EMPLOYMENT TRIBUNALS

Claimant: Mr K Finch

Respondent: Bellway Homes Ltd

HELD AT: Leeds **ON:** 18 April 2018

BEFORE: Employment Judge D N Jones

REPRESENTATION:

Claimant: In person
Respondents: Mr M Dulovic, Employed Barrister

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. Had the respondent adopted a fair procedure there was a 40% chance the claimant would have been dismissed in any event. The compensatory award will be reduced commensurately.

3. The claimant was culpable of conduct which renders it just and equitable to reduce the compensatory award by 20%.

REASONS

Findings of fact

1. Mr Finch was employed by the respondent, Bellway Homes Limited, from February 2010 until he was dismissed, summarily, on 12 September 2017. At the time of his dismissal he was a Site Manager, operating a site constructing homes for the respondent near Cityfields in Wakefield.

2. The circumstances which gave rise to that dismissal were as follows. On Thursday 10 August 2017 a joiner, who was a sub-contractor, submitted a complaint that he had fallen through a gap in a ceiling where he had been working on that day. There is some issue as to whether that was a genuine fall or one which was staged but I do not consider anything particularly turns upon that. There was a gap which should have been covered with trad decking. The purpose of trad decking is to provide a temporary floor to prevent falls.

3. An investigation was undertaken by Clare Birkenhead, the Regional Health and Safety Manager of the respondent. She concluded that there were two primary causes of the accident. The trad decking had been removed and the joiner had failed to secure a handrail around the exposed edge. She made six recommendations. There was no reference in her report to failings of the Site Manager.

4. On the 5 September 2017 Mr Carter, the Managing Director of the Yorkshire Division of the respondent, wrote to the claimant and informed him that because of the serious accident involving a fall from a height at the development at which he was the Site Manager an allegation of misconduct had been made against him. He informed the claimant that the purpose of the meeting was to put the allegation to him to establish whether it was well founded. He warned him that if the allegation of failing to provide a safe working environment was found to be true a possible outcome could be his dismissal on grounds of gross misconduct. He included the accident report and its appendices.

5. On 7 September 2017 Mr Finch sent an email to ask for a detailed breakdown of the individual allegations. This was because the report of Mrs Birkenhead had not criticised the site manager, Mr Finch. In response, Mr Carter said, "*the allegation was failing to provide a safe environment, namely demonstrating a flagrant disregard for established safety procedures and placing others at significant risk. As you are aware there was a fall from height with no fall arrest system in place. This is the substance of the allegation which will be discussed…*".

6. Mr Finch attended the meeting and answered questions. He did not feel he had a fair opportunity to say all he wished. Mr Carter was anxious to establish how it was that there had been no trad decking at the time of the fall. After the accident, a statement had been taken from Mr Finch by the Contract Manager, Mr Dawson. A copy was within the investigatory materials. Mr Finch had informed Mr Dawson that on Monday 7 August, he and the assistant site manager, Dean Richardson, had discussed the trad decking. Dean had said that he had booked the contractor, Trad Deck, to strip the area where the accident had occurred, known as 138/139, on Wednesday 9 August 2017. Mr

Finch told him that he could not strip 139 as the trusses needed to be spread. According to the note, he then spoke to Trad Deck regarding the missing decking to another area. Trad Deck attended the site on 9 August to install decking to that area. It appears that, at the same time, Trad Deck removed the decking from area 138/139. Mr Finch told Mr Dawson he was not aware that that had been done at the time. Mr Finch had arranged for the provision of a crane on Thursday 10 August when the dormers in the relevant plots were to be installed (and when the accident occurred).

7. Mr Carter believed the trad decking had been removed on Tuesday 8 August, from records. Mr Dean Richardson had made a statement, on 11 August 2017, in which he said he believed it had been removed on Wednesday 9 August. In that statement, he said that he and Mr Finch learned first thing on that day that the decking had been removed. Mr Richardson said, upon Mr Finch's instruction, he had told the contractors, Trad Deck, who were laying decking to area 282/285, to refit the decking to the first floor of 139, before they left that day. Mr Finch had instructed Trad Deck to remove the flooring at the end of July, before he went on holiday. In the meantime, there had been a delay, because brick laying work had not been completed to allow the joinery work to be undertaken in the area 139. Mr Richardson, therefore, had contacted Trad Deck, whilst Mr Finch was on leave, to postpone the removal of the decking at 139.

8. After the meeting Mr Carter spoke to Mr Richardson and took a short statement. Mr Richardson had said to him that he could not recall if Mr Finch had instructed him to cancel the stripping of the trad decking on the Monday, as Mr Finch had said in the disciplinary hearing. Mr Richardson said that on the Wednesday, he and Mr Finch had seen the missing decking through the site cabin windows and that Mr Finch had told him to speak to Trad Deck to have it re-installed, which he says he then did. Mr Richardson said he did not then check that this had been done. This discussion led Mr Carter to conclude that it was unlikely Mr Finch would have raised an instruction on the Monday to Mr Richardson to cancel the removal of the trad decking, because he had not mentioned it earlier in the investigation. He therefore disbelieved Mr Finch.

9. In his witness statement Mr Carter stated that he concluded that Mr Finch had been aware that the trad decking had been removed. He said that it was most likely that Mr Finch had organised that. He knew that works were continuing to be undertaken in the affected plots, at height, but had done nothing about it to ensure it was rectified. He therefore concluded that Mr Finch was culpable of gross misconduct, having created a serious risk to any workers in that vicinity, in particular the joiners. He concluded that summary dismissal was the appropriate sanction. He met the claimant on the 12 September and explained his reasoning to him.

10. Mr Finch submitted an appeal against the decision on 25 September 2017. Mr Kerr, the Chairman of Bellway Homes Northern Region, heard the appeal on 2 October 2017. Mr Finch had submitted a very detailed document outlining how and

why he said the procedure had been unfair, submitting that he had been dismissed for something he had not been originally charged with and that there had been an inadequate investigation. He said many people were responsible for this incident although he was not.

11. Mr Kerr dismissed the appeal, by letter dated 12 October 2017. Mr Kerr informed Mr Finch that, as part of his role as Site Manager, he had responsibility for managing all aspects of the construction site to ensure the provision of safe and efficient work at all times. He informed him that it was very apparent that he had not taken any responsibility for his actions and, in so doing, it was clear that he had failed to provide a safe environment which had placed others at significant risk.

12. In their evidence, Mr Kerr and Mr Carter developed their thoughts and views. Mr Carter believed that Mr Finch had taken a deliberate short cut in instructing Trad Deck to remove the decking on the Monday, because the materials were required in another plot. There was a shortage of decking. He believed Mr Finch had instructed Trad Deck to substitute the decking from area 138/139 to area 248. This was to enable the project to progress to avoid delay, but in so doing exposed the joiners to avoidable risks. Mr Kerr, on the other hand, expressed his view that, in his role as Site Manager, Mr Finch had failed to ensure the site was safe. He said that in the one or two days which preceded the accident, when the decking had been removed, he ought to have become aware of the exposed area and dealt with it. He had failed in his duty to ensure that that decking remained in place.

The Law

Unfair dismissal

13. By Section 98(1) of the Employment Rights Act (ERA 1996) it is for the employer to show the reason for the dismissal and that it falls within a category recognised in Section 98(1) or (2), one of which relates to conduct, see Section 98(2)(b).

14. Section 98(4) of ERA provides: "*where the employer has fulfilled the requirements of Subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

16. There is no burden of proof in respect of the analysis to be undertaken under Section 98(4) of the ERA. Material considerations in a case where the reason

for the dismissal was conduct, will include whether the employer undertook a reasonable investigation and formed a reasonable and honest belief in the misconduct for which the employee was dismissed[1]. It is not for the Tribunal to substitute its own view, but rather to review the procedures against the statutory criteria and, if the process or decision fell within a reasonable band of responses the decision will be regarded as fair[2]. The reasonable band of responses in which an employer may act includes not only the determination of sanction but embraces the procedure as a whole, including the investigation[3]. When a dismissal will have a serious impact upon an employee's future career prospects, an employer will have particular regard to the fairness of following those avenues of enquiry which might establish the employee's innocence as well as those which might establish guilt[4].

17. By Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal a Code of Practice issued by ACAS is admissible and any provision in the Code which appears to be relevant to any question arising in the proceedings should be taken into account in determining that question.

18. The ACAS Code of Practice on Discipline and Grievance Procedures 2015 is one such Code. It must be read in full but a number of provisions are worthy of note. By paragraph 9, if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its consequences to enable the employee to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification. Under paragraph 12, at the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses.

19. If a claim of unfair dismissal is established, the Tribunal shall make a basic and compensatory award, if no order for re-instatement or re-engagement is sought, see section 118 of the ERA. Formula for calculating awards is contained in Section 119 and Section 123 of the ERA.

20. Under section 122(2) of the ERA, where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to

[1] BHS v Burchell [1980] ICR 303.
[2] Iceland Frozen Foods v Jones [1983] ICR 17.
[3] J Sainsbury PLC v Hitt [2003] ICR 111.
[4] Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457.

reduce or further reduce the amount of the basic award to any extent, it shall reduce or further reduce that amount accordingly.

21. By Section 123(1) of the ERA, the amount of the compensatory award should be such amount as the Tribunal considers just and reasonable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal, insofar as that loss is attributable to action taken by the employer. If the dismissal is unfair for procedural reasons, the Tribunal may reduce or extinguish any compensatory award if it is just and equitable to do so, if the Tribunal concludes that the complainant would or might have been dismissed had the procedures been fair[5].

22. Under Section 123(6) of the ERA, where the Tribunal finds that the dismissal was to any extent caused or contributed by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to the finding.

Discussion and Conclusions

24. I am satisfied that the reason for this dismissal related to conduct; that was the state of affairs, in the minds of Mr Carter and Mr Kerr, which led them to take the decision to dismiss and reject the appeal respectively. I am satisfied that Mr Carter and Mr Kerr thought that the claimant had failed in his duty as site manager; but with a different view of what the claimant had been culpable. Mr Carter thought that Mr Finch had given an instruction for the decking to be removed and knowingly left workers at risk, in working at height. Mr Kerr, on the other hand, considered Mr Finch's failed to secure the safety of the site in his role as Site Manager.

25. I am not satisfied that there was a reasonable investigation into the finding which led to the dismissal, specifically Mr Carter's conclusion that Mr Finch had instructed the contractor to remove the decking and, knowingly, had allowed there to be an exposed gap in the ceiling for a significant period.

26. A reasonable employer would have contacted Trad Deck to ask who had spoken to them and what had led to the decking having been removed, at least by the Wednesday, the day before the accident. That might have thrown light on whether Mr Richardson's account was accurate: had he instructed them on the Wednesday to reinstall the decking, had Mr Finch, as Mr Carter found, contacted Trad Deck on the Monday and instructed them to remove the decking? These were matters which would be in the knowledge of those who worked at Tradeck. It remains to be seen what they would have said. The account put forward in the witness statements of Mr Richardson and the interviews with Mr Finch were consistent, to the extent that both suggested Mr Finch had taken steps to ensure that the decking would have been in place by Thursday, 10 August 2017. Although the accounts of Mr Richardson and Mr Finch were not wholly consistent, such as Mr Richardson saying that Mr Finch knew

[5] Polkey v A E Dayton Services Ltd [1988] ICR 142.

of the absence of the decking on Wednesday, 9 August, there remained important evidence to support Mr Finch that he had taken measures to secure the safety of the area. A Tribunal should not substitute its own view of the appropriate investigation, but must consider whether what occurred fell outside any reasonable enquiry of a reasonable employer. Given the importance of the issue as to who had instructed Trad Deck to remove the decking, I am satisfied no reasonable employer would have failed to seek clarification of this from the contractor. It would have been a relatively easy enquiry to make and it could have had a significant impact upon findings which would affect the claimant's career.

27. I am satisfied that there was a further significant procedural error, in failing to explain clearly, before and during the hearing, the allegation that the claimant had created this risk and knowingly allowed subcontractors to work in this dangerous area. That was the ultimate finding of Mr Carter and, in order to be able to respond to it and use all available evidence which might throw light on the accusation, it was necessary for Mr Finch to have been given notice of it. Mr Finch had sought clarification as to the reason he was to be disciplined. That was understandable because the investigation report which was sent to him, written by Mrs Birkenhead, did not specifically criticise anything Mr Finch had or had not done. Although Mr Carter had replied in general terms, it was not discernible from the materials provided, namely the report, how it was he was said to have shown a flagrant disregard for procedures and in what respect. Mr Finch attended a meeting without appreciating that the focus was going to be upon whether he had been instrumental in the removal of the decking.

28. There is a difference in the culpability of an employee with regard to the form of misconduct alleged and found proven. An employee who knowingly cuts corners and places people at risk will generally be regarded as being more to blame than one who has, through error, allowed risks to arise unwittingly. I am satisfied that it was only when he received the letter of dismissal that the claimant appreciated that he was being accused of having created the danger. That is why one of his grounds of appeal was that he was found guilty of something he had not been charged with.

29. In his closing submissions Mr Dulovic submitted that any such shortcoming was of no matter, because there was an opening in a ceiling, creating a danger, for two days during which the claimant, as Site Manager had responsibility. If this case had turned upon the conclusion of Mr Kerr, that Mr Finch had been negligent in not discharging his health and safety duties as Site Manager, that might have been the case. That was not the finding of the person who decided to dismiss Mr Finch. Mr Carter's finding and reason for dismissing was for a more serious form of misconduct.

30. I do not accept the suggestion that this matter was clarified in the appeal. I am not satisfied that Mr Kerr was fully aware of the reasoning of Mr Carter and how it differed to his own, in the light of his answers in evidence.

31. It is said, by Mr Finch, that Mr Kerr did not address all of the matters in his detailed grounds of appeal. I reject the majority of that complaint, because his grounds of appeal were so defuse it was difficult for them to be addressed comprehensively. That said, I do find that there were two criticisms Mr Finch made

which were not adequately addressed. Firstly, that he was dismissed for a charge which he was never aware of and secondly, that a full investigation had not taken place by enquiries being made of Trad Deck or the crane operators to ascertain their knowledge as to when the decking had been removed and in what circumstances.

32. For those reasons I find this was a dismissal which was unfair and the respondent's approach and procedures fell outside any reasonably permissible range.

Polkey

33. I accept the submission of Mr Dulovic that the claimant has, to a degree, been in denial in this case. It is self-evident that the responsibilities of a Site Manager will include ensuring that safety equipment is in place. The conclusion of Mr Kerr was that Mr Finch failed in his responsibilities, to have seen the danger, when the gap in the ceiling was exposed, and to take any actions to correct it.

34. I am satisfied a reasonable employer who had made a reasonable enquiry could have come to the conclusion that Mr Finch had committed an act of gross misconduct due to his negligent discharge of duties as Site Manager. I am satisfied upon reaching such a conclusion a reasonable employer might have dismissed the claimant. Had the case been clearly explained in that way, and not drifted into a focus on his creation of the danger, Mr Finch could have focussed his defence on a number of potentially mitigating features; for example the full panoply of his duties which he alluded to in evidence, which precluded him from having a comprehensive knowledge of every part of the site. These might have mitigated any of his shortcomings. I regard there as having been a 40% chance the claimant would have been dismissed had there been a reasonable investigation and had he understood that to have been the allegation of gross misconduct.

Conduct

35. In contrast to my assessment of the fairness of the dismissal and what a reasonable employer might have concluded, it is necessary for me to make findings on the evidence before me on a balance of probabilities, in determining whether there was conduct which should be taken into account in respect of reducing either the basic or compensatory award.

36. Having heard from three witnesses and their experience of the building industry, I am satisfied Mr Finch was at fault in failing to inspect the area sufficiently to ensure the site was free from danger. He had ultimate responsibility for that. Having heard from Mr Finch I am satisfied he recognises he fell short in the discharge of his duties, albeit he is unwilling to concede it.

37. I am not able to determine, on the evidence before me, why and when the decking was removed, whether Mr Richardson had been instructed to remove the decking on the Monday or whether he and Mr Finch had seen the missing decking on the Wednesday and he had been instructed by Mr Finch to remove it. I have not heard from Mr Richardson. I do not find, on the evidence, that Mr Finch instructed Trad Deck to remove the decking on the Monday and he knowingly created a risk. I find that he had the opportunity, in walking around

and inspecting the site, to see that the decking was missing and to take steps to remove the danger. It just and equitable further to reduce the award by 20% as consequence of such contributory conduct to his dismissal.

38. That is after the reduction for 40%, for Polkey considerations.

39. I do not consider it just and equitable to reduce the basic award because of conduct of the claimant before the dismissal, having regard to the totality of compensation. I have already reduced the compensatory award pursuant to two principles, which adequately reflect the justice in the case. Had I reduced the basic award in addition, I would not have applied the same levels of reduction to the compensatory award. In my judgment it is more appropriate to reduce the loss by reference to that conduct which contributed to the dismissal; the approach which is distinct to the compensatory award.

Employment Judge D N Jones

Date 15 May 2018

[JE]