THE EMPLOYMENT TRIBUNALS

Claimant: Mr M Baxtrem
Respondent: Strabag AG - UK Branch

Heard at: Newcastle Hearing Centre **On:** 6 May and 28, 29 and 30 June 2022

Before: Employment Judge Morris (sitting alone)

Representation:
Claimant: In person
Respondent: Mr N Bidnell-Edwards of counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that the claimant's complaint under Section 111 of the Employment Rights Act 1996 that his dismissal by the respondent was unfair contrary to Section 94 of that Act, by reference to Section 98 of that Act, is not well-founded.

REASONS

The hearing, representation and evidence

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

2. The claimant appeared in person, gave evidence and called Mr J Elliott, a former employee of the respondent, to give evidence on his behalf.

3. The respondent was represented by Mr N Bidnell-Edwards of counsel who called the following employees of the respondent to give evidence on its behalf: Miss H Whatmore, HR and Payroll Manager; Mr G Vollaro, Construction Manager; Mr C Sewell, General Construction Manager. I also had a statement of Mr S Khan who did not attend the hearing to give evidence; he had previously been employed by the respondent as Senior Health and Safety Adviser.

4. The evidence in chief of or on behalf of the parties was given by way of written witness statements. I also had before me a bundle of agreed documents comprising 476 pages. The numbers shown in parenthesis below are the page numbers (or the first page number of a large document) in the document bundle. I also had certain CCTV footage **(**that was viewed at various times during the hearing), which the parties agreed showed the incident that led to the claimant's dismissal.

The claimant's claim

5. The claimant had presented a complaint under section 111 of the Employment Rights Act 1996 ("the Act") that his dismissal by the respondent was unfair being contrary to section 94 with reference to section 98 of the Act.

6. The respondent's response was that although it accepted that it had dismissed the claimant that was a fair dismissal in that the reason related to the conduct of the claimant, which is a potentially fair reason under section 98(1) of the Act, and the dismissal was fair by reference to section 98(4) of the Act.

The issues

7. The respondent having accepted that the claimant had been dismissed, the issues to be determined at this hearing were as follows, the references to "the respondent" being read to include, also, relevant employees acting on its behalf:

> 7.1. Has the respondent shown what was the reason for the claimant's dismissal? The respondent asserted conduct.
>
> 7.2. Was that reason a potentially fair reason within sections 98(1) or (2) of the Act? Conduct, if established, is such a potentially fair reason.
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> 7.3. If the reason was a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for the dismissal of the claimant in accordance with section 98(4) of the Act? This would include whether (taking account of the Acas Code of Practice: Disciplinary and Grievance Procedures (2015) ("the Code") and the guidance in British Home Stores Limited v Burchell [1978] IRLR 379, as qualified in Boys and Girls Welfare Society v McDonald [1996] IRLR129) a reasonable procedure had been followed by the respondent in connection with the dismissal and whether (in accordance with the guidance in cases such as Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439, Post Office v Foley [2000] IRLR 827) and Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903) the decision to dismiss the claimant fell within the band of reasonable responses of a reasonable employer in such circumstances.
>
> 7.4. In this respect, I would, however, apply the guidance set out in Burchell having regard to the fact that the statutory 'test' of fairness, which is now found in section 98(4) of the Act, had been amended in 1980 such that neither party now has a burden of proof in that regard.

7.5. With regard to the above questions, in accordance with the guidance in Burchell and Graham, I would consider whether at the stage at which the decision was made on behalf of the respondent to dismiss the claimant its managers who, respectively, made that decision and upheld that decision on appeal had in mind reasonable grounds, after as much investigation into the matter as was reasonable in all the circumstances of the case, upon which to found a genuine belief that the claimant was guilty of misconduct.

Consideration and findings of fact

8. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities. For completeness I record that although I raised the need to understand the status of the respondent and the number of employees it employs at the hearing, the information in response was provided by the respondent's solicitors the day after the hearing concluded in an email dated 1 July 2022.

8.1. The respondent is a construction company the activities of which include complex infrastructure and ground engineering projects and large-scale mining operations. It is registered at Companies House as an overseas company (number FC030275). It is a large employer which, at the time of the claimant's dismissal, employed 949 employees in total, 409 of whom were employed at the site where the claimant worked. It has significant resources including an internal Human Resources Department ("HR").

8.2. The claimant was employed by the respondent as a Crane Operator but, in accordance with a provision of his contract of employment that he could be required to undertake other duties, he often carried out duties as a Welder. He was employed by the respondent from 3 April 2019 until his dismissal on 29 September 2021.

8.3. Apart from relatively minor matters that are referred to in an email from CJ, HR Coordinator, to the claimant dated 15 September 2021 (344) nothing particularly untoward had happened during the claimant's employment until the incident that led to his dismissal, which occurred on 10 August 2021. On that day the claimant was operating welding equipment fabricating cages on what he has referred to as jig A2 on a mezzanine deck of the respondent's premises known as the Segment Factory. It is sufficient for the purposes of these Reasons to record that the welding equipment consists of a welding wire feed unit from which a hose runs to the welding torch (137). The welding unit can either sit on top of a pedestal or be removed from there and placed on the floor.

8.4. During the course of the claimant's work a fire broke out on the welding unit that he was using. The following is apparent from the CCTV footage referred to above. The claimant is shown working approximately in the centre of the screen. He has his back to the camera and is welding on what has been described as the "non-shoe side" of the cage that he was welding. The opposite

side is close to the windows of the premises and is referred to as the "shoe side". The section of the footage that is of direct relevance in this case can be summarised as follows:

Passage of time (in seconds)	Description
27	The claimant stops welding and lifts the visor of his helmet.
29	He appears to pull the torch, and therefore the hose, slightly and place it on top of the cage that he is welding in preparation for moving to the opposite side of the cage adjacent to the window to continue welding.
30	He begins to walk around to the opposite side.
37	On reaching the opposite side he retrieves the torch and walks to the right (as viewed from the camera).
41	He pulls on the torch/hose and immediately a flash can be seen beneath the cage whereupon the claimant walks away from the jig.
49	He appears to speak to another employee. [*In evidence the claimant explained that this was his supervisor, JM.*]
56	He collects a fire extinguisher and returns to the jig accompanied by another employee and they are joined by a third employee, being the person referred to above to whom the claimant appeared to speak earlier.
69 to 83	They look beneath the cage, presumably to examine the source of the flash and any damage.
85	The claimant deploys the fire extinguisher.

8.5. Later that day, the claimant attended an interview with certain of the respondent's health and safety officers one of whom produced what is referred to as a "Witness Statement" (155). In oral evidence the claimant confirmed that the content of that statement was "broadly right, there are no significant factual inaccuracies" (albeit noting that it is written in the words of the officer apart from the final paragraph that the claimant added himself, and was not a full account), which he signed as being a true and accurate account. The claimant subsequently provided a fuller account in his own words (206), which he presented for consideration at the disciplinary hearing, much of which he reproduced within his witness statement for the hearing before this Tribunal.

8.6. Relevant parts of that statement taken by the health and safety officer include the following:

8.6.1. The claimant was using the welding unit on the floor, which was his "personal preference as opposed to having the weld set mounted on the pedestal".

8.6.2. The weld set was underneath the window (shoe) side of the jig and he had pulled it closer when he went to the non-shoe side giving him a better reach.

8.6.3. "I don't think that this fire was started by dripping weld splatter."

8.6.4. At the start of the shift he had carried out a visual inspection to make sure that everything was clean and working correctly, and was satisfied that the A2 bay was in good working order.

8.6.5. He had not witnessed the daily pre-start welding area checklist of his bay being undertaken on the day.

8.6.6. "I did not causes this damage maliciously – nor would I ever – and if the damage was caused by an act or omission on my part then I am truly sorry for any inconvenience or damage caused. I have made no secret of my preference NOT to weld".

8.7. The claimant was suspended on 11 August 2021 (156) the alleged occurrence being, "Allegation of misuse of company property causing a fire from the welding equipment on the mezzanine deck".

8.8. Mr Khan was appointed as Investigation Manager. In that role his statement records that he obtained and/or considered the following:

8.8.1. Witness statements from three other employees none of whom had actually witnessed the cause of the fire (158, 168 and 171).

8.8.2. A witness statement from the claimant (155).

8.8.3. CCTV footage.

8.8.4. The relevant Risk Assessment Method Statement (111).

8.8.5. A daily welding area checklist completed by JM on 10 August, which showed that everything was in order (144).

8.8.6. The claimant's welding qualification (70).

8.8.7. The respondent's disciplinary and capability procedures (96).

8.8.8. The respondent's Fair Culture Model (193).

8.8.9. The inspection record of the welding set in question (143).

8.8.10. A report from Sparks NE Ltd ("Sparks"), which had inspected the welding unit and viewed the CCTV footage, setting out the following

> amongst other things: the damage that had occurred; the opinion that the feeder on the welding unit had suffered an Arc flashover "simultaneous with the aggressive handling of the weld torch and feeder; there was no evidence of internal fire damage or source of ignition, including on the printed circuit board; and the electronics engineer who had been consulted had advised that the circuit board being the possible source of ignition was highly unlikely and never seen (160). Photographs of the unit were attached to the report (161 to 166).

8.9. Relying particularly upon the CCTV footage and the Sparks' report, Mr Khan came to the opinion that the claimant had aggressively handled the weld torch and feeder when dragging the welding unit, which was believed to have simultaneously caused the Arc flash resulting in a fire on the mezzanine floor. He considered that the claimant had breached duties under sections 7 and 8 of the Health and Safety at Work Act 1974. As such, he was of the view that there were reasonable grounds for considering that misconduct may have occurred and, therefore, recommended in the Investigation Summary Form that he completed and is dated 26 August 2021 that further formal action be taken (169).

8.10. In light of the above, I find as a fact that Mr Khan conducted a reasonable investigation of the incident in question.

8.11. Under cover of an email dated 27 August 2021 Miss Whatmore sent the claimant copies of the report from Mr Khan and the documents he had considered together with a letter of that date from Mr Vollaro inviting him to attend a disciplinary hearing on 1 September 2021. Amongst other things, that letter advised the claimant as follows:

> "The allegation is that on Tuesday, 10th August 2021, whilst working in the segment factory on the mezzanine deck welding cages, you allegedly mishandled the welding equipment – namely dragging the welding trolley aggressively which in turn caused an Arc flash and thereby resulting in a fire."

8.12. The letter asked the claimant to provide names of any witnesses he wished to call to the hearing and copies of any further documents he wished to be considered, warned the claimant that if he were to be found guilty of gross misconduct he might be dismissed without notice and informed him of his right to be accompanied and that his suspension would continue pending the outcome of the disciplinary hearing.

8.13. The claimant replied to Miss Whatmore that day. He requested the following: permission to contact Sparks directly; the CCTV of the day in question starting at least 10 minutes prior to that which had been provided (which he said was his third request); that the welding unit should be made available to him for independent inspection. He also provided the names of six witnesses to be available to give their evidence at the disciplinary hearing. Miss Whatmore's reply included that as Sparks was an independent company it would not speak

to him; the CCTV footage was not available as the system removes previous footage after seven days but Health and Safety had viewed all CCTV that day and the only footage that related to the incident had already been provided to the claimant; the welding unit was "still quarantined" with the independent company and, therefore, was unavailable for inspection by the claimant; she would contact the witnesses to ask if they would like to make themselves available for the hearing. Only two the potential witnesses replied to Miss Whatmore to the effect that they were not willing to attend the hearing one explaining that he had not witnessed the incident so would not be able to help.

8.14. In preparation for the disciplinary hearing the claimant made certain requests of Miss Whatmore including for a copy of the respondent's health and safety policy, which she provided to him (315).

8.15. In summary of the immediately preceding paragraphs, I am satisfied that the arrangements that were put in place for the disciplinary hearing were reasonable including as to 'the investigation pack' that was provided to the claimant and his being informed of his right to be accompanied.

8.16. In the event, as a consequence of the claimant not being in good health on 1 September, the disciplinary hearing actually took place on 13 and 14 September 2021 and, in total, lasted some 2 hours and 40 minutes. The claimant chose not to be accompanied. Mr Vollaro was accompanied by CJ, HR Coordinator, as HR representative and notetaker.

8.17. The Record of the Disciplinary Hearing (200) is comprehensive. Following amendments made by the claimant it was agreed. Being a matter of record it need not be set out at great length in these findings. Suffice it to say that key points include the following:

8.17.1. The claimant opted not to be accompanied.

8.17.2. Mr Vollaro explained the allegations in the following terms, "On Tuesday, 10th August 2021, whilst working in the segment factory on the mezzanine deck welding cages, you allegedly mishandled the welding equipment – namely dragging the welding trolley aggressively which in turn caused an arc flash thereby resulting in a fire."

8.17.3. Having viewed the CCTV footage the claimant explained, "I've walked round and turned back to the far side to continue welding and as looked I've seen the fire, I've quickly pulled it into the open". Asked why he had pulled the hose when he saw the fire he replied that it was licking the jig so he "pulled the wire feed unit into the open", which he said in his witness statement was instinctive. It was not correct that this pull had caused the fire. Initially he thought that the fire "had incurred internally but I accept now that's not the case. It's happened as a splatter or drip." In evidence the claimant explained that this was not inconsistency in his account as compared with the initial interview on 8 August (155); rather it was him reappraising the

cause of the fire having had the opportunity of looking at the photographs attached to the Sparks' report. During the second day of the disciplinary hearing the claimant expanded his explanation in relation to pulling the unit, stating that the damage was caused prior to the pulling and it had already been burning. "My quick thinking and quick moving was misunderstood as aggression by the investigation."

8.17.4. The claimant having remarked that if they had the CCTV 10 minutes prior he thought they might have seen some smoke, CJ asked where he was 10 minutes before and the claimant replied that he had been on the other side. CJ then asked, "So you think the fire was already there?" to which the claimant replied, "I don't think, I know it was." In evidence, Mr Vollaro stated that, if so, he considered it odd that the claimant would choose not to raise the alarm earlier. CJ then suggested that the claimant's legs could be seen as he walked around the back and it was clear with no flames, and the flash of fire could be seen after he walked through so it appeared that the fire did not start until after he had walked past. The claimant responded, "That's not the case". Mr Vollaro said in evidence that he felt that the claimant was unable to establish a coherent response on this point.

8.17.5. The claimant confirmed that when he saw the fire he immediately got the fire extinguisher.

8.17.6. The claimant also confirmed that the welding equipment was "welding ok" although it had the usual scuffs and scrapes and was "welding satisfactorily".

8.17.7. The claimant suggested that the daily inspection of the equipment, which indicated that it was in good working order, had not been carried out that day.

8.17.8. Having been asked for any comments that he had on the Sparks' report, the claimant noted that the only thing the report makes clear is that the fire did not start internally. He continued, "I have no doubt that my actions have caused the fire as a result of a drip of a hot weld, welding splatter or dripping plastic." In evidence Mr Vollaro noted that this was inconsistent with the claimant's statement during the investigation when he said that he did not think that the fire was started by dripping weld spatter.

8.17.9. The claimant did not agree that the CCTV footage showed that the Arc flashover happened simultaneously with his alleged mishandling of the welding equipment explaining, "I am just pulling it into the open to deal with it, that is when I pull it. It was already burning." He explained that he had not seen the fire when he walked round to the window side as he "had full welding equipment on". Mr Vollaro noted that it was clear from the CCTV that he was not wearing the welding mask, which the claimant agreed but explained, "I still

couldn't see the fire". In his witness statement the claimant referred him having lifted his visor but because he was still wearing the helmet he was somewhat "blinkered".

8.17.10. The claimant confirmed that he had never made any secret of the fact that he does not like welding but had no recollection of the conversation recorded in the witness statement of PN (158) who had stated that the claimant had had an outburst to him in the week of 6 August 2021 when he shouted in an elevated voice, "I hate this job"; sufficiently so that it caused PN to have concerns with the claimant's state of mind, which he had mentioned to management.

8.17.11. The claimant noted that it was a shame that the CCTV was not available from earlier as they might have seen the smoke but CJ responded that if no smoke could be seen at the start of the CCTV clip that had been provided before the claimant walked round and pulled the equipment why would it be seen 10 minutes beforehand? As she put it, "If a fire is burning at the beginning of the clip wouldn't the smoke be present then?" In evidence Mr Vollaro noted that the claimant was unable to provide meaningful response to this question and instead proceeded to explain the definition of an Arc flash.

8.17.12. The claimant read out a definition of an Arc flashover and then commented that from the CCTV it could be seen that there was no reflection of intense bright light as no Arc flash occurred. Similarly there was no reaction in his eyes and he was looking directly in that direction. He suggested that the evidence had been tailored to fit and that what was seen in the CCTV was "an already burning suitcase being pulled into view." Mr Vollaro countered that what he saw was the claimant "pulling then the light of the fire."

8.17.13. The claimant suggested that the check sheets said that everything was perfect at the start of the shift but it was not. That said, when CJ asked him whether he was happy with his equipment he again confirmed that he was, "it was welding OK".

8.17.14. The claimant then raised two statements that he had emailed to CJ shortly before the meeting: one from him (206) and the other from Mr Elliott (342). Mr Vollaro adjourned the hearing at this stage in order to review the statements. Amongst other things, in his statement Mr Elliott commented upon the CCTV footage observing that there was no sign of any flashover and that the extraction hose on the welding torch looked more likely the cause of the fire. In evidence, Mr Vollaro said that he felt that he had to consider the specialist advice from Sparks as an independent assessor who had checked the equipment rather than a report made by an ex-employee. I accept that evidence.

8.17.15. On reconvening the following day, the claimant read through the points contained in his statement.

8.17.16. In relation to the welding area checklist, the claimant asserted that there had been "a falsification of the documents", which could be established by speaking to the health and safety officers.

8.17.17. The claimant suggested that there had been a number of other fires about which he had requested information that had not been provided to him. CJ explained that health and safety had been asked for information on other similar fires but had responded that there was no other fire that had occurred similar to the fire in question. The claimant provided the names of two other employees who had been involved in what he considered to be similar fires and CJ confirmed that she would ask health and safety again.

8.17.18. Towards the conclusion of the meeting, Mr Vollaro asked the claimant whether he had any additional points that he wanted to add. The claimant asked to check his personnel file, which was produced for him to view, and a summary was sent to him by CJ on 15 September 2021 (344).

8.18. On 14 September 2021, Mr Vollaro undertook further investigation and obtained verbal clarification over the telephone from Sparks on the disputed point of whether an Arc flash had occurred, which the engineer confirmed. Prompted by a request from the claimant, in an email dated 4 October 2021, Mr Vollaro asked the engineer to confirm his answers in writing, which he did that day (420):

8.18.1. "I confirm the fire began with the ARC flashover, an earlier fire would have caused more damage and been visible on the CCTV."

8.18.2. "The other damages to the welding set and torch would not have been the cause of this ARC flashover."

8.18.3. "The magnitude of an ARC flashover can range from a small spark to a large explosion. I confirm what is seen in the CCTV after the operator pulled the welding torch is ARC flash over."

In this respect the claimant suggested that there was something sinister in the exchange of emails between Mr Vollaro and Sparks taking place on 4 October 2021, which post-dated the dismissal letter of 27 September 2021; "I think he realised that there were significant holes in the report and sought to reinforce it but I don't believe it happened – I had already seen the dismissal letter by then." I accept Mr Vollaro's evidence, however, that the answers from Sparks had been obtained verbally on 14 September 2021. This is borne out by a phrase in the introductory paragraph of Mr Vollaro's email to Sparks, "could you please confirm in writing the questions I have asked during our conversation".

8.19. As mentioned, by letter of 27 September 2021 (368), Mr Vollaro informed the claimant of his decision that his employment with the respondent should be terminated for gross misconduct without notice. The reason given was that the company had established to its reasonable satisfaction that the claimant had

committed the following acts of misconduct, the somewhat stilted language being drawn from the respondent's Disciplinary and Capability Policy (374):

> "Wilful or negligent damage to property whether or not owned by the company.
>
> Unauthorised use or misuse of company property or facilities."

8.20. In his decision letter, Mr Vollaro addressed points raised by the claimant at the disciplinary hearing including the following:

8.20.1. The claimant had said that he believed that the welding set had been on fire underneath the cage for some time and was only seen on the CCTV footage when he pulled it into view. Mr Vollaro had pursued this point with the Sparks engineer who had confirmed that the fire began when the claimant aggressively pulled the welding set quickly, which in turn caused an Arc flash as shown in the CCTV footage.

8.20.2. The claimant had said that smoke might have been visible if CCTV footage from 10 minutes before the incident had been available to which Mr Vollaro responded that the footage showed 41 seconds before the fire and it could clearly be seen that there was no smoke in sight before the claimant pulled the welding set. In this connection Mr Vollaro noted that the claimant had stated that when he walked round the cage he did not see a fire despite later changing his statement and believing that there was a fire beforehand.

8.20.3. The claimant had expressed a belief that the fire was caused by pre-existing operator abuse on the torch rather than by him but, again, Sparks had advised that it was their assessment that the claimant's pulling action caused the fire (so, "operator abuse") and there was no mention in their report that the pre-existing damage to the hose had been a contributing factor to the fire.

8.20.4. During the disciplinary hearing the claimant stated that he believed the fire was caused by a weld spatter or drip, which contradicted his witness statement, "I don't think that this fire was started by dripping weld spatter". The claimant having asked about other similar fires, Mr Vollaro had checked the investigation reports and it was clear that they were not originated by weld spatter but by other causes not related to this case.

Mr Vollaro expanded upon this in oral evidence. He explained that there had been three other incidents in the weeks before the incident in question all of which had been different in nature and with completely different causes; instances of smouldering rather than fire as such. In one a hot welding torch had been mistakenly placed on the top of the welding set (229) causing the control panel to smoulder and a small flame was starting to form ((172); in another a spray

product used by electricians during maintenance of the unit should have been left to dry but the unit was started too early and caused smoke or the beginning of a flame (178); in the third a welder was cutting cages with the grinder and sparks went onto the unit causing the box to melt (186). This contrasted with the cause in the claimant's case, which was him pulling on the hose in an aggressive way (that was a deliberate act and misuse of equipment) which caused an Arc flash and consequent fire, which compared with careless behaviour amounting to human error. Supported as it is by the incident reports, I accept that evidence.

8.20.5. The claimant had suggested that an Arc flash did not occur due to its extreme nature and bright light. Mr Vollaro had asked Sparks this question and had been advised that there are differing degrees of Arc flash and they stood by their assessment that an Arc flash caused the fire, which could be seen on the CCTV. In relation to this point, in oral evidence, Mr Sewell added that the 41 seconds of the CCTV footage prior to the incident had been sufficient to determine that heat potentially applied to the unit was not the cause.

8.20.6. The claimant having cast doubt on the reliability of the check sheets Mr Vollaro had checked and confirmed that the claimant's equipment had been checked at the start of the shift by his supervisor and the check sheet confirming that the claimant's equipment was in good working order had been completed and processed.

8.20.7. The claimant had stated that he believed there was a fire beforehand and it could not be seen on the CCTV as it was under the jig; and could he not see the fire himself until he walked round the jig due to having full PPE on. That contradicted the CCTV that showed that the claimant was not wearing the welding mask when walking round the jig. Further, the CCTV showed the claimant's legs clearly visible through the bottom of the jig and there was no evidence to suggest a fire beforehand, which would most commonly cause smoke or flame which would be seen on the CCTV.

8.20.8. Mr Vollaro did not dispute that the claimant dealt with the fire calmly but did not consider that to be proof that he did not carry out wilful or negligent damage to the company equipment; the CCTV and the Sparks report providing evidence of the incident.

8.20.9. Although the claimant's representations had been listened to, no mitigating factors for a lesser sanction than dismissal had been identified.

8.20.10. The dismissal took effect immediately and the claimant's final day of employment was therefore 29 September 2021. The claimant was offered a right of appeal.

8.21. The respondent's Fair Culture Model (193) is a flowchart that is said to be used to assist the respondent in identifying why health and safety breaches have occurred and ensure that the consequences of any breach are fair and proportionate. As set out above, it was one of the documents considered by Mr Khan. There are three boxes on the flowchart that are relevant to this case as set out below. I accept Mr Vollaro's explanation as to the meaning and purpose of the content of those boxes.

8.21.1. The first question is, "Was the action deliberate?" Mr Vollaro explained that the purpose of that question is to try to understand if the individual had done an intentional act: i.e. was he conscious of what he was doing. Mr Sewell summarised this in cross examination as follows: "Did you deliberately start the fire – No; did you deliberately pull the cord and start the fire – Yes; and misuse the equipment deliberately – Yes".

8.21.2. If the answer to the question in that first box is, "Yes", the second question is, "Was the action well-intentioned?" Mr Vollaro explained that that referred to a situation where the individual knows that the consequences could be negative but decides to do the act: for example, in an emergency situation where the individual does the act but does so to save a person or equipment from injury. If so, the answer to that question would be, "Yes" but if the action was not well intended the answer would be, "No".

8.21.3. The third box contains three options, "Reckless, Sabotage, malicious intention". Mr Vollaro explained that these were similar in nature, all being negative, and related to the individual doing something intentionally.

In this regard, I understand the claimant's contention that the 'flow arrows' between these boxes on the chart and the third box having been highlighted could indicate that whoever made that highlighting was indicating the path that should be followed and, therefore, the decision was predetermined but without evidence on that point and it not having been put to either Mr Vollaro or Mr Sewell I do not take it any further.

8.22. The claimant exercised his right to appeal in an email dated 3 October 2021 (408). The claimant first raised his previous requests for disclosure of statements, reports and information relating to the case, which had not been received. He said that this compromised his ability to conduct his appeal and asked for his requests to be responded to. He also requested access to the segment factory to take photographs and measurements. These requests were subsequently declined (442) on the following bases: the equipment was still with Sparks to be fixed; Sparks was an independent inspection company with the required experience, qualifications and knowledge to provide a thorough report; the claimant would not be permitted to access the factory to take images which would not be of assistance 56 days after the fire, the claimant having already been provided with the report from Sparks with images and detail of the incident and the CCTV footage.

8.23. The claimant relied upon three particular grounds of appeal drawn from the respondent's Disciplinary and Capability Policy as follows:

8.23.1. Severity of the action.

Other fires on welding wire feed units had had an identical point of combustion and no sanction had been imposed for any previous accidental fire; the fire in his case being caused by either a malfunction or accident.

8.23.2. Findings of the hearing on a point of fact of the hearing.

The claimant was critical of Mr Vollaro's understanding of the evidence he had given at the disciplinary hearing as he maintained was shown by his dismissal letter containing a number of factual inaccuracies. Mr Vollaro had made no mention of the claimant's independent report or of the falsification of the welding sheets. The CCTV video contradicted the findings of Sparks, which was not an independent organisation as it had a commercial contract with the respondent to service the welding equipment. The claimant had been denied access to witnesses whom he wished to be available at the appeal hearing.

8.23.3. Failure to adhere to the published procedures.

The respondent had not followed its own processes in terms of definition of roles and responsibilities; it had misinterpreted and prejudged its fair culture model; the investigation was a model of complacency; his allegations regarding falsification of safety inspections had been ignored.

8.24. Mr Sewell was appointed to hear the claimant's appeal and was provided with the documents produced in the course of Mr Khan's investigation and the disciplinary outcome letter from Mr Vollaro. The appeal hearing took place on 20 October 2021. Mr Sewell was accompanied by Miss Whatmore. The claimant again chose not to be accompanied. Mr Sewell addressed, in turn, each of the three grounds of appeal relied upon by the claimant. Once more, the Record of the Appeal Meeting (217) is comprehensive and does not need to be set out at great length. Key points include the following:

8.24.1. The claimant referred to having been refused access to previous fire reports but Mr Sewell explained that every investigation is specific to that individual incident so would be irrelevant. For example, the incident involving the employee MW had arisen from human error. The claimant disputed this suggesting that previous fires had similarities to his. He requested a copy of the photograph of the incident involving MW, which Mr Sewell provided (231).

8.24.2. The claimant suggested that Sparks was not independent but would be biased as the respondent had a service contract with it,

which was a commercial arrangement. If the fire was due to servicing negligence they surely would not want to spoil that relationship.

8.24.3. Mr Sewell confirmed Mr Vollaro's position that the respondent took advice from Sparks, as the independent assessor, in preference to a report from an ex-employee, Mr Elliott.

8.24.4. The claimant referred to the check sheets recording that all equipment was in perfect working order, which he asserted was a lie. Further, the supervisor had confirmed to the claimant that he did not carry out a start of shift check but Mr Sewell responded that he had a document signed by the supervisor to confirm the check was done on the day and he had no reason to believe that this was falsified; that said, he said that he would look into this.

8.24.5. In relation to the point made at the disciplinary hearing that the claimant's legs could be seen through the cage, he had provided a photograph of another welder welding on a cage, which he maintained showed that the view was obscured and, therefore, Mr Vollaro's point in this regard was disingenuous.

8.24.6. The claimant explained that when he first saw the fire it was approximately 3 inches high and appeared to be internal coming up to the control panel. He initially pulled the hose after he saw the fire so as to pull the unit into the open to deal with it. Although it was a quick pull to get it out the way it did not cause an Arc flashover.

8.24.7. The claimant repeated that he had been denied access to all witnesses who would be able to provide evidence and support him but Miss Whatmore explained that although all witnesses had been contacted individually asking them to attend, whether they wished to attend was their individual choice. As explained by Mr Sewell, however, witness statements had been taken from the two individuals that the claimant was suggesting could support his case and he was sure that if they had seen a fire before it would have been in their statements but neither had discussed or confirmed that there was a fire beforehand.

8.24.8. The claimant believed that the investigation manager should have taken on board the information provided to him suggesting that the initial report had arrived at the wrong conclusions. He did not believe that the engineer at Sparks had the experience or qualifications to provide what an Arc flash is. He had previously asked for notes taken by the health and safety team during the investigation but had been denied access. The claimant said that he considered the statement from PN regarding his state of mind to be disrespectful. In any event, Mr Sewell explained in evidence to this Tribunal that he regarded PN's statement as being his own opinion, which should therefore not be considered at the appeal hearing although the claimant's

admission that he hated his job as a welder was factual and was relevant.

8.24.9. Having addressed the claimant's three grounds of appeal, Mr Sewell asked if he had any other points he would like to raise. The claimant took the opportunity to comment upon and clarify his position in relation to a number of points made by Mr Vollaro in the letter of dismissal.

8.24.10. Following an adjournment, Mr Sewell discussed an email that the claimant had sent alongside his appeal but he was satisfied that none of the points made by the claimant in that email were relevant to the appeal. In closing, Mr Sewell again asked if there were any points the claimant wanted to add and he replied that there were not.

8.25. Mr Sewell adjourned the meeting to consider what had been said in relation to each of the three grounds of appeal. I accept his evidence that he carefully considered the claimant's point that there had been no Arc flashover in relation to which he reviewed the Sparks report alongside the CCTV footage. He was satisfied that their conclusion was correct, particularly as their assessment included a post-incident inspection of the weld set. Mr Sewell decided to reject the claimant's appeal and uphold the original disciplinary decision.

8.26. Mr Sewell informed the claimant of that decision in his letter of 28 October 2021 (463) in which he addressed the principal points of the appeal including as follows:

8.26.1. Reports of previous incidents would not be shared with employees as they are confidential and, in particular, were not related to the fire in question that occurred on 10 August; the incident particularly relied upon by the claimant as being operator negligence had been caused by human error.

8.26.2. The respondent had relied upon its internal experienced and knowledgeable health and safety team to undertake a thorough investigation and had used Sparks as an independent company to assess the damage and provide a detailed report of the causes. The claimant had provided a statement of an ex-employee's opinion, who had not inspected the equipment and would not be used as evidence.

8.26.3. Mr Sewell had thoroughly checked the evidence from the investigation including the daily check sheet and had no reason to believe that the records were falsified. In this regard the claimant had confirmed that he did his own checks prior to starting his shift and that the welding set had been welding correctly. Any pre-existing damage was not a cause of the fire.

8.26.4. The internal health and safety team and Sparks concurred that the fire was caused due to operator abuse, namely "the aggressive handling of the weld torch and feeder".

8.26.5. All the individuals named by the claimant as witnesses had been contacted but the respondent could not influence their decision as to whether to attend. Witness statements had been obtained from the two individuals whom the claimant suggested would be able to confirm that there was a fire within the welding unit before the claimant pulled the welding hose but neither discussed or confirmed that there was a fire beforehand. Furthermore, Mr Sewell had rechecked the CCTV footage, which clearly showed that they did not have visibility of the welding equipment at the time of the incident.

8.26.6. The further clarification from Sparks had been provided verbally to Mr Vollaro following the disciplinary hearing but when, on 30 September, the claimant requested that clarification in writing, Mr Vollaro requested that from Sparks on 4 October (420) and the response was sent to the claimant on 6 October 2021 (442).

8.26.7. Mr Sewell was satisfied that those involved (the health and safety team, disciplinary manager and the appeal manager) had adhered to the respondent's procedures.

8.27. Mr Sewell enclosed with his letter a copy of the notes from the Disciplinary Appeal Hearing and invited the claimant to let him know of any factual changes he would wish to have made. The claimant replied that the minutes were "largely a correct record of the meeting" except for the reference of the end of the meeting to his role as a cage fabrication supervisor, which Mr Sewell had determined was not relevant to the appeal. The claimant also raised a number of other matters but they were similarly not relevant to the appeal. He concluded that he had no desire to enter into any further correspondence on this issue, suggesting that it should be referred to ACAS conciliation for a fair adjudication (468). Miss Whatmore again invited the claimant to inform her of any changes or additions that he wanted to have made to the minutes (467) but it would appear that he did not respond.

Mr Elliott

9. Mr Elliott gave his evidence by reference to his witness statement in a very straightforward and helpful fashion. He had previously been an employee of the respondent but now worked elsewhere as a CM Engineer. Much of Mr Elliott's witness statement related to matters that were not directly relevant to the issues in this case such as, from his experience as an employee of the respondent: the setting up of the welding bays; the positioning of the welding plant; the potential for harm to the health of the welders; the lack of weekly maintenance; the daily welding area checklists not being completed correctly particularly in relation to frequent broken or missing parts. Particular points of note that were relevant to the issues included as follows:

9.1. He had based his findings from viewing the video and seeing the report and its photographs.

9.2. He had had almost 30 years of experience of welding processes including the use of the equipment that the claimant was using at the time of the incident.

9.3. An Arc flashover causes a very bright intense light whereas that on the video had been an orange type flame with no sign at all of any flashover.

9.4. The extraction hose looked more likely the cause of the fire as they are prone to holes as shown in the images. The welding torch would have been stretched vertically up the jig and possibly resting against the face of the display as it started to burn. While working with the respondent he had witnessed damage to the display and the controls identical to that in the photograph that had been exclusively caused by either grinding sparks and exposure to welding sparks or fall out.

Submissions

10. After the evidence had been concluded, the claimant and Mr Bidnell Edwards made submissions, both by reference to detailed written submissions, which addressed the issues in this case.

11. In this respect I record that at the end of the third day of the hearing, with only submissions to come the following morning, in accordance with the overriding objective, I sought to give the claimant guidance as to the issues that he needed to address in this case and referred him to relevant case law. It became apparent during his submissions (not least his having divided his written submissions into the three elements referred to in the decision in Burchell) that he had understood and possibly researched further the points that I had made.

12. It is not necessary for me to set out the respective submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made, together with the statutory and case law referred to by Mr Bidnell Edwards, and the parties can be assured that they were all taken into account in coming to my decisions. That said, the key points in the representatives' submissions are set out below.

13. On behalf of the respondent, Mr Bidnell Edwards made submissions including the following:

13.1. The respondent had proved that conduct was the reason for the claimant's dismissal.

13.2. The claimant had accepted that it was reasonable for an investigation to take place, that both Mr Vollaro and Mr Sewell believed the Sparks report and, if they believed it, it was not unreasonable for them to have dismissed him.

13.3. Mr Khan undertook extensive investigations including interviewing a number of witnesses and obtaining an independent report.

13.4. The contemporaneous statement from the claimant on 10 August 2021 was signed by him and is the most reliable account. He had stated that he did not think that the fire was started by dripping weld spatter. He also stated that using the welding set on the floor was his personal preference as opposed to having it mounted on the pedestal.

13.5. The CCTV footage shows the claimant significantly move the weld set, there is a flash and the claimant moves away that very second to retrieve the extinguisher. The claimant changed his account when he stated that he had urgently moved an already flaming welding set that was sat underneath the jig, which was a change in the order of events from what had previously been stated. His suggestion that he was saving the equipment was a telling change. Similarly, the claimant maintained that he had seen the fire then accepted that he had not and, after having stated that he was wearing welding equipment, accepted that he was not.

13.6. The claimant's attitude to welding was negative, "I have made no secret of my preference NOT to weld ….". This supports his handling of the welding set aggressively.

13.7. The respondent had obtained an independent report from Sparks, which is skilled in explaining causation. The opinion was that the fire did not start internally but was caused by "operator abuse" and an "Arc flashover", which occurred simultaneously with the aggressive handling of the weld torch and feeder. Mr Vollaro asking further questions of Sparks show that he did not have a closed mind.

13.8. Mr Vollaro understood all of the salient information and applied his mind to the key questions of causation and seriousness.

13.9. The claimant not being provided with other fire reports was a red herring as those fires had different causes: there had been no Arc flash and no aggressive handling. He had also referred to the standard of the respondent's equipment and checks but confirmed that his equipment was okay. He had been provided with all relevant CCTV footage.

13.10. The claimant's conduct had been very serious with economic and health and safety implications.

14. The claimant made submissions including the following:

14.1. Mr Vollaro's misunderstandings, misrepresentations and errors (perhaps as a result English not being his first language) were numerous and troubling, and the claimant had been unable to raise them at the appeal because they were not clear in the dismissal letter and only became apparent in Mr Vollaro's witness statement. For example:

14.1.1. At the disciplinary hearing, in answer to the question of whether he thought the fire was already there, the claimant was speaking in the past tense, “I know it was”, he did not answer “I knew it was”.

14.1.2. The claimant’s answer, “That’s not the case”, to the point about his legs being visible as he walked around the back and there being no flame until the flash of fire after he walked through did not show a lack of coherence as Mr Vollaro had suggested.

14.1.3. The claimant initially saying that he did not think that the fire was started by dripping weld spatter and then that it was had been construed as inconsistent but it was a reappraisal having viewed the disassembled item in the Sparks report.

14.2. Mr Sewell (and Mr Vollaro) had withheld full exonerating evidence including from his own electricians who had examined a previous fire and determined that there was not enough power in the unit to cause less damage than had occurred in the incident. The electricians’ report was also in complete contradiction of the Sparks report. As such, at the time they decided to dismiss and uphold that dismissal, they cannot have genuinely believed that he was guilty of misconduct. Likewise, statements were not obtained that could have proven facts contrary to those that were presented as evidence.

14.3. Both Miss Whatmore and CJ did not understand their roles, had substantially ignored his many requests for access to exculpatory evidence and had passed his requests directly to Mr Vollaro and Mr Sewell, which amounted to cross-pollination. CJ was appointed as an independent notetaker but contributed a full 50% of all questioning and content of the disciplinary hearing. Consequently the findings of the hearing were significantly compromised. Similarly, Mr Vollaro continuing the investigation by contacting Sparks following the disciplinary hearing contravened defined roles and responsibilities. His second communication with Sparks had not been impartial. He had chosen not to put to Sparks points the claimant had raised at the hearing; particularly why the explosion had been insufficient to cast light or cause damage to the claimant who was viewing it some 6 feet away.

14.4. The copy of the Fair Culture Model that had been provided had been highlighted indicating the predetermined outcomes, which represented a ‘smoking gun’. It was a significant indicator that the matter was pre-judged.

14.5. A previous fire had arisen from a negligent act by MW that had caused very severe damage but did not require the sanction of dismissal, so there was a precedent. Fire reports, which could have been redacted, were withheld. They had three similar aspects: what caught fire, how it caught fire in terms of application of a heat source to the upper Perspex cover and where it caught fire. Also, none of the welders had noticed the fire themselves. His inability to consult these reports meant that he was unable to mount any meaningful defence.

14.6. It was wrong to suggest that the incident had arisen as a result of a backlash to a duty did not enjoy. He was not a recalcitrant employee.

14.7. The respondent did not follow its own processes and had contravened ACAS guidelines on such matters, including investigations. He had requested a review of his suspension but did not receive a reply and his designated single point of contact had 'sent him to Coventry'. Mr Khan knew that there were verifiable falsehoods in the safety critical check sheets being undertaken without inspection and had lied when he said that there was no more CCTV footage.

14.8. Sparks had a vested interest. They were the failing service engineers of the respondent's equipment and had a pecuniary reason for maintaining their relationship. Also, there were likely to be implications for them if the fire was found to be in part at least to be associated with poor maintenance. The expert report gave no details pertaining to the expertise or experience of its author. Aggression was a subjective conclusion by an unqualified and presumably untrained person and could not have been determined from the video with any degree of certainty. The tests only proved that an internal fault was not the cause of the fire.

14.9. Mr Sewell completely refused even to consider alternative evidence from Mr Elliott.

14.10. The respondent had made up its mind before starting the investigation thus prejudicing both the investigation and the outcome.

The Law

15. The above are the salient facts and submissions relevant to and upon which I based my judgment. I considered those facts and submissions in the light of the relevant law being primarily the statutory law set out below and relevant case precedents in this area of law many of which were relied on by Mr Bidnell Edwards.

16. The principal statutory provisions that are relevant in this case are to be found in the Employment Rights Act 1996, which (with some editing so as to be relevant to the claimant's complaint) are as follows:

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.

(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 —

……

(b) relates to the conduct of the employee,

……

(4) 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."

17. As to case law, in Iceland Frozen Foods it was stated as follows:

"*We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by [ERA 1996 s 98(4)] is as follows:*

(1) the starting point should always be the words of [s 98(4)] 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 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."

18. Additionally, while bringing into my consideration the decision of the EAT in Burchell (which has obviously stood the test of time for over forty years and was relied upon by both parties) I also took into account certain more recent decisions of the Court of Appeal, which reviewed and indorsed the relevant authorities: ie. Fuller v The London Borough of Brent [2011] EWCA Civ 267, Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29 and Graham, particularly at paragraphs 35 and 36 where Aikens L.J. stated as follows:

> *"In Orr v Milton Keynes Council [2011] ICR 704, all three members of this court concluded that, on the construction given to section 98(4) and its statutory predecessors in many cases in the Court of Appeal, section 98(4)(b) did not permit any second consideration by an ET in addition to the exercise that it had to perform under section 98(4)(a). In that case I attempted to summarise the present state of the law applicable in a case where an employer alleges that an employee had engaged in misconduct and has dismissed the employee as a result. I said that once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.*
>
> *If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see section 21(1) of the Employment Tribunals Act 1996."*

Application of the facts and the law to determine the issues

19. Unfair dismissal as a concept was first introduced into the UK legislation in 1971. Some might have expected a tribunal to focus on whether it was fair that the employee had been dismissed. As indicated in the excerpt above, however, the higher courts have consistently said that that is not the correct approach; rather a tribunal should "focus its attention on the conduct of the employer": W Devis & Sons Ltd v

Atkins [1977] IRLR 314. That being so, the issues arising from the statutory and case law referred to above that are relevant to the determination of this case are summarised at paragraph 7 of these reasons. They fall into two principal parts, which I shall address in turn.

What was the reason for the dismissal and was it a potentially fair reason?

20. The first questions for me to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within section 98(1) of the Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

21. In ASLEF v Brady [2006] IRLR 576 it was said,

> "*Dismissal may be for an unfair reason even when misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that ….*
>
> *It does not follow, therefore, that whenever there is misconduct which could justify dismissal a tribunal is bound to find that that was indeed the operative reason, even a potentially fair reason. For example if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – would not be the misconduct at all, since that is not what brought about dismissal, even if the misconduct merited dismissal.*
>
> *Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so*."

The above excerpt and its reference to "antagonism" is of some relevance in this case as during cross examination the claimant asserted that he was not particularly liked by either Mr Vollaro or Mr Sewell who, he said, did not particularly like him on the site. There is no mention of this in the claimant's witness statement and he accepted that it had not been put to those witnesses but answered instead that they had been happy to fill his position "with another of their acolytes". I found nothing in the evidence that was before me that supported these assertions.

22. In light of the above, and stepping back and considering all the evidence presented to me at this hearing in the round, I am satisfied that the respondent has discharged the burden of proof upon it to show that the reason for the claimant's dismissal was related to his conduct, that being a potentially fair reason in accordance with section 98(1) of the Act.

In all the circumstances (including the size and administrative resources of the respondent's undertaking) and considering equity and the substantial merits of the

case, did the respondent act reasonably or unreasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing the claimant?

23. I now turn to consider the question of whether (there being no burden of proof on either party) the respondent acted reasonably as is required by section 98(4) of the Act. That is a convenient phrase but the section itself contains three overlapping elements, each of which a Tribunal must take into account:

> 23.1. first, whether, in the circumstances, the employer acted reasonably or unreasonably;
>
> 23.2. secondly, the size and administrative resources of the respondent;
>
> 23.3. thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

24. In addressing 'the section 98(4) question', I am alert to two preliminary points. First, I must not substitute my own view for that of the respondent. In UCATT v Brain [1981] IRLR 224 it was put thus:

> "*Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not*."

This approach has been maintained over the years in many decisions including Iceland Frozen Foods (re-confirmed in Midland Bank v Madden [2000] IRLR 288) and Sainsburys v Hitt [2003] IRLR 23.

25. Secondly, I am to apply what has been referred to as the 'band' or 'range' of reasonable responses approach. In respect each of these two preliminary points, I again refer to the excerpt from Graham above.

26. In this context, I now turn to consider the basic question of fairness as more fully set out in the three elements in Burchell and Graham. In that regard it is important to note that in the first of those decisions it is recorded that the Tribunal has to decide whether the employer "entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time". That is to say at the time the decisions were made to dismiss the claimant and uphold that dismissal and, therefore, on the basis of the information available to those persons at the time; although it would be no defence to state that information was not available if it could have been available had a reasonable investigation undertaken.

27. The first element in Burchell is that "there must be established by the employer the fact of that belief [*in the employee's misconduct*]; that the employer did believe it". For the reasons set out more fully above, I am satisfied that Mr Vollaro and Mr Sewell

both believed that the claimant was guilty of misconduct. That is clear from the evidence recorded above, particularly the decision letters that each of them sent to the claimant, and was clear from the clarity of their oral evidence before me. Further, I am satisfied that it was reasonable on the evidence available to them for those two managers to form that belief and to reject the claimant's alternative explanation that the fire had broken out some time before he returned to the window side of the jig and when he saw it he quickly pulled the hose so as to pull the unit into the open, and that pull did not cause an Arc flashover. As such, this first element in Burchell, the fact of belief of misconduct, is satisfied.

28. The second element in Burchell is that "the employer had in his mind reasonable grounds upon which to sustain that belief".

29. In this regard, I first refer to and rely upon the findings I have set out above relating to the respondent having shown that the reason for the claimant's dismissal was the statutory reason of conduct. Secondly, I find that it was within the range of reasonable responses of the respondent's managers to rely upon the report of Sparks as to the nature of the incident ("Viewing the CCTV, it can be seen that the Arc flashover happens simultaneous with the aggressive handling of the weld torch and feeder") and its cause ("Operator abuse"). In this regard, I accept the evidence of the respondent's witnesses that Sparks was an independent expert and it was, therefore, reasonable for the respondent to rely upon that report. It follows that I reject the claimant's submissions that Sparks had a vested interest due to the fact that they were the contracted service engineers of the respondent's equipment which was a commercial arrangement, thus had a pecuniary reason for maintaining their relationship and would the biased, had failed to discharge its maintenance obligations and there would be implications if the fire was found to be in part at least to be associated with poor maintenance. I note that Mr Elliott fairly accepted that it was reasonable for the respondent's managers to rely on the Sparks report. Conversely, I find that it was reasonable for those managers not to take account of Mr Elliott's report: he no doubt is an experienced welder but he had not inspected the welding unit and, more importantly, in light of his answers in cross examination I am satisfied that he has had neither the training nor the experience required to undertake an analysis of an incident such as this and provide an authoritative opinion as to its cause. Even the claimant conceded in cross examination that Mr Vollaro and Mr Sewell could be persuaded by the Sparks report.

30. More generally, I have addressed in some detail above the points made by Mr Vollaro in his decision letter. That being so, it will suffice if I simply record that on the basis of the key points arising at that hearing, which I have summarised in my findings above, I am satisfied that Mr Vollaro had a reasonable grounds upon which to draw the conclusions that he reached, which I have also summarised in my findings above. On those same bases, I am also satisfied that Mr Vollaro had reasonable grounds upon which to base his decision that the claimant had been guilty of gross misconduct and make his decision that the appropriate sanction was dismissal. In particular, with reference to the specific allegations against the claimant I consider that it was reasonable for Mr Vollaro to conclude that, in light of the CCTV footage and the report and follow-up email from Sparks, the fire began simultaneously when the claimant aggressively pulled the welding set, which in turn caused an Arc flash (in relation to

which the engineer had advised that there are differing degrees of Arc flash) and consequent fire; and in reaching that conclusion to reject the claimant's contentions to the contrary, first, that the welding set had been on fire underneath the cage for some time and only became visible when he pulled it into view and, secondly, that the fire was caused by pre-existing operator abuse on the torch.

31. For the reasons that I have also summarised in my findings above, I am satisfied that Mr Sewell too had a reasonable grounds upon which to draw the conclusions that he reached and, having drawn those conclusions, that it was within the band of reasonable responses for him to decide to uphold the decision that the claimant should be dismissed and, therefore, to reject his appeal. In essence, he too was satisfied, principally on the basis of the investigation conducted by the respondent's health and safety team, the CCTV footage and the independent reports from Sparks, that the claimant had caused the Arc flashover and resulting fire by aggressively pulling on the hose connected to the welding unit. As was put succinctly by Mr Sewell in cross examination, Sparks had "looked at the CCTV in parallel with the inspection of the equipment", and his conclusion was the same as the experts; as he put it, "An Arc flashover caused the fire and the flashover was caused by your pulling of the hose."

32. All in all, I find it was reasonable of respondent's management, on the evidence available to them, to reach their respective decisions on the grounds that are fully set out in their decision letters; and, therefore, to reject claimant's alternative explanations.

33. For all the above reasons therefore I consider that the respondent did have reasonable grounds upon which to sustain the belief in the claimant's misconduct.

34. The third element in Burchell is that at the stage that Mr Vollaro formed that belief on those grounds and Mr Sewell maintained that belief, the respondent "had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

35. The starting point of the investigation was the claimant's meeting with the respondent's health and safety officers on the date of the incident, 10 August 2021. While I accept that the Witness Statement that was produced was written by one of those officers (except for the final paragraph which the claimant added) the claimant signed it as being "a true accurate account" and confirmed in evidence that it was, "broadly right, there are no significant factual inaccuracies". On the basis of that statement together with all the other information that Mr Khan collected, as set out above, I repeat that I am satisfied that Mr Khan conducted a reasonable investigation of the incident in question. I am further satisfied that, on the basis of the investigation, he had reasonable grounds for deciding that there was a disciplinary case to answer. In this connection, throughout the hearing the claimant made repeated reference to the respondent having failed to seek out exculpatory evidence. Although I accept the principle as enunciated in A v B [2003] IRLR 405 that an investigator should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges, I am satisfied that in collecting all the evidence that he did, Mr Khan was gathering together relevant evidence including that which might potentially either exculpate or arraign the claimant.

36. In the above circumstances, the claimant was invited to attend a disciplinary hearing with Mr Vollaro, which also constitutes part of the investigation into the alleged misconduct. In evidence the claimant accepted that at least from this point on he understood that the allegation against him was the incident that had occurred on 10 August 2021 (as more fully explained by Mr Vollaro at the commencement of the hearing) namely, his having dragged the welding trolley aggressively, which caused an Arc flash resulting in a fire. I have referred above to the notes of the disciplinary hearing being comprehensive and have set out my key findings in relation to that hearing.

37. I am satisfied that the notes of the disciplinary hearing (key points from which I have summarised above), which the claimant was invited to and did amend, demonstrate that relevant issues were explored and that the claimant was given every opportunity to explain the circumstances of the incident from his perspective. Indeed at the end of the meeting Mr Vollaro rightly asked the claimant whether he had any additional points that he wanted to add.

38. The final stage of the process was the appeal hearing that was conducted by Mr Sewell and also constitutes part of the investigation into the alleged misconduct. I am satisfied that, as with the disciplinary hearing, the arrangements that were put in place for that hearing were reasonable including as to the information available to the claimant and his being informed of his right to be accompanied. Furthermore, for the reasons that I have summarised in my findings above I am satisfied that the notes of the appeal hearing, upon which the claimant was asked for his comments, demonstrate that all three of his grounds of appeal and the relevant issues arising therefrom were explored and that the claimant was once more given every opportunity to explain his position. Indeed at the end of the meeting Mr Sewell asked the claimant, as had Mr Vollaro at the disciplinary hearing, whether he had any points that he wanted to add to which the claimant replied, “No that’s all thank you”.

39. It is convenient that I should interject at this point that the claimant was critical of many aspects of disciplinary process followed by the respondent’s managers from the investigation through to the appeal. I have referred to these criticisms above but now draw together key points, in no particular order, as follows:

> 39.1. The claimant sought to have six fellow employees called as witnesses at the disciplinary hearing. I am satisfied, however, that Miss Whatmore did what was required of her in contacting the potential witnesses and the respondent cannot be criticised for the unwillingness of those individuals to participate in the disciplinary hearing.
>
> 39.2. The claimant was critical of the witness statements that had been collected by Mr Khan; both the content of those statements and the fact that only three statements had been obtained. I am satisfied, however, that Mr Khan had sought witness statements from all those who were in the vicinity and might have been able to shed some light on what occurred. As Mr Sewell answered at the Tribunal hearing, “The investigation took witness statements from individuals in and around the activity or who had had previous discussions with you”. The reality is that no one other than the claimant saw anything of the incident until after he informed his supervisor of the fire when he was fetching

the fire extinguisher. As Mr Sewell also said in evidence, witness statements had been taken from the two individuals whom the claimant suggested could support his case and he was sure that if they had seen a fire before it would have been in their statements but they had not mentioned there having been a fire beforehand. Mr Sewell had also rechecked the CCTV footage, which he said clearly showed that they did not have visibility of the welding equipment at the time of the incident. This is borne out by the claimant having accepted in cross examination that no one else had been close enough to say exactly when the fire started.

39.3. The claimant's evidence is that on the day of the incident and thereafter he had requested sight of the CCTV footage of the day starting at least 10 minutes prior to that which had been provided. It would appear that that footage should have been available at the time of the claimant's request to Mr Khan as it is retained on the respondent's system for seven days before being automatically deleted. Despite that, the claimant's evidence is that when he made this request Mr Khan responded that there was no additional footage. The reasons why he might have made that statement were never clarified at the Tribunal hearing. Ultimately, when the claimant pursued this request with Miss Whatmore I find that she correctly responded that the additional footage was no longer available as it had been automatically removed as described above. She informed the claimant, however, that all the day's footage had been viewed by health and safety officers. I find that from a practical perspective this point was answered by Mr Vollaro in evidence when he said (building upon a point made by CJ at the disciplinary hearing and in his own dismissal letter) that if there was no smoke or any other indication of a fire in the 41 seconds of the available footage immediately preceding the incident, there was unlikely to have been any such evidence in the preceding 10 minutes.

39.4. The claimant also requested permission to contact Sparks directly and for the welding unit to be made available to him for independent inspection. I acknowledge that another employer might have responded more positively to a request such as this but, as set out above, my task is to "focus [*my*] attention on the conduct of the employer" (W Devis & Sons Ltd) and I am satisfied that it was reasonable for Miss Whatmore to reply that as Sparks was an independent company it would not speak to him and that the welding unit was still quarantined with that company and, therefore, was unavailable for inspection.

39.5. The claimant was critical of CJ's role at the disciplinary hearing suggesting that she had been appointed only as an independent notetaker but contributed a full 50% of all questioning and content of the disciplinary hearing rendering the findings of the hearing significantly compromised. I reject that criticism. The agreed record of the disciplinary hearing includes that CJ was there "as the HR representative and independent note-taker" and, in my experience, it is common practice and by no means unreasonable for an HR representative to participate in a disciplinary hearing. Crucially, I accept the answers given by Mr Vollaro at the Tribunal hearing that while CJ might have helped him to phrase sentences because of language issues he was

independent and although she had contributed at the hearing she had "not to my decision".

39.6. The claimant was also critical of Mr Vollaro continuing the investigation by contacting Sparks following the disciplinary hearing, which he suggested contravened defined roles and responsibilities, and this further investigation "should have been conducted by the investigation team as per the company's own conduct requirements under the provisions of the disciplinary and capability policy". Once more, however, I reject that criticism as, in my experience it is not only common practice but is understandable and often right for any manager conducting a disciplinary hearing to pursue points that had been raised in order to gain a better understanding of any issue that has been raised. It is also possible that in so doing, the exculpatory evidence (which I repeat the claimant in this case repeatedly said the respondent had not sought to identify) would come to light. In this connection also, Mr Vollaro contacting Sparks for an opinion on the points raised by the claimant addresses, to an extent, his request that the welding unit should be made available to him for inspection.

39.7. At the Tribunal hearing the claimant sought to clarify that when, in answer to the question at the disciplinary hearing, "So you think the fire was already there?" he replied, "I don't think, I know it was", he was speaking in the past tense, "I know it was", and he did not answer, "I knew it was"; and suggested that the subtlety of the different tense had been lost on Mr Vollaro as English is not his first language. From my reading of that exchange as set out in the agreed record, I consider it was reasonable for Mr Vollaro to understand from the claimant's reply that he was suggesting that he had knowledge of the fire having started prior to him walking round to the window side of the jig and pulling on the hose attached to the welding unit, which is not what is shown in the CCTV footage and is inconsistent with the claimant's evidence that he only became aware of the fire after he had returned to the window side.

39.8. The claimant complained that three reports into previous incidents had been withheld. I have set out above his perception that those incidents all had aspects that were similar to the incident in question and his contention that his inability to consult those reports meant that he was unable to mount any meaningful defence. I have also recorded, however, that having considered the incident reports themselves, I accept the oral evidence of Mr Vollaro that the previous incidents had been different in nature with completely different causes. As Mr Sewell said in evidence, every investigation is specific to that individual incident so any report arising would be irrelevant to a consideration of the incident in question: for example, the incident involving the employee MW had arisen from human error.

39.9. The claimant maintained that the daily check sheet had not been completed by his supervisor that day but, first, Mr Vollaro had checked and confirmed that the claimant's equipment had been checked at the start of the shift by his supervisor and that the check sheet confirming that the claimant's equipment was in good working order had been completed and processed

appropriately. Secondly, Mr Sewell responded to this point at the appeal hearing that he had a document signed by the supervisor to confirm the check was done on the day and he had no reason to believe that it was falsified. He undertook, however, to look into this and there is no suggestion that he did not do so or that, having done so, he found that the check sheet had not completed. Regardless of any procedural irregularities that might have occurred, there was no evidence before this Tribunal to support the claimant's contention as to there having been "a falsification of the documents". In this respect I consider it important that the claimant confirmed at the disciplinary hearing and at the hearing before this Tribunal that there was nothing dysfunctional about the equipment that he was using at the time and it was "welding ok".

39.10. The claimant questioned the meaning of the content of the three boxes shown on the respondent's Fair Culture Model but I have found above that I accept Mr Vollaro's explanation as to the meaning and purpose of that content; particularly that the respondent construes "deliberate" as meaning an "intentional" or a "conscious" act. I have also addressed above the claimant's suspicions arising from the copy of the Fair Culture Model having been highlighted in a way that he says suggests that the outcome had been predetermined from the outset. I repeat that without evidence on that point and it not having been put to either Mr Vollaro or Mr Sewell I do not take it any further.

39.11. More generally, although the claimant provided few specifics, he asserted that the respondent had failed to comply with ACAS guidance. During the course of the Tribunal hearing I confirmed to the claimant (without providing the statutory reference) that section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that in any proceedings before an employment tribunal any relevant Code of Practice issued by ACAS is admissible in evidence and relevant provisions must be taken into account in determining any questions arising. It is unnecessary for me to address every detail in the Code but I am satisfied that the respondent complied with the several requirements of that Code in relation to the following: investigating the potential disciplinary matter; providing the claimant with sufficient information to enable him to prepare his answer to the allegations together with copies of relevant documents; informing the claimant of necessary details regarding the disciplinary meeting including the right to be accompanied; conducting that meeting appropriately; deciding whether disciplinary action was justified and informing the claimant of that decision in writing; providing him with an opportunity to appeal. There is only one aspect of the above that is unclear, which is that any period of suspension "should be kept under review". The claimant alluded to this in the further statement that he produced shortly before the disciplinary hearing (206) in which he stated, "I do not feel that my status has been in any way reviewed at any time", and in an email dated 29 September 2021 (365) to CJ he asked, "Can you please explain this delay and provide to me details of any historical ongoing reviews into the matter", which at the Tribunal hearing he said was a request regarding a review of his suspension but it seems to be more general than that. That said, the above is a provision in the Code and it matters not whether the claimant requested such a review. The

claimant did not, however, pursue this with any of the respondent's witnesses other than Mr Vollaro (Miss Whatmore perhaps being best placed to address this point) and Mr Vollaro was only able to reply that the email of 29 September was to CJ and he had not seen it previously, although he believed there were regular communications between them. It might be arguable that it can be inferred from the reference in the email of 27 August 2021 from Miss Whatmore that the claimant's suspension would continue pending the outcome of the disciplinary hearing that it had been reviewed at that time but I repeat that she was not asked about this at the Tribunal hearing. At worst, it might be that the claimant's suspension was not reviewed. That would be contrary to the Code but, as referred to above, that is only a factor that must be taken into account and is not in itself determinative. In all the circumstances, I do not consider that that breach, if it is such, comes close to amounting to the respondent having adopted a flawed and unreasonable process or results in the claimant's dismissal having been unfair.

40. Considering all the evidence before me I am not satisfied that any of the claimant's criticisms of the process followed by the respondent in this case, judged against the standard of reasonableness rather than perfection, can be said to be such as to render his dismissal unfair.

41. Stepping back and considering all the evidence before me in the round, I am satisfied on the basis of the evidence available to me that the respondent acted reasonably and in accordance with the Code in relation to the process that was followed leading to the dismissal of the claimant (including in relation to the investigation, the disciplinary hearing and the appeal hearing) and, in accordance with the third element in Burchell, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case".

42. In summary, by reference to the three elements in Burchell, on the evidence available to me and on the basis of the findings of fact set out above, I am satisfied that:

40.1 Mr Vollaro and Mr Sewell "did believe" that the claimant was guilty of misconduct;

40.2 they had in their minds reasonable grounds upon which to sustain their respective beliefs that the claimant was guilty of misconduct; and

40.3 at the stage at which they formed those beliefs on those grounds the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

43. The final issue, given the above, is the reasonableness or otherwise of the sanction of dismissal: ie the question of whether dismissal was within the range of reasonable responses of a reasonable employer. Referring to established case law such as Iceland Frozen Foods (again as indorsed in Graham) there is, in many cases, a range or band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. In this regard, I can do no better than quote Lord Denning MR (as he then was)

sitting in the Court of Appeal in the case of British Leyland UK Limited v Swift [1981] IRLR 91. There he said as follows:

> "*The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view*".

44. It is quite possible therefore that another employer in these circumstances might have come to a different decision. My function, however, is to determine in the circumstances of this case whether the decision of this respondent fell within the band of reasonable responses that a reasonable employer might have adopted. In light of my findings that it was within the range of reasonable responses for the respondent's managers to conclude that the fire began when the claimant aggressively pulled the welding set, which in turn caused an Arc flash and consequent fire, I do not find that no reasonable employer would have dismissed the claimant. Indeed I am quite satisfied, in the circumstances known to Mr Vollaro and then Mr Sewell as a result of the respondent's investigation (including the claimant's input at the investigation, disciplinary and appeal stages), that Mr Vollaro's decision to dismiss the claimant was a decision that fell within the range of reasonable responses of a reasonable employer in these circumstances as did Mr Sewell's decision to uphold that dismissal and dismissed the appeal. In short, I am satisfied that it was within the range of reasonable responses for the respondent to dismiss the claimant.

45. In summary, therefore, I am satisfied that, as is required of me by section 98(4) of the Act, the respondent acted reasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing him.

Conclusion

46. In conclusion, my judgment is that the reason for dismissal of the claimant was conduct, which is a potentially fair reason under section 98(1) of the Act and that the respondent did act reasonably in accordance with section 98(4) of the Act. I have to be satisfied that there was a reasonable investigation, reasonable grounds and a reasonable belief allowing the managers, on the evidence available to them, to come to a decision which fell within the range of reasonable responses. I am so satisfied.

47. For the above reasons the claimant's complaint under section 111 of the Act that his dismissal by the respondent was unfair, being contrary to section 94 of the Act, is not well-founded and is dismissed.

EMPLOYMENT JUDGE
MORRIS

JUDGMENT SIGNED BY EMPLOYMENTJUDGE

ON 10 July 2022

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