EMPLOYMENT TRIBUNALS

Claimant: Mr. J Barone

Respondent: Openreach Ltd

Heard at: London South via CVP **On:** 5th & 6th October 2022

Before: Employment Judge D Wright (Sitting Alone)

Representation
Claimant: In person
Respondent: Mr. Gunnion, Solicitor.

JUDGMENT

1. The Claimant's claim for holiday pay is not well founded and is dismissed.

2. The Claimant was not unfairly dismissed.

3. The claim for unfair dismissal is dismissed.

WRITTEN REASONS

These written reasons are produced at the Claimant's request following my judgment of 6 October 2022. The request was made within the relevant time limits.

Background

1. The Claimant commenced employment with BT on 19 January 2004 and worked in IT customer service. He moved to work with Openreach in 2018 and on 01 May 2019 he was transferred to the current Respondent's employ by way of TUPE.

2. On 05 May 2020 he was issued a final written warning for failure to follow safety procedures. On 21 October 2021 he was dismissed for gross misconduct, specifically for failing to follow safety procedures again.

3. The Claimant brought a claim for unfair dismissal and holiday pay. He subsequently applied to amend his claim to include age discrimination and unfair dismissal for making a protected disclosure. This application was refused at a preliminary hearing on 18 July 2022.

4. The Claimant denies that he failed to follow the procedures, saying that they

didn't apply to the work he was doing. He alleges that there was a conspiracy to get rid of him because he was on protected terms and therefore cost more than other people in his role. He further alleges that management had it in for him and wanted him out and that the disciplinary process was procedurally unfair. He further relies on a culture of breaches of policy by those in authority over him to show that the Respondent does not really care about safety breaches unless they want to use it as a reason to dismiss someone.

5. The Respondent denies that there was any conspiracy and states that the disciplinary process was procedurally and substantively fair. In respect of the holiday pay claim, the Respondent states that the Claimant has failed to properly particularise the claim, and that all payments have been made.

The Issues

6. The issues for me to determine are:
    a. Did the Respondent genuinely believe that the Claimant was guilty of misconduct? In his skeleton argument the Claimant accepts that they did.
    b. Was that belief based on reasonable grounds?
    c. Were the disciplinary proceedings and investigation carried out in a reasonable and fair manner?
    d. Was the decision to dismiss the Claimant within the band (or range) of reasonable responses open to the Respondent?
    e. If it is found that the dismissal was procedurally unfair, what adjustment should be made to the award, if any, to reflect the possibility that the Claimant would have been dismissed even if a fair and reasonable procedure had been followed?
    f. If it is found that the dismissal was unfair, would it be just an equitable to reduce the Claimant's award on the basis that he caused or contributed to his dismissal? If so, by what amount should the award be reduced?
    g. Was the Claimant entitled to any accrued but unpaid annual leave?
    h. If so, how much.

The Legal Framework

7. Under section 98(1)(b) of the Employment Rights Act 1996, a potentially fair reason is one which either falls within subsection (2) or is "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". Reasons within subsection (2), which are potentially fair, include a reason relating to the employee's conduct (section 98(2)(b)).

8. Secondly, if the Respondent shows a potentially fair reason for dismissing the Claimant, then the Employment Tribunal's consideration moves to the question posed by section 98(4) of the Employment Rights Act 1996:
.. 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.

9. The Tribunal must consider the alleged acts of misconduct within the context of the Claimant's contract of employment and against the background of the particular employer /employee relationship.

10. It is not for the Employment Tribunal to substitute its decision for that of the Respondent, but to start always with the wording of section 98(4) itself. The determinative question on this issue is not whether the Claimant's conduct amounted to misconduct, but whether it could amount to, and was fairly held to be, misconduct for which dismissal was within the band of reasonable responses of a reasonable employer.

11. A 3-stage test is used in approaching the question of the fairness of the dismissal (see **British Home Stores v. Burchell [1978) IRLR 378** as approved by the Court of Appeal in **W Weddel & Co Ltd v. Tepper [1980] IRLR 96)**, to establish:
    (i) That the Respondent genuinely believed in the employee's guilt – the fact of that belief.
    (ii) That the Respondent had reasonable grounds for the belief.
    (iii) At least at the stage when the belief was finally formulated on those grounds, that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

12. In addition to the 3 stage Burchell approach when considering reasonableness and fairness which the Employment Tribunal would generally expect of any reasonable employer's handling of almost any misconduct dismissal, under section 98(4), which may or may not be regarded as overlapping these guidelines.

13. The Court of Appeal in **Post Office v. Foley and HSBC Bank pie v. Madden [2000] IRLR 827 r**eaffirmed the approach first formulated by Browne-Wilkinson J (as he then was) in **Iceland Frozen Foods v. Jones [1982] IRLR 439**:

    …whilst [the Employment Tribunal} must not substitute [its) view for that of the Respondent, nonetheless a dismissal for a potentially fair reason will be fair if ii falls within the band of reasonable responses of a reasonable employer, but unfair if it falls outside that range of reasonable responses.

14. It is for the employer to determine the seriousness of the conduct, **Tayeh v Barchester Healthcare Ltd [2013] EWCA CIV 29.**

15. With respect to the final written warning the Tribunal may rely on it providing it was issued in good faith, there were *prima facie* grounds for imposing it and it was not manifestly inappropriate to have issued it (**Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135**).

16. As the EAT put it in **Wincanton Group plc v Stone and another [2013] IRLR 178**

    "A tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4)

[of ERA 1996] applies. Thus, the focus … is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently.

Discussion and Findings

The final written warning

17. The Claimant was issued a final written warning on 5 May 2020. This came about following an incident where the Claimant was working on a pole on a country lane. He parked his vehicle up at the side of the road and placed some barriers around the vehicle. By his own admission he did not place any barriers on the grass verge because, he says, he did not have any suitable feet.

18. Whilst he was up the pole Matthew Hooper (MH), the patch manager, attended the work site and told him to get down. The Claimant accepts that he did not do so straight away. In cross-examination he said that this was because he "knew better" than MH and that MH was only there because of a grievance the Claimant had raised.

19. The Claimant was taken through the signage and barrier requirements as published by the Respondent and I find that it was reasonable for the Respondent to take the view that the Claimant had failed to comply with them and that this was a health and safety violation.

20. In fact, the Respondent was not alone in coming to this conclusion. The CWU representative also agreed that the Claimant had acted not in accordance with the policies. Chris Holkham (CH) then issued a final written warning valid for 18 months. The Claimant appealed this decision, along with the decision to reject his grievance against MH. These appeals were heard by Kevin Miller (KM) who upheld both decisions.

21. To date the Claimant does not accept that what he did may be wrong, stating that he "knows better" than that patch manager and that it was safe to do what he did.

22. The Claimant accepted that health and safety violations are listed as grounds for misconduct in the Respondent's disciplinary policy. In light of, the cross examination and my findings that the Respondent was reasonably entitled to take the view that the Claimant was acting not in accordance with the published safety requirements (as backed up by the Union) I find that the case law above allows the Respondent to rely upon the final written warning.

23. As this warning was still live at the time of the incident which led to dismissal, I find that the Claimant was, or ought to have been, aware that any further breaches of health and safety rules could lead to the termination of his employment.

The Incident of 21 May 2021 and subsequent disciplinary process

24. On 21 May 2021 the Claimant was on a job when he was visited by Luis Crane (LC) to conduct a safety check.

25. Following the check, and whilst LC was still on site the Claimant determined that he needed to look inside a JF2 box. This was only going to be a cursory glance, so he determined that he did not need to place barriers around the work area. In addition, he did not use a roller to assist him to raise the lid.

26. He denies that LC saw him doing this or told him to stop, although he accepts that LC later reported that he had raised the lid without using a roller or placing barriers. I find that LC clearly did see this action as he would not otherwise have been in a position to report it.

27. The Claimant denies that LC told him to put the lid down at all, let alone the claimed three times. He says that in the five seconds the lid was open there would not have been time to tell him that many times. I note the Claimant's evidence on this point, as with many of the issues in dispute, was rather bullish, and failed to acknowledge facts which must have been true (for instance maintaining that LC couldn't have seen him carrying out this action when he must have done in order to report it). Therefore, I approach the evidence on how long he had the lid open for with a degree of caution. I find that LC told him three times to put the lid down before he complied. This was similar to the situation on 5 May when MH had to tell him multiple times to come down the pole.

28. On 25 May 2021 LC emailed Luke Jones (LJ), the Claimant's line manager to raise a safety concern. He said:

> "I want to bring to your attention a safety concern regarding Joe Barone. Whilst at a job with him on a field visit on Friday 21/05/21, I walked back down a customer's driveway to find Joe standing there with a JF2 lid in the air with no guards present and using incorrect lifting techniques, Joe did have his GDU present. I had to ask Joe to put the lid down several times before he did."

29. The Claimant was informed on 28 May 2021 that he was being investigated for allegedly not following the safety requirements. And on 07 June 2021 he was informed that he was being suspended on full pay whilst investigations continued. He was not presented with any written evidence until he received the disciplinary pack on the post on 18 August 2021.

30. He was informed of the two gross misconduct allegations against him:
    a. "You did not deploy guarding around your worksite when opening an underground structure; and (the "First Allegation)
    b. You opened a joint box using incorrect lifting techniques i.e. without using your roller bar" (the "Second Allegation").

31. The disciplinary meeting was held by CH on 15 September 2021. The Claimant decided not to attend but provided written representations. He declined to attend as he felt that he would not get a fair hearing with CH, but it is important to note that he did not raise any issue with CH handling to the meeting.

First Allegation

32. The Claimant's response to the first allegation was "…at no point was any member of the general public on the path or were any vehicle passing or moving down the road…"

33. In evidence before the Tribunal, he maintained this point, saying that no members of the public were around and so there was no risk. Furthermore, he was not removing the lid from the inspection hatch, simply lifting it up to look inside and therefore the policy did not apply.

34. He also mentioned that due to high winds that day the barriers would not have stayed up. He performed a visual check and determined that his actions would be safe.

35. The Respondent's position is that their policy says that "if the works are on or near a footway, then there is a risk that pedestrians might enter the working space" therefore "you must ensure that they are adequately protected against being exposed to these risks…at all static works, pedestrians must be protected by a continuous system of barriers."

36. In other words, the Respondent's position is that regardless of the length of time that the inspection hatch was to be uncovered/partially uncovered, the works site would need barriers.

37. The Claimant denies that this is the practice of workers on the ground, saying that insufficient barriers are provided and that the time taken to erect and dismantle them would make the jobs take much longer than they were allowed to spend on them.

Second Allegation

38. The Claimant says that all he did was raise the JF2 lid slightly to glance inside. He was not fully lifting the lid or removing it and therefore the Removal and Replacement of Footway Jointing Chamber Covers policy the Respondent relies upon was not applicable as he was simply lifting the cover and not removing or replacing it.

39. He says that as the lid was not being removed there was no risk to the public and that even if he had dropped it, the manner in which he was opening it meant that it would have fallen straight back into place. He did not accept that there was a risk in that situation of it failing to fall fully into place.

40. The Respondent's position is that the policy clearly did apply. I was taken to the introduction paragraph which says: "This Practice describes methods of handling footway type jointing chamber covers. Also included are the methods to be used when removing and replacing Covers, Driveway, Unit Type Light; Covers, Carriageway 4, Covers Precinct and Covers, Temporary, Reinforced Concrete."

41. I find that it is plainly reasonable to consider the policy applied here. Notwithstanding the semantic argument over whether the Claimant's actions constituted a removal of the cover, the introduction makes it clear that it applies to all handling of footway type jointing chamber covers. I find that the Claimant's actions were plainly handling of a footway type jointing chamber cover. Furthermore, I find that any action which results in the cover

not being fixed in the closed position, for however short a period, is indeed a removal of the cover.

42. The Claimant did point out that the introduction also contained a note saying, “for situations where cover removal cannot be achieved using the following standard practices, the site must be assessed.”

43. He says that he assessed the site and as there were no members of the public around it was safe for him to perform his quick glance inside without following the full removal protocol.

44. I find that this was not a situation where cover removal COULD NOT be achieved using the standard practices. The Claimant simply determined that it was expedient and more efficient to not follow the standard practice. The same finding applies to the failure to place safety barriers around the box when lifting the lid. Therefore, I find that it is reasonable for the Respondent to determine that this exemption did not apply in this situation.

The Hearing and Appeal

45. The Claimant was informed by email on 19 October 2021 that he was being dismissed on 21 October 2021. He raised an appeal to David Kelly (DK) on 21 October 2021.

46. The appeal was delegated to Aled Edwards (AE) who is a senior manager at the same level as CH. The Claimant says that as they are the same level and sometimes cover the same geographical region, that AE could not possibly be impartial.

Findings on Unfair Dismissal

47. The Respondent is a large national organisation with, as far as they are concerned, a reputation to protect. They say that they take safety very seriously and deem failure to comply with health and safety requirements to be a significant disciplinary issue as it places the Respondent’s reputation at risk, as well as opening them up to the risk of legal action from regulators and from injured parties.

48. I find that protection of reputation and prevention of legal action is a valid reason to use to develop policies. Whilst it may be said that the policies are very much on the cautious side, the Respondent is entitled to demand that employees follow those policies, even if they deem them to be “overkill” and unnecessary.

49. It is not open to an employee to determine that they “know better” than their employer, as the Claimant stated, and substitute their own, lower, safety requirements. Whilst I have a degree of sympathy that following the policy would have taken significantly longer than the “quick look” that the Claimant performed, it does not absolve the Claimant of the responsibility to follow his employer’s reasonable instructions.

50. The Claimant alleges that the Removal and Replacement of Footway Jointing Chamber Covers Policy does not apply to the work he was doing whereas the Respondent says that it does. As set out above, I find that it was a reasonable position for the Respondent to take here that the policy applied. Furthermore, if the Tribunal were required to determine whether it

applied or not then I would find that the policy did indeed apply.

51. Therefore, having found that it was reasonable for the Respondent to determine that the policy applied in these circumstances, I find that it was reasonable for them to determine that the Claimant's actions were in breach of that policy. This position is fortified by the Claimant's own position that he did not follow the policy because he did not feel it applied here.

52. Moving on, I find that, regardless of any fairness issues which I deal with below, the Respondent acted reasonably in determining that these actions of the Claimant fell below the required standard and were grounds for a finding of misconduct.

53. Therefore, in light of the final written warning, I find that termination the Claimant's employment was within the range of responses which a reasonable employer could make.

54. Moving onto the procedure by which the Claimant was dismissed I find that there is no evidence whatsoever of a concerted effort on the part of the Respondent to remove him from his employment. The Claimant accepted this in submissions, though he maintained that it was obvious when one reads between the lines. With respect I do not accept that this is an obvious conclusion when reading between the lines.

55. I find that the Claimant was given adequate notice of the disciplinary procedure and various meetings. I find that he was given the opportunity to present written submissions before the hearing and was invited to attend along with a representative.

56. The Claimant availed himself of the right to produce written submissions and filed a lengthy and well thought out document. He says the reason that he did not attend the hearing was that he knew he would not get a fair hearing with CH running it. At no point in this document did the Claimant suggest that CH should not be carrying out the hearing.

57. In cross-examination he said that this was because he was tired of the process and resigned to the outcome. However, I accept Mr. Gunnion's argument that this does not tally with an individual who produced written submissions into which had gone a lot of thought and time.

58. I find that if the Claimant genuinely had a problem with CH chairing the meeting at that point in time, then he could and should have raised it as a concern. He did not and I therefore find that limited weight should be given to any procedural unfairness which may have resulted from CH chairing the meeting.

59. The Claimant also relies on the fact that he was ill with stress at the time as another reason to not attend, but he did not request a delay to the hearing when sending in his information.

60. In any event, whilst I accept that there was a history between CH and the Claimant, I find that CH was an appropriate person to chair the meeting as he was the manager with responsibility for the Claimant. I do not accept the Claimant's arguments that he was already biased against the Claimant. I

find that the Claimant was given an adequate chance to present a response to the allegations against him and that these were considered when reaching a final determination.

61. As is good practice to prevent unfairness, the Claimant was given the chance to appeal this decision. He availed himself of this. The appeal was placed in the hands of AE who is a peer of CH. The Claimant argues that this was unfair because they were the same level, and it should have been heard by someone above CH. He also suggests that the Respondent tried to hide the fact that CH and AE sometimes worked together by using different job roles when referring to AE. I find that whilst this confusion over his job title and area of responsibility was not ideal, it was not a deliberate attempt to hoodwink the Claimant, nor did it impact on the fairness of the appeal.

62. I also find that when the appeal was delegated to AE, this was a reasonable action. AE had played no role in the proceedings to date, and whilst on the level with CH, he did not report to CH, and I find that there was no undue pressure and no evidence of bias in the appeal determination.

63. As such I find no procedural unfairness in relation to CH chairing the initial meeting and AE dealing with the appeal.

64. Furthermore, the Claimant argues that it was unfair to use issues raised at an annual safety check to lead to disciplinary action. He argues that where failings, which he does not accept occurred, were identified at such a check then this should lead to training and a chance to improve.

65. In general, I have a degree of sympathy in relation to this point. However, regardless of whether this took place during the safety check or after it but whilst LC was still on site, it is necessary to look at the Claimant's actions against the backdrop of him being on a final written warning for failure to follow safety procedures and his ongoing attitude that he knows better than those in management as to what safety procedures are required and his refusal to accept that the policy applied in this case. When looked at in that light I find that it was reasonable for the Respondent to deem this worthy of disciplinary action.

66. The Claimant further suggests that he was treated unfairly by way of being treated differently from others and that safety is not really the concern the Respondent claims it to be.

67. He relies upon a screenshot of an internal company social media page. This included a banner picture of people working in a manner which is now deemed to be unsafe and not in accordance with the current policies. Whilst this shows the internal communications team may need to make sure that all images used are compliant with current policies, I do not find that this is persuasive when it comes to the Claimant's argument that safety is not taken seriously, other than when it comes to trying to dismiss people.

68. Additionally, I was directed to various screenshots of social media pages which included photos posted by senior employees of the Respondent, including people involved in these proceedings. I find that these social media posts potentially fall foul of data protection and/or general security

policies, but again I am not convinced that this helps the Claimant show that he was unfairly treated in the disciplinary process.

69. Overall, I find that the disciplinary process was fair and that the final decision to dismiss the Claimant was one within the range of reasonable decisions open to the Respondent. I therefore dismiss the claim of unfair dismissal.

70. Furthermore, if I am wrong on the point of procedural fairness, I find that the Claimant's admitted conduct was such that he would have certainly been dismissed at the same time had a fair procedure been carried out. In that event I would have reduced any compensatory award by 100% in any event.

Holiday Pay

71. The Claimant's claim for holiday pay in the ET1 has no information whatsoever relating to it.

72. In subsequent documents he expands this claim. He says:

> As part of my right to be re-instated, and terms and conditions returned to me as if I never left, and my losses during this period paid. I lost 5 days holiday, carried over from the previous year (April 2019-2020), and in the year I have been away, I have only had 20 days entitlement of holiday, whereas I would have had 8 days more if still in the employ of Openreach.

73. He has provided no evidence of the holiday carried over from a previous year and therefore I dismiss that aspect of the claim.

74. Having found that the dismissal was fair I therefore find that claim for holiday which he would have accrued had he still been employed, must also fail.

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Employment Judge D Wright
Date: 5 January 2023

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.