



EMPLOYMENT TRIBUNALS

Claimant: Mr M Irvine

Respondent: The Oil and Pipeline Agency

Heard at: Exeter (by CVP) **On:** 2 and 3 February 2021

Before:
Employment Judge Goraj

Representation

Claimant: in person

The Respondent: Mr O Holloway, Counsel

JUDGMENT having been sent to the parties on 10 February 2021, and written reasons having been requested in accordance with Rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:-

REASONS

Background

1. By a claim form presented on 8 May 2020, the claimant claimed that he had been unfairly dismissed by the respondent. The allegations are denied by the respondent. The respondent contended that the claimant was fairly dismissed because of his conduct, in summary, in respect of his taking on to site his personal mobile phone in breach of the rules and instructions of the respondent.
2. The hearing was, with the agreement of the parties, conducted remotely by Video Hearing.

DOCUMENTS

3. The Tribunal was provided with an agreed bundle of documents ("the bundle")

WITNESSES

4. The Tribunal has received witness statements and has heard oral evidence from the following witnesses :-
 - (a) The claimant and Andrs Konosonoks.

- (b) The respondent – Mr A Bond, Depot Engineer, Mr N Kerslake, depot manager and Mr P Grange, Operations Director.

THE ISSUES

5. The Tribunal clarified with the parties at the commencement of the hearing the issues which it is required to determine. In summary, the claimant says that his dismissal was unfair for the following reasons (which are denied by the respondent) :- (a) the allegations were not serious enough to justify dismissal as he was not suspended/ was allowed to continue to work after the incident (b) Mr Kerslake did not give proper consideration to the matters raised by the claimant at the disciplinary hearing (c) inconsistency of treatment and (d) the penalty of dismissal was too severe particularly as the claimant had not previously received any written warnings and (d) the mitigating factors relating to the claimant's mother / the claimant's assurances about his future conduct.
6. It was agreed that the Tribunal would deal first with liability and also, in the event that the claimant's dismissal was unfair, contribution and (if relevant) what would have happened if a fair procedure had been adopted.

FINDINGS OF FACT

The claimant

7. The claimant was employed by the respondent from 1 April 2017 until 19 February 2020 which latter date is the effective date of termination for the purposes of the Employment Rights Act 1996 ("the Act"). Prior to the commencement of his employment the claimant provided services on site as a subcontractor. The claimant was employed by the respondent as a mechanical technician at the respondent's Thanckes Oil Fuel Depot site.
8. The claimant's terms and conditions of employment are at pages 34 – 45 of the bundle. The Tribunal has noted in particular the provisions of paragraphs 18 and 21 of the terms and conditions (relating to the respondent's disciplinary rules and procedures-including in respect of suspension-and notice of termination of employment). The terms and conditions of employment were accepted by the claimant on 13 March 2017.

The respondent

9. The respondent is a statutory public corporation. The respondent is responsible for the operation, maintenance and management of six naval oil fuel depots and one petroleum storage depot on behalf of the Secretary of State for Defence. The respondent's Thanckes depot supports the HM Naval base at Devonport.

10. The respondent has duties under the Control of Major Accident Hazards (COMAH) Regulations 2015. It is the operator of COMAH regulated sites. The purpose of the COMAH Regulations include the prevention of major accidents involving dangerous substances.
11. At the time of the matters in issue, the respondent employed approximately 160 people in the United Kingdom including approximately 22 employees at the Thanckes site. The respondent also engages the services of contractors on site from time to time.

The respondent's disciplinary procedure

12. The respondent's disciplinary procedure is at pages 46-54 of the bundle. The Tribunal has noted in particular :- (a) the provisions relating to the issue of warnings (including that employees should not be dismissed for a first breach of discipline except in the case of gross misconduct-which would normally result in dismissal), and the right of the respondent to instigate disciplinary action at any level of the process where appropriate (b) the provisions relating to suspension and (c) the examples of gross misconduct including - a refusal to carry out a reasonable management instruction, wilful neglect or refusal to carry out any of an employee's duties and serious, deliberate or negligent failure to comply with the respondent's health and safety policies.

The use of mobile phones

13. The bringing on to site and/or use of personal mobile phones is prohibited by the respondent save in limited specified locations. There is a sign at the entrance to the Thanckes site which states that no mobile phones should be taken onto site (page 177 of the bundle). The position with regard to mobile phones is addressed during the induction process for contractors and employees.
14. In February 2018, the claimant was involved in an incident with his then line manager Mr O'Driscoll. Following a period of suspension pending investigation into the incident the respondent decided not to pursue the matter as a formal disciplinary procedure as it concluded there were faults by both parties. Mr Grange of the respondent however wrote to the claimant by letter dated 20 March 2018 (71-72 of the bundle) inviting him to a meeting. During this meeting Mr Grange raised a number of matters of concern including in respect of the use of mobile phones and the claimant was reminded that the use of mobile phones and the taking of mobile phones into operational areas, was strictly prohibited as they were a source of ignition (page 72 of the bundle).
15. Mr Grange subsequently wrote to the claimant by a letter dated 11 April 2018 in which he confirmed the outcome of the meeting and the claimant's formal counselling. This letter is at pages 74-75 of the bundle. The letter addressed issues relating to the claimant's relationship with Mr O'Driscoll and also addressed issues relating to

the use of the claimant's mobile phone. In summary, Mr Grange recorded in the letter that he had discussed with the claimant the issues relating to his use of his mobile phone/taking it into prohibited areas including that the claimant had made a commitment to leave his mobile phone in his car and that Mr Grange had recommended that the claimant gave the site number to individuals who might need to contact him in the event of an emergency.

16. Mr Grange was concerned about what had come to light regarding the claimant's possession/use of a mobile phone on site and issued an email to managers to remind staff of the rules regarding the possession/use of mobile phones on site. This email dated 20 March 2018 is at page 73 of the bundle. Mr Grange set out in the email the respondent's position with regard to the bringing onto site/using of personal mobile phones. He instructed that the information be communicated to all staff on site including that any breach of company policy or procedures risked disciplinary action.

12 April 2018

17. On 12 April 2018, Mr Bond saw the claimant in possession of his mobile phone in a prohibited area. Mr Bond reminded the claimant of the respondent's rules regarding mobile phones and warned him that if he breached the rules again he would receive a written warning (page 174 of the bundle).
18. The relevant manager who had been tasked with the dissemination of the information contained in Mr Grange's email dated 20 March 2018 shared the contents of the email with personnel on site who were required to sign to confirm that they had read and understood the email. This document is page 76 of the bundle. This document records that it was signed by the claimant on 8 May 2018. The claimant denied during this hearing that he had signed the document and alleged that the signature was not his signature. The Tribunal is however satisfied, on the balance of probabilities, that the claimant signed the document and is further satisfied that the claimant is being untruthful regarding this matter. When reaching this conclusion, the Tribunal has taken into account in particular that the claimant has not any time prior to this hearing suggested that he did not sign this document including during the course of the disciplinary hearing (at which was represented by a trade union representative) and /or during the course of the appeal process. The Tribunal has also taken into account the various forms of the claimant's signature contained in the bundle and is satisfied that the signature at page 76 is entirely in keeping with previous signatures.

10 May 2019 and subsequent events

19. On 10 May 2019, Mr Bond saw the claimant using his mobile phone in a prohibited area and warned him that if it happened again it would be dealt with on an official basis.
20. The claimant was suspended and investigated for further alleged safety related matters in autumn of 2019 before being allowed to return to work on 30 October 2019.

3 February 2020 and subsequent events

21. On 3 February 2020, Mr Bond saw the claimant in his works van on site in an area where mobile phones were not permitted. When Mr Bond approached the claimant he had his hands between his legs and confirmed to Mr Bond, when questioned, that he had his mobile phone in his hands.
22. Following consultation with HR and collation of relevant documentation, the claimant was invited to a disciplinary hearing. The letter dated 3 February 2020 is at pages 94 – 95 of the bundle. The claimant was advised of the allegations including that they were potentially serious and could be deemed to be gross misconduct warranting summary dismissal. The claimant was also provided with the documents listed at page 95 of the bundle including the document recording his signature dated 8 May 2018. The claimant was permitted to continue to work during this period.

The disciplinary hearing on 12 February 2020

23. Mr Kerslake, conducted a disciplinary hearing on 12 February 2020. The claimant was accompanied at the hearing by his TU representative. The notes of the meeting are at pages 105 -109 of the bundle. In very brief summary, the claimant admitted and apologised for his conduct. The claimant stated that he had committed an error of judgment due to personal circumstances as he had been waiting for a telephone call regarding his mother who had been very ill.
24. The trade union representative contended that as no formal disciplinary action had previously been taken it was inappropriate to proceed to potential dismissal. The claimant did not contend at this meeting that he was unaware of the respondent's policy regarding the possession of mobile phones on site or allege any inconsistency of treatment. The hearing was adjourned on the basis the respondent would give further consideration to the matter.

The letter of dismissal dated 18 February 2020

25. Mr Kerslake of the respondent wrote to the claimant by letter dated 18 February 2020, advising the claimant of his decision to dismiss him. This letter is at pages 115 – 118 of the bundle. Mr Kerslake gave a detailed explanation of the reasons for his decision including that :- (a) he was satisfied that the claimant was guilty of the misconduct set out in the letter of invitation (including deliberately breaching / failing to

comply with management instructions/ health and safety policies) and that such matters were considered to be gross misconduct in the respondent's disciplinary policy (b) he had considered the mitigating circumstances/ whether a lesser sanction would be appropriate (c) however for the reasons set out in the letter, did not consider that a lesser sanction was appropriate including that the claimant had been repeatedly warned about the use of mobile phones on site, in the light of the history of matter he did not consider that the claimant would adhere to the rules in the future and further the critical health and safety risks on site including that a phone was a potential source of ignition. The claimant was given 4 weeks' notice in lieu and a termination dated of 19 February 2020. This date is the effective date of termination for the purposes of the Act. The claimant was advised of his right of appeal.

The claimant's appeal

26. The claimant appealed against his dismissal on 24 February 2020. This document is at page 136 of the bundle In brief summary, the claimant queried why he was allowed to stay on site, alleged that other more serious health and safety matters had not been addressed and alleged that he had seen Mr O' Driscoll using his mobile phone on site in out of the way locations and that on the day he was asked to leave site Mr Spencer Watts was told not to have his mobile phone on him anymore. The claimant was requested to submit a full written submission for the purposes of the appeal which he did on 27 March 2020. The claimant reiterated his allegations regarding Mr O'Driscoll/ Mr Watts but did not provide any additional information.
27. Mr Grange wrote to the claimant by letter dated 1 April 2020 in which he addressed some of the matters raised in the claimant's appeal (including why the claimant had not been suspended/ had been permitted to work after the incident) and requested the claimant to provide him with further information so that he could investigate the allegations of inconsistency. This letter is at pages 157 – 160 of the bundle.
28. The claimant did not provide any further information and ultimately informed the respondent that as he felt that he already knew the outcome of the appeal he did see any point in submitting any further points (page 166 of the bundle).

The appeal outcome letter dated 14 April 2020

29. Mr Grange wrote to the claimant by letter dated 14 April 2020, which is at pages 167 – 169 of the bundle, dismissing the claimant's appeal. Mr Grange explained in his letter the reasons for his decision including:- (a) regarding alleged inconsistency of treatment (Danny O'Driscoll / Spencer Watts) that in respect of Mr Watts he had been told (in accordance with the respondent's policy) that the was not permitted to take his mobile phone on site and further, that in respect of Mr

O'Driscoll there was no evidence that any manager on site was aware of any breaches (b) why he considered that the sanction was appropriate including that he did not consider given the history that the claimant would adhere to the rules in the future. Mr Grange also explained the respondent's rationale for not suspending the claimant following the incident.

Inconsistency

30. The claimant has raised allegations of inconsistency. The Tribunal is not however satisfied on the basis of the evidence that:- (a) there was any evidence that the respondent's managers were aware of any breaches of the mobile phone policy by Mr O'Driscoll and / or (b) there was any inconsistency of treatment with any other employee (including Mr S Watts). When reaching this conclusion, the Tribunal has taken into account in particular the contents of Mr Grange's letter to the claimant dated 14 April 2020 (page 167-168) in which he addressed such matters.

THE LAW

31. The Tribunal has had regard in particular to sections 98, 119 and 122-123 of the Act and also to the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 and the ACAS Code.

32. The Tribunal has reminded itself in particular of the following:-

- (1) The starting point is section 98 (1) of the Act. It is for the respondent to establish the reason for the claimant's dismissal or, if more than one, the principal reason for the claimant's dismissal, including that it had a genuine belief in such reason and that it was for one of the potentially fair reasons permitted by section 98 (1)/(2) of the Act.
- (2) If the respondent is able to establish the reason for the claimant's dismissal, the Tribunal has to determine whether such dismissal was, in all the circumstances of the case, fair or unfair having regard to all of the matters set out in section 98 (4) of the Act. This includes whether (a) the respondent's belief that the claimant was guilty of the alleged misconduct was based on reasonable grounds and after undertaking reasonable investigations and (b) the respondent acted fairly or unfairly in all the circumstances in treating the reason as sufficient for dismissal having regard to the size and administrative resources of the respondent and in accordance with equity and the substantial merits of the case. The burden of proof is neutral at this stage.

- (3) When considering the above, the Tribunal has to determine whether the overall procedure adopted by the respondent and also the decision to dismiss the claimant/to reject his appeal considered together, fell within the range of responses of a reasonable employer. The Tribunal is not entitled to substitute its own decision. When determining the fairness of the procedure adopted by the respondent the Tribunal has to have regard to the overall disciplinary/appeal process including whether the respondent adhered to its own policies and the provisions of the ACAS Code.
- (4) Dismissal for a first offence may be justified, notwithstanding the lack of any previous misconduct, including where (a) the act of misconduct is so serious that dismissal is a reasonable sanction (b) where the rules make it clear that a particular conduct will lead to dismissal and/or(c) where the employee has made it clear that he/she is not prepared to alter their attitude so that a warning is unlikely to lead to any improvement.
- (5) A finding of gross misconduct does not automatically justify dismissal and it is important to consider any mitigating factors which might justify a lesser sanction for reasons specific to the employee or the incident in question.
- (6) If the Tribunal considers that there were defects in the process which were sufficiently serious to render the claimant's dismissal unfair, the Tribunal is required to consider for the purposes of any award of compensation (if it is possible to do so on the evidence available), what is likely to have happened if a fair procedure had been followed. This includes consideration of the percentage chance that the claimant would thereafter have been fairly dismissed for the purposes of any compensatory award pursuant to section 123 (1) of the Act.
- (7) If the Tribunal finds that the claimant has been unfairly dismissed, the Tribunal is also required to determine whether there should be any reduction/further reduction in any basic and/or compensatory award pursuant to sections 122(2) and/or 123(6) of the Act by reason of the claimant's contributory fault. The Tribunal has reminded itself that contributory fault covers a wide range of conduct and can include culpable, blameworthy, foolish or otherwise unreasonable behaviour. The Tribunal has also reminded itself however, that for the purposes of determining any contributory fault it has to be satisfied that the claimant was, on the balance of probabilities, guilty of any such

conduct, that it caused or contributed to the dismissal and that it is just and equitable to reduce any award.

The submissions of the parties

33. The Tribunal has given careful consideration to the submissions of the parties.

THE CONCLUSIONS OF THE TRIBUNAL

34. The Tribunal has given careful consideration to all of the above.

The reason for the claimant's dismissal

35. The Tribunal has considered first the reason for the claimant's dismissal for the purposes of section 98 (1)/ (2) of the Act.

36. Having given the matter very careful consideration, the Tribunal is satisfied that the respondent has established for the purposes of section 98 (1)/ (2) of the Act, that the reason for the claimant's dismissal was conduct namely, the claimant's conduct on 3 February 2020 when he was found by Mr Bond with a mobile phone in his possession in a prohibited area on site which was considered to be a breach of management instructions / breach of health and safety.

The fairness of the claimant's dismissal

37. The Tribunal has therefore gone on to consider whether the claimant's dismissal was, in all the circumstances fair for the purposes of section 98 (4) of the Act having regard to the matters identified in that section. The Tribunal has reminded itself that it is not for the Tribunal to decide what it would have done but, with regard to both the procedure and the decision to dismiss, whether in all the circumstances it was within the range of responses of a reasonable employer.

38. The claimant did not challenge the overall procedure adopted by the respondent other than :- (a) why he was not suspended prior to his dismissal (which he says was inconsistent with the alleged seriousness of the allegations) and (b) Mr Kerslake did not give careful consideration to the matters raised by the claimant. The respondent denied any unfairness and contended that the procedure adopted was, at all stages, reasonable and proper and within the range of responses of a reasonable employer.

39. The Tribunal is satisfied in the light of the findings of fact which it has made above, that the respondent undertook a reasonable investigation/ disciplinary/ appeal process at all stages of the procedure and in accordance with the ACAS Code. The Tribunal is further satisfied, that the claimant was given a proper opportunity to raise any matters of concern at the disciplinary and appeal stages and that the matters raised by him were given proper consideration by the respondent.

40. Further, The Tribunal is not satisfied, in the light of its findings of fact, that:- (a) the fact that the claimant was allowed to continue to work

prior his disciplinary hearing rendered his dismissal unfair or (b) that Mr Kerslake failed to give proper consideration to the matters raised by the claimant at the disciplinary hearing or (c) that there has been any actionable breach of the ACAS Code. When reaching the above conclusions, the Tribunal has taken into account in particular :- (a) the explanation provided in Mr Grange's letter to the claimant dated 1 April 2020 (pages 157 – 160 of the bundle) concerning the rationale for allowing the claimant to continue to work/ not suspending him following the incident and (b) the Tribunal's findings of fact relating to the conduct of the disciplinary hearing and the associated documentation including the contents of Mr Kerslake's detailed letter dated 18 February 2020 explaining the reasons for his decision and including his response to the matters raised during the disciplinary hearing by the claimant/ his TU representative (pages 115 – 118 of the bundle).

The decision to dismiss the claimant/ reject his appeal

41. The Tribunal has therefore gone on to consider whether the claimant's dismissal (and the subsequent dismissal of the claimant's appeal) was a fair sanction in all the circumstances of this case having regard to the matters set out in section 98 (4) of the Act.
42. The claimant challenges the fairness of the sanction on two key matters :- (a) inconsistency of treatment with others which rendered his dismissal unfair as a matter of equity and (b) the sanction of dismissal was too severe particularly as he was not the subject of any formal warnings including in respect of the use of his mobile phone.
43. As already explained above, the Tribunal is not satisfied on the facts that there is any evidence of inconsistency such as to render the claimant's dismissal unfair for the purposes of section 98 (4) of the Act.
44. The Tribunal has therefore gone on to consider what, in reality, is the principal issue in this case namely, whether the sanction of dismissal was, in all the circumstances, a fair sanction particularly in the absence of any previous formal disciplinary warning that the use of a mobile phone on site could result in the claimant's dismissal. In summary, the claimant contends that the sanction was unfair in the absence of such warning. In very brief summary, the respondent contended that dismissal was, in all the circumstances, a fair sanction as the claimant's conduct constituted gross misconduct (breach of management instruction / breach of health and safety), that the claimant had further been repeatedly warned about the use of mobile phones on site/ was unlikely therefore to comply in the future and the safety critical nature of the environment.
45. When reaching its conclusions, the Tribunal has taken into account in particular the provisions of section 98 (4) of the Act and the provisions of the ACAS Code including that in the absence of gross misconduct an employee should normally receive formal written warnings of the

consequences of further misconduct prior to dismissal together with the further matters referred to above.

46. Having given the matter careful consideration, the Tribunal is satisfied that the respondent acted reasonably in all the circumstances of this case for the purposes of section 98 (4) of the Act in treating the claimant's conduct namely, being in possession of a mobile phone in a prohibited area on site, as sufficient for dismissal notwithstanding that the claimant had not previously received any formal written warnings concerning such conduct.
47. When reaching this conclusion the Tribunal has taken into account in particular the following matters :- (a) that the examples of gross misconduct contained in the respondent's disciplinary procedure (page 50 of the bundle and paragraph 12 above) include refusal to carry out a reasonable management instruction and serious deliberate failure to carry out the respondent's health and safety policies (b) the safety critical nature of the respondent's business (c) the claimant had been repeatedly told that the bringing of a personal mobile phone on to a restricted area on site was not permitted – including Mr Grange's letters to the claimant dated 20 March 2018 and 11 April 2018 (paragraphs 14 and 15) (including in the latter Mr Grange recorded the claimant's commitment to leave his mobile phone in his car / the advice given to the claimant regarding emergency contacts), the signing of the document on 8 May 2018 (paragraph 18) and the other warnings dated 12 April 2018 (paragraph 17) and 10 May 2019 (paragraph 19) (c) that in the light of such repeated conduct the respondent was entitled to conclude (and notwithstanding the claimant's assurances regarding his future conduct) that the claimant was unlikely to comply in the future and (d) that the disciplining and appeal officers gave proper regard to the mitigating circumstances on 3 February 2020 regarding the claimant's mother.
48. The Tribunal is therefore satisfied that the claimant's dismissal was, in all the circumstances fair for the purposes of section 98 of the Act and the claimant's claim is therefore dismissed.

Employment Judge Goraj
Date: 03 April 2021

Reasons sent to the Parties: 20 April 2021

FOR THE TRIBUNAL OFFICE

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness