He was asked if it was possible to get the ladder close enough to the dish bracket to secure it and he responded that it was not stated what distance the ladder needs to be from the bracket. The Claimant accepted in relation to the second incident that if he had been drilling an eyebolt he would be directly in front of the ladder whereas the bracket was off to one side and this resulted in instability. He was questioned how if he put the ladder behind the dish he had managed to install the "ladder mate" because the angle was too acute for this. He said he has used it but it might not have had 6 points of contact. The wall gave additional stability. The Claimant said that he assessed the job when he arrived at it and if he could not use the required method he would strap the ladder to the bracket. He raised concerns about the fact there was a kitchen and pipes on the inside of the brickwork. He subsequently accepted that that was not a real risk.

23. When the meeting adjourned at 1.15 the Claimant produced a letter headed: "*To whom it may concern. Letter of apology*." The Claimant said he wished to place on record his sincere and unreserved apology for failing to follow the preferred method of safe systems of work by securing the ladder with an eyebolt on the two jobs. He wished to place on record that the method and procedure he used was done in good faith but on reflection he should have followed the method and processes in the Home Services guideline set out by the Respondent. He said that given the opportunity to resume the job he promised he would only use methods and processes set out by the company.

The Outcome

24. When the meeting reconvened the first allegation was found proved. The Claimant had failed to follow the escalation process. There are other methods to secure the ladder with an eyebolt but the Claimant chose to pick a method which was not part of the rational progression through the hierarchy. He used the method which was only appropriate if a good fixing for an eyebolt could not be obtained.

25. Mr Carless also upheld the second allegation. He found it unlikely that the Claimant had used a ratchet strap because of the distance between the ladder and the dish bracket. There was no reason why an eyebolt should not have been used. Mr Carless said he appreciated that securing a ladder to a dish bracket is a recognised process but on both visits there was no reason to use this method. The Claimant was not allowed to choose his own methods and working practices. His extensive experience indicated that he should know the correct procedures in each situation. Both of the instances identified would have needed escalation. Mr Carless said he had considered the statement offered by the Claimant and his remorsefulness for not following correct procedures. This had not altered the decisions he made on the day in question. Given the serious nature of the allegations he dismissed the Claimant with immediate effect.

The Appeal

26. The Claimant signed the copy of the notes to indicate that they represented an accurate account of the hearing discussions. A letter was written to the Claimant dated 6 May 2017 confirming the outcome of the hearing. He was notified of his right of appeal. The Claimant indicated his intention to appeal. In an e-mail dated 23 May 2017 he also indicated that he had an audio tape recording of the hearing which he wished to use as part of the appeal which bore no resemblance to the written notes taken at the meeting. He believed he was unfairly dismissed for reasons best known to the Respondent which had never been disclosed to him other than the official reason given in the dismissal letter. He said he had an impeccable and unblemished record with Sky.

27. He considered he should have been given the opportunity to cross-examine or question Mr Fitchet at the meeting taking into account that dismissal was based on his report. Other points raised in the appeal were that the manager had not communicated that the Claimant's work would be checked after it was completed. The method used was a recognised method in the health and safety manual. The method was recognised but the manager had to be contacted before it was carried out. The Claimant accepted he failed to do this but that failure to escalate should not have resulted in a dismissal for an outright health and safety breach. Because a spot check was taken after the job was completed there was no witness of the offence alleged against the Claimant. The fact that there was no hole in the wall where the bolt would have been placed was treated as conclusive evidence that the regulations had not been followed. The investigation failed to consider the possibility of

the alternative approved method used. The Claimant said he had been suspended at a meeting at Costa Café and demonstrated what he had done by setting his ladder against a tree outside the café. This was different from the scenario at the client's property. The Claimant said he had worked for the Respondent for 6 years and had a clean health and safety record for that entire time.

The Appeal Meeting

28. The appeal meeting took place on Friday, 16 June 2017. In the letter convening the meeting Mr Pamphilon set out the documents which he would be considering. He also set out the grounds for the appeal. Again the Claimant attended without a companion. The chair person of the appeal was Mr Nick Pamphilon and the note taker was Mr Michael Denny.

29. In the appeal hearing the Claimant pointed out that although he had been notified that checks would be carried out on his work the message was sent after he had completed the work. The standard process of notification was not followed. Mr Pamphilon said that he would investigate that point. The Claimant then said that the method he had used was the safest and most feasible. The sanction was unfair and too harsh. Again, Mr Pamphilon said he would investigate further.

30. In relation to the fact that the Claimant had not been witnessed undertaking the work Mr Pamphilon referred to the lack of the eyebolt hole in the wall to demonstrate that the ladder had been properly secured. Mr Pamphilon responded that there were a number of processes within the manual and asked if the Claimant was saying he had followed all the processes. The Claimant said he had followed the processes. The Claimant recognised that he did not follow the process but said he felt this did not constitute a dismissal. The Claimant then said that Mr Cotton-Jones did not inform him he was undertaking post checks as he was required to do. The Claimant considered the investigating manager did not consider the possibility of an alternative method. The Claimant accepted there was no evidence of an eyebolt and stated "Hindrance that did not allow me to use an eyebolt the bay window and newly rendered wall on the property which did not allow me to do this." The meeting then discussed why the Claimant was asked to demonstrate the method he had used against a tree. The Claimant believed that the decision maker had accepted the evidence of the investigating manager in preference of that of the Claimant. In responding the Claimant made particular reference to the distance between the bracket and the ladder, in the absence of any indication how close to the bracket the ladder needed to be.

31. Mr Pamphilon drew attention to the fact the Claimant stated he had worked for the company for 6 years and had a clean health and safety record for the entire time. The Claimant said he felt he had been thrown into the bin with no clear understanding that his record had been clear. He had only missed one training meeting due to being late and reattended a week later. He was asked

about his assertion that the Respondent did not follow the procedure. He considered he should have received a warning before dismissal. The Claimant had also raised in his appeal the fact that he was asked to hand back the keys to his van. The Claimant said that he considered the decision to dismiss was predetermined. The Claimant had been left stranded at a remote location. Mr Pamphilon asked if transportation was offered and the Claimant accepted that it was but that he had declined the offer. The Claimant said he had his own transportation and felt he should have been trusted to return the vehicle under his own efforts. The Claimant said he have been victimised by the investigating manager. An engineer had come to the Claimant and highlighted that he was not the one who snitched him up. The Claimant felt that there was more to this and the audio recording of the meeting showed victimisation by the managers who dealt with the investigation. Mr Pamphilon asked the Claimant if he had informed the investigation manager that he had recorded the conversation. The Claimant said he had not as they did not believe anything he was saying. The Claimant provided 3 voice recordings and the Claimant was asked to summarise. The Claimant said the tone of the conversation favoured the manager over the Claimant from the beginning of the meeting and his points were not discussed. Mr Pamphilon asked if the appeal was being recorded. The Claimant said it was not. In conclusion the Claimant said he wished to know why he had been sacked. He had never received any complaint from Sky or customers. The Claimant signed to say the note taken by the Respondent was accurate.

32. Mr Pamphilon subsequently investigated further with Mr Cotton-Jones on 27 June 2017. It appears the background to the post check of the Claimant work was a high number of revisits for him and others. Mr Cotton-Jones indicated that when he spent time with the Claimant he explained the reason for the meeting and that it involved on site observation, a knowledge check and a minimum of 3 post checks to ensure consistency. The checks were undertaken the following day. On visiting the first property where the Claimant had worked the owner identified that access to the place where the dish was located could not be provided as it was above someone else's garden. The Claimant had apparently accessed this area in the absence of the owner of the garden by using a ladder to climb over the fence. Mr Cotton-Jones could not obtain access to the garden to look for evidence of health and safety, namely an eyebolt. At the second property the dish was 12 – 15 feet of the ground and would have needed a ladder to access it. There was no evidence of an eyebolt or existing anchor point for securing a ladder. Mr Cotton Jones moved to the next post check. The Claimant had already left. Again, the dish was around 12 feet of the ground. The old LNB had been left on the windowsill. There was no evidence of an anchor point or eyebolt. The investigation was then handed to Mr Fitchet because he had experience which Mr Cotton-Jones did not.

33. Mr Pamphilon then met with Mr Fitchet. He explained to Mr Pamphilon that the ladder hierarchy was an essential part of the engineer risk assessment.

All of the methods should be first considered and if they are not possible then the method used by the Claimant should be the last resort and be escalated to the manager by telephone for further guidance and approval before proceeding. All known methods were available for this job. The Claimant should not have proceeded without first escalating. Mr Fitchet pointed out that there were two incidents on the same day where there was no evidence of an eyebolt. Mr Fitchet said he did not believe the Claimant had followed the process of securing his ladders as it was not possible on one customer's property. The process of securing to the bracket is in a separate working brief, Mr Fitchet explained, which is not in the working procedure manual. It would have been briefed to the Claimant at the point it became available and the ladder hierarchy would have operated to advise the Claimant what needed to be done. Mr Fitchet explained why he had asked the Claimant to demonstrate his method of working against a tree. Mr Fitchet explained that there was no basis for the allegation of victimisation since he had little contact with the Claimant before the checks which had been undertaken. In relation to the audio recordings Mr Fitchet confirmed that he had read back the notes he had taken to the Claimant for approval. He considered it was unprofessional for the Claimant to have made an undercover recording.

The Appeal Outcome

34. On 8 September 2017 Mr Pamphilon wrote to the Claimant. He dealt extensively with the point of appeal raised. The points raised in the appeal were not accepted and Mr Pamphilon set out clearly and concisely his extensive reasons or the conclusion. In relation to the sanction he explained at point 8 that the Claimant had been warned that the allegations might constitute gross misconduct and this might lead to dismissal. The allegations and the Claimant's conduct were characterised as gross misconduct.

The Tribunal Hearing

35. In the course of the Tribunal hearing the Claimant indicated that he wished to see the "internal memo" that communicated his dismissal. The Claimant believed that others took the decision to dismiss and this was communicated to the decision makers who gave evidence. The Respondent has given discovery and there was no reason to doubt the quality of the disclosure given. The Claimant has produced no basis for the allegation that there was an internal memorandum from others directing the decision makers to dismiss. The Claimant in his oral testimony said he believed that he had been targeted for dismissal for two reasons. He had not been made aware of concerns about the safety of new equipment. The Claimant in his witness statement said he believed he was dismissed because he had sustained an injury at work while performing installation at a client's property on 11 December 2017. That date should be 11 December 2016. He also considered that his job security was threatened from the moment he

expressed concerns about the safety of new equipment, specifically the triple section ladder which he said seemed to have defective latches. He said his concerns were met with ridicule and derision on a group chat platform even though some of his colleagues agreed with his position. He had decided to bring a negligence case against the Respondent and at this point the smear campaign, which he said led to his dismissal, intensified. The Claimant also considered that because of the acquisition of Sky by Fox a reduction of the workforce was an inevitability.

36. Both these points were put by Counsel for the Respondent to Mr Carless at the beginning of his evidence. Mr Carless said he was unaware of the incident referred to by the Claimant on 11 December 2016. He was not aware of any concerns expressed about the safety of new equipment. In relation to a reduction in workforce, recruitment of engineers was active throughout London and had been for the last 4 years. The matters raised by the Claimant had no influence on the decision to dismiss. The decision to dismiss was taken so that the Respondent could protect the business, third parties and employees. Dismissal was appropriate because of the risks to the Claimant and others which were severe. The Claimant failed to follow natural progression in the methods he used and the risk of reoffending was significant. The Claimant failed to make any effective challenge to the evidence given by Mr Carless in this context.

37. When the Claimant was specifically asked to put his assertion that his accident on 11 December 2016 was the reason for dismissal, the Claimant again declined to put it straight to the witness. Again, Mr Carless said that he was not working in the Claimant's region and would not be aware of the accident and the evidence was not presented to him. The Claimant accepted that he had not raised it in the disciplinary hearing but asserted that it was unbelievable to say Mr Carless did not know about it. Mr Carless gave evidence that he had not seen any evidence of it before it appeared in the bundle. Mr Carless also gave evidence that he had not been informed of any potential reduction in the workforce of Sky by Fox if the business was taken over but in any event this would not have had any influence on the disciplinary process.

38. In the evidence of Mr Pamphilon, Counsel for the Respondent again as part of the evidence in chief gave him an opportunity to deal with the Claimant's case that there were other reasons for his dismissal. He said he knew about the Claimant's injury but had not taken this into account in dealing with the appeal. He became aware of the Claimant's concerns only after the case begun. The Respondent was recruiting engineers in London and in the South East. Currently the Respondent was looking to recruit 200 engineers. The merger had no bearing on the Claimant's appeal. Over the years there have been a number of serious injuries and fatalities resulting from falls from ladder, one of which was just before Christmas. The Claimant asked Mr Pamphilon for the internal memo dismissing the Claimant. Mr Pamphilon said there was no such memorandum. The Claimant asked Mr Pamphilon if he

had a clear record of what he had considered and Mr Pamphilon replied that he considered the appeal documents only.

39. In the cross-examination of the Claimant the Claimant appear to suggest for the first time that he was not required to escalate matters, which clearly required escalation, because he was using a combi ladder. That construction of the Respondent's safety documentation appears entirely without foundation. The Claimant was also asked about the apology letter in which he accepted he was guilty of the misconduct alleged. The Claimant said he had not admitted the misconduct but just wanted to keep his job. It is difficult to see how the apology letter stands as anything other than an acceptance of his faults as identified in the process.

40. The allegations set out against the Claimant are replicated in the apology letter.

41. The cross-examination also challenged the Claimant's assertion that he had a clear health and safety record. It was pointed out to him at page 101 of the bundle that the Claimant had been issued with the first written warning for drilling without using the pipe detector which resulted in damage to the customer's property having drilled through an electrical cable which powered the boiler and heating system. This was sanctioned by withholding a bonus and a requirement for three unannounced Homesafe job observations within a 5 week period. The letter was dated 31 December 2012.

42. On 3 September 2012 the Claimant was issued with the final written warning for poor conduct for failing to attend a training course without valid reason and dishonestly indicating that he left for a training course at 7.30am when he had not left home until 7.45am and further stating that he had broken down on the side of the road due to the malfunction of the vehicle battery when in fact the monitoring report showed his van had not stopped until it had reached the destination. Further the Claimant indicated that he went by central London when the monitoring report stated that he went through Woolwich, Greenwich, Newcross, Stockwell, Chelsea, Cranford and Isleworth. He was also found to have incorrectly advised the trainer that the power on his Sat Nav had failed and told another that his van had broken down for 15-20 minutes. The Claimant further indicated that he called the AA for assistance when in fact the AA had not been called. On the refusal of entry to the course the Claimant had indicated that he called a covering team manager when his van broke down while the itemised phone records showed that the manager was only told after he had been declined entry to the course.

43. It is clear that these matters were not taken into account by the Respondent's decision makers in the decision to dismiss but that they were relevant to the Claimant's cross-examination on the basis that he had a completely clear record.

44. Finally, in relation to the appeal the evidence that Mr Pamphilon was that immediate termination of the Claimant's employment was appropriate because the serious risk factors involved in working at height contrary to principles did not allow for risks to be taken. The potential consequences would be to erode standards for all engineers and could leave the Respondent open to injury and fatalities. Those are the relevant findings of fact.

The Submissions of the Parties

The Claimant

45. The Claimant maintained that he was sacked for a reason other than that put forward by the Respondent. The internal memorandum would reveal the reason. The Claimant should have received a warning or suspension. He had a clear disciplinary record. The Claimant had invested in the Respondent. He wished the Tribunal to look at all the evidence. He was singled out based on the evidence of the Respondent at the hearing.

The Respondent

46. The Respondent relied on the skeleton argument produced. It was not plausible for the Claimant to say that there was a dismissal in the light of a possible take over of the Respondent when there was clearly a shortage of engineers. Mr Carless did not know of the Claimant's injury. Mr Pamphilon did but did not make any reference to it. The facts in the case were clear. Checks had been carried out on the Claimant's work and it was found that he had not complied with health and safety requirements. There had been a full investigation and a suspension. A detailed report had been prepared based on attendance at the property. Subsequently a meeting had been convened for the Claimant to explain the method used. The Claimant did not give an adequate explanation for his actions. The Claimant had been called to a disciplinary hearing and had admitted the charges in his letter of apology. It is not clear whether the Claimant now disputes that admission. It was clearly framed in the form of an admission. The Claimant had accepted that he could have used the eyebolt and failed to do so in breach of the policy. The Respondent noted his remorse and length of service but considered he should have known better. The Claimant was dismissed and on appeal further detail was sought from Mr Fitchet and Mr Cotton-Jones and the dismissal was subsequently upheld. The Respondent had to take a stringent approach to health and safety. There were approximately 40 deaths per annum in the UK from falls from height. A hard line is needed from employers. The consequences of breaches of procedure are life threatening. If rules are not observed that has a ripple effect through the business. Chances of accidents will increase. As a nationwide name the Respondent is entitled to consider its reputation in enforcing health and safety. If there were any procedural defects 100% Polkey reduction was appropriate. The Claimant was summarily dismissed on 2 May 2017 and there was no reason for any further payment to be made to him. The earlier disciplinary track goes to

credit, particularly the finding of dishonesty. The Tribunal might find the Claimant had lied in the current process as well. As large national organisation the Respondent must adhere to brand standards.

The Law

47. In relation to the law the statutory provisions are found in the Employment Rights Act 1996. Section 98 provides that the Respondent must establish a potentially fair reason for the dismissal. The reason relied on in this case is conduct. Thereafter it is for the Tribunal with a neutral burden of proof to decide whether in the circumstances, including the size and the 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 that determination is to be in accordance with equity and the substantial merits of the case.

48. The Respondent referred to leading authorities on the band of reasonable responses, particularly ***Foley v Post Office [2000] ICR 1283***. The submission also referred to ***BHS v Burchell [1980] ICR 303*** and the important subsequent authority ***Boys & Girls Welfare Society v MacDonald [1997] ICR 693***. The Tribunal should consider the disciplinary process as a whole in determining whether the dismissal is fair and should not substitute its own view in assessing the reasonableness of the Respondent's decision. The Respondent's submission made particular reference to dismissal for breach of a clearly enunciated policy citing ***Noor v Metroline Travel [2014] UKEAT/0059/14***. In that case an employee of a bus company deliberately covered up CCTV cameras on the bus. In ***AAH Pharmaceuticals v Carmichael [2003] UKEAT/0325/03*** considered a dismissal fair and commented on the context of a rule such as "no hats, no boots, no job".

49. It is accepted that the reasonable responses test should apply to the various stages of the Burchell formulation, namely the belief of the employer upon reasonable grounds after such investigation as a reasonable employer would undertake.

Conclusion

50. I therefore apply the well-known statutory provisions and appellate decisions to the circumstances of this case. Despite what the Claimant says it is clear that he accepted he was in breach of significant health and safety provisions put in place by the Respondent and given priority in order to ensure his safety and the safety of others. It is not possible for the Claimant to argue that his letter of apology to the disciplinary hearing amounted to a dispute on the underlying facts. His admission and plea for clemency were produced after the Respondent's investigation. The Claimant has put forward in the Tribunal arguments suggesting that there were ulterior motives on the part of the Respondent in bringing his employment to an end. Neither of the arguments

put forward bears any serious scrutiny. The dismissing officer was unaware of the Claimant's injury in December 2016 and the appeal officer says, and there is no reason to disbelieve him, although he was aware of it, that it bears no part in his decision making process. The Claimant's argument that the Respondent was seeking to reduce the number of engineers in light of a prospective take over similarly does not stand scrutiny. It is factually incorrect as the Respondent appears to be recruiting and no announcement is put forward by the Claimant as justification for the suggestion that engineers were to be made redundant in a covert fashion.

51. I therefore accept that the Respondent has discharged the obligation on it to show the principal reason for dismissal. That reason was the conduct of the Claimant in adopting working practices that rendered him vulnerable to a fall from height in breach of clearly communicated safety procedures. The Claimant seeks to minimise that default by arguing that the only deficiency in his conduct was the failure to obtain prior approval from a manager for the step he has taken. Understandably, the Respondent's approach is to question whether the Claimant ever actually took the protective measures which he says he took, but even if he did take those measures they were clearly outwith the Respondent's procedure.

52. The Respondent's decision makers formed a view of that misconduct. They reasonably and honestly believed that the Claimant had not complied with the clear requirement to either install an eyebolt or alternatively to escalate the problem to a manager to obtain permission for some other solution. There was no basis for challenging the reasonable and honest belief of the two decision makers who were clearly experienced professionals and who took a measured and balanced approach to giving evidence in this case consistent with their measured and balanced approach in relation to the internal hearings.

53. Was the belief of the decision makers formed upon reasonable grounds after such investigation as a reasonable employer would undertake? The investigations undertaken by the Respondent were thorough and detailed. Three properties were visited, at one of which the antenna was inaccessible. It appears clear the Claimant had trespassed in order to undertake the work he had to do there. The manager was not prepared to trespass in pursuit of the investigation. The other two properties were viewed and the Claimant's explanation for his actions found to be entirely unsatisfactory. The Claimant has not pointed to any investigation which the Respondent could or should have undertaken in order to meet some higher standard in the diligent work which they in fact undertook. I therefore accept that the investigation was such that a reasonable employer would undertake and the product of that investigation provided reasonable grounds for the belief of the decision makers in the Claimant's misconduct.

54. Was the decision to dismiss within the band of reasonable responses? It is clear that the decision makers took into account the safety of the Claimant.

They took into account the requirement to uphold safety standards. They took into account the considerable investment demonstrated on the papers by the Respondent in providing safe systems of work to its engineers. They also took into account the potentially disastrous consequences both for the individual and for the organisation if serious injury or fatality were to occur to an engineer undertaking work on their behalf. In light of those many factors there is nothing to suggest that summary dismissal was outwith the band of reasonable responses to the misconduct identified. The sanction was well within the band of reasonable responses. The Claimant had demonstrated not only that he was in breach of the standards but that he failed to support in any meaningful way the values upon which those standards are based. It was clear on the Claimant's approach to cross-examination in the hearing that his primary position was that as the person on site he had the power to make all relevant decisions in relation to the method of working. He appears not to have internalised the need to comply with the Respondent's directions for his own wellbeing and the importance of consistent standards of safety at work for the Respondent's engineers. Further, as the Respondent's decision makers have observed, it would be difficult to have confidence in the Claimant working independently given the serious circumstances identified in the disciplinary process.

55. Accordingly, it is my conclusion that the dismissal in this case is fair based as it is on gross misconduct, namely dangerous working practices and the refusal to abide by the Respondent's health and safety requirements.

56. If for some reason that conclusion is found to incorrect and there is said to have been some procedure default in the actions of the Respondent I consider that a fair procedure would in any event have resulted in a 100% chance of a fair dismissal. I further conclude that the Claimant by his actions in the event that this dismissal is said for some reason to be unfair contributed by his culpable conduct to the tune of 100% to the fact of his dismissal.

57. Notwithstanding those final observations the primary conclusion is that this claim of unfair dismissal fails and it is therefore dismissed.

Regional Employment Judge Hildebrand
Date: 9 May 2018