EMPLOYMENT TRIBUNAL

Claimant: Mr R Curran

Respondent: Doosan Babcock Limited

HELD AT: Manchester **ON:** 21 & 22nd September 2021

BEFORE: Employment Judge Howard (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr K Duffy, Solicitor

JUDGMENT

The claimant's claim of unfair dismissal pursuant to the provisions of S95 & 98 Employment Rights Act 1996 succeeds. The claimant was unfairly dismissed.

The claimant contributed to his dismissal through his culpable conduct; this is reflected in a reduction to the basic and any compensatory award of 80%.

The 'Polkey' provisions apply; any compensatory award is reduced by 80% to reflect the likelihood that the claimant would have been dismissed in any event.

The claimant's claim of breach of contract, being unpaid notice of termination of employment fails and is dismissed.

The matter is listed for a hearing to determine remedy on **13th January 2022** at 10.00am; directions for which are at paragraphs 41 – 43 below.

REASONS

1. This was a hybrid hearing; the respondent's witnesses and representative participated remoted via CVP and Mr Curran attended in person.

2. On behalf of the respondent, I heard evidence from Scott Foster, Construction Manager; Andrew Wilson, Operations Manager and Keith Jones, Service Management Director. I then heard evidence from Robert Curran. During the hearing I was referred to documents contained within an agreed bundle.

The Issues

3. At the outset of the hearing I identified and agreed the issues to be determined with the parties, as follows:

5.1 What was the reason for Mr Curran's dismissal? The respondent stated that it was 'conduct' which was the potentially fair reason for dismissal falling within Section 98(1) of the Employment Rights Act 1996. Mr Curran did not dispute that this was the reason for dismissal but argued that his dismissal was unfair.

5.2 Applying Section 98(4) of the Employment Rights Act 1996, whether the decision to dismiss was fair in all the circumstances and applying the **'Burchell'** and **'Polkey'** principles. Mr Curran argued that his dismissal was unfair, in particular, because the investigation and disciplinary process was procedurally flawed, that the sanction of dismissal was disproportionate and inconsistent with previous sanctions issued for similar matters to others and that no weight was given to his length of service and clean disciplinary record.

5.3 If Mr Curran's dismissal was unfair;

5.3.1 Whether he had contributed to his dismissal, to any extent, through his conduct and if so the extent to which this should be reflected by a reduction to his basic and/or any compensatory award.

5.3.2 Whether the **'Polkey'** principles applied to limit any compensatory award to a period within which any procedural defects would have been remedied.

5.3.3 Both parties confirmed that no uplift or deduction to any award was sought for an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

5.4 Whether Mr Curran was summarily dismissed in breach of his contractual right to notice of termination of employment.

The Findings of Fact Relevant to the Issues

6 Mr Curran was continuous employed by the respondent from 16th May 1982 until his dismissal for gross misconduct on 15th July 2019. For the last 6 years of his employment he was a section engineer; responsible for supervising a team of 4-5 operatives. He was based at Heysham 1 power station.

7 It was not disputed that he had a clean disciplinary record.

8 The respondent provides maintenance and engineering services at power stations. As such it operates in a safety critical environment and health and safety policies and procedures are rigorously enforced and strictly adhered to.

9 Following a serious incident in 2017, the respondent and EDF; the client company which operated the power station, engaged in an extensive 'Working at Height' safety campaign. The campaign was rolled out throughout the workforce through presentations, updated guidance and policies and 'tool-box' briefings. Mr Curran attended these events and accepted that he had been fully appraised of and familiar with the 'Working from Height' policies and procedures.

10 The event that triggered disciplinary action against Mr Curran is not in dispute; Mr Curran accepted responsibility from the outset for his actions on 26th June 2019. Mr Curran and a colleague working under his supervision; Mr D Banner; entered an area designated as 'COP24A', which required 'Working from Height' protocols to be observed. They carried out a procedure without the requisite safety equipment and without having completed the necessary advance documentation; which was completion of the relevant 'workpack' and pre-job brief. The pre-job brief is also known as a 'Point of Work Assessment; 'POWA'.

11 The incident was observed and reported by 2 health and safety officers. They challenged Mr Curran and Mr Banner on the spot, both of whom accepted that they had not been compliant.

12 Mr Foster, who was the site manager, told me that it was everyone's responsibility to complete a POWA check list. Mr Curran explained that all operatives carried a booklet of POWA checklists. Before a job was undertaken, each operative should complete a checklist which was then torn out of the booklet and placed on the work pack and the work pack was signed by the operative.

13 Mr Curran's responsibility as supervisor was to complete the workpack, including the risk assessment and pre-job brief, in advance of the work being undertaken.

14 Mr Curran explained the sequence of events leading up to the event and I accepted his account as accurate and consistent with his open admissions of fault from the outset.

15 He explained that the job had originally been scheduled for a few weeks earlier. The task was to remove manhole covers along a trench. Mr Curran prepared the workpack on 7th June 2019, then visited the location to do the pre-job brief, completing the check list. It then transpired that the job could not be undertaken at that time and it was cancelled.

16 On 26th June, the removal of one of the manhole covers became a priority as it was holding up other scheduled work for that day. Mr Curran was placed under considerable pressure to complete the job and it was interjected as an urgent task. Mr Curran should have carried out a further pre-job brief but did not do so, being focused on getting the task done ASAP.

17 Mr Banner should have completed his own POWA but did not do so and he subsequently admitted to signing the work-pack after the task had been completed, rather than beforehand, as was required.

18 Both were suspended the following day and an investigation was carried out by Mr Foster. Mr Foster interviewed Mr Banner first. Mr Banner wrote a statement in which he said *'at some point later, R Curran asked if I did a POWA. This was done post-event and then signed onto the work-pack'*.

19 Mr Curran was not asked at any stage during the investigatory, disciplinary or appeal process about this statement and whether he had, in fact, asked Mr Banner if he had done a POWA or whether he had instructed Mr Banner to complete any paperwork retrospectively. No-one checked to see if a POWA had been completed by Mr Banner and that document was never located or shown to either Mr Banner or Mr Curran.

20 In his evidence to me, Mr Curran was adamant that, had he been asked about this, he would have denied ever having had that discussion with Mr Banner and/or instructing him to completed paperwork retrospectively.

21 Mr Foster produced an investigatory report that recommended disciplinary action. Appended to his report was the statement from Mr Banner, one subsequently taken from Mr Curran and from the health and safety officers.

22 In his report Mr Foster stated that it was *'evident that the work pack was signed off post event'*. Mr Foster's report was limited to the event itself; he did not refer to any potentially relevant or mitigating factors, such as Mr Curran's long service and clean disciplinary record.

23 Mr Foster confirmed to me that he had been aware of at least one previous incident involving an individual; Mr Holden, who had not complied with working from height safety measures and had received the sanction of a final warning.

24 Mr Foster recommended disciplinary action and Mr Curran was provided with a copy of the investigatory report and statements several days before the disciplinary hearing on 15th July 2019 which was held by Mr Wilson.

25 The letter of invitation dated 9th July 2019 specified the allegation he was to meet as *'working within a COP24A work area without the appropriate fall protection equipment'*.

26 During the disciplinary hearing, the issue of paperwork was raised. Mr Wilson put it to Mr Curran that he should not have started work on the job without the relevant paperwork, to which Mr Curran agreed. Mr Wilson also stated that Mr Banner had signed paperwork after the event which had not been *'signed off by the Quality or Safety people or verified by the QHSE officer'* and not correctly

adhered to. Mr Curran did not dispute that assertion. However, Mr Wilson did not make it clear to Mr Curran that he held Mr Curran responsible for Mr Banner's actions in post-dating his signature on the workpack. In his witness statement and confirmed in his oral evidence to me, Mr Wilson stated that he considered a lesser sanction but that he was concerned at 'the dishonesty aspect, where he had had Mr Banner complete documentation retrospectively to show the correct pre-work brief had been carried out and paperwork completed.'

27 Mr Wilson also confirmed to me that he had based his finding that Mr Curran had acted dishonestly in instructing Mr Banner to falsify documentation entirely on the statement of Mr Banner that *'at some point later, R Curran asked if I did a POWA. This was done post-event and then signed onto the work-pack'*.

28 Mr Wilson accepted that he had not given Mr Curran an opportunity to comment on Mr Banner's statement or the allegation that he had acted dishonestly in requiring him to falsify documentation. Mr Wilson also agreed that he had not made any enquires of Mr Banner to clarify precisely what had happened or to find the POWA referred to. He told me that he did not think it necessary to make further enquiries as he considered it reasonable to rely on Mr Banner's statement alone to conclude that Mr Curran had instructed Mr Banner to postdate the documentation.

29 Mr Wilson deliberated for 25 minutes and then dismissed Mr Curran summarily for gross misconduct on the grounds of *'failure to follow policies and procedures and putting himself and colleagues at risk'*.

30 Mr Curran pointed out that he had 42 years' service (he was including an earlier period of 5 years' service in addition to the 37 years of continuous service) and had made one mistake. He referred to other incidents where verbal warnings had been given for similar infringements. Mr Wilson replied that he had been unaware of any of these matters but did not consider them relevant in any event; stating that each case was different, and he had made his decision on the paperwork today.

31 In evidence to me, Mr Wilson confirmed that he was not aware of, had made no enquiries about and did not take account of length of service and disciplinary record when reaching his decision. He did not consider those matters as relevant to his considerations which were solely based on the gravity of the event itself. His evidence was at odds with the content of his witness statement, which he had affirmed as true, where he stated that he had given *'serious consideration'* to Mr Curran's disciplinary record and length of service. Given his adamant oral evidence to me on this matter, his witness statement was plainly untrue in that regard.

32 The letter of dismissal recorded the reason for dismissal as *'the breach of policies and rules and exposure to risk, failure to completed required paperwork'* and *'that the point of work assessment was signed off post-event'*. The precise finding that Mr Wilson had made; that Mr Curran had instructed Mr Banner to postdate and falsify documentation, was not specified.

33 Mr Curran appealed against his dismissal which was heard by Mr Jones. Mr Curran did not challenge the statement that *'that the point of work assessment was signed off post-event'*. As he explained in evidence, it was never made clear to him that the respondent was holding him responsible for this as an act of dishonest conduct. His appeal focused on mitigating factors that were not considered; his length of service and clean record and on inconsistency of sanction with previous incidents.

34 Mr Jones dismissed the appeal. He dealt with the previous incidents in some detail; distinguishing them from Mr Curran's offence on the grounds that in the earlier incidents, the correct paperwork had been undertaken in advance and that they pre-dated the 2017 campaign on working from heights. I accepted that these were reasonable distinctions to draw between the various incidents and that it was reasonable for Mr Jones not to consider himself bound by the sanctions imposed in those earlier disciplinary hearings.

35 In distinguishing the earlier incidents, Mr Jones stated that in Mr Curran's case, 'there was a clear attempt to complete the paperwork retrospectively..' Again, this had not been put to Mr Curran during the appeal hearing so that he could provide his account and Mr Jones confirmed that he had reached that conclusion based on Mr Banner's statement alone.

36 In respect of length of service and disciplinary record, Mr Jones simply concluded that the conduct was such that it *'cannot be mitigated by your length of unblemished service'*. It was clear from Mr Jones' evidence to me that he did not give any real consideration to these matters, however.

37 Mr Banner received a final written warning for his part in the incident. The reason for his warning was; *'working from height without fall protection and failure to challenge your supervisor as to why appropriate paperwork was not in place prior to carrying out the job'*.

38 Mr Banner's disciplinary hearing was held on 26th July 2019. after Mr Curran's dismissal. Despite Mr Banner admitting to retrospectively completing paperwork, he was not sanctioned for that behaviour.

39 Whilst I accepted that there were distinguishing features between Mr Banner and Mr Curran's situations; in particular Mr Curran's seniority; the fact that Mr Banner has been absolved of any responsibility for postdating paperwork, despite his concession that he did so, was persuasive of my conclusion that Mr

Wilson had formed a clear settled view, upheld at appeal, that it was Mr Curran who was to blame for this behaviour, and that view was based entirely on the statement of Mr Banner.

The Law

25 S98 ERA 1996 provides as follows;

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
……
(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

26 I was guided by the EAT judgment in **British Homes Stores v Burchell 1978 IRLR 379 EAT,** being mindful that the employer must show that he had a genuine belief in the employee's guilt, held on reasonable grounds, after reasonable investigation. I was also guided by the Court of Appeal in **Sainsbury's Supermarket Ltd v Hitt 2003 IRLR 23 CA** that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss.

27 In accordance with the Employment Appeal Tribunal's guidance in **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**, I was mindful, in reaching my conclusions, not to substitute my own view of what the appropriate sanction should have been for that of the respondent's, but that I should consider whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer in the particular circumstances of the case.

28 In approaching the question of contributory fault, I was guided by the principles laid down by the Court of Appeal in **Nelson v BBC (No.2) 1979 IRLR 346 CA**; first; there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy; second; there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by action that was culpable or

blameworthy, third; there must be a finding that it is just and equitable to reduce the assessment of the complainant's loss to a specified extent.

30 In considering whether the **'Polkey'** principles, laid down by the House of Lords in **Polkey v A E Dayton Services Limited 1987 IRLR 503 HL**, applied to the claimant's dismissal, I was further assisted by the Employment Appeal Tribunal's judgment in **Software 2000 Ltd v Andrews 2007 IRLR 568 EAT** which outlined the five possible outcomes (prior to the repeal of S98A(2) ERA 1996) and allowed for the possibility that a tribunal may decide that employment would have continued indefinitely because the evidence that it might have terminated earlier is so scant that it can be effectively ignored.

The Tribunal's Conclusions

31 Reminding myself that it is not my role to substitute my view of what was reasonable and focusing on the range of reasonable responses open to a reasonable employer in the particular circumstances; I found that the respondent did not conduct a reasonable investigation upon which it founded a reasonable belief that Mr Curran had committed all the elements of the wrongdoing alleged. Specifically, whilst there was no dispute that the correct working from height procedures had not been followed or relevant paperwork completed in advance, there was no investigation carried out on whether Mr Curran had acted dishonestly by instructing Mr Banner to complete paperwork retrospectively; Mr Wilson simply interpreted Mr Banner's statement to that effect. He based his decision on that insubstantial and unverified evidence, made no enquiries of his own and gave Mr Curran no opportunity to answer an allegation that he was not even aware was being levelled at him.

32 That element of wrongdoing; dishonesty; was not a minor factor. Mr Wilson identified it as a distinguishing feature which mitigated against a lesser sanction. I found that Mr Wilson's belief that Mr Curran had acted dishonestly was not reasonable.

33 Applying the **Burchell** principles; the respondent did not form a genuine and reasonable belief that Mr Curran had committed all aspects of the wrongdoing alleged. Further it was not within the reasonable range of responses for Mr Wilson to take no consideration of the claimant's very long service to the respondent and his unblemished record in deciding the appropriateness of sanction. Whilst I accept that there are occasions where the act of misconduct is so serious that these matters may not mitigate against it; at the very least, in the particular circumstances of this case, Mr Wilson should have addressed his mind to mitigation. The fact that Mr Wilson did not do so renders his decision to dismiss outside the range of reasonable responses open to an employer in those circumstances.

34 Mr Jones did not remedy these defects on appeal, rather he compounded them by taking no steps to explore the dishonesty allegation with Mr Curran and he

simply upheld Mr Wilson's decision on mitigation and sanction without giving it proper consideration.

35 For those reasons, the claim of unfair dismissal succeeds.

36 Contributory fault: Mr Curran contributed significantly to his dismissal through his own culpable conduct; not following procedures, adopting an unsafe practice which placed him and his colleague at risk of injury and placed plant at risk of damage and not completing the requisite paperwork in advance.

37 I assessed the level of contributory fault at 80%; this deduction to be made from the basic and any compensatory award.

38 **Polkey**: Given that Mr Wilson gave significant weight to the dishonesty aspect; had a proper enquiry been undertaken and had Mr Curran been given a fair opportunity to provide an explanation, it is possible that Mr Wilson would have imposed the lesser sanction of a final written warning and so I did not limit the award to a precise period as the eventual outcome was uncertain.

39 However, I considered that, taking Mr Wilson's evidence into account of how serious a breach of working from heights protocols he considered Mr Curran's actions to be, I found that there was an 80% chance that, had a reasonable and fair investigation and disciplinary process been adopted, Mr Curran would have been summarily dismissed in any event. Accordingly, any compensatory award is subject to a deduction of 80%.

40 Breach of contract; notice pay: The admitted misconduct identified above is sufficient to amount to a breach of contract warranting summary dismissal and as laid out in the respondent's disciplinary procedure. On that basis the claim for notice pay fails and is dismissed.

Remedy

41 By **20th October 2021**, Mr Curran is to send to the respondent (1) a revised schedule of loss; (2) a witness statement dealing with mitigation; his efforts to find work after his dismissal and any earnings he has received since and (3) copies of any documentary evidence; e.g. offer letters, contracts, payslips, evidence of seeking employment, applications and interviews.

42 By **17th November 2021**, the respondent will send to Mr Curran any counter schedule and/or witness statements and/or documents for the hearing to determine remedy.

43 By **23rd December 2021** the respondent will send to Mr Curran the bundle of documents for the remedy hearing.

Employment Judge Howard
Date 19th October 2021

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

20 October 2021

FOR THE TRIBUNAL OFFICE