EMPLOYMENT TRIBUNALS

Claimant: **Mr E Agofure**

Respondent: **Beacon Support Service Ltd**

Heard at: **East London Hearing Centre**

On: **11 - 12 December 2019**

Before: **Employment Judge Jones**

Representation

Claimant: Mr A McKenzie (Lay Representative)

Respondent: Mr G Alder (Company Representative)

JUDGMENT

The judgment of the Employment Tribunal is that the Claimant was fairly dismissed. The claim is dismissed.

REASONS

1. This was the Claimant's complaint of Unfair Dismissal which the Respondent strongly defended.

Evidence

2. The Tribunal had live evidence from Mr Adam Bush, Account Manager, Mr George Alder, Director and from the Claimant in person. The Tribunal had a witness statement from the Claimant. The Claimant had helpfully prepared a bundle of documents for the hearing.

3. The Respondent brought additional documents with it to the hearing and further documents were produced on the second day of the hearing, at the Tribunal's direction.

4. The Respondent completed its disclosure late in these proceedings. The Respondent had obtained some legal advice prior to the hearing but was not legally represented at the hearing. In view of the late disclosure, the Tribunal adjourned on the first morning to allow Mr McKenzie sufficient time to consider the Respondent's documents. The Respondent had also not prepared any witness statements. The Tribunal restricted Mr Alder to the case as set out in the Response. The Tribunal requested Mr Bush attend court to be asked questions by the Tribunal and by the Claimant's representative.

5. From that evidence, the Tribunal made the following findings of fact. The Tribunal made findings only on those matters that are relevant to the complaint of unfair dismissal.

Findings of fact

6. The Claimant has been employed as a high-level cleaner for many years, having been employed by Interserve from 2007. In 2017, the Claimant transferred to the Respondent's employment under the TUPE Regulations 2006.

7. The Respondent is a small business with a contract to carry out high-level cleaning at Waterloo Rail Station.

8. Although the Claimant denied ever receiving a copy of the Respondent's company handbook, Mr Bush's live evidence was that he had personally given the Claimant a copy of the handbook. He stated that the Claimant had been given a copy when he and his colleagues were TUPE transferred over in 2017 and then again in 2018, when it was updated.

9. As part of the background to the Claimant's dismissal, the Respondent's case was that the Claimant was part of a team that submitted a false timesheet, which stated that he was present at work on 27 April 2018, when he had not in fact worked that day. The Respondent's case was that it carried out an investigation into this matter and then conducted a disciplinary hearing with the Claimant on 11 May 2018. The other members of the team were also disciplined for the same matter.

10. The end of that disciplinary process was that the Respondent concluded that the Claimant was part of the team who worked 4 days that week but who had all signed the timesheet claiming that they had worked 5 days. The Claimant was given a written warning for this. The Respondent wrote to the Claimant on 14 May 2018 to confirm this written warning. The Claimant was part of a team of three who had done this. The other operative was also given a final written warning. The supervisor who coordinated the submission of the false timesheet admitted that he had done so and he was dismissed.

11. In today's hearing the Claimant claimed that he knew nothing of a written warning. He denied that he had been given a written warning in May. There were two facts which made that implausible. Firstly, in his ET1 the Claimant confirmed that he had been given a final written warning. He referred to being given a written warning

because he failed to attend work on 27 April. He did not mention that he had signed the timesheet to falsely claim that he had been at work that day. The ET1 confirmed that he had been given a final written warning in May based on what happened on 27 April.

12. Secondly, the Tribunal noted that this was the Respondent's position set out in its Grounds of Resistance to the Claim. In it the Respondent stated clearly that the Claimant had been given a written warning for signing the timesheet. If this was something that the Claimant did not accept had happened, the Tribunal would have expected him to address it in his witness statement, in response to the Respondent's Response. He did not do so.

13. Therefore, the Claimant put forward a different case today (that he had never received a written warning) than the case he presented to the Tribunal in his ET1 (that he had received a warning for not attending work on 27 April). The reason for doing so was unexplained. The Tribunal gave Mr McKenzie an opportunity to address this in supplementary questions before the Claimant was cross-examined but this was not addressed. The change in his case remained unexplained at the end of his evidence.

14. The Claimant was part of the cleaning team that worked at Waterloo Station in the middle of the night/early hours of the morning. The Claimant was part of a team of four or five operatives who would attend the station to do cleaning work. On each shift, they would be allocated to different tasks by a supervisor employed by the Respondent.

15. The Respondent presented worksheets to the Tribunal which relate to the evenings of 8 – 12 July 2018. These confirmed that the Claimant was part of the team from the Respondent that worked on the Waterloo Station concourse on those evenings. I was told and the Respondent's evidence on this was not challenged – that once the station is closed to the public at night many different types of operatives from different companies – cleaners, electricians, painters, engineers and others – all attend the station to do various tasks. They all work on the station concourse during the night and all expect to complete their various tasks. The Respondent was challenged on its evidence that the worksheet does not state the actual specific activity that each operative is meant to do, for the duration of the whole shift. I find it likely that the phrase – '*the area where individuals will be working'* written at the top of the column on the sheet which referred to a specific area of the Station gave a general idea of where the team would be working during the shift. It was not a statement that the individual operative would only work at that particular spot on the Station concourse, for the duration of the whole shift. It was more likely that the team would be given a block of work to do and the supervisor on the night would decide where each person needed to be working on a minute by minute, hour by hour basis.

16. During each shift the Respondent's operatives are usually working around the other operatives who are also working on the station at the same time. This meant that there would need to be a certain level of cooperation and flexibility built into the system of work to enable them all to get their work done. For example, if a painter or an electrician from another company is working on the shop signs on, say the Upper Crust unit at the time that the Claimant is assigned to clean it, on the Respondent's worksheet, it is unlikely that the Claimant would be able to get to it, at that time. In those circumstances, it would not be practical or a good use of his time for the Claimant to sit and wait until the operative from the other company is finished as he

would be wasting time. There was also a certain amount of time pressure as there was a short window of time within which all the work had to be completed before the station had to re-open in the morning. In those circumstances, it is more likely that the Claimant would be asked to do something else or to assist a colleague elsewhere on the concourse, while waiting, so that the Respondent gets all its work done within the time available.

17. Taking all of that into consideration, the Tribunal finds that the jobs and areas listed on the worksheets are the broad jobs assigned to that the team for that shift. Although names are put next to tasks or units/areas that need to be cleaned, there would usually be some flexibility as to who actually does what, to allow all the work to be done by the end of the shift. The details could also change just before or during the shift. Once the work is completed, the workers would take a photo of what they had done and send it back to the account manager at the office. Mr Alder and Mr Bush would them create a report for Network Rail.

18. It is likely that on the shift that began in the evening of 11 July the Claimant was at work at Waterloo Station. Another colleague called Rasheed was also at work. The shifts would be between 10pm and 3.30/4am. The worksheet shows that both Rasheed and the Claimant were assigned to work on the ground floor. Next to the Claimant's name were the words '*lower concourse'* and next to Rasheed's name was written '*exit 3 to victory arch'*.

19. The Respondent company was contacted during the following day, 12 July, by Interserve who are the subcontractors of Network Rail who contract with the Respondent to do the cleaning work at the station. The Respondent was told that one of its operatives had failed to comply with Health & Safety requirements whilst working at height at Waterloo Station. The Respondent company was suspended from working at Waterloo Station and was told that it needed to conduct its own investigation while Interserve would also conduct an investigation into what occurred that night. All work was suspended while these investigations were carried out.

20. The Claimant disputes that there was suspension of work or that there was any investigation into what happened that night. In this hearing he relied on what he submitted were parts of group chats on WhatsApp between the team, which included the Claimant and Paolo, his supervisor, in which Paolo confirmed that. The Respondent was unable to confirm that the messages were from Paolo. However, the Tribunal finds that the messages which are purported to be from Paolo on 19th and 23rd July in the bundle both confirm that there was no work for the team on those days, while the allegation was being investigated. A text message dated 19 July stated: "*No work tonight as there is an investigation about Waterloo being on the roof and why was we not latched on with the harness, thank you just what I need"*. Another on 23 July stated: *"Just to keep you informed it looks like there will be no work for a long time we will not be getting paid as it's a health and safety issue this is very serious matter do not think it's a case of yeah we are sitting at home we will be lucky to keep our jobs if we keep the network rail contract, if I lose my job over this trust me I'll be coming for you".*

21. I find it likely that the Respondent company and all its workers were unable to work after that shift. The Directors and Mr Bush focussed on this investigation as they had to. It was a serious matter. This was an allegation that a member of its staff had

worked in breach of health and safety regulations on the night of 11 July. It had to take the matter seriously as there was a real chance of it losing the contract with Interserve/Network Rail if it did not do so and also, someone could have been hurt.

22. I find that the Claimant had been trained by previous employers on working at height and that it is also highly likely that he had been trained by the Respondent as recently as 7 June 2017 on 'Working at Height'. The Respondent produced a certificate today that confirmed this. The Claimant's response on being shown the certificate was that he did not have a copy of the certificate. He did not deny that he had attended the training.

23. I find that in such a safety critical environment it is highly likely that the Respondent arranged for the Claimant to be given the training necessary to do the job. There would be no benefit to the Respondent in not doing so. If the Claimant was not properly trained and did not have regular refresher training then the Respondent would be putting its business in jeopardy every time the Claimant went to work, which would not make good business sense. Such training is not only for the Claimant's benefit and safety but also for that of his colleagues and the business. Also, if the Respondent had not completed training on a regular basis for its staff and provided evidence of that to Network Rail/Interserve, it is unlikely that it would have kept the contract.

24. I find that at page 21 of the Respondent's Handbook it states: "Before considering a warning or dismissal, steps will be taken by us to establish the facts". Mr Alder and Adam Bush, the Respondent's Key Account Manager, undertook the initial investigation into the incident that allegedly occurred during the shift on 11/12 July 2018. It is likely that the Respondent wanted to move on this quickly as everyone was sitting at home waiting for the matter to be resolved. If the text messages quoted above were from Paolo, as the Claimant contends, they show his frustration with the situation and the fact that everyone was sitting at home not working. It is likely that, at the time, the Claimant and his colleagues were also concerned about work.

25. On 16 July, as part of the Respondent's investigation, Paolo came in to the Respondent's office and gave Mr Bush a witness statement about what happened on the night of the 11 July. In the witness statement Paolo stated that the Claimant was working on cleaning the roof of the ICE money exchange. Paolo was the supervisor on the shift that night. He confirmed that he did his checks and moved on to manage other work. At 2.40am the Network Rail station manager notified him that the Claimant had been caught standing on the roof of the ICE money exchange. As this was a breach of Health and Safety and the RAMS, the Network Rail manager told Paolo that all works would be suspended. In his witness statement Paolo stated that he went over to the Claimant and asked him why he had done this and the Claimant stated that he did so to get a better finish. At the time, the Claimant did not deny standing on the roof. Paolo telephoned Adam Bush to let him know what had happened and he was told to stop work and remove the Respondent's equipment from the work areas. That was likely to have happened in the early hours of the morning of 12 July.

26. The Respondent also spoke to all its operatives who were on site that night. The Respondent had telephone calls about the incident from Network Rail/Interserve.

27. On 18 July, after the investigation Mr Bush produced a written report. A copy of it was produced at the hearing. Although he submitted that there had been an inadequate investigation, the Claimant did not say that there were other people that the Respondent should have spoken to or other enquiries that should have been made. The report concluded that the incident had been caused by a momentary lapse of concentration and time saving by a very experienced operative who was trying to achieve a superior cleaning result. Mr Bush reported that the operative was trying to complete the cleaning work by stepping on to the roof rather than use an extendable pole.

28. Network Rail, through its subcontractor Interserve, also conducted its own investigation. The form used for the investigation was created in 2018 but there was no date on the investigation report. The investigation was conducted by a Senior HSE Advisor, Steve Bowker. The Respondent's chronology of events noted that this report was produced on 2 August 2018.

29. The aim of the Network Rail investigation was to provide a report into the circumstances surrounding an incident that involved one of the Respondent's employees climbing from what was referred to as a 'razor deck' on to the roof of the ICE shop unit to clean, rather than using a 'cherry picker', as per the risk assessment for this job. The report stated that the investigation had been commissioned as part of Interserve's procedure for a potential severity Category C investigation.

30. The investigation report confirmed that RAMS for high level cleaning at Waterloo Station were reviewed and signed off by the Interserve competent person and by Network Rail prior to the works commencing. I find it likely that RAMS are the procedures and safety requirements agreed for each task that has to be completed in this safety critical environment. The Claimant would have signed in at the reception prior to starting the work and would have been briefed on the risk assessment and the method for each task he had to do. If the Claimant had not received the requisite training this would have been his opportunity to ask what was required of him in so that he would be able to safely complete tasks allocated to him.

31. In the description of the incident in the report, it stated that the Respondent's operatives were found on the roof of the ICE retail unit attempting to clean the roof area. They were wearing harnesses that were not attached to the safety systems. One operative had accessed the roof of the unit using the razor deck. The roof of the unit was covered in pigeon spikes. The report stated that if he had slipped or tripped the operative could have received serious puncture wound injuries. The report confirmed that the Respondent company had been suspended from working on the account pending a thorough investigation.

32. The investigation report concluded that: Firstly, that the individual concerned, despite being suitably trained and competent and having signed to confirm that he accepted and understood the safe system of work; knowingly violated the safety controls put in place to conduct the task. Secondly, that the Respondent failed to suitably supervise its employees working on site; and thirdly, that the Interserve management team also failed on the night to adequately monitor the work being carried out. The report did not name the Claimant as Network Rail/Interserve did not know the Claimant's name. He was referred to as the Respondent's operative.

33. This was a serious incident. It is clear from the report that Network Rail took it seriously and the Respondent was immediately suspended from working on site. The report stated that it was fortunate that no one was hurt. The report put that down to the actions of the Network Rail employee who stopped the work.

34. I find that the action set out at section 7 of the report to be implemented following the investigation were that the Respondent's operative who was working around the roof of the ICE outlet should be banned from working on Network Rail/Interserve sites from then on. This was communicated to the Respondent. It is likely that following the incident there were meetings between the Respondent and Interserve company representatives on this matter which would not have been only about the Claimant's employment contract but also about the contract that Interserve had with the Respondent and whether that would continue and if so, on what basis.

35. I find that if it was Paolo who sent those text messages to the WhatsApp group he was not being completely candid with the members of his team. In the messages sent in July/August, he referred to Rasheed as the person who had been seen on the razor deck and not having latched on. At the same time, Paolo gave a witness statement to the Respondent, mentioned to above, in which he referred to the Claimant as the person who the Network Rail manager had pointed out to him was not latched on. I find that the Respondent relied on the evidence in Paolo's witness statement in the disciplinary hearing as at the time it did not have these What's App messages. The Tribunal also finds that the What's App messages are not in the form of a witness statement. They demonstrate that Paolo, if it was him, used the What's App group to express his frustration at the situation. The Respondent relied on his witness statement. It was appropriate that the text messages did not have the same weight as the signed witness statement he gave to his employers as part of the investigation.

36. I find that following its investigation and that of Interserve, the Respondent invited the Claimant by letter dated 28 August to a disciplinary hearing to be conducted on 11 September. The letter advised the Claimant that the issues to be discussed were his failure to attend work in August and his failure to follow Health and Safety regulations in July. The letter did not refer to the specific incident on 11/12 July but there was no point taken on that today by the Claimant and it is likely that as everyone had been off work since then that he knew the incident that was being referred to. The Claimant was therefore on notice before he attended the meeting that the Respondent was going to discuss two issues with him – his failure to attend work in August and the health and safety issue. He was advised that possible consequences that could arise from the meeting could be verbal/written warnings or dismissal. The Claimant was also advised of his right to be accompanied.

37. The Claimant was accompanied to the disciplinary meeting conducted by Mr Bush on 11 September 2018 by his RMT representative.

38. At the meeting, the Respondent confirmed with the Claimant that he had been given a final written warning by letter dated 14 May. As he did in today's hearing, the Claimant denied that he had had a final written warning. The meeting minutes record that in response, Mr Bush pulled his chair around so that he could sit next to the Claimant and his representative and show them on his laptop screen, a copy of the letter that had been sent to the Claimant informing him of the final written warning. The notes from the disciplinary meeting confirm that the Claimant's union representative

asked some questions about it before they moved on to discuss the allegation that the Claimant had taken unauthorised leave in August. I find that in the disciplinary hearing, the Claimant accepted that he had previously had a final written warning.

39. The allegation about leave, was that the Claimant had gone on unauthorised leave in August and sent a text to his manager informing him of the leave. He had not received permission beforehand to take holiday. That was the matter that had been described in the letter of invitation to the disciplinary hearing as the failure to attend work.

40. They then discussed the incident at Waterloo Station. The notes of the disciplinary hearing record that the Claimant confirmed that the Network Rail manager stopped him from working. The notes also record the Claimant as stating that his lanyard was not connected. He is recorded in the notes as saying this on two occasions during the disciplinary meeting. The Claimant confirmed that he had been trained professionally and that he had all the right equipment. When it was put to him that he had breached the RAMS and failed to follow procedure he answered '*yes'*. He confirmed that his lanyard was connected to him but not to anything else. He also confirmed that he had been on the razor deck. He then tried to blame Paolo and stated that because Paolo sent him up there, it was Paolo's fault.

41. The Claimant was told that he had personally been banned from Network Rail stations because of the incident that occurred during the evening shift on 11/12 July.

42. At the end of the disciplinary hearing, the Claimant asked why Network Rail had banned him from site. He wanted to know why he was not allowed to work on Network Rail sites anymore. Mr Bush stated that he would find out and ask for it to be put in writing.

43. After the disciplinary hearing and after considering all that had been said, Mr Bush concluded that the Claimant had not had authorisation to take leave in August. His decision was that the Claimant had taken 2 weeks unauthorised leave from 13 August.

44. Mr Bush considered all the information from the investigations and the disciplinary hearing and as he put it today, he '*vented'* in the office about it. It is likely that he was annoyed with the situation. The Respondent had previously been pleased with the Claimant's work and he was considered a good worker. Before the incident that led to his dismissal the Respondent had only ever acted against him in respect of the fraudulent completion of the time sheet in April, for which he had been given the final written warning. Apart from that, it is likely that he performed his job well and was a considered a reliable operative.

45. It was Mr Bush's evidence that he made the decision on his own on the appropriate disciplinary sanction on his own. He was not challenged on that in the hearing.

46. He decided that the Claimant had breached Health and Safety (H&S) rules on the evening shift on 11 July by not having his lanyard connected while working at height and that he had stepped off the razor deck and on to the roof of the ICE unit to

clean - which he was not supposed to do and which was dangerous. The Claimant was given a copy of the disciplinary hearing notes on the day following the hearing.

47. On 2 October the Respondent received an email from Mr McLean of Interserve which confirmed that the Claimant would not ever be able to work on any Network Rail site anywhere in the country. It is possible that Mr Bush had that email before he wrote the dismissal letter although when asked today, he did not recall seeing it. The Respondent wrote to the Claimant on 3 October to inform him of the outcome of his disciplinary hearing.

48. Mr Bush's evidence was that even before the disciplinary hearing he had been told by Network Rail that the Claimant would not be allowed to work again on Network Rail/Interserve sites anywhere in the country. That is what was set out in section 7 of the Interserve investigation report although it does not name the Claimant. It stated that the person the Network Rail manager spoke to and asked to stop working would not be allowed to work again at any Network Rail site. As the Claimant confirmed in the disciplinary hearing, it was he the Network Rail manager spoke to and asked him to stop working.

49. In the letter dated 3 October Mr Bush informed the Claimant that he considered the Claimant to have admitted to both allegations: going on holiday without authorisation and failing to follow H&S procedures while working at height at Waterloo Station.

50. Mr Bush stated that he did not take the final written warning given to the Claimant on 14 May into account in deciding the appropriate sanction. He decided that the appropriate sanction, taking into account the Claimant's long service, was that the Claimant should be dismissed from his employment. He stated that because of the Claimant's long service, he had delayed his decision, to see if Interserve would be willing to let the Claimant return to site. But by the time he had written the letter – he had received the email dated 2 October, which confirmed that Interserve was not prepared to do so. The Respondent had no other work that it could assign the Claimant to, so his dismissal was confirmed.

51. The Respondent's decision was that the Claimant had committed serious misconduct. He was dismissed with notice. He was subsequently paid his notice pay. The reason for his dismissal was stated as serious misconduct and third-party pressure from Network Rail/Interserve.

52. It is likely that the Respondent and the Claimant's colleagues were allowed to return to the site but the Respondent was unable to remember the date when its team was allowed back on the site.

53. The Claimant was advised of his right to appeal against Mr Bush's decision. The Claimant did appeal. I was not shown his appeal letter, but the Respondent acknowledged it on 11 October and set up an appeal hearing for 31 October which was going to be conducted by someone from Croner, the Respondent's contracted HR advisers. I was told in the hearing that as the Respondent's Director, Mr Alder was away at another site on business, the Respondent had no one else but Mr Bush to conduct the appeal hearing. The Respondent is made up of Mr Alder, Mr Bush and an admin person. There is no one else in the company. There was no one else to hear

the appeal. The Respondent stated today that it could not afford an HR department or to pay Croner to decide the Claimant's appeal. The representative from Croner was noted in the minutes as the Chair of the hearing. The Claimant was once again represented by someone from the RMT.

54. The appeal hearing notes were in the papers today, in this hearing. The Claimant confirmed at the start of the appeal hearing that he had been trained by the Respondent. He put a different case forward about training today which I have addressed above. The notes show that the representative from Croner, Ms Wood took the lead in the discussion in the hearing. She asked the Claimant to take her through the points in his appeal and asked most of the questions.

55. It was noted that the Claimant had not appealed against the final written warning that he had been given in May. When they discussed the incident of 11 July in the appeal hearing, the Claimant changed his version of events and stated that his lanyard was clipped on but that he was on the razor deck and that it was shaking. Ms Wood stated that she would print off the Interserve report and give the Claimant a copy. The meeting adjourned to allow the Claimant and his representative to look at the investigation reports from the Respondent as well as from Interserve. The Claimant did not answer when he was asked why the Network Rail manager stopped him from working. The minutes show that he kept referring to what his colleague Rasheed had been doing.

56. In today's hearing the Claimant referred to Rasheed and stated that it was Rasheed who was on the razor deck and not connected with his lanyard. This was also the Claimant's case at the appeal hearing. Mr Bush disputed this. He confirmed that the investigation showed that it was the Claimant who had been spoken to by the Network Rail manager who had spotted him stepping on to the roof of the ICE unit without following health and safety. Also, Rasheed is a heavy man which meant that he would not have been able to go through the hatch or go up on the razor deck.

57. I find it likely that Sam Wood from Croner conducted the appeal hearing but that following the hearing and after discussing it with Mr Alder, Mr Bush made the decision on the appeal.

58. The Claimant made a written complaint about the use of bad language and of harassment from his supervisor Paolo. The Claimant wrote to the Respondent about this on 6 July 2018. I find that the Respondent received the letter. I find it likely that the Respondent did take some action on it as Mr Bush invited Paolo to the office and spoke to him about his language, the need to be professional and how to deal appropriately with people. The Respondent did not report back to the Claimant on the outcome of his grievance and nothing further was said about it.

59. Mr Bush confirmed his decision that it was the Claimant who stepped out on to the ICE roof and whose lanyard was not clipped to the platform. This was dangerous, in breach of health and safety and serious misconduct. He upheld his decision to dismiss the Claimant. The Claimant's appeal was not upheld.

Law

Unfair dismissal

60. In this case, the Tribunal is concerned with the question of determining the reason for the Claimant's dismissal and whether it was one of the reasons set out in section 98(2) of the Employment Rights Act 1996 (ERA). The burden is on the Respondent to show the reason for the dismissal and that it was a potentially fair reason i.e. that it related to the Claimant's conduct or capability.

61. A dismissal that falls within that category can be fair. In order to decide whether it is fair or unfair, the Tribunal needs to look at the processes employed by the Respondent leading up to and including the decision to dismiss. In cases concerning the employee's conduct, a three stage test must be applied by the Respondent in reaching a decision that the employee has committed the alleged act/s of misconduct. This was most clearly stated in the case of *British Homes Stores Ltd v Burchell [1980] ICR 303*, as follows. The employer must show that: -

(a) he believed the employee was guilty of misconduct;

(b) he had in his mind reasonable grounds which could sustain that belief, and

(c) at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

The means that the employer does not need to have conclusive direct proof of the employee's misconduct but only a genuine and reasonable belief of it which has been reasonably tested through an investigation.

62. If the Tribunal concludes from all the evidence that this is the case; then the next step for the Tribunal is to decide whether, taking into account all the relevant circumstances, including the size of the employer's undertaking and the substantial merits of the case, the employer has acted reasonably in treating it as a sufficient reason to dismiss the employee. In determining this, the Tribunal has to be mindful not to substitute its own views for that of the employer. Whereas the onus is on the employer to establish that there is a fair reason, the burden in this second stage is a neutral one. The *Burchell* test applies here again and the Tribunal must ask itself whether what occurred fell within "the range of reasonable responses" of a reasonable employer. The law was set out in the case of *Iceland Frozen Foods v Jones [1982] IRLR 439* where Mr Justice Browne-Wilkinson summarised the law concisely as follows:

"We consider that the authorities establish that in law the correct approach for the … tribunal to adopt in answering the question posed by [section 98(4)] is as follows:

(1) the starting point should always be the words of section 98(4) themselves;

(2) in apply the section (a) the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (members of the tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct, a tribunal must not substitute its decision as to what was the right course to adopt for that employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the …. Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable response which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

Applying law to facts:

63. *The first question for the Tribunal was - whether the Respondent has proved the reason for the Claimant's dismissal?*

64. In my judgment, the Respondent has proved that the reason for the Claimant's dismissal was the Claimant's misconduct on the night of 11 July 2018 and the effect of the instruction by Network Rail that the Claimant was not to be allowed to work on its sites ever again.

65. There was evidence that the Claimant had complained about the way Paolo spoke to him. There was no evidence that the Respondent wanted to dismiss him because he complained about Paolo. The Claimant had previously committed misconduct by falsely completing a time sheet when he had not worked on one of the days. If the Respondent had wanted to dismiss him, they could have considered it on that occasion. Instead, he was given a final written warning.

66. There was no evidence that the Respondent wanted to get rid of the Claimant. The evidence was that he was a good worker and the Respondent was happy with the quality of his work.

67. The Respondent proved that it dismissed the Claimant because it believed that he had committed serious misconduct.

68. *The next question was - whether the Respondent had reasonable grounds for believing that the Claimant had committed misconduct?*

69. In this Tribunal's judgment – the Respondent conducted an investigation into what happened at Waterloo Station on the evening of 11 July 2018 as did Interserve.

70. The Respondent stated that it was told what it had to do and it followed instructions from Network Rail. The Respondent was suspended immediately at the time of the incident and it needed to investigate what happened in order to secure the contract with Interserve as well as to ensure the health and safety of its operatives.

71. The Respondent complied with its handbook in that it ensured that it had taken steps to establish the facts before considering any disciplinary sanction against the Claimant. Before the disciplinary hearing was held, Mr Bush conducted his investigation and also received the investigation report from Interserve.

72. The Claimant and the whole team were suspended while these investigations progressed. This was confirmed by the Interserve report and by the WhatsApp messages that the Claimant relies on.

73. It is unusual that Mr Bush was the person who conducted the investigation, the disciplinary hearing and made the decision on the appeal. He did not conduct the appeal meeting as that was done by the representative from Croner. However, the Tribunal takes into account the size and administrative resources of the Respondent. In this situation the company is made up of three individuals. Apart from Mr Bush, the company consisted of an admin person would have been junior to Mr Bush and Mr Alder, who was out on business. Once the issue with hiring Ms Wood to make the decision was identified on the day, the Respondent had the choice of continuing with her to conduct the meeting but with Mr Bush making the decision or of incurring the cost of starting the appeal process again. The Respondent decided to continue with the appeal with Mr Bush making the decision. Ms Wood conducted the appeal hearing so that she could find out from the Claimant what were his appeal points and why he challenged the decision to dismiss. The Respondent was a small company with limited resources and did the best that it could in the circumstances.

74. The Claimant admitted in the disciplinary hearing that he had not had his lanyard connected while on the razor deck. It was also confirmed that when he saw him there, the Network Rail manager asked the Claimant to stop working. The Interserve report confirmed that it was the person who the Network Rail manager asked to stop working that had stepped on to the roof of the ICE unit and had not been connected. Whatever Rasheed was doing on the night, he was not the person that Network Rail identified as someone who was breaching health and safety rules and putting their life and other's lives in danger. That was the Claimant. The Claimant was the person who was reported to the Respondent by Network Rail.

75. Although the Claimant's case seemed to be that Paolo had it in for him, it was not Paolo who reported the Claimant to the Respondent. Paolo saw him working and left him working to go and supervise others. It was the Network Rail manager who stopped the Claimant working and reported it to Paolo and also reported it to the Respondent. There was no evidence to support the Claimant's contention that this was anything to do with Paolo or the Claimant's complaints about Paolo.

76. Mr Bush took a statement from Paolo and spoke to the other operatives who were at work that evening. He also considered the Interserve report on the incident and took into account the Claimant's answers during the disciplinary hearing.

77. In this Tribunal's judgment the Respondent had sufficient evidence on which to base a reasonable belief that the Claimant had committed serious misconduct due to a momentary lapse of judgment while at work on the evening of 11 July.

78. In this Tribunal's judgment, it was a serious matter and the Respondent had no choice but to treat it as a serious matter when Network Rail suspended it from the station until the recommended actions were taken. This had serious repercussions for the company and its business as well as for the Claimant.

79. Once Network Rail banned the Claimant from its stations the Respondent had to consider whether there was any other work that it could give him to do. The Respondent was not challenged on its position that it had no other contracts on which the Claimant could work. The Respondent could not continue to employ the Claimant if it had no other work to give him.

80. Although they discussed the final written warning that the Claimant had been given in May, for the falsification of the time sheet and it was referred to in the decision letter; Mr Bush's evidence was that he had not taken it into account when considering an appropriate sanction for the breach of health and safety. Mr Bush also considered the Claimant's actions in taking unauthorised leave as a serious matter of misconduct. The Respondent considered that the Claimant had committed serious misconduct by stepping on to the roof of the ICE unit at all and being up on the platform without having his lanyard connected. This together with the ban from Network Rail led the Respondent to decide that it had to terminate the Claimant's employment.

81. The Claimant was already on a final written warning. The Tribunal did not hear evidence of any other sites/contracts that the Respondent had, that the Claimant could work on. The Claimant had been banned from Network Rail sites.

82. In all the circumstances, it is this Tribunal's judgment that the decision to dismiss the Claimant was based on the serious misconduct found by Mr Bush at the disciplinary hearing. There was nothing raised at the appeal that could challenge that decision. The Claimant did not put forward any new points in his appeal. He denied that he had been the person on the ICE roof but the Respondent did not accept that. Mr Bush was the person who decided the Claimant's appeal but the Claimant attended with his trade union representative and Ms Wood from Croner was there to advise the Respondent. if there had been any new points that had been put forward by the Claimant, it is likely that either Ms Wood or the Trade Union representative or both of them would have pointed that out to Mr Bush.

83. In this Tribunal's judgment, even if Ms Wood had been the person making the decision, there was nothing that had been drawn to her attention that would have warranted that the decision be overturned. The Claimant had no new evidence or new matters to put before the Respondent at the appeal.

84. The Respondent took into account the Claimant's long service. That is why Mr Bush went back to Interserve after the disciplinary hearing to ask whether Network Rail was holding to its decision to ban the Claimant from its sites. The Respondent received an email dated 2 October that confirmed Network Rail's position. The Claimant was not allowed to ever work on its sites again.

85. The Claimant had been doing this work for a long time. The Respondent had no issue with the Claimant and there was no evidence that it wanted to get rid of him or that it wanted to dismiss him because of issues with Paolo. The Respondent was happy with the Claimant's work.

86. The evidence was that these disciplinary proceedings and the decision to dismiss the Claimant arose from his serious misconduct during the evening shift of 11 July. Although the Claimant denied that it was him who did the misconduct, there was evidence from Network Rail, the Claimant's admissions in the disciplinary hearing and from Paolo's witness statement that it was him. It was reasonable for the Respondent to conclude that it was more likely than not that it was the Claimant who had stepped off the razor deck and onto the roof of the ICE unit without his lanyard being connected to the platform which was extremely dangerous and in breach of health and safety. That was an act of serious misconduct. The Respondent decided to dismiss the Claimant on that misconduct and because, following his ban by Network Rail they had no other jobs to put him on.

87. Taking all the above into account, it is this Tribunal's judgment that notwithstanding that the person who decided the appeal was also the person who had earlier decided to dismiss the Claimant; on balance, the decision to dismiss the Claimant was within the band of reasonable responses open to the Respondent given the Claimant's serious misconduct. The Claimant's dismissal was fair. The claim is dismissed.

Employment Judge Jones
Date: 25 March 2020