



EMPLOYMENT TRIBUNALS

Claimant: Mr C Boxall

Respondent: Network Rail Infrastructure Limited

HELD AT: Newcastle Employment Tribunal

SITTING AT: Teesside Magistrates Court

ON: 28-30 November 2022

BEFORE: Employment Judge Martin

REPRESENTATION:

Claimant: Mr J McHugh, (Counsel)

Respondent: Mr M Selwood (Counsel)

RESERVED JUDGMENT

The Judgment is that the claimant's complaint of unfair dismissal is well-founded. The case will be listed for a remedies hearing with a time estimate of half a day.

REASONS

Introduction

1. Phillip Watters, Signal and Telecoms Maintenance Engineer; Mr Christopher Harrison, Infrastructure Maintenance Engineer and Mr George Drum, Infrastructure Delivery Manager North and East all gave evidence on behalf of the respondent.

2. The claimant and his two trade union representatives being Mr Jack Rawcliffe and Mr Mark Hall of the RMT union gave evidence on behalf of the claimant.
3. The Tribunal was provided with an agreed bundle of documents marked Appendix 1.

The law

4. The Tribunal considered the following legislation and case law:-

Section 98(1) Employment Rights Act 1996 “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.”

Section 98(2) ERA 1996 “a reason falls within this subsection if it:-

 - (b) Relates to the conduct of the employee.

Section 98(4) ERA 1996 “the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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”.

Section 122(2) ERA 1996 “where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.”

Section 123(6) ERA 1996 “where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”
5. The well-known case of **British Home Stores Ltd v Burchell** [1978] IRLR 379, where the EAT held there are three elements in a conduct dismissal. First there must be established by the employer that they believed the employee had committed an act of misconduct. Secondly the employer must have in his mind reasonable grounds upon which to sustain that belief and thirdly the employer must have carried as much investigation into the matter as was reasonable in all the circumstances of the case.
6. The case of **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439 where the EAT held that the function of the Employment Tribunal was to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.

7. The case of **The Royal Society for the Prevention of Cruelty to Animals v Cruden** [1986] ICR page 205, which held that the dismissal of an employee was unfair because of a delay of 7 months with no good reason even though there was no prejudice as a result of the delay.
8. The case of **A v B** [2003] IRLR 405 where the EAT held that, where the investigation is defective, it is no answer for an employer to say that, even if the investigation had been reasonable, it would have made no difference to the decision. If the investigation is not reasonable in all the circumstances, then the dismissal is unfair and the fact that it may have caused no adverse prejudice to the employer goes to compensation. The Tribunal was also referred to paragraphs 66-69 of that Judgment. It was held that in our opinion the question whether an employer has carried out such investigations as is reasonable in all the circumstances necessarily involves a consideration of any delays. In certain circumstances the delay in the conduct of the investigation might of itself render an otherwise fair dismissal unfair. That was confirmed to be the view of the EAT in **RSPCA v Cruden**. It also went on to hold that “where the consequence of the delay is that the employer is or may be prejudiced, for example, because it has led to a failure to take statements which might otherwise have been taken, or because of the effect of the delay on fading memories, this will provide additional and independent concerns about the investigative process which will support a challenge to the fairness of that process. The EAT accepted that fact is irrelevant to the question of whether the delay rendered the investigation unfair or whether the decision to dismiss might have been reasonable in the circumstances.
9. The case of **Secretary of State for Justice v Mansfield** UK EAT/0539/9 where the EAT referenced the two above cases and held that in considering a delay in a case of this kind one needs to look at the length of the delay and the reasons for it. The effect of the two authorities to which we have referred is that, while prejudice to the employee from the delay may be an additional ground of challenge, it is not essential that prejudice should be shown. Delay may still render the dismissal unfair if it is substantial and there is no good reason for it. This is particularly so where the employer is acting a deplorable motive as in **Cruden**, although the principle is not limited to a case of that kind. At paragraph 29 the EAT held that this is not a case where the postponement of the disciplinary proceedings and subsequent continuation of the criminal prosecution meant that witnesses were being asked for the first time two years after the incident what their recollection of the matter had been.
10. The case of **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 where the House of Lords held that Tribunals should consider whether the employee would still have been dismissed if a fair procedure had been followed. Where the Employment Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.
11. The case of **Nelson v BBC (No 2)** [1979] IRLR 346 where the Court of Appeal held that where a Tribunal finds contributory fault it must first of all consider whether the conduct on the part of the employee in connection with his dismissal was culpable or blameworthy. Secondly, those matters must have caused or contributed to some extent to the claimant’s dismissal and

thirdly whether it is just and equitable to reduce the assessment of the claimant's loss to the specified extent.

The Issues

12. The Tribunal had to consider the reason for dismissal which was pleaded as conduct.
13. The Tribunal had to therefore consider whether the respondent had a reasonable belief that the claimant had committed an act of gross misconduct. In that regard it had to consider whether that belief was based on reasonable grounds and whether the respondent undertook a reasonable investigation into the matter.
14. The Tribunal also had to consider whether the respondent followed a fair procedure and whether dismissal was a reasonable response in the circumstances of the case. The Tribunal also went on to consider whether or not the claimant might have been fairly dismissed in any event and whether or not the claimant had contributed in any way to his dismissal.

Findings of Fact

15. The claimant was employed by the respondent as a lubrication team leader from 1 November 2004.
16. The claimant had no previous disciplinary sanction although he was involved in a previous safety incident a year or so earlier in which he received no action other than he was required to be re-trained as a Controller of Site Safety. He had completed the retraining some months prior to the incident which ultimately led to his dismissal.
17. At or around the time of that incident, the claimant had for some time had some personal issues. His sister was terminally ill at that time and he was his sister's main carer. He attended work and did not have any significant periods of sickness absence. He undertaking his Team Leader and Controller of Site Safety (COSS) role and during that period.
18. The respondent, as one would expect, had a number of different policies in place dealing with safety and disciplinary matters.
19. The respondent's Code of Conduct is at pages 56-84 of the bundle. Page 61 specifically refers to safety. Page 63 refers to Life Saving Rules, where it states that always be sure the required plans and permits are in place before you start a job and go on to the next one. (Page 64).
20. The respondent's Handbook No 7 sets out the general duties of a Controller of Site Safety (COSS). That handbook is at pages 93-124 of the bundle. At page 96 it refers to work that you can do without the line being blocked.
21. At page 102 it refers to blocking the line and states that the COSS may use a blocked line as part of the safe system of work. Page 106 refers to a safe system of work using lookouts. Page 112 refers to COSS briefing. It states that before the group goes on or near the line, you must make sure each member fully understands the safe system of work. You need to tell the group ... which lines have been blocked and which are still open.
22. The respondent's Handbook 8 deals with blocking a line. That document is at pages 125-148. At page 133 it states that, if that line is blocked, you must record those details. Page 139 deals with granting the line blockage. At

page 141 it explains when the line blockage is to be given up or suspended. It states that when the line blockage is to be given up, you must make sure that any work that is to continue does not need a line blockage. Page 142 deals with when the line blockage is to resume. It states when the line blockage is to resume after being suspended, you must again carry out the instructions shown in this handbook.

23. The respondent's disciplinary policy is at pages 85-92 of the bundle. At page 86, it states that, having investigated the facts, the manager will decide promptly whether to disregard the matter or arrange for the matter to be dealt with under a formal stage of the disciplinary procedure. The procedure refers to expected standards of conduct at page 86.
24. Page 87 of the policy deals with suspension. It states that, in certain circumstances, such as in cases where gross misconduct is suspected, or where it is considered that the employee's presence at work involves a risk to safety, the public, railway infrastructure, network rail, railway employees or themselves, consideration will be given to a brief period of suspension from duty.
25. Pages 90 to 91 deal with the various different sanctions. At page 90, it states that, in certain circumstances, the following disciplinary penalties may be considered:- disciplinary suspension from work without pay; disciplinary transfer/demotion, duration of warnings. It is noted that warnings –e.g. a final written warning is usually for a period of 12 months, but it can be extended to two years. Page 90 to 91 also sets out instances of gross misconduct, which includes serious infringement of health and safety rules.
26. The respondent agreed that, in relation to any safety incident, they would set up as Fair Culture Process and consider any safety issue under that Process before it became part of any disciplinary process. It appears that this Process was agreed some years previously following negotiations with the trade unions.
27. The Fair Culture Flow Chart is at pages 173-191.27 of the bundle. At page 174 It states who the fair culture flow chart can be used for any employee involved in a safety incident. It is specifically for use following a safety accident or incident. It then goes on to explain how the Fair Culture Flow Chart works. It identifies that there are a number of questions that have to be asked starting with deliberate harm test. This is noted at pages 174 to 175. At page 176 it gives some guidance with regard to the deliberate harm test. It states that, in the overwhelming majority of safety incidents, the individual has decided to behave in a particular way, but without the intent of causing harm or any other bad outcome. It states that, in rare cases the intent was to cause harm or for personal gain, where no concern was given to the consequences for safety. It notes that it is the role of the investigation team is to record the outcome, identify the behavioural cause of all unsafe acts identified during the investigation and then consider the consequences to be applied at page 189.
28. Page 189 sets out the Guide to the Flow Chart itself. The first question is whether the action was deliberate. It then goes on to ask whether the action was well intentioned. It then goes on to consider whether it was sabotage / malicious intention or reckless contravention for personal benefit. It then states that is when consideration should be given to disciplinary action. The

Flow Chart also considers what should happen if the action was not deliberate. If the answer to the question of whether the action was deliberate is no then it considers whether it was a mistake or a procedural failing and then considers issues about procedural changes or whether training / coaching should be considered.

29. The Flow Chart also includes a table in the form of a guide to decide on the appropriate consequences for rule breaking. It states that the lead investigator will recommend action from the review Flow Chart. Page 191 sets out the two types of behaviours that could lead to a formal disciplinary process. Those are cited at the bottom of page 191 to be: - firstly reckless contravention for personal benefit. This is where the person thought it was better for them to do it that way because they would derive a personal benefit at the risk of safety standards. In such circumstances it states that the formal disciplinary process should commence. The second behaviour which could lead to the formal disciplinary procedures is where there is sabotage or malicious intention, namely where the person committing the act/omission did not think or care about the consequences. It states that gross negligence can be considered as part of this violation. The table sets out other types of lesser behaviour, including where there may be errors or mistakes, which it states will need to lesser outcomes action for example coaching or training.
30. The claimant was accredited as a controller of site safety (COSS). He had been acting as a COSS for several years. He was also a team leader. It is understood that, following a previous safety incident for which no action was taken against him, the claimant had been required to re-train as a COSS, which had been completed the previous year or so.
31. An incident occurred on 22 October 2019. The claimant was the team leader of a team of four. He was the COSS on that day. The team consisted of Mr Sean Burton, Mr Cameron Telfer and Mr Graeme Leathard.
32. As the COSS it was the claimant's responsibility to liaise with the two signallers who were managing the signal boxes for the up line and downline. It was for the claimant to secure temporary line blocks in order for the team to undertake their work safely. The claimant was responsible for communicating with the team which lines were blocked at the relevant times.
33. An incident occurred when one of the team members, Mr Sean Burton, went to cross the downline. A train came down causing a health and safety risk. He quickly got out of the way, but the incident could have led to very serious consequences.
34. Mr Burton indicated that the downline was blocked and was safe to cross. The other team members all said the claimant had communicated that it was safe to cross. The claimant said that he was on telephone to the signaller to give back the up line. He did not see the incident.
35. Very shortly afterwards all of the team came off the tracks and ceased work.
36. Immediately after the incident the claimant telephoned Mr Steve Willis his line manager. He said to Mr Willis that he was unfit to be COSS and referred to issues regarding his sister. He did not report the incident in question.
37. In his evidence to the Tribunal, which he has not previously referred to in any of his previous statements through from the investigations to the disciplinary and appeal hearing and indeed in his witness statement in these

proceedings, he indicated that, immediately after the incident all the team agreed that the claimant would contact his manager to say that he was not going to act as COSS, but would not refer to the incident.

38. After the claimant telephoned his line manager that day, it was agreed that the claimant would meet with his line manager the following day. Before he went to see his manager Mr Burton had reported the incident to Mr Willis.
39. The respondent then commenced a Level 1 which was followed by a Level 2 investigation. This was standard practice for a potential health and safety incident. It was also standard practice that no other actions would be taken of a disciplinary nature until after such investigations had concluded.
40. In accordance with his role as COSS on that day, the claimant had completed the line blockage forms which are at pages 225 to 226 of the bundle. At 225 it is shown there were various different activities with regard to line blockages over that morning and afternoon with regard to both the up and down lines. There is a note of the up line being handed back at 11:59 and then again at 12:42 with it being handed back at 12:49. In relation to the downline it is noted that it was taken up at 12:04pm. It is a little less clear when it was handed back as the handwritten time seems is a little bit more unclear and appears to be 12:29.
41. The rest of the team all described the claimant as being quite upset and distressed about the incident and in a state of shock which was also confirmed by Mr Willis, after the latter spoke to him the following day. The claimant and all of his team were then asked to complete handwritten statements relating to the incident the following day on 23 October 2019.
42. The claimant's statement is at page 214 of the bundle. He says that they were on the upside when Sean shouted and walked off the track shortly after a train approached on the downline. He said that he did not see Sean stepping across but that he said he stepped over the sixth rail about to cross. He said they all came off the track and never went back on.
43. Mr Burton's statement is at page 216. He said that they were working on the up line and that both the up and down lines were blocked. He said that the claimant said the up line was being handed back, but he still had the downline blocked. He agreed to step across with Mr Telfer looking out. He said that he heard a train which came down on the down line. He goes on to indicate that they all left the track and the claimant rang Mr Willis to tell him what happened and say he was not fit to COSS due to personal circumstances.
44. Mr Leathard's statement appears to be the one at page 215. He says he was on the path on the other side of the wall with the van. He says that the claimant had blocked both lines. He said the claimant was given back the up line when he saw a train coming on the down line, which he said they had been told was blocked for another 12 minutes and that Sean had said I thought the down was blocked. They all then returned to the van. He said they all indicated they were not happy and did not feel safe with the claimant being the COSS and that he would have to tell Mr Willis about the situation.
45. Mr Telfer's statement is at page 217. He said that the claimant had briefed them about the up and down line both being blocked. He said that the claimant had handed back the up line when they were working. It was agreed for him to act as look out whilst they attempted to go over on the down line

which they all thought was still blocked. It was then that Sean crossed and that they saw a train and then all left. He indicates that the claimant reported the incident to his line manager.

46. Mr Willis also produced a statement on that date which is at page 218 of the bundle. He indicates that he received a telephone call from the claimant who said he did not think he should be acting as COSS at the moment, his head is all over the place, his sister was in a hospice and that he was getting himself confused. He told the claimant to come in to see him the following day. He said that when he arrived however the following day, Mr Burton told him about the incident.
47. Following the incident the claimant was removed as a COSS during the period of the investigation but remained as a team leader.
48. The claimant was interviewed as part of the Level 2 investigation on 10 February 2020. He attended with his trade union representative. The interview is at page 207 of the bundle. The interview took place almost four months after the original incident. No explanation has been given about this delay.
49. In this interview the claimant said that he understood they were all waiting on the upside waiting for the signaller to give the line blockage. He said that he was looking in his bag when the train passed and Sean got up and shouted that the train came by on the downline but he thought that everybody was in the up line. The claimant said that the team were briefed and aware of this. He said that that things then got heated and when he got to the van he apologised but could not really think straight as he was in shock. He said he then telephoned Mr Willis to tell him that he was not fit to carry on as COSS.
50. All the team members were also all interviewed around the same time in February 2020. The notes of their interviews are at pages 209-212 which includes the interview with Mr Willis.
51. Mr Leathard says that he was stood off the track and saw the train so he shouted. He also says he heard the claimant say that they had 12 minutes left. He also said that he told the claimant to call Mr Willis and report it.
52. Mr Burton's statement is at page 210. He said that the claimant had been on the phone to the signal box to give up the up line. He said that he understood that the downline was still blocked for 12 minutes. He said that he thought that the claimant had given his manager the full story about the incident.
53. Mr Telfer also gave a statement which is at page 211 of the bundle. He said that the claimant was on the phone handing back the up line. He said that everyone was on the track apart from Graham who was by the van getting stuff out. He said that he understood that the down line was blocked and they had another 10 to 12 minutes left on it. When he saw the train, he was confused because they all thought that all the lines were blocked.
54. Mr Willis then gave a statement which is at page 212 of the bundle. He said that the claimant had contacted him saying that he should not be COSS and referred to his mental state. Mr Willis also said that there had been a previous incident concerning the claimant. He said that all of the others indicated there was 12 minutes left on the downline.

55. As is well known, the UK experienced a pandemic, the Coronavirus pandemic, and the Country went into lockdown towards the end of March 2020.
56. The Level 2 investigation report was not completed until 8 December 2020. No explanation has been given for the delay in producing this report except it has been suggested that it may have been possibly due to the pandemic but that would not really affect it until March 2020. That is also inconsistent with the respondent's own conclusions from the grievance hearing where at page 251 they indicate that COVID could not have impacted the excessive delay. The respondent also suggested without any details being provided that the delays may have been caused by annual leave or a change in personnel but no specific explanation regarding the delay has been provided to this Tribunal.
57. The report from the Level 2 investigation is at pages 192-204 of the bundle. It states that in summary on page one in the description of the event that the COSS had instructed use of an unauthorised lock out system and the incident involved a member of the work group stepping on to a line before hearing a train. It indicates that the behavioural cause is contravention by the COSS. It says that the COSS had failed to communicate to the team which lines were blocked and which lines were clear; failed to control which lines were blocked and to keep his work group in a safe place. At page 194 it notes that actions already taken include the COSS having had COSS competency suspended by his line manager after the incident.
58. At pages 197 - 198 it sets out the sequence of events.
59. At page 200 it notes that there was a previous incident involving a COSS which was not concluded and was not deemed relevant for the investigation.
60. At page 201 it notes that the unsafe act was instructing the working group to use an unauthorised unassisted look out system on one line to cross to another line which did not have a line block. It then asks the question whether there was deliberate harm. It answers this question in the affirmative. It notes that "the COSS had handed back the downline six minutes previously. He had stated on this call that the line was clear. In addition this gave ample time to keep the group in the up cess. He had the paperwork in his hand to confirm the up line was not blocked. He asked the agency man on site to act as look out." At page 202 it suggests that his action was not well intended because he handed back the line blocked and chose not to share that with the group. However it is noted there was no evident benefit from his failure to share this. It also notes that the COSS failed to report this incident had occurred despite calling his line manager immediately afterwards.
61. This investigation report was then put before the Fair Culture panel which included union representatives. They confirmed proceeding to a disciplinary process.
62. Mr Watters was then appointed to undertake the disciplinary investigation.
63. He interviewed the claimant on 11 February 2021 which is at pages 230-237. At this time the claimant was interviewed with his trade union representative present. By this time almost one year and four months had passed since the incident in question. The claimant says in that interview at page 230 that he

didn't see the incident as a near miss. He also said that Mr Leathard was in the van and was not trackside (231). He indicates that they are not his gang. He did not see Mr Burton step on to the track and he didn't ask Mr Telfer to act as lookout (232). He notes that their statements are inconsistent with his statement and suggests they are a gang and they will do what they are told. He also says that, at the time, he was under a lot of stress with the problems with his sister. He indicated that he had some history with Sean Burton (page 233). He reiterates that Mr Leathard was in the van (page 234).

64. Mr Burton was also interviewed towards the end of February 2021. His statement is at page 238-241. He says that the claimant had said that they had 12 minutes left on the downline (238). He discovered that the claimant had not told Mr Willis about the incident (page 238). He reiterates on a number of occasions (page 239 and 240) that he understood he had 12 more minutes on the downline.
65. Mr Telfer was also interviewed towards the end of February 2021. His interview is at pages 242-244. He said that they were told that the claimant was about to hand back the up line and to cross over to the down (page 242). He said that the claimant was shocked when he found out what had happened (page 243). He said that they understood that the downline was still blocked (page 243). He also said that he was not acting as look out.
66. Mr Willis was also interviewed towards the end of February 2021. His interview is at pages 245-246 of the bundle. He again refers to the telephone call that was made immediately afterwards to him by the claimant. He also says that the claimant seemed to be somewhat in shock and emotional about the situation.
67. In his witness statement in evidence to the Tribunal, the claimant made no reference to any details about the incident. When he was asked about it during the course of his oral evidence he said he did not see the incident so he did not know whether it was or was not a near miss. He said that they had all stood down after the incident. He said in evidence that he was on the telephone to the controllers and said that the team were with him in the up cess. He said that he was in the process of giving back the up line at the time and on the phone to the signal man. His evidence was that because he did not see the incident occurring or what happened he did not accept that it was a near miss because he did not see it.
68. The claimant then went on to indicate in his evidence orally in Tribunal that he believed that Mr Burton went on an open line and that it was Mr Burton's mistake. He said that the other members of the team all worked together as a team but there were issues between him and the team. He also suggested that there were issues between and Mr Burton. He said that Mr Burton was always challenging him. He referred to a very recent issue with regard to overtime. In his evidence, the claimant suggested that there was some financial benefit to Mr Burton from this incident. However, when he was cross-examined about this, he was not able to explain what financial benefit Mr Burton might have in being involved in a very serious incident of this nature nor exactly benefit Mr Burton might get because the only financial benefit he mentioned was the overtime which had already occurred.
69. In his evidence it seemed that the claimant seemed concerned about Mr Burton going in to see Mr Willis first before him the following day, although

he never suggested in his evidence that he was going to tell Mr Willis about the incident.

70. The claimant raised a grievance in March 2021 regarding that the way the respondent was dealing with this matter. In particular, he raised issues about the duty of care to him, the stress this was causing and the way the disciplinary process was being managed, in particular the delay to the process.
71. Mr Leathard was also interviewed by the respondent in March 2021 with regard to the incident. His statement is at pages 254-256 of the bundle. He said that he was stepping back onto the footpath when he heard the claimant saying that he was giving back the up line, but that they still had the downline for another 12 minutes (page 254-255). He says that the warning of 12 minutes was accurate. He also indicated that the van had been turned around. He said that they were all concerned about the claimant acting as COSS (page 255).
72. The claimant was not interviewed again as part of the disciplinary process after all the other witnesses had been interviewed. The respondent did not interview the driver of the train. It was subsequently understood by Mr Watters that this was not classified as a near miss so it was understood that the driver had not reported the incident. The respondent's witnesses all said that the driver would not add anything to the investigation. He would not have heard any instructions from the claimant. Mr Watters said the CCTV footage was not available. Again the respondent's witnesses said this would not add anything to the investigation. The Tribunal agrees that it was not reasonable to interview the driver or obtain the CCTV footage.
73. The disciplinary investigation report was produced by Mr Watters. It is at pages 257-263 of the bundle. It notes that three members of the team have one version of events and the claimant has a different version of events. It sets out the timeline of events. It notes that Mr Watters, as confirmed in his evidence to the Tribunal, concludes that there is no issue with regard to the look out but concludes that there should be a referral to a disciplinary hearing with regard to the claimant's communication. He incorrectly communicated the line blockage status which could have resulted in a potential near miss of a member of the team which could have had fatal consequences (page 263).
74. Despite the fact that the Level 2 investigation found that the unsafe act was the issue about an authorised look out, which allegation Mr Watters concluded should be dismissed, he did not reconvene the Fair Culture process or indeed even consider whether the case should be referred back to the Fair Culture process. In his evidence to the Tribunal, he said he had not referred the matter back. He was not aware that cases were referred back. He said he did not consider doing so in this case. He was unable to provide any real explanation as to why he did not do or recommend a referral back to the Fair Culture Process.
75. In evidence to the Tribunal both the disciplinary manager and the appeal manager confirmed that neither of them, at any stage, considered referring the matter back to the Fair Culture process, despite the fact that the matter had been referred through the disciplinary process in the first instance because of the unauthorised look out allegation which was not upheld during

the disciplinary investigation. One of the respondent's witnesses indicated that they did not recall there being referral back of cases, but both acknowledged they were not really aware about whether it occurred or not. Mr Hall, the trade union representative however said that he did sit on the Fair Culture panel and that he had been aware of cases being referred back. His evidence was not contested.

76. Mr Hall also said that, if the matter had been referred back to the Fair Culture process, he did not think that the outcome would have been for a referral for any disciplinary process. He said the allegation did not amount to reckless contravention. Indeed, there was there any evidence from any of the respondent's witnesses that there was any element of personal gain. He said the reason why it could not have been reckless contravention or deliberate was because the claimant's evidence throughout appeared to have been and had been accepted to be that he was surprised and in shock. Therefore that would not constitute a deliberate action so it would not get to the stage of being a referral to a disciplinary process.
77. The respondent's witnesses all accepted that there was not necessarily any element of personal gain in relation to the communication issue. Mr Watters suggested that the element of personal gain regarding the unauthorised look out related to circumventing taking certain steps which he thought could possibly derive some personal gain for the claimant. The respondent's witnesses all initially accepted on cross examination that these actions were not malicious or sabotage, but they all suggested that the actions could fall under the definition of gross negligence which was one of the description in the criteria set out for the category of malicious and/or sabotage under the Fair Culture flow chart.
78. The claimant received the outcome from his grievance in June 2021. The respondent partially upheld his grievance in relation to the delay in the process. The claimant sought to appeal the outcome, but the respondent considered that related to the disciplinary process and proceeded with the disciplinary proceedings.
79. On 15 July 2021 the claimant was invited to a disciplinary hearing. The invite letter is at page 269-270 of the bundle. The allegation is one of gross misconduct stating that the claimant showed a neglect of his COSS duties whilst responsible for the safety of team members by incorrectly communicating the line blockage status of the line which was not blocked resulting in a near miss to a team member with potentially fatal consequences. The letter referred to breaches of various rules and enclosed the relevant documentation. The claimant was advised that he could call witnesses and could be represented at the hearing. He was also warned that, if he was found guilty of gross misconduct that it could result in his instant dismissal.
80. The disciplinary hearing was conducted by Mr Harrison. The claimant attended with his trade union representative Mr Rawcliffe. The notes of the disciplinary hearing are at pages 271-290 which incorporate amendments from the claimant.
81. At page 273 of the bundle, the claimant's representative raised the issue about the look out. They seemed to be unaware until they attended at the disciplinary hearing that this was not a matter was not being pursued. Mr

Harrison stated at the disciplinary hearing that it was not being pursued. The trade union representative suggested that there an issue therefore with the Fair Culture process. He also indicated that, on that basis, the witness statements of the others should be disregarded because they all referred to a look out and that aspect was not being upheld.

82. At the disciplinary hearing Mr Harrison went through the events with the claimant. In his evidence to the Tribunal, Mr Harrison described the claimant as vague and evasive. He said that the union representative did a lot of the talking. In describing the events, the claimant indicated that he was on the telephone and that he had not seen what had happened (page 276). The claimant also maintained that Mr Leathard was in the van and could not see what was happening. He said that was consistent with his own statement (page 276-278). The claimant said that Mr Burton was shouting about the incident, but he did not see it. The claimant suggested, during the course of the disciplinary hearing, that the others had colluded. He suggested that Mr Burton had made a mistake and that the others were effectively covering up for that mistake. It was suggested that the witness statements of the others should not be believed because they had referred to the look out which was not the case. The claimant referred to issues with Mr Burton. He mentioned an issue about overtime the previous day. He suggested that Mr Burton had financial motives.
83. The claimant was permitted to call witnesses. He called Mr Grainger whom he had been working for some time as the team leader with Mr Grainger acting as the COSS. Mr Grainger said he had no safety concerns about the claimant.
84. The disciplinary hearing was adjourned. In his evidence to the Tribunal Mr Harrison said he did not think he could undertake any further investigations into the matter and he did not do so. He also indicated in his evidence, when cross-examined about it, that he did not think that he could refer the matter back to the Fair Culture process, but that he perhaps should have done so.
85. Mr Harrison then reconvened the disciplinary hearing to provide his decision. The hearing was reconvened for 4 August 2021. Notes of the reconvened hearing are at pages 293-295. Mr Harrison gave his decision and immediately thereafter outlined the sanction. He gave the reasons for his decision. He relied on the consistency of the other witness statements and said he did not think that the claimant's explanation or rationale for challenging those statements was plausible. He concluded that the claimant failed to take responsibility for the safety of others on the site and that there were potential serious consequences. He concluded that the claimant took no personal accountability or responsibility for the situation. He determined that the claimant should be summarily dismissed for gross misconduct. No further submissions on mitigation were considered.
86. In his evidence to the Tribunal, Mr Harrison indicated that he was concerned about issues regarding health and safety concerning the claimant, whom he considered did not take responsibility for this incident and he could not be assured that there would not be a further health and safety incident of this nature in the future. He did not take into account it would appear the fact that, since the incident, the claimant had been working as a team leader for almost two years without any health and safety incidents.

87. At the end of the disciplinary hearing, the trade union representative referred to a concern about the Fair Culture process not being followed. The claimant was given a right of appeal.
88. The respondent wrote to the claimant following the hearing to confirm his dismissal. That letter is at page 296-297 of the bundle. The claimant was dismissed for serious neglect of his COSS duties, whilst being responsible for the safety of team members. In the letter, the respondent referred to the breaches of various health and safety rules. Mr Harrison stated that he considered that the claimant had not shown any personal accountability or taken any responsibility for the incident. He explained the claimant had a right of appeal.
89. In his evidence to the Tribunal, Mr Harrison said that he had considered other sanctions. However when he was cross-examined about this matter he referred back to the respondent's disciplinary policy and the act of gross misconduct. He said that he did not think any other alternative sanctions were applicable and seemed in his evidence to consider there were no alternatives to dismissal by the manner in which he continued to refer back to the act of gross misconduct. Throughout his evidence, it appeared that he had discounted any other sanctions as alternatives because it was an act of gross misconduct and seemed to suggest that the alternatives in the policy referred to other acts not of gross misconduct.
90. Mr Harrison indicated he was concerned about health and safety and that there may be further breaches, yet he did not seem to take into account that the claimant had remained as a team leader for almost two years since the incident and there had been no further incidents. He did not suggest what other alternative sanctions he had considered including a final written warning which could have been extended or some form of demotion or removing his COSS options he had co
91. It was also unclear to the Tribunal what account, if any, Mr Harrison took account of the claimant's personal issues. He seemed to discount them. He suggested that they were not issues which might have affected the incident but did not invite or consider any evidence about them from the claimant in any detail.
92. In his witness statement to the Tribunal, Mr Harrison also indicated that he was aware of a previous safety incident which he said he was mindful not to take into account, but gave no explanation as to why he had referred to it in the first instance and how he had been able to ignore it.
93. In his evidence Mr Harrison also indicated that he did not consider that delay was a concern.
94. The claimant appealed against the decision to dismiss him. His letter of appeal is at page 298.1 of the bundle. He says that the reasons for his appeal were: - misinterpretation of the available events; failure to consider all of the available evidence; failure to carry out the disciplinary process within a reasonable timeframe; serious breaches of the disciplinary process and severity of the punishment.
95. The claimant went on to provide further information with regard to his appeal through his trade union representative which is at pages 299-309 of the bundle.

96. Mr George Drum heard the appeal on behalf of the respondent. The claimant was represented again by a different trade union representative. The notes of the appeal hearing are at pages 311-318 with the claimant's amendments incorporated at pages 319-334 of the bundle.
97. During the course of the appeal hearing, an issue was raised by the claimant's trade union representative about the accuracy of the witness statements none of which were noted to have been signed. The respondent has subsequently produced emails in which the witnesses confirm that the contents of those statements are approved by them (pages 248.28 – 248.34).
98. During the course of the appeal hearing, the claimant also raised the issue, through his trade union representative, that his actions were not deliberate. He asserted that therefore he should not have been referred to a disciplinary hearing and that there was a breach of the Fair Culture process (page 317 of the bundle).
99. Mr Drum also said in his evidence before the Tribunal that he was aware of a previous incident. In his witness statement, he indicated that he had not taken it into account, yet he also said in his witness statement that it was a factor he had taken into account when he considered the claimant's credibility. When Mr Drum was cross-examined about the issue he was not able to explain the inconsistencies in his evidence. He had either not taken the matter into account or he had. He acknowledged on cross examination that he had in fact taken that matter into account.
100. In his appeal, the claimant also argued that the sanction was too harsh. In his evidence to the Tribunal, Mr Drum never really addressed the issue about what alternative sanctions he had considered. He appeared to concentrate on the health and safety aspect of the incident. He was not able to explain what account he took of the fact that the claimant had continued in his team leader post for almost two years since the incident. as a team leader. There had been no health and safety issues. Mr Drum did not appear to have addressed his mind as to whether or not an alternative sanction to dismissal was appropriate. He did not say whether he had considered demotion or some form of final written warning, which might have been extended, or indeed permanently removing the claimant's COSS, nor did he suggest he had discounted any of those sanctions or why he might have done so.. He did suggest to the Tribunal when cross-examined about the issue with regard to demotion, that all employees whether operatives or team leaders did require COSS. He did not seem to have considered alternative sanctions but appeared to review the case on the basis of whether the act of misconduct had occurred without fully considering alternatives to dismissal whether he concluded it did or did not occur.
101. Mr Drum adjourned the hearing to consider his decision.
102. When considering his decision Mr Drum had put together a list of factors which he was taking into account. He had set out details of the various statements which had been provided by the other witnesses. This is noted at page 338. In this document he appears, as is consistent with his oral evidence, to be concentrating upon whether or not he believed that the incident had happened as opposed to whether or not some alternative sanction might be considered. There are no notes with regard to what alternative sanctions he might have considered.

103. The notes of the reconvened hearing are at page 339 of the bundle. At the reconvened hearing Mr Drum went through the reasons for his decision which was to dismiss the claimant's appeal.
104. Mr Drum then wrote to the claimant following that hearing to dismiss the claimant's appeal and uphold the decision to dismiss the claimant. That letter is at pages 340-341 of the bundle.
105. In his findings, Mr Drum referred to the evidence of the other witnesses which he said were consistent, but not consistent with the claimant's version of the facts. He rejected the issue with regard to the Fair Culture panel because he indicated that the decision had been to refer the matter through a disciplinary process. He said that he considered that the sanction was appropriate, but did not indicate on what basis he arrived at that decision.
106. By way of observation, the Tribunal did not find the claimant the most convincing witness. He had to be asked on several occasions to answer the questions put to him on cross examination.

Submissions

107. The claimant's representative submitted that the respondent did not have reasonable grounds to believe that the claimant had committed an act of gross misconduct because he asserted that the respondent had proceeded with the disciplinary process based on a false premise because the act of misconduct which led to the disciplinary process was not pursued. The act of misconduct as found by the Fair Culture panel was not upheld during the disciplinary investigation. Therefore, it should not have gone to a disciplinary hearing in the first instance.
108. The claimant's representative also asserted that the process followed was not a reasonable process. Firstly, because alternatively to their proposition above, the matter should have been referred back to the Fair Culture process and, alternatively because there was such a substantial delay to the disciplinary process.
109. The claimant's representative further submitted that dismissal was not within the band of reasonable responses. He submitted that the claimant had been doing his job as a team leader with no issues for almost two years and that no proper consideration was given to alternative sanctions.
110. In relation to a referral back to the Fair Culture process, he said that, if a Fair Culture process had been followed following a referral back, there would be no referral on to a disciplinary process. In relation to contribution, he said that the claimant made a mistake and it was not blameworthy conduct. He submitted the respondent had acknowledged that this was an error.
111. The respondent's representative submitted that the respondent had followed their disciplinary process and that, although there were some delays, there were contemporaneous witness statements and then interview statements four months into the Level 2 investigation. He submitted that the witnesses all had a recollection of events.
112. The respondent's representative also submitted that there was no breach of the Fair Culture process. He submitted that the respondent was following their own disciplinary process. He further submitted that if it had been referred back to the Fair Culture process, it would have been referred on as

an act of gross negligence. He said the claimant would have been therefore dismissed on that basis. The respondent's representative also said that this issue had not been pleaded by a claimant who had been legally represented throughout these proceedings.

113. The respondent's representative submitted dismissal was within the range of reasonable responses for this employer, bearing in mind the potential safety issues and concerns which had arisen.
114. In relation to contribution the respondent's representative submitted that the claimant had been defensive and evasive throughout the internal disciplinary process, which was consistent with his evidence during the Tribunal proceedings. He had at no stage referred to what had happened in relation to the incident in his witness statement. The Respondent's representative submitted that the claimant was culpable. He had not reported the incident. He also said that he had been responsible for the incident by his actions. He submitted that the respondent was entitled to fairly believe the other three witnesses to the incident. The respondent's representative also said that, bearing in mind, the evidence the claimant gave about choosing not to report this incident with his colleagues, which he gave in evidence to this Tribunal for the first time that any basic award should also be reduced.

Conclusions

115. This Tribunal finds that the claimant was dismissed for the serious neglect of his controller of site safety duties (COSS) and safety of team members by incorrectly communicating a line blockage resulting in a near miss of a team member with near fatal consequences; which behaviour amounts to misconduct.
116. Conduct is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.
117. The Tribunal accepts that the respondent had reasonable grounds to believe that the claimant had committed an act of misconduct. It had evidence from the three other site members, who all indicated that the claimant had miscommunicated that the down line was blocked, resulting to one member of the team going on to the line and nearly being hit by a train. The claimant's evidence in relation to that is that he had not seen the incident.
118. The Tribunal accepts that the respondent had reasonable grounds to believe those witnesses whose accounts did not substantially differ throughout the entire process of this very long and delayed investigation. All of the witness gave various statements at various times from the outset of the incident namely the following day, four months later and then about 16 months later. The witness statements remained largely consistent except for the lookout issue to which the Tribunal will refer to further in due course.
119. The Tribunal also accepts that largely this was a reasonable investigation. The relevant witnesses were all interviewed. The Tribunal does not consider that CCTV footage, as suggested by the claimant's representative added anything nor the testimony of the driver. It is therefore unclear whether any other evidence would have assisted in the investigation.
120. The Tribunal does however consider the reasonableness of the investigation is called into question because of the delay in the way that the investigation was undertaken. The initial statements were taken immediately after the

incident was reported. There was then a four month delay until any of the witnesses were interviewed again. No explanation has been given for why it took four months to undertake a safety investigation. It then took almost a further year for the disciplinary investigation to be commenced and the witnesses to be re-interviewed. No proper explanation has been given for that delay. All of the witnesses had been interviewed prior to the Coronavirus Pandemic. That delay, although the Tribunal accept there are some contemporaneous statements, was in this Tribunal's opinion wholly unacceptable and made the investigation wholly unreasonable. This Tribunal, taking cognisance of the various case law above dealing with delay does not consider that the respondent acted fairly in dismissing the claimant following an investigation which took place almost 16 months after the initial incident. It is inevitable that memories would fade over that time albeit that there was some short contemporaneous witness statements from the outset.

121. The Tribunal also does not consider that the respondent followed a fair procedure. The respondent incorporated into their disciplinary procedure the Fair Culture process and flow chart. The Fair Culture process provides only two bases upon which a case will be referred to a disciplinary post process in a health and safety incident like the one the subject matter of these proceedings. The first basis is where there was a reckless contravention for personal gain and the second basis is where the action was malicious or sabotage. In this case, the Fair Culture panel referred the matter to a disciplinary process on the first basis namely for reckless contravention for personal gain. This was on the basis of an unauthorised look out system, which may have had a personal gain by circumventing taking certain actions which might have had an element of some personal gain. By the time that the matter was investigated as part of the disciplinary process that allegation had been removed and replaced by a failure to communicate a line blockage. That allegation was not a reckless contravention nor deliberate and on the respondent's own evidence all of their witnesses accepted there was no personal gain in that regard. This Tribunal finds that on that basis the matter should have been referred back to the Fair Culture process to consider whether it should proceed down a disciplinary route. The respondent's failure to do so is in breach of their own process.
122. The Tribunal further finds that dismissal was not a reasonable response in the circumstances of this case. The Tribunal do not consider that the respondent properly considered alternative sanctions. Mr Harrison in his evidence when questioned about it referred to the act of gross misconduct suggesting that no alternative sanctions were an option for him. He discounted any mitigation and did not consider it separately. In this case there was quite substantial mitigation both on a personal level with the stress the claimant was under caring for his dying sister; of which the respondent was aware and his clean disciplinary record and period of service.
123. Most significantly however the Tribunal has noted that, during this entire period of the respondent's investigation, which lasted almost two years before it got to a disciplinary hearing, the respondent chose not to suspend the claimant from his role as team leader, albeit that they removed his COSS duties. Therefore on the face of it they did not consider that there was any health and safety risk in him continuing to work for them for almost two years in a team leader role. Despite that when they came to consider sanction they

took no account of the fact that over a period of almost two years he had continued effectively in his role as team leader having the COSS accreditation removed, but they gave no thought as to whether or not the claimant could have continued either being issued with a final written warning which they could have extended and/or considered some form of demotion and/or simply removing his COSS accreditation permanently or for a further period of time. Nether the dismissing officer or the appeal officer properly considered alternatives to dismissal. Indeed, the appeal officer largely simply concentrated on whether or not the act of misconduct should be upheld. The real issue that both the dismissing and appeal officer focused on was whether there was a risk that the claimant might be a risk to safety risk, yet they took no account of the fact that there were no safety issues raised during a period of almost two years when the claimant remained employed in a team leader role.

124. The Tribunal also consider that both the dismissing officer and appeal officer took account of the claimant's previous safety incident and the Tribunal consider that incorrectly probably influenced their decision to dismiss the claimant.
125. For these reasons this Tribunal find that the claimant's claim for unfair dismissal is well-founded.
126. Therefore his dismissal is unfair.
127. The Tribunal went on to consider whether if a fair procedure had been adopted the claimant might have been fairly dismissed in any event.
128. The Tribunal accept the evidence of Mr Hall who came across as a well-balanced witness and appeared to have experience of sitting on the Fair Culture panel. His evidence was that if the matter had been referred back to the Fair Culture panel that it was unlikely it would have been referred on for any further disciplinary process because it did not appear to be a deliberate act. He based this assertion on the fact that the claimant was surprised and shocked about the incident. Mr Hall's evidence was not contested in that regard.
129. However the Tribunal has also noted that if the case was referred back to the Fair Culture panel that they could then have referred it for a disciplinary process for a different reason, namely malicious or sabotage. In relation to that there is a reference to gross negligence in the guidance and the claimant's actions could be deemed to be gross negligence. The Tribunal does not consider that gross negligence on the face of it would be either malicious or sabotage, because with both of those categories one would expect some element of a deliberate act as suggested under the Fair Culture process. It is clearly debatable whether or not if the matter was referred back to the Fair Culture process whether it would still have been referred on for a disciplinary process. The Tribunal consider that it is more than likely that it would not be referred back for a disciplinary process, but the Tribunal does think there is chance probably somewhere between 30 to 40%. That it could have been referred back
130. The Tribunal then went on to consider whether the claimant had contributed to his actions. The claimant did not come across a particularly credible witness. His evidence at times was confusing, for example he could not accept the incident had happened because he had not seen it. He also could

not explain what the financial benefit was to Mr Burton of nearly being hit by a train. His evidence in Tribunal seemed to be consist with the approach he was criticised for by the respondent's witnesses during the disciplinary proceedings for being vague and evasive. When he was answering questions on cross-examination the questions had to be put several times. Of more significance his witness statement for these proceedings provide no details whatsoever about the events for the incident for which he was dismissed. It is astonishing that he did not feel he should give the tribunal his version of events of the day in question His suggestions about the various reasons why the incident occurred lacked credibility at times for example the motivation of the person involved in the serious incident namely that there was some person gain for him, which he was never able to articulate. It is almost inconceivable that someone would have put themselves into that much danger and colluded with the rest of the team for some financial benefit which was unclear at best. Further it is also unlikely that all the other members of the team would also have agreed with the course of action.

131. The Tribunal was also concerned about evidence given by the claimant, which had not been given previously, suggesting all of the other members of the team had agreed with him not to tell his manager about the incident but that he would stop acting as a COSS. That suggests an element of collusion about a very serious safety issue to which the claimant as team leader appeared to be prepared to agree to. He did not tell his line manager about the incident. He appeared concerned when Mr Burton mentioned it to his line manager. This suggests that it may have deliberate not to report the incident which is blameworthy conduct
132. The Tribunal is minded to accept the evidence of the other three witnesses about the incident in question, as the Tribunal has concerns about the credibility of the claimant's evidence. It was inconsistent at best. It does however appear that the claimant's actions were most likely to have been a mistake, but at the end of the day he was the person who was responsible for the safety of the site and for his team at the site. He was in charge and therefore must take some responsibility for the incident in question.
133. On the basis of the evidence presented to the Tribunal, the Tribunal is minded to accept as the respondent did, the evidence of the other team members, who also witnessed the event and were all present, that the incident did occur as they indicated and not as the claimant suggested.
134. On that basis the Tribunal consider that the claimant was partially responsible for the incident in question. The Tribunal does not think his actions were completely blameworthy or culpable. However taking into account that he deliberately, it now appears, did not report the incident, which actions are culpable and blameworthy. When he was asked about that his suggestion was that this was because he was in shock, but his subsequent explanation about colluding effectively with his colleagues not to report it at the time is inconsistent with that suggestion.

135. This Tribunal therefore considers that the claimant's basic award should be substantially reduced based on the evidence that he effectively colluded not to report the matter. The Tribunal also finds that the claimant did contribute to his dismissal to an extent by failing to report the incident at the time. Although that contributed to his dismissal, it was not the main reason for his dismissal, so we could not put that higher than about 25%

Employment Judge Martin

Date 23 December 2022