EMPLOYMENT TRIBUNALS

Claimant: Mr R Brookes

Respondent: Network Rail Infrastructure Limited

Heard at: Stoke (Hanley) **On:** 01/10/2019 & 02/10/2019

Before: Employment Judge Butler

Representation
Claimant: Ms V Webb (Counsel)
Respondent: Ms A Carse (Counsel)

JUDGMENT

The decision of the employment tribunal is that:

1. The claim of unfair dismissal is not well founded and is dismissed.
2. The claim for breach of contract is not well founded and is dismissed

REASONS

3. The various claims in this case arise following Mr Brookes having been dismissed on 18 May 2018, for alleged gross misconduct. Mr Brookes had worked for the respondent, Network Rail Infrastructure Limited, since 17 September 2007 and was employed as an Assistant Mobile Plant Fitter. His role was part of the Overhead-line Condition renewals (OCR) team. Following an investigation into some of the practices of Mr Brookes, the respondent dismissed him without notice.

4. Mr Brookes commenced his claim form with an ET1 received by the tribunal on 29/08/2018, in which he brought complaints of unfair dismissal and wrongful dismissal. His complaint is that he was dismissed for having not signed the respondent's new terms and conditions, and not for gross misconduct, but in the alternative, that even if he was wrong on that assertion, the dismissal was unfair both substantively and procedurally. The

wrongful dismissal claim, put simply, was that the reason(s) behind is dismissal, if not his refusal to sign a new contract, were not such that they could be classified as a repudiatory breach of his contract and justify a summary dismissal.

5. I heard evidence form Mr Brookes himself. From the respondent I heard evidence from three witnesses: (i) Mr Alsop, who was Programme Manager of the OCR team at all material times, and had overall responsibility for operational aspects of OCR, and supervisory responsibility for staff within OCR; (ii) Mr Edwards, who was a Senior Project manager at all materials times and was the dismissing officer, and (iii) Mr Brinkley, who was the Head of Strategy for the respondent at all material times and was the appeal officer in this case. Both the claimant and Alsop produced supplementary witness statements. I was also assisted by a bundle of 495 pages.

6. The first day of the hearing was used for reading time and to hear the respondent's evidence. Mr Brookes began giving evidence on the first day and concluded his evidence on the morning of the second day. Closing submissions were made before lunch. The judgment was reserved.

Applicable Law

Unfair Dismissal

7. By virtue of Section 94 of the Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by their employer. In respect of what constitutes an unfair dismissal the relevant law is to be found within Section 98 of the ERA 1996.

8. Section 98(1) requires that in deciding whether a dismissal was unfair it is for the employer to show the reason for that dismissal. That reason must fall within a list of potentially fair reasons to be found within Section 98(2) of which subsection (2)(b) states:

> "A reason falls within this subsection if it relates to the conduct of the employee."

9. Section 98(4) of ERA 1966 requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for one of the reasons in Section 98(2). In a conduct dismissal, the Tribunal is bound to consider the guidance issued by the Employment Appeals Tribunal in the Courts (including the decisions in ***British Home Stores Ltd v Burchell*** [1978] 379, ***Iceland Frozen Foods Ltd v Jones*** [1993] ICR 1, ***Post Office v Foley*** [2000] IRLR 827, ***Sainsbury's Supermarkets v Hitt*** [2003] IRLR 23).

10. In particular, the case law requires me to consider four sub-issues in determining whether the decision to dismiss on the grounds of conduct was fair and reasonable:

a. Whether the employer genuinely believed that the employee had engaged in conduct for which he was dismissed;
b. Whether they held that belief on reasonable grounds;
c. Whether in forming that belief they carried out proper and adequate investigations, and
d. Thereafter, whether the dismissal was a fair and proportionate sanction to the conclusions they had reached.

11. I was taken to the case of ***Brito-Babapulle (Appellant) v Ealing Hospital NHS Trust*** **(respondent)** [2013] IRLR 854 by the respondent, and in particular paragraph 38, where it is stated by Langstaff P:

> "The logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. Mr Midgley attempted to answer this point by saying that the sentence could not be simply looked at in isolation; it had to be seen against the totality of the Judgment as a whole. He relies upon ***Hewage v Grampian Health Board*** [2012] ICR 1054 in which there is emphasis upon the generosity which an Appeal Tribunal should give to the reasoning of an Employment Tribunal. The employer here had itself looked at the question of mitigation because it had said in its dismissal letter that having decided that the allegation could be considered as gross misconduct it, therefore, turned to consider the mitigation presented. The Tribunal's function was to look at the employer's conclusion. Implicitly the Tribunal here, giving the generous interpretation which should be permitted, had taken account of potential mitigation in concluding that the misconduct was gross."

12. Equally important from this judgment is paragraph 40, where Langstaff P states:

> "It is not sufficient to point to the fact that the employer considered the mitigation and rejected it, largely upon the basis that the failure to observe the verbal notice and the letter undermined it, because a tribunal cannot abdicate its function to that of the employer. It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate."

13. In addition, the tribunal must consider the reasonableness of the employer's decision to dismiss and, in judging the reasonableness of that decision, the tribunal must not substitute its own decision as to what was the right course to adopt for the employer. Rather, the tribunal must consider whether there was a band of reasonable responses to the conduct within which one employer might reasonably take one view whilst another quite reasonably takes a different view. My function is to determine whether in the

circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band it is fair. If it falls outside that band, it is unfair.

14. The tribunal is also required to consider the fairness of the procedure that was followed by the employer in deciding to dismiss the employee. However, if the procedure followed was unfair, the tribunal is not allowed to ask itself whether the same outcome (i.e. dismissal) would have resulted anyway, even if the procedure adopted had been fair (per ***Polkey v AE Dayton Services Ltd*** [1987] IRLR 503 HL).

15. The requirement for procedural fairness includes consideration of the reasonableness of the decision to dismiss up to and including any appeal process undertaken (***West Midlands Co-operative Society v Tipton*** [1986] ICR 192, HL).

Wrongful Dismissal

16. By virtue of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 SI1623, proceedings may be brought before the Tribunal in respect of a claim of an employee for the recovery of damages or any sum for breach of a contract of employment where the claim arises or is outstanding on the termination of the employee's employment.

17. Section 86 of the ERA 1996 affords rights of notice to employees, the length of which is determined by their period of continuous employment with their employer. Any failure by the employer to give correct notice constitutes a breach of his contract of employment, save where either the employee waives his rights to, or accepts payments in lieu of, notice. In addition, an employer is entitled to dismiss an employee without notice where satisfied that the employee's conduct amounted to a repudiatory breach of the employment contract and discloses a deliberate intent to disregard the essential requirements of that contract. The employer faced with such a breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation, which results in immediate dismissal.

Issues

18. What was the reason for the dismissal?

19. Was there a genuine belief in the claimant's misconduct?

20. Was that belief based upon reasonable grounds?

21. Was there a reasonable investigation?

22. Was dismissing for the misconduct in question a reasonable response by the employer?

23. Was the dismissal procedurally fair?

24. If the dismissal was unfair, should there be any adjustments to the compensation awarded?

25. Was dismissing Mr Brookes without notice a wrongful dismissal?

Findings of fact

I make the following findings of fact, on the balance of probability based on all the matters I have seen, heard and read during this hearing. In doing so, I do not repeat all the evidence, even where it is disputed, but confine my findings to those necessary to determine the issues.

26. I make no finding in relation to the credibility of any of the witnesses I heard from. I did not consider any deliberately tried to mislead the tribunal. However, there were a number of inconsistencies in Mr Brookes' evidence, which although corrected on realising an error, does cast doubt on the accuracy and reliability of his account.

27. Mr Brookes was employed as an Assistant Mobile Plant Fitter for the respondent. He commenced employment on 17 September 2007. He remained in this position until his dismissal on 18 May 2018. He was employed under a contract, which only required him to work 32 weekends a year, as opposed to a new contract that had been introduced by the respondent that required workers to work 39 weekends. The claimant worked at both his home place of work, namely the Crew depot, but he also undertook agile work, which meant he worked at places other than his home place of work. When Mr Brookes did agile work, he was afforded travel time into his working time.

28. Mr Brookes had not been subject to any disciplinary warnings or other disciplinary sanctions during his employment.

29. Mr Edwards, when considering the disciplinary issue, and when deciding to dismiss, was not aware that Mr Brookes had not signed new terms and conditions. Mr Edwards made the decision to dismiss for reasons of gross misconduct. This related to five separate (although overlapping) allegations, and were confirmed to the claimant in his dismissal letter dated 18/05/2018, which can be found at p.359 of the bundle. The reasons stated were as follows:

    a. Attending work on 24/09/2017 without permission, which included unauthorised use of a company vehicle, instead of attending work for a planned shift on 25/09/2017.
    b. For the week ending 28/09/2017, completing and signing timesheets that did not reflect the hours work and have been falsified.

c. On 25/09/2017 and 26/09/2017, falsified vehicle use and service sheets to state that work was completed. However, these were at time when the claimant was not present at work.
d. On 25/09/2017, the claimant falsified vehicle log books, indicating that he had used a company vehicle on a date that he did not attend work.
e. On 26/09/2017, provided false information to the management team as to his whereabouts and his arrival time at work.

30. Mr Brookes was aware and had knowledge of the respondent's policies including their code of conduct, and their life saving rules. Mr Brookes knew that the respondent had a need for planning work in advance, and that many of the policies in place had safety at their core. He accepted and understood that safety was of great importance to the respondent.

31. There had been some unofficial practices that had developed that did not necessarily accord with the approaches contained within the respondent's policies. These practices had been endorsed by some members of the supervisory team. I accept that Mr Brookes engaged in some of these unofficial practices, in particular around the completion of time sheets and service sheets. However, these practices were clamped down on by the respondent in or around 3 May 2016. This is evident in the letter of 3 May 2016, at page 127 of the bundle, which is the conclusion of investigations around inaccurate timesheet recording. The respondents witness evidence was consistent on this.

32. Although these investigations concerned the Crewe Depot, Mr Brookes had knowledge of the investigations that took place by the respondent into inaccurate completion of time sheets during early 2016. He had this knowledge as his permanent place of work was Crewe, although he did complete agile working. He was also aware that as a result of this investigation the respondent decided to dismiss a number of individuals. In or around, and from, this time, Mr Brookes knew of the importance placed on accurate completion of timesheets by the respondent, and that any failings in this regard could result in dismissal.

33. Mr Brookes had been subject to an investigation in to allegations of falsifying time sheets. This investigation ended on 14 July 2017 and resulted in no further action being taken as the evidence was inconclusive. The report into this investigation can be found at p.134A-134C of the bundle. This reinforced knowledge on the part of Mr Brookes that timesheets needed to be completed accurately.

34. As part of the conclusions of this investigation report, it was recommended that Martin Wallage should meet and inform Mr Brookes of how to fill in sheets for booking on and off duty. This meeting did not take place. Mr Brookes' evidence is clear on this, and the evidence presented by the respondent is inconsistent on this point. On balance, I accept Mr Brookes' explanation.

35. Mr Brookes attended the workplace on 24 September 2017, and this was not a planned shift. Mr Brookes did not attend on 25 September 2017 as per

his rota. He filled in the relevant time sheet and dated it 25 September 2017. This was not done in accordance with how these time sheets were supposed to be filled in. None of this is disputed. Mr Brooke under cross examination accepted that he had filled in this time sheet wrong and that he should have filled it in with the date 24 September 2017, to reflect the date on which he did attend site.

36. The respondent maintained a document entitled 'Disciplinary policy and Procedure'. This was found at pages 36-47 in the bundle. At page 10 of the policy (page 45 in the bundle), the respondent had listed a number of examples of gross misconduct, which included the deliberate falsification of records. This applied to all records including timesheets and logbook entries.

37. As part of the disciplinary/dismissal process a number of witnesses were interviewed by the investigating officer, Mr Davy Thomas. This included the claimant, Mr Wallage and Mr Yeomans. The statements of each of these can be found in the bundle.

38. What was described as an informal meeting took place with Mr Brookes on 19 October 2017. This was an investigatory meeting. The purpose of this meeting was to establish whether Mr Brookes had engaged in practices that warranted disciplinary action. The notes of this meeting can be found at pages 270-297 of the bundle.

39. When considering dismissal, the dismissing officer Mr Edwards did not take into account any mitigating factors. Although mitigating factors were mentioned in the disciplinary hearing, there is no evidence to support that they were in fact taken into account, and Mr Edwards' oral evidence was that the mitigating factor he took into account was that this was gross misconduct and that warranted dismissal. From this I drew the conclusion that no mitigating factors were taken into account.

40. The respondent did not consider alternative sanctions. Neither Mr Edwards or Mr Brinkley provided evidence on what, if any, alternative sanctions were considered.

The following findings of fact are specific to the allegations

Allegation 1 and 4

41. It was important to the respondent that employees worked at their rostered times, as this is planned for operational reasons. This includes a significant safety aspect. Mr Brookes did not have the authority to change his shift from Monday or to a Sunday. He knew that if he wanted to change a shift, or wanted to attend work on a non-rostered day, he would need to first get permission from a supervisor before doing so. This is important to the respondent as they needed to ensure safety measures were in place and to ensure that that they had adequate staffing on each rostered day for the tasks that they had planned.

42. Mr Brookes knew that when he completed a shift he had to record the shift in a Fitter's Daily Shift Report and that he needed to complete the log book. He knew of the importance of accuracy in respect of these records.

43. Mr Brookes knew that it was mandatory for him to complete the logbook for every task that he completed.

44. Mr Brookes recorded the shift that he worked on the 24 September as if he had worked it on the 25 September. The record of this shift was at p.307 of the bundle. He also completed the logbook as if he had completed the shift on the 25 September, and this can be seen at p.299 of the bundle. This is an inaccurate completion of these records.

Allegation 2

45. Mr Brookes knew how to complete his timesheet. He understood the importance of completing time sheets accurately. He signed his time sheet with knowledge of the declaration that stated that 'the hours booked are properly claimed, accurate and complete'.

46. For the avoidance of doubt, the claimant signed the weekly time sheet for the period covering 25 September – 28 September 2017 to declare that 'the hours booked are properly claimed, accurate and complete'. This time sheet can be found at page 315 of the bundle.

47. On 25 September 2017 the claimant did not attend his rostered shift. His time sheet has recorded him as having attended. This was a deliberate completion, and was inaccurate.

Allegation 3

48. The claimant completed a fitters' daily shift report for 25 September 2017. This report records activities undertaken whilst on site on the datat. This includes numerous checks and tests on machinery at the site. This can be seen at page 307 of the bundle. Mr Brookes was not present on site on that date and therefore did not complete the tasks as recorded on this report. This record is therefore inaccurate.

49. At page 310,311 and 312, the claimant recorded various jobs that he had undertaken. These record the times as being at 6.30am, 6.45am and 7.00am. The claimant's evidence was that he was not on site until later that morning. Mr Brookes did not complete the tasks as reported at the times stated on these records.

Allegation 5

50. The claimant did not leave his house on 26/09/2017 until 4.45am, and not the 3.45am that he stated during the investigation. The evidence given by the claimant under cross examination and the time recorded for a refuel stop supports this finding.

Procedural Fairness

51. Mr Brookes was invited to meetings at the investigatory, disciplinary and appeal stages of the process. At each stage, he was informed of his right to be accompanied, was provided with the information and evidence available and was informed that he would be able to put his case forward. Mr Brookes was afforded the right to appeal, which he exercised. The disciplinary hearing and the appeal hearing were conducted by different members of staff.

52. Mr Brookes was absent from work with illness from 7 February 2018. Part of the reason for his illness was the ongoing investigations at work, however, there were other reasons too.

53. The disciplinary hearing was arranged for 17 May 2018. Mr Brookes stated that he was not well enough to attend this meeting. This was confirmed in the Occupational Health report of 26 April 2018.

54. A further OH report was produced on 09 April 2018, which expressed that Mr Brookes was well enough to attend the disciplinary hearing.

55. As there was a conflict with the OH report on 09 April 2018 as to whether Mr Brookes was well enough to attend the disciplinary hearing, the respondent raised this as an issue with OH Assist. A further document was produced on 11 May 2018. This stated that the OH report of 26 April should have encouraged the employee to engage with the internal work investigation, as his condition was unlikely to improve and resolve without the investigatory meeting going ahead. However, this document also referred to a further OH assessment.

56. Mr Brookes wanted to engage in the process and sought a postponement of the hearing, this is confirmed in an email at page 353 of the bundle.

57. The respondent held the meeting on 17 May 2018. Mr Edwards relied on advice from a human resources practitioner in deciding this. I accept that he interpreted the report of 11 May 2018 as suggesting that Mr Brookes would benefit from having the investigation dealt with and completed as soon as possible, to assist in his recovery. It was not unreasonable to hold this interpretation or to hold the meeting in these circumstances, given that the OH report did not indicate a likely recovery period.

58. The respondent did not interview Mr David Woodhouse as part of their investigations. Nor did they check security records on 24 September 2017. However, in my judgment neither of these facts are of great importance. As Mr Woodhouse had no authority in respect of rota changes, and the most that security could do is provide confirmation of whether the claimant attended site on the 24 September 2017. This would not, in my opinion have changed anything.

59. Mr Brookes was given the opportunity to and did appeal the decision to dismiss him. This was arranged for 7 June 2018. The claimant attended this appeal meeting along with a Trade Union representative.

60. The claimant was given all relevant documentation in advance of the appeal hearing, was given the opportunity to present a case of misrepresentation of facts and severity of punishment and given the opportunity to have included relevant documents to is appeal.

Conclusions

61. The burden rests with the respondent to establish that the reason for the dismissal falls within one of the potentially fair reasons. The respondent satisfied this burden, with the dismissal being for the potentially fair reason of misconduct, rather than because the claimant refused to sign new terms and conditions. This is evident through the concessions made by the claimant, the investigations that the respondent undertook, and the clear signposting of the issues with the claimant throughout. I therefore accept that the respondent has discharged the obligation on it to show the principal reason for the dismissal.

62. The respondent's decision makers formed a view of that misconduct. It is clear that the dismissing officer, Mr Edwards, held an honest and reasonable belief that the claimant had engaged in the conduct that formed the reasons in the dismissal letter. Mr Brookes accepted that there were inaccuracies in his timesheets and logbook entries, and that he had unilaterally changed his shift from the 25 September 2017 to the 24 September 2017 with no authority. There was no basis for challenging Mr Edwards' honest and reasonable belief.

63. In terms of whether there was such investigation as necessary undertaken by the employer, again this in my judgment is satisfied. Given the extent of the written documentation in this case and the interviews that took place in establishing the allegations in question, it is clear in my mind that this was satisfied. I therefore accept that the investigation was such that a reasonable employer would undertake in these circumstances and the product of that investigation provided reasonable grounds for the belief of the decision makers in the claimant's misconduct

64. Turning to the question of reasonableness of the decision to dismiss. The size and resources of the organisation is important. The context in which the respondent operates is also relevant, with it operating in a sector where planning tasks from a safety perspective is important. All the circumstances, including consideration of mitigating factors must also be taken into account as part of considering whether the dismissal was fair or unfair.

65. I remind myself that it is not for the tribunal to substitute its view as to whether or not it would have dismissed the claimant in the same circumstances. In *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 it was held that:

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

> another; ...the function of the [Employment Tribunal] ... is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

66. This approach applies to dismissals generally, including cases of misconduct. The decision maker took account of the respondent's policies, the need for planning, the requirement of the respondent to uphold safety standards. They also took into account the potentially serious consequences both for the individual, for others, and for the organisation if serious injury were to occur following the use of equipment that had not been properly checked but had been documented as if they had, or in circumstances where Mr Brookes was on site without knowledge of others or with no safety provision put in place. Although the respondent did not take account of mitigating factors, it is a relevant circumstance that I do take account of when considering whether the sanction of dismissal falls within the band of reasonable responses. Overall, I conclude that the decision to dismiss the claimant by the respondent does fall within the band of reasonable responses.

67. Although the claimant submits that the dismissal was procedurally unfair, this must also be considered under the band of reasonable responses test.

68. Relevant factors include that the respondent used different persons throughout the process, with the investigation officer, the dismissing officer and the appeals officer all being different people; the claimant was given the opportunity to engage with the process and was kept informed of the proceedings; he was given notice of the allegations and evidence, and he was given the opportunity to bring a representative with him to hearings; and he was given the opportunity to appeal the decision, which he duly took up.

69. It is submitted on behalf of the claimant that the decision not to postpone the dismissal hearing in light of the claimant being unable to attend due to illness, and allowing him to engage in a process that he wanted to engage in should lead this tribunal to finding that the dismissal was procedurally unfair. However, this must also be considered in light of the appeal hearing itself, where the claimant was able to submit further relevant evidence, but was also given the opportunity to make representations. It is the entirety of the process that must be considered.

70. Having considered all of the matters above, I find that the dismissal was procedurally fair.

71. And if I am wrong on that then had a fair process been followed then I find that Mr Brookes would have been dismissed in any event, with this being a 100% chance.

72. Notwithstanding that final observation my primary conclusion is that this claim for unfair dismissal fails and is therefore dismissed.

73. In terms of the wrongful dismissal, the respondent placed considerable weight on the need for accurate filling in of timesheets and logsheets. For reasons already outlined above, objectively, these are clearly fundamental terms of the contractual relationship between Mr Brookes and the respondent, as supported by the policies, and the actions taken by the respondent in 2016. The claimant was in breach of these requirements. Dismissing Mr Brookes for gross misconduct is justified. The claim for wrongful dismissal fails and is therefore dismissed.

Employment Judge Butler

17/10/2019

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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