EMPLOYMENT TRIBUNALS

Claimant: Mr Gary Barnfather

Respondent: Gentoo Group Limited

HELD AT: Newcastle by CVP **ON:** 24-25 August 2022

BEFORE: Employment Judge Moss

REPRESENTATION:

Claimant: Mr Bruce Henry (Counsel)
Respondent: Ms Amy Rumble (Counsel)

WRITTEN REASONS

Judgment in this case having been given orally in the presence of the parties, and following a request from the respondent, the Tribunal's reasons for its decision are set out below.

In preparing these reasons, it came to light that the names of the claimant and respondent representatives had been transposed on the judgment. Apologies are extended to all concerned for any confusion caused by the error.

Introduction

1. The respondent is a housing association, owning and managing domestic properties in Sunderland, employing just over 1000 people around the time of the claimant's dismissal. The claimant's employment with the respondent began on 2 September 2002 and ended when he was dismissed on 9 December 2021. At the time of his dismissal, the claimant was acting up as an Electrical Repairs and Maintenance Manager.

Tribunal Hearing

2. The hearing took place over 2 days, 24 and 25 August 2022. I had been provided with the hearing bundle comprised of 310 pages, together with the witness statements of the claimant, Joe Robson (Electrician) and respondent witnesses, Ian Thompson (Operations Manager, Repairs Department - Investigating Officer), Marc Edwards (Director of Assets and Sustainability – Chair of Disciplinary Hearing) and Susan Thompson (Executive Director of Housing – Appeal Manager). Sworn evidence was given by the claimant and Mr Robson on his behalf. Mr Thompson, Mr Edwards and Mrs Thompson all gave sworn evidence on behalf of the respondent.

Claim and issues

3. The claimant brought claims of unfair and wrongful dismissal based on the respondent's decision to summarily dismiss him on grounds of gross misconduct. He contends that the dismissal was both substantively and procedurally unfair and that to dismiss him without notice amounted to a breach of contract. He disputes the reason for dismissal was conduct, believing instead that the respondent was looking to apportion blame to explain its own procedural failings to the Housing Regulator.

4. The respondent disputes the claims, contending that the dismissal was both substantively and procedurally fair and arguing that summary dismissal was justified due to the claimant's gross misconduct in breach of his contract of employment. Should gross misconduct not be found, the respondent asserts in the alternative that dismissal was for some other substantial reason (SOSR), namely a breakdown in trust and confidence due to the claimant's actions and assertion he would repeat the conduct in question.

5. The issues for me to determine were whether the claimant was unfairly dismissed and whether he committed gross misconduct sufficient to justify summary dismissal. It was agreed at the outset that the question of dismissal in any event (Polkey) would be determined as part of the liability hearing and the parties dealt with this in their closing submissions.

Determining the central issues would involve consideration of the following:

Unfair dismissal

5.1 What was the reason (or the principal reason) for dismissal?
5.2 Was the reason a potentially fair reason under s98 Employment Rights Act 1996 (ERA)?
5.3 Did the respondent act reasonably in treating that reason as a sufficient reason for dismissing the claimant?
5.4 Was the dismissal fair or unfair in accordance with s98(4) of the ERA?
5.5 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable

procedure been followed – *Polkey v A E Dayton Services Ltd 1988 AC 344.*

Wrongful dismissal

5.6 Has the respondent established that the claimant did commit gross misconduct sufficient to justify summary dismissal?

Findings of fact

6. On the documents and oral evidence presented I make the following essential findings of fact, restricted to those necessary to determine the central issues in the case.

7. The claimant commenced employment with the respondent on 2 September 2002, initially as an Apprentice Electrician before being appointed to the role of Electrician on 9 March 2007. Having received an honorarium for undertaking additional duties with effect from 1 June 2016, he was appointed permanently to the role of Electrical Services Supervisor on 1 May 2017. From a date in November 2020, he undertook the role of Repairs and Maintenance Manager (Electrical Services) on a temporary basis. He had responsibility for supervising 10 operatives as part of the role.

8. The claimant had previously been issued with a 'statement of expectations' to deal with an incident of minor misconduct when he failed to attend an emergency out of hours shift on 4 September 2020. Other than that, his disciplinary record was clean.

9. The claimant's training records, applicable to both his substantive and temporary roles were fully up to date. Although it was not the claimant's primary responsibility to look after Domestic Electrical Installation Condition Reports (DEICRs), he would carry out that function at times. He would certify such reports in his substantive role of Electrical Services Supervisor as well as in the role he was performing on a temporary basis.

10. In respect of its electrical installation condition reporting standards, the respondent relied upon a Best Practice Guide issued by electrical safety experts. The Guide provides that each observation relating to a concern about the safety of the installation should be attributed an appropriate Classification Code and describes the meaning of each of the codes as follows:

C1 - 'danger present'. Risk of injury. Immediate remedial action required
C2 - 'potentially dangerous'. Urgent remedial action required
C3 - improvement recommended
F1 - further investigation required

Notably, a C1 coding would require immediate action to be taken to render a dangerous situation safe. An F1 coding would require further investigation to

take place within 28 days in accordance with the respondent's prescribed timescales.

11. On 5 November 2020 Joe Robson, an Electrician and employee of the respondent, was undertaking work at one of the respondent's domestic properties. He found that a socket had been removed from within a fitted wardrobe in one of the bedrooms and gave the installation an FI coding. In Mr Robson's assessment, there was no copper on show and the cables were insulated due to connector blocks having been fitted but further investigation was required because a cable was leading to somewhere that had yet to be located. In accordance with the Best Practice Guide, an F1 coding would be appropriate where a potential safety issue had been revealed but it could not be fully determined due to the agreed extent or limitations of the inspection. Mr Robson recalled that the tenant wanted him to leave the premises at the time.

12. On 12 November 2020 the claimant reviewed Mr Robson's DEICR, including a colour photograph of the installation, and he signed off the FI coding as being appropriate. There was no evidence of testing having taken place to establish whether the cables were live, but the claimant's evidence was that he would not have classified the installation as a C1 whether or not the cables were live.

13. An internal audit took place almost a year later, during which a number of issues came to light that caused the respondent to refer itself to the Housing Regulator. One of those issues resulted in the respondent undertaking an investigation into the FI coding attributed by Mr Robson to the installation on 5 November 2020. Initial investigations suggested the property had been left in a potentially dangerous condition and that a C1 coding should have been applied to the relevant installation. On 15 October 2021, remedial works were carried out by Joe King, Electrician, by removal of the 'diy wiring' and the fitting of a single socket and back box.

14. On 11 November 2021, the claimant was informed in writing by Ian Thompson that he was being formally suspended pending an investigation into allegations of potential gross misconduct, specifically gross negligence of duties.

15. An investigation meeting was held with the claimant on 16 November 2021, chaired by Ian Thompson and attended by Claire Connifey (HR Advisor). The claimant was asked whether in his opinion the correct classification code for the installation was a C1. He maintained that it wasn't, that he didn't think danger was present.

16. Further investigation was undertaken by the respondent by way of meetings being held with three other qualified electrical supervisors, Ian Aiston, Keith Holt and Leon Stephenson. They all concluded the installation ought to have been classified as a C1. Mr Stephenson classified the installation as a C1 as it showed exposed parts, specifically access to live conductors and connectors. Although in a wardrobe, he stated there was still a risk of

touching live connectors and exposure to live parts. In his opinion a blank plate should have been added before leaving the property or, as a minimum, it should have been taped up to make it a C2. For him, this was 'not sleeping at night stuff'.

17. Mr Thompson then asked Stephen Lister, Repairs and Maintenance Manager, also a qualified supervisor, to provide a further opinion since he hadn't been involved in the audit that led to the claimant being investigated. Mr Lister also concluded that the classification should have been a C1 due to exposed electrical cables being able to be touched.

18. Mr Thompson concluded the investigation with a finding that the claimant had failed to carry out his duties with full due care and attention, resulting in the tenants at the property potentially being put at risk through his negligence.

19. Following the investigation, a disciplinary hearing was held with the claimant on 9 December 2021, chaired by Marc Edwards. The claimant was accompanied by a Trade Union representative at the hearing. The claimant had been provided with a disciplinary pack ahead of the hearing. It contained the written opinion of Stephen Lister but not the other Qualified Supervisors. Shortly before the disciplinary hearing started, the claimant was provided with the summarised statements of Mr Aiston, Mr Holt and Mr Stephenson. It was put to the claimant that he had incorrectly certified Mr Robson's report. The claimant maintained the classification was not a C1. He did state that he would have applied some tape as a form of additional protection and agreed that adding a blank plate would have enhanced protection.

20. Towards the end of the hearing, the claimant was provided with documentation from Morgan Lambert, an industry specialist in Gas and Electrical disciplines. The firm had undertaken an independent review at the behest of the respondent and had also classified the installation as a C1. The meeting was stood down to allow the claimant to consider the paperwork with his TU representative. The claimant maintained his position throughout, that Mr Robson had attributed the correct classification code to the installation.

21. The respondent's disciplinary policy included the following in relation to gross misconduct:

"There are some circumstances when conduct is so serious that it breaches the contractual relationship between the employee and the Group. In the event that an employee commits an act of gross misconduct, Gentoo will be entitled to terminate summarily the employee's contract of employment without notice or pay in lieu of notice". Examples are provided of acts regarded as gross misconduct and include 'gross negligence of duties or a serious or deliberate breach of contract or operating procedures'.

22. At the end of the disciplinary hearing, the claimant was summarily dismissed for gross misconduct. The reason given was gross negligence in relation to his key responsibilities, compromising the safety of tenants in his review of

the DEICR. He was advised of his right to appeal in writing within 5 working days of receipt of the outcome letter.

23. On 12 December 2021 the claimant sought his own external coding advice and received an opinion that the code should be based on the interpretation of risk by the engineer conducting the DEICR. The respondent did not dispute that an element of subjectivity is involved in deciding which classification code to use.

24. The claimant submitted an appeal against his dismissal to the respondent by email on 31 December 2021. He stated the grounds of appeal to be "in reaching the decision, the relevant practical facts of the matter and the points mentioned in my Written Statement were not given fair consideration throughout the hearing process". By way of letter dated 13 January 2022, the claimant was notified that the appeal would be heard on 24 January 2022, that it would be heard by Mrs Susie Thompson and that Nikki Young, People Director, would be present to advise on process. The claimant notified the respondent by email on 19 January 2022 that he would prefer not to attend due to personal circumstances and he asked for the appeal to proceed in his absence.

25. The appeal was heard on 24 January 2022 in the claimant's absence.

26. The respondent's disciplinary policy included a requirement for an appeal panel to consist of 2 members where the sanction had been dismissal:

"For appeals where the action resulted in dismissal, the appeal panel will consist of two members which will be made up of a member of the Executive Team/Senior Leadership Team, not within the same reporting line as the hearing manager and has had no direct involvement in the case, and/or a Board member. An HR representative will be present to advise the appeal panel".

For sanctions short of dismissal, the policy provided as follows:

"For appeals where any other sanction has been issued, the appeal will be heard by the appropriate level of management, from a different business area. An HR representative will be present to advise the appeal panel".

27. In contravention of the respondent's disciplinary policy, the appeal was determined solely by Mrs Thompson with Ms Young in attendance as HR representative to give procedural and/or legal advice to Mrs Thompson. Mrs Thompson could not recall the reason for sitting solo, stating that she took advice and got on with the process. Ms Young was present as the HR representative referred to in the policy. She was not a decision maker, as confirmed by Mrs Thompson in evidence.

28. At the appeal hearing, the claimant's personal statement, together with questions and responses from the notes of the disciplinary hearing, were considered in detail. Marc Edwards was asked to attend the hearing to allow

Mrs Thompson to ask questions of him relating to the appeal. Mr Edwards confirmed that the claimant's statement had been taken into consideration at the disciplinary hearing, the claimant having taken about 40 minutes to verbalise and give additional information in support. In respect of whether alternative sanctions were considered given the claimant's length of service, Mr Edwards explained that it would have been a consideration if there had been any level of acceptance by the claimant that the classification was wrong. Mr Edwards maintained the claimant was guilty of gross negligence due to the fact there was a clear risk to tenant safety which in turn has an impact on the regulatory compliance of Gentoo as a Group. When asked whether a final written warning or demotion would have been a more appropriate sanction, Mr Edwards responded that the claimant had been unable to accept that the matter was serious and still hadn't recognised it, despite there being 4 Qualified Supervisor reports. It was Mr Edwards' view that if the same situation arose it would happen again, and the claimant could put tenants and the Group at serious risk of harm.

29. Mrs Thompson decided to uphold the outcome of the disciplinary hearing and notified the claimant of her decision in a letter dated 25 January 2022. Mrs Thompson informed the claimant that she felt the relevant practical facts and his personal statement were discussed and given full consideration at the initial disciplinary hearing. She went on to say that she had considered whether a final written warning or demotion would have been a more appropriate sanction. Alternative sanctions were not deemed appropriate due to the fact that the claimant had been unable to appreciate the seriousness and danger presented to the tenant and the Group. If the same situation arose in future, she believed the claimant would make the same assessment again, putting tenants at risk. It was stated that, while the claimant's length of service had been taken into account, his refusal to accept his decision was wrong left Mrs Thompson with no alternative than to agree with the original panel's decision. The claimant was notified that the decision to dismiss him with immediate effect was upheld.

Relevant Law

30. An employee has the right under s94 ERA 1996 not to be unfairly dismissed.

31. Where a complaint of unfair dismissal is made, it is for the employer to show that it dismissed the claimant for a potentially fair reason ie. one within s98(2) of the 1996 Act, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the claimant held. If the respondent fails to do that the dismissal will be unfair.

32. Conduct is a potentially fair reason falling within s98(2).

33. If conduct is shown to have been the reason, the decision to dismiss for that reason has to be reasonable in all of the circumstances of the case.

34. Once a potentially fair reason is established by the employer as the reason (or main reason) for dismissal, then s98(4) must be considered, the burden being neutral at this stage. S98(4) provides as follows:

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.

35. In applying s98(4), the Tribunal must not substitute its own view of the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA; Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.* In other words, the dismissal must have been procedurally, as well as substantively, fair.

36. The main authority relevant to conduct dismissals is *British Home Stores v Burchell [1978] IRLR 379* which identifies three key questions for the Tribunal:

- whether the respondent genuinely believed the claimant was guilty of the misconduct alleged;
- if so, whether the respondent had reasonable grounds upon which to sustain that belief;
- whether the respondent carried out such investigation as was reasonable in all the circumstances of the case.

37. Under the principle in *Polkey v A E Dayton Services Ltd 1988 AC 344,* where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event had there been no unfairness ie. if a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis. The Tribunal should make a percentage reduction in the compensatory award which reflects the likelihood that the claimant would have been dismissed in any event.

38. As far as the wrongful dismissal claim is concerned, it is for the Tribunal to make its own assessment of whether the claimant did or did not commit an act of gross misconduct, and accordingly whether or not the respondent was entitled to terminate the employment without notice.

Conclusions

39. I am satisfied that conduct was the reason for the claimant's dismissal. Although the claimant suspects that he was a scapegoat for the organisation's own failings, in that it had to be seen to be doing something having referred itself to the Housing Regulator, I found no evidence beyond supposition to support the claimant's assertion in that regard.

40. It is not for me to decide what classification code should have been attributed to the installation, but whether the respondent held a genuine belief on reasonable grounds that the installation had been coded incorrectly and that the claimant had a responsibility to ensure the correct classification was applied. I proceeded on the basis that all involved, including Mr Robson, the claimant and those who were subsequently asked to provide an opinion about the correct classification of the installation, will have been working on the assumption the cables were live when making their assessment of risk. That may be an academic point considering the claimant confirmed in evidence that he would not have given it a C1 coding whether or not the cables were live. I accept that the respondent genuinely believed the claimant had failed to correctly certify Mr Robson's installation report, and that it was a reasonably held belief because it was based on a number of statements of other professionals in the field, including one external to the organisation. This formed the basis for the respondent's belief the claimant was guilty of gross negligence. Relying on a number of sources of evidence that the correct classification was C1 – danger present, the respondent had reasonable grounds for believing this to be the case. In accordance with the respondent's disciplinary policy, gross negligence is an example of an act falling within the category of gross misconduct.

41. I am satisfied a reasonable investigation took place. The claimant was interviewed. He understood what was being asked of him and had an opportunity to raise any issue he deemed to be relevant. The respondent had obtained statements from 4 other Qualified Supervisors and although they had not seen the installation in situ, they based their opinions on the very same evidence upon which the claimant had based his own.

42. At the disciplinary hearing, although statements were provided to the claimant just beforehand and one towards the latter part of the hearing, they were brief statements, were able to be digested easily and the claimant was accompanied by a union representative. A request for an adjournment could have been made if the claimant felt prejudiced and needed further time to consider them or obtain further evidence in support of his case. Matters were discussed at length and the claimant given every opportunity to advance arguments in support of his position. The procedure up until this point was undertaken fairly.

43. When it comes to the question of whether the decision to dismiss was within the band of reasonable responses open to the employer, I remind myself that I am unable to substitute my own opinion of what should have happened. One employer might choose not to dismiss in circumstances where another

would choose to do so and both decisions could be said to be within the range of reasonable responses. The Tribunal is unable to interfere simply because it regards a decision as harsh. I cannot say that the decision to dismiss the claimant was outside of the range, having regard to the nature of the respondent's business and the need for its employees to appreciate the gravity of misclassification from the employer's perspective. The claimant's failure to acknowledge the employer's concerns as being legitimate in light of the evidence it had taken into account, gave rise to an understandable fear that the claimant could continue to operate in the same way in the future. I am persuaded the respondent gave thought to lesser sanctions being applied but concluded there was no viable alternative given the claimant was fully qualified and up to date with his training and that the risk would remain even were he to revert to his substantive role since that would also involve him certifying DEICRs. I find that it was within the range of reasonable responses for the respondent to decline to take that risk.

44. I must consider the question of fairness throughout, including in connection with the appeal hearing. I do find there was a significant failing in respect of the appeal, in that the respondent did not comply with its own internal policy requiring appeals to be determined by a panel of 2 where the sanction had been dismissal. The fact the claimant had asked for the appeal to be determined in his absence did not justify a departure from the respondent's written procedure. No less consideration should have been given to the merits of the case than had he attended the hearing. In any event, the letter inviting him to the appeal hearing stipulated that it would be heard by Mrs Thompson, making no mention of a 2 person panel.

45. The respondent's policy required a more onerous procedure to be adopted where the sanction had been dismissal for obvious reasons. The severe consequences for the employee meant that careful scrutiny of the decision by more than one person was called for. Instead, the procedure relating to lesser sanctions was applied in this case for some unknown reason. It is perfectly feasible that another person may have attached considerable weight to the claimant's largely unblemished employment history of 19 years and may have deemed a sanction other than dismissal to have been appropriate. While the claimant's unwillingness to accept he had made an error weighed heavily against him in the minds of Mr Edwards and subsequently Mrs Thompson, factors such as the passage of time since the error had occurred, that no other errors had come to light in respect of the claimant's work over that period, or indeed beforehand, and the element of subjectivity involved in applying the classification codes may have materially influenced the decision making of another person.

46. I have concluded that the dismissal was procedurally unfair due to the respondent failing to adhere to its own disciplinary policy at the appeal hearing stage without justification, or even any explanation. This is not a case where dismissal was inevitable, and it was simply not open to me in the circumstances to conclude that it would have made no difference to the outcome, or that it would have made every difference to the outcome, had the appeal panel been constituted as it should have been. I therefore find there

would have been a 50% chance that the claimant would have been dismissed in any event.

47. As far as the wrongful dismissal claim is concerned, I had to ask whether the claimant breached his contract in such a way as to justify summary dismissal. While length of service is a relevant consideration in the unfair dismissal claim it has no bearing upon the question of whether the claimant's acts were such a dereliction of duty as to justify summary dismissal. There was no suggestion by the respondent that the claimant was acting in bad faith or that there was deliberate wrongdoing on his part when he signed off Mr Robson's work. I should be slow to find summary dismissal to have been justified in the absence of dishonesty or other deliberate actions that poison the employment relationship. However, there is no rule of law defining the degree of misconduct that will justify dismissal. A one off act of negligence with potentially serious consequences can justify summary dismissal. It is not disputed that the cables were exposed. There is a conflict of evidence relating to whether they were adequately insulated. I did not feel able to make a definitive finding on that, but one piece of evidence I did find compelling to support danger being present was the evidence from the summarised statement of Leon Stephenson where he said, for him this was 'not sleeping at night stuff'. Such was the concern he had from looking at the photograph that I am persuaded danger was present. I therefore find it did constitute an act of gross negligence on the part of the claimant to verify as being appropriate the F1 coding attributed to the installation by Mr Robson.

48. Focussing on the extent of the damage to the employment relationship, I do accept that the employer's business justified a stringent rule here because it has an obligation to its tenants in terms of undertaking works in a manner that ensures their safety. What has undermined the trust and confidence in the employment relationship is not the solitary instance of negligence in the claimant signing off Mr Robson's work, it was his unwavering belief that his judgement had been correct in the face of the respondent's reasonably held belief that the installation ought to have been classified as a C1 'danger present'. Whereas an error of judgement, even a serious error of judgement, might be forgiven, a resolve to do the same again confronted with a similar situation in the future is what makes it sufficiently serious and injurious to the employment relationship so as to have breached the implied term of mutual trust and confidence. I therefore find summary dismissal to have been justified in those circumstances.

49. Having found the dismissal to have been procedurally unfair, and upon announcing my finding that there would have been a 50% chance of the claimant being dismissed in any event, the parties were able to reach agreement on the compensation to be awarded. A remedy hearing was not sought in the circumstances.

Employment Judge Moss

Date: 15 November 2022

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.