EMPLOYMENT TRIBUNALS

Claimant: **Mr Kevin Suen**

Respondent: **Fisk Fire Group Ltd**

Heard at: **East London Hearing Centre**

On: **15 & 16 September 2022**

Before: **Employment Judge Liz Ord**

Representation:

Claimant: In person
Respondent: Ms Angelica Rokad (Counsel)

JUDGMENT having been sent to the parties on 28 September 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Complaints and Issues

Unfair Dismissal

Issues

1. What was the reason or principal reason for the claimant's dismissal?

2. If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that conduct as a sufficient reason to dismiss the claimant? The tribunal will decide, in particular, whether:

    2.1. the respondent genuinely believed that the claimant had committed the misconduct;

    2.2. this belief was based on reasonable grounds;

2.3. at the time the belief was formed, the respondent had carried out a reasonable investigation;

2.4. the respondent followed a reasonably fair procedure;

2.5. the dismissal was within the band of reasonable responses.

Wrongful Dismissal

Issues

3. Was the Claimant in repudiatory breach of his contract of employment?

4. If so, did the Respondent terminate the contract of employment in acceptance of this repudiatory breach?

5. If not, what notice pay was owing to the claimant and what notice pay was paid?

Remedy

Issues

6. What remedy, if any, is the claimant entitled to? The tribunal will decide:

6.1. Whether the claimant caused or contributed to his dismissal by blameworthy conduct and, if so, whether it is just and equitable to reduce his award;

6.2. Whether there was a chance the claimant would have been fairly dismissed anyway, if a fair procedure had been followed.

Evidence

1. I had before me:

1.1. an electronic bundle of 170 pages and separate index;

1.2. a cast list;

1.3. a chronology;

1.4. a video on how the fire alarm test system worked;

1.5. A witness statement from the claimant, Kevin Suen, and two witness statements on behalf of the respondent, from Mark Fisk and James Moughton;

1.6. Closing submissions from the respondent.

2. I heard evidence on oath from the claimant, Mark Fisk and James

Moughton.

Law

Legislation

Fairness

3. **Section 98 of Employment Rights Act 1996 (ERA)** provides, so far as is relevant:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

a) …..
b) Relates to the conduct of the employee

(4) whether the dismissal is fair or unfair

(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.

4. The **ACAS Code of Practice 1** on Disciplinary and Grievance Procedures 2015 is relevant to the procedure. Amongst other things it states:

4.1. Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made.

- The employee should be notified of this in writing and the notification should contain sufficient information to enable the employee to prepare to answer the case at a disciplinary meeting. Normally, copies of any written evidence should be produced.

- The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses.

4.2. Employers should allow employees to be **accompanied** at any formal disciplinary or grievance meeting.

- Workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:
  - A formal warning being issues; or
  - The taking of some other disciplinary action; or
  - The confirmation of a warning or some other disciplinary action (appeal hearing)
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4.3. Employers should allow an employee to **appeal** against any formal decision made.

5. Also of relevance is the **ACAS Guide**: **Discipline and Grievance at Work (2020)**.

Reduction in compensation

6. **Section 122 ERA** covers the basic award and, with respect to reductions provides:

(2) Where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

7. **Section 123 ERA** covers the compensatory award and, with respect to reductions provides:

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Caselaw

Fairness

8. It was held in ***Abernethy v Mott, Hay & Anderson*** [1974] ICR 323 that: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee."

9. ***British Home Stores Ltd. Burchell [1980] ICR 303*** held that "First of all, there must be established by the employer the fact of that belief; that the

employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in in all the circumstances of the case."

10. When determining reasonableness, the tribunal should not focus on whether it would have dismissed in the circumstances and substitute its view for that of the employer – ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, EAT.

11. The test to be applied in determining reasonableness is whether the employer's decision to dismiss fell within the range of reasonable responses available to it – **(1)** ***Post Office v Foley*** **(2)** ***HSBC Bank plc v Madden*** [2000] ICR 1283, CA.

12. In ***J Sainsbury plc v. Hitt*** [2003] ICR 111, the Court of Appeal said that, in applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere.

13. Whether or not a procedural defect is sufficient to undermine the fairness of the dismissal as a whole, is a question for the tribunal. Not every error will do so. It is crucial to assess the gravity of any procedural defect and consider its impact on the fairness of the decision as a whole – ***Pillar v NHS*** 24 UKEAT/0005/16/JW [2017] All ER (D) 173 (Apr).

14. A failure to follow the ACAS Code of Practice or internal procedures is not determinative of the fairness of a dismissal. The tribunal must address whether the procedure followed overall was reasonable – ***UPS Ltd v Harrison*** (UKEAT/0038/11/RN)(16 January 2012 unreported).

15. The tribunal must have regard to the appeal process when considering the unfair dismissal claim. It should examine the fairness of the disciplinary process as a whole and each case will depend on its own facts – ***Taylor v OCS Group Ltd*** [2006] ICR 1602, [2006] IRLR 613.

Reduction of compensation

Basic award

16. The conduct of the employee should be "culpable or blameworthy" - ***Langston v Department for Business, Enterprise and Regulatory Reform EAT 0534/09.***

Compensatory award

17. In ***Nelson v BBC (No.2)*** 1980 ICR 110, CA, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

17.1. The conduct must be culpable or blameworthy
17.2. The conduct must have actually caused or contributed to the dismissal, and
17.3. It must be just and equitable to reduce the award by the proportion specified.

18. I was also referred to a large number of other cases by the respondent's representative, which are contained in her closing submissions. I have taken these into account.

Findings of Fact

Background

19. The respondent provides clients with fire protection systems and with engineers to test the systems. The claimant was employed by the respondent from around October 2008 as an engineer and part of his duties was to test fire alarms.

20. He initially undertook induction training, and in May 2012 was specifically trained on relevant British Standards. He attended Fire Industry Association courses and was BAFE (British Approvals for Fire Equipment) approved, which meant he was qualified to undertake work on fire extinguishers, fire safety systems and other fire safety equipment. At the time of his dismissal in December 2020, he was a senior engineer with considerable experience, who undertook testing and fault finding for the respondent company.

21. The respondent says that in October 2019 the claimant was given a final written warning for failing to fully test a fire alarm system for two years at a client's premises and for his general attitude to working practices. There is a warning letter to this effect in the bundle.

22. The claimant said he was not given this letter and was not aware of any problems with his testing. However, he did recall a conversation in October 2019, but said it was about him raising issues of racism. In his witness statement he said that the warning letter must have been imposed after that meeting, but he wouldn't have looked too closely at any letter sent at the time.

23. The letter was correctly addressed to the claimant. The claimant's evidence is inconsistent in that he says on the one hand he was not given any letter, but on the other hand that he wouldn't have looked too closely at any letter sent. He does however admit that some sort of meeting took place at the time.

24. I prefer the respondent's evidence, which was consistent and supported by documentary evidence. I therefore find that a written warning was given as stated.

The fire alarm system

25. The respondent's largest and most lucrative contract was with University College London (UCL) and the claimant had significant experience of testing systems in UCL's Stanmore Hospital. In around 2020 a new system was installed in the "UCL Research Department of Orthopaedics and Musculoskeletal Science" and the claimant was tasked with carrying out fire alarm testing on a weekly basis.

26. James Moughton (director and contract manager) in evidence explained how the system worked as follows:

    26.1. There was a fire alarm panel in the building and fire alarm break glass manual call points (red boxes) were located by all fire exits; there being about six exits at the UCL building. The system was linked to an Alarm Receiving Centre (ARC), which was located at the Gate House of the hospital.

    26.2. The engineer would attend site and go into the building. Only one engineer attended at any one time.

    26.3. The job was to test a different call point each week. The engineer would put the alarm system into test mode and go to the call point. If the system was not in test mode the alarm would ring and carry on ringing until the engineer got back to the panel, which could be a reasonable time and would cause disturbance. In test mode, the system re-set itself after a few rings lasting 10 seconds.

    26.4. It was the engineer's job to check the sound system was working. The bells were all in the corridors and audible to the engineer. All bells would ring when any call point was tested. There were about 10 bells in different zones. All bells would ring each week. The engineer would only hear a bell when present in its vicinity. Each week the engineer would be in the vicinity of a different bell(s) and be able to hear them on rotation.

    26.5. The engineer would then return to the panel, which would have reset itself. To ensure the call point tested came up correctly on the panel, the engineer would check the log. The log is an automatic entry on the panel; the engineer would press menu and then log. The zone tested, the date and time would be recorded electronically.

    26.6. When the system was in test mode, no signal was sent to the ARC. To test the ARC signal, the engineer would take the system out of test mode and test a call point nearby. There is a call point next to the panel, which is in Zone 2, the only one in this zone. This is used to check the ARC signal.

    26.7. He would test the system in non-test mode (in normal operating condition) by activating zone 2, and a signal would go through to the ARC. The engineer would ring the ARC and check that the signal had been received. This is done every week, whichever call point was

being tested on rotation. Therefore, zone 2 would be activated every week in non-test mode, in addition to whatever other zone was being tested in test mode.

26.8. The panel would log the non-test mode test and would record a date and time and zone 2.

26.9. There is different wording for recording test mode and non-test mode. When in test mode the panel would record “fire test”; so for example, if a call point in zone 4 had been tested, the system would say “fire test zone 4”. For the non-test mode ARC signal the panel would record “fire alarm zone 2”, because it was tested from zone 2.

26.10. Therefore, every week the log should record the “fire alarm zone” and the “fire test zone ”, for example “fire alarm zone 2” and “fire test zone 4”. That is how the two tests are differentiated.

26.11. The engineer would physically write down in the manual log book, the fire test zone that had been tested, the date and time and tick box “W” for weekly. He would sign it. He would then telephone the ARC to let them know he had finished on site.

27. There was a fire alarm maintenance log book on site that provided instructions on how to operate the weekly tests.

28. Mr Moughton illustrated his account of the system by referring to documents in the bundle and the video recording of how the system worked.

29. Mr Moughton is an experienced engineer who worked for the respondent since 2003. He presented as a knowledgeable and credible witness, and on the basis of his evidence and the supporting documents he referenced, I am satisfied that his account reflects how the system functions.

The events which led to dismissal.

30. On 27 November 2020 Mark Fisk (managing director) received a call out from UCL because bells on the system had failed. The claimant and another engineer attended but could not find any faults.

31. The problem was escalated to Mr Moughton, who attended UCL on 29 November with another engineer and fixed the fault. Whilst there, he checked the Fire Alarm Maintenance logbook and the panel.

32. Mr Moughton said that he discovered the system had not been tested correctly. The panel showed that for some weeks, only the fire alarm ARC signal and zone 2 had been tested, and this was reflected in the electronic printout. However, the manual log, which the claimant had completed by hand, and which bore his signature, recorded that different zones had been tested on rotation. Mr Moughton supported his account with screen shots of the alarm panel going back to 7 September 2020, the electronic panel log, and the manual log.

33. His unchallenged evidence was that zone 2 call point was the first one you came to when entering the building and was next to the panel. Therefore, it was the easiest zone to test.

34. The claimant said there was a misunderstanding and the printouts and panel readings only showed one of the two tests. I do not accept this evidence. I prefer Mr Moughton's account, which is supported by documentary evidence.

35. The claimant also said that the system could have been tampered with, although he gave no motivation as to why this might be the case. Mr Moughton said that in all his years of working, he had never known a situation where an electronic log could be tampered with. He said the panel had been properly commissioned and referred to a certificate in the bundle to this effect.

36. I prefer Mr Moughton's clear and credible evidence. This was a modern electronic alarm system and will have kept an accurate record of tests. I do not accept it was tampered with and I find that the log it produced was an accurate record of what was tested.

Disciplinary action

37. Mr Moughton reported his findings to Mr Fisk and sent him the evidence.

38. On 8 December 2020 Mr Fisk telephoned the claimant and told him he needed to meet with him to discuss the UCL building. In evidence he conceded that he did not say how serious the problem was or that disciplinary action might be taken.

39. No opportunity was given to the claimant to be represented, and the claimant was not sent any evidence beforehand.

40. They met in the open in a lay-by near the university, where contractors often park. Mr Fisk said he needed to act quickly and because of lockdown they did not meet indoors. Mr Fisk told the claimant that UCL had contacted the respondent about bells not working on the system. There is then a conflict of evidence as to what happened.

41. The claimant's version of events is:

41.1. There was no mention of the testing being an issue and he was not shown the photographs of the system. Mr Fisk stated that the claimant needed to be a scapegoat for a dissatisfied client and so he would be dismissed. The conversation lasted no more than ten minutes and he was given no opportunity to explain himself.

42. Mr Fisk's version of events is:

42.1. He told the claimant about the issue with testing and showed him images of the alarm panel and log books, which were screen grabbed

on his phone. He told the claimant he had put people's lives at risk. He had been told about this kind of thing before and had been warned. The claimant just kept saying that he couldn't lose his job, but Mr Fisk dismissed him there and then.

43. I find it implausible that Mr Fisk did not mention the alarm testing, when this was at the heart of the problem. It is more likely that Mr Fisk confronted the claimant over the test details and showed him the images on his phone. Consequently, I find that Mr Fisk informed the claimant that he had failed to properly carry out the alarm tests, showed him the images, and summarily dismissed him.

44. Mr Fisk wrote a letter to the claimant dated 10 December 2020 confirming the summary dismissal for gross misconduct for not fully testing the fire alarms at the Stanmore Research Centre, and because of issues brought up by the client and photos shown to him at the meeting of the fire system log. It referred to the previous final warning.

45. The claimant's witness statement asserts that he did not see the dismissal letter until April 2022, after the tribunal's preliminary hearing. He also said he was not aware that the testing issue was the basis of the gross misconduct until it was raised in the Grounds of Resistance, and that it was not detailed in the dismissal letter.

46. Mr Fisk stated that the letter was sent to the claimant a couple of days after the meeting.

47. I accept that the letter was sent, as there is no good reason why the respondent would not send a dismissal letter, and the letter has been produced in the bundle. The dismissal letter was clear that the failure to fully test the alarm was the reason for dismissal.

48. Whilst the dismissal letter indicated that the claimant could come to the office for further discussions, if he felt he had not been fully able to defend himself, this is not the same as an appeal. The respondent did not inform the claimant of his right of appeal.

49. The respondent's Disciplinary and Capability Procedure at section 3 indicates that an employee will be given written notice of a disciplinary hearing and sufficient information about the alleged incident to allow the employee to prepare. This would normally include relevant documents. It also set out a right to be accompanied by a trade union representative or a colleague.

Discussion and Conclusions

Unfair Dismissal

Reason for dismissal

50. The respondent's dismissal letter clearly indicated that the claimant was being dismissed for gross misconduct and I am satisfied that this was the

reason for his dismissal.

Genuine belief based on reasonable grounds and a reasonable investigation

51. The claimant was an experienced and properly trained engineer, who knew how to carry out the fire alarm testing at UCL's Stanmore Research Centre.

52. However, the documentation demonstrates that over a period of some weeks, he had not tested the call points in the various zones of the building, as he was required to do, but only tested the easiest one in zone 2. He falsified the manual log book by recording that he had tested other zones, when he had not in fact done so. This was deceitful.

53. The documents speak for themselves and, coupled with Mr Moughton's account of events, there was no need for any further investigation before taking disciplinary action.

54. By not testing the fire alarm system properly, the claimant put people's lives and property at risk. Furthermore, he jeopardised the respondent's business relationship with its biggest and most lucrative client, and risked the respondent's reputation.

55. The claimant had already received a final written warning the previous year for not properly testing a system.

56. Summary dismissal was a proportionate response to the misconduct.

57. Consequently, for these reasons, the respondent had sufficient cause to summarily dismiss the claimant for gross misconduct.

Procedure

58. The respondent did not give the claimant any warning that the meeting was a disciplinary meeting, and he was not told of the allegations or shown the images of the logs beforehand. Consequently, he had no chance to prepare. Nor was he given an opportunity to be accompanied.

59. The allegations were sprung on him at the meeting and he had no real opportunity to respond or to provide his own evidence. The meeting was in a totally inappropriate place in the open, where members of the public might have been able to see or hear what was happening.

60. The claimant was not told of his right to appeal.

61. The respondent was therefore in breach of the ACAS Code of Practice and its own Disciplinary and Capability Procedure.

62. The way in which the respondent carried out the disciplinary process was unreasonable and not within the band of reasonable responses.

63. Therefore, for procedural reasons, the dismissal was unfair.

Wrongful dismissal

64. For the reasons given above, the claimant's misconduct was a repudiatory breach of his contract of employment, for which his contract was terminated. Therefore, his dismissal was not wrongful.

Remedy

65. The claimant was wholly responsible for the failure to properly test the alarm system and for falsifying the manual log book. This was culpable and blameworthy conduct that caused the dismissal. It is of such a serious nature that any remedy the claimant would have been entitled to, should be reduced by 100%. Therefore, I do not award the claimant any compensation.

66. For completeness, even if the respondent had carried out a fair disciplinary procedure, the claimant would have been dismissed in any event.

Employment Judge Liz Ord
Dated: 24 November 2022