Neutral Citation Number: [2024] EAT 74

Case No: EA-2021-SCO-000080-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 10 May 2024

Before :

THE HONOURABLE LORD COLBECK

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Between :

MR CRAIG WAITES	**Appellant**
- and -	
BILFINGER SALAMIS UK LTD	**Respondent**

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- -

Miss Amanda Marquarite Robinson (instructed by direct access) for the **Appellant**
Mr Kenneth McGuire (instructed by Addleshaw Goddard LLP) for the **Respondent**

Hearing date: 2 May 2024

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JUDGMENT

THE HONOURABLE LORD COLBECK:

Introduction

1. The claimant commenced employment with the respondent on 1 June 2005. In the circumstances outlined below, he was dismissed with effect from 18 September 2019. The respondent is a contractor that provides services to clients in the offshore energy sector. At the time of his dismissal the claimant was employed as a level 3 rope access technician working on the East Brae platform in the North Sea.

2. On 27 August 2019, a level 3 team leader reported that he had witnessed a level 1 rope access technician under the claimant's supervision climbing with no anchor points, three to four metres above decking, standing on a pipe. As a consequence, a First Alert form, which identified that a "Potential Golden Rule Violation" had taken place, was prepared and issued to the claimant. The golden rule in question was "Always attached while working at height".

3. An investigation into the incident was carried out. The level 1 rope access technician and the claimant were both interviewed. The claimant also provided a handwritten statement of events. An investigation report was produced. It recommended that the level 1 rope access technician (a contract worker) should be removed from the platform and that disciplinary action should be taken against the claimant for 'golden rule' violations.

4. It was the investigating officer's erroneous understanding that all level 3 team leaders had access to the respondent's TMS system – an online system operated by the respondent in which all their procedures are available – and received emails notifying them of updates to the respondent's procedures. It became apparent, during the course of the investigation, that the claimant had been using an earlier version of the relevant procedures. I return to this below at paragraph [6].

5. A disciplinary hearing took place on 12 September 2019. On 18 September 2019 the respondents wrote to the claimant to inform him that the outcome of the disciplinary hearing was that he was dismissed for breach of the Golden Rules of Compliance and the respondent's working at height procedure.

6. The claimant submitted an appeal against his dismissal. An appeal hearing took place on 21 October 2019. After investigation, it was accepted during the appeal process that the claimant did not have access to the respondent's TMS system. However, it was found that the annual issue of various method statements had been sent to the claimant. The method statements were regarded as being very clear and were also referenced on the permit to work that had been issued for the scope of work relating to the task being carried out by level 1 technician under the claimant's supervision. The claimant's appeal was refused.

7. The claimant brought a claim before the Employment Tribunal (Employment Judge M.A. Macleod, sitting alone). The case was heard in June 2021 and a judgment dated 27 August 2021 was sent to parties on 1 September 2021. The claimant's claim for unfair dismissal was dismissed.

8. The procedures available to the claimant were explored before the tribunal. The tribunal found that the claimant undertook regular training in rope access procedures; at the time of the incident that led to the claimant's dismissal, he had the 2013 Rope Access Procedure available to him. That procedure was updated in 2015 and 2017, however, the tribunal found that the relevant provisions referred to in the 2013 Procedure had not been amended before inclusion in the 2017 Procedure.

9. The tribunal found that the respondent also has in place "Golden Rules" which are held to be crucial health and safety rules that are to be observed by its staff while carrying out

their duties. The first Golden Rule is that a technician is "Always attached while working at height".

10. The tribunal also found that the respondent also had in place a method statement with the title "Electrical Installation, Repair and Planned Maintenance Routines", which placed a number of responsibilities on level 3 team leaders (such as the claimant). The method statement requires, *inter alia*, a level 3 team leader to carry out a task-based risk assessment to reduce all associated risks to as low as reasonably practicable. In relation to the completion of the work that led to the claimant's dismissal, the claimant was required to complete a risk assessment.

11. The claimant's evidence to the tribunal was that he only had a 2012 version of the Rope Access Procedure. The tribunal found that, in fact, he had a 2013 version; that the Rope Access Procedure was updated in 2015 and 2017; and that the relevant provisions of the 2013 Procedure had not been amended before inclusion in the 2017 Procedure.

12. The tribunal's findings of fact are set out in detail at [11] – [97]. The claimant does not challenge any of those findings.

Grounds of Appeal

13. At a rule 3(10) hearing on 29 March 2023 two amended grounds of appeal were allowed to progress to a full hearing.

14. The first ground of appeal 1 is entitled "substitution mindset" and is in the following terms:

> "The claimant was dismissed for gross misconduct and that outcome and characterisation was upheld upon appeal. A key aspect of the misconduct related to the use of a policy which had been superseded. Although there were other allegations, the respondent concluded "*your failings on this job stem from not using the latest version of the procedure" [para 61, final sentence]*. In assessing the severity of the misconduct and the appropriate

> sanction, it is tolerably clear that the respondent proceeded upon the basis that the Claimant has been issued with the updated (2017) policy and had the means to access it, given his supervisory role. It transpired that was erroneous [*para 189 of judgement*]. That was clarified by the Respondent as at the point of appeal [*para 85 of judgement*]. In the face of that material error, central to the assessment of the fairness was whether the appeal decision maker adequately took account of those changed circumstances and that the appeal was conducted in a way that cured that earlier defect. It was for the tribunal to scrutinise the procedure as a whole and determine its fairness in that context [s.98(4) *Employment Rights Act 1996*]. Having acknowledged the error at dismissal stage [*para 189*], the Tribunal's reasoning at para 191 et seq. implies a substitution mindset based upon the Tribunal's own views rather than reasoning which the appeal manager relied upon. The Tribunal's impermissible substitution of its own views on the conduct and its severity vitiate the decision."

15. The second ground of appeal is entitled "lack of fair notice / effective participation at appeal stage" and is in the following terms:

> "The tribunal found in fact (para 78) that, following the appeal hearing on 21 October 2021, the appeal decision maker sought further information and views from the Respondent's 'Technical Authority', Mr Graham. That information appears at para 79- 83 of the judgement and appears to be information directly in response to the claimant's grounds of appeal and submissions at the appeal hearing. It is replicated in full within the appeal outcome letter, and, so appears to have been accepted uncritically and adopted by the appeal decision maker. The appeal decision maker's conclusion that the claimant "*knowingly placed a fellow employee at risk of a fall to his severe injury"* – a more serious, and different conclusion to the (by then) disproved failure to follow policy - appears to be based upon the information from and opinions of Mr Graham. The claimant was given no opportunity to respond to or comment upon that information prior to the appeal decision maker issuing his decision. He was given no opportunity to respond to, or comment upon, the new charge of deliberate misconduct of the type alleged. Those procedural deficiencies were material in the circumstances and sufficient to vitiate the fairness of the dismissal. The tribunal did not acknowledge those or factor them in to their reasoning on procedural fairness (at para 203-205)".

16. I consider each of the grounds of appeal in turn.

Ground 1

17. Central to the first ground is the assertion that the tribunal's reasoning at paragraph 191 et seq. of the judgment *implies* (my emphasis) a substitution mindset based upon the tribunal's own views rather than reasoning which the appeal manager relied upon. The claimant goes on to assert that the tribunal's impermissible substitution of its own views on the conduct and its severity vitiate the decision.

18. To address this ground of appeal it is necessary to consider the paragraphs of the tribunal's judgment which the claimant invites consideration of. Those paragraphs are 191 to 202.

19. Paragraph 191 in terms states that the employment judge concluded that it was legitimate for the *respondent* (my emphasis) to conclude that the claimant was at fault in the respect stated. Nothing contained that paragraph allows the inference to be drawn that the tribunal was substituting its own views for those of the respondent.

20. Paragraphs 192 and 194 set out admissions by the claimant. Nothing contained within those paragraphs allows the inference to be drawn that the tribunal was substituting its own views for those of the respondent.

21. In paragraph 193 the employment judge, again, sets out a conclusion reached by the respondent on certain facts as narrated therein. The employment judge formed the view that the conclusion was a justifiable one. There is no substitution of views.

22. There is nothing which could be said to amount to a substitution of views in paragraph 195; and in paragraph 196 the employment judge does no more than find that the respondents were entitled to reach the conclusion set out therein.

23. Paragraph 197 sets out evidence and seeks to draw no conclusion from it. In paragraph 198 the employment judge, again, finds that the respondents were entitled to reach the conclusion set out therein. There is no substitution of views.

24. Paragraph 199 also sets out evidence. The employment judge highlights certain difficulties this evidence occasioned the claimant, however, there is no substitution of views.

25. In paragraphs 200 and 201 the employment judge, again, finds that the respondent was entitled to reach the conclusions stated therein. There is no substitution of views.

26. Paragraph 202 is the tribunal's conclusion in relation to the matters set out in the paragraphs above referred to, namely, that the respondent had reasonable grounds for concluding that the claimant was guilty of gross misconduct.

27. In conclusion, there is nothing contained within the paragraphs relied upon by the claimant from which one might legitimately draw the inference that the tribunal substituted its own views for those of the respondent. It was notable in the hearing of the appeal that, when asked to highlight paragraphs from which such an inference could be drawn, counsel (who was not responsible for the grounds of appeal) struggled, albeit valiantly, to do so.

Ground 2

28. The second ground of appeal is centred on the appeal decision maker seeking further information and views from the respondent's technical authority. It appears not to be disputed that this occurred, however, what were the consequences of it? Firstly, it is incorrect to state that the appeal hearing concluded that there had been a more serious, and different failure to the "disproved failure to follow policy". The appeal hearing concluded that the matter was dealt with thoroughly and properly at the disciplinary hearing and the appeal decision maker was unable to uphold the appeal.

29. Secondly, the appeal decision maker already had the views of the claimant on the allegations he faced (many of which he did not dispute). It was for the appeal decision maker to form a view on the totality of the evidence before him. There is nothing in the

response of the technical authority that the claimant had not, in essence, already commented on. In the hearing of the appeal, counsel effectively conceded that seeking the claimant's views on the technical authority's response would not have added anything that was not already before the appeal decision maker. If there was a failure on the part of the respondent, it was one which had no consequences.

Conclusion

30. There is no merit in either ground of appeal. The appeal is refused.