EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Paul Nka **v** **Telent Technology Services Limited**

Heard at: Watford (by CVP) **On**: 25 and 26 May 2021 and 11 June 2021 (Tribunal deliberation)

Before: Employment Judge Alliott
Members: Mr T Chapman
Ms J Fiddler

Appearances
For the Claimant: Ms Kate Temple-Mabe (Counsel)
For the Respondent: Mr Tim Welch (Counsel)

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"**This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and no-one requested the same."**

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claims are dismissed.

REASONS

Introduction

1. The respondent is a radio telecommunications and internet systems installation and services provision company. The claimant was employed as a Maintenance Engineer from 18 November 2014 until summary dismissal on 9 May 2019. The reason given for the claimant's dismissal is gross misconduct.

2. By a claim form submitted on 23 July 2019, the claimant brings claims of unfair dismissal, race discrimination and breach of contract.

The issues

3. The issues were agreed at a preliminary hearing held on 31March 2020 in front of Employment Judge Skeehan who recorded them as follows:-

"

1. **UNFAIR DISMISSAL**

1.1 **Fairness**

1.1.1 Did the Respondent conduct a reasonable investigation?

1.1.2 Did the Respondent have reasonable grounds to believe that the Claimant was guilty of the misconduct?

1.1.3 Did the Respondent believe that he was guilty?

1.1.4 Was dismissal within the range of reasonable responses open to the Respondent?

1.1.5 Did the Respondent and the Claimant comply with the ACAS Code of Practice?

2. **REMEDY**

2.1 If the Claimant's claims are upheld:

2.1.1 What remedy does the Claimant seek?

2.1.2 If the Claimant seeks reinstatement or reengagement, is it practicable for the Respondent to comply with such an Order?

2.1.3 What financial compensation is appropriate in all of the circumstances?

2.1.4 Should any compensation awarded be reduced in terms of Polkey v AE Dayton Services Ltd [1987] ICR 142 and, if so, what reduction is appropriate?

2.1.5 Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to their dismissal and, if so, what reduction is appropriate?

2.1.6 Has the Claimant mitigated their loss?

3. **WRONGFUL DISMISSAL**

3.1.1 Did the Claimant breach their contract of employment?

3.1.2 If so, was that breach serious enough to be a repudiatory breach?

3.1.3 Did the Respondent waive the breach?

3.1.4 If the Tribunal finds that the Claimant was not in repudiatory breach of his contract, and therefore that he was wrongfully

dismissed by the Respondent, then what damages is he entitled to?

4. **DISCRIMINATION – RACE**

4.1 **Jurisdiction**

4.1.1 Was the claim form submitted more than 3 months after the conduct complained of?

4.1.2 If so, would it be just and equitable for the Tribunal to hear the claim?

4.1.3 Further or in the alternative, should the Respondent's conduct extending over a period be treated as done at the end of the period in accordance with section 123(3)(a) of the Equality Act 2010?

4.2 **Direct discrimination**

4.2.1 Who is the Claimant's comparator (actual or hypothetical), whose circumstances must be materially the same as the Claimant's? The claimant refers to a hypothetical comparator.

4.2.2 Was the Claimant treated less favourably than the comparator was or would have been? The Claimant seeks to rely on the following alleged acts:

(a) Mr Slinn believing white engineers over the Claimant in an investigation in December 2018;

(b) [Mr Costello] Making up a false accusation against the Claimant without any supporting evidence;

(c) Believing Liam Costello, a white employee of the Respondent, over the Claimant;

(d) Pre-determining the Claimant's dismissal; and

(e) Dismissing the Claimant summarily in respect of a false allegation.

4.2.3 If so, was the reason for the treatment the Claimant's race, colour, nationality or ethnic origin or perceived race, colour, nationality or ethnic origin?

The law

4. We have been provided with written closing submissions from the claimant and respondent's representatives. Both have made extensive submissions on the law which are not repeated in any detail here. Nevertheless, we record that we have read those submissions.

Unfair dismissal

5. It is for the respondent to show the principal reason for the dismissal and that it was a potentially fair reason.

6. Did the employer genuinely believe in the reason for dismissal and was that belief based on reasonable grounds follow a reasonable investigation?

7. Was the decision to dismissal fair in all the circumstances? Obviously, we have s.98(4) of the Employment Rights Act. In particular, was the decision to dismiss within the range of reasonable responses of a reasonable employer? It is not for the tribunal to substitute its view for the views of the employer.

8. Length of service of the dismissed employee is a factor which can properly be taken into account.

9. The Acas Guide to Discipline and Grievances at Work provides guidance on matters to take into consideration when deciding upon an appropriate disciplinary penalty.

10. Summary dismissal will be appropriate if there has been a repudiatory breach of contract by the employee.

Wrongful dismissal

11. Where an employer seeks to rely upon disobedience as a repudiatory breach of contract by the employee forming grounds for summary dismissal, then the alleged disobedience "must at least have the quality that it is wilful – a deliberate flouting of the essential contractual conditions". Laws v London Chronicle Ltd [1959] 2 all ER 285.

12. The label "gross misconduct" is not determinative of the question whether the employer is entitled to summarily to dismiss the employee; the key question is whether the misconduct "so undermines the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment". Neary v Dean of Westminster [1999] IRLR 288.

13. The focus is on the damage to the relationship between the parties and a repudiatory breach of contract can include an act of gross negligence: Adesokan v Sainsburys Supermarkets Limited [2017] EWCA Civ 22.

Race discrimination

Burden of proof

14. We obviously have s.136 of the Equality Act 2010. The burden of proof will fall upon the respondent if there are primary facts from which we could conclude, absent adequate explanation, that the respondent has committed an act of discrimination.

The evidence

15. We have been provided with a hearing bundle running to 260 pages. In addition, we have been provided with a chronology and a cast list. We had witness statements and heard evidence from the following:

    - The claimant
    - Mr Paul Slinn, Maintenance Team Leader and the claimant's Line Manager.
    - Mr Terry Marsh, Jeopardy Manager, employed by the respondent (conducted the investigation).
    - Mr Ian Middleton, Capital Works Planning Manager, employed by the respondent (who dismissed the claimant).
    - Mr John Graham, Asset Manager, Head of Operations, employed by the respondent (who heard the appeal against dismissal).

16. We have received closing written submissions form the claimant and the respondent.

The facts

The claimant's race

17. The claimant originally came from Rwanda, arriving in the UK in 1995.

The claimant's contract of employment

18. The claimant was employed by the respondent on 18 November 2014. His contract of employment includes the following :-

> "1. Duties
>
> In addition to the duties, which your position normally entails, you will carry out such duties and comply with such requirements as the company shall determine from time to time which are required to support the company's objectives (whether on a permanent or a temporary basis).
>
> During your employment you must:-
> …
>
> "(c) Comply with all lawful and reasonable instructions of the company;"

And

> "5 Termination of employment
> …
>
> (c) Summary dismissal
>
> The company reserves the right to terminate your employment without notice in the case of gross misconduct. Gross misconduct includes (but is not limited to) … refusal to accept reasonable orders from superiors"

19. The respondent's Disciplinary Policy gives examples of conduct that may lead to disciplinary action. Under s.5.2 Gross Misconduct, the following is set out:-

> " • Serious Neglect that could or does result in unacceptable loss, damage or injury;
>
> • Refusal to accept or act on reasonable instruction from a manager or management representative;
>
> • Serious infringement of health and safety rules;
>
> • Serious breach of the duty of trust and confidence.

20. The Disciplinary procedure sets out a flow chart with a step by step process. However, it is clear that, "The disciplinary procedure can be entered into at any stage."

21. The respondent's Asset Management Pack includes a section dealing with mandatory requirements including PPE. This states:-

> "It is a mandatory requirement to wear the following items of PPE at all times when working in external locations on the TFL… Maintenance and Supplementary Works Contract.
>
> Safety helmet with chin strap
>
> Safety helmet are a mandatory requirement.
>
> Foot protection
>
> Foot protection will be worn at all times.
>
> High visibility clothing
>
> Full high visibility clothing will be worn at all times.
>
> High visibility long sleeve jacket, vest or equivalent on all roads.
>
> High visibility trousers".

22. The respondent's "Traffic Signal Safe System of Works" provides the following:-

> "Always wear mandatory company issued PPE including:
>
> - Safety helmet;
> - High visibility long sleeve jackets or similar;
> - High visibility trousers;
> - S3 Safety Boots with adequate ankle support"

And

> "Work Safe

> You have the right to stop work on the grounds of health and safety where:
>
> - You have not been adequately trained or are not competent for the task and to undertake it would be unsafe to you or others;"

The claimant's work

23. The claimant worked in a team of 14 engineers managed by Mr Paul Slinn. Of the 13 that provided the respondent with their ethnicity, 9 selected "Ethnic Minority" (including the claimant) against 4 that selected "White British". We accept that the claimant's team was ethnically diverse.

24. The respondent had a contract with Transport for London ("TFL") which involved the maintenance and repair of street furniture, in particular, road traffic lights and pedestrian crossings.

25. Obviously enough, road traffic lights and pedestrian crossings are controlled by electricity. When TFL report a fault then the respondent would record the fault and send an engineer to fix it. Often, but not always, the fault would be caused by a road traffic accident. When the fault was reported it was not always obvious that it was a road traffic accident. In the event that the structural integrity of the traffic light or pedestrian crossing had been compromised by a road traffic accident, then there was scope for the electrical supply to be disrupted and to have become unsafe.

26. During the course of his employment the claimant undertook extensive training and had tool box talks. Of particular relevance the claimant attended and completed the following relevant training:-

> "214 - Safe Isolation – 23 July 2017
> 215 – Emergency Attendance 19 April 2018."

The Honeypot Lane incident – 26 September 2018

27. As a result of an incident that took place on 26 September 2018 in Honeypot Lane, the claimant received a final written warning.

28. On 26 September 2018 the claimant was tasked to attend Honeypot Lane to deal with a faulty pushbutton detector.

29. The claimant's evidence was that he finished the job and returned to his car. He states that he put his tools back in the car and removed his PPE, namely his hard hat, his hard boots and his high visibility jacket. He states that he was about to drive to his next job when he realised that he had left his reading glasses at the site. He states that he then returned to the site and it was as he was searching for his reading glasses that Mr Paul Slinn arrived and asked him why he was not wearing his full PPE.

30. The claimant's evidence was in stark contrast to that of Mr Slinn. Mr Slinn's evidence was that as his team all worked in the field, he often checked on his engineers and was required to conduct a random audit once a month.

Before carrying out an audit, for obvious reasons, he did not inform his engineers that he would be checking on them. Mr Slinn's evidence was that on 26 September 2018 he went to check on the claimant at Honeypot Lane. He pulled up in his car on the opposite side of the road and sat in his car for 5-10 minutes observing the claimant. The claimant was not wearing his PPE. He had the controller door open, had his tools out and his handset plugged in. Mr Slinn was quite clear that what he saw was the claimant finishing the job.

31. Mr Slinn then approached the claimant and asked him if he had his PPE with him. The claimant said he did and was told to go and put it on straight away. Mr Slinn stated that the claimant did not say anything about going back to the site to collect his glasses.

32. Mr Slinn completed an audit document in handwriting at the site and later typed it up on 27 September. The audit states:-

> "Paul was not wearing the correct PPE on site and was instructed to leave site immediately and return with correct PPE, which he did."

33. The audit records that the safety helmet, foot protection and high vis jacket were not being worn.

34. The claimant was invited to an investigatory meeting on 27 September at 13.30 hours. The claimant was asked if he knew what the correct mandatory PPE requirement was when working on site and correctly answered, "boots, high vis trousers, high vis top with full length arms, hard hat." He was then asked:

> "PS: What PPE were you failing to wear that is mandatory on site?
>
> PN: Hard hat, boots, incorrect high vis top."

35. The following exchange is then recorded in the notes:-

> "PS: Can you tell me why you were not wearing the correct PPE while working on site?
>
> PN: I felt I had assessed the situation was safe and felt that it was ok to continue with my work.
>
> PS: I need to understand your thought process as to why.
>
> PS: Why did you think it was a good decision to not wear your safety shoes on site.
>
> PN: It is not a good decision, but I felt I could continue safely as I was and my boots were not to hand.
>
> PS: Why did you think it was a good decision to not wear your correct full sleeve high visibility top on site?
>
> PN: The full sleeve was not to hand and I picked up the first one that was accessible, and I believed the top I was wearing was adequate PPE.

PS: Why did you think it was a good decision to not wear your hard hat on site?

PN: After assessing the situation I felt that it was safe to continue my work without a hard hat as I was not using my ladders or working at height.

…

PS: Looking back can you understand my concern for not wearing the correct PPE?

PN: I do."

36. The notes of the interview were signed by the claimant.

37. Following the investigation Mr Slinn referred the claimant for disciplinary action.

38. The claimant had a disciplinary hearing on 23 October 2018. It was only at this hearing that the claimant advanced his account of having finished the job and only returning to site to get his glasses. He stated that he had taken his full PPE off as he had returned to his car and wanted to stop at a café to go to the toilet. When asked why he did not have his safety boots on he claimed that his boots were dirty (dog dirt) and so he had to take them off. When asked about signing the interview notes he claimed that he did not understand what he was signing and when asked why he had not mentioned going back for his glasses at the time he stated that he was not in a good mind and did not want to go over the past.

39. In our judgment, this is not an incident where two differing versions can be explained by confusion or mis-recollection or misinterpretation of the same event. We do not believe the claimant's account. We found Mr Slinn to be a straightforward and credible witness. We find that the interview notes on 27 September accurately reflect what was said by the claimant at that time, He said nothing about going back for his glasses and was merely trying to justify his failure to wear his PPE by asserting that in his assessment it was safe not to do so. We find that the claimant's account of finishing the work, returning to his car and taking off his PPE before going back to get his glasses to be an invention. Further, we find that even if the claimant had gone back to his car and taken off his jacket and hat, there would have been no need for him to take off his safety shoes to go back and get his glasses. It is for that obvious reason that we find the claimant made a further invention about his safety boots having dog dirt on them to justify him taking his safety boots off.

40. The claimant maintained his account in oral evidence before us. Having rejected his evidence on this issue, we found the claimant's credibility to be significantly lacking and approached the rest of his evidence with great caution.

41. On 30 October 2018 the claimant received a final written warning arising out of this incident.

42. On 8 November 2018 the claimant appealed, and his appeal was heard on 29 November 2018 by Mr John Graham.

43. By a letter dated 30 November 2018 Mr Graham rejected the claimant's appeal. Mr Graham told us that he did so on the basis that there was no factual dispute concerning the allegations that the claimant had not been wearing PPE on site even if he had been going back for his glasses.

The Grove Road and Hanworth Road incidents – 15 December 2018

44. On 15 December 2018 the claimant attended two incidents at Grove Road and Hanworth Road.

Grove Road

45. On 17 December 2018 Mr Jamie Brown, Chargeable Maintenance Supervisor, emailed Mr Geoff Johnson regarding the two jobs stating as follows:-

> "Geoff, could you take a look at these two jobs as I'm concerned about the competency of the visiting engineers. He doesn't seem to be able to read a SLD [Site Layout Diagram] or be able to disconnect/make safe a pole following a RTA. I believe this to be a serious safety issue.
>
> Thanks."

46. Geoff Johnson telephoned Mr Slinn and asked him to investigate the matter.

47. The respondent maintains a log for each job. Engineers in the field are able to place contemporaneous records of what they have done on attendance on the log.

48. The claimant was tasked to attend the Grove Road site following a Road Traffic Accident. There was a pole damaged. The claimant's entry on the log states as follows:-

> "Mobile client update on finishing the visit – RTA pole 8, Pole damaged laying on the ground. Moved damaged P8 from the road, switch out signals form controller, unable to safety access pole 7 to isolate P8 due high vehicle turning left on centre island. Cleared site, removed debris and display OOO [Out of Order] boards plus barriered and coned. Site now safe. Find OOO boards photo. Follow up required to replace pole and RAS."

49. There are two further entries on the log.

50. The next entry is from Mark Bloomfield on 15 December at 23.46 and states:

> "Mobile client update on finishing the visit – arrived on site to diss P8 from P7 and restore signals but P8 ok. See phase P3 is RTA but P3 feeds P4 unable to restore signals as no signals would be working on see Phase CT to follow up to replace Pole 3."

51. The next entry is at 9.44 on 16 December 2018 from Mr Jamie Thomson. This records:-

> "Mobile client update on finishing the visit – as previous text the pole hit is fed from controller and then goes out so will leave it unsafe. It was never Pole 8 that was hit. Spoke to Kelly and not sure why was originally put in as Pole 8."

52. It is beyond doubt that the claimant failed to identify the correct pole that had been damaged in the Road Traffic Accident. The claimant accepted this in oral evidence and that he had got it wrong. The claimant seemed to try and suggest that he may have got this wrong because there was no SLD on site. However, having seen the SLD, it is clear that, for the extra low voltage cables, Pole 8 is fed from Pole 7. The reference in the claimant's entry to being unable to access Pole 7 to isolate Pole 8 confirms to us that the claimant did have the SLD. We find that the claimant did fail to read the SLD accurately.

53. There was some confusion as to whether the claimant had left the damaged pole potentially exposed to live electricity, ie not isolated. We have a record of a meeting with Mr Slinn on 19 December 2018. Mr Slinn clearly believed that the pole had been left live and not safe. The meeting notes record the claimant asserting that when he asked for help, he had been told by Mr John Ballard to leave the site running and to pack up. He is recorded as saying, "I switched the site back on…". However, in his oral evidence to us the claimant stated that he switched the whole junction off at the controller and, as such, cannot have left Pole 3 live. We prefer the contemporaneous record of what the claimant is recorded as saying, namely that he switched on the site and left it running. As such, we find it more probable than not that the damaged Pole 3 was left potentially live.

<u>Hanworth Road</u>

54. The Hanworth Rad log indicates that the claimant attended at 17.27 on 15 December 2018. The following was entered by the claimant onto the log:-

> "Mobile client update on finishing the visit – Put barrier around the Pole 8 and removed debris around the damaged pole. Displayed OOO boards and due to heavy rain and safety had switch out signals from controller. Isolated P5 which supplies power to P8. Returned to the controller to restore signals but 1st fuse kept blowing. After investigation found water has been dripping in cores on pole, dried the water, removed OOO boards and restored signals. Checked P8 is still not isolated. Liaised with John Ballard who advised not to switch out signals. FUP required to replace damaged pole and RAG."

55. The next entry on the log is from John Ballard timed at 19.43 on 15 December 2018. This states:-

> "Mobile client update on finishing the visit – F/UP to confirm isolation of RTA Pole 8 – found post cap Pole 8 still LIVE, LV cores not isolated from feed pole P5 – disconnected cores and now Pole 8 is isolated and safe, on further review of site, it appears that the previous engineer has disconnected the ELV cores at Pole

> 4 – unable to reconnect at night, requires daylight follow up reconnect ELV cores at Pole 4, ELV P4 input set PD in RAM…"

56. Thus, the claimant thought he had isolated Pole 8 via Pole 5 but had left Pole 8 live and had actually disconnected Pole 4.

57. We had some quite technical evidence from the respondent's witnesses about the power supply to poles (low voltage and extra low voltage) and how the SLD would give the sequence of wiring of poles from the control box which would have to be understood in order to isolate a damaged pole. In addition, we had evidence from Mr Slinn as to the various actions that could be taken to isolate the equipment. We do not think we need to go into that in any detail here. It is quite clear and we find that Mr Slinn concluded that the claimant had left two poles live and his competence was seriously at issue.

Events post 15 December 2018

58. Mr Slinn met the claimant on 19 December 2018. It would appear that one page of the meeting notes is missing from our bundle. Nevertheless, Mr Slinn told us that from the claimant's responses it was apparent to him that the claimant did not know the difference between low voltage and extra low voltage and that he was confused when disconnecting the damaged poles.

59. In the subsequent disciplinary proceedings for failing to comply with a management instruction not to attend to Road Traffic Accidents and isolate poles, the claimant has consistently denied that he was ever told or instructed not to isolate poles.

60. Mr Slinn gave evidence that at the conclusion of the meeting on 19 December 2018 the claimant was told by Mr Slinn that he, Mr Slinn, did not want the claimant to attend RTA sites until further training had been arranged for him. He states that the claimant thanked him and agreed that he would benefit from more training. We do not believe the claimant and prefer the evidence of Mr Slinn. Firstly, we have gained the clear impression that the respondent takes health and safety extremely seriously. Secondly, Mr Slinn had clear evidence that on two occasions the claimant had left a damaged pole live and a potential danger to members of the public and any colleagues attending thereafter. We find it inherently unlikely that the respondent, through Mr Slinn, would have simply ignored this potential danger and allowed the claimant to carry on attending RTAs to isolate damaged poles. Thirdly, a handover report of management instructions from December 2018 records that the claimant was not to attend RTAs until further notice. Fourthly, on 19 December 2018 the claimant sent an email to Mr Slinn stating as follows:-

> "After investigation meeting with you on 19/12/2018 I would like to request on site training in traffic signal wiring identification mainly on pole tops and inside cabinets.
>
> I believe the training will improve my ability to safely isolate electrical circuits."

61. That confirms to us that the claimant's competency was in question and that he himself realised he needed more training.

62. The claimant has sought to challenge that he was instructed not to attend RTAs on the basis that he did attend RTA sites on 8 January 2019 and 16 March 2019. We find that the evidence does not support this proposition. On 8 January 2019 he was instructed to attend an RTA site after another engineer had already attended and confirmed that the controller was off, and the claimant's task was merely to change a fuse.

63. On 16 March 2019 the claimant attended a misaligned pedestrian signal. Whilst that may have been pushed out of place by a road traffic incident, the claimant's task was merely to make adjustments and tighten some nuts. The key point is that the two jobs the claimant was sent to did not involve him having to isolate the electrical supply to a pole.

64. On 18 February 2019 Mr Slinn arranged for the claimant to be assessed by Mr Jon Barton. There is no contemporaneous record of this meeting, but Mr Barton did provide a statement in April 2019 as part of the claimant's disciplinary process. Mr Barton has stated:-

> "Paul struggled quite significantly in being able to answer my questions. I tried to lead him to the answers by giving him further information, but he still couldn't answer correctly… I came to the conclusion that PN was not safe to go to site for RTIs and I was not going to sign him off.
>
> …
>
> PN admitted to me that he did not feel confident in this area and he was not confident to carry out this type of work
>
> I called Paul Slinn into the room to share my observations and concerns. PS said he would put it on the system that PN was not to sent to be sent to these types of work. PN was also advised that if he did end up attending RTAs then he wasn't to touch it but to call it back in, so another operative could be assigned. I also stated that if he was unsure or didn't feel confident carrying out any type of role/task he was asked to do, then she should put the fault back and/or ask for assistance. PN advised both me and Paul Slinn he needed training further training".

65. Mr Slinn gave evidence that Mr Barton said to him, when the claimant was not present, words to the effect, "There is no way I can sign him off as competent, he will end up hurting someone". Mr Slinn told us that he told the claimant there and then not to carry out RTAs as he required more training. Mr Slinn instructed the claimant that if he attended site and learned it was an RTA that he had to call the job back in rather than proceed to try and fix it himself. He told us that the claimant acknowledged this and said ok.

66. The claimant denied that he was ever instructed not to attend RTAs or not to attempt to isolate poles. We do not believe him. We prefer the evidence of Mr Flynn and that of Mr Barton, albeit that Mr Barton's evidence is hearsay and has not been able to be challenged. We are supported in that

conclusion by a comment made by the claimant in his disciplinary meeting on 3 My 2019 when the following exchange took place:-

> "IM – When you got there why did you not back it as the fault was RTA?
>
> PN – I wasn't thinking. I was thinking it was something I could do. I have been in that situation before, I have been sent to those types of jobs before."

67. We find that that exchange happened and was tantamount to a recognition by the claimant that he should not have been working to isolate a pole. That can only be because he had been told not to do so.

Clapham Common incident – 22 March 2019

68. On 22 March 2019 the claimant was tasked to attend a pole in Clapham. The log records that he arrived at 10.24 and on arrival he found that it was an RTA. The log records the claimant entering the following at 10.38:-

> "Mobile client update on finishing the visit – found RTA. Pole 13 C Phase RAG on the ground and the pole leaning. Removed signal head out of pedestrian way – to be reused. Covered the pole with orange bag, made it safe, tested for dead and no danger to the public.
>
> Unable to switch out as the junction is very busy & SLD cable run 14 13 12 Required CT to rewire the signal head. Find attached photo"

69. The claimant took before and after photographs of the pole which we have. The before photograph shows the traffic light unit on the ground with wires hanging from the pole top. The after photograph shows the pole with an orange bag over the top secured by two cable ties.

70. The log does not go into detail how the claimant made it safe. In his witness statement the claimant states that he isolated damaged wires at the pole cap terminal block, secured, tested and confirmed that the wires were dead. In the investigation meeting the claimant stated that he removed the terminal block. In the disciplinary hearing the claimant was asked what wires he removed from the terminal block and his answer is recorded as:-

> "Showed that he removed three wires from the terminal block."

71. In his oral evidence the claimant went further still and claimed that he had placed insulation tape on the wires that he had removed. This had never been mentioned before. In our judgment this reference to insulation tape may have been prompted by the witness statement of Mr Middleton who refers to putting tape round bare cores as being a way safely to isolate wires. We do not accept the claimant's evidence that he successfully isolated the pole cap. It is clear to us that the claimant was not competent to do this job and did not really know what he was doing. It may be that he isolated some wires which would be consistent with the three referred to in the disciplinary hearing but left other wires live.

72. The log goes on to record that at 19.07 on 22 March, Mr Liam Costello attended the site. The log records:-

> "Mobile client update on finishing the visit – placed barriers around P13. Made up installed new signal and wired in. Replaced blown box sign fuse in controller. Wreck follow up with 4-meter slotted pole."

73. Prior to filing that log entry, Mr Costello made an incident report at 18.00 on 22 March 2019. This states:-

> "Arrived site replace damaged traffic light – found engineer attended previously has left live hanging wires from pole cap next to a metal pole."

74. Mr Costello took a number of photographs of the pole and it is clear that well in excess of three wires are dangling from the top of the pole and that they are potentially able to come into contact with the metal pole and, if live, present a danger to the public.

75. It would appear that the "Telsafe" Report from Mr Costello was picked up by a Chargeable Team Supervisor and Mr Terry Marsh was tasked to investigate the matter.

76. Mr Marsh interviewed Mr Costello on 29 March 2019. The following is recorded:-

> "LC - …Removed the orange bag. Carried out the whole site check with care as I have noticed the cables were hanging around unsecure.
>
> TM – What did you do next?
>
> LC – I have tested the pole which wasn't live, checked the pole cap – this was live, cables were live. I have tested this with a volt stick.
>
> TM – So looking at this before you carried out your job do you think the site was left in safe condition by the previous engineer?
>
> LC – No. The cables were at my height they could just have touched the metal pole and automatically you have live pole with danger to the public. This could go live any time. Plus, there was no barriers on arrival the whole site would be live."

77. The claimant was then interviewed on 29 March. The following exchanges are recorded:-

> "TM – On the hand overs and communication from management you have been informed not to attend RTAs. What have you done on arrival to this fault?
>
> PN – Yes, I wanted to be train on this and that was raised to management many times. I have attended RTAs before and wanted to have more knowledge about how to approach it. I have removed the signal head from the pavement. Removed the pole cap, isolated the wires, isolated the signal pole top by covering it with a bag.

TM – How did you confirm, tested for dead.

PN – Terminal block removed, isolated that with gloves, tested with proof dead, I went to the controller with my volt stick. I have secured the site with barriers first but this was on the way of the road and pedestrians.

TM – Let me just ask again. Were you aware that you are not to attend RTAs?

PN – No one has let me know about this. No communication on this. We have been asked to attend this type of work not the first time. They know I don't have the training but still sending me this job."

78. Following the investigation meeting Mr Marsh decided to make further enquiries and it is against that background that Mr Barton's statement appears to have been produced. The claimant was suspended on 2 April.

79. Following a review of the documents Mr Marsh was satisfied that there was evidence that the claimant had attended and continued to work on an RTA despite being told not to. He was also satisfied that the claimant had left the site in a dangerous state. He referred the claimant for disciplinary action.

80. Mr Ian Middleton was tasked with conducting the disciplinary hearing. He reviewed all the documents and, with the assistance of HR, the claimant was sent a letter on 18 April informing him that a formal disciplinary meeting would be heard looking into an allegation of gross misconduct and referencing the following sections of the disciplinary policy:-

> " • Serious infringement of health and safety rules.
> • Gross dereliction of duty.
> • Serios neglect that could result in unacceptable loss, damage or injury.
> • Refusal to accept or act on reasonable instructions from a manger or management representative.
>
> In that, on 22 March 2019, you were requested to visit site, Clapham Common Southside – the Avenue – Cavendish, lamp fault. On attendance you discovered that it was an RTA not a lamp fault. You proceeded with dealing with the RTA when you had previously been advised that you did not have the competency to do this which resulted in the site being left in a dangerous manner."

81. The letter was accompanied by all the relevant documentation.

82. The disciplinary hearing was heard on 3 May 2019 by Mr Middleton. The claimant referred to removing three wires from the terminal block, denied he had ever been told not to attend RTAs, had no explanations to why the site had been found live by Mr Costello and had the exchange referred to above wherein we consider the claimant effectively accepted that he should not have been working on the pole. The claimant reiterated he was not confident having to isolate poles.

83. On 9 May 2019 the claimant was sent a letter giving him confirmation of the outcome of the disciplinary meeting, namely summary dismissal for gross misconduct. Mr Middleton's core conclusions set out in the letter are as follows:-

> "I do believe that you were informed by your manager in February 2019 and you failed to follow manager's instruction which resulted in the site being left in a dangerous manner which gave cause to members of the public being put at risk."

84. Mr Middleton took into account the final written warning from October 2018.

85. The claimant appealed. The claimant prepared a statement dated 17 June 2019. The appeal was heard by Mr Jon Graham. We observe that Mr Graham had previously heard the appeal against the final written warning in October 2018. Given his prior involvement, and the size and administrative resources of the respondent, it would perhaps have been preferable to have a manager not previously involved with the claimant involved at the appeal stage. Nevertheless, we do not find that the fact Mr Graham dealt with the appeal in actual fact compromised his impartiality or ability to deal with the appeal fairly. In any event, the claimant declined to answer any questions and confined his appeal to reading out his statement.

86. Mr Graham has set out in his witness statement that he went through each of the points made by the claimant in his appeal document. On the key issue as to whether the claimant had been advised not to attend an RTA or, if he did, not to touch anything and call in at the office, Mr Graham says that he found Mr Barton's evidence credible and that there was no reasonable motivation for Mr Barton to make a false statement. Consequently, the appeal was turned down.

Conclusions

87. We find that the reason for dismissal was gross misconduct. We find that Mr Middleton genuinely believed that the claimant had disobeyed a clear instruction from management that he was not to attend RTAs or if he found himself at an RTA, at the very least not to attempt to isolate a pole.

88. We find that that belief was based on reasonable grounds following a reasonable investigation. The claimant had on 15 December 2018, demonstrated that he was not competent safely to isolate poles. We find that the claimant was recommended for training and was assessed on 18 February 2019. We find that he was told not to attend RTAs or, if he found himself at an RTA, then he was not to isolate poles. We find that the claimant attended at Clapham on 22 March 2019 and nevertheless attempted to isolate the pole. We find that the claimant in all probability failed to isolate the pole and left it live. We find that the claimant thereby potentially exposed the public and colleagues to serious harm from electrocution.

89. We have considered whether the decision to dismiss falls within the range of reasonable responses of a reasonable employer. We have taken into account the various matters made in submissions on his behalf, in particular his previous service record, length of service etc. It is of particular relevance that the claimant had a live final written warning. We cannot conclude that the decision to dismiss was outside the range of reasonable responses of a reasonable employer.

90. We find that the respondent complied with the ACAS Code of Practice on disciplinary procedures.

91. Consequently, we find that the decision to dismiss the claimant was fair.

92. It follows that we find that the claimant was not dismissed in breach of contract. He was guilty of gross misconduct, had acted deliberately and was in fundamental breach of contract.

93. We have considered all the evidence to see if there are primary findings of fact from which we can infer that the claimant was treated less favourably on the grounds of his race. We deal in turn with each of the allegations of treatment that are complained about.

Mr Slinn believed white engineers over the claimant in an investigation in December 2018

94. We note that no less than three different engineers reported from two sites that the claimant had left poles live and failed to understand the SLD plans. We do not know but have assumed that those three engineers are white. The claimant has acknowledged that he identified the wrong pole at one of the sites. The claimant was not disciplined as a result of his lack of capability on 15 December 2018 but was recommended for training and instructed not to attend RTAs and isolate poles. In our judgment Mr Slinn had every justification for believing the three engineers who had reported the claimant's failings and we find that this is not a primary fact from which we can infer less favourable treatment on the grounds of the claimant's race.

Making up a false accusation against the claimant without any supporting evidence (Mr Costello)

95. Mr Costello was a sub-contractor of the respondent. Mr Costello reported his safety concern in real time at 18.00 hours on 22 March 2019 prior to him finishing on site. We have heard absolutely no evidence of any interaction between the claimant and Mr Costello prior to this date. It may be that Mr Costello was able to see from the log the entry that the claimant had made and so was aware of his surname. Nevertheless, we find it inconceivable that Mr Costello would, out of nowhere, have invested a false accusation that the site was live. The claimant suggested that Mr Costello, in reporting the matter, lied in order to progress his career. We fail to see how reporting a potentially dangerous situation could have progressed Mr Costello's career. We find that the allegation was not false. Further, we find the fact that Mr Costello reported his finding is not a primary fact from which we can infer less favourable treatment on the grounds of the claimant's race.

Believing Liam Costello, a white employee of the respondent, over the claimant.

96. It is correct that Mr Costello was believed, and the claimant's account was not believed. We do not find that this was less favourable treatment because of the claimant's race. We find that Mr Costello was believed

because he had no reason to advance a false account. Further, that the background to the evaluation of the claimant's account was that he had previously been shown to be incompetent in isolating a pole, had been told not to do that particular job and yet had done it and that his various explanations were inconsistent. We do not find that this is a primary fact from which we can infer the claimant was treated less favourably on the grounds of his race.

Predetermining the claimant's dismissal and dismissing the claimant summarily in respect of a false allegation.

97. We find that Mr Middleton had not predetermined the claimant's dismissal and made the decision following the disciplinary hearing. We find that the allegation against him was not false. Consequently, we find that these two alleged items of treatment have not been proved and consequently are not primary facts from which we can conclude that the claimant was less favourably treated on the grounds of his race.

98. For the aforesaid reasons, we find that the claimant was not unfairly dismissed and was not subjected to discrimination on the grounds of his race. The claims are accordingly dismissed.

_____
Employment Judge Alliott

Date: …16/7/2021.

Sent to the parties on: ..2/8/2021.....

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For the Tribunal Office