EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000020/2023

Hearing held at Dundee on 8, 9 and 10 August 2023

Employment Judge I McFatridge
Tribunal Member W Canning
Tribunal Member M McAllister

Mr Ian Craig	**Claimant** **Represented by:** **Mr Lawson,** **Solicitor**
Openreach Limited	**Respondent** **Represented by:** **Ms Page,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that

1. The claimant was not unfairly dismissed by the respondent.

2. The respondent did not unlawfully discriminate against the claimant on grounds of age.

3. All claims are dismissed.

REASONS

E.T. Z4 (WR)

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed by the respondent and unlawfully discriminated against by them on grounds of age. The respondent denied the claims. It was their position that the claimant had been dismissed by reason of gross misconduct and that the dismissal was procedurally and substantively fair. They denied discrimination. The final hearing took place over three days on 8, 9, 10 August 2023. Evidence was led on behalf of the respondent from Mr K Laing a Patch Manager with the respondent who had carried out the initial fact find and advised the claimant of his suspension, S Hogg a Senior Area Manager with the respondent who had conducted the disciplinary hearing following which the claimant was dismissed and Mr I Lawrence the respondent's Director of Network Health – Special Services who conducted an appeal. The claimant gave evidence on his own behalf. Mr Lawrence gave his evidence over CVP but all of the other witnesses initially gave their evidence orally. This evidence was given by CVP. The parties lodged a joint bundle of documents. On the second day the claimant sought permission to lodge two additional documents (pages 192-193), the Tribunal granted this despite opposition from the respondent. The respondent was then given permission to lodge two further documents in rebuttal and to recall Ms Hogg who gave some further brief evidence over CVP. The parties also lodged a short statement of agreed facts. On the basis of the evidence and the productions and the statement of agreed facts the Tribunal found the following essential facts relevant to the case to be proved or agreed.

Findings in fact

2. The respondent is BT Openreach. The claimant was employed as a Network Engineer in service delivery. This work required the claimant to travel out to sites to fix faults or carry out checks on the respondent's cables and connection systems. The claimant commenced employment with the respondent in or about 7 September 1988 and as at September 2022 he had 34 years' service with them. The claimant had worked as an Engineer throughout his employment and had been in his role as a Network Engineer for around 20 years.

3. As one would expect the respondent has various safety policies and working practices in place which engineers are expected to comply with at all times.

4. In particular they have a protocol in place for working on underground boxes. Generally, this will involve the underground box being guarded off from members of the public before being opened. Guarding off barriers are used. The respondent have a general licence to guard off and temporarily close public access to pavements for a limited period of time where they are working on equipment. The engineer requires to wear appropriate PPE. This includes a high visibility vest and a helmet as well as appropriate footwear. The engineer is expected to use a Gas Detector Unit (GDU) before opening any underground box. He is expected to use a roller bar whilst opening the box for his own safety.

5. Historically, explosions have occurred where gas or petrol fumes have seeped in to an underground box which have then been ignited once the box has been opened.

6. As part of their usual management the respondent carries out very regular checks known as AST checks to ensure that staff comply with these safety requirements at all times.

7. On or about 20 August the claimant went to work at a job in Balmain Street, Montrose. At some point a photograph was taken of the claimant without him being aware of it. The identity of the person who took the photograph is not known.

8. The claimant's line manager was a patch manager who was temporarily acting up in that role (Mike Fraser). At some point between 20 and 22 August he was sent a copy of the photograph by Scott Henderson who was one of his patch supervisors. Although the Tribunal did not hear any direct evidence on the point it would appear that certain of the respondent's engineers are part of a closed facebook group known as "Pew,pew,pew". It would appear that the photograph was posted on this group chat from an account which appeared to be from one of the claimant's colleagues Jordan Bastow. Mr Bastow denied sending the photograph to Mr Henderson and denied that he was the person who took

the photograph. It is unclear how Mr Henderson obtained the photograph given that he is not a member of this facebook group.

9. The photograph was lodged. From the photograph it is not possible to clearly identify the individual engineer concerned. The engineer is bent over an open underground box. It is not possible to identify his face. The box is not guarded off in any way. There is no sign of a roller bar having been used to open the box. There is no sign of a Gas Detector Unit being used. The engineer is not wearing a high viz jacket or a helmet. A copy of the photograph was lodged (page 98).

10. On or about 22 August Mike Fraser telephoned Kenny Laing a patch manager with the respondent who was not the claimant's direct line manager. He explained the situation which had arisen and indicated that he had been advised that the next stage was to carry out a fact find but that as he was only an acting patch manager he could not do it and that a substantive patch manager was required to carry out the fact find. He asked Mr Laing to do this. During the course of this conversation he advised Mr Laing that the picture had been sent in anonymously from a member of the public. He also advised that it was a picture of the claimant. Mr Laing subsequently was advised that the picture had initially been sent to Scott Henderson but he was not told that at the time. Mr Laing then decided to set up a fact find meeting. He invited one of his manager colleagues, Alex Moir, to sit in as a note-taker/witness. He invited the claimant to the meeting. The claimant was working at a fairly remote location in Glenisla on that morning. The claimant was contacted and told that immediately he finished the job he was on he was to return to the office for a meeting with Mr Laing. He was not told the purpose of the meeting. The claimant finished the job and then received a more urgent request from Mr Laing to attend the meeting. He was again not advised of the reason for the meeting. The claimant thereafter duly attended the meeting.

11. On arriving at the meeting the claimant was told that it was an investigation meeting under the company's disciplinary policy. The meeting then took place. The notes of the meeting were lodged and were agreed by the parties to be accurate (page 102-103).

12. The claimant was initially asked in general terms about his experience and what steps or risk assessment he would carry out before working on an underground structure. The claimant confirmed that he would use the gas tester then use the roller bar open it, that cones and guards would be used and a high viz jacket would be required as well as boots. The claimant confirmed that he had passed an AMS roadworks guarding check on the 2nd of March. He was asked if he had ever worked unsafe whilst at work and he replied *"most times I work as safe as I can".* The claimant confirmed that he had worked on a job at Balmain Street in Montrose on Saturday 20 August. The claimant then confirmed that he had opened the box without guards. The claimant was then shown the photograph. At that point the claimant indicated that he wished to speak to Mr Laing in private. Mr Laing and the claimant then left the room. The claimant showed Mr Laing a photograph which he had on his phone. This photograph showed Mr Laing opening an underground box without guards being in place, without him wearing the appropriate PPE and using a T-bar rather than a roll-bar. There was no sign of a Gas Detector Unit. A copy of this photograph together with another photograph more clearly showing Mr Laing's face was lodged (pages 151-152). Mr Laing said that he had nothing to hide and that it was in order to show it to Alex Moir the note-taker.

13. Mr Laing's understanding of the picture was that it had been taken approximately nine years' previously at a job in Brechin where flood defence works were being carried out. The area he was working was one which was coned off and was not open to the public. He believed that was the reason why he was shown working without guards and without the appropriate protective clothing.

14. Following that there was a brief discussion. The claimant accepted that he had not guarded off or coned off the site and that he was not wearing the appropriate clothing. He was not asked about the GDU after the point where the photograph was shown. His position was that he was just having a quick look and that this was something which all engineers did. He was trying to check whether there was a joint in the underground box

or not. If there had been he would have guarded off and coned off the box appropriately before he started doing any work.

15. The claimant admitted that he was not carrying out the correct procedures. He admitted the photograph was of him. The claimant confirmed that he was working in Balmain Street, that he did access the box to have a quick look and that he normally worked as safe as possible.

16. Following this Mr Laing adjourned the meeting for a short time. During this adjournment he telephoned his manager Susan Hogg. He did so as he did not have authority to suspend anyone. Ms Hogg confirmed that it was in order for him to suspend the claimant.

17. Mr Laing then went back into the room and confirmed to the claimant that he was being suspended with pay.

18. Following the claimant being advised of his suspension Mr Laing arranged for Mr Moir to give him a lift home. The claimant was asked to hand over his laptop and the keys to his company vehicle.

19. Following the meeting Mr Laing telephoned Ms Hogg again. He advised her of the incident during the meeting where the claimant had shown him a photograph of Mr Laing accessing an underground box apparently without carrying out the appropriate safety procedures. He advised Ms Hogg that the circumstances were that the photograph had been taken around nine or ten years' previously when the flood works were being carried out in Brechin. He advised her that the box he was working on was in a closed off area which the public did not have access to. Ms Hogg did not ask to see the photograph. She accepted what Mr Laing told her and decided that it would not be appropriate for her to take any further action.

20. Mr Laing then produced an investigation report which incorporated the minutes of the investigation meeting. It also contained the photograph (page 98) and a copy of the job sheet showing the work the claimant had been called upon to do. The whole misconduct investigation report was lodged (pages 96-106). In the box on page 105 Mr Laing set out his recommendation that

"there are grounds to proceed with a disciplinary investigation under the company's disciplinary procedure."

He went on to state

"Ian has admitted today 23rd August 2022 that on Saturday 20th August 2022 he was working unsafely when accessing an underground structure in Balmain Street, Montrose.
Ian also advised during the fact find investigation that he works safe most of the time which is also a concern as safety should always be paramount and we should never cut any corners when it comes to safety.
When the photo of Ian was produced Ian advised it was him in the photo, but he was doing something everyone else does daily.
After careful consideration and taking everything into account the decision's been made to suspend Ian to make sure that the integrity of the investigation is protected and to protect the business."

21. Mr Laing also at this time telephoned several of his management colleagues who were also patch managers. He asked them if they had ever heard of a practice of an engineer being able to open an underground box without guarding it off or taking any of the usual precautions simply to take a "quick look". All of the managers confirmed that they were totally unaware of this practice and that they would never sanction it.

22. Mr Laing then caused a formal letter to be sent to the claimant dated 25 August 2022 confirming his suspension. This letter was lodged (pages 107-108).

23. On 1 September Ms Hogg wrote to the claimant inviting him to a disciplinary hearing to take place on 8 September. It stated

"I'm writing to let you know that the Company has now carried out its investigations relating to your conduct and specifically:-
The reason for this investigation is due to an anonymous complaint from a member of the public about unsafe working practices on the 20th of August 2022.

The incident occurred around 12pm in Montrose at Balmain Street"

The claimant was advised of his right to be accompanied. There was included with the letter copies of the misconduct investigation report completed by Mr Laing.

24. The hearing took place on 9 September. Ms Hogg conducted the meeting. The claimant was accompanied by Ian Kilgallon a CWU official. A note of the meeting was produced (pages 111-113).

25. The meeting was extremely short. It lasted around 10 minutes. The claimant agreed that the note of the meeting produced at pages 111-113 was an accurate record of what took place. The claimant's position was that he had opened the box for a quick look to check if there was a joint inside. He accepted that he shouldn't have done what he had done. He then went on to say that people were working unsafely all the time 'with these early morning starts they do'. He said that if the person who took the photo had stayed longer and the fault was in there then that person would have seen the guards going out. He explained that he had not put the guards out because he was simply taking a look. Ms Hogg put it to the claimant that the box was just outside a sheltered housing complex. He responded that it was a quiet street. The claimant confirmed that he understood the possible consequences of working unsafely. The claimant was asked to clarify the comment about working safely most of the time and said that he worked safely all of the time apart from this one incident. Mr Kilgallon raised the issue of the claimant's record. He noted the claimant had worked for Openreach for 34 years and had a clean record.

26. Ms Hogg knew the location of Balmain Street fairly well. It was her understanding that the claimant would probably have parked his van with the cones with the guarding materials and other safety equipment at the exchange which was in the vicinity. She felt it unlikely he would have been able to park in Balmain Street since she knew that although there was car parking available on one side of this street it was usually very difficult to get a parking space. Her understanding was that engineers would usually not bother trying.

27. Following the meeting Ms Hogg decided that the appropriate outcome was dismissal. She set out her rationale in a document lodged at pages 114-117. Having set out the points made by the claimant she then went on to provide her analysis. It was probably as well to set at least part of this out. She said

> *"You said you had 'opened the box for a quick look', however as you were not using GDU this could have led to a dangerous outcome for not only yourself but for the general public and I simply cannot accept that you had taken your kneeling pad and toolbox from your van however hadn't considered any safety aspects i.e. GDU, High vis jacket, rolling bar for your lifter nor any gate guards for placing round the box to protect yourself or the public. I also cannot accept that you went in for a 'quick look' as you had your tool bag sitting next to you in the photo. You had decided that your kneeling pad and toolbox were essential however deemed your safety equipment a non-essential item. This was not just one item however several of your safety equipment you chose to leave behind.*
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> *On that day you made the decision to leave those essential items in your van, which had been left at the exchange a good few minutes' walk away, this was most of your essential safety kit and the volume of breaches is massively concerning. You left behind your high vis jacket, which is not only to alert the general public of your presence but also there to keep you safe so you can be visible. You also chose not to take your GDU, which is without doubt one of your most vital aspects of your safety kit. The GDU is an item which is potentially a lifesaver when working in the UG network and Openreach have invested millions of pounds to keep you and the public safe and you made the decision that day to risk not only your own life but potentially everyone in that neighbourhood. The consequences to not having a gas detector and using it appropriately could have been catastrophic and you made a choice not to use that method of protection. You have also chosen not to use the roller bar which prevents any injuries to yourself and makes the removal of the joint box cover easier and much safer. Again,*

another measure to protect you and keep you safe and well. And finally, and potentially the most significant you chose not to guard the box which you had opened, in a public street, irrespective of it being a 'quiet street' your dynamic risk assessment would have instinctively alerted you to the fact that you were working outside a sheltered housing complex. This had the potential to risk the health and safety of some of our most vulnerable members of the community and for me the total disregard to anyone's safety including your own is worrying.

I have serious concerns that this would have been your normal working practice and that you may have been working unsafely previously.

I appreciate that you have worked for Openreach for 34 years with apparently no recorded previous issues on safety however this concerns me more as for the 34 years you have worked here you would have been trained, coached and alerted to the risks involved in what we do and that even with all your experience you have chosen to take yours and others lives into your hands and make your own reckless decision to ignore pretty much all safety measures that Openreach as a company have put in place for all our safety. The fact that a member of the public has felt so compelled with regards to your lack of safety practices that they had sent a photo in to the company is a red flag for even a non-Openreach workers concerns and this I cannot ignore.

There is no excuse for working, in our network, in a public space without the safety requirements put in place to protect you and the general public. All safety workwear and equipment are supplied and must be worn and used to always keep yourself safe. To open box, albeit for a 'quick look' without the required guarding around the box, is unacceptable and extremely dangerous. Regardless of the location of the box, the guarding must be in place to protect yourself and members of the public. A street still has passing traffic and footfall and it is not acceptable to believe that your judgement of the possible risk is sufficient to prevent injury or harm to yourself or others. Our safety processes and procedures are in place for a reason, and that is to protect you and members of the public.

Breaching these processes and procedures is grossly negligent and something that I cannot condone or accept.

Your admission to all the breaches is also a factor in my decision and demonstrates the level of safety that you knowingly chose to ignore. There would have been very little negative reasons for you deciding to use any of the afore mentioned safety equipment and to cite 'a quick look' is not mitigation as to use the equipment provided including using a full set of gate guards would have only taken a few minutes to safeguard yourself and make the site safe.

As a business we work tirelessly to ensure our employees are always working safely and this incident is a clear disregard for the procedures clearly set out for you to follow. Every day we place a lot of trust in you to work independently out in the field and the key word in this is trust. We require you to always put yours and the public's safety at first. This incident has severely breached this trust and created a situation that we cannot risk this occurring again in the future.

Openreach has a responsibility to ensure all our employees are following our standards and expectations, processes and procedures and living the values daily. Disappointingly you have not demonstrated this and put yourself and others at risk. It is with all of this taken into consideration; I have decided to terminate your employment with the company."

28. Ms Hogg wrote to the claimant on 22 September 2022 confirming the decision. His last day of employment was 25 September 2022. Ms Hogg arranged to meet with the claimant on or about 24 September in order to hand him a written copy of his letter of dismissal which had been emailed to him. She also arranged at the same time to hand over to him the personal items he had left in his van. She arranged to meet the claimant in a car park for this purpose. The claimant found this inappropriate and needlessly upsetting.

29. The claimant was advised of his right of appeal. The claimant submitted an appeal by email dated 27 September 2022 (page 122). He simply stated that he wished to formally appeal the disciplinary penalty.

30. By letter dated 24 October 2022 the claimant was invited to an appeal meeting which was due to take place on 24 October 2022.

31. Mr Lawrence who was to hear the appeal is a Senior Manager with the respondent. He has considerable experience in dealing with disciplinaries and appeals and investigation including discrimination claims. He was not in direct line management of engineers. In advance of the hearing he obtained copies of the documentation from the fact find and the appeal. He also looked at the photograph produced by the claimant and Mr Laing and various screenshots of google maps which were sent through by the claimant. He understood the claimant's concern to be that he had been treated harshly and that other people breached processes and committed gross negligence and were not treated so harshly. He had a brief meeting with the claimant in advance of the hearing just to make sure the claimant and his union representative were comfortable and familiar with Microsoft Teams over which the meeting was to be taken. He suggested that the claimant provide him with a written statement setting out his position and the claimant did this. This was lodged (page 137).

32. The meeting took place on 4 November. Mr Lawrence was accompanied by Adam Elsworth who took notes. The claimant was accompanied by Ian Kilgallon his CWU union rep. A note of the meeting was produced and lodged (page 125-128). The claimant accepted that this was accurate and the Tribunal considered this to be an accurate albeit not verbatim account of what took place at the meeting. During the course of the meeting the claimant accepted that it was him shown on the photographs kneeling down and having a quick look into the opened underground box. He was not wearing any safety equipment. There were no gate guards, there was no roller bar and no Gas Detector Unit. During the course of the hearing the claimant specifically admitted that he had not used the Gas Detector Unit although he said that he normally did this and it was a one-off not using it. Mr Lawrence asked the claimant about the meeting with Ms Hogg and the claimant confirmed that he had been taken through the formal requirements and had been given the chance to present his case. He also confirmed the notes were a fair reflection. The claimant raised the issue that he didn't think that Ms Hogg liked older people in the company. He

also considered that she had shown very little respect for his time in the company. He indicated that during the meeting Ms Hogg had told him that she had no choice in the matter as she highlighted in a similar case where there had been the same outcome. He said that she had no justification for not considering this incident to be a one-off. The claimant then spent a considerable amount of time criticising Mr Laing for his safety record. He raised the issue of the photograph of Mr Laing he had presented during the fact find. He raised another issue where he said that Ms Hogg had cancelled training for an engineer and that engineer had then had a power strike incident. He said that another engineer in the group had been caught not using tetra and only given a warning. He said that Ms Hogg had been giving out passwords to her CSS access which he considered to be a breach of security. He referred to an incident where he alleged Ms Hogg had instructed an engineer to put a socket on an MDF block in order to 'get a clear' at Kirriemuir. The claimant subsequently produced a photograph of this for the Tribunal. This was lodged (page 165). It was the claimant's position that it was a practice amongst BT engineers that on occasions where they were faced with a persistent fault which would not go away they would attach the line to a socket in a joint box. The claimant's position was that this would mean that when the exchange tested the line they would only test it as far as the socket and any error message caused by a defect between the control box and the consumer would show as being cleared. This would then enable the engineer to close off the job notwithstanding the fact the customer's line was still faulty. It was the claimant's position that on this occasion Ms Hogg had arranged for the line to remain connected to such a socket for a period of time. The claimant's position was that this was so that the customer would not be in the position to claim the daily fee which BT required to pay for faults which have not been cleared within a target period. The claimant referred to another incident where someone called David Adams had been working without barriers. He indicated that Susan Hogg was to blame for this. He said that David Adams had subsequently been dismissed for working without barriers. He said that not enough time had been given for an NRSWA course. He referred to the respondent's working systems meaning that though there were 40 people working only 20 were officially shown as being on the job. He referred to there having been a number of

people leaving the business. He was highly critical of Ms Hogg and stated she had no operational experience. He said that previous managers had lots of experience and cared for safety. He was generally critical of the organisation but did not say much about his own admitted breach of the safety rules. Mr Kilgallon intervened at the end to indicate that he believed there was a training or coaching issue and that after 34 years dismissal was too harsh. At the end the claimant said he wanted to get his job back but he did not wish to work under Susan Hogg.

33. During the course of the meeting the claimant stated

> *"Since I've been on the job I've had no safety concerns at any time. Susan seems to think different, but didn't present any proof of that".*

Following the meeting Mr Lawrence decided to speak to Mr Laing. Mr Laing confirmed to him what had happened in terms of the investigation. He also explained the situation regarding the photograph. He said that the incident had happened a number of years ago and that he was working without guards as the road was closed off to the public. Mr Lawrence also spoke to Ms Hogg. As well as discussing the disciplinary with her he also asked whether there was any practice that she was aware of of engineers taking a "quick look" without using guards or following the respondent's procedures. She confirmed she was not aware of any such practice.

34. He decided that he should check the claimant's safety records. He found it contrary to what the claimant said he had two incidents where he had failed AST safety checks. The detail regarding these was lodged (page 143-144). The claimant had been discovered to be in breach of safety procedures in 2014 and had received a written warning for this. In 2023 the claimant had also failed an AST check in respect of climbing poles.

35. Mr Lawrence was unaware that the respondent's disciplinary policy states (as do most policies) that written warnings expire after a period of time (in this case one year) and cannot be taken into account after that date.

36. Mr Lawrence decided that he would check the safety culture within Scotland and contacted a J McFarlane the person in charge of the

engineers in Scotland. He discussed the various claims that the claimant had made regarding the 'quick look' practice. He was advised that there was absolutely no such practice that was known to management. Engineers were expected to follow the standard procedures at all times. Mr Lawrence also raised the issue at the next meeting of the respondent's Service Delivery Leadership Team where all six regional managers throughout the UK were present. None of them agreed that there was any policy or practice of allowing engineers to take a quick look without following the correct procedures.

37. Mr Lawrence also decided that he should investigate the general safety record within Scotland to see if there was a particular issue with Ms Hogg's area. He contacted Adam Elsworth who produced data in an email sent to Mr Lawrence on 15 November 2022. The data detailed the number of total checks carried out in each area, the sum of the defects and the percentage. The email was lodged (pages 188-190). The table on 189 shows each area, BVK12 is the area the claimant worked in. It shows there were 6093 checks in total and that 160 defects were found giving a defect percentage of 2.6%. This was one of the lowest percentages within the UK. Within BVK12 Ms Hogg's area was BVK124. There were a total of 666 checks carried out and there were 6 defects found showing that the defect percentage was 0.9 which again was the lowest within the BVK12 area. Mr Lawrence was also provided with data regarding GDU usage which is to be found on page 190. GDU usage for BVK124 was stated to be 38.35 which was close to the average of 41.2. It was noted there was some variance between teams which may reflect the type of network in different areas.

38. Following the completion of these investigations Mr Lawrence decided that the original decision to dismiss should be upheld. He wrote to the claimant on 9 December 2022 confirming his decision. This letter was lodged (page 133). He enclosed his appeal rationale (pages 134-136). Under conclusion he stated:

> *"The charges of Gross Misconduct are proven; dismissal upheld. You admitted committing a number of health and safety breaches and I am led to believe that whilst you know the correct safe working*

practices, you deliberately and knowingly disregarded them. It is this risk and deliberate negligence that I deem as too high to expose yourself, members of the public and the company.

I have considered other lesser sanctions such as a final written warning based on your 34 years of service, however, considering your deliberate and knowing disregard to the safety standards and procedures, I consider the risk to reinstate you is too high. Ultimately, your actions have resulted in a breach of trust and confidence and your dismissal is upheld on the grounds of:

Gross Misconduct – Safety Breech of Policy, Standards and Procedure whilst working in the UG Network on Saturday 28th August 2022.

- ***Gross negligence – which might have a major impact on the company.***
- ***Seriously breaching our health and safety rules (including breaches to the Safety and Sustainability policy/Health and Safety policy).”***

39. Mr Lawrence when considering alternative sanction had considered whether the claimant could be redeployed. It was his view that it would not be safe to have the claimant back working as an engineer. It might have been possible however to have him work at a desk job that was not so safety critical. He checked but noted that there were no deskbound jobs available within the area where the claimant worked.

40. Following his dismissal the claimant either took or obtained various photographs which in his view showed BT members of staff working in an unsafe way or at least contrary to established procedures. These were lodged (pages 153-163). The photograph at page 153 shows Susan Hogg and other BT managers on what appears to be a building site without wearing the appropriate safety equipment. None are wearing helmets and one is not wearing high vis. It was Ms Hogg’s position that there was no work going on in the site at the time and the photograph was posed.

41. Next on page 154 and 155 there is a photograph and exchange on social media in relation to a photograph of workmen who appeared to be working on an underground box, guards are out but the lid of the box is outwith the

guarded area. Page 156 is a photograph showing a number of BT managers standing in the road wearing helmets and high vis and having their photographs taken. Page 157 is a text message from Susan Hogg which appears to relate to the incident which the claimant discussed at the appeal hearing where Susan Hogg had asked *"Guys we have SOS anyone done the CBT NRSWA excavation line search before you dig recently as we are struggling to complete any help appreciated".* The claimant has then written on this saying that Ms Hogg went on to cancel the course and that subsequently an engineer hit an electric cable while digging. Pages 158 to 161 are photographs which the claimant has written on indicating they were taken in February 2023 and showing unidentified workmen working opposite his house in Alexander Gordon Drive. They showed them lifting the lid of an underground cover without having guards out. Pages 162 and 163 are a similar photograph which bears the date 29 September 2022 and are said to be taken in Accrington, Lancashire and again show an unidentified individual not wearing high vis and apparently lifting a BT cover. The claimant also lodged a number of photographs he took of guarded off underground boxes within Dundee (page 166-175). All of the lids of the boxes appear to be damaged in some way. It was the claimant's position that there is a target of having such repairs carried out within 24 hours but that instead of doing this BT arranges for engineers to simply guard off the boxes and leaves them often for months at a time.

42. Following his dismissal, the claimant did not seek other work as an engineer. For some years the claimant would drive a taxi at weekends. He continued driving the taxi at weekends. He was unable to increase his hours taxi driving because other drivers already had the weekday shifts. The claimant did not seek other work as an engineer but he was successful in February 2022 in obtaining work as a driver for Dundee United Football Club. The claimant does 15 hours per week and currently receives £10.24 per hour. Prior to 1 April 2022 the rate was £9.50 per hour. The claimant now receives around £125 per week from this source.

43. The claimant's pay slips were lodged. These show the claimant paid a fairly high amount of 23% of salary as a voluntary additional payment into

his pension. This is around £634 per month. The reason for this is that in or about 2021 the claimant decided to claim his BT pension. Initially BT indicated he could not do this before he retired but eventually the claimant was able to obtain payment of his pension lump sum and a monthly payment of £800 or so. The claimant only really had need of his lump sum and was therefore trying to pay as much as possible into his pension before retiring. In addition to the 23% the claimant pays the respondent pays 12% into his pension.

Observations on the evidence

44. The Tribunal found Mr Laing to be a generally honest witness who was trying to assist the Tribunal however it was clear that he had very little idea of the task which he was supposed to be carrying out. He indicated that he had only done a small number of disciplinary type meetings prior to doing the fact find in respect of the claimant. During his evidence he spoke of his role being to decide whether or not the case would proceed to a disciplinary investigation. He did not appear to appreciate at all that he was the one doing the disciplinary investigation. Mr Laing appeared to be an uncomfortable witness when being asked questions about the photograph of him. He was adamant however that the incident that had been photographed had taken place some nine or ten years ago. On the second day of the Tribunal the claimant produced a dated photograph which tended to indicate that the photograph had been taken on a specific date in 2018. This was produced too late to be put to Mr Laing. The claimant did not give any evidence as to how he had come to have the photograph with this date. In any event, Ms Hogg was then recalled to give evidence and spoke to the BT worklog which indicated that Mr Laing had not been working on the day in which the photograph was alleged to have been taken. The Tribunal's view was that we had not heard sufficient evidence for us to have any confidence in our factual finding in relation to the date on which the photograph of Mr Laing had been taken. On balance given the limited evidence before us we thought it probably had been taken when Mr Laing said it had. In any event, for the reasons discussed below we did not consider this to be particularly relevant given that this is what both Ms Hogg and Mr Lawrence had believed at the time.

45. It was clear from Mr Laing's evidence that he had obtained some information from Mike Fraser at the same time as Mike Fraser had asked him to do the disciplinary. This was not recorded anywhere. Mr Laing's position which we accepted was that at the time he carried out the disciplinary investigation meeting he had been told that the photograph had been sent in by a member of the public. His position was that later on, sometime after the claimant's dismissal he had discovered that in fact Mr Fraser had been sent the photograph by his patch supervisor Mr Henderson. Mr Laing's understanding was that the photograph had been taken by a former BT employee and had been passed in some way to Mr Jordan Bastow another former employee of the respondent and that he was the person who appears to have been responsible for putting it in the facebook group. Mr Laing was unable to give us any information beyond this.

46. Ms Hogg was also a somewhat unsatisfactory witness. She was cross examined extensively by the claimant's representative. Many of her answers were argumentative and not particularly clear as to what her understanding had been of matters at the time. She accepted that the disciplinary hearing had only lasted around 10 minutes. Essentially her view was that the accusations Mr Craig made against other people were simply not relevant to the allegation against him. She accepted that she had simply taken what Mr Laing said at face value. She had not made an attempt to look at the picture of Mr Laing.

47. She confirmed that she had understood that the claimant had probably left his vehicle at the exchange because that is what all the engineers did when they were working in Balmain Street. During her evidence she said that there was no parking in Balmain Street. On the second day of the hearing the claimant's representative lodged a Google Earth photograph showing that there were in fact cars parked down one side of the street. Ms Hogg then provided the explanation that she was aware there were parking spaces on Balmain Street but that generally speaking no-one would try to park there because all the spaces were always full. Essentially, it was her position that the claimant had accepted his guilt. His defence appeared to be that others were doing the same and she did

not consider that to be relevant. Her position was that at the time she had understood that it was a member of the public who had sent in the photograph to Mr Fraser. She accepted that this is specifically mentioned in her rationale as being "a red flag", the position was however that the main issue was that the claimant accepted that he had been working unsafely in breach of the respondent's procedures. This was the key point and he had not disputed this. In her view it amounted to gross misconduct.

48. She did not accept that she had any difficulty with older workers. She spoke of a previous incident when another worker had been accused of a similar breach of the respondent's rules and procedures and had resigned before the disciplinary process was completed. She thought this man was in his mid-forties. She also indicated that she was currently involved in a disciplinary appeal where an engineer in his 20s had received a final written warning for wearing trainers rather than appropriate footwear. She was fairly clear in her evidence that the age of employees did not matter to her. She confirmed that she had considered the claimant to be a very good engineer and that when he left there was a real hole in her team.

49. Mr Lawrence was a much better witness than the first two witnesses for the respondent. It was clear that he had carefully considered matters and taken his responsibilities seriously. We had no difficulty whatsoever in accepting his evidence as both credible and reliable. He indicated in his evidence that he did not consider the claimant had been particularly remorseful. He also indicated that he had absolutely no confidence that the claimant would not do this again. When it was put to him that the claimant as a long-standing employee had had a real fright by being dismissed and that he was very unlikely to repeat matters he indicated that he had carefully considered the position but felt that on balance the claimant had learned bad habits and simply could not be trusted to follow the respondent's safety procedures in future. In his evidence Mr Lawrence did accept that he had been unaware that final written warnings expired after a year and could not be relied upon after that. That having been said he indicated that this would not have made any difference to his decision. His purpose in checking the claimant's safety record was to see whether the claimant's statement that he had never had any safety issues before

in the past was correct. He had ascertained that it was not correct. It was clear from his evidence that he had genuinely sought to fully investigate the claimant's assertions that others within the engineering team believed that it was okay to carry out a quick look without going through the appropriate opening up procedures. We accepted his evidence that everyone he spoke to within the organisation denied that this was the case.

50. The claimant was also an extremely poor witness. It is clear that the claimant is extremely angry at his dismissal however the Tribunal were somewhat surprised when in his evidence he basically went on the attack and accused others of ignoring health and safety. During his evidence before the Tribunal he did not appear in the slightest bit remorseful and, if his demeanour at the appeal hearing was similar to the way he approached his evidence at the Tribunal the Tribunal were entirely unsurprised that Mr Lawrence came to the view that he could not be trusted to comply with health and safety rules in the future. The claimant was extremely critical of both Ms Hogg and Mr Laing as managers. He said that Mr Laing was Ms Hogg's blue-eyed boy and he had only become a manager because Ms Hogg had tutored him in how to pass the interview. The claimant was critical of Ms Hogg's abilities and wished to talk about incidents which had occurred in the past which he considered showed her in a bad light as a manager. His view was that he was doing what everybody did and that management were not telling the truth when they said they were unaware of it. Although at times he also said that this was a one-off and that he would not do it again the Tribunal felt this was a somewhat false response since the rest of his evidence made it clear that what he actually felt was that he had done nothing wrong. During his evidence he spoke to the various photographs he had lodged. With regard to the photograph of Mr Laing he said that it showed a location well away from the flood prevention works where Mr Laing and Ms Hogg had said the photograph had been taken. He set out his view that the road could not have been blocked off. He did not provide any evidence. He did not say where he had found the photograph or why he had kept it on his phone for, given his own dates, about five years. With regard to the photographs of the individuals working outside his house it was put to him that there

was nothing to show that they were BT engineers. It was suggested that often BT uses contractors. He indicated that he had taken a photograph of their van and he had that with him. When asked why he had not lodged this photograph if it would prove they were BT engineers he said he did not want to have the men sacked. He said he also had that information in relation to the pictures from Accrington which had been sent to him by his sister of similar unsafe practices. He denied that it was essential to use a GDU on the basis that he had never heard of any gas explosions in his 34 years. This contradicted the evidence of Mr Lawrence who indicated he was aware of one of their managers who had lost a foot following a gas explosion. It was the claimant's position that one would smell gas as soon as one opened the lid and in those circumstances one should immediately phone the gas board. With regard to the previous safety incident where he had received a written warning he claimed to have been set up. Given the variances in the claimant's evidence we did not consider him to be a reliable witness.

Issues

51. The parties had agreed a list of issues, a copy of the list was lodged (pages 185-196). The parties also lodged a list of agreed facts. The claims being made were of direct age discrimination. The claimant relied on a hypothetical comparator namely someone with the same characteristics as the claimant but below the age of 50. There was also a claim of unfair dismissal. It was the respondent's position that the reason for dismissal was conduct and that it was procedurally and substantively fair. The claimant disputed this. There was also a preliminary issue raised by the claimant regarding whether or not the respondent had complied with an order of the Tribunal made on 23 May 2023. Although the claimant did not insist on this at the hearing it is as well that we record our view on the matter first. We shall then deal with the claim of unfair dismissal and the claim of discrimination in turn.

Preliminary matters

52. On 23 May 2023 the Tribunal made an order that the respondent must *"Disclose the identity of the writer of the Facebook message (a former employee of the respondent) upon which the allegation against the claimant was based"*. In an email dated 30 May 2023 the respondent's representative wrote to the Tribunal stating that the individual who provided a copy of the picture was Mr Jordan Bastow (page 184). On 7 June 2023 the claimant wrote to the Tribunal complaining that he had since spoken to Mr Bastow who denied the allegation and stated that he was bewildered at what had been alleged. At the hearing the claimant lodged a copy of an email from Mr Bastow in which he denied any involvement (page 178). They also forwarded a copy of their prior email to Mr Bastow (page 176-177). They did not call Mr Bastow to give evidence. Mr Bastow is a former employee of the respondent. The respondent lodged a copy of the original post to the facebook group (Pew,pew,pew) which has been referred to in our findings in fact above. It is clear that this post bore to have been made by a user called "Penalty Rangers". The respondent lodged a document comprising a list of the nicknames used by various individuals on the groupchat (page 182). This gives the correct name of "Penalty Rangers" as Jordan Bastow.

53. The Tribunal's view was that the respondent had complied with the order. What they had been asked to do was state who had made the facebook post. The Tribunal's view was that on the balance of probabilities this was Mr Jordan Bastow based on the documentary evidence we saw. The claimant did not dispute that "Penalty Rangers" was Jordan Bastow.

54. Whilst it is clear that there may have been another one or two links in the chain the Tribunal did not have any evidence before us on which we could make any realistic findings as to precisely how the photograph had been acquired by Mr Jordan Bastow and secondly how the photograph which was posted on a facebook group of which Mr Henderson was not a member of came to be acquired by Mr Henderson. In the circumstances we did not feel that this was something which was at all necessary for us to investigate further.

Unfair dismissal

55. Section 98 of the Employment Rights Act 1996 states

> *"(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."*

The respondent stated that the reason for dismissal was conduct which is a potentially fair reason for dismissal falling within section 98(2)(b) of the said Act. The Tribunal's view based on the evidence was that the reason for dismissal was the claimant's conduct. The respondent formed the belief that the claimant had worked unsafely and failed to comply with the respondent's standard safety procedures when he opened the underground box on 20 August. Although the claimant maintained that there was some kind of policy within the respondent to get rid of older employees the Tribunal's view was that the claimant had entirely failed to establish this. The Tribunal were satisfied that the employer's reason for dismissal was conduct.

56. Having established that the dismissal was for a potentially fair reason the Tribunal had to consider the terms of section 98(4). That states

> *"(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."*

The well known case of ***British Home Stores v Burchell [1978] IRLR 379*** sets out a three-fold test. The Tribunal is required to ask whether the employer had a genuine belief in the employee's guilt. Did they genuinely believe what the employee had done what he was supposed to have done. The second element of the test is whether that belief was based on reasonable grounds and the third and crucial part of the test is whether at the point where the employer had formed that belief on those grounds had a sufficient investigation been carried out. The case of ***Sainsburys Supermarkets Ltd v Hitt [2003] ICR 111*** makes the point that the well known test of the range of reasonable responses applies as much to the reasonableness or otherwise of the investigation as well as to other aspects of the employer's decision. The claimant in their submission quite correctly also referred to the more recent case of ***Sharkey v Lloyds Bank Plc UKEATS/0005/15*** which states that this is really a four-fold test; is there a genuine belief in the misconduct, are there reasonable grounds for that belief, do they follow a reasonable investigation and is the decision to dismiss on that within the band of reasonable responses. Whilst we consider this to be correct we shall deal with the matter below separating out the issue of the investigation as to what the claimant was supposed to have done from the issue of reasonableness of the penalty for which the test is the band of reasonable responses.

57. So far as the first part of the test is concerned the Tribunal were in absolutely no doubt that both Ms Hogg who made the initial decision to dismiss and Mr Lawrence who upheld this decision on appeal held a genuine belief that the claimant had committed the misconduct in question.

58. The claimant in his submission challenges this. It is his view that the reason for dismissal was not genuine because the catalyst that started the disciplinary process was an alleged anonymous complaint from a member of the public which the claimant states was not the case. The claimant's representative in submissions clearly set out the claimant's case that this was a "stitch up" and that the claimant had somehow been set up by management. Ms Hogg was cross examined on this point and although at times she became somewhat argumentative with the claimant's

representative the Tribunal agreed with her that so far as the respondent was concerned the source of the photograph was indeed irrelevant. The fact of the matter was that the photograph showed the claimant appearing to act completely contrary to the respondent's established safety procedures. When challenged at the initial fact find the claimant admitted that he had done this. The Tribunal's view was that that was the meat of the allegation against the claimant.

59. As noted above the precise route by which the photograph came to first be in the possession of Mr Henderson the patch leader who then gave it to Mr Fraser the patch manager is unknown. It is clear that Mr Barstow put it up on the group chat facility. Technically of course Mr Bastow having left the respondent's employment was a "member of the public" albeit that we do not think much turns on this since we could not make a finding that Mr Henderson had definitely obtained the photograph from the group chat. The evidence was that he was not a member of this. The key point so far as the respondent was concerned was not how the photograph had come into their possession but the fact that the claimant was working unsafely.

60. The claimant's position was that Mr Laing had lied about the source of the photograph. The Tribunal did not find this to be established. He did not investigate further when he was told by Mr Fraser that the photograph had been sent in anonymously. The Tribunal accepted his evidence at the Tribunal that he had subsequently found out that matters were not quite as straightforward as that. Similarly with Ms Hogg her position was that she had understood at the time that the photograph had been sent in anonymously.

61. It is clear from the claimant's evidence that he considers that there was some kind of conspiracy against him. There are two strands to what he says, the first is that he was doing what other people do every day anyway. His view was that the respondent had somehow put someone up to taking a photograph of him doing this and then used this as an excuse to dismiss him. The Tribunal did not accept that explanation. During the course of his evidence the claimant made reference to a photograph of a car belonging to a manager which he considered in some way backed up his position that a manager had taken the photograph. We consider this

highly unlikely. Ms Hogg gave evidence that as part of her normal management process she conducted drive-bys to check on what engineers are doing. Her position was that if she had seen the claimant working as he was without any guards up then she would have stopped immediately and raised the matter with him. The Tribunal considered that if a manager wanted to make an issue of the claimant working without following safety procedures there had been absolutely no reason for them to go through the process of taking a photograph and passing it on. Any of the managers involved could have simply driven past and then taken the matter up direct with the claimant. The Tribunal did not accept the claimant's submissions regarding this. Our view was that the respondent did have a genuine belief in the claimant had committed the misconduct he was accused of.

62. In our view there were more than reasonable grounds for the respondent to come to that belief. As well as the fact of the photograph itself it was clear that the claimant admitted from the outset that he was the person shown in the photograph. He also admitted the various breaches of health and safety alleged at numerous points during the whole disciplinary process. Although the claimant's representative made much of the fact in cross examination that Ms Hogg had not specifically asked the claimant if he had used the Gas Detection Unit it was clear that Mr Lawrence did during the appeal and the claimant freely admitted that he had not used the Gas Detection Unit. The claimant's own evidence to the Tribunal was that the appropriate way to proceed was to check if one could smell gas and there was no need to use the Gas Detection Unit. He also indicated that he had personally never heard of any gas explosions having occurred in those circumstances. This evidence did not enhance his position.

63. With regard to the investigation the claimant's principal criticism was that there was no investigation of the provenance of the photograph. Those responsible for the disciplinary process did not carry out an investigation as to precisely where it had come from or who had taken it. In addition, it was the claimant's position that they ought to have investigated the photograph of Mr Laing which the claimant produced during the initial fact finding meeting.

64. With regard to the first of these points the Tribunal's view is that it was within the band of reasonable responses for the employer in this case to decide that they did not require to investigate the photograph further. Matters may have been different had the claimant denied the misconduct in question for example by saying that it was not him or that it had been taken some years previously or that it had been contrived or altered in some way. The claimant did none of these things. The claimant's position was that he had been working on the box in breach of the respondent's safety processes. Whilst some employers may have decided that they wanted to get to the bottom of who took the photograph and where it had come from the Tribunal's view was that it was open to a reasonable employer to decide that they did not require to do this.

65. With regard to the photograph of Mr Laing the Tribunal's view was that there was no obligation on the respondent to investigate Mr Laing in the context of the claimant's disciplinary process. Whilst it may be emotionally satisfying it is absolutely no defence to any accusation of wrongdoing to say that someone else is also doing it. Even if the respondent had investigated Mr Laing and found that Mr Laing had been guilty of the same misconduct as the claimant this would not have assisted the claimant in any way. What the respondent were concerned about in the claimant's disciplinary process was whether or not the claimant had breached the rules.

66. What the respondent did do was investigate in general terms the claimant's assertion that he was simply doing what everybody else did. This particular line of defence has to be seen in the context of the claimant's acceptance during the whole process that he knew very well what he was supposed to do in terms of the respondent's procedures. It is also clear that the claimant was well aware that breaches of health and safety were usually dealt with severely. He was clearly aware of the case Ms Hogg mentioned where an individual had been subject to disciplinary proceedings but resigned rather than be dismissed. It was also clear in the claimant's comments regarding withholding details of the people he had taken photographs of which may be capable of identifying them because he "did not want them to be sacked". The claimant's position

during the process was that whilst a couple of occasions he paid lip service to the notion that this was a one-off incident for which he was sorry his main defence was that this was something that everyone else was doing. Mr Laing in the initial investigation checked with other managers whether they had ever heard of the "quick look" practice. Mr Lawrence also did this but in a much more organised way at the appeal stage. The outcome of these investigations was that there was no evidence to support the claimant's assertion.

67. The Tribunal did have a number of concerns regarding the general fairness of the procedures adopted. Whilst there was no obligation on the respondent to tell the claimant in advance of the purpose of the meeting he was being called to with Mr Laing the Tribunal's view was that it would have been fairer to the claimant if they had given him forewarning that this was an investigative hearing which could lead to a disciplinary. The Tribunal's view was that it would have been better if Mr Laing had recorded in some way his conversation with Mr Fraser and the precise source of the information which he obtained from Mr Fraser which first of all linked the photograph to the claimant and secondly confirmed where the notion that this was a photograph sent in by a random member of the public came from. At the end of the day however the Tribunal considered that these criticisms did not render the process of investigation unfair.

68. As noted above the test is the range of reasonable responses. The respondent referred to the well known case of ***ILEA v Gravit 1988 IRLR 497***. There is clearly no one size fits all approach to investigation. In that case the court stated

> *"At one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference."*

We would agree with the respondent that in this case the picture was clear. The claimant was caught in the act then went on to admit the act so the amount of enquiry required was not high.

69. There were also a couple of matters which the respondent surmised from the evidence which with the benefit of hindsight they could have and

probably should have put to the claimant but did not do so. The first relates to Ms Hogg's understanding that he would have parked his van at the exchange and not in the street. We accepted that Ms Hogg had reached an honest conclusion that it was unlikely that the claimant had parked in Balmain Street from her knowledge of the parking situation there and her knowledge that most engineers did not even try to park there but would park at the exchange which was relatively close by. She came to this conclusion without putting it specifically to the claimant. Furthermore, Mr Lawrence in his rationale ought to have made quite clear that whilst he did not accept the contention made by the claimant that he had a completely clear disciplinary record (because that was factually incorrect) the 2014 written warning was purged from his record.

70. We also had some concerns regarding the letters inviting the claimant to the hearing and the allegation put to the claimant at both stages. This was said to be *"the reason for this investigation is due to an anonymous complaint from a member of the public about unsafe working practices on the 20th August 2022. The incident occurred around 12pm in Montrose at Balmain Street."* It was extremely poorly drafted and as noted above the complaint does not appear to have been anonymous and was only technically from a member of the public. Our view as a Tribunal however was that at the end of the day the claimant well knew what he was being charged with. This was extremely clear to him from the point of his initial meeting with Mr Laing onwards. The thrust of the matter was that he had worked on an underground box without following the respondent's safety procedures. The claimant also criticised the invitation letters as they did not at any point mention gross negligence whereas the particular bullet point within the respondent's disciplinary policy refers to gross negligence. Again the Tribunal's view was that this was simply a label and there was absolutely no unfairness to the claimant in not using the specific words "gross negligence" in advance.

71. Finally the Tribunal required to decide whether the decision to dismiss was within the band of reasonable responses. We found, as above, that the respondent were entitled under employment law to take the view that the claimant had been guilty of breaching their safety rules whilst working on

the underground box on 20 August. They had formed a reasonable belief that he had done this based on reasonable grounds and following a reasonable investigation. The question was whether it was within the band of reasonable responses to visit this with the sanction of dismissal. The Tribunal considered this to be the most difficult part of the case. The claimant had 34 years' service. He had no live warnings. On any view the decision to dismiss an employee of such long service for one single breach of his employer's rules is an extremely harsh one.

72. On the one hand we had the evidence of the respondent's witnesses that safety is something which was taken extremely seriously within the company and which the company invests heavily in. On the other hand we had the claimant's position which was that he was simply doing something which everyone else was doing. The Tribunal's view was that the respondent were entitled to come to the view that the claimant's position was simply incorrect. Mr Lawrence went to considerable lengths to find out whether any other managers were aware of the safety breach the claimant alleged was an everyday occurrence.. No doubt had they responded in the affirmative then this would have been viewed as a bit of a problem by the respondent given that their safety rules were being regularly breached but it would have allowed them to deal with the claimant differently. As it was however the clear evidence which the respondent obtained was that this was not something that everyone else was doing. Given that the claimant was saying that he was simply doing what everybody else did the respondent were entitled to treat the various statements he made that this had purely been a one-off incident with some degree of scepticism.

73. The Tribunal's view was that it was entirely reasonable to conclude, as both Ms Hogg and Mr Lawrence did, that if there was a serious risk to the company that the claimant would do the same in future if he remained in their employment. The Tribunal were impressed by Mr Lawrence's evidence since this was clearly a matter which he had considered long and hard. We should also say that the claimant's own evidence at the Tribunal hearing did not particularly assist his case in this connection. His position essentially was that the company paid lip service to safety. He

was not prepared to accept there had been anything wrong in what he had done and the main thrust of his defence was that other people were doing this all the time and it was unfair for him to be singled out for punishment.

74. We noted that Mr Lawrence had considered the possibility of an alternative sanction which would have allowed the claimant to remain in employment in a post where he did not require to work alone and where the respondent's view that he could not be trusted to carry out their policies would be less of an issue. We accepted that he was giving honest evidence when he said that there were no such roles available in the local area. It was therefore with regret that our view is that the decision to dismiss was within the range of reasonable responses in this case.

Age discrimination

75. The claimant claimed under section 13 of the Equality Act 2010. This states

> *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

76. The reverse burden of proof applies in terms of section 136 of the Equality Act 2010. In the list of agreed issues the claimant confirmed that he claimed that he was treated less favourably than a hypothetical comparator whose circumstances were the same as his but were under 50 years old.

77. The terms of section 136 have been subject to clarification and interpretation by the higher courts. In the case of ***Igen Ltd v Wong [2005] IRLR 258 CA*** the Court of Appeal approved the approach taken by the EAT in the case of ***Barton v Investec Henderson Crossthwaite Securities Ltd [2003] IRLR 332 EAT***. This makes it clear that when approaching a discrimination case the Tribunal must adopt a two-stage process. The first stage requires the claimant to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent has committed or is to be treated as having committed the unlawful act of discrimination against the claimant. At this stage although the evidential burden is on the claimant the Tribunal is entitled to

take into account all of the evidence heard by the Tribunal. If the claimant fails to prove facts on which the Tribunal could conclude that the respondent has committed the unlawful act then that is the end of the matter. If not, then the second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that it did not commit or was not to be treated as having committed the unlawful act. If the second stage is reached then the burden is on the respondent to show that the claimant's treatment was in no sense whatsoever on the basis of a protected characteristic.

78. In this case the Tribunal considered that the facts presented were such that it was clear that the first stage had not been reached.

79. Although the claimant was not relying on Mr Laing as a direct comparator, no doubt because those advising him were aware of the legal difficulties of doing this it is as well that we address the question of whether the reason the respondent treated Mr Laing differently from the way they had treated the claimant was that Mr Laing is younger than the claimant and below the age of 50. The respondent obtained a photograph of the claimant carrying out unsafe working practices and they launched a disciplinary investigation. On the other hand the respondent was presented with a photograph of Mr Laing carrying out unsafe practices and no investigation was launched. The Tribunal considered that the circumstances of Mr Laing and the circumstances of the claimant were completely different. As pointed out by the respondent section 23(1) of the Equality Act stipulates that there must be no material difference between the circumstances relating to each case and the case of ***Shamoon v The Chief Constable of The Royal Ulster Constabulary [2003] ICR 337 HL*** clarifies this to the effect that the comparator required for the purpose of the statutory definition of discrimination to be in the same position in all material respects as the victim save only that he or she is not a member of the protected class. There were a substantial number of differences between the position of the claimant and Mr Laing. The most obvious one was that the incident and the photograph involving Mr Laing took place many years before. Mr Laing's evidence which Ms Hogg agreed with was that the incident had happened around nine

years previously. The claimant's position was that it had been taken in 2018 approximately four years previously. Interestingly, Mr Lawrence also understood that the photograph had been taken four or five years previously. The key point is that it would obviously have been unfair to launch a disciplinary investigation in relation to Mr Laing given the elapse of time. Mr Laing would have been placed in an impossible position trying to defend actions from many years previously. In any event, and further to this Mr Laing had a ready explanation as to why he was working in an apparently unsafe manner. Ms Hogg confirmed that she accepted that the incident happened many years previously and she was aware from her own knowledge that the road had been closed off at the time the flood prevention works in Brechin were being carried out. The main point however was that the circumstances of Mr Laing and the claimant were entirely different.

80. The claimant referred in general terms in his own evidence to his assertion that the company appeared to prefer individuals below the age of 50. During his evidence he indicated that he was on better terms and conditions than people who had started later than him. As such the respondent would have an incentive to get rid of him as his replacement would be recruited on the newer less favourable terms. As pointed out by the respondent however, he also accepted in evidence that a person over the age of 50 who had started after the new terms and conditions came into account would also be employed on the new terms and conditions. Any discrimination would be based on length of service and not age. The claimant noted that his 34 years' service had been taken against him by Ms Hogg and her rationale. In her rationale Ms Hogg did indicate that she felt that with 34 years' service the claimant ought to have known better. She felt that given the claimant's general response that "everyone does this" then it was likely that he had learnt bad habits. The Tribunal did not consider that this view amounted to age discrimination. She would have considered the same of anyone no matter their age who had had long service.

81. In any event, apart from the claimant's assertion there was absolutely no evidence provided by him so as to indicate that there was any general

prejudice by the respondent against individuals over the age of 50. Such evidence as there was indicated that another individual who in Ms Hogg's estimation had been in his 40s had also been subject to disciplinary action for similar breaches of the safety rules. Both Mr Laing and Ms Hogg commented on this individual who they said had been subject to a disciplinary investigation but had resigned before his disciplinary hearing took place. The claimant in his own evidence alluded to this incident and did not dispute the salient points. Ms Hogg also gave various examples of the respondent's policies not taking account of individual's ages. At the end of the day there was simply no cogent evidence at all from the claimant upon which we could form any kind of conclusion that his dismissal was in any way affected by his age.

82. For the above reasons the claim of direct race discrimination is also dismissed.

Employment Judge: I McFatridge
Date of judgment: 30 August 2023
Date sent to parties: 31 August 2023