THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH EMPLOYMENT TRIBUNAL**

BEFORE: **EMPLOYMENT JUDGE WEBSTER**

BETWEEN:

Mr A Bullions **Claimant**

AND

Skanska Construction UK Ltd

Respondent

ON: **17 February 2017**

Appearances:

For the Claimant: **Mr Lester (Free Representation Unit)**

For the Respondent: **Mr S Woodford (Project Director for the Respondent)**

JUDGMENT

1. The Claimant was fairly dismissed by the Respondent. The Claimant's claim for unfair dismissal fails.

2. The Claimant was not dismissed in breach of contract. The Claimant's claim for wrongful dismissal fails.

The claim

1. By a claim presented to the Tribunal on 16 September 2016 the Claimant claimed he had been unfairly and wrongfully dismissed from his role as a Testing Electrician. The Claimant worked as a street lighting Testing Electrician and his role at the time involved inspecting and testing lampposts as part of the respondent's contract with Surrey County Council to do their Bulk Lamp Check and Clean contract (BLCC). He had held this role since April 2014 but had continuity from employment since 2000 (his employment was TUPE transferred to the respondent on 1 March 2010). The Claimant stated that his dismissal was both procedurally and substantively unfair following a disciplinary procedure in September 2016. He asserted that the respondent could not have had a reasonable belief that he was working unsafely and that he was treated differently from colleagues apparently working in the same way. He further asserted that his long service and appropriate behaviour afterwards were not properly considered as mitigating factors that should have meant that dismissal was not a proportionate response.

2. The Respondent presented a response disputing the claims. The respondent asserted that the Claimant had committed a repudiatory breach of his employment contract by seriously breaching health and safety rules and had been fairly dismissed stating that the decision was based on a reasonable investigation and fell within the range of reasonable responses for an employer in all the circumstances. They also stated that if (which they denied) the dismissal was procedurally unfair, they would have dismissed him in any event and if it was unfair in any way, that the claimant significantly contributed to his dismissal because of his actions.

3. At the tribunal hearing I heard from the claimant and two witnesses for the respondent – David McArthur who made the original decision to dismiss the claimant and Christopher Murphy who heard the claimant's appeal against his dismissal.

4. I was provided with an agreed bundle of documents and witness statements for each witness. The respondent also relied upon some physical evidence namely an actual fuse box which all parties agreed the tribunal could look at.

List of Issues

5. The issues were agreed with the parties at the outset of the hearing.

6. What was the reason for dismissal? Was it a potentially fair reason for section 98(2) Employment Rights Act 1996. The respondent asserts that it was a reason related to conduct.

7. Did the respondent have a genuine belief in the misconduct and that this was the reason for the dismissal? The Claimant asserts that his dismissal was related to capability not conduct.

8. Did the respondent hold its belief in the claimant's misconduct on reasonable grounds?

9. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
   (i) The claimant relies upon the following to show that it was not within the range of reasonable responses:
      a) The claimant's long period of service
      b) The fact that the claimant had stopped his previous practice when told.
      c) The fact that the respondent did not take into account that the issues should be dealt with as capability as opposed to conduct.
      d) The low probability of danger or harm actually occurring.
      e) Lack of any serious action or response by the claimant's managers when they found out he had not been isolating lamps.
      f) The claimant was treated differently from his colleagues.

10. If the dismissal was unfair did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on balance of probabilities that the claimant actually committed the misconduct alleged.

11. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

Findings of Fact

12. The respondent had the contract for Surrey County Council to maintain and repair their street lighting. The claimant was a Testing Electrician. At the time of his dismissal his work consisted of carrying out bulk lamp change and clean works referred to as BLCC. He had done this work before. He was the only person directly employed directly by the respondent to do this work. The other people carrying out this work were agency contractors. The claimant was the respondent's most qualified electrician doing this work. The claimant worked as part of a pair with a colleague, Mr Bulbeck. Mr Bulbeck was not an engineer. His role was to replace the bulbs and clean the lamp. Mr Bulbeck

would work at the top of the column on the lamp whilst the claimant was working at the bottom carrying out the electrical tests.

13. The respondent became suspicious about the claimant's working practices and in particular whether he was starting and finishing his work on time. Mr Keith Beard carried out an investigation. As part of that investigation the claimant was interviewed on 15 March 2016.

14. The claimant was then invited by letter dated 24 March 2016 to a disciplinary hearing on 6 April 2016. The meeting was to discuss allegations that his working times were different from those claimed on his timesheets and that he was not carrying out his role as required. The claimant was sent Mr Beard's investigation report and the evidence he had gathered prior to that meeting. He was accompanied by his trade union representative throughout the disciplinary process.

15. Mr McArthur chaired the disciplinary meeting. During the disciplinary meeting the claimant mentioned various aspects of his work that were not related to the allegations being considered in that meeting but that caused Mr McArthur to believe that the claimant was working unsafely. Mr McArthur adjourned the first disciplinary hearing to consider the situation so that he could investigate the new allegations. At that meeting he also decided to suspend the claimant because he was concerned that the claimant was not fulfilling his duties to the required minimum standard. The claimant's suspension was confirmed by letter dated 15 April 2016.

16. By letter dated 19 April Mr McArthur informed the claimant that the original concerns that formed the basis for the first disciplinary hearing were found to be cause for disciplinary action and the claimant was issued with a final written warning. His colleague was also issued with a final written warning for the same behaviour. The claimant did not appeal against this sanction. In the same letter the claimant was invited to a second disciplinary hearing to discuss the 'new' issues which had come to light as part of the original hearing.

17. The second meeting was held on 22 April. The claimant agreed that he had been working contrary to procedures. The specific allegations were that he
    - Failed to isolate columns before undertaking works which is a serious breach of health and safety
    - Breaches of G39 in relation to isolation and safe working practices
    - Not fulfilling the testing operation to BS7671 as per his level of training competence, knowledge and skills.
    - Failure to comply with Electricity at Work Regulation 1989

18. The claimant confirmed that he did not isolate the columns as part of an experiment to see whether by not isolating the columns (turning off the power

source) they could avoid the ballast and leaf nodes from blowing. He stated that he had heard from his colleagues in the repair teams that every time he carried out his BLCC work, they would be called out to repair several of the lamps that he had checked because the ballast and leaf nodes would blow. He wanted to find out whether his work was in fact causing the increase in ballast and leaf node malfunctions. He thought that it was possible that isolating the columns (turning the power off) was causing the damage.

19. Both at the disciplinary meeting and in evidence to the tribunal, the claimant agreed that he knew that working without turning the lamps off was contrary to procedure. He accepted that it increased the risk to both him and his colleague working at the top of the lamp. He agreed that he knew that the official reason given that the ballasts and leaf nodes kept blowing was that there was a malfunction in that brand of lamp. However he said that anecdotal evidence from the repair crews was that after he had carried out his maintenance checks then it increased the numbers of lamps suffering this malfunction and he wanted to see if he could 'fix' this by doing his experiment.

20. Whilst I accept that the claimant was carrying out an experiment as opposed to simply being lazy as asserted by the respondent, I also find that he knew that the basic premise of his experiment was contrary to accepted practice and that the reason he did not inform a manager before undertaking the procedure, was because he knew he would be told not to do it because of the key rule of isolating the columns.

21. The claimant says that he did raise his experiment with a manager, Mark Wootton, before Mr Beard commenced his disciplinary investigation and that as soon as Mr Wootton told him to stop, he stopped. Mr Wootton's statement given for the disciplinary investigation said that he had no recollection of that conversation. In evidence to the tribunal the claimant was unsure of the exact date of the conversation but said it was before the investigating meeting on 15 March. The respondent produced evidence to show that the claimant had failed to isolate lamps up until 15 March but stopped at that point. The respondent stated that this showed that the claimant only stopped because he had been caught out, not because he had raised it and responsibly stopped.

22. The claimant's evidence on when he started and stopped the experiment was contradictory. He says he stopped before he actually did as evidenced by the evidence on node activity used by the respondent in the investigation and disciplinary process. In evidence to the tribunal the claimant conceded that he must have been doing the experiment longer than the 3-4 weeks he asserted in his witness statement.

23. I accept the respondent's version of events. Although Mr Wootton did not given evidence I accept it was more likely than not that the claimant did not speak to a manager about his experiment as I find that he knew it was wrong

and knew that as soon as a manager became aware he would not be able to continue with it. I believe that the claimant was interested to see if it would stop ballasts blowing but I also find that he would have continued this practice for some time had he not been found out. He knew from all his training and the various literature, that he had to isolate the columns before undertaking several of the tests and that working on a live column increased the risks to him and his colleagues even if he considered the increased risk to be minimal.

24. There was some debate about whether the claimant had read the systems of work that the respondent gave out however I find that this was largely irrelevant as the claimant accepted that he knew the system of work, he knew that ought to have followed it and that he understood that isolation was the basic starting point for electrical work across the industry.

25. The other aspect of unsafe working that he was found guilty of was not properly checking the fuses. The respondent alleged that for him to properly check the fuses and ensure not only that a fuse was there but also that it was the correct amp fuse, meant that he should have pulled out the 'box' which would automatically have cut the power. The respondent witnesses concluded that he was not checking the fuses at all or, failing that, that he was not checking the fuses properly because he should have been taking them out of the box to check what amp they were. The respondent brought a fuse box for the columns to the tribunal and showed how it worked to the tribunal and the claimant's representative.

26. The claimant maintained that he did check the fuses but could tell the difference between the fuses by looking at the top of the fuse. He stated that you could do this by partially pulling the lid back and peeking at the top of the fuse. He said that the correct 6 amp fuses were shinier than the higher amp fuses and so he could tell from that. He said that the fuse box shown to the tribunal was a new version and that many of the lamps he serviced had a different style that did not have such an easy isolation 'trigger' and he could have checked the fuse more easily on the lamps with the 'old style' fuse box. He also stated the lamps in question were all relatively new and therefore would only have the correct fuses because nobody else would have tampered with them or if they had he would have been able to tell.

27. I find that the claimant was, on balance, checking the fuses in the way that he described i.e. peeking in by just pulling back the top of the box. He may well have been confident in his 'shortcut' approach, but I consider that the respondent's concerns about the potential implications of this approach were reasonable. The claimant was responsible for 'signing off' a column and the lamp as safe for 6 years until the next check was due. Whilst I accept that it was unlikely that the wrong fuse was in the lamp, I accept Mr McArthur's evidence that it was nonetheless possible and I accept that the systems of work that were in place were there for a reason, namely to avoid safety risks

and to ensure that the product was adequately checked. If shortcuts were taken then they increased the risk, did not comply with the systems of work and had the potential to increase the health and safety risk to those near the columns.

28. There was also significant discussion surrounding the earth loop impedance test which was part of the required checks. It was not in dispute that the claimant was carrying them out. However the respondent asserted that the claimant's methods were contrary to correct practice and would not show the proper reading thus meaning that the test results were meaningless and would not show whether the system was safe.

29. The claimant disputed this saying that he had been told to only carry out one aspect of the earth loop impedance test by a previous manager. He said that he had been told this by a previous manager several years before. I accept that it is possible that one of the claimant's previous managers may well have said that corners could be cut but I do not accept that the claimant believed it was still acceptable practice or that he did not know what he was meant to be doing. I accept the respondent's evidence that the claimant was omitting a key part of the test and that this meant that the information gathered was either incomplete or inaccurate.

30. Central to the claimant's case was that although he was aware that the risks were raised by his actions, they remained minimal. Photos at pages 269-281, provided by the claimant, were said by the claimant to show how safe he continued to be. He also stated that the protective equipment he and his colleagues wore would protect them were anything to go wrong.

31. The respondent stated that the protective equipment was the last defence against injury and the fact that the claimant maintained his position that what he had done was not particularly wrong was what concerned them. They stated that their processes and procedures, particularly isolation were in place to comply with the health and safety legislation and their obligations under the contract with Surrey County Council. I accept that they were obliged to have these safe systems of work in place and that whilst some of the risks may have been small, they still had to try and minimise any risk.

32. The claimant was dismissed for gross misconduct with immediate effect at the conclusion of the hearing on 22 April. The dismissal was confirmed by letter dated 27 April 2016. The reasons given for the dismissal were a serious breach of health and safety rules on the basis that the claimant:

    - Did not isolate the columns
    - That he was not carrying out the testing in line with his qualifications, training and competence

- That he only undertook an earth loop and impedance test contrary to correct practice (paraphrased)
- That he did not check the fuses properly and to verify the max earth loop impedance and therefore correct operation of electrical installation under fault conditions
- No isolation took place and isolator covers were not removed to assess condition and termination of internal wiring
- He was not undertaking his duties by the book.

33. By letter dated 6 May 2016 the claimant appealed against his dismissal. The appeal hearing was chaired by Mr Martin Ward and Mr Chris Murphy on 27 May 2016.

34. The claimant was represented by his trade union representative at the hearing. He produced evidence from three people; John Piggott, Peter Rainsford and Jim Bulbeck. In different ways, all 3 stated that the claimant's ways of working were either not unsafe or were not contrary to accepted practice.

35. Mr Murphy in his witness statement considered the evidence but felt that none of them exonerated the claimant from the fact that he had knowingly undertaken unsafe practices. Mr Piggott's letter stated that several years earlier he had told the claimant that he could work without isolating the columns 'if it was safe to do so'. I accept the respondent's submission that the fact that the claimant had, until the period at the beginning of 2016, continued isolating, indicates that he knew and understood that isolating was necessary. Further I accept the respondent's evidence that such practices were contrary to industry norms and that isolation was the basic starting point for all electrical work. Therefore whether or not Mr Piggott, who no longer worked at Skanska, accepted this working practice, was largely irrelevant to the decision they had to make.

36. Mr Rainsford's letter confirmed that the safety equipment the claimant used would make his methods safe or at least mean that they posed a minimal risk. Mr Murphy concluded that Mr Rainsford condoning this method of work also did not make it right or meant that it complied with the rules that were meant to be followed.

37. Mr Bulbeck gave evidence at the appeal hearing. He stated that he felt safe working with the claimant and confirmed that the method statements they gave out were rarely if ever read.

38. The appeal hearing was adjourned and Mr Murphy spoke to two managers to check whether the working practices exercised by the claimant were common practice by colleagues in accordance with the assertions of the claimant. Both witnesses stated that it was not.

39. The hearing was reconvened on 27 June and Mr Murphy concluded that the original decision was reasonable and upheld the claimant's dismissal.

Submissions

40. The claimant's representative made various submissions and provided me with a written skeleton argument. In summary he stated that the claimant had not committed a repudiatory breach of contract because the risk of harm caused by his methods was minimal, and because it was clear that the claimant only carried out the practice for a short period of time and as soon as he was told that it was wrong, he stopped. Therefore any breach was minor and/or shortlived.

41. In terms of unfair dismissal the claimant's representative stated that there was no reasonable investigation on which the respondent could base a genuine belief that the claimant was carrying out gross misconduct. There is a significant gap between the respondent's belief that the claimant had acted in a way that was lazy or complacent and the claimant's own explanation that he was carrying out an experiment. He stated that the dismissal was unfair because the real reason behind the claimant's behaviour was capability and the respondent should have treated it has such as opposed to disciplining him for misconduct. Further he stated that the decision to dismiss was without the range of reasonable responses because they failed to take into account his length of service, the fact that his conduct stopped as soon as he was told it was wrong, and that his motivation was positive as opposed to laziness or complacency.

42. The respondent's submissions were that the claimant had fundamentally breached his contract of employment. He had breached all the health and safety guidance and legislation by failing to isolate the columns for the relevant tests. His actions were also a breach of the respondent's contract with Surrey County Council.

43. The respondent stated that the reason for dismissal was gross misconduct. The claimant knew that he ought to have been isolating and carrying out the various tests in accordance with their methods but chose not to. He was the most qualified person actually employed by them doing this work and he knew better. They asserted that the investigation was fair, they considered all the evidence and came to the conclusion that because of the seriousness of the breach and the claimant's response to their concerns, ie to continue to state that the risk was minimal and he had not done anything particularly wrong, meant that he was guilty of a serious breach of health and safety and they could not trust him not to do it again in the future. Therefore their decision to dismiss was within the range of reasonable responses for an employer in all the circumstances.

The Law

44. Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:
    (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 (20 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
    (2) A reason falls within this subsection if it –
        (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
        (b) Relates to the conduct of the employee,
        (c) Is that the employee was redundant, or
        (d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
    (3) In subsection (2)(a)
        (a) 'capability' in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental qualify and
        (b) 'qualifications in relation to an employee means any degree, diploma or other academic technical or professional qualification relevant to the position which he held.
    (4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss 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 reasonable 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.

45. The respondent's case was that this was dismissal for conduct. That is a potentially fair reason under s 98 ERA. In the event that the respondent is correct in that context a determination of the fairness of the dismissal under s98(4) is required. This involves an analysis of whether the respondent's decision makers had a reasonable and honest belief in the misconduct alleged. Further a tribunal must determine whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine

whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band or reasonable responses also applies to the belief grounds and investigation referred to.

46. In the event that the claimant is found to have been unfairly dismissed a monetary award is made under s119 ERA (basic award) and s123 ERA (compensatory award). Reductions may be made to those awards. For the basic award a reduction cane be made where the tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award, then the tribunal is to reduce that amount accordingly. Under s123 ERA subsection 6, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just an equitable having regard to that finding.

Conclusions

47. I find that the respondent has shown that the reason for dismissal was misconduct. They demonstrated to the tribunal that they considered the claimant to be highly trained and that they reasonably believed that he knew that his actions were contrary to normal practice and breached health and safety guidance. They based this conclusion on the fact that the claimant conceded during the investigation and the disciplinary process that he knew that what he was doing breached the industry standard safety procedures. Whilst I accept that the claimant may not have read the respondent specific method statements, he confirmed during the investigation and again in evidence to the tribunal that he did know that isolation was a basic first step and he knew the correct step for the earth loop impedance test but had decided not to follow it. It was therefore reasonable for the respondent to consider that there was no further training or information that could have been provided to the claimant to change what had happened and that this was not a problem of capability. The fact that the claimant ceased the process once he knew it was not condoned by his managers, does not mean that he did not know that it was contrary to proper procedures and why.

48. The respondent had an honest and reasonable belief that the claimant had chosen to ignore the policies and practices and they therefore considered that this was misconduct as opposed to capability.

49. I conclude that the investigation carried out by Mr Beard was reasonable in all the circumstances. He gathered a significant amount of documentary evidence (though some was not relevant to this issue but those regarding the first disciplinary issue) and spoke to the claimant and his colleague. When the matter was adjourned another manager was spoken to to assess the veracity of the claimant's assertion that he had voluntarily told his manager about the

experiment and had ceased carrying out this practice as soon as he was told not to.

50. The claimant asserts that he was not told he could produce evidence or witnesses at the initial stage which was compounded by the fact that the original disciplinary hearing was about a different matter altogether. However, the claimant was given the opportunity to produce evidence at the appeal stage and in any event, the facts of the situation remained essentially unchanged. The claimant conceded at all stages that he had breached the health and safety policies contrary to established policy and that he knew that he was breaching established policy. As discussed above, I do not find that the witness statement from Piggott changes that. I do not accept that the claimant had permission from an earlier line manager to operate without isolating the column. That permission was given several years before the claimant commenced his experiment, the manager in question had left the respondent some time before the claimant started the experiment and the permission given was qualified by concerns over safety. I therefore think that any failure to allow the claimant to provide evidence at the first stage did not affect the decision that was reached and was rectified by the appeal stage when Mr Murphy did consider the new evidence when assessing the reasonableness of the dismissal.

51. I find that the respondent's decision to dismiss the claimant was within the range of reasonable responses. I do not accept the claimant's assertion that their failure to consider his longevity of service or the fact that he had stopped the behaviour before the dismissal render the dismissal unfair. The claimant had knowingly and deliberately breached recognised health and safety procedures. I accept that his motivation was positive and that his experiment was genuine as opposed to his decision being motivated by the desire to cut corners. I also accept that the increase in risk to the claimant and his colleagues was not huge. Nonetheless, his experiment necessarily entailed cutting corners and breaching sensible and legitimate health and safety rules that put him and his colleagues at risk. He knew of the risks and I agree with the respondent that in fact his longevity of experience and level of qualifications counted against him as opposed to for him because he was acting in full knowledge of the possible repercussions.

52. Whilst I accept that the fact that the claimant had stopped his behaviour before the disciplinary process commenced and that this could have been a mitigating factor, I also accept the respondent's evidence that they believed he had only stopped because he was found out, not because he was willing to accept that what he had done was wrong and would therefore not do something similar again.

53. The claimant was not treated differently from his colleagues. Mr Bulbeck was given a final written warning regarding the first disciplinary issue just as the claimant was. Mr Bulbeck was not carrying out the experiment in the same way that the claimant was because he was not a qualified electrician and was not
responsible for the shortcuts that the claimant was taking.

54. When questioned during the disciplinary process and before the Tribunal he continued to assert that the practices were not that unsafe and that whilst the risk was increased it was not minimal. He also did not appear to accept or understand that his actions were in breach of the respondent's obligations to Surrey County Council and that his shortcuts e.g. the fuse checking, were not thorough enough. Whilst it may be correct that the claimant's actions have not in fact caused any harm or wrongly 'passed' a column/lamp as 'safe', the respondent has no way of ascertaining that without retesting the columns that the claimant has signed off and they reasonably concluded that they had no assurance from the claimant that he would not take such shortcuts in the future.

55. The claimant had a final written warning on his record regarding his conduct and he had not challenged that warning. I therefore consider that the respondent based their decision on a reasonable investigation and that their decision to dismiss fell within the range of reasonable responses and that the claimant's dismissal was fair. The claimant's claim for unfair dismissal therefore fails.

56. I also conclude that the claimant did carry out a repudiatory breach of his contract in carrying out his experiment and failing to follow basic but fundamental health and safety measures. I accept that the claimant was highly skilled and that he felt that he was managing the risk appropriately but I also accept that this was not his decision to make as he was potentially putting himself, his colleagues and the public at risk and the respondent could reasonably expect someone of his level of experience to follow the method statements and his training. The claimant's claim for wrongful dismissal therefore fails.

Employment Judge Webster

Date: 4 March 2017