Case No. 4111497/19
Code V

EMPLOYMENT TRIBUNALS

Claimants: Mr Peter Flannery

Respondent: Babcock Rail Ltd

Heard at: Manchester (by CVP) **On:** 10-11th March 2021

Before: Employment Judge Newstead Taylor (sitting alone)

REPRESENTATION:

Claimants: Mr Bronze (Counsel)

Respondent: Mr Abernethy (Solicitor

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's claim that he was unfairly dismissed contrary to s.94 Employment Rights Act 1996 ("ERA") is not well founded and is dismissed.

2. The claimant's claim for breach of contract in relation to notice pay is not well founded and is dismissed.

REASONS

Introduction:

1. The respondent is a limited company that carries out railway engineering and maintenance services to user clients across the UK. On 26 February 1996, the respondent employed the claimant. On 1 August 2019, the

claimant was summarily dismissed for alleged gross misconduct. At the time of dismissal, the claimant was employed as a Senior Supervisor. This claim is concerned with that dismissal.

The Tribunal Hearing:

2. The hearing took place on 10-11 March 2021.

3. The claimant was represented by Mr. Bronze of Counsel. He gave evidence on his own behalf.

4. The respondent was represented by Mr. Abernethy, solicitor. Mr. Steve Maddocks (Head of Design) gave evidence on behalf of the respondent. Mr. Chris Gregory, the respondent's UK Construction Manager who chaired the disciplinary hearing, did not give evidence. I was informed that he left the respondent's employment in July 2020. Whilst initially he was prepared to give evidence, he became reluctant to do so and the respondent chose not to seek a witness order, but to rely on Mr. Maddocks' evidence alone. At the outset of the hearing, I enquired of both parties whether or not any adjustments for disabilities or other access to justice issues arose. I was advised that there were none.

5. A joint bundle of 237 pages was prepared for the Employment Tribunal ("the Tribunal.") I informed the parties that there were a number of pages, specifically pages 33-35, 174-175 and 185-186, that were illegible and invited them, if the pages were relevant and to be relied upon, to provide better copies. After the morning break, I was informed that these pages were not required, would not be referred to in cross examination and, accordingly, no further copies were provided. Additionally, there were two remedy bundles. The second remedy bundle contained everything from the first along with additional updated documents. The second remedy bundle comprised 47 pages. There were also two witness statements. One from the claimant comprising 18 pages and 71 paragraphs. One from Mr Maddocks comprising 5 pages and 19 paragraphs. At the beginning of the hearing, I was provided with 4 further photographs that the claimant had disclosed to the respondent the day before the hearing at around 4.30pm. The respondent did not object to their inclusion. I read the bundle. I informed the parties that they should refer me to the documents on which they relied regardless of my reading and the cross references in the witness statements. References in square brackets in this Judgment are to the pages of this bundle.

6. At the start of the hearing, I identified that, whilst extracts from the Employee Handbook were included in the bundle [182-186], Section 2.14 of the Employee Handbook, which was cited in the dismissal letter [137-138] and the appeal decision letter [163-164], appeared to be missing. Towards the end of Mr Maddocks' cross examination, the respondent applied to adduce Section 2.14. However, Mr Bronze identified that the document provided was incorrect as it was from the Employee Handbook dated 8 August 2019, being post dismissal. The

respondent located the correct version of Section 2.14 and applied to adduce it. I gave the parties a break to consider the documents and the application. After the break, Mr Bronze confirmed that he accepted that the respondent had produced the correct section, but he opposed the application. He relied on the lateness of the application and the potential prejudice to the claimant. However, he confirmed that he had had sufficient time to discuss the documents with the claimant and to prepare cross examination and did not require any further time. However, if I was minded to admit Section 2.14 he requested that I admitted both versions i.e. Section 2.14 from the Employee Handbook dated 8 August 2019 as well. Mr Abernethy accepted the lateness of the application and apologised. He submitted that the Employee Handbook was a document in evidence in the bundle [182-186], but by error the relevant section was missing. He contended that there was no prejudice as the claimant had had the opportunity to consider the documents and Mr Bronze was ready and able to cross examine Mr Maddocks on the documents. I considered the application. I allowed both versions of Section 2.14 to be admitted in accordance with Rule 2 & 41 of the Employment Tribunals Rules of Procedure. I noted that they were provided very late. However, the claimant had also provided documents late, namely the photographs disclosed the night before. I accepted that the Employee Handbook was already in evidence, albeit that the relevant sections were missing, and that the claimant could still submit that this was the first time these documents had been provided to him. Also, I noted that Mr Bronze did not require any further time to consider the documents and that he was ready and able to cross examine on them.

The Claims & Issues:

7. This is a claim for unfair dismissal and breach of contract. As to the unfair dismissal claim, the claimant contends that he was unfairly dismissed because the principal reason for his dismissal was not conduct, but cost cutting. Further, the claimant argues that the respondent had no genuine belief that he had committed misconduct, had no reasonable grounds for such belief, failed to carry out a reasonable investigation, failed to follow fair procedure and the dismissal was outside the band of reasonable responses. As to the breach of contract claim, the claimant claims that the respondent breached the employment contract by dismissing him without the 12 weeks' notice he was contractually entitled to.

8. As to the unfair dismissal claim, the respondent accepts, as confirmed by Mr. Abernethy, that the claimant was an employee of the respondent; Ss. 94 & 230 ERA, had been continuously employed for more than 2 years; s.108 ERA and was dismissed by the respondent without notice; s.95 (1) (a-b) ERA. However, the respondent denies that the claimant was unfairly dismissed. The respondent contends that the claimant was dismissed for instructing Mr Pearson to operate a telehandler knowing that he was not competent to do so. This is a reason relating to conduct and therefore a potentially fair reason. Further, the respondent acted

fairly in treating it as a sufficient reason in all the circumstances to dismiss the claimant. The respondent denies that the dismissal was procedurally defective. Alternatively, if it was the respondent contends that remedying the alleged defect would not have affected the outcome. Further or alternatively, the respondent submits that if the dismissal was unfair then the claimant is guilty of blameworthy conduct which contributed to his dismissal and seeks a reduction of up to 100% [paragraphs 16-20, 24-25,] As to the breach of contract claim, the respondent contends that it was entitled to summarily dismiss the claimant for gross misconduct.

9. A list of issues was agreed with the parties at the start of the hearing, see Annex A.

Findings of Fact:

10. I make the following findings in this case.

11. The respondent carries out railway engineering and maintenance services to user clients across the United Kingdom.

12. On 26 February 1996, the claimant commenced employment with the respondent. At the time of dismissal, he was a senior supervisor working 35 hours per week and receiving approximately £4,700 pounds gross per month.

13. In or around 2009, the respondent introduced the home safe message. This message was the respondent's commitment to return all employees home safe at the end of every day. It was in essence the respondent's motto. It was embedded into the respondent's culture by way of briefings, workshops, and safety champions. The claimant acted as a safety champion. His role was to get the home safe message out to the respondent's workforce. However, the claimant did not receive any training or briefing in this regard within the last 10 years.

14. The respondent is committed to health and safety in the workplace as is evidenced by its use of the following:

    14.1. Briefings: These involve PowerPoint presentations and are disseminated from the top down [69-79.] Attendance at briefings is recorded and attendees are required to sign to confirm that they have been briefed [67-68.]

    14.2. Safety roadshows: These are annual events where the respondent hires a large venue, such as a cinema, in order to address the entirety of the workforce.

    14.3. Safety stand downs: These involve stopping all work, sometimes on a national level, in relation to a safety matter.

14.4. The Life Saving Rules ("LSRs") [166]: There are ten LSRs. These are clear and straightforward rules. They support the home safe message. The LSRs are contained in the respondent's briefings [69 & 78]. They are on all notice boards, including those on site, on the respondent's designs and on the respondent's packaging. The LSRs include the provision to work responsibly by never undertaking any job unless you have been trained and assessed as competent. In accordance with the LSRs, it was well understood by all of the respondent's employees that an employee required a current competency, not just a standard driving licence, to operate work vehicles at the respondent's site. There is no document that states that a breach of the LSRs is gross misconduct, but I accept that this was well understood by the respondent's employees. In reaching this finding, I refer to and rely on the claimant's evidence that he understood the importance of applying the health and safety rules and that instructing someone to breach the LSRs could, depending on severity, result in dismissal.

15. On or around 8 March 2012, the claimant entered into a new employment contract with the respondent [37-42.] Clause 15 on Notice stated:

"Except in the circumstances set out in paragraph 17 below you are entitled to receive notice as under to terminate your contract of employment:
...

12 years' or more employment *12 weeks' notice*
...

In the event of you being guilty of misconduct your contract of employment may be terminated without notice..."

16. Clause 11 stated as follows:

"The Company Health and Safety Policy is detailed in the Company Employee Handbook which will be issued to you on starting Company employment. In order to comply with the Company Health and Safety Rules you are required to take such steps as are reasonably practicable for your own health and safety and that of your working colleagues and those affected by your work. You must make use of all safety clothing and equipment and must cooperate with management in all respects for full implementation of the Company Policy."

17. Clause 17 on Disciplinary and Other Rules stated as follows:

"As a condition of your employment you are subject to and are required to conform with the Company Rules and Regulations which may for the time

being be enforced and applicable, and to become thoroughly acquainted with those rules and regulations relevant to your work.

Rules of Employment and Discipline are set out in the following Company publications, one copy of which will be issued to you on starting employment:

(a) Post related Rule Book;
(b) The Company's Employee Handbook.

The company disciplinary procedure includes provision that management may at anytime :

(i) dismiss without notice, or
(ii) suspended from duty, and, after inquiry, dismiss without notice, or
(iii) suspended from duty, as a disciplinary measure,

An employee for certain offences including:

(a) Drunkenness,
(b) Disobedience of orders,
(c) Misconduct or negligence,
(d) Absence from duty without leave.

An employee so dismissed forfeits any right to notice and also any right to salary for any period subsequent to dismissal, or suspension from duty prior to dismissal, as the case may be. ..."

18. Section 2.14 of the Employee Handbook states:

*"**Disciplinary Offences:***

The agreed disciplinary procedures will be applied in any of the following circumstances: ...

[2.14.6] You commit misconduct or act negligently...

[.2.14.10] You are guilty of gross misconduct...

[2.14.15] You disregard Rules Regulations and Instructions, particularly those concerning the safety of the public, other employees, or yourself...."

19. Further and for the avoidance of doubt, Section 2.14 of the Employee Handbook is in identical terms in the 8 August 2019 Issue.

20. In March 2019, the claimant was assigned to a project the respondent was delivering at the Rail and Innovation Development Centre, Melton Mowbray for Network Rail Telecom ("RIDIC.") The project was experiencing commercial issues and serious client concerns. The claimant was assigned to turn it around which he and his team did.

21. On 24 June 2019, the claimant was named Babcock site manager for the week. This was a role the claimant was not certified to undertake because he did not have an SMSTS qualification. However, he did not raise this issue at the time. On this date the claimant attended a final planning meeting at the respondent's Crewe offices at which he was made aware by Mr Sykes and others of a shortfall in civil staff that week due to redundancies.

22. On 26 June 2019, the claimant attended a company briefing at the Crewe Depot held by Mr Deuchars (Managing Director) and Mr Mclauren [79D- 79L.] In the evening the claimant fully briefed the staff at RIDIC about this meeting and stressed the importance of safety [67-68.] Notably, this included briefing the staff on the LSRs [69]. In particular he told the staff if anything was unsafe or doesn't feel right not to do it.

23. On 27 June 2019:

    23.1. The claimant became aware that no competent telehandler operatives would be on site on the 28 June 2019. This was because Mr Mark Harris, who held the required competency, had informed the claimant that he was not on duty that night and the other qualified operative was being made redundant and also would not be working.

    23.2. Mr Gregory emailed stating, in effect, that he was no longer involved in RIDIC [80 to 82.]

    23.3. The claimant contends that Mr Craig Pearson used a telehandler without the required competency on the evening of the 27 June 2019. He refers to and relies on the tracking information for the telehandler [85-86], photographs showing a bag of stone on a trolley [168] and the Site Shift Report [83-84.] The claimant maintains that these documents show that Mr Pearson used the telehandler without the required competency that night. I find that Mr Pearson was working on that night. I find that the photographs show a bag of stone on a trolley. I also find that the telehandler was used in the early hours of the 27 June 2019. However, I do not find that it was Mr Pearson who used the telehandler on this occasion. This is because the documents do not show who operated the telehandler. I consider that it is simply the claimant's opinion, which I do not accept, that it was Mr Pearson.

24. On 28 June 2019 at 01.24, the claimant emailed requesting certified staff for a job lowering polls to instal anti-climb [87.] In the afternoon, the claimant attended Speedy Depot Notts to off hire plant. In the evening at around 17.30, the claimant attended a farmer's field to finalise plans for the movement of stone [126.]

25. In relation to the issues of contributory conduct and/or wrongful dismissal only, I make the following primary findings of fact about the events that occurred following the claimant's arrival at RIDIC on 28 June 2019 at around 18.10 [126]:

25.1. It was a condition of the claimant's employment that he was subject to and required to conform with the respondent's Rules and Regulations which may for the time being be enforce and applicable. As at 28 June 2019, these included the LSRs.

25.2. The claimant was the highest graded person on site that night and, consequently, was responsible for every person and activity on site [133.]

25.3. The site was approaching the end of the work and there was no more than the usual pressure associated with such work. Specifically, there was no instruction to complete the remaining works that night as there were still a lot of bits left to do.

25.4. The claimant was aware of the importance of competency, as shown in his email dated 28 June 2019 [87]. Specifically, he was aware that the respondent required an employee to be competent to operate a telehandler. For the avoidance of doubt, I accept, on the evidence before me, that a telehandler could be driven on a standard driving licence, albeit the forks could not be used for lifting, but I note that the respondent required, in addition, that its employees held the relevant competencies. He was also aware that there were no competent telehandler operatives on that shift [paragraph 23.1 above.]

25.5. The claimant, who had briefed the staff on 26 June 2019 on, among other things the LSRs, knew that the LSRs provided *"Never undertake any job unless you have been trained and assessed as competent."* He also knew the importance of applying the health and safety rules and that instructing someone to breach the LSRs could, depending on severity, result in dismissal.

25.6. On Mr Ward's arrival, the claimant asked him if he held a telehandler ticket. He said no and that he had failed the course.

25.7. On Mr Craig Pearson's arrival, the claimant asked him if he held a telehandler ticket. He said no. He said he had previously held a ticket but it had lapsed. The claimant did not ask Mr Pearson when his competency had lapsed. If he had done so, he would have found out that Mr Pearson's competency lapsed in 2008.

25.8. The claimant asked if there were any staff on site who held a telehandler ticket. He was told no. Therefore, the claimant was aware that there was no one on site who was competent to operate the telehandler. He did not pass this information on to management.

25.9. The claimant asked if Mr Pearson could load a flat back pick up [177] with a bag of stone [176] in the secure compound area which was separated from the railway line by two fence lines and gates. Mr Pearson was happy to do the job and asked the claimant to arrange his re-certification.

25.10. The claimant assessed this as a low risk and not life-threatening activity because it was in the secure compound area and involved, what the claimant considered to be, a basic lift. I do not accept this assessment. I find that it was a task that involved potentially significant risk. First, because Mr Pearson was not competent to operate the telehandler. Second, because of the close proximity of other personnel. I accept that there was no public in this area and that all personnel were certified to at least PTS level. However, it is material that at the relevant time there was staff in and around the yard loading plant and controlling the movement of vehicles [126.] There is a dispute as to the number of staff around at the relevant time. The claimant contends that there were 3 - 4 people. However, the minutes from the appeal hearing refer to approximately 40 people including Telecommunications and E&S staff who would be attending the cabins / welfare areas [143.] The claimant in evidence sought to distance himself from the 40 people by suggesting that this was the number of staff on the entire 14-mile site. I note that this is not what is said in the minutes. However, whether there were 3 – 4 people or 40 people is not particularly material. What is material is that there were other people in the area at the time that Mr Pearson, who was not competent to operate the telehandler, was operating that machine.

25.11. The claimant instructed Mr Pearson to use the telehandler to load the bag of stone onto the flat back pick up in the compound area knowing that he was not competent to do so. By so doing, the claimant acted in contravention of the LSRs and, accordingly, breached his employment contract.

25.12. Mr Pearson did as instructed.

25.13. In fact, the claimant had a viable alternative to the use of the telehandler. The work could have been undertaken by cutting open the bag and shovelling the stone onto the back of the pickup. The claimant felt that using the telehandler reduced any manual handling risks. However, I find that, save for convenience, there was no need to use the telehandler for this task.

25.14. Thereafter, Mr Pearson, apparently of his own motion and not requested by the claimant, use the telehandler to undertake a separate task, namely loading a rail trolley under live overhead lines. This was witnessed by the Engineering Supervisor who, after taking photographs and video, stopped the work. The claimant was shocked to discover what Mr Pearson had done. He spoke to the Engineering Supervisor, viewed the video and agreed that this was not right. He called Mr Pearson, first getting the engaged tone, and Mr Pearson returned to site. The claimant and Mr Mason (Engineering Supervising Manager) agreed to stop the whole job. All staff returned to site and the claimant arranged drug and alcohol testing. The claimant also underwent drug and alcohol testing. The reason for this was that the claimant knew he had made a misjudgement in instructing Mr Pearson to load the flat back pickup with stone in the secure compound knowing that he was not competent to do so [paragraph 23 of the claimant's witness statement.]

26. On 29 June 2019 at approximately 2 am, the claimant left the site after making it safe

27. On 3 July 2019, the claimant attended an informal meeting in Scotland to discuss the incident on 28 June 2019. The claimant was not told that this meeting might lead to disciplinary action or given the right to be represented. The respondent's explanation for this, which I accept, was that this was simply an investigation and the respondent did not know at this stage if a disciplinary hearing would be required [144.]

28. On 8 July 2019, the respondent asked the claimant for a written explanation of the claimant's request to Mr Pearson to operator the telehandler when he was aware that Mr Pearson didn't hold the formal competency [124.] The claimant provided that written explanation the same day [125-127.] Notably the claimant does not admit any error or apologise for his actions in this written explanation.

29. On 16 July 2019, the claimant was provided with Form No.1 [130-131.] This form is headed Disciplinary Procedure - Form No 1. Accordingly, the claimant knew or ought to have known that this was part of a disciplinary process. The Form No 1 informed the claimant that he was charged with the following irregularity:

"On Friday 28th June 2019, whilst working at RIDIC Widmerpool you requested employee Craig Person to operate a Telehandler, where you were aware he did not hold the formal competency for such equipment.

This is in contravention of Babcock Life Saving Rule Never undertake a job unless trained and assessed as competent and always be sure the required plans and permits are in place before you start a job or go on or near the line.

This is also a contravention of the Rules Applicable to All Employees, Section 214 six commit misconduct or act negligently and two 14.15 you disregard rules and regulations and instructions particularly those concerning the safety of the public, other people or yourself." [130]

30. The Form No. 1 referred to misconduct or negligence not gross misconduct. It also made no mention of the risk of summary dismissal. However, it did allow the claimant to say he wanted to state his defence at an interview and it did notify him of his right to be accompanied at that interview.

31. On 16th July 2019, the claimant returned Form No.1 by email marked 'IN CONFIDENCE LIMITED CIRCULATION' confirming he wished to progress to interview. The covering email referred to the claimant's unblemished record and stated he would be contesting this [128.] On the same day the respondent emailed the claimant inviting him to a hearing on 17 July 2019 and informing him of his right to be accompanied [129.]

32. On 17 July 2019, the disciplinary hearing took place at Crewe with Mr Gregory, Ms Ramsey (HR Business Partner Control Systems) and the claimant. Ms Ramsey confirmed the claimant's right to be represented which the claimant acknowledged but declined. At the outset Mr Gregory said *"What I don't want to do is talk about RIDIC or the redundancies all I want to discuss is what is on the Form 1 and move on and deal with the situation…"* [132] I accept that by so doing Mr Gregory unreasonably sought to restrict the content of the disciplinary hearing. In the disciplinary hearing the claimant admitted the following:

    32.1. He had asked Mr Pearson if he had the required competency. Mr Pearson had said no. Accordingly the claimant knew that Mr Pearson did not have the required competency. The claimant admitted that he had asked Mr Pearson to undertake the job. He agreed that he shouldn't have asked him to do so. He accepted that he had given Mr Pearson permission to use the telehandler [132.]

    32.2. *"I made a misjudgement asking him to use the telehandler knowing he didn't have an in date competency. I know it snowballed from there and Craig then went on to use the telehandler in a non safe area. I know this and that is why when this happened I put myself forward and arrange the D&As."*

    32.3. *"The only mistake I made was to ask Craig to drive the telehandler in a low risk area... I accept that there needs to be blame and I am willing to accept some of the blame..."* [133']

    32.4. *"I just took the wrong decision."* [133]

33. During the disciplinary hearing, the claimant did not raise the allegation that Mr Pearson had used the telehandler without the required competency on the previous evening. At the end of the hearing, the claimant was advised that all evidence would be considered and a decision would be made [133.]

34. On 18 July 2019, the investigation report was completed [95 - 116.] This report considered the events on the 28 June 2019 as a whole and, accordingly, its remit is much wider than simply the claimants involvement. The report accepts that the claimant's instruction to Mr Pearson to use the telehandler was limited to loading the pickup and did not extend to loading the trolley under the overhead lines [105.] The report repeats the claimant's admission that it was wrong to have asked Mr Pearson to use the telehandler without the required competency to load the pickup [110.] It also considers the direct and indirect causes and finds that the claimant's involvement came within the heading of indirect causes [111.] Notably, the investigation report was completed after the claimant's disciplinary hearing but prior to his dismissal.

35. On 19 July 2019, the Just Culture Review Panel ("the Panel") considered the investigation report and made recommendations [117-118.] Specifically, the panel recommended dismissal for both the claimant and Mr Pearson [117.] The decision was notified to Mr McLaren, Mr Batho, Mr Doherty, and Mr Deuchars [118.] Once again, this review was completed after the claimant's disciplinary hearing but prior to his dismissal.

36. I accept that neither the investigation report nor the Panel's review decision were provided to the claimant prior to, during or after the disciplinary hearing. However, I note that there is no positive evidence that either of these documents were provided to Mr Gregory before the claimant's dismissal. At its highest Mr Maddock's evidence was that there was no reason to believe that these documents were not provided to Mr Gregory. Whilst Mr Maddocks was doing his best to assist the Tribunal, this is no more than speculation on his part. I note that Mr Gregory's name is not on the list of people to whom the decision was notified and, accordingly, I reject the contention that the investigation report and/or the Panel's review were provided to Mr Gregory at any time prior to the claimant's dismissal.

37. On 1 August 2019, the claimant was informed by Mr Gregory on the telephone that the company had made a decision and he was to be dismissed with immediate effect and no notice pay.

38. On 2 August 2019, the claimant received the dismissal letter and Form No 2 [137 -138.] The claimant was told that he had been dismissed for gross misconduct namely requesting Mr Pearson to operate the telehandler knowing that he did not have the formal competency to do so. Further, the claimant was informed that this amounted to breaches

of the LSRs and contraventions of Sections 2.14.5 and 2.14.6 of the Employee Handbook. I note that the claimant had not been provided with a copy of the Employee Handbook prior to, during or after the disciplinary hearing. Finally, the claimant was informed of his right to appeal. I note that the allegation moved from misconduct to gross misconduct at some stage between the 16 July 2019 and the 1 August 2019 without the claimant being informed of the same.

39. On 3 August 2019, the claimant requested an appeal [139.] He stated that he was fully contesting the violation given out of gross misconduct and his dismissal.

40. On 5 August 2019, the respondent announced a 30-day redundancy consultation programme [140.] I find that Mr Maddocks had no part in the redundancy process and was unaware of the numbers involved.

41. On 7th August 2019, the respondent wrote to the claimant fixing the appeal hearing for the 15 August 2019 at 11:00 AM before Mr Maddocks and informing the claimant of his right to be accompanied. The letter enclosed the disciplinary hearing notes [141.] The letter did not provide the claimant with any further documentation. Specifically, the claimant was not provided with a copy of the Employee Handbook.

42. On 15 August 2019, the appeal hearing took place at Crewe with Mr Maddocks, Ms Danielle Dean (HR Business Partner), the claimant and the claimant's colleague Mr Wrynne. This was not Mr Maddocks' first appeal hearing. He had undertaken previous appeal hearings following dismissals. Mr Maddocks approach to the appeal hearing was to look at all the evidence and look at the initial decision with a complete fresh set of eyes as if he was hearing it for the first time. To this end, the appeal hearing took approximately 1.5 hours. The claimant was given the opportunity to present his version of events and any supporting evidence. Specifically, the claimant referred to a timeline of events he had prepared and produced fatigue sheets and diagrams [142.] Accordingly, I accept that the appeal hearing was a rehearing and not simply a review of Mr Gregory's decision. I note that the appeal decision letter contains the same references to the Employee Handbook as the dismissal letter. However, I do not accept that this in and of itself indicates that the appeal hearing was simply a review of the earlier decision.

43. The notes of the appeal hearing are extensive and considerably longer than those of the disciplinary hearing. This supports the contention that the claimant was provided with an opportunity to explain his version of events in full. I accept that the notes contain omissions as evidenced by the amended notes produced from the claimant's covert recording of the appeal hearing. However, I do not consider those omissions to be either deliberate or intentional. In any event, the tribunal has been provided with verbatim notes via the claimant's recording. Albeit, that the

amendments are only those that the claimant thought relevant and therefore not all amendments that may have been required.

44. During the appeal hearing the claimant admitted that he had put himself up for drug and alcohol testing as he knew he had made a minor mistake [145.] He also admitted that he had taken a wrong decision [145.] However, he did not raise the allegation that Mr Pearson had used the telehandler without the required competency on the previous evening. In addition, he referred to what he considered to be a previous similar incident involving a telehandler and Mr Mark Harris. He alleged that there were no disciplinary consequences from this incident and that it was pushed under the carpet. However, the claimant had not been directly involved in this incident and did not provide any further details about it. Also, I note that Mr Mark Harris was competent to operate a telehandler [paragraph 23.1 above.] Mr Maddocks did not investigate the alleged Mark Harris incident. In evidence he said that he did not think it was his responsibility to do so. I find that Mr Maddock's was reasonably entitled to form this view despite the fact that by so doing he could not personally ensure parity of treatment. This is because insufficient detail was provided by the claimant to establish that it was sufficiently similar to the claimant's incident.

45. Mr Maddocks took a break of approximately 40 minutes to consider the evidence and thereafter upheld the claimant's dismissal. The claimant complains that 40 minutes was an insufficient amount of time and that Mr Maddocks did not take away with him for consideration the fatigue sheets and diagrams that the claimant had provided. I consider that 40 minutes was a sufficient period of time. I also note that the fatigue sheets and or diagrams have not been relied upon before me to suggest that they would have been material to the decision reached by Mr Maddocks. Further and for the avoidance of doubt, whilst Mr Maddocks had seen the investigation report and the Panel review, I do not accept that he was hamstrung by these documents such that the real decision maker was someone other than Mr Maddocks. His evidence was that there was no influence from any third party in his decision making. He was adamant that he would not compromise his professional integrity in this way. I found his evidence generally, but particularly on this point, to be clear and persuasive especially as this was not his first appeal from a dismissal.

46. After 15 August 2019, the respondent sent out a Why Safety Matters Bulletin [181.] The claimant accepted in cross examination that most reasonable employers would provide such a bulletin after an incident like that in which the claimant have been involved. In fact, the claimant went further and accepted that such a bulletin should in fact be provided nationwide.

47. On 21 August 2019, the respondent wrote to the claimant confirming the outcome of the appeal hearing [163 - 164.] Mr Maddocks believes that this letter captured the decision and its rationale. However, he accepted

that it did not address all points such as the breach relating to plans and permits or the claimant's long service and clean record. I accept that the appeal letter is deficient in these regards, but find that these matters were all raised by the claimant at the appeal hearing and considered by Mr Maddocks although not recorded in the appeal letter. I also find that a copy of the Employee Handbook, which was referred to in this letter, had not been provided to the claimant during the appeal process and was not provided to the claimant until Day 1 of this hearing.

48. In November 2019, the claimant started a new job working for a southern based company developing civils railway in the Northern area. The claimant has a performance based zero hours contract.

49. On 22 January 2020, the claimant set up a new limited company.

50. On 23 March 2020, the claimant started a SMSTS site management training course which he has since completed.

The Law:

51. The burden of proof lies on the respondent to show, on the balance of probabilities, what the reason or principal reason for dismissal was and that it was a potentially fair reason under S. 98 (2) ERA.

52. S.98 ERA states:

"(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b)relates to the conduct of the employee,

(c)is that the employee was redundant, or

(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held..."

53. The respondent contends that the reason for dismissal was the claimant's conduct, namely instructing Mr Pearson to operate the telehandler knowing that he did not have the required competency to do so, which is a potentially fair reason within S. 98(2) (b) ERA. The claimant asserts that this was not the real reason and contends that the real reason was cost cutting.

54. If the respondent shows a potentially fair reason, such as conduct, for dismissing the claimant then the question of fairness is determined by s.98 (4) ERA which states:

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case..."

55. Further, when considering the question of fairness, the correct approach is based on **British Home Stores v. Burchell [1980] ICR 303** and **Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23**. In addition, the Tribunal should also have regard to the ACAS Code of Practice on Disciplinary & Grievance Procedures 2015 and take account of the whole process including any appeal; **Taylor v OCS Group Ltd [2006] IRLR 613.**

56. In conduct cases, when considering the question of reasonableness, I am required to have regard to the test outlined in **British Home Stores v. Burchell** and **Sainsbury's Supermarket v Hitt.** The questions for me are:

56.1. Did the employer genuinely believe that the employee was guilty of misconduct?

56.2. If so, was that belief based on reasonable grounds?

56.3. Did the employer carry out a reasonable investigation in all the circumstances?

56.4. Did the employer follow a fair procedure?

56.5. Was dismissal within the band of reasonable responses?

57. Also, **Sainsbury's Supermarket v Hitt** confirmed that the 'band of reasonable responses' test applies equally to the employer's conduct of an investigation as it does to the employer's decision on sanction. Whilst an employer's investigation need not be as full or complete as, for example, a police investigation would be, it must nonetheless be even-handed, and should focus just as much on evidence which exculpates the employee as on that which tends to suggest he is guilty of the misconduct in question.

58. In summary, these decisions require that I focus on whether the respondent held an honest belief that the claimant had carried out the acts of gross misconduct alleged and whether it had a reasonable basis for that belief. However, I must not put itself in the position of the respondent and decide the fairness of the dismissal based on the what I would have done in that situation. It is not for me to weigh up the evidence as if I was conducting the process afresh. Instead, my function is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer.

59. Section 123(6) ERA provides that: Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. S.122(2) makes a similar provision in respect of the basic award.

60. Under the principle in **Polkey v A E Dayton Services Ltd 1988 AC 344** the Employment Tribunal may reduce the amount of compensation payable to the claimant if it is established that a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis. In this case, the respondent contends that the claimant would have been dismissed by reason of gross misconduct in any event.

Inconsistent Treatment:

61. It is settled Law that inconsistent treatment is a rare basis upon which the Tribunal can conclude a dismissal was unfair.

62. The case of **Post Office v Fennell [1981] IRLR 221** established that:

'It seems to me that the expression equity as there used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that an industrial tribunal is entitled to say that, where that is not done, and one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal'.

63. Further, as stated in **Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 at 25** and confirmed in **Procter v British Gypsum Ltd [1992] IRLR 7**, the comparable situations must be truly comparable for the argument to be sustained.

64. The Court of Appeal in **Paul v East Surrey District Health Authority [1995] IRLR 305** emphasized the limited basis of inconsistency as follows:

"It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that the tribunal may be led away from a proper consideration of the issues raised by [s.98 (4) of the ERA.] ...

If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified.

An employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely. "

65. In **Doy v Clays Ltd UKEAT/0034/18 at 48-49**, the Employment Appeals Tribunal reiterated the requirement that the cases are "truly similar or sufficiently similar."

66. If an employer consciously distinguishes between cases, the dismissal can only be successfully challenged if there is no rational basis for the distinction made; **Securicor Ltd v Smith [1989] IRLR 356 CA**.

Discussion & Conclusions:

67. As to the principal reason for the claimant's dismissal and whether it was a potentially fair reason. The respondent says that the principal reason was conduct namely the claimant's instruction to Mr Pearson to operate the telehandler knowing that Mr Pearson did not have the competency to do so. The Responded acknowledges that there was another reason for the dismissal, namely the failure to ensure that required plans were in place, but states that this was a secondary reason and not the principal reason. For the avoidance of doubt, the conduct relied on by the respondent does not extend to the subsequent use by Mr Pearson of the telehandler to load a trolley underneath the overhead lines. In essence, Mr Pearson's subsequent act is irrelevant to the decision in relation to the claimant.

68. The claimant contends that the principal reason for the dismissal was cost cutting. I have considered this argument, but I reject it. Redundancies had previously been made at the respondent. The claimant had been involved in the redundancy process, but the claimant's role had never been at risk. The redundancy process consultation document, dated 5 August 2019, postdates the claimant's dismissal. Mr Gregory was aware of redundancies in general as shown by his attempt to exclude the issue of redundancies from the disciplinary hearing, but there is no evidence that Mr Gregory was either aware of or influenced by the impending redundancy process. However, it was raised during the appeal hearing [145], but notably the claimant also stated his belief that following his dismissal his role had been filled by two employees. Whilst Mr Maddocks was aware of the redundancy process at the time of the appeal hearing he was not involved in it and was unaware of the numbers concerned. His clear evidence to the tribunal, which I accept, was that he was not influenced by it. In short, I am unable to tie the two, dismissal and redundancy process, together on the evidence in this case or make any inference as invited to do by the claimant.

69. Therefore, I find that the principal reason for dismissal was the claimant's instruction to Mr Pearson to operate the telehandler knowing that he did not have the required competency to do so. This is a reason relating to conduct and a potentially fair reason within section 98(2).

70. I find that the respondent genuinely believed that the claimant was guilty of misconduct and that this belief was based on reasonable grounds. In reaching this finding I note that on the night of 28 June 2019 the claimant put himself up for drug and alcohol testing as he knew he had made a mistake. Also, and of particular relevance is the fact that the claimant admitted that he had instructed Mr Pearson to operate the telehandler knowing that he was not competent to do so both within the disciplinary hearing [132-133] and in the appeal hearing [145].

71. As to the reasonableness of the investigation, I consider it material that the claimant admitted that he had instructed Mr Pearson to operate the

telehandler knowing that he did not have the required competency to do so. In these specific circumstances, I do not consider that the matter required extensive investigation. However, the respondent did undertake an investigation. The claimant was invited to attend an informal meeting on 3 July 2019 to discuss the incident. Also on 8 July 2019, the claimant was asked to provide a written explanation of the incident which he did the same day [124- 127]. His written explanation was detailed and admitted instructing Mr Pearson to operate the telehandler knowing that he was not competent to do so. Further I note that the respondent conducted a full investigation of the incident as a whole and that the Panel reviewed this report. However, the remit of this report was not confined to the claimant's involvement and, in fact, the report and the review were finalised after the disciplinary hearing. In summary, I remind myself that the 'band of reasonable responses' test applies equally to the employer's conduct of an investigation. I find that, in light of the claimant's admissions, particularly as detailed in his written explanation, the investigation was within the band of reasonable responses and, accordingly, the respondent carried out a reasonable investigation in all the circumstances.

72. As to whether or not the respondent followed a fair procedure, I find that there were a number of defects in the procedure leading up to and including the disciplinary hearing. In particular, but not exclusively:

72.1. The Employee Handbook does not contain examples of gross misconduct. I note that a failure to list certain types of behaviour as gross misconduct may result in an employer being unable to rely on them to summarily dismiss; **Basildon Academies v Amadi and anor EAT 0343/13.** However, I remind myself that the Employment Appeals Tribunal specifically rejected the idea that for disciplinary rules to comply with the Acas Code they must contain an exhaustive list of offences; **Hodgson v Menzies Aviation (UK) Ltd EAT 0165/18.** As in **Hodgson v Menzies Aviation (UK) Ltd**, I find that a high degree of specificity was not required for the claimant to realise that by instructing Mr Pearson to operate the telehandler knowing that he was not competent to do so put him at risk of summary dismissal.

72.2. No notes were distributed from the informal meeting on the 3 July 2019.

72.3. No copy of the Employee Handbook was provided to the claimant either before, during or after the disciplinary hearing.

72.4. The Form No 1 referred to misconduct not gross misconduct. However, the Form No 1 clearly indicated that this was part of a disciplinary procedure.

72.5. The invitation to the disciplinary hearing did not tell the claimant that the matter was considered to be gross misconduct

and that there was a risk of summary dismissal [129.] Nonetheless, even if he was not specifically aware that the matter was considered to be gross misconduct and could lead to summary dismissal, the claimant was aware that the respondent had invoked the disciplinary procedure and that the matter was serious. This is clear from his confirmation that he wished to state his defence at interview [131] and that he would be contesting the charge [128.] Further and for the avoidance of doubt, the claimant ought to have been aware of this in light of paragraph 17 of his Employment Contract and the wording of Form No 1.

72.6. The charge moved from misconduct to gross misconduct without the claimant having been informed.

72.7. Mr Gregory unreasonably sought to limit the scope of the disciplinary hearing. However, I do not accept that the claimant had no opportunity to speak. It is clear from the minutes of the disciplinary hearing that the charge on Form No 1 was discussed and that the claimant knew that the next step was that a decision would be made [132-133.]

73. I have given full consideration to these defects. However, I find that they were cured on appeal as the appeal was a rehearing as opposed to a review, as detailed in paragraphs 42 – 45 above. Whilst there are some defects with the procedure followed by the respondent at the appeal hearing, such as failing to provide the claimant with a copy of the Employee Handbook, the Investigation Report and the Panel review and failing to address the cost cutting contention, I consider that the appeal provided was sufficiently comprehensive; **Taylor v OCS Group Limited.** Further, I consider that the procedure followed was within the band of reasonable response in all the circumstances and, accordingly, that the respondent followed a fair procedure.

74. As to whether the sanction of dismissal was within the band of reasonable responses in the circumstances of this case, I find that it was. On the one hand, the claimant was a long-serving employee with a clean disciplinary record who had admitted the error at the disciplinary hearing albeit not in his written explanation. On the other hand, the incident, namely instructing Mr Pearson to operate a telehandler knowing that he was not competent to do so, was very serious and potentially life threatening. In the circumstances, I find that the respondent was reasonably entitled to consider that the mitigation did not outweigh the severity of the matter and that dismissal was the appropriate sanction. In the circumstances of this case, I find that dismissal was within the band of reasonable responses. I have paid particular attention to the allegation of inconsistent treatment. I remind myself that it is settled law that inconsistent treatment is a rare basis on which a tribunal can conclude that a dismissal was unfair. What is required is that the situation must be truly comparable or as in **Doy v Clays Limited** *"truly similar or sufficiently similar."* The only allegation of inconsistent

treatment raised during the disciplinary procedure was that detailed at paragraph 44 above. in light of the findings of fact made in paragraph 44 above, I am unable to accept that this was a truly similar or sufficiently similar incident so as to engage the principle of inconsistent treatment.

75. It follows from the reasoning that I have set out above that the dismissal was fair and it is not necessary to proceed to consider Unfair Dismissal sub-issues 7, 8 and 9. However, for the avoidance of doubt, in light of my findings in paragraphs 25 – 25.14 above, I would have found that the claimant did cause or contribute to the dismissal by blameworthy or culpable conduct and that a 100 % reduction should be made in respect of contributory fault.

76. Finally, I refer to and rely on my primary findings of fact at paragraph 25 – 25.14 above and conclude that this was a case of gross misconduct. I consider that by instructing Mr Pearson to operate the telehandler knowing that he was not competent to do so the claimant fundamentally breached the employment contract thereby entitling the respondent to summarily dismiss him. Accordingly, the claim of wrongful dismissal is not well founded and is dismissed. For completeness, if the wrongful dismissal claim had succeeded, I would have found that the claimant's compensatory award should not reflect losses in the notice period as he would not be entitled to be paid twice for the same loss.

Employment Judge Newstead Taylor
Date: 17 March 2021

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
18 March 2021

FOR THE TRIBUNAL OFFICE

ANNEX A
Agreed List of Issues

Unfair Dismissal:

1. What was the reason or principal reason for the claimant's dismissal and was it a potentially fair one?

2. Did the respondent have a genuine belief in the misconduct which was the reason for the dismissal.

3. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?

4. Did the respondent carry out a reasonable investigation in all the circumstances?

5. Did the respondent follow a fair procedure?

6. Was the decision to dismiss a fair sanction, that is was it within the reasonable range of responses of a reasonable employer?

7. If the dismissal was unfair did the claimant cause or contribute to the dismissal by any blameworthy or culpable conduct and, if so, to what extent?

8. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed?

9. Did the respondent fail to comply with the ACAS Code of Practice of Disciplinary & Grievance Procedures and, if so, was that failure unreasonable? If so, would it be just and equitable in all the circumstances to increase the compensatory award and/or any other award and if so by what percentage up to 25%?

Breach of Contract:

1. What was the claimant's notice period?

2. What was the claimant entitled to for notice pay?

3. Did the claimant fundamentally breach the employment contract thereby entitling the respondent to summarily dismiss him i.e., did the claimant commit gross misconduct?