EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Nick Smith	**v**	**Abellio East Anglia Limited T/A Greater Anglia**

Heard at: Cambridge

On: 14 June and 15 June 2023.

Before: Employment Judge L Brown

Appearances

For the Claimant: Mr Adam Ross, Counsel.
For the Respondent: Ms Sheridan, Counsel.

RESERVED JUDGMENT

1. The claim for Unfair Dismissal contrary to s.94 of the ERA 1996 succeeds.

2. The Claim for Wrongful Dismissal succeeds.

REASONS

Claim

1. By way of an ET1 claim filed on the 14 December 2022 the Claimant brings claims of unfair dismissal and wrongful dismissal.

2. On the 16 January 2023 the Respondent filed their ET3 response denying all claims.

Issues

3. At the outset the claims were identified as unfair dismissal and wrongful dismissal. The issues for me to determine were as follows: -

Unfair dismissal

3.1 Was there a potentially fair reason for dismissal? The Respondent relies on conduct as the reason for dismissal (s98(2)(b) ERA 1996).
3.2 Was there genuine belief in the Claimant's misconduct?
3.3 Did the Respondent undertake a reasonable investigation?
3.4 Did the decision to dismiss fall within the band of reasonable decisions open to an employer?
3.5 In all the circumstances, was the decision to dismiss fair?
3.6 Did the Claimant contribute to his dismissal?
3.7 If there is found to be any procedural unfairness, what is the percentage likelihood that notwithstanding any such unfairness, the Claimant would have been dismissed anyway (Polkey reduction)?

Wrongful dismissal

3.8 Did the Claimant commit an act of gross misconduct?
3.9 If not, is there a breach of contract by the Respondent in failing to pay notice?
3.10 Has the Claimant suffered a loss as a result?

The Hearing

4. The Claimant gave evidence and called evidence from Mr Lee Turner in his support.

5. The Respondent called the following witnesses who gave evidence in the following order: -

   (i) Mr Peter Mellar
   (ii) Mr Bob Davies

6. There was an agreed bundle of documents for the hearing.

7. I was also given some additional documents at the outset of the hearing, and this was the Respondents Disciplinary Policy and Procedure and its document entitled 'Rule Book' which was a policy document about the movement of trains at the depot.

8. The issues were not in dispute, and after the hearing commenced at 10.00am I adjourned at 10.15 am while I read the papers and the hearing recommenced at 11.30 am.

Findings of fact

9. From the information and evidence before me I made the following findings of fact. I made my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. I do not set out in this judgment all of the evidence which I heard but only my principal findings of fact, and those necessary to enable me to reach conclusions on the issues to be decided.

10. Where it was necessary to resolve conflicting factual accounts, I have done so by making a judgment about the credibility or otherwise of the witnesses I heard based upon their overall consistency and the consistency of accounts given on different occasions when set against any contemporaneous documents. I have not referred to every document I read or was directed or taken to in the findings below, but that does not mean it was not considered.

Introduction

11. By the time of his dismissal on the 3 August 2022 the Claimant had been employed by the Respondent for 30 years, the last 21 years of which he held the position of Yard Controller at the Respondents Norwich Crown Point Depot. The Respondents business was that of the servicing trains on behalf of Greater Anglia Railways.

12. The Claimants role involved overseeing the movement of train vehicles around the depot and other supervisory duties. The Claimant was dismissed for alleged gross negligence after a manoeuvre ended in a powerless train hitting some buffers. The shunting manoeuvre, carried out by the Claimant (the second shunter on this manoeuvre), the shunter and the driver, which lead to the Claimants dismissal, arose from a radio failure and the failure to stop the train. This caused a safety risk, £25,000 of damage, unavailability of the train pending repair, and the demolition of the relevant buffer stops.

13. The core evidential issue in this case was about the Claimant's reaction time while on the train on the day of the collision. The Respondent said he didn't react quickly enough in stopping the train when the expected message from the shunter didn't arrive. I had to decide if the reaction time of the Claimant did amount to gross negligence and gross misconduct such as to justify his summary dismissal.

14. The Claimants duties included controlling and authorising train movements at the Respondents depot, undertaking shunting, yard and multitasking activities at the depot and supervising as the yard controller, other yard assistance on the shifts involving shunting activities, and generally supervising activities on the site.

15. The communication system when moving trains was by way of radios. The radio system functions by an employee holding down the transmit button and speaking to the other person using another radio. The person receiving

the message could not reply until the speaker finished speaking but would then press the transmit button and reply.

16. On the 4 of June 2022, the Claimant arrived at work to start his shift. One of the Claimants' colleagues, Owen Benton, told him there had been an issue with some of the radios and that there was static interference [Para 5 of Claimants witness statement]. The Claimant said he tested his radio he was going to use, and it was working fine. This was not disputed. I found that the Claimant had no way of knowing if his radio was one of the faulty radios on site that day or not.

17. In the Claimant's statement of case [Para 3] it sets out that no new replacement radios were provided to the team on shift prior to the Claimant arriving, despite it having been reported. This was uncontested by the Respondent. The Claimant also told me, when I asked what the procedure was if radios were thought to be faulty, that you had to fill in a form, and request a new radio, and that he had enquired about whether there were any other radios to use that day, and he was told there was not and I found there were no alternative new radios for the Claimant to use that day.

18. I also noted that [Paragraph 17 of the Claimants witness statement and p.34] that even after the incident occurred and new radios were ordered there was still a static problem on site. This was uncontested. I therefore found there was clearly an issue with radios, both old and new working on the site due to something on site that was interfering with the radio signals.

19. It was not suggested by the Respondents during the hearing or during submissions that all manoeuvres should have been cancelled that day by the Claimant due to faulty radios. At its highest it was put at the hearing that knowing of the problems with the radios he should have been on even higher alert during the manoeuvre or considered an alternative method for carrying out the move [Paragraph 22 of witness statement of Peter Mellar]. However, at no point did the Respondent put forward at the hearing any case about what the Claimant should have done instead as an alternative method. Peter Mellar for the Respondent was the disciplining officer who took the decision to dismiss the Claimant.

Delay in messages and radio failure

24. The way the Claimant and Mr Dawson communicated was that Mr Dawson would say to the Claimant via his radio, "four carriages" and the Claimant upon receiving that message would repeat back 'four carriages" and this would then be repeated for the phrase "three carriages" and again "two carriages" and again "one carriage" and finally "half a carriage', and then Mr Dawson would countdown '5 yards, 4 yards, 3 yards, 2 yards, 1 yard, stop' [page 47].

25. Mr Dawson, who could see the buffers approaching and communications from the Claimant having ceased after he heard him repeat back to him '1

carriage to go', should at this point have used the emergency plunger and stopped the strain. Mr Dawson was also later dismissed for failing to use the emergency plunger.

26. During the manoeuvre, Mr Dawson said by radio to the Claimant, shortly before the collision, (after counting down, 4 to go down etc) 'one carriage to go', and the Claimant repeated back to him 'one carriage' and then, at this point, there was a 30-35 second time lapse before the collision occurred. There was some dispute about whether the shunter heard the message repeated back to him by the Claimant of 'one carriage,' but I preferred the Claimants evidence on this and found Mr Dawson did hear the last message from the Claimant of 'one carriage.'

27. The Claimant was expecting to hear shortly thereafter 'half a carriage' from Mr Dawson but did not do so. It was undisputed that the message 'half a carriage,' was not heard by the Claimant. It was also not in dispute that the message of 'half a carriage' was sent 19 seconds after the message '1 to go', but static stopped the Claimant hearing it.

28. The train then crashed into the buffers sometime after 11.22.32 11 seconds later after the failed message and this was not in dispute. It was also not in dispute that just before the collision the train was at a walking pace, and under five miles an hour slowing to zero.

29. The Claimants position in his witness statement was that there were only 19 seconds for him to react to the situation of messages not getting through and the Respondents position was that there was between 30-35 seconds for the Claimant to react. The Respondents said this mattered as on a train travelling at under 5 miles an hour 30-35 seconds was plenty of time to realise transmissions on the radio had failed and that he needed to stop the train. However, during cross-examination, the Claimant accepted that the 19 seconds was wrong as that was the gap between the message he did hear and the one that failed. However I found that this concession by the Claimant did not alter matters in any material way for the reasons set out below.

30. I found the evidence relied on, i.e., the table of timings, from which the reference to a 30-35 second delay by the Respondent derived, was highly unsatisfactory for reasons set out below, but in any event the time lapse asserted by them ignored the fact that the message 'half a coach' was sent to the Claimant in the 30-35 seconds time period at the 19 second point but failed. It could not be a reasonable finding of fact by the Respondent in the investigation to say the delay by the Claimant to react began before the failed message was even sent i.e., prior to the 19 second point.

31. I found the alleged delay of the Claimant to react could only possibly be judged by any reasonable employer as the period after the failed message which according to the table was 11 seconds. If you added on the Respondents estimated 5 seconds to stop this was in fact a 16 second delay

but in any event it was much less than the 30-35 seconds asserted by the Respondent.

32. Presented with a table of timings I found was unreliable in any event, and the Respondent asserting a 30-35 seconds delay but the actual delay from the failed message being around 16 seconds to stopping, and based on the Respondents judging his reaction time as running from a period before the failed message was even sent, I found the time period the Claimant had to react was at least half that asserted by the Respondent as he wouldn't have started to think anything was wrong until some seconds after the failed message and that can have been the only reasonable conclusion of any other reasonable employer. I found that 16 seconds delay was a short period of delay while the Claimant waited for the next message and preferred the Claimants evidence on this that the delay period was not long enough for him to conclude something had gone wrong.

33. As this table was the key document in the bundle, and took up the large majority of cross-examination during the hearing, I also made the following findings of fact about that piece of evidence, and found it was unreliable for the following reasons: -

    (i) The length of time recorded as the gap between messages ran from the start of the message to the beginning of the next message not the end. Where the messages are timed in seconds this makes a difference.
    (ii) The radio times a recording from when the button is pressed down not from when the person starts speaking so that meant if the person kept their finger on the button but didn't speak it may distort the timings of the gaps between messages making any judgment on this unreliable.
    (iii) The table sometimes ran two messages on one line with no explanation for this.
    (iv) The stated time of the messages were wrong, and they did not align to BST. There was also confusion over the time of impact. At page 41 of the bundle, it stated the time of impact was 10.51 am whereas based on the transcripts it was said to be somewhere between 32 and 49 seconds after 11.22 am. There was no explanation for this and even factoring in the change in BST this did not assist on this discrepancy.
    (v) The Respondents said that didn't matter as the seconds were correct, but they did not lead any evidence on who complied the table and how they satisfied themselves it was accurate. Where an employee with 30 years' service was dismissed for around a 16 second delay in reacting during a manoeuvre it was incumbent on them to call the person who compiled this table to the investigation and disciplinary hearing, especially having regard to the discrepancy between the recorded times of the crash.

Method of verifying distance left.

34. Mr Ross put it to Mr Mellar that it was a subjective measure of time by reference to “three coaches to go” etc. Mr Mellar accepted this. He also put it to him that a shunter might call “one coach to go” early to allow for a margin in stopping time and it wouldn’t therefore be surprising if the driver didn’t hear anything for a longer than usual period before the next message, having maybe called it early. Mr Mellar agreed with this.

24. The Claimant in evidence stated that he had thought it was possible that Mr Dawson had called ‘one carriage’ too early to over-compensate and that this did sometimes happen. He denied he had been grossly negligent and said the decision to dismiss him for this was too harsh. He stated in his witness statement [para 14] that: -

    ‘Only 19 seconds had passed between the last communication, and this was not long enough to question whether the move was going to plan.’

25. I therefore found the verification method of measuring distance by coach lengths to be very subjective due to the possibility of over-compensation and accepted the Claimants evidence that he assumed the longer than expected lapse was due to over-compensation in the last message sent by Mr Dawson.

26. During cross-examination Mr Mellar also accepted that the train speed, between one coach to go and half a coach to go, had slowed by a third and was by that point at walking pace, and that judging distance as speed decreased was difficult. I found that when a train is at walking pace and slowing to zero even an experienced shunter would find judging whether the gap of around 16 seconds was concerning would be difficult.

Investigation into the incident

27. The Respondent did not interview any of the witnesses in the investigation that the Claimant contended had relevant evidence to give in his defence on the issue of the long-standing problems with static interference on the radios. Some had submitted brief one-page letters to the Respondent, but they were not interviewed. They were relevant to the failing radios and safety issues on site that had been the main cause of the accident.

28. I found that the following witnesses were not interviewed but had relevant evidence to give: -

    (i) Richard Jones the Crown Point Operations Manager was aware of all the previous radio issues.
    (ii) Helen Dickinson, Deputy Operations Manager, was also aware of the previous radio issues.
    (iii) Dominic Carter the Service Delivery Driver who was on duty during the shift in question and who authorised the move wasn’t interviewed.

(iv) Ben Humphries, the Crown Point Signal Person had relevant evidence about the move.
(v) Oliver Benton, the Crown Point Driver, reported the problems with the radio earlier that day.
(vi) Some other drivers who reported there were problems with the new radios were not interviewed. This assertion there were still problems with the new radios even after the crash was uncontested.

29. The Respondent asserted that the witnesses did not witness the incident in question and therefore had nothing relevant to say in relation to the allegation against the Claimant. The Claimant maintained they should have been interviewed as the history of the safety issues on the site ought to have been taken into account. I found that the context of the alleged negligence of the Claimant was crucial, that their evidence was highly relevant to the investigation where it was asserted the Respondent had failed to act on warnings about the faulty radios, and that the witnesses should have been interviewed where a man with a thirty year career was at risk of being dismissed for gross negligence.

The disciplinary procedure

30. Mr Mellar accepted that the Respondent did not supply to the Claimant any of its policies or procedures prior to commencing the disciplinary process up to the date of the dismissal.

31. He also accepted there was a failure to tell the Claimant he could call witnesses to the hearing. This was raised at the outset of the disciplinary hearing when it was said to the Claimant that, 'you are not calling witnesses?' and he said he wasn't. I noted they did not ask if he wanted to call witnesses but simply asked him to confirm he wasn't calling witnesses.

32. The Claimant was suspended during the procedures adopted and was told he could not attend the site or contact any members of staff and so his ability to contact witnesses was cut off [P48]. The letter said: -

'During your suspension, you will not be permitted to attend any premises of Greater Anglia or speak with any members of staff, in connection with this matter, other than myself.'

33. This created a highly unfair situation for the Claimant, and I found that any reasonable employer would not have said he could not speak with any member of staff about the matter, and instead would have said if he needed to ask them to attend his upcoming disciplinary hearing as a witness he could speak to those employees. It wasn't clear to me why he was suspended though it was not challenged by the Claimant at the hearing. I found it clearly placed him in a disadvantageous situation where he was told that he had no access to potential witnesses to call in his defence.

34. In addition, in relation to the issue of witnesses' counsel for the Claimant put it to Mr Mellar that the ROG driver Mr Wadeson was in a good position to

give evidence about what the Claimant was saying and doing in the run-up to the collision, and Mr Mellor agreed with this submission. I found that Mr Wadeson could have attended the disciplinary hearing as a witness and given valuable evidence about the allegations of negligence against the Claimant had the Claimant felt able to contact him. He was the only witness to the crash aside from Mr Dawson and was the only witness who was with the Claimant when the alleged delay in stopping the train occurred.

35. The yard safety plan was also not provided to the Claimant in advance of the hearing. I found this was unfair on the Claimant as it was a key document relied on by the Respondent. Whilst it is true he had his trade union representative at the hearing neither of them knew the Respondent would produce the yard safety plan at the hearing.

36. Mr Mellar also accepted that it was not put to the Claimant during the disciplinary hearing that he was distracted and not paying attention. He also accepted that Mr Wadeson could have been called by them to the hearing but that they did not call him. I found that as by the time of the disciplinary hearing the allegations had been narrowed to being distracted and not concentrating, and that the only witness to what the Claimant was doing, Mr Wadeson, would have lead any other reasonable employer to call that witness to the disciplinary hearing.

The decision to dismiss.

37. The Claimant was advised on the 3 August 2022 that he was being dismissed.

38. They referred once again to the 30-35 second delay and stated that it was beyond argument that critical opportunities were missed to stop this live operational propelling move. It said they concluded that he was not fully concentrating and had been negligent and that the charge of gross misconduct was upheld against him.

39. They stated they had considered his emails about incidents that had taken place recently at Norwich Crown Point Depot and that they acknowledged the concerns about the equipment, yet it was beyond doubt that he failed to react to the prolonged break in transmission.

40. They said in relation to sanction that they considered the potential mitigating factors such as his experience and service to the company since 1992, including his 21 years working at the depot, but that his previous operational incidents ‘negated on balance any leniency in this case.’

41. The previous operational incidents referred to an expired ‘reprimand’ from two years ago in 2020, which had expired in 2021 more than a year before dismissal, and concerned the Claimant releasing a train to service without permission from the ‘BDM.’ This was the lowest level of sanction in the Respondents policy and appeared to equate to a first written warning but there was no clarity on this at the hearing.

42. The other operational incident was about releasing a train for a test run without permission from the SDM and it stated that: -

    'Severe Reprimand with a final warning, has been issued to you for failing to adhere to Crown Point (Depot) Operating Procedures, which means if you fail to comply to the Operating procedures and you have another similar incident of releasing trains without permission your employment with greater anglia may well be terminated.'

    I noted that this final written warning was tailored to a repeat incident of the same nature.

43. The Claimant in his witness statement [para 37 and 38] referred to his letter of dismissal and stated that it said that while his long service had been taken into account, so had previous operational incidents which went against any potential mitigation, and that this should not have been done. He referred to the confirmation from Vicky Mecham during the disciplinary hearing that the previous incident had been raised in error, as it was unrelated.

44. The minutes of the disciplinary hearing record VM as saying on this issue of this final warning and in reply to the Claimants trade union representative as [page 147]: -

    MP 'So the final warning is no longer valid?'

    VM 'No, apologies for the error, but it was clear in everyone's mind that it was only relating to the release of trains.'

45. The final written warning was issued on the 1 November 2021[P124-P126] and so was still active at the time of the Claimants dismissal.

46. As the reason for the Claimants dismissal was not caught by the specific issue of releasing trains without permission, I found it could not be the basis of his dismissal in terms of 'totting up.' The submissions on this are dealt with below.

The appeal

47. The appeal hearing took place, and the appeal was dismissed on the 5 September 2022, but no reasons were set out as to why and it simply said that he had already been given detailed reasons for his dismissal by Peter Mellar.

48. However, Mr Davies then sent another letter on the 13 September 2022 giving more details for his decision. He stated that the Claimant had in effect carried out a shunt move using radios reported as defective and that he did not accept the Claimant had no other choice [P164].

49. He also referred to the lack of relevance of the Yard Safety Plan being included in the pack sent to the Claimant prior to the disciplinary hearing and said: -

    'As you have pointed out you were an Assessor responsible for ensuring the knowledge of such documentation and would be well aware of the context of references to the plan without needing a copy in the pack.'

50. The Yard Safety Plan was a key document relied on in deciding to dismiss the Claimant and by replying that 'In your position you would be required to be aware of the plan,' I found this demonstrated a lack of attention to the principles of natural justice and the importance of sending the documents in advance so that the Claimant would know the case against him.

51. I found the appeal hearing failed to remedy any of the procedural failings in relation to the failure to tell the Claimant he could call witnesses. On cross examination the appeal officer was unable to confirm that he had sent the Respondents policies to the Claimant ahead of the appeal hearing.

The charges levelled against the Claimant.

52. There was also cross-examination about the allegation against the Claimant, in the letter to him of the 20th of July 2022, and that it did not specify with any particularity the allegation against him. The letter (page 126) stated that: -

    "That on fourth of June 2022, you were negligent in your duties as Yard controller at Norwich, Crown point depot, which directly contributed to a buffer stop collision, causing significant damage to both the train and the buffers."

53. The charge against the Claimant was later refined to that of being distracted and failing to concentrate. During cross-examination Mr Mellar accepted that the investigator did not ask Mr Wadeson if the Claimant had seemed distracted or was not concentrating just before the crash, despite the way the allegations were now put. I found there was a failure to ask that question of the only witness able to answer that question about the Claimants demeanour just before the crash in the investigation meeting.

Safety on Site prior to and following the crash.

54. Following the dismissal of the Claimant it was not disputed safety had been improved on the site and signs had been put up telling drivers and shunters when to apply the brakes. Mr Turner, the witness for the Claimant [Paragraph 10] said that static interference was a problem with the radios at Crown Point but he was unsure as to why, but speculated it was probably due to the overhead 25KV line as well as a multitude of metal structures around Crown Point depot, and that even with the new style radios static

interference still took place and it was still being reported to the Respondent at the date of his witness statement.

55. He also stated [Paragraph 12] that changes had taken place since the collision, with two shunters now at the leading end of the propelling movement, one shunter in the cab to operate the emergency plunger and one shunter on the floor walking the movement towards the stops. He also detailed that shunt moves are now stopped five metres from the final stopping point. A stop board had also been placed by the track to show the shunter driver not to propel any further to the stops. I found that the improvement to safety on site was very significant after the Claimant was dismissed with the number of members of staff on any train being moved being increased from two to four members of staff.

Submissions

56. Oral and written submissions of Ms Sheridan were as follows: -

(i) In an industry where safety is very important the Respondent is entitled to take a pretty hard line on safety issues.
(ii) On the day the radios had already malfunctioned. The Claimant was aware of this and he accepted any reasonable shunter of his experience would need to be on high alert in those circumstances and in that context should have been constant communications. She asserted the Claimant had accepted the point about being in communication every 3-4 seconds.
(iii) It was the Respondents case that it was not inappropriate or unfair to take into account previous reprimands. One had expired and one had not. For the purpose of seeing if there had been relevant mitigation, and taking the severe reprimand first, it had not expired under the terms of the disciplinary policy, and a reasonable reading of the document at page 196, i.e., if he committed another train releasing offence he would be dismissed because of that reprimand, is not to say it could not be taken into account for other safety issues. She referred to ***Airbus UK Ltd v Webb*** **[2008] ICR 561, §47.**
(iv) The alleged defects in procedure are overall minor and, in any event, immaterial and she asked for a Polkey reduction if any were made out.
(v) She said that if Mr Dawson and Mr Wadeson had attended the disciplinary hearing the panel would inevitably have given most weight to the recordings and still found him to be guilty of gross misconduct.
(vi) On gross misconduct and here this was a case where we must judge if the Claimants actions were culpable. In Wrongful Dismissal she submitted I must find there was gross misconduct and not just a reasonable basis for thinking such, and that in her submission there was a failure to intervene which amounted to a gross dereliction of duty, which could and did amount to gross misconduct entitling the Respondent to dismiss without notice.
(vii) If any claim succeeded that I should make 100% reductions for reasons set out above i.e., dereliction of duty and contributory fault.

(viii) She said she also relied on her written submissions which in summary were as follows: -

(a) It was substantively fair for the Respondent to treat the misconduct as sufficient reason for the dismissal.

(b) The Claimant was fully cognisant of his duties in a safety critical post. Those duties included the duty to keep in constant communication. They did not need to be set out in a disciplinary procedure for the Claimant to understand their significance.

(c) The Claimant accepted that the circumstances of the morning of the incident were such he should have been on very high alert to the possibility of radio failure.

(d) In circumstances where the employer reasonably found there had been a failure to comply with those procedures – namely to bring the manoeuvrer to a stop – that gross negligence was fairly capable of amounting to gross misconduct. It went to the fundamental nature of the trust and confidence – particularly in matters relating to safety - between the employer and employee.

(e) The dismissal was also procedurally fair:

(f) There was a full and thorough investigation, in which the Claimant was involved. The Claimant was played and taken through key pieces of evidence – namely the voice recording – and asked to comment on it.

(g) The Claimant was suspended from duty on basic pay, in accordance with the disciplinary procedure.

(h) The Claimant was invited to a disciplinary hearing. The letter was accompanied with the investigation pack that set out the charges in full detail. The Claimant knew what was alleged against him.

(i) At the disciplinary hearing, which was lengthy and thorough, he was represented and confirmed that (i) he did not have witnesses to call and (ii) he had adequate time to prepare.

(j) The Claimant was given a full dismissal letter, in which some of his points were accepted but others were not. He was given full reasons for his dismissal. His length of service was carefully considered. He was given an appeal right.

(k) The Claimant exercised his appeal, contending not that the facts had been found incorrectly or that the process had been unfair, but that the punishment was too harsh.

(l) The Claimant's appeal was dismissed after careful consideration, and fuller reasons were provided on request. [162] – [164]

(m) The Claimant could have easily accessed the disciplinary procedure at any point by way of the staff intranet, as he accepted. Various letters he was supplied with referred to clause 9 of the procedure, through which he was referred to the disciplinary policy [49] [125].

(n) The complaint that the 'charge' was vague goes nowhere – the Claimant was provided with the findings of the investigation which set out the allegations against the Claimant very clearly and fully [44]. It would have made no difference had these matters been set out in the disciplinary letter itself. Indeed, the Claimant makes no complaint in his evidence that the charge was unclear [NS/30]

and indeed goes through the detailed findings of the report that underlay that charge [NS/23 – 24]. He confirmed during his disciplinary hearing that he had had adequate time to prepare [145].

(o) The complaint that peripheral witnesses were not interviewed does not render the process unfair – on the Claimant's own evidence these witnesses would only give context in relation to (i) radios and (ii) the choice of the ROG traction unit. The Claimant's account in relation to those was in any event accepted.

(p) The Claimant does not complain in his witness statement that he was prevented by the terms of the disciplinary invitation letter to invite witnesses. The presence of a further witness – either Mr Dawson or the driver – would have confirmed that which was already before the disciplinary panel. The Tribunal are invited to find that the decision maker would have placed most weight – as was eminently reasonable – on the recordings.

(q) It was permissible, per *Airbus,* for the Respondent to take into account previous warnings. The Tribunal is invited to accept the evidence of Bob Davies that repeated incidents involving the release of trains without permission is a safety related issue that remained relevant to the charges of gross negligence in this claim. The second incident – the Severe Reprimand – had not in any event expired [301] Its significance was that if the Claimant committed another incident relating to the release of trains, which would not have but for the warning resulted in his dismissal, the Severe Reprimand would stand as reason for his dismissal. It did not represent an undertaking that the reprimands would not be taken into account for the purposes of mitigation. In any event, the absence of reprimands would have made no difference to the decision to dismiss: (i) the decision that the Claimant had committed gross misconduct stood irrespective of the warnings (they only want to the absence of mitigation) [153] and (ii) James Dawson was dismissed, despite having no previous issues to report [85] [155].

(r) The points raised by the Claimant are therefore minor and do not do enough to take the dismissal outside the range of reasonable responses when considering fairness overall, as the Tribunal must. To the extent that the Tribunal disagrees, the Tribunal is invited to find that the alleged defects were immaterial and apply a *Polkey* reduction. In the same vein, the Claimant contributed to his dismissal and to the extent any such dismissal was unfair, there should a reduction for contributory fault.

Wrongful dismissal

(s) The Claimant accepted that the Respondent's trust in him to comply with the relevant safety procedures was fundamental to the relationship between employer and employee. He was in safety critical role. The Claimant accepted that he should have

been on very high alert to the possibility of radio failure at the material time.

(t) Those safety procedures required the Claimant and Mr Dawson to be in constant communication. The Claimant described in his interview as the required amount of communications to be every 3 – 4 seconds. The Claimant accepted, and the safety procedures are clear, that if there is any break in transmission each person (both shunters and the driver) has a responsibility to bring the manoeuvre to a stop. They should not rely on one another but take independent initiative.

(u) The Tribunal is invited to find that the most reliable evidence of the time elapsed between the last heard communication ("1 to go") and the collision is that found in the transcript of the recordings. The Claimant himself contended through his counsel that it is difficult for individuals to estimate time and speed, and he relies on the time stamps in his own evidence as to how many seconds passed between the communications and the collision.

(v) That evidence clearly shows that, having regard to the unlikelihood of a person blocking the line by holding down their thumb without speaking, there were approximately 35 seconds between the last communication and the collision. Any reasonable shunter would have realised within 35 seconds that, in the absence of any communication, there had been radio failure. It was grossly negligent not to terminate the movement, particularly when, as Mr Smith accepted, any reasonable shunter would have been (in the circumstances) on very high alert as to radio failure.

57. Oral and written submissions of Mr Ross: -

(i) His point about the investigation letter only setting out charges of negligence, were not nit picking – someone going into a disciplinary hearing for job of 30 years needs a clear understanding of what they are said to have done wrong because otherwise it did not enable him to prepare a case to answer.

(ii) Any reasonable employer would say you can call witnesses as set out in the attached disciplinary policy. This is a not a counsel of perfection or nit picking but basic fairness. The right to call witnesses and Ms Sheridan referring to page 145, where she refers to the statement to the Claimant that he is not calling witnesses at the start of the disciplinary hearing, cannot possibly amount to a reasonable opportunity to call witnesses in their defence in response to a specific charge. This was said at beginning of the hearing, and it was too late by that point, and that today the Claimant said he didn't realise he was allowed to call any witnesses by reference to his suspension letter [P48] which says that he could not contact anyone apart from Mr Lording. This perhaps might have been ameliorated if he said, 'as you know you are not allowed to contact anyone but if you wish to call a witness do it via Mr Lording or your Union Representative', and so all the Claimant knew was what in the letter. Also, in the invitation

letter to the disciplinary hearing there is no mention of the right to call witnesses. Counsel said these were serious procedural breaches,

(iii) Counsel referred to the case of ***Brito Babapulle and Ealing Hospital NHS Trust –2013 IRLR 854*** – summarising that it is an error of law to assume that gross misconduct should always lead to summary dismissal without looking at sanction and mitigation and one has to consider mitigation always.

(iv) On the question of whether he was concentrating or not this all comes down to the Respondents table and that table was not a safe or sufficient basis for Mr Mellar to draw the conclusion he was not fully concentrating, and was not a safe or sufficient basis for him to draw the conclusion that the Claimant should have intervened in the move because of effluxion of time.

(v) He pointed out there was no evidence about the verification of the table or who carried it out. The time stamps were wrong. Mr Lording told Claimant in the investigation meeting [P75] that the time stamps were not aligned to BST but says the seconds are correct and 'we have verified that.' He asked who is we? How has the verification been undertaken? Has it been taken on a sample of messages or on all of them? The Claimant wasn't in a position to challenge any of the verification process and was not told what it was. Given the Respondent deemed it important enough to make recordings of all the transmissions it is surprising that the time stamps were wrong, and it is enough to put someone on alert more investigation was required. Mr Ross made other points about problems with the table as set out by me in my findings in above which I do not set out here.

(vi) As to the reference to the Claimant not communicating every 3-4 seconds, he was not dismissed for that he was dismissed for not reacting after 30-35 seconds.

(vii) The allegation that he wasn't concentrating was never put to the Claimant in the investigation or disciplinary hearing and it is not proper to form a view on that without giving the person a chance to comment.

(viii) Mr Wadeson had shown his willingness to be interviewed yet wasn't interviewed and this Tribunal was not told why he wasn't interviewed.

(ix) The Claimant was dismissed because of his failure to judge distance by reference to time and speed but that was not a sufficient basis for his employer to conclude he was not paying proper attention. Mr Mellar on all the information before him had no grounds to conclude gross negligence and should have held it was an innocuous mistake to not to realise the distance to buffers had approached zero.

(x) Dealing with sanction on warning it was ultimately for the Tribunal to decide if dismissal was in the band of reasonable responses. One warning had expired and one was about a different incident, and it was not reasonable to take into account. More generally the dismissal was too harsh and outside the band of reasonable responses and was unfair.

(xi) By reference to the Polkey test, he submitted I must construct a hypothetical reality on any unfairness I find. He gave examples of what that could be and suggested if the Claimant had been informed

of his right to bring a witness, and had also been advised in advance of a specific charge against him there may have been a different result i.e., if Mr Wadeson had been called then it was highly likely he would be found to have done nothing wrong – in fact this was so if either side had called him.

(xii) Turning to contributory conduct and reductions under s123 (6) of the ERA the Tribunal has to make findings of fact. Ms Sheridan called it dereliction of duty. He submitted I would have to find there was a dereliction of duty and there is no evidence to entitle me to make that finding. The Respondent has called no witnesses who could address properly what happened – i.e., no eyewitnesses – and Mr Lording may have been able to explain the [p 47] table. The Respondent had not called him as a witness so the Tribunal was in the same position as Mr Mellar i.e. how the table was produced, why the time stamps were wrong, which radio the messages came from, how the time lapse was verified, and whether it was every entry, or a sampling and that there was no evidence before the tribunal, and that put simply all the Tribunal had was a table prepared with very little explanation and no basis for finding he should have intervened and did not and the reason he did not intervene was because he was not concentrating, and that this was the necessary finding for a finding of contributory fault.

(xiii) The Respondent must show he did do something wrong, and it was their burden to show he was in the wrong in order for compensation to be reduced and the Respondent didn't lead evidence on that i.e., from witnesses on what he positively should have done.

(xiv) The Tribunal must decide how blameworthy it was on contributory conduct and a Tribunals assessment of how serious the impugned conduct was, and it is therefore relevant that the Respondent has since changed its procedures, and those changes point away from blameworthiness otherwise one would infer no need to make any changes.

(xv) On wrongful dismissal in summary terms the Respondent has to prove on balance of probabilities that the Claimant is in repudiatory breach of conduct – i.e., an intention to no longer be bound by contract of employment and this is the Respondents evidential burden, and that they have not discharged it. He submitted that even if the Respondent had shown the Claimant not to be fully concentrating in the run up to collision that was still not enough to reach the Adesoken threshold.

Ms Sheridan's reply

Ms Sheridan replied with the following points: -

(i) Mr Smith conceded in evidence that he did understand the charges against him by the time of the disciplinary hearing so on the evidence that defect was cured.

(ii) As for submissions on the table this is not a criminal trial, and some of the points Mr Ross makes are speculative. It would be surprising if it

was not in the remit of what an employer could do with its own recording systems.

(iii) She stated it was all very well to say the Claimant was dismissed because of his inability to judge distance and time at a reduced speed but that was his job and had been doing that job for 20 years and knew the depot more than anyone else.

(iv) She said as for Mr Wadeson she understood it to not to be in dispute that he was not an employee of the Respondent, and they could not oblige him to be in the disciplinary process. Mr Lording had his account of Mr Wadeson, and he preferred evidence of the recordings, and he was entitled to do that.

(v) As to Mr Ross stating that on Mr Turners evidence the changes since the incident that of course it was open to the Respondent to make changes and learn from things, and that didn't mean what the Claimant did was not culpable and in her submission it was.

The Law

Unfair Dismissal

58. The Claimant was continuously employed by the Respondent for more than two years and in those circumstances had the right not to be unfairly dismissed by it (section 95 of the Employment Rights Act 1996).

59. Section 98 of the Employment Rights Act 1996 ('the Act') provides that:

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it … (b) relates to the conduct of the employee,

60. The correct approach for the Tribunal to adopt in considering section 98(4) of the ERA (as set out in **Iceland Frozen Foods v Jones [1982] IRLR 439)** is as follows:

… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted

reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

61. The ACAS Code of Practice on Disciplinary and Grievance procedures set out matters that may be taken into account by tribunals when assessing the reasonableness of a dismissal on the grounds of conduct, as follows:

'Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions, or confirmation of those decisions.
Employers and employees should act consistently.
Employers should carry out any necessary investigations, to establish the facts of the case.
When investigating a disciplinary matter take care to deal with the employee an affair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against it. Be careful when dealing with evidence from a person who wishes to remain anonymous. In particular, take written statements that give details of the time, place, dates as appropriate, seek cooperative evidence check that the person's motives are genuine, and assess the credibility and weight to be attached to their evidence.
Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct. And its possible consequences to enable the employee to prepare to answer the case of the disciplinary hearing. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements within the notification.
At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should also be given a reasonable opportunity to ask questions, present evidence, and call relevant witnesses. They should also be given the opportunity to raise points about information provided by witnesses.
Employers should allow an employee to appeal against any formal decision made.

62. For guidance on the level of investigation and on the Respondent's belief that an act of misconduct has occurred, **British Home Stores v Burchell [1979] IRLR 379** provides as follows:

'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 the 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."

63. As at the time of the Claimant's dismissal, the Tribunal is to ask: -
    (i) did the Respondent believe the Claimant was guilty of the misconduct alleged,
    (ii) if so, were there reasonable grounds for that belief,
    (iii) at the time it had formed that belief had it carried out as much investigation into the matter as was reasonable in the circumstances, and
    (iv) was the decision to summarily dismiss the Claimant within a range of reasonable responses open to an employer in the circumstances **(Yorkshire Housing Ltd v Swanson [2008] IRLR 609)?** The range of reasonable responses test applies as much to the procedure which is adopted by the employer as it does to the substantive decision to dismiss **(Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23).**

64. The employer cannot be said to have acted reasonably if he reached his conclusion in consequence of ignoring matters which he ought reasonably to have known and which would have shown that the reason was insufficient **(W Devis & Sons Ltd v Atkins [1977] IRLR 314, HL).**

65. An employee can challenge the fairness of a dismissal if an agreed procedure was not correctly followed **(Stoker v Lancashire County Council [1992] IRLR 75).**

66. The Tribunal should be satisfied as to the appropriate thoroughness of the investigation in career ending cases, as in this case, or where some form of professional status is in jeopardy, also as in this case, and where the consequences to the employee of a finding of guilt are likely to be severe. Additional care in the investigation is likely to be required as in the case of **Roldan v Royal Salford NHS Foundation Trust [2010] IRLR 721** in which the Court of Appeal stated:

'Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In A v B [2003] IRLR 405, the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So, it is particularly important that

employers take seriously their responsibilities to conduct a fair investigation, where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. An A v B the EAT said this: 'The investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate, or at least point towards the innocence of the employee, as he should on the evidence directed towards proving the charges against him' and … 'there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of one side or the other'.

67. The fairness of the procedure adopted by an employer is to be assessed at the end of the internal process, including any appeal process. **(Taylor v OCS Group Limited [2006] IRLR 613).** The process must be considered in the round. Smith LJ stated:

'If [the Tribunal] find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceedings with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or review, but to determine whether due to the fairness or unfairness of the process procedures adopted, the thoroughness or lack of it of the process and the open mindedness or not, of the decision maker, the overall process was fair, notwithstanding any deficiencies at the earliest stage'.

68. Case law has identified that the reason for dismissal will be a set of facts known to the employer at the time of dismissal or a genuine belief held on reasonable grounds by the employer which led to the dismissal **(Abernethy v Mott, Hay & Anderson [1974] IRLR, 213, CA).**

69. In the event of an unfair dismissal the Tribunal must determine what would have been likely to have occurred if a fair procedure had been adopted, in accordance with the guidance in **Software 2000 Ltd v Andrews [2007] IRLR 569**. The EAT stated:

'If the employer seeks to contend that the employee would or might have ceased to be employed in any event, had fair procedures being followed, or alternatively, would not have continued in employment indefinitely, it is for him to adduce relevant evidence on which he wishes to rely. … However, there will be circumstances where the nature of the evidence which the employer wishes to adduce or on which he seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been so riddled with uncertainty that no sensible prediction based on that evidence can properly be made'.

Conclusions

Was there a potentially fair reason for dismissal? The Respondent relies on conduct as the reason for dismissal (s98(2)(b) ERA 1996).

70. There was a potentially fair reason for dismissal in this case and that is gross negligence which falls under misconduct.

71. I considered the submissions of the Claimants counsel that gross negligence was not defined in the disciplinary policy as something that could amount to gross misconduct, but I also took on board the submissions of the Respondents counsel who asserted that it is not necessary for the relevant disciplinary policy to set out exhaustive examples of the gross misconduct in question.

72. She said where there were obvious and clear safety rules, and where the Claimant ought reasonably to know that certain behaviour will place him at risk of dismissal then clearly gross negligence can amount to gross misconduct and she referred to the case of ***Hodgson v Menzies Aviation UK UKEAT/0165/18/JOJ,*** at s.27 which states: -

> *"The lay members are of the view that it did not need a high degree of specificity in those documents for the Claimant to realised that if he were to behave as he did, he was putting himself at risk of dismissal. This is not a simple case of lateness, nor of taking an extra cigarette break. The conduct has to be taken in the round. It involved a reckless decision to take a cigarette break, which he implicitly accepted that he ought not to have taken, which not only resulted in his arrival at the aircraft late, as he was eventually to admit, but without the necessary equipment; meaning that he had to go to another stand to collect it. They reject the notion – as do I – that in order for a disciplinary code to be compliant it has to contain an exhaustive list of possible offences."*

73. I therefore found that the allegation of gross negligence, which was he failed to stop a train when it is said he should have done, was clearly something he knew could put him at risk of dismissal, as in the above case, and could stand against the Claimant in this case and potentially amount to gross misconduct.

List of Issues - Was there genuine belief in the Claimant's misconduct?

74. I found that the Respondent held a genuine belief in the Claimants misconduct.

Did the Respondent undertake a reasonable investigation (within the band of reasonable investigations)?

75. In asking myself this question I had regard to the case of **Newbound v Thames Water Utilities [2015] IRLR 735, CA** where it was said [s.61]: -

> The band of reasonable responses is not infinitely wide. The Tribunal must not overlook Section 98(4)(b), which requires the Tribunal to decide the reasonableness question "in accordance with "equity and the substantial merits of the case".

76. I found that the Respondent did not undertake a reasonable investigation within a reasonable band of investigations in accordance with both the size and administrative resources of the Respondent and in accordance with the substantial merits and equity of the case.

77. Having regard to the above case of **Roldan** and applying the facts I found the investigation carried out by the Respondent was outside the band of reasonable investigations of any other reasonable employer in a career ending case like this where the Claimant would never be able to work in his profession again after being in the industry for over 30 years.

78. I found it unfair procedurally and outside the band of a reasonable band of investigations of any other employer for the following reasons: -

    a. They failed to interview any witnesses for the Claimant in the investigation that had relevant evidence to give about the long-standing problems with the radios, and the safety issues that caused on site and sought only inculpatory evidence and did not seek exculpatory evidence in favour of the Claimant. I did not accept the submissions of Counsel for the Respondent that had they called them to the meeting they would still have preferred the transmission evidence instead of that of the live witness, Mr Wadeson, to what the Claimant was doing. Whilst it is true that he was not an employee of the Respondent he was interviewed for the investigation and no evidence was led that they asked him to attend the disciplinary hearing and that he refused to or that the ROG group would not allow him to. I therefore found this was a serious procedural failing in a career ending case in accordance with the case of **Roldan**.

    b. They failed to send the Claimant their disciplinary procedures or the yard safety plan prior to the hearing. They had a duty to send him all documents in advance of the hearing and failed to do so. Whilst they said he could have accessed the policies himself on the company intranet the ACAS code refers to the importance of sending all policies and procedures, and all relevant documents in advance of

any hearing, and having regard to the size of the Respondent with its own Human Resources department this was an inexcusable failing.

c. They failed to advise the Claimant in advance of the disciplinary hearing of his right to call witnesses. He could have asked the witnesses that he had named to attend the hearing, particularly Mr Wadeson, but was deprived of this opportunity due to the fact he was suspended and was told he must not discuss the incident with any employees. It was submitted by the Respondents that he was asked to confirm at the disciplinary hearing that he was not calling any witnesses but even though he replied he was not this was the first time they had mentioned his right to do so during the actual hearing and I found by this time it was too late and unfair on the Claimant in a career ending dismissal like this and I found it was a serious procedural failing.

d. As to the decision taken to dismiss, I found that while they said they acknowledged his reference to the incidents on the site prior to the crash that they did not take them into account and particularly the faulty radios as evidenced by their failure to interview the witnesses about all the radio issues and prior incidents reported prior to the crash.

e. I did not find that the appeal officer properly reviewed the decision to dismiss and paid scant regard to matters such as the Claimants witnesses not being interviewed, the failure to tell him of his right to call witnesses to the disciplinary hearing, and the Claimant not being sent the disciplinary policies and yard safety policy in advance.

f. Ms Sheridan submitted the failure to send documents in advance of the hearing, and the failure to interview his witnesses or tell him he could call witnesses to the hearing were minor procedural errors. I do not find they were minor procedural errors and I find the procedure was a procedure outside the reasonable band of procedures of any other employer.

g. I found there was a ‘closed mind’ to the charges against the Claimant ahead of all the hearings and their failure to seek exculpatory evidence as well as inculpatory evidence was highly unfair, especially where the Claimant faced the loss of his career after 30 years’ service.

h. In asking myself if the Respondent could rely on the table of timings as part of its investigation, I found that any other reasonable employer carrying out a reasonable investigation would have concluded it was not a satisfactory piece of evidence to rely on due to the unexplained errors in it on timings, and that any other reasonable employer conducting a reasonable procedure within the reasonable band of procedures would have explored all other lines

of investigation, such as interviewing the Claimant's witnesses, before deciding whether to dismiss, and would have called Mr Wadeson at the very least to the disciplinary hearing. They would have also interviewed and called the person who compiled the table to the investigation hearing.

i. The Respondent admitted that during the investigation Mr Wadeson was never asked if the Claimant seemed distracted or was not concentrating, this being the main charge against the Claimant. I found the main charge was never put to the only witness who could comment on it.

j. I found that after they dismissed the Claimant, and when they erected signage for the first time and improved safety at the site telling drivers when to stop in the absence of a message from the shunters, and doubled the number of employees on the trains for shunting manoeuvres that this was a clear admission of the poor systems they had on the site for drivers to judge distances to the buffers and any reasonable employer would have taken this into account in deciding on whether the Claimants actions amounted to gross negligence.

k. I found that the investigation, and procedure, adopted by the Respondent was outside the reasonable range of investigations and procedures of any other reasonable employer and was not in accordance with the size and administrative resources of the employer or in accordance with the substantial merits and equity of this case.

Charges against the Claimant

79. Whereas the invitation letter to the disciplinary did not refer to failing to concentrate or becoming distracted on this point I did not find the failure to insert words after the word 'negligent in your duties' such as '... in that you were not concentrating and were distracted...' made that part of the procedure unfair, as the word 'negligence' clearly covers not concentrating and lack of concentration.

What would have likely occurred had a fair procedure been adopted?

80. Recent case law has moved away from the distinction between a finding of Unfair Dismissal on procedural grounds as opposed to dismissal on substantive grounds such as in **Gover and ors v Propertycare Ltd 2006 ICR 1073, CA; Thornett v Scope 2007 ICR 236, CA; Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT; and Contract Bottling Ltd v Cave and anor 2015 ICR 146, EAT.**

81. While all these cases recognise the remarks made by Lord Prosser **in King and ors v Eaton Ltd (No.2)** the courts are increasingly drawing back from the view that there is a clear dividing line between procedural and substantive unfairness, and as a result that line is no longer used to

determine when it is and is not appropriate to make a Polkey reduction. Lord Prosser observed:

> '[T]he matter will be one of impression and judgement, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure makes no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been.'

82. In a case like this I found however I could ask the question what would have likely occurred had a fair procedure been adopted in accordance with the case of **Polkey v AE Dayton Services Ltd [1987] UKHL 8, ICR 142.**

83. Firstly, if a fair procedure had been followed, they would have sent the disciplinary policy to the Claimant, and he would have been alerted to his right to call witnesses to the hearing. They would also have sent the yard safety policy to the Claimant prior to the hearing.

84. He would then have called his witnesses to the hearing. I find the Claimant would in particular have called Mr Wadeson to the disciplinary hearing who would have given evidence about what the Claimant was doing in very short time before impact and the Respondent may then have reached a different conclusion and decided the Claimant had been concentrating at the time of the collision and had not been distracted, and that his actions did not amount to gross negligence.

85. He would also have called the other witnesses and there is a chance that the Respondent, having reflected on its own failing radios, and site safety issues, may have concluded his actions did not amount to gross negligence and instead may have issued no sanction or instead a final written warning.

86. Whilst there were written warnings, one of which was a final and live warning though not relevant to the incident, they may have decided that those warnings should not be held against him and weighed in the balance had they conducted a more thorough procedure.

87. I find that had the Respondent followed a fair procedure that the chance of him being dismissed fairly in any event after taking such steps would have fallen to 60% and therefore there was a 40% chance he would have been retained in his employment.

88. Accordingly, the Claimants claim for Unfair Dismissal succeeds.

Did the Claimant contribute to his own dismissal?

89. On the issue of whether the Claimant contributed to his own dismissal, I did not find that he contributed to his own dismissal in relation to his alleged gross negligence. On my findings of fact, having found there was around a 16 second delay after the failed message where a train is slowing to zero at

under five miles an hour I did not find that the Claimants actions were culpable where he worked in an environment with radios that did not work properly, and where the operating system for calling out distances was imprecise. This was not a case of the Claimant deciding to do something wrong. This was a case where over a matter of some seconds his judgement was questioned on how much time had elapsed.

90. Communications failed at a critical point, due to the Respondents faulty radios, of which they were on notice and ignored, and I did not find his actions to have reached the point that he could be said to have been grossly negligent or even negligent and so as I do not find he was culpable I do not find he contributed to his own dismissal.

Wrongful Dismissal

91. When deciding whether an employer can dismiss an employee summarily for gross misconduct, the attention of a Tribunal is necessarily on the damage to the relationship between the parties. Gross negligence can damage the relationship between the parties: **Adesokan v Sainsbury's Supermarkets Limited [2017] ICR 590, CA, per Elias LJ at s.23**.

92. However, I must ask myself if that any alleged negligent dereliction of duty is "so grave and weighty" as to amount to a justification for summary dismissal: Adesokan, per Elias LJ at s.24. There it was stated that it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal.

93. On the balance of probabilities, I did not find that the Claimants actions were anywhere near the 'grave and weighty' threshold or that he intentionally acted in a way to breach the Respondents safety policies, and it would be startling if he had chosen to do so especially given the risk to his own safety and that of others on the train. I did not find on the balance of probabilities that he had been grossly negligent.

94. Given that the Respondent was not entitled to summarily dismiss the Claimant the Respondent has breached the employee's contract by failing to pay notice.

95. As the Claimant has not received notice pay, he was suffered a loss.

96. The losses in both claims will be determined at the remedy hearing.

_____
Employment Judge L Brown

Date: 21 July 2023

Sent to the parties on: 25 July 2023

GDJ
For the Tribunal Office