EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100064/2020 Hearing by Cloud Video Platform on 24, 25, 28 and 29 June 2021

Employment Judge: M A Macleod

Craig Waites	Claimant Represented by Mr P Hannah Solicitor
Bilfinger Salamis UK Limited	Respondent Represented by Mr D Hughes Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim for unfair dismissal fails, and is dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 8 January 2020 in which he complained that the respondent had dismissed him unfairly from his position as a Rope Access Technician.

2. The respondent submitted an ET3 response in which they admitted that the claimant had been dismissed, but denied that his dismissal was unfair.

3. A hearing was listed to take place on 24, 25, 28, 29 and 30 June 2021 by way of Cloud Video Platform. As it turned out, only the first four days were required for the hearing, concluding on 29 June 2021.

4. The claimant was represented by his solicitor, Mr P Hannah, and the respondent by their solicitor, Mr D Hughes.

5. A joint bundle of productions, running to 5 separate volumes, was presented by the parties to the Tribunal and relied upon by both parties during the course of the hearing.

6. The respondent called as witnesses:

- David Graham, Working at Height/Rope Access Technical Manager;
- Fergus Cameron, Rope Access Manager;
- Nigel Whitehead, Project Manager formerly employed by the respondent;
- Garth Gordon Reid (known as Gary Reid), Senior Operations Manager formerly employed by the respondent; and
- Kenneth Bennet (known as Kenny Bennet), Operations Director.

7. The claimant gave evidence on his own account, and called as a witness Leslie Hernandez, Level 1 Technician.

8. Evidence in chief was taken from each of the witnesses by witness statement, and each witness was present and available during the course of the hearing at scheduled times for cross-examination.

9. The hearing proceeded without significant difficulties by way of Cloud Video Platform. Each of the participants and witnesses was able to see and hear each other at the appropriate times, and no difficulties arose during the course of the hearing as a result of the technology being relied upon. I was satisfied that the interests of justice were duly served by this

hearing, and that each party was able to present its case freely to the Tribunal.

10. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

11. The claimant, whose date of birth is 8 March 1969, commenced employment with the respondent on 1 June 2005, and was dismissed with effect from 18 September 2018.

12. He was employed, on termination, as a Level 3 Rope Access Technician, also referred to as a Team Leader. At the material time the claimant was based on the RockRose Energy – East Brae platform ("East Brae").

13. The respondent is a contractor providing a number of services, including fabric maintenance, to clients in the offshore energy sector. The claimant was deployed primarily to work on offshore oil and gas platforms in the North Sea. He was an experienced rope access technician in the offshore energy sector. As a Level 3 technician, the claimant was employed in a supervisory capacity.

14. On 27 August 2019, Robert Hamilton, Level 3 Team Leader, emailed Chris Fackey (63). Mr Fackey passed the email to Fergus Cameron, the Rope Access Manager. The email stated:

"I've got a problem with one of the boys in the squad.

Just seen Ricky Burgess climbing about with no anchor points 3/4 metres above deck standing on a pipe.

When I said to him he didn't seem too bothered and said he was nearly down anyway!

I tried to engage him in conversation about this, he showed little interest.

This is a problem which needs addressing.

Regards

Robert"

15. Mr Burgess was a Level 1 Rope Access (RA) Technician.

16. Mr Cameron was aware, when he received the email, that he would require to carry out an investigation as he regarded this as a serious health and safety manner. He was asked to do so by Nigel Whitehead, Operations Manager.

17. A "First Alert" form was completed on 27 August 2019 (64), which identified that a "Potential Golden Rule Violation" had taken place, and said that information was currently being gathered for the investigation. The author of the form is not identified.

18. It was also confirmed that the nature of injury or damage was "First Aid Treatment".

19. The Golden Rules are 8 rules which are held to be crucial health and safety rules to be observed by all staff of the respondent in carrying out their duties, and are listed (123) as follows:

    1. *Always attached while working at height.*
    2. *Don't enter confined spaces without authorisation.*
    3. *Personal verification of isolation.*
    4. *No drugs or alcohol.*
    5. *Don't walk under suspended loads.*
    6. *Don't cross barriers without authorisation.*
    7. *Always wear the specified PPE correctly.*
    8. *Stay safe around plant and vehicles.*

20. The particular golden rule being referred to in this instance by the respondent was no 1 “Always attached while working at height”.

21. Mr Cameron decided to speak to Mr Burgess first, and did so, in the presence of Mr Massie, HR Business Partner, on 28 August 2019. Brief notes of that interview were set out in the Investigation Report produced by Mr Cameron (71).

22. It was noted that:

“Richard Burgess was interviewed first and he explained that he had carried out cow’s tail operation under the guidance of his level 3 (Craig Waites) during the final part of the descent he was challenged by the (sic) Robbie Hamilton (Bilfinger L3 team lead) that he had gone down to no points of contact, Richard maintained that he had one point on at all times but acknowledged his mistake. Richard carried out the cows tailing operation utilising live pipework and a safety cabinet both of which are not rated and should not have been utilised. Instruction within the rope access method statement.”

23. Mr Cameron then made reference to TMS/23/MS/04/42/45710001 Electrical Installation, Repair and Planned Maintenance Routines, a method statement put in place by the respondent (produced at 249ff). The claimant and Mr Burgess had been engaged in carrying out work to an electrical box at height. Reference was made to section 6.5:

“Rigging Arrangements

Bilfinger Salamis’s personnel will utilise the platforms main structural steel work as their primary anchors for their working and back up ropes. The rope lengths will vary as this will be relevant to each work location. A secondary attachment to the structure may be required to redirect, deviate or re-belay the ropes as the Bilfinger Salamis rope access level 3 team leader sees fit.

Anchorage to process pipe work is not allowed without written permission from the Offshore Inspection Engineer (OIE) and authorisation from the Offshore Installation Manager (OIM)."

24. Cow's tailing is a process where the technician wears a full body harness and at a central point on that harness there are short pieces of dynamic rope which have elasticity and can be connected to various things, the short pieces of rope being known as cow's tails.

25. Photographs of the area where the incident took place were taken by Mr Cameron and produced (65-69).

26. The claimant provided a handwritten "Statement of Events" (undated)(61/2). In that, he wrote:

"I was working with Ricky Burgess on the morning investigating a lighting fault on circuit 5901 4Y.

The task was very straightforward 'cowstailing'. For ease of observation I was stood in the ballroom approx. 15m away from Ricky as he ascended to the worksite, carried out his work and then descended again.

I have worked with Ricky for a period exceeding 12 months. In that time I've found him to be a very competent electrical rope access tech. He's a pleasant person and in my opinion we work well together. For a brief moment during the task Ricky was out of my view. I know his competence, his capabilities and his attitude to safe working so this was not a concern for me as I changed locations & walked closer to his access point.

At this stage Rab Hamilton was walking past Ricky & engaged in conversation. I am aware of bad blood between Rab & Ricky to pay little attention to hostile attitude between them.

Ricky was stood on the fire hydrant box attached by cowstail to steel framework above the hydrant. This is an acceptable fall arrest practice.

Ricky removed his cowstail and jumped off the hydrant box in one motion. Nobody attempted to stop the job or have any other safety intervention. The first I become aware of a dispute is when answer a tannoy later in the afternoon. During my period of observation Ricky was at no time in an unsafe position without attachments. Had he done so I would have raised the issue with utmost importance. It is my belief neither of us gets paid enough to be hurt on the job."

27. Les Hernandez, a Level 1 technician, also produced a handwritten statement (undated) (70):

"After checking out lighting circuit 4B I was walking back to M0056 switch room on east side of ballroom mezz deck. Ricky Burgess was ascending (sic) from the cable rack ante [?] when we reached him. He stepped off the pipe support onto the fire cabinate (sic) removed his cows tail and jumped down.

At this point Rab shouted at Ricky. Craig was coming around from the other side after watching Ricky checking out a faulty circuit. Ricky is a valuable member of our team and when I have worked with Ricky overside work on when 2 abseilers were required. At the workface I have found no problem in his craft."

28. Mr Cameron's Investigation Report included a summary of the statement given by the claimant and some observations thereon (72).

29. The statement taken from the claimant by Mr Cameron, with Mr Whitehead in attendance, was produced at 73ff.

30. Mr Cameron met with the claimant in the Aberdeen office of the respondent on 30 August 2019.

31. The notes included the following exchanges:

"…FC asked CW to talk through how Richard got to the job and to talk through the full process.

CW: stated that it was a routine task they were carrying out and didn't require barriers and talked through the photograph and stated that Richard always ensure he had two anchor points and that Richard had cow tailed all the way to the point he was to work at CW confirmed where he was standing at this point.

FC: Asked how RB got on the box (fire extinguisher storage) (Appendix A Photograph)

CW stated that RB climbed on top of it.

FC: Asked CW to explain how RB got up to the job.

CW: Stated that RB climbed on the pipework and reached the junction box then he went out of site (sic) and was obscured and that he moved around to a better angle to see him.

FC: Asked if CW could see if RB was clipped on.

CW: Stated he was.

FC: Asked how RB got back down from his position.

CW: Stated he came down the same exact way in reverse. CE stated he came round when RB was at point 6 in the photograph (Appendix A), Rab then intervened we agreed he would jump off as his second cow tail was tight and we agreed he would remove it and jump off.

FC: Stated that the intervention with Rab, did he say CB [understood to be RB] had one point of contact.

CW: Stated that Rab and RB don't see eye to eye and don't even speak at the heliport. CW stated he was speaking to boys all the time…

FC: Asked what was said before the job.

CW: Stated that RB stated it was a routine job and I stated ok mate on you go.

FC: Asked if they discussed the permit.

CW: Stated yes and it was signed (Risk assessment).

FC: asked if it was on the job feedback.

CW: Stated it was in the workshop.

FC: Asked if it was done in the workshop the onsite.

CW: Stated FC could call him out on that one and that it was just done in the workshop as it was a previous task.

FC: Asked why it wasn't done at site as it was site specific and asked if CE [understood to refer to the claimant] seen anything wrong with the climb.

CW: Stated it was a sturdy line.

FC: Asked if CW thought there was a better way of doing it.

CW: Stated he considered a yellow platform, considered cable trays however there were no anchor points.

FC: Asked if CW considered using a ladder and he foot it and clip to a structure.

CW: Stated that the issues with ladders unless scaffolders have tagged it it's hard to get one.

FC: Asked CW if he set up the ropes for the job.

CW: Stated that was making the job bigger for a ten minute task.

FC: Asked where CW equipment was.

CW: Stated he had a rope bag and harness against bulkhead wall and Rab had pointed it out and admitted it was a bit out of the way and was using out of date Documents form TMS.

FC: Asked if CW had access to TMS.

CW: Stated he just had documents and should have been aware they were out of date.

FC: Asked what version of RA documents CW was using.

CW: Stated 2013.

FC: Stated we were now on version 6 and asked CW when the last time he was in the RA hub on TMS.

CW: Stated he did not know what this was.

FC: Explained what was in the HUB.

CW: Stated he was not aware of this and was using a copy on a CD and had been using this…

FC: Stated that CE didn't download the procedures when discussing the permit, what was CW rescue plan

CW: Stated he had a rig to rescue set up but didn't carry orange bag.

FC: Gave a scenario as to why the need for a bag.

CW: Stated he couldn't argue that point.

FC: Stated not wanting to carry a heavy bag was not an excuse.

CW: Stated he agreed and took it on board.

FC: Stated that rescue is at the forefront at all time and is your goal as a safety supervisor to protect personnel.

CW: Stated he understood and that the buck stops with him.

FC: Asked where CW harness was.

CW: Stated it was next to his bag.

FC: Gave another scenario in relation to the importance of wearing a harness.

CW: Stated he didn't state (sic) that he didn't need to wear a harness as it is job specific.

FC: Stated the reasons for the importance of wearing a harness.

CW: Stated he totally agrees.

FC: Stated that CW was a level three safety supervisor, most experienced on the park and buck stops with you. The buck stops with me at 500 people. Stated that they had allowed climbing on safety equipment, clipped onto pipe work. Don't do it go for the inspector and get clarity on the integrity of things and follow our Bilfinger processes.

CW: Apologised and stated it had become common practice over the years.

FC: Stated that CW should have challenged it and asked how long CW had been a level 3.

CW: Stated since about 2000.

FC: Stated nearly 20 years, need I say more!

CW: Stated no.

FC: Stated with all that experience the whole safety on that job is in question.

SCW: Stated having to dodge pipework it wasn't an RA job.

FC: Stated that CW should have challenged the job and had just allowed a guy to break so many rules and that he had asked RG about a rescue plan and that he said he didn't it and that tells FC that CW didn't do one…"

32. In the interview, reference was made to the TMS system. This is an online system operated by the respondent in which all of their procedures are available. Mr Cameron understood that all level 3 team leaders not only had access to the TMS system online but that they received emails notifying them of updates to procedures contained within TMS. In particular, he understood that the claimant had such access.

33. In his investigation report, Mr Cameron summarised the claimant's statement thus:

"Craig Waites was interviewed and asked to run through how the scope had been carried out, Craig explained how he set the scope up and confirmed Richard had access the work face as Richard had described.

I questioned Craig around the safety of this particular rope access scope and found that several areas had not been managed correctly.

The following observations were made:

- *Rescue plan had not been discussed fully (Level 1 was not aware of what the rescue plan entailed)*
- *Incorrect versions of procedures were in use (attached to the permit)*
- *TRA was carried out in the workshop*
- *Safety equipment was not fully set up for the task*
- *Level 3 was not kitted out to carry out a rescue (no harness donned during cows tail operation)*
- *No direction and/or challenge to level 1 cow tailing technique*
- *No awareness on the requirements for pipe work to be used as anchorage*
- *Showed poor judgement in rope access set process (should have set up releasable anchor system)."*

34. Mr Cameron went on to make recommendations. He recommended that Mr Burgess, a contract worker, should be removed from the platform, and that disciplinary action be taken against the claimant for golden rule violations, and in particular:

- *"Rope access and working at height management visit to include audit program.*
- *Remaining offshore rope access team members are taken back through the rope access induction process including procedural questionnaire with focus on anchorage usage*
- *Confirm latest rope access documentation is available at site.*
- *Ensure all working at height activities are risk assess (sic) at work location."*

35. In his evidence before the Tribunal, the claimant insisted that he had not had the 2013 procedures available to him, but a version in 2012. No 2012 version was produced to the Tribunal. At 154, the claimant signed a Rope Access Procedures Acknowledgement Form dated 27 August 2012 (though that did not form part of the papers available in the internal proceedings), which confirmed that he had participated in an induction session given by the Level 3 Team Leader covering all aspects of the Rope Access Procedures.

36. A copy of the Rope Access Procedure was produced (155ff), drafted and approved by Mr Graham, and given a date of issue of 1 April 2013.

37. On the balance of probabilities, and in particular standing the admissions made by the claimant in the course of his Disciplinary Hearing, it is our conclusion that the claimant had the 2013 Procedure (155ff) available to him at the time of the incident in question. We are unable to make any findings in relation to a 2012 Procedure, since no such Procedure has been produced, nor was any reference made to it by the claimant prior to his dismissal.

38. Under “Responsibilities”, at paragraph 4.2 of the 2013 Procedure, it is provided (4.2.3) that the rope access manager’s responsibilities include providing copies of all relevant documents at the work locations and ensuring all operational locations are working to correct revisions.

39. In paragraph 4.3, the rope access supervisor’s responsibilities are delineated. These included, at 4.3.4, *“Ensuring that all work at height is undertaken in accordance to this written procedure and all relevant industrial best practice and project specifics requirements”*, and at 4.3.6 *“Be fully harnessed up inclusive of life jacket (where necessary) at the work site when technicians are performing rope access activities”.*

40. At paragraph 7.12, the Procedure provided that *“Every level 3 team leader will be provided with a rope access documentation Cd which will contain all documents required for the implementation of the safe system of work. This documentation Cd will be updated at regular intervals by the rope access compliance manager to ensure the information remains up to date. Cd’s will be issued by the quality department and interim updates will be communicated via electronic mail.”*

41. The Procedure went on to set out the requirements of Worksite Assessment at paragraph 8, including the following provisions:

“8.2 The Rope Access Team Leader (Level 3) will determine the best method of access and egress to and from the task. A rescue plan will be completed for the task by the level 3 using the guidance document TMS/10/GD/06, and completing form TMS/10/F/18. Where a complex rescue scenario is required then consideration should be given to allow the team sufficient time to practice/rehearse the specific rescue scenario to ensure its effectiveness. All rescue plans will be registered in the installations rescue plan register (TMS/10/F/25).

8.4 The Team Leader (Level 3) will brief all personnel on the permit, risk assessment, rescue plan, and all other aspects of the work. This will be undertaken by means of task specific toolbox talks (using the

Toolbox Talk form TMS/10/F/03). Task specific work-packs will provide additional information.

8.5 Site specific method statements and risk assessments (undertaken using the Master Risk Assessment form TMS/10/F/04 and the Task Risk Assessment form TMS/10/F/05) will be thoroughly understood by all team members prior to commencement of the task. The level 3 will undertake a site visit and generate a rescue plan using form TMS/10/F/18.

8.6 Work permits, method statements and risk assessments are a safety aid and not a guarantee or substitute for common sense so personnel must constantly ensure that systems remain safe and that associated electrical cables, piping systems and the like are isolated or secured."

42. The claimant underwent regular training in Rope Access Procedures. He required to answer questions in a multiple choice format on 17 March 2014 (197), and achieved a pass mark of 53/55 (pass level is 50). His final answer, to the question "Where can you find a copy of IRATA ICOP?", was "On the rope access Cd issued from the quality department". One of the options for that answer was "On the TMS system", but he did not circle that, and his answer was marked as correct.

43. IRATA Is a reference to the International Rope Access Trade Association, which sets industry standards in rope access practice.

44. The Rope Access Procedure was then updated in 2015 (202) and on 8 December 2017 (204ff). The respondent's position is that this was the most up to date Procedure in force on the date when the incident occurred. The claimant's position was that he was never shown a copy of that version of the Procedure, and was therefore unaware of its terms and any amendments to the previous version of which he was aware (the 2013 version).

45. The provisions referred to in the 2013 Procedure have not been amended before inclusion in the 2017 Procedure.

46. In 2018, the claimant signed a Safety Charter (246), which included a number of declarations relating to understanding risk, performing jobs safely and following systems and processes (*"I will ensure that I understand the safe work requirements that are held in the Company Procedures for the work I undertake and follow them at all times. If I do not have the requirements available or do not understand them I will ask my supervisor."*)

47. The Method Statement for Electrical Installation, Repair and Planned Maintenance Routes referred to by Mr Cameron in his investigation report provides a list of responsibilities (paragraph 3.3) incumbent upon level 3 team leaders, including the claimant, among which are included (255):

- *"Be aware of his and the teams responsibilities for safety at all times whilst working at height…*
- *Conduct toolbox talks*
- *Conduct task based risk assessments (POWRA) to reduce all associated risks to ALARP [as low as reasonably practicable]…*
- *Completed comprehensive rescue plans*
- *Safety of the team when working at height during the initial set up of equipment*
- *Safety of the team whilst carrying out rope access trade specific tasks*
- *Safe and correct rigging of all equipment to provide sufficient anchorage at all times…"*

48. In order to obtain a work permit for the task in question, the claimant required to complete a risk assessment (283). With regard to Abseiling, the technique which the technician was going to employ in carrying out the work at height, the controls were said to be *"Rope Procedures TMS-23-P-11 and Method Statement TMS-23-MS-04-042-Y-457".* The Permit to Work was granted by the respondent on the basis of the risk

assessment provided. The reference to the Rope Access Procedure was correct, though it did not specify which version was relied upon.

49. Steven Massie, HR Business Partner, wrote to the claimant on 10 September 2019 to invite him to a disciplinary hearing on 12 September 2019 (78).

50. He confirmed that:

"The purpose of the hearing is to discuss the allegation that you violated a working at height procedure as well as:

- *Used incorrect versions of procedures*
- *TRA was carried out in the workshop*
- *Safety equipment was not fully set up for the task*
- *As a level 3 you were not kitted out to carry out a rescue (no harness donned during cows tail operation)*
- *No direction and or challenge to level 1 cow tailing technique*
- *No awareness on the requirements for pipe work to be used as anchorage*
- *Showed poor judgement in rope access set process (should have set up releasable anchor system)"*

51. The claimant was informed that the meeting would be chaired by Gary Reid, Senior Operations Manager, and a copy of the minutes of the investigation meeting and the respondent's disciplinary policy were attached to the invitation. He was also notified of his right to be accompanied by either a work colleague or by a recognised and trained Trade Union official.

52. Prior to the hearing, Mr Reid, who understood the use of TMS but had a limited understanding of rope access procedures, felt it was appropriate to speak to Mr Cameron in order to improve his understanding, since Mr Cameron is the respondent's expert technical manager in the subject. The meeting was an informal one, and no noes were kept. Mr Cameron told Mr Reid that the claimant had shown a blatant disregard for rope access procedure, and that there were no mitigating circumstances.

53. The hearing took place on 12 September 2019 as scheduled. Mr Reid chaired the hearing, and was accompanied by Fiona Sharp, Human Resources, who took notes (80ff). At the start of the meeting, the claimant was noted as confirming that he had asked a union representative to attend with him, but that they were not available; however, he confirmed he was happy to proceed unaccompanied.

54. He confirmed that he was content with the terms of the notes of the investigation and supporting documents, other than spelling mistakes.

55. When Mr Reid asked him if he was aware of the Working at Height Procedure, he replied: *"This is a grey area for me, I don't know it. We used to have a focal point and I will hold my hands up and say I didn't know about the latest version. The revision had not come to me. I have heard of TMS but I was sent a document on CD and that's what I've been working from. I am aware of the revised document now."*

56. The "focal point" is a reference to a supervisor on the platform who is responsible for disseminating information about updates to procedures.

57. Mr Reid observed that all leads offshore have access to TMS, but the claimant replied that *"I have also not heard of rope access. The previous focal point must have been doing all that."*

58. There followed this exchange:

"GR: How did the level 1 get to the job?

CW: He cow tailed. I wasn't aware of the new procedure. It was a decision made for the job to cow tail as I was following best practice and am still doing this now.

GR: Have you read the new procedure?

CW: I am aware of it now.

GR: Was the level 1 clipped on?

CW: Yes. There was a dispute at first if he was jumping. I do understand why now and I have done it myself. Rab decided to take it further when he witnessed it.

GR: Is he a level 3?

CW: Yes.

GR: What permit did you have in place for the job?

CW: A 5901.

GR: Can you talk through the risk assessment that was carried out?

CW: I had been on the East Brae before and had a walk around and walked the platform.

GR: Your document that was out of date, where did you get it from?

CW: It was from 2013 I think.

GR: Where did you get it from?

CW: It was issued to me on a disk and stored on the Marathon network…

GR: How long have you been using the out of date document?

CW: About 3 years.

GR: This one is concerning for me from the investigation. You carried out a risk assessment in the workshop.

CW: The tool box talk was held in the workshop and signed off.

GR: Why?

CW: A bad habit I have gotten into. It is close to the worksite. It is a bad habit but easier for the noise level.

GR: As a level 3 you were not kitted out to carry out a rescue, can you talk us through the requirements?

CW: Fergus told me in the investigation. No one has pulled me up before apart from Rab on this occasion. It has been 18 months working together and never said anything before. I know now what it says in the procedure.

GR: How did Rab get the document?

CW: I don't know.

GR: You didn't challenge the level 1 for cow tailing.

CW: This is what I have always done. I fully accept what Fergus told me.

GR: What would you have done?

CW: Explained about using the ladder to tag.

GR: Can you comment on the pipe work and your awareness?

CW: I have always done best practice but I have got into bad habits. Explained that he attached to large pipes…"

59. Mr Reid asked the claimant if he had access to TMS off shore, to which the claimant replied that they had the PCs, but he was unsure about TMS. He went on to say that he admitted that he had made mistakes, but stressed that he was not aware of the new procedure. He said that Mr Cameron's taking him through various scenarios was a "huge learning for me". He reiterated that it was not deliberate, that he was acting in good faith, and that he had got into bad habits. Mr Reid asked if the claimant

felt that the meeting was fair, and he was recorded as having replied that it was.

60. Mr Reid and Ms Sharp signed the meeting notes, but the claimant did not (84).

61. On 18 September 2019 Mr Reid wrote to the claimant to confirm the outcome of the disciplinary hearing (88):

"…The hearing was arranged to discuss the allegation that you violated the working at height procedure and were using the incorrect version of the procedure. We also discussed that your safety equipment was not fully set up for the task and you were not kitted out to carry out a rescue.

You were provided with a copy of the evidence gathered from the investigation concerning the allegation and you confirmed you had received this. The details of our investigation into the alleged misconduct found that you were working from an old working at height procedure.

During the hearing you were asked to comment on your actions and you stated you had been issued the document you were using on a CD. The document you were working from was dated 2013. You confirmed you had heard of TMS but did not use this to access the latest version of the procedure. You were also not aware how the other level 3 had the new version.

You were asked about carrying out the risk assessment in the workshop and you confirmed this is where it was signed and has become a bad habit. You stated you had a walk around and the site was close to the workshop.

During the hearing we also discussed that you were not safely kitted out, as a level 3, to carry out a rescue. You advised that this was explained to you in the investigation but no one had pulled you up on this before. You also stated this was not in the document you were using but understood this is in the most up-to-date version.

In view of the above, I have decided to dismiss you from the organisation's employment as this is a breach of our 10 Golden Rules of Compliance and our working at height procedure. As a level 3 you have access to TMS and should have been using this to access your procedures as the other level 3's are doing. From further investigations all personnel offshore have access to this. Your failings on this job stem from not using the latest version of the procedure.

As discussed with you today, you are therefore dismissed with notice, however you will be paid in lieu of notice and 18th September 2019 will constitute the effective date of termination of your employment. You will receive monies due up to this date including any accrued and untaken holidays and notice in the next pay date."

62. Mr Reid notified the claimant of his right to appeal within 5 working days of receipt of the letter, to Alison Porter, Human Resources Manager.

63. The claimant was dissatisfied with the outcome of the disciplinary hearing, and accordingly he submitted an appeal against the decision to dismiss him (90), having signalled by email on 21 September 2019 his intention to do so (92).

64. The basis of his appeal, he said, was *"that I believe the sanction of dismissal is disproportionate to the alleged offence. There was no injury to anyone and no damage to property or equipment. Indeed this issue only came to light because of bad blood between two technicians. I was not knowingly violating procedures, I never have. The maintain the events falls into the classification of a systems failure…"*

65. The claimant then recited the reasons why he considered this to be the case. He said that updated rope access procedures had never been communicated to him, and that he continued working in accordance with the methods he was taught as a Level 1 in 1995. He stressed that East Brae has open modules, and that it was not always possible to complete talks and paperwork outside in open areas due to noise and weather conditions, and accordingly it was common practice to review the work

site then subsequently sign the paperwork inside where it was easier for parties to communicate.

66. He went on to say that Mr Cameron had said that he had needed a RA induction to review up to date procedures, but his position was that he had never had such an induction provided to him.

67. He maintained that since TMS was a total management system, and therefore assumed that it was for management; at no time had the respondent provided him with access to the system together with updated procedures. He felt it was reasonable to assume that audits and site visits would have highlighted the fact that he and colleagues were using out of date procedures.

68. He reiterated, when considering the terms of the eighth paragraph of his letter of dismissal, that it was not true that he had had access to the TMS online system, and that he had never been provided with the website or login details. He asserted that other Level 3s were attaching outdated procedures to the work permits. He denied that it had ever been stated that a Level 3 must be fully kitted out. He said that if the respondent had provided him with up to date procedures he would have complied with them. He had an impeccable safety record, and was extremely hurt that his reputation was being “destroyed” due to the allegation of unsafe working.

69. He asked that the respondent agree with his position that the decision to dismiss him was disproportionate, and that the sanction should be reduced.

70. An appeal hearing was fixed to take place on 21 October 2019, and the claimant was invited by letter dated 16 October 2019 (106). The hearing was conducted by Kenny Bennet, Operations Director, who was accompanied by Jean Moir, HR Business Partner. The claimant attended and was accompanied by a trade union representative, Jake Molloy. Minutes of the meeting were taken (108ff).

71. Mr Bennet asked the claimant if he had seen the TMS. The claimant replied that *"…he had still not seen the TMS and thought that it came on a disk with number behind it and confirmed that he now knew where it was. CW advised that the last rope access induction he had done was with Fiona Mann for RBG and Fergus Cameron (FC) had included the procedures in the induction."*

72. The notes went on:

"KB advised CW that he had done the rope access updates in March 2014 and he scored 97%.

CW confirmed that he had been doing this role for a long time and he could score 70/80% without going through the procedures as he would score high anyway…"

73. Mr Bennet is then noted to have asked the claimant as follows:

"KB asked CW if he believed that it was the Level 3's responsibility to operate a safe level of work and look out for his Level 1.

CW confirmed yes it was.

KB asked CW if he thought it was a safe practice to be hanging off process pipeworks?

CW advised that they have always done that.

KB advised that the procedure for safety equipment you should always have safe footing.

CW advised that he held up his hands and it certainly would not happen again and confirmed that a 4" diameter was a definitely a no no.

KB advised that he did not believe that a fire hydrant box is safe to stand on.

CW advised if you put your weight on something and it is sturdy enough to stand on then you would go ahead. CW advised that he had learned from this."

74. The claimant reiterated that he believed he should have been given a login for the TMS. He said that audits had been carried out by Marc Forbes in the previous two or three years, and that Mr Whitehead was carrying out rope access audits where paperwork and permits had been checked when CW had been absent.

75. When asked why he was not kitted out to carry out a rescue, the claimant said that he could slip on a harness within 90 seconds, that he accepted the issue of being ready for a rescue, and that in this case he would have been ready.

76. Mr Bennet asked him about the blue bag he had with him with his rescue kit, and the claimant confirmed that he used his own bag. He accepted that Mr Cameron uses an orange bag so that everyone would know what it was, but that he could modify his rescue bag quickly and easily, though he had taken on board the comments made, and described this as a "learning curve".

77. The claimant and his union representative stressed that the claimant did not know he was breaching procedures, and that he was prepared to accept that he had bad habits. He said, however, that this was an incident about 2 colleagues who did not get on with each other.

78. Mr Bennet consulted David Graham following the appeal hearing. As a result of having put certain points to him, Mr Bennet received a reply by email from Mr Graham dated 22 October 2019 (114).

79. Mr Graham confirmed to him that the method statements for rope access operations were issued on 11 January 2018, and said that the information was readily available on the East Brae. He pointed out that numerous other Level 3 team leaders had signed front sheets to confirm their adherence to the procedures.

80. Mr Graham also said that even if the claimant did not have access to the TMS Rope Access Hub, there was sufficient defined information contained within the document "TMS-23-MS-04-42-Y-457100001 Marathon East Brae Electrical Installation repair and maintenance campaign" to allow safe operations and give clear instructions not to attach process pipe work without express written permission.

81. He confirmed that it is written into the Rope Access Procedure at section 4.3.6 that all level 3s will be harnessed up during rope access operations. In addition, based on the respondent's own statement and the ICOP references, the level 3 team leader would be expected to have his harness on at all times when technicians are deployed at height on the work site.

82. Mr Graham expressed the view that the claimant's confirmation that he had allowed the technician to climb on top of safety critical equipment to access the worksite, and allowing the level 1 to disconnect his cows tail from the structure and jump from height, could have caused serious personal injury, and amounted to a direct breach of the Golden Rules. This was not the action they would expect from a supervisor.

83. He also said that due to shortage of beds, client decisions and cancelled flights, the respondent has been unable to carry out audits as often as they would have liked.

84. Mr Bennet wrote to the claimant on 4 November 2019 (119) to confirm the outcome of the appeal hearing.

85. He said that he had checked with the IT department and confirmed that no TMS login had been supplied to the claimant, and accordingly he accepted that the claimant did not have full access to the full TMS system. However, he said that the annual issue of various method statements had been sent to the claimant by email dated 23 January 2019, and a copy of that email was attached.

86. He pointed out that the method statement was very clear, and that it was also referenced on the permit to work which was issued for the scope of work relating to the job being carried out.

87. He quoted from Mr Graham's letter setting out his advice as the Technical Authority. Mr Bennet then stated: *"In conclusion, our Technical Authority believes that you have failed to provide and maintain a safe system of work and have knowingly placed a fellow worker at risk of a fall to his severe injury."*

88. He went on:

"After an adjournment, which gave me time to properly consider your grounds for appeal and investigate further. I have considered carefully all the facts presented and listened to and taken account of your comments.

In reaching my decision, I have taken into account your conduct record and length of service and have considered whether a lesser sanction would have been appropriate.

I am satisfied that the matter was dealt with properly and thoroughly at the Disciplinary Hearing and that the correct decision was made at the Hearing and consequently I am unable to uphold your appeal."

89. This concluded the claimant's internal processes.

90. Following the claimant's dismissal, he attempted to find alternative work in the Rope Access industry, but found this impossible owing to the need to disclose to prospective employers that he had been dismissed for a reason related to health and safety. He has been a resident of Spain for some 12 years, and accordingly started to look for work in Spain following the appeal hearing. He did not start looking for work until that point as he had been confident that he would be reinstated at appeal.

91. The parties agreed a Statement of Agreed Facts which was presented to the Tribunal following the conclusion of the hearing, and it is appropriate to record what was agreed here.

92. The claimant's weekly wage prior to his dismissal was £927 net.

93. During the period 2 June 2020 to 17 July 2020 the claimant earned £1,018.37 net.

94. During the period 18 July 2020 to 30 June 2021 the claimant earned £10,118.79 net.

95. The claimant's ongoing earnings are £204.42 net per week.

96. The claimant's primary application is to be reinstated with the respondent. His evidence was that notwithstanding the allegations of falsifying documents which he originally made against the respondent in these proceedings he would be willing and able to continue to work for them as an employer. He said that he was not making allegations against one person in particular.

97. Mr Cameron expressed the view that he would not have confidence in the claimant conducting himself in a safe manner and protecting those working with him. He considered that his attitude to health and safety was wrong, having become complacent with the responsibility which his role brought with it. He asserted that the claimant put Mr Burgess' life at risk.

Observations on the Evidence

98. In an unfair dismissal claim, the obligation upon the Tribunal is not to carry out the fact-finding exercise which is incumbent upon an employer, but to consider the facts established by the respondent and determine whether or not, on the information available at the time and following a fair procedure and reasonable investigation, the respondent had reasonable grounds for finding the claimant guilty of the misconduct alleged and thereby deciding to dismiss him.

99. As a result, the evidence given by witnesses relates to what was before the respondent at the time rather than setting out the events as they were said to have happened.

100. It is appropriate for the Tribunal to consider the credibility and reliability of the evidence given by the various witnesses, to the extent that that is necessary for the determination of those issues.

101. The witnesses for the respondent were largely straightforward and sought, in my judgment, to assist the Tribunal by giving their evidence in a helpful and open manner.

102. Mr Cameron and Mr Graham were both regarded, and treated, by the respondent as experts in Rope Access. There is no doubt that they are entitled to be regarded with great respect in this field, having many years' experience and expertise in it. I considered them both to be honest witnesses, but there were occasions when they relied upon an assumption rather than a tested fact. For example, both were strongly of the view that the claimant, as a level 3 team leader, had access to the TMS, and moreover had been sent emails confirming when the Rope Access Procedures, as other Procedures on the TMS, were being updated. It is apparent from the evidence that this was not correct, and that the claimant had never had an email address at the platform to which such updates could be sent.

103. The other witnesses for the respondent – Mr Whitehead, Mr Reid and Mr Bennet – were candid in accepting that they largely relied upon the knowledge of Mr Graham and Mr Cameron in determining their attitude to the claimant's actions as the experts in Rope Access. Nevertheless, they emerged as honest and reliable witnesses before me.

104. The claimant's evidence gave rise to some concern. In particular, his witness statement, at paragraphs 35, 36, 37, 38 and 44 contained assertions that the respondent had been guilty of falsifying controlled documents, failing to provide proof that the final permit had not been edited previously, forging the risk assessment document and tampering with evidence to cover their own mistakes.

105. When Mr Hughes cross examined the claimant, he challenged him to name the individual or individuals to whom he had spoken at the respondent's company in making some of these assertions. No objection was taken to that question by Mr Hannah. The claimant declined to name the individual, on the basis that he was a member of the TAQA production team and would be likely to be subject to disciplinary action if he were identified. Mr Hannah confirmed that he wished to leave this matter to the Tribunal to decide.

106. I cautioned the claimant that if he were making a very serious allegation that the respondent had been guilty of falsifying documents, he may require to be instructed to answer the question as to the basis for that allegation. The claimant then agreed to delete certain statements from his witness statements, in the paragraphs set out above (namely 35, 36, 37, 38 and 44).

107. The claimant's willingness to withdraw very serious allegations, which he had been initially prepared to make in these proceedings, gives rise to concern as to whether or not those allegations were well-founded at all. In light of the claimant's refusal to give up the identity of the person at TAQA with whom he had been in contact about this matter, there is no basis in evidence to support such a grave allegation before the Tribunal. That he was willing to make and then withdraw such an allegation reflects poorly on the claimant's credibility, in my judgment.

108. Further, the claimant's clear evidence to the internal disciplinary hearing was that he had access to the 2013 Rope Access Procedure. However, before this Tribunal, the claimant's position changed, and he insisted repeatedly that he had in fact meant that he had seen a 2012 version. No evidence was presented by the claimant to point to such a version, and indeed it was not put to the respondent's witnesses that there was such a version.

109. Finally, the claimant's witness statement, at paragraph 4, asserted that he noticed Mr Burgess, during his descent, removing one point of contact while still off the ground, and proceeded to instigate a safety conversation with him that he should always remain on two points of contact while off the ground. In the handwritten statement provided to the respondent in the investigation (61/2), the claimant said that Mr Burgess had "removed his cowstail and jumped off the hydrant box in one motion." There is no reference there to his removing one point of contact and leaving another attached, as his witness statement seems to suggest, and no conversation is described in that handwritten statement.

110. As a result, I have some misgivings about the claimant's evidence and in particular whether it can be regarded as consistent and credible.

Submissions

111. For the respondent, Mr Hughes made an oral submission, which is summarised briefly below.

112. The respondent has admitted dismissal of the claimant, but denies that the claimant was unfairly dismissed. The Tribunal is therefore invited to dismiss the claimant's claim. In the event that the Tribunal were to find that the claimant was unfairly dismissed, it would not be just and equitable to reinstate the claimant, and any award of compensation should be substantially reduced on the basis of the claimant's contributory conduct, and for Polkey reasons.

113. Mr Hughes submitted that the claimant was a very experienced employee, who had worked for almost 20 years as a level 3 team leader, who prided himself on his attention to his work. He underwent regular re-certification through IRATA.

114. He sought to address the procedures to which the claimant had access and purported to work. He submitted that there was no prior indication that the claimant's evidence would be that he did not have access to the 2013 Rope Access Procedure. He has not produced any other procedure.

That Procedure was issued on 1 April 2013, and the claimant sat an exam about those procedures in 2014. He surmised that since the claimant had seen that question 2 in that exam referred to version 12, that meant that he had the Procedure from 2012, but the evidence was that at all material times the claimant had the 2013 Procedure. The investigation and the disciplinary hearing clearly recorded that that was the Procedure to which he had reference. If the Tribunal were to find that the Procedure was from 2012, there is no evidence available as to what the content of that Procedure was.

115. The 2013 and 2017 Procedures are, he said, to all material respects the same, and the responsibilities imposed upon the level 3 team leader are the same in both. Accordingly, Mr Hughes submitted that the Procedure the claimant had in 2019 was essentially the same as the one he said he was working to. He accepted, for example, that he should have been harnessed up.

116. The Method Statement is also an important indication of the responsibilities to be carried out by the level 3. The claimant received an email enclosing that Method Statement, albeit that it was nominally related to Brae Bravo, a different platform. If he did not have the correct Method Statement, Mr Hughes argued that the alternative proposition for the respondent would be that he was aware of it but chose to ignore it.

117. The claimant was aware of, and agreed to work to, the respondent's Golden Rules of safety, and also the Work Permit and the Risk Assessment for the job. Accordingly, Mr Hughes argued that whether or not the claimant had the most up to date Procedure was largely irrelevant. The respondent's position that the Procedures were identical as between 2013 and 2017 was not challenged in any way.

118. The respondent followed a fair and appropriate procedure in dismissing the claimant, compliant with the ACAS Code of Practice. An appropriate and reasonable investigation was carried out, in which the relevant witnesses were interviewed. The claimant's witness statement went

missing and cannot be located. The allegations against him were set out to him, and he was offered the opportunity to answer them in the disciplinary hearing. He was also offered the right of appeal against dismissal.

119. The dismissal letter could have been better worded, he conceded. It contained some confusing points, but the claimant was aware of the reasons for his dismissal, which was not just related to outdated Procedures.

120. With regard to the allegations themselves, there was evidence in relation to each from the claimant which reasonably entitled Mr Reid to come to the conclusion which he did.

121. With regard to out of date procedures, the claimant did rely on such procedures; the question is whether he was the one at fault. He made no effort to inquire as to whether the respondent's procedures had been updated since 2013.

122. Mr Hughes conceded that there is an issue with the respondent's process for updating staff and management about their procedures. The claimant accepted that he did receive updates by email on a regular basis, but did not accept that he had received updates of the Rope Access Procedure. Mr Reid reasonably concluded, he said, that the claimant should have taken steps as a responsible level 3 team leader to have updated himself on the procedures, and he was shocked that the claimant had not done so. He wilfully closed his ears and eyes, and the respondent is entitled to expect more from a level 3. Such a position has very serious health and safety responsibilities.

123. The respondent concluded that he had carried out the Task Risk Assessment (TRA) in the workshop. In his evidence before the Tribunal, the claimant asserted that only the paperwork was done there, but that the risk assessment itself was carried out at the site. That was not, he submitted, the position he took and which was noted in the investigatory

and dismissal hearings. He accepted that Mr Cameron would "call him out" on that, and that he had developed bad habits.

124. The TRA requires to be carried out on site on every occasion. Mr Hughes said that this is not a small matter, and the claimant accepted that. It was a very serious matter not to comply with this requirement.

125. The claimant was also alleged not to have used appropriate safety equipment and not to have been kitted out for rescue. The claimant admitted that he was not wearing a harness, as required, and Mr Reid was clearly entitled to conclude that he had breached that requirement. He also accepted that he did not have the orange rescue bag, and that he had taken some equipment in his own bag. He said that it would take him 90 seconds to don his harness, which the respondent's witnesses were scathing about, saying that that was an extremely long time in a rescue situation. Taking time to put on a harness and for others to locate his safety equipment is, submitted Mr Hughes, simply unacceptable. It is no excuse to say that the rescue bag was too heavy, which was his position in the investigation and in evidence. The respondent was therefore entitled to conclude that these were serious breaches of the respondent's procedures which were admitted by the claimant.

126. The claimant did not challenge the allegation that the cowstailing technique was not appropriate. He accepted what Mr Cameron had told him. This was one of the reasons why the respondent chose to dismiss the claimant.

127. The claimant accepted that pipework should not be used as an anchorage. The Rope Access Procedure makes clear, said Mr Hughes, that selecting appropriate anchor points is an important part of a safe system of work.

128. He asserted that the claimant's evidence was disingenuous. The statements clearly recorded that Mr Burgess was using the pipework upon which he was climbing to reach the electrical box on which he was working. The claimant apologised for allowing this.

129. He made further statements in the appeal hearing to the effect that he was referring to anchor points on the pipework. Pipework cannot be relied upon as it cannot be assumed to have the strength to support the weight of an individual, creating an immediate and obvious risk of injury.

130. Mr Hughes turned to the allegation that the claimant had breached the Golden Rules, and in particular to the rule that one must always be attached while working at height. The claimant gave evidence that Mr Burgess always had one point of attachment, which would mean that he was not in breach of the Golden Rule but of the Working at Height Regulations, which require two points of contact at all times. The claimant was responsible for setting that system of work, but failed to ensure that a safe system was operated.

131. The decision to allow him to use the firebox to jump off resulted in Mr Burgess detaching. Mr Cameron found that the cowstail would not be long enough to allow Mr Burgess to remain attached and jump to the floor from the firebox. The evidence was strongly indicative of Mr Burgess having detached completely from both points of contact before the claimant allowed him to jump down. The claimant set up a system which allowed a level 1 technician knowingly to breach one of the Golden Rules.

132. Mr Reid, he argued, was then entitled to consider dismissal of the claimant, taking into account any mitigating factors, which in this case related to his length of service. The claimant was guilty of several serious breaches of procedure, and dismissal was almost inevitable. The dismissal letter makes clear that the claimant was dismissed for multiple reasons, and the claimant, he submitted, was aware of that, as is show in the ET1 and the amendment thereto.

133. The claimant's argument was that the appeal substituted a new reason for dismissal. Mr Bennet went to David Graham and asked some reasonable and legitimate questions to allow him to assess the appeal. Rope access work is complex, and it was important to get an expert view, which is what Mr Bennet did.

134. Mr Bennet concluded that Mr Reid's decision was correct. As a result, the appeal only upheld the decision as made, and did not add any new allegations. The reasons for dismissal are the same in the dismissal letter.

135. Mr Hughes submitted that the claimant sought to blame the respondent for failing to carry out audits but this would have made no difference to the current case. The claimant had admitted that he had fallen into bad habits, and any audit would have picked that up. He would have been dismissed sooner, on that reckoning. The claimant accepted that he did not need any training for the task, and he never asked for such training at any time.

136. With regard to remedy, Mr Hughes submitted that if the claimant were successful, reinstatement should not be granted, as it would not be practicable for the respondent to comply with such an order. It has been 2 years since dismissal, and there are no level 3 vacancies. It was an important role, and the claimant has failed to accept at any stage the seriousness of his failings, and in addition has sought to blame others. Essentially, Mr Hughes argued, the claimant blames others for not having caught him sooner.

137. The absence of up to date procedures was a "red herring", he said. The claimant had to be able to work largely unsupervised. Safety offshore is of fundamental importance. He breached the procedures he had. They had to trust him to carry out the work he was given, and that trust is lost.

138. The claimant has, moreover, made serious allegations against senior management, and it cannot be expected that they could welcome him back with open arms.

139. In any event, the claimant contributed wholly or substantially to his own dismissal.

140. He submitted that while a reduction by 100% to the award of compensation due to contributory conduct is rare, it is close to that in this case, but should not be less than 75%. The claimant wilfully disrespected the procedures and the method statement for the task being carried out here.

141. For the claimant, Mr Hannah expressed gratitude for Mr Hughes' detailed and well-considered submissions, but signalled his disagreement with certain parts of his analysis of the case.

142. He accepted that conduct is a potentially fair reason for dismissal here.

143. Mr Hannah then referred to the dispute between Mr Burgess and Mr Hamilton, following which Mr Hamilton submitted a complaint. The claimant accepts that Mr Cameron was entitled to carry out a full investigation into this matter once raised with him.

144. The question for the Tribunal to determine then is whether the respondent had reasonable grounds on which to reach their conclusions. The claimant says that the minutes of the meetings were not accurate, and the Tribunal must determine what it makes of that evidence. There was not clear and straightforward evidence about the issues leading to dismissal, such as whether he operated without secure attachment, used pipework, failed to use harness or rescue equipment.

145. Generally, the claimant does not take issue with the process followed by the respondent in general.

146. The matter with which the claimant takes issue is whether dismissal was within the band of reasonable responses open to a reasonable employer. The evidence of Mr Reid which suggested that he had taken account of mitigating factors is not reflected in his witness statement: at paragraph 45, he simply stated that there was no mitigating information at all. The respondent's actions must be seen, in addition, against the background of the way in which they promulgated their safety procedures. The

responsibility cannot lie solely with the claimant, particularly having regard to the evidence about the respondent's system of work.

147. The claimant's alleged failings must be considered together, and also together with the respondent's failings. The evidence suggested that one witness might say that the claimant had unfettered access to the TMS, whereas another may say that that was not the case.

148. What we do know, submitted Mr Hannah, is that what started as a breach of the Golden Rules in Mr Hamilton's email, had it been established, would have been a significantly clear breach of the safety rules amounting to gross misconduct. However, the investigation then uncovered a number of apparent failings, and it became much less clear to what extent these were failings of the claimant. What Mr Cameron discovered was much less significant than what was reported to him in the first place. It was unclear whether Mr Burgess was standing on the pipes or anchored to them. It has to be reasonably clear, and judged against the degree of discretion allowed by the Procedure.

149. The question is whether Mr Burgess became detached with the consent of the claimant, which needs to be judged against all of the evidence.

150. With regard to the harness, and the TRA carried out away from the worksite, Mr Hannah said that the evidence was not so clear as to allow Mr Cameron to take such a straightforward view of matters as he did.

151. What is at issue, with regard to the investigation, is whether it was reasonable. The way the respondent proceeded from investigating the claimant's failings to looking at whether the respondent had acted reasonably is at issue. 2 witnesses were not prepared to concede anything in cross-examination, and attributed all fault to the claimant. 3 later witnesses made concessions which, had they been made in the internal process, may have led to a different outcome. He questioned whether the respondent's witnesses were as familiar with the Procedure and the way in which it was communicated to staff as they might have been.

152. Mr Hannah observed that the respondent suggests now that there were few differences between the 2013 and 2017 procedures, but said that he could not accept this, as the use of outmoded procedures remained a significant part of the respondent's criticisms of the claimant.

153. Mr Hannah seeks to criticise the respondent's fact-finding process. He said that if the use of an outdated procedure were not part of the reason for dismissal, it is not possible to say what the outcome of the disciplinary process would have been. This is not a procedural point but a criticism of a fundamental part of the respondent's reasoning. The respondent may now say that the outcome would have been the same, but we will never know if that is the case, he submitted.

154. It is important to consider this point not only in light of the inadequate communications, but also of the fact that Mr Reid misapprehended that the claimant had access to the TMS system. This is a substantive matter.

155. He submitted that what it comes down to is whether the respondent was at fault, and reasonableness must be viewed in that light. If they did not operate a safe system of work, the dismissal requires to be judged in that light. The question then is whether the claimant should be held responsible when the respondent has failed to provide such a system of work.

156. Mr Cameron set out recommendations that improvements could be made to the system of work, in 4 areas. The fact that the claimant did accept that he may have been at fault in some areas may have some relevance to the question of remedy.

157. The respondent did not act fairly or reasonably in treating the claimant's actions as justification for summary dismissal. The claimant had a lengthy, exemplary record of safety. Mr Hernandez said that he would not be here if the claimant were not his supervisor.

158. Mr Graham's evidence consisted of long convoluted answers to questions which obfuscated the question of responsibility. He declined to accept that the permit system acted as a check on whether the system of work was safe or otherwise. Mr Graham's answers were unsatisfactory in considering the responsibility of the supervisor. He did not accept any responsibility between the respondent and their clients for ensuring that the later versions of the Procedure were attached to the permits. It makes no sense to have a permit system if there is no scrutiny.

159. Mr Cameron's evidence was that all level 3 team leaders are sent emails identifying updates to TMS. The respondent, however, only produced one email, and Mr Hannah invited the Tribunal to "make of that what you will". Mr Reid proceeded on a misunderstanding of the available access given to the claimant to the online TMS system.

160. Mr Hannah said that Mr Hughes' argument is that audits would have made no difference, but asked how he would know that. It is wrong to say that the result would have been to have led to an earlier dismissal. It would have been an opportunity to verify the processes, not to catch him out.

161. Witnesses suggested that if a level 3 did not have access to TMS, they would have known to ask the focal point, but again, Mr Hannah said, there was no evidence that this was communicated clearly to the claimant and all employees.

162. It is unclear as to whether Mr Burgess was anchoring to pipes or stepping on them. There is a discretion about the use of pipework. The respondent seemed to suggest that there was an absolute prohibition.

163. The failures in this job stem from not having had the correct procedure, but Mr Reid misunderstood the claimant's access to updates of the procedure.

164. Mr Hannah submitted that reinstatement would be just and equitable in this case. Trust and confidence must be judged according to all the circumstances. Whether it is now reasonably practicable is a separate consideration. It is a long time since he was dismissed and there are no current vacancies available at his level.

165. Other staff were put through retraining following the claimant's dismissal, and that could be granted to the claimant if he were reinstated.

166. Mr Hannah invited the Tribunal to find in favour of the claimant and to grant the remedy requested by him.

The Relevant Law

167. In an unfair dismissal case, where the reason for dismissal is said to be conduct, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

> "Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –
>
> > (a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
> >
> > (b) shall be determined in accordance with the equity and substantial merits of the case."

168. The Tribunal also referred to section 123(6) of ERA, which provides that "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

169. Further, in determining the issues before it the Tribunal had regard to, in particular, the cases of **Burchell** and **Iceland Frozen Foods Ltd**, to which I was referred by the parties in submission. These well known cases set out the tests to be applied by Tribunals in considering cases of alleged misconduct.

170. **Burchell** reminds Tribunals that they should approach the requirements of section 98(4) by considering whether there was evidence before it about three distinct matters. Firstly was it established, as a fact, that the employer had a belief in the claimant's conduct? Secondly, was it established that the employer had in its mind reasonable grounds upon which to sustain that belief? Finally, that at the stage at which that belief was formed on those grounds, was it established that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

171. The case of **Quadrant Catering Ltd v Ms B Smith UKEAT/0362/10/RN** reminds the Tribunal that it is for the employer to satisfy the Tribunal as to the potentially fair reason for dismissal, and he does that by satisfying the Tribunal that he has a genuine belief in the misconduct alleged. Peter Clark J goes on to state that "the further questions as to whether he had reasonable grounds for that belief based on a reasonable investigation, going to the fairness question under section 98(4) of the Employment Rights Act 1996, are to be answered by the Tribunal in circumstances where there is no burden of proof placed on either party."

172. The Tribunal reminded itself, therefore, that in establishing whether the Respondents had reasonable grounds for their genuine belief, following a reasonable investigation, the burden of proof is neutral.

173. Reference having been made to the **Iceland Frozen Foods Ltd** decision, it is appropriate to refer to the well-known passage from that case in the judgment of Browne-Wilkinson J:

> *'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by S.57(3) of the 1978 Act is as follows:*
>
> *(1) the starting point should always be the words of S.57(3) themselves;*
>
> *(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
>
> *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
>
> *(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'*

Discussion and Decision

174. The Tribunal had to address, firstly, the reason for dismissal in this case, and whether it amounted to a potentially fair reason under section 98(4) of the 1996 Act. The respondent dismissed the claimant, in this case, for gross misconduct. There appeared to be no dispute about that, and that this amounts to a potentially fair reason for dismissal on their part.

175. It is then necessary for the Tribunal to determine whether or not the dismissal was fair, having regard to the terms of section 98 of ERA, and taking into consideration the well-known authorities which provide guidance in this exercise.

176. In light, in particular, of the Judgment in **Burchell**, the Tribunal must determine whether the respondent had a genuine belief in the claimant's guilt. In my judgment, this is straightforward. Mr Reid came across as a believable and sincere witness who genuinely believed that the claimant had acted in breach of the respondent's standards in his supervision of Mr Burgess in the incident in question.

177. What the Tribunal must then consider is whether the respondent had reasonable grounds upon which to base such a belief.

178. It is essential to review the reasons for dismissal given by the respondent at the time, taking into account both the dismissal and the determination of the appeal against dismissal.

179. The letter of dismissal written at the relevant time by Mr Reid (88) is not well drafted, as Mr Hughes appeared to accept. The letter is brief and summarises the respondent's findings on a number of points before setting out the decision reached. Given that the claimant was taken to a disciplinary hearing in order to answer a number of specific allegations, it may have been more helpful for the letter to address each of these allegations and set out the finding made, rather than summarising conclusions.

180. It is true, in my view, that the claimant did complain particularly about the terms of the letter of dismissal, though some questions were directed to the respondent's witnesses about the wording of parts of it.

181. Reading the letter as it stands, it is plain that the finding made by Mr Reid was contained in this paragraph:

"In view of the above, I have decided to dismiss you from the organisation's employment as this is a breach of our 10 Golden Rules of Compliance and our working at height procedures. As a level 3 you have access to TMS and should have been using this access your procedures as the other level 3's are doing. From further investigations all personnel offshore have access to this. Your failings on this job stem from not using the latest version of the procedure."

182. In order to understand this passage in its context, it is necessary to discern to what "in view of the above" referred to. In my judgment, the statements made above, to which Mr Reid was referring and upon which he was therefore relying, were:

- *"The details of our investigation into the alleged misconduct found that you were working from an old working at height procedure."*
- *"The document you were working from was dated 2013. You confirmed you had heard of TMS but did not use this to access the latest version of the procedure. You were also not aware how the other level 3 had the new version."*
- *"You were asked about carrying out the risk assessment in the workshop and you confirmed this is where it was signed and has become a bad habit. You stated you had a walk around and the site was close to the workshop."*
- *"…we also discussed that you were not safely kitted out, as a level 3, to carry out a rescue. You advised that this was explained to you in the investigation but no-one had pulled you upon this before."*

183. The allegations which the claimant had been invited to answer at the disciplinary hearing (78) were that *"…you violated a working at height procedure as well as:*

- *Used incorrect versions of procedures*
- *TRA was carried out in the work shop*
- *Safety equipment was not fully set up for the task*
- *As a level 3 you were not kitted out to carry out a rescue (no harness donned during cows tail operation)*
- *No direction and or challenge to level 1 cow tailing technique*
- *No awareness on the requirements for pipe work to be used as anchorage*
- *Showed poor judgement in rope access set process (should have set up releasable anchor system)"*

184. The allegations were discussed by Mr Reid with the claimant during the disciplinary hearing, and accordingly it is my conclusion that Mr Reid took these allegations, and his findings on them, into account in reaching this decision.

185. I have concluded, therefore, that Mr Reid decided that the claimant's supervision of Mr Burgess in the exercise of his duties was in breach of the respondent's procedures.

186. Dealing with those allegations, and considering the evidence available, it is necessary to consider whether there were reasonable grounds for reaching the conclusion that the claimant was guilty of gross misconduct in his actions.

187. **Used incorrect versions of procedures.** There is no doubt that the claimant did not have or place reliance upon the 2017 Rope Access Procedure. He was reliant upon the 2013 Procedure. In my judgment,

the claimant's assertion that he had a 2012 Procedure is simply unsupportable on the evidence, and it is entirely unclear to me why he chose to give such evidence before the Tribunal when he had not made any such suggestion to the internal disciplinary or appeal processes. There is no evidence upon which I could conclude that there was a 2012 version of the Procedure, and all of the respondent's witnesses were adamant that the 2013 Procedure was the one which preceded the 2017 Procedure, and that the claimant had referred only to 2013 in this regard.

188. The respondent clearly regarded the claimant's reliance on an incorrect version of the Procedure as an act of misconduct. Mr Hannah made the point, however, that if the respondent is correct in asserting, as they do, that there was no material difference between the two Procedures, this was not a significant matter and should not have been regarded as serious. While seeing that this is an attractive argument, I have concluded that the respondent's position throughout these proceedings has been that safety on offshore platforms must be held to have the highest priority, and that the very fact that a level 3 team leader was using an out of date Procedure is itself a cause for serious concern. In light of all of the circumstances of this case, it seems to me that that is, of itself, a justifiable position for the respondent to take.

189. However, there is a difficulty in this for the respondent, which is that Mr Reid plainly found that the claimant had access to the online TMS system offshore, and was therefore culpable in his failure to take that updated version into account. Mr Reid, as was confirmed by the appeal panel, was quite wrong in his finding that as a level 3 the claimant was told whenever there was an update to the Procedure on TMS. The claimant did not have an email address on the platform, and there was no evidence at all that he ever received any confirmatory communication from the respondent's senior management which would have alerted him to the updated version of the Procedure.

190. In the appeal, Mr Bennet accepted that the claimant had not had the benefit of such updates to the Procedure, but concluded that he had received method statements directly related to the electrical work on Marathon was issued to him by email in January 2019.

191. While it is unsatisfactory that the original dismissal letter made an assertion which turned out to be incorrect, particularly as it was asserted by Mr Reid that he had looked into the matter, the respondent did address this issue on appeal and I have concluded that the claimant's responsibility for maintaining his own knowledge, allied to his awareness of the terms of the method statement for electrical work and his regular IRATA testing on the procedure meant that it was legitimate for the respondent to conclude that he was at fault for failing to ensure that he was relying upon the correct procedure in this case.

192. **TRA was carried out in the work shop.** The claimant admitted that this was the case. In his evidence before the Tribunal he sought to suggest that he had actually scrutinised the area on site but had then gone to the sheltered area of the work shop to complete the paperwork. That differed from his evidence in the internal process, wherein he accepted that he had got into a bad habit and therefore that he had not complied with the respondent's requirements.

193. **Safety equipment was not fully set up for the task.** The claimant accepted that he did not have the orange rescue bag to hand when he attended the site, but maintained that he had a blue bag of his own into which he had transferred some of the kit required. The respondent concluded that the claimant did not have the full rescue equipment at the scene, and in my judgment that was a justifiable conclusion. The claimant never properly explained why he would not simply take the rescue bag, which was ready for use in an emergency, but instead transfer some but not all of the equipment into a different bag to take with him. In my judgment, the respondent was right to regard the claimant's response as inadequate. In any event, there was no dispute by the

claimant that the equipment which he did have remained in the bag, and was not set up in the event of a rescue.

194. The claimant said that it would only take him 90 seconds to don a harness in order to effect a rescue, but the respondent was unimpressed by this, on the basis that an emergency situation may require an immediate response, which would be delayed by the need to put on safety kit which was readily available.

195. **As a level 3 you were not kitted out to carry out a rescue (no harness donned during cows tail operation).** In my judgment, this is very similar to the previous point, and the claimant's response in the disciplinary hearing was essentially to say that he accepted what Mr Cameron had told him about the requirements of the Procedure, but that nobody had "pulled him up about it" before.

196. In my judgment, the respondent was justified in concluding that the claimant had failed to comply with the requirements of the Procedure in this regard, admitted such failure in the disciplinary and failed to advance a good reason for that failure.

197. **No direction and or challenge to level 1 cow tailing technique.** Mr Reid found that the claimant had not acted so as to prevent Mr Burgess from detaching the cows tail while on top of the fire box, and thereby being unattached while at height (it being accepted by the claimant that any height above floor level means being at height). In my judgment the respondent was entitled to conclude that by failing to prevent Mr Burgess from detaching completely from the anchor point and jumping off the fire box, or at least by failing to take action to ensure that Mr Burgess was aware of his responsibilities for working at height, the claimant was culpable and allowed Mr Burgess to place himself at risk of injury.

198. In my judgment, the claimant's protests about the Procedure, and his access to the most recent version, can be treated as being disingenuous. He was an experienced level 3 team leader in rope access. In effect, the

respondent was entitled to treat him as an expert in rope access activities, and to carry out such activities in a way which complied with the Procedures in place. The claimant's actions in this process fell below the standards which they were entitled to expect from him, and in my view they were justified in concluding that the claimant had been guilty of failing to direct or challenge Mr Burgess in ensuring that he did not detach himself from the anchor points in such a way as to place himself at risk.

199. **No awareness on the requirements for pipe work to be used as anchorage.** The evidence available to the respondent confirmed that the claimant had allowed Mr Burgess to attach himself to, and possibly even stand on, pipework while ascending and descending in order to carry out the electrical work required. The claimant's position on this was essentially that there is an exception to this rule in certain circumstances. In doing so, he appealed to the terms of the Method Statement (262) which stated that *"Anchorage to process pipe work is not allowed without written permission from the Offshore Inspection Engineer (OIE) and authorisation from the Offshore Installation Manager (OIM)."* The difficulty for the claimant, however, was twofold: firstly, the fundamental position described there is that anchorage to process pipe work is not allowed; and secondly, that if it were to be allowed, written permission would have had to be obtained from both the OIE and the OIM, and there was no evidence that such permission had been obtained.

200. It is my judgment that the respondent was entitled to conclude that the claimant knew well that Mr Burgess should not be anchoring to or climbing on process pipework in this particular case since there was no permission given to do so, and that he was culpable in allowing this to take place in the circumstances of this case.

201. **Showed poor judgement in rope access set process (should have set up releasable anchor system).** In my judgment the respondent had reasonable grounds for finding that the claimant had failed to set up the anchoring system in such a way as to ensure that the safety of the level 1 was secured.

202. Taking into consideration the findings of the respondent in the process which included both the disciplinary and appeal hearings, it is my judgment that the respondent had reasonable grounds for concluding that the claimant was guilty of gross misconduct in failing to ensure a safe system of work in conducting this incident on 27 August 2019.

203. The Tribunal must then consider whether or not a reasonable investigation was carried out. In my judgment, it was. The respondent relied upon the expert knowledge of both Mr Graham and Mr Cameron, but the claimant was interviewed and given the opportunity to know the detail of the allegations against him, and to answer them. In that process, the claimant's main defence related to the fact that he was not in possession, nor could he reasonably have been in possession, of the most up to date Procedure. He accepted much if not all of what Mr Cameron said to him, and suggested that he had not been fully aware of the obligations upon him, but that he had fallen into bad habits and had not been disciplined before.

204. The respondent interviewed those who were present at the scene, and gave consideration to the information provided to level 3 team leaders, and the procedures in force at the time. Clearly the investigation at disciplinary hearing level was not adequate, to the extent that Mr Reid reached an erroneous conclusion that the claimant had been sent email updates of the procedures on TMS, but that was, in my judgment, resolved in the appeal, and the respondent reached a justifiable conclusion on that point at that stage.

205. I am also satisfied that the respondent followed a fair procedure in reaching the decision to dismiss the claimant. The claimant had the opportunity to know the allegations against him and to respond to those allegations at hearings where he was entitled to be represented.

206. The major issue identified at the outset of Mr Hannah's submission for the claimant was that the respondent, by dismissing the claimant, took a

decision which was outwith the band of reasonable responses open to a reasonable employer in all the circumstances.

207. In particular, Mr Hannah argued very strongly that the failures of management in communicating and disseminating updates to their policies meant that they should take equal if not greater responsibility for the claimant's failures as he himself should.

208. As a result, he argued that a final written warning would have been more appropriate in the circumstances of the case. The claimant himself accepted before this Tribunal that he would have accepted a warning in the case, particularly given his failure to check whether or not he was dealing with the most updated version of the Procedures.

209. In my judgment, the respondent's decision to dismiss the claimant fell within the range of reasonable responses open to a reasonable employer in these circumstances. Employment Tribunals must be careful not to substitute their own thinking for that of an employer, and one reason for that injunction is that an employer such as the respondent has priorities and responsibilities which can only be understood from their perspective. It was suggested at one point that the claimant had placed another employee's life at risk by failing to ensure that the process was properly set up. Given the focus upon the claimant's failure, in particular, to prevent Mr Burgess jumping from the top of a fire box which was a matter of a few feet above the ground, it might be thought that this was an exaggeration for effect.

210. However, it is important to recognise that the safety of employees on board an offshore installation is of the highest importance, and that a level 3 team leader is given considerable authority and responsibility to ensure that this is enforced. The Rope Access Procedure sets out the level 3 responsibilities at some length and detail. Further, it is plain that the respondent's concern in this case did not simply relate to the act of jumping off the fire box, but of relying upon pipework upon which to ascend and descend, failing to carry out a reliable task risk assessment at

the site and failing to be prepared and harnessed up, ready to effect a rescue in the event that an unexpected accident took place.

211. It is not surprising, in my judgment, nor at all unjustifiable, for the respondent to have taken the view that in these failings, the claimant acted in such a way as to be guilty of gross misconduct but also so as to destroy the trust and confidence which an employer must reside in a senior supervisory employee with health and safety responsibilities.

212. The claimant's constant focus upon the respondent's system of communication did not, in my judgment, detract from the fairness of the dismissal. There is no doubt that the respondent did not have an impressive system of working in this regard, and following this incident they required to take steps to improve that system of communication. However, it is also legitimate, in my judgment, for the respondent to have placed reliance upon a senior, experienced Rope Access technician to avoid failings which were fundamental in the respondent's eyes, and which could not be ignored.

213. The fact that the claimant himself accepted that he had been guilty of a level of misconduct which would justify at least a warning is a clear indication that he was responsible for a process which was unacceptable to the respondent. That he maintained during the internal process that he had fallen into bad habits and had not previously been disciplined for such failings suggests that he had become complacent and even casual in his adherence to and attitude towards the respondent's workplace rules.

214. Even if there were some doubt as to whether the claimant was aware of the 2017 Procedure, I am satisfied that his attitude towards the 2013 Procedure, which he admitted to knowing, was unsatisfactory.

215. As a result, I am not persuaded that the decision to dismiss the claimant was outwith the range of reasonable responses open to a reasonable employer in all the circumstances of this case.

216. Accordingly, it is my judgment that the claimant was not unfairly dismissed in this case by the respondent, and therefore that his claim must fail, and be dismissed.

217. I wish to add my thanks to both representatives in this case, Mr Hughes and Mr Hannah, for their professionalism, courtesy and eloquence in presenting their respective clients' cases to the Tribunal. Mr Hannah had plainly been instructed relatively close to the start of the hearing but fought his client's case valiantly. Mr Hughes bore the burden of the extensive preparations for the hearing, particularly in relation to the very voluminous bundle of productions, and presented the material to the Tribunal in an impressive manner. Both sought to assist the Tribunal throughout the proceedings.

Employment Judge	**Judge M A Macleod**
Date of Judgment	**27 August 2021**
Date sent to parties	**1 September 2021**