



## EMPLOYMENT TRIBUNALS (SCOTLAND)

5 Case No: S/4102611/16 Held at Aberdeen on 28, 29 and 30 March 2017

Employment Judge: Mr N M Hosie (sitting alone)

10 Mr Damien Wilson

Claimant  
In Person:

15 Stork Technical Services (RBG) Limited

Respondent  
Represented by:  
Mr E Gilligan -  
Solicitor

## 20 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the claim is dismissed.

## 25 **REASONS**

### Introduction

30 1. Damien Wilson claimed that he was unfairly dismissed by the respondent company, Stork Technical Services (RBG) Ltd ("Stork"). Stork admitted the dismissal but claimed that the reason was conduct and that it was fair. In short, Stork maintained that the claimant had failed to follow its "Integrated Safe System of Work" processes ("ISSOW").

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**ETZ4 (WR)**

### **The Evidence**

2. On behalf of the respondent I heard evidence from:

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- Jason Waites, Project Manager, who carried out the investigation.
  - James Yeats, Operations Manager, who took the decision to dismiss.
  - Kenneth Pirie, Contract Delivery Manager, who heard the claimant's appeal against his dismissal.

10 I then heard evidence from the claimant, Damien Wilson, and on his behalf from:

- William Campbell, Scaffolder.
- Paul Bradley, Scaffolder.

15 3. A joint bundle of documentary productions was lodged on behalf of the parties ("P").

### **The Facts**

20 4. Having heard the evidence, and considered the documentary productions, I was able to make the following material findings in fact.

5. Stork is based in Aberdeen and provides "Asset Integrity Services" to the oil and gas and other sectors.

25 6. The claimant commenced his employment with Stork as a Scaffolder on 12 March 2012. His terms and conditions of employment were included with the documentary productions (P.3). He worked on the Brent Delta offshore installation ("the Installation") in the North Sea which is operated by Shell.

30 7. The claimant also carried out the role of 'Leg Sentry', having been trained and certified to carry out that role (P.7 and P.9). The role involves the monitoring of workers entering and exiting a confined space.

**Incident on 22 November 2015**

8. On or around 21 November 2015, the claimant was carrying out the role of nightshift Leg Sentry in relation to the utility shaft in the leg of the Installation. During the course of the claimant's shift, a specialist work party were carrying out asbestos removal work in the utility shaft and the Asbestos Supervisor, Brian Kidd, re-positioned a scaffold tube in order to progress his scope of work.

9. On or around 22 November 2015, shortly after the claimant's shift had ended, two workers entered the lift in the utility shaft and began to descend. After a short time, there was a loud bang and scraping noise and as a result one of the workers hit the emergency stop button.

**Shell Report**

10. An investigation was subsequently carried out by Lee Scrafton, Shell Offshore HSE Adviser and Michael Green, Safety Representative. As part of the investigation process, the claimant was interviewed on 25 November 2015 by Keith Greenwood, Senior HSEQ Advisor and Jamie Robertson, Focal Point. The interview used a prepared questionnaire on the role and duties of Leg Sentry. The investigation team found that the immediate cause of the incident was the repositioning of the scaffold tube by Mr Kidd, which placed it in the line of the lift. However, the investigation team also found that there were a number of significant failings in terms of the conduct of the claimant in his role as leg Sentry. These failings were identified in the investigation report ("the Shell Report") which was produced by the investigation team (P.27). The Shell Report included a "Summary and Background" (P.27/4); a timeline (P.27/6-27/8); and "Findings" (P.27/9-P.27/12).

11. One of these findings was: "a number of failings with regard to the process of ISSOW" (P.27/9). The "ISSOW" manages work offshore to identify hazards and to ensure that everyone works by an agreed permit. No work takes place offshore without a permit. Permits are critical in ensuring that the work is carried out safely.

12. The claimant was a "Permit Authority" ("a PA") which meant that he could be the person in charge of the work.

13. An example of a "Cold Work Permit" which is taken out by a PA was one of the documentary productions (P.43/1); there was also produced a "risk assessment" (P.43/2) which is discussed at a "tool box talk" arranged by the PA. It is the PA's responsibility to make sure that the work party is aware of the scope of the work and their roles and responsibilities. The PA and work party are required to sign a declaration to that effect. The claimant had signed such declarations (P.43/4, for example).

14. On 21 November 2015 the claimant was carrying out the role of PA and nightshift Leg Sentry in relation to the utility shaft in the leg of the Installation. The Confined Space Entry permit ("the CSE") (P.21) and the "Workscope" relative to the CSE in the form of a "Work Control Certificate" ("WCC") were included with the documentary productions (P.23). The WCC was obtained by the Asbestos Supervisor, Brian Kidd, signed by him (P.23/8). The CSE and WCC required to be kept by the claimant as Leg Sentry.

#### **Investigation by the Respondent**

15. Following the Shell Report, as part of the respondent's investigation the claimant was interviewed on 25 November (P.28); a statement was also taken from Brian Kidd who accepted that he had moved the scaffold tube to allow access (P.26).

#### **23 December 2015**

16. On 23 December 2015, the claimant was interviewed on the telephone by Jason Waites, from whom we heard evidence at the Tribunal Hearing. Minutes of that "meeting" were produced (P.29).

17. Mr Waites asked the claimant about the issues which had been raised in the Shell Report. So far as he was concerned, as Leg Sentry the claimant was

responsible for making sure that the work party knew the risks; as he put it, as Leg Sentry the claimant was the “custodian of entry and exit into and the leg”.

18. The following are excerpts from the Minutes: -

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*“JW asked if DW had signed the permit. DW advised that the permit was live and with him. DW explained that he had never been shown how to complete a CSE permit before and there had never been any problems before with audits in the past.*

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*JW asked why DW took out the permit if unsure. DW advised he has never been shown the CSE before but has taken out permits.*

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*JW explained that CSE is standard across every permit. DW stated that with hindsight realises he should have asked. DW stated that when he first started. He has been ordered to previously without issue.*

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*JW stated that DW has been through the course and doing the role so there is not excuse. JW explained that it is clear in the task description.*

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*DW advised that there are random CSE’s lying around and one on the door so it can be quite confusing. JW explained that you take the CSE out, print it and take it to the leg sentry box. JW advised that he was struggling to understand how this can be confusing.*

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*DW explained that when he was asked if he had it, he didn’t and had to go and get it. DW questions whether he should have lied. JW advised that not having the permit on the worksite is just as bad as not signing it. DW advised that it was on the worksite, he just thought that he had mislaid it. DW advised that he wouldn’t have handed it over if he knew it was wrong. DW explained that he was happy to complete further training as he feels that it was clear he needs it.*

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*DW advised that he wasn’t to blame for the scaffold tube incident. JW agreed and advised that this conversation is on the back of that incident to discuss the permit and DW’s role as leg sentry.*

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*JW asked DW if he was at the toolbox talk. DW confirmed he was. JW asked why DW hadn’t signed anything. DW advised that he did not see anything that he had to sign.*

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*JW stated that DW had been in the role.....DW interjected to advise that he has done the role of granting access to and from the leg however never on the worksite as a PA. DW advised that he has never signed toolbox talk as leg sentry in the past. He can’t see the worksite. DW stated that he would sign tool box talk if on the worksite.*

5 *JW explained that if you are there to ensure that guys are safe you should sign the CSE. JW confirmed that as part of the role as leg sentry you check PPE. DW confirmed that everyone had it. JW asked why the paperwork confirming this wasn't completed. DW explained that he had just come on shift. It was human error, nothing intentional. Everyone has PPE.*

10 *JW stated that when guys were entering and exiting numerous times the entry control sheet wasn't completed (P.20). DW explained that he had logged them into the shift then used the tea cards and contacted the control room for breaks. The tea cards are the first thing that people would look at. They would then be signed out at the end of the shift.*

15 *JW explained that it is a log of activities and is used for more than if there is an incident. You are recording who is where when.*

*JW asked if DW had anything to ask at this point.*

20 *DW explained that he feels that the amount of paper in the sentry box needs to be looked at and feels that if he needs coaching it is fair enough. DW explained that he felt he was doing everything right.*

25 *JW explained that DW had attended the training course and therefore wasn't sure what training DW was expecting. DW reiterated that he had never been chaperoned.*

30 *JW advised that he was also struggling to understand the issue with all the paperwork as there is more with scaffold paperwork which DW has plenty of experience with. DW stated that he is used to doing scaffold paperwork, not an idiot.*

*JW asked DW if he was aware that a tool box talk needed to be completed with every job. DW confirmed that he was.*

35 *JW confirmed with DW that he wasn't sure of CSE and had not raised it previously. DW confirmed he didn't know.*

40 *JW explained that the ISSOW training is clear. Its standard is that you sign onto the permit. Also, if you read the permit there are clear instructions....."*

19. As part of his investigation Mr Waites also obtained evidence of the claimant having taken out permits in the past as Leg Sentry (P.30).

## Disciplinary

20. Mr Waites recommended disciplinary action and on 11 January 2016 Ken Pirie, Contract Delivery Manager, wrote to the claimant to advise that he was required to attend a Disciplinary Meeting on 14 January (P.31). The following are excerpts from the letter: -

*“The purpose of this meeting is to consider an allegation that:*

- *You have failed to follow the ISSOW processes and procedures while working as a PA and Leg Sentry on the Brent Delta on 21 November 2015 by failing to:*
  - *Present the Live CSE for the utility shaft on-site.*
  - *Sign the CSE and hold the Tool Box Talk for the utility shaft.*
  - *Sign the tool box talk to confirm that you attended and understood the requirements of the job.*
  - *Accurately complete the personnel entry log during the shift for employees entering and exiting the leg.*
  - *Sign to confirm that pre-entry PPE checks had been completed on the required sheet.”*

21. As it transpired, the Disciplinary Meeting did not take place until 20 January and as Mr Pirie was on holiday at the time the Disciplinary Hearing was conducted by James Yeats, Operations Manager.

22. I heard evidence from Mr Yeats at the Tribunal Hearing and also Kenneth Pirie who conducted the Appeal. Both these witnesses, and indeed the respondent's other witness Jason Waites, all gave their evidence in a measured, consistent and convincing manner and presented as credible and reliable.

23. Minutes of the Disciplinary Meeting were produced (P.36). Some aspects of the Minutes were challenged by the claimant, but I was satisfied, primarily on the basis of the evidence of Mr Yeats, that they were reasonably accurate. The following are excerpts: -

*“JY commenced with first allegation: **failed to follow the ISSOW processes and procedures whilst working as a PA and Leg Sentry on the Brent Delta on 21 November 2015 by failing to: present the live CSE for the utility shaft onsite.** DW said that the permit was onsite,*

should have been put in the box next to the control room but it was in his bag. He said that he had put it in there when he was asked about it by the Shell safety guy. JY asked if he had it correct that DW would have placed this in the box once done because it wasn't there at leg sentry position.

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DW said that he couldn't remember at the time because he had an early check-in the night before and was maybe tired (end of shift). DW went on to say that it was the culture to put the permits in at the end of the week and there were no strict time scales and he couldn't remember from his ISOS training. JW questioned no strict time scales or was DW tired? DW said he was on his way there but he kept everything in one place. JY questioned definitely onsite? DW said 100%.

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**JY moved on to the second allegation: failed to follow the ISSOW processes and procedures whilst working as a PA and Leg Sentry on the Brent Delta on 21 November 2015 by failing to: sign the CSE and hold the toolbox talk for the utility shaft.** DW said he only had a 0.5 day or 1 x day training on the course and it had been a few months since he had done his training that he was doing this role. DW said he should have had a chaperone as told on the course so he was left on his own. DW said he was left to his own devices pretty much and had never been shown what to do or had been explained what to do. JY felt fundamental requirement for all employees involved in a work scope to attend a TBT and for a PA to hold these.

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JY asked so during leg sentry work DW had never come across this before and DW said he didn't think anything of it, though he was doing it correct. JY continued to ask for every separate leg entry DW had not carried out a separate permit. DW said it would have been for the work party only and had never been shown that not covered in the course or not that he could remember; never occurred to him so wouldn't have done it. JY asked if DW signed a CSE every time and DW said not that he could remember. JY reads from the Level 1 Investigation Report carried out by a Shell Safety Representative and DW felt he was seen in a bad light. DW went on to say it was the culture. JY: what should DW sign? DW confirmed he should sign the log in sheet, PPE sheet and control T-cards. JY repeated that because of the culture this was not done.

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DW said all this came to light afterwards but it was the culture on the Brent Delta to sign things themselves.

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JY: So what would they sign? DW said the log in sheet, the PPE sheet and T-cards. JY questioned and this is the culture? DW: yes it has now just come to light. JY asked is this not just relieving you off your duties and leg sentry by the work party doing this themselves? DW never thought anything about it until now as people do it themselves. JY asked did DW think it was his role to retain T-cards, CSE and call to control room. DW said it was difficult because training took place a long time ago so couldn't remember from training.....

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5 JY: Did a toolbox talk take place? DW said for the work party but not for leg entry sentry and this is a 2nd role as I'm a Scaffolder so think a refresher course is just needed for leg entry sentry as training was done some months ago and mistakes can be made. TC (claimant's trade union representative) felt that a refresher course would be advantageous as there would be a timescale involved from doing training to being offshore and carrying out the job.

10 JY decided to move on to the third allegation. JY stated that DW did not sign the toolbox talks which would have confirmed his attendance and understanding of the work to be carried out. DW said he did not sign it as he wasn't aware he had to as he believed it was from the asbestos team so no he didn't realise he had to sign it.

15 JY said that it affected the leg sentry work. Was DW aware of that? DW said no. JY said that as DW was the stand-by man for the job DW had the right to be there and attend the toolbox talk. DW said he would for scaffolding work but not for leg sentry as you cannot visually see what is happening to (sic) doesn't make sense and his role was to maintain radio contact.

20 JY asked what about the work hazards to be made aware of and surely DW needed to keep in contact. DW said that he understood the hazards as gas was the main thing but the work in hand was for the asbestos. JY repeated what he had picked up on which was DW knew what to do with a leg entry but not aware of what the work party actually did but would have if he had participated in the toolbox talk. DW: yes possibly. DW went on to say not a lot you can do when you are on leg sentry. DW does not recall this being said at this point. JY said this was covered in the training as it is a fundamental requirement.

25 DW said not offshore. DW said he was a bit miffed as he explained to the safety rep. who carried out the investigation (Lee Scrafton) who said this was nothing to worry about, just a witness to another incident regarding witness referred to is the E & D Asbestos Supervisor who moved scaffolding tubing. JY said the client does not dictate to what we/Stork do as we make our decisions. DW said he was never chaperoned. Been 2 years on Brent Delta and had no training. Everyone just got on with things as 1st time PA and not dropped in at the deep end as a PA gets time to settle in but this does not happen as it should have with leg sentry; later DW did admit there was a chaperone.

30 JY advised again it was fundamental to the role that leg entry that logs were accurate PPE was checked/signed and that would not change.....

35 JY said that DW wasn't logging in/out Leg as he relied on t-cards system so only entered log for in/out but not in between. DW said yes only did the CSE for start/finish off the job (P.20/1). JY went over that DW couldn't recall certain aspects of the training but asked why would DW not log every time someone went in/out of the leg? DW said he relied on each person moving t-cards and he would use radio control. JY asked DW was

5 *he aware it was responsibility? DW can't remember as he was never chaperoned as the training course was so long ago. DW said he thought someone showed him but he can't remember if this was a Shell or Stork person. JY again clarified that earlier DW said no one showed him but now he is saying someone did but can't remember the person. DW said there were a couple of people floating around at the time. TC asked DW that he would have received an induction and DW said yes but it was long ago.....*

10 *JY wanted to run through points to ensure that he had everything understood: -*

15 *JY did have a live CSE but couldn't remember when asked at the time but then realised it was in his bag so on site but was carried out.*

20 *JY said DW wasn't aware he had to sign CSE or the toolbox talk had to be carried out and he couldn't recall having training onshore or debrief. DW said correct wasn't aware.*

25 *JY said DW didn't sign toolbox talk and didn't realise it was applicable to himself or been part of the talks. DW said no.*

30 *JW said that DW used the t-card system to control in/out and everyone did this and he only signed the register at the start/finish of the shift. DW said yes.*

35 *JW said that DW carried out PPE check/buddy check but DW didn't complete paper work as he felt it was the work party's responsibility.*

40 *JY asked if DW had anything that he wanted to state. DW said that he was shocked to be in this situation, safety man said nothing to worry about and now in a disciplinary. This has caused stress to me and my family.*

45 *TC added that he felt further refresher training was needed for the leg sentry work and this was DW's account as he/DW saw that at the time."*

## **Dismissal**

24. A telephone conference call was arranged for 22 January 2016 when Mr Yeats  
40 advised the claimant that he had decided to dismiss him "without notice". Minutes of that "Meeting" were produced (P.37). I was satisfied that they were reasonably accurate.

25. On 22 January Mr Yeats wrote to the claimant to confirm his decision. The  
45 following are excerpts from his letter (P.38):

*"In making my decision I concluded that:*

- 5                   • *You explained that this ("the live CSE") had been held on-site during the activity but when requested for it as part of the investigation, you had forgotten that this remained in your bag rather than being placed in the permit box after your shift. The fact that you confirmed that you did not hold a TBT nor have the document signed provides reasoning for the document being clean as if it had not been on site. I therefore accept your recollection and believe this allegation to be unfounded.*
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- 15                   • *This ("signing the CSE and holding the toolbox talk for the utility shaft") is a fundamental part of your duty as both the leg sentry and PA for the confined space entry into the leg. You confirmed that this did not take place. I believe that you were well aware of this requirement despite your claims and that you chose not to complete a TBT with members of the work party to ensure that they fully understood the hazards and control. This resulted in the failure to document TBT and sign the CSE.*
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- 25                   • *You failed to participate in and sign to confirm your attendance at the work scope TBT. As you are aware, this is a basic offshore requirement for all members of a work party. As the leg sentry for the scope, it is deemed crucial as a safety critical member of the work party to understand the work activity taking place and it is extremely concerning that you chose not to do so.*
- 30                   • *The entry/exit register was not fully completed and you advised that you felt that this was not the leg sentry's responsibility but that of the individuals who entered and exited the leg. This is once again considered a fundamental part of the leg sentry duty and once again I believe that you chose not to complete this as required. This is evidenced by the fact that you completed the log for both the initial entry in the morning and final exit at the end of shift but not the entry/exit events in between this. This was confirmed by you.*
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- 40                   • *In respect of the pre entry PPE checks, you stated that you did in fact carry out the checks yourself but did not sign the paperwork confirming this was carried out. You felt it was the responsibility of the individuals who entered the leg. You had advised this was the way it was done on Delta however the other work party members did not regularly visit the Delta nor take part in the leg entry duties on board. This combined with your failure to complete a TBT and outline these responsibilities would result in incompleteness of the records. It would also be clear to you that these logs were not being completed prior to entry into the leg and you should have intervened as the individual responsible for the safe entry into the leg. It should however once again be noted that completion of*
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*these records is a fundamental responsibility of the leg sentry and I believe you chose not to complete these as required."*

5 **Appeal**

26. On 28 January 2016, the claimant wrote to Mr Pirie to intimate that he wished to appeal against his dismissal (P.39). The following are excerpts from his letter: -

10 *"I am disputing my dismissal via letter dated 22 January 2016 for the following reasons:*

15 *I was informed via a telephone conversation with Mr James Yeats that I'd been dismissed due to 'deliberately and intentionally' failing to complete paperwork correctly. This was not the case; as I informed the panel at my disciplinary meeting on Wednesday 20 January 2016 I had not received appropriate training in the correct manner of completion. In addition, I have always completed the Leg Sentry paperwork in this way and have never been advised that I was making an error. Therefore, if I have never been trained in the appropriate completion of the paperwork nor has my work been corrected previously, I fail to comprehend how I can be accused of an 'intentional and deliberate' act. I would ask that you consider that I cannot do something intentionally when I do not realise it is incorrect due to a lack of appropriate training.*

25 *The day after the incident, I was informed by the platform's HSE advisor Lee Scrafton, that my involvement was 'nothing to worry about and you'll be ok and if anything you'll be getting coaching out of it'. This led me to believe that I had done nothing seriously wrong.*

30 *I am relieved at my action, incorrectly managing paperwork, had no direct impact on the incident and damage which occurred to the lift shaft. In fact, without a colleague (who is in a supervisory role) causing this incident, the errors I made would have gone unnoticed and caused no danger whatsoever. I now have reason to believe that despite this said colleague proffering his resignation and admitting guilt with regard to this incident allegedly he is still working for the company."*

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40 27. The Appeal Hearing was conducted on 18 February 2016 by Kenneth Pire from whom I heard evidence at the Tribunal Hearing. As I recorded above, he presented as entirely credible and reliable. The claimant participated by way of telephone conference call. His trade union representative, Tommy Campbell, was in attendance along with Mr Pirie and Nicola Murray, HR Manager.

28. Minutes of the Appeal Meeting were produced (P.41). I was satisfied that they were reasonably accurate.

29. The following are excerpts from the Minutes: -

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*“KP explained that he has reviewed the allegations and has taken into account the potential seriousness of the matter should an incident have occurred in the leg whilst DW was performing sentry duties. KP asked if DW was confident that the permit was displayed on site. DW confirmed that he would not have printed it off if he was not going to display it. KP double checked, so it was fully displayed? DW confirmed that it was. KP advised that in his opinion the permit paperwork was not fully completed and he would have assumed that as DW is a Performing Authority for scaffolding activities on a regular basis he would have realised this. DW agreed that he regularly acts as a Performing Authority. KP asked DW if he read the permit paperwork in detail, as is required of a Performing Authority. DW confirmed that he had read it on the screen before printing it off. DW mentioned that permits are repetitive. KP asked DW again if he had read through the detail on the permit, DW advised that he had. DW added that he had not done anything intentionally. He has been audited as a Leg Sentry previously and no issues have been mentioned.*

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*KP asked DW if he understood the Work Control Certificate requirements and the role of a Leg Sentry. DW answered yes, and said there are T cards to manage and calls to complete, sign the log in/out register which is meant to be completed on each entry & exit. CSR (Confined Space Register) logged by work party. DW advised that it is his belief that this is completed by each individual of the work party not the Leg Sentry. It was done like this in the past when DW was a ‘leg’ employee. KP asked DW if he was aware of all of the main points to be adhered to as detailed in the Work Control Certificate. For example ‘read the First Responder and PSSSI 81’. DW advised that he could not remember seeing that requirement.*

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*KP asked DW if in relation to the Work Control Certificate for the ‘in leg’ scope (P.23), he took part and signed on to the work party declaration section. DW replied that he had not and that is the culture on Brent Delta, the Leg Sentry just focuses on the CSE Work Permit. KP asked DW if he thought that the culture was correct. DW advised that he had no reason to doubt it. KP asked if DW would think the same should apply for overside work. DW replied that overside would all be done together, Leg Sentry you just grant access.....*

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*TC (trade union representative) commented that on behalf of Damien and the ultimate dismissal decision, Stork should look at the matters in a corrective way. He went on to say that DW has not falsified the process maliciously or deliberately and through investigation the company should accept some responsibility.”*

30. After the Appeal Hearing Mr Pirie arranged for Nicola Murray, the HR Manager, to make enquiries of the training providers, Petrofac. They advised there was no requirement for a “chaperone”, as the claimant had alleged. He then spent some time reviewing all the documentation before writing to the claimant on 3 March to  
5 advise him that he had decided to uphold the decision to dismiss and that his appeal had been unsuccessful (P.42).

31. The following are excerpts from his letter: -

10 **“Lack of training**

*Throughout the disciplinary investigation and minutes it is noted you had advised that you had not received appropriate training to allow you to fulfil the paperwork requirements of the Leg Sentry role. You stated you have always completed the Leg Sentry paperwork in the way it has been presented on this occasion and you have never been advised that you were doing it incorrectly. In the appeal hearing you advised that in your opinion following completion of the Leg Sentry Training the delegates are required to be chaperoned before they are classed as fully trained. I have considered your comments and have investigated matters further. In regards to Leg Sentry training, a consistent approach is taken across Shell. The employee attends a formal training session at Petrofac Training Services, as you did in April 2013, on completion of the course the employee is deemed as fully trained and competent and a certificate is issued to support this. Nicola Murray, HR Manager had contacted the training provider and they have advised there is no requirement for persons who have completed the training to be chaperoned. In our meeting of 18 February you advised that you read the permit on the screen prior to printing it off. I was clear in the meeting that in my opinion the permit paperwork on this occasion was not fully completed. You confirmed you assumed the role of a Performing Authority for scaffolding activities on a regular basis and as such I would expect you to complete the permit fully due to the nature of the Health and Safety risks and the importance placed on this document. My immediate observation of the Leg Entry Work Control Certificate is that you have not signed it, nor carried out a tool box talk. This is an important part of the permit with specific ‘HOLD POINTS’ detailed to ensure that work party members familiarise themselves with the detailed documents and allow time for the team to ask questions and discuss risks. You therefore did not adhere to instructions. You also failed to participate in the actual ‘leg’ work, WCC tool box talk and sign on to this permit. This is unacceptable practice, as Leg Sentry you have a duty of care to the safety of those carrying out the work in the leg and as such you should have a basic understanding of what is going on and what could potentially trigger an evacuation situation. This leads to the requirement to complete the access personnel entry/exit logs. The entry/exit register controlled by yourself on this occasion was*

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5 *incomplete and on some inputs only noted work party's initial entries and the final exit. The evidence would suggest that you were relying solely on the work party themselves using T-cards for in/out movement management. Had an emergency situation occurred on the platform or down the leg it is your responsibility as Leg Sentry to support the evacuation of the work party. In summary, I am satisfied that you had received the necessary training, followed by an offshore assessment, a copy of which is enclosed. I am therefore concerned that you appear to fail to comprehend the seriousness and magnitude of not fulfilling the Leg Sentry role in the correct manner.*

### **HSE Investigation**

15 *You advised that the platform HSE Advisor investigating the accident at the initial stages explained that you had 'nothing to worry about'. As the HSE Advisor was not a Stork employee I will feed this back to the relevant organisation. Stork have independently read the investigation and have taken appropriate action as we see fit.*

### **Colleague**

20 *In your appeal letter you raise your concern that a colleague (Brian Kidd) involved in an incident linked to these matters concerning yourself remains in employment. As I advised in the meeting I cannot comment on individual cases, however, having investigated this further I am satisfied that the appropriate action was taken. The fact that you state your own error was 'merely failing to complete paperwork correctly' supports my above comment that you do not appear to comprehend the seriousness of your failure to take responsibility for the duties of a Leg Sentry.*

### **Deliberate & Intentional**

25 *In your letter you refer to page 6 of the policy (the 'Just Culture' Policy – P.13), namely the 'Possible Consequences' section and you believe your breach fits the criteria of **'where the non-compliance is of an accidental or minor nature and has a low potential to cause an accident or injury, employees will undergo further training or receive additional coaching and supervision to reinforce good safety behaviour'**. Unfortunately I disagree with this and deem the failures on your part to be:*

- *Violating Stork Safety Policies, procedures or rules;*
- *Violating safety legislation or our clients' safety policies, procedures or rules;*
- *Committing reckless or serious violations of safety behaviour;*
- *Displaying limited or no recognition of seriousness of breaches of safety.*

**Duration of Investigation and Disciplinary**

5            *At our meeting you highlighted the length of time this investigation has taken to complete. As with any HSEQ Investigation no deadline is set due to nature of investigations in general, the location and access to personnel involved who are on various rotations. It is unfortunate that the timing of the incident, the birth of your child and the outcome of the investigation happened in the build up to Christmas, however, this could not have been prevented or dates changed or delayed. As per the government's ACAS code of best practice, it is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case....."*

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15            **Respondent's Submissions**

32.        The respondent's solicitor spoke to written "*Outline Submissions*". These are referred to for their terms.

20        33.        He submitted that the reason for the claimant's dismissal was conduct which is a potentially fair reason.

34.        He then went on in his written submissions to invite the Tribunal to make certain findings in fact. He submitted that Leg Sentry was "*a safety critical role*".

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35.        He also referred to the "*Root Cause(s)*" section of the Shell Report (R.27/13). While it was accepted that the basic cause of the accident in the lift shaft was not due to the claimant's "*failings*", he was seriously criticised: "*A complete lack of ownership and diligence with regard to understanding safe working procedures was demonstrated in the case of the nightshift leg sentry*".

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36.        In support of his submission that the dismissal was fair and that the claim should be dismissed the respondent's solicitor referred to the following cases:

35            **British Home Stores Ltd v. Burchell [1978] IRLR 380;**  
**Neary & Neary v. Dean of Westminster [1999] IRLR 288;**  
**Post Office v. Foley** and  
**HSBC Bank Plc (formerly Midland Bank Plc) v. Madden [2000] IRLR 827.**

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37. He submitted that the “test” in **Burchell** had been made out. He referred, in particular, to the failings on the part of the claimant which had been identified by Shell in its Report and went on to say this: -

5                   *“The technical requirements are many and complex but there was a clear basis for concluding that there had been significant failings on the part of the claimant. Some of the failings may have been more serious than others but some were fundamental.”*

10 38. The respondent’s solicitor also stressed the failures in relation to the CSE Permit and the failure to hold a tool box talk. It was submitted that the claimant had been trained in the ISSOW system and was familiar with taking out permits and it was clear from the actual permit (P.21) that he was required to carry out a tool box talk and to sign to indicate that he had done so.

15 39. Further, the Shell Report was clear that under ISSOW the Leg Sentry, as part of the work party, is required to be aware of the work scope and its controls and this could not be done unless he attends the tool box talk and signs off to confirm this.

20 40. It is also a fundamental part of the Leg Sentry’s training (P.11) that it is the Leg Sentry, not the work party as the claimant maintained, who is responsible for accurately maintaining the personnel entry log and the fact that he “*partially completed it*” undermined his credibility. It was further submitted in this regard, that “*it is obvious that the register is worse than useless if it does not record all entries and exits as opposed to merely the initial exit and final entry.*”

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41. The respondent’s solicitor further submitted that the position was the same with regard to the PPE checks. It is clear from the CSE permit, taken out by the claimant, that it was his responsibility (P.22).

30 42. The respondent’s solicitor submitted that the claimant was guilty of gross misconduct. In this regard, he referred me to **Neary and Neary** and the guidance in that the test for gross misconduct: “*must vary with the nature of the business and the position held by the employee....*”

43. The respondent's solicitor went on to say this in his submission: -

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*"on the facts of this case the Respondent was entitled to treat the Claimant's conduct as amounting to gross misconduct and accordingly to summarily dismiss him. The claimant attempted to minimise the issue as mere failure to complete paperwork but the failings fundamentally go to the ISSOW system which were put in place to save people lives in a safety critical industry. The failings in relation to the CSE permit and the failure to carry out a tool box talk were sufficient in themselves to merit dismissal but taken together the failings cumulatively amount to a serious disregard for the ISSOW system and the basic duties of the Leg Sentry role. The Claimant did not at any time express any remorse or acceptance of the magnitude of his failings. Instead he sought to shift the blame onto others. He took no responsibility."*

44. Finally, with reference to **Madden**, the respondent's solicitor reminded me of the test in s.98(4) of the Employment Rights Act 1996, namely whether the dismissal fell within the "*band of reasonable responses*".

20 **Claimant's Submissions**

45. The claimant submitted a "final statement" in the form of an e-mail dated 29 March 2017, which is referred to for its terms.

25 46. He submitted that he had carried out his duties as a Leg Sentry "*to the best of my ability and belief in the same manner in the way I was shown*" and he went on to submit the following: -

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*"I believe I have been used as a fall guy for the main incident which initiated this investigation. It is now apparent that no action was taken against Brian Kidd after his actions, which were a criminal offence and far more serious than my non-intentional errors.*

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*During my period of almost four years as a scaffolder for Stork on Brent Delta I have shown a good standard of work with no previous issues or bad attitude towards safety and no record of breaches of health and safety. In addition to my scaffolding role I had gained qualifications in Offshore Emergency Response, Helideck Emergency Response and Offshore First Aid. I always aimed high and to progress as best I could in my career offshore."*

47. He then went on in his statement to explain that after his dismissal he completed a course to improve his prospects of finding alternative employment and said this in conclusion: -

5                   *“I wish to re-iterate that although it has become apparent that mistakes*  
                      *were made in completion of certain documents, I believed at the time I was*  
                      *completing the role to the best of my ability. Any mistakes made were*  
                      *most certainly not made intentionally as Stork are so vehemently insisting.*  
10                   *I still believe that further training/coaching should have been offered in the*  
                      *first instance, rather than an instant dismissal. If my attitude was ever*  
                      *portrayed as negative at any stage, then I can only put this down to the*  
                      *fact that I was dismayed and stressed at the situation and it was not my*  
                      *intention to come across this way.”*

15    **The Issues & The Tribunal’s Decision**

48. In every unfair dismissal case where dismissal is admitted s.98(1) of the Employment Rights Act 1996 (“the 1996 Act”) requires the employer to show the reason for the dismissal and that it is an admissible reason in terms of s.98(2), or  
20                   some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held. An admissible reason is a reason for which an employee may be fairly dismissed and among them is conduct. That was the reason which Stork claimed was the reason for Mr Wilson’s dismissal. I was satisfied that he was dismissed for that reason.

25                   49. The remaining question which I had to determine, therefore, under s.98(4) of the 1996 Act, was whether Stork had acted reasonably in treating that reason for dismissing Mr Wilson as a sufficient reason and that question had to be determined in accordance with equity and the substantial merits of the case.

30                   50. To determine whether a dismissal for conduct is fair, valuable guidance was provided in the well-known case of **Burchell** to which I was referred. Mr Justice Arnold gave the following guidelines in that case at page 380: -

35                   *“What the Tribunal have to decide every time, is broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the*

*guilt of that employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief: that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief and thirdly, we think that the employer, at the stage at which he formed that belief, on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”*

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51. So far as the first branch of this three-fold test was concerned, based on the evidence which I heard from the respondent's witnesses all of whom presented as credible and reliable, I was satisfied that Stork believed that Mr Wilson was guilty of misconduct. Indeed, he himself, accepted that there had been “mistakes”.

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52. What then of the second branch of the test, namely whether Stork had reasonable grounds for its belief? Once again, I was in little doubt that Stork had such grounds, based primarily on first, the findings in the Shell Report and then their own investigations and disciplinary procedures. There was also supporting documentation. Indeed, it was not disputed by Mr Wilson that he had not followed recognised procedures, his position being that he had been doing exactly this for a number of years and if this was incorrect then this was due to a lack of training.

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53. So far as the third branch of the test in **Burchell** was concerned, I was satisfied that Stork had carried out as much investigation into the matter as was reasonable in the circumstances. Not only did Stork have the Shell Report but also Mr Jason Waites carried out a full investigation and recovered all the relevant documentation. This documentation was then considered in the course of the disciplinary proceedings, first by James Yeats who took the decision to dismiss and then by Kenneth Pire who carried out a comprehensive Appeal.

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54. Mr Wilson was made fully aware of the allegations and afforded a reasonable opportunity of responding. At both the Disciplinary and Appeal Hearings he had the benefit of trade union representation and I was satisfied that at both these Hearings Mr Yeats and Mr Pirie, respectively, considered the representations

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which were made by and on behalf of Mr Wilson by way of response to the allegations, as a reasonable employer would have done in the circumstances.

55. The test in **Burchell** means that the employer need not have conclusive direct proof of the employee's misconduct – only a genuine and reasonable belief reasonably tested. I was satisfied that that test had been met.

56. I then went on to consider, therefore, whether in all the circumstances dismissal was a reasonable sanction. As the claimant had accepted that he was at fault, to a degree, but as he put it: *"merely failing to complete paperwork"*, this was the central point in the case.

57. In this regard, I was mindful of the guidance given in such well-known cases as **Iceland Frozen Foods Ltd v. Jones [1982] IRLR 439** that there is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep him on. It depends entirely upon the circumstances of the case whether dismissal is one of the penalties which a reasonable employer would impose. If no reasonable employer would have dismissed, then the dismissal is unfair. But if a reasonable employer might reasonably have dismissed. Then the dismissal is fair.

58. Mr Justice Browne-Wilkinson summarised the law in **Iceland**. I had regard to this in arriving at my view: -

*"24 Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Tribunal to adopt and answer the questions posed by [s.98(4)] is as follows:*

*(1) the starting point should always be the words of [s.98(4)] themselves;*

*(2) in applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair;*

(3) *in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*

5 (4) *in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

10 (5) *The function of the Employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band the dismissal is fair; if the dismissal falls outside the band it is unfair.*

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59. Turning now to the circumstances of the present case. The claimant maintained that he had been made "a fall guy for the main incident". What I took that to mean, was that he had been disciplined for the wrong doing or the mistake of  
20 Brian Kidd, the Asbestos Supervisor, repositioning the scaffold tube in the lift shaft which had created a safety risk and caused damage when the lift was operated in the morning of 22 November 2015 (P.24 and P.26).

60. However, I was not persuaded that the claimant's contention that he had been  
25 made some sort of "scapegoat" was well-founded. While it was the incident on 22 November, in which he had not been involved, which caused Shell to investigate and Report (P.27) and it was only as a consequence of that incident that the claimant's role as PA and Leg Sentry and the relevant paperwork came to be scrutinised, that was nothing to the point. The fact remained that Shell  
30 identified failings on the part of the claimant in relation to the ISSOW processes and in his role as PA and Leg Sentry and they were extremely critical of him (P.27/9-27/11). Their findings led, understandably, to an investigation by the claimant's employer Stork, as any reasonable employer would have done in the circumstances. Further, the claimant accepted himself that: "*mistakes were made*  
35 *in the completion of certain documents*" (his written statement),

61. Of course, the claimant maintained that his admitted failings had not been intentional, that there had been a lack of training and that he had carried out his work on this occasion in a manner which he had been doing for some

considerable time and which had never been challenged. I heard evidence about this from the claimant's two witnesses, William Campbell and Paul Bradley, both of whom had worked with Stork as scaffolders on the Brent Delta for a number of years. Their evidence was at complete odds with the evidence I heard from the respondent's witnesses and with the findings in the Shell Report, about why it was critical, so far as offshore safety was concerned, that ISSOW be strictly adhered to, that the relevant documentation be completed and that tool box talks be held.

10 62. In his evidence, Mr Bradley was taken in cross-examination to the relevant CSE Permit (P.21) and the provision that: "*All personnel entering the shaft to sign worksite declaration to confirm understanding and requirements prior to entry*" (P.21/1). He was then taken to the final page of that document (P.21/5) and it was put to him that the claimant should have completed that section and also signed it. Mr Bradley's response was that "*in practice it didn't. Nobody did*". Mr Bradley confirmed that as Leg Sentry the claimant would have received the CSE permit and the accompanying "Workscope" (P.23) but he still maintained that it was not necessary for the claimant to sign it.

20 63. However, he was also referred in cross-examination to the CSE permit for the previous shift which had been completed and signed by the Leg Sentry (P.19/5). Notwithstanding this, Mr Bradley continued to maintain that "*in his experience*" the CSE permit was never signed by the Leg Sentry.

25 64. As I recorded above, the respondent's witnesses all presented as credible and reliable; they all spoke about the absolute requirement, for reasons of safety, of following the ISSOW processes and completing the documentation; they spoke about safety being of paramount importance in the offshore environment; their evidence was supported by the findings in the Shell Report (P.27/9-27/11); I was in no doubt the claimant was aware of the requirement to complete the relevant documentation and carry out a tool box talk; I was in no doubt that he was aware that as Leg Sentry he was required to maintain the "entry/exit log" as part of his duties and that this meant recording each and every occasion an employee entered and exited the shaft and not just their start and finishing times (P.20/1);

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Petrofac, the training provider, confirmed to the respondent at the time of the Appeal that the claimant had been properly trained in 2013, the claimant had worked regularly as a PA in respect of scaffolding work and I was satisfied that the claimant had received adequate training and was fully aware of all the duties and responsibilities of a PA and Leg Sentry.

65. I decided, therefore, that the respondent's evidence was to be preferred. I did not find the claimant's own evidence and that of his witnesses to the effect that it was "*the culture*" not to follow the ISSOW processes to be either credible or reliable. Their evidence made no sense.

66. I did not accept the contention by the claimant, therefore, that, notwithstanding his training and the very detailed written procedures and relevant documentation which were in place, all in the interests of safety, that it was common practice not to follow these procedures and to complete the documentation. Indeed, the PA/Leg Sentry on the previous shift had completed the documentation (P19/5).

67. The respondent maintained that the claimant was guilty of gross misconduct which justified his summary dismissal. The case of **Neary** provides valuable guidance on the meaning of gross misconduct. It can vary according to the character of the employer and in determining the seriousness of the breach of trust by the employee there has to be consideration of the role of the employee concerned and the degree of trust required of him by his employer. Health and safety is of paramount importance in the oil and gas industry and rightly so. All employees who work offshore are well aware of this. The claimant was no different. This meant that the degree of trust required of him by the respondent in his role as PA and Leg Sentry was very high indeed. There were clear breaches of the ISSOW process by the claimant which were identified first by Shell and then by the respondent. For example, one of his failings so identified related to completion of the personnel entry log for employees entering and exiting the leg. As Leg Sentry, he had had a duty of care to those working in the leg. He was required to support an evacuation in an emergency. From a safety point of view, for obvious reasons, it was essential that the respondent be aware of the employees who are in the lift shaft, and not in the lift shaft, at any given point in



time. The claimant failed to complete the entry/exit log properly. That created a serious safety risk. When this is considered, in the particular circumstances of the case, along with the other failings which were identified and established such as the failure to carry out a tool box talk, and the claimant being unable to give any satisfactory explanation, I arrived at the view that the respondent's conclusion that the claimant was guilty of gross misconduct fell within the band of reasonable responses open to a reasonable employer.

68. While I was mindful that the claimant had almost four years' unblemished service, I arrived at the view that, in all the circumstances, the dismissal in this case fell within the band of reasonable responses which a reasonable employer might have adopted.

69. The respondent satisfied the test in **Burchell**, followed a fair procedure and imposed a sanction, dismissal, which fell within the range of reasonable responses. Accordingly, the dismissal was fair. The claim is therefore dismissed.

Employment Judge: Nicol M Hosie

Date of Judgment: 12 July 2017

Entered in register and copied to parties: 12 July 2017