



EMPLOYMENT TRIBUNALS

Claimant: Mr K King

Respondent: GVG Contracting Ltd

Heard at: London South (by video)

On: 25 & 26 February 2025 and 3 & 4 March 2025. In chambers on 24 March 2025 and 6 May 2025

Before: Employment Judge D Wright (sitting alone)

Appearances

For the claimant: Mr Langridge, Lay Representative

For the respondent: Mr Aimufua, Litigation Consultant

JUDGMENT

1. The Claimant's application on day 2 to amend his claim to include a claim that the Respondent failed to provide him with a written statement of particulars is refused.
2. The Claimant's application on day 2 to amend his claim to include a claim for exemplary and/or restitutionary damages is dismissed.
3. The Claimant's application to admit covert recordings of meetings is partially allowed.
4. The Claimant's application on day 3 to admit evidence of mobile phone communication, and how his representative's name was saved, is allowed.
5. The Claimant's applications on day 4 for reconsideration of my decisions at 1 and 2 above are dismissed.
6. The Claimant's application on day 4 to admit fresh witness evidence is dismissed.
7. The Claimant's application on day 4 for reconsideration of my decision at 6 above is dismissed.

8. The Claimant's application on day 4 to admit other documentary evidence is partially allowed.
9. The Claimant's claim of Age Discrimination is not well founded and is dismissed.
10. The Claimant's claim of Unfair Dismissal is not well founded and is dismissed.
11. The Claimant's claim for Aggravated Damages is not well founded and is dismissed.

REASONS

Background

12. The claimant was employed by the respondent, a road maintenance company, as a skilled site operative until his dismissal for gross misconduct on 23 February 2023. The claimant says that his employment commenced on 27 May 2016 with a predecessor company and then transferred to the respondent by TUPE. The respondent denies this and says that his employment was not transferred by TUPE and that he began his qualifying employment with them on 4 November 2019.
13. ACAS early conciliation was commenced on 17 May 2023 and the certificate was issued the same day. The Claimant issued proceedings on 16 June 2023 claiming unfair dismissal and discrimination on grounds of age. He also brought claims for notice pay, holiday pay and other payments in the ET1. At this point he indicated that his claim was for £65,000. By the time he submitted his 56-page schedule of loss the total claimed had risen to £ 508,533.93
14. The background to the claim is that on 5 September 2022 the claimant is alleged to have attended a manhole on North Street, Guildford to do a repair along with a colleague (In the pleadings the location is Woking High Street but the documentation taken from the handheld devices and accident location says North Street Guildford). Subsequently, a member of the public tripped at this location and sustained personal injury, which led to the respondent making a compensation payment to her.

15. On 20 February 2023 the claimant was called whilst at a job site and asked to return to the depot where he had a quick meeting with Mr Slociak, his supervisor. The claimant was suspended pending an investigation.
16. Between 20 and 22 February 2023 the claimant says that he received messages from colleagues saying that he had been dismissed over this incident and that this had been announced to the workforce by Mr Slociak. During this time the claimant received a letter inviting him to an investigation meeting with a company director, Ryan George.
17. On 23 February 2023 the claimant attended this meeting with Mr George and was supported by Mr Langridge (who also represented him in the Tribunal proceedings). At the conclusion of the meeting the claimant was informed that he had been dismissed from his employment.
18. The claimant exercised his right to appeal but says that he was unable to make the dates and times offered for the appeal hearing due to securing other work in order to mitigate his losses. He says that the respondent unreasonably proceeded with the appeal in his absence and upheld the dismissal.
19. The claimant says that this was all a ruse and in fact was just an excuse to get him off the books because he was older than the other staff and one of the few people being paid day rate rather than per job and therefore, he was more expensive to the respondent. The respondent denies that the claimant's age played any part in their decision-making process and says the dismissal was down to misconduct only.
20. Alternatively, the claimant says that the dismissal was unfair with criticism being levelled at the respondent for failure to investigate the incident, to work out who did the repair, who signed off on the repair, the options available to mark the work complete on the handheld device, the failure to provide evidence to the claimant before the investigation meeting, the decision to dismiss him summarily rather than using a less drastic option such as offering training, giving him a warning, or dismissal with notice. The claimant also says that the appeals process was unfair as he was not given the chance to attend the appeal.

21. The respondent says that a fair process was followed, and if there were any failures in the initial stage these were remedied by offering an appeal. The respondent says that they offered a number of appeal times to the claimant, including outside of normal office hours, but he declined to attend any of them.
22. There was a preliminary hearing before EJ Lumby on 5 September 2024 where case management directions were given and the complaints were confirmed as:
 - 22.1 Unfair dismissal;
 - 22.2 Direct age discrimination relating to his dismissal;
 - 22.3 Notice pay;
 - 22.4 Accrued but unpaid holiday pay.
23. A list of issues was also set out confirming what the tribunal would be dealing with.
24. It appears that neither side complied with the directions in terms of serving witness statements, although the claimant served his substantially earlier, the respondent only doing so a few working days before the final hearing. The claimant also made applications for further disclosure which were not dealt with before the final hearing.
25. There were also allegations and counter allegations from both sides saying that the manner in which the other side had conducted litigation fell below the standard expected and that it was rude and abusive at times.

The hearing

26. In relation to the disclosure application and the late service of the witness statements we had a discussion about the need to delay the final hearing to allow those to be dealt with. The claimant's representative indicated that he was content to proceed with the hearing on the evidence we had before us.
27. The claimant was represented by Mr Langridge, a friend. Mr Langridge is not legally qualified but has experience of litigation having been an expert witness in High Court proceedings on a number of occasions. At times I felt that he struggled

to understand that Employment Tribunal proceedings are different to those in the High Court and also struggled to remember that his role in this hearing was to be a representative and not an expert witness. I had to remind him on a number of occasions that he was not there to give evidence.

28. The respondent was represented by Mr Aimufua, a litigation consultant with the respondent's external HR firm. I understand that Mr Aimufua came on board partway through the case after the previous case handler asked to be moved off it due to her perception of how Mr Langridge was treating her.
29. It was clear from the manner in which both representatives spoke about and to each other that there is a high degree of tension and possibly animosity between them. At times Mr Aimufua appeared emotionally drained when dealing with points raised by Mr Langridge, and Mr Langridge was clearly unimpressed with the manner that the respondent's representatives, as a whole, had dealt with the litigation.
30. At various parts of the hearing, I had to talk to the representatives to remind them of the importance of being civil to each other and of being civil to witnesses during cross-examination. This behaviour, which was more on the side of Mr Langridge did not assist with the smooth running of the hearing. I must add that after a particularly strong discussion with the parties on day two the conduct did somewhat improve.
31. Whilst I had to talk to the representatives about behaviour, I can confirm that I have put conduct during the hearing to the back of my mind, other than if it becomes necessary for the question of aggravated damages.
32. I heard evidence from the claimant who confirmed his witness statement and presented himself for cross-examination. The respondent's evidence was given by Ryan George, Claire George, and Mitch Good who all confirmed their statements and presented themselves for cross-examination.
33. There were a number of applications made during the hearing which I dealt with as follows;

- 33.1 The claimant made an application to amend his claim to include a number of new heads of claim. I dismissed the application to include a claim for failure to provide written particulars, exemplary damages, and restitutionary damages. I found that the claim for aggravated damages was implicitly in the claim already and allowed that element to proceed.
- 33.2 The claimant made an application to rely upon covert recordings. I allowed the admission of the recording of the meeting at which he was dismissed. I refused to admit the recording of Mr Langridge and Mr Good talking at the time of an adjourned appeal hearing.
- 33.3 On day three the claimant applied to admit evidence of phone communication between the respondent and his representative, including how his representative's name was saved in the phone. I allowed this application.
- 33.4 On day four I partially allowed the claimant to admit further documentary evidence but indicated that I would bear in mind that cross-examination had finished by the time these were presented and that may affect the weight I could give them.
- 33.5 On day four I dismissed the claimant's application to rely on newly served, unsigned witness statements from witnesses who had not confirmed that they were available to attend that day.
- 33.6 On day four I also dismissed the claimant's application for a reconsideration of my decision to refuse the amendment application and to reconsider my refusal to admit the witness evidence.
34. There was a delay to the start of the hearing on the last day due to the CVP system going down across the HMCTS network.
35. There was insufficient time for deliberations and giving judgment in this matter. Partly this was because the hearing should have been listed for longer than four days, partly due to the time lost by the CVP outage, and partly due to the amount of time lost to applications during the hearing. As a result, I reserved my decision.

Discrimination – The Law

36. Direct discrimination is defined in section 13(1) of the Equality Act 2010 which provides that “(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.*”
37. In terms of the burden of proof section 136(2) sets out that if there “*are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the [tribunal] must hold that the contravention occurred.*” This is subject to subsection (3) which says that this does not apply if “*A shows that A did not contravene the provisions*”.
38. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 86**.
39. It is permissible for the tribunal to consider the explanations of the respondent at the stage of deciding whether a prima facie case is made out (see **also Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof.
40. At the second stage the employer must show on the balance of probabilities that the treatment of the claimant was in no sense whatsoever because of the protected characteristic. At this stage the tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.
41. The tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the tribunal should apply what is effectively a two-stage test. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to

make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Unfair Dismissal – The Law

42. 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)).
43. 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.*
44. 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.
45. 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.

46. 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.
47. 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.
48. The Court of Appeal in **Post Office v. Foley and HSBC Bank plc v. Madden [2000] IRLR 827** reaffirmed 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 it falls within the band of reasonable responses of a reasonable employer, but unfair if it falls outside that range of reasonable responses.*
49. It is for the employer to determine the seriousness of the conduct, **Tayeh v Barchester Healthcare Ltd [2013] EWCA CIV 29**.

Discussion and Findings

50. It is common ground that the claimant was at the older end of the spectrum of the respondent's employees. It has been extremely difficult to establish the exact position because the parties were referring to a number of different documents with details on. The situation was further complicated by the fact there were employees on day rates, on per job rates.
51. The claimant's case is that the respondent wanted a reason to force Mr Langridge out because he was older and cost more than the newer people on per job rates or contractors.
52. It was claimed that other older employees were similarly got rid of, or made to feel that they needed to leave of their own accord but no substantial evidence was presented on this point and therefore I place little weight on these claims.
53. The respondent provided some evidence that they had employed people older than the claimant at a different site for a period, although the claimant suggests that this was simply to bolster their defence. I have limited information from the respondent as to these individuals and I place little weight on them.
54. At times, Mr Langridge's submissions were confused. He said that it was unfair to get rid of the claimant due to his age, but then criticised the respondent for saying that they employed older people to do repair work on the streets because their bodies would not be up to the job anymore. He even suggested at one point that he would not employ someone in their sixties to do this work for that reason, although he did roll back on this point.
55. On the face of it, we have an older employee with a very good track record making (on the respondent's case) one mistake suddenly being dismissed for it. The respondent argues that they would treat anyone the same, and would have dismissed Joe Draper (the claimant's colleague on this job) at the same time had he not already quit to move elsewhere.
56. The evidence of age discrimination in this case is at the weaker end. I take into account the case law above about the shifting burden of proof. I find that there may be enough here to shift the burden if I look solely at the argument in the preceding paragraphs, but I really do need to take an holistic approach and

consider all of the circumstances and evidence. Therefore, I will look in more detail at the dismissal before deciding whether the burden has shifted.

57. It is first necessary to consider the events of 5 September 2022. From the worksheet on page 39 of the bundle it is clear that the claimant was scheduled to work on a team with a gentleman called Joe Draper. The claimant is listed on this sheet as “lead operative”.
58. The claimant denies being a lead operative or otherwise being in charge of the team. His evidence before me was that both members of the team were equals and no-one was ever in charge. The respondent’s evidence was that Mr Draper did not hold the qualifications which would allow him to do all the work required on the street, such as manhole covers over electrical junctions. The claimant, it is agreed, had such qualifications. Mr Langridge, in cross examination, did not accept that Mr Draper did not have these qualifications (although he did not advance a positive argument that he did hold them). There was no documentary evidence before me as to the qualifications of the individuals involved but I find that I accept the respondent’s evidence and find that Mr Draper did not have all the necessary qualifications. I also accept the respondent’s evidence that when a team was sent out one person was always designated the lead operative and that they were in charge should a situation arise.
59. I find from the evidence that it was reasonable for the respondent to determine that the claimant was the lead operative on this job and was in charge of the team consisting of him and Mr Draper.
60. One of the jobs which the claimant and Mr Draper were sent to on the day was on North Street Guildford (also referred to in pleadings and the hearing as Guildford High Street. From the print off on page 65 I find that this was identified as being a ‘footway defect – ironwork missing or bro”. This was allocated to Gang 57 which tallies with the claimant’s gang on the schedule on page 39.
61. Bearing in mind my finding above, I find that it was reasonable for the respondent to take the view that Mr Draper did not have the qualifications to do this work and

therefore the claimant would need to do it, or Mr Draper would need to do it under the claimant's supervision.

62. From page 65 I find that the job was accepted by Gang 57 at 13:36:50 on 5 September 2022 and that they started to travel there at 13:37:35. They arrived on site at 13:39:10 and the job was marked as "Job Completed" at 13:51:04.
63. Within the box for notes it reads: "Job Completed: COMP Completed: ukpn box needs replacing made safe as asked".
64. At the bottom of page 65 and moving on to page 66 there are some photographs. One showing a warning triangle in place, one showing the state of the previous repair, and one showing the job having had more tarmac placed on top of the damaged area. There were blown up copies of these photos in the bundle.
65. At page 71 of the bundle there is a completion form with a signature on which is taken from the handheld device each gang was issued with.
66. The claimant's case at various stages (from the investigation through to the hearing) has variably been "I don't recall going to the job", "I may have gone there", "I went to the job but the repair was already done", "I did not do that repair", "Joe Draper did the repair", and "I did the repair, but it was only a temporary repair and it is unfair to blame me for it having deteriorated by the time the member of the public tripped."
67. From that evidence I find that it was reasonable for the Respondent to find that the claimant did attend this site and that he was responsible for making sure the work was done correctly and that it was signed off correctly.
68. There was a question over who actually signed the handheld device to mark the work as complete. On this point I accept the claimant's evidence that this is not his signature and is more likely to be Mr Draper's signature. However, as I found above, the respondent was entitled to hold the view that both parties were responsible for ensuring the job was completed properly and that it was signed off correctly.

69. There is then a question over the quality of the repair. From the photos it is clear that the repair job is not flush with the pavement. This is common ground between the parties and I find that it would be unfeasible for a temporary repair job such as this to be flush with the pavement. At the time of the investigation meeting the respondent indicated that this height difference was about 70mm. At the same meeting Mr Langridge said his view was that it was about 15-22mm.
70. The respondent now accepts that this initial estimate was too high but maintains that the height difference was unacceptable. It is difficult given the fact that we have no evidence of anyone attending the site to measure it, but I find that it was in all likelihood between the two estimates, albeit closer to Mr Langridge's estimate. I find that it was open to the respondent on the evidence before them to determine that this was too big of a gap, although in many ways this is not determinative of their decision to dismiss as the repair had deteriorated by the time of the accident and was in a different state.
71. Mr Langridge tried to argue that the material provided by the respondent was not suitable for repairing this type of manhole and that they should have provided alternative means. The respondent points out that if the claimant, who is a very experienced operative, was of the view that he did not have the correct materials on the day then it was open to him to put down safety barriers around the manhole and mark on the handheld that the site was "made safe". This would have then triggered someone to look at the job and return on another day to fix it.
72. In the absence of expert evidence, and for the purpose of this hearing Mr Langridge is not treated as an expert, I am unable to determine whether the materials were suitable for a temporary repair or not. I do however find that it was reasonable for the respondent to take the view that Mr Langridge had options open to him if he felt that the job could not be completed properly at that time. This would have included placing barriers and marking the job as "made safe."
73. This brings me neatly to the question of how the gang marked the job as complete. I found above that this was probably done by Mr Draper, but I also found that he should only have been doing this job under the claimant's supervision and therefore the claimant would ultimately bear a degree of responsibility for how it was signed off.

74. The respondent told me that there are a number of options on the handheld unit which include “incomplete”, “made safe”, “investigation needed” and “completed”. I was told that the first three options would trigger the system to place the job back in the queue for someone else to go and look at it. The fourth option, “completed” would take the job out of the system. I was told that most of the “completed” jobs were not reviewed unless something went wrong, but there was some random quality control.
75. The claimant argues that these options were not all present at the time. He gave evidence that the handheld devices had changed due to a change in the overarching contractor with the council. He said that when they were brought in there were teething problems with the system and you could not enter the information that you used to be able to. He denied that there was a “made safe” or “investigation needed” option and that “completed” was the only choice. He said that this would have been picked and then details placed in the notes section.
76. I found the claimant’s evidence at this point to be extremely vague and unclear. He was unable to give any dates as to the change over of the handheld devices, or what state they were in at the time of the job being completed. The respondent’s witnesses were cross-examined at length about whether they had personally used these devices and no one had. It was suggested therefore that they were unable to comment on the options available. The witnesses denied this, saying that they had seen the user interface on a laptop and had seen reports.
77. I find that there were probably teething problems when the devices were changed over, but that on the evidence before me I am unable to accept the claimant’s evidence that “made safe” or “investigation needed” were not options at the time. I find that there must have been an option to mark the job as needing further work doing. I accept the respondent’s evidence that marking the job as “complete” would take it out of the system and that it was unlikely that anyone would read the notes.
78. Therefore, I find that it was reasonable for the respondent to find that the job had been signed off incorrectly, and to hold both members of the gang responsible for that.

79. Moving on, I find that because of this error in signing off the job, no-one else attended the site to complete the repair to the manhole. Nor was it fed back to the power company who owned it so that they could replace it with a new one.
80. I find that over time the temporary repair job deteriorated, and that by the time of the trip on 23 October 2022 it was in a worse state than it had been left by the claimant and Mr Draper.
81. To be fair to the claimant and Mr Draper, this was outside the time that the repair was meant to last, and therefore it is arguable that the quality of their handiwork is secondary to how the trip occurred. The bigger question was why the repair had not been looked at after the lifetime of a temporary repair had passed. That, I find, was due to the error in signing the work off as complete. That being said, it was open to the respondent to take both the repair quality and the signing off as complete into account.
82. The respondent was not notified of this incident by the council until several months after the event. The claimant has criticised the respondent for not going out to measure the height of the repair but I find that by the time they were informed of the incident, the situation had changed and they were unable to investigate in that way.
83. The claimant also criticised the respondent for not seeking more information from the council such as loss adjuster's report. The respondent's evidence on this was patchy as to whether one was requested or not but they did not have one. Whilst such a report may have helped to a degree in terms of measuring the height of the repair, it would only have taken the matter so far. A photo, provided by the injured party, is shown at page 76 of the bundle, and it is clear to me that this repair was, at that stage, no longer fit for purpose and that there is a clear trip hazard there.
84. The respondent was first made aware of this incident on 20 February 2023 when they received an email from Surrey County Council. This email commented that the "job in question was closed as completed and not as S81 investigation needed." This strongly suggests that such an option was available. The same day

Mr Slociak passed the message onto Mr George. He commented that it seemed the “gang in question, 1 half being Karl King have carried out an inappropriate make safe resulting in the incident attached. This was terrible workmanship & poor decision making on the gang’s behalf, and they also closed the job incorrectly. The other half of this gang no longer work for us.”

85. Clearly the initial view of both the County Council and Mr Slociak was that the workmanship was poor and that the job had been closed incorrectly. As such a decision was made to talk to the claimant.
86. The claimant argues that taking this at face value was a failure of the respondent. He says that the respondent should have made further inquiries into whether anyone else attended the scene between the claimant’s repair and the incident. I do not accept that this is necessary. An investigation needs to be reasonable. The test is not a counsel of perfection. It was entirely reasonable to accept the council’s word that the claimant’s job was the last one there especially if nothing was flagged up on the respondent’s system either. In any event, comparing the photographs of the completed job and the state of the repair at the time of the trip, it is reasonable to take the view that this was the same repair, just in a worse condition.
87. The claimant was suspended the same day and sent home pending an investigation. Up to this point I find that the investigation was entirely fair.
88. The claimant then alleges that before his meeting on 23 February, colleagues were messaging him to say he had been sacked and Mr Slociak had informed them of this was the stand-up meeting with the whole team. The respondent denies this.
89. The claimant produced no real evidence to support this assertion. No admitted witness statements to support it, no witness attending to corroborate his claim and no copies of the messages. As such I dismiss this allegation.
90. The claimant attended the meeting on 23 February with Mr Langridge. It is common ground that he was told that this was an investigation meeting and that he was not provided with copies of the evidence in advance. The claimant accepts

that there was a brief discussion on 20 February with Mr Slociak about what had happened so he had a rough idea of the allegations, but he had not received anything formal.

91. He was allowed to have Mr Langridge represent him, although the respondent's policy would have fairly entitled them to refuse this request. It was a standard policy that the tribunal sees all the time that you are entitled to be accompanied by a trade union representative or a colleague. In this case the respondent acceded to the request for Mr Langridge to attend instead.
92. This meeting was recorded by Mr Langridge on a hidden 'pen camera'. I allowed this footage to be admitted because there was a clear disagreement over the contents of the summary relied upon by the respondent.
93. From both the respondent's summary and the claimant's recording, it is clear to me that Mr Langridge at times tried to railroad the meeting. He would jump in when questions were asked and was combative. At times his interventions were reasonable, at others not so much. At times he told the claimant not to answer questions. I must say at this point that I do not think this approach was the best approach to take. It made the claimant appear uncooperative at times and suggested that he was not taking the incident as seriously as he perhaps should have been doing. [I said above that Mr Langridge's conduct in the hearing was not relevant to the final decision, but I do find that it is a relevant factor here].
94. As the meeting went on however, the claimant did accept that this was not his best work.
95. There was also discussion of how many jobs over the years the claimant had done without issue, which was accepted in principle by the respondent. But they emphasised that they were concerned about this particular job.
96. There was also discussion over whether the claimant was on day rate that day or being paid per job. The claimant indicated that he did both but could not recall which that day was. He did comment that if doing price work, you would lose out on money if you had to leave your barriers at a site because you would then need

to return to the yard to pick up more, thus losing time you could be working. It was suggested by Mr George that the claimant may have “botched the job” to get paid.

97. Mr George was also criticised by the claimant for referring to the work as ‘an abortion of a job’. I find that this language was not professional and, in many circumstances, would be deemed to be extremely offensive. However, I do not believe that it impacted upon the fairness of the meeting. It simply showed that the respondent saw this as a really important manner, and as many people do (rightly or wrongly) foul and offensive language was used to signify the importance.
98. At the end of the meeting, Mr George decided to terminate the claimant’s employment with immediate effect on the basis of Gross Negligence. I take this to be the same thing as Gross Misconduct. On the recording, but not on the summary, Mr George also referenced concerns at this point about the claimant’s attitude in relation to the day rate vs price work because he made the impression the claimant believed he would do a more slapdash job. However, this was at the end of the meeting when he was being put under pressure by Mr Langridge and was clearly quite flustered. I find that the main reason for the dismissal was that the job was not done to the appropriate standard and that it was not signed off properly.
99. There are some problems though that I find here. The first is that the meeting was conducted on the assumption that the claimant did the work and signed it off. The matter of Mr Draper signing off the handheld was not considered. However, I find that this does not affect the fairness of the process, nor does it affect the reasonableness of the decision. The respondent’s evidence is that both members of the team would have been held responsible, but Mr Draper had left the company before the incident came to light. Furthermore, the claimant was the qualified individual on site and was ultimately responsible for the work. Therefore, I find that this error does not poison the decision.
100. I do find that the claimant should have been informed that the meeting was also a disciplinary meeting which could result in his termination. He was told it was an investigation meeting. He was not provided with documents prior to the meeting, although he was aware in broad terms of the allegation against him. These were

procedural failings and I find that they were, without any remedy, sufficient to render the dismissal procedurally unfair.

101. I then have to ask myself whether the respondent remedied this unfairness.
102. The claimant was given the right to appeal his dismissal and he took up this option. He complained that the timeframe given to request the appeal was shorter than allowed in his contract, but I place little weight on it as it did not prevent him making the request by the deadline given.
103. In his request he set out a number of grounds of appeal, none of which raised age discrimination. One part of the letter which stands out to me is where he says “the repair was not aesthetically pleasing, nor carried out in the manner that I would have carried it out, but it was not my work, and did not warrant the closure of the footpath”. So, at this point he is still flip-flopping on whether it was his work or not (having admitted in the investigation meeting that it was not his best work).
104. The appeal was to be by way of rehearing with Mr Good. On 9 March 2023 a letter was sent to the claimant giving an appeal date of Friday 17 March at 12pm.
105. On 16 March 2023 Mr Langridge wrote to the respondent on the appellant’s behalf asking for the appeal meeting to be outside working hours because the claimant did not want to jeopardise his new work by taking time off so early. In this email Mr Langridge again repeats that the tarmac was not laid by the claimant and that it was done prior to his arrival on site. This claim was demonstrably untrue simply by looking at the photographs produced by the handheld unit. The fact that the claimant was persisting in this position is certainly something the respondent could take into consideration in any decision-making process.
106. On 17 March 2023 the respondent replied confirming that they would reschedule the meeting for outside of work hours. This did not reach Mr Langridge before 12pm and so he attended the respondent’s premises. I understand that there was a discussion with him and Mr Good but I refused to allow the recording of that discussion into evidence as the claimant was not there and so it was not relevant to proceedings.

107. The matter was rearranged outside of work hours at 6pm on 30 March. A letter was sent on 22 March with this date on. The claimant wrote to say that he was unable to attend this hearing either due to work commitments.
108. On 5 April 2023 a further letter was sent by the respondent giving a date of 11 April at 12pm. The claimant was informed that if he failed to attend on that occasion the hearing would go ahead in his absence. As in the previous letters it was made clear that Mr Langridge did not qualify to accompany the claimant to the meeting.
109. The claimant did not attend this meeting either and on 13 April 2023 a letter was sent to him confirming that the decision to dismiss was upheld. It set out that Mr Good found substantial evidence of;
- 109.1 The repair was marked as “completed” incorrectly, therefore there was insufficient follow up and consequently an adequate safe repair was not made.
- 109.2 The repair made was carried out and left in such a way that it further created a tripping hazard for members of the public.
110. The flaws set out in paragraph 99 above were repeated here, but again I find they did not poison the outcome.
111. The claimant raises problems with insufficient notice being given of these appeal hearing dates. I find that sufficient notice was given. It was open to the claimant to request time off work, but on his evidence, he decided not to request this. Had he requested it and been denied then the situation might be slightly different, but in this instance the claimant made a decision not to attend the hearing.
112. There were also complaints made about Mr Langridge not having his phone calls answered or returned and his emails not responded to. At some point his number was saved in a phone belonging to the respondent as “do not answer”. The respondent accepts this, but says they did not have authorisation from the claimant to share details with Mr Langridge. They had requested it but he did not provide the required authorisation to allow them to share the data and comply with data protection legislation. I accept this argument. Mr Langridge was not a lawyer

or professional representative, he did not meet the requirements under the respondent's policy to accompany the claimant to meetings and therefore there was not implied right to share data with him.

113. In any event, I find that the refusal to share data with Mr Langridge did not impact the fairness of the proceedings.
114. I now return to the question of the shifting burden for the discrimination claim. I find that there may just about be enough to say that the burden has shifted to the respondent. I say this mainly because the evidence on the ages of employees provided by the respondent is poor, but it is accepted that the representative; claimant was at the upper end of the age range of employees. I also find that he would have been more expensive to employ than newer, younger members of staff due to being on day rates for historic terms and conditions. I am reluctant to make such a finding, but I give the claimant a healthy dollop of benefit of the doubt here.
115. However, when I then look at the explanation given by the respondent, I find that the clear and obvious reason for the claimant's dismissal was not his age but because the respondent believed that his actions in completing this repair were gross misconduct. I therefore dismiss the discrimination claim.
116. Looking then at the unfair dismissal claim I find that the respondent genuinely held the belief that the claimant's actions amounted to gross misconduct.
117. I further find that this belief was reasonable and was open to the reasonable employer. I personally would have found this to be misconduct rather than gross misconduct, but I find that a finding of gross misconduct was one which was open to the respondent.
118. I also find that the investigation was reasonable in all the circumstances. Whilst there were procedural failings in the initial meeting (not providing the documents and the invitation not making it clear that this was a disciplinary meeting) these were remedied by offering an appeal by way of rehearing. As set out above, the respondent acted reasonably in trying to set the dates and made it clear that the

third date offered would go ahead. The claimant made a decision not to request leave from his new job to attend and must live with the consequences of that.

119. When I apply these findings to the tests set out in the law section above, I find that the respondent was entitled to make a finding of gross misconduct.
120. I then consider whether the decision to dismiss was reasonable. Again, I personally would have looked at a final written warning and retraining or dismissal with notice, but I remind myself that the role of the tribunal is not to substitute our decision, but to consider whether the respondent's decision is one which falls within the range of reasonable responses. In this instance, having come to a finding of gross misconduct, I find that summary dismissal was within the reasonable range, notwithstanding the claimant's history of unblemished work.
121. I therefore dismiss the unfair dismissal claim.
122. Having found that summary dismissal was reasonable, I must dismiss the claim for notice pay and loss of statutory rights.
123. The claim for holiday pay was not pursued and does not appear as a head in the schedule of loss. I therefore dismiss any such claim.
124. I also dismiss the claim for aggravated damages. I find that the respondent, whilst not covering themselves in glory in the conduct of litigation have done so against the backdrop of a demanding claimant/representative who has made life very difficult for them. The respondent could have done more to help themselves but their conduct does not come close to meeting the threshold for aggravated damages.
125. That means that the entirety of the claimant's claim is dismissed.
126. I would at this point pre-empt any costs application by the respondent. I have at times been critical of Mr Langridge and the manner in which he has conducted this litigation. But I have also raised criticism of the respondent and I feel that any increased costs prior to the hearing would fall at the door of both parties. Whilst the decision in this matter has been delayed primarily by Mr Langridge's applications and litigation strategy meaning we ran out of time in the final hearing,

this did not add to the respondent's costs. It increased the costs for the tribunal in having to find additional days in the diary for me to sit in deliberation and then prepare a written judgment, but it did not incur additional costs for the respondent. This is just a preliminary view that I have taken and the parties are welcome to make such further applications as they see fit which will be given all due consideration, but I would invite them to consider my preliminary view before making any such application.

D J Wright

16 May 2025