Case Number: 3314757/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Worby	**v**	RFT Repairs Ltd

Heard at: Huntingdon **On:** 13 July 2020

Before: Employment Judge Ord

Appearances
For the Claimant: Miss J Bradbury (Counsel).
For the Respondent: Mr L Varnam (Counsel).

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant contributed to the dismissal and under s.123(6) of the Employment Rights Act 1996 it is just and equitable to reduce the amount of any compensatory award to be paid to the claimant by 60%.

REASONS

1. The claimant was employed continuously for a period of 14 years from the 29 March 2005 until he was dismissed, summarily, on 28 March 2019 for reasons related to conduct.

2. The claimant was originally employed by Norfolk County Services Limited, his employment subsequently transferred to the respondent. The provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 [TUPE] applied.

3. The claimant was issued with a contract of employment by Norfolk County Services Limited which was signed by him on 21 April 2005. No amended contract or other document has been brought to my attention to alter those terms and conditions. That contract refers to a disciplinary procedure, it is not clear whether that disciplinary procedure was contractual or not. The respondent has, throughout this process, proceeded on the assumption that their own processes and procedures apply.

4. Following problems with a scaffold from which the claimant was to work on premises in Vores Terrace, Dereham the claimant was suspended on 21 March 2019. The allegation of misconduct which was being investigated was said to be:

> "Making alterations or adjustments to scaffolding after its construction and after it was signed off by the scaffolding company (VPH) as safe."

5. The claimant was called to a disciplinary hearing on 28 March 2019 to face an amended allegation that:

> "On Thursday 21 March 2019 at the site location being 17 Vores Terrace, Dereham, Norfolk you were reported as having made alterations or adjustments to scaffolding after its construction and after it was signed off by the scaffolding company (VPH) as safe. In doing so you breached clause 7.11 of the Health and Safety Policy."

6. The claimant was summarily dismissed and his appeal against dismissal failed.

7. It is against that background that the claimant brings his claims.

The Hearing

8. The claimant gave evidence, as did Ms Patricia Worden (Head of Cyclical Works) who dismissed the claimant and who conducted the disciplinary hearing and Mr Warren Gannaway (Managing Director) who heard the claimant's appeal. Reference was made to a bundle of documents.

The Facts

9. Based on the evidence presented to me I have made the following findings of fact.

10. The claimant was employed as an external multi trade person.

11. The claimant had been continuously employed for 14 years at the time of his dismissal. There was no evidence before me the he had previously been guilty of any acts of misconduct nor had he given any other reason for concern during the lengthy period of uninterrupted service.

12. The claimant had outlined works to be performed at premises at Vores Terrace in Dereham including scaffolding requirements. That email of 13 April 2018 was not in the bundle before me. The unchallenged evidence of the claimant, however, was that the email stated that a 225mm gap between the scaffold and the wall was needed for the work to be performed safely.

13. The claimant's further unchallenged evidence was that this is the maximum gap allowed for scaffolding between brick structures according to the Health and Safety Executive website and that the power tool which he uses can only be used if that gap is in place between the scaffold and the wall which required re-grouting.

14. The claimant said (and again this was unchallenged) that:

    14.1 He attended site on 31 January 2019. The scaffold was constructed too close to the walls so there was no space between the scaffold and the walls thus preventing him from working.

    14.2 He emailed the respondent again to explain that there was an error on the work and a breach of safety requirements on the scaffolding.

    14.3 He also advised that the work could not be done because at the back of property the scaffold did not reach the boundary where the semi-detached property joined the adjacent property and he would have had to lean 1.5 meters over the edge of the scaffolding to do his work.

    14.4 That there was a bend in the ladder step which could have led to the ladder giving way and a fall.

    14.5 He identified other safety issues on site, no brick rails having been installed around the perimeter of the back of the scaffolding and no toe boards to prevent objects from falling from the scaffold.

    14.6 A structural pole had been incorrectly placed so that the claimant could not move up and down from the flat roof at the rear of the property and there was not enough space for him to effectively carryout his work.

    14.7 He advised an independent scaffolder had confirmed that the weight of the scaffold was not spread evenly across the flat roof which could have led to the rear elevation of the structure collapsing.

15. The scaffold company, VPH, advised the claimant they would return to site to carry out adjustments so that the work could take place.

16. The claimant attended site on 15 February 2019. The scaffold had been adjusted slightly but the gap between the scaffold and the wall was still only 50mm. The scaffold was 3 storeys high and the claimant's unchallenged evidence was that although it had been signed off as safe it was moving from side to side whilst being walked on and lacked stability as a result of which the claimant re-iterated that it was unsafe and advised the respondent he could not perform his work until the issues which had been identified were resolved.

17. On 12 March 2019 the claimant returned to site again. The position had not been resolved and he contacted his line manager along with the scaffolding company "urging them" to come to the site and help resolve the issues.

18. On the fourth occasion the claimant attended site, 18 March 2019, none of the adjustments had been made.

19. None of that evidence was challenged at all by the respondent.

20. On 18 March the claimant had also received news that his mother was terminally ill and was admitted into Norfolk and Norwich Hospital for chemotherapy following a diagnosis of lung cancer.

21. The claimant also said (again unchallenged) that he had received several complaints and hostilities from the tenant whose property he was to work on and the next door neighbour. He said that as he had had no support from the respondent or the scaffold company to resolve this situation he adjusted some of the scaffold poles away from the wall so that he could carry on with his work.

22. One of the claimant's managers, Mr Veal then attended site and asked who had moved the poles. The claimant said that he had done so, he had had no support from the respondent and had tried everything to meet safety requirements to do his job. He was told to go and get some lunch and when he returned from his break he was told to take all of his tools and go to the main office.

23. I was not advised of what took place between the 18 and 21 March 2019, but on Thursday 21 March the claimant attended a meeting with Mr Andy Johnson, Head of Health and Safety and Electrical Compliance. Maria Fosbrook was in attendance as a note taker from the Human Resources department.

24. Mr Johnson advised that the fact finding meeting was in relation to the claimant making alterations or adjustments to scaffolding after its construction and said that the matter would be treated in confidence. He said that "after the recent court case this is a very serious incident" which could have serious consequences for the claimant and for work colleagues" as well for the company.

25. The “recent court case” was referred to by the claimant in his evidence. According to his unchallenged evidence the 19 March 2019 issue of Eastern Daily Press advised that the respondent was involved in court proceedings regarding the matter involving scaffolding for which they received a fine.

26. Mr Johnson said that VPH had inspected the scaffold as it had been altered. The claimant admitted altering it and said that he had done so to ensure a gap, at the legal requirement, so that he could carry out his work.

27. Mr Johnson read an email from VPH (Mr Robert Wright) who was an advanced scaffolding inspector and said that the scaffold had been adapted, and “I have pulled the scaffold tag out as it is unsafe to use, if anyone would of used the top lift the inside boards could have failed and seriously hurt someone. I am getting scaffolders to attend and correct all faults. Please see attached pictures and scaffold guidelines.”.

28. The claimant said that he had requested a 225mm gap but there was not one which Mr Johnson said would be checked as part of investigation.

29. When asked about the safety of the scaffold the claimant said that it had been checked on the Monday (18 March) and that despite him advising that there was an insufficient gap it had been signed off as safe. When he was asked by Mr Johnson if there was an alternative way to the job the claimant said that the scaffold company had said “take it down and start again”.

30. Mr Johnson asked if the claimant had called anyone or spoken to his manager about this matter. The claimant said he had advised Mr Veal about the position. Mr Veal had told VPH to change the gap. Mr Johnson said his concern was that “the HSE won’t care what you’ve said, you’ve altered it, you’ve broken the law and I know frustrating for you but the end of the day you’ve done it”.

31. When the claimant was asked ‘If he could go back, what would he have done differently?’. He replied, “the customer was going on, the neighbour was going on, I just got fed up” and said that the scaffold was safe. He admitted adjusting the scaffold but said that it was not unsafe. He confirmed that he had asked three times for the scaffold to be adjusted and it had not been changed. Mr Johnson said that he would speak to “all relevant parties, VPH, Richard (Veal), those guys that did the facias”.

32. The claimant was suspended on full pay. His telephone, iPad and access fob were taken from him.

33. A statement was provided by Mr Veal. The statement is unsigned and undated. The contents of that statement confirm that scaffolding had been erected on 17 January 2019, on 31 January operatives were on site and adaptation of the scaffold was requested, on the same day work was stopped due to threat of legal action from the homeowner next door, VPH

were asked to tender for the complete works on the same day but their quote was rejected and the work was brought back in-house on 15 February 2019; the work was due to start on the 4 March and further adaptation to scaffold was requested on 12 March 2019. On that same day work was suspended due to high winds and work continued on 18 March. According to Mr Veal the date of the incident was 21 March 2019.

34. Mr Veal said that he had instructed VPH to adjust the gap between the structure and the scaffolding to the legal maximum of 225mm. That was before the 18 March on the day work recommenced. There was no confirmation from Mr Veal that the gap had been properly put in place, nor any reference to the specific complaints raised by the claimant.

35. Mr Veal confirmed that he was approached on 21 March by an operative working on the project who told him that the scaffolding had been adjusted and that person said they were concerned for their safety. Mr Veal requested VPH to attend, upon his arrival on site all operatives were working at ground level. Whilst operatives were absent from the site on lunch the VPH inspector confirmed that "a dangerous alteration had taken place" and Mr Veal asked for a written statement. The claimant confirmed that it was he who made the alteration, work was suspended.

36. An anonymised statement was obtained by Mr Johnson on 22 March. The maker said that he was working on the site and that two weeks previously Mr Veal had had the lack of gap between the scaffold and the wall brought to his attention. The anonymous employee said he did not agree with the gap being bigger and would stay on the ground. The scaffold company confirmed the legal maximum gap was 225mm and Mr Veal had said "if that is the legal maximum then that's what it is going to be". He said that on 19 March he saw the claimant "knocking the scaffold poles back" and when asked why he was doing it, he said that he had to have a gap.

37. The anonymous employee said that he spoke to Mr Veal about this and Mr Veal had asked, "Is SW [the claimant] still going on about the gap?". Mr Veal told the anonymous employee to "go back to site and get on". He confirmed that the claimant admitted moving the scaffold poles and that VPH remove the safety tag and "condemned" the scaffold.

38. Mr Johnson completed his investigation report on 22 March. He confirmed that he had had the fact finding meeting with the claimant and attached the notes of it. The claimant had admitted altering the scaffolding, it was said to be a "disputed matter" as to whether the scaffold was originally constructed for a previous job – replacement of facias.

39. The report confirmed in "mitigation" that the claimant was frustrated. He had previously asked twice for the scaffold to be altered, was told that it had, but it had not and that both the customer and a neighbour were "getting at him". The claimant's training record was attached to the investigation report. It demonstrated that he had been trained on fixed

scaffold towers (PSMA towers and Tetra towers) in April 2018 and October 2017 respectively, that there had been training on tower scaffolding in August 2015 but no training since July 2018 and no relevant training since April 2018.

40. On the 25 March 2019 by letter of that date the claimant was called to a disciplinary meeting on Thursday 28 March 2019. He was required to answer the allegation that:

> "On Thursday 21 March 2019 at the site location being 17 Vores Terrace, Dereham, Norfolk you were reported as having made alterations or adjustments to scaffolding after its construction and after it was signed off by the scaffolding company (VPH) as safe. In doing so you breached clause 7.11 of the Health and Safety Policy."

The letter further went on to say:

> "If this allegation is this is likely to be regarded as gross misconduct, and therefore result in your dismissal from the company."

41. The claimant was sent a copy of the investigation report and appendices, the company Health and Safety Policy Objectives and Procedural Arrangements and the company Disciplinary Policy and Procedure. The claimant was advised of his right to present documents, relevant information and core witnesses, his right to be accompanied and was given a telephone number to contact the Human Resources advisor in the event that there was anything he did not understand.

42. Ms Worden had conduct of the disciplinary hearing.

43. The question of whether or not the respondent's disciplinary procedure applied to the claimant does not appear to have been considered by anyone. The claimant said, and this evidence was not challenged, that he had not seen the disciplinary procedure until a copy of it was sent to him with the letter calling him to the disciplinary hearing. The respondent's evidence was that it was available on their internal intranet but did not say that that had been brought to the claimant's attention at any time. Further, the reference to clause 7.11 is not a reference to the Health and Safety Policy, but to the Health and Safety Policy Objectives and Procedural Arrangements, which is a separate document.

44. Under the disciplinary procedure a limited number of people may authorise dismissal without notice for a first offence, namely:

44.1 The Director (People).

44.2 The Chief Operating Officer.

44.3 The Chief Financial Officer.

44.4 The Chief Executive Officer.

45. Under the non-exhaustive list of matters in relation to gross misconduct are "serious breach of health and safety".

46. Under the Health and Safety Policy (which again the claimant had not seen but again was apparently available on the respondent's intranet although again no one said that this had been brought to the claimant's attention previously) clause 2.2 required all employees to observe all health and safety instructions. Under clause 7.11 of the RFT Health and Safety Policy Objectives and Procedural Arrangements all employees have a responsibility to, inter alia:

> "Not misuse or interfere with anything provided to safeguard their health and safety."

47. During the hearing Ms Worden had access to at least one document which she considered as part of the disciplinary process but which was not made available to the claimant. This was a risk assessment document headed "risk assessment working from a fixed scaffold" for carrying out repairs at height on customers' properties issued on 30 April 2018, reviewed on 29 April 2019 by Mr Johnson. It had within it a section marked "collapse of scaffold" which said that the scaffold must carry an up to date "Scaff Tag" which must be inspected at the start of each day and any issues must be raised immediately.

48. Prior to the hearing the human resources officer had contacted the Director of People and Workplaces, Lisa Collen. She confirmed the claimant's length of service and that there was a disciplinary allegation. Her email said:

> "We are holding a disciplinary for the following
>
> 1. He made adjustments or alterations to scaffolding after its construction after it was signed off by the scaffolding company (VPH) as safe."

and said that that was deemed as gross misconduct under the disciplinary policy as a serious breach of health and safety. Miss Fosbrook asked if "We" had permission to dismiss should this be deemed the correct and right outcome in this case.

49. Ms Collen's reply was:

> "Authorised"

She also went on to say:

> "I am concerned this is now the 3rd person in as many weeks almost.
>
> Is Andy J doing something about this regarding training, awareness etc to remind staff of the regulations and requirements rather than keep disciplining people … address the root cause and not the symptoms."

50. Miss Fosbrook replied:

> "I know it's a real concern, I'll talk to him about your observations and see what he plans to do"

51. At the disciplinary hearing the claimant was not represented. When this was raised with him he said he had no telephone to contact someone and when asked if he would like someone with him said "no it's ok go ahead".

52. Ms Worden, after the claimant said he had no questions on the investigation report, said that they were there today to see what happened, how it happened, why it happened. She had "a few questions to ask" after which the claimant was to "have the opportunity to respond and explain what happened".

53. The claimant asked to "run through it from the start" and Ms Worden asked him to wait as her questions "will probably cover most of what happened".

54. The claimant was asked was he aware that he should not adjust the scaffolding. His reply was, "that a friend in the industry had said a competent person can adjust scaffold, the part he moved was the board to the requirement he had asked for 4 times".

55. He was asked about who was a competent person and was asked at the time he moved the scaffolding what was he thinking. His reply was that he had kept asking for it to be moved, the customer had kept complaining and he wanted the job done. He said that the bolts were in place.

56. He was asked if he was aware that he was breaking health and safety and replied that he was following the measurement and not going against the allowed gap. He said that at the time he was not aware that adjusting the scaffolding was "that serious" although he admitted knowing he should not have adjusted it.

57. The claimant then set out the history of the matter.

58. Ms Worden said that "In my [her] mind …", the claimant had options to stop work, advise the customer and inform the field manager, move away from the situation and call the office. But that "The one option you did not have was to adjust, change or adapt the scaffolding in any way, due to health and safety."

59. When the claimant said that the scaffolding was not safely erected in the first place Ms Worden said that he had "options to resolve the issue and chose the other option". The claimant said he tried every avenue he could.

60. The claimant at the end of the hearing raised the point about his mother's health and apologised to Ms Worden.

61. After an adjournment Ms Worden said:

> "Up to you telling me about your mum it was a clear decision, it has put a spanner in the works."

62. He was asked if he had asked for support from his field manager regarding his mother's health as he presented himself fit for work. She considered the matter to be a serious breach of health and safety and gross misconduct. Her decision was to dismiss as the action and the threat to the business was serious and it could have caused a serious accident. He was given 5 days to appeal.

63. Ms Worden said that the claimant was still seeking to justify what he had done and he said, "I am not I was just really frustrated".

64. The claimant submitted an appeal in writing. The appeal was conducted by Mr Gannaway. The claimant was accompanied by his father at the appeal hearing.

65. The claimant stated at the very beginning of the meeting "I am sorry for what I have done". He referred to his 14 years of service, his hard work, the fact that he had just received bad news from his family and he had been unable to contact anyone from the company to help him. The claimant recited the history of the matter. He emphasised the number of times he had asked for the scaffolding to be adjusted which Mr Gannaway stated emphasised that he knew the process he should follow and to seek permission for the scaffold to be adjusted. Mr Gannaway said that health and safety had to be a priority for everything done in the business, and that "I have a feeling that you might have done this before". He upheld the original decision to dismiss.

66. In his outcome letter Mr Gannaway set out the principally three reasons upon which the claimant relied upon at his appeal, namely the severity of the sanction, external matters including his family situation which was putting him through extra stress and the fact that he had asked for the scaffolding to be altered on four separate occasions and it was not done.

67. Mr Gannaway confirmed that sanction was dismissal because of the consequences that could have occurred following the claimant's actions which put himself, his colleagues, members of the public and the claimant's reputation at risk. Whilst there was sympathy with the claimant's personal circumstances he "presented himself as fit for work" and was trusted to work professionally and in a legal manner. By asking for the scaffold to be adjusted on previous occasions he demonstrated knowledge of what the process was but acted without permission and without following due process.

68. It is against that factual background that the claimant brings this claim.

The Law

69. Under s.94 of the Employment Rights Act 1996 every employee has the right not to be unfairly dismissed.

70. Under s.98(1) it is for the employer to show the reason for the dismissal and that it is either a reason falling within sub-section (2) or some other substantial reason justifying the dismissal of an employee holding the position which the employee held.

71. Under s.98(2)(b) a potentially fair reason for dismissal is a reason relating to the conduct of the employee.

72. Under s.98(4) where the employer has established a potentially fair reason for dismissal the determination of the question whether the dismissal is fair or unfair, having regard to that reason, depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

73. The seminal case of British Homes Stores Ltd v Burchell [1980] ICR 303 established that the questions the Tribunal must ask itself when considering whether or not a dismissal on the ground of conduct was fair are as follows:

    73.1 Did the respondent have a genuine belief in the employee's guilt?

    73.2 Was that belief held on reasonable grounds?

    73.3 Was that belief held following a reasonable investigation?

74. After those three questions have been answered the question for the Tribunal is whether dismissal fell within the range of responses open to a reasonable employer.

75. In Foley v Post Office; HSBC Bank Plc v Madden [2000] ICR 1283 the Court of Appeal set out that the Tribunal must not substitute themselves for the employer and form an opinion of what they would have done had they been the employer. The test is whether the respondent has behaved in a way which a reasonable employer in those circumstances in that line of business could have behaved.

76. The so called "range of reasonable responses" test was established in British Leyland (UK) Ltd v Swift [1981] IRLR 91. The question is whether it was reasonable for the employer to dismiss the employee. If no reasonable employer would have dismissed him, the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him then

the dismissal was fair. One employer might reasonably take one view, another quite reasonably take a different view.

77. The range of reasonable responses test applies to the entire procedure (J Sainsbury plc v Hitt [2003] ICR 111) and if a dismissal is procedurally unfair the role of the Tribunal is to consider whether in the circumstances the employer (employee?) could have been fairly dismissed had a correct procedure been followed and apply a proportional approach to the issue of compensation.

Conclusions

78. Applying the relevant law to the established facts I have reached the following conclusions.

78.1 When the claimant attended site to carry out work on the 18 March 2019 he faced an exceptionally difficult situation.

78.2 The claimant had been attending the same site to carry out the same work intermittently, without being able to carry out the work, since January 2019. He had set out the requirements to carry out the job as long before as 13 April 2018, but these were not put in place.

78.3 On 31 January 2019 the scaffold had been erected in such a way that he could not carry out his work safely both in relation to the lack of a gap between the scaffold and the wall so that he could work with the necessary tools and other issues relating to the positioning of the scaffolding; a bend in a ladder step, the lack of brick rails around the perimeter at the back of the scaffolding, the lack of toe boards, the lack of even spread of the weight of the scaffold across the flat roof and the positioning of a structural pole so that the claimant could not move up and down from the flat roof.

78.4 The claimant was advised that the scaffold company would return to site to carry out adjustments.

78.5 The claimant went back to site on 15 February 2019. The scaffold had been adjusted to create a small gap between the scaffold and the wall but not the gap required. The scaffold was moving and lacked stability. This was brought to the attention of the scaffolding company and the respondent.

78.6 On 12 March 2019 the matter had still not been rectified. The claimant contacted his line manager and the scaffolding company were urged by the claimant to return to site to resolve the issues.

78.7 On 18 March 2019 when the claimant again returned to site none of the adjustments had been made.

78.8 That situation was compounded by the following matters. First the claimant was receiving complaints from the tenant whose property he was to work on and from the next door neighbour complaining about the length of time the scaffolding had been in place and the disruption it was causing. The claimant had also received distressing news regarding his mother's health on 18 March with her being admitted to Norfolk and Norwich Hospital for chemotherapy.

78.9 The claimant, as he admits out of frustration, made an adjustment to the position of some scaffold poles but says (and there was no evidence to the contrary at any stage during the investigation) that he had clipped the boards back in place.

78.10 This matter was brought to the attention of Mr Veal by the claimant's co-worker. Mr Veal attended site, sent the claimant for lunch, called the scaffolding company who immediately withdrew the safety certificate ("Scaff Tag"). The claimant returned to site and was told to report to the main office.

78.11 Three days later the claimant attended an investigatory interview. The investigation officer had clearly determined in his own mind that the claimant was guilty of a series offence. His role as investigator would be to establish the facts. He set out his own view ("… if Health and Safety Executive had arrived") and said that the claimant had broken the law.

78.12 Further, the investigating officer said that the question of how large a gap had been provided would be checked as part of the investigation and that he would speak to "all relevant parties, VPH, Richard [Veal], those guys that did the facias".

78.13 In fact, he did not speak to VPH. He had already obtained from VPH an email dated earlier that day, 21 March, which said that Mr Wright could "clearly see that the scaffold has been adapted not by VPH, I have pulled the scaffold tag out as it is unsafe to use, if anyone would of used the top lift the inside boards could have failed and seriously hurt someone. I am getting scaffolders to attend and correct all faults".

78.14 No further investigation took place. The complaints which the claimant had raised about the condition about the scaffold were not investigated.

78.15 Mr Johnson obtained a statement from Mr Veal which recited his part in the process but did not speak to anyone regarding why the scaffold had been erected – was it for the purpose of erecting the facia boards, nor to the people who had "done the facias" as he promised he would.

78.16 He further did not make any enquiry of Mr Veal or anyone else regarding the previous complaints raised by the claimant.

78.17 A statement was obtained from (it appears) the claimant's work colleague, anonymised. That colleague reported Mr Veal's response to being told about the position on the day in question, "Is SW still going on about the gap". That clearly indicated that previous complaints had been made. Mr Johnson did not investigate them at all. The claimant had sent complaints in by email, these were not sought and they have not appeared before me in the relevant bundle.

78.18 The investigation was, therefore, inadequate. Promised enquiries were not made and clearly relevant issues of previous complaints and previous requests for assistance being made of managers but ignored were not investigated at all.

78.19 The conclusion of the investigation report was that there was a case to answer.

78.20 The disciplining officer, Ms Worden, had already obtained authorisation, through Human Resources, to dismiss the claimant. Authorisation must be given by one of a limited number of people. To obtain that authorisation, pre-hearing, is indicative of a pre-judgment. The role of the disciplining officer was to consider the investigation report, establish the facts of the matter and reach her own conclusions. If at the end of that process she considered that the appropriate sanction was dismissal then she should seek authorisation for that based on the established facts.

78.21 In this case, however, that authorisation was sought through Human Resources before the facts of the matter were established and before any consideration of any mitigation which the accused employee might put forward. During the course of her evidence before me, Ms Worden said that the matter would have been different had the claimant shown some remorse. She said that he continued to justify his actions. In fact, in the disciplinary hearing it was put to him that he was justifying his actions and he said that he was not, he said he was frustrated. The fact that the claimant had raised concerns about the scaffold on three previous occasions without the necessary work to rectify the problem being carried out appears to have been used against him. Ms Worden's view was that demonstrated that the claimant knew what he should do and, presumably, that he should have continued to not do the work notwithstanding the issues that were being raised by the tenant and the neighbour.

78.22 Ms Worden described the claimant raising the issue of his mother's ill health as "a spanner in the works".

78.23 Further, Ms Worden admitted that she had access to at least one document which was relevant to the issue and in her mind at the time she reached her decision (a risk assessment document) which had not been shared with the claimant. She said she assumed it had been, but in truth it was not part of the disciplinary pack and therefore she had obtained it outside that process. It is a basic tenent of fairness that the evidence being used and considered should be available to the employee as well as the employer. That was not done in this case.

78.24 The respondent (as confirmed in the email from the Director of People dated 25 March 2019) was experiencing problems with scaffolding, and the Director of People asked for confirmation whether something was being done about training rather than simply disciplining people with the need to "address the root cause and not the symptoms".

78.25 Further, in the bundle before me are emails passing between the scaffold company and the respondent's Human Resources advisor Miss Fosbrook which are said to have been forwarded to the chair of the disciplinary hearing (Ms Worden). These were not disclosed to the claimant at any stage during the disciplinary process. There was discussion about the gap created by the claimant. It was confirmed by VPH as being no more than 225mm. The scaffold boards were described as being "unsupported" but when that was put to the claimant it was steadfastly denied.

78.26 The use of documents, in the possession of disciplining officer and considered by her, which were not available to the claimant is a demonstration of basic lack of fairness. It is not merely procedural. It goes to the root of the fairness of the process. No reasonable employer would use documents as part of a disciplinary process without ensuring that they were shared with the employee so that the employee could comment on them. In this case no such comment was sought on the documents themselves, the claimant was unaware of their existence and he could not therefore challenge them.

78.27 These matters could have been rectified on appeal but they were not. Indeed, they were compounded.

78.28 Notwithstanding the respondent's stated position throughout that the claimant lacked remorse, the first thing he did at the appeal hearing was apologise for what had happened. Mr Gannaway, without suggesting it to the claimant and without any evidence at all to support this conclusion had a "feeling" that the claimant "might have done this before". He said that he had "no confidence that this would not happen again" and felt that "frustrations would get the best of [the claimant] again".

78.29 As well as reaching a conclusion about previous actions, or basing his decision on "feelings" about previous actions which had no evidential basis at all, he clearly disregarded or gave inadequate consideration to the attempts which the claimant had made to rectify the problem he was presented with. That again is indicative of a closed mind and a failure to adequately consider, or indeed to consider at all, the circumstances which pertained at the time the claimant made the adjustment to the scaffold.

79. For those reasons I find the dismissal was unfair. There was a want of proper process, a failure to carry out a proper investigation with the investigating officer not doing the things which he had said to the claimant he would do as part of the investigation, the use at the disciplinary hearing of documents which were not before the claimant but which were in the mind of the disciplining officer and a failure to correct these matters on appeal, exacerbated by the appeal officer concluding, based on "feelings" which were unsupported by any evidence of previous misdemeanours by the claimant.

80. I have considered whether these are "mere" procedural errors or whether they go to the root of fairness. I find that they go to the root of fairness.

81. Although the individuals concerned (the investigating officer, the disciplining officer and the appeal officer) clearly had a belief that the claimant was guilty of gross misconduct this belief was formed, I find, before the conduct of the disciplinary and appeal hearings. There was not an adequate investigation into the matter with avenues of investigation which the investigating officer had promised to explore being left untouched and a failure to properly or at all enquire into the previous attempts which the claimant had made to enable the work to be done properly and safely.

82. The pre-authorisation of summary dismissal, before the disciplining officer had reached any conclusion and heard any mitigation is redolent of a closed mind approach. The disciplining officer heard at length from the claimant about the attempts he had made to have the scaffold properly put in place but did not consider this worthy of further investigation. She described the fact that the claimant's mother was seriously, possibly terminally, ill as "a spanner in the works" but her only further enquiry into the matter was to ascertain that the claimant had not said that he was unfit for work. She had before her documents which were not shown to the claimant and which she accepted before me influenced her decision. She did not consider the fact that this was a recurring problem within the respondent's undertaking (3 occasions in 3 weeks) nor enquire as to whether any disparate treatment was being afforded to the claimant when compared to those two colleagues. Indeed, even as the matter was before me she had no information about them.

83. Finally, for the appeal officer to reach a conclusion based on a "feeling" which was without any substance whatsoever and which had not even been put to the claimant for his comment was the final act of unfairness.

84. There was insufficient investigation, the respondent approached the matter with a closed mind, there was inadequate consideration of the mitigating factors and on the face of the papers no consideration at all by the disciplining officer of the claimant's length of service and previous good record. For those reasons the dismissal was unfair.

85. The claimant contributed to his dismissal by his actions in moving the scaffold poles. It was to a substantial degree understandable that he did what he did. It was also contrary to the obligation to have scaffold properly Scaff Tagged. The claimant says that the scaffolding was secured in relation to his adjustments and the comments from VPH regarding tipping boards, contained in emails which the disciplining officer had before her but which the claimant had not seen, were challenged before me by the claimant who maintained that the boards were properly secured. The claimant could not, therefore, challenge that evidence.

86. The claimant however admitted that he had done something which he should not have done and clearly this was the root cause of the disciplinary process which he faced.

87. Mr Varnam on behalf of the respondent considered that this should warrant an 80% reduction in any award, for the claimant Miss Bradbury considered that 20% would be appropriate. I have considered the matter and as the claimant's conduct was the root cause of action being taken against him a reduction of higher than 20% is appropriate. I have determined that an appropriate reduction to reflect the claimant's contribution to this matter which properly reflects the justice and equity of this situation would be 60%.

Summary

88. The claimant was unfairly dismissed.

89. There will be a reduction of 60% in the claimant's compensatory award to reflect his blameworthy conduct prior to dismissal.

90. The question of remedy will be determined at a hearing on a date to be fixed.

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Employment Judge Ord

Date: 29 July 2020

Sent to the parties on:

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For the Tribunal Office