EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103829/2020 (V)

Hearing Held on CVP on 14, 15, 16 June 2021

Employment Judge I McFatridge
Tribunal Member J McCullagh
Tribunal Member P Fallow

Mr Veroslav Trcka	**Claimant** **Represented by:** **Mr Reid,** **Solicitor**
Bear Scotland Ltd	**Respondent** **Represented by:** **Mr Maguire,** **Advocate** **Instructed by** **TLT LLP Solicitors**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal was that the claimant was not unfairly dismissed by the respondents. The claim is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed by the respondents. The claimant also initially claimed that he had been unlawfully discriminated against on grounds of race however this claim was subsequently withdrawn by the claimant and dismissed on 2nd September 2020. The respondents

resisted the claim. It was their position that the claimant had been summarily dismissed for gross misconduct and that the dismissal was procedurally and substantively fair. At the hearing evidence was led on behalf of the respondents from Simon Heron, Electrical Manager with the respondents who investigated the events which led to the claimant's dismissal, Kevin Campbell the respondents' Senior Operations Manager who carried out a disciplinary hearing following which the claimant was dismissed and Edward Thomas Ross, Operating Company Representative with the respondents who dealt with the claimant's unsuccessful appeal against dismissal. The claimant gave evidence on his own behalf and led evidence from Jarek Horak, a former colleague. A joint bundle of productions was lodged. On the basis of the evidence and the productions the Tribunal found the following essential matters relevant to the claim to be proved or agreed.

Findings in Fact

2. The respondents are Bear Scotland Ltd. They hold a contract from Transport Scotland for maintenance of trunk roads in Scotland. They hold contracts for the north east and north west of Scotland as well as other areas. One of their responsibilities is the maintenance of street lighting. The Electrical Department is based in Perth and consists of the Electrical Manager, Assistant Electrical Manager, a Design Team Leader, office based staff and around 16 site based staff who carry out work on the street lighting.

3. The claimant was employed by the respondents as an Electrician from the 5th of June 2017. The claimant qualified as an Electrician in the Czech Republic. He came to Scotland in 2004. Whilst in Scotland he obtained certification under the 17th edition of the IEE Regulations. This was sufficient for him to be regarded as an Electrician by Bear Scotland when he commenced employment with them. He was considered a competent person to carry out electrical work. During his time with Bear Scotland the claimant attended a ECS health and safety assessment which is an assessment carried out on employees every two years. The claimant also underwent a number of specific training courses. There were 49 of these

and they are listed on pages 34 and 35. The claimant also attended toolbox talks. These were generally short talks given at the beginning of a shift by a Manager or Supervisor. One of the toolbox talks which the claimant attended was entitled “Electricity on Site”. The claimant attended this talk on 20th May 2019. The documentation for this talk was lodged (pages 35-43). The claimant signed the box on page 43 confirming that he had attended this. Initially he worked alongside more senior experienced electricians who had been with the company a long time. After a few months he began working himself. He generally worked either on his own or in a pair, sometimes there would be two pairs working together. Usually the other member of the pair would be an Assistant or Electrician’s Mate.

4. During late 2019 /early 2020 the respondents were tasked with carrying out a project which involved renewing the street lighting on various motorways. One of these was the M80. The project involved replacing the existing bulbs in the street lighting columns with LED lamps.

5. Before carrying out the work on the M80 the respondents, as is their usual practice, carried out a health and safety risk assessment. This health and safety risk assessment was documented in a form which was lodged (page 44-47). Part 1 is the design stage which was signed off by Keith Fleming, the Design Team Leader on 25th November 2019. Part 2 is the planning stage which was signed off by Scott Rowan, the Assistant Manager on 25th November 2019. This notes in the briefing:

> “Before use of MEWP – a visual check to see if any overhead obstructions may affect your use. Live traffic – high speed ensure a lateral safety zone at all times and second man as lookout.”

The reference to MEWP (mobile elevated work platform) is a reference to a cherry picker type device which was used to enable workmen to get to the top of the street lighting column.

6. Part 3 of the risk assessment form related to the “construction stage”. This was completed by David Moffatt, an electrician with the respondents

on 25th November 2019. One of the issues identified was that certain of the lighting columns which required to be worked upon were of a non-standard design. Generally speaking the power supply to the lighting columns would go to each column from a control pillar (CP). There is an opening panel at the base of the column which gives access to the electrical cut outs. With most columns there was a separate internal safety panel which prevented access to the cut outs for safety reasons however it was established that many of the specific lighting columns on the M80 did not have this separate internal panel. This meant that the cut outs would be accessible once the external panel had been opened. It was identified that this was an additional risk. The respondents' management were aware of a fatal accident which had previously taken place where an apprentice had been electrocuted while testing the exposed cut outs. As a result the respondents' position was that an experienced electrician required to test that the cut outs were not live prior to anyone else working on the lighting column.

7. Mr Moffatt confirmed this whilst completing Part 3. He stated in section 3.4 (entitled 'five minute site briefing by chargehand to site team'):

> "Working in closure disconnect and remove lantern fit and connect lantern second man to disconnect/reconnect lantern after electrician has inspected cut out."

Under comments he stated

> "isolated circuit to work on safely (hit and miss circuits) electrician to test each cut out as isolated before work starts."

The reference to 'hit and miss circuits' is a reference to the fact that street lights are often wired up in a way where adjacent street lights are on different circuits. This is to avoid a situation where a fault in one circuit means that an entire section of roadway is plunged into darkness. Wiring street lights in a hit and miss fashion means that if there is a problem with one circuit then every second or third street light in the street may be dark but there will still be some street lighting available. One feature of hit and

miss street lighting is that one cannot always be absolutely certain which street lights have been disconnected from the live supply at the control pillar.

8. The claimant was part of the team which carried out initial work on the street lights in November. He signed the risk assessment on page 47 confirming that he understood the safety critical controls and pledged to carry these out.

9. On the night of 19th/20th February the claimant was again part of a team tasked with going back and continuing with the replacement of lanterns on the M80. The team consisted of the claimant, David Moffat a Senior Electrician with the respondents who on that evening was acting as Chargehand, Alan MacKenzie an Electrician's Assistant and Jarek Horak. Mr MacKenzie worked as part of a pair with Mr Moffatt. Mr Horak worked with the claimant. Like the claimant Mr Horak had qualified as an electrician in the Czech Republic. He was employed by the respondents as an electrician however he was recognised as having insufficient experience. Mr Horak started with the respondents in January 2019. He had completed the same college course as the claimant in the Czech Republic which qualified him to be an electrician. When he started with the respondents he was originally on a temporary contract where his job was noted as Street Lamp Attendant. After 6 months he obtained a personal contract and he was named as Electrician on it. He had worked with the claimant for a few weeks attending to the replacement of lanterns to LEDs in street lighting. He had carried out work on the A90 during the first six months of his employment acting as Street Lamp Attendant helping to upgrade the lamps to LEDs. He did not work with the claimant all the time. He did not have a ticket to use the MEWP so he was not allowed to do the high level work at the top.

10. In advance of the team going back to the A80 Scott Rowan, the respondents' Assistant Electrical Manager sent an email to the claimant, Mr Moffatt and Mr Horak on 17th February 2020. It is timed at 16:10. It was lodged (page 115). He stated:

> "Gents
>
> Please be aware of the live parts on the top of the cut outs you came across last time you visited this area. Cut outs should be verified as being dead and isolated by either Dave or Jarek prior to anyone else working on them. Many thanks."

The claimant was the Jarek referred to in this email. Dave was Dave Moffatt.

11. The four workmen (Mr Moffatt, Mr Horak, Mr MacKenzie and the claimant) duly started work on the A80. They were working a night shift. The lighting columns where they were replacing lamps were situated on a slip road. The slip road had been already closed off. A different department within the respondents deals with the closing off of roads and putting out cones. Usually they would either leave additional cones to mark out a safety area or alternatively mark out the safety area themselves. They had not done so on this occasion. Prior to starting work the claimant had a conversation with Mr Moffatt regarding this. Mr Moffatt indicated that because the slip road was closed then it would be in order to proceed without the safety zone. The claimant agreed with this.

12. Despite the terms of the risk assessment and despite the clear instruction from the email from Mr Rowan the claimant and Mr Horak proceeded to work in the columns in the way that they usually did. This involved Mr Horak working on the panel at the bottom whilst the claimant went up in the MEWP to change over the lantern. The correct procedure was that once the bottom panel was open the claimant should have personally checked that the cut outs were not live prior to Mr Horak being allowed to do any work near them.

13. During the course of the evening a situation arose where Mr MacKenzie and Mr Moffatt were working on a particular lighting column. The claimant and Mr Horak had finished work on their column. They then reversed back to the control pillar. Whilst at the control pillar the claimant switched on the power to the lighting column which Mr Moffatt and Mr MacKenzie had been working on. Both were extremely shocked when they saw the

light come on. Both avoided electrical shock because they were not in contact with any live conductors at the time but were extremely concerned that they had each been in contact with conductors a short time previously and, so far as they were concerned, the lighting circuit had been switched on without any request from them and in circumstances where it was manifestly unsafe for this to happen.

14. Mr Moffatt telephoned the respondents' Electrical Manager Mr Heron at home to advise him of what had happened. Mr Moffat was extremely upset. As a result of the call Mr Heron instructed all four workmen to cease work and return to the yard.

15. Mr Heron decided that he would require to carry out an investigation as to what had happened and resolved to speak to the four workmen the following day. Since all of them worked night shift this involved him staying on and meeting with them when they came in for their shift in the early evening.

16. Mr Heron met with all four employees including the claimant and took statements from them. Mr Heron typed out notes of the meeting as it was taking place and at the end of the interview he asked each employee to sign a printed copy of the note in order to confirm that it was correct. Mr Moffatt's statement was lodged (pages 48-49). Mr Moffatt was asked by Mr Heron to give a brief background to the events. He said…

> "VT was witnessed going to a light that was live and attempting to upgrade lantern. This was after he had been told by myself to make sure it had been isolated. Ignoring this instruction put Jarek in a compromising position."

He was then asked about the next incident. He stated:

> "The second incident was S/B at CP AK09. We got there isolated the circuit as per previous email. Alan and I pulled up to the first column, Verek then pulled in front of us at the second column which was lit so was not part of the isolated circuit. I proceeded to

tell Verek that he was not to work on that column as it was live, Alan also had words with Verek as well. It was lucky that they were in front otherwise we would not have seen them. Ultimately he has ignored the instruction from Scott Rowland that was sent on safety grounds.

He was then asked about a further incident and stated:

"Yes we carried on working down the circuit got near the end of it. It was hit and miss until the end which visually looked like it was part of the circuit. I was going up to what would be the end of the circuit but noticed that Verek and Jarek were back in the MEWP and reversing back to CP. So I phoned him and asked what he was doing as it looked like there were two to go. He said he was away to switch off the other circuit as he was away to start a new section. I told him that we are only allowed to work on one section at a time. M80 supervisor had instructed previously that only one section is to be left dark and I reiterated not to touch anything in the CP. We then finished that column. Alan was finishing off in the bottom of the column and I went down to the next column which was dark and withdrew fuse and used proving unit to ensure column was dead. At this point the lights went on and the proving unit lit up simultaneously however it since transpired the column was not on that circuit. Regardless at that moment I got a considerable fright and more worryingly Alan was just working on the column he had energised and was lucky to not receive a shock. I immediately phoned Verek and asked him what he was doing however given that I was suffering from shock (non-electric) I cannot recall the discussion fully. I immediately phoned you and you defused the situation with Verek and Jarek leaving the job."

Mr Heron asked Mr Moffatt to clarify stating:

"So Verek ignored your instruction and proceeded to make the circuit live".

Mr Moffat responded yes. Mr Heron then asked

> "Was it clear in terms of the isolation procedure set out in the risk assessment".

Mr Moffatt then said:

> "Yes, I went over the procedure in the Perth electrical store at the start of the job in December with Verek, Jarek and Alan present and then I completed on-site with Verek, Jarek and Alan present. At the very first column Verek started going up in the bucket. I walked up to the column he is working on and asked Verek was it safe to continue. He said yes, I checked and found live terminals.

Mr Heron asked Mr Moffat to confirm:

> "So you are again saying he ignored a direct instruction".

Mr Moffatt responded yes.

17. The statement from Mr MacKenzie was lodged (pages 54-55). He referred to the incident at the start of the night stating:

> "At the start of the night I knew something wasn't right as he had fallen out with Mark Mitchell the night before. We were working on the last column and Verek said we should not be working here as there was no safety zone however we were seven metres plus away and coned off our own safety zone. Dave explained that the column is photocell fed and stated that the CP has to be switched off in order to work on columns. Verek ignored this went up and changed the lantern regardless."

He went on to describe a further incident. He stated:

> "Then we continued to next section, de-energised circuit this was hit and miss circuit with various lights not powered in a row. We stopped at first column which is not lit and started process of changeover. Verek then proceeded to next column which was lit and I stopped and asked what he was doing as it was lit. He came over and I said you can't touch the live columns, he asked why and I said because of the instructions sent by Scott Rowan. He proceeded to move on to next column unit unlit and changed lantern".

He then went on to say:

> "Later on in the night near the end of the circuit I was doing one lantern noticed Verek going back to MEWP and I asked what he was doing. He said going to CP. I said wait until Dave has told you what to do, do not touch anything. Dave then phoned Verek and said there is still two lights on this circuit do not touch CP as we are still working on it. Then I was just finishing up and putting on door and moving forward in van and saw all lights going on. Literally 30 seconds earlier I was in column that was dead but now live feed."

Mr Heron asked Mr MacKenzie if it was clear in terms of the isolation procedure set out in the risk assessment. Mr. MacKenzie stated:

> "yes and we all spoke about it at the beginning of the week. Jarek and Verek were all aware"

Mr Heron then said

> "So you are saying he ignored a direct instruction."

He responded:

> "Yes because again David told him do not switch CP on."

The statement from Mr Horak was lodged (pages 56 and 57). During the early part of the meeting he indicated that he was aware that there had been telephone conversations between "Dave" and "Verek" by phone during isolating circuits. He said that he could not hear what was being said. Mr Heron asked Mr Horak if he had been told to stop the job on another occasion. Mr Horak said "Alan told me don't do this lantern as it's still live but the column was dark go to next one". He said he could not remember if the door was open. He was asked to set out the process of lantern install and stated:

> "I open column and check cut out, Verek get lantern and go to top of column".

Mr Heron then asked him:

> "So you check cut out, but does Verek".

Mr Horak answered

> "no Verek doesn't."

Mr Heron asked Mr Horak if he had attended a toolbox talk on this prior to the start of the job and Mr Horak said no. He also said that he had not signed the risk assessment that stated this. When asked if he had received an email that said this he said "I don't know."

18. The claimant's interview note was lodged (pages 50-52). As at the other interviews Mr Heron asked him to give a brief outline of events. The claimant stated:

> "Yes second last light was off Jarek and I were working on. David and Alan overtook us and went and worked on the last one. We finished before them. I then told Alan that we are away to the CP to turn power back on but asked Alan to phone me once it was safe to re-energise but when we finished conversation with Alan Dave came back down in bucket and I told him the same thing

> that when he is finished working to give me a phone so I can put power on. Dave then said that he thought that the next 2 or 3 lights were on the same CP and I said okay I will go back and check circuit by circuit and he'll work out from there and Dave said okay. We then reversed back to CP and waited around 5 minutes. Dave then phoned and said before you turn any other lights off you need to turn the section back on. Then after a minute or so he phoned again not happy he said he was still working on it and that the power should be off."

Mr Heron asked Verek about his understanding of the instruction with regard to having sections of lights off. He stated:

> "That the cut outs had exposed lives when removing covers and that the circuit needed isolated prior to removing lantern."

Mr Heron then asked the claimant to confirm that this was clear and understood. The claimant confirmed this was clear and understood. Mr Heron then stated

> "At no point in the night were you stopped before going to change a lantern that was live".

The claimant then said:

> "Yes we were told to stop at column that was live. It was also illuminated".

The claimant was then asked to explain what happened and said

> "I went up in the bucket, JH was opening column and at that point Dave saw us and stopped us."

Mr Heron asked the claimant to confirm the instruction he had been given and the claimant stated that:

> "myself and David have to check out prior to Alan and Jarek removing fuse."

Mr Heron then asked him if he had checked the cut out. The claimant stated:

> "No I did not look at the cut out because Jarek didn't ask me. But Jarek knows which one is which."

19. It was put to the claimant by Mr Heron that this went against the instruction received. The claimant said:

> "He didn't touch cut outs. He only opened door." Mr Heron asked the claimant again if he had checked the cut out and the claimant confirmed "No".

There was then a discussion regarding another incident regarding a photo cell where the claimant accepted that he had worked unsafely. However this incident did not form part of the charges against the claimant.

20. Following the taking of statements the four workmen were put on store duties for the rest of the night. The following day Mr Heron consulted with the respondents' HR Department. He had decided that following the investigation, disciplinary proceedings should be instigated against the claimant. Mr Heron made this decision having taken advice from HR. No disciplinary proceedings were taken against any of the other 3 employees. Mr Heron decided that the matters of concern in relation to electrical safety were that the claimant appeared to have ignored a direct instruction that he was to check the cut outs and ensure they were not live prior to Mr Horak working on them. Secondly that the claimant had switched on the power to the circuit when the last lantern on the circuit was still being worked on by Mr Moffatt and Mr MacKenzie in circumstances where he had not been clearly told by Mr Moffatt that it was safe to do this.

21. In a letter dated 2nd March 2020 the claimant was invited to a disciplinary hearing which was to take place on 4th March. The letter of invitation was

lodged (page 62). The claimant was advised that disciplinary action was being considered with regard to the following incidents of disobeying instruction.

- Energising columns prematurely and endangering colleagues working on these columns
- Not working to cut out toolbox talk
- Working without traffic management.

The third charge referred to a further investigation which had been carried out by Mr Rowan, the claimant's immediate Line Manager. At some point following the events of the evening the claimant had submitted what is termed an "Observation Report" using an online system provided by the respondents. This is basically a system whereby any employee can bring to the attention of management any observations they wish to make in relation to the running of the company and is particularly designed to allow employees to highlight health and safety breaches. The claimant wished to raise the fact that on the night in question the four employees had been working without a safety zone and that in his view there should have been a safety zone set up. He wished to bring to the attention of the respondents that he felt Mr Moffatt was in the wrong for authorising the work to be continued without a safety zone being in place. The claimant's statement in respect of this investigation was lodged (pages 60-61). During the course of this the claimant confirmed that the instructions from the respondents were that in the event of an unsafe scope of work as per any risk assessment occurring the claimant was supposed to immediately stop work and report the matter to a supervisor and thereafter submit an Observation Report. The concern of the respondents' management was that in this case if the claimant had identified something which he genuinely considered to be a health and safety risk then he had breached this process by carrying on working and only putting the Observation Report in later.

22. The claimant duly attended the disciplinary hearing which took place on 4th March 2020. The meeting was conducted by Kevin Campbell, a Senior Operations Manager with the respondents who looks after both of the

north contracts and is responsible for the electrical team. He was Simon Heron's Line Manager. Mr Campbell was accompanied by Rachel Gray of the respondents' HR Department who took notes. Her notes were lodged. The Tribunal considered these to be an accurate although not verbatim record of what took place at the hearing.

23. In the letter inviting him to the hearing the claimant had been advised of his right to be accompanied. The claimant was not accompanied at the hearing.

24. At the commencement of the disciplinary hearing Mr Heron was in attendance and read through each of the notes of his investigation meetings. The Tribunal considered that Mr Heron's notes were an accurate record of what was said by each of the four employees at their respective investigation hearings. During the disciplinary hearing the claimant accepted Mr Campbell's statement that he attempted to work on a live lantern was 'sort of correct'. It was put to him he had ignored an instruction and put Mr Horak in danger. The claimant denied this. He accepted that he didn't follow the instruction but disagreed that he had put Mr Horak in danger. It was put to him that Mr Horak wasn't trained. The claimant said that he was an electrician. He disagreed with Mr Campbell's position that the work was deemed unsafe for him. It was his view that Mr Horak knew the difference in cut outs and would tell him if there was a problem and he would then come down and look. He did however agree with Mr Campbell that Bear Scotland had stated that Mr Horak should not be doing the cut out. Mr Campbell then put to him:

> "This is Bear Scotland's policy so you went up, JH assessed. This is under investigation and was stated at the start of the job you have to check. Onto the second incident on DM's statement. Did you ignore Scott Rowan's instructions. Did DM pull you up".

The claimant agreed yes.

25. Mr Campbell then put to him

> "the gist is you energised the circuit the men were working on correct".

The claimant said yes. When asked why, he said

> "because before I energised DM phones and told me before I turn the lights off I need to put the section on."

The claimant agreed that he could not clearly see Mr Moffatt and Mr Campbell from the control pillar. He was once again asked if Mr Moffatt had told him to put the lights on and he said

> "not really different wording".

After a discussion of what had been said the claimant agreed that he had turned the section on without a clear instruction. Mr Moffatt had told the claimant that he was not allowed to switch the other section off before he had switched this section back on because Mr Moffatt was keen to ensure that Bear's instructions not to plunge large sections of the motorway into darkness were to be followed. The claimant had then switched on the electricity to the circuit on which Mr Moffatt and Mr MacKenzie were working. He accepted that he ought to have been certain of Mr Moffatt's instructions and that if the instruction was not clear he should not have switched it on. His position was that the instruction had not been clear but he had still switched it on.

26. There was then a discussion regarding the Observation Report submitted by the claimant. The claimant accepted Mr Campbell's suggestion that he was responsible for his own safety and that if he felt Mr Moffatt shouldn't have told him to carry on working he should stop and call a supervisor. There was a discussion regarding the practicality of calling a supervisor. The claimant was then asked if there was anything else to add and he stated:

> "Yes (checks notes). AM and DM say I was reversing and they stopped me. If I am reversing how can he stop and discuss. D

> and A are not saying how it worked. To be safe I spoke to A. They say I didn't. A said to discuss with D. D was down. I physically spoke to him. I sat and waited on his call. Totally agree. See your point. In future I'd act differently. No-one said yes or no. Usually off you go or okay not you can put it on or you can't put it on. When DM called that's how I understood. DM should have been clear when I was working on column I said no don't always use clear wording. If it was how I understand it I realise if he's working and I put power on he'd be shocked. I wouldn't do that."

Mr Campbell then put to the claimant

> "You need to be given clear instruction. You weren't given one".

The claimant's response was

> "Not clear but not clear that I can't. They have a communication problem they've had disciplinary about it. It's been noted by the HR. DM has communication problem. He mixes up things doesn't express himself clearly when he wants."

Mr Campbell then put it to the claimant then he was aware of this and the claimant agreed. Mr Campbell then stated:

> "That means you make doubly sure if there was any discussion as to how much the claimant could actually see."

Mr Campbell again put it to the claimant that he had energised the column without clear instructions and the claimant agreed that he had.

27. There was then a further adjournment in which Mr Campbell asked some more questions about the detail of what had happened. The claimant confirmed that there were two interpretations of what Mr Moffatt had said.

28. Mr Campbell then adjourned the meeting. He considered matters before him. He felt that all three of the charges had been proved. He did not consider that the charge relating to the absence of a traffic separation zone was serious. He felt that it was inappropriate for the claimant to have on the one hand identified that this was unsafe and lodged an Observation Report about it whilst on the other hand he had carried on working. Mr Campbell felt that given that the slip road was closed off in any event then he could understand Mr Moffatt's position but felt that it was probably still not correct. In any event he felt this was a relatively minor breach by the claimant. The other two matters however he considered to be serious. He considered that each in their own right amounted to gross misconduct. The first was in relation to the claimant's admitted failure to follow the procedures set out in the risk assessment and in the email from Mr Cowan. The claimant had accepted that there was a clear instruction from the respondents that the claimant should have checked that there was no power going to the cut outs before allowing Mr Horak to work on them. The claimant accepted that he had ignored this instruction and had not done that. The claimant's position was that this was not dangerous because Mr Horak was an electrician and was capable of checking these matters for himself. The respondents' position was that the claimant had disobeyed a direct instruction relating to safety. Mr Campbell was aware of the background which to this instruction which was that previously an apprentice had been killed as a result of working on cut outs which had not been checked by an electrician. The respondents wished to have an experienced person check things before a less experienced person worked on them. This instruction had been clearly passed to the claimant and he accepted that he knew what he was meant to do but had decided not to do it. Mr Campbell felt that this failure to follow instruction was itself gross misconduct and would warrant dismissal.

29. With regard to the second point he considered that it was absolutely clear that the claimant should not have re-energised the circuit without a clear instruction from Mr Moffatt that it was safe to do so. The claimant's own position was that he had spoken to Mr Moffatt and Mr Moffatt's instruction was not clear. It was Mr Campbell's view that in those circumstances the claimant ought to have sought clarification from Mr Moffatt. He should not

have switched the electricity back on without such a clear instruction. Mr Campbell considered the claimant's statement that he had learnt from this and would do things differently in future however he considered that the claimant's action amounted to gross misconduct which also would in its own right merit dismissal.

30. Mr Campbell's view was that given the two flagrant and serious breaches which the claimant had committed which related to serious health and safety issues that dismissal was the appropriate response. He felt that not only had the company been given cause to lose trust and confidence in the claimant but that the claimant's colleagues would find it difficult to have trust and confidence in the claimant going forward. He advised the claimant of the outcome. He advised the claimant that he would be receiving a letter in due course which would confirm matters and would provide instructions for an appeal.

31. Mr Campbell wrote to the claimant on 5th March 2020 confirming the decision. The letter was lodged (page 71). He set out the incidents which were being investigated and then went on to state:

> "The circumstances of each incident were discussed at length. With regard to the first point (emerging columns prematurely, endangering colleagues working on these columns) you admitted that there was no clear instruction to re-energise the circuit. You have stated that you assume that your colleagues are working in the same way that you do and so thought they had completed that section. However you couldn't clearly see them to confirm that they had finished working on the de-energised column.
>
> The toolbox talk issues in regard to procedures set in place to protect your colleagues (cut out checks) you admitted again that you ignored the TBTs in doing so putting your colleagues in a dangerous position. Finally we discussed working without traffic management. You stated that you knew it was unsafe to work but continued to do so."

The claimant was advised of his right of appeal. The claimant wrote to the respondents on 24th March 2021 confirming that he wished to appeal. His email doing so was lodged (page 72). The letter simply advised the claimant wished to appeal. He did not provide any grounds of appeal at that point.

32. In a letter dated 7th April the claimant was invited to a disciplinary appeal meeting that was due to be heard on 10th April. Subsequently this was changed and a further letter was sent on 8th April confirming that the date of the hearing would be 15th April. The appeal was to be heard by Eddie Ross, Operating Company Representative with the respondents. It was held over video conference. The claimant was again advised of his right to be accompanied.

33. The appeal hearing took place on 15th April 2020. The claimant attended. He was not represented although he had been advised of his right to be represented in the letter inviting him to the hearing. Mr Ross was accompanied by Diane Ogg of HR who took notes. Ms Ogg's notes were lodged (pages 76-79). The Tribunal considered these to be an accurate albeit not verbatim account of what was said at the hearing. Mr Campbell as Disciplinary Chairperson attended at the beginning of the hearing and went through his reasons for dismissal. Mr Campbell took no part in the decision which was made by Mr Ross. The claimant was advised of his grounds of appeal. He stated that he was appealing on all three points and went on to say "Let's say that switching on circuit was complicated and was a life lesson". He was asked to clarify and stated

"I should have asked a clear question rather than assuming."

He went on to say that in the Czech Republic "we are allowed to work on live not an excuse that is how we connect." When asked who was responsible for the site he stated that he was in charge of Jarek no-one was a chargehand." He confirmed there had been a miscommunication with Mr Moffatt. He then raised the issue that Mr Moffatt could, and in his view should, have adopted a procedure called lock off. This means that where a workman is to be working on a circuit he is personally responsible

for de-energising that circuit and then places a lock on the switch or fuse so as to ensure that the circuit cannot be re-energised by anyone without removing the lock first. The employee working on the circuit then keeps the key for the lock and is personally responsible for switching the electricity back on once work has been completed. He agreed that Mr Moffatt had not switched off and had a key. He was asked about the second point which was in relation to working to the process. With regard to Jarek he said:.

> "He was electrician but not picking up as expected he was there to help."

He agreed he was not an apprentice and was qualified but was put with the team to learn. The claimant's position was that Jarek could do most things and that he could recognise a safe cut out and knew the danger of life and death. He accepted however that it was for the claimant to test the dangerous cut out. He agreed that not every cut out was tested by himself 'some with Jarek'. He agreed that he had not followed instructions but said he was confident in Jarek and that if it was live Jarek wouldn't have done it. He said he had a lot to do. The claimant said that there was no intention to get Jarek injured but

> "when you explain I can understand your view."

At the end of the hearing Mr Ross felt that he wished to check a couple of matters with Mr Heron. One of these was in relation to the lock out procedure. He also wished to check the position regarding the traffic separation zone. He felt that there had been an open discussion at the hearing and the claimant had been able to put forward his point of view. He checked with Mr Heron the point regarding the locking process. He was advised that this process was not something which was always required to be carried out when working on street lighting. Many of the control pillars did not have the facility to allow this to be done. Mr Ross's view was that in this situation it was even more important that electricians followed the agreed procedures and did not switch re-energise a circuit without it being absolutely clear to them that it was safe to do so.

Mr Ross's view was that if there had been any doubt at all in the communication which the claimant received from Mr Moffatt then the claimant should not have turned the power on. It was clear from the claimant's own statements that Mr Moffatt's instruction had not been clear and in those circumstances Mr Ross believed that the claimant should not have turned the power on. He also considered that the claimant had disobeyed a direct instruction in relation to allowing Mr Horak to work on the cut outs without the claimant having first checked to ensure that they were not live.

34. Like Mr Campbell he considered the matter of traffic management to be relatively minor. He agreed that if the claimant had decided it was not safe then he should not have proceeded as he did. If he was concerned the respondents would expect him to contact the team which put out cones in order to get cones to make the appropriate safety zone. If there was a problem he should not have proceeded to work but should have contacted his supervisor. Mr. Ross believed it would be a simple task to put out a row of cones with a ribbon along the top. He considered the claimant's statement that Mr Moffat had said it was okay. He noted that Mr Moffatt had not accepted that he ever said this. In any event the point was that if the claimant felt it was unsafe then he should not have continued to work. There were other avenues which the claimant could have followed had he been unhappy about this. Mr Ross decided not to allow the appeal but to confirm the original decision. He wrote to the claimant at length setting out his reasoning on 28th April 2020. This letter was lodged (page 82-83). A second copy of the letter dated 28th April 2020 was also lodged at page 80-81. This appears to be an earlier draft which was not sent. It is probably as well to set out Mr Ross's reasoning in respect of each matter. With regard to the first matter he stated:

> "You noted that the instruction from Dave Moffatt was in hindsight not clear and that he should have given a clearer instruction. David Moffatt and Alan MacKenzie gave statements to confirm that David had instructed you not to re-energise the circuit and you also shouldn't de-energise the adjacent circuit. Your recollection was different indicating that you had been told to re-

energise the section before disconnecting the second section and that was effectively an instruction to re-energise. There is obviously a difference of opinion in what was actually said and I believe in taking your version of events the instruction was not a clear instruction to proceed to re-energise and should at the very least have been queried before potentially endangering a colleague.

You noted that there was no Chargehand on the site. I have been advised by the Electrical Manager that David Moffatt was the Chargehand.

You noted that David Moffatt not locking off the cut out was against the Electrical Regulations. I have been advised by the Electrical Manager that locking off was not possible and that this made it even more important that instructions were followed."

35. With regard to the second allegation he stated:

"You considered that he (Mr Horak) was capable of checking the cut out himself and although you had been told to check the cut out yourself you allowed him to do so himself. You noted that this would save time on the job.

The decision made by the Electrical Manager to not allow your colleague to check his own cut outs was based on a situation previously where an apprentice electrocuted himself doing so. This was a clear instruction to you which you were well aware of but decided to disregard endangering the life of your colleague.

With regard to the third point ??"

36. Following the termination of his employment the claimant applied to the Benefit Agency and received Jobseekers Allowance. After 6 months he was then put on Universal Credit. He found it difficult to obtain employment. He found it difficult to get employment as an electrician because he was not qualified to the 18th edition of the IEE Regulations but only to the 17th. He applied to do the course to upgrade to the eighteenth edition but because of the Covid 19 lockdown the centres providing the course were closed. He was successful in obtaining a job in a warehouse

in or about December but only remained in that job for around 4½ days. He started work in early September 2020 with a company called Everwarm. This job lasted until mid-December. He was then unemployed for a period from mid-December to early January before finding work with a company called All Renewable Energy Ltd. His earnings from early January have been on a par with those he enjoyed with the respondents. The claimant's intention is to become self-employed as an electrician and he has been attending various training courses and purchasing various pieces of equipment which will be of assistance to him when he does move to self-employment.

Matters arising from the evidence

37. In general the Tribunal accepted the evidence of the respondents' witnesses. Each witness gave their evidence in a patently honest and straightforward fashion. Their evidence was in line with the contemporary documents. They were prepared to make appropriate concessions during cross examination but at the end of the day their evidence was essentially unshaken. The Tribunal felt that Mr Horak's evidence was fairly limited. He could only give evidence in relation to what he thought had occurred on the night in question. He accepted he had not heard the telephone conversation between the claimant and Mr Moffatt. The Tribunal accepted his evidence that he was employed as an electrician. We did not find his evidence helpful beyond his own statement of what he could personally speak to.

38. The claimant in his evidence sought essentially to re-litigate the disciplinary process. It was his view that the notes of the disciplinary hearing, the investigation meeting and the appeal meeting were incomplete and that substantial bits were missed out. He could not give any reasonable explanation as to why he had not raised these matters at the time. It was clear that he had signed the notes of the investigation meeting at the time. The notes of the disciplinary hearing were sent to him along with the outcome. He did not raise any issue regarding these at the appeal and indeed, even at the Tribunal hearing, it was not entirely clear what it was that he claimed had been omitted from these notes. The

claimant expressed the view that it was unfair that he had been the only one disciplined. The Tribunal did not find his evidence particularly reliable given that he appeared to now wish to contradict things which he had agreed to at the time. Where there was a conflict the Tribunal preferred the evidence of the respondents' witnesses and the contemporary record.

Issues

39. Following the dismissal of the claimant's claim of discrimination the sole remaining claim before the Tribunal was a claim of unfair dismissal in terms of section 98 of the Employment Rights Act 1996. The claimant sought compensation in the event that he was successful.

Discussion and Decision

40. Both parties made full submissions. There was substantial agreement on the relevant law. Rather than repeat the submissions at length they will be referred to where appropriate in the discussion below.

41. The right not to be unfairly dismissed is contained in Part X of the Employment Rights Act 1996. Section 98 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."

42. In this case it was the respondents' position that the reason for dismissal was the claimant's conduct. Conduct is a potentially fair reason for dismissal falling within section 98(2)(b) of the said Act.

43. In this case the Tribunal were satisfied that the reason for dismissal was the claimant's conduct. This was clearly the reason which both of the decision makers in this case had in mind at the time of the dismissal. There was no evidence to suggest that there was any other reason or ulterior purpose behind the dismissal.

44. Having decided that the reason for dismissal was a potentially fair one the Tribunal requires to consider the terms of section 98(4). This states:

> "Where the employer has fulfilled the requirements of sub-section (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 resource of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
>
> (b) It shall be determined in accordance with equity and the substantial merits of the case."

45. We were reminded by the respondents' representative that the approach which the Tribunal is required to take is that of the band (or range) of reasonable responses as set out in the case of ***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439. This recognises that it is not the job of the Tribunal to consider whether or not the Tribunal would have dismissed the employee in the circumstances but whether dismissal was in the range of responses open to a reasonable employer. In a number of appeal cases including ***London Ambulance Service NHS Trust v Small*** **[2009] EWCA Civ 220 CA** the Appeal Courts have made it clear that the Tribunal should avoid substituting its own view for that of the employer. The Tribunal is required to limit its consideration to the facts relating to how the employer handled the dismissal, whether or not the Employer's belief in the employee's conduct was genuine and on reasonable grounds when it dismissed and whether dismissal was within the band of reasonable responses in those circumstances. It follows from this that it was not for the Tribunal in this case to form its own view as to what had happened on

the night of 19th-20th February 2020 when considering the fairness of the dismissal. The Tribunal's view of the actual facts might become relevant in relation to remedy had we decided that the dismissal was unfair. However in deciding the issue of fairness in a conduct dismissal the Tribunal requires to apply the terms of section 98(4).

46. Considerable assistance is given to Tribunals in conduct cases as to the proper approach by the case of ***British Home Stores Limited v Burchell*** [1980] ICR 303 (approved by the Court of Appeal in ***W Weddel and Co Limited v Tepper*** [1980] ICR 286.) This case indicates that the Tribunal requires to answer 3 questions. The first of these is whether the respondents had a genuine belief that the employee was guilty of the misconduct in question – did they actually believe it. The second is whether the employer had reasonable grounds for that belief. The third is whether at the time the employer formed that belief on those grounds had the employer carried out as much investigation as was reasonable in the circumstances of the case.

47. In this case the Tribunal was satisfied that Mr Campbell who made the decision to dismiss did genuinely believe that the claimant was guilty of the misconduct alleged. We also considered that Mr Ross, the Appeal Manager, had a genuine belief that the claimant was guilty of the misconduct alleged against him. This was clear from the evidence of both of these witnesses. With regard to the reasonableness of that belief the Tribunal considered that the respondents' belief was reasonable given the circumstances. In particular the statement of all four employees confirmed that the claimant had ignored the instruction that he was to test the cut outs before allowing Mr Horak to work on them. The claimant's own evidence corroborated this. In the claimant's own statement he accepted that he was well aware of the instruction but had decided to overrule it because he believed that Mr Horak was capable of testing the cut outs himself. The respondents were entitled to the view that this was not the claimant's decision to make. They had reasonable grounds for believing that the claimant had deliberately ignored an instruction and moreover an instruction given in relation to a health and safety matter where there had been a previous incident involving a fatality.

48. The respondents also had reasonable grounds for believing that the claimant was guilty of the second charge relating to re-energising the circuit without ensuring that Mr Moffatt and Mr MacKenzie were no longer working on it. Once again the evidence of all of the workmen involved as set out in their statements confirmed this. The claimant's own evidence was that he was unclear about Mr Moffatt's instruction. The claimant accepted on several occasions that in a situation where he was unclear about Mr Moffatt's intentions then he should definitely not have re-energised the circuit.

49. It was clear from the evidence, looking at the statements of Mr Moffatt and Mr MacKenzie that the claimant's own position went more towards exculpating him from fault than the statements of the other employees. Mr Moffatt was quite clear in his statement that there could be no ambiguity whatsoever in what he had said. That having been said it would appear that both of the respondents' decision makers, Mr Campbell and Mr Ross, were prepared to proceed on the basis of what the claimant told them about the incident. On the basis of what the claimant himself said they were entitled to come to the view that the claimant was guilty of the misconduct in question. The claimant's own position during the investigation carried out by the respondents was that what Mr Moffatt had said was unclear. The respondents were of the view that even if they accepted this then there was absolutely no doubt that the claimant should have clarified Mr Moffatt's instructions before re-energising the circuit. He did not.

50. It is noted that during the Tribunal the claimant claimed that although Mr Moffatt did not utter clear instructions the claimant was used to Mr Moffatt's way of speaking and that on this basis he was entitled to accept it as a clear instruction. This is not what the claimant said at the investigation stage nor did he say it at either of the disciplinary or appeal meetings. The Tribunal did not accept the evidence the claimant gave at the Tribunal but even if we had, as noted above the Tribunal has to proceed on the basis that it is looking at the reasonableness of the employer's decision based on what they knew or could reasonably have

been expected to know at the time. The Tribunal were in absolutely no doubt that both the respondents' decision makers in this case had ample grounds to conclude that the claimant was guilty of the misconduct alleged in re-energising the circuit.

51. With regard to the third point the respondents' representative took less time over this since it was accepted by the respondents' witnesses that this of itself would not have led to dismissal and did not contribute to the claimant's dismissal. Suffice to say that the Tribunal considered that the respondents had ample grounds to find that the claimant was guilty of the misconduct alleged based on what the claimant himself said. It appeared to the Tribunal that the claimant had issued the Observation Report following the incident where he re-energised the circuit as a way of trying to confuse the issue and impose blame on others. The respondents' view was that if the claimant genuinely believed that there was a health and safety issue then he should not have carried on working. The Tribunal accepted that these were the respondents' instructions in the matter. It was clear that the claimant had carried on working. The claimant clearly felt aggrieved that having raised the health and safety issue himself he was effectively penalised for this by it forming an additional charge against him. In the circumstances and given that the claimant had failed to comply with one of the basic tenets of the respondents' health and safety policy namely that each individual workman is responsible for his own health and safety and should not work in circumstances of danger, the Tribunal considered that the respondents had ample grounds for finding this aspect of the misconduct allegations against the claimant to also be proved.

52. With regard to the issue of reasonable investigation the Tribunal notes from the case of ***Sainsbury's Supermarkets Limited v Hitt*** **[2002] EWCA Civ 1588** that the question of reasonableness of investigation itself has to be determined in accordance with the band of reasonable responses. In this case we had absolutely no doubt that the respondents' investigation fell well within the band of responses of a reasonable employer. The respondents carried out a full investigation by interviewing all 4 of the employees involved as soon after the incident as was

practicable. The note taking process for the investigation meeting was robust. The notes were typed at the time and each employee asked to sign them to confirm they were correct. Each employee did this. As noted above, the respondents essentially proceeded on the basis of the claimant's own statement rather than seek to challenge those aspects of his statement which did not wholly coincide with those of his colleagues. The respondents did not seek to make further enquiry into the claimant's allegation that Mr Moffatt had told him that it was okay to work without setting up traffic separation cones. They did not further explore Mr MacKenzie's statement that he had specifically told the claimant to put out cones. They could have done so but they decided that in the circumstances they were happy to proceed on the basis of what the claimant had admitted to during the investigation. The view of the Tribunal was that this was entirely reasonable. The claimant did not raise any additional issues during his disciplinary hearing with Mr Campbell which required investigation. Although at the Tribunal hearing the claimant indicated that the notes made of the investigation meeting were not complete this was not something he raised at the disciplinary hearing and the Tribunal's view was that it was entirely reasonable for Mr Campbell to decide matters on the basis of the investigation which had been carried out to date.

53. During the appeal hearing the claimant did raise two additional matters. One of these in relation to the locking off procedure was, in the view of the Tribunal simply another attempt to obfuscate matters by passing blame onto someone else. In any event Mr Ross investigated the matter by speaking to Mr Heron, the Electrical Manager in relation to both matters before coming to his decision on the appeal.

54. In all the circumstances the Tribunal considered that the investigation carried out by the respondents fell well within the range of reasonable responses in this case.

55. The case of ***Polkey v A E Dayton Services Limited*** [1988] ICR 142 makes it clear that procedural fairness is an important part of overall fairness. In this case the Tribunal considered that the procedure adopted

by the respondents was entirely satisfactory. The claimant had been invited to an investigation. He had been given the opportunity to peruse and correct the notes of the investigation hearing. He was then invited to a disciplinary hearing where he was advised of his right to be represented. At the hearing he was given the opportunity to explain his version of events in relation to each of the charges against him. He was given the right of appeal and the appeal hearing was conducted properly. Matters raised by the claimant at the appeal hearing were investigated before the decision was made. The Tribunal considered that there were no procedural defects in the way the respondents handled the claim such as would have rendered the dismissal unfair on procedural grounds.

56. Having decided that the respondents were entitled to come to the view they did as to the claimant's guilt in respect of the allegations made against him the Tribunal required to consider whether the sanction of dismissal was within the range of reasonable responses. Both of the respondents' decision makers indicated in evidence that they felt that in this case there was very little choice. It was their view that the claimant's conduct was such as to have irrevocably broken the trust which an employer requires to have in an employee employed in a role such as the claimant. We also accepted Mr Campbell's point that given the serious health and safety risk to which the claimant had put his colleagues to by re-energising the circuit without checking if they were no longer working on it there would be an ongoing issue of trust between the claimant and his colleagues had the claimant's employment continued.

57. At the end of the day the Tribunal requires to decide whether the sanction of dismissal was within the range of reasonable responses. It may be that some employers would have dealt with these matters by way of a formal warning, retraining or indeed demotion to a less skilled role. That having been said the Tribunal accepted Mr Campbell's evidence that the two electrical health and safety incidents were both of themselves sufficiently serious that it would have been within the band of reasonable responses for an employer to dismiss on the basis of either one of them. With regard to the first matter the claimant had received a direct instruction that he was to check the cut outs before anyone else worked on it. He accepted that

he had been given this instruction. He accepted that he had ignored it. As noted above the respondents regarded this as an important health and safety point since they had previously suffered a fatality arising from similar circumstances. The Tribunal's view was that it was clearly within the band of reasonable responses to dismiss for this reason alone.

58. With regard to the second point the claimant had re-energised the circuit in circumstances where by his own admission in the investigation he had not received a clear instruction that it was safe to do so. It was clear from the statements that the respondents' view was that it was simply good fortune that one or two of the claimant's fellow employees had not suffered serious injury or death as a result. In those circumstances the Tribunal's view was that it was well within the range of reasonable responses to dismiss for this action alone. Given that the respondents had found that the claimant was guilty of both of these items of misconduct the Tribunal were in no doubt that the dismissal in this case was well within the range of reasonable responses.

59. The claimant's claim of unfair dismissal is therefore dismissed. Since we did not find the dismissal unfair we have not dealt with the issue of remedy. Had we been required to do so we should say that we would not have made any award in respect of the out of pocket expenses which the claimant incurred in respect of training courses and purchase of equipment. The Tribunal's view was that this expenditure was occasioned by the claimant's decision that he wished to at some point become a self-employed electrician. The expenditure was not caused by his dismissal and had we found that the claimant was unfairly dismissed we would not have made any award in respect of this.

Employment Judge: **I McFatridge**
Date of Judgment: **14 July 2021**
Date sent to parties: **14 July 2021**