EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106007/2019

Held in Glasgow on 4, 5 and 6 December 2019

Employment Judge M Sutherland

Mr George Nobbs	**Claimant** **Represented by:** **Mr P Deans,** **Solicitor**
Network Rail Infrastructure Limited	**Respondent** **Represented by:** **Ms C McKee,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the Claimant was not unfairly dismissed.

REASONS

Introduction

1. The Claimant presented a complaint of unfair dismissal.

2. The Claimant initially sought re-instatement or re-engagement as a remedy but he subsequently advised that he was seeking compensation only.

3. The Claimant was represented by Mr P Deans, Solicitor. The Respondent was represented by Ms C McKee Solicitor.

4. At the final hearing the Respondent led evidence from Simon Constable (Head of Route Safety), Kate Anderson (Scheme Project Manager), Alex Sharkey (Head of Operations). The Claimant then gave evidence on his own behalf.

5. The parties lodged an agreed set of documents. Additional documents were lodged during the hearing.

6. The parties made closing submissions.

7. The following initials are used as abbreviations in the findings of fact–

Initials	Name	Title
AS	Alex Sharkey	Head of Operations (‘Appeal Manager’)
CH	Colin Hamill	Program Manager
KA	Kate Anderson	Scheme Project Manager (‘Investigation Manager’)
MM	Michelle Mullen	Programme Engineering Manager (‘Disciplinary Manager’)
SC	Simon Constable	Head of Route Safety (‘FCP Chair’)

Findings in fact

8. The Tribunal makes the following findings in fact:

9. The Claimant was employed by the Respondent as an Operations Delivery Supervisor from 8 September 2001 until 19 December 2018. The Claimant had 17 years’ service.

10. The Respondent is a large employer with access to significant resources and has a dedicated HR function. Safety is of paramount importance to the Respondent.

11. The Respondent’s Disciplinary Policy provides that dismissal without notice will be taken when there is found to be gross misconduct. Examples of gross

misconduct include serious infringement of health and safety rules, serious negligence which causes or might cause unacceptable loss, damage or injury.

12. The Respondent's Appeal Hearing Guidelines state that managers should: ask for clarification if they are in doubt about any elements of the appeal being presented; listen carefully to the arguments and do not dismiss without due consideration; make a note of the key points; consider any mitigating circumstances which need to be taken into account; and adjourn to consider.

13. On 24 July 2018 the Claimant was scheduled to work as the Person in Charge of Possession (PICOP). The duties of the PICOP Are set out in the Rule Book. The Claimant was aware of his duties and was an experienced PICOP.

14. The worksites and details of the Possession are published in the Weekly Operating Notice. Amendments to Possessions are noted in the Daily Wire. The purpose of the possession is normally to enable specific work on the railway line to be carried out safely. Under the Rule Book if it is necessary for any of the protection arrangements to be changed this must be agreed with Operations Control.

15. In terms of the Rule Book in order to take possession the PICOP must contact the relevant signaller to confirm the possession arrangements. The signaller is based at the remote signalling centre. The signaller has a bank of screens. The protecting signals are placed to danger. The points are set to protect the possession. The signaller will then confirm they had done this and grant possession to the PICOP. The PICOP will then arrange the possession protection. The purpose of possession protection is to enable work to be carried out safely. Standard detonator protection is placed clear of a junction and beyond the signals by 400 metres. It is also placed on the branch line clear of the junction and before the signals. Detonator Protection consists of 3 detonator boards being placed on the same rail 20 metres apart with a possession limit board placed at the centre detonator. The PICOP will then advise the Engineering Supervisor to put up marker boards at each end of the work site. Once this is confirmed work may start in the possession area.

16. The Respondent applies their “Fair Culture Procedure” when there is a breach of a life saving rule. The Fair Culture Flowchart is applied to an individual involved in a safety incident. The flowchart guides the investigator through a series of structure questions about the individual’s actions, motives and behaviours at the time of the incident. The flowchart asks “Was the action deliberate?” and if so “Was the action well intentioned?”. An action is deemed “well intentioned” if the individual “thought they were doing the right thing”. “In most cases where the actions were as intended the individual’s action were well intentioned and they did not mean the harm that resulted”. An action is deemed “malicious or reckless” if the individual intended the safety risk, or was reckless as to the safety risk, or “knowingly break the rules for their own benefit. Examples include cutting corners to leave work early to get longer breaks…”

17. If the action is not well intentioned the investigator must decide if the behaviour was “Sabotage or malicious intention” or “Reckless contravention for personal benefit”. If the action is not well intentioned the guide directs the investigator to recommend that the formal disciplinary procedure is to commence.

18. If the action is well intentioned and the procedures are “clear and workable” the guide directs the investigator to recommend a “coaching conversation” and not a disciplinary procedure.

19. The Claimant was appointed PICOP for a possession from Shields Junction to Paisley St from 23 to 24 July 2018. The published possession limits were: Down Ayr: Beyond GG5851 to Approach GP6207; Up Ayr: Beyond GP6204 to Approach GG5846; Down Gourock: Approach GP6101; Up Gourock/ Down and Up Through Terminus: Beyond GP6104 to Approach 449 pts; Chord Line: Beyond 460 pts to Approach 474pts. RRV/S (road rail vehicles) in use within possession. The possession limits were then changed through the Daily Wire to Down Gourock: Approach GP6101#; Up Gourock/ Down and Up Through Terminus: Beyond GP6100# to Approach 449 pts. All other limits remained as previously published.

20. The preliminary investigation was prompted by the Claimant who had gone home and fallen asleep whilst on duty during his shift on 23 to 24 July 2018

and could not be contacted to hand back the possession. CH was appointed to act as the preliminary investigator. Concerns were identified regarding changes made to the planned protection on the night. The Claimant advised he contacted the Engineering Supervisors to ask where they were working and they advised that they were working clear of Shields Junction. The Claimant advised that he changed the detonator positions because "it would drastically reduce time and give the ES worksites longer in possession". CH found that the change in the protection arrangements meant that the Claimant was not required to lay any protection. The incident was described as giving rise to a low risk of injury because "no one planned to be working in the area affected and to have a train signalled into the area would also have required a mistake on the Signaller's part also". The preliminary investigator determined that the unsafe act was "the changes to protection [which] left the Paisley Canal Lines without flank protection". The preliminary investigator concluded that the action was deliberate ("a conscious decision was made to lay protection in this way") and was not well intentioned ("decision taken in order to reduce workload, yet left an unsafe situation"). The preliminary investigator recommended that the Claimant was suspended whilst a disciplinary investigation was carried out. The findings and recommendations were noted in a Preliminary Report and Investigation Form dated 3 August 2018.

21. The Claimant was then suspended from safety critical duties and KA was appointed as Investigation Manager.

22. On 29 September 2018 the Fair Culture Panel was chaired by SC, Head of Route. Trade Union reps also sat on the panel. The unanimous decision of the panel was that the claimant's actions amounted to a reckless contravention. They felt there had been personal benefit to him because the new arrangements saved him time and effort. Although he had weighed the risk he had not done so sufficiently.

23. On 9 October 2018 the claimant was invited to attend an investigation interview regarding the following allegations: leaving work earlier than scheduled; using the company vehicle for an unauthorised purpose; sending a staff member home without proper consent; "Possession not handed back in the proper

manner following works; Not ensuring protection was placed at correct locations in line with the published possession; changing the plan out with of [sic] normal procedure."

24. On 16 October 2018 the Claimant and his union attended an investigatory interview with KA, Investigation Manager. The Claimant advised that he had agreed with the signaller to take the chord line of the limits because detonator protection was unachievable there (the line was too short), he had contacted the Engineering Supervisor who had confirmed no-one was working at Shields Junction, moving the protection avoided a 25 minute walk each way, and this gave more time working on track. The Claimant advised he was not changing the possession limits but the detonator position and it was to get more time on track. The Claimant advised that he should have informed the Operational Delivery Manager (in Operations Control) of any changes and would do so in future.

25. KA, Investigation Manager also obtained and consider the relevant Weekly Operating Notice and the Daily Wire.

26. KA, Investigation Manager prepared an Investigation Report. In that report she recommended that the matter proceed to a disciplinary hearing; that the claimant face the allegation that he had not ensured protection was placed at correct locations in line with the published passion and changing the plan out with normal procedure; and that the allegation was potentially one of gross misconduct. This was in addition to other allegations regarding leaving work earlier than scheduled, unauthorised use of a vehicle, sending staff home and not handing back possession properly (the "additional allegations").

27. On 12 November 2018 the Claimant was invited to attend a disciplinary hearing regarding the "additional allegations" and the following allegation of gross misconduct: "On Thursday 24 July 2018, whilst acting as PICOP for item 91, you changed the protection arrangements without authority and as such protection was not placed in line with the published possession and protection was not provided to all lines within the possession" (the change of protection

allegation). The claimant was warned that if he was found guilty of gross misconduct “he may be dismissed without notice”.

28. Prior to the Disciplinary Hearing the Disciplinary Manager carefully read the Preliminary Report prepared by the Preliminary Investigator and the Investigation Report prepared by the Investigating Manager. On 26 November 2018 the Claimant attended a disciplinary hearing with his union rep. The hearing was chaired by MM, Disciplinary Manager. The Claimant confirmed that he was aware that it was a Rule Book requirement for all changes to be raised to the Operations Control. The union advised that historically the PICOP and the Signaller were able to agree to shorten a possession but they appreciated that this had not been allowed since the introduction of the Life Saving rules. His years of experience were discussed. The Claimant advised that he couldn’t put protection on the chord line (due to its length). The Claimant accepted that he should have put flank protection on the canal branch line. He advised no one was working at Shields and at no time was anyone put in danger. He explained that the Signaller offers protection by locking and collaring the signals and points. He explained that he did this to give 25 minutes more time for work on the track and not for personal gain. He recognised the risk but it was not deliberate intent and he had apologised profusely. The Disciplinary Manager sought to explore whether tiredness affected his decision. The hearing was adjourned.

29. On 19 December 2018 the Claimant attended the resumed disciplinary hearing with his union rep. MM, Disciplinary Manager advised that there was no case to answer in respect of the other allegations. In respect of the change of protection allegation she advised that having listened to the recording of the telephone call she was satisfied that the changes to the chord line had been agreed with the Signaller and there was no case to answer. MM, Disciplinary Manager stated that the protection was moved beyond the required distance leaving the junction out with the control of either the signaller or the PICOP and the branch line was left without flank protection. The Claimant advised that since no one was working at shields protection on the canal side was not required. MM, Disciplinary Manager stated that if a train came out of the

Corkerhill Depot it would have been an issue. She considered the branch line to be unprotected.

30. In reaching her decision to dismiss MM, Disciplinary Manager was conscious of life changing ramifications for a colleague. She thought about the '10 incident factors' that might give rise to an incident including what were his duties and whether he was under undue pressure or tired. She considered his length of service but she felt he was very experienced. She had previously checked with HR whether a dismissal sanction would be unduly harsh in the circumstances or would be inconsistent with past disciplinary decisions. She had considered alternative sanctions. She said that due to the extremities of the offence she had decided summary dismissal was appropriate. She felt she had the flexibility to decide whether the conduct in the circumstances amounted to gross misconduct (i.e. merited dismissal). Once she decided it was gross misconduct the relevant penalty was dismissal.

31. On 20 December 2018 MM, disciplinary manager wrote to the claimant to advise that his employment was being terminated without notice for gross misconduct. She stated that "The reason for your dismissal is that on Thursday 24 July 2018, whilst acting as PICOP for item 91, you changed the protection arrangements without authority and as such protection was not placed in line with the published possession and protection was not provided to all lines within the possession" (the change of protection allegation). The Claimant was advised of his right of appeal. The dismissal letter did not make reference to the exculpation or mitigation offered by the Claimant at the disciplinary hearing including his long service, clean disciplinary record and his self-reflection. The Claimant was provided with minutes of the disciplinary hearing which captured the discussions at the hearing.

32. On 28 December 2018 the claimant submitted his appeal "based on the severity of the sanction against [him] in relation to the incident that took place on the 24th of July 2018".

33. On 9 January 2019 the claimant was invited to an appeal hearing.

34. On 17 January 2019 Sentinel wrote to the claimant to advise that he was being suspended for a period of 6 months from 4 January 2019 until 3 January 2019 and for a further 12 months he would not be allowed to hold any / supervisory safety critical competences that are higher than his 'PTS' competence until after 3 July 2020. Sentinel provides rail workers with a certificate permitting them to work.

35. Prior to the Appeal Hearing the Appeal Manager carefully read the Preliminary Report prepared by the Preliminary Investigator, the Investigation Report prepared by the Investigating Manager and the minutes of the disciplinary hearing. On 20th January 2019 the claimant attended an appeal hearing with his union rep. The appeal hearing was chaired by a AS, Appeal Manager. At the start of the appeal AS, Appeal Manager said this was "an interesting case with a lot of background noise". He invited the Claimant and his rep to give comment on the appeal. The Claimant's Union Rep advised that he had spoken to several PICOPs and more than half of them would have done the same thing on the night. (The Claimant did not provide any statements or call any witnesses. The Appeal Manager as Head of Ops had not experienced anyone behaving in that manner.) The union rep advised that other possession irregularities had occurred and no one was dismissed for the same situation. (The Claimant did not provide any names or dates regarding those incidents.) The claimant stated that "in his view on the night there was no need to flank protect the junction however he admits that he now sees that this would have been the appropriate action and is sorry to have caused so much hassle." AS, Appeal Manger explained that "it was possible a signaller could have made an error that morning, the signalling was not disconnected, and a train could have been signalled from Corkerhill Depot towards the worksites and it would not have met with any detonator secondary protection because [the claimant] had decided it was not required when it clearly was". The Claimant said he had 17 years in the railway and "if there was any sanction other than dismissal he wouldn't have complained and he should be given a chance to correct his behaviour". AS, Appeal Manager stated that in his view this event was a very serious event and people could have lost their lives. (In the view of the appeal manager workers could potentially move between worksites within a

possession. The Claimant explained they would have had to come from the worksite at Ibrox which was 1.2 miles away.) He brought out the map to explain the severity of the omission. He understood that the Claimant had a career with the railway and sympathised with his circumstances. AS, Appeal Manager twice asked the Claimant if there was anything the Claimant could say that could mitigate the circumstances that he could consider further. The Claimant said he was sorry. AS, Appeal Manager then advised that safety had been compromised by his omission and if there had been a signal error a train or any rail mounted vehicle could have access into a worksite and the outcomes would have been a disaster. He was not upholding his appeal. The appeal hearing lasted 20 minutes.

36. The outcome of the appeal was confirmed by letter of 29 January 2019. The appeal outcome letter did not make reference to the exculpation or mitigation offered by the Claimant at the appeal hearing including his long service, clean disciplinary record and his self-reflection. The Claimant was provided with minutes of the appeal hearing which captured that discussion at the hearing.

37. The Claimant's gross weekly wage at the date of termination was £1394.40 and his net weekly wage was £916.95. He was entitled to an employer's pension contribution of £23.32 a week (3%). The Claimant was 50 years old at the termination date.

38. The Claimant secured work via Jobs and Business Glasgow from 25 April 2019 until 25 October 2019. His average net weekly earnings were £308.26.

39. The Claimant's Sentinel railway competences were suspended until 3 July 2020 making it difficult for him to secure alternative employment at the same level of remuneration.

40. The Claimant made various applications for work following his dismissal and also following the loss of his second job in October 2019.

41. The Claimant was in receipt of state benefits from 14 February 2019 until 14 April 2019. The Claimant is not currently working.

Observations on the evidence

42. The witnesses gave their evidence in a measured and consistent manner and there was no reasonable basis upon which to doubt the credibility and reliability of their testimony other than the undernoted minor exception. They answered the questions in full, without material hesitation and in a manner consistent with the other evidence.

43. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur.

44. In evidence the Claimant asserted that at the start of the appeal hearing AS, Appeal Manager stated that this was "an interesting case with a lot of background noise" (the opening remark). In evidence AS, Appeal Manager denied this. On 6 February 2018 the Appeal Manager provided the Claimant and his rep with minutes of the appeal hearing held on 28 January 2019. On 11 February 2019 the Claimant's union rep replied stating that the notes in the main are a fair reflection but one minor amendment was to add in his opening remark about this "being an interesting case with a lot of background noise". The appeal manager replied stating he had no recollection of that comment and he has checked with the note taker and she confirms his view. By the time of the Tribunal hearing nearly one year later the Appeal Manager was inevitably reliant upon the minutes as a comprehensive record. The minutes do not contain that remark. Appeal Manger genuinely believed he had not made that remark. However given that the Claimant and his rep could recall the opening remark at the time and given that the Appeal Manager and the note taker could not recall it but did not deny it at the time, it is considered more likely than not that he in fact said it.

Relevant Law

45. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not be unfairly dismissed by the Respondent.

46. It is for the Respondent to prove the reason for the Claimant's dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.

47. If the reason for his dismissal is potentially fair, the Tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant. At this second stage of enquiry the onus of proof is neutral.

48. If the reason for the Claimant's dismissal relates to his conduct, the Tribunal must determine that at the time of dismissal the Respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation in the circumstances (*British Home Stores Ltd v Burchell [1978] IRLR 379, [1980] ICR 303*).

49. In determining whether the Respondent acted reasonably or unreasonably the Tribunal must not substitute its own view as to what it would have done in the circumstances. (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 827*) Instead the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if the decision to dismiss fell out with that range. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT)*).

50. In determining whether the Respondent adopted a reasonable procedure the Tribunal should consider whether there was any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Tribunal then should consider whether any procedural irregularities identified affected the overall fairness of

the whole process in the circumstances having regard to the reason for dismissal.

51. Any provision of a relevant ACAS Code of Practice which appears to the Tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures provides in summary that –

    a. Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

    b. Employers and employees should act consistently.

    c. Employers should carry out any necessary investigations, to establish the facts of the case.

    d. Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

    e. Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

    f. Employers should allow an employee to appeal against any formal decision made

52. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.

53. Section 123 (1) of ERA provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer.

54. Where, in terms of Section 123(6) of ERA, the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, then

the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

55. An employer may be found to have acted unreasonably under Section 98(4) of ERA on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred (*Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL)*). In this event, the Tribunal requires to assess the percentage chance or risk of the Claimant being dismissed in any event, and this approach can involve the Tribunal in a degree of speculation.

56. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") provides that if, in the case of proceedings to which the section applies, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer or the employee has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase or decrease the compensatory award it makes to the employee by no more than 25%. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice.

Respondent's submissions

57. The Respondent's submissions in summary were as follows-

- Safety is of paramount importance to the Respondent. The Claimant's role was safety critical.

- The range of reasonable responses must be considered in the content of the Respondent's business (*Iceland*).

- The Tribunal must stand back and ask themselves whether, overall, the Respondent reached a decision which was not open to a reasonable

employer in all the circumstances (*Semple Fraser LLP v Daly UKEATS/0045/09/BI*).

- If the dismissal was procedurally unfair the Claimant would have been dismissed in any event had a fair procedure been followed and no compensation should be awarded (*Polkey*).

- Alternatively there should be no compensation because of contributory fault. It is the Claimant's fault and not the Respondent's which should be considered (*Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09*). It is just and equitable to reduce the basic and compensatory award to nil, the dismissal having been caused wholly by the Claimant's culpable actions (*W Devis & Sons Ltd v Atkins [1977] IRLR 314*).

- The Disciplinary Manager had considered alternative sanctions and took into account length of service and mitigation.

- The Appeal Manager expected new evidence or robust mitigation which he would have adjourned to consider. The only mitigation offered was that he was sorry.

- The Respondent's adopt a belt and braces approach to safety – the PICOP is the belt and the Signaller the braces. Signallers can make errors. The Claimant accepted this. Without the belt they were vulnerable if the braces broke too.

- There was no evidence of inconsistent treatment

Claimant's Submissions

58. The Claimant's written submissions were in summary as follows: -

- The appropriate course of action is to suspend the employee on full pay.

- Hearings will follow the rules of natural justice which are really matters of fairness and common sense. A suggested approach would be to: explain

the purpose of the meeting; identify those present; arrange representation; inform the employee of the allegation (s); indicate the evidence (by calling witnesses, witness statements, or otherwise); allow the employee to ask questions; allow the employee to call witnesses; allow the employee to expel and argue the case; listen to the arguments on exculpation and mitigation; ask the employee whether there is any further evidence or enquiry which may assist. *(Clark v Civil Aviation Authority [1991] IRLR 412)*

- The Claimant accepts that the reason for the dismissal was misconduct and that is a potentially fair reason.

- The Claimant accepts that the Respondent had a genuine belief in the misconduct, and it was not a sham or that there was some ulterior motive.

- There were not reasonable grounds for the Respondent's belief.

- The Respondent had not carried out as much investigation into the matter as was reasonable in the circumstances.

- The decision to dismiss fell out with the range of reasonable responses.

- The Claimant had 17 years' service and had never been subject to any disciplinary proceedings.

- Detonator Protection was laid within the possession but not as originally instructed. Detonator Protection was not laid on the flank/ Canal line.

- To signal a train into the area would have required a grave mistake on the part of the Signaller. The Signaller remains responsible for the protecting signal and the points leading into the area in possession. They continue to be responsible for ensuring trains do not pass into the area in passion.

- In applying the Fair Culture Policy the Respondent failed to properly consider the Claimant's explanation take into account taking the decision to commence the disciplinary procedure as opposed to a coaching conversation the Respondent failed to. His conduct was deliberate but well intentioned. He changed the protection locations to allow colleagues longer in possession in order to carry out the works. The Respondent

unreasonably formed the view that his conduct was reckless by focusing on the potential effect of his actions rather than his intentions.

- If the action is well intentioned and the procedures are “clear and workable” the guide directs the investigator to recommend a “coaching conversation” and not disciplinary action.

- The Claimant accepts that he should have contacted the Operations Delivery Manager for authorisation to change the detonator location.

- The Claimant was not dismissed for changes to the Chord Line because although this was technically a breach of the rules, there had been a discussion between the Signaller and the Claimant about this such that the there was an understanding between them. This demonstrates that not every breach of the rule book jeopardises an employee’s continued employment.

- The Disciplinary Manager failed to consider the signaller remains responsible for not allowing trains to enter the possession. She made flawed assumptions about the flank protection.

- The Disciplinary Manager focused on the idea that failure to follow the protection arrangements constituted gross misconduct which inevitably meant dismissal. Her decision was contradictory because he was dismissed for a failure to not seek authorisation from the Operational Manager in relation to the chord line but not the canal line.

- Once the Disciplinary Manager deemed the conduct to be gross misconduct, there was not room for discretion and the outcome must be dismissal. (*Brito-Babapulle v Ealing Hospital NHS Trust 2013 IRLR 854).* Once gross misconduct is found dismissal does not necessarily follow because mitigatory factors must be considered.

- The Claimant explained why he took the steps he took and the risk was very low. The Respondent disregarded that evidence and there was not reasonable basis for the belief in misconduct.

- The dismissal letter reflects the mindset of the Disciplinary Manager and makes not reference to the exculpation or mitigation offered by the Claimant including his long service, clean disciplinary record and his self-reflection.

- At appeal the Claimant explained his reasoning and the union rep advised that other PICOPs would have taken the same steps and other possession irregularities had not resulted in dismissals. The appeal manager did not ask for clarification, did not listen carefully to the arguments, did not consider any mitigating circumstances, and did not adjourn to consider.

- The Appeal Manager's decision was unreasonably influenced by the other allegations raised against the Claimant. This can be inferred from his opening statement that this was "an interesting case with a lot of background noise".

- The Appeal Manager gave no genuine consideration to the possibility of overturning the decision to dismiss and had already made up his mind. This can be inferred from the short hearing, the lack of meaningful engagement, and the absence of any adjournment. He did not accept that other PICOPs would have taken the same steps without investigating the issue.

- The Appeal Manager unreasonably relied upon a hypothesis that workers could have been in the affected area when no-one planned to be working there.

- The Claimant accepts the emphasis that the Respondent puts on health and safety practices. He accepts the issues raised are important and any failing are serious. However a breach of a safety rule does not mean people have necessarily been put at risk.

- Whilst he accepts his decision not to lay flank protection was an error of judgment the punishment must be considered in the context of the genuine risk. Both the Disciplinary Manager and the Appeal Manger failed to make a reasonable assessment of that risk. The Respondent does not operate a

zero tolerance approach to rule book breaches as evidenced by their decision in relation to the chord line.

- The decision to dismiss was out with the range of reasonable responses given because the Respondent failed to take into account his clean record, his honest risk based explanation, his self-reflection, the inconsistency regarding the chord line omission, and the low level of risk.

- Polkey does not apply if the decision to dismiss was substantively unfair.

- If the decision to dismiss was procedurally unfair the procedure would have affected the decision to dismiss such that Polkey does not apply.

- The Claimant accepts that he contributed to his dismissal but a deduction of 20% is just and equitable given his dismissal from a specialist industry and the consequential loss of his safety critical competencies and the significant difficulty in transferring to other industries.

Decision

59. The Claimant was dismissed by the Respondent for misconduct on the ground that "he changed the protection arrangements without authority and as such protection was not placed in line with the published possession and protection was not provided to all lines within the possession" (the change of protection allegation). There was no evidence that the Disciplinary Manager had another unrelated reason in mind when she made the decision to dismiss or that the Appeal Manager had another unrelated reason in mind when he refused the appeal. The Tribunal therefore concludes that the reason for dismissal was the stated ground. This reason related his conduct which is a potentially fair reason within the meaning of Section 98(1) of the ERA 1996.

60. As a result of their investigations the Respondent had established that: the Shields junction had been specified as a worksite within the possession arrangements; the Claimant called the Engineering Supervisors on the night to ask where they were working and they advised that they would not be working at Shields Junction; as a result the Claimant considered that flank protection was not required to the Canal Line and he did not provide it; he was under a

duty to provide that protection under the possession arrangements; any changes to protection arrangements must be authorised by Operations Control and they were not; the Claimant was an experienced PICOP and was aware of his obligations; the changes to the protection arrangements meant that there was less work and less time involved in providing the protection and that meant there was more time was available to the worksites; protection was still being provided to the Canal Line by the Signaller who sets lights and points accordingly; there was a low risk of injury in the circumstances; a worker would have required to have moved between worksites within the possession area and the signaller would have required to make a mistake by signalling a train into the possession area.

61. Having regard to the above there was a reasonable basis for the Disciplinary Manager’s and the Appeal Manager’s belief that the Claimant changed the protection arrangements without authority and as such detonator protection was not placed in line with the published possession and detonator protection was not provided to all lines within the possession.

62. The Respondent’s findings were based upon information gathered from the possession documents, the Claimant, Senior Operations Delivery Managers, other PICOPs and the Signaller. The Respondent had carried out as much investigation as was reasonable in the circumstances.

63. The Respondent complied with all of the material requirements of their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. Matters were dealt with promptly, consistently, necessary investigations were carried out, and the Claimant was accompanied and afforded an opportunity for appeal.

64. Considering the disciplinary process as a whole, and having regard to the reason for dismissal, the procedure adopted fell within the range of reasonable responses open to an employer acting reasonably in the circumstances.

65. Both the Disciplinary Manager and the Appeal Manager appeared entirely genuine and sincere in their belief that the Claimant had not placed the protection in line with the published possession arrangements. There was no

evidence either that they had any other unrelated reason in mind or that their belief was not genuine. There was a reasonable basis for their belief based upon a reasonable investigation. The Tribunal therefore concludes that the Disciplinary Manager held a genuine belief in the Claimant's misconduct at the time of his dismissal. The Tribunal also concludes that the Appeal Manager held a genuine belief in the Claimant's misconduct at the of refusing his appeal.

66. As to the level of risk caused by the breach, the Disciplinary Manager was aware from the Preliminary Investigation that the signaller offered secondary protection, a mistake was required on the part of the signaller too and the level of risk was considered to be low. However the Disciplinary Manager stated in the disciplinary hearing that the branch line was unprotected. There was an understandable concern that the Disciplinary Manager made flawed assumptions about whether the Signaller also offered protection to the Canal line. However the same concerns do not extend to Appeal Manager. He understood that protection was provided by the Signaller and the protection provided by the PICOP was "secondary." He fully understood that a mistake would was also required on the part of the signaller. Having properly assessed the risk, he considered the breach to be very serious in the circumstances and that safety had been compromised by the Claimant. Any flaw in the Disciplinary Manager's understanding was remedied on appeal.

67. The Claimant had a responsibility to arrange possession protection to enable work to be carried out safely within the possession area. The Claimant decided not to provide flank protection to the Canal line which was required under the published possession arrangements. He did not provide the flank protection because he had established on the night, in a change to the published arrangements, that no one was working at Shields junction. He considered it did not need protection, and not providing that protection would save time and effort for him and his team which meant more time for the worksites. The Claimant failed to obtain authorisation for the change from Operations Control. Protection was still being provided to the Canal Line by the Signaller. However the Respondent adopts a belt and braces approach because there is a risk that the belt or the brace might fail. There was a low risk of injury in the

circumstances which would have required a worker moving out with their worksite within the possession area and also a mistake on the part of the signaller by signalling a train into the possession area. However the risk was not so low as to be discounted as negligible.

68. Breach of an agreed procedure is a factor but it is not determinative. The Claimant's conduct was considered reckless because although he had weighed the risk he had not done so sufficiently. Although there was benefit to the worksites there was obvious benefit to him personally by way of reduced time and effort in providing the protection. His act was not wholly well intentioned. The Respondent was entitled to consider the act was a reckless contravention for personal benefit under the Fair Culture Procedure and was entitled to commence the formal disciplinary procedure.

69. The Disciplinary Manager's decisions in respect of the chord line and the Canal line were not contradictory and it was reasonable to distinguish her approach. The chord line was too short and protection was unachievable. This was not the position with the Canal line. The removal of the chord line had been agreed with the signaller who was aware of the changes. This was not the position with the Canal line. Whilst his failure to provide chord line protection was a breach of the safety rules and arguably met their definition gross misconduct, the Disciplinary Manager had concluded in the circumstances that this did not amount to gross misconduct. Her treatment of the chord line and the Canal line was not inconsistent.

70. The Respondent reasonably believed that the Claimant's conduct in relation to the Canal line in the circumstances met the definition of gross misconduct under their policy which includes serious infringement of health and safety rules and serious negligence which causes or might cause unacceptable loss, damage or injury.

71. The Claimant asserted by way of mitigation his long service, clean disciplinary record and his self-reflection. When determining whether the misconduct amounted to gross misconduct the Disciplinary Manager had taken into account those mitigatory factors. She considered any exculpatory and

mitigatory factors at the stage of categorisation of the misconduct rather than at the stage of determining the penalty. (His failure to provide protection to the Chord line arguably met the definition of gross misconduct but she decided not to categorise it as gross in the circumstances.) The mitigatory factors of long service, clean disciplinary record and self-reflection were also considered on appeal by the Appeal Manager. Notwithstanding the wording of the disciplinary policy, mitigatory factors could be considered and were considered.

72. The Claimant's Union Rep advised the Appeal Manager that he had spoken to several PICOPs and more than half of them would have done the same thing on the night. The Claimant did not provide any statements or call any witnesses. The Appeal Manager as Head of Ops had not experienced anyone behaving in that manner. The union rep advised that other possession irregularities had occurred and no one was dismissed for the same situation. As noted in the disciplinary minutes the Disciplinary Manager had already check with HR regarding inconsistency with past decisions. The Claimant did not provide any names or dates regarding those incidents. It was not unreasonable for the Appeal Manager not to make any further enquiries in the circumstances given his own knowledge as Head of Operations and given the lack of information other than a bald assertion of inconsistency.

73. The appeal manager did not adjourn to consider and the appeal hearing lasted only 20 minutes. At the appeal hearing the Claimant and his representative had not offered any new information and arguments beyond that previously asserted and the bald assertions regarding consistency. The Appeal Manager had already carefully read the prior investigations and minutes. He did not require to adjourn to properly consider the appeal.

74. The Appeal Manager's decision was not unreasonably influenced by the other allegations raised against the Claimant. This cannot be inferred from his opening statement that this was "an interesting case with a lot of background noise". Saying it was an interesting case merely implied it was out of the ordinary and therefore unique. Saying there was a lot of background noise implied recognition that there had previously been more strands to this at the disciplinary hearing stage than at the appeal stage. That was factually correct.

The Appeal Manager was under obligation to read the papers which pertained to the disciplinary process. Describing it background noise suggests it was something he was intending to ignore rather than to put weight on.

75. The Appeal Manager gave genuine consideration to the possibility of overturning the decision to dismiss and had not already made up his mind. The hearing was short because of the limited submissions of the Claimant and his rep. There was no adjournment because there was little new information to consider. There was not a lack of meaningful engagement –the Appeal Manager twice asked the Claimant if there was anything the Claimant could say that could mitigate the circumstances that he could consider further.

76. Another employer of similar size and administrative resources, acting reasonably in the circumstances, might well have taken the decision to dismiss an ODS with 17 years' service who did not have any prior conduct or other warnings, who was an experienced PICOP, who made a conscious decision not to provide the specified protection in benefit to himself and the worksites, and which gave rise to a low risk of injury for which he had apologised.

77. The Tribunal therefore determined in accordance with equity and the substantial merits of the case that the Respondent acted within the band of reasonable responses (including the procedure adopted) in treating the reason given as a sufficient reason for dismissing the Claimant in the circumstances.

78. The Claimant was not therefore unfairly dismissed.

Employment Judge: M Sutherland

Date of Judgement: 28 December 2019

Entered in Register,

Copied to Parties: 09 January 2020