EMPLOYMENT TRIBUNALS

Claimants: Mr B Fahey
Mr S Woods

Respondent: Bilfinger UK Limited

Heard at: Manchester **On:** 3 and 4 June 2019
& 5 June 2019
(In Chambers)

Before: Employment Judge Hill

REPRESENTATION:

Claimants: In person
Respondent: Mrs Keogh, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimants claims for unfair dismissal are well founded and succeed.

2. For the purpose of unfair dismissal remedy the claimants contributed to their own dismissals and any basic or compensatory award will be subject to a 25% reduction.

REASONS

1. Following an order made by Judge Shotter on 25 February 2019 the claims of Mr B Fahey (BF) and Mr S Woods (SW) were ordered to be heard together as they gave rise to common or related issues of fact and/or law.

2. The claim forms were presented on 3 December 2018 (BF) and 10 December 2018 (SW). The claimants complained of unfair dismissal arising out of their summary dismissals on 9 August 2018 (BF) and 29 August 2018 (SW) for gross misconduct.

3. By its response forms filed on 25 February 2019 (BF) and 7 March 2019 (SW) the respondent resisted the claims on the basis that they were fair dismissals for gross misconduct.

Issues

4. At the beginning of the hearing the respondent prepared a draft list of issues, the Tribunal discussed these issues with the parties and following that discussion it was agreed that the issues for the Tribunal to determine were:

(i) Did the respondent have the potentially fair reason to dismiss;

(ii) Did the respondent act reasonably or unreasonably in dismissing the claimants for the reason given. The respondent relies on conduct in each case and in particular gross misconduct for failure to wear the correct Personal Protective Equipment (PPE) whilst working on site which was a breach of Golden Rule 7;

(iii) Did the respondent reasonably believe that the claimants were guilty of misconduct at the time of dismissal. Did the respondent have in mind reasonable grounds to sustain that belief and that the stage the respondent formed that belief had it carried out as much investigation in to the matter as was reasonable in the circumstances and whether the dismissals fall within the range of reasonable responses of a reasonable employer;

Evidence

5. The Tribunal was provided with a bundle of documents consisting of 286 pages. However, during the hearing additional documents were provided in relation to Mr Fahey's contract of employment and documents in relation to another employee of the respondent who had been disciplined for a breach of health and safety rules, bringing the total number of documents to 330. The claimants each provided a written witness statement and gave oral evidence to the Tribunal. In addition, the claimants produced four additional written witness statements, two of which were signed by several employees of Emerald Widnes (the location where the claimants were working) and the other two signed by Mr Pickton, a Security Officer and Mr Roberts the Maintenance Co-Ordinator. They did not attend and did not give oral evidence.

6. The respondent produced two witness statements, one from Mr Gareth Townsend, the Appeals Officer who also gave oral evidence and one from Mr Richie Morgan the Disciplinary Officer who did not attend because he had gone on holiday.

7. It was explained to the parties that I would read all the witness evidence provided but the witness statements produced by people who were not in attendance at the Tribunal and therefore unable to give oral evidence would only carry as much weight as appropriate because they were unable to provide oral evidence and be cross examined.

Findings of relevant facts

8. Set out below are relevant findings of fact in respect of each claimant.

Mr Fahey

9. Mr Fahey was employed as a Rigger from 16 April 2010 until his dismissal on 17 August 2018. At the time of his dismissal he was working at the respondent's customer site Emerald Kalama on a planned shutdown. The claimant had previously been employed by the respondent and had left in 2004 before returning to work for them in 2011.

10. Mr Fahey stated that when he returned to work for the company in 2011 he was not given a new contract of employment. At pages 287 to 295 included an offer letter to Mr Fahey dated 2 February 2011 which set out his basic rate of pay and his terms and conditions of employment were in accordance with the national agreement for the engineering construction industry of which Mr Fahey confirmed he was aware. The respondent produced a blank template copy of the NIECI contract of employment for hourly paid employees.

11. Mr Fahey had a clean disciplinary record and had worked in the industry for over twenty-five years. He was an experienced employee and had the responsibility of being a Chargehand in additional to his role as Rigger.

12. Mr Fahey had also had during his employment been made aware of health and safety requirements in respect of his role and had attended inductions and training in respect of the respondent's health and safety rules. The Tribunal was provided with copies of a number of "toolbox talks" showing that Mr Fahey had attended several of these events which included training on the Golden Seven safety rules which were set out at page 76A of the bundle.

13. In particular, Rule 7 of the Golden Seven rules provides that all employees should wear the correct PPE for the job. It goes on to state that the rules are absolute expectations for all employees and the personnel and it is a company requirement that everyone will fully comply with the rules and be aware of the potential consequences for those who do not. It states that failure to follow the golden rules will result in "other consequences – disciplinary action". A consequence escalator is set out "Penalty: Increasing negative impact, going from step 1, which could be a quite word down to step 8 Dismissal".

14. Mr Fahey explained that these toolbox talks were often very short four or five minute quick talks early in the morning. Mr Fahey explained that the sign in sheets would be sent round the room for everyone to sign. The Tribunal accepted this evidence.

15. However, Mr Fahey accepted that he knew the Golden Seven rules and was aware that there were potential consequences for failing to follow them. Mr Fahey also agreed that one of those consequences could be dismissal.

16. Mr Fahey stated that although he knew that there were potential consequences, including dismissal, that he was not aware that there was a zero tolerance policy.

Mr Woods

17. Mr Woods was employed as a Mechanical Fitter and also worked at the respondent's customer site Emerald Kalamar at the time of his dismissal and was working on a planned shutdown. Mr Woods had been employed by the respondent from 20 March 1995 until his dismissal on 29 August 2018.

18. Mr Woods' evidence was the same as Mr Fahey in respect of the "toolbox talks". Mr Woods had also attended inductions and training in the form of toolbox talks during his employment and in particular was aware of the respondent's Golden Seven Rules in respect of health and safety and that failure to abide by these Golden Seven Rules could result in disciplinary action including dismissal.

19. At page 69B of the bundle the respondent's disciplinary standard is sets out matters that the respondent viewed as amounting to gross misconduct and includes, "a serious breach of the company rules including but not restricted to health and safety rules and rules on computer use". It does not refer to the Golden 7 Rules specifically at this section.

20. However, at pages 71-73 the golden rules are set out in a further 'Standard' the Golden Seven Rules and available to all employees. This document does not refer to potential disciplinary action or consequences but provides details of each of the rules. It was not in dispute between the parties that wearing were appropriate PPE was a requirement of the claimants' employment or that failure to wear the correct PPE may result in disciplinary action.

The Incident

21. The incident on 7 August 2018 both claimants were working on a plant shutdown at Emerald Kalamar sub-contracted by Billfinger (the respondent). It was an unusually hot day with the temperature being around 31 degrees with zero windspeed. The job involved lowering a bundle joint into a recess with a crane. This involved working at heights of six flights of stairs and then four sets of 30 feet straight ladders.

22. As a result of the heat and as Mr Woods explained in his statement, also standing on steel plate floors which were reflecting the heat and the fact that hot Nitrogen was coming out of the column both claimants' safety glasses were steaming up to the point that they were unable to see clearly. Mr Fahey said in his statement that he realised that the reason the glasses were steaming up was because the hard hats peak was trapping the hot air and this was creating a severe visibility problem for both claimants. Both claimants were also sweating profusely as the job continued and as they neared the end of the job they were required to lower the bundle joint into its recess where there were two match marks which needed to be aligned correctly.

23. The claimants explained that they needed good visibility in order to carry out this job and they had to physically hold and turn the bundle recess to align the match

marks precisely. At this point both claimants removed their hard hats in order see clearly to enable them to finish the job. Both claimants said that this took three or four minutes and this was not disputed by the respondent. Upon completion of the job the claimants received a message via radio asking them to put their hard hats back on which they did immediately and then moved on to their next job.

24. It was apparent that the customer had completed a 'near miss' form as a result of this incident. 'Near miss' forms were completed where safety issues occurred on site. On 9 August 2018 at around 11.00 am in the morning the claimants were asked to provide statements regarding the incident. They both wrote brief statements confirming what had happened, which were included in the bundle at pages 201-203.

25. At around 3.30 on the same day they were spoken to by Mr Mike Daley and told that they were both being suspended pending an investigation. At that point the claimants were not told that the incident was being classed as gross misconduct.

26. The claimants gave evidence that for previous serious incidents anybody suspected of gross misconduct it was usual for them to be removed from the site within two hours of an event occurring. At the point of suspension the claimants were aware that they had been suspended for taking their hard hats off whilst working and that a 'near miss' report had been completed by Emerald Kalamar and the incident had been reported to the respondent.

27. Both claimants received letters dated 9 August informing them that they had committed an act of gross misconduct and enclosing a copy of the disciplinary procedure. The respondent then carried out an investigation which included the witness statements already provided by the claimants. A witness statement from Mr Graham Smith, Mr Steven Woods and Mr Paul Sway, it also included their clearance to work form and photographs of the site.

28. The investigation took into account the brief statements written by the Claimants and the above statements, but the Claimants were not informed that an investigation was taking place until after they had been suspended. The Claimants were not part of the investigation process subsequent to their suspension.

29. On 14 August 2018 the respondent sent the claimants a further letter inviting them to a disciplinary hearing which included copies of the investigatory documents. No investigatory meeting was held with the claimants prior to the invite to the disciplinary hearing other than the witness statements taken on 9 August at the point that the claimants were not aware that this matter was proceeding to a disciplinary.

Disciplinary Hearings

<u>Mr Fahey</u>

30. Mr Fahey attended a disciplinary hearing with the respondent on 17 August 2018. This hearing was conducted by Mr Morgan who is the Regional Operations Manager. Mr Fahey attended the hearing without representation.

31. Mr Morgan was not at the hearing and did not give oral evidence. Mr Morgan's witness statement says at paragraph 19 that he understood that it was a very hot day and that Mr Fahey's glasses were steaming up and he was under pressure from the client to complete the job as soon as possible. It was common ground between the parties that the claimants had removed their hard hats in order to complete a job for the client and that it was in breach of the Golden Seven Rule.

32. Mr Fahey's defence at the disciplinary hearing was that he was under pressure to do the job, that he had only removed his hat for 3 to 4 minutes and this was in order to make sure that the job was completed safely without his glasses steaming up. He also raised concerns that there had been a delay between the incident and the company's decision to suspend.

33. Mr Morgan adjourned the disciplinary hearing in order to find out why there had been a delay and at the time of the disciplinary hearing, Mr Morgan was told by Mr Daley that there had been a delay by the client supplying the 'near miss' information to them and that they were unable to investigate until it had been reported to them.

34. Mr Townsend's evidence on this point was that the near miss entry had been made on the data base on 7th August and that on 8 August Mr Daley had a conversation with the safety manager at Emerald the same day. He understood that Mr Daley was in a meeting on the morning of the 9th August. When questioned Mr Townsend could not say why no statement had been taken from Mr Daley neither at the time or during the investigation and subsequent disciplinary proceedings as to why the Claimant's were not removed from site at least when Mr Daley was made aware which was on the 8th August. Mr Townsend also conceded that Mr Daley did not consider it so serious and that Bilfinger had different standards.

35. Mr Morgan says that when he adjourned the hearing he reviewed all the evidence before him, including representations that had been made by Mr Fahey including mitigation factors. Mr Morgan's statement states that he took into account that Mr Fahey had admitted to the breach of the Golden Seven Rule. His view was that if the job could not be completed safely then the claimants should have stopped the job, sought further risk assessments and not removed their safety helmets. Mr Morgan reviewed Mr Fahey's health and safety certificates and training records and at paragraph 28 says he took into consideration Mr Fahey's extensive knowledge of the company's health and safety requirements through years of attending training sessions and then his last toolbox training talk was on 4 July 2018.

36. Mr Morgan's evidence was that he was satisfied that Mr Fahey was competent and fully aware of the safety requirements and that Mr Fahey confirmed that he understood why the company had health and safety requirements in place and the importance of them being adhered to at all times. He considered that Mr Fahey had eighteen years' experience working on site and that also in addition to this as he was the Chargehand appointed person he was responsible on a supervisory level for ensuring the compliance of the plans for carrying out the work.

37. Mr Morgan said the decision to remove his hard hat and continue working on a high risk operational lift was not setting a good example for other employees and was

against company procedures. Mr Morgan also stated that in his statement that in his view Mr Fahey had failed to recognise or acknowledge the seriousness of the breach stating that he had only removed his hat for three or four minutes and that in his view this demonstrated a neglect of the need to strictly adhere to company's health and safety requirements. Mr Morgan further stated that he took into consideration that the incident occurred on the client's site and that it was the client who had reported Mr Fahey and that the incident could have jeopardised the relationship between the respondent and Emerald Kalamar.

38. At paragraph 35 Mr Morgan states after considering all of Mr Fahey's representations and the evidence he reached the conclusion that "no employee should breach health and safety to complete a job". Mr Morgan was satisfied that Mr Fahey's actions were serious enough to amount to gross misconduct. Mr Morgan then states that he considered a range of penalties available to him and that he took into account Mr Fahey's length of service and his previous clean disciplinary record, however given his blatant disregard of the company's health and safety requirement Mr Morgan said he felt he would be unable to trust Mr Fahey to work unsupervised and therefore took the decision that summary dismissal was the appropriate penalty in the circumstances. Mr Morgan's decision was confirmed in writing the same day and Mr Fahey was informed of his right of appeal.

39. Mr Fahey had produced a further statements for the disciplinary hearing and Mr Morgan's statement seems to suggest that he was surprised that two statements were provided. Mr Fahey said that he had remembered further information and the Tribunal finds that it was entirely reasonable, particularly in view of the fact that the first statement was given without the Claimant being aware that it was going to be used in a disciplinary hearing that he gave more information.

40. At page 222 (Minutes of the disciplinary hearing Mr Fahey states that if he was in this situation again he would stop the job and ask someone else to make the decision. The Tribunal finds that Mr Morgan's conclusion that Mr Fahey had failed to acknowledge the seriousness of the incident or that he could not trust him is not supported by the evidence available to him.

41. Mr Morgan was not in attendance at the hearing and the claimants were unable to cross examine the witness. Mr Morgan does not refer to the Respondent having a zero tolerance in respect of breaches to the Golden 7 Rules.

42. Mr Woods was also invited by letter to a disciplinary hearing on 17 August 2018 however Mr Woods did not attend that hearing and during evidence at the Tribunal he confirmed that a message had been sent via Emerald Kalamar but it would appear that this message was not received by the respondent. However, the respondent rescheduled the disciplinary hearing for 22 August. Mr Woods was unwell and unable to attend that hearing and the respondent was informed by Mr Woods' sister that he would be required to attend for an operation on 28 August and that therefore any disciplinary hearing would not be able to take place until after that date. The respondent therefore rescheduled the disciplinary hearing for 29 August 2018 and a letter was sent to Mr Woods on 22 August 2018 confirming the date.

43. It would appear that on or around the same time the claimant's sister sent a doctor's note on behalf of Mr Woods dated 27 August and he was signed off sick until 8 September 2018. It was not clear in the witness evidence or at this hearing whether Mr Morgan had sight of the sick note that was submitted on 23 August 2018 but it would appear that he did not because he proceeded with the disciplinary hearing on 29 August in the absence of Mr Woods on the basis that no communication had been received from Mr Woods to say that he could not attend.

44. Mr Woods evidence was that as his sister had already spoken to the respondent explaining that he was unwell and a sick note had been sent in on 23 August saying that he was unable to attend and that he was sick until 8 September that his view was that the hearing would have been postponed. Mr Morgan's statement says that he tried to contact the claimant on the day of the hearing by telephone but it that the telephone number he had was incorrect and had not been in use for several years.

45. Mr Morgan conducted a similar process to Mr Fahey's case in reviewing the investigatory documentation although once again Mr Woods had never been invited to an investigatory meeting prior to the disciplinary hearing other than relying on the brief witness statement that was provided when he was asked to respond to the near miss for Mr Morgan's statement repeats that taking into account that Mr Woods had removed his hard hat in a designated PPE area and that it was his belief that the job cannot be completed safely it should be stopped and a further risk assessment undertaken.

46. He considered Mr Woods twenty three years of service with no disciplinary warnings on his file and his experience as a Mechanical Fitter, Mr Morgan's view was that he was surprised that Mr Woods would have removed his hat without taking a break from the required task in order to assess how to undertake it safely.

47. Mr Morgan reviewed his health and safety certificates and training records and that it was his view that Mr Woods had extensive knowledge of the company's health and safety requirements, that he had also attended a toolbox talk on 4 July and that he was satisfied that Mr Woods was competent and fully aware of the company's health and safety requirements including the Golden Seven Rules. Mr Morgan's view was that because of Mr Woods twenty years' experience he would have known about the risks involved in removing his hard hat and that he would have been aware that it was a breach of the Golden Seven Rule. Mr Morgan says in paragraph 52 that his concern was that despite Mr Woods' awareness he failed to adhere to the health and safety requirements and potentially committed a gross misconduct offence. He also considered the reputational damage that may have been caused and that in his view he reached the conclusion at paragraph 54 that no employee should breach health and safety whilst undertaking work and in order to complete a task.

48. He goes on to say that he again considered the range of penalties and that he considered Mr Woods would have known the seriousness of his actions and was surprised that he did not stop and consider taking a break, speaking to a supervisor or requesting a further risk assessment and that given his blatant disregard for company health and safety requirements he felt that he would be unable to trust Mr Woods to work in accordance with health and safety procedures moving forward. He therefore

considered that summary dismissal was the appropriate penalty. A letter was sent to the claimant dated 29 August informing him of the outcome and also of his right to appeal.

Appeals

Mr Fahey's appeal

49. Mr Fahey's appeal was sent on 17 August 2018 and the grounds for his appeal were that the severity of the punishment was too severe, he did not consider that his character or safety record being considered and referred to some other aspects but did not give details, he was invited to an appeal hearing on 5 September 2018 where he was accompanied by his union representative Mr Colin Carr.

50. At the beginning of the hearing Mr Fahey explained that the conditions on the day of the incident were horrendous and that he did not think his character or clean record had been taken into consideration during the disciplinary process. He also said that he had a clean history with no previous disciplinary warnings on his records. Mr Townsend referred to the fact that Mr Fahey had breached golden rule seven and was aware that he should wear the correct PPE and ensure that the PPE is suitable for the task and that employees should report any defects to a supervisor.

51. Mr Fahey confirmed that he was aware of the policies and when asked why he had not taken a break or consulted with the supervisor Mr Fahey explained that he was very close to finishing the job but would think differently in the future. Mr Townsend states at paragraph 8 of his witness statement "it seemed to me Mr Fahey therefore accepted his actions were wrong".

52. Mr Fahey was also concerned with regards that he was not informed as to the severity of the incident at the time and did not understand why it had taken two days tor the company to suspend him, again Mr Townsend repeated what Mr Morgan had said at the disciplinary hearing in that there had been a delay in reporting the incident. Mr Townsend explained to Mr Fahey that it was his opinion that Mr Fahey should have stopped working to either have a break or speak to a supervisor regarding the conditions and at paragraph 10 of his witness statement, "I explained at the outcome of the disciplinary hearing may have been different if Mr Fahey had removed his hat momentarily to wipe his face, head and put the hard hat back on before continuing with the required task".

53. Mr Fahey's other concern was that the sanction was too severe and at paragraph 12 of Mr Townsend's witness statement he says he explained that Mr Fahey's character was not being questioned but the company operated a "zero-tolerance" approach to health and safety and that he personally placed health and safety of employees and others as the highest priority

54. At paragraph 13 of his witness statement Mr Townsend said "I explained that I would consider everything that had been discussed when making my decision regarding the appeal, I agreed to take into account the mitigating circumstances on the day which were explained by Mr Fahey, it was a very hot day and there was a lot of pressure from the client to complete the job. The job was very close to completing

and he thought he would complete the job better and quicker if he took his hat off to do so. Mr Fahey confirmed that he would not breach any further health and safety requirements and would accept any other disciplinary sanction if the dismissal was overturned.

55. In considering the outcome of the appeal Mr Townsend said that health and safety is one of the foundations of the companies industry and no employee should have to breach a health and safety requirement in order to complete a job, that he had considered the mitigation and factors on the day but that he was satisfied that Mr Fahey could have taken a short break to remove his hat to wipe his head and if he was unhappy with the conditions he should have reported it, or sought another risk assessment. He considered the repercussions of his actions could have resulted in serious injury, even death and he was satisfied that the company could not risk this situation happening again given Mr Fahey's complete misjudgement of the situation.

56. Mr Townsend also reviewed Mr Fahey's health and safety training records and was satisfied that he had received adequate training and that his last training session was on 4 July 2018. He reviewed his disciplinary meeting notes and that he was concerned that Mr Fahey had not been aware of the severity of the incident at the time and that this indicated there was a clear disregard for the companies health and safety procedures, he also agreed that his actions set a bad example to other employees and that he considered if Mr Fahey had not been contacted by a radio then it is likely that he would have continued working for an extended period of time without the correct PPE. He did not ask Mr Fahey about this and was his assumption. He further considered his length of service and his clean record however felt that this meant that Mr Fahey should have been more aware of the risks and consequences of such a serious breach of health and safety given his experience. He considered that the actions of the claimants would have jeopardised the relationship between the company and its client.

57. Mr Townsend says "I reached my conclusion and believe that Mr Fahey could have taken a different course of action to deal with the conditions on the day, he was fully aware of and trained in health and safety requirements and was employed in a Chargehand position therefore he had responsibility to set an example to others with regard to procedural compliance but failed to do so. I agreed with the outcome of the disciplinary hearing and was satisfied that summary dismissal was the appropriate penalty in the circumstances".

58. Mr Fahey was informed of the outcome on 7 September 2018.

Mr Wood's Appeal

59. Mr Woods sent an appeal letter dated 5 September 2018 and the grounds for his appeal were unsafe work practices, lack of training work culture, no consideration into the reasons for needing to reschedule the disciplinary hearing and no consideration into his character or clean record. The appeal hearing was scheduled and went ahead on 14 September 2018 and Mr Woods was accompanied by a work colleague.

60. At this meeting Mr Woods explained that he had not had an opportunity to send in a letter about his unavailability for the disciplinary hearing and he wasn't given an opportunity to discuss his version of events, Mr Townsend said that neither he or his sister had communicated to the company that Mr Woods would not be able to attend the hearing, Mr Woods also raised the issue of the delay in suspending him and once again was explained because of the delay by the client in passing on the information.

61. Mr Woods acknowledged that he had done something wrong but said that he had replaced his hard hat immediately Mr Woods also queried where on the documentation it states an employee would be dismissed for a breach of a Golden Seven Rule. Mr Townsend explained the disciplinary procedure to Mr Woods and at paragraph 29 of his witness statement says "an employee would not be instantly dismissed but would be suspended pending an investigation into alleged breach taking into account all the circumstances of a particular incident. Following an investigation, a decision would be reached on whether the matter should proceed to a disciplinary hearing or if the employee should be issued with a warning. If the alleged breach is for gross misconduct a disciplinary hearing is likely to result in summary dismissal. Mr Townsend explained that Mr Woods' years of service and clean record would be taken into consideration when making his decision".

62. Mr Woods also pointed out that another safety incident had occurred eighteen months previously when he had reported a fire inside a vessel and explained the circumstances. Mr Townsend was not aware of this incident and found it surprising that because of this previous incident Mr Woods would decide to take his hat off at another incident. Mr Woods was concerned that no action had been taken over this other safety breach.

63. During Mr Townsend's considerations of Mr Wood's appeal he looked at the unsafe work practices and considered that it was very hot on the day and that Mr Woods was under pressure to complete the job as soon as possible. However, he was satisfied that Mr Woods should have taken a break and should have not continued working without a hard hat on under the circumstances and should have sought advice from a supervisor or requested a further risk assessment. Mr Woods also said that he had claimed that it was deemed safe to remove his hat because Mr Fahey who was a Chargehand had removed his hat, however Mr Townsend said that he felt that with twenty-three years of experience he should know health and safety should never compromise and PPE's should not be removed. He also was of the view that if Mr Woods had not been instructed to replace his hat then he would have continued working for an extended period. Again the Respondent did not provide any evidence to support this view. Mr Townsend also considered the allegation of lack of training and work culture and he said that he had reviewed Mr Woods' training records and was satisfied that Mr Woods was fully trained and aware of the company's requirements. Mr Townsend said that he investigated the reason Mr Woods had been unable to attend the hearing and as far as he was concerned no one was aware that Mr Woods was attending an operation. Mr Townsend did not refer at all to the sick note that had been submitted on 23 August 2018. Mr Townsend reached the conclusion that he believed Mr Woods could have taken a different course of action, he had been fully trained and had over twenty years' experience and that he only replaced his hat when he had been caught with it off. He questioned Mr Woods' awareness of the severity of the breach of health and safety requirements, he was

satisfied that it amounted to gross misconduct and that he agreed with the outcome of the disciplinary hearing. This was confirmed to Mr Woods by letter dated 21 September 2018.

64. During his oral evidence Mr Townsend stated that the company had a zero tolerance in respect of the breaches to the Golden 7 rules. He could not give examples of situations where a breach would result in 'a quiet word' in accordance with the Golden 7 Rules Standard and the respondent did not provide any evidence of a zero tolerance policy in operation.

65. However, Mr Townsend conceded that other employees had not been dismissed for breaches of the golden 7 Rules. Mr Townsend also conceded that pressure to complete jobs by the customer was a factor.

66. In particular Mr Townsend confirmed that another employee who was not dismissed had breached a Golden 7 Rule but was under the instruction of the customer to breach the rule. The Tribunal was provided with documentation relating to another employee at page 330, the disciplinary outcome letter. This letter refers to mitigation where the employee had said that it was custom and practice on that site to work in breach of Health and Safety requirements. This employee was not dismissed.

67. Mr Townsend in his oral evidence would not confirm if the outcome would have been different if the Claimant's had been instructed to remove their hats.

68. Both Claimant's had acknowledged that they would repeat the behaviour.

Points of Dispute

Breach of Procedures

Mr Woods disciplinary hearing

69. The Tribunal finds that Mr Woods' sister did inform the respondent that Mr Woods would not be able to attend until after 28 August. The respondent argue that they were not aware that he was having an operation on 28 August, however, the Tribunal finds that the fact that the respondents were informed that he was not available until after that day, due to ill health, is reasonable that they were told that the reason why he could not attend was due to an operation. Further, the respondents received on 23 August a sick note signing Mr Woods off sick until 8 September 2018 and therefore the Tribunal finds that being in possession of that information by the time of the appeal that it would have been reasonable for the respondents to have reconvened the appeal hearing and given Mr Woods an opportunity to have stated his case.

Reporting Incident

70. It is accepted by all parties that the client company completed a near miss form set out at page 203 of the bundle at 16.49 on 7 August 2018, where it reports that two Bullfinger operatives were observed standing adjacent to a lift not wearing their safety helmets, that the remedial action taken was that they were informed via radio to wear

their helmets which they did and that the maintenance supervisor was also informed (Mr Daley).

71. The Tribunal accepts the assertion that Mr Daley may not have picked this up until the following morning but the Tribunal finds based on the respondent's evidence that this information was not considered serious enough to warrant immediate suspension and no action was taken by Mr Daley on 8 August when he was informed.

72. The respondent states that Mr Daley was busy that day however his actions the following day indicate that he did not rush to take witness statements or to ascertain what had happened. The Tribunal finds that the claimants were not informed when they were asked to complete their witness statements that this was to be part of an investigation into gross misconduct and therefore their forms were completed on the basis of very brief information just to confirm what had happened. The claimants were still then not suspended until 3.15 in the afternoon and the Tribunal finds this to be inconsistent with the respondent's stance on the zero-tolerance for breaches of health and safety.

73. During the hearing the Tribunal was provided with documentation regarding other incidents that had occurred on the site, the breaches of the Golden Seven Rules had occurred where employees had been dismissed previously, we were not provided with details of their disciplinary or investigation reports and were not informed whether they had been suspended at the time. However, the claimants' gave evidence that on previous incidents of serious breaches people were always removed from site immediately or certainly within a couple of hours of the event occurring. The Tribunal accepts this evidence.

Golden Rules

74. The Tribunal was provided with a variety of documents in respect of the Golden Rules from the toolbox talks. The Tribunal accepts the evidence of the claimant that these were very brief meetings were employees were asked to sign to say that they attended but not necessarily that they understood the contents of the talks, it also appeared that materials were available but no indication that claimants were given a copy of these materials at these talks.

75. The respondent relied on this evidence that the Claimants would have been aware of the consequences of their actions. Page 76A sets out the consequence escalator for breaches of the Golden Seven which range from 'a quiet word' one would assume less serious breaches to the most serious breaches that would result in dismissal. Mr Townsend the only witness for the Respondent was unable to answer how or when the escalator would be used because he referred to a zero tolerance policy only.

76. Further, handouts of the Golden Rules, for example at page 80E clearly states a breach of these rules is seen as gross misconduct and will be investigated as such but does not override the consequences escalator. During this hearing the disciplinary hearing and the appeal hearing. The respondent has consistently referred to a zero tolerance and provided evidence of other dismissals that have taken place for breach of Golden Seven Rules. However, the evidence of at least one employee who was

found guilty of a breach of health and safety Golden Seven Rules is that because he was instructed and/or supervised by the client that dismissal was not appropriate in those circumstances. When questioned by the Tribunal Mr Townsend said that because they were working under the supervision of the client that even though they had breached the Golden Seven Rule that dismissal would not be appropriate in those circumstances. The Tribunal enquired whether if the claimants had been instructed to take their hard hats off by the client whether that would have resulted in dismissal. Mr Townsend was unable to positively answer that question either way. Mr Townsend was also unable to provide details of where the consequence escalator would apply.

77. The Tribunal finds that this is inconsistent with their policies and that this is the information that was provided to the Claimants.

The Law

Unfair Dismissal

78. Section 98 of the Employment Rights Act 1996,

a. did the respondent have a potentially fair reason to dismiss?

b. did the employer act reasonably or unreasonably in dismissing the Claimant for the reason given?

79. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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.

80. A dismissal for a reason which relates to an employee's conduct is a potentially fair reason for dismissal. When determining cases of misconduct the Tribunal has settled case law to assist it in drawing conclusions. In particular in cases of misconduct guidelines have been set out by Arnold J in **British Home Stores Ltd v Burchell [1978] IRLR 379**. Essentially the Tribunal must determine the following:

a. Did the respondent reasonably believe that the Claimant was guilty of misconduct at the time of the dismissal?

b. Did the respondent have in mind reasonable grounds to sustain that belief? And

c. At the stage the respondent formed that belief had it carried out as much investigation into the matter as was reasonable in the circumstances?

81. Further once a Tribunal has determined whether the Burchell test has been satisfied a Tribunal is required to consider whether the dismissal falls within the 'range of reasonable responses' of a reasonable employer. This is an objective test and a Tribunal should not substitute its own view on whether it thinks the dismissal was fair.

82. In **Orr v Milton Keynes Council [2011] ICR 704**, Aikens LJ says:

> *"The Employment Tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The Employment Tribunal must not simply consider whether* they *think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Employment Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted"….An Employment Tribunal must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice."*

83. In cases of gross misconduct a Tribunal must decide whether the employer acted within the band of reasonable responses in choosing to characterise the misconduct as gross misconduct entitling it to terminate the employment contract without notice. Further, whether the employer acted within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal.

84. An employer should consider whether dismissal is reasonable after considering any mitigating factors: **Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854**. And the employer should consider the employee's length of service and disciplinary record prior to deciding that dismissal is the appropriate sanction: **Trusthouse Forte (Catering) Limited v Adonis [1984] IRLR 382.**

85. In conduct cases the 'range of reasonable responses' test applies in conduct cases not only to the decision to dismiss but also to the procedure by which that decision was reached. ***J Sainsbury Plc v Hitt [2003] ICR 111 CA***.

86. The ACAS Code states that an employers' disciplinary rules should set out clearly what the employer regards as gross misconduct and should be clear on what conduct it considers serious enough to justify summary dismissal.

Polkey and contributory fault

87. A Tribunal can make a reduction to any compensation awarded where it considers that although the employer has acted unfairly in dismissing an employee by failing to follow the correct procedure the Tribunal finds that the employer may have dismissed the employee anyway. Any compensation can be reduced according to the

likelihood the dismissal would have occurred and expressed as a percentage chance up to a full 100 per cent: **Polkey v A E Dayton Services Limited [1987] IRLR 503.**

88. In order for a deduction to be made for contributory fault the Tribunal must be satisfied that the claimant's conduct was culpable or blameworthy for a reduction to be just and equitable: ***Nelson v BBC (no 2) [1980] ICR 110***.

Conclusions

89. The respondent has established that the reason for dismissal was conduct and that is a potentially fair reason to dismiss.

90. The respondent argued that both claimants were aware that failure to abide by the Golden 7 Rules would be considered gross misconduct and the Tribunal has found that this was the case. The respondent held a reasonable belief in the claimants' guilt and indeed the behaviour was admitted. Both Claimants admitted the breaches in their statements prior to the disciplinary hearing, at the hearing and at appeal. This is not in question.

91. The question for the Tribunal to determine is whether the decision to dismiss falls within the band of reasonable responses. Looking at the conduct of the respondent at the time the Tribunal considers that there were circumstances in which the employer would consider a breach of a Golden 7 rule to merely warrant a 'quiet word' and other circumstances where a breach would warrant dismissal. The respondent was unable to satisfy this tribunal that it had considered the consequences escalator or explain why in these cases the decision to dismiss was the only option available as submitted by Mr Townsend.

92. Mr Townsend's evidence was based on the fact that he said that the company had a zero tolerance to any breaches. This was not consistent with the evidence. There were clearly circumstances where breaches had occurred that did not result in dismissal. One being if an employee was instructed by a client to breach rules. There was no documentary evidence that this type of situation would be tolerated in the company's standards and Mr Townsend was unable to provide an explanation as to why it would be acceptable to breach the rules in those circumstances.

93. The breach of the rules was a first for both claimants. Both had previously unblemished records and both conceded that they would do things differently in the future. However, in the witness evidence of the respondent and in submissions a reason for not considering alternative sanctions was that the claimants had not accepted that they had done anything wrong and that Mr Fahey as a chargehand should have known better and that Mr Wood had already been involved in a serious incident (of which he was not to blame) and again should have known better. This argument lacks weight and would indicate that newer or less experienced employees would not have been dismissed. This in turn contradicts the respondent's alleged zero tolerance policy.

94. In addition the evidence in the disciplinary and appeal minutes is that the Claimant's did accept it was a breach of policy and that they would do things differently.

95. It is clear to this Tribunal and would have been clear to the claimants, that a range of possible consequences were available to the respondent and that the respondent did not provide any evidence of why those possible consequences were not considered or why the circumstances of the event were not considered as mitigation. The respondent provided evidence that where an employee is instructed to breach rules dismissal is not appropriate so has shown that on previous occasions it has taken mitigation into account. The Claimants had provided evidence that the job was urgent and they felt under pressure from the client and it appears that this was acknowledged by the respondent as being the case.

96. The respondent had a number of options open to them including demoting Mr Fahey, giving them a final written warning, potentially moving them to another site and ensuring that they underwent further training. The respondent did not provide any detailed explanation of whether any of these options were considered and if so, why they were rejected. The only explanation provided by Mr Townsend was that the company had a zero tolerance despite providing evidence that this was not the case.

97. I was satisfied that the evidence from Mr Townsend showed that the respondent had failed to consider the mitigation evidence sufficiently; the Claimant's previous good records and length of service appropriately and that it had failed to properly consider alternatives to dismissal. In addition the Respondent made assumptions that the Claimants could not be trusted in the future. The evidence from Mr Townsend was that a finding of a breach of a Golden Rule automatically resulted in dismissal despite stating that each case had been considered on its own facts and on its own merits.

98. The Tribunal considers that the decision to dismiss was not a reasonable response open to the respondent and does not fall within the band of reasonable responses.

99. The Claimants argued that the respondent failed to investigate the circumstances properly by not inviting them to an investigatory meeting; failed to suspend them at the time of the incident or as near to the incident as possible and in the case of Mr Woods, failed to rearrange the disciplinary hearing. The Claimant argue that this amounts to a flawed procedure.

100. The Tribunal agrees that the investigation was flawed and that the fact that the Claimants were not told that the initial witness statements would form part of an investigation into gross misconduct or invited to discuss the matter at an investigatory meeting and falls short of a fair procedure.

101. Further the Tribunal has found that it would have been reasonable to have rearranged Mr Woods disciplinary hearing particularly in view of the fact that no investigatory meeting had been carried out and that medical evidence had been supplied.

102. The Tribunal also finds that the failure to suspend as soon as practicable was not consistent with the outcome. No evidence was taken from Mr Daley at the time to understand his view of the situation and why he choose to allow the claimants to continue working on site. The respondent at the time of the near miss report (or at

least as soon as they became aware) did not consider the matter so serious that the claimants needed to be suspended as was normal practice.

103. In all the circumstances the Tribunal finds that the claimants' claims for unfair dismissal are well founded and succeed.

Polkey

104. I find that the respondent failed to follow fair procedures and also that the dismissal was substantively unfair. The respondent had closed its mind to any alternative other than dismissal and therefore I consider no reduction pursuant to Polkey is appropriate.

Contributory Fault

105. I have considered whether the claimants' conduct could be characterised as culpable or blameworthy. In this case both Claimants accepted that they had breached health and safety rules and that they were aware that such breaches were wrong. Whilst I accept that the Claimants considered that removing their hats was a safer option in the circumstances nonetheless, they were aware that failure to wear PPE at all times amounted to a breach of the rules.

106. In this sense they contributed to their dismissal by their conduct and it is just and equitable to reduce any basic or compensatory award by 25%.

107. A further hearing will be listed in order to consider remedy. A separate letter inviting the parties to provide details of availability has been sent separately.

_____

Employment Judge Hill

Date 13 August 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

30 August 2019

FOR THE TRIBUNAL OFFICE

[JE]