.

EMPLOYMENT TRIBUNALS

Claimant: Mr T McColgan

Respondent: Heyrod Construction Limited

Heard at: Manchester (by CVP) **On:** 18 October 2021

Before: Employment Judge Cookson

REPRESENTATION:

Claimant: Ms Clooney (the claimant's sister)
Respondent: Mr Martin (Solicitor)

RESERVED JUDGMENT

It is the decision of the Tribunal is that:

1. The claimant was unfairly dismissed contrary to section 94 of the Employment Rights Act 1996 ("ERA").

2. The claimant caused or contributed to his dismissal and a reduction of 90% will be applied to the compensatory award when determined in accordance with section 123(6) of the ERA.

3. In light of the conduct of the claimant before dismissal, it is just and equitable to reduce the amount of the basic award by 90% in accordance with section 122(2) of the ERA.

REASONS

Introduction

1. The respondent in this case is a constructive company. For the purposes of this case, it had been engaged as a subcontractor on a construction site operated by another company. Although not addressed anywhere in its notice of appearance or in written evidence, I was told by one of the company witnesses that it employs around

200 employees and has a turnover of around £25million per annum. It has no designated HR department.

2. Mr McColgan ("the claimant") is 50 years of age. He was employed from 9 July 2001 until 20 November 2020 as a concrete labourer until his dismissal by reason of gross misconduct.

3. The claimant brought a claim of unfair dismissal on 8 March 2021 following a period of early conciliation from 16 January 2021 until 24 February 2021.

4. In reaching my judgment I have considered:

(1) A bundle of documents prepared by the respondent ("the bundle") which contains documents but no pleadings;

(2) The claim form submitted by the claimant and a response form submitted by the respondent, including its grounds of resistance;

(3) The evidence in witness statements and given orally by:

(i) Mr Cagney (contracts manager),

(ii) Mr Ness (director);

(iii) Mr Hedgcock (a colleague of the claimant).

(4) The evidence given in the claimant's witness statement and his oral evidence;

(5) Oral submissions given by the claimant and the respondent.

Findings of Fact

5. I have made my findings of fact in this case on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

6. As already noted, the claimant was employed as a contract labourer on a site where the respondent was a subcontractor. The lead contractor on the site had the right to "red card" subcontractor staff who disobeyed certain key rules while on site. That meant those individuals would be excluded by them from the site. That reflects the fact that the lead contractor did not have a right to terminate employment of subcontractor staff but had the right to control access to the site.

7. On 5 November 2020 the claimant was working in an excavation pit. Equipment being used in the pit which had necessitated the ladder allowing him to leave the area being removed. The claimant decided to smoke a cigarette while he was waiting for work to resume. He says that this was to relieve his stress because he was uncomfortable about being unable to leave the pit without the ladder and his concerns were dismissed out of hand.

8. At this hearing the claimant has said that rather than smoking a cigarette he was "vaping" an "e-cigarette" but he admits that he had not made clear during the disciplinary process and he says he referred to "smoking" because he uses the terms smoking and vaping interchangeably and does not distinguish between e-cigarettes and tobacco cigarettes interchangeably. I return to this later in my judgment.

9. On 5 November 2020 the claimant was observed smoking by a manager from the lead site contractor (Mr Bolton) who issued him with a red card requiring the claimant to leave the site immediately. While the claimant was leaving, he met one of the respondent's managers, Mr Callaghan. The claimant told him what had happened. Mr Callaghan, then spoke to Mr Bolton and prepared an incident report. That is a very short document which reads as follows:

> "On 5/11/20 at approximately 10:30 I, Mark Callaghan, was walking from the site compound (pie factory) to the site along Broadway Street when I met Terence McColgan coming the opposite direction. Terence McColgan stopped me to inform me that he had been given a red card by B & K Matthew Bolton for smoking on site. I responded my [sic] informing Terence I would go and speak to Matthew regarding this issue and I would get back to him. Entering site, I was unable to locate Matthew on the site and my phone call was not returned. I spoke to John Lacken regarding the red card and John informed me Matthew had found Terence smoking at the bottom of TC2 base. At this time of construction of TC2 base the area of TC2 base had been dug out within a steel sheeted box approximately three metres deep. Terence had been tasked by John Lacken to assist in the cropping of the concrete piles within the steel box. It was at this point that Matthew observed Terence smoking. I was unable to locate Terence in the welfare compound (pie factory) upon my return and was informed he had gone home. I spoke to Matthew from B & K at that point who informed me it was a red card offence because of the location where he found Terence smoking and the implications for rescue should anything have gone wrong i.e. a fire. His concern was that a fire could have commenced, and Terence would have been unable to escape with only one means of access."

10. This is the only written evidence of any investigation into what happened. There was no investigation meeting with the claimant at any stage.

11. On 9 November 2020 the claimant was suspended without pay for breaching health and safety rules. The suspension letter does not refer to smoking in terms. There was no provision in the respondent's disciplinary procedure or in the contract of employment allowing suspension without pay. However, Mr Cagney said that he thought suspension without pay was the right thing to do in the circumstances. Mr Cagney had had no training on holding disciplinary hearings and was unaware of the ACAS Code of Practice.

12. The suspension from work letter is also an invitation to a disciplinary hearing. That letter does not contain details of a specific disciplinary charge and does not enclose any relevant documents. The letter says, "Future employment could be considered because this is gross misconduct". There is no express warning of dismissal, but the claimant confirmed in cross-examination that he understood that the letter meant he might be dismissed and that he understood the disciplinary hearing related to him smoking on site.

13. The claimant did not attend the first disciplinary hearing he was invited to but says that was because he received the letter after the hearing had taken place. The respondent invited him to another hearing on 20 November 2020 and the claimant was offered the chance to have a companion with him.

14. Mr Cagney asked another employee, Mr Hedgecock, to attend the hearing as a witness. The claimant alleges that Mr Hedgecock said to him words to the effect that he was "gone" and there was nothing that Mr Hedgecock could do. Mr Hedgecock denies that he said that. Mr Cagney and Mr Hedgecock both denied that Mr Hedgecock played any part in Mr Cagney's decision or had any knowledge of the decision in advance and I accept that.

15. There are brief notes of the meeting in the bundle prepared by Mr Cagney. The notes of the hearing show that the claimant was asked if he understood the reason why it was being held. It records the claimant as saying, "I was removed from site for smoking. I was in the wrong and cannot deny". The notes record that at this point the claimant made a comment about "others breaking site rules, bypassing site entrance and others smoking". Those notes are not entirely clear but are consistent with the claimant's arguments presented at this hearing that, in essence he tried to raise that there was a lack of consistency because other workers would also smoke on the site and break site rules. The notes record that Mr Cagney at that point said, "that is for the main contractor to deal with and the meeting is about you smoking on site".

16. The claimant had gone on to explain that he was in an excavation pit that he could not get out of because the ladders had been lifted, and it was at this point he had been seen by the lead contractor manager, presumably Mr Bolton, who would not listen to any explanation that the claimant wanted to offer him. The notes of the hearing then record a discussion about what the site rules were and the extent to which the claimant was aware of them, and during which the claimant said there was no mention of no smoking on-site during the induction process. Mr Cagney says that he knew that was not correct because he had knowledge of the induction process. The claimant then said that he had a lot of personal stress and smoking was a release. That was an attempt to raise mitigating factors. Mr Cagney asked the claimant if he accepted that he should not smoke on site, to which Mr McColgan replied, "Yes, I'm sorry and I hold my hands up". At that point Mr Cagney closed the meeting and told the claimant that he was dismissed but would have a right of appeal. There was no attempt to even let the claimant explain the mitigation issues he wanted to raise.

17. Mr Cagney's evidence was that he decided to dismiss the claimant because he was very experienced, and he must have known that smoking was completely unacceptable.

18. On 26 November 2020 the claimant wrote to appeal the decision to dismiss him because he said he decision was "too harsh" and he requested a number of documents including any relevant to the investigation which had been carried out.

19. On 2 December 2020 the Contracts Director, Mr Ness, wrote to the claimant to say that he was gathering information and would need some more time. There is no evidence in the bundle that that was ever provided, although a letter of 8 December 2020 is referred to in the appeal minutes. In his witness statement the claimant says

that he did receive a letter with further information, but that it was provided the night before the appeal and he had no time to consider it.

20. The appeal hearing went ahead on 11 December 2020. This time the claimant was accompanied by his sister, Ms Clooney, who represented him at this Tribunal hearing.

21. The notes of the hearing show that Mr Ness outlined the background to the claimant's dismissal and that he pointed out smoking is a ground for summary dismissal in the contract of employment. The claimant then explained his case:

a. He believed there are no signs on site saying there was no smoking on site, that it had not been concerned in the induction. That was disputed shortly afterwards by Mr Cagney;

b. He admitted he has been smoking because a ladder had been removed. The notes show that Mr Ness appear to reject that out of hand because it was not referred to in the incident report, despite the fact the incident report had not been prepared by someone who had witnessed the incident directly: it was prepared by Mr Callaghan who had recorded what he had been told by others;

c. The claimant referred to the stress that he was under due to the illness of his mother for whom is he is the primary carer and again to not being able to exit the site. Mr Ness told him that do not relieve him of his obligation (presumably not to smoke) and that he should have brought any such issues to the attention of his supervisor;

d. He referred to another employee seen working without a harness who was given a red card but reinstated the following day. The notes record Mr Cagney disputing the relevance of that because that was a different main contractor and that this "would not apply in terms of precedence". In relation to that Mr Martin made much his cross examination of the fact that the incident involving Mr Virgo involved wearing a harness and the claimant's breach was smoking, but there is no suggestion in Mr Ness' notes, which record that the reference to Mr Virgo "did not relate to the principal contract on this site and was an entirely separate issue", the appeal outcome letter or his witness statement that this was the basis of the distinction Mr Ness drew at the time. The only references are to the fact that Mr Virgo was working for a different main contractor and I have drawn the conclusion that this was only the basis for the distinction which Mr Ness drew at the time.

22. The minutes of the hearing then appear to become Mr Ness own notes recording how Mr Ness summarised the appeal, "points to consider" and what Mr Ness concluded. They are somewhat confusing in nature and it is far from clear where the meeting ended and where notes begin. In the summary there is reference to the claimant having "20 years service with HCL which had been unblemished". That is not referred to as a ground of appeal in the appeal letter and it consistent with the way Mrs Clooney out the claimant's case. I am satisfied that this was in essence another ground for mitigation raised for the claimant as grounds for appeal.

23. The notes are not clear but in his statement Mr Ness says that he adjourned the meeting to carry out further investigations including speaking to Mr Bolton. There are however no notes of those investigations and no evidence was offered to me about what was discussed. The claimant was never provided with any information about what Mr Bolton had said. The bundle does contain an email from January when Mr Bolton sent though signing sheets and information about the induction which show the claimant had been told that smoking on site was prohibited.

24. On the question of the claimant's previous disciplinary record, the notes record that because "upon further investigation it would seem over the last few years he had a record of being late on site and unreliable". There is no evidence to suggest that in the course of the appeal hearing Mr Ness told the claimant that this was his view. In his evidence before me Mr Ness says that he was told that the claimant was subject to a verbal warning but no record of that could be found. No evidence was presented to me that Mr Ness had any reasonable basis for this belief and the claimant was given no opportunity to challenge Mr Ness' opinion that he was "unreliable". What is clear is that the claimant had had some time off work in the year or so prior to this incident but that related to his mother's very significant health problems and his caring responsibilities. It that had been investigated it may have been that the time off was authorised or that the claimant would have been entitled to that leave under statutory provisions relating to emergency dependant leave but there is no way to know that because there is no evidence before me that this was not investigated by Mr Ness.

25. Following the appeal hearing Mr Ness did carry out some investigations to determine what induction the claimant had received, and on 11 January 2021 he received an email from the head contractor providing confirmation of the signing sheet for induction along with evidence of what the induction had included, which clearly included a prohibition on smoking.

26. On the question of the claimant' reliability the bundle contains an email exchange between Nr Ness and the payroll department as follows (the highlighting shown in this is in the bundle provided to me, it was not explained at any stage).

Hi Jim

Please find below the weeks where Terry had days of absence in tax year 2020/21.

Terry McColgan		
-		
Payroll Week	Week ending	
33	15/11/2020	5 hrs only
32	08/11/2020	4 days only
23	06/09/2020	4 days only
22	30/08/2020	3 days and 2 hrs only
19	09/08/2020	12.5 hrs only
18	02/08/2020	4 days and 7 hrs only
17	26/07/2020	3 days only
15	12/07/2020	sick
12	21/06/2020	4 days only
9	31/05/2020	4 days only
7	17/05/2020	4 days and 4 hrs only
6	10/05/2020	4 days only

With regards to any lateness, I assume we can collect the information from the turnstiles on site which I do not have access to.

Kind regards
Naomi Mayers

HEYROD

Naomi Mayers Payroll and Subcontractor Administrator **for and on behalf of Heyrod Construction Ltd**

T + 44 161 683 4294 F +44 161 683 4876

Albion Works, Clowes Street, Chadderton, Oldham, Manchester, OL9 7LY

naomi.mayers@heyrod.co.uk www.heyrod.co.uk

From: Jim Ness
Sent: 17 March 2021 13:47
To: Naomi Mayers <Naomi.Mayers@heyrod.co.uk>
Cc: Neil Harrison <neil.harrison@heyrod.co.uk>
Subject: Terry McColgan

Good Afternoon Naomi,

I hope you are keeping well. I just wondered whether you could look at Terry McColgan's times on E7 & E8 and D3 to confirm how often he was late or if he missed days or did not work a full week. I would like this information to ascertain his reliability over these contracts.

Any further clarification required please do not hesitate to contact me.

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27. I concluded from this that Mr Ness only took steps to investigate his assessment of the claimant's "reliability" when he received details of this tribunal claim. The wording of his email is consistent with this being to seek information he has already been provided with. I have concluded that Mr Ness had not investigated

this in any meaningful sense at the time he reached his appeal decision. In any event the information provided by payroll records absence but fails to say if it was authorised or holiday. Mr Ness does also say this in his statement *"there were a number of weeks when he did not work a full five-day week, and therefore, I did not think that Mr McColgan's record was absolutely unblemished. Having said that, even if he had had a completely unblemished record, I still feel that dismissal was warranted, as it was a very serious act of misconduct, and as I say, it raises questions about whether we could trust him to comply with our health and safety rules".*

28. The appeal outcome letter was dated 27 January 2021. It informed the claimant that his appeal was rejected on the following grounds:

(a) Investigations have established that the claimant had attended an induction which made clear he must not smoke.

(b) It is disputed that the claimant has an unblemished record because over the last year he had been late on site and been unreliable at times.

(c) The issue about consistency which the claimant had raised was rejected because that incident had happened with a different contractor.

29. The letter concludes in the following way:

"From Heyrod's perspective, we need to be able to trust our employees to abide by the safety rules on site, and as I have said previously, it has been common practice for many years that operatives are not allowed to smoke on site for health and safety reasons. Therefore, you have breached this long-established rule, and given that this is specifically referred to in your contract of employment, I have no option but to uphold the original decision and confirm that your dismissal will stand. This is the end of the internal process."

30. This was the first time that the contract of employment had been mentioned in the disciplinary process. The contract of employment, in the disciplinary offences section, says this:

"In any disciplinary interview you have the right to be accompanied by a representative of your choice. If you wish to appeal against the outcome of a disciplinary interview you should follow the appeal procedure (Appendix B). In applying the above and all other disciplinary and related procedures, the company will follow the recommendations set out in the draft ACAS Code. The following are examples of misconduct which may lead to summary dismissal or may be sufficiently serious to warrant only one written warning which will be both first and final ….. and there is then a list of misconduct which refers to smoking in prohibited areas.

Relevant Law – Unfair Dismissal

31. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of a complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant within section 95(1)(a) of the ERA.

32. Section 98 of the ERA deals with the fairness of dismissals. There are two stages within section 98. First the employer must show that it had a potentially fair reason for dismissal under section 98(2). Second, if the respondent shows that it had a potentially fair reason for dismissal, the Tribunal must consider whether the respondent acted fairly or unfairly in dismissing for that reason.

33. In this case it is not in dispute that the respondent dismissed the claimant because it believed that he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

34. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case. The Tribunal must decide whether the dismissal of the employer was a reasonable response to the misconduct. Reasonable employers will follow principles of natural justice, with decision makers approaching questions in an openminded and fair way, so a decision should not be taken until all the evidence has been considered, decisions must not be pre-judged and the decision maker must be unbiased and acting as impartially as possible. All aspects of the case including the investigation, the grounds for belief, the penalty imposed and the procedure followed, must be taken into account in deciding whether the employer acted reasonably or unreasonably, and in assessing that the Tribunal must decide whether the employer acted within the range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal itself would have handled events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer.

35. The claimant and the respondent provided me with all the submissions on fairness which I have considered and refer to where necessary in reaching my conclusions.

Submissions

Claimant's Submissions

36. In her submissions to me Ms Clooney argued that the respondent had applied rules about health and safety inconsistently. She argued that the claimant's dismissal was unfairly punitive and although she conceded that the claimant had "held his hands up" to smoking, the company had not thoroughly investigated what had happened and had failed to follow its own procedures. Although Mr Ness had said that they would follow the ACAS Code of Practice, neither Mr Ness nor Mr Cagney seemed to be familiar with that. She also referred to the fact that although within the contract summary dismissal is a possible outcome for the gross misconduct offences, there is also the option of a first and final warning which she argued which, she argued, had not been properly considered in this case given the claimant's 20 years of service. In essence she argued that mitigation had not been properly taken into account and she referred in particular to the fact that Mr Ness said that the claimant was unreliable when there was no evidence to support that, and the respondent had failed to take

into account that the claimant was his very ill mother's primary carer with the added stress that that had caused to him.

Respondent's Submissions

37. In his submissions Mr Martin addressed me on the law. He mad detailed submissions but did not provide me with anything in writing. I have sought to briefly summarise the main points but it is not proportionate for me to set out every submission in detail.

38. Mr Martin emphasised that the Tribunal must recognise there are a range of reasonable responses to a particular disciplinary situation and the Tribunal must not substitute its own view but decide whether the decision of the employer fell within the range of reasonable responses, and that this is a principle which applies not only to the decision to dismiss itself but also to the investigation and to conduct of the disciplinary hearing. He also pointed out that the Tribunal must look at the process adopted as a whole and that procedural defects can be rectified at the appeal stage (with reference to **Taylor v OCS Group** [2006] EWCA Civ 702).

39. In relation to that latter case I note that it looked at whether an appeal would be need to be a "rehearing" to rectify earlier defects in the process. The Court of Appeal emphasised that is not required. What is needed is a process which is appropriate to rectify defects.

40. In terms of the alleged lack of investigation, Mr Martin pointed out that this was not a case where there was any doubt about what had happened. The claimant accepted that he was smoking, and he had held his hands up to that. Mr Martin referred to the facts and decisions in a number of cases involving admissions and in particular the case of **Boys and Girls Welfare Society v McDonald** [**1996] IRLR 129** .

41. Mr Martin argued that it was a red herring in terms of the fairness of the dismissal to say there was a lack of investigation in this case, and he rejected the suggestion of the claimant that there could be any significance to the fact that the claimant now says it was an e-cigarette. The claimant had said at the disciplinary hearing that he had decided to smoke because he was stressed. Mr Martin suggested it was disingenuous to say that a thorough investigation would have changed anything about that.

42. Mr Martin also suggested that the evidence about the removal of the ladder was also a red herring. There was no dispute that the ladder had been removed but that did not entitle the claimant to smoke. Mr Martin pointed to evasive evidence given by the claimant on his knowledge of policies on site and whether or not other individuals were allowed to smoke on site. Mr Martin argued that the rule about smoking applies whether or not the individual was in a pit, and he also referred to the fact that when the claimant was asked how long it took to get a ladder when he was seen smoking, it only took five minutes for the ladder to be brought to him. He also pointed to the fact that in cross examination the claimant admitted that smoking gave rise to a risk of fire, although he had appeared to trivialise that risk. A fire could of course be catastrophic.

43. Mr Martin argued that the claimant had trivialised what the claimant had sought to describe as an indiscretion, but that was not the case. It was a serious matter, and

so serious in fact that in two contracts of employment it is made absolutely clear that smoking on site can lead to summary dismissal.

44. Mr Martin argued that the evidence is overwhelming that the claimant had been told that he could not smoke on site. In terms of the possibility of a final written warning being given as an alternative, Mr Martin emphasised that the issue of trust has been raised by Mr Ness. The evidence given by the claimant showed what he thought about the smoking rule which he trivialised and that was relevant to the trust which Mr Ness would have been able to have in the claimant moving forward.

45. On the question of the taking into account of the claimant's previous record, Mr Martin suggested that Mr Ness had expressed himself poorly because it was clear that the claimant's disciplinary record was unblemished but said the point he was trying to make was that the claimant had had a lot of time off and things were far from perfect with the claimant's employment. Mr Ness was entitled to reach the view that it would have not made any difference whatever is view on that. Mr Martin pointed out that the claimant knew from the contract of employment and from the site rules that he would be dismissed if he smoked. It was not unfair for the employer in those circumstances to dismiss the claimant for smoking given even the claimant admitted there was some risk of fire in those circumstances.

46. In relation to the appeal Mr Martin submitted that any matters raised would not have made any difference to the outcome and the dismissal was fair in all the circumstances but, if it was found to be technically unfair for any reason, the claimant was entirely at fault for what had happened 100% contribution should be applied in those circumstances.

Discussion and Conclusions

47. The claimant sought to put significant weight on the fact that he had, in his words, been “smoking an e cigarette”. I can see that from a health and safety risk point of view that might have been significant, but the claimant told Mr Callaghan he had been given a red card for smoking and admitted to Mr Cagney and Mr Ness that he had had been smoking. At no stage did he say I was smoking an e-cigarette. I accept that it was reasonable of all the managers to understand that he had been smoking a tobacco cigarette. The claimant could have raised this matter during the disciplinary and appeal process. He did not and the managers had no reason in those circumstances to investigate that further.

48. I have had regard to the ACAS Code of Practice on Discipline and Grievance in reaching my decision. The ACAS Code of Practice is relevant when determining the reasonableness of a dismissal but breaching the Code of Practice does not render a dismissal automatically unfair – all of the circumstances must be taken into account. What is significant is that the ACAS Code makes clear that a fair disciplinary process should always be followed for dismissing for gross misconduct. In other words, it is not enough that the employer has a very good reason for dismissing an employee, to act fairly it must follow a fair process.

49. Although I am sure it is not what he intended, at times Mr Martin’s submissions seemed to come close to suggesting that any procedural irregularity in this case did not matter because it would not have made any difference to the outcome. The IDS handbook on unfair dismissal provides this summary of the law on this which seems

to me to be uncontroversial (para 3.84) *"The House of Lords' decision in Polkey v AE Dayton Services Ltd 1988 ICR 142, HL, firmly establishes procedural fairness as an integral part of the reasonableness test under S.98(4). As stated by Lord Bridge in that case, where an employer fails to take the appropriate procedural steps, the one question a tribunal is not permitted to ask in applying the reasonableness test is whether it would have made any difference if the right procedure had been followed. That question is simply irrelevant to the issue of reasonableness (although very relevant to the issue of compensation). Thus, if there is a failure to adopt a fair procedure at the time of the dismissal, whether set out in the Acas Code or otherwise (for example, in the employer's disciplinary rules), the dismissal will not be rendered fair simply because the unfairness did not affect the end result."* The approach I have taken is to consider the fairness of the approach adopted by the employer, taking into account the range of reasonable responses different employers can have and indeed that a process can be fair without being "perfect", that what is significant is the overall fairness of the dismissal process and decision making.

50. Mr Cagney told me that he was unaware of the ACAS Code of Practice and had received no training in handling disciplinary matters. Perhaps in those circumstances it is not surprising that it was clear he was not familiar with principles of natural justice but the consequence was the Mr Cagney did not conduct the disciplinary hearing in a way which I am able to conclude was one which a reasonable employer would have taken.

51. I accept Mr Martin's submission that an admission of misconduct, even of gross misconduct, is significant in terms of the amount of investigation which an employer will be expected to conduct before concluding the employee's guilt of misconduct. That must be correct. However, a fair investigation is not however the only element in a fair process.

52. I recognise that employers will adopt a range of reasonable ways of handling discipline in cases like this but there are principles which all employers acting reasonably could be expected to have regard to bearing in mind the requirements of the ACAS code and the principles of fairness as set out by the House of Lords in **Polkey.** As a minimum in terms of fairness there must be a need for the employee to fully understand the case against them and why dismissal is being considered in their case (which may well include looking at how other employees are treated), and an openminded consideration of mitigation and any issues which the employees raising in their defence. Here the employer was considering dismissing an employee who had worked for them for almost 20 years. Looking at the notes of the disciplinary hearing it is clear that the claimant has accepted his misconduct. He admitted that he was smoking, but it is also clear that he is trying to draw Mr Cagney's attention to other matters – the stress that he says he was under, the unsafe way that he felt he had been treated himself when he was working in the pit and the ladder was taken away and a risk of consistency in terms of other employees. Faced with a situation where an employee is seeking to raise concerns about the circumstances in which his misconduct has occurred, even if that is admitted, no reasonable employer would have proceeded to dismiss without at least attempting to understand the points the employee was seeking to raise. I have concluded that Mr Cagney did not do that. I conclude from the evidence of the disciplinary hearing once the claimant admitted his misconduct Mr Cagney's mind was made up. Although I accept that Mr Hedgecock played no part in the decision making it is not surprising that the claimant felt that his

dismissal was a foregone conclusion when he left the disciplinary hearing. It is difficult to draw any other conclusion from the notes of the dismissal hearing.

53. In his evidence before me Mr Cagney suggested that he had spoken to Mr Bolton, although that is not referred to anywhere in his witness statement. It was not clear to me if Mr Cagney was telling me the truth about that, but in any event the information which was the basis for Mr Cagney's decision should have been properly explained to the claimant so that he could answer the case against him. Mr Cagney failed to do that. It was true that the claimant's length of service meant that he must have been aware of the rules in relation to smoking, and I find that the claimant knew that what he was doing was wrong. Nevertheless, Mr Cagney was not acting in the way a reasonable employer would when he failed to listen to what the employee wanted to say and give consideration to possible mitigation.

54. It was particularly significant that the claimant had repeatedly tried through this process to highlight to the respondent that he was under a lot of personal stress, but there is no attempt by the employer to understand his case about that. An employer acting reasonably may reflect on evidence about such mitigation and decide that a dismissal is still warranted, but an employer who simply fails to give an employee the opportunity to raise those matters in a fair and open minded fair is not acting within the range of reasonable responses. Nor would an employer acting reasonably fail to look at all at consistency and how other employees had been treated. In this case there seemed to be a confusion between the termination of employment and the fact that the claimant had been "red carded" by B & K. The reason given by Mr Cagney for the claimant's dismissal was not that the claimant was not allowed to work on the site anymore. He was dismissed for breaching health and safety rules. Whether he was treated consistently with other employees dismissed for such breaches was a relevant issue and the representations the claimant sought to raise about that could not be reasonably be disregarded without any meaningful consideration or explanation simply because it was a different contractor because it was not B & K who were dismissing the claimant, it was the respondent. The respondent could have relied on the red card as a ground for dismissal in which case that might have been a relevant matter but that was not how they told the claimant they were approaching the matter.

55. I then considered whether the approach of Mr Ness to the appeal fell within the range of reasonable responses and whether the approach he adopted could be said to have addressed the defects in Mr Cagney's approach. I was unable to conclude that Mr Ness' approach did that. It appears that Mr Ness reached a conclusion on the issues raised by the claimant at the appeal hearing and then only looked for the evidence to support that conclusion – so he looked for evidence relating to the induction but simply assumed that the claimant was unreliable without looking at that evidence in any meaningful way. Mr Ness had refused to accept the claimant's mitigation about the fact that he had unblemished disciplinary record and asserted in the appeal outcome that he was "unreliable" but the only evidence of him looking for the evidence of he the true picture of the claimant's employment record is the email some two months later which coincides with the start of the tribunal proceedings. Mr Martin sought to suggest that Mr Ness had simply "expressed himself poorly" but the unfairness of his approach was more fundamental than that. Mr Ness rejected that mitigation the claimant was trying to raise without giving fair regard to what the claimant was saying and drew negative conclusions about the claimant's "reliability" without properly investigating whether that was fair and justified.

56. Mr Ness says that if he had concluded that the record was unblemished it would have made no difference but I cannot accept this makes the failure to look at this irrelevant even if that is true. In any event his assertion that it would have made no difference is self-serving. It is a statement which serves the respondent's interests in these proceedings but it is unsupported by evidence, for example of other employees and how they have been treated and I do not regard Mr Ness' evidence in this regard to be reliable.

57. On the issue of consistency Mr Ness fell into the same error as Mr Cagney. He dismissed the relevance of what the claimant said about Mr Virgo because he had worked for another contractor rather than looking at the consistency of the respondent's approach to breaches of health and safety rules. I accept that Mr Ness may have concluded that there was no inconsistency if he had considered the matter fairly, but that does not alter the fact that consistency is an important element of fairness and to reject that matter is irrelevant because it happened on the site of a different contractor is an approach which I consider falls outside the range of reasonable responses.

58. I concluded that Mr Ness' approach to the appeal did not rectify the unfairness of the approach adopted by Mr Cagney.

59. Looking at fairness overall in terms of the disciplinary process adopted by this employer, these are serious breaches by an employer with the administrative resources to approach disciplinary matters fairly. This is not a small employer. With around 200 employees it is an employer with a significant workforce and that is relevant in the application of the statutory test in s98(4). I conclude that the claimant's dismissal was unfair because the employer acting unreasonably in treating it as a sufficient reason for dismissing the employee when determined in accordance with equity and the substantial merits of the case.

60. I have then considered the claimant's conduct. I have found that the claimant was unfairly dismissed but that does not mean that he was blameless. He was smoking on-site and he knew that was not allowed. I accept that he had been told that smoking was prohibited outside designated areas in the course of his induction and there was signage reminding him of that. The claimant was evasive in his evidence about the issue of the induction. He sought to rely on the fact that he said he received his induction for the site much later than he should have done. That may be the case, but it does not alter the fact that in the course of his induction he was told that smoking was prohibited and the induction happened before the incident on 5 November 2020. It is implausible that any employee is unaware of the strict workplace rules which apply to smoking even if they work outside much of the time, and it is clear that those rules had been brought to his attention. These are health and safety rules and it is of vital importance that health and safety rules are taken seriously by all employees. In the circumstances it is just and equitable to reduce the claimant's compensatory and basic awards by a significant amount to take account of his significant and serious contributory fault.

61. Mr Martin suggested that if I found the dismissal was unfair I should reduce compensation by 100%. I reflected carefully on whether I should do that in light of the seriousness of the claimant's fault in this case. I did not apply a 100% reduction because I cannot be entirely satisfied that if the respondent had applied the approach of a reasonable employer by looking at all of the circumstances of the case, including

the claimant's mitigation and listened to what the claimant wished to raise about consistency and his personal circumstances, it was absolutely inevitable that he would have been dismissed. It seems to me that there was a chance, albeit a small one, that a final written warning or other penalty may have been given but I do consider that chance was a very small one. For that reason, I have applied a 90% reduction to compensation of both the basic and compensatory award.

Remedy

62. This case involves a litigant in person so I have set out the following information in the hope that this clarification will assist the parties.

63. Where a claim for unfair dismissal is successful the Tribunal may:

a. Order the employer to "reinstate" the dismissed employee. This is to put them back in their old job, as if they had not been dismissed; or to "re-engage" them, which is to employ them in a suitable but different job. In each case the Tribunal may order payment of lost earnings.

b. If those orders are not sought by the claimant or are not practicable, the Tribunal may order the employer to pay compensation. This is calculated in two parts:

i. A "Basic Award", which is calculated in a similar way to a statutory redundancy payment and need not be calculated by the Claimant because it involves the application of a formula; and

ii. a "Compensatory Award", which is intended to compensate the employee for the financial loss suffered.

64. Mitigation

a. All persons who have been subjected to wrongdoing are expected to do their best, within reasonable bounds, to limit the effects on them. If the Tribunal concludes that a claimant has not done so, it must reduce the compensation so that a fair sum is payable. The Tribunal will expect evidence to be provided by claimants about their attempts to obtain suitable alternative work and about any earnings from alternative employment.

b. The Tribunal will expect respondents, who consider that the claimant has not tried hard enough, to provide evidence about other jobs which the claimant could have applied for. Ultimately the burden of proof is on a respondent to show loss was not mitigated.

65. The bundle contains a document in which the claimant refers to his loss but this does not enable me to calculate what he is actually claiming. The claimant has also indicated that he seeks compensation only, but it is important that I give the claimant the opportunity to have the orders which the Tribunal can make explained to him, in particular in relation his right to express a desire for reinstatement or reengagement which he is still entitled to do. Accordingly this case will be listed for a half day remedy hearing, the date of this hearing will be notified separately to the parties.

66. The attention of parties is drawn to the Employment Tribunal Presidential Guidance on Case Management which can be found at https://www.judiciary.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf . In particular guidance note 6 deals with remedies and explains how loss is calculated which I have quoted from in part above.

67. There is nothing to stop the parties from seeking to resolve the issue of compensation between themselves without a further hearing, if that is possible. The parties are reminded that the services of ACAS remain available to them. If that is not possible the issue of remedy will be determined by me after hearing any relevant evidence and submissions from the parties at the remedy hearing.

68. I consider that it will be useful for me to make the following orders to ensure the efficient conduct of the remedy hearing if it is required. I remind the parties that:

    a. Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.

    b. Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

ORDERS

The parties are ordered as follows (pursuant to the Employment Tribunal Rules of Procedure):

Statement of remedy / schedule of loss

69. The claimant must provide to the respondent, copied to the Tribunal, **by 4pm on 6 January 2022** a document – a "Schedule of Loss" – setting out the following:

    a. The amount of "compensatory award" that he claims – that is what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to his unfair dismissal and explaining how this has been calculated. The compensatory award can include compensation for past loss of earnings between the date of dismissal and the date of the schedule and the remedy hearing and future loss of earnings, for example even if the claimant is working he may now be earning less than he was before.

    b. Loss will be awarded on the basis of net salary, that is after tax and national insurance has been deducted but the calculation should show net and gross pay. Compensation can also be awarded for lost benefits

such as employer pension contributions and pay in lieu of notice (where no notice or inadequate notice was given).

c. If the Claimant has a new job he should provide details of his new employer, his new job title and details of pay and benefits in his new job. He should also explain what steps he took to find alternative employment.

d. The Claimant's calculation of loss claimed must set out a calculation showing how each amount claimed has been worked out. For example: x weeks' pay at £y per week.

e. If any other sums are claimed full details should be provided and the Claimant should produce evidence, for example of bank charges or expenses incurred travelling to interviews.

f. If the Claimant has received State or social security benefits, he must set out the type of benefit, the dates of receipt, the amount received and the Claimant's national insurance number in his schedule. This is because for some claims, such as unfair dismissal, if a claimant has received certain benefits from the State the Tribunal is obliged to ensure that the employer responsible for causing the loss of earnings reimburses the State for the benefits paid. In those cases the Tribunal will order only part of the award to be paid to the claimant straightaway, with the rest set aside until the respondent is told by the State how much the benefits were. The respondent then pays that money to the State and anything left over to the claimant. This is called "recoupment".

g. There is a link to guidance here which the claimant may find helpful https://www.citizensadvice.org.uk/work/problems-at-work/employment-tribunals-from-29-july-2013/employment-tribunals-valuing-a-claim/compensatory-award/calculating-the-compensatory-award/employment-tribunals-preparing-a-schedule-of-loss/employment-tribunals-sample-schedule-of-loss/. However he must note that references to injury to feelings (or personal injury damages) are only relevant in discrimination cases are not applicable here.

70. Counterstatement of remedy / counter- schedule of loss: the respondent must provide to the claimant, copied to the Tribunal, a counter schedule of loss if it disagrees with the Claimant's schedule, **by 4pm on 20 January 2022** together with copies of any documents and/or statements of evidence that it wishes to rely upon at the remedy hearing.

Remedy bundle

71. It is likely that the only relevant documents will be the schedules of loss and counter-loss. However, if more is required it is most likely that that will be because the respondent wishes to produce evidence that the claimant has failed to mitigate his loss. For that reason if a remedy bundle is required for the hearing it must be prepared by the respondent.

72. The respondent must prepare a page numbered file of documents ("remedy bundle") relevant to the issue of remedy and in particular how much in

compensation and/or damages they should be awarded and provide the claimant with a 'hard' and electronic copy of it **by 4 pm on 3 February 2022**. The documents must be arranged in chronological or other logical order and the remedy bundle must contain the up-to-date schedule of loss and any counter schedule of loss at the front of it.

73. **Five working days before the remedy hearing**:

a. the respondent must lodge with the Tribunal a pdf copy of the remedy bundle,

b. if either party is relying on witness statements, a pdf copy of that statement must be lodged by whichever party is relying on the witness statement in question. If a witness statement is being relied upon a copy must be sent to the other party not less than 14 days before the remedy hearing.

c. One pdf copy of any written opening submissions / skeleton argument must be lodged by whichever party is relying on them / it. This must also be provided to the other party at least 14 working days before the remedy hearing.

Employment Judge Cookson

Date 18 November 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
23 November 2021

FOR THE TRIBUNAL OFFICE